

Teaching (Constitutional) Law under an Authoritarian Regime: The Case of Palestine

Mira Khayyat* & Asem Khalil**

1. Introduction

Challenges of considerable scope confront the Arab World and, in recent years, authoritarian governance has expanded across several Arab states during a period when the law should have strengthened and contributed to the furtherance of human progress. In responding to popular unrest and instability, Arab regimes have sought to reassert control by developing and applying strategies that contain and manage demands for democratization.¹

In Palestine, an initial movement had been made towards democratization by the 2006 legislative elections, which were supposed to herald a democratic transition that never happened. I remember this as it was the same year when I began working for Birzeit University. During a recent lecture on constitutional law, I recalled the course of events for my students and described how a split emerged between Hamas and Fatah that, one year later, became a geopolitical divide when Hamas seized control of the Gaza Strip. It was only as I was speaking that I realized that most students had little or no knowledge of the 2006 events (they were at the time 6-7 years old maximum) and, as a consequence, they felt no real relation to those events. I realized we lacked a common political framework of reference. Since 2007, no democratic elections have taken place in Palestine, and the authoritarianism of the incumbent regime is the only political experience and reference that my students have. Since I began teaching, I have taught my students about democracy, the rule of law and the separation of powers in a country where ‘governance’ is synonymous with a president who rules through decree laws and there is no parliament.

In attempting to grasp the challenges that legal academics encounter when teaching constitutional law in Palestine, it is necessary to first acknowledge that university life is grounded in political values. Observers should then proceed to the question of if legal academics transmit a regime that promotes quietism and political marginalization. Alternatively, they will perhaps seek to challenge

* Research Assistant, member of the Junior Palestinian Legal Experts Network.

** H.H. Shaikh Hamad Bin Khalifa Al-Thani Professor of Constitutional & International Law.

¹ Upgrading Authoritarianism in the Arab World, analysis paper Number 13, October 2007, The Saban Center at the Brookings Institution, 1.

the prevailing status quo by encouraging their students to ask if authoritarian practices are rooted within, and sustained by, cultural and social institutions.²

With the intention of engaging with this question in more detail, this paper introduces the authoritarian regime and individualizes its characteristics with the intention of setting out the challenges that confront legal academics when they teach constitutional law under an authoritarian regime.

2. Authoritarianism in Palestine

In *An Authoritarian Regime: Spain*, which was published in 1964, Juan J. Linz, a Spanish sociologist and political scientist, observes that Authoritarianism is a form of government with a strong central power and limited political freedoms. He observes that the word describes:

Political systems with limited, not responsible, political pluralism, without elaborate and guiding ideology, but with distinctive mentalities, without extensive nor intensive political mobilization, except at some points in their development.

By way of further clarification, he adds that ‘a leader or occasionally a small group exercises power within formally ill-defined limits but actually quite predictable ones’.³ He also relates a series of more general features, which include an authority that is not rooted in consent, which views submission to its dictates as a virtue and whose power is defined by the ability to dominate, oppress, punish and repress.⁴ Law is not the point at which its power and influence is limited, but is instead a mechanism it applies to exert control.⁵

Authoritarianism can be said to be form of government where there is limited political pluralism and political power is concentrated in a single authority, which helps to explain the peculiar tendency for power to become personalized under this arrangement. Under Authoritarianism, executive power is informally defined, vague and shifting. The absence of constitutional accountability and democratic control, meanwhile, appear as its most significant defining attributes.

² Bruce Romanish, “Authority, Authoritarianism, and Education”, in: *Education and Culture* Fall, 1995 Vol. XII No. 2, 17.

³ Juan J. Linz, *An Authoritarian Regime: Spain* (1964), 297.

⁴ Henderson, Lynne (1991) "Authoritarianism and the Rule of Law," *Indiana Law Journal*: Vol. 66 : Iss. 2, Article 2, 392.

⁵ Hannah Arendt, *What Was Authority?* In *Authority: NOMOS I*, at 81, 82.

Before authoritarian characteristics are individualized with reference to the Palestinian case, it should first be acknowledged that, for reasons that will subsequently be explained, that the Palestinian legal system is different. The complex and unique Palestinian legal system consists of a patchwork of laws that can be traced back to the different authorities that have ruled over the territory.

The Ottoman Empire provides the initial point of reference, and then the British Mandate. Attention then proceeds to Jordanian rule (over the West Bank) and Egyptian administration (of the Gaza Strip) and concludes with the Israeli occupation and PA (Palestinian Authority) administration. Laws, some of which continue to be enforced, have emanated from each of these periods.⁶

Observers should, in recognizing these dispersed sources of legal authority, endeavor to understand how the system functions, identify actors who retain decision-making power and, perhaps most importantly of all, disassemble the power relations that conjoin different government branches.

Although the PA's surface appearance creates the superficial impression of a democratic institution, its character has actually been more profoundly influenced by authoritarian inheritances⁷ from the PLO and Israeli military occupation. Although most criticisms of the Government's democratic shortcomings tend to focus on the post-2007 period, authoritarian antecedents also have deep social (society) and political (Palestinian leadership) roots.⁸

Some of them can be traced back to the period after the PLO's eviction from Lebanon after the 1982 war when Yasser Arafat, the former president, began to concentrate powers. They can also be traced to the Oslo Accords, as direct secretive negotiations with representatives of Israel and the 'international community' empowered Arafat at the expense of democratic accountability. This impacted on institutional development and resulted in the PA's system of governance coming to

⁶ Reem Al-Botmeh, A Review of Palestinian Legislation from a Women's Rights Perspective, the report is an independent publication commissioned by UNDP, March 2012, 18.

⁷ Ma'an News Agency, Neopatrimonialism, Corruption, Palestinian Authority: Pathways to real reform. (<http://www.maannews.com/Content.aspx?id=782140>)

⁸ Institute for Palestine Studies (<https://www.palestine-studies.org/jps/fulltext/40693>)

function as a system of dominance that centralized and concentrated power and exerted control through various means.⁹

In many cases, law enabled control to be exerted over society. The absence of the Palestinian Legislative Council (PLC), which has not held a regular session since Hamas won the parliamentary elections in 2006, has enabled Abbas to steadily monopolize his power, form and dissolve the Government and use emergency powers to appoint an ‘emergency government’ whose duration has extended beyond the one-month limitation that normally applies during a state of emergency. It also enabled him to rule by law by issuing presidential decree laws,¹⁰ which have come to out-number the PLC laws (between 1996-2006). The lack of accountability is further exacerbated by the fact that the Cabinet, in its role as an executive authority, is solely accountable to the President.

3. Case Studies/Examples

The Government’s control of civil society and its institutions is quite illustrated by the rules and laws that the PA has imposed since 2007, which quite clearly act to the detriment of basic human rights and popular representation.¹¹ For example, the Government has continuously sought to tighten its grip on non-governmental organizations (NGOs) and non-profit companies (NPCs) by amending the law on Charitable Associations and Non-governmental Organizations (No.1 of 2000) and other laws and, in so doing, has sought to control these organizations, with the consequence that their public monitoring role has been impeded.¹²

A further example is provided by the Decree Law No. 16 (2016), which relates to **social security** and its complementary regulations and instructions. It jeopardizes the right to social security, which is a fundamental human right enshrined in the Basic Law and stipulated in the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Palestine has acceded.¹³ This shows how control over financial resources is used to exert control more generally.

⁹ Institute for Palestine Studies.

¹⁰ European Council on Foreign Relations, (https://www.ecfr.eu/article/commentary_europe_and_the_palestinian_authoritys_authoritarian_drift_7274)

¹¹ European Council on Foreign Relations.

¹² Al-Haq’s Comments on the Draft Law by Decree Amending the Law on Charitable Associations and Non-governmental Organizations No. 1 of 2000 as Amended (<http://www.alhaq.org/advocacy/6142.html>)

¹³ Al-Haq’s Comments on the Law by Decree on Social Security and its Complementary Regulations and Instructions (<http://www.alhaq.org/advocacy/6117.html>)

These authoritarian characteristics are a challenge for legal academics who teach constitutional law because they undermine rights that establish and reflect the extent of a society's respect for democratic consolidation. As legal academics, we are obliged to educate our students that rights are a critical legal tool that can be used to challenge authoritarianism, and it is for this reason that we reiterate and underline the link between law and rights. Over the years, I have taught my students about the importance of the **right to freedom of expression** and the right to form an opinion in any democratic system. I have made it clear that these rights must meet international standards and should only be restricted in accordance with Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Article (5) of the Basic Law of 2003 clearly establishes that the Palestinian system is democratic and also respects freedom of expression and other constitutional rights.¹⁴ However one problem that legal academics encounter is the gap between theory and reality. When an authoritarian regime is established that has the ability to restrict individuals and control them through fear, basic rights become restricted, and choices and decisions are arbitrarily controlled;¹⁵ in these circumstances, it becomes very difficult for the general public and academics to speak about the system, let alone criticize it.

This is clearly demonstrated by Decree Law No. 10 on **cybercrimes**, which was issued in 2018, and which has been criticized by civil society organizations, international human rights institutions, the media and the press, who claim that it flagrantly violates fundamental rights and freedoms and is not consistent with relevant legal bases. It has negatively impacted the right to access information, digital rights, and free press by blocking more than 30 websites, including those that publish news or critical opinions on the Government, and has also been used to place journalists on trial for their publishing activities.¹⁶ The Special Rapporteur (for the promotion and protection of the right to freedom of opinion and expression) has expressed deep concern that it infringes rights to privacy and freedom of expression.¹⁷

The **right to peaceful assembly** is one of the public rights and freedoms and forms of political participation that the Government upholds through Article 26 of the Basic Law.¹⁸ The Public

¹⁴ Article 5, The Amended Basic Law of 2003, published in the Official Gazette, Special Issue No. 2, March 19, 2003.

¹⁵ Bruce Romanish, "Authority, Authoritarianism, and Education", 19.

¹⁶ Al-Haq Defending Human Rights, (<http://www.alhaq.org/advocacy/16110.html>)

¹⁷ Al-Haq Defending Human Rights, (<http://www.alhaq.org/advocacy/6221.html>)

¹⁸ Article 26, The Amended Basic Law of 2003: "Palestinians shall have the right to participate in political life, both individually and in groups. They shall have the following rights in particular: 1- To form, establish and join political parties in accordance with the law. 2-To form and establish unions, associations, societies, clubs and popular

Meetings Law No. 12 (of 1998) further reiterates this political right and endows it with special protection by guaranteeing the civilian's right to hold freely public meetings, a commitment that is entirely consistent with many human rights treaties.¹⁹

The gap between the Basic Law's theory and practice highlights one of the main dilemmas that confronts legal academics. They may inform their students that the upholding of the peaceful right to assembly clearly indicates the extent to which a government respects constitutional rights and acts in accordance with international standards and the separation of powers and rule of law. They may then proceed to claim that these commitments provide insight into the efficacy of political participation and the extent to which a government is willing to defend and uphold the right to freedom of expression on public issues.²⁰

The reality is however very different. The Democratic Development Unit of the Palestinian Centre for Human Rights has issued a number of reports that document the **violation of the right to peaceful assembly** in Government-controlled areas.²¹ In 2000, an Executive Regulation was added to the Public Meetings Law No. 12, which was originally issued in 1998. It restricted the exercise of the right to freedom of assembly and even violated the right to establish public meetings by permitting official authorities to apply police estimates when dispersing and ending meetings.²²

This confirms that legal academics are confronted by the dilemma of whether to teach students about the law in theory (how it should be) or to instead consider the question of how or if theory translates to practice. While the former will convey a rosy image of a system that does not exist, the latter will come as something of a shock to students. Students are indeed more accustomed to the internal logic of legal theory; as a result they will be abruptly confronted by the stark realization that actual implementation diverges from, and possibly even challenges, the austere, serene and reassuring representations of their legal textbooks. This raises the question of whether, in teaching students about the separation of powers legal academics are obliged to point to the state of

institutions in accordance with the law. 3- To vote, to nominate candidates and to run as candidates for election, in order to have representatives elected through universal suffrage in accordance with the law. 4-To hold public office and positions, in accordance with the principle of equal opportunities. 5-To conduct private meetings without the presence of police members, and to conduct public meetings, gatherings and processions, within the limits of the law.”

¹⁹ Report on the Right to Peaceful Assembly under the Palestinian National Authority, Palestinian Center for Human Rights (PCHR), 8.

²⁰ *ibid*, 4.

²¹ *ibid*.

²² Article (6) of the Regulation establishes that “the police has the right to terminate any meeting if [they] estimat[e] that the meeting was far from its targets”.

exception, the legislating under necessity rule and the encompassing reality of emergency government (which has been imposed under a state of necessity).

Another problem that confronts legal academics is that **power has become concentrated in a small number of people** whose power and control is exerted through what are essentially monopolies. To take one example, the autonomy, power and prominence of the Palestinian security sector has significantly grown since 2007,²³ when the Government adopted Security Sector Reform (SSR) as an essential component of its state-building project. Although democratic governance began, with the active interest and support of prominent international donors (including the EU and US),²⁴ to be constructed, the impact of such measures was drastically mitigated by increases in the security sector's power. Instead of challenging this development, president Mahmoud Abbas escalated it, and the consequences for Palestinian political life have been highly negative.²⁵

The Government's security forces have negatively impacted resistance movements, popular protests and freedom of assembly. Expression of political views or membership of certain political groups²⁶ arouse suspicion in an environment where the right to protest is denied, and protestors are imprisoned or beaten for 'violations' that include resisting the occupation,²⁷ and at one point resistance fighters were criminalized and forced to answer to (Palestinian) military courts.²⁸

An example that illustrates the dominance of the security sector on the Palestinian lives is the case of Abed Sattar Qassem, who has been a professor of political science in An-Najah University since 1980. Qassem was targeted and arrested on several occasions by the Palestinian Preventive Security forces in the West Bank.²⁹ He received politically motivated attacks for the books, papers, and articles he wrote on the Palestinian politics and for being a prominent critic of the PA.³⁰

²³ Middle East Monitor (<https://www.middleeastmonitor.com/20141011-authoritarianism-in-palestine/>)

²⁴ Alaa Tartir and Timothy Seidel, *Palestine and Rule of Power Governance & Politics of Palestine, Local Dissent vs. International Governance*, Middle East Today, 2019, 205.

²⁵ European Council on Foreign Relations, (https://www.ecfr.eu/article/commentary_europe_and_the_palestinian_authoritys_authoritarian_drift_7274)

²⁶ Middle East Monitor
European Council on Foreign Relations.

²⁷ Alaa Tartir and Timothy Seidel, 216.

²⁸ Ibid, 213-214.

²⁹ The Palestinian Authority's authoritarian turn, (<https://electronicintifada.net/content/palestinian-authoritys-authoritarian-turn/8205>)

³⁰ ibid

The so-called ‘**state security courts**’ were actually (Palestinian) military courts that apply (PLO) military rules to civilians, while concerning themselves with crimes that sometimes have no military dimension. Palestinian military courts were in place and applied laws that have been in force since the 1970s, and frequently failed to show even a minimum of respect for due process – for example, even those sentenced to the death penalty have no right of appeal.³¹

Many local and international human rights organizations have voiced concerns that the ‘**reformed**’ **Palestinian security forces routinely violate human rights** and suppress fundamental freedoms.³² The growth of the security forces and the blocking of accountability mechanisms has strengthened authoritarianism.³³

4. Multilayered Authoritarianism

The Palestinian Government’s authoritarianism has become more entrenched over time, but it is just one among a **number of actors** that should be held to account in this respect. To this extent, the respective ‘contributions’ **Israel**, and **Hamas**³⁴ should be rendered in their full significance.³⁵

This is part of the unique character of the Palestinian legal system. Palestinians are subject to **different legal and judicial regimes**, which jurisdictions overlap and vary in accordance with the individual Area (A, B or C) in question.³⁶ Different jurisdictions evidence considerable variation in accordance with, *inter alia*, area, citizenship status, ethnicity, ID status, nationality, residency and territory.³⁷

Authoritarianism is not only practiced through different actors but also varies at the point of contact with individuals. This reflects the fact that Israel has created a **legal fragmentation** in which different legal boundaries are established in accordance with distinct patterns of authority, functional rule, jurisdiction and territoriality. A new legal space has consequently emerged in

³¹ Naser Rayyes, *Illegal Trial of Palestinian Civilian Persons before Palestinian Military Courts*, Report from Al-Haq Organization, 2011.

³² Alaa Tartir and Timothy Seidel, 233.

³³ *ibid*, 232.

³⁴ We have referred throughout the paper to the role of the international community in entrenching the authoritarian regime of the PA. For more, *see*: The Palestine Chronicle, (<http://www.palestinechronicle.com/the-pa-is-authoritarian-yet-lacks-authority/>).

³⁵ European Council on Foreign Relations.

³⁶ Wadi Fouad Muhaisen, *The Palestinian Legal System*, 2003.

³⁷ Khalil, Asem and Del Sarto, Raffaella A., *The Legal Fragmentation of Palestine-Israel and European Union Policies Promoting the Rule of Law*, 135.

which rights and freedoms vary considerably,³⁸ and individuals are categorized in relation to the governing authority.

Areas controlled by the **Israeli military** are also subject to authoritarian governing structure. The Israeli military commander rules through security checkpoints and military orders, and this enables him/her to micromanage the population's behavior by dictating what is permitted. An established maxim of Israel's authoritarian regime in the West Bank is that 'all is forbidden unless the Israeli military commander or an authorized military officer permits it.' He/She enforces his/her orders through the Israeli army and military courts, which apply Israel's military rules to Palestinian civilians. Thousands have been imprisoned, sometimes without charge (they are detained administratively) and often after being tried on the basis of secret evidence.³⁹ However, it was not until the Israeli government began systematically targeting "strategic threats",⁴⁰ in the form of Palestinian activists or even human rights organizations, that observers began to express concerns about Israel's authoritarianism.

Since 2007, **Hamas** has ruled every aspect of Gazan life, and its activities have extended to the upholding of 'public morality' and the launching of missiles at nearby Israeli settlements and towns. The so-called 'informal economy', which smuggles goods and persons to and from the Strip through tunnels, has also been reported to be subject to its strict scrutiny and regulation.⁴¹ It has also asserted civilian control over the security sector⁴² and has committed significant resources to this end (although, in contrast with its West Bank counterpart, outside assistance has made a minimal contribution to its development).⁴³ In both contexts there is however the common problem that the sector's construction and development has occurred in the absence of democratic governance and a functioning constitutional order.⁴⁴

³⁸ *ibid*, 132.

³⁹ Prisoner Support and Human Rights Association (ADDameer), Military Courts in the Occupied Palestinian Territory. (<http://www.addameer.org/publications/military-courts-occupied-palestinian-territory>)

⁴⁰ Want to combat Israeli authoritarianism? Listen to Palestinians
(<https://972mag.com/want-to-combat-israeli-authoritarianism-listen-to-palestinians/137278/>)

⁴¹ Cleveland OH Local News (https://www.cleveland.com/world/2010/04/hamas_temporarily_shuts_gaza_s.html)

⁴² Yezid Sayigh, Policing the People, Building the State: Authoritarian Transformation in the West Bank and Gaza, Carnegie Middle East Center, 2011, 15.

⁴³ *ibid*, 3.

⁴⁴ *ibid*, 4.

Authoritarianism creates a clear dilemma for those who teach Law in Palestine, and they tend to offer one of two responses in return. In the first instance, they refuse to think about the system and instead view themselves as being responsible for explaining the law. This position can be said to characterize authoritarianism because, in this instance, it appears more appropriate to speak of rule by law than rule of law. Rule of law entails that the government's willpower is constrained by the law.⁴⁵ In an authoritarian regime, the opposite applies and rule by law, which many jurists define it as a failure to use the law to limit the state,⁴⁶ serves the ends of power. Thomas Hobbes, meanwhile, defines the *rule by law* as a system that helps the sovereign keep peace among his subjects. The sovereign himself is however free from the laws he lays down; which means that the sovereign's authority is absolute.⁴⁷

In adopting the second response, academics instead adopt a critical stance and openly question the law's legitimacy and sometimes even refuse it. For example, some judges will not implement military orders on the grounds they are illegitimate. Academics similarly reject the laws that Hamas has passed in the Strip and refuse to teach them to their (West Bank) students.

In many cases rule by law is directly connected with a lack of procedural values. If laws are not enforced in accordance with norms of procedural **due process**, this can create a lack of institutional values,⁴⁸ which can in turn jeopardize the principle of judicial independence and, by extended implication, imperil the democratic system.

As legal academics we continually speak about this principle and, in doing so, render an idealized image that does not approximate to a reality where the High Judicial Council and PLC have been dissolved. In their absence, President Abbas has resorted to the Constitutional Court and a small coterie of advisers to sustain his rule, and the former has proven its utility by dissolving the Hamas-controlled PLC in the West Bank and in maintaining the Temporary High Constitutional Court (that replaced the one that was dissolved).⁴⁹

⁴⁵ Ulrich K. Preuss, "The Political Meaning of Constitutionalism". In: *Constitutionalism Democracy and Sovereignty: American and European perspectives*, edited by Richard Bellamy, 11-27. Averbury, 1996, 16.

⁴⁶ Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INTL.L. 471, 500 (2002).

⁴⁷ Waldron, Jeremy, Rule by Law: A Much Maligned Proposition (April 25, 2019). NYU School of Law, Public Law Research Paper No. 19-19, 3. Available at SSRN: <https://ssrn.com/abstract=3378167> or <http://dx.doi.org/10.2139/ssrn.3378167>

⁴⁸ *ibid*, 6.

⁴⁹ Palestinian President to Dissolve Parliament, Hamas Irate

5. Conclusion

In its initial stages, this paper said it would tackle the challenges that legal academics encounter when teaching constitutional law in the Occupied Palestinian Territories (OPT). It noted this can only be achieved if observers first focus on the concrete situation in Palestine in order to gain an accurate insight into the features and dynamics of the Palestinian legal system.

Various legal borders exist across Palestine-Israel, and they are characterized by distinctions, overlapping jurisdictions and political instability. The application of authoritarianism through several means of control creates a complex web of legal boundaries and intersecting legal regimes, which in turn complicate the research question and efforts to provide a definitive answer.

If legal academics fail to consider the history of authoritarianism and acknowledge that it is a method that restricts civil liberties, closes down democratic space and represses social and labor movements, then we will ultimately fail to identify or offer a solution.

In conclusion, it can be said that a lack of awareness of authoritarian tendencies is synonymous with the problem itself, and this is precisely how legal academics transmit, and ultimately help to sustain, a regime of political marginalization and quietism.

(<https://www.usnews.com/news/world/articles/2018-12-22/palestinian-president-to-dissolve-parliament-hamas-irate>)