EMILIO DABED

This article sheds new light on the political history of legal-constitutional developments in Palestine in the fourteen years following the Oslo Accord. It examines the relationship between the unfolding social, political, and economic context in which they arose, on the one hand, and PA law-making and legal praxis, on the other. Focusing on the evolution of the Palestinian Basic Law and constitutional regime, the author argues that the “Palestinian constitutional process” was a major “battlefield” for the actors of the Palestinian-Israeli conflict. Thus, changes in the actors’ political strategies at various junctures were mirrored in legal-constitutional forms, specifically in the political structure of the PA. In that sense, the constitutional order can be understood as a sort of “metaphoric representation” of Palestinian politics, reflecting, among other things, the colonial nature of the Palestinian context that the Oslo process only rearticulated. This perspective is also essential for understanding the evolution of the Palestinian-Israeli conflict after Oslo.

The academic literature on Palestine has discussed the content and evolution of the Oslo accords at length, advancing our understanding of their social, political, and economic aspects. Nevertheless, the legal structures created by these accords have not yet been sufficiently considered. By focusing on constitutional-institutional developments in Palestine during the Oslo process, this article aims to shed new light on the socio-political conditions surrounding the establishment of the Palestinian Interim Self-Government Authority (PA) and the substantive impact it had on the Palestinian national movement, Palestinian social space, and ultimately, the Palestinian-Israeli conflict.

Because legal and institutional processes are historical products of the social and political context in which they arise, major social and political transformations can be understood through the evolution of the law. In other words, legal structures are social creations reflecting the roles played by the actors, the relative positions they occupied in various periods, and the strategies they deployed. Without meaning to overstate the importance of the legal domain, I argue that the Palestinian constitutional process was a major battlefield for the actors of the Palestinian-Israeli conflict. By this, I simply mean that the fight for political domination—in Palestine, as elsewhere—is never confined to the streets, elite structures, or elections alone, but rather, enacted over multiple
fields. The legal field is one of them. The changes in the actors’ political strategies at various junctures have thus been translated into legal-constitutional form. In the course of this process, significant political dimensions—the nature of the actors’ power relationships, their conception of the Oslo process, and the role that they attribute to the PA—were spelled out in legal-institutional terms and mirrored in the PA’s political structure. It is in this sense that the constitutional order can be understood as a sort of metaphorical representation of Palestinian politics.

In much of the existing literature on the Palestinian Basic Law, the constitution-drafting process has been made to appear incongruous or without identifiable rationale. In fact, from the beginning of the process in the early 1990s to the suspension of the constitutional regime in 2007, the constitutional structure envisioned went through four distinct stages, each representing a different political system. Thus, it evolved from a strong presidential regime, albeit maintaining the Palestine Liberation Organization (PLO) as the overall political authority (November 1993–December 1995), to a presidential system with some parliamentary aspects and an increasingly sidelined PLO role (January 1996–July 2000) to a semi-parliamentary regime in which important executive powers were transferred from the president to the prime minister and the cabinet (August 2000–November 2004), and finally to a gradual reconcentration of power in the president’s hands (December 2004–June 2007).

Each of the four stages of the constitutional process involved a historical turning point in the evolution of the Israeli-Palestinian conflict, implying changes in the actors’ relative positions within Palestinian political space and, consequently, changes in their political strategy. These changes were systematically echoed in shifts in the PA’s legal-institutional design, reflecting a gradual “constitutionalization” of Palestinian politics inside the occupied Palestinian territories (oPt). With the PA as the major Palestinian political forum, the legal and political forms of the new institutions became central to Palestinian political battles. Specifically, Palestinian national expectations, the evolution and outcome of the “indirect rule” regime that Israel sought to establish, and the international community’s interest in settling the conflict according to the “two-state solution” framework, all depended greatly on the legal form that the new authority would take. Thus, the constitutional structure of the PA, at the center of the process, quickly became an arena of negotiation and battle. For instance, when during Oslo, Palestinian and Israeli negotiators diverged on the name of the new authority (Palestinian Authority or Palestinian National Authority), on the title of its head (president or chairman), on the designation of its legislative body (parliament or council), or on the jurisdictional power of the PA, they knew that they were not just struggling for symbolic markers, but over the very articulation of a new set of power relations.

Deconstructing the Palestinian Constitutional Process

The seeming incongruity of the Palestinian constitution-drafting process, as depicted in much of the academic literature, stems not from the process itself, but rather from the readings imposed upon it. These tend to approach constitution-making in the Palestinian context in one of two ways: either it is examined in light of a set of normative principles (i.e., separation of power, rule of law, sovereignty) to which the text should respond; or, it is regarded as part of a political
consensus intended to lead Palestinians from occupation to democracy. From the perspective of the former approach, the drafting process appears unsuitable insofar as it contradicts the normative assumptions of good governance theory and is very often even regressive by such standards. The latter approach, on the other hand, exposes the gap between law and fact—in other words, between formal democratization and authoritarian reality, such that the normative system is held responsible for the failure to express or promote the alleged consensus for Palestinian democracy.

This last approach was the case, for example, in 2003, when the first amendments to the Basic Law were adopted for the purpose of “de-concentrating power and improving governmental performance,” a prevalent mantra in Palestine at the time. According to this paradigm, the gap between norm and fact was to be solved by a constitutional change, completely overlooking the social and political context in which the change was proposed. Not surprisingly, the reforms did not bridge the gap. Indeed, the specter of authoritarianism continued to hover over Palestinian politics until the collapse of the constitutional structures in 2007, and it dramatically increased with the division of the Palestinian government between the West Bank and the Gaza Strip thereafter.

Instead of using a normative perspective that is analytically misleading, this study will be undertaken empirically, through a historical deconstructive approach aimed at making explicit an alternative way in which the process can be understood. Rather than imposing a repertoire of rules as an interpretative grid, I focus on the issues that have decisively determined the actors’ strategies but have generally been ignored by previous works: namely, the colonial context in which the constitutional process took place, the nonstate character of the PA, the changes in the structures of power distribution in the Palestinian social space, and the different relative positions that the actors occupied in the four major periods of the constitutional process. From this perspective, what some analysts regard as the incongruousness of the process is no longer understood as institutional inadequacy requiring reform. Rather, systemic incongruousness is considered at the center of the law-making process—and it is seen, as the outcome of choices articulating the actors’ positions, strategies, and actions within the framework of a colonial conflict and its structured power relations.

Drafting a Constitution without a State

According to Eugene Cotran, a Palestinian-born British jurist and one of the framers of the early constitutional drafts, “the main issue to keep in mind to understand the constitutional drafting [process] is the fact that it was done in a situation of occupation.” Indeed, the PA’s constitutional and institutional frame is the product of an ongoing colonial conflict rather than a system intended to mark its end. Consequently, the PA’s structures rearticulated the colonial power relationship, resulting in a regime of indirect rule that freed Israel from many of the costs of occupation and inhibited the coalescence of a Palestinian resistance capable of challenging the reconfigured colonial order. This is not to suggest that Palestinian institutional and legal processes can be causally attributed exclusively to colonial forces, but rather that they provide the context within which such processes become intelligible. Within this context, it is clear that the PA regime
has tended to reproduce certain colonial patterns: Palestinian nonsovereign status, authoritarian forms of domination, and the division of the colonized/occupied population into social groups with different legal statuses and often antagonistic interests.

The first of these features, the nonsovereign status of the PLO, was reproduced in the nonstate character of the PA, and was the primary factor shaping the political field within which the constitution-drafting process took place. The Basic Law was drafted by and for a nonstate, the PA, and was to be applied during an interim period of five years (1994–99). Its task was to regulate the functioning of a provisional authority that lacked the features normally belonging to modern states. Without the attributes of sovereignty, and in a position of extreme political and economic dependency vis-à-vis external actors, the PA was prey to different influences regarding its institutional design and especially its constitutional evolution. On the one hand, the traits of the PLO as the leadership for a national armed liberation movement strongly contributed to the molding of the constitutional process. On the other hand, the nonstate nature of the PA allowed significant interference by external actors, namely, the occupying power and the donor countries.

To understand the seemingly incongruous Palestinian constitutional process as an intelligible sequence, it is thus necessary to conceive of it as part of a changeable framework of interaction between these domestic and international actors. These actors exerted varying influences on political and constitutional processes orienting them in multiple, and often contradictory, directions. A more detailed examination of the context and phases of the constitutional process, as laid out below, illuminates these dynamics.

GUERRILLAS DRAFTING CONSTITUTIONS: BUILDING INSTITUTIONS TO CONCENTRATE POWER

The first phase of the constitution-drafting process began in November 1988 at the Algiers meeting of the Palestine National Council (PNC), which issued the Declaration of Independence and called for a constitution to be drawn up. It ended in December 1995, just before the election of the Palestinian Legislative Council (PLC), which marked the first major change in the PA’s structures and specifically in the constitution-drafting process.

This period, when Palestinian politics was dominated by the PLO leadership, reactualized a second colonial pattern: authoritarianism. The reproduction in the PA’s structures of authoritarian rule, characteristic of both the PLO and the Israeli occupation regime, was thus facilitated by complementarities between the imperatives of Israeli colonial design and PLO aspirations for political hegemony in the oPt. The subordination of the Oslo process to Israel’s security imperatives and drive for territorial expansion was clear from the wording of the agreements and Israel’s interpretation of them. Accordingly, Israel allowed the PLO leadership to create a political regime characterized by the concentration of power and the organization of a strong security sector.

For its part, the PLO had conceived the PA primarily as an instrument to consolidate its power in the oPt. Consequently, legal structures that accommodated this vision were given priority. Even before he had arrived in Gaza in 1994, Yasir Arafat had already started outlining the constitutional frame of the new PA. On 20 May 1994, he issued Resolution 1 stating that all laws
in force in the oPt prior to 5 June 1967 would remain valid. The resolution encompassed Ottoman, British Mandate, Jordanian, and Egyptian laws, all of which were characterized by the concentration of power and centralized authority, and by implication, rejected the post-1967 Israeli military orders. For various reasons (basically opposition from Israel) this resolution was modified on 17 April 1995, when Arafat issued two new laws. The first, Law 5, transferred to the new Authority all the prerogatives provided for in legal acts effective in the West Bank and Gaza Strip before 19 May 1994, including all Israeli military orders since 1967. The second, Law 4, gave the executive (Arafat himself) control over the legislative process. This legal-constitutional frame for the PA, which remained in place until the election of the PLC in January 1996, clearly increased Arafat’s power, and also gave the PA an extraordinary capacity for internal control.

The rationale of PLO hegemonic power was also laid out in the early constitutional drafts proposed by the PNC’s Legal Committee between 1993 and 1995. The first versions of the Basic Law were drafted mainly by Anis al-Qasem, head of the PLO-PNC Legal Committee, and Eugene Cotran. Despite their efforts to lay the foundation of a Palestinian democratic regime, their successive drafts had to consider, in Cotran’s words, “what Arafat would accept.” This turned out to be no less than total control over the new Authority by the PLO/Fatah leadership, and more specifically, by Arafat. Given that Israel’s objective of control over the Palestinian population (supported by donor countries) coincided with Arafat’s objective of consolidating his power, there was no challenge to Arafat’s authority. As al-Qasem pointed out when reflecting on this period, “…the only institution able to thwart his move… the PNC… was not functioning… and after his arrival in Gaza in 1994 Arafat had completely sidelined the PLO.”

The third “Draft Basic Law for the National Authority in the Transitional Period” showed the extent to which Arafat’s vision had prevailed. It established a strong presidential regime even though the Declaration of Independence had mandated a parliamentary form of government for Palestine. Arafat, already the chairman of the PLO Executive Committee (PLO-EC), was designated as “the President and the head of the National Authority” and given extensive powers. The PLO leadership maintained a strong grip on the new Authority, which was to be “appointed by the Executive Committee of the PLO.” The PLO-EC was moreover to be considered the PA’s reference authority, as stipulated in Article 58, sections 1 and 2.

In December 1995, after public discussions, a fourth and final “Draft Basic Law for the National Authority in the Transitional Period” was prepared by the PNC’s Legal Committee, which made some changes to the constitutional powers of the president, the PLC, and the PLO. Again, the principle of a parliamentary regime was proclaimed, as established by Article 2, but the main characteristics of the text consolidated a presidential system and the concentration of executive power. Articles 67, 68, and 77 maintained that this power was to be exercised by the president as head of the executive, along with a cabinet of ministers whose function, explained in Article 78 section 1, was merely to assist the president in the performance of his duties. As such, Article 92 calls for the president to exercise the powers and fulfill the duties provided for in legislation in force prior to this Basic Law. In addition, Article 72 maintains the president’s control of the security forces; Articles 73 section 2 and 75 establish that he can initiate or propose laws and issue secondary legislation; and Article 73 section 1 that he bears responsibility for promulgating laws.
Article 110 goes on to grant him the authority to appoint the head of the Judicial Authority and president of the Supreme Court, and Article 94 includes his power to establish “specialized public bodies . . . to assist the government.”

By the time of the drafting of the fourth “Draft Basic Law” in December 1995, the PA had been operating for almost a year and a half, and the concentration of power and authoritarian political structure were already realities. Without the approval of a Basic Law and an elected parliament with political authority, Arafat was ruling the PA without any meaningful checks on his power. He monopolized the legislative process and, within the political structures, he was simultaneously head of Fatah, chairman of the PLO, president of the State of Palestine, and president of the PA. Moreover, with the main opposition forces to Oslo having already refused to participate in the parliamentary elections set for January 1996, Fatah was left to dominate the future elected authority. Thus, this fourth draft fulfilled the Tunis-PLO leadership’s strategy of maximizing political power and consecrating it in constitutional terms. Yet, even this draft, which so completely secured Arafat’s political power, was never approved by the PLO Executive Committee or the PA that he controlled, showing Arafat’s unwillingness to accept even the principle of constraints on his authority.

During this first period, lack of territoriality, among other things, exacerbated the authoritarian nature of the PA regime: Its full jurisdiction was confined to 3 percent of the West Bank and Gaza Strip, Area A, as spelled out in the Oslo II agreements (September 28, 1995), which allotted another 25 percent (Area B) to PA administrative but not security control, leaving the rest of the territory under total Israeli control. In this fragmented reality, the PA was unable to provide its constituency with personal security, adequate services, or protection against harsh Israeli occupation measures (not to mention attainment of any meaningful national objective). This weakened loyalty to and identification with the new PA order. As with the PLO before it, the PA leadership resorted to neo-patrimonial and authoritarian rule, co-optation, and corruption to reinforce stability and secure the compliance of its constituency. These trends would prevail not only during Arafat’s lifetime but also after his death, becoming enduring characteristics of PA rule.

THE PALESTINIAN LEGISLATIVE COUNCIL: ARAFAT NO LONGER ALONE

The second phase of the constitution-drafting process runs from the election of the PLC in January 1996 to the collapse of the Camp David final status negotiations in July 2000. The period was characterized by the first modest checks on Arafat’s hitherto virtually unbridled power.

Under Article III section 7 of Oslo II, the PLC was called upon to adopt the Basic Law for the Interim Self-Government Authority. The election of the legislative body on 20 January 1996 was the first major political adjustment within the PA. Since the great majority of those elected to the Council were from the West Bank and Gaza—as opposed to the top PLO and Fatah leadership, which had come mainly from exile in Tunis or elsewhere—the PLC institutionalized the influence of the local leadership in the Palestinian decision-making process. Thus, even though the newly elected deputies overwhelmingly belonged to Fatah, there was a new eagerness to restrict the arbitrariness and authoritarian practices that already characterized Fatah-controlled PA rule. The new PLC sought to deconcentrate power, increase accountability, and fortify civil rights guarantees.14
The constitutional draft (titled “Palestinian Basic Law”\textsuperscript{15}) was approved by the PLC in its third reading on 2 October 1997. The new text, considerably modified compared to the last draft prepared by the PNC Legal Committee, now emphasized the principles of separation of powers,\textsuperscript{16} rule of law,\textsuperscript{17} and government accountability to the parliament.\textsuperscript{18} It also extended the bill of rights, Articles 9–33, and strengthened the legal prerogatives of the PLC, Articles 34–49, including the PLC’s participation in nominating key public officials, as highlighted in Articles 84, 87, and 98. The powers of the Constitutional Court were also expanded in Article 94. Importantly, the new draft also clearly defined the legal framework for any declaration of a state of emergency, additionally giving the PLC the right to review all measures “implemented during the emergency state”\textsuperscript{19} and curbing the prerogatives of the executive authority during such a state of emergency.\textsuperscript{20}

Despite these improvements vis-à-vis earlier drafts, the final version of the Basic Law, approved by the PLC, still failed to challenge the strong presidential nature of the post-1994 PA regime in a meaningful way. While the Article 5 stipulation that “the governing system in Palestine shall be a democratic parliamentary system” remained intact, and some features of parliamentarianism were established,\textsuperscript{21} the constitutional text consecrated the existing presidential regime. The president was still the chief executive authority, appointing the ministers and presiding over their meetings.\textsuperscript{22} Article 63 spells out that he was still merely to be “assisted” by the Council of Ministers, with Articles 5 and 68 expounding that the council remained responsible to him. Critically, the president maintained control of the security forces\textsuperscript{23} and preserved the power to declare a state of emergency.\textsuperscript{24} He also monopolized the Authority’s diplomatic prerogatives.\textsuperscript{25} He could propose laws, issue regulations, and take the necessary actions to execute them,\textsuperscript{26} and retained the right to issue decrees with the power of law in exceptional cases.\textsuperscript{27} He could also promulgate laws, had legislative veto power,\textsuperscript{28} and the right to pardon or commute sentences.\textsuperscript{29} Finally, the president had the power to appoint key authorities.\textsuperscript{30}

Yet, even while consolidating a presidential political system, the PLC’s text outlined the legal and institutional basis for a potentially unprecedented democratic regime in the Middle East. Article 5 established direct elections for the president and Article 34 did the same for the PLC, as well as setting specific terms for each (the interim period, which was to end in 1999). Moreover, the elections were to take place in a context of political party pluralism\textsuperscript{31}. Unfortunately, the democratic expectations generated by the new text were to be frustrated by the political and legal practices of the executive authority, buttressed by the dynamics of what was to all intents and purposes a one-party (Fatah) regime.

Many important battles between the PLC and the PA executive took place throughout this period, but two issues in particular are pertinent here: the conflict over the legislative initiative, which Arafat wanted reserved for the executive, and the actual promulgation of the Basic Law. Concerning the first, Arafat attempted to retain the legislative initiative for himself and to weaken the role of the parliament by failing to promulgate numerous laws passed by the PLC, including the Basic Law. But this maneuver, instead of downgrading the significance of the legal framework, only reinforced the idea that the law—and especially the constitutional process—was a political battlefield. As for the Basic Law, Arafat managed to use the centrality of his role and his leverage over the political process to avoid
promulgating it for many years (1997–2002), without even being subject to significant political pressure.

Many reasons were given by Arafat (or attributed to him) to justify his strong opposition to a constitutional text. One argument was that promulgating a constitution was premature, since the PA did not constitute a state. Another was that the adoption of a constitution concerned all Palestinians (represented by the PLO) and not just those represented by the PA (the inhabitants of the West Bank and Gaza).

Ilan Halevy, while not downplaying the importance of these arguments, emphasized another explanation given by Arafat privately: that constitutional limitations on his power could potentially frustrate Palestinian national aspirations for a state of their own. According to Halevy, Arafat believed that the possibility of a peace agreement depended largely on the leadership’s capacity to make painful concessions unlikely to be accepted by the Palestinians, leading him to reject any constitutional restrictions that could impede his ability to act without public consent.

Whatever the case, the bottom line, as Sulayman Abu Snayna noted, was that “our great leader Abu ‘Amar strongly opposed every part of the constitutional drafting—and, for that matter, any real limit to his authority. The following period, by contrast, represents the decline or weakening of Arafat’s “reign” with the attendant adjustments within the national movement and the PA.

FORCIBLY “DEMOCRATIZING” THE PA: THE INFLUENCE OF INTERNATIONAL ACTORS

The third phase of the constitution-drafting process began in the wake of the collapse of the Camp David summit on final status talks, which in turn was one of the factors that triggered the second intifada in September 2000. These events profoundly changed the Palestinian political landscape, with extreme pressures on Arafat leading to the promulgation of the Basic Law in 2002 and far-reaching constitutional reforms in 2003. The period ended with the death of Arafat in November 2004, marking the end of an era.

Up until the failure of the Camp David summit and its aftermath, which seriously affected Palestinian hopes for an independent state, Arafat was the personification of the “Palestinian revolution” and, as such, an autonomous source of a sufficient political legitimacy to give him a tight grip on Palestinian politics and wide discretion within the PA.

During the first and second phases, neither Israel nor international donors had objected to Arafat’s concentration of power, the assumption being that executive centralization would guarantee Israel’s security and facilitate a final settlement on terms agreeable to Israel. Arafat’s rejection of the “generous” Israeli offer at Camp David, however, made clear that he was unwilling to accept all of Israel’s conditions for a final settlement. Israel’s response was to launch a ruthless campaign, within the context of the second intifada, to isolate Arafat diplomatically and debilitate him politically and ultimately replace him. A significant number of donor countries, led by the United States, went along with this strategy.

With Arafat’s marginalization, the influence of the occupying power (Israel) and international actors prevailed. For Israel, the PA’s main role had always been to guarantee security for the occupation regime, especially after Oslo II, which effectively subcontracted the job to Palestinian security forces. The international actors, even while financing the PA’s institutional
and state-building development plan, likewise seemed to prioritize Israel’s security at the expense of more democratic practices. This viewpoint was strongly eroded by the outbreak of the second intifada and its progressive militarization, as well as the suicide attacks inside Israel, all of which severely undermined Arafat’s margin of maneuver. The pressure was heightened further with the “War on Terror” launched after the 11 September 2001 attacks on U.S. targets.

In the push to marginalize Arafat, the international actors privileged the constitutional field. On 29 May 2002, Arafat, confined since December 2001 to his PA Ramallah headquarters by an Israeli siege that lasted almost until his death, yielded to the international pressure and belatedly promulgated the Basic Law approved by the PLC in 1997. As in the past, however, constitutional “hopes and promises,” to use Cotran’s expression, “would be betrayed by the Authority’s legal practices.” And indeed, Arafat, convinced as he was that the pressure for reform had been intended by Israel and the donor countries to weaken him politically rather than to improve the Palestinian political system, paid lip service to the Basic Law while using all his remaining political leverage and strength to maintain his power intact and resist any real change to his rule.

When the constitutional text proved insufficient to weaken Arafat or meaningfully limit his exercise of political authority, Israel and the donor countries pushed for constitutional reforms that more explicitly diluted the president’s power. To this end, they joined forces with a number of Palestinian leaders, both inside and outside the PLO, who had been demanding such reforms for a long time. In 2003, the PLC duly returned to the drawing board, and undertook significant constitutional amendments aimed at introducing a strong dose of parliamentarianism into the Palestinian political system. More specifically, the changes sought to divide the political power hitherto concentrated in the president’s hands by vesting the newly-created post of prime minister and the Council of Ministers with the bulk of the executive prerogatives. According to Azmi Shuaibi, “the president was forced to accept [the reforms] in negotiations with the international community based (among other considerations) on the advice that doing so would reduce Sharon’s opportunity to use the war against Iraq [gearing up in early 2003] as a cover for extraordinary measures against him.”

The result of this battle was the Amended Basic Law of 18 March 2003. By shrinking the president’s role, it consecrated what seemed to be a two-headed constitutional regime under which the president and the prime minister basically shared power. Specifically, the president’s position was no longer spelled out in the articles pertaining to executive authority, as had been the case in the 2002 Basic Law. Instead, the prime minister theoretically became the head of the executive authority. With regard to executive prerogatives, Articles 63, 68, 69, 70, and 71 of the amended text established the Council of Ministers (cabinet) as the highest executive and administrative instrument, with some of the most sensitive powers previously attributed to the president now under its jurisdiction. As a general rule, except for the explicitly enumerated executive powers of the president, Article 63 clearly laid out that the “executive and administrative powers shall be within the competence of the Council of Ministers.”

Simultaneously, however, other provisions of that same Amended Basic Law undermined the very political independence and executive prerogatives it had assigned to the prime minister vis-à-vis the president by giving the latter strong symbolic status and powers to intervene in the political process. For example, the political legitimacy of the president under the amended text is
not less than that of the Council of Ministers, or government, since the president is directly elected, whereas the government, formed by the prime minister, is not. Indeed, it is the president who appoints the prime minister, authorizes him to form the government, and retains the power to dismiss him and accept his resignation. Under Article 74 section 1, the prime minister remains accountable to the president, who, under Article 75 section 1, can refer the prime minister to parliamentary investigation for alleged criminal misconduct. Furthermore, the president has his own executive, diplomatic, legislative, judicial, institutional, and security prerogatives. In all these areas, the Council of Ministers (in principle led by the prime minister) continues to merely “assist the president.”

The Amended Basic Law was quickly approved under international and local pressure. Arafat accepted the drafting of constitutional amendments on 12 February 2003, and on 18 March they were approved by the PLC. In the drafting process and thereafter, little attention was paid to the problems likely to arise from such an intricate division of the practical and symbolic power of the executive. Indeed, the new constitutional system became the embodiment of institutional dissonances and tensions whose implications would be revealed during the tenure of the first Palestinian prime minister, Mahmud Abbas (Abu Mazen), leading to his hasty resignation in early September 2003, less than six months after being appointed. According to Shuaibi,

These [legal prerogatives] were precisely the core of the conflict between Arafat and Abu Mazen . . . in a matter of months Arafat succeeded in knocking out Abu Mazen who ended up resigning. Later, Arafat nominated Abu ‘Ala as prime minister. But Abu ‘Ala had learned the lesson: he [the prime minister] cannot do business without the approval of Arafat. At the end of the day we succeeded in putting the amendments on paper but we could not implement the reforms . . . the PM continued working as though it was another office of the presidency.

The constitution-drafting process was essentially concluded during this third period, as only minor changes were introduced thereafter. Nevertheless, the fourth and final phase, which witnessed the most acute intra-Palestinian political crisis in the history of the PA, is important to our investigation because of the way in which the contending parties deployed new legal, and specifically constitutional, strategies in their bitter struggle for power. The 2006–07 political crisis had important constitutional dimensions, including an exacerbated confrontation over the division of powers between the president and prime minister after Hamas won control of the parliament in 2006. The far-reaching social and political consequences of the period continue to this day.

TOWARDS AN AUTHORITARIAN NONSTATE

The final phase of the constitutional process began with Arafat’s death in November 2004 and ended with Hamas’s military victory over Fatah forces in Gaza in June 2007. The outcome of the showdown resulted in divided rule between the West Bank and the Gaza Strip, and ultimately in the collapse and suspension of the constitutional regime. Between these two events, the PLC passed only one constitutional amendment, in 2005, to establish four-year terms for the PLC and the presidency, in keeping with the new Election Law passed the same year. As noted above, the period’s importance in constitutional terms lies in the resort by the factions to legal means to advance their political agendas.
Arafat’s death had vast psycho-political effects: the “father” of the Palestinian movement, who lent his personal legitimacy to the entire PA structure and fostered relative unity and stability, had suddenly disappeared. Once he was gone, and after ten years of Fatah rule, public discontent about corruption grew, and the instrumental and ethical limits of the Arafat-Fatah neopatrimonial rule were laid bare. The result was increasing internal division and rivalry within Fatah, accelerating the decline of its political legitimacy.

In this context, and after over eight years with no elections, legal and constitutional issues returned to the forefront of the political scene. Seeking fresh forms and sources of legitimacy among a dispersed constituency, the new PA leadership emphasized, at least rhetorically, both its legal foundations and the democratic process. In the succession to Arafat, for instance, the PA closely followed the constitutional framework set out by the Basic Law: the speaker of the PLC replaced the deceased president in the interim period and organized presidential elections. On 9 January 2005, Abbas was democratically elected by a substantial margin, giving him his principal political credential for validating his leadership.

The president and his advisers sought to use this electoral victory to buttress the PA’s democratic legitimacy, a recurrent and increasingly insistent domestic and international demand. To this end, the PA leadership scheduled two rounds of elections: local elections for 2005 and parliamentary elections for 2006, in which, by contrast with the 1996 voting exercise, most of the political factions, including Hamas, planned to participate. Thus, for the first time since the establishment of the PA, its nonstate apparatus was to be the object of an open and competitive electoral struggle.

Hamas’s strong showing in the 2005 local elections alerted the PA rulers to the possibility of a Hamas win in the legislative elections the next year. In autumn 2005, Fatah leaders and MPs, acting proactively, introduced a motion for further amendments to the 2003 Basic Law. Their proposal had several components, but it was essentially an attempt to strengthen the president’s prerogatives and roll back the 2003 reforms.

For example, it explicitly established the presidential character of the Palestinian political system and the president’s central role within the institutional regime, as “the head” of the PA (new Articles 5 and 55). Two “new Articles” also gave the president the right to call a general referendum on issues concerning the “higher interests of the homeland” and the power to call early elections—which implied dissolving the PLC—under a number of scenarios. (Interestingly, several of these strikingly resemble situations that actually transpired after Hamas won control of the PLC in January 2006.) Article 63 and another “new Article” of the proposal strengthened the president’s legislative prerogatives and his security powers as the head of a National Security Council. Another “new Article” created the post of vice president, who would act on the president’s behalf in certain circumstances. For example, under the 2003 Amended Basic Law, the speaker of the PLC (a post automatically held by the majority party) would assume the president’s functions in the event of a presidential vacancy. In other words, the amendment, if passed, would save Fatah from losing control of the presidential office were Hamas to win at the ballot box, and a presidential vacancy to take place.

The amendment proposal was not approved, however, perhaps reflecting Fatah’s overconfidence regarding the elections: if it won, there would be no need to rush to push through amendments. Thus, when the motion was reintroduced a few days before the vote, on two occasions the
parliamentary quorum was not reached. Fatah’s apparent preference for campaigning over parliamentary attendance was to no avail: on 25 January 2006, Hamas won a sweeping victory at the polls, obtaining 74 of the 132 parliamentary seats, and therefore a strong mandate to form a new government.

Although Fatah officials made public statements indicating that they would abide by the popular vote, the PA leadership undertook actions that revealed its strong resistance to relinquishing political control and the material privileges that went along with it. For example, having failed in its efforts to amend the constitution, the outgoing Fatah government and parliament issued a series of legal measures (especially in the domains of public finance, security, and institutional jurisdiction) that reversed significant portions of the 2003 reforms. In other words, what Fatah had failed to achieve through constitutional amendments before the elections, it achieved through decrees afterward. In the words of Ghazan al-Shaaka, “They did not change the constitutional text, but through decrees they changed the [constitutional] reality.” Indeed, in a number of cases, the measures succeeded in their goal of obstructing the performance of the incoming Hamas-led government. Said Siyam, who became interior minister in that government, was later to declare upon leaving office, “I did not fail, they made me fail . . . I was not given the chance to work properly . . .” Once Hamas had formed the government, Fatah’s goal was no longer to modify the Amended Basic Law (now impossible given the Hamas majority in the PLC) but to interpret it to accommodate its political objectives.

Constitutional issues continued to have major importance throughout the 2006–07 political crisis. In May 2006, a constitutional interpretative battle invaded the public debate when President Abbas, who was also head of Fatah, claimed the right to call for a referendum aimed at ending the Fatah-Hamas stalemate, though he subsequently renounced the idea after acknowledging that the Basic Law did not provide for this action. Later, in December 2006, a new “constitutional” way out of the deadlock was put forward that involved the president’s dissolving the PLC and calling early parliamentary elections. However, the constitutional basis for the action was no stronger than for the referendum, and the initiative, in any case widely opposed, was dropped.

Israel contributed to the constitutional dimension of the crisis in June 2006 by launching an arrest campaign targeting Hamas members of the government and parliament. With over 40 Hamas deputies detained by May 2007, the PLC was completely paralyzed, which in the context of a parliamentary system means virtual paralysis of the entire political regime. With the PLC unable to fulfill its role, interpreting the constitution with regard to the jurisdictional prerogatives of the presidency and the government dominated public political discourse.

By early 2007, the fragmenting of the Palestinian national movement had reached the point where armed clashes between Fatah and Hamas paralyzed the political process and brought the entire oPt to a standstill. In May, Abbas announced the deployment of 3,000 PA (Fatah) security forces in Gaza to “improve law and order,” without prior coordination with the Hamas-led PA government. Shortly afterward, rumors of an imminent internationally supported Fatah “putsch” seemed confirmed when 500 new Egyptian-trained Palestinian recruits loyal to Abbas/Fatah arrived in Gaza (with Israel’s permission). In early June, rumors circulated that Abbas had pressed the United States and Israel to allow major arms shipments to Fatah forces in Gaza. On 10 June 2007, Hamas-affiliated forces launched retaliatory military action, which ended
on 14 June with the total takeover of the Fatah-controlled PA security and political apparatus in Gaza.

Despite the context, the Hamas action was labeled by Fatah as a “coup d’état.” President Abbas declared a state of emergency and dismissed Prime Minister Ismail Haniyeh (Hamas) and his cabinet. In its place, the president appointed a new prime minister (Salam Fayyad) to form a government that completely excluded Hamas. Finally, after Hamas’s power grab in Gaza and the division of the PA into two governments, the application of significant chapters of the constitutional text were legally and practically suspended, effectively suspending the entire constitutional regime.

The End of a Colonial Democracy?

Several other factors, besides those already outlined, contributed to exacerbating the constitutional crisis that determined the final chapter of the PA constitutional experience.

First, to the extent that the Palestinian political regime was ever a democracy, it was a “colonial democracy” in its denial of real sovereignty, its authoritarian practices of power, and its fragmentation of the population. Regarding the latter especially, Oslo’s institutional/legal structures contributed to redefining identities, reshaping subjectivities, and dividing Palestinians by restructuring political, economic, and symbolic incentives and by creating new groups (i.e., a new class of bureaucrats, the economic and political elite, etc.). It also excluded refugees and the Palestinian diaspora (more than half the Palestinian people) from the political process, thereby symbolically reducing Palestinians to the inhabitants of the oPt, and it defined Palestinians as moderates or extremists according to their positions on Oslo. The emergence of these different groups—whose fortunes often diverged, and whose interests were openly antagonistic—consecrated a new cognitive grid for social meaning and political action. It generated new forms of interaction between Palestinian actors and transformed alliances to the extent that former “liberation fighters,” for instance, could begin to consider each other enemies—or even begin to treat the occupying power as an ally.

Second, the PA’s extreme vulnerability to Israeli pressure and its dependency on foreign funding gave external powers wide scope to intervene in the Palestinian political process in ways that were unsettling and often insidious. Thus, while the intra-Palestinian conflict clearly has its own internal dynamics, there is no question that the role of outside actors was decisive in accentuating the political rivalries. It was at least partly under international influence that Fatah declined to participate in the national unity government Hamas had been trying to put together after the 2006 elections. Likewise, donor countries made financial aid contingent on the new Hamas-led government’s acceptance of certain conditions and, when Hamas refused, all official international aid was suspended. Meanwhile, Israel froze the clearance revenues that it collected on the PA’s behalf, as stipulated in the Paris Economic Protocol (1994), increasing the economic chaos.

Finally, the strongly contradictory influences that coexisted in the Palestinian constitutional system also played a role in the escalation between the two parties. Various changes in the constitutional text were introduced at different junctures without a unifying clear political vision to guide them. Inevitably, the system that resulted was rife with institutional dissonances and
tensions, only one example of which involves the presidential and the prime ministerial prerogatives already alluded to. This opened the way for confusion and fighting over legal and constitutional interpretation, eroding the respective institutional authorities, and further aggravating the political situation.

This historical deconstruction of the Palestinian constitutional process highlights the impact that the actors’ social and political action had on legal processes. It suggests that, as Pierre Bourdieu puts it, “given the determinant role it plays in social reproduction, the juridical field has a smaller degree of autonomy than other fields . . . external changes are more directly reflected in [it] . . . .”64 In fact, the actors’ political strategies during the four periods of the constitutional process identified here were systematically accompanied by legal/constitutional strategies whose interaction contributed to the consolidation of colonial patterns: Palestinian nonsovereign status, the division/pacification of the colonized people, and authoritarian forms of domination.

Indeed, until now, sovereignty has been explicitly denied to Palestinians, and the current attempts to negotiate statehood cannot hide the fact that what is on the table is nothing more than the label of statehood aimed at legitimizing the current colonial reality. The territorial, social, and political division of the Palestinians has reached a point where it is no longer a question only of two rival factions within one national movement, but of two PA governments fighting against one another. Given this state of affairs, the social and political demobilization is painfully visible.

The authoritarian form of domination has become so institutionalized that the West Bank since June 2007 has been ruled by an “emergency government” controlled by Abu Mazen which falls outside constitutional legality—albeit with the support of the international community.65 Meanwhile, the PA-Fatah leadership has created a “police quasi-state” in the West Bank that entails the repression and arrest of dissidents, the outlawing of Hamas and all other armed militias, and the closure of nongovernmental organizations alleged to have links with Hamas. Under this regime, even freedom of speech exists only in appearance. Evidently, Hamas has followed a similar pattern in governing Gaza. Since the division, the Palestinian national movement has to all intents and purposes been on hold: with not one but several voices, without a clear program or strategy, absorbed by internal deadlock, losing internal and international legitimacy, and unable to confront occupation in any meaningful way. At the same time, ironically, the discursive reference to the law and the democratic process by all political actors has only increased.

Author Bio
Emilio Dabed is a lawyer and Ph.D. in political science who specializes in constitutional matters and whose research focuses on the constitutional process in Palestine. He is currently teaching in the Human Rights Program at Al-Quds University/Bard College Jerusalem and Abu Dis. His research aims to shed light on the role of juridical phenomena in sociological and anthropological questions.

ENDNOTES
1 The expression “Palestinian constitutional process” includes: the drafting initiated in the early 1990s by the PLO following the Declaration of Independence (1988) and the Oslo accords, the constitutional text approved in 1997 by the Palestinian Legislative Council (PLC), its promulgation by Arafat in 2002, the amendments passed in 2003, and the constitutional practice since the PA’s inception and until the collapse of the “constitutional regime” in 2007.
According to Oslo II (1995) the PA does not have powers in the domain of foreign relations (Art. 9-5); its jurisdiction is limited to Areas A and B, excluding permanent status negotiation issues and “the powers not transferred to the Council” (Art. 17-1-a-b); the PLC is entitled to adopt legislation (Art. 18-2), but all legislation must be communicated to the Israeli side which can refer any law to a “joint Palestinian-Israeli Legal Committee” (Art. 18-5 and 6), where Israel enjoys veto power.


Cotran, interview.

Al-Qasem, Anis (head of the PLO-PNC Legal Committee), interview, London, fall 2009.


The president enjoyed a great deal of legal powers (Art. 50, 78, and 107), legislative (Art. 55), judicial (Art. 56), executive (Art. 60-3), security (Art. 54), and institutional (Art. 96) prerogatives.


In this fourth draft, general elections for the presidency and the PLC were established (Art. 68 and 48); the president’s powers were limited (Art. 75); the references to the PLO-EC were deleted; and ministers are responsible only to the president and the PLC (Art. 83).

Secondary legislation [the text of the basic law] includes Orders, Resolutions, Regulations, and Decrees.


PLC Records, volume I, document 24, Palestinian Basic Law, 2 October 1997. These records are the written trace of the constitutional drafting process in the PLC’s archives. The author separated them in three volumes corresponding to the last three periods of the constitutional drafting.

PLC, Palestinian Basic Law, Art. 2.

PLC, Palestinian Basic Law, Art. 6.

PLC, Palestinian Basic Law, Art. 5, 64, 68 section 2, and 71.

PLC, Palestinian Basic Law, Art. 101.

PLC, Palestinian Basic Law, Art. 102–104.

The appointment of the Council of Ministers (COM) requires the vote of confidence of the PLC (Art. 64); and the COM is responsible to the PLC (Art. 5) which can withdraw its confidence from the COM (Art. 44).

PLC, Palestinian Basic Law, Art. 50 and 62.

PLC, Palestinian Basic Law, Art. 55.

PLC, Palestinian Basic Law, Art. 101, sections 1 and 2.

PLC, Palestinian Basic Law, Art. 56.

PLC, Palestinian Basic Law, Art. 58.

PLC, Palestinian Basic Law, Art. 60.

PLC, Palestinian Basic Law, Art. 57.
29 PLC, Palestinian Basic Law, Art. 59.
30 PLC, Palestinian Basic Law, Art. 87 and 98.
32 Halevy, Ilan (Fatah-PLO cadre), interview, Ramallah, October 2006.
33 Milhem, interview.
34 Halevy, interview.
36 Cotran, interview.
38 Al-Shaaka, Ghazan (PLO cadre), interview, Ramallah, August 2011; and Nabil Kassis and Hatam Abd al-Kader, in Which Prime Minister Do We Want? (Ay Rais Wazara Nurid?), Palestinian Center for Survey and Political Research, Doc. Cit.
39 Shuaibi, Azmi, Which Prime Minister Do We Want? (Ay Rais Wazara Nurid?), Palestinian Center for Survey and Political Research, Doc. Cit.
41 PLC, Amended Basic Law of 18 March 2003, Art. 68.
42 PLC, Amended Basic Law of 18 March 2003, Art. 34.
43 PLC, Amended Basic Law of 18 March 2003, Art. 45.
45 PLC, Amended Basic Law of 18 March 2003, Art. 41 section 1 and Art. 43.
47 PLC, Amended Basic Law of 18 March 2003, Art. 93 section 2, 96 section 3, and 107 section 1.
50 Shuaibi, interview.
52 The draft proposal refers to some Articles as “new Article,” only specifying a number in some instances, but not all. Occasionally, the draft refers to the Articles of the amended Basic Law which are being modified, but it does not say “new Article.” Here, the author refers to them exactly as they are presented in the text and has placed the quotation marks to highlight this.
53 PLC officers, interview, Ramallah, November 2008.
54 The board of the Palestinian Investment Fund (PIF) was modified and PIF oversight transferred to the president’s office, thereby limiting the government’s access to PA resources (Presidential Decree (PD) 4/2006 Official Gazette, Issue 63, 27 April 2006). The board of the Palestinian Monetary Authority was also modified, preventing the government from resorting to it for funds (PD 25/2006, Official Gazette, issue 63, 27 April 2006).
55 The presidency reinforced its security prerogatives to prevent Hamas from controlling the security apparatus. In response, the Hamas-led government created the Executive Force, in April 2006.
56 The law of the Constitutional Court was passed with some last-minute amendments, increasing the president’s powers with regard to the court’s formation (Official Gazette, issue 62, 25 March 2006). In its final meetings, the outgoing Fatah-led PLC passed amendments creating new administrative posts within the council to which it appointed Fatah members; the outgoing government appointed Fatah loyalists to head several governmental bodies; and oversight of the official Palestinian media was transferred to the presidency (Resolutions 29 and 30/2006. Official Gazette, issue 63, 27 April 2006).
A Constitution for a Nonstate

57 Al-Shaaka, interview.


59 The amended Article 47 (2005) gave the PLC a four-year term, and did not foresee its dissolution.


63 PD 11 and 12/2007 (Official Gazette, Issue 71, 13 August 2007) suspended the chapters of the ABL concerning the government’s formation and the vote of confidence by the PLC.


65 According to the Basic Law, no government can take up office before receiving a vote of confidence from the PLC. None of the emergency governments appointed after June 2007 ever met this condition, which seems to indicate that, technically speaking, the only constitutionally legitimate caretaker government after June 2007 was that of Ismail Haniyeh.