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# *Beyond the written constitution: Constitutional crisis of, and the institutional deadlock in, the Palestinian political system as entrenched in the basic law*

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*This article focuses on the Palestinian political system, its current crisis, its roots, and its future. The current crisis reached a climax in 2007 with the armed clash between Palestinian factions. The historical roots of the conflict, however, go much deeper. They are inherently connected to the legacy passed on to the Palestinian Authority.*

*The current crisis of the Palestinian Authority has been a frequent subject of constitutional debates. While the key role of the Basic Law remains indisputable, this written, constitution-like text seems to be a part of the problem, rather than of the solution.*

*In this article I will adopt a positivist approach to constitutions only to suggest its deficiency whenever it leads to formalism in interpreting written constitutions. Instead, I suggest using different paradigms that contribute to a better understanding of the role of written constitutions whenever conflicts between political actors are threatening the same political structure that made it possible for a political system to exist in the first place.*

## **1. Introduction**

This article focuses on the Palestinian political system, its current crisis, its roots, and its future. The current crisis reached a climax in 2007 with the armed clash between Palestinian factions. On the one hand, Hamas took control of Gaza Strip by force, while, on the other, the Palestinian Authority, under the presidency of Mahmoud Abbas, continued to govern the West Bank. At the same time both territorial entities were still part of the “occupied Palestinian territory,” and the Gaza Strip was under siege. Since then, questions, doubts, and concerns have been increasingly raised with regards to the legality of some of the actions undertaken, on one hand, by both President Abbas and his

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government in the West Bank (such as the issuance of decree-laws, establishment of an emergency government, etc.) and, on the other hand, by Hamas in the Gaza Strip which they ruled by force. The many changes in the legal and judicial system (the nomination of a new judicial council, nomination of new judges and police officers, etc.) also came under scrutiny. Similarly, questions were raised with regards to the Palestinian political system as a whole, the role of the Basic Law and constitutional arrangements in causing this clash (and the way it can help to stop it), the future of the Palestinian Authority and the Palestine Liberation Organization (PLO) itself, and the feasibility and viability of a future Palestinian state.

This article takes this crisis as a starting point for its analysis; however, it will sometimes go “forward” and other times “backwards” as much as is needed to provide some support to the arguments being advanced. I have the intention of dealing with this crisis not as an event outside history but rather as something that occurred in a particular context—a context that I will try to situate in this article in order to show the real issues at stake, and not only those that are at the heart of the current debates. However, while my analysis moves backwards, my research is motivated by concerns over the future of the Palestinians as a people, of law and legality, of the Palestinian Authority constitutional order, and of the Palestinian political system as a whole—a political system that I do not deal with as an objective in itself but simply as an adequate arrangement for decision making, both “legal” and “political.”

In this sense, the concerns related to the political system are motivated by finding adequate arrangements for decision making, i.e. for the expression articulated by appointed officials as guardians of the rule of law.<sup>1</sup> Since law, even if only as a fiction, expresses a popular will in the name of whom the “representatives” pretend to talk legitimately, the people remain in the background of those constitutional debates. This article advocates that the people be put back at the center of any debate related to the Palestinian political system. At the end of the day, isn’t this just the logical consequence of acknowledging the Palestinians’ right to self-determination? More importantly, this article will reflect on the intimations of legality<sup>2</sup> at a time when law and legality seem to be trampled by political parties which advance various narratives to justify their political decisions, while looking to the Basic Law for support or a post-facto justification of their *prima facie* unconstitutional actions.

<sup>1</sup> The relevance of a constitution is that it enables the rule *by* law (i.e., the will of the government is subjected to the constraints of the law), as well as the rule *through* law (i.e., the head’s of state use of the form of the law to support his or her decision). This is the twofold meaning of the rule *of* law. It is the rule *by* law that realizes what the medieval English jurist Henry de Bracton stated in the thirteenth century with great clarity: the king does not make the law, the law makes the king. See Ulrich K. Preuss, *The Political Meaning of Constitutionalism*, in CONSTITUTIONALISM, DEMOCRACY AND SOVEREIGNTY: AMERICAN AND EUROPEAN PERSPECTIVES 11, 16 (R. Bellamy ed., 1996).

<sup>2</sup> I borrow this sentence from the title of an article by Dyzenhaus. See David Dyzenhaus, *Intimations of Legality Amid the Clash of Arms*, 2 INT’L J. CONST. L. 244, 244 (2004). This borrowing is justified by the similarities between the concerns in his and my research, although he was concerned with the crisis of the Weimar Republic, whereas I deal with the crisis of the Palestinian Authority. This borrowing can also be explained by my use of the Weimar Republic as a paradigm for the examination of the Palestinian Authority’s political system and of its the current crisis.

My reflections on the Palestinian political system take the Palestinian Authority (PA) as their starting point. Since 1994, the Palestinian Authority has been in control of *parts* of the occupied Palestinian territory, including the West Bank, East Jerusalem, and the Gaza Strip. This article will suggest that the failure of the Basic Law to settle conflicts between the branches and organs of the government can be explained in part by the constitutional tools that the Palestinian Authority has at its disposal, i.e. the Basic Law.

While recognizing the existence of serious problems within the Basic Law, I do not argue that it should be, for that reason, rejected as the supreme law governing the Palestinian Authority and the branches of the government; nor do I suggest that it is not a valid starting point for the evolution of the Palestinian constitutional law. Doing so would be denying the obvious: the main political actors concerned, that is, the parties to the conflict, continue to use the Basic Law in order to justify their contradictory positions regarding particular constitutional questions.<sup>3</sup> Rather than rejecting the Basic Law, this article argues that what should be set aside are certain common assumptions with regards to the Basic Law, its place, its role, and importance in the Palestinian legal system on the one hand, and the way its provisions should be applied and interpreted. In other words, this article does not question whether: (1) the Palestinian Authority political system matters; (2) the crisis in the Palestinian Authority political system is a matter of constitutional law and theory; or whether (3) the Basic Law still matters to political actors. On the contrary, while assuming this is the case, I will limit myself to assessing why I believe this is the case.<sup>4</sup>

This article focuses on practical consequences of those three observations. In particular, I am interested in the way(s) in which the Basic Law does indeed matter and why despite continued interest in and references to the Basic Law, it has proved to be an ineffective tool in resolving the current political crisis of the Palestinian Authority. In this sense, I use the crisis only as a pretext in developing a theoretical analysis. I thus aim to produce a number of general observations that may be applicable to constitutional experiences elsewhere. I do not seek to provide solutions to concrete constitutional disputes between the political actors concerned. Such solutions would be of limited theoretical use, given the contingencies and the particularities of each case.

My objective is rather to suggest a new paradigm for understanding and interpreting the Basic Law. If deemed relevant and valid, this paradigm may shed light on many of the constitutional questions that are currently being debated in the territories

<sup>3</sup> It is true that factions often disrespected the Basic Law provisions, often overruled by “national consensus,” and that Hamas’s armed control of the Gaza Strip as well as the Palestinian Authority’s many legal undertakings in the West Bank since the declaration of the state of emergency violate the letter and the spirit of the Basic Law. However, the Basic Law has never been rejected as such. Rather, the violation of the Basic Law can often be viewed as an alternative interpretation of the Basic Law (e.g., the disagreement over the possibility of calling a referendum, calling for anticipated elections, the president’s and the government’s emergency powers); as following the spirit, rather than the letter of the Basic Law (the president’s emergency powers); or simply as a preliminary consensus needed for amending the Basic Law (e.g., the 2005 amendments following the national agreement on electoral system and the admittance of Hamas to the political process).

<sup>4</sup> See *infra* § 2.

controlled by the Palestinian Authority. Moreover, the new paradigm will outline new guidelines to help the authorities find a way out of the current constitutional crisis of the Palestinian Authority. It should be noted, however, that, although I am personally convinced of the revolutionary character of such a new paradigm for the understanding of the Basic Law, I will not be able to assess its magnitude within the scope of this article. Instead, I will limit myself to offering initial insights and call for further research in this field.

This article starts out with five premises. First, it is interdisciplinary in that constitutional problems are analyzed from the complementary fields of law, political science, and sociology. Second, it possesses a historical dimension in that it ties the discussion of real-world constitutions to concrete constitutional traditions. Third, it strives towards a systems perspective. A constitution consists of several different but mutually dependent parts. Looking at these in isolation would not be very fruitful; instead, one should consider how today's system functions as a whole and which components of this constitutional construction can be replaced with new ones. One must therefore take into consideration the way these components interact and how this affects the functioning of the constitution as a whole. Fourth, this article will combine theoretical and empirical analyses. Fifth, this paper develops some general arguments. Although it focuses on the Basic Law in the context of the Palestinian Authority, its line of reasoning may apply to other constitutional problems.<sup>5</sup>

I am first going to examine the Palestinian Authority's political system in the light of the Basic Law of 2002, show that this political system contained the seeds of its own destruction, and explain why the Basic Law did not help in managing the power struggle between competing factions but, instead, contributed to reaching a deadlock. I will go on to suggest a different analytical framework that can be used to derive an alternative reading of the Palestinian Authority's political system and, to some extent, lead to new insights into the political system of the (future) Palestinian state. My conclusions concerning the Basic Law as a written constitution are based on the similarities between the Basic Law and other world constitutions drafted in a way unhelpful to engineering a coherent political system. First, however, I am going to start with the three assumptions enumerated above.<sup>6</sup>

## 2. The three assumptions

As stated earlier, this article rests upon three assumptions. I will first explain the reasons for using the Palestinian Authority political system as a starting point of my discussion. I will then examine the crisis in the Palestinian Authority's political system

<sup>5</sup> For a similar approach to constitutional scholarship, see Niclas Berggren, Nils Karlson, & Joakim Nergelius, *Introduction to WHY CONSTITUTIONS MATTER* vii (Niclas Berggren, Nils Karlson, & Joakim Nergelius eds., 2000).

<sup>6</sup> See text accompanying note 4.

and explain why it can be qualified as a constitutional crisis. Finally, I will show that the Basic Law, considered as a constitution for the Palestinian Authority, is relevant to that crisis.

## 2.1. Departing from the Palestinian Authority

Many readers may object to the use of the Palestinian Authority as a starting point for an analysis of the Palestinian political system. They will argue political systems and forms of government imply organization of branches of the government, in the context of a state, and that the Palestinian Authority is not (yet) a state. Another objection may rely on a completely different argument. The PLO is shaped as a state and enjoys international subjectivity. It was the PLO that authorized the Palestinian Authority to govern the territories from which had Israel withdrawn. The discussion of the Palestinian political system should then focus on the PLO rather than on the Palestinian Authority. Yet other readers may agree with both objections but conclude that the focus should rather be on the future state; in other words, the discussion of the political system should be speculative and future-oriented.

If one were to agree with those objections, a study of the Palestinian Authority's political system would be, at best, irrelevant and, at worse, counterproductive and misleading, and it would be best to end right here. However, if I persevere and the reader's interest hasn't waned, it is because we do not share the above premises. The following sections will explain why taking the Palestinian Authority as the starting point for about a discussion of the Palestinian political system is worthwhile.

First, although the Palestinian Authority is not a sovereign state and, accordingly, the Basic Law is not a state constitution, the assumption that a constitution and a constitutional order, determining how a government exercises power, are possible only within a sovereign state has no basis in either theory or reality. Sovereignty is not a *sine qua non* for a political entity to govern its subjects through the exercise of legislative, executive, and judicial powers. Federated entities within a federal state are the most obvious counterexample. Others include supranational political entities, such as the EU. The Palestinian Authority governs the "Autonomous Territories" through a legislative body (Palestinian Legislative Council, PLC), an executive body (the president and the government), and a judiciary body (courts), and a constitutional order is needed to regulate the relationships between the different branches of the government as well as their respective authority, regardless of whether they form a sovereign state or not. It can be therefore argued that the Basic Law, although it is not a state constitution, functions as one for the Palestinian Authority. The Basic Law is a written document: a rigid, constitution-like text, functioning as the supreme law within the territories controlled by the Palestinian Authority and, most importantly, as this article will show, there are good reasons to believe that it is recognized and treated as such by public officials and by Palestinian courts (and by the public in general).

Second, the fact that the PLO has a state-like structure is undeniable. The Palestinian National Council is structure as a parliament; the executive committee, presided by

a chairman, serves as the executive authority. There are even military courts, regulated by the PLO penal and procedural codes of 1979. The relationship between the “branches” of the PLO is relevant in a discussion of constitutional law and of the Palestinian political system as a whole. However, the creation of the Palestinian Authority has altered the issues at stake, directly touching upon the Palestinian population and territory. The Palestinian Authority, regardless of its relationship with the PLO, exercises its authority through legislative, executive, and judicial powers, whereas the PLO has remained in the background. Issues of “constitutionality” and “legality” are tied up with the territorial jurisdiction over Palestinian subjects, and, consequently, the relationship between the Palestinian Authority and the PLO is not a juridical issue. We have stepped outside the domain of the “legal” and entered the domain of the “political.”<sup>7</sup>

Third, the simple answer to those who object to my focus on the Palestinian Authority rather than on the state, would be that I cannot see into the future. Nor do I have the knowledge or the desire to do so. Dissatisfied with this answer, a more persistent reader may rightly observe that the Palestinian Authority substantially differs from the (future) Palestinian state, since the former is a self-governing authority while the latter a sovereign entity. Further, one could also argue that each is built on different constitutional grounds, that is, the Basic Law in the former case, and the Palestinian Constitution in the latter.<sup>8</sup>

The reasons for my use of the Palestinian Authority as the starting point for my discussion of the Palestinian political system reside deeper. For now, I will limit myself to presenting two sets of reasons.

The first set of reasons is bound up with the way institutions usually function: they tend to practice self-preservation, and the Palestinian Authority is no different. As has often been noted, since its establishment, the political centre of gravity has

<sup>7</sup> I will deal with that relationship in another paper in order to challenge the line of separation that is often drawn between the “political” and the “legal” which is based on many wrong assumptions.

<sup>8</sup> A “constitution” was drafted in the context of the “Palestinian state” established in Algiers in 1988. Nevertheless, initial drafts appeared only after the Oslo Agreements, thus taking into account the limitations imposed by the agreements with Israel and the resulting new realities. The Basic Law is not a constitution for a sovereign state; it is transitional, and will be replaced by a constitution once (and if) the state is established. The Palestinian Legislative Council adopted the Basic Law in 1997, and it was endorsed by former president Arafat on 2002. It was later amended (in 2003 and 2005), and it is still valid in the territories controlled by the Palestinian Authority. 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’th as the committee’s chairman. The 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 February 14, 2001, while negotiations with Israel totally collapsed. The same text was the object of revisions in 2003 (a second and third draft were subsequently published), and it sparked interest in the international arena as important groundwork towards statehood. The text is available on the Palestinian Authority Ministry of Foreign Affairs official website: <http://www.mofa.pna.ps/ar/cp/plugins/spaw/uploads/files/Constitution.pdf>. An English version is in NATHAN BROWN, *THE THIRD DRAFT CONSTITUTION FOR A PALESTINIAN STATE: TRANSLATION AND COMMENTARY* (Palestinian Center for Policy and Survey Research, 2003).

shifted from the PLO to the PA,<sup>9</sup> and the Basic Law has become the focal point of any debates between the Palestinian factions and political parties. Although it makes a reference to the validity of the interim period,<sup>10</sup> the Basic Law, adopted by the PLC in 1997, was endorsed by President Arafat only in 2002, that is three years following the end of the “five-year period” originally designated as the interim period. Moreover, in 2005, the Basic Law was amended to introduce four-year mandates for legislative and presidential terms.<sup>11</sup> Thus the Palestinian Authority, originally perceived as “temporary,” “transitory,” or “interim,” has turned into an experience of much longer duration.

Second, even the establishment of a Palestinian state would not imply divine-like creation *ex nihilo*. Calling it a “new beginning” would only be a necessary legal fiction to signal the start of a new era marked by the establishment of a state. The Palestinian state will not make a *tabula rasa* of previous legal systems and institutions,<sup>12</sup> but will build on what is there, namely, the foundations laid for the most part by the Palestinian Authority. In other words, as a legal system and institution, the Palestinian Authority will continue to live in and through the state of Palestine. The Basic Law created a constitutional and political order and institutions that would be difficult to uproot.<sup>13</sup> Consequently, the Palestinian Authority is inevitably going to shape the (future) Palestinian state, and, in order to speculate

<sup>9</sup> The narrative of institutions that accompanied the establishment of the Palestinian Authority and the adoption of the Basic Law prevailed over other narratives, including the “liberation of Palestine” discourse, now considered old-fashioned; the two-state solution as per the partition plan—but this is not my central argument here. For more on the impact of the creation of the Palestinian Authority on the PLO, see Lamis Andoni, *The PLO at the Crossroads*, 21 JOURNAL OF PALESTINE STUDIES 54 (1991); 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); Jamil Hilal, *PLO Institutions: The Challenge Ahead*, 23 JOURNAL OF PALESTINE STUDIES 46 (1993); Ali Jarbawi, *Palestinian Politics at a Crossroads*, 25 JOURNAL OF PALESTINE STUDIES 29 (1996).

<sup>10</sup> Article 115 of the Basic Law 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.” (trans. the Institute of Law), available at <http://muqtafi2.birzeit.edu>.

<sup>11</sup> Article 1 of the Basic Law of 2005 concerning some of the provisions of the amended Basic Law of 2003 (amending articles 36 and 47(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(3) (the 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.”

<sup>12</sup> The Basic Law adopted this technique with regards to the legal system in force in the West Bank and the Gaza Strip. Article 118 of the Basic Law 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 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, *supra* note 8, at 75.

<sup>13</sup> Nasser H. Aruri & John J. Carroll, *A New Palestinian Charter*, 23 JOURNAL OF PALESTINE STUDIES 5, 8 (1994).

about Palestine's political system, one must understand the political system of the Palestinian Authority.<sup>14</sup>

Some may find the reasoning of the preceding paragraph unconvincing. They will argue that the Palestinian Authority has failed, its political system has reached an impasse, and the Basic Law is dead letter.<sup>15</sup> Accordingly, they will conclude that it is useless to use the Palestinian Authority political system as the starting point for a speculation on the (future) Palestine state's political system. It is impossible to brush aside the skepticism regarding the current state of affairs in the Palestinian Authority. However, the failure of the Basic Law and of the Palestinian Authority's political system as a whole (i.e., the premise of the skeptical argument) does not necessarily lead to the suggested conclusion. On the contrary, one might as well argue that such a failure makes the study of the Palestinian Authority's political system and the analysis of the causes of the Basic Law's failure to provide a suitable blueprint for the division of power and conflict resolution a matter of even greater urgency. By pointing out the shortcomings of the Palestinian Authority's political system as a whole, this article intends to contribute to the design of the future Palestinian state.

## 2.2. The crisis of the Palestinian Authority's political system

The key role of "constitutional issues" in the internal debates of the Palestinian Authority is striking. It even predates the 2007 Hamas coup in the Gaza Strip and its aftermath, and goes back as far as the establishment of the Palestinian Authority in 1994 and the public discussions which accompanied the first drafts of the Basic Law. In the following years, similar debates took place at the time of the elections to the PLC in 1996, and the efforts to draft the Basic Law. A year later, the PLC endorsed the Basic Law in its third draft despite the resistance of the executive branch, in particular of President Arafat who would not ratify the Basic Law until 2002. By then, a new issue was at stake: namely the status of the Palestinian Authority following the end of the interim period but before an agreement has been reached as to its permanent status.

<sup>14</sup> The draft Palestinian Constitution—which I consider as the only "official version" the state of Palestine has, at least within the framework of the two-state solution—shows that the Basic Law does not differ much from the way Palestine might look like, and the way power might be shared and managed. Both those concepts can be traced back to the draft Palestinian Constitution, and were at the heart of the public debates from 2001 to 2003. Since the draft of the Palestinian Constitution adopted *grosso modo* similar political structures and provisions as the Basic Law, I am going to use the Palestinian Authority's political system as a starting point for my analysis.

<sup>15</sup> The deadlock reached its peak with Hamas opting for the use of force in the Gaza Strip in June 2007, which has remained to this day under Hamas control. The Palestinian Authority headed by Mahmoud Abbas and his government, continues to control the West Bank. Although the crisis manifested itself only after Hamas's surprising victory, it did not appear out of nowhere. This article shows how the Basic Law contributed to the deadlock. However, it should be noted that I use the word "contributed" because there are many other reasons related to the failure of the Basic Law to help resolve the power struggle in the Palestinian Authority, including the negative role played by Israel as the occupying state and the negative impact of the dependency on international funds. These and many other factors need to be taken into account, but they go beyond the limited scope of this article.



The Basic Law was once again in the limelight when constitutional arrangements were needed to delimit the powers of the president and prime minister—an office created in 2003 when the amended Basic Law entered into force. The Basic Law provisions were also applied in 2004, following Arafat's death, to operate a peaceful transfer of power to the newly elected president within the sixty-day period, as defined by the Basic Law. In 2005, further constitutional amendments were adopted, this time following a “national consensus” between Palestinian factions regarding the shaping of the electoral system in order to allow Hamas to participate in the legislative elections.

Since the Hamas victory in 2006 elections, constitutional debates over the prerogatives of the president on the one hand and of the prime minister, the government, and the PLC on the other hand have intensified. The issues discussed include the responsibility over the security forces, public funds, civil service, etc. Following the 2007 Hamas coup in Gaza, constitutional debates extended to the president's right to declare a state of emergency and to form an emergency government. The debates over the thirty-day limit on the state of emergency were followed by a discussion of the status of the emergency government, the president's power to issue decrees, and the legality, despite the president's withdrawal, of the former Hamas-led government in the Gaza Strip. Other key issues included the president's prerogative to dissolve the PLC, to call a referendum, and to call for anticipatory elections. Presidential mandate itself was put under scrutiny, as was the next election process and schedule. The PLO, especially through its Central Council, once again became a main political actor.

It is noteworthy that only a limited number of issues have been put before the Supreme Court in its capacity as the Supreme Constitutional Court.<sup>16</sup> These included the constitutionality of the Judiciary Authority Law no. 15 of 2005 (decision no. 5 of 2005), the constitutionality of a decision made by PLC (led by the new Hamas majority), to invalidate all actions undertaken by the previous PLC session (decision no. 1 of 2006), and a recent decision by which the Court considered it had no jurisdiction to review the constitutionality of two laws issued by the PLO (namely, the Revolutionary Penal Code and the Revolutionary Penal Procedural Code of 1979). The limited number of issues that reached the Supreme Court in its capacity as the Supreme Constitutional Court means that the most pressing issues are disputed, resolved, or accommodated in other forums including, but not limited to, public forums such as the media.

The remarks of the preceding paragraph suggest that the study of and interest in the Palestinian Authority's political system is not merely an academic, theoretical exercise. On the contrary, it represents a practical concern over concrete issues that call for

<sup>16</sup> The Basic Law called for the establishment of a Supreme Constitutional Court but left the issue to be determined by a law (article 103). Until the establishment of a Supreme Constitutional Court, the Supreme Court was to perform that function. Law no. 3 of 2006 established a Supreme Constitutional Court. Just like the Basic Law, law no. 3 opted for a centralized “judicial” body, independent from the judiciary branch. At the time of writing this article, the president, authorized to nominate the first panel of the Supreme Constitutional Court, has not nominated any judges, and the Supreme Constitutional Court is not yet operational.

a solution. Regardless of the disagreement of opinion over the solutions, there is no doubt that these issues are central in the internal debates in the territories controlled by the Palestinian Authority despite the continuous Israeli occupation and siege.

### 2.3. The constitution, the form of government and the political system

That most of the issues presented above in section 2.2 qualify as “constitutional” is beyond doubt, since they are related to the exercise of the legislative, executive, and judicial authority. Most importantly, however, they address the legitimacy of the Palestinian Authority’s organs in exercising their power over Palestinian subjects. The separation of powers has long been a part of modern constitutions. Article 16 of the French Declaration of the Rights of Man (1789) declared it to be an indispensable element of any constitution.<sup>17</sup> The Basic Law echoed that sentiment.<sup>18</sup>

The separation of powers is the institutionalization of a non-hierarchical order in which a single and undivided state authority is divided into and shared by different branches of the government. This institutionalization is codified in a written constitution, thus producing a horizontal order of state authority in which “a system of careful coordination of the functionally specified powers produces a web of mutual and almost circular dependence.”<sup>19</sup> The separation of powers is therefore essential to constitutionalism “in that it establishes a rule which ‘governs the governor’ without resorting to the obvious idea of a monistic supreme authority which controls the governor and which therefore operates as the ultimate guarantor of an orderly political rule.”<sup>20</sup> Consequently, the Basic Law is central to a discussion of the political system, since it codifies most rules and institutions that define the adopted form of government.

The importance of the Basic Law derives from its role as the constitution of the Palestinian Authority, in the sense of a written, constitutional text which codifies preexisting rules and institutions that have fueled the debates.<sup>21</sup> Institutions indeed matter, and institutional differences make a difference.<sup>22</sup> Constitutions matter because basic political institutions play an important role in the way a society and a political system function.<sup>23</sup> The constitutional design also help shape laws and

<sup>17</sup> See Preuss, *supra* note 1, at 17.

<sup>18</sup> Article 2 of the Basic Law of 2003 states:

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.

The third draft Constitution for the Palestinian State adopted a similar provision in article 64:

The relationship between the three public authorities shall be based on equality and independence. They shall exercise their authority on the basis of relative separation with respect to their duties and mutual cooperation and oversight. . .

The text is cited in BROWN, *supra* note 8.

<sup>19</sup> See Preuss, *supra* note 1, at 17.

<sup>20</sup> *Id.*

<sup>21</sup> Bruce Ackerman, *Revolution on a Human Scale*, 108 *YALE L. J.* 2279, 2285 (1999).

<sup>22</sup> Maurice Duverger, Arend Lijphart, & Gianfranco Pasquino, *A New Political System*, 31 *EUR. J. POL. RES.* 125, 128 (1997).

<sup>23</sup> *E.g.*, “the design of the constitution affects who gets to exercise power and who does not, who wins and who loses in the political game.” See Berggren, Karlson, & Nergelius, *supra* note 5, at vii.

policies, irrespective of who is in power.<sup>24</sup> Most importantly, constitutional design regulates the relationship between the state and the individuals in a society and hence it can be seen as a kind of contract between those in office and the people.<sup>25</sup>

However, while expected to function as a constitution, and treated as such, the Basic Law—as I intend to show—offers two discrete constitutional narratives. While providing the contending parties with a common language to frame crucial issues in a way intelligible to both parties, the Basic Law has contributed to the unsettling of the debate, abandoning the parties to blind combat. Although it articulated the procedures for issue resolution which would be minimally acceptable to both parties, it also contained provisions that could be considered to authorize one party to crush the other. Most importantly, while the constitutional order is often conceived as a legitimating tool by political actors who claim to represent the people, it does not encourage the losing party to acknowledge that, however much they may detest the outcome, it translates the will of the people.<sup>26</sup>

### 3. The positivist approach

Unlike the natural law tradition, legal positivism assumes that law can be *legally* legitimate without necessarily being morally legitimate.<sup>27</sup> Richard Fallon distinguishes between the two forms of legitimacy by arguing that legal legitimacy depends on one set of tests (legal norms),<sup>28</sup> while moral legitimacy on another (moral justifiability and respect-worthiness).<sup>29</sup> He then distinguishes between what he calls ideal and minimal theories of moral legitimacy, where the ideal theories may be either consent-based or substantive. The substantive theories are dependent on ultimate standards of justice, regardless of the consent of the governed. The consent-based theories, on the other hand, assume that consent has been given, be it real or hypothetical. Minimal theories of moral legitimacy,<sup>30</sup> which typically start out with the premise that decent human life would be impossible without a government, consider given legal regimes morally legitimate when they “are sufficiently just to deserve the support of those who are subject to them in the absence of better, realistically attainable alternatives.”<sup>31</sup>

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> I borrowed the questions asked by Ackerman in order to refer to the Basic Law’s indeterminacy. See Ackerman, *supra* note 21, at 2285.

<sup>27</sup> See Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1801 (2005).

<sup>28</sup> According to Richard Fallon:

Legal legitimacy and illegitimacy depend on legal norms. That which is lawful is also legitimate—although . . . legal decisions can sometimes be erroneous without thereby becoming illegitimate. A charge of illegitimacy typically implies a strong condemnation not warranted by all legal errors.

*Id.* at 1794

<sup>29</sup> According to Richard Fallon:

When the term is used in a moral sense, legitimacy is a function of moral justifiability or respect-worthiness. Even if a regime or decision enjoys broad support, or if a decision is legally correct, it may be illegitimate under a moral concept if morally unjustified.

*Id.* at 1796.

<sup>30</sup> The one that seem to be favored and supported by Richard Fallon: see *id.* at 1803.

<sup>31</sup> *Id.* at 1798.

Another distinction can be made with regards to sociological legitimacy. In a strong sense, legitimacy means that a legal regime is justified, deemed appropriate, or otherwise deserving support for reasons other than fear of sanctions or hope of personal gain. In a weak sense, sociological legitimacy derives from mere public acquiescence. The strong version of sociological legitimacy can be traced back to Max Weber: it assumes that the weak version of sociological legitimacy lacks adequate foundations since a people may acquiesce to assertions of authority solely out of habit or self-interest.<sup>32</sup>

According to the distinction drawn in the preceding paragraph, the legal legitimacy of actions undertaken by public officials does not depend on moral or sociological legitimacy, but rather on the consistency of public officials' actions with pre-established legal norms. Those pre-established legal norms (forming the constitution in the material sense) delimit the powers of the branches of the government and define the way state organs delimit each other, creating a kind of system of checks and balances. The majority of contemporary states have codified those rules in a written, inflexible, *legislated* text, that is, in a constitution in the formal sense. This is not to argue however, that, for legal positivism, only *positive* law matters (in some systems, for example, customs, provide a valid standard for legitimate action of public officials). Neither does this mean that, within positive law, only *legislated* law matters (in some countries with common law tradition, for example, precedents play a prime role position). This further means that what matters in legal positivism is not only a written constitution, that is constitution in the formal sense, but also a constitution in the material sense (some countries such as the UK or Israel do not even have one).<sup>33</sup>

Legal positivists interested in the political system would be therefore primarily concerned with the constitutional order regulating the government. Those norms are the standards that help set the boundaries of the (legally) "legitimate" and the (legally) "illegitimate" actions of public officials. Those legal positivists would be most likely satisfied with sociological legitimacy in the weak sense and a minimal vision of moral legitimacy, because these are present in all existing legal regimes: either as a matter of fact (as Kelsen, I believe would say, seen that he is basing his whole system of norms in a *grundnorm* that he presumes the existence, without daring to deal with that pre-existing fact because it is not deemed a legal matter), or as a matter of social practice (based on a rule of recognition which, as Hart would say, is largely determined by public officials).<sup>34</sup> The two versions of legal positivism have earned the name of "legal nonvolitionism" because they build their systems of norms on fact and social practice, in that they insist

<sup>32</sup> *Id.* at 1795–1796.

<sup>33</sup> As for the very important issue of legal legitimacy of the constitution itself (constitution in the formal sense), or, more importantly, of the supreme norm or rule in a particular legal regime (*Grundnorm*, as Kelsen would call it, or the *rule of recognition*, as Hart would call it), I believe that this is a completely different issue that requires a completely different kind of analysis, which I do not promise to give in this article.

<sup>34</sup> There isn't a single positivist approach towards the nature of law. For Austin, law is a command (an order backed by a threat) issued by a sovereign. Hart introduced the distinction between "primary rules" and "secondary rules." He then insisted on the need for "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 granted to an official to impose sanctions, while the validity of legal norms depends on a Basic Norm (which is presupposed). See Brian H. Bix, *Legal Positivism*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 29, 32–33 (Martin P. Golding & William A. Edmundson eds., 2005).

that the “foundations of legal orders are and can only be organically grown facts of social practice, as distinguished from acts or expressions of anyone’s will.”<sup>35</sup>

This dichotomy of fact and social practice makes sense to legal positivists who arguably perceive legal systems as gapless, closed, and self-sufficient. The challenge will then be to distinguish between what is part of a legal order and what is not. The two versions of legal positivism represented by Kelsen and Hart disagree on the way they explain the inclusion of a norm within a legal order. According to Hart, it must meet the criteria of recognition, laid down by a special rule of recognition.<sup>36</sup> For Kelsen, the ultimate criterion is a *basic norm*.<sup>37</sup> However, in the end, both visions approximate the legal order to a system of norms, and they both argue that it is the task of jurisprudence to describe and analyze what the law of a country is and not what it ought to be; accordingly, only existing norms, not values, fall within the purview of jurisprudence.<sup>38</sup>

According to this positivist approach to political systems, which dominates in the following sections, the Basic Law, treated as a constitution by the Palestinian Authority, is a *law* characterized, as most modern laws, by two features. The first one is the positivity of modern law,<sup>39</sup> which means that the binding force of law is not its inherent truth, but the authority of the law’s author, or, in the words of Thomas Hobbes: “*auctoritas, non veritas facit legem.*”<sup>40</sup> The second feature is the separation of morality from legality.<sup>41</sup> In this sense obedience is institutionalized and does not need the invocation of any moral grounds on which the law may or may not be based.<sup>42</sup>

### 3.1. Different Forms of Government

From the perspective of constitutional law, there are useful models regarding the way power is divided between legislative, executive, and judicial branches of government.

<sup>35</sup> Frank I. Michelman, *Constitutional Authorship by the People*, 74 NOTRE DAME L. REV. 1605, 1613.

<sup>36</sup> JAN-ERIK LANE, CONSTITUTIONS AND POLITICAL THEORY 138–139 (1996).

<sup>37</sup> See LANE, *supra* note 36, at 138–139.

<sup>38</sup> See *id.* A similar approach can be also found in the traditional French doctrines of state sovereignty as presented by the prominent jurist Carré de Malberg. Such doctrines do not explain the value of democratic political systems. Consequently, the role of legal science as he conceived it was limited to describing existing rules and principles of law. See Yasuo Hasebe, *Constitutional Borrowing and Political Theory*, 1 INT’L J. CONST. L. 224, 230 (2003).

<sup>39</sup> “Positive law is the term for that kind of law which owes its authority and binding force not to its religious, philosophical or otherwise sacred content, nor to its tradition, but to its origin from a legitimate lawgiver.” Preuss, *supra* note 1, at 13.

<sup>40</sup> Quoted in *id.* at 14.

<sup>41</sup> The reference to the 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.

See HANS KELSEN, *PURE THEORY OF LAW* 1 (Max Knight trans., 1967). Much earlier, Austin, in his famous lectures on jurisprudence, summarized what is known as “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.

Quoted in Bix, *supra* note 34, at 29–30.

<sup>42</sup> See Preuss, *supra* note 1, at 14.

In this sense, forms of government are simply different ways in which the principle of the separation of powers is exercised. In other words, a political system, legally speaking, is synonymous with the specific way powers in which are separated. The two most common, although not the only ones, constitutional models are the parliamentary system and the presidential system. They represent two distinct forms of government in that they determine structurally opposed methods of government formation and dissolution.<sup>43</sup> Those two categories derive their characteristics respectively from the American and the British systems of government which are rooted in their history (respectively, republican and monarchic) and in forms of state (respectively, federal and unitary).

The most striking feature of contemporary states is that they rarely adopt a purely presidential system of government (which, for the sake of simplicity, I identify as a US-style form of government) or a purely parliamentary system (which I identify as a UK-style form of government). Instead, most states have more in common with the so-called semi-presidentialism—a term coined by Maurice Duverger in 1980<sup>44</sup> to describe the system created by the French Constitution of the Fifth Republic.<sup>45</sup> The advantage of this third category, model, or type of government, is that it includes elements of the two other systems. Duverger's insight helped clearly identify a specific set of mechanisms and institutions distinct from both parliamentary and presidential systems.<sup>46</sup>

One may contend that each system of government is unique, and applying the categories of the preceding paragraph as would be counterproductive; instead, each system should be examined apart from any pre-established categories.<sup>47</sup> This is a valid concern, likely to stimulate further discussions, treating each system as a unique form of government. However, the broad categories have the advantage of showing different ways of the separation of powers; that is, by helping classify different forms of government, they define different political systems. My objective is to individualize political institutions that perform certain tasks common to all well-functioning

<sup>43</sup> Cindy Skach, *The "newest" separation of powers: Semipresidentialism*, 5 INT'L J. CONST. L. 93, 95–96 (2007).

<sup>44</sup> In an innovative 1980 article on semi-presidential government in the *European Journal of Political Research*; see Duverger, Lijphart, & Pasquino, *supra* note 22, at 126.

<sup>45</sup> Semi-presidentialism is indeed not a new system. It is as old as the Weimar Republic—the first constitutional regime similar to what Duverger qualifies as semi-presidential. The new system Duverger came up with is the theorizing about it, and considering it as a distinct form of government. However, as outlined by Skach, its rapid spread and growing importance since the fall of the Berlin Wall is what makes it the earliest separation of power. See Skach, *supra* note 43, at 96, 98. According to Osiatynski, in the 1990s, "many postcommunist countries created parliamentary systems with popularly elected presidents." See Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 INT'L J. CONST. L. 244, 260 (2003). However, semi-presidentialism remains largely under-theorized in constitutional law, despite its popularity and the high (theoretical and empirical) probability of it being problematic from the standpoint of democracy, constitutionalism, and the protection of fundamental civil liberties and political rights. See Skach, *supra* note 43, at 94–95.

<sup>46</sup> See Duverger, Lijphart, & Pasquino, *supra* note 22, at 129.

<sup>47</sup> A position that may be held by those subscribing to what Tushnet referred to as "expressivist approach" in comparative constitutional law. See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225, 1269–1285 (1999).

systems of governance, and show how their various components and mechanisms ensure their stability in a changing political environment.<sup>48</sup>

### 3.1.1. *Classical classifications*

In presidentialism, the president plays a primary role because he wields executive power and, at the same time, is the head of state. In the parliamentary system, the head of state is distinct from the executive branch of the government which is represented by the cabinet. The cabinet can exercise its authority only if it wins parliamentary confidence, and its power depends on the continued trust of the parliament (which can be withdrawn at any time). At the same time, the government may call for anticipated election. This mutual dependency between the executive and the legislative branches is absent in the presidential system which opts for fixed terms of office for both the president and the parliament, which need to be strictly followed.

In a sense, a purely presidential government is a divided government (between the president and the parliament), whereas a government in a pure parliamentary system is a united government (belonging to the majority party, that is to the party having a majority of seats in the parliament). Both systems depend on the separation of powers; and both have proven to be functional systems of government and to guarantee political stability.

Accordingly, there are two criteria that distinguish a purely presidential from a purely parliamentary form of government. The first criterion has to do with the executive authority, whereas the second is determined by the relationship with the legislative branch. In a purely presidential system, the head of state and the executive power are united in a single person—the president. The parliamentary system is characterized by duality: the head of state—the king or the president—plays only a symbolic role, without exercising actual executive power. Executive power can only be exercised by those who respond to the parliament (i.e., the cabinet). The second criterion, strictly and logically related to the first, is the mutual dependence, or independence, of the legislative and executive branches of the government.<sup>49</sup>

Although theoretically distinguishable, the two criteria are, however, inseparable if they are to make sense (as representing two distinct forms of government): the independence of both the president and the parliament is possible only if the executive power resides in the person of the head of state, whereas the interdependence of the

<sup>48</sup> This is the approach that can fit within what some called as “functionalism” to describe one of the three possible ways to compare constitutional experiences elsewhere that can help to interpret national constitutions. *See id.* at 1238.

<sup>49</sup> Parliamentarism is characterized by a fusion of powers and a mutual *dependence* between the executive and the legislative powers. This is due to the fact that the chief executive (usually a prime minister or chancellor) emanates from the legislature after elections and needs the confidence of the legislature in order for his government to survive the duration of the legislature’s term. Presidentialism is the opposite: it is a system characterized by the separation of powers and a mutual *independence* of the executive and legislative powers. This is because the chief executive (a popularly elected president) and the legislature are elected independently of each other, for fixed terms of office, and both can survive for their respective terms without the other’s approval.

*See Skach, supra* note 43, at 95–96.

executive and the legislative branches is possible only if the head of state is distinct from the executive branch. This logical coherence of the two criteria stems from the difference between the government and the state, between a branch of government and the head of state. The unity of the state is symbolized by the head of state, the president, who cannot be dependent on any of the branches of the government without undermining the unity and the sovereignty of the state as such.

In other words, the two criteria must be considered together if they are to make sense within a political system which can be a divided government or a united government. This principle, reflected in the form of government, is what distinguishes the American political system from the British model. All other differences between the two forms of government are only the logical and technical consequences. I thereby argue that dissolving the parliament is a technical issue that does not contradict the principle of the separation of powers *per se*, but rather falls within the second form of government which adopts the principle of united government. The exercise of the executive power without a prior vote of parliamentary confidence does not contradict the separation of powers *per se*, but rather falls within the first form of government which adopts the political system of divided government. Consequently, many of the technical issues related to the respective powers make sense within one form of government or the other only by being a part of a political system (i.e., one based on a divided government or on a united government).

### 3.1.2. A “new model”?

According to Duverger, the semi-presidential system is characterized by three main features: the election of the president by universal suffrage, the considerable presidential powers, and the presence of a prime minister and ministers who wield the executive, governmental power and can stay in office as long as they do not meet the parliament’s opposition.<sup>50</sup> Given how easy it is for a regime to classify as semi-presidential it is not surprising that Duverger did not consider his “new model” to be unique to the French Fifth Republic, but also to describe six systems, including the German Weimar Republic.<sup>51</sup> Other scholars came up with different criteria to distinguish semi-presidentialism, such as the power to appoint the prime minister and to dissolve the parliament.<sup>52</sup> It may be the very elasticity of the model that has rendered it applicable to other systems which are neither purely presidential nor purely parliamentary, with the US and the UK nevertheless acting as the prototypes, respectively, of the presidential system and the parliamentary system. France, however, was only one of the many possible examples of the semi-presidential system.

The duality of the executive (the president and the prime minister) made some specialists prefer the name of “premier-presidential” instead of “semi-presidential” because

<sup>50</sup> See Duverger, Lijphart, & Pasquino, *supra* note 22, at 130.

<sup>51</sup> Of course Duverger included countries with a semi-presidential system at the time he was writing his paper, i.e., in the 1980s. The other regimes are those of Austria, Finland, Iceland, Ireland, and Portugal. See *id.* at 126.

<sup>52</sup> See *id.* at 130.



the latter carries the misleading implication of a regime type that is located midway between the presidential to the parliamentary.<sup>53</sup> This is exactly what Duverger was trying to avoid. In fact, he suggested that his new model is neither half-presidential nor half-parliamentary, but rather alternates between the presidential and parliamentary phases. It is presidentialism as long as the presidency and the parliamentary majority belong to the same party or coalition; and parliamentarism when they are in the hands of opposing parties or coalitions.<sup>54</sup> This alternation is determined by four variables: constitutional rules, political traditions and circumstances, political composition of the majority in the legislature, and the relationship between the president and this majority.<sup>55</sup> Duverger seems to say that his model—the semi-presidential form of government—is not a single but plural political system. This conclusion seems to be self-contradictory: Duverger defends his model as a distinct form of government, with its own distinctive mechanisms and institutions, but at the same time describes a multiple political system!<sup>56</sup>

I agree that semi-presidentialism is a distinct form of government and needs to be theorized as such, regardless of the fact that it was originally a simple distortion of one or both systems, or even that it was established with the intention to include many institutions and mechanisms from other systems, as, for example, in the case of the German Weimar Republic.<sup>57</sup> I disagree, however, with the mainstream explanation for the uniqueness of semi-presidentialism as a distinct form of government based on what I have referred to as the “technical and logical consequences” of a specific form of government, which alone do not suffice to create a distinct political system. In this sense, one regime can be classified as parliamentarism even if it has an elected president,<sup>58</sup> while another can be semi-presidential even if it has a president who is not elected by universal suffrage.<sup>59</sup> In fact, as I have argued above (section 3.1.1), I distinguish between a form

<sup>53</sup> As suggested by Matthew S. Shugart's & John M. Carey in 1992. *See id.* at 126.

<sup>54</sup> *See id.* at 127.

<sup>55</sup> *See id.* at 126.

<sup>56</sup> Lijphart seems to agree with this possible conclusion. He argued:

I would argue that—in spite of the fact that Duverger proposed semipresidential government as a ‘new political system model’ in addition to the parliamentary and presidential models...—the logical implication of his division of the model into several subtypes is that most systems that appear semi-presidential can be classified either as mainly presidential or as mainly parliamentary; hence the semi-presidential category becomes a nearly empty cell.

*Id.* at 127.

<sup>57</sup> “Germany's Weimar constitution, was overburdened by the attempt to combine in one document very many institutions.” *See* LANE, *supra* note 35, at 196. The same author then quotes Headlam-Morely in Hawgood who wrote:

The Germans have made use of all the devices new and old by which a democracy can express itself, and have sought at the same time to find room for the application of new theories. Cabinet government has been borrowed from England, the idea of a strong popular president from America, direct legislation from Switzerland. *See* LANE, *supra* note 36, at 196.

<sup>58</sup> In Austria, for example, the President is elected by universal suffrage, but it is not for this reason that it is necessarily a presidential system.

<sup>59</sup> This was the case of France before the introduction of direct popular election of the President, effectuated by a popular referendum in 1962.

of government as a set of mechanisms and institutions and as the kind of separation of powers adopted. What distinguishes a system is not one or more mechanism or institution. Rather—and this is where I locate the distinctive feature of semi-presidentialism—it is the primacy of the figure of the president, in conjunction with the ideas of national sovereignty, popular will, and constituent power (all these ideas being typically French) that make structural differences work as a given form of government, distinct from other political systems. In this sense, semi-presidential structures are unique in that they introduce duality into the executive branch, where the president controls segments of the executive branch, without being dependent on the national assembly's vote of confidence (which is equivalent to the presidential independence of the executive and the legislative) but having the power, under certain circumstances, to dissolve the national assembly (in parliamentary systems this power is granted to the government). Those mechanisms and institutions make up a distinct system because they form a type of separation of powers which introduces a third factor—the president. Situated between (or above) the legislative and the executive organs, he is the stabilizing element in the system.<sup>60</sup> The cabinet remains dependent on parliamentary confidence (which makes it theoretically and practically possible for a cabinet to be composed of a party other than the president's), while the parliament is dependent on the president who can dissolve it under certain circumstances. These two technical consequences make sense within a parliamentary system that adopts the principle of united government. The French system of the separation of powers is sometimes called “rationalized parliamentarism,” where I take “rationalized” to mean the presence of the stabilizing factor, i.e., the president, in the political system. It is the figure of the president as a stabilizer which is unique to the French system,<sup>61</sup> and his role as the guarantor of the constitution and of the constitutional order derives therefrom.

### 3.2. The Palestinian Authority's form of government

The question of the “political system” has always been at the heart of Palestinian public debates. Palestinians tend to disagree not just on the kind of political system they should have, but even on how to classify the current Palestinian Authority's political system. I suggest that this is in part due to the confusion between the descriptive and the prescriptive accounts, that is between what *is* and what *ought to be*. The

<sup>60</sup> For some authors, this is a reason to suspect that the semi-presidential system is uniquely problematic as a separation-of-powers system, which is why “semipresidentialism, as a constitutional framework, is in critical ways more vulnerable to democratic breakdown than either the purely presidential or purely parliamentary models.” See Skach, *supra* note 43, at 104. Other reasons for not favoring this system are suggested. These includes possible structural tensions between the two unequal components of the executive branch. Besides, in times of disagreement between the president and the prime minister, it is often unclear from the constitution which executive has the final decision-making authority, even in such critical areas as national defense. Finally, the dual executives enjoy unequal legitimacy, accountability, and responsibility *vis-à-vis* citizens and their elected representatives. See Skach, *supra* note 43, at 97. This possible democratic deficiency, however, goes beyond our interest at this stage of the analysis.

<sup>61</sup> In a sense, I perceive the semi-presidentialism system as more “presidential” than presidentialism in that the president is not an executive set against the legislative, he is neither and at the same time can be both, because he is above the two, counter-balancing both the legislative and the executive.

confusion between the two accounts is rather unfortunate, since their assumptions and questions as well as their propositions and answers are completely different. Some have argued that the Palestinian Authority's political system is a presidential system, or that it should be; others, that it is parliamentary, or that it should be. Yet others have referred to it as rationalized parliamentarism, semi-presidentialism, or a mixed system, or claimed it should be one. The question arises of how do the Basic Law's provisions<sup>62</sup> define the Palestinian Authority's political system? Below are a few insights.

First, the Palestinian Authority's president, just as PLC members, are elected by the Palestinian people (residing in the West Bank, including East Jerusalem and the Gaza Strip). Direct elections exclude political responsibility of one institution to the other; i.e., the president does not need the confidence of the PLC but neither is he authorized to dissolve the PLC. Some scholars claim that presidentialism best defines such a system. However, a pure presidential system is incompatible with executive power shared between the prime minister, the government, and/or the cabinet, as is the case in the Palestinian Authority. Thus, pure presidentialism does not apply here.

Second, the Palestinian Authority's cabinet, headed by a prime minister (since the office was created by the 2003 Basic Law amendments), acts as a collegial body (i.e., a council of ministers). The cabinet represents the highest executive and administrative powers, and is accountable to the PLC, which constitutes a parliament-like body. Ministers can be chosen from the PLC or from the outside, without having to resign as PLC members; the possibility of combining both the offices of Member of Parliament and of government is typical of parliamentary systems. On the contrary, the presidential system (just as the semi-presidential system, although in different modality) makes it impossible for a member of the parliament to serve at the same time in the cabinet as a result of the clear separation between the executive and the legislative branches. In this regard, the Palestinian system does not resemble a pure parliamentary system, in that a pure parliamentary system does not have 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 of other powers. A pure parliamentary system does not tolerate a duality in the executive power, nor does it tolerate rigid separation between the executive and the legislative body. Parliamentarism, therefore, is not the right choice, either.

<sup>62</sup> There are here two ways to deal with the Palestinian Authority's political system. A more comprehensive approach will not be limited to the Basic Law texts (the law on the book), but include the way power is shared and exercised in the real world. To do so a different kind of data and research are needed, which I do not have at my disposal at the present. Political scientists, sociologists, and anthropologist may be able to offer a better account than I can, in my capacity as a jurist, of how power is to be shared, managed, and exercised. They can say more about politics, including conflicts and compromises, and the way it shapes the decision-making process. Law in action, rather than law in the book, may be much more interesting and attractive, because it gives a clearer picture of the way the existing power relations and authority are exercised and managed. In that type of project, empirical, rather than theoretical data or analytical input might be more useful. Without undermining the relevance of the first question, I cannot promise to provide an exhaustive answer, but only some hints that may help frame future debates and research. I will discuss this in greater detail in section 5.

Third, some of the features outlined in the preceding paragraph are present in the semi-presidential system. In fact, the president of the Palestinian Authority, elected directly, shares the executive power with the cabinet. This duality is typical of a French-style semi-presidential system. The cabinet is composed of a prime minister and a number of ministers. In the Basic Law, the terms “cabinet” and the “council of ministers” are used interchangeably. The prime minister, rather than the president of the PA, presides over the council of ministers. The president, however, can issue presidential decrees without securing the signature of the prime minister or any ministers. It is the president, and the president alone, who, under certain conditions, has power to issue decrees that have the power of law (decree-law), or who can declare a state of emergency, etc. In other words, the president exercises his “executive powers” directly and not through the ministers. At best, the president is assisted by the council of ministers, which further means that the president does not need the council of ministers’ approval to exercise his powers. This in turn creates a similarity with the American-style presidential system—although this classification was initially discounted.

The examples cited in preceding paragraphs<sup>63</sup> may explain—and even excuse—the confusion observed as to the way the Palestinian Authority’s political system should be described or classified. The examples indeed suggest that the confusion is largely due to the lack of clarity inherent the Basic Law. How can we then, classify the Palestinian system? To answer this question is not a mere academic exercise. It involves assessing the way the system functions, who wields the decision-making power, and who controls and checks whom. In other words, an interest in the power relations between the different branches of the government is necessarily complemented by an inquiry into representativity, legality, and legitimacy of governmental actions.

### 3.3. Shortcomings of the positivist approach

In this section, I will outline the various polemics which took place in the Palestinian Authority. Using the three forms of government, I will then provide possible solutions and compare them to those offered by the Basic Law and other laws in force. The first polemic deals with the power of the head of state (the king or the president) to call a popular referendum; the second addresses the president’s right to call for anticipated parliamentary elections; the third tackles the president’s right to form an emergency government without a prior vote of parliamentary confidence.

My argument here is straightforward. If the Palestinian Authority’s political system can be defined as parliamentary, i.e., modeled on the UK, then the answer leans in one direction: no referendum or no government possible without parliamentary confidence; possibility of anticipated elections. If it is similar to the US’s presidential system, however, then the solution would lean in the other direction: no referendum, no anticipated elections, but the executive branch does not need parliamentary

<sup>63</sup> Those examples can be given with regards to two other important pillars of constitutions: a mention of basic human rights and constitutional review of legislation. See, e.g., Nathan J. Brown, *Constituting Palestine: The Effort of Writing a Basic Law for the Palestinian Authority*, 54 MIDDLE EAST J. 25 (2000).

confidence. If, on the other hand, it can be identified as the French semi-presidential system, then the answer would be still different: yes to the referendum, yes to anticipated elections, plus the president assumes all powers in the state of emergency. The Basic Law fell short in that it did not rule out any of those possibilities, leaving the Palestinian political system in suspense.

In 2006, Hamas won legislative elections. Fatah-affiliated Mahmoud Abbas nominated Hamas-affiliated Ismael Haneyyeh to the Palestinian Authority's government. The government refused to refer to the PLO in its program, creating tensions with the PLO's Central Council; it also refused to recognize Israel or any prior agreements; and most recently, it violated the conditions that the Quartet considered as *sine qua non* for the recognition of any Palestinian government, and for receiving international aid. Israel imprisoned over forty newly elected Hamas deputies to the PLC. The president called on Palestinians to participate in a popular referendum which was to be held on July 2006.<sup>64</sup> There is nothing in the Basic Law concerning the president's right to carry out those actions, and Hamas criticized the president for acting illegally.

Hamas and Fatah reached an agreement in Mecca, and a new unity government was formed, headed by Ismail Haneyyeh.<sup>65</sup> The government had a short life as Hamas took over the Gaza Strip by force in June 2007 and has controlled Gaza ever since. President Abbas declared the state of emergency in conformity with his powers as defined in the Basic Law (articles 110–114), and formed a new government, headed by Salam Fayyad. The Basic Law is silent on the topic of such an "emergency government." More importantly, it never addresses the question of the emergency government beyond the thirty-day limit on the state of emergency. In any case, Hamas rejected the president's decrees, considering them illegal, and the Hamas leader Ismail Haneyyeh continued to govern the Gaza Strip, asserting his government's legitimacy. He even nominated new members to his government, since some had withdrawn or accepted the demission as per the president's decree.

The thirty-day emergency period ended, and no agreement between Hamas and Fatah could be reached. The international community restarted providing international aid for Abbas and the Palestinian Authority in the West Bank, while the Gaza Strip, under strict Hamas control, remained under siege. Many Hamas deputies remained in Israeli prisons, and the PLC could not convene. The question was raised whether the President can call for anticipated elections. Once again, the Basic Law was silent on this matter.<sup>66</sup>

<sup>64</sup> The referendum did not take place and both factions started negotiating.

<sup>65</sup> The formation of the Unity government was a result of what is known as the Mecca Agreement, concluded between Fatah and Hamas. A new government was formed by Ismael Haneyya (from Hamas), including ministers from Fatah.

<sup>66</sup> The only reference was a limitation of the president's power during a state of emergency, i.e., the president could not, *inter alia*, dismiss the PLC. This sentence was interpreted by some as meaning that, even if during a state of emergency the president would wield extensive power, the dismissal of the PLC would not be possible. Others, on the contrary, reached the opposite conclusion, i.e., the President could not dismiss the PLC only during time of emergency while enjoying that power outside emergency periods. The provision on the limitation of presidential powers during a state of emergency might imply that the limitation is lifted once the state of emergency has ended.

What's more important, the Basic Law has been unhelpful with regards to actions undertaken since the Gaza coup. The two parties continued to conduct their business, each in the portion of the territory under their control. In the West Bank, the president ruled by decrees. Hamas ruled the Gaza Strip and did not apply presidential decrees. The Palestinian Authority's political system was at an impasse, at least as a unified political system, according to the Basic Law. To a jurist, the Basic Law was a disappointment: it appeared unable to respond to the new circumstances and political needs. And things needed to be resolved, one way or another.

What was to be done? One might be tempted to say, "Nothing." But government affairs need to be dealt with one way or another. Where the matters of the government or of the courts are concerned, "nothing" is not an acceptable answer. So what was to be done?

I believe that there are here two possible ways to deal with the situation. First, it is possible to say that an action carried out without the backing of a pre-established norm is unauthorized, that is legally illegitimate (in the sense described in section 3). To be sure, a pre-established norm can be outside the constitution in the formal sense.<sup>67</sup> Further, it is possible to say that an action may be carried out unsupported by a pre-established rule as long as it fits within the scope of the form of government or political system that the Palestinian Authority represents. This does not necessarily render those actions legally illegitimate. What is at stake here is not a legal decision in the strict sense, but a political decision. Since, in certain circumstances, public officials need to decide what the law is in order to be able to govern, perform administrative duties, and exercise public authority. When they do so, they make specific decisions (of political nature) which simply create the law.

If one is to understand legal positivism in the way I have defined it in this section, I believe that a legal positivist is likely to opt for the first solution. A positivist would in fact agree that something must be done but, for him, the question of legality no longer applies since legality is strictly related to actions carried out by public officials in accordance with pre-established norms or rules, or at least as their interpretation. A legal realist might prefer the second option. Not only will a legal realist consider that the new domains, in which public authorities intervene without the support of a pre-established norm, are politics, but that this is the way law is created. In both cases,

<sup>67</sup> In the Palestinian context, this may mean the return to previous constitutions that were in force in Palestine, or parts of it, before the establishment of the Palestinian Authority. The Jordanian constitution was not expressly abrogated, and forms part of the West Bank legal system (although one may argue that the Basic Law implicitly abrogated it); the Palestine Order in Council, the Basic Law for Gaza, and the Declaration of Constitutional Order are also still part of the law of the land in the Gaza Strip. A positivist might look back to those constitutional texts, if deemed still valid, to check whether the president of the Palestinian Authority could be thought of as a counterpart to the King of Jordan, the British High Commissioner for Palestine, and the Egyptian Administrative Governor, and thus enjoy their constitutional prerogatives. One may even come up with possible solutions to the problem of presidential power by calling a referendum, to nominate an emergency government without parliamentary confidence, or to dissolve the PLC. This reasoning seems completely consistent with the positivist insistence on the need at any price to act according to pre-established norms and rules. What I will argue here is that the problem lies in the very approach to what is legal or illegal. I will present legal realism as an alternative, but I will later on dismiss it as a way to distinguish legal political actions from illegal ones.

however, the domain of the “legal” is limited to ordinary cases (or normal politics, to use an Ackerman expression). In exceptional, or hard, cases (or, in Ackerman’s words, constitutional politics), the system would once again reach an impasse.

## 4. Borrowed political system?

In previous sections I have shown that the Basic Law was an inadequate tool for drawing boundaries between different branches of the government. It did not solve the power sharing issue or help avoid clashes between the Palestinian Authority’s organs. And when conflicts occurred, it did not provide adequate tools for resolving them. In other words, the Basic Law was not part of the solution; rather, it was part of the problem. It codified a distorted political system that did not fit within any of the existing forms of government.

The Basic Law contained contradictory provisions, sending mixed signals in different directions. It was also silent on many important issues that needed to be dealt with in order for the system to function. Was this distortion the basis of the system’s uniqueness? That may well be, but this is not the issue—at least not at this stage of my analysis. The issue is that the Basic Law failed to provide clear norms concerning the form of government of the Palestinian Authority. I will argue that the confusion was largely due to the way the Basic Law was drafted: it was written at a time when constitutions are often drafted by arbitrarily copying documents.

### 4.1. Constitutional borrowing

Scholars tend to disagree on whether the use of foreign constitutional texts, ideas, or institutions, is acceptable and should be encouraged, or whether it ought to be resisted and rejected. Various plausible but inevitably normative arguments are advanced in favor of or against what can be called “constitutional borrowing.”<sup>68</sup>

<sup>68</sup> Some authors refer to constitutional borrowing as a metaphor; see, e.g. articles in earlier issues of the *International Journal of Constitutional Law*: see Lee Epstein & Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT’L J. CONST. L. 196–223 (2003). Other scholars think it is an odd metaphor (see, e.g., Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence Through Negative Models*, 1 INT’L J. CONST. L. 296, 297 (2003)), or at least as unfortunate (see, e.g., Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 1, 20 (Sujit Choudhry ed., 2006)). Those scholars prefer different metaphors: the “migration of constitutional ideas” instead of borrowing, and “cross-constitutional influence.” Neil Walker summarizes the benefits of the migration metaphor in his contribution to a volume edited by Choudhry:

Migration . . . is a helpfully ecumenical concept in the context of the inter-state movement of constitutional ideas. Unlike other terms current in the comparativist literature such as “borrowing,” or “transplant” or “cross-fertilization,” it presumes nothing about the attitudes of the giver or the recipient, or about the properties or fate of the legal objects transferred. Rather, as we shall develop in due course, it refers to all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by giver or receiver, accepted or rejected, adopted or adapted, concerned with substantive doctrine or with institutional design or some more abstract or intangible constitutional sensibility or ethos.

Quoted in *id.* at 21. Despite this theoretical disagreement, this phenomenon, rightly considered as one of the grand old topics of comparative law is at the center of debate in comparative constitutional law and theory. See, e.g., Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. P.A. J. CONST. L. 325, 325 (1998).

Despite theoretical relevance of this debate<sup>69</sup> and the validity of the underlying concerns,<sup>70</sup> I am not going to discuss the wisdom of constitutional borrowing. Because my article is largely descriptive, based on facts, rather than speculative, I am going to start by asserting that constitutional texts, ideas, and institutions do indeed travel from one jurisdiction to another. Interestingly, this is a widespread phenomenon in contemporary states.<sup>71</sup>

Written constitutions are increasingly using standardized provisions, creating similar institutions, and adhering to similar constitutional ideas, principles, doctrines, and models. In this context, borrowing may be even considered a plausible,<sup>72</sup> perhaps even inevitable activity<sup>73</sup> which “is not . . . devoid of reason.”<sup>74</sup> But, for that same reason, it

<sup>69</sup> The theoretical debate goes beyond this phenomenon (movement of constitutional texts, ideas, and institutions); scholars disagree over the right metaphor to describe and understand this phenomenon. I recognize that the interest in finding an adequate metaphor is justified since, as Kim Lane Scheppele pointed out in her contribution to a recent volume edited by Choudhry, “[m]etaphors matter in shaping thought, and so it is crucial to get the metaphors right for highlighting key features of the matter under discussion.” Quoted in Choudhry, *supra* note 68, at 19–20. I believe that the disagreement over the metaphor is a direct consequence of the phenomenon that the scholars are trying to describe. In fact, it is one thing to describe the phenomenon of the use of constitutional texts and institutions, and another to describe the adherence of contemporary states to similar constitutional designs, ideas, and models. However, I do not think it will make a difference, in terms of clarity of the arguments I advance in this article, what metaphor I am using. For this reason, I will use “constitutional borrowing” to describe this phenomenon. This does not mean I subscribe completely to the premises of accepting constitutional borrowing as an adequate metaphor to describe this phenomenon. At the same time, I tend to reject “migration” as an alternative metaphor, since migration presupposes a movement of texts, ideas, and institutions, on the model human beings, i.e., as rational agents capable of moving from one place to another. In a sense the metaphor suggests that ideas leave one place in order to reach another, as if it appeared there for the first time. It is the image of texts, ideas, and institutions as a product of one culture, one system, that migrate and influence (illuminate, or even civilize) others, in a very unilateral and paternalistic way which I oppose. On the contrary, I perceive this movement as a *crescendo* of texts that are increasingly standardized, ideas that are universally shared and accepted, and institutions that are tested and applied; they are the product of different cultures, different contexts, and different systems. They may be given different names and uses, but they still have similar intensity and provoke similar interest.

<sup>70</sup> The concerns can be boiled down to two: whether this borrowing is necessary (or is it simply a false necessity?), and whether this borrowing is legitimate. I believe, however, that a distinction needs to be made. The concerns expressed with regards to constitutional borrowing differ depending on the kind of constitutional borrowing one is trying to describe. There are two different kinds of constitutional borrowing: one described by the drafters of new constitutions, and the other defined by constitutional judges. They are different in that they occur in completely different time-frames in a country’s constitutional history, relate to a different kind of mandate for the borrower, which in turn raises completely different issues with regards to the relevance and legitimacy of borrowing, which requires completely different kind of investigation.

<sup>71</sup> Most importantly, it is not the characteristic of contemporary states alone. Even the American constitution had largely borrowed from previously available institutions, especially from the British constitutional system.

<sup>72</sup> See Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT’L J. CONST. L. 269, 282 (2003).

<sup>73</sup> Choosing a constitutional text as a point of departure may be simply based on utilitarian or practical reasons. It is a way to help the drafters advance in their work more easily. In that sense, it is not limited to constitutional borrowing; it is also the case of borrowing other kinds of legislative texts.

<sup>74</sup> Rosenkrantz, *supra* note 72, at 277. The author then provides different arguments to support this claim.



is not necessarily indispensable,<sup>75</sup> or without limitations.<sup>76</sup> Constitutional borrowing, therefore, may be problematic from the perspective of constitutional theory.<sup>77</sup>

Whenever a constitution-making process is launched,<sup>78</sup> the drafters of the new constitution do not simply write it from A to Z; as a matter of fact, “[n]o one begins writing a constitution from scratch.”<sup>79</sup> They use different materials as their point of departure; these can include earlier versions of the national constitution, foreign constitutions, and even international documents.<sup>80</sup> More importantly, the drafters do not have to reinvent the wheel, “because there are a limited number of general constitutional ideas and mechanisms, and they have been in the air for some time.”<sup>81</sup>

The amplitude of the drafters’ choices lies not only in what they are borrowing, but perhaps even more in what they have avoided or rejected.<sup>82</sup> Choosing or rejecting a

<sup>75</sup> Some have referred to the opposite tendency as a “false necessity.” Tushnet refers to that claim of false necessity which is often associated with Montesquieu and Hegel: “They argued that a constitutional system is so deeply enmeshed within a society’s social, economic, and political systems that only the constitutional regime that has arisen organically from within the society will be accepted by the society.” Tushnet, *supra* note 68, at 333. In fact, for Montesquieu, “[l]aws . . . should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.” *Quoted in id.* at 333. For Hegel also, a constitution is “the work of centuries, . . . the consciousness of rationality so far as that consciousness is developed in a particular nation.” *Quoted in id.* at 333. However, even in the case of both Hegel and Montesquieu, the arguments that they advance do not seem to exclude in absolute terms the *possibility* of a successful borrowing. Tushnet refers to both Hegel and Montesquieu, who, he claimed “do not necessarily rule out the possibility of successful borrowings.” *Id.* at 333.

<sup>76</sup> Those barriers may be related to national pride or culture in general, or they may reflect legitimacy concerns. Those barriers may be the result of resistance of existing institutions willing to keep or to increase their power (e.g., in the case of East Central Europe. See Osiatynski, *supra* note 45, at 245).

<sup>77</sup> See Rosenkrantz, *supra* note 72, at 282. For that reason, I completely agree with Osiatynski that “borrowing is a complex and difficult issue that deserves further study.” Osiatynski, *supra* note 45, at 267.

<sup>78</sup> It should be noted that constitutional borrowing may occur on two different occasions: First, in times of constitution making, when the drafters have a specific mandate to prepare a new constitution, where they *may* make use of foreign constitutional texts, ideas, and institutions. Second, constitutional judges make use of foreign constitutions and case law to interpret their own constitution. In this article I will limit my analysis to the first kind of constitutional borrowing, since I’m interested in the way contemporary constitutions are drafted, which will then help me understand why the Basic Law contains contradictory provisions, and why it did not help establish a form of government that would be functional or stable.

<sup>79</sup> See Osiatynski, *supra* note 45, at 244.

<sup>80</sup> It is hardly difficult for a government to have a new constitution written or an old one rewritten. The constitutional language is an international one and there are many constitutional models floating around. The formally enacted constitutions in the world are available in print should a government wish to copy what is used elsewhere. There can be no doubt about the occurrence of constitutional copying. When constitutional lawyers draw up new constitutional documents they are almost always well aware of major systems of constitutional paragraphs in other countries.

See LANE, *supra* note 36, at 195.

<sup>81</sup> See Osiatynski, *supra* note 45, at 244.

<sup>82</sup> For a discussion about constitutional borrowing and non-borrowing, see *id.* at 289–290. In fact, it is argued that the debate becomes more interesting when we look at the larger phenomenon of constitution building, where positive borrowing (borrowing certain rules, institutions, and ideas) as much as negative borrowing (rejecting many other possible alternatives) are duly considered. It is sometimes the case that constitutional borrowing is done by positively rejecting a particular conception of constitution, a phenomenon that some have called “aversive constitutionalism.” See Rosenkrantz, *supra* note 72, at 289–290, citing Scheppele.

constitutional model may be culturally, ideologically, politically, historically, or even religiously motivated.<sup>83</sup> However, borrowing can be simply a result of practical needs; the similarities in the problems or objectives may lead to the adoption of similar solutions and mechanisms.<sup>84</sup> Most interestingly, there are examples in which borrowing or rejecting constitutional models can be largely explained by the immediate history of the concerned nation, which the new constitution tried to distance itself from.<sup>85</sup>

<sup>83</sup> An Arab country, for example, may use a constitution of another Arab country as a point of departure, due to their shared linguistic, cultural, and historical background. A postcolonial state may use the constitution of the former colonizer as a point of departure. Osiatynski claimed:

Many postcolonial countries “consciously” adopted models similar to those of their former colonial power, particularly when independence came as a result of negotiations and peaceful agreement.

See Osiatynski, *supra* note 45, at 248. Julian Go, based on empirical data collected about postcolonial states seems to support this claim. Go argues:

...the genre and substantive provisions of postcolonial constitutions varied greatly. These variations suggest that if there was constitutional isomorphism at all, it occurred within imperial boundaries rather than across them. They also suggest that when isomorphism did in fact occur across imperial boundaries, it followed other subglobal scales of influence, not the purely global scale of “world society.” He then adds:

...many of the ex-British countries... adopted the Westminster parliamentary model in their constitutions... Conversely, most of the ex-French countries entered independent status with constitutions calling for presidential rather than parliamentary systems, thereby following the constitution of the French Fifth Republic. These states, then, simply adopted the constitutional model of their former imperial master. See Julian Go, *A Globalizing Constitutionalism? Views from the Postcolony, 1945–2000*, in *CONSTITUTIONALISM AND POLITICAL RECONSTRUCTION* 89, 92 (Saïd Amir Arjomand ed., 2007).

<sup>84</sup> This is what some called the procedural argument:

Under the general form of the procedural argument, we have reasons to follow what others have decided about issues we now confront if the decisions were arrived at using procedures designed to increase the reliability of these decisions. The same kind of argument could be offered in the constitutional realm. Sometimes, legislatures, constitutional assemblies, and courts operate within procedural requirements specially tailored to reproduce the ideal conditions of choice. Thus, in many legislatures there are norms that regulate discussions in order to allow the expression of all points of view.

See Rosenkrantz, *supra* note 72, at 280.

<sup>85</sup> Thus the South African insistence on the bill of rights and equality is largely related as a reaction to apartheid. As pointed out by Sarkin: “The particular socio-political context in South Africa accounts to some degree for South African acceptance, in theory at least, of international law and comparative experience.” See Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa’s Bill of Rights and Interpretation of Human Rights Provisions*, 1 U. PA. J. CONST. L. 176, 178 (1998). Rosenkrantz seems to concur on this conclusion too. See Rosenkrantz, *supra* note 72, at 281. Similarly, the insistence of post-dictatorship Argentina on the protection of human rights is largely related to the massive violations that occurred by the previous system:

After the traumatic experiences of the massive human rights violations performed by the military juntas in the 1970s and early 1980s, Argentina decided to amend its Constitution in 1994... The reason to incorporate these treaties was explained by Alicia Olivera, a member of the 1994 convention. She said that “the decision [to incorporate human right treaties into the Constitution] ha[d] as its immediate source the abhorrent crimes committed by the military dictatorships in Argentina, especially the last one...” “Our history,” continued Olivera, “was condensed in the expression ‘Never Again,’ and to guarantee [that this will be the case] we should grant constitutional standing to the principles of *jus humanitariorum*.”

Quoted in Rosenkrantz, *supra* note 72, at 280–281 (emphasis in the original). Similar experiences have been observed in post-Communist countries: “In 1989, after its communist past, Hungary adopted a constitution that required that domestic law be harmonized with international law.” *Id.* at 281.

Borrowing may, of course, be simply the result of the prevailing interests of those who drafted or endorsed the constitution.<sup>86</sup> More extreme cases can be found where constitutional borrowing, rather than being a result of genuine deliberation, was a direct consequence of defeat in war. Indeed, in many cases, the constitution making process was initiated under the direct supervision of foreign authorities, or even while foreign military forces were still in complete control of the country. This phenomenon often concludes in the adoption of a constitution, but it is an “imposed constitutions.”<sup>87</sup> Such experiences have occurred with greater frequency since the Second World War. However, similar experiences of imposition can be found, *mutatis mutandis*, much earlier,<sup>88</sup> and continue to occur in many contemporary states.<sup>89</sup>

In many other cases, the pressures exercised by the outside world on states to opt for one constitutional model instead of another, may be more or less subtle. However, even in the most extreme case of “imposed constitutions,” the indigenous community maintains a degree of involvement. In fact, constitution making is often the result of a kind of negotiation between local elites who are invested with authority in a transitional period, on the one hand, and the foreign authorities in complete or partial control of the country, on the other.

<sup>86</sup> Other reasons can help in promoting constitutional borrowing:

there exist strong interests that promote borrowing, e.g., the need of the leaders of a particular country to look good to others or to demonstrate friendship toward another country. Constitutional experts also have a vested interest in borrowing or, at least, in the international exchange of ideas, because this may provide with influence and a sense of importance

See Osiatynski, *supra* note 45, at 245. There are the opposite experiences, though:

Often there were important reasons to reject even the best advice. This usually was the case when the drafters represented institutions that might be affected by a new constitution. Any reallocation of power necessarily becomes a subject of grave controversy and does not always lend itself to compromise. When constitution making is entrusted to parliaments, the drafters have a vested interest in opting for some version of a parliamentary government.

*Id.* at 259.

<sup>87</sup> Nothing in the above arguments suggests that an imposed constitution would be less successful than completely indigenous constitutions, since historical experiences in that sense are mitigated. Notice that success here does not refer to any particular content, but rather to the stability of institutions the new constitution has created, the mechanisms created by it to resolve internal power conflicts, as much as realizing other goals and objectives, such as transition to democracy, development, and economic growth. Most importantly, there is nothing to suggest that written constitutions would really matter in the real life, where political institutions often continue to function without caring much of the written constitution itself.

<sup>88</sup> Osiatynski showed how countries defeated in the First World War were compelled by the Versailles treaty to adopt certain provisions to protect minorities and how, following the Second World War, American constitutionalism influenced the constitutions of Japan and of the occupied Germany, and how the Council of Europe and the European community pressured former Communist states in their transition to democracy to adopt certain provisions and changes. Those developments had an impact of international human rights law. See *id.* at 248–289. Hasebe agrees that Japan’s written constitution (the Constitution of Japan 1946), “was not borrowed but rather imposed by the occupying forces after the Second World War.” See Hasebe, *supra* note 38, at 224. Similarly many countries while still under foreign occupation or colonial regimes had adopted constitutions before independence. Similar experiences of constitutions under foreign control also occurred in many Arab countries, which adopted written constitutions before statehood, while still under British and French mandates.

<sup>89</sup> The case in question are Iraq and Afghanistan, where constitution making started while the American and their allies’ armies were still present in the country.

Although still central in the definition of national legal orders and in the shaping of international law, twenty-first century states are not the same as they cannot pretend absolute power over their subjects, and their sovereignty in the classical Westphalian sense, is increasingly put in question. In this context, one thing seems to be clear. It is no longer possible to consider constitutions only as either imposed or genuine, because no contemporary constitution can be said to be completely imposed, just as no contemporary constitution can be said to be completely indigenous.<sup>90</sup>

#### 4.2. Borrowing constitutional models

Regardless of the similarities among various constitutional texts, it is the spreading of constitutional ideas or ideals, such as the separation of powers, representative government, and, most recently, the rule of law and the protection of human rights, that are remarkable.<sup>91</sup> In the contemporary world, where written constitutions are gaining relevance,<sup>92</sup> the reference to these commonly shared principles in the constitutional

<sup>90</sup> As Schauer pointed out, “seeing constitutions as necessarily either indigenous or imposed is invariably to see today’s constitutions through yesterday’s lenses.” He then cites the examples of Iraq and Afghanistan, where constitution making is done with a large investment of the American expertise, accompanied by military presence; he then concluded: “Legal development and constitution-making... will invariably be shaped by an elaborate interrelationship between the views of [external entities] and the views of local residents and local authorities.” See Frederick Schauer, *On Migration of Constitutional Ideas*, 37 CONN. L. REV. 907, 907 (2005).

<sup>91</sup> However, I will limit my analysis in what follows to the ways separation of powers is accommodated in contemporary constitutional systems.

<sup>92</sup> In contemporary states it is increasingly considered as the best way for new nations to “write down” their constitutional commitments and compromises. See Saïd Amir Arjomand, *Constitutional Development and Political Reconstruction from Nation-Building to New Constitutionalism*, in CONSTITUTIONALISM AND POLITICAL RECONSTRUCTION 3, 6–7 (Saïd Amir Arjomand ed., 2007). However, the “worldwide embrace of written constitution” (to cite Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1800 (2007)) can be in part explained by noting that it is a legitimating tool for the newly established state, within the community of nations. For Sathyamurthy, a written constitution serves as an instrument of political cohesion in Postcolonial states: “Constitutions were expected to fulfill a dual role, enabling a smooth and orderly transition from anticolonial struggle to independent self-rule, and at the same time securing for the new regime the political fruits of nationhood, new state structures, legitimacy (domestic and international), and sovereignty. . . .” See T. V. Sathyamurthy, *The Constitution as an Instrument of Political Cohesion in Postcolonial States: The Case of India, 1950–1993*, in DESIGNS FOR DEMOCRATIC STABILITY: STUDIES IN VIABLE CONSTITUTIONALISM 147, 147 (A. I. Baaklini & H. Desfosses eds., 1997). Based on empirical comparative study of constitutions of postcolonial states, Go argues:

The very fact that all postcolonial countries adopted written constitutions indicates that by the mid-20th century, when decolonization began, any state entering the system had to have a single-document constitution in order to be a legitimate nation.

See Go, *supra* note 83, at 92. This explains why even the United Kingdom, historically without a written constitution, encouraged the codification process in the ex-colonies, even before they achieved independence, and helped shape written constitutions in territories under its mandate, such as Transjordan (the Basic Law of 1923 and 1928, and the Constitution of 1947), and Palestine under British mandate (the Palestine Order in Council of 1922). According to Dahrendorf’s three stage universal sequence of state-building, writing a constitution is the very first. R. DAHRENDORF, REFLECTIONS ON THE REVOLUTION IN EUROPE (1990) cited in Go, *supra* note 83, at 111.

documents becomes almost a necessary step; it is a legitimating tool for the new polity or the new regime.<sup>93</sup>

However, it is not by a provision in a written constitution that ideals are realized. Rather, it is the task of a constitution to establish a functional system which may accommodate these ideals. Rules and institutions, codified by a constitution, work only if they create such a system which has been chosen among other possible systems. If a state adopts the separation of powers as a principle determining the way the government is run, then the constitution must include relevant provisions and create necessary institutions to enact this principle. In other words, the success of constitutional borrowing does not depend on the adoption of certain constitutional provisions, rules, or institutions. Rather, it depends on its ability to fulfill the borrowers' intentions<sup>94</sup> which will vary from one country to another.<sup>95</sup>

Things are, however, more complex. In fact, despite the similarities among the rules and institutions, there are a number of possible constitutional models capable of enacting the same principle. If a state opts for the separation of powers, inevitably, the next step would be to determine which constitutional model to choose.

States are often tempted to borrow from available constitutional models. The result is that "most constitutional systems are or were derivative in part," with the exception of what Cheryl Saunders calls "ancestor systems of the United Kingdom, the United States and France."<sup>96</sup> Regardless of whether this claim is correct or not, it is often true that classical constitutional theory continues to use available classical paradigms to classify existing political systems based on the way powers in the state are separated, checked and balanced.<sup>97</sup>

If the fulfillment of the borrowers' intentions is enough to gauge the success of constitutional borrowing, would it be helpful to figure out what conditions need to be satisfied for the borrowing of a specific constitutional model accommodating the separation of powers to be successful? How can borrowing the desired form of government be a success? A new criterion of success needs to be introduced. It can be defined

<sup>93</sup> Nothing in what preceded needs to be interpreted as arguing that contemporary states necessarily need to opt for such and such constitutional ideal, or even that it was indispensable for them to write it down in the form of a constitution in the first place. However, the fact that certain constitutional provisions are there, codified and protected by a written constitution, is sufficient for me to conclude that contemporary states have opted for such and such ideal.

<sup>94</sup> Here it may be argued that, despite the difficulties in knowing what was exactly the framers' real intention (if there was any), it is nevertheless possible to speculate about them, deduce them from the framers' actions or from successive governmental acts. It is even possible to test the success of the borrowed system by measuring the satisfaction of the expectations of the actors concerned. Finally, it is possible to return to the same constitutional text which often refers to those goals that the new system intends to realize, or intentions the new system intends to fulfill.

<sup>95</sup> It may be economic growth, encouraging immigration, the realization of sovereignty, or the acquiring of governmental legitimacy, etc. For a discussion, see Tushnet, *supra* note 68, at 327–329.

<sup>96</sup> Cheryl Saunders argued that "most constitutional systems are or were derivative in part, with the possible exceptions of the ancestor systems of the United Kingdom, the United States and France." *Quoted in* Osiatynski, *supra* note 45, at 244.

<sup>97</sup> Presidential, parliamentary, or even semi-presidential systems, while the Swiss directorate system is not applied in countries other than Switzerland.

as the capacity of the borrowed system to establish a reasonably functional and stable system, and to avoid anarchy.

Even with the application of the new criterion, however, it is possible to argue that the available forms of government are *grosso modo* successful in maintaining a relative stability, at least in the country of origin (which explains their attractiveness for other states willing to borrow a given constitutional model in the first place). The greatest challenge comes from the objection that the success of a given form of government in the country of origin is largely due to the specific historical development of that country, which might renders its system incompatible with other countries' experience. This argument may lead us back to skepticism, not about the forms of government, but about constitutional borrowing in general.

The semi-presidential form of government is among the options available to institution makers.<sup>98</sup> Interestingly, however, this option seems to be even more attractive to contemporary states.<sup>99</sup> There is arguably no way to definitively determine why some constitution makers opt for the semi-presidential system,<sup>100</sup> or why they decided on constitutional borrowing in the first place. One may even advance arguments aiming to discredit the semi-presidential system, whether as a specific form of government or as a system adequate for the country that has borrowed it. However, even those reticent towards

<sup>98</sup> See Duverger, Lijphart, & Pasquino, *supra* note 22, at 129.

<sup>99</sup> For more about the diffusion of this political system, see Bruce Ackerman, *The New Separation of Powers*, 113 HARV. LAW REV. 633 (2000); Skach, *supra* note 43.

<sup>100</sup> The reasons behind the attractiveness of the French system go beyond our immediate concern, at least at this stage of the article. Below are some ideas, although still largely speculative, and requiring further analysis. I will argue in the following sections that the attractiveness is not only related to what I will call technical issues that are available in semi-presidentialism, which is often connected to France as a prototype, but to the attractiveness of the constitutional culture behind it. Most importantly, the French system seems to be attractive for the simple reason of not being an open-ended system (contrary to the parliamentary, UK-style system and presidential, US-style system); in other words, with the adoption of a semi-presidential, French-style system many issues of extraordinary politics are not dealt with at the moment of constitution making, but largely determined by normal politics; in other words, with a semi-presidential system, it will still be possible (in abstract and in reality) to have an alteration in the political system, based on electoral choice. There may be other reasons, but they are, at this stage, simple speculations, which need further research and analysis. The attractiveness of the French-style system also resides in including the most attractive characteristics of both the American and the British systems. It is a unitary state as in the UK (most contemporary states are unitary), but has a written constitution as the US (most contemporary states opt for written constitutions). It has a strong parliament, to which the government is accountable, but it also has a strong president, to whom large powers are granted, especially in times of crises, emergency, or necessity. Most importantly, the UK system is not entrenched in one unique written document, which renders any temptation of borrowing constitutions extremely difficult and unpractical. While, in the case of the US, the written constitution, old and rarely formally amended, has acquired with time force that is largely determined by the way the Supreme Court has interpreted its provisions. The French system is attractive because, within the existing prototypes, it is the only "civil law" country which is widely disseminated. It is the system that gives a particular importance for formally established norms, through legislation, in anticipation of possible future conflicts between subjects. This task of norm making is not left to be determined by the courts themselves when conflicts arise, as it is in the case of both the US and the UK systems. In both systems indeed precedents, although in different degrees and modalities, have still the priority over other sources of law. For all the above reasons, I believe, it is not surprising that the French system seems to be more attractive than other systems.

constitutional borrowing in general, or towards the semi-presidential model, may find it difficult to disagree that the construction of that system (as much as of any other form of government) *can* be successful (which doesn't mean that it always succeeds).

The question we are now left with is simple: what is it that makes borrowing the semi-presidential system successful? As pointed out by Lijphart, Pasquino, and Duverger, constructing a semi-presidential system requires “an explicit, purposive, and well designed act of institutional and constitutional engineering.”<sup>101</sup> In such a context, writing a constitution becomes an occasion to design a particular system. This is not to argue that this will create a stable political system (although it does not exclude it for that same reason). What this means is that in order for constitutional borrowing to succeed, an act of institutional and constitutional engineering is required. In other words, in order to establish a functional political system, the above mentioned scholars argue that those would be the necessary steps to follow. Those who adopt this approach inevitably need to examine how each institution functions within the form of government that is being borrowed, and see how similar institutions and mechanisms can be possibly adopted to realize those functions; for them, borrowing institutions and rules makes sense only if it is closely connected to the functions the borrowers had in mind.<sup>102</sup>

It is in this context that drafting a constitution acquires an added value where the written constitution has the task of establishing basic institutions, determining the relationship between the branches of the government, and delimiting their respective powers.<sup>103</sup> Rules (elaborated through particular constitutional provisions which borrowed from various sources) are simply a tool which helps realize such an institutional design. Accordingly, for a borrowed form of government (such as the semi-presidential system) to be a success, it is not enough to borrow particular rules—which can abstractly be an example of successful borrowing, but they are for that same reason irrelevant. Rather, the success of the borrowed rules is their “functional suitability.”<sup>104</sup>

<sup>101</sup> See Duverger, Lijphart, & Pasquino, *supra* note 22, at 129.

<sup>102</sup> I use function by reference to one of the possible ways of analysis in comparative constitutional law:

Functional analysis asks us to identify some function that is being performed in two or more systems. Applied to constitutional institutions, it then asks us to identify the institutions that perform that function. There is no reason to think that the two institutions we identify will correspond in any useful way to legal categories.

See Tushnet, *supra* note 68, at 338.

<sup>103</sup> It is inevitable that this approach to constitutional borrowing is related to a set of assumptions about the role of constitutions in general, which is not necessarily in its capacity and role as moral framework or as an expression of national identity. See Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PA. J. CONST. L. 640, 644, 648 (1999). In both cases, indeed, the tendency is to resist constitutional borrowing all together. On the contrary, borrowing is justified often on the basis of an assumption of the constitution as an operating system:

A constitution may be analogous to an operating system for a computer, it provides the basic programming by which authoritative decisions are made by political actors, and the rule for determining when such actions are legitimate. In this aspect, the constitution should be judged and construed in instrumental and institutional terms. A “good” operating system for a computer operates efficiently and accurately in accomplishing the tasks set to the computer.

See *id.* at 641.

<sup>104</sup> See Tushnet, *supra* note 68, at 337.

Successful constitutional borrowing of a semi-presidential system will largely depend on the constitution's capacity to individualize those rules and institutions in order to establish a stable and functional constitutional system. If there is a disconnection between the constitution-making (which codifies specific rules in a rigid, formal, written constitution) and the institutional and constitutional engineering, setting up a stable and functional political system is going to be problematic. In the following sections, I will argue that this has largely been the case of contemporary constitutions, and in particular of the Basic Law of the Palestinian Authority.

#### 4.3. "Constitutional gardening"

We live in a globalized world:<sup>105</sup> written constitutions are increasingly globalized, and constitution making is increasingly internationalized.<sup>106</sup> Similarities among constitutions are frequent, but differences are no less present and are usually accompanied by the heterogeneity of constitutional law and constitutional mechanisms.<sup>107</sup> How can one reconcile the two apparently irreconcilable characteristics of contemporary constitutions? I believe those two characteristics are interrelated because globalization does not lead to complete hegemony. In other words, globalization implies insistence on cultural particularism and on national exceptionalism.

In this context, the similarity among constitutions—mainly written constitutions—is striking. However, this similarity is misleading and mainly due to the way new constitutions are drafted.<sup>108</sup> For scholars interested in constitutions in the "new era," constitutionalism—known as the new constitutionalism (since the 1990s)<sup>109</sup>—the key words to better qualify constitutions of the new era are: "syncretism,"<sup>110</sup> "bricolage,"<sup>111</sup>

<sup>105</sup> For more about the impact of what has been called "World Society" on nation-states, see: J. Meyer *et al.*, *World Society and the Nation State*, in *THE GLOBALIZATION READER* 84 (F. J. Lechner & J. Boli eds., 2004).

<sup>106</sup> NICOLAS MAZIAU, *LES CONSTITUTIONS INTERNATIONNALISÉES: ASPECTS THÉORIQUES ET ESSAI DE TYPOLOGIE* 8 (Ecole Doctorale de l'Université de Sienne 2002), available at [http://www.unisi.it/ricerca/dip/dir\\_eco/COMPARATO/maziau.doc](http://www.unisi.it/ricerca/dip/dir_eco/COMPARATO/maziau.doc) (accessed on Jan 12, 2010); ASEM KHALIL, *THE ENACTMENT OF CONSTITUENT POWER IN THE ARAB WORLD: THE PALESTINIAN CASE* 157-159 (PIFF Etudes et Colloques, 47, 2006).

<sup>107</sup> One of the reasons used to explain the heterogeneity in constitutional law is "the combination of the multiplicity of our relationships as citizens, and our continuous ability to redefine, reshape, and remold them, is what makes constitutional law heterogeneous." See Rosenkrantz, *supra* note 72, at 282.

<sup>108</sup> Scholars, interested in the constitutions adopted during the "new era of constitutionalism" notice this phenomenon of convergence and divergence that exist. They explain this by the way new constitutions are made; they called it by specific names: "syncretism" (see, e.g., Go, *supra* note 83, at 104), "bricolage," (see, e.g., Tushnet, *supra* note 47 at 1285-1286), "gardening" (see, e.g., R. R. Ludwikowski, "Mixed" Constitutions – Product of an East-Central European Constitutional Melting Pot, 16 B. U. INT'L L. J. 1, 64 (1998)), "plagiarism" (see, e.g., LANE, *supra* note 36, at 196), or "distortion" (see, e.g., Osiatynski, *supra* note 45, at 267).

<sup>109</sup> Constitutional copying is much earlier. It is true that the American and French constitutions, following the revolutions, were influenced by pre-existing constitutions (in the material sense, as sets of institutions related to the government). However, in the written constitutions that followed the First World War, one receives a broad picture of what is possible in constitutional plagiarism. See LANE, *supra* note 36, at 196.

<sup>110</sup> For more, see Go, *supra* note 83.

<sup>111</sup> 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 all the occasions there have been to renew or enrich the stock

*Quoted in Tushnet, supra* note 47, 1285-1286.



“constitutional gardening,”<sup>112</sup> “constitutional plagiarism,”<sup>113</sup> or even “distortion.”<sup>114</sup> Constitutions are made, or re-made as the case may be, by using native and foreign material, whatever is most easily available, often in translation, resulting in an assemblage of contradictory provisions.

Constitutional gardening is distinct from constitutional engineering and surgical transplanting. Rett R. Ludwikowski explained the difference among those concepts: An engineer’s or surgeon’s work requires some level of exactitude; their freedom to experiment is limited. In contrast, the *constitutional gardeners* did not try to construct their products from well-tested components or to transplant organs into accomplished social organisms. Rather, they were picking seedlings from different gardens and implanting them, piece by piece, into living and constantly changing vegetation composed of rules, norms, and institutions. The *new gardens* do not resemble traditional French or British parks, they have a mixed character, blending together features produced by different tastes, cultures, and styles.<sup>115</sup>

Whether constitutional gardening is the result of unsuccessful,<sup>116</sup> poor,<sup>117</sup> or self-conscious borrowing,<sup>118</sup> of non-borrowing,<sup>119</sup> or even of willful distortion,<sup>120</sup> is beyond the scope of this article. The result remains the same: a mitigated constitutional product. It is a result not only of the multiplicity of available models or of the multiplicity of interests at stake, but also of the same process which is used to produce written constitutions. Contemporary constitutions contain similar constitutional provisions, ideas, and institutions, as well as technical differences. Accordingly, each form of government contains some characteristics that render it unique; this uniqueness is rarely related to the novelty of rules and institutions, but rather to the way they are assembled in that particular system.<sup>121</sup> Those details—rather than the overall structure which may be shared with other systems—are determinant for each system, as well as influence its interpretation.<sup>122</sup>

<sup>112</sup> A concept formulated by Rett R. Ludwikowski, *cited in* Osiatynski, *supra* note 45, at 267.

<sup>113</sup> *See* LANE, *supra* note 36, at 196.

<sup>114</sup> *See* Osiatynski, *supra* note 45.

<sup>115</sup> *Quoted in id.* at 267 (emphasis in the original).

<sup>116</sup> For a discussion about criteria for determining when constitutional borrowing succeed, *see* Tushnet, *supra* note 47.

<sup>117</sup> Something that some scholars refer to as *bricolage*, gardening. For more see *infra* text accompanying notes 104–126.

<sup>118</sup> *See* Osiatynski, *supra* note 45, at 244.

<sup>119</sup> “Equally obvious, and much easier to assess, were the cases of conscious rejections of foreign constitutional ideas and institutions. Rejection takes place when the drafters consider an idea or provisions and decide not to borrow.” *Id.* at 250.

<sup>120</sup> “Apart from rejections, there are also cases of conscious distortions of allegedly ‘borrowed’ ideas.” *Id.* at 251.

<sup>121</sup> This does not mean that some institutions are borrowed on the constitutional level and introduced for the first time in a particular political system. In fact, while the traditional institutions are often the same (executive, legislative, and judiciary), sometimes new institutions are introduced, such as the “ombudsman” borrowed by many countries from the Scandinavian countries (*see id.* at 254), or the Constitutional Court, borrowed largely from the Austrian constitution designed by Hans Kelsen. *See* LANE, *supra* note 36, at 196–197.

<sup>122</sup> “Despite the fact that the number of powers to be separated, and the variations in the relationships between them, is limited, careful analysis of constitutions demonstrates many minute differences behind seemingly similar solutions.” *See* Osiatynski, *supra* note 45, at 245.

This explains why, while opting for a semi-presidential system for example, there are many technical differences with regards to the extent of presidential powers, the cabinet–parliament relationship, etc. Most importantly, different choices are made with regards to important institutions indispensable for a system to be stable and operational, as well as coherent and logical. This is true in the case of the *Conseil d'Etat* which has jurisdiction in administrative matters, and of the *Conseil Constitutionnel* (not the constitutional court), because of the rejection of *a posteriori* control of constitutionality of laws that have already been promulgated. On the contrary, states which borrow the semi-presidential system of government, may opt for a completely different institution of constitutional review, through the introduction of a constitutional court into the system, instead of a constitutional court which would have direct jurisdiction over the control of constitutionality of laws.<sup>123</sup> The argument here is that although different states may appear to have the same semi-presidential system, the fact that they have established a constitutional court, rather than a *Conseil Constitutionnel*, means that their system is not an exact mirror image of the French system.<sup>124</sup>

The way the Basic Law was drafted suggests that, for the Palestinian Authority, the process of constitution making is similar to other such experiences in the new era of constitutionalism.<sup>125</sup> The product of that experience is a text that I consider as highly problematic. It does not contain real compromises, in which each party has given something up for the sake of agreement. Rather, it leads to each group accepting an

<sup>123</sup> There are two categories of actors in borrowing. One will be called “the messengers.” These are the experts, including constitutional scholars; diplomats; the personnel of international organizations; human rights activists; etc. – all of whom try to bring proposals and solutions to the drafters. The drafters are “the recipients.” They listen to such proposals and accept, reject, revise, or distort them. *Id.* at 255.

<sup>124</sup> Classical constitutional theory, in fact, had limited space for such a new institution in the determination of the form of government and the impact on the kind of separation of power. The fact that the three models presented as the prototypes of presidentialism, parliamentarism, and semi-presidentialism, do not have such an institution is very significant. This means that there is a need for re-consideration of forms of government to include those systems which opted for the creation of a constitutional court in their system while opting to one of the three forms of government.

<sup>125</sup> I have followed the drafting process of the Basic Law and draft Palestinian Constitution elsewhere, for more see Khalil, *supra* note 106, at 216–221. Nathan Brown followed in detail the drafting process of the Basic Law since its first inception and he seems to explain the product at hand (the Basic Law as it was finally adopted by the Palestinian Legislative Council) partially as a result of the materials used by the drafters of the Basic Law:

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, *supra* note 63, at 34.

For more about earlier drafts of the Basic Law and the Draft Palestinian Constitution, see generally Anis Al-Qasem, *Commentary on Draft Basic Law for the Palestinian National Authority in the Transitional Period*, VII PALESTINE YBK INT'L L. 187 (1992–94); 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); Aruri & Caroll, *supra* note 13; Zaha Hassan, *The Palestinian Constitution and the Geneva Accord: The Prospects for Palestinian Constitutionalism*, 16 FLORIDA J. INT'L LAW 897 (2004); Adrien K. Wing, *The Palestinian Basic Law: Embryonic Constitutionalism*, 31 CASE WESTERN RESERVE J. INT'L LAW 383 (1999).

extreme option in exchange for another elsewhere (public space, here, is perceived as various parcels or fields),<sup>126</sup> that ends up producing a text made up of opposites. This syncretism does not imply a synthesis but rather a spontaneous, unreflected juxtaposition of thesis and antithesis. As a result, there is such a thing as an indispensable provision (many controversial provisions are simply deleted), whereas some may be inserted at different stages of constitution-making: during drafting, debates, or even voting. I am therefore compelled to suspect that the only decision undertaken by the constitution-framers is, indeed, to avoid making any decisions, for the sake of reaching agreement on the text.<sup>127</sup>

#### 4.4. Beyond the Basic Law

If the presentation of the way constitutions are drafted in the new era (as presented in section 4.3) applied to the Palestinian context—and I believe it does—it would be very naïve to look to the Basic Law for ready-made answers, as if it expressed a comprehensive, coherent project or were a product of rational, predetermined will.<sup>128</sup>

<sup>126</sup> In this sense, I argue, the reference to Islam and *shari'a* in the Basic Law was not necessarily meant to change anything in the way the PLO and the Palestinian Authority perceive the authority they exercise; rather, it at a way I have defined it, necessary for attracting a portion of the Palestinian population, and at a 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 Basic Law article 4(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](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 Basic Law (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 Palestinian Authority 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: (a) personal status issues (different codes are still applicable for Christian communities, and Muslims. While for Muslims, there are two codes, one (Jordanian) for the West Bank, and the other (Egyptian) for Gaza Strip); (b) penal codes, where Jordanian and British mandate codes still apply respectively in West Bank and Gaza Strip.

<sup>127</sup> 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.

<sup>128</sup> 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 a 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 Basic Law, in research for coherence and for rationality of the whole, within the existing legal and political systems. See Edward L. Rubin, *Law and the Methodology of Law*, 3 Wis. L. Rev. 521, 550–551 (1997).

Admittedly, it is possible to come up with plausible explanations for the contradictions encountered in the Basic Law. These may include, among others, textual, contextual, purposive, etc., interpretations.<sup>129</sup> I believe there is always a way to come up with an intelligent explanation for such a mess. One could also say that, taken individually, many Basic Law provisions may be said to be successful in other systems. On the whole, however, I argue that the Basic Law cannot be said to create a rational, functional political system.<sup>130</sup>

Let's go a step further: trying to test the Basic Law and find a coherent story is a grave error; that is to say, it is incorrect to say that the Basic Law—or any other constitutional text—necessarily represents a comprehensive and rational system, that is one that works, provides a rational blueprint for political action, in accordance with the pre-established form of government.<sup>131</sup> It is this false assumption that makes us believe that a constitution has been engineered (regardless of who designed it), and I believe it is this assumption that needs to be rejected. In this sense, the idea of constitution as a perfect framework of government should be abandoned.<sup>132</sup>

So what is the point I defend here? In fact, my approach seems destructive, because I use a positivist approach in order to undermine it. I am not saying that the Basic Law should be rejected as such, but rather that the assumptions underlying the interpretations of the Basic Law, treating it as necessarily expressing rational will and defining an infallible system.

I therefore argue that in order to understand the mechanisms of power separation, sharing, and balancing in the territories controlled by the Palestinian Authority,

<sup>129</sup> 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). *See id.* at 559.

<sup>130</sup> 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 an irrational total (as if I were saying the sum of positive numbers 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.

<sup>131</sup> This assumption can be related to recent liberal philosophy influenced by the ideal character of the rational individual actor. Building on this assumption, liberals have produced normative theories of immense analytical rigor. Their strength as normative theory is also, at the same time, source of their weakness as constitutional theory. In this same direction, the society is perceived as "natural" and the state as "artificial." The state is assumed to have been established by society for the purpose of meeting certain limited objectives. *See* Martin Loughlin, *Constitutional Theory: A 25th Anniversary Essay*, 25 *Ox. J. LEGAL STUD.* 183, 187 (2005).

<sup>132</sup> In the sense defended by Griffin, interested in US constitutionalism: Griffin in fact insists that "[u]nderstanding American constitutionalism in a historical context requires accepting its discontinuities and crises and abandoning the idea of the Constitution as a perfect framework for government." *Cited in* Howard Gillman, *From Fundamental Law to Constitutional Politics—And Back*, 23 *LAW & SOC. INQUIRY* 185, 193 (1998).

one needs to look beyond the Basic Law, and even beyond the Palestinian Authority itself.<sup>133</sup>

In previous sections, I have indicated that even for a legal positivist, positive law is more than a source of norms. Accordingly, even if a written “constitution” is of primary importance to a legal positivist, it is not the unique source of pre-established norms regulating the functioning of a government. He/she might be tempted to look for basic rules and practices that structure the government, without paying much attention to whether these rules and practices are included within the canonical document.<sup>134</sup>

In this sense, a legal positivist, just as a legal realist, would have a tendency to look outside the formal written constitution, that is to accord more weight to the material constitution of which the written constitution is only one component. A legal positivist, just as a legal realist, will be tempted to go beyond the written constitution. This section has supported this tendency, arguing that in order to understand the Palestinian Authority’s form of government, one needs to go beyond the Basic Law. However, to a legal realist, it is not the Basic Law that matters, the way public officials and courts act. A legal realist, despite, or perhaps due to, the indeterminacy of the constitutional text, is interested in power relations shaping a political system. It is that political system that matters, not the system codified in a written constitution.

## 5. Conclusion

This article has examined the present regime of the Palestinian Authority. In a sense, I moved within the domain of what some call “constitutional theory proper,” to distinguish it from political philosophy.<sup>135</sup> The descriptive approach focuses on immanent

<sup>133</sup> This can be done by taking in consideration: (a) the pre-Palestinian Authority laws in force in the West Bank and Gaza Strip; (b) international law, including the International Human Rights law and International Humanitarian law; (c) the right to self-determination in the light of the partition plan; the right of return in the light of the two states solution; refugee status, statelessness, and citizenship; (d) the place of the PLO and the role it plays in relation to the Palestinian Authority, but also in relation to the state (to be) of Palestine; (e) the West Bank–Gaza Strip dilemma, and does not read the current flaw exclusively and naively on the light of Fatah– Hamas discordance; (f) the impact of occupation over the Palestinian political system, and how even the establishment of a state would not necessarily signify the end of dependency over Israel or over the international community. In sum, the political system for Palestine is not the qualification that can be done based on the president–Palestinian Legislative Council, or President–cabinet relationships, but relates the Palestinian Authority to the PLO itself, and both to the future state, and the three of them to historical Palestine and to Palestinians as a nation.

<sup>134</sup> See Ernest A. Young, *The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda*, 10 U. PA. J. CONST. L. 399, 403.

<sup>135</sup> See Martin Loughlin and Neil Walker, *Introduction*, in *THE PARADOX OF CONSTITUTIONALISM* 1, 2 (Martin Loughlin & Neil Walker eds., 2007). For others, this is the only possible approach to constitutional theory, the descriptive one that is distinguished from the other two possible approaches, i.e., normative, and conceptual, or philosophical. D. J. Galligan, *The Paradox of Constitutionalism or the Potential of Constitutional Theory*, 28 OX. J. LEGAL STUD. 343, 244–246 (2008).

possibilities, where history and facts temper rationality and norms.<sup>136</sup> That is why I focused my analysis on the “political system”—understood in the narrow sense of a form of government, i.e., the way the three branches of government are separated and the way power is exercised, shared, and checked and balanced—and on the rules and institutions codified by the Palestinian Authority’s Basic Law.<sup>137</sup>

I have shown that the positivist approach is deficient and falls short in the case of the Palestinian Authority. This is due not only to the approach itself, but above all to the Basic Law and the way constitutions are drafted in the new era of constitutionalism. In fact, I have made use of the conclusions reached by comparative constitutional law concerning constitutions drafted worldwide in the 1990s, and argued that it is possible to conclude that similar tendencies of “*bricolage*” and “distortion” can be identified in the Basic Law. Such a text is characterized by indeterminacy and syncretism,<sup>138</sup> rather than rationality and coherence.

What is to be done? Is it possible to suggest an alternative approach or methodology for jurisprudence (epistemological concern) without necessarily giving up the premise of separating the “legal” from the “moral” (ontological concern)? Although alternative models of legal positivism are beyond the scope of this article, I will mention a few possible approaches:

- (a) Legal realism may be helpful. Legal realists focus on the behavior of officials who run the legal system. They consider a legal order to be synonymous with the actions of judges (in the American version of legal realism) and bureaucrats (in the Scandinavian version). Legal realists agree with the positivists that the task of jurisprudence is not to engage in values; however, unlike the positivists, they believe that the focus should be on the analysis of legal mechanisms and/or courts decisions.<sup>139</sup> The advantage of this approach is that it is compatible with the analytical method of inquiry. What it might affect, however, is the target of the analysis: from the pre-established norms to the “legal machinery.”

<sup>136</sup> See Loughlin & Walker, *supra* note 135, at 2. To realize this ambition, two lines of inquiry can be envisaged: analytical, in which ideas and concepts occurring in practice are analyzed, and sociolegal, founded largely on empirical research. Notice that I use “sociolegal” to mean the same thing as the law-and-society approach that Galligan had individualized as a distinct approach within descriptive constitutional theory. This approach engages with empirical research into the way things work in practice. See Galligan, *supra* note 135, at 346. My approach in this article drew on the first method of inquiry, i.e., the analytical one. While adopting the analytical approach in descriptive constitutional theory, in the way that legal positivism would engage, I perceive this second approach, which I refer to it in this article as sociolegal, as the most appropriate approach that a legal realist would adopt. The two examples of the analytical method of inquiry that inspired all my enterprise in this paper are those of H. Kelsen’s and H.L.A. Hart’s theories, which are the two “versions” of legal positivism which will inspire my whole debate in the first place about the “ought-to-be” (i.e., legally speaking) political system for the Palestinian Authority.

<sup>137</sup> The Basic Law is indeed, a constitution-like text, determining the prerogatives of the three branches of government, and regulating their relationship to each other. The Basic Law includes also a list of human rights and regulates the way the Basic Law can be amended. For more, see, Khalil, *supra* note 106, and section II.

<sup>138</sup> See Go, *supra* note 83.

<sup>139</sup> See LANE, *supra* note 36, at 196.

I recognize, as many scholars do, that the two methods of inquiry (analytical and socio-legal) are complementary.<sup>140</sup> The analytical insights need a complementary insight based on empirical research that it is not in my capacity to provide. It is possible to make use of available empirical data generated by other disciplines, such as political science, sociology, or economics.<sup>141</sup>

- (b) Even legal realism may be dismissed, although for other reasons than those advanced against legal positivism. One can note that the Palestinian Authority's political system has indeed reached an impasse and that the conflicting interests of the parties concerned made it difficult to reach an agreement on power sharing. One could adopt a more radical position and contextualize the constitutional debates around the Palestinian political system by using the example of the constitution of the Weimar Republic as a paradigm for the analysis of the current crisis in the Palestinian Authority.<sup>142</sup> A paradigm is not a case for comparison, but rather a situation that stimulates different questions. In a sense, the suggestion here would be—rather than rejecting all possible answers to constitutional questions at the heart of the internal Palestinian debate—to refer to the “norms” (just as legal positivists do to answer the question: “what does the law say?”) or to behaviors to anticipate outcomes (just as legal realists do to answer the question: “what would public officials do?”). Instead, one could argue that the problem resides in the questions one poses, rather than the answers one gives. The paradigm of the Weimar republic will help ask completely different questions: Where are the Palestinian people in this debate? Who decides for them and how? Who represents them and why? Who is in and who is out? Who is Palestinian and who is not? Who is the friend and who is the enemy? What is political and what is legal?
- (c) As a third alternative, one could argue that the issue of “rights”—as it was presented by Dworkin in *Taking Rights Seriously*—could fill the gap<sup>143</sup> by adopting a particular interpretative approach.<sup>144</sup> Dworkin's insight may be compared to other possible approaches, including Habermas's co-originality thesis.<sup>145</sup> Both

<sup>140</sup> I recognize also, that the “... the incorporation of ‘reality’ and ‘theory’ into legal scholarship is as heterogeneous and controversial today as it was eighty years ago.” See Armin von Bogdandy, *The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe*, 7 INT'L J. CONST. L. 364, 380 (2009).

<sup>141</sup> By doing so, my suggestion goes in the same direction of some scholars who consider positive insight of other disciplines on the study of law, without, for that reason, giving up the methodology that is specific to legal scholarship, in the way suggested by Rubin. The author in fact argued: “The purpose of this article is both cautionary and hortatory. It suggests that the ‘law and’ enterprise should be approached with caution. While other fields may produce many beguiling insights, they cannot supply standard legal scholarship with a methodology.” Rubin, *supra* note 128, at 565.

<sup>142</sup> See generally Arthur J. Jacobson & Bernhard Schlink, *Introduction. Constitutional Crisis: The German and the American Experience*, in *WEIMAR: A JURISPRUDENCE OF CRISIS 1* (Arthur J. Jacobson & Bernhard Schlink eds., 2000).

<sup>143</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

<sup>144</sup> I distinguish between the concept and the approach to law because I recognize that there are two different issues at stake: ontological and epistemological. They are necessarily connected, but they need not to be confused: (1) the disagreement about what a legal system is or consists of and (2) the conflict about what the proper methodology of jurisprudence should be. See LANE, *supra* note 36, at 138.

<sup>145</sup> For more, see Loughlin, *supra* note 131, at 192.

theses fit very well within the development that occurred in the jurisprudence after the Second World War. The atrocities of the “human machinery” are always in the background, and the impact on the development and spread of constitutionalism as a political theory of limited government is only one of its ramifications. Even with this alternative approach, theorizing about the constitution in Palestine is an ambitious project, mainly because the paradigms available in the constitutional theory are largely state-centered. In the Palestinian case, the sequence of events is inverted. Further questions need to be answered: To what extent is it possible to build a democracy before establishing statehood and to limit the government before enabling it? To what extent is it possible to build a “liberal state” in the abstract under occupation, before there is an independent state? What is the correlation, if any, between constitutionalism, liberal democracy, and statehood?

In this article, I have limited myself to dismissing as misleading and counterproductive the assumptions underlying a limited version of the political system which I take to be arguably and possibly advanced by those who accept the premises of legal positivism. There is not enough room to tackle all these questions: answering them requires the formulation of a constitutional theory—and specifically a theory in the context of Palestine, or of Arab countries in general.