
AN (UN)CONSTITUTIONAL HANGOVER? AN ANALYSIS OF THE CURRENT PALESTINIAN BASIC LAW IN LIGHT OF PALESTINE'S CONSTITUTIONAL HERITAGE

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The Palestinian Basic Law ("BL") was released with much fanfare, optimism, and promise. Indeed, the BL was said to signal the dawn of a new Palestine state: it was hailed as a building block towards Palestinian self-determinism and used as an example to showcase progressive diplomacy with Israel. Since the birthing of the BL at the Oslo Accords, however, the onset of constitutional crises over the past fifteen years—namely the international intervention in 2003, the death of Arafat in 2004, and Hamas-Fatah clash in 2007—the BL today is viewed rather cynically, as "a document not worth the paper it is written on." The BL has thus come under scrutiny from numerous scholarly angles that have tried to explain why the BL has failed to reach its lofty expectations.¹

This Article seeks to follow the process that lead to the drafting of the Palestinian BL, an angle which shows that the BL did not need much comparative or theoretical analysis to highlight the gaps it had, the actual process was leading to a certain executive concentration of powers. The history that led to the creation of the BL, however, consists of many direct and indirect factors. Combining these factors indicate that the current dilemma created by the BL during Hamas-

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1. Many authors have written about the constitutional process in Palestine, but their approach differs from this Article as this paper combines all factors that scholarly work discussed and explains how these factors all together affected the BL. See e.g., NATHAN J. BROWN, *PALESTINIAN POLITICS AFTER THE OSLO ACCORDS: RESUMING ARAB PALESTINE* (2003); ADRIEN KATHERINE WING, *DEMOCRACY, CONSTITUTIONALISM AND THE FUTURE STATE OF PALESTINE* (1994); Emilio Dabed, *Constitutionalism in Colonial Context: The Palestinian Basic Law as a Metaphoric Representation of Palestinian Politics (1993–2007)*, in *ISRAELIS AND PALESTINIANS IN THE SHADOWS OF THE WALL: SPACES OF SEPARATION AND OCCUPATION* 57 (Stéphanie Latte Abdallah & Cédric Parizot eds., 2015); Asem Khalil, *Beyond the Written Constitution: Constitutional Crisis of, and the Institutional Deadlock in, the Palestinian Political System as Entrenched in the Basic Law*, 11 *INT'L J. CONST. L.* 34 (2013).

Fatah clash was expected. Executive concentration of powers, which was strengthened by the BL, is a common phenomenon that Palestinian constitutional history experienced in the previous documents governed Palestine. It is indeed, through combining all factors sit directly in front of scholars: the Oslo Accords, other Arab State's Constitutions which affected the BL drafters' mentality, and past Palestinian Constitutional struggles. It is these factors, and imposed circumstances on the Palestinian people, that created the flaws, and ultimate failure, of the Basic Law as a constitutional document.

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I. INTRODUCTION

“Appeals to the past are among the commonest of strategies in interpretations of the present[.]”²

Before examining and evaluating the Basic Law (“BL”), it is prudent to first recount the historical context that led to its formation. The BL did not appear from a constitutional vacuum, although the drafters of the BL attempted to “start from scratch.”³ The reality is that the past will always shape the future if no serious changes take place to abandon it. In this situation, constitutional drafters cannot escape their constitutional past, especially when their past history of governance has not been a great success.

The current Palestinian constitutional framework is considered unique in comparison to other constitutional systems in the world. Its unique situation was created by the strange mass of laws and constitutions inherited from various authorities claiming legislative power in Palestine during this century: Ottoman rule, the British mandate, Egyptian

2. EDWARD W. SAID, CULTURE AND IMPERIALISM 1 (Vintage Books ed., 1994).

3. NATHAN BROWN, PALESTINIAN POLITICS AFTER THE OSLO ACCORDS: RESUMING ARAB PALESTINE 60 (University of California Press 2003).

administration in Gaza, Jordanian annexation of the West Bank, and Israeli military occupation and civil administration after 1967. The result is a hybrid system of civil and common law that has nothing in common. Even within Palestine there is an absence of uniformity; the West Bank and Gaza have their own heritage of laws, which developed in two parallel lines independent of each other. When the Palestinian Authority ("PA") took over in 1994, the situation remained unchanged.⁴ Indeed, the first decision made by Arafat as President of the Palestinian National Authority ("PNA")⁵ stated that laws, regulations, and orders in effect before June 5, 1967 were to remain effective in the Palestinian territories "the West Bank and Gaza" until their unification is complete.⁶ The decision seems especially unhelpful and unsuitable for the current dilemma, and the situation has only worsened further.⁷

Examining the previous constitutional documents before evaluating the BL is necessary to put the BL into context. The previous Palestinian constitutional documents were drafted by nonPalestinians and also drafted to strengthen the power of the executive, which undermines the key attributes of constitutionalism. In fact, the constitutional history of Palestine raise the an old argument that the president, or in this case the executive, is the guardian of the constitution; there was no constitutional protection, and therefore the people's rights were always abused without any referee apart from the executive.

The history that led to the BL's creation indicates that the document was an outcome of a political deal the drafts that were prepared by the Palestine Liberation Organization ("PLO") and even the current BL, which was drafted by the Palestinian Legislative council ("PLC"), repeated the idea of one-man rule that existed in most of the constitutional documents governed Palestine and the surrounding Arab constitutions where most of the Palestinians gained their education in.

This assessment of the past will show that constitutional mentality, even if it was not affected directly by those documents, has not changed that much in comparison to the current BL. The only difference is that Palestinians drafted the BL; however, the drafting of the document was a result of a political agreement that did not gain most of the Palestinian people's approval.

4. According to the Oslo agreement in 1993, the Palestinian National Authority was created to govern certain areas in the West Bank and Gaza. Mr. Arafat, the first President of the PNA and Chairman of the PLO, came to Palestine in 1994, according to the Oslo agreement.

5. Palestinian National Authority or the Palestinian Authority ("PA") means the same thing; the Israelis objected to the use of "National" and wanted to keep it as PA only. For this thesis, PNA or PA means the same body.

6. Presidential Decree No.(1) Published in *Palestine Gazette* on the 20 November 1994, 10.

7. Norman Bentwich, *The Legal System of Palestine Under the Mandate* 2 MIDDLE E.J. 33(1994).

II. BACKGROUND

A. *Complex Constitutional Background*

The initial idea of drafting a Palestinian constitution came with the 1988 Declaration of Independence.⁸ The Declaration of Independence is considered the starting point in Palestinian constitutional drafting. It is also the starting point in the confusion of which Palestinian people would be represented in the constitution would be. The declaration stated that: “[t]he State of Palestine is the state of Palestinians wherever they may be”.⁹

In many ways, the PLO Declaration of Independence can be seen as a necessary attempt to put the cart before the horse. As Palestine was still under Israeli Occupation, the PLO was forced to draft a constitution before achieving sovereignty or even independence.¹⁰ It was a move that caught the attention of international actors,¹¹ as the Declaration asked for a state, which belonged to all Palestinians throughout the world and would be characterized by a democratic system, freedom of expression, equality, rule of law, and an independent judiciary.¹² This was a unique claim in comparison to other, more authoritarian Arab states.¹³ The Declaration was attractive to the international community as it pushed the idea of a governing constitution that would allow Palestinians to enjoy their freedoms and to draw limits not by force, which was a typical tenet of Arab constitutions, but by law.¹⁴ The Declaration also detailed a precise political system, parliamentary in nature, to govern Palestine and would highlight and revere the “separation of powers” doctrine.¹⁵

The Declaration caught the attention of the world and many states rushed to recognize Palestine as an autonomous entity.¹⁶ Although the Declaration could be considered as the statement of constitutional intent, it was also an astute political move, which pushed the Palestinian case to the forefront of the international political agenda after years of silence.¹⁷

The PLO’s attempts to design and draft a constitution and constitutional mechanisms before the Palestinian state emerged was arguably a rash step.¹⁸ Drafting a constitution is a relatively easy task in comparison

8. PALESTINIAN DECLARATION OF INDEPENDENCE (1988).

9. *Ibid.*

10. For details regarding the declaration, see *id.*

11. *Id.* at 681.

12. See BROWN, *supra* note 3, at 60.

13. The PLO (which was created by the PNC) signed the Oslo agreement, and the PLO itself created the Palestinian National Authority according to Oslo. *Id.* at 59–60.

14. See *id.* at 61–65.

15. PALESTINIAN DECLARATION OF INDEPENDENCE (1988).

16. James L. Prince, *International Legal Implications of the November 1988 Palestinian Declaration of Statehood, The Recent Development*, 25 STAN. J. INT’L L. 681, 704 (1989).

17. See *id.* at 690–91.

18. See *id.* at 703–05 (discussing the recognition of Palestine as a State); Chery Rebunber, *The Palestine Liberation Organization / Historical Background*, AN-NAJAH NAT’L U. (Aug. 7, 2004, 10:25 AM), http://www.zajel.org/article_view.asp?newsID=2537.

to forming a state. Indeed, it was next to impossible for the PLO to form a state, as they had no political control over the land, its people, or the necessary institutions to implement a constitution.¹⁹ At the time of the Declaration, the PLO was functioning from outside the occupied territories.²⁰ To complicate things further, the creation of Hamas, a grassroots political party opposed to PLO policy, raised doubts regarding the legitimacy of the PLO and its members.²¹ Also, the PLO institutions raised some doubts, as the Palestinian National Council (“PNC”)²² had never been elected by the Palestinian people.²³ The development and design of a constitution, without the input of the constituent power, arguably can immediately invalidate the very notion of a constitution. Palestine, however, as an occupied and blurred legal entity, perhaps negated the possibility of a constituent power having a voice to create a constitution.

The implementation of a constitution for political reasons without any representation of popular sovereignty is not without precedent in Palestine. Such had been the case in Palestine with the past constitutions created under the Ottoman Empire, the British Mandate, and various others designed by Egyptian, Jordanian, and Israeli administrators.²⁴

As with the international administrators before them, the PLO considered the drafting of the BL as their legitimate right since they were the current body or entity that had power over Palestine. The PLO was the body that agreed and signed the Oslo Accords to begin the initial drafting process.²⁵

B. *The roots of creating the current BL: The Oslo Accords*

While the Declaration of Independence was a political move related to the revolutionary stage of the PLO life, the current BL was a result of a political deal and far away from a revolutionary moment.

The Oslo Accords²⁶ were signed on September 13, 1993, on the South Lawn of the White House and sealed with a handshake between Israeli Prime Minister Rabin and PLO Chairman Arafat.²⁷

19. To complicate things more, the Palestinians inside the West Bank and Gaza started an uprising against Israel from 1987–88, which made the situation even worse for the PLO as the Palestinians inside needed it the most at that time. See generally Don Peretz, *Intifadeh: The Palestinian Uprising*, 66 FOREIGN AFF. 964, 976 (1988).

20. *Id.* at 969.

21. Hamas is an Islamist movement in Palestine that appeared in 1988. It is originated from the Muslim Brotherhood in Egypt and sought the establishment of an Islamic state in Palestine. It opposed the Oslo Agreement. One of its main political ideologies is the rejection of the state of Israel. See SHAUL MISHAL & AVRAHAM SELA, *THE PALESTINIAN HAMAS: VISION, VIOLENCE AND COEXISTENCE* 35–37 (2000).

22. MUHAMMAD MUSLIH, *TOWARDS COEXISTENCE: AN ANALYSIS OF THE RESOLUTIONS OF THE PALESTINE NATIONAL COUNCIL* 4 (1990).

23. For more details regarding the full structure of the PLO, see JILLIAN BECKER, *THE PLO: THE RISE AND FALL OF THE PALESTINE LIBERATION ORGANIZATION* 85 (1984).

24. BROWN, *supra* note 3, 69–70.

25. *Details of the Oslo Accords*, PALESTINEFACTS.ORG, http://www.palestinefacts.org/pf_1991_to_now_oslo_accords.php (last visited Mar. 6, 2017).

26. *Id.*

On September 28, 1995, one year after the creation of the Palestinian Authority, the parties signed the Interim Agreement implementing the Declaration of Principles in Taba, known as Oslo (II).²⁸ Oslo (II) called for the creation of an elected Palestinian council of eighty-two people to supersede the Palestinian Authority established by the Gaza/Jericho agreement.²⁹ Moreover, it asked for a *Ra'ees* (Arabic for president or chairman) to be the head of the twenty-four-member-strong Executive Committee of the Council.³⁰

The Oslo Accords created an interim self-government for the Palestinians inside Palestine, the PNA, while the PLO as a representative of Palestinians inside and outside of Palestine stayed in the picture.³¹

C. Oslo Created Tension: PLO Role in Creating a BL.

By creating an interim government (*i.e.*, the PA), Oslo put the Palestinians in a dilemma, which created tension in the relationship between the two bodies: should the PLO or the PA be responsible for drafting the Basic Law?³² Oslo indicated that it was the responsibility of the PA through the elected council to draft a BL.³³ This might not have been how the PLO viewed the situation. The PLO started drafting a constitution (the Basic Law) before electing the Palestinian council.³⁴ The PLO called the drafts on which it was working Basic Laws.³⁵

This rush to draft such a document before the Palestinian Legislative Council ("PLC") elections, according to Glenn E. Robinson, was a strategy to personalize and deinstitutionalize politics.³⁶ In other words, it was an attempt by the PLO elite to maintain personal authority over political Palestine.

In 1993, for example, a draft of the BL was issued by the Legal Committee of the PLO headed by jurist Anis Al Qasem, and had wide input from Palestinian legal experts and leading female activ-

27. AVI SHLAIM, *WAR AND PEACE IN THE MIDDLE EAST: A CONCISE HISTORY* 123–25 (Penguin Books 1995).

28. The Israeli-Palestinian Interim Agreement (Oslo II) on the West Bank and the Gaza Strip, Isr.-PLO, ch. 1, arts. I–IX, Sept. 28, 1995, <http://www.acpr.org.il/publications/books/44-Zero-isr-pal-interim-agreement.pdf> [hereinafter Oslo II].

29. *Id.*

30. *Id.* ch. 1, art. V. The Council's structure is very similar to the structure in the 1922 Constitution, as shall be noticed. See discussion *infra* Part III.A.

31. See Jerome Slater, *What Went Wrong? The Collapse of the Israeli-Palestinian Peace Process*, 116 POL. SCI. Q. 171, 176–79 (2001), <http://onlinelibrary.wiley.com/doi/10.2307/798058/pdf> (last visited Jan 20, 2017).

32. Asem Khalil, *Constitution-Making and State-Building: Redefining the Palestinian Nation*, in CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 583, 586–89 (Rainer Grote & Tilmann Röder eds., 2012).

33. *Id.*

34. Ziad Abu-Amr, *The Palestinian Legislative Council: A Critical Assessment*, J. PALESTINE STUD., Summer 1997, at 90, 91.

35. Naseer H. Aruri & John J. Carroll, *A New Palestinian Charter*, J. PALESTINE STUD. 5, 5 (1994).

36. GLENN E. ROBINSON, *BUILDING A PALESTINIAN STATE: THE INCOMPLETE REVOLUTION*, INDIANA SERIES IN ARAB AND ISLAMIC STUDIES 176–77 (1997).

ists Anis Al-Qasem and Eugene Cotran.³⁷ The drafters of the first version of the Basic Law aimed to create a Palestinian democratic regime, but were also forced to consider a constitutional structure that had to adhere to, in Eugene Cotran's words, "what Arafat would accept."³⁸

In effect, it gave political autonomy to the PLO and, more specifically, to Arafat's own leadership.³⁹

Central to the PLO's drafts was the continued relevance of the PLO, as explicit attempts were made to maintain the PLO's duties and jobs. It was clear that the aims of the drafts were to strengthen the powers of the president and to ensure the PLO remained an influential political body. The presence of the PLO caused a problem for the newly created PA and affected its institutional structure later. This issue, however, was not recognized initially nor was it ignored, as most of the people in the PA were also members of the PLO. One could argue that the PLO was becoming both an international and a domestic political body.⁴⁰ The PLO was more concerned with ensuring it designed a constitution that gave it hierarchical supremacy over the PA and the PLC, and its focus, perhaps, was not to represent the constituent power.

Efforts were made, however, to pay at least lip service to the constituent power. In 1994, a third BL draft included an article that recognized the Palestinian people as the source of authority rather than the negotiations of Oslo.⁴¹ The draft, however, always maintained that the BL should not affect the duties and the job of the PLO. Article 103 of the 1994 draft, for example, read:

This Basic Law shall apply during the transitional period, but shall not affect the powers and duties of the Palestine Liberation Organization and its organs including its powers to represent the Palestinian people in foreign and international relations and relations with foreign government [sic] international organizations.⁴²

Similarly, Article (50) of the 1994 draft stated that:

The Chairman of the Executive Committee of the Palestine Liberation Organisation (hereinafter referred to as the _PLO_) shall be the President and the head of the National Authority and shall exercise the powers prescribed for him in the Basic Laws of the PLO, the resolutions of the Palestine National Council, the Central Council of the PLO and the Executive Committee of the PLO as well as the powers prescribed in this Basic Law.⁴³

37. See Dabed, *supra* note 3, at 61.

38. *Id.* (detailing the drafting by the PLO).

39. See Dabed, *supra* note 3, at 61. For the original text See

Anis Al-Qasem was the head of the Legal Committee of the Palestinian National Council of the PLO. See BROWN, *supra* note 3, at 67.

40. HANAN ASHRAWI, THIS SIDE OF PEACE: A PERSONAL ACCOUNT 62–63 (1995).

41. PALESTINIAN BASIC LAW [CONSTITUTION] May 1, 1994, ch. 1, art. 1 (Palestine).

42. *Id.* at ch. 7, art. 103.

43. *Id.* at ch. 5, art. 50.

This Article offers clear evidence that the PLO was never intended to be separate from the Palestinian Authority, a contradiction to recognizing the constituent power as the source of authority. That Mr. Arafat held the position of PLO chairman and PA President from 1994 until 2003 and was then succeeded by Mr. Abbas—who also held both positions—has facilitated the continual dominance of executive authority.

This overlapping relationship between the PLO and the PA forced many members, like Hanan Ashrawi, to object to the Oslo Accords due to the perspective President Arafat had of representation:⁴⁴ “[a]ll agreed that this authority should be made up of Executive Committee members and ‘inside’ Palestinians, working within the structure of the PLO.”⁴⁵

Ashrawi asked the question of who “All” refers to and who “All” should represent?⁴⁶ Palestinian jurist Anis Al Qasem⁴⁷ cynically replied that Arafat’s “All” simply refers to the members of the PLO.⁴⁸

Dabed’s analysis of the PLO draft is as follows: the 1994 draft was not put into effect and, after public discussions, a fourth draft was issued and made public by the Legal Committee of the PNC in 1995.⁴⁹ In this fourth draft, the President was no longer the head of the PLO-EC; general elections for the Presidency were established (Art. 68); the president’s powers were limited to those prescribed “by this Basic Law” (Art. 75); all the indications of the PLO-EC as reference authority were deleted; the Legislative Council was not appointed by PLO-EC but elected in general elections (Art. 48); and the ministers were no longer responsible to the PLO-EC but to the president and the PLC (Art. 83).⁵⁰ Despite these changes, and the fact that Article 2 of the fourth draft of the Basic Law proclaimed a parliamentary regime, a presidential system and concentration of power with the executive were the main characteristics of this constitutional text.⁵¹

By reviewing the drafting of the PLO documents, we can see that “[a]t the time of the fourth ‘Draft Basic Law’ (December 1995), the new Palestinian Authority had been operating for almost a year and a half

44. ASHRAWI, *supra* note 40, at 260.

45. *Id.* at 276.

46. ASHRAWI, *supra* note 40.

47. For more details, see GREGORY S. MAHLER, CONSTITUTIONALISM AND PALESTINIAN CONSTITUTIONAL DEVELOPMENT 129 (1996).

48. ASHRAWI, *supra* note 40.

49. See Dabed, *supra* note 3.

50. PALESTINIAN BASIC LAW [CONSTITUTION] December 11, 1995, ch. 4, art. 48, ch. 5, art. 68, 75, 83 (Palestine).

51. See Dabed, *supra* note 3, at 62. He also mentions that

Executive authority is exercised by the president and a Cabinet of Ministers (Art. 67); the president is the head of the executive (Arts. 68 and 77); the cabinet only assists him in the performance of the executive authority (Art. 78-1); the president maintains the control on security services (Art. 72); he can initiate or propose laws and issue secondary legislation (Art. 73-2) and promulgates the laws (Art. 73-1); the president appoints the Head of the Judicial Authority and President of the Supreme Court (Art. 110); he can establish specialized public bodies to assist the government (Art. 94); the executive exercises the powers and duties provided for its predecessors in legislation in force before this Basic Law (Art. 92).

See generally *id.*

and the concentration of power and authoritarianism were already a reality.”⁵² Without the Basic Law having been approved or a Parliament elected, and given the supremacy of his leadership, Arafat was ruling the PA without any real challenge. “In the legal domain, he monopolized the legislative process and within the political structures he occupied at the same time the offices of head of Fatah, Chairman of the PLO, President of the State of Palestine (since the declaration of independence in 1988), and President of the PA.”⁵³ The PLO drafts, timing, and content were a cosmetic reform to ensure that the PLO would have the upper hand in the legislative process through its Chairman. President Arafat initiated a decree, governing the legislation that was issued before electing the Council, which allowed the elected future Council to approve legislation rather than initiate it.⁵⁴

Since those drafts never saw the light nor were put into effect, one could logically question the necessity of them being mentioned here. The reason behind focusing on those drafts is to show how Oslo, as a political deal, created tension between two bodies who wanted to have control over the drafting process of the BL. The PLO drafts relied on the constitutional documents Palestinians used and show the mentality of the drafter who engineered the drafting of the current Basic Law years later. Indeed, the PLO drafts and past Constitutions were looked at during the drafting of the BL.⁵⁵ This sad reality meant that the BL was bound to be similar to the PLO drafts and the constitutional history of Palestine’s colonial past. Oslo indirectly sparked a constitutional problem by creating a new body that the PLO wanted to overthrow; hence, the PLO drafted the Basic Laws. Oslo also forced the PA to draft a constitution that they were not yet ready to have.⁵⁶ This political reality is something the drafters could not change; however, they could have chosen not to rely on the constitutional past as they did. The easiest option for the drafters, however, was to use the constitutional history, which was colonially imposed constitutional documents. There are three main areas where constitutional heritage has affected the BL: 1) the drafting process; 2) the separation of powers; and 3) the weak parliament, which was a common feature in all these constitutions.

III. DRAFTING THE CURRENT BASIC LAW

In 1996, the PLC started working on the Basic Law, as the PLO leadership wanted to appoint a committee to draft the BL in order to not

52. Dabed, *supra* note 3, at 62.

53. *Id.*

54. Law No. 4 of 1995, Official Gazette of the Government of Palestine 6-5-1995, translated in 8 PALESTINE Y.B. INT’L L. 115–16 (Anis F. Kassim ed., 1996).

55. See Adrien Katherine Wing, *The Palestinian Basic Law: Embryonic Constitutionalism*, 31 CASE W. RES. J. INT’L L. 383, 403 (1999).

56. See John Strawson, *Palestine’s Basic Law: Constituting New Identities Through Liberating Legal Culture*, 20 LOY. L.A. INT’L & COMP. L. REV. 411, 413 (1998).

lose control over the issues the law was going to discuss.⁵⁷ Mr. Arafat wanted to select members of the committee, which he thought would represent the actual Palestinian society that would approve of the document.⁵⁸

The PLC wanted the BL to be drafted quickly because it wanted Palestinian institutions to have a legal basis other than the Oslo Agreements.⁵⁹ The whole system needed change, and the PLC and the executive had to be governed by a document that could not be breached by PLO interference and the dual position that President Arafat had and used whenever it suited him. The document was supposed to govern the transitional period leading up to the establishment of a state and the drafting of a final constitution.⁶⁰

[T]he constitutional draft—approved by the PLC in its third reading in October 2nd, 1997 under the name of “Palestinian basic law”—was modified along these principles: it emphasised the separation of power (Art. 2) and the rule of law (Art. 6) as constitutional principles, and the responsibility of the government to the PLC (Arts. 5, 64, 68-2, 71); it improved the catalogue of rights (Arts. 9 to 33); it strengthened the prerogatives of the PLC (Arts. 34 to 49) and its participation in the nomination of key public officials (Arts. 84, 87 and 98); it widened the prerogatives of the Constitutional Court (Art. 94); [and] it defined the legal frame for a declaration of a state of emergency giving to the PLC the right to review all the measures “. . . implemented during the emergency state” (Art. 101) while restraining the prerogatives of the executive during the emergency (Arts. 102, 103, 104).⁶¹

In 1997, the PLC sent the document to the president; Arafat ignored it for almost five years only to approve it in 2002 after the transitional period came to an end, begging the question of how important it was to approve this document after its expiration date had passed. Thus, Palestinian legislative life was divided between the PLC, which had the right to enact laws but could not, and the president who should not enact laws but did. There was no document that could organize the relationship between the president, the legislature, and the judiciary, which was very weak at that time. The Ottoman Constitution, which is the first constitutional framework for most Arab constitutions prior to the Arab Spring, and the one that governed Palestine, had a similar trajectory.⁶² While there was a group of interested elite within the Ottoman Empire that wanted to have a constitutional government instead of what the sultan had created as a way to guarantee political reform, the idea was consid-

57. See *id.* at 417.

58. See Nathan J. Brown, *Constituting Palestine: The Effort to Write a Basic Law for the Palestinian Authority*, 54 MIDDLE E.J. 25, 32 (2000).

59. See *id.* at 26–28.

60. Wing, *supra* note 55, at 384.

61. Dabed, *supra* note 3, at 63.

62. Brown, *supra* note 58, at 34–35.

ered controversial.⁶³ It was likely too radical for the lawmakers of the time to create a constitution with the potential to influence the privileges of powerful individuals and groups.

The drafting process happened through different stages, but the final edition that was approved was the version drafted by the elected Palestinian Legislative Council with various changes made by Mr. Arafat.⁶⁴

Despite his interference, the PLC could not challenge Mr. Arafat, who was seen as the nation's leader because of his dual position as the PLO chairman and PA president. It is the same style of leadership that Sultan Abd Al Hamid used to promote himself as the nation's leader at the time.⁶⁵ Sultan Abdul Hamid promoted the idea of Ottoman citizenship. He was concerned with gaining the loyalty of the Arabs by promoting his image as the Islamic *caliphate* in order to gain loyalty of the people by using religion.⁶⁶ Despite his efforts, he lost the loyalty of other groups—Armenians, Greeks, and Bulgarians, to name but a few.⁶⁷ Mr. Arafat also promoted the idea of Palestinian leadership and he justified his refusal of signing the BL on the ground that he wanted the BL to represent the Palestinians inside Palestine and in the diaspora, something that was impossible due to Oslo restrictions.⁶⁸

A. *Not by the People: Similarity with the Drafting Process*

The BL was drafted by a small group which was appointed by the PLC and was never put into referendum.⁶⁹ This is similar to the way constitutions used to be created in Palestine. The PLO's drafts were also made by a small group, appointed by the PLO's officials.⁷⁰ The only difference was that the PLC was an elected body.⁷¹ This way of drafting is not something new in Palestinian constitutional history. The PLO's BL drafts bear intriguing similarities to the Ottoman Constitution of 1876 and the British Constitution of 1922.⁷² Indeed, both attempted to appear constitutional in nature whilst limiting the influence of the constituent power.⁷³ The Ottoman constitution was promulgated by Sultan Abdul

63. See NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT 25–26 (2002).

64. See Dabed, *supra* note 3, at 61–65.

65. Nazeer Ahmed, *Sultan Abdul Hamid II*, HIST. ISLAM, <https://historyofislam.com/contents/resistance-and-reform/sultan-abdul-hamid-ii/> (last visited Jan. 20, 2017).

66. See *id.* Mr. Arafat used a similar way to guarantee the loyalty of the Palestinians, but he used the “father of the nation” card to do so.

67. See generally Karen Barkey, *Islam and Toleration: Studying the Ottoman Imperial Model* 19 INT'L J. POL. CULTURE & SOC'Y 5 (2005) (exploring the relationship between religion and politics with a focus on Islam).

68. Khalil, *supra* note 32, at 591; see Brown, *supra* note 58, at 32–33.

69. See Strawson, *supra* note 56, at 417.

70. *Id.*

71. Dabed, *supra* note 3, at 60.

72. BROWN, *supra* note 3, at 61.

73. BROWN, *supra* note 63, at 20–26.

Hamid II on December 2, 1876,⁷⁴ and it was influenced by the Belgian Constitution of 1831 and the Prussian Constitution of 1850.⁷⁵ The drafting process, enacted by the Ottoman Empire in 1876, was not driven by a desire to create a constitution that was bound by popular sovereignty (to be by the people and for the people).⁷⁶ It was instead driven by the political need to legitimize the Sultan's rule under a constitutional document.⁷⁷ The reason for creating the Ottoman Constitution and the reason for having a BL drafted by the PLO is very similar.

In addition, the drafting of the 1876 Ottoman Constitution took place when a group of senior officials, military leaders, and *ulama*⁷⁸ were appointed by the sultan to draft a constitution that was submitted by the sultan to the cabinet, which promulgated the constitution. This group may have represented the diversity that existed in the Ottoman Empire, but the group itself was not elected and the constitution was never put to a referendum.⁷⁹ Therefore, the actual representation of the people by an elected elite group may have been questionable; a narrow group did the drafting and the sultan issued the constitution.⁸⁰ This is very similar to how the PLO selected specific political elite to draft the PLO-BL drafts. This type of drafting eliminates the idea that a constitution serves the people it governs, an aspect mirrored in the 1922 British constitution.⁸¹

The 1922 English Constitution was established by an Order in Council and was signed by His Majesty the King of the United Kingdom.⁸² The 1922 Constitution was not drafted by a constituted power or assembly or even by an elected Palestinian legislative authority; instead, the order was enacted by the individual will of the king.⁸³ Similar in practice to what Mr. Arafat, as the chair of the executive committee of the PLO, wanted to do. The people, as the source of authority, were never part of that deal.⁸⁴ Thus, no national sovereignty existed in the constitution. This is logical, as the mandatory power wanted to impose the aims of the mandate and 1922 Constitution. The main aim of the Constitution was to serve the Zionist aims of having a Jewish state in Palestine.⁸⁵ The

74. *Abdulhamid II*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Abdulhamid-II> (last visited Jan. 20, 2017).

75. BROWN, *supra* note 63, at 21.

76. *Id.*

77. *Id.*

78. This is the title used for highly educated people in Islamic religion. *Ulama*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/ulama> (last visited Jan. 20, 2017).

79. BROWN, *supra* note 63, at 21–24.

80. *Id.* at 22.

81. See PALESTINE ORDER IN COUNCIL [CONSTITUTION] Aug. 10, 1922 (UK).

82. *Id.*

83. *Id.*

84. See Brown, *supra* note 58, at 30–31.

85. This aim was clearly expressed by adopting the Balfour Declaration as one of the basic grounds in the Constitution. The idea of creating a national home for the Jews in Palestine, according to Henry Cattán, differs from creating a state. A national home according to Norman Bentwich, a leading Zionist Jew and the Attorney General of Palestine during the mandate, means a people that are connected to the land; it is the place where they can develop their cultural, social, and intellectual ideas without any political sovereignty over the land. The Balfour Declaration can be considered a breach

notion of involving The People in the formation of legislation was never a part of the intended design.

The difference between the current BL, the Ottoman Constitution, and the PLO Basic Laws lies in the fact that shortly after the PLC started the drafting, the document became public and was amended due to the overwhelming criticism, unlike the Ottoman Constitution.⁸⁶ For the British Constitution, the similarity was more clear in the executive domination than it was with the drafting process.⁸⁷

B. Similarity with a One-Man Constitution

The BL could not restrict the power of free-acting Mr. Arafat, as evinced by the drafting process.⁸⁸ This issue resulted from the dual position of Mr. Arafat as president of the PA and chairman of the PLO. He moved freely between the two positions. The BL was silent on this matter. It did not organize the two roles, giving Mr. Arafat more freedom to move freely and enact laws from both positions. Past constitutional documents in Palestine have not been characterised by a strong separation-of-powers (“SOP”) doctrine.⁸⁹ The PLO drafts were also guilty of maintaining this tradition. The decision to keep its military structure with no separation of powers, thereby making Mr. Arafat the sole leader, may have reiterated the previously established point that a constitution should be drafted to empower the ruler and not limit his authority.⁹⁰ This executive structure is similar to the constitutional framework that the British Order in Council of 1922 created.⁹¹ The said Constitution is a living example of executive domination. Despite the fact that the 1922 Constitution transformed Palestine in different ways and proved the existence of the Palestinian state as a legal entity, it was the past constitution that Palestinians should never have relied on because it was the document that focused on creating a system based on one-man rule.⁹²

of the terms of the Mandate as it takes sovereignty away from the inhabitants of Palestine. In his book, Cattán indicates that the Jewish inhabitants and the religious ones in Palestine opposed the Balfour Declaration as they believed the promise destroyed the harmony that they used to have with other Ottoman subjects in Palestine at that time. See HENRY CATTAN, *PALESTINE AND INTERNATIONAL LAW: THE LEGAL ASPECTS OF THE ARAB-ISRAELI CONFLICT* 11–21 (1973).

86. BROWN, *supra* note 3, at 67–68.

87. See PALESTINE ORDER IN COUNCIL [CONSTITUTION] Aug. 10, 1922 (UK).

88. This point was discussed by Dabed, *supra* 3, at 4.

89. *Id.*

90. For more details regarding the full structure of the PLO see BECKER, *supra* note 32.

91. See PALESTINE ORDER IN COUNCIL [CONSTITUTION] Aug. 10, 1922 (UK).

92. The mandate used the name Palestine and the government of Palestine to refer to the mandated area. See REPORT ON PALESTINE ADMINISTRATION (1922), <http://ismi.emory.edu/home/resources/primary-source-docs/1922report.pdf>. Palestine was under military administration from 1917 until 1920, as part of the occupied territory. It was taken from the Turks by the Egyptian Expeditionary Force under General Allenby who entered Jerusalem and occupied it on December 29, 1917, while the northern land was occupied only in September 1918. In September 1918, a military administration called the Occupied Enemy Territory Administration ruled the area; General Allenby was the commander-in-chief with supreme authority in the land. Sir Herbert Samuel became the High Commissioner for Palestine and exercised full power of legislation and administration. The civil administration replaced the military on June 30, 1920. It was not until 1922 that the definite constitution of the gov-

The Order in Council did not have any kind of separation of powers between the legislature and the executive.⁹³ The king delegated his powers to the high commissioner who had unlimited authority. The Executive Council was formed from:

1. The King (who delegated his powers in Palestine to the High Commissioner);
2. The High Commissioner (“HC”);
3. The Minister (no definition was provided of which minister is meant); and
4. The Executive Council (“EC”).⁹⁴

The king was to be outside Palestine while the HC and the EC shall be inside Palestine. This structure is reflected in the PLO’s design of the BL drafts. In other words, the PLO was equivalent to the king while the PA—that had to function from inside the West Bank and Gaza—was equivalent to the HC.

The British Constitution also centralized three powers in the hands of the HC. The HC was the highest executive officer, and he could act on or disregard the advice of his councillors.⁹⁵ Moreover, the full power of legislation was given to the HC, who acted freely and used his powers to adapt Palestine to radical changes.⁹⁶ Essentially, the legislation did not contain any particular principles relating to freedom of the press, freedom of association, etc.;⁹⁷ rather, the constitution made the HC the sole executive power. Mr. Arafat as the PA’s president and PLO’s executive committee chair, dominated the legislative process until 2000, and he was the sole executive and legislative power, similar to what the HC used to have.

C. *Weak Parliament v. Strong President*

The Palestinian Legislative Council could have been stronger if it knew how to face the president. The system that President Arafat had created before the PLC was elected made it very challenging for this institution, that had no antecedent, to function as intended. Most other newly created PA institutions had antecedents in pre-existing political structures—“Palestinian courts were lineal descendants of mandate-era

ernment as regards legislative, executive and judicial powers was issued. The policy that Great Britain relied on was the same one it used for its colonies. See A Brief Introduction to the Palestinian Problem, APPLIED RESEARCH INSTITUTE—JERUSALEM, www.arij.org/atlas40/intro.html (last visited Jan. 21, 2017); Michael Ruark, “Capital is the First Settler”—Palestine, Israel, Power Elite (Aug. 12, 2013) <https://michaelruark.wordpress.com/2013/08/12/capital-is-the-first-settler-palestine-israel-power-elite-1841/>.

93. See PALESTINE ORDER IN COUNCIL [CONSTITUTION] Aug. 10, 1922 (UK).

94. *Id.*

95. *Id.*

96. *Id.*; BROWN, *supra* note 3, at 62.

97. See PALESTINE ORDER IN COUNCIL [CONSTITUTION] Aug. 10, 1922 (UK).

structures”⁹⁸ and “[t]he PA presidency was based on the PLO presidency.”⁹⁹ In the case of the PLC, its structure was unique to Palestinian history and thus its legal basis was far weaker than that of any other assembly in the Arab world.¹⁰⁰ This is due to the fact that the PLC originated in the Oslo Accords, and was not an organic development of constituent power.¹⁰¹ The agreement outlined the structure of the Council, which would have limited personal and territorial jurisdiction.¹⁰² The agreement focused on autonomy only. The Israelis were anxious to avert any symbolism of statehood, and so terms like parliament, cabinet, and constitution were avoided.¹⁰³ The language of the agreement made it clear that the Council could issue a Basic Law as long as its Articles did not contradict the agreement.¹⁰⁴

The Council eventually evolved into a legislative body, the PLC.¹⁰⁵ President Arafat maintained his executive authority while surrendering the bulk of his legislative authority to the PLC.¹⁰⁶ The PLC spent the first two years defending and proving itself as more than an outcome of Oslo, and it showed that it could serve the Palestinians without relying on Oslo as the basis of its creation.¹⁰⁷ It also found itself facing a powerful president from day one of its election; it was difficult to confront the president when the basis of the PLC was different than other parliaments. President Arafat enacted twenty-three decrees regarding different matters, and objected to PLC laws the Council wanted to draft.¹⁰⁸ Rawhi Fatuh, Secretary General of the PLC, and Fatah member stated that:

The Legislative Council has performed its role well, but there have been obstacles from the Executive Authority. The Legislative Council has an independent will, because its membership believes strongly in the Council’s priorities, so we have no problems with attempts to influence it. But the Executive Authority stalls the implementation of these democratically voted recommendations and resolutions as well as the endorsement of legislation.¹⁰⁹

For the first few years after its creation, the PLC was halfway between a parliament and an oversight committee of the executive.¹¹⁰ This was clari-

98. BROWN, *supra* note 3, at 96.

99. *Id.*

100. BROWN, *supra* note 63, at 136.

101. See Oslo II, *supra* note 28, art. III.

102. *Id.* art. XVII.

103. BROWN, *supra* note 63, at 137–39.

104. See Oslo II, *supra* note 28, art. III.

105. See BROWN, *supra* note 3, at 96–97.

106. See *id.* at 80.

107. This point could be understood from the way the PLC was trying to issue a BL and from issuing Standing Orders. See BROWN, *supra* note 63, at 138.

108. BROWN, *supra* note 3, at 98.

109. *Id.* at 102.

110. PALESTINIAN BASIC LAW [CONSTITUTION] December 11, 1995, ch. 2, art. 47 (Palestine). The Council created by the Oslo agreements, which later became the PLC, was referred to in the BL as an oversight committee, as Article 47 indicates: “[t]he Legislative Council shall assume its legislative and oversight duties as prescribed in its Standing Orders, insofar as they do not contradict the provisions of this law.” *Id.*

fied by practice: Arafat did not accept the idea of having a rival in legislating laws and considered the PLC subordinate to the PLO and implicitly subordinate to the executive. This might be partially true as Law 4 of 1995, published on April 17, 1995, dominated the legislative process until the Standing Orders of the PLC were put into force.¹¹¹

The PLC started organizing its own house in 1996 by electing Ahmad Quray as Speaker. President Arafat objected to this choice; the PLC refused to select Arafat's choice of Haydar Abd al-Shafi for the position.¹¹² This interference by the president made it harder for the PLC to strengthen itself and face the executive strongly. The PLC took the initiative in drafting Standing Orders for governing the internal relationship between the PLC's committees and between the PLC and the president.¹¹³ The PLC gave itself the right to question and withdraw confidence from ministers.¹¹⁴ The executive was hardly questioned and ministers who were asked to attend sessions did not attend for questioning.¹¹⁵

The Standing Orders clarified the role of the President in enacting laws in Article (71), which states that:

A) The President of the PNA shall issue the laws within one month after being forwarded to him, and shall return them to the Council within the above period, accompanied with his comments, or justification of his rejection. Otherwise the proposal shall be considered a decree, and shall be published immediately in the official gazette.

B) If the President of the PNA returns the draft law as per the provisions of the above clause, it shall be re-discussed in the Council. Then, if the draft law has been ratified by absolute majority of the Council, it shall be considered as a law, and shall be published immediately in the official gazette.¹¹⁶

The PLC was continuously trying to break free from presidential and executive control—a task made difficult because the president would not approve any law he disliked. The Standing Orders were enforced after the PLC took the initiative to enact them without the approval of the president, which gave them different power than that which they originally were supposed to have in 2000.¹¹⁷ Arafat and his cabinet considered them documents to govern the internal issues of the PLC only.¹¹⁸

This issue was one among many that the PLC faced. The PLC did not want members of the PLO Executive Committee ("EC") to attend the Council's session. For Mr. Arafat, the EC members were supposed to be in the meeting of the PLC, and the EC committee had the right to be part of the PA institutions. This attitude was supported by Article 3 of the Election Law of 1995, which stated that the PLC members would be

111. BROWN, *supra* note 3 at 80–81, 100.

112. *Id.* at 99.

113. *Id.*

114. *Id.*

115. *Id.* at 107.

116. PLC STANDING ORDERS 2003 Title 1, ch. 1, art. 71 (Palestine).

117. BROWN, *supra* note 3, at 100.

118. *Id.* at 99–100.

members of the Palestinian National Council (“PNC”), but not the opposite.¹¹⁹ It was a status that not many parliamentary members in the world would have.¹²⁰ The PNC did not like the fact that the PLC members could obtain this status while the PLC itself could not—it was clearly an unfair treatment from their point of view.¹²¹ From a constitutional standpoint, Arafat’s actions complicated the relationship even more and made the PA/PLO relationship more ambiguous. In making this decision, however, the PA/PLC institution was marginalized in favor of the PLO/PNC institution. The PLC members did not want to comment more on this matter, as no one wanted his loyalty to the PLO to be questioned.¹²² This issue did not seem urgent, as most PLC members were either individuals or Fatah members that supported the PLO.

The PLC, however, wanted to be stronger than other Arab parliaments. Therefore, an on-going competition between the PLC and the president persisted. It is natural to have competition between the executive and the legislative; each will try to protect itself and its interests and this competition is acceptable as long as it is democratic.¹²³ The BL was the victim of this competition, and it was ignored for almost five years while awaiting the president’s approval.¹²⁴

The PLC lost the battle as well, as it was significantly weaker than the president. Due to the lack of a previous Palestinian legislative arm, the PLC had to rely on other Arab parliaments and how those countries had drafted their respective constitutions. The drafters of the BL—with a majority of members educated in Arab countries—relied on the Egyptian and the Jordanian constitutions due to their shared history and the president’s decision of 1994.¹²⁵ Jordan and Egypt updated their constitutions, but when Palestinian drafters looked at their constitutional history, they looked at the outdated versions on these documents. The Arab documents that Palestinians relied on found their way through the Arab world when most of them were colonies under the British or French. The best example of this is the British Constitution of 1922.¹²⁶ Indeed:

[Britain], historically without written constitution, [is considered responsible for drafting most of the constitutions that governed its post-colonies, it] encouraged the codification process in the ex-colonies, even before independence, and helped shape written constitutions for territories under its mandate, such as was the case of Transjordan (the Basic Law of 1923 and 1928, and the Constitution

119. See Election Law, Law No. 15 of 1995 Dec. 7, 1995 Ch. 1, art. 3. (PNA).

120. See BROWN, *supra* note 3, at 96–103.

121. *Id.* at 99–103.

122. See *id.*

123. Abu-Amr, *supra* note 34, at 94.

124. BROWN, *supra* note 3, at 73.

125. See *id.* at 70–74.

126. See PALESTINE ORDER IN COUNCIL [CONSTITUTION] Aug. 10, 1922 (UK).

of 1947), and Palestine under British mandate (the Palestine Order in Council of 1922).¹²⁷

Therefore, constitutions that were formulated under the British influence, and particularly the previously discussed 1922 Constitution, should have been viewed as examples of how not to write a constitution, not as templates to be adapted. The role of the people in the process is disputed, as is whether these documents were actually drafted to serve them and not the political elite in the country. The right balance between the authorities was absent. Brown summarizes this in what he calls “[t]he history of Arab constitutional documents,” splitting it into three periods:

In the 19th century, regimes ruling much of the Arab world experimented with written constitutions in response to fiscal and international crisis. In the first half of the 20th century, newly independent Arab states issued written constitutions in order to affirm their sovereignty. And in the 1960s and 1970s, constitutions became ideological manifestos for self-styled revolutionary regimes.¹²⁸

The two examples of such Arabs constitutions would be the Jordanian Constitution that governed the West Bank after 1948 and the Egyptian Constitution that governed Gaza after 1948—both governed Palestine and both were used in the BL’s drafting.¹²⁹ At the legal and administrative level, Gaza came under the control of the Egyptian army after its entry into Palestine on May 15, 1948.¹³⁰ Egypt was not that interested in applying its law in Gaza,¹³¹ but instead followed the same laws that the mandate enacted and practiced as a belligerent occupation since Egypt never annexed Gaza or claimed sovereignty over it. The Egyptian administration continued to uphold the law in effect at the time of its accession to control, as it considered Gaza to be part of Palestine. A governor was appointed by the Egyptian cabinet in June 1948 and had to follow the Egyptian Ministry of Defence.¹³² The Egyptian role in Gaza was a way of maintaining the existence of the state and the sovereignty of Gaza with the Palestinian people.¹³³ During the Egyptian control of Gaza there were two constitutional documents: the Basic Law of 1955 and Constitutional Regime of 1962.¹³⁴ A follower of the documents can easily observe the lack of individual freedoms in both of them.¹³⁵ The 1962 constitutional

127. Asem Khalil, *From Constitutions to Constitutionalism: an Opportunity for Arab States, Not a Paradox*, 6 OSGOOD HALL COMP. RES. L. & POL. ECON. RES. PAPER 2, 8 n.18 (2010).

128. Nathan Brown, *Regimes Reinventing Themselves: Constitutional Development in the Arab World*, in CONSTITUTIONALISM AND POLITICAL RECONSTRUCTION 47, 49 (Said Amir Arjomand ed., 2007).

129. BROWN, *supra* note 3, at 59–74 (discussing the Jordanian and Egyptian influence on the Palestinian BL).

130. Thomas Mayer, *Egypt’s 1948 Invasion of Palestine*, 22 MIDDLE E. STUD. 20, 20 (1986).

131. See generally *id.* (detailing the history and politics behind Egypt’s 1948 invasion of Palestine).

132. See generally John Quigley, *The Oslo Accords*, 12 AM. U.J. INT’L L. & POL’Y 285, 290 (1997).

133. See generally *id.*

134. See generally *id.*

135. AHMAD AL KHALIDI, AL OSOS AL-DOSTORIA LNZAM AL SYASE AL FALSTENI 13 (2004) (source on file with author). It is argued that the documents lacked the ability to provide the citizens with the minimum protection for their human right. For example, in Constitutional Regime Article 13, individual property is protected and no one has the right to take it away unless it contradicts the public

system, however, made the executive more dominant than the previous document, giving executive authority over an executive committee and a high-ranking officer, the general administrative governor.¹³⁶ The Constitutional Order of 1962 in Articles (35), (38), and (39) made the Legislative Authority merely a follower of the executive, as the governor had the ability to ask for legislative meetings while the legislature did not have the right to organize its own meetings, and if it did, the meeting was considered invalid.¹³⁷ In addition, the executive had the right to interfere in the work of the legislature while the reverse was not allowed.¹³⁸

Similarities to the mandate rule can be found in the Egyptian control over Gaza in two main areas. The first was in the role of the administrative governor, who was to control the area as the head of the Executive Council.¹³⁹ The Council was made up of the heads of different departments and organizations bereft of any Palestinian input.¹⁴⁰ Thus, the Council was an Egyptian innovation. Moreover, there was no standard operating procedure between the executive and the legislature. The Council of the Legislature was composed of the members of the executive, in addition to a number of representatives from the population of Gaza.¹⁴¹

Like the situation in Gaza, the Jordanians enacted the Constitution of 1952 in which the Jordanian Parliament was elected with representation from the West Bank.¹⁴² The Constitution of 1952 was amended four times: in 1955, 1958, 1960, and 1965,¹⁴³ and the Jordanian Parliament was composed of two chambers for terms of four years each. The king nominated the members of the upper house (*Ayan*) while the people elected the parliament (*Nawab*).¹⁴⁴ Palestinians were represented in both houses; the prime minister was always Jordanian.¹⁴⁵ As was the case in the Order in Council of 1922, executive authority was in the hands of the king and his ministers. The Jordanian regime is a hereditary monarchy. For Gaza,

interest. The public interest is left open; thus any argument by the authority regarding public interest will be a valid one.

136. BROWN, *supra* note 3, at 65–66.

137. See Jamal Abd al-Nasir, *Republican Decree Announcing Constitutional System of Gaza Sector*, March 9, 1962, 17 MIDDLE E.J. 156, 159 (1963).

138. Haneen Mohammed Akram Hejab, *The Role of The President in The Palestinian Legislative Political System, Comparative Study*, AN-NAJAH J. 1, 20 (2011), <https://scholar.najah.edu/content/role-president-palestinian-legislative-political-system-comparative-study-prepared>. (Arabic).

139. Abd al-Nasir, *supra* note 137, at 157–58.

140. *Id.* at 168; see BROWN, *supra* note 3, at 65–67.

141. Abd al-Nasir, *supra* note 137, at 158–59; BROWN, *supra* note 3, at 65.

142. MAHLER, *supra* note 47, at 68–71. West Bank was part of Jordan's political system from 1948 to 1967. *Jordan Annexed West Bank After 1948 War*, PALESTINEFACTS.ORG, http://www.palestinefacts.org/pf_1948to1967_jordan_annex.php (last visited Jan. 21, 2017).

143. See THE CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN Jan. 1, 1952, Official Gazette No. 1380 of 4/5/1958.

144. *Id.* It is the same system as in the Ottoman Constitution of 1876. THE OTTOMAN CONSTITUTION, PROMULGATED THE 7TH ZILBRIDJE, 1293 Dec. 23, 1876.

145. MAHLER, *supra* note 47, at 68–71; see THE CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN Jan. 1, 1952, Official Gazette No. 1380 of 4/5/1958; *The Tragedy of Palestine*, THE HASHEMITE KINGDOM OF JORDAN, http://www.kinghussein.gov.jo/his_palestine.html (last visited Jan. 20, 2017).

the 1922 British Order in Council was never abolished and the idea of a one-man authority shaped the mentality there more than in the West Bank.

Such constitutions affected the mentality of the Palestinian drafters that used to be governed by them in times of political instability, where emergency laws had to be used by these constitutions. Thus, the Palestinians never enjoyed the good parts of such constitutions, as these documents were always used as an oppressing tool against them.

Furthermore, most of the Arab constitutions can be described as “emerging constitutions,” which are often born in times of crisis and in response to a total or partial breakdown of the state.¹⁴⁶ Unfortunately, even if Palestinians used the Arab versions that were amended before the Arab Spring—as Brown indicates in his work on the Middle East—the goal of having constitutions that aim at limiting and restraining political authority has generally been of secondary importance.¹⁴⁷ It seems that the Arab world has stood aloof from ensuring limits over the executive arm of government, even failing to indicate how best to ensure political accountability. Most of the documents that Arab countries, and in particular the Gulf states, drafted after the initiation of Saudi Arabia’s Basic Law, followed the same path. These states even avoided the term “constitution” and were satisfied with the term “Basic Law.”¹⁴⁸ Their intention was to write documents without taking into consideration whether they could only be used for a certain time, or could function as long as there was no collapse in the system. In contrast to Western countries, such as the United States, where constitutions are given an almost divine and eternal precedence, in the Arab world they are often viewed as a short-term political stop gap. Consequently, they often cause a degree of uncertainty in the political system.

The Palestinian people should have been protected in the Constitution from any authoritarian ruling that could affect their rights or their fundamental freedoms. Sadly, the drafters relied heavily on the Egyptian Constitution of 1971¹⁴⁹ and the Jordanian Constitution of 1954. The Egyptian Constitution was abolished after the Arab Spring, and the Jordanian Constitution is under review. The PLC wanted a different democratic state and a different style of legislative arm, but by relying on such examples, the content might have been affected.

146. Ebrahim Afsah, *Constitution-Making in Islamic Countries—A Theoretical Framework*, in CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 475, 477 (Rainer Grote & Tilmann J. Röder eds., 2012).

147. See Brown, *supra* note 128, at 66.

148. MAHLER, *supra* note 47, at 87. Saudi Arabia drafted a constitution in 1992, and then Qatar and Oman followed its path by drafting their own. For more details regarding this matter see BROWN, *supra* note 63, at 59–61 and MAHLER, *supra* note 47, at 85–89.

149. THE CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT 1971; see MAHLER, *supra* note 54, at 130–132 (discussing the shortcomings of the Palestinian BL).

IV. AN IMPOSED CONSTITUTION AFTER ALL

All the previous constitutions that governed Palestine were written by non-Palestinians to govern Palestinians: the Ottoman Constitution, the British Constitution of 1922, the Egyptian Constitution 1962, and the Jordanian Constitution of 1952. The unique aspect of the BL was that it was drafted by the PLC, a Palestinian elected body; however, in 2003 this was changed due to the interference of international actors. Thus, the BL became a partially non-Palestinian creation. While this action might not have been the fault of the drafters, it showed that once an imposed constitution, always an imposed constitution.

Under international pressure, the BL was forced to undergo amendments, most significantly with respect to the addition of a prime minister position. The trigger for this international pressure began when President Arafat faced pressure from the international community, particularly the United States, after the failure of the Palestinian-Israeli negotiations leading to the events of the second Palestinian uprising (*Intifada*). The international community placed many financial restrictions on Palestine, chief among them the refusal to grant aid as long as the president was in control of policy and security. In addition, Israel refused to pay Palestinian tax revenues unless the power of the president was effectively checked. Any international intervention that interferes in a country's constitution is by definition an unconstitutional act,¹⁵⁰ as the constituent power is completely bypassed even if the intervention had the constituent interest at heart. A country's constitution is in many ways a nation's soul and it needs to be revived from within. The international community should perhaps have facilitated an opportunity for the Palestinian people to have a referendum.

Thus, the only way to save his position and the PA was for Arafat to accept the conditions of the "Road Map," a policy document presented to Palestine by the international community.¹⁵¹ The first condition of the Road Map was the appointment of the first Palestinian prime minister, Mahmud Abbas (also known as Abu Mazen).¹⁵² The United States and Israel demanded that Arafat be neutralized in the Road Map process, claiming that he had not done enough to stop Palestinian attacks against Israel while in power.¹⁵³ The United States refused to release the details of the Road Map to the public until a Palestinian prime minister was in

150. See *Unconstitutional*, BLACK'S LAW DICTIONARY (10th ed. 2014).

151. The Road Map was presented by a group known as the Quartet, which included the representatives of the European Union, Russia, the United Nations, and the United States. It suggested a permanent two-state solution and was published on 30 April 2003. See *A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict*, U.S. DEPT STATE (Apr. 30, 2003), <https://2001-2009.state.gov/r/pa/prs/ps/2003/20062.htm>.

152. *Id.*

153. See Chris McGreal & Ewen MacAskill, *Bush to Publish Road Map to Peace*, GUARDIAN (Mar 14, 2003, 10:29 AM), <https://www.theguardian.com/world/2003/mar/15/israel>.

place. Mr. Abbas was appointed on March 19, 2003, clearing the way for the release of the details on April 30 of that year.¹⁵⁴

The amendments proved that the Palestinian peoples' was not the major concern when it came to redrafting or amending their constitutional document. Effectively, "it was the will of the main players in the Palestinian-Israeli conflict: the PLO and its leadership; the internal Palestinian leadership of Gaza and West Bank; Israel, the occupying power; and the international community, namely the donor countries."¹⁵⁵ In 2003 it was mainly the will of the international community and Israel. The BL was amended again in 2005, but without major changes to the actual text this time it was amended by the PLC like any other normal law.¹⁵⁶

V. ALWAYS AN EXECUTIVE DOMINATION

Dividing the powers between two executive heads in 2003 was a unique case in the Palestinian constitutional history, as the Palestinian leadership used to have a sole leader in charge for a long time. Thus, using constitutional heritage may have blocked the constitutional development. By adding the prime minister position, the political system that used to be parliamentary according to Article (5)¹⁵⁷ of the BL evolved into a semi-presidential system. This created a system that, in a politically unstable environment, causes political conflict between the president and the prime minister. If they cannot work together, then one of them will be stronger and overshadow the other. In 2003, Mr. Arafat overshadowed Prime Minister Mr. Abbas.¹⁵⁸

Ironically, when Mr. Abbas was elected as the Palestinian president in 2005, he exerted the same pressure upon the prime minister in 2006 that he had faced from Mr. Arafat just a few years prior. The PA faced major change when Hamas won the parliamentary elections in 2006.¹⁵⁹ The party had a different political agenda than the Fatah party, the PLO, and the president. The semi-presidential system, that combines an elected president, prime minister, and a parliament, put Mr. Abbas with a PM from Hamas and the majority parliament from Hamas.¹⁶⁰ The crisis reached its peak in 2007.¹⁶¹

154. See Greg Myre, *Arafat Formally Names First Palestinian Premier*, N.Y. TIMES (Mar 19, 2003), <http://www.nytimes.com/2003/03/19/international/middleeast/arafat-formally-names-first-palestinian-premier.html>.

155. Dabed, *supra* note 3, at 62.

156. See *2005 Amendment to the Basic Law*, PALESTINIAN BASIC LAW, <http://www.palestinianbasiclaw.org/basic-law/2005-amendments>.

157. PALESTINIAN BASIC LAW [CONSTITUTION] Mar. 18, 2003, art. 5 (Palestine).

158. See Dabed, *supra* note 3 (discussing this and the *Resignation Speech to the Palestinian Council*, 33 J. PALESTINE STUD. 165, 169 (2004)).

159. *Geopolitical Diary: Implications of a Hamas Victory*, STRATFOR, (Jan. 27, 2006), <https://www.stratfor.com/geopolitical-diary/geopolitical-diary-implications-hamas-victory>.

160. See Dabed, *supra* note 3, at 65–67.

161. *Id.* at 69 (discussing the "Hamas coup d'état" and subsequent "Emergency Government" action).

The president and the chairman of the PLO, Mr. Mahmoud Abbas, declared a state of emergency on June 14, 2007. He dismissed the cabinet headed by Hamas Prime Minister Ismail Haniyeh. The president, according to the BL, has the right to dismiss the PM and to appoint a new one.¹⁶² Hamas vehemently opposed this and indicated that Mr. Abbas had no right to use this power. Mr. Abbas used Article (45) of the BL of 2003, which gave him the right to dissolve the government.¹⁶³

Thus, Mr. Abbas had a constitutional right to dissolve the government. Despite this right, the Legislative Council, with Hamas majority, stopped working, as many disagreed on the president's attitude.¹⁶⁴ In addition, many of the Hamas members were arrested by Israel on security grounds, which made it hard for the PLC to function.¹⁶⁵

On June 15, 2007, Mr. Abbas appointed a new government headed by independent Dr. Salam Fayyad, who had been minister of finance under the Hamas government.¹⁶⁶ Hamas, thus, gained *de facto* control over Gaza which allowed the president to continue using the BL Articles to declare a state of emergency. The Article only allows for a thirty-day-long state of emergency, during which the president has the right to appoint an emergency government without seeking the approval of the parliament.¹⁶⁷ The Article, however, does not indicate what will happen if the situation stays the same. Article (101/1) reads as follows:

The President of the National Authority may declare a state of emergency by a decree when there is a threat to national security caused by war, invasion, armed insurrection, or in times of natural disaster for a period not to exceed thirty (30) days. 2) The emergency state may be extended for another period of thirty (30) days if a two-thirds majority of the members of the Legislative Council vote in favor of the extension 3) The decree declaring a state of emergency shall state its purpose, the territory to which it applies, and its duration. 4) The Legislative Council shall have the right to review all or some of the procedures and measures adopted during the state of emergency, at the first session to be convened after the announcement of the state of emergency or in the extension session, whichever comes earlier, and to conduct the necessary interpellation in this regard.¹⁶⁸

Mr. Abbas used his right in declaring an emergency situation, repeating the same scenario that Sultan Abd Al Hamid used, allowing the use of a

162. PALESTINIAN BASIC LAW [CONSTITUTION] Mar. 18, 2003, art. 45 (Palestine).

163. *Id.* ("The President of the National Authority shall appoint the Prime Minister and authorize the latter to constitute his government. The President shall have the right to dismiss the Prime Minister or to accept his resignation and to request him to convene the Council of Ministers.").

164. *Presidential Decrees Issued on June–July 2007*, THE PALESTINIAN BASIC LAW, <http://www.palestinianbasiclaw.org/presidential-decrees/presidential-decrees-issued-on-june-july-2007> (last visited Jan. 20, 2017).

165. See NATHAN J. BROWN, CARNEGIE ENDOWMENT, WHAT CAN ABU MAZIN DO? 9 (2007).

166. See Salam Fayyad (1952–), JEWISH VIRTUAL LIBRARY: A PROJECT OF AICE, <http://www.jewishvirtuallibrary.org/salam-fayyad>.

167. PALESTINIAN BASIC LAW [CONSTITUTION] Mar. 18, 2003, art. 110 (Palestine).

168. *Id.*

police state in political crisis.¹⁶⁹ The president, in an emergency situation, will start issuing decrees, using emergency power, and utilizing military forces, though in the Palestinian case this was a policy adopted by both Hamas and Fatah against each other. This usage of emergency powers by the president became worse with the absence of constitutional text indicating what should happen after the thirty days. The ambiguous situation raises questions regarding the constitutionality of the emergency government, which has been operating since 2007. During Mr. Fayyad's emergency government, the new PM wanted to initiate real reforms and build an institutionalized state. The PM was close to Fatah but he achieved his seat in the parliament by relying on a new ideology called the "third road" (*Al Tareq al Talet*), a moderate movement that was later called Fayyadism.¹⁷⁰ Whilst serving as PM from 2007 until April 2013, he tried to save the economy and work with the president to fix the institutions.¹⁷¹ For any president, this is arguably one of the advantages of semi-presidential systems, where the PM works on developing such aspects. Ezra Suleiman makes a very relevant point explaining why this is the case.¹⁷² In certain situations, he suggests, the president might be satisfied in sharing his powers with a PM.¹⁷³ Where such instances occur in semi-presidentialism, the president might put his PM in charge of solving economic crises,¹⁷⁴ as was the role Mr. Abbas afforded Mr. Fayyad. The president in such situations waits and observes the results, then "he takes the credit for any substantial improvement in the economy[] and[] he can sacrifice his Prime Minister if the government's economic policies aggravate the crisis."¹⁷⁵ The dual executive system, therefore, has the advantage of shielding a president from trouble. Mr. Abbas did not face as much blame for the economic situation as Mr. Fayyad did, indicating that Suleiman's suggestion was correct here, as it had been when he raised it in relation to France in 1976.¹⁷⁶ Due to the mentality that executive leadership should be a solo one, Mr. Abbas' and Mr. Fayyad's differing political ideologies threw a wrench in the president's and PM's relationship: Mr. Abbas threatened to remove Mr. Fayyad from office; he resigned on April 13, 2013.¹⁷⁷ Once again, the dominant executive leadership that was inherited in the minds and the hearts of the political elite led to political deadlock—a deadlock that may endure in the new government headed

169. Dabed, *supra* note 3, at 69.

170. The term Fayyadism has been used in many academic articles. See Nathan Brown, *Palestine: The Schism Deepens*, CARNEGIE ENDOWMENT (Aug. 20, 2009), <http://carnegieendowment.org/2009/08/20/palestine-schism-deepens/3v05>.

171. See Isabel Kershner & Jodi Rudoren, *Palestinian Prime Minister Resigns, Adding Uncertainty to Government*, N.Y. TIMES (Apr. 13, 2013), <http://www.nytimes.com/2013/04/14/world/middleeast/salam-fayyad-palestinian-prime-minister-resigns.html>.

172. Ezra N. Suleiman, *Presidential Government in France*, in *PRESIDENTS AND PRIME MINISTERS* 94 (Richard Rose & Ezra N. Suleiman eds., 1981).

173. *Id.* at 111.

174. *Id.* at 119.

175. *Id.* at 121.

176. See *id.* at 135.

177. Kershner & Rudoren, *supra* note 171.

by Dr. Rami Hamdaullah. Exacerbating things, the BL cannot help mitigate any problem because the BL was drafted to empower the president and no one else.

VI. CONCLUSION

Through following the BL journey of creation, it seems that the BL contained a “gap” from the beginning, which was exploited by the president’s office. This gap originates from the time of the drafting and the mentality behind the BL’s initial creation. Crucial to the drafting mentality of the BL was the situation and position of the Arab regimes, which were considered as models at the time.¹⁷⁸ This was an era before the Arab Spring, where constitutional documents were characterized by the idea of presidential centralization of power, creating regimes that failed to serve their people. These pre-Arab Spring constitutions, exemplified in places like Egypt and Tunisia, were constitutions that enabled their presidents to enjoy unlimited powers without any real limitations.¹⁷⁹ This enabled the president to control most of the institutions in the country, usually involving a single, powerful political party to which the president belonged.¹⁸⁰ The political system of government did not help in stopping this abuse of power, and the legislature in those countries did not provide proper checks on the president. Therefore, it is important to focus on the drafting process that usually balances power at the time of drafting. The way the constitution is drafted and the body that drafts the constitution affects the way the power is going to be separated between its branches: legislative, executive, and judicial. As a result, the body that should take the initiative in drafting the constitution should not be part of the constituted powers. Instead, it should be a higher power that represents the true owners—the constituent power—of the document, which is something that Palestinians had issues with even before having the Basic Law for a variety of factors, not least the difficulty in identifying the Palestinian people.

The importance of having the constituent power drafting the constitutional document lies in the fact that a constitution is the social contract that people give themselves to organize their collective life and shape their governance structures.¹⁸¹ As a result, constitutional processes are a perfect occasion to openly express real popular sovereignty. The process through which a constitution is drafted is in itself highly significant, in particular because it is essential to ensure that new constitutional content reflects the values and aspirations of the people.¹⁸² Rules of procedure

178. Khalil, *supra* note 127.

179. Brown, *supra* note 128.

180. *Ibid.*

181. See Asem Khalil, *The Role of a Constitution in the Arab World* (Univ. Fribourg Working Paper), <http://www.freewebs.com/plhr/The%20role%20of%20the%20constitution%2026%20may.pdf>.

182. BILL PROCTOR & IKBAR BEN MOUSSA, *THE TUNISIAN CONSTITUENT ASSEMBLY’S BY-LAWS: A BRIEF ANALYSIS*, INTERNATIONAL IDEA, <http://www.idea.int/publications/tunisian-con>

should be designed to ensure that law-making bodies operate in a balanced, well-structured, professional, and systematic manner. This is particularly the case for constituent assemblies that are tasked with drafting legislation while also constructing a new constitutional framework.¹⁸³ In that context, priority is given to ensuring that the people's views are adequately represented during the process while at the same time encouraging professionalism and efficiency throughout. Only in this way can the end result reflect the collective views and concerns of the people while enjoying some form of normative legitimacy as well. From studying how the BL came to exist, this Article concludes that the first gap occurred before the actual text was written. By following the constitutional drafting of the Basic Law, it was clear that the process was not conducive to creating a limited government or achieving the goals that a constitution was hoped to provide.

This might be due to two reasons. First, the conflicting objectives behind the drafting of the BL did not help in providing a clear idea of the reason behind having such a document. From the beginning, the BL was intended to serve two different aims: the Palestinians were looking to build a state and the Israelis were looking to achieve security when signing the Oslo Accords.¹⁸⁴ When the Israelis allowed the Palestinians to have a BL, it did not occur to them that this law would function as a constitution for structuring a state. The idea for the Israelis was to have a document that could structure the newly established Palestinian Authority. In fact, Article (7) of the Interim Agreement was very clear about this. It made the agreement superior to the BL as it stated that any regulation made under the BL should not contradict the provisions of the Interim Agreement.¹⁸⁵ Even words such as "constitution," "ministers" or "cabinet" were carefully avoided to make sure that this document was not an element for the Palestinian statehood.¹⁸⁶ Therefore, for Israel, the PA with its new BL was simply a transitional regime that was designed to meet Israeli security needs.¹⁸⁷ Maybe this is why the Israelis felt that they had a say in who was forming the PLC and the cabinet after the second election in 2006.¹⁸⁸

For the Palestinians, the purposes of drafting the BL were varied, for the PLC elected in 1996, the BL was akin to having a constitution that could help in building a state. On the other hand, the PLO leadership did not want the BL to be drafted because they did not want to limit themselves to a small geographical area, governing and representing only

stituent-assemblys-by-laws/loader.cfm?csModule=security/getfileandpageid=56635/ See also <http://www.mei.edu/content/tunisia%E2%80%99s-new-constitution>.

183. Khalil, *supra* note 181.

184. Nathan Brown, *The Effort to Draft a Palestinian Constitution* 54 MIDDLE E.J. 4 (2000).

185. Oslo II, *supra* note 28.

186. BROWN, *supra* note 1, at 80.

187. ROLAND FRIEDRICH, SECURITY SECTOR REFORM IN THE OCCUPIED PALESTINIAN TERRITORIES 23 (PASSIA 2004).

188. The Israeli government objected to Hamas' win in the PLC elections and, as a result, it put financial restrictions upon the Palestinian Authority.

those Palestinians in the WBGs. Therefore, the tension in drafting the BL between the Palestinians themselves did not help in creating the document they wanted. The seven drafts of the BL by the PLO indicate the desire of the PLO to be the body designing this document, but the first reading of the BL took place by the PLC without input from the PLO. Later, in 1997, the third draft that was approved by the PLC indicated that this elected body intended to be the one in charge. The idea of drafting a constitutional document by a constituted power (*i.e.*, the PLC) indicated that this body was trying its best to prevail over the other bodies that the BL organizes. The PLC members wanted a detailed document: a document that could specify the actual role of the legislature, executive, and the judiciary—more detailed than the American constitution, but less detailed than the South African. Those attempts were shattered by President Arafat, who refused to sign the document. Thus, the Palestinians in the diaspora had nothing to do with the document in the first place.¹⁸⁹

Despite the PLC's effort to make sure it would produce a document that did not contain ambiguity, the PLC was not the body responsible for the way it drafted the BL, the PLC drafted the BL as any normal law, which affects our ability to consider this process as a completed one for drafting a constitutional document. The PLC could not object when President Arafat interfered because the PLC knew that President Arafat represented the PLO, the one that created the PA, and the PLC is part of the PA. In addition, the majority of the PLC members were PLO members and Fatah party members; they were not that strong in facing President Arafat or trying to pass the BL without his approval.¹⁹⁰ They could not even face him after the changes that President Arafat added to the document in 2002.

The second issue with the drafting process was the lack of real understanding of who the constituent power was. The Constitution, or the BL, or any name we would like to call it, should represent the people. President Arafat, the PLC, and the judiciary were powers that the BL organized; therefore, another power should have taken the initiative to draft this document if the main aim of its drafting was to be used as a constitutional document to help in the state-building process. Article (2) of the BL states that: "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."¹⁹¹

Therefore, the people are represented by the three constituted powers and each power is equally important when it comes to representing the people.

189. For further details, see Adrien Katherine Wing, 'Democracy, Constitutionalism and the Future State of Palestine' (1994) in Palestinian Academic society for the study of International Affairs.

190. BROWN, *supra* note 1, at 12.

191. PALESTINE BASIC LAW (2003).

The question was how could the PLC draft the document if the document was going to organize the PLC? Would that mean that the PLC was the true representative of the people if it takes the initiative to draft the BL because indirectly it is the people who drafted their own constitution? If being elected by the people qualified the PLC to draft the BL, then the president, as an elected individual, can also arguably be qualified to draft such a document. The PLC had no superior status to the president or the judiciary to take this initiative of drafting a constitutional document that was supposed to organize all of the constituted powers. Therefore, there was ambiguity regarding the drafting of the BL from the beginning.

In this sense, in order to say that a constitution is representing the people and drives its legitimacy from the people, then the document should be drafted to ensure that none of the authorities is taking more power than it should. It is not an easy task and usually this does not happen in the drafting process. In times of political transition, however, it is important to draft the constitutional document before the new power takes over or it will give itself authority to stay in power.¹⁹² However, if the constitutional document is drafted before the new power takes over, the old power may put restrictions on the new one. This is exactly what happened during the drafting of the BL, as the PLO (as an old and original power) wanted to put the PA and the PLC under its control and so wanted to draft the Basic Law. The PLC, as a new power, wanted to draft the BL to have more authority than it should. Due to the tension between the constituted powers, and in particular the PLC and the president (representing the PLO), and the lack of a constituent assembly, it was evident that one of the two constituted powers would prevail over the other. There is no guarantee that having a constitutional assembly in the case of Palestine would have stopped the international actors, but at least it would have stopped the president. The BL is an interim constitution regardless of the Israeli aims behind allowing the Palestinian to have it, but the way that this interim document was drafted was very weak and it allowed the executive to have more say than it should in the drafting process. Therefore, the drafting process of the BL helped in executive centralization of powers, similar to what it used to have in the past. This is something that should not be repeated in any future drafting.

192. See TAMIR MUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC IN EGYPT* 20 (Cambridge Univ. Press 2009).