

Are Palestinians Building a State?

NATHAN J. BROWN
MIDDLE EAST PROGRAM

JUNE 2010

In June 2007, after a brief civil war that split the Palestinian Authority in two, Palestinian President Mahmoud Abbas appointed Salam Fayyad leader of a technocratic cabinet. But the PA—the body that governs the internal affairs of Palestinians in the West Bank and Gaza—is no longer a united body. Fayyad’s cabinet oversees the half of the PA that administers the West Bank; the Gaza PA is under control of a Hamas-led cabinet.¹

Fayyad’s West Bank cabinet—in power since 2007 with some reshuffling—has been the recipient of an enormous amount of international support—both material and moral—and has been cast by its international backers as the kernel of a future Palestinian state. Fayyad himself, despite a refreshingly understated personal style, has encouraged such talk: a year ago, his cabinet issued an ambitious plan “to establish a *de facto* state apparatus within the next two years.”² In essence, the Fayyad cabinet’s approach is to build the administrative basis for a state rather than wait for international diplomacy to deliver one. While a diplomatic process will be necessary to turn a *de facto* state into a *de jure* one, that task will be made much easier if there is a functioning Palestinian state-like apparatus on the ground. The Bush administration gave some backing to this approach; the Obama administration has doubled down the bet on Fayyad and his program.

With the ambitious timeline almost half completed, are the Palestinians any closer to establishing a state?

Unfortunately not. In fact, they are farther. This is the inescapable conclusion based on evidence gathered during a recent visit to the West Bank, during which I was able to hold hours of conversations with Palestinian officials, activists, and observers, many of them involved in and earnestly working toward building the kinds of institutions that Fayyad’s plan depends on.

The fault lies not in Fayyad himself but in the cards he has been dealt. There was far more building of institutions under Yasser Arafat than there has been under Fayyad. It is true that many institutions were built in spite of Arafat and that Fayyad’s behavior suggests a greater respect for rules and institutions. But that is consolation only for those who mistake personalities for politics. For all his admirable qualities, what Fayyad has managed to do is to maintain many of the institutions built earlier and make a few of them more efficient. But he has done so in an authoritarian context that robs the results of domestic legitimacy.³ In the long term, neither Fayyad nor his international backers are well served by ignoring the hollow nature of the current strategy.

In this commentary, I will spell out why the admirable efforts of the Fayyad government are not leading in the direction of statehood. In exploring this terrain, it will be necessary to buck much of

the conventional wisdom about “Fayyadism” in Washington. Palestinians, by contrast, would be far less surprised by the conclusion—it is difficult to find many Palestinians who believe that continued institutional progress can be sustained without sovereignty. This is true even for those who participate in Fayyad’s program. Those who run the West Bank PA and staff its institutions—including Fayyad himself—do not see the effort as an indefinite substitute for real statehood. And Fayyad’s international backers increasingly acknowledge that the current “time out” in the Israeli–Palestinian conflict (as Thomas Friedman, one of Fayyad’s least restrained boosters, has called it⁴) is unsustainable absent diplomatic progress.

But my focus here will be less on the diplomacy and far more on the institutional realities on the ground. I have been following the institutional development of the PA since it was founded; on a recent trip to the West Bank to update my research I found that for every one step forward taken under difficult circumstances, politics in the West Bank has taken two steps taken back.⁵ The focus on Fayyad’s personal virtues has obscured a series of unhealthy political developments and mistakes honest administration for sound politics. The entire program is based not simply on de-emphasizing or postponing democracy and human rights but on actively denying them for the present. The effect of this approach—taken perhaps more out of necessity than conviction—is not merely troubling but also deeply debilitating and self-defeating.

Real Accomplishments—Within Limits

The Fayyad cabinet does have some real successes to show off. Perhaps its most impressive has been its international respectability.

International observers often miss the point of Fayyad’s program and how it presents itself to Palestinians. Fayyad is often portrayed internationally as practically building a Palestinian state instead of demanding that foreign powers deliver one. And the prime minister in Ramallah is indeed trying to approach statehood by “building it rather than ballyhooing it,” as *New York Times* columnist Roger Cohen put it.⁶ But he is hardly operating independently of international support. There is indeed a political actor that urges Palestinians to worry far less about currying favor with foreigners and instead take matters into their own hands— Hamas. Fayyad, by contrast, represents the promise that international respectability can bring—enormous amounts of assistance and far more modest if still welcome diplomatic support.

The message of “Fayyadism” is clear, and it is personal: if Salam Fayyad is prime minister, wealthy international donors will keep the PA solvent, pay salaries to its employees, fund its infrastructural development, and even put gentle pressure on Israel to ease up its tight restrictions on movement and access. Fayyad has become so indispensable to U.S. diplomacy in particular that there now seems a bizarre knee-jerk reaction to anything bad that happens in Gaza: delivering more money to Ramallah (as happened when the Gaza war concluded in January 2009 or after the Israeli raid on the Gaza flotilla in May 2010).

Fayyad and President Abbas have also presided over a renewal of security cooperation with Israel. That—and the willingness of the West Bank security establishment to crack down hard on Hamas—have led Israel to ease up on the deadening controls that decimated the Palestinian economy during

the intifada years. The results have led some Western observers into flights of wild hyperbole, such as a recent breathless article in *Slate*:

Since his appointment as prime minister of the Palestinian National Authority in 2007, following the Fatah-Hamas civil war that led to Hamas' takeover of Gaza, Salam Fayyad has completely transformed the West Bank from an immiserated backwater into a thriving, integrated society. Ramallah, the capital, where not too long ago Yasser Arafat's compound was encircled by IDF tanks, now resembles an embryonic Tel Aviv, featuring state-of-the-art office buildings, expensive boutiques and shopping malls, and ads for imported luxury goods.⁷

The more prosaic but still noteworthy truth is that the end of the intifada, Fayyad's steady hand and fiscal discipline, international respectability, the tough (and sometimes brutal) security measures, and the Israeli response have brought about a sustained economic recovery in the West Bank—still lagging behind pre-intifada levels of performance but rapidly bringing West Bank Palestinians back to where they were a decade ago.

Fayyad has other accomplishments to his credit: there is less corruption and better policing. He has even managed to implement some politically difficult measures—like getting Palestinians to pay their electricity bills.

Fayyad is impressive, but he is not alone. I have met officials sprinkled throughout West Bank PA institutions who impress me with their competence and integrity.

Yet Washington tends to make the same mistake over and over in Palestinian politics—searching for (and sometimes finding) a particular individual who has the virtues needed to lead Palestinians in the path the United States wishes at a particular time. In Washington, Fayyad is the indispensable man of the hour, suggesting that once more the U.S. leadership is confusing a useful individual with a sound policy.

Nobody I met in Palestine suffers from the same confusion. Even the most earnest officials are frustrated by the political context of their efforts—they see their effectiveness limited by the absence of sovereignty and feel that they are operating in a punishing holding pattern rather participating in an inexorable march toward statehood. And of course Fayyad himself regularly indicates that his efforts cannot succeed absent a political and diplomatic process that supports them. And that diplomatic process simply does not exist at the moment. Indeed, not even the negotiators on both sides (or would-be negotiators, since no real negotiations are underway) are fooling themselves that there is a viable process. Only among U.S. mediators is there any sign of hope that meaningful negotiations to end the conflict are likely to take place, and that hope seems born of habit more than conviction or analysis. The self-delusion might once have been charming but is now deeply harmful since it leads U.S. officials to ignore emerging realities based on an unsupportable belief that meaningful negotiations are just around the corner.

Among the few signs that the optimists seem to be able to point to is the spate of Palestinian institution building that is taking place under Fayyad's leadership. But after examining Palestinian

institutional development on the ground, I see only spotty signs of progress—and there are also profoundly worrying signs of regression as well.

Are Institutions Being Built? A Closer Look

Those who cite Fayyad's success at building institution rarely cite a single institution that has been built. Instead they refer generally to improvements in “security” and “rule of law.” (On security, they tend to concentrate on daily policing—where there has been improvement—and overlook the far more checkered record of the intelligence and security services.) There is a reason for this vagueness. There simply have been few institutions built in Ramallah since the first Fayyad cabinet was formed in 2007. Instead, the focus has been on breathing life and regularizing institutions that were built in previous periods.

In a recent trip, I focused on two areas that I have tried to follow over the past decade and a half—the legal and educational systems. The Ramallah PA has some accomplishments to claim in both areas—generally in the area of sound public administration—but those accomplishments are both balanced and, over the long run, deeply undermined by a problematic political context.

LAW

If “rule of law” in a very general way is central to the Fayyad program, then the program is not succeeding. There are positive developments to be sure, most particularly in nonpolitical cases, where courts are beginning to recover some of the effectiveness they lost during the intifada years. But allowing a partial recovery in the court system is not tantamount to building the rule of law.

More efficient and more popular courts—but continued political interference

The two most hopeful indicators in the legal realm involve the case-load of the courts. The backlog of cases has steadily declined while new cases are filed at an increasing rate. Both trends are steady and impressive; they are supported by some hiring and training of legal personnel (though the record on this count seems spottier). The decrease in the backlog indicates that courts are becoming more efficient; the increase in new cases suggests that they are becoming more popular as an instrument for resolving disputes.⁸

There is thus progress to boast of. But the Fayyad plan is far more ambitious in its lofty claims:

Government is to be based on the principles of justice and rule of law, equality and tolerance, safeguarded by clear separation of powers of the executive, the legislature and judiciary. All government authorities, agencies, departments and individuals shall abide by the law and work in the service of citizens without discrimination on any grounds whatsoever. The independence and immunity of the judiciary are constitutionally guaranteed and the law shall punish any infringement on its dignity. Crime and punishment are to be determined under the law, under which all Palestinians are equal; collective punishment is absolutely prohibited.

The problem is that many of these more general promised developments are simply not occurring. There is no separation of powers; instead there is an increasing concentration of authority in the executive branch. There is no legislative branch. Court orders have ignored; judges have bowed out of some sensitive political issues; and the independence of the judiciary is hardly guaranteed.

And despite its increasing efficiency and workload, a series of political problems still plague the judicial system:

- Personal and institutional rivalries that have plagued the legal system from the beginning of the PA (an ongoing contest between the Ministry of Justice and the High Judicial Council; debates over the role of the bureau in the Ministry of Justice responsible for drafting and publishing legislation; uncertainty over the status of the public prosecution system) are simply unresolved. Or rather each attempt to resolve them only sets off a new round of rivalries. For anyone who has been following the Palestinian legal system since the mid-1990s, there is an eerie timelessness about these institutional rivalries: like a soap opera, the specific characters change but the melodrama continues regardless, and there is no suggestion of any resolution. Not only are key actors often acting at cross purposes, but they also are often able to block any efforts at reform if they are led by an institutional rival. Judicial training, reforms in public prosecution, and sometimes even key appointments have been held up because of the divisions. The influx of international funding actually aggravates the problem, as each part of the legal apparatus jockeys against the others in an attempt to secure external financial support.
- The security services continue to act outside the law; military courts continue to try civilians by using a law issued by the PLO in exile (one that would seem to have no legitimate status in Palestinian law in the West Bank⁹); and legal observers claim that judicial decisions have often been ignored by the security services. Others fear that those targeted for security reasons have given up on the courts for certain kinds of cases (for instance, those who have lost their jobs or who find themselves periodically re-arrested by security services).
- Complaints about interference from the security services in sensitive political cases or intimidating behavior by officers in Palestinian courts continue to be the stuff of daily conversation in the judicial system.

The human rights shortcomings of the current system (frequent reports of torture, questionable detentions by security services, failure of some official bodies to respect court decisions) did attract some of Fayyad's attention a year ago. On a visit in August 2009, I heard repeated and credible claims from officials in various bodies about the prime minister's direct and personal instructions, issued with presidential support, to curb abuses.

But on my recent visit, it is clear that his effort had only partial success. Reports of the routine use of torture by the security services have diminished. I heard fewer reports of court orders being ignored. And some security services have attempted to move against political opponents by citing clear legal violations (such as weapons or money-laundering offenses) rather than political orientation as a basis for action.

The fact remains, of course, that a campaign for "security" is often synonymous with the attempt to suppress Hamas. And as a result other problems—political interference, illegal detentions—do not seem to have been addressed. Or, rather, they have been addressed—by a decision at senior levels

(the security service heads and perhaps the president himself) that the struggle against Hamas takes priority over the law. Critics point in particular to one prominent political case involving the dismissal of teachers on purely political grounds. In that case, the High Court (the judicial body that hears cases involving official actions) issued a highly questionable ruling in the government's favor.¹⁰ That decision is seen by human rights organizations and others as a precedent that will allow the political purge of the bureaucracy to proceed without judicial oversight.

Outside the judicial sector, in the broader legal system, two notable problems are emblematic of the difficulties facing Palestinian institutional development in this period: writing laws and organizing lawyers.

Legislation: Jerry-rigging a way to make law

First, the government has brought into being an ad hoc and completely unaccountable legislative process. When it described its approach on legislation, the Fayyad plan was characteristically ambitious in its goals:

The Palestinian legal framework comprises an array of laws and regulations inherited from a succession of foreign regimes—Ottoman, British, Jordanian, Egyptian and Israeli. In some cases the laws and regulations applied in the West Bank differ from those applied in Gaza. This, coupled with the fact that aspects of the legal framework are outdated, presents all manner of challenges to ensuring good governance. One of the highest priorities of the Government will be to finalize the ongoing comprehensive review of the Palestinian legal and regulatory framework. It is essential that this review and modernization of the legal framework is taken forward in a coordination fashion, sector by sector, through full consultation between all relevant government, civil society and private sector institutions.

The description of the problem is sound enough, but it completely ignores the very significant legislative accomplishments of the now moribund Palestinian parliament, the Palestinian Legislative Council. Indeed, the greatest strides in reviewing, modifying, modernizing, and unifying Palestine's legal framework were taken when there was a viable parliament (between 1996 and 2006). The process was messy, contentious, and uncertain. But it also resulted in laws that were far more solidly based, liberal in spirit, and regarded as legitimate. Since the January 2006 electoral triumph of Hamas and the arrest by Israel of many Hamas deputies later that year (paralyzing the parliament), that legislative process has come to an end.

But if the rule of law is to prevail, laws have to be written. The Fayyad cabinet has not so much developed institutions to fill this gap as it has improvised an ad hoc mechanism. That mechanism is probably about as sound a one as can be devised under the difficult political circumstances in which it operates, but it cannot be regarded as healthy institutional development or state building nor can it be used to meet the lofty goals described in the plan.

The Fayyad cabinet has tried to fill the vacuum created by the breakdown of parliament by devising a legislative process that seizes on the president's authority to issue emergency decisions with the force of law in cases when parliament is not in session. A committee of legal advisors for the various

ministries reviews (and sometimes drafts) legislation to forward to the cabinet; the cabinet then forwards legislation to the president to be issued.

The Fayyad cabinet has no good alternative to this system. But the path it has been forced to take poses severe problems. First, rather than unifying the West Bank and Gaza, every legislative step taken by the Fayyad cabinet deepens the split between the two halves of the PA (the same is true of legal measures taken by a rump Palestinian parliament that meets under Hamas leadership in Gaza). Second, the process is an administrative one that bypasses many of the steps that would be involved in a parliamentary legislative process: there is no separation of powers and little oversight; the process is generally carried out with limited public scrutiny and consultation. In a sense, an appointed cabinet that serves without the confidence of the parliament and without any constitutional basis has transformed itself into a legislative body. Third, these political problems with the process lead the cabinet to restrict its usage largely to more technical and administrative areas; it simply has been politically unpalatable to deliver the comprehensive program of legislative development and modernization the Fayyad plan promises with such an ad hoc structure.¹¹

Bar Association

Most of the international interest in Palestinian institutions focuses on governmental bodies, but there are also a host of other institutions (nongovernmental organizations, political parties, and so on) that play an important role in Palestinian society and politics. When one takes a slightly broader view of institutions, some of the blind spots in the Fayyad program become clearer. In the legal sector, the Bar Association is a potentially critical structure in representing lawyers and their perspectives, undertaking professional development, and regulating professional affairs. The creation of a unified Palestinian Bar Association was an extremely difficult task, but it was finally on the verge of completion when the second intifada broke out in September 2000. As a result of this earlier institution building process, the Bar Association's status lies between the public and the private sector—it is officially chartered and has its own law that governs its operation, but its membership consists of private individuals.

Rather than being a time of institutional development, the period since June 2007 (and the West Bank-Gaza split) has been debilitating for the Bar Association. Bar Association elections were always difficult and partisan affairs, and the Bar leadership as it exists right now is a Fatah-dominated body. But common political loyalties have hardly led to cooperation. The Bar Association remains on paper a unified body between the West Bank and Gaza, but the two halves are serving under different governments. The Gaza branch, often feeling marginalized in the past, is particularly apprehensive now because it has hammered out a working relationship with the Hamas government. This led Gaza lawyers to agitate against Bar Association elections and—lawyers that they are—a group of Gaza attorneys resorted to the Hamas-appointed High Court in Gaza to obtain an order suspending the elections. While that Gaza court order is not recognized in the West Bank, the Bar Association headquarters in Ramallah cannot force elections in Gaza. And to pursue elections on the West Bank alone would be politically difficult, because it would be seen as deepening the split.

Further, the West Bank Bar, even though it is dominated by Fatah, is still badly divided within itself. As one legal observer explained, each board member is attached to a different Fatah leader, and “there is a war in Fatah.”

For all their byzantine nature, the details of Bar Association politics do follow a clear pattern: we are witnessing the same process that occurred during the 1990s after the formation of the PA—except that it is now happening in reverse. A torturously unified body is dissolving and losing its effectiveness, driven apart by geographical and political divisions that only get worse over time.

At least in this realm, Palestinian institutions are moving backwards.

EDUCATION

The current cabinet in Ramallah has done little to “build” Palestine’s educational system. It has maintained it, however. That is not a small achievement by any means, but it is one that is sometimes hampered by—rather than a tool for overcoming—the fundamental political problems in Palestinian politics. The Fayyad plan does observe that “more than one third of the Palestinian people attend schools” but devotes only fleeting attention to the educational sector. The message of the plan seems to be that simply administering the system while making modest incremental improvements was a sufficiently challenging goal.

Perseverance

That is a very realistic attitude—and it is therefore significant praise to observe that the challenging goal of maintaining the system has been met. The Palestinian educational system has witnessed some minor improvements, but the simple fact that it operates as it always has done is a laudable achievement. Indeed, the education sector is one that has been least affected by the split between the West Bank and Gaza.

The PA split in two just a couple years after the complete enactment of a wholly Palestinian curriculum (beginning in 2000, Palestinian schools had been shifted over from the pre-existing Jordanian and Egyptian curricula to the new Palestinian one two grades at a time). That curriculum remains largely unchanged and continues to unite the West Bank and Gaza. (Hamas made very minor changes to the curriculum when it held the unified Ministry of Education from March 2006 until June 2007, most significantly increasing the number of hours devoted to religion as a subject. That change has not been reversed by the Fayyad cabinet.) Not only that, but the two halves of the Ministry of Education managed to implement a comprehensive evaluation of the new curriculum over the period of the split. That is now leading to a carefully negotiated set of minor changes with a more wide ranging set of reforms being tackled slowly, subject by subject (beginning with technology education). Fundamental changes in the curriculum in more sensitive subjects (like history, civics, and religion) will probably be quite difficult, however, since they will require coordination between the West Bank and Gaza leaderships, with their very different visions. Thus the split will likely place limits on some things that the Fayyad cabinet might otherwise wish to do.

The two halves of the ministry continue to cooperate in writing and grading the *tanjibi*, the comprehensive set of examinations that Palestinian students nervously take at the end of their high school education (the examinations cover most high school subjects and determines university admission and placement). And very quietly, the two halves of the Ministry of Education cooperate in granting diplomas to graduates. After the split, the Hamas-led Ministry of Education in Gaza attempted to have diplomas issued in the name of its minister, but it found that these diplomas

would not be recognized in the Arab world, so it has meekly accepted the necessity of having diplomas issued in the name of the Ramallah-based minister.

Politics gets in the way

The main accomplishment of the Fayyad cabinet—maintaining the functioning and the unity of the educational system—is impressive but is better seen as institutional maintenance, not institution building. And not even the education sector is immune from problems created by the political context. Most significant, the rivalry between Hamas and Fatah and the oppressive security measures taken in both halves of the PA have poisoned the politics of the teaching profession in two ways. First, both PAs—the one based in Gaza and the one based in Ramallah—have taken steps to fire teachers loyal to the rival movement. In Gaza, this was easily and legally done. When Hamas took over the Gaza half of the PA in June 2007, the Fatah-controlled unions (a civil service union and a teachers union) ordered a strike. Those who broke the strike were told that they would no longer receive their salaries (which are still generally paid by the Ramallah government as a way of claiming influence and legitimacy in Gaza). The strike eventually ended, but not before the Hamas-controlled government fired the teachers. The effects were to purge the teaching profession of many Fatah loyalists (the employees most likely to honor the strike) and to allow Hamas to hire its own replacement teachers (who are not only more politically reliable but also far less expensive because of their lack of seniority).

In the West Bank, the political purge has a shakier legal basis. Teachers sympathetic to Hamas have simply been fired in almost certain violation of the law, and the courts have closed their eyes. New teachers—or others who wish to work for the government—are required to obtain a certificate of good conduct from local security officials, and most observers regard this as a political vetting process that bars Islamists and privileges Fatah supporters.

And as with the legal sector, if our interest in “institutions” is slightly broader than simply a focus on governmental bureaucracy, we see unmistakable signs of decay. The teachers union, a structure slowly and uncertainly knit together from diverse rival structures in the 1990s like the Bar Association, is in crisis. Its longtime leader, an old-school Fatah stalwart, recently passed away, and he has been succeeded by a group of leaders who find that their affiliation with Fatah is a source of division rather than unity. Elections are difficult given the divisions in the leadership and the split with Gaza. And attempts to reform or replace the structure have failed. In my recent trip, I met with two individuals who so despaired of the union that they launched different attempts to bypass it. One such leader—on the political left—helped organize a series of grass-roots “coordinating committees” that led wildcat strikes in the 1990s. A second leader helped launch an organization with more of an Islamist coloration that aimed to be an alternative body to the Fatah-dominated union. Of its original nine founders, four are in Israeli prison, four were arrested by the Ramallah PA and released only when they disassociated themselves from the effort, and only one remained unmolested. (And he reports that the association itself remains closed despite its obtaining a court order that it should be allowed to operate.)

The U.S. backers of the Ramallah PA would likely regard the price of a crackdown on Hamas as a necessary price for Palestinians to pay. But even if that is the case, the unmistakable result is not

institution building but institutional paralysis in civil society and a marked retrogression from the Oslo years.

Palestinian authoritarianism in 2010 is different from Palestinian authoritarianism under Arafat—it is less venal and probably less capricious. But it is also more stultifying.

The Underlying Problem: Pursuing Administration at the Expense of Politics

A dispassionate analysis reveals that rather than building institutions, Fayyad's cabinet is reviving some of them and attempting to inject elements of greater competence and efficiency in selected bureaucratic locations. This is then a program of improved public administration rather than a state-building effort.

But is there any harm in the boosterism about “Fayyadism?”

Yes. The international infatuation with the effort obscures two extremely unhealthy developments, both of them tied to the schism in Palestinian politics—the effort is predicated on the denial of democracy and human rights, and it is bypassing (and perhaps even enabling) the further deterioration in Palestinian institutions that lie outside of the realm of government. The Palestinian political system is deeply troubled; Fayyadism does not address the crisis. At best it manages administration in the face of crisis; at worst it allows international and domestic actors to ignore it—for now.

AN END TO PALESTINIAN DEMOCRACY

Palestinian democracy has simply come to an end in both halves of the PA. The president's term has expired, the parliament's term is also expired, no new elections are in sight, elected local officials selectively dismissed, and local elections have been cancelled. Opposition supporters have been ousted from the civil service and municipal government and their organizations have been shuttered. Activists are detained without charges; court orders are ignored; and the broader citizenry is increasingly administered according to laws that are drafted by bureaucrats out of public view. To the extent that Fayyadism is building institutions, it is unmistakably doing so in an authoritarian context. There is no reason to associate Fayyad personally with the most egregious aspects of this new authoritarianism, but there is no way his cabinet could have been created or sustained in a more democratic environment.

I was somewhat surprised to find on my recent trip a degree of politically-generated fear on the West Bank. This should not be exaggerated—nobody could ever mistake Mahmoud Abbas's Palestine for Kim Jong Il's North Korea. Indeed, all the information on which I base my analysis was freely and openly supplied by West Bank Palestinians who still show a strong diversity in political views. But on top of a general feeling of political alienation, there is clear nervousness that the wrong kind of politics can hurt your career or, in some cases, lead to your arrest. Again, the effort on the part of Fayyad government—and at least some of its political backers—is to ensure that even repressive political measures are taken within a clear legal context (so that opponents are

charged not with opposition but for real legal infractions and are prosecuted through the regular legal system). Such a system would still be viewed as repressive by many, but at least it would be regularized and have some procedural safeguards. But it has not emerged. (One Palestinian researcher I was supposed to meet could not do so because he had been “asked” to appear at the intelligence headquarters the morning of our appointment.)

Certainly when measured against the ideas proffered by other political actors—the bloody mindedness of Hamas, the unseemly disarray of Fatah—Fayyad’s program looks preferable to many. It is likely the unattractiveness of these alternatives that explains Fayyad’s steady rise in polls of Palestinian public opinion.

But U.S. officials who take comfort in these polls are missing some other critical developments, such as the deepening despair and cynicism in Palestinian society and the corrosive long-term effects of the Ramallah government’s reputation for human rights abuses. Unpleasant surprises or political miscues in the past (such as past eruptions of violence between Israel and Hamas or Abbas’s reaction to the Goldstone report) have had severe (if temporary) repercussions for the Ramallah PA’s domestic standing. A governmental system with no organized domestic constituency whose performance is completely dependent on continuing international largesse can hardly be seen as stable indefinitely.

Ephemeral standing in the polls will be no substitute for a more deeply entrenched democratic legitimacy if (or when) the next crisis hits.

THE HIBERNATION OF CIVIL AND POLITICAL SOCIETY

The PA split and the authoritarianism of both halves has deeply infected other Palestinian institutions, even those outside of the governmental structure.

The sad conditions of the Bar Association and the teachers union described above are not unusual. Palestinian civil society, fairly robust by regional standards, is not flourishing under current conditions. Civil society organizations associated, even informally, with the Islamist camp have been closed throughout the West Bank, sometimes by Israel and sometimes by the Ramallah government. The Hamas-dominated PA in Gaza is no different: it has quietly flooded the membership of some NGOs with its own supporters and pressured others whose registration is with the Ramallah-based PA. A recent report of the Palestinian Independent Commission for Human Rights found “stark violations” of the law by both halves of the PA and observed more dryly that “it is possible to conclude that despite the presence of a modern legal framework governing the registration and operation of associations, the current political and security considerations prevail over the system of rights and public freedoms.”¹²

Those organizations that straddle the West Bank-Gaza split are particularly exposed, as the two halves of the PA try to tighten their grip in the face of political opposition. Indeed, two Ramallah-based NGOs that I visited that have active Gaza offices both reported attempts and threats by the Gaza PA to close their operations at the beginning of this month.

But it is not only civil society that is feeling the pinch. Palestine’s political parties are also in a state of crisis. Hamas is certainly in the healthiest state, but only in Gaza (in the West Bank the

organization is still in hibernation, with only a few leading members active in public view). And even in Gaza, where its dominance is so well established, the movement is still sorting out the effects of being melded with a governing political structure it had long held in disdain.¹⁵

The smaller factions (such as the PFLP and the People's Party) remain small, and the newer initiatives (most notably the Palestinian National Initiative) are not gaining much traction.

But Fatah is undoubtedly in the greatest disarray. The much-celebrated (and long delayed) party congress held last summer did little to revive the organization or calm its bitter internal rivalries. It is not clear if Fatah really remains a political party in any meaningful sense; instead it consists of an aging old guard monopolizing top positions, a middle generation that stands in the wings (and is no more unified than the old guard), and a host of local branches whose links to the center are tenuous. Fatah showed its inability to act coherently in the disastrous 2006 elections (in which it managed to tailor an electoral system to its specifications and then watch as its own disunity allowed its main opponent, Hamas, to translate a narrow popular plurality into a landslide parliamentary majority). In 2010, the movement shows no sign of having recovered. The recent debacle of local elections—in which Fatah leaders forced Fayyad's cabinet to cancel them just as candidate registration was closing because of the movement's inability to assemble electoral lists—shows the extent of the disarray. Fatah would have waltzed to an overwhelming victory with Hamas boycotting and a host of smaller parties and independents either cooperating with Fatah or putting forward meager challenges. One of the most knowledgeable observers of Palestinian elections told me: "Now we know that Fatah is incapable running against itself, let alone against Hamas."

A SET OF UNPALATABLE CHOICES

Palestinian state building under Fayyad's leadership may be inherently Sisyphean. Some institutional successes are possible but not ones that are likely to lead cumulatively to statehood. Does he have any alternatives?

One that he seems to be pursuing is careful embrace of what Palestinians refer to as "popular resistance." That phrase is vague, but is generally used to refer to a grassroots effort to resist Israeli occupation (those who advance "popular resistance" often criticize what they refer to as the "militarization" of the second intifada). It is not clear if Palestinian society has the organizational capability to sustain a nonviolent campaign, and "popular resistance" is not always synonymous with nonviolence. Thus Fayyad's steps in this area carry great risk. But they also allow him to build popularity (if not an organized political base). And he has done so by endorsing popular efforts to resist the construction of the separation wall. Fayyad also rushed in front of the campaign to boycott settlement products—not only by helping destroy settlement products in public but also (and perhaps more characteristically) shepherding through a decree-law banning the sale of such products. Fayyad's foray into populism has also extended to a series of field visits to towns and villages throughout the West Bank. The departure from the aloof political style that Palestinians have come to expect from their leaders does help boost Fayyad's popular standing. But it is not clear how he can sustain anything more than occasional forays into such activity without endangering his fairly correct relations with Israel. A wholesale embrace of "popular resistance"—even if it is steered into explicitly nonviolent forms—would be an unusually risky move for a very cautious figure.

A second, equally risky option would be pursuit of reconciliation with Hamas. But this may not be an option for Fayyad to pursue. Reconciliation remains a deeply popular idea among Palestine's people but not among its leaders (whether in the West Bank or Gaza). If it were to occur, Fayyad would hardly be able to lead the effort. Negotiations with Hamas, such as they are, remain in the hands of President Abbas and Fatah. And they are also hostage to the U.S. and European attitude—with the fiscal dependence of the PA on external support, reconciliation would have to be tolerated by donors. There is some willingness in Europe to consider the idea but to date Obama administration officials have largely continued the opposition they inherited from the Bush years. And since 2007, the terms for a likely reconciliation with Hamas have only become more difficult. At this point, Hamas seems even more reluctant to entertain proposals than Fatah. Even a PA reunited on paper would still be a divided entity that would be very difficult to manage. When I commented to a very seasoned Palestinian political analyst that “We’re no longer talking about reconciliation, we’re talking about power sharing,” he replied, “Not even that. We’re talking about limited coordination.”

And even if such a modest goal were reached, Fayyad might be more victim than victor (since he has little support in either Fatah or Hamas). At most his participation might be tolerated by both sides as indispensable to any effort to plead for the international legitimacy of a nominally reunited PA—but there is no indication whatsoever of Fayyad's interest in lending his name and reputation to such a project. (Fayyad's public support for reconciliation likely stems from a calculation that it is better politically to be on the right side of the question but there is no sign that he is interested in pursuing or participating in it.)

The third and most likely path may be for him to soldier on, satisfying himself with keeping the Ramallah government afloat, presenting a respectable image to the outside world, achieving a series of administrative and fiscal successes, and therefore holding the political system together until something better comes along. The problem with such an approach, of course, is that what comes down the road may hardly be an improvement. As has been shown time and again in recent years (most recently with the Gaza blockade), both Israel and the United States have unfortunately but unmistakably (and quite consistently) maintained policies until a crisis forces them to reevaluate. Israel does so out of a lack of alternatives, an ability to tolerate the status quo, and (for some) a conviction that the country is better served by continuously outmaneuvering rather than coming to terms with the Palestinian national movement. The United States has done so in recent years out of a seemingly blind faith in negotiations.

The cost of U.S. and Israeli inertia for the policies of both countries is that they do not readjust their strategies on their own time but only when compelled to adjust by circumstances beyond their control. The recent reconfiguration of the closure imposed on Gaza—a policy that was widely acknowledged not to be working long before the flotilla incident—is the latest example of officials scrambling to change policy only after its bankruptcy had brought it to the verge of collapse. A political misstep by the West Bank government, an eruption of violence against Israeli targets originating either in the West Bank or Gaza, an upsurge in the conflict in Jerusalem, an extensive Israeli military campaign in Gaza, or the loss of one of the two indispensable men of the moment (Fayyad and Abbas) would likely leave both countries once more desperately rather than deliberately

adjusting their policies toward internal Palestinian politics, and doing so most likely on unfavorable terms.

And the costs of political inertia are even greater for the Palestinians. If Fayyad does pursue the path of least resistance he may be harnessing the long-term fate of the PA to a U.S. leadership that has shown little ability to develop a realistic long-term strategy.¹⁴

NOTES

- ¹ It is common internationally to use the phrase “Palestinian Authority” only to refer to Fayyad’s half. That is extremely misleading, however. It misses the deep entrenchment of Hamas in the Gaza half of the PA where, in many ways, institution building has been more successful (if equally authoritarian).
- ² “Palestine: Ending the Occupation, Establishing the State, Program of the Thirteenth Government, August 2009,” http://www.mop-gov.ps/web_files/issues_file/090825%20Ending%20Occupation,%20Establishing%20the%20State%20-%20Program%20of%20the%2013%20government.pdf.
- ³ I have argued this earlier in the section “Is Fayyadism New?” in “Palestine: The Schism Deepens,” Carnegie Web Commentary, August 2009, http://carnegieendowment.org/files/palestine_schism1.pdf.
- ⁴ Thomas L. Friedman, “War, War, Timeout, War, Time ...” *New York Times*, June 25, 2010.
- ⁵ For my earlier analysis of Palestinian institution building, see *Palestinian Politics after the Oslo Accords: Resuming Arab Palestine* (Berkeley: University of California Press, 2003), and “Requiem for Palestinian Reform: Clear Lessons from a Troubled Record,” Carnegie Paper no. 81, February 2007, http://carnegieendowment.org/files/cp_81_palestine_final.pdf.
- ⁶ Roger Cohen, “Fayyad’s Road to Palestine,” *New York Times*, April 29, 2010.
- ⁷ Michael Weiss, “Palestine’s Great Hope,” *Slate*, June 8, 2010.
- ⁸ For some statistics, see the High Judicial Council’s website: <http://www.courts.gov.ps/atemplate.aspx?id=517>.
- ⁹ On the use of PLO military law and military courts, see Ghandi Rabie, *The Detention of Civilians by Palestinian Security Agencies with a Stamp of Approval by the Military Judicial Commission*, Independent Commission for Human Rights Special Report, no. 64, December 2008, <http://www.ichr.ps/pdfs/eSP64.pdf>. A Ministry of Interior official I spoke with acknowledged that the use of military courts is controversial and is in need of a clearer legal basis.
- ¹⁰ The decision was roundly criticized by human rights groups and independent observers. Political interference in the case was widely alleged, though the only direct evidence offered was the tortured logic of the decision itself. But critics also noted the changing composition of the judicial panel that issued the decision, and some close observers of the High Court believe that the tinkering was directly designed to ensure that the teachers would lose the case.
- ¹¹ There are constitutional doubts about the practice that may also inhibit its use. First, the Fayyad cabinet itself has no basis in the Palestinian Basic Law whatsoever. That problem is partly surmountable because the legislation developed by Fayyad’s cabinet is formally issued by the president, as the Basic Law requires. But more seriously, the president’s authority under the Basic Law extends only to “cases of necessity that cannot be delayed.” And on one earlier occasion, the Palestinian High Court (acting as an interim constitutional court) struck down an emergency decree-law as unconstitutional because no emergency justified it. However, despite these doubts, West Bank judges now are very much inclined to accept the ad hoc legislative process developed and treat the resulting decree-laws as regular laws. Not only are many sympathetic to the government, but even those with a more independent streak see no alternative other than moving completely outside any legal framework.
- ¹² “Report on the Freedom of Association in the Palestinian Controlled Territory,” Palestinian Independent Commission for Human Rights, <http://www.ichr.ps/pdfs/eFreedomofassociation.pdf>.
- ¹³ I examine the effects of governing on Hamas in a chapter in the book co-authored with Amr Hamzawy, *Between Religion and Politics* (Washington: Carnegie Endowment for International Peace, forthcoming).
- ¹⁴ For a gentler version of this criticism of U.S. policy as shortsighted and insufficiently attentive to Palestinian politics, see Michele Dunne’s “A Two State Solution Requires Palestinian Politics,” Carnegie Paper, no. 113, June 2010, http://carnegieendowment.org/files/palestine_politics.pdf.

NATHAN J. BROWN is a nonresident senior associate at the Carnegie Endowment and is also professor of political science and international affairs at the George Washington University. His past work has focused on Palestinian politics and on the rule of law and constitutionalism in the Arab world.

© 2009 CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE

The Carnegie Endowment for International Peace is a private, nonprofit organization dedicated to advancing cooperation between nations and promoting active international engagement by the United States. Founded in 1910, Carnegie is nonpartisan and dedicated to achieving practical results.