



# “The Contours of a Future State”

*A multi-part compendium of Palestinian Thinking  
Commissioned by the Institute of Law – Birzeit University*



2008

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## FOREWORD:

The United Nations is committed to the goal of the emergence of an independent, democratic and viable Palestinian state living side by side in peace and security with Israel and based on United Nations Security Council Resolutions. Beyond the issues addressed in the final status negotiations, there is little clarity on the constituents necessary for the formation of such a state.

The viability of all states depends on the "social contract" that is made between the state and its citizens, regulating the relationship between the state, institutions and the individual. The economic, social, cultural, judicial and legislative components for a new state emerge from institutions, the shared memory and aspirations of the people. This study is designed to contribute to shaping the dialogue about the future state, so that it may be prosperous, participative and Palestinian. It was conducted with the invaluable contributions of Dr. Asem Khalil, Dr. Nasser Abd Al-Kareem, and Ms. Reem al-Botmeh. The study has been supported by the Office of UNSCO and funded by the Norwegian Ministry of Foreign Affairs. The views expressed in this study are solely those of the author and do not necessarily reflect the views of the United Nations or the Government of Norway.



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# 1

**A Constitutional Framework of a  
Future Palestinian State**

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# **A Constitutional Framework of a Future Palestinian State**

Synthesis of Leading Palestinian Thinking and Public Perceptions

Working paper presented within the context of the project:

**“The Contours of a Future State”**

A multi-part compendium of Palestinian thinking

Commissioned by the Institute of Law – Birzeit University

*Prepared by: Dr. Asem Khalil*



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## LIST OF ABBREVIATIONS

BL	Basic Law
Bureau	Financial and Administrative Control Bureau
CC:	Central Council
Charter	Palestinian National Charter
DPC	Draft Palestinian Constitution
EC:	Executive Committee
EU	European Union
HCC	High Constitutional Court
HJC	High Judicial Council
IMF	International Monetary Fund
MoF	Ministry of Finance
OPT	Occupied Palestinian Territory
PA	Palestinian Authority
PFLP	Popular Front for the Liberation of Palestine
PIF	Palestinian Investment Fund
PLC	Palestinian Legislative Council
PLO	Palestine Liberation Organization
PLO-CC	PLO Central Council
PLO-EC	PLO Executive Committee
PNC	Palestinian National Council
SSC	State Security Courts
STA	Single Treasury Account



# Constitutional Framework of the Future Palestinian State

## Synthesis of Leading Palestinian Thinking and Public Perceptions

Asem Khalil<sup>1</sup>

### 1. INTRODUCTION

#### *A. The "Anomalous" Palestinian Constitutional System*

The term 'constitution' means different things to different people. According to the material definition, a constitution refers to a comprehensive system of government while in a formal sense it denotes a specific document with special legal inviolability, which sets out the framework and the principal functions of the organs of the state. For the purpose of this report, both concepts will be used as required. Furthermore, despite the fact that written constitutions are normally associated with state sovereignty, contemporary constitutional developments prove that they may be drafted, and even enacted under conditions of occupation and therefore prior to statehood.

The Palestinian Authority (*hereinafter* the PA)<sup>2</sup> is a good example of the contradictions inherent in the role of a constitution and its place in a particular (non-state, pre-state or quasi-state) legal system. At present, there is a Basic Law (*hereinafter* the BL), which is enforced in the territory under PA control, and a Draft Palestinian Constitution (*hereinafter* the DPC) is also circulating.<sup>3</sup> At the same time, the 1968 Palestinian National Charter (*hereinafter* the Charter) remains, formally, in force, although considered by many as 'old fashioned' since it renounced the armed resistance as a means to national liberation (Nofal 1997, 87). Furthermore, the Palestine Liberation Organization (*hereinafter* the PLO) unilaterally proclaimed the establishment of a new independent state called the 'State of Palestine' in 1988 but this did not lead directly to the realisation of statehood. Therefore it remains an aspiration and future objective as the Israeli occupation persists and the 'State of Palestine' has still to be established. Throughout this report, reference will be made to both the BL and the DPC as these documents represent the current and the future Palestinian constitutional framework.

The first attempt to prepare a BL or a constitution followed the Palestinian Declaration of Independence in Algiers in 1988.<sup>4</sup> However, the situation changed after the signing of the Declaration of Principles (1993) and other agreements between the PLO and the Government of

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1 This report was completed in May 2007. Since then, the paper passed through a long editing process. In the meantime, many events have taken place, including Hamas' military control of Gaza and the declaration of emergency by President Abbas. Those events had direct impact on issues tackled in this report and needed to be updated, but could not be covered since this report has a different time frame. The author wishes to thank all those, who contributed to the realisation and revision of this work, mainly to Yara Jalajel, Ph.D. Candidate at the University of Sorbonne and research assistant at the Institute of Law.

2 It is commonly used with the term 'national' in between the two words, relating to the temporary nature of its authority over the Palestinian national project. Without prejudicing this concept, this paper will use the term PA.

3 The BL endorsed by the President of the PA in 2002 was adopted by the Palestinian Legislative Council (PLC) in 1997. The version adopted by the PLC was prepared by its legal committee, who took on the task from a PLO committee. As for the DPC, it was prepared by a special committee nominated by Yasser Arafat in his capacity as Chairperson of the PLO Executive Committee.

4 More precisely, the first BL was drafted following the establishment of an 'All-Palestine Government' in 1948. However, it was only following the Declaration of Independence of the State of Palestine that a BL was needed to regulate the newly declared state. Therefore, no further reference will be made to the 'All-Palestine Government' related BL.



Israel (commonly known as the Oslo Accords). Therefore all subsequent efforts to prepare a BL were intended to regulate the PA, acting in its institutional capacity as a temporary body with authority to administer a limited part of the occupied Palestinian Territory (*hereinafter* oPt) until a final agreement is reached with Israel. The first drafts of a BL started to circulate immediately after the establishment of the PA.

Following the first legislative and presidential elections (1996), changes needed to be made to the draft BL. The legal committee of the Palestinian Legislative Council (*hereinafter* the PLC) had taken a central role in shaping the final version of the draft BL that was approved, almost unanimously, by the PLC in its third reading (Law No.1/96) on 2<sup>nd</sup> October 1997. Five years later, the President endorsed the BL (on 29<sup>th</sup> May 2002), which came into force on 7<sup>th</sup> July 2002. The reasons for the delay vary according to the authors (Khalil 2006b, 216-221). The official reason given by President Arafat is that the adoption of a BL is a matter for all Palestinians to consider and not only for the PLC (Milhem 2006, 129).

All laws, regulations and decisions that were in force in the oPt prior to the establishment of the PA remain in force, unless they are incompatible with the BL (Article 119) or until they are amended or repealed (Article 118): the procedure for amendment of BL is by a two-third majority vote in the PLC (Article 120).

According to the provisions of the BL, it shall only apply during the interim period and may be extended until a new constitution of the State of Palestine is enforced (BL, Article 115). In preparation for statehood, different drafts of the DPC were prepared by a committee nominated by President Arafat in 1999. The first DPC was finalised in 2001 and the second and third drafts in 2003.<sup>5</sup> It shall be noted that drafting a constitution for Palestinian statehood was one of the Palestinian obligations under the 'Road Map'.<sup>6</sup>

Mahmoud Abbas was inaugurated as the first Palestinian Prime Minister following amendments to the DPC in 2003, but resigned less than six months later, following disagreements with the President on matters relating to his constitutional powers and, according to some analysts, for political visions (Al-Masri 2003, 20). Ahmad Qurei replaced him as Prime Minister and remained in this post during Abbas' Presidency. In both cases, the issue of power relations between the President and the Prime Minister remained an internal party political issue.<sup>7</sup> It was only after *Hamas'* victory in the 2006 elections that these constitutional issues, related to the institutions and processes of governance, surfaced again. This time, fundamental issues such as the right of the President to call for a referendum or early elections; the limitations of adopting decree-laws; the separation of powers between the President and the Office of the Prime Minister, mainly with regard to control over the security forces; and the controversial adoption of a law establishing a Constitutional Court were widely debated in public and became the focus of inter-party dialogue.

## ***B. Preliminary Methodological Notes***

This paper will look at leading Palestinian thinking and public perceptions on the following: The relationship between the three powers of state; different perceptions of the principle of the 'separation of powers' in Palestinian literature, including the potential separation between the PLO and the PA;

5 Annex 4 of this paper will outline the similarities and differences between the BL and the DPC concerning the topics discussed in this report.

6 A Performance Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, published 1 May 2003.

7 See for example parts of the speech delivered by Ahmad Qurei to the PLC on 26/10/2005: *Majallat Ad-Duwwan Al-Fala - awqa*, 65, 137.

- The systems, which create, amend and enforce laws such as the PLC and the judiciary;
- The basic rules, which govern public finances including a presentation of the main principles included in the BL and DPC and also the reform process; and
- The degree to which normative orientation (secular/religious) should direct state formation, institution building and the application of law.

This report provides a structured synthesis of leading Palestinian thinking, including public perceptions on one of the core elements of the state: the constitution. This report, however, contains a number of methodological gaps, which will be explained below:

*First*, it is important to mention that the thoughts and positions of the so-called Palestinian 'elite' (e.g. PA and PLO officials, academics, representatives of civil society and others, who influence public opinion) as represented in this paper do not necessarily reflect the perceptions of Palestinian society as a whole. As recent public opinion surveys and studies have shown, there is a gap between what the 'elite' thinks and what the public thinks,<sup>8</sup> while recent political developments (following the 2006 elections) have shown that the 'elite' may not be the only section of Palestinian society to influence the constitutional shape of a future State of Palestine.

*Second*, it will therefore be necessary to make selective reference to publicly available data, such as public opinion polls, party political charters, programmes and discourses and also points of view published in newspapers. Due to the volume of information and reporting timeframe, the researcher focused on the most relevant, influential and, in some cases, the most accessible data made available to them.

*Third*, this report is intended to objectively present the different expressions of "Palestinian thinking" on constitutional issues without commenting on the authors, the quality of the publication, or consistency of the reasoning. Some of the information presented therefore may need to be further developed and analysed, which is beyond the scope of this paper.

*Fourth*, although the issue of Palestinian statehood and related constitutional matters is of vital interest to the international community, and has also been widely discussed and debated by international academic experts, this paper focuses primarily on Palestinian perspectives. Therefore only minimal reference will be made to the contributions of non-Palestinians.<sup>9</sup>

*Fifth*, not all topics related to the constitution have been discussed or debated in equal measure. For this reason, some important but sensitive discussions, such as the role and purpose of a DPC under continuing occupation and prior to statehood, have kept a very low public profile. This could be said to reflect the overall preoccupations of the general public, regarding the constitutional role of the PA itself. However, other issues such as the role of religion and *Shari'a* (Islamic law) in particular, have been widely debated. This imbalance will inevitably be reflected in the structure of this synthesis.

### ***C. Typology of Constitutional Contributions***

It is possible to distinguish between two kinds of contributions to the discussion on a constitutional framework, which will be reflected in this report:

<sup>8</sup> See for example the Opinion Leaders' Survey published by the Birzeit University Development Study Programme on 28<sup>th</sup> February 2007. <http://home.birzeit.edu/dsp/opinionpolls/elitepoll/>.

<sup>9</sup> For example, Nathan Brown and Katherine Wing, who worked as expert consultants on the drafting process of the BL and the DPC respectively.

## 1) Talking about the PA while Imagining the State

The discussions on the constitutional framework of the PA (taking into account the provisions of the BL and limitations of the Oslo Accords) indirectly contribute to an understanding of how a future State of Palestine would look. This approach can be considered pragmatic and realistic. Some look at the existing institutions and *imagine* the possible political system of their future state (Kubba 1997, 97) while others look at the PA and simply *see* the state (at the same time seeing Palestine as an existent reality under occupation or *in status nascendi*).

Conversely, when talking about a 'state', reference is made to a totally different experience from that of the PA with its limited powers, jurisdiction and related uncertainties of the interim period: indeed the BL was enacted for the interim period although there is always the possibility that the transitional becomes permanent.

Despite this, when discussing issues of Palestinian statehood, the particular experience of the PA needs to be considered not least because the nascent PA institutions and laws will most likely serve, at least in the beginning, as the new institutions of a new Palestinian State. The state will not start *ex nihilo* (from nothing) because it will inherit existing institutions and laws (Atalla 2003, 47), some pre-PA legislation that remained in force during the interim period and also PLO documentation and institutions. In fact, the BL created constitutional and political arrangements, as well as interests and institutions that will be difficult to dislodge (Aruri AND Carol 1994, 8). The State of Palestine, therefore, will necessarily absorb these preceding institutions whilst abiding by the legal and political texts produced by them.

In fact, each historical/political period has impacted on the development of the Palestinian legal system. The tendency of the legislator was always to modify and adapt the legal system to fit with the new system. There has never been a complete rejection of previous laws and regulations but rather their maintenance until amended by new ones. In 1994, PLO Chairman Yasser Arafat issued Decree No. 1 - "Continuation of the Laws, Regulations and Rules Operative in the Palestinian Territories (West Bank and Gaza Strip) before and since 5<sup>th</sup> June 1967" - until such time as it may be replaced by a unified PA legislation. The same technique was adopted by the BL (Article 119) and also the third DPC (Article 187), thus linking the current PA with a future Palestinian State.

## 2) Imagining the Palestinian State tout court

This group of contributions can be further divided into two main subgroups:

### **First, the Palestinian State in abstract**

The state here is seen as an *a-historical* event that either already exists (without knowing where it is precisely) or which ought to exist (without deciding where it should be). This is an image of the state based on religious, moral, or cultural considerations, or on international law and legitimacy, or is simply a reflection of imagined or recognised 'rights'. This image is then compared, analysed and enriched by the experiences of other countries. In other words, this group sees other states and then they imagine how the Palestinian State looks or shall look like, irrespective of the facts on the ground. This is the vision of both the Charter, successive resolutions of the Palestinian National Council (*hereinafter* the PNC) and several declarations of Palestinian leaders. This vision of the state clashes with realities on the ground.

### **Second, the 'official' version of the state**

The contributions of this group stem from a particular text (the DPC) drafted in response to the PA's international obligations under the 'Road Map' peace plan: the first DPC was completed

in 2001 and draft two and three in 2003.<sup>10</sup> The publication of the three drafts initiated several discussions and studies at different levels although arguments were presented according to party political affiliations (Said 2004a, 7-8).<sup>11</sup>

The most important characteristic of these discussions concerns the difference between the 'official' and 'unofficial' versions of events. The official version comes from the declarations of various PA personnel and/or from members of the Constitutional Committee, which was nominated by President Arafat in 1999, consequently leading to allegations of impartiality and unwarranted control by the executive (Al-Rayes 2004, 51).

For Palestinian civil society, notwithstanding the importance of PA obligations to the international community, the importance of the constitution stems from its role in determining the social contract between the state and the individual (Said 2004a, 7). The DPC, in comparison to the BL, does not introduce any substantial changes to the legal and political system under the PA. However, the issues that were left untreated in the BL find a place in the DPC.<sup>12</sup>

Besides, the DPC contains articles that will presumably be enforced before its final ratification; such as regulating the adoption of the constitution (Article 185). This anomaly was outlined by observers, such as Brown (2003b, 72) Al-Rayes (2004, 51) and Khalil (2006, 296).

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10. One is conscious of the absence of the legal value of such a text before its adoption; however, nothing forbids treating the document as a text that expresses one (or more) vision(s). The DPC may provide a vision of how Palestinians (or at least the committee that drafted it) conceive the state, the way powers will be separated and the principles that will guide public institutions, and most importantly, how the new constitution would be adopted! This vision best expresses the official approach but in places is in contradiction to other approaches to a constitution, including those of Palestinian civil society and academia. The formal approach was criticised for being too concerned with the international obligations of the PA rather than with Palestinian aspirations, and also more with the needs of the diaspora than the residents of the oPt.

11. See for example the Executive Summary of the conference organised by the University of Birzeit, Development Study Programme (27<sup>th</sup> – 28<sup>th</sup> September 2003) in: *Majallat Ad-Dawlat Al-Falastiniya*, 157, 137ff.

12. These differences will be outlined throughout this report and most clearly presented in Annex 4.



## 2. DIFFERENT CONCEPTS OF THE 'SEPARATION OF POWERS'

The separation of powers is intended to avoid the concentration of power in one person or a group of persons or institutions. Accordingly, it is presented as a fundamental requirement in the construction of a democratic state. This type of democratic state has been the main objective of the Palestinian national struggle from the outset. In the Palestinian context, liberation (as self-determination) and democracy are presented as one and the same thing (Nassar 2004, 74).

Discussions on the BL and the DPC were to a large extent about the possibility of creating democratic institutions under occupation and during a national liberation process. Three main positions can be outlined here:

- For some, democracy can only be achieved under conditions of statehood and therefore not prior to it. As the PA is not a state, it is not therefore possible to achieve democracy. For this reason, President Arafat justified his refusal to endorse a BL for the PA (cited in: Milhem 2006, 141).
- Others have expressed serious doubts about the possibility to achieve democracy under occupation; however, they fully support the need to subordinate the PA to law (Khalil 2005c). This is the reason why they may support the adoption of the BL but categorically refuse a constitution before statehood is achieved (Samara 2003, 11).
- For the last group, the transition to democracy does not need to wait for statehood; it can accompany the liberation process, and democracy can be achieved under conditions of occupation. Furthermore, it can contribute to ending the occupation (Hasan 2003, 84).

The PA has been criticised for the system it presides over in the territory under its control, as reflected in the BL; indeed for some authors, the proposed BL seems likely to impose the old regime of the PLO onto the new (post Oslo) politics of the oPt. Since its establishment, fear has been raised that decades of struggle against the Israeli occupation may have to be redirected against the new PA for its undemocratic performance. Some authors have criticised the reference in early versions of the BL to the revolutionary PLO and see this provision as giving the PLO decision-making authority over constitutional concerns, including human rights (Aruri AND Carol 1994, 16).

In Palestinian discourse and writing, references to the principle of the 'separation of powers' do not necessarily reflect the concept as it is traditionally understood, i.e. separation between the three branches of government (legislative, executive and judiciary), their reciprocal control and collaboration. Indeed, when Palestinians refer to the 'separation of powers' they may be referring to a number of different issues relevant to the Palestinian political context:

- a. Separation of the PLO from PA institutions;
- b. Separation as checks and balances between the legislative, executive, and judiciary;
- c. Separation between the Presidency and the Cabinet;
- d. Separation between the public and the private spheres.<sup>11</sup>

It should be noted that the distinction between constituent power (the power to frame or amend the constitution) and constituted powers (the legislative, judiciary and executive) is (almost) absent from Palestinian thinking (as an exception, see Khalil 2006). The adoption of the BL and possible amendments shows that constitutional change was not different from any other law-making and changing acts (unless by the majority needed). On the contrary, the DPC provides for constitutional amendment through referendum (albeit not obligatory), thereby distinguishing it from the amendment of other laws.

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<sup>11</sup> Annex I of this report.

## ***A. Separation of the PLO from PA Institutions***

Since the early nineties, there has been a consensus regarding the potential impact of the establishment of the PA on the PLO; namely that the PA is not intended to, did not (Shikaki 1997, 60) and shall not (Nofal 1997, 83,) replace the PLO as the sole legitimate representative (political entity and institution) of the Palestinian people, both in the oPt and the Diaspora. However, despite the absence of discourse calling for the replacement of the PLO by PA institutions, certain facts on the ground suggest that the Palestinian leadership (regardless of their intentions) has taken the PA in this direction, as outlined below (Nofal 1997, 89; Kubba'a 1997, 73).

### ***1) The PA Challenges the PLO***

The PLO - its role, status and relation to the PA and future state - was already at the centre of debate, both during and immediately after the Declaration of Principles, and successive agreements that gave birth to the PA were signed. Authors started to consider the impact of these agreements and their authority on the PLO, describing the issue variously as a 'crossroads', the 'challenge ahead' or simply as a dilemma (Andoni 1991, Jamil 1993, Khalidi A. 1997, Jarbawi 1996).

The establishment of the PA did contribute to the regression of an already fragile PLO and its (limited) democratic processes (Okal 2005, 13). The discussions, however, were not about whether to maintain or dismantle the PLO. On the contrary, many authors expressed a need to reconstruct the PLO for a variety of reasons: to boost the Palestinian position in negotiations with Israel; to give impetus to the building of civil society institutions; and to create the necessary infrastructure for an independent state, including encouraging independent economic development (Hilal 2003).

However, four main trends have begun to take shape in the emerging system created in the oPt following the signing of the Oslo Accords: 1) a shift in the centre of Palestinian political life from 'outside' (i.e. abroad) to the oPt itself; 2) a growing conflict between the formulas governing Palestinian politics in exile and those appropriate to the 'new' situation inside the oPt; 3) a shift in the goal of demanding the right to a state on all of historic Palestine to the more 'modest' goal of recovering territory occupied by the Israelis since 1967; and 4) the end of the 'revolutionary' stage of the national liberation struggle and the political structures that accompanied it (Jarbawi 1996).

Some authors have compared the relationship between the 'inside' Palestinians and the Diaspora (and thus between the PA and the PLO) to other experiences, such as the relationship between the pre-state Jewish Agency and the State of Israel; the objective here being to encourage efforts between all Palestinians to realise their common objectives (Kubba'a 1997, 80). Others have recognised this possibility but only after the establishment of a Palestinian State (Nofal 1997, 87). In this sense, the PLO would not exhaust its role after the establishment of the state; rather its role would necessarily need to be adapted in accordance to the new reality.

### ***2) Comparing the "Council"<sup>14</sup> with the PLO system***

Interestingly, few comparisons have been made between the Palestine National Council-Executive Committee relationship, as determined through the PLO Basic System (*Nezam Assasse*), and the PLC-PA Executive Authority relationship as outlined in the BL. Similarly, few researchers have

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<sup>14</sup> Oslo Accords referred to the «Council» as the elected body to which all transferred authorities shall be exercised. For more details, see paragraphs below.

outlined the similarities in the way that the PLO and Oslo-envisaged Council separate powers between the legislative and executive branches of government.

According to Article 7 of the PLO Basic System, the PNC is the PLO's highest authority, responsible for establishing policies, plans and programmes (Attannani 2003). While the Executive Committee (EC) is elected by PNC members (Article 13), its President is elected by the EC itself. This is a system, theoretically, in which the PNC (a parliament-like institution) has primacy over the EC.

According to Article III of the Interim Agreement of 1995 (Oslo II), the Council of the Palestinian Interim Self-Government Authority (PA) is composed of the Palestinian Council and the *Ra'ies* (Head) of the Executive Authority ("The Council shall possess both legislative and executive powers"). According to the same article, the "Council shall be responsible under its executive powers for the offices, services and departments transferred to it and may establish, within its jurisdiction, ministries and subordinate bodies, as necessary for the fulfilment of its responsibilities".

One may note that Oslo's image of the PA is closer to the PLO system than the PA that actually resulted from the Oslo Accords. If compared to other state systems, the PLO Basic System and PA system as envisaged in Oslo II are similar to the Council System of Switzerland, in which the legislative power has primacy over the executive power. This contrasts with more well-known systems, such as the presidential or parliamentary system where the separation of powers is either more favourable of the executive (presidential) or where the powers must exist in an equilibrium (parliamentary).

This theoretical similarity may suggest that the Oslo Accords could have created a PA structure similar to the PLO. If the PA were democratically elected, it would gain popular legitimacy, would localise the Palestinian cause (increasingly delimited to the West Bank and Gaza Strip) and could eventually replace the PLO.

### **3) *The PA Legitimised by PLO Mandate***

After analysing the original documents of the PA and the PLO, it becomes clear that the PA is not intended to substitute the PLO unless, and until, all the legitimate rights of the Palestinian people have been realised (Al-Khalidi 1997, 49). The PLO remains the reference point for the PA. Indeed, it was possible to establish the PA because of agreements made between the PLO (recognised by the Israeli authorities as the representative of the Palestinian people) and the Government of Israel (Kubbava 1997, 73). The formation of the PA itself was agreed at a meeting of the PLO Central Council (*hereinafter* PLO CC) in Tunisia on 10-12<sup>th</sup> October 1993 (Nofal 1997, 85). The resolution entitled the PLO Executive Committee (*hereinafter* the PLO-EC) to form the PA Council and nominate the Chairman of the PLO-EC (Yasser Arafat at the time) as President of the PA Council.

It is interesting to note that the above resolution enabled the PLO-EC to choose the members of the PA Council, both from its own membership and others (either from 'inside' the oPt (West Bank and Gaza Strip) or 'outside' (in the Diaspora). This indirectly led to a potential overlapping of functions between PLO and PA institutions. The PA Election Law of 1995 and the new Election Law of 2005 did not impose any limitation on the participation of PLO personnel in either PLC or presidential elections. This meant that a person could be both, a member of the PLO-EC (thus a member of the PNC as PLO-EC members are chosen from PNC members) and the PA Council, and after the 1996 elections, a member of the PLC. This potential duplication of functions has had a negative impact on the accountability of PA personnel (Shikaki 1997, 61). This is particularly true

for the position of the PA President as in current practice he is directly elected to the position of PA President while at the same time acting as the Chairperson of the PLO-EC (Kubba'a 1997, 77).<sup>15</sup>

It should be noted that there was a discussion within the PLO concerning the composition of the PA Council, including a call for the formation of the Council from Palestinians 'inside' the oPt only. One option explored was the suggestion to rename the Palestinian Authority (as defined in the Oslo Accords) into the National Authority. Eventually, the majority of the PLO-EC decided that its members should be able to join the PA-Council (Nofal 1997, 84).

#### **4) The PLO Gradually Marginalised**

Some authors have observed that, *de facto*, the centre of Palestinian political gravity has shifted away from the PLO towards the PA (Nofal 1997, 86; Khalil 2005c). In this sense, the PA increasingly plays the role of 'state in waiting' thus influencing and shaping the Palestinian political system and institutions (Sayigh 1997, 63). The PLO presence has become increasingly symbolic (Hilal 1997, 98) as a political convenience to be utilised as required (Al-Hasan 2006, 38) and whose role is limited to the signing of agreements on behalf of, and for the benefit of the PA (Khaled 2005).

It should also be noted that there is a generalised tendency within the international community to conduct business with the PA rather than with the PLO; the most relevant example was the presentation of the Road Map peace plan by the Quartet to the PA Prime Minister (Attannani 2003).

This is viewed with suspicion and considered almost as a conspiracy by some (Kubba'a 1997, 68, 73) while others see the PA's increasing centrality as a natural phenomena commensurate with its (limited) territorial jurisdiction and administration of those Palestinians living in the oPt. For others, however, the objectives of the PLO will not necessarily be exhausted with the establishment of a state. It is not conceivable then to envisage the dissolution of the PLO prior to statehood and resolution of all outstanding issues, mainly the question of refugees (Sayigh 1997, 67).

The transference of most of the PLO institutions and leadership to the territory under PA control initiated the gradual marginalisation of PLO institutions as key departments, such as the PLO Political Department, remained outside the oPt. For some authors, this process is irreversible (Shbeib 1997, 54-55) and the PLO will never recuperate its initial role (Sayigh 1997, 66).

At the same time, the transition has inevitably been made away from the direction of a national liberation struggle and towards the process of state-building to include the administration of the population of the oPt. The Palestinian cause, which once centred on the rights of the entire Palestinian nation (including a geographically dispersed Diaspora) to self-determination, has increasingly been reduced to the question of autonomy and sovereignty over a limited territory and Palestinian population (Khalil 2005c). This is perhaps what Azmi Bishara (2007) calls the 'privatisation of the Palestinian cause', which has marginalised the rights of the refugees.

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15. If PNC members can be candidates in the PLC elections, and if PLC deputies, once elected, can become members of the PNC, it is possible to conclude that some individuals may be members of the PNC twice, one by nomination to the PNC and one after their election to the PLC. This would suggest that the overlap between the PLO and PA was inevitable and that the principle of the separation of powers has been undermined (Kubba'a 1997, 76).



To some, however, the role of the PLO remains crucial while its reconstruction and reform will guarantee the realisation of national objectives (Khaled 2005). More than a decade after the establishment of the PA, the future of the PLO remains unresolved. Despite this, discussions are ongoing in public and although the DPC does not seem to provide a coherent solution, the role of the PLO was discussed in talks on forming a National Unity Government, following the second legislative elections and the subsequent victory of *Hamas* (Attannani 2006).

For Abrash (2006*b*, 43–45), the arrival of *Hamas* in power does not only have consequences for the separation of powers within the PA itself but also for the Palestinian political system as a whole and in particular on the representativeness of the PA. In other words, the participation of *Hamas* (who are not members of the PLO) in the PA elections gives the PA institutions an increasingly representative role. For the same author, *Hamas* has always presented itself as an *alternative* representative of the Palestinian people, being a religious-motivated group rather than a nationalistic-secular PLO. The reconstruction of the PLO to potentially include religious parties such as *Hamas* and *Islamic Jihad* would primarily resolve the question of the 'secularism' of the PLO (which the two Islamic groups categorically oppose) in addition to resolving the question of quotas for these groups in the PNC (Qasem 2004, 15).

On the other hand, the refusal of the PLO-EC to endorse the programme of *Hamas* Prime Minister Ismael Haneyyeh's first government reignited discussions at the highest levels on the relationship between the PA and the PLO. The PLO-EC further criticised the lack of reference to the PLO as the sole legitimate representative of the Palestinian people (Abrash 2004*b*, 50).

### **5) The PLO-PA Conflicting Domains**

The eminent analyst, Khalil Shikaki (1997, 61) as early as 1997 suggested two areas of possible conflict between the PLO and PA: *First*, the 'ratification' of treaties, such as the 'Hebron Protocol' of 1997, which the PLC asked to review but was refused by President Arafat, who determined that it was a matter for the PLO; and *second*, the drafting of a 'nationality' law, which would have inevitable repercussions on the Diaspora (Khalil 2007) despite the fact that the Charter had already attempted to define a Palestinian. However, the participation of (West Bank & Gaza Strip) refugees in the legislative, presidential and municipal elections (thus treating them effectively as 'citizens') should not be interpreted as a renunciation of their right to return (Jarrar 1998).

Several other examples can be presented, concerning possible conflicts between the PLO and the PA:

#### **First, the BL reference to the PLO**

In earlier drafts of the BL, there was only one article in the last chapter (Al-Haq 1996, 74) in which it is stated that the endorsement of a BL shall not undermine any of the PLO's powers, mainly with respect to diplomatic representation, which some authors have criticised (Shikaki 1997, 60). This article, however, was cancelled when reviewed by the legal committee of the newly elected PLC. The BL adopted by the PLC in 1997, and endorsed by the President in 2002, did refer to the PLO but only in its introduction, in which it is stated that the PLO is the sole legitimate representative of the Palestinian people. Another example is the fact that the PA President delivers his/her oath of office in front of, *inter alia*, the PNC speaker (Article 35). This issue was regulated earlier by Presidential Decree No. 1 of 1996.

#### **Second, the endorsement of the PA laws**

All laws are endorsed by the PA President although he always signs as Chairman of the PLO-EC in addition to his function as the elected PA President. So, if the two functions can be distinguished

in practice, then it is theoretically possible to have the two functions covered by two different people in the future. In which case, only the signature of the PA President would be needed for the adoption of laws.

#### **Third, the prior approval of the PLO EC of the Election Law**

Election Law No.13 of 1995 was adopted "after the approval of the PLO-EC, in the presence of the Presidency of the PNC" (check the preamble of the law). The same procedure was applied to the adoption of Law No.16 of 1995, amending the Election Law No.13 of 1995. However, following the election of the first PLC, no prior approval of the PLO-EC was sought. This was also the case with the passing of Election Law No. 9 of 2005 and its amendments (Law No.19 of 2005 and Law No.4 of 2006). On the contrary, a new phrase was inserted into the text: "In the Name of the Arab Palestinian People". This suggests that the PLC, as an elected institution, carries the necessary legitimacy to approve laws. This vision is reflected in legislative procedures that are codified in the BL and the PLC by-laws. A contrasting position is held by Faruk Al-Kaddoumi, Head of the PLO Political Department, who wrote in a letter addressed to Mahmoud Zahhar (*Hamas*) Minister of Foreign Affairs that "...all legislations issued by the Council of Ministers or the PLC shall be endorsed by the PNC and the PLO-EC before its entrance into force".<sup>16</sup>

#### **Fourth, the PLC deputies are members of the PNC**

The above mentioned Law No.4 of 2006, which amended Election Law No. 9 of 2005, is interesting because it adds a paragraph to Article 2, which states that PLC members become members of the PNC (Kubba'a 1997, 71). This article was included in the first Election Law but surprisingly disappeared from the second one. PNC President Salim Zannoun criticised this omission in a letter (2/2/2006) addressed to President Abbas, in which he suggested that neither the PA nor PLC was 'competent' to make this decision as it relates to a sovereign decision taken by the Chairman of the PLO-EC prior to the election of the PLC.<sup>17</sup> The new Election Law (No. 4 of 2006) does not provide for PLC members to become, *ex officio*, members of the PNC. They can only become members after taking the oath, according to the Basic System of the PLO. However, there is nothing in the cited reference concerning the way the oath shall be taken.

#### **Fifth, the nomination of delegates to foreign countries**

Article 40 of the BL provides that the President is responsible for the appointment and termination of the services of the PA's "delegates to foreign countries, international organisations and foreign agencies" and "shall accept the credentials of foreign delegates" to the PA. This overlaps with various PLO priorities mainly in the Political Department. In the same spirit, the Diplomatic Law No. 13 of 2005 was adopted. Previously, two other ministerial changes also took place within the PA that strengthened the role of the PA vis-à-vis the PLO: the post of a Minister for Negotiations Affairs was created, and the Ministry of Planning and International Cooperation was divided into two separate ministries thus strengthening the position of the PA Minister for Foreign Affairs with respect to the role of the PLO Political Department (Attannani 2003).

### **6) The Consultative Council**

The DPC makes reference to a Consultative Council composed of 150 members but with no clear provisions as to its competencies or the way in which its members will be nominated or elected (as the DPC is not clear on this point). The lack of clarity concerning the process of determining its membership has led to confusion, regarding the identity and role of the Consultative Council (Al-Bargouthi 2004, 40).

16. The letter was published in *Majalat Al-Iqtisad Al-Falastiniya*, 67, 184.

17. The letter was published on: [http://www.safsaf.org/mot3aamor\\_ala\\_majles\\_watani.htm](http://www.safsaf.org/mot3aamor_ala_majles_watani.htm)

Such a body would be established in recognition of the fact that Palestinians in the Diaspora needed to be represented in the state institutions without necessarily having a determined role in the legislative process. It should be noted that in early DPC drafts, the Consultative Council was the same as the PNC, and thus indirectly referenced the PLO's most important institution (Brown 2003b, 42). This provision was viewed by some as an attempt to replace the PNC (a PLO institution) once a Palestinian State exists (Rabah AND Hamam 2004, 225). The Constitutional Committee has always denied that this Consultative Council would replace the PNC and for this reason, renamed this advisory council from 'National' (in the first draft) to Consultative Council (in later drafts).

Lingering legitimate doubts concerning the nature of this body persist as the Deputy Chairman of the Constitutional Committee (Head of the Drafting Committee, Dr. Ahmad Mubarak Al-Khalidi) called for the bi-cameral advisory system to accommodate the specificities of the PA-PLO relationship to ensure the separation of powers between the 'inside' and 'outside' Palestinians (Al-Khalidi 1997, 53).

Some authors, however, believe that the constitution should not determine or delineate the relationship between PA and PLO institutions as the PLO represents *all* Palestinians (Rabah AND Hamam 2004, 225).

### ***B. Separation as checks and balances***

The separation of powers can never be absolute as the level and degree of that separation depends largely on the type of political and legal system in use. Therefore, it could be said that there are as many different kinds of 'separation of powers' as there are political and legal systems. However, for the purposes of this paper, reference will be made to the most widely accepted understanding of the concept, which refers to the three main powers of the state: the legislative, the executive, and the judiciary.

The separation of powers should not undermine the unity of the state; on the contrary, it encompasses mutual cooperation and control (through the use of so-called checks and balances) in order to ensure the continuation and functioning of the state, and the protection of citizens from the possibility of corruption and despotism by either one person or a group (Nassar 2004, 74). The goal of consolidating a political system based on the separation of powers was primary the motivation for drafting a democratic Palestinian constitution, according to Dr. Nabil Sha'ath, Chairman of the Constitutional Committee (Kayed 2004, 30).

The constitution is presented as the most appropriate instrument to determine the margin of manoeuvrability of each power towards the others, and towards the citizens (Nassar 2004, 75), which essentially converts the issue from the theoretical to one of practical mechanisms and procedures. For this reason, Palestinians opted for the adoption of a BL to regulate and separate the three main powers although under PA limited jurisdiction.

#### ***1) Which Political System for Palestine?***

When examining the political system in the territory under PA control, there is often confusion between what it «is» and what it «ought to be». The first instance refers to the existing system of institutions and laws (mainly at the constitutional level) while the second refers to what may be best for the Palestinians. In this case, analysis is based more on political or moral judgments while in the first case, the analysis tends to be more descriptive.

Indeed, the way in which the main powers of state are separated (or not) largely reflects the kind of political system that is in operation. A 'rigid' separation of powers (i.e. the executive and the legislative are independent from each other) would suggest a presidential system, while a more flexible system of separation (based on the principle of equilibrium) would suggest a parliamentary one. The system adopted in the BL is more parliamentary (mixed with some elements from the presidential system) because the executive (excluding the President) depends to a large extent on the legislative body for its survival (Al-Rayes and Sanyoura 2004, 46).

Interestingly, the DPC defines the Palestinian political system as a 'parliamentary representative democracy' (Article 8) while the BL defines it as a 'representative democracy' (Article 5). However, the type of political system (whether presidential or parliamentary) depends on how the three main powers are organised and how the relationship between each of them is regulated. Accordingly, most Palestinian analysts define the Palestinian system (according to the BL) as 'mixed' (Al-Bargouthi 2004, 20; Al-Khalidi 2004*b*, 105). It has elements of a parliamentary system mainly in the form of a government that is answerable to parliament (PLC) and a presidential system, whereby the elected President enjoys wide-ranging executive authority but is not answerable to the PLC.<sup>18</sup>

Some authors have drawn a comparison with the French system, often called a semi-presidential system (Khashan 2004*a*, 6). However, there are major differences between the two systems mainly regarding the Palestinian Presidency of the Council of Ministers and co-signature procedures in France. Other authors describe the Palestinian political system as neither mixed nor presidential, but rather as an anomaly (Aman 2006).

## ***2) Reconsidering the Palestinian Political System***

While analysing the Palestinian political system, authors outlined advantages and disadvantages of different political systems (Al-Khalidi 2004*a*; Khashan 2004*a*; Abu Dayyeh 2007; Abu El-Ata 2007; Awad 2007). In the Palestinian context, there appears to be a correlation between the nature and form of its actual political system and its efficiency and stability (Abu El-Ata 2007, 1). Indeed there are different views on the relative merits of the existing (mixed) system, created by the BL and adopted in the DPC (Kayed 2004, 30):

- Some authors are indifferent to which type of system should be adopted for Palestine and consider that either of the existing options (presidential or parliamentary) is preferential to the perceived confusion created by these constitutional texts.
- Others are critical of the constitutional provisions that grant the President an executive role and would therefore prefer to enhance the parliamentary system (Shikaki AND Harb 2005; Harb 2004*a* & 2005). For some, the parliamentary system is the most appropriate system for the Palestinians (Samara, 2003, 12).
- The third group would prefer to enhance the powers of the President but insist on limiting the presidential mandate to two terms in office (Al-Astal 2000).

In all cases, there is almost complete consensus on the need to review the existing mixed political system, and that any new system should include better mechanisms of accountability and transparency to combat corruption and enhance the overall stability of the political system, thus positively contribute to state-building (Abu Dayyeh 2007, 5). Furthermore, the reconsideration of the Palestinian political system should address the perceived mistrust of the Palestinian populace in the existing political system (Hasan 2003, 90).

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18. For a different position see (Hasan 2004, 5).



Study and analysis of the Palestinian political system has acquired a new importance following the election of *Hamas* and consequent need to clarify the rights and duties of different institutions and authorities.

### ***3) To Separate Powers; They Should Exist First!***

It seems that the general trend in Palestinian thinking is more towards enhancing the 'parliamentary' characteristics of the political system. However, some have argued that it is not worth changing the political system in the current situation as the real problem is not related to the type of system that exists now. The problem stems from the historical origins and development of the system, in terms of its emergence, leadership, practices and societal changes over time. Indeed, any perceived weaknesses in the current system may disappear with the establishment of a Palestinian State. But ultimately, the most important point with respect to a future Palestinian political system is that it should include a clear and suitable mechanism to separate the three main powers and regulate the relationship between them (Jarbawi 2007).

Given that PA jurisdiction is limited to only a portion of the Palestinian territory and population (Abrash 2006*b*, 43), many authors have re-directed their discussion to questioning the very existence and nature of power in the PA under conditions of occupation and lack of sovereignty. They argue that before discussing which political system would be best for a future Palestine, the question of whether a system currently exists or not should be answered (Jarbawi 2007).

In 2003, the Palestinian political system changed, following international pressure, to accommodate an Office of the Prime Minister as a counter-weight to the all powerful Office of the President, inhabited at the time by Yasser Arafat. Since the election of Mahmoud Abbas as President of the PA, this trend has been somewhat reversed. For example, Presidential Decree No. 26 of 2005 concerning the reconstruction of the National Security Council or the proposition to amend the BL to include an Office of the Vice President (as stated by President Abbas to the PLC on 9 August 2005). Some authors argued that this apparent return to a more presidential style of government meant a return to instability and therefore suggested constitutional amendments to limit presidential authority, including that the President should not be directly elected but nominated by the PLC (Harb 2004*a* & 2005; Shikaki and Harb 2005). The same authors argued that change should not be based on removing powerful personalities (Harb 2004*a*, 4) but rather on creating a system that reflects a comprehensive vision of what is best for the Palestinian people.

### ***4) Emergency Regulations***

The BL expressly abrogated the British Emergency Regulations of 1945 (Article 114) and instead gave the President the authority to declare a state of emergency under certain circumstances and for a limited period of time (Article 110-114).

The DPC also added a further limitation on the President's power to declare a state of emergency: he first has to agree with the Prime Minister and also 'consult' with the Speaker of the Council of Representatives. Some consider this to be a weak provision that may undermine the possibility for oversight of the initial emergency declaration (Brown 2003*b*, 50-53). For others, the DPC provision is a step towards a more participatory process in declaring an emergency, one that limits the possibilities of misuse and manipulation by the President, despite the fact that declaring the state of emergency remains entirely in the hands of the President (Kayed 2004, 32).<sup>19</sup>

### ***5) The Possibility to Dissolve the Legislative Assembly***

<sup>19</sup> Occasionally, there is confusion between the ability to declare a state of emergency and the ability to create an 'emergency government'. There is no provision in either the BL or DPC for the latter.

The possibility to dissolve the PLC brought out the continuing debate on constitutional law issues following the recent call by President Abbas for early elections. As the BL lacked appropriate provisions, a number of constitutional issues could only be resolved either by referring to other legal documents, by comparison with other legal systems or by referring to the DPC. The legitimacy of straying beyond the BL was discussed widely in a rather politicised national debate. The main positions taken in this debate can be divided into two groups although certain variations of opinion exist within each group:

#### **First, those who believe that the President could not call for early elections**

This group bases its position on the BL, which provides for legislative and presidential elections every four years. As the BL does not impart constitutional power to the President to dissolve the PLC, he equally has no right to call for early elections.

#### **Second, those who believe that the President could call for early elections**

This group bases its position on a variety of different justifications and explanations, which can be seen as either strengths or weaknesses of this position:

##### 1. Justifications based on the BL:

- There is nothing in the BL that entitles the President to dissolve the PLC, but nothing that prohibits him from doing so either.
- The electorate is the ultimate source of authority and can be called upon to vote in times of political instability and uncertainty.

##### 2. Justifications based on provisions in legal documents other than the BL:

- The President as PLO chairman can call for early elections;
- In the absence of a clear reference in the BL, reference can be made to previous constitutional texts. For instance, the Palestine Order-in-Council and the Jordanian Constitution give this power to the Head of State.
- The political system created by the BL is a parliamentary system with an elected President, who is not formally accountable to the PLC. In parliamentary systems, the separation of powers is not absolute. There is no contradiction *per se* in giving the President the power to dissolve parliament on condition that it is provided for in the constitution or other law.

Other authors referred to Article 88 in the DPC, which gave the Council of Ministers the right to call for early elections, at the request of the President or the Prime Minister, promulgated by the President (this right, however, cannot be practiced, according to the same article, during the state of emergency). This article was criticised for favouring the executive, who may use this authority against the elected legislative council and thus potentially negates the need for the Cabinet to account for its actions to parliament (Kayed 2004, 33).

### ***C. Separation of the Presidency from the Cabinet***

The issue of the separation of powers has been at the centre of internal Palestinian discussions not only to clearly define the relationship between the executive, legislative and judiciary but also to define and separate the powers within the executive itself: between the elected President (not accountable to the PLC) and the appointed Prime Minister and government (accountable to both the President and the PLC (reference: PLC in BL Article 5, or reference: Representative Council in Parliament in DPC Article 86). However, in practice, their respective roles and responsibilities have generally not been clarified or interpreted according to the various laws and constitutional texts when conflict has arisen. The preference, in practice, has been to resolve all conflicts through

'fraternal dialogue' using the same approach of the National Agreement Document drafted by a group of Palestinian prisoners in 2007.<sup>20</sup>

### **1) Separation as Cobabitation**

The issue of the separation of powers between the President and the Prime Minister has been at the centre of debate since the amendment of the BL in 2003, which created the post of the Prime Minister (Al-Khalidi 2004a; Khashan 2004a). Following the death of President Arafat, several authors started to talk about a new era in terms of moving from a period of 'charismatic leadership' to a more institutionalised authority (Safieh 2004; Khalil 2005c). Here, reference can be made to Max Weber's three types of authority: traditional authority, charismatic authority and rational legal authority based on law (Jarbawi 2006, 87).

However, the issue of the division of powers between the President and the Prime Minister gained prominence, following the second legislative election that brought *Hammas* to power and the President's party (*Fatah*) into a minority for the first time (Abu Dayyeh 2007; Abu El-Ata 2007). The so-called cohabitation between the two parties within PA institutions has not proved easy, and the existing constitutional texts have not always been helpful in this regard (Aman 2006).

All commentators are clear about the provisions in Articles 38 and 63 of the BL concerning the exercise of the presidential executive authority. However, the office of the PA President currently has certain competencies normally assigned to a head of state. The problem is that the BL makes no mention of these, or provides for mechanisms of control over the President's exercise of these competencies (Khalidi 2004a, 5). The DPC is more explicit on this point.<sup>21</sup>

### **2) Separation of Powers as Partition of Gains**

Following the 'Mecca Agreement' in 2007,<sup>22</sup> the main Palestinian political factions agreed to resolve their political differences by establishing a Government of National Unity, essentially a quasi-tribal arrangement between factions based on repartition of the public sphere between political factions. This solution is considered by some to be technically outside of the law and/or existing constitutional arrangements.

While a separation of powers, or repartition, between the President and the government is sought, the DPC and the BL do not articulate such a separation of powers, and therefore arrangements negotiated outside the constitutional framework will be necessary, unless such arrangements can be duly codified and adopted into existing constitutional documents.

For some authors, the constitutional arrangements of the BL and PA legal system in general, create a system that serves the party in power, in which any gains become its 'personal' property (Jarbawi 2007). Similarly, it has been observed that Palestinian political culture is somewhat 'personalised' in the sense that loyalty is directed to the leader and party that dominates (Hasan 2003, 89).

20) The document was produced by Palestinian prisoners representing all Palestinian factions; it proposes principles intended to be basis of unity between Palestinian factions. The document was published in *Maqalat Abdallah Al-Falastiniya*, 67, : 186-198.

21) More details are provided in Annex 4 concerning the president's prerogatives vs. the prime minister, Cabinet, and PLC.

22) Based on the initiative announced by Saudi King Abdullahi Bin Abdul Aziz, Fatah and Hammas Movement held in the period February 6-8, 2007 in Mecca, the dialogues of Palestinian consultation and agreement. This agreement was named «Mecca Agreement».

The repartition or division of powers is often undertaken for reasons of 'national interest' although in practice, priorities are often determined by party political or even personal interests (Jarbawi 2007). Thus, there have been calls to distinguish between political and administrative actions (Jarbawi 2007). The same applies to the security forces. No political party, in principle, rejects the need to de-politicise the security forces. However, de-politicisation in a Palestinian context is often confused with meaning the increased participation of members of the new party in power, thus moving from a one-party system to a two-party system. For Abrash (2006b, 47), *Hamas* agreed to participate in national elections in order to participate in the decision making process and to share the political gains. For Giacaman (2006, 54), the inclusion of *Hamas* in the Palestinian political system will inevitably bind it to past and future PA action and decisions as the PA's origin of legitimacy is based on popular elections.

#### ***D. Separating the Public from the Private Sphere***

Civil society in Palestine has historically played a prominent role, most especially since the beginning of the Israeli occupation in 1967. Civil society was well established and could not be ignored at the time that the PA was created. PA institutions have to deal with and take into account the various civil society structures that exist on the ground but often find that they compete for the same resources or control over public services that should be provided through state institutions. In this sense, the discussion on the separation of powers ended up sometimes by considering the delicate issue of separating public from private interest. The separation here does not mean that civil society is not entitled to pursue public interests, but rather that state institutions shall play a central role in public affairs.

### **3. THE LEGISLATIVE PROCESS AND ENFORCING**

#### ***A. The Legislative Process***

The legislative process<sup>23</sup> involves three phases:

3. Preparing the draft law: this includes the preparation of policy and drafting the proposed law;
4. Discussing the draft-law: this includes the so-called "general discussion", followed by two (or three) different votes; and
5. Endorsing the law: this includes the signature of the President (or the amendments he proposes), publication in the Official Journal and its execution through by-laws.

The actors and skills needed for each phase are various.<sup>24</sup>

Until the adoption of the BL in 2002 (see Annex 2 for procedures), the legislative process was completely regulated by Law No. 4 of 1995.

The procedures gave complete control to the executive (mainly the President) over the legislative process. The President's role in the legislative process was in accordance with the Oslo Accords, which state that the President shall not enact laws in contradiction to agreements between Israel and the PLO. The 'veto right' of the President was the object of criticism by several local and human rights organisations.<sup>25</sup>

<sup>23</sup> Here, referring exclusively to procedures regulating the law-making process, not secondary legislations.

<sup>24</sup> This is not, however, the main issue here. The Institute of Law at Birzeit University has undertaken several studies on the different phases in the process of legislation. For more details, see the table in Annex II.

<sup>25</sup> See for example the annual reports of the Palestinian Independent Center for Citizens Rights (PICCR) at: <http://www.piccr.org/index.htm>



Following the first elections of the PLC in 1996, the new legislative actor (PLC) replaced the Council of the PA in the process created by the law mentioned above. The by-law of the PLC, adopted in 2000, regulated internal procedures at the PLC.

Following the adoption of the BI in 2002, the legislative process went through a revolutionary change, which was highly appreciated by those struggling for the rule of law. In theory, the PLC could bypass the President's refusal to endorse the law according to Article 57 (and following amendments to Article 41 in 2003): "*The President of the National Authority shall promulgate laws after being ratified by the Palestinian Legislative Council within thirty days from referring them to him...*". In other words, the PLC now had all the legal instruments to bypass any possible presidential disapproval of its legislation. Although it did enhance PLC legislative activity, certain facts on the ground show that that the article was not duly used or activated. In fact, Raouhi Fattouh signed most of the pending laws when he held the Office of President *ad interim* after the death of President Arafat (Al-Rayes 2004, 61; Abrash 2006a, 88). Since President Abbas arrived in office, there has been a clear tendency to respect legal procedures and time requirements.

### ***1) Anomalies in the Legislative Process***

The legal and regulatory framework of the Palestinian legislative process has been the object of numerous studies and analyses by experts, some of which have documented the following interconnected gaps and limitations (for example: Bkeirat 2005 & 2006; IoL 2007):

#### **First, in the preparatory phase:**

- The absence of general legislative policy and planning.
- Unclear regulations on the authority of the Cabinet concerning legislative priorities and decisions taken within;

#### **Second, in the discussion phase:**

- The possibility of the PLC speaker holding on to proposed laws without detailing a timeframe for presentation and general discussion.
- The possibility for one or more deputies to present draft laws. There were calls for amendments to increase the number of deputies necessary to propose laws.
- The secondary role of the PLC committees and the possibility of proceeding without waiting for their reports;

#### **Third, in the promulgation phase:**

- The unclear legal provisions concerning amendments that may be proposed by the President and the way the law is promulgated following the vote of the PLC;
- The complete control the executive branch of government has over the decision to publish laws in the Official Journal; on some occasions, the Minister of Justice or the *Diwan* even changed the text before publication (Abu Dayyeh 2007, 3).
- The absence of strategic planning or (in some instances) political will needed to adopt the necessary by-laws required to enact the laws. In practice, the government has the power to block the execution of several laws simply by not doing anything (Abu Dayyeh 2007, 3).

### ***2) Legislation is Not Just a Technical Issue***

Legislation should not be limited to being a technical issue left only to jurists and religious experts; nor should its substance be left for politicians alone to decide upon. On the contrary, it is a process

that expresses the spirit of a society, including its contradictions and homogeneity. Legislation is a process of debate, agreement and disagreement between different interest groups, who use their resources to impose their vision or to influence the decision makers (Said 2004b, 13).

Any legal reform should take into consideration Palestinian social relations, which in various forms are based on three sets of 'laws': the formal state or civil laws; the unwritten customary laws; and the religious laws (*Shari'a*) that govern so-called personal status issues (Abdo 1999, 43).

There is no doubt that legislation should take into consideration the particularities of the Palestinian case. However, the Palestinian experience, although unique, should not consider itself isolated from universal and/or other regional experiences and contexts; on the contrary, many authors believe that they overlap (Said 2004b). For this reason, legislation should reflect and respect the plurality of the Palestinian experience:

- Laws should not be imposed or based on exclusion but on citizens' equality in front of the law.
- Laws should not be seen to be an imposition of the will of the majority on religious or political minorities.
- Laws should take into consideration any positive contributions from the rest of the world, including religious traditions, on condition that they be used solely for the benefit of Palestinians and based on humanistic principles.

The above position opposes refusal of possibility of exchange, influence or impact between nations and cultures in the name of cultural particularity. However, this vision of the law that 'should be' often contradicts with what the law actually 'is'.

### ***3) The Executive's Legislative Powers***

The BL ensures a determinant legislative role for the President by enabling him to adopt decree laws under certain circumstances and giving him power to endorse or return a draft law to the PLC. These legal and constitutional provisions have been interpreted in a variety of ways, resulting in differing conceptions of the extent of the President's legislative powers and the procedures needed to ensure that presidential functioning remains within the law. Moreover, additional powers assigned to the executive authority, such as whether or not to publish new laws in the official journal or the ability to adopt by-laws deemed necessary for the enforcement of existing laws, create further ambiguities (Abu Dayyeh 2007, 2).

## ***B. Law Enforcement***

### ***1) The Independence of the Judiciary***

The independence of the judiciary has been much debated. It is significant to note that the Judiciary Law, as much as the BL itself, was one of the five laws endorsed by President Arafat in 2002, after years of abstention. The principle of the independence of the judiciary is ensured in the BL (see Annex 3 and 4) and in the Judiciary Law. This independence refers to the institution, which means the independence of the judicial power from the other two powers and also the independence of the judges themselves (Abu Sharara AND Khashan 2004a, 1).

In 2005, an amended Judiciary Law No. 15 was adopted and endorsed by the President. The High Court in Gaza, acting as a Constitutional Court, for the first time in Palestinian history, declared this law unconstitutional. Most of the amendments included in the law were adopted by Decree Law No.2 of 2006, less than twenty days before the legislative elections, thus creating a controversial situation. The Decree Law effectively gave enormous power to the High Judicial Council (*hereinafter* the HJC) and its President received most of the powers that were previously held by the Minister of Justice.<sup>26</sup>

The independence of the judiciary is intended to protect the judges and the institution from possible interference by the executive leading to a more independent judiciary that is answerable only to the law. However, some commentators have observed (Azmi Shueibi, in: Abu Sharara AND Khashan 2004a, 7) that in the oPt, the independence of the judiciary means something quite different, namely that the judiciary answers only to the President!

Before the agreement on a Government of National Unity in 2007, a draft Judiciary Law was prepared and circulated by a group of smaller parties not affiliated to either *Hamas* or *Fatah*. The PLC is currently reviewing this new draft and if adopted, it will be the first law to be ratified since *Hamas* was voted in to power. This suggests that there is political consensus between the two main parties and other smaller parties on the need for an independent and functioning judiciary despite their differences over power-sharing.

One impediment towards a professional, independent and functioning judiciary and HJC is the territorial fragmentation of the oPt, whereby the West Bank, including East Jerusalem, has become increasingly fragmented internally as well as separated from the Gaza Strip (Abu Sharara AND Khashan 2004a).

### ***2) The High Judicial Council***

President Arafat established the HJC in 2000 by Decree No.29 of 2000. Later on, the Law on Formation of the Courts No.5 of 2001 provided some of the competences of this body. The BL adopted in 2002 (Article 91, which became Article 100 in the 2003 version) created a HJC and provided that the "law shall specify the way it is constituted, its responsibilities and its operating rules". According to the same article, the HJC should be consulted about draft laws relating to the Judicial Authority, including Public Prosecution.

At the same time, Judiciary Law No.1 of 2002 dedicated the fourth section to the HJC. In his Presidential Decree No.11 of 2002, the President considered the previously established HJC as a transitional body, as provided for in the Judiciary Law of 2002 (Article 81). In 2003, the President reconstructed the HJC with Presidential Decree No.8 and nominated Issa Abu Sharara

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26. On 4<sup>th</sup> May 2006, President Abbas issued Decree No.364 of 2006 abrogating, *inter alia*, Decree Law No.2 of 2006.

as its President, replacing Zuheer Sourani. According to Abu Sharar, the last Decree refers to a permanent Council, as provided for in the BL and the Judiciary Law, and not a temporary one (Abu Sharara AND Khashan 2004a, 3).

### **3) Duality of Jurisdiction between Religious/Shari'a and Regular Courts**

One of the salient features of a future Palestinian State will be the inevitable adoption of a dual system of jurisdiction consisting of religious (*Shari'a*) courts and civil or regular courts. This will ensure the independence of (recognised) religious communities to adopt legislation on so-called personal status issues, and separate courts will deal with such cases. This was one of the important provisions of Decree No.1 of 1994 that President Arafat issued from the PLO in exile in Tunisia concerning the 'Continuation of the Laws, Regulations and Rules Operative in the Palestinian Territories (West Bank and Gaza Strip) before and since 5<sup>th</sup> June 1967' until it was replaced by a unified PA legislation.

This topic has not been central in the discussions held by Palestinian scholars regarding a future Palestinian constitutional framework. On the contrary, the independence of religious communities in regulating their own personal status issues, and the jurisdiction of their courts to decide on cases involving members of their communities was confirmed by the Article on Islam delineating it as the official religion of the state.<sup>27</sup> In other words, the autonomy of religious communities to decide and legislate on personal status issues is considered to be part of the solution rather than the problem.

Those who call for the separation of religion and state suggest the adoption of one civil code (that also covers personal status issues) for all citizens, including those who profess a religion, and to give the civil courts jurisdiction over personal status issues. This minority position is based on the assumption of statehood with equal citizenship for all, without discrimination based on religion; accordingly, the same laws should apply to all citizens and the same courts adjudicate on behalf of all citizens (Al-Deeb 2003). It should be noted, however, that this topic has not been extensively discussed or debated and may, on occasion, have been used as a counter-argument in the larger debate on religion (Islam) and the state.

The Palestinian women's movement has been campaigning for reform of the family law system for the last decade. Following the Oslo Accords when the prospect of statehood appeared realistic, the movement began to focus more closely on the BL (Abdo 1999, 44) and the different drafts of the Palestinian constitution. However, calls for reform were not necessarily accompanied by a call for the abolition of the distinction between regular and religious (*Shari'a*) courts and thus the adoption of a unified civil code that covers personal status issues.

### **4) High Constitutional Court**

The BL calls for the establishment of a High Constitutional Court (*hereinafter* the HCC) but leaves the issue to be determined by a law (Article 103). Until its establishment, the HJC will act as the constitutional court. Law No.3, which establishes a HCC, was adopted in 2006. The law decided on a centralised 'judicial' body, independent from the judiciary. The discussions that followed the adoption of this law centred on its inherent inconsistency and the role and place of the HCC within the Palestinian political and legal system. The DPC, on the other hand, had regulated the issue with more specificity leaving fewer details to be defined by a law establishing the HCC. In both cases, the HCC risks being overloaded once it is established as it is foreseen to adopt all possible mechanisms for judicial review, including all laws adopted prior to the creation of the HCC (Milhem 2006, 148).

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<sup>27</sup> Article 4 of the BL and Article 5 of the DPC.

### ***5) Administrative, Military and Security Courts***

The BL permits the establishment of administrative courts by law (Article 102). But until the adoption of such a law, the only type of administrative court is the HCL.

The BL requires that military courts be regulated by 'special laws' that limit their role to military affairs only (Article 101/2) although there is very little research on this issue. The (PLO) Revolutionary Penal Code and Palestinian Revolutionary Criminal Procedures Law issued by PLO in 1979 still apply in the existing military courts.

In contrast, the State Security Courts (*hereinafter* the SSC) were formed by presidential decrees relating to either internal or external security. Unlike the BL, the SSC were criticised for applying military legislation to civilian cases. The status of the SSC was unclear between 2003 and 2004, when they were *de facto* inactive, and on 27<sup>th</sup> July 2003, the former Minister of Justice issued a written decision abrogating the SSC and passing their cases on to the regular civil courts.



## 4. THE ADMINISTRATION OF PUBLIC FINANCE

Several reports have confirmed the existence of corruption within PA institutions, generally defined as the use of public authority or money for personal or partisan gain (Shueibi 2004, 711). Corruption may take different forms: bribery, nepotism, favouritism or '*wasta*' (using connections), and blackmailing, all of which have a negative impact on the administration of public finances (Shueibi 2004, 714). The PLC has recently been involved in crystallising the legal framework for the administration of public finance (Shueibi 2004, 718). However, corruption cannot be eradicated through laws only. Corruption in the PA specifically is related to a lack of political will and commitment to the principle of the separation of powers, the weakness of institutional structures and the oversight role of the PLC, and the overall weakness of the judiciary compounded by the absence of the rule of law (Shueibi 2004, 721). The various Palestinian constitutional documents take into account the seriousness of the administration of public finance, especially the budgeting process, by upholding the general principles of transparent public administration and outlining mechanisms for the prevention of corruption. However, these mechanisms remain open to abuse. In 2002/2003, external pressure helped to facilitate an internal movement for reform, including calls for greater transparency in public financial management and administration.

### *A. The Constitutional Protection of Public Finance*

#### *1) The Constitutional Procedure of the Budgeting Process*

The various constitutional documents in the oPt concentrate on the budgeting process and its vote in the PLC. Both the BL and the third DPC include mechanisms for protection, the most important of which are the checks and balances in the budgeting process. In most democratic systems, as in the oPt, the initiative for budget preparation is left to the government, while parliament approves or disapproves through a vote. Although it is interesting to note that the BL refers to this procedure mainly in chapter five in the section on the executive (under the title *Public Finance*), while the DPC refers to it in the chapter on legislative powers (under the title *parliamentary competence concerning finance laws*). This means that in the ongoing Palestinian debate on this issue, the emphasis has shifted from administrative (i.e. the administrative aspects of budget preparation) to legislative control.

In the BL, Articles 61 and 90 describe the procedure for the budgeting process. Article 61 gives the government two months before the end of the fiscal year to hand the budget to the PLC. Article 90 gives the government the right to ask the PLC for credit amounting to 1/12 of the previous year's budget in the event that the coming year's budget will not be ready at the start of the new fiscal year. This procedure is not clearly regulated, mainly after the passage of the first three months stated in Article 4 of the budget law (Harb 2006, 23).

The DPC tackles the same issue but in a different way. Article 92 requires that the government submit the budget to the PLC four months before the end of the fiscal year (which is twice the period mentioned in the BL). After this time the PLC has five months from the date it received the budget to debate it and vote on it. If the budget is still not voted on after this period, the President can approve the budget, based on a decision from the Council of Ministers. The rule of 1/12 credits also features in the DPC but is more limited (Article 96).

Both the BL and the DPC obliges the government to submit an annual financial statement to the PLC for its approval at the end of each fiscal year (Article 62, BL; Article 97, DPC).

It should be noted that while the DPC recognises the principle of the unity of treasury accounts, it still allows for annexed budgets that cover spending on long term projects (Article 91). The

BL does not appear to allow this, although it does mention 'annexed budgets' that the PLC is exclusively proficient to vote on, however, no more specifications are given. On the other hand, the BL explicitly allows the PA to compile a 'strategic financial reserve' in the event of 'fluctuations and emergency situations' (Article 91-2) but does not specify who or what can decide on such a fund, or how it should be managed.

## ***2) Constitutional Principles in Managing Public Finance***

Both the BL and the DPC have established constitutional principles for managing public funds. On the issue of taxes, a tax cannot be imposed without a law (Article 88, BL; Article 62 & 99 DPC) as they are part of a citizen's obligations to the state (Article 62, DPC). However, the law can decide how to divide the charges progressively, according to social criteria based on equality (Article 99, DPC) although this is not mentioned in the BL. All money raised through tax collection must go to the public treasury. The principle of non-affectation of tax money is affirmed in Article 91 of the BL and Article 99 of the DPC. All spending from the treasury must be accredited by law. Similarly, the use of natural resources, engaging credits for the state, enhancing investments in Palestine by special treatments for foreign capital, and the rules of payments of salaries for public agents, and public subventions must be determined by law and approved by the PLC (Articles 92, 94, 95, BL; Articles 98 and 100, DPC).

## ***3) Constitutional Mechanisms for Protecting Public Finance***

There are two kinds of mechanisms in the current constitutional system under PA control for protecting public financial resources: 1) by creating formal agencies for the purpose of financial accountability; and 2) by instituting systems or rules that obligate financial transparency by public institutions.

The BL establishes two agencies: the Palestinian Monetary Authority and the Financial and Administrative Control Bureau<sup>28</sup> (*bercinafiar* Bureau), which was created by Law No.15 of 2004, replacing the previously established Public Control Authority established by Decree No.22 of 1994. The Monetary Authority, which is equivalent to a central bank, has a President who is nominated by the President of the PA with accreditation from the PLC (Article 93, BL). This guarantees both its independence from any other administrative body as well as its independence in decision-making because the nomination is issued from the highest authority in the PA, which is controlled by the elected PLC.

The Financial and Administrative Control Bureau was created in response to donors' accusations of corruption in the PA, and is charged with making reports both annually and/or on demand to the PLC and the President of the PA. This body had a constitutional statute in the BL in 2002. The President of the Bureau is nominated in the same way as the President of the Monetary Authority. Although the Bureau only has the remit to issue reports, it has gained the credibility and trust of the public by revealing the loss of public funds outlined in PA financial documents in 1997. An investigation was ordered on the basis of this report.

These institutions are not mentioned in the DPC, which is important to note considering the positive impact they have had in terms of protecting public finances and exposing corruption.

But what both constitutional documents contain are mechanisms for ensuring transparency in public accounting. These documents require deputies, ministers and the Prime Minister (once elected or

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28. For more information about the Bureau see their official website: <http://www.fach.gov.ps/>

nominated) to submit a financial disclosure of their total wealth (including family), both inside and outside the country to a judicial body such as the HCC (DPC) or the HCJ (BL). These documents will remain confidential, unless the court concerned authorises their consultation for investigative purposes (Articles 54 and 80, BL; Articles 108 and 140, DPC). The DPC requires the future President of the Palestinian State to also submit a financial disclosure (Article 116), but the BL does not.

### ***B. Reforming the Public Administration of Money***

The question of 'reform' (embodied by the Road Map) was at the centre of the debate, both internally and externally, in the late 1990's and early 2000 regarding the issue of a Palestinian public administration and financing. In return for external political and financial assistance, the PA was encouraged to implement certain reforms in the areas of financial accountability and transparency. Initial calls for reform, however, had come from the PLC and Palestinian civil society, both of which continue to play a key role in this regard, although their respective motivations may differ.

One key area for reform on which there is national consensus is the administration of public finances although there is no agreement on the method or the approach (Khaled 2005). It should be noted, however, that the basic principles governing public institutions and assets and the redistribution of public finance occupied little space in the overall debate that accompanied the adoption of the BL and preparation of the DPC.

In fact, endorsement of the BL in 2002 ran parallel to the reform process. Many steps have been taken towards achieving greater accountability and transparency in the public financial sector (Kdiah' 2003), but more still needs to be done (Harb 2004b).

The authors Abdelkarim and Abu Humos (2006, 46-47) noted the following reform efforts undertaken in the area of financial accountability and transparency during the period from June 2002 to July 2003:

- **Revenue consolidation:** The consolidation of all PA revenue into a Single Treasury Account (*hereinafter* the STA), the transfer of income from PA commercial activities into the STA, the consolidation of all PA commercial activities into the Palestinian Investment Fund (*hereinafter* the PIF), and the valuation of its assets and a transparency assessment.
- **Tax administration:** Steps toward the unification of tax administration and computer systems in the oPt; technical assistance provided by the International Monetary Fund (*hereinafter* the IMF) and European Union (*hereinafter* the EU); and revising the Income Tax Law based on international best practice.
- **Strengthening expenditure controls:** Consolidation of expenditure management in the oPt; establishing a modern Internal Auditing Department; moving from cash payments to direct bank account deposits for security personnel salaries; strengthening external auditing procedures through the drafting of a new External Auditing Law by the PLC to ensure full independence of the department; submission of regular auditing reports to the PLC and comprehensive coverage of all PA institutions; establishing an independent procurement agency within the MoF.
- **Limits on PA employment expansion:** Strict adherence to additional civil service positions as specified in the budget; enforcement of budgetary appropriation limits on increases in security personnel; enforcing retirement of civil servants at the age of 60.
- **Budget reform:** Design of fully financed and balanced 2003 budget based on realistic assumptions; repayment of arrears to the private sector; enhancing transparency by meeting the budget calendar and publishing all budgetary accounts.
- **Pension reform:** Steps taken toward unifying the pension system and the inclusion of security



personnel under pension coverage; resumption of transfers of civil servant and government contributions to the pension fund in 2003.

- **Restructuring monopolies:** MoF to take over the Petroleum Authority to ensure greater transparency and accountability, and to restore market shares and tax revenues; restructuring pricing policies for cement and petroleum products in favour of consumers by eliminating monopolistic rents.

It should be noted that most of the achievements in the financial sector are in line with the financial reform plan adopted by the Council of Ministers in June 2002 (Kdah' 2003). Further achievements in the financial reform process have been outlined by authors such as Harb (2004b, 8-12) and mainly in the following areas: improved relationship between the Ministry of Finance (*hereinafter* MoF) and the PLC; clarification of financial procedures; restructuring of the MoF, re-organisation of PA investments, application of procedures provided for in the Budget Law No.7 of 1998, and the effective application of several adopted laws.

Other reforms were deemed to require more time because of their complexity and scope, as well as the need for new legislation, such as the re-drafting of a new Income Tax Law; the unification of the pension system; civil service reform; the achievement of a fully operational internal and external audit system; and enhancement of financial accountability vis-à-vis the budget of the Office of the President (Abdelkarim and Abu Humos 2006, 47).

## 5. SECULAR / RELIGIOUS ORIENTATION OF THE STATE

According to the BL and DPC, the principles of *Shari'a* (Islamic law), are a primary source of legislation in Palestine. Indeed, Islam is the official state religion and for that reason, *Shari'a* principles should be considered as one of the most important legal foundations of the state-in-waiting.<sup>29</sup> It should be noted that earlier drafts of the BL made no mention of Islam as being the 'official religion of Palestine' and it remained unmentioned until the 7<sup>th</sup> draft BL.<sup>30</sup>

The PLO and *Fatah* (its main faction) has always been a secular organisation. Therefore its' various declarations and discourses are necessarily oriented towards the establishment of a secular and democratic state, for example: Yasser Arafat's speech to the United Nations General Assembly on 13<sup>th</sup> November 1974. The Charter (1964 and 1968) and the Declaration of Independence (1988) are also based on the assumption of a secular Palestinian State. However, these declarations were not intended to be anti-clerical or anti-religious, however, they all include provisions that recognise the religious heritage of the Palestinian people and its importance to believers of all three monotheistic religions. On the contrary, as the Declaration states: "Governance will be based on principles of social justice, equality and non-discrimination in the public rights of men or women, on grounds of race, religion, colour or sex, and the aegis of a constitution, which ensures the rule of law and an independent judiciary".

The emergence of political Islam and the increasing prominence of *Hamas* in the social (through charity work) and political (through elections) spheres since the first *Intifada* has led to a reconsideration of the role of religion in politics in general, and in public affairs in particular. Indeed, several indicators (opinion polls for example), would suggest that attachment to Islam is on the increase. However, references to Islam or *Shari'a* (or its absence) in the DPC may be misleading as to the extent of a possible 'Islamisation' of Palestinian society and state (Khalil 2006b, 271; Suleiman 2005, 14).

29. This section does not examine all existing literature on the topic of religion and state, neither does it cover all discussions on the existing religious or secular orientation of the PA and a future Palestinian State. This chapter presents only some of the discussions on Islam and *Shari'a* that preceded the drafting of the BL and DPC.

30. Drafted by the Legal Committee of the PLC, 9<sup>th</sup> July 1996 and circulated to the public.

The issue of the role of religion in society, and the relationship between Islam and the state in particular, was one of the main topics debated in relation to the drafting of the BL and the publication of the three DPC. The final version of the BL, promulgated by the President and the DPC, makes reference to Islam as the official religion of the state and *Shari'a* as a (not *the*) source of legislation.

The reference to Islam in the BL and DPC is at the centre of the debate on the role of religion in the Palestinian constitutional system. However, it should be noted that this debate was not conducted on a nationwide basis or inclusive of all sections of society, but rather limited to a minority Palestinian elite (Suleiman 2005, 27). The debate further showed variations of opinions from region to region (Kayed 2004, 9). International observers were also of the opinion that a future Palestinian State should seek to protect its minorities within a secular constitutional framework.

### ***A. Islam as Official Religion***

The constitutional reference to Islam is not exclusive to the Palestinian case as comparable studies have shown that many neighbouring countries also make the same reference. Indeed, when analysing the potential impact on Palestinian society, a number of Palestinian authors concluded that the Palestinian constitutional system should not be disconnected from its regional environment (Khalil 2006*b*, 271), given the historical attachment of Middle-Eastern society to religion in general, and the fact that the majority of the population is Muslim (Ahmad 2000).

The various constitutions of neighbouring Arab countries make reference to Islam in a number of different ways, for instance: Islam is the official religion; Islam is the religion of the state; or Islam is the religion of the majority of the people in the state. All possible options were presented to the drafters of the BL and DPC. However, the BL (contrary to its first draft prepared in the early 1990s) and the DPC refer to Islam as the 'official religion' of Palestine (Article 4 of the BL and Article 5 of the DPC). In the same articles it states that the other monotheistic religions (Christianity and Judaism) should have their sanctity respected. This reference, however, does not necessarily assume a religious state or indeed a secular state, in which religion is totally absent from state affairs. In this sense, the Palestinians, as in the case of neighbouring Arab states, chose to constitutionally recognise the existence of an Islamic majority (Al-Khalidi 2004*b*, 112).

One group of commentators viewed this reference as an ending of the secularism envisaged by the PLO (Abu Fakher 2004), and instead saw the beginning of the 'Islamisation' of Palestinian society. Others considered the article to be a reflection of the existing reality or welcomed it as recognition of the special status of Islam in the lives of the majority of Palestinians. A third group did not object to the reference to Islam as long as the principle of equality between citizens was not undermined on the basis of religion. Accordingly, it can be said that in the debate on the constitutional role of Islam, Palestinians can be roughly divided into two main groups: those who believe that religion has a role to play in the affairs of state, and those who think it should be considered as separate (Ahmad 2000; Kayed 2004, 10-13):

#### ***1) Religion (Islam) and State Shall be Interlinked***

This group can be further divided into two subgroups, according to the preferred extent of religious influence in state or public affairs:

##### ***First, the reference to Islam as 'official religion' is sufficient***

This would guarantee, for the majority of the Palestinian people, a national identity that directly corresponds to their own personal religious beliefs. This reference therefore carries more political

than religious significance as it could be construed as the first step towards the establishment of an Islamic state in the future. In the interim period, a modern, democratic state is preferable on condition that it respects, or at least does not contradict, Islamic principles. This position relates to the increase in religiosity in Palestinian society and not necessarily to the increase in support for Islamic movements.

#### **Second, the reference to Islam as 'official religion' is good but not enough**

Here, a constitutional provision states that the Head of State and the Prime Minister should be Muslims based on the belief that a non-Muslim would not sufficiently protect Islamic principles or issue and execute *Shari'a* laws as a (or the) principle source of legislation (The Imams of Tulkarem and Qalqilya, cited in Kayed 2004, 12).

### **2) Religion and State Shall be Separated**

According to this position, all references to Islam in the constitutional text should be removed (Al-Ali 2004). However, different authors (Al-Deeb 2003, Al-Bargouthi 2004, 21, 36; Abu Fakhri 2004; Al-Hawaree 2004; DSP 2004, 156) have different reasons for their position:

- ❑ Reference to an official religion contradicts the principle of equality in a country that is willing to treat all its citizens equally and without discrimination, including on the basis of religion.
- ❑ Palestinian society is already mindful of the importance of having a modern democratic political system based on the equality of all citizens.
- ❑ It contradicts the principle of the rule of law, as enshrined in the constitution, which is designed to safeguard the individual against arbitrary governance.
- ❑ It may be misused by fundamentalist groups to justify actions that discriminate against non-Muslims.
- ❑ The state, as a sovereign political entity, has no religion. It rises above religious beliefs or either an individual or group.
- ❑ Reference to Palestine as an Islamist state may be considered justification for Israel to declare itself a Jewish state, which could have negative consequences for the Israeli Arab population.
- ❑ Most modern constitutions make no reference to an official religion but rather refer to the state as a secular state. Palestine should strive to be a modern state.

### **B. Constitutional Reference to *Shari'a***

The BL and the DPC adopt the same reference to *Shari'a*: '(the) principles of Islamic *Shari'a* are a primary source of legislation', which means that the law can have other sources but uses *Shari'a* as a reference (Kayed 2004, 13). From this position, two main groups of thought can be identified:

#### **1) The Constitution Shall Refer to *Shari'a***

For this group, although *Shari'a* will be a primary source of legislation, respect for other monotheistic religions will be guaranteed in accordance with the traditions of Palestinian society. Within this group, however, there are three different sub-groups, each with a different opinion as to what constitutes a 'reference' to *Shari'a*:

##### **First, *Shari'a* as a primary source of legislation is enough**

The current reference to *Shari'a* as a primary source of legislation would be acceptable if *Shari'a* enjoyed a high level of credibility within Palestinian society, and only if no other laws that contradict the spirit of *Shari'a* were adopted. Otherwise, a constitutional amendment would be needed and

requested. For this group, *Shari'a* takes priority even over international law and conventions (Nasser Deen Sha'er in: Kayed 2004, 14).<sup>31</sup>

### **Second, *Shari'a* should be 'the' (not a) principle source of legislation**

In this case, all laws and legislation in the Palestinian state would be taken from *Shari'a*; it being inherently a source of social justice and political, economic and social stability.<sup>32</sup> Furthermore, these laws would contain articles that contain the phrase "without contradicting Islamic *Shari'a*". It is interesting to note that *Hamas'* political manifesto for the 2006 elections included a proposition to amend Article 4 of the BL, from "a" to "the" principle source of legislation.

It should also be noted that the 7<sup>th</sup> draft of the BL and the first DPC also adopted this position, which was harshly criticised by the international community. This may have inadvertently facilitated internal pressure on the PLC and its Constitutional Committee to amend the article by replacing "the" with "a". These changes were considered to be positive but not sufficient to remove the ambiguity regarding the authority of constitutional provisions over *Shari'a* in the event of a conflict over the rights or duties of citizens (Khalil 2006b, 272-275).

### **Third, a *Shari'a* expert should become one of the judges of the Constitutional Court**

For this group, reference to *Shari'a* as 'a' or 'the' source of legislation will remain ineffective in practice if there is no mechanism to review laws that may contradict with *Shari'a*. In other words, this group supports a requirement for each law to be reviewed by a constitutional court on its reference to *Shari'a*. This group further believes that judges of the constitutional court should use *Shari'a* as their reference in all decisions (Kayed 2004, 16).

## **2) The Constitution Shall Not Refer to *Shari'a***

Overall, this group generally agrees on the need to remove the Article that refers to *Shari'a* but some would consider amending it to read as follows: "*Shari'a* principles are one of the sources of legislation": i.e. one of many rather than 'a' or 'the' principle source (Al-Hawaree 2004, 21). Others would prefer the article, if not cancelled, to be re-formulated as follows: "Human rights principles and monotheistic religious principles, which do not contradict those rights are a source of legislation" (Al-Deeb 2003).

Those who call for the removal of any reference to *Shari'a* justify their positions for a variety of different reasons (cited in: Kayed 2004, 16):

- Religion and faith concerns the private relationship between an individual and their God (Samara 2003, 14)
- *Shari'a* contradicts the principle of equality between citizens in accordance with the Universal Declaration of Human Rights, the BL and the DPC (Al-Deeb 2003, 3).
- Laws should be clear and conclusive while *Shari'a* often lacks such clarity and in many instances allows for different interpretations (Shueibi in: Kayed 2004, 14);
- *Shari'a* is more useful as a guiding principle for drafting laws rather than as a mechanism to enforce the law or resolve litigations between parties (Musallam, in: Kayed 2004, 16);
- *Shari'a* could be used in the future by fundamental groups, who may demand its total application in all aspects of public and private life (Abu Fakher 2004, 18);
- *Shari'a* negates the purpose of civil society (Al-Ali 2004, 38).
- *Shari'a* negates the possibility of opting for a bi-national state (Abrash 2003).

31. This the position taken by Nasser Deen Sha'er, cited in Kayed (2004, 14).

32. Conference at *Dar Al-Fatwa wal Babath Islamiyya* on the Palestinian Constitution (23<sup>rd</sup> July 2003) cited in Kayed (2004, 15).



Some authors preferred the idea of codifying a 'national' link between citizens and the state rather than one based on religious belief (Jarrar in: Kayed 2004, 17) because Palestinians have a particular national identity that includes, but ultimately transcends, religion as it incorporates a number of other distinguishing features, such as history, language, geography and culture (Abrash 2003).

For others, the fact that the majority of Palestinians is Muslim is accepted and sufficiently reflected in the reference to Islam as being the 'official religion in Palestine'. Other articles (concerning *Shari'a* for example) are ambiguous with regard to their objectives and possible consequences (Rehan 2004, 131).

For the Constitutional Committee, as expressed by its President, references to religion and *Shari'a* take into account the reality of Palestinian society and its Arab and Islamic identity (Nabil Sha'ath in: Kayed 2004, 17) as confirmed by several public opinion polls.<sup>33</sup>

According to Dr. Sha'ath, Christian communities that are the most concerned by references to *Shari'a* in the constitution, were consulted and agreed on the version adopted in the DPC and the religious leaders having provided their comments on the DPC (Fr. Raed Awad, cited in: Nawahda 2004, 122).<sup>34</sup>

### *C. A Third Way to Perceive the State-Religion Relationship*

#### *1) Is Islam the Only Religion?*

The discussion on the various constitutional provisions regarding Islam and *Shari'a* has inevitably broadened to encompass the larger issue of the relationship between religion and the state. For some authors, the degree of separation between religion and state varies according to the particular constitutional system. Theoretically, there are four main possibilities (Rehan 2004, 129):

- A theocracy, whereby religious institutional representatives replace or dominate civil government, which is rarely the case in 'modern' states;
- Co-habitation between the state and religion(s), which is often applied in secular states as it allows for religious provisions
- The state disregards religion; the feasibility of this option is dependent on the degree of importance given to religion in a given society.
- The state bans religion and takes steps to systematically prohibit religious practice and institutions, as in the case of the former Soviet Union

For some authors, all modern states must separate religious affairs from state affairs. This separation represents the middle way between two other, more extreme options: the complete unity of religion and state, or the opposite, whereby the state acts to combat religion. In this sense, religion is an individual matter that concerns your own personal relationship with God while a homeland is a collective interest that concerns all citizens. In this respect, Islam is a religion like any other and not a system for political governance (Hani El-Masri, in: DSP 2004, 155). The alternative position, in contrast to the above, seeks the creation of an Islamic state for political rather than religious reasons (Hani El-Masri, in: DSP 2004, 157).

33. See Public Opinion No. 14 of 2003 prepared and published by the Development Studies Program - Birzeit University, Ramallah in Annex 5.

34. However, other researchers have reached a different conclusion concerning this consultation process (Kayed 2004, 173ff.).

## 2) Political Islam

Many authors, while studying the constitutional references to Islam and *Shari'a*, made comparisons between the BL and DPC, and the Charter and Declaration of Independence. They noted the absence of any specific reference to either Islam or *Shari'a* in the PLO documents. The reason, they observed, was the reluctance of the PLO to present the conflict with Israel or Zionism as a religious conflict. Given that the PLO is a secular institution, the version of Palestinian statehood it presented was secular (Odwan 2005, 93).

However, following the first *Intifada*, the residents of the oPt (so-called 'inside' Palestinians) witnessed the increasing popularity of Islamic groups, who began competing with national or secular groups at the level of syndicates, associations, and local institutions for local support (Odwan 2005, 96). The references to Islam and *Shari'a* in the BL and DPC are therefore included in order to 'legitimise' these documents in accordance with the perceived wishes of Palestinian society. In other words, the references to Islam and *Shari'a* are really expressions of a 'power struggle' between the 'insiders' and exiles or 'outsiders', reflecting the wider dialectic between the PLO and the PA and their respective visions of a state.

Some representatives of political parties have spoken publicly on the issue, with particular reference to the DPC. For the Front of Palestinian Popular Resistance, the constitutional reference to *Shari'a* as source of legislation represents a deterioration when compared to other texts that were adopted during the struggle for national liberation, such as the National Charter and Declaration of Independence, which present the options for a secular and democratic state. Although statehood has not yet been achieved, these documents are part of, and indeed facilitate the historical trajectory towards that goal and therefore remain a legitimate source or reference point. Furthermore, the division of Palestinians into religious communities and groups will necessarily have an impact on the principle of equal citizenship (DSP 2004, 257).

For the Popular Front for the Liberation of Palestine (*hereinafter* PFLP), the constitutional reference to *Shari'a* presents a problem for the following reasons: reference to one of the sources and not others is not consistent in current texts justified; the principles of *Shari'a* are too vague and therefore open to (mis)interpretation; the provision hinders the separation of religion and state institutions of governance; it is also in contradiction with the principle of equal citizenship under the law; and a religious (*Shari'a*) rather than civil law will be applied for issues relating to 'personal status' (DSP 2004, 264).

The participation of *Hamas* in the second legislative elections opened up the discussion on political Islam in the oPt. It is also true to say that *Hamas* does represent a sizeable portion of the Palestinian body politic. However, political Islam (defined as Islamic-based political action) (Al-Sha'er 2004, 5) is not new to the Palestinians; it has always had a strong and influential streak within the Palestinian national movement. The secular party *Fatah*, considered by some to be the embodiment of Palestinian 'secular nationalism', has roots deeply embedded in Islamic provenance (Khalidi 1995, 8). Accordingly, they assert that political Islam is not therefore confined to Islamic groups and/or religious discourse, and in the absence of coherent secular discourse, religious one, it has been used by secular groups as much as Islamist ones (Habib 2005, 103; Al-Ajrami 2005, 117).

## 3) Referring to Islam to Recognise Culture and History

There is a third group that has an interest in the relationship between religion and state but this group is less concerned with constitutional references in this regard. What is important is the particular constitutional mechanism established to protect individual and minorities rights. Thus,

their perceived indifference to constitutional references to Islam is dependent on the degree to which Islam will have a determining role in the Palestinian legal system.

For this group (Suleiman 2005; Khalil 2006b), Islam is a question of cultural identity and historic civilisation. This position is also adopted by defenders of secularism because a state can be secular, but a society can never be. Thus, they accept a constitutional reference to Islam because they recognise the importance of religion for any given society.

The constitutional reference to Islam simply recognises the common belonging of all Palestinians to Arab and Islamic culture. This experience is not unique or exclusive to Arab and Islamic countries. However, the reference to *Shari'a* as a source of legislation gives the articles mentioned above an authority that surpasses the cultural dimension of Islam. For this reason, some authors have called for the cancellation of the constitutional reference to *Shari'a*. Furthermore, it has been argued that the reference to *Shari'a* is a political issue and thus vulnerable to changes in the internal or external political environment. Moreover, this reference could be used by state authority to legitimise (on religious grounds) an undemocratic government or simply to strengthen its own authority (Habib 2005, 103).

For Abu Sway (2006, 108), there is an almost implicit contrast between the ruler and the ruled, according to which obedience to the ruler is forthcoming in exchange for the upholding of the *Shari'a*. However, there is also a kind of tolerance in Islamic history for authoritarian rulers based on the notion that it is better to live under a dictator than to be part of a *fitna* (i.e. bloody chaos).

For the authors, who adopt the above position, the reference to Islam in the constitution should not create any unnecessary confusion or complexity. For this school of thought, the fact that Islam is the majority religion of the Palestinian people does not contradict the right to, and freedom of, religion or, alternatively, not declaring Islam to be the state religion does not automatically mean that freedom of religion is secured. For this group, the reference to Islam in constitutional texts should not mean that the legislator must apply or enforce *Shari'a* in Palestine (Azmi Shueibi, cited in: Kayed 2004, 13). Here, the reference to Islam and *Shari'a* is confined to the remit of positive law: *Shari'a* and religious laws in general are confined to personal status issues and not to all aspects of the lives of citizens. In other words, there is a difference between the positive constitutions, created within the states, and Islamic constitutions (Nawahda 2004, 117-118).

An Islamic religious or theocratic state refers to a state that applies *Shari'a* as the incarnation of God's will, as opposed to positive law, which is a human construct, thus vesting power and authority in the word of God (Muhsein 2005, 60). In this sense, some authors note that it is difficult to agree that the specific reference to *Shari'a* in the DPC automatically makes the Palestinian state a religious or theocratic one. On the contrary, the fact that reference is made to *Shari'a* in the constitutional paper means that the origin of the obligatory nature of *Shari'a* is not 'divine will' but rather its codification in positive law. In other words, the empowerment of *Shari'a* through the BL or DPC means that a 'secular will' is the origin of its nature and not 'divine will' (Khalil 2005).

In order to understand the article, which refers to *Shari'a* principles, Milhem (2006, 143) needed to compare Islamic jurisprudence with the laws of other legal systems. He suggests the Egyptian example, which confirms that *Shari'a* is the main source of law, but stresses the possibility for change in order to suit the needs of new socio-economic developments.

In other words, *Shari'a* is implemented in accordance with the law by the state and not according to fixed-doctrinal models (Khalil 2006b, 272). This is the case in neighbouring countries where Arab



and Islamic systems reflect a reality whereby religion is separated *de facto* from the state, such as in a codified (positive) constitution (Hani El-Masry in DSP 2004, 156).

Other commentators have attempted to interpret democracy in Islamic terms by mixing Islamic *shura* and democracy ('shuracracy'). In this case, governance or *hakemeyya* is for God but humans can act freely in those areas that are not regulated by religion. Furthermore, in some cases it is permissible to violate *Shari'a* in order to save the lives of fellow human beings (Abu Sway 2004, 109-110).

#### ***D. Possible Conflicts between Constitution and Shari'a***

Whatever constitutional references to Islam and *Shari'a* will be decided upon, it is considered important to determine whether the constitution or *Shari'a* will be considered as the supreme source of law. A number of potential conflicts between the application of constitutional or *Shari'a* law have been identified; those possible contradictions will need to be dealt with by the drafters of the constitution or eventually the constitutional court. Moreover, some authors have suggested that a reference to the 'principles' of *Shari'a* is ambiguous, given that *Shari'a* is a particular method of application and practice rather than a 'principle'. This ambiguity is a source of potential conflict regarding the drafting of a future constitution (Rehan 2004, 131).

##### ***1) Women's Rights***

A number of authors have looked at the rights of women and *Shari'a* (Abdo 1999, 44; Jubran 2004; Rehan 2004; Said 2004c; Khalil 2005a; Khalil 2006b, 272-273, Muhsein 2005), and two main positions have been identified:

- Those who prefer that the state and constitution should be created before judging how references to *Shari'a* could potentially have legal consequences for the constitutionally protected rights of women.
- Those who prefer to resolve the issue prior to statehood and the promulgation of the constitution on the basis that it would be easier to make amendments while the constitution is still in draft format

For Khashan (2004), Islam has protected women and ensured several rights, including their participation in public and political meetings, and the expression of political opinions. Furthermore, the DPC ensures direct and indirect protection and guarantees for women, and the adoption of international standards included in conventions and declarations.

It should be noted that in the first DPC (Article 63), it stated that "*Women are the full sisters of men. They have rights and duties as guaranteed by the Shari'a and established in the law*". However, according to that provision, the principles of *Shari'a* have priority over the constitution in matters related to women's rights. This article was widely criticised (Khalil 2006, 259) and the Constitutional Committee cancelled it in the second and third versions of the DPC. In these later versions of the draft DPC, it is stated that the "constitutional and *Shari'a* rights of women shall be safeguarded" (Article 23). This means that these rights are accumulative and that the existence of the *Shari'a* provision cannot be used in justification of a violation of a constitutional right.

This represents a positive change towards constitutionally protected women's rights but it does not provide procedures and mechanisms to ensure the superiority of the constitution over *Shari'a* in the case of conflict, for example with regard to the relationship between the constitutional court and the religious/*Shari'a* courts.

It is not only a question of *Shari'a* and religion; it is also a question of society and culture. Should the law ensure full citizenship for women or should it codify the social *status quo* whereby women are often perceived as second class citizens? For example, following the establishment of the PA, women were told that when they applied for a passport they needed to have a male guardian. Following a successful lobbying campaign by women's organisations and certain individuals, a presidential decree was issued that permits women to apply freely for their own passports (Bullata 2006, 113). This demonstrates not only the high level of political awareness amongst women's groups but also the gaps in the system that are vulnerable to executive exploitation or misinterpretation.

For Said (2004c, 212), provision for the protection of women's constitutional and *Shari'a* rights is discriminatory because it refers exclusively to women; the implication being that men have total freedom to regulate women's rights while they themselves have limitless freedom.

Special attention has been given by the Palestinian legislature to gender issues for example, female quotas for political party representation in municipal and legislative elections. This was made possible by the persistent lobbying of several civil society organisations (Bullata 2006, 114). There were various reactions to this idea ranging from complete rejection, because it contradicts the principle of equality between citizens, to complete support for positive discrimination aimed at reducing their *de facto* inequality (Samara 2003, 14; Yusuf 2005, 67; Said 2004c; Khalil 2005a; Khalil 2006b).

## 2) *Shari'a* Principles and International Law

There is a lack of information in the Palestinian literature on the relationship and potential contradictions between international law and *Shari'a* principles (Rehan 2004). Given that the PLO and PA have, on several occasions, publicly adhered to or expressed their will to abide by international human rights norms and conventions, it would appear that the Palestinian leadership is willing to prioritise respect for universal human rights within Palestinian constitutional texts. The BL (Art. 10) states that: "Basic human rights and liberties shall be protected and respected. The Palestinian National Authority shall work without delay to become a party to regional and international declarations and covenants that protect human rights". The reference in the BL, however, implies that international law does not have direct effect in domestic law unless it is ratified by the Palestinian legislature (Milhem 2006, 141).

However, the extent of a potential contradiction between *Shari'a* (as a source of legislation) and international law in general, and with regard to human rights in particular, varies according to the author:

- Some suggest that there is no contradiction between *Shari'a* and the principle of universal human rights but call for the application of *Shari'a* whenever a contradiction arises with regard to international law and related conventions (Nasser Deen Sha'er in: Kaye 2004, 14);
- Others point to the literal text in the BL and DPC, which reflects their opinion that international law should prevail whenever there is a contradiction between the two approaches (Jubran 2004, 206).

For example, the issue of freedom of religion as expressed in the Declaration of Human Rights and several other international documents and conventions. Is there a contradiction between freedom of religion, as envisaged in these international documents, and the fact that Islam is the official religion of the state of Palestine? (Al-Haq 1996, 30; Khalil 2006b, 275).

In the BL and DPC, reference is made only to freedom of confession (or credo) and freedom to practice religion. But reference to religious freedom, which includes the right to adhere to, change and/or leave a particular religion, is not mentioned and therefore not guaranteed (Al-Deeb 2003). In this sense, the BL and the DPC seem to have adopted a strict interpretation of freedom in religious affairs.

It should also be noted that 'freedom' is granted only to the monotheistic religions' (Judaism, Christianity and Islam). But very few authors have criticised this limitation due to the fact that other faiths are rarely represented in the oPt. This article, however, shall be reviewed, if we consider that a constitutional text is not intended to regulate Palestinian lives today but rather in the future (Khalil 2006b, 275).

The BL and DPC have adopted similar constitutional provisions to those of neighbouring countries with regard to religion. However, the right to freedom of conscience and religion has particular importance in the oPt because Jerusalem is considered to be the guardian of the three monotheistic religions. Crucially, both the BL and DPC lack references to the importance of the Holy Land to the monotheistic religions with regard to existing arrangements with concerned actors such as the Holy See.

Furthermore, many authors like to point out that the conflict with Israel should be clearly identified as being primarily a political one, based on the Palestinian right to self-determination and national liberation from Israeli occupation. In this regard, the Israeli-Palestinian conflict is not a religious conflict and should not therefore be understood as such (Khalil 2006b, 277).

### **3) Religious Minorities**

In the oPt, the majority of Palestinians is Muslim while a minority is Christian, who are mainly concentrated in a number of cities and villages in the Central West Bank. Although greatly reduced in number now, Christians have always been part of Palestinian society and together with Muslim Palestinians, have participated in the process of nation and state building (Khalil 2006b, 278). However, Christianity is distinguished from other monotheistic religions by the Christian tradition for a strict separation between church and state; a separation that keeps the church outside political considerations on the one hand but that encourages Christians, as other citizens, to participate in politics, which is considered as the commitment towards the public good (Lahham 2004, 36).

As outlined in the BL and also the DPC, equality between citizens is guaranteed, which ensures that religious majorities are not favoured, in any respect – political, social or economic – over a minority.

For all Palestinians, including the Muslim majority, there is no doubt that Christians, although they are a minority, form a constituent part of the Palestinian nation. However, there have been various debates and discussions on the future of Palestinian Christians with regard to the constitutional references to Islam and *Shari'a*. The position of an authoritative Christian leader, Msgr. Michel Sabbah, perhaps best expresses the view commonly held by most Christian leaders: "It is useless to discuss this question if different communities, Muslim or Christian, have the mentality of winning or losing, at the expense of the other, as if we are in different teams, each trying to catch the ball and take it to their side or camp, as the victor. Daily life pushes us to be in the same camp, and no one wins if the other loses. We both win if a new Palestine, with a new face, is born, that inspires mutual trust and security for Muslims and Christians... if we nurture this mentality, we will find

the best expressions that reflect this new culture, for the Constitution” (Cited in: Nawahda 2004, 122).<sup>35</sup>

There are some indications that the Palestinian legislature intends to enforce the principle of equality in a substantial and not just formal, theoretical or factual sense. The adoption of the quota system in legislative and municipal elections proves this approach. However, for some authors, legal protection for some minorities against societal discrimination is not enough and could lead to the need for a re-evaluation of the concept of citizenship and identity itself (Jubran 2004, 205).

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35 The speech was made at the University of Bethlehem and published in Arabic on the internet, translated by the author of this report: <http://www.hqj.org/Nonviolence/PatriarchBU/Universityara.htm>

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## Annex 1: Various Concepts of "Separation of Powers"

In Palestinian literature, the "separation of powers" does not reflect only the classical concept, i.e. the separation of the legislative, executive and judicial powers and their reciprocal oversight and collaboration. On the contrary, Palestinians talk about the "separation of powers" but mean at least four different things:

- 1) The Separation of legislative, executive and judiciary;
- 2) The Separation of PLO from PA institutions;
- 3) The Separation (within the PA executive) between the President ,the Prime Minister & the cabinet;
- 4) The separation between the public and private sectors and civil society domains.

### First Level: The Separation of Legislative, Executive and Judiciary

Legislative Power		Executive Power		Judicial Power	
PLO	PA	PLO	PA	PLO	PA
PNC (or CC)	PLC	EC , headed by a Chairman	President + Cabinet	Military Courts	Regular + Religious Courts
Gave the mandate to EC to nominate first Council. Approved important changes in the PA.	Members of PNC ex officio		Elected President is the Chairman of the EC	Special Courts regulated by PLO Penal Code + (former) Security Courts (apply to civilians)	Parallel judicial systems

### Second Level: The Separation of PLO from PA institutions

Legislative Power		Executive Power		Judicial Power	
PLO	PA	PLO	PA	PLO	PA
PNC (or CC)	PLC	EC , headed by a Chairman	President + Cabinet	Military Courts	Regular + Religious Courts
Gave the mandate to EC to nominate first Council. Approved important changes in the PA.	Members of PNC ex officio		Elected President is the Chairman of the EC	Special Courts regulated by PLO Penal Code + (former) Security Courts (apply to civilians)	Parallel judicial systems



### Third Level: The Separation between the PA President and the Prime Minister + Cabinet

Legislative Power		Executive Power		Judicial Power	
PLO	PA	PLO	PA	PLO	PA
PNC (or CC)	PLC	EC, headed by a Chairman	President + Cabinet	Military Courts	Regular + Religious Courts
Gave the mandate to EC to nominate first Council. Approved important changes in the PA.	Members of PNC ex officio		Elected President (not responsible to PLC)   Prime Minister + Cabinet (needs confidence of PLC)	Special Courts regulated by PLO Penal Code + (former) Security Courts (apply to civilians)	Parallel judicial systems

Third Level

### Fourth Level: The Separation between the Public and Private Sectors

Legislative Power		Executive Power		Judicial Power	
PLO	PA	PLO	PA	PLO	PA
PNC (or CC)	PLC	EC, headed by a Chairman	President + Cabinet	Military Courts	Regular + Religious Courts
Gave the mandate to EC to nominate first Council. Approved important changes in the PA.	Members of PNC ex officio		Elected President (not responsible to PLC)   Prime Minister + Cabinet (needs confidence of PLC)	Special Courts regulated by PLO Penal Code + (former) Security Courts (apply to civilians)	Parallel judicial systems

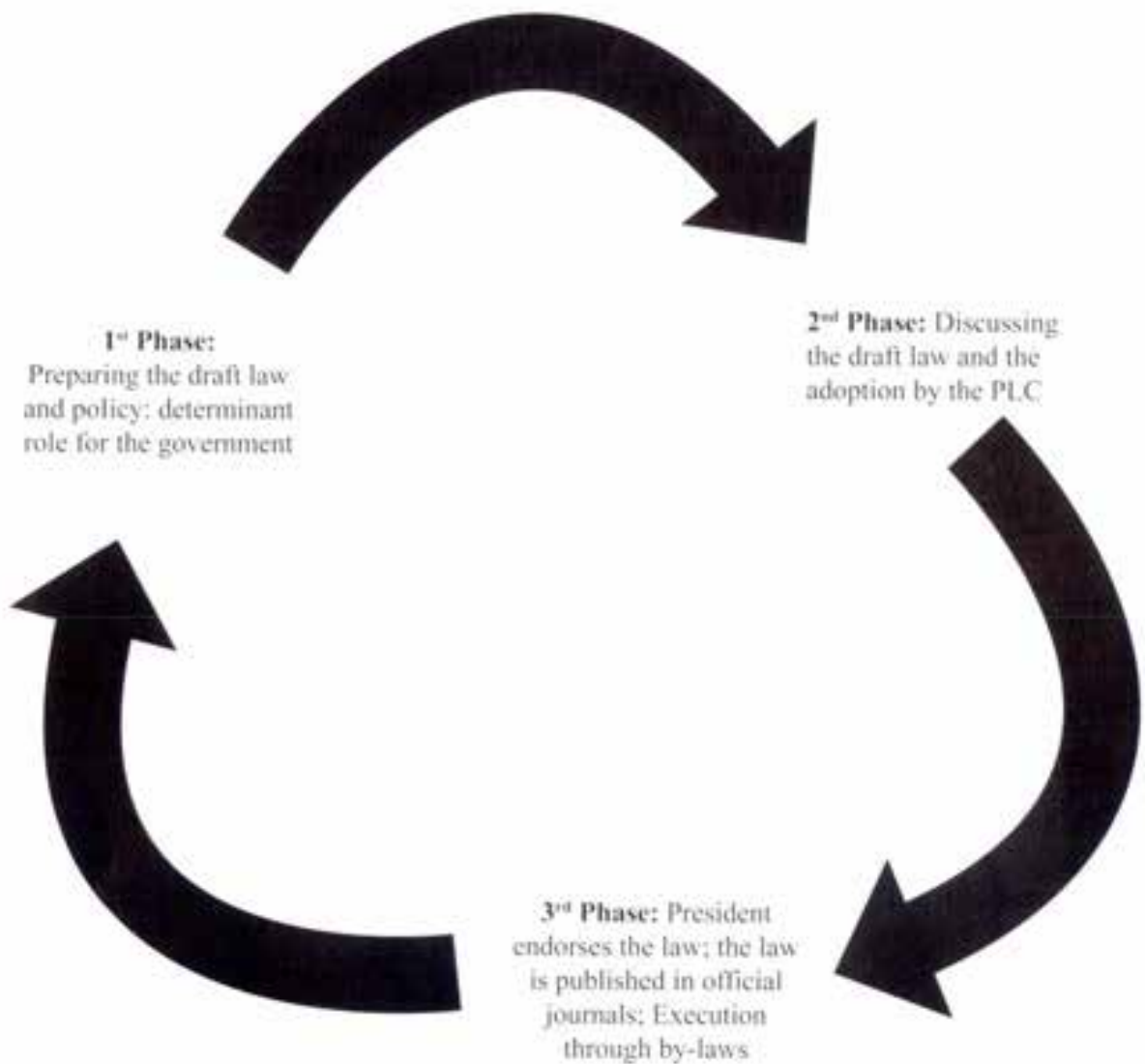
Fourth Level



Private Sector, Civil Society...



*Annex 2: The Legislative Process*

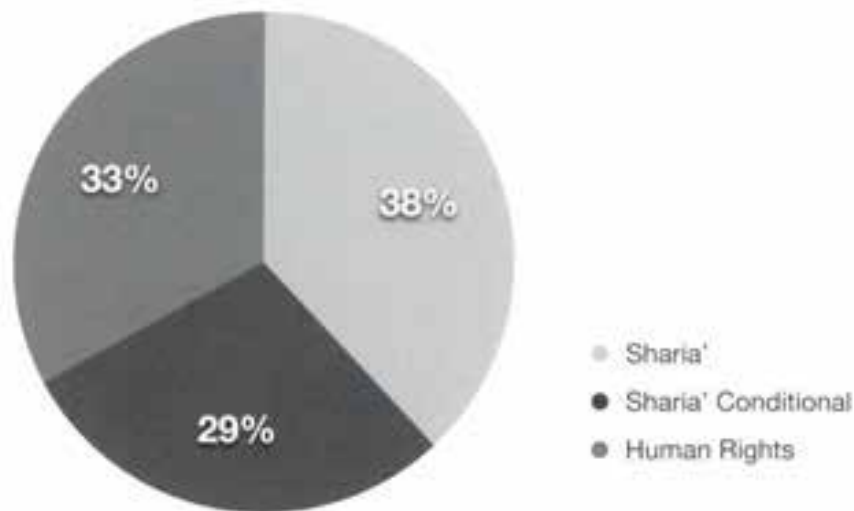


### *Annex 3: Public Opinions*

#### Development Studies Program – Birzeit University Public Opinion No. 10 of 2002

##### *Division over the Use of Islamic Sharia (Law)*

Palestinians are divided over the use of Sharia as the “basis for legislation” in the proposed Palestinian Constitution; 38% consider Islamic Sharia’ to be the sole source of legislation. In contrast, 33% believe that human and civic rights must be the source of legislation. Another 29% see Islamic Sharia’ as a primary source, but combined with human rights and international conventions. For 8% (out of this 29%), Sharia is acceptable as a primary source, but conditional upon the approval of an elected body.



##### *Shari'a in governance might lead to abuse of power*

While many Palestinians feel that Sharia is an important element in their lives, many feel that the implementation of Sharia might not be “practical”. About 54% feel that the use of Sharia in governance will lead to abuse of religion by the government only to reinforce its own power. Furthermore, the majority of respondents (76%) do not perceive the establishment of an Islamic state to be a realistic option.

##### *Support for democracy*

It is also interesting to note that that over 66% of the respondents approve of an article stating that the Palestinian political system is democratic, parliamentary, and based on political pluralism.

##### *All Palestinians are born equal*

In addition, 92% approve of an article stating that all Palestinians are equal before the law with equal rights and duties, and no discrimination will exist based on race, sex, colour, religion, political opinion, or disability.

## **Public Opinion No. 14 of 2003**

### ***Sources of Legislation***

38% believe Islamic Shari'a should be the only source of legislation.

17% see Islamic Shari'a as a main source of legislation combined with respect paid to universal principles of human rights and international treaties.

### ***Characteristics of the State***

56% see religion as the chief characteristic of a future Palestinian State; 32% see democracy as the main characteristic. 6% also see a future state in socialist terms and 6% Arab nationalist.

82% support a constitution based on equality between Muslims and Christians. 76% support a constitution based on equality between sexes.

A majority of Palestinians believe in tolerance and pluralism and desire a community based on principles of equal rights and individual freedoms. Palestinian attitudes on a range of social issues, as follows: Democratic system in the Palestinian state, 81%; religion is a personal matter, 81% ; separation between religion and state, 51%.

## *Annex 4: Amended Basic Law of 2003*

### *The Amended Basic Law*<sup>36</sup>

*Promulgated on 18 March 2003*<sup>37</sup>

*(Consolidated Version)*<sup>38</sup>

*In the Name of God, the Merciful and the Compassionate.*

#### **Introduction**

The continuous attachment of the Arab Palestinian people to the land of their fathers and forefathers, on which this people has historically lived, is a fact that has been expressed in the Declaration of Independence, issued by the Palestine National Council. The strength of this attachment is confirmed by its consistency over time and place, by keeping faith with and holding onto national identity, and in the realisation of wondrous accomplishments of struggle. The organic relationship between the Palestinian people, their history and their land has confirmed itself in their unceasing effort to prompt the world to recognise the rights of the Arab-Palestinian people and their national entity, on equal footing with other nations.

The birth of the Palestinian National Authority in the national homeland of Palestine, the land of their forefathers, comes within the context of continuous and vigorous struggle, during which the Palestinian people witnessed thousands of their precious children sacrificed as martyrs, injured persons and prisoners of war, all in order to achieve their people's clear national rights, the foremost of which are the right of return, the right to self-determination and the right to establish an independent Palestinian State, with Jerusalem as a capital, under the leadership of the Palestine Liberation Organization, the sole, legitimate representative of the Arab-Palestinian people, wherever they exist.

Within the framework of the interim period, resulting in the Declaration of Principles Agreement, the establishment of the Palestinian National Authority with its three pillars – the legislative, executive and judicial branches – became among the most urgent of national missions. The establishment of the Palestinian Legislative Council, through free and direct general elections, made the adoption of a Basic Law suitable for the interim period a necessary foundation upon which to organise the mutual relationship between the government and the people. It is a first step on the way to determining the distinguishing characteristics of a civil society capable of achieving its independence. At the same time, it is a basic foundation upon which to enact unifying legislation and law for the Palestinian national homeland.

This Basic Law has established a firm foundation, representing the collective conscience of our people, including its spiritual components, its national faith and its nationalist loyalty. The titles of the Basic Law include a group of modern constitutional rules and principles that address public

36. Translation into English for the *Palestine Yearbook of International Law*, published in *Al-Muqafi – Institute of Law*, Birzeit University. Some changes to the translation were effectuated by the author and shall be indicated each time is done.

37. Published in the *Palestine Official Gazette*, Special Issue No. 2, March 19, 2003. The original Basic Law was published in the *Palestine Official Gazette*, Special Issue, July 7, 2002.

38. The 2003 Basic Law was amended by the **Basic Law of 2005 Concerning the Amendment of Some of the Provisions of the Amended Basic Law of 2003**, published in the *Palestine Official Gazette*, Issue No. 57, August 2005. This consolidated version is done by the author of the report, thus unofficial and under his own responsibility. The articles amended or added in 2005 were duly underlined, while providing also the original text in footnote, for information.

and personal rights and liberties in a manner that achieves justice and equality for all, without discrimination. Further, they ensure the rule of law, strike a balance between the executive, legislative and judicial branches, and draw lines between their respective jurisdictions in a manner that ensures independence to each of them while coordinating their roles to achieve a high national interest that will serve as a guide to all.

The enactment of this temporary Basic Law for a transitional and interim period constitutes a fundamental step towards the realisation of the firm national and historical rights of the Arab-Palestinian people. It shall not in any way abrogate or cancel their right to continue to strive to achieve their rights of return and self-determination, including the establishment of a Palestinian State with Jerusalem (*al-Quds al-Sharif*) as its capital, which is the first shrine and the third mosque, to which the Prophet Muhammad, *may peace be upon him*, travelled by night, in the land of the nativity of Jesus, *may peace be upon him*.

The provisional character of the Basic Law shall not abrogate the right of any Palestinian, wherever residing, to exercise equal rights with his/her fellow citizens on the soil of the homeland.

This temporary Basic Law draws its strength from the will of the Palestinian people, their firm rights, their continuous struggle and the exercise of their democratic right – as represented in the election of the President of the Palestinian National Authority and the members of the Palestinian Legislative Council – to commence the organisation and establishment of a sound, democratic and legislative life in Palestine. At the same time, the enactment and ratification of this law by the Legislative Council does spring from the fact that the Palestine Liberation Organization is the sole and legitimate representative of the Arab-Palestinian people.

### *Explanatory Memorandum for the Amended Basic Law*

Article 111<sup>39(2)</sup> of the Basic Law provides the Legislative Council with the authority to amend the Basic Law by securing a majority vote of two-thirds of its members. The Council believes that it is necessary to amend the Basic Law to allow for the creation of the position of a Prime Minister in the Palestinian National Authority and to determine his powers and the legal and political controls that will regulate his work, as well as to define and clarify the form of the relationship between him and the President of the Palestinian National Authority and the legislative branch.

This amendment requires rearrangement of some provisions of the original law. Accordingly, the title that deals with the powers of the President of the National Authority is now Title Three in the amended law. On the other hand, the title that deals with the legislative branch has been moved to a subsequent title, which is Title Four.

As for Title Five, dealing with the Council of Ministers, it covers the formation of the government by the Prime Minister, the procedure for obtaining the confidence of the [Legislative] Council, the powers of the Council of Ministers and its head, and the relationship between the Prime Minister and the President of the National Authority.

The Council decided during the review of the amended law that it would not be necessary to add provisions dealing with the Prime Minister's presentation of all matters related to the formation,

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<sup>39</sup> Editor's note: Article 111 refers to the original text of the Basic Law as published in July 2002. In the Amended Basic Law, it becomes Article 120. The reason for this apparent discrepancy is that the Palestinian Legislator has chosen to integrate the March 2003 amendments into a consolidated text. This has involved numbering anew a substantial part of the original articles.

resignation or dissolution of the cabinet to the President of the National Authority, on the grounds that this is a political tradition that does not require being put into a separate article in the text of the law.

Ahmed Qurei (Abu Ala)  
Speaker  
The Palestinian Legislative Council



## TITLE ONE

### Article 1

Palestine is part of the larger Arab world, and the Palestinian people are part of the Arab nation. Arab unity is an objective that the Palestinian people shall work to achieve.

### Article 2

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.

### Article 3

Jerusalem is the capital of Palestine.

### Article 4

1. Islam is the official religion in Palestine. Respect for the sanctity of all other divine religions shall be maintained.
2. The principles of Islamic *Shari'a* shall be a principal source of legislation.
3. Arabic shall be the official language.

### Article 5

The governing system in Palestine shall be a democratic representative<sup>41</sup> system, based upon political and party pluralism. The President of the National Authority shall be directly elected by the people. The government shall be accountable to the President and to the Palestinian Legislative Council.

### Article 6

The principle of the rule of law shall be the basis of government in Palestine. All governmental powers, agencies, institutions and individuals shall be subject to the law.

### Article 7

Palestinian citizenship shall be regulated by law.

### Article 8

The flag of Palestine shall be of four colours and in accordance with the dimensions and measurements approved by the Palestine Liberation Organization. It shall be the official flag of the country.

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<sup>41</sup> Original translation was: Parliamentary. I prefer to use the term representatives to indicate *mayhwa* used by Arab original text.

## TITLE TWO: PUBLIC RIGHTS AND LIBERTIES

### Article 9

Palestinians shall be equal before the law and the judiciary, without distinction based upon race, sex, colour, religion, political views or disability.

### Article 10

- 1 Basic human rights and liberties shall be protected and respected.
- 2 The Palestinian National Authority shall work without delay to become a party to regional and international declarations and covenants that protect human rights.

### Article 11

- 1 Personal freedom is a natural right, shall be guaranteed and may not be violated.
- 2 It is unlawful to arrest, search, imprison, restrict the freedom, or prevent the movement of any person, except by judicial order in accordance with the provisions of the law. The law shall specify the period of pre-arrest detention. Imprisonment or detention shall only be permitted in places that are subject to laws related to the organisation of prisons.

### Article 12

Every arrested or detained person shall be informed of the reason for their arrest or detention. They shall be promptly informed, in a language they understand, of the nature of the charges brought against them. They shall have the right to contact a lawyer and to be tried before a court without delay.

### Article 13

1. No person shall be subject to any duress or torture. Indictees and all persons deprived of their freedom shall receive proper treatment.
2. All statements or confessions obtained through violation of the provisions contained in Paragraph 1 of this article shall be considered null and void.

### Article 14

An accused person is considered innocent until proven guilty in a court of law that guarantees the accused the right to a defence. Any person accused in a criminal case shall be represented by a lawyer.

### Article 15

Punishment shall be personal. Collective punishment is prohibited. Crime and punishment shall only be determined by the law. Punishment shall be imposed only by judicial order and shall apply only to actions committed after the entry into force of the law.

### Article 16

It is unlawful to conduct any medical or scientific experiment on any person without prior legal consent. No person shall be subject to medical examination, treatment or surgery, except in accordance with the law.

Transplantation of human organs and new scientific developments shall be regulated by the law in order to serve legitimate humanitarian purposes.

#### **Article 17**

Homes shall be inviolable; they may not be subject to surveillance, broken into or searched, except in accordance with a valid judicial order and in accordance with the provisions of the law.

Any consequences resulting from violations of this article shall be considered invalid. Individuals who suffer from such violation shall be entitled to a fair remedy, guaranteed by the Palestinian National Authority.

#### **Article 18**

Freedom of belief, worship and the performance of religious functions are guaranteed, provided public order or public morals are not violated.

#### **Article 19**

Freedom of opinion may not be prejudiced. Every person shall have the right to express his opinion and to circulate it orally, in writing or in any form of expression or art, with due consideration to the provisions of the law.

#### **Article 20**

Freedom of residence and movement shall be guaranteed within the limits of the law.

#### **Article 21**

1. The economic system in Palestine shall be based on the principles of a free market economy. The executive branch may establish public companies that shall be regulated by a law.
2. Freedom of economic activity is guaranteed. The law shall define the rules governing its supervision and their limits.
3. Private property, both real estate and movable assets, shall be protected and may not be expropriated except in the public interest and for fair compensation in accordance with the law or pursuant to a judicial ruling.
4. Confiscation shall be in accordance with a judicial ruling.

#### **Article 22**

1. Social, health, disability and retirement insurance shall be regulated by law.
2. Maintaining the welfare of families of martyrs, prisoners of war, the injured and the disabled is a duty that shall be regulated by law. The National Authority shall guarantee these persons education, health and social insurance.

#### **Article 23**

Every citizen shall have the right to proper housing. The Palestinian National Authority shall secure housing for those who are without shelter.

#### **Article 24**

1. Every citizen shall have the right to education. It shall be compulsory until at least the end of the basic level. Education shall be free in public schools and institutions.
2. The National Authority shall supervise all levels of education and its institutions, and shall strive to upgrade the educational system.

3. The law shall guarantee the independence of universities, institutes of higher education, and scientific research centres in a manner that guarantees the freedom of scientific research as well as literary, artistic and cultural creativity. The National Authority shall encourage and support such creativity.
4. Private schools and educational institutions shall comply with the curriculum approved by the National Authority and shall be subject to its supervision.

#### **Article 25**

1. Every citizen shall have the right to work, which is a duty and honour. The Palestinian National Authority shall strive to provide work for any individual capable of performing it.
2. Work relations shall be organised in a manner that guarantees justice to all and provides workers with welfare, security, and health and social benefits.
3. Organisation of unions is a right that shall be regulated by the law.
4. The right to conduct a strike shall be exercised within the limits of the law.

#### **Article 26**

Palestinians shall have the right to participate in political life, both individually and in groups. They shall have the following rights in particular:

1. To form, establish and join political parties in accordance with the law.
2. To form and establish unions, associations, societies, clubs and popular institutions in accordance with the law.
3. To vote, to nominate candidates and to run as candidates for election, in order to have representatives elected through universal suffrage in accordance with the law.
4. To hold public office and positions, in accordance with the principle of equal opportunities.
5. To conduct private meetings without the presence of police members, and to conduct public meetings, gatherings and processions, within the limits of the law.

#### **Article 27**

1. Establishment of newspapers and all media means is a right for all, guaranteed by this Basic Law. Their financing resources shall be subject to the scrutiny of the law.
2. Freedom of audio, visual, and written media, as well as freedom to print, publish, distribute and transmit, together with the freedom of individuals working in this field, shall be guaranteed by this Basic Law and other related laws.
3. Censorship of the media shall be prohibited. No warning, suspension, confiscation, cancellation or restriction shall be imposed upon the media except by law, and pursuant to a judicial ruling.

#### **Article 28**

No Palestinian may be deported from the homeland, prevented or prohibited from returning to or leaving it, deprived of his citizenship, or handed over to any foreign entity.

#### **Article 29**

Maternal and childhood welfare are national duties. Children shall have the right to:

1. Comprehensive protection and welfare.
2. Not to be exploited for any purpose whatsoever, and not to be permitted to perform work that might damage their safety, health or education.
3. Protection from harmful and cruel treatment.
4. Not to be subjected to beating or cruel treatment by their relatives.

5. To be segregated – in cases where they are sentenced to a penalty that deprives them of their freedom – from adults, and be treated in a manner that is appropriate to their age and aims at their rehabilitation.

#### **Article 30**

1. Submitting a case to court is a protected and guaranteed right for all people. Each Palestinian shall have the right to seek redress in the judicial system. Litigation procedures shall be organised by law to guarantee prompt settlement of cases.
2. Laws may not contain any provisions that provide immunity to any administrative decision or action or against judicial review.
3. Judicial error shall result in a remedy by the National Authority. Conditions and methods of such remedy shall be regulated by law.

#### **Article 31**

An independent commission for human rights shall be established pursuant to a law that will specify its formation, duties and jurisdiction. The commission shall submit its reports to the President of the National Authority and to the Palestinian Legislative Council.

#### **Article 32**

Any violation of any personal freedom, of the sanctity of the private life of human beings, or of any of the rights or liberties that have been guaranteed by law or by this Basic Law shall be considered a crime. Criminal and civil cases resulting from such violations may not be subject to any statute of limitations. The National Authority shall guarantee a fair remedy to those who suffer from such damage.

#### **Article 33**

The enjoyment of a balanced and clean environment is a human right. The preservation and protection of the Palestinian environment from pollution for the sake of present and future generations is a national duty.

## TITLE THREE: The President of the Palestinian National Authority

### Article 34

The President of the Palestinian National Authority shall be elected in a general and direct election by the Palestinian people, in accordance with the Palestinian Election Law.

### Article 35

Before assuming office, the President shall take the following oath before the Legislative Council and in the presence of the Speaker of the Palestinian National Council and the President of the High Court:

*"I swear by God, the Almighty, to be faithful to the homeland and to its sacred places, to the people and its national heritage, to respect the constitutional system and the law, and to safeguard the interests of the Palestinian people completely, as God is my witness."*

### Article 36

The term of the presidency of the National Authority shall be four years. The President shall have the right to nominate himself for a second term of presidency, provided that he shall not occupy the position of the presidency more than two consecutive terms.<sup>41</sup>

### Article 37

1. The office of the President shall be considered vacant in any of the following cases:
  - Death;
  - Resignation submitted to the Palestinian Legislative Council, if accepted by two-thirds of its members;
  - Loss of legal capacity, as per a ruling issued by the High Constitutional Court and subsequently approved by a majority of two-thirds of the members of the Legislative Council.
2. If the office of the President of the National Authority becomes vacant due to any of the above cases, the Speaker of the Palestinian Legislative Council shall temporarily assume the powers and duties of the Presidency of the National Authority for a period not to exceed sixty (60) days, during which free and direct elections to elect a new President shall take place in accordance with the Palestinian Election Law.

### Article 38

The President of the National Authority shall exercise his executive duties as specified in this law.

### Article 39

The President of the National Authority is the Commander-in-Chief of the Palestinian Forces.

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<sup>41</sup> Original text: "The term of the presidency of the National Authority shall be the interim phase, after which the President shall be elected in accordance with the laws."



#### **Article 40**

The President of the National Authority shall appoint and terminate the services of the National Authority's delegates to foreign countries, international organisations and foreign agencies. The President shall accept the credentials of foreign delegates to the Palestinian National Authority.

#### **Article 41**

1. The President of the National Authority shall promulgate the laws voted by the Palestinian Legislative Council within thirty (30) days of their transmittal to him. The President may refer a law back to the Legislative Council with his observations and the reasons of his objection within the same period. Otherwise, the law will be deemed promulgated and will be published in the *Official Gazette*.
2. If the President of the National Authority returns the proposed law to the Legislative Council in conformity with the time limit and conditions specified in the previous paragraph, the Council shall debate the law again. If the Council passes the law a second time by a majority of two-thirds of its members, the proposed law shall be considered approved and shall be immediately published in the *Official Gazette*.

#### **Article 42**

The President of the National Authority has the right to grant special pardons or to commute sentences. However, general amnesties or amnesties for crimes may not be granted except by law.

#### **Article 43**

The President of the National Authority shall have the right, in cases of necessity that cannot be delayed, and when the Legislative Council is not in session, to issue decrees that have the power of law. These decrees shall be presented to the Legislative Council in the first session convened after their issuance; otherwise they will cease to have the power of law. If these decrees are presented to the Legislative Council, as mentioned above, but are not approved by the latter, then they shall cease to have the power of law.

#### **Article 44**

The President's salary, allowances and remuneration shall be determined by law.

#### **Article 45**

The President of the National Authority shall appoint the Prime Minister and authorise 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.

#### **Article 46**

The Council of Ministers shall assist the President in the performance of the President's duties and exercise of powers, in the manner stipulated in this Basic Law.

## TITLE FOUR: THE LEGISLATIVE AUTHORITY

### Article 47

1. The Palestinian Legislative Council is the elected legislative authority.
2. The 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.
3. 3. The term of the Legislative Council shall be four years from the date of its being elected and the elections shall be conducted once every four years in a regular manner.<sup>42</sup>

### Article (47 bis)

The term of the current Legislative Council shall terminate when the members of the new elected Council take the constitutional oath.<sup>43</sup>

### Article 48

1. The members of the Legislative Council shall be elected in general, free and direct elections in accordance with the provisions of the Election Law, which shall determine the number of members, electoral constituencies and electoral system.
2. In the event a seat of the Legislative becomes vacant, the vacancy shall be occupied in accordance with the provisions of the Election Law.<sup>44</sup>

### Article 49

Before commencing work, every Member shall take the following oath before the Council:

*"I swear by God, the Almighty, to be faithful to the homeland, to preserve the rights and interests of the people and the nation, to respect the law, and to perform my duties in the best manner, as God is my witness."*

### Article 50

In its first meeting, the Council shall elect a Speaker, two Deputies to the Speaker, and a Secretary-General. Together, they shall make up the Office of the Legislative Council. It shall not be permitted to be a member of the Office and hold the position of President of the National Authority, or Minister, or any other governmental position at the same time.

### Article 51

The Council shall accept the resignation of its Members and establish its own Standing Orders, as well as procedures for questioning its Members, in a manner that does not contradict the provisions of this Basic Law or general constitutional principles. The Council shall be solely responsible for maintaining order and security during sessions and committee meetings. Security personnel may not be present in the Council premises unless requested by the Speaker or by a Committee Chair, as the circumstances may require.

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<sup>42</sup> Original text: «The term of this Council shall be the interim period».

<sup>43</sup> This article was added in 2005 amendments.

<sup>44</sup> Original text: 1) The Legislative Council shall be composed of eighty-eight (88) Members elected in accordance with the law. 2) If the position of one or more Members becomes vacant due to death, resignation or loss of capacity, partial elections shall be conducted in the relevant district to elect a successor, in accordance with the law.

#### **Article 52**

The President of the Palestinian National Authority shall open the first ordinary session of the Council and deliver an opening address.

#### **Article 53**

1. Council Members may not be questioned in civil or criminal proceedings due to opinions they express, facts they mention, their voting in Council sessions or committee meetings, or because of any action they undertake outside the Council in the course of performing their parliamentary duties.
2. No Member shall be interfered with in any manner, nor shall any search be made of a Member's luggage, home, place of residence, car, office, or any real estate or movable property belonging to the Member, throughout the period of immunity.
3. No Member of the Legislative Council shall be required during the period of membership, or subsequently, to testify on any subject regarding Council-related actions, statements or information obtained as a result of membership in the Council, unless the Member voluntarily agrees to do so and has prior consent of the Council.
4. No penal measures shall be taken against any Member of the Legislative Council unless a Member is found red-handed in the commission of a crime. The Council shall be notified immediately about measures taken against a Member so that the Council may decide upon its proper course of action in the matter. The Office of the Council shall assume this responsibility if the Council is not in session.
5. A Member of the Legislative Council shall not relinquish parliamentary immunity without prior permission of the Council. Immunity shall not lapse after membership in the Council ceases but shall be subject to the limits prevailing during the membership period.

#### **Article 54**

1. A Member of the Legislative Council may not exploit Council membership in any type of private business or in any manner whatsoever.
2. Members of the Legislative Council shall present financial statements for themselves, their spouse and their minor children that detail their wealth, including real estate and movable property both inside Palestine and abroad, as well as debts. These statements shall be kept in sealed confidential envelopes at the High Court of Justice and may not be accessed unless permitted by the Court and within the limits it allows.

#### **Article 55**

Allocations, rights and obligations of the members of the Legislative Council and Ministers shall be determined by law.<sup>45</sup>

#### **Article 56**

Each Member of the Council shall have the following rights:

1. To submit to the executive branch all legitimate requests necessary to enable the Member to carry out parliamentary functions.
2. To propose laws. Rejected proposals may not be resubmitted within the same term.
3. To address inquiries and interpellations to the government, to any Minister or to others of similar rank. Interpellations may only be discussed seven days after submission, unless the addressee agrees to reply immediately or within a shorter period. However, the seven-day period can be shortened to three days in urgent cases and with the approval of the President of the National Authority.

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<sup>45</sup> Original text: «A Member of the Legislative Council shall receive a monthly salary determined by laws.»

#### **Article 57**

1. Following an interpellation, a minimum of ten Members of the Council may submit a request to withdraw confidence from the government or from any Minister. Voting on such a request may not be held earlier than three days after submission. A decision may be issued by approval of the majority of the Council's Members.
2. Withdrawal of confidence shall result in termination of the term of the party from whom confidence was withdrawn.

#### **Article 58**

The Council may form special committees or entrust one of its committees to conduct information gathering and fact-finding regarding any public matter or regarding any public institution.

#### **Article 59**

The Legislative Council shall approve the General Development Plan. The law shall specify the way to prepare and present the Plan to the Council.

#### **Article 60**

The law shall regulate the specific rules governing the preparation and approval of the general budget and disbursement of funds appropriated in it, as well as any attached budgets, developmental budgets, budgets for public institutions and services, and budgets for any project in which the government's investment comprises at least 50% of its capital.

#### **Article 61**

Taking into consideration the provisions of Article 90 of this Basic Law:

1. The government shall present the draft budget to the Legislative Council at least two months prior to the start of the fiscal year.
2. The Legislative Council shall convene a special session to discuss the annual draft budget. It shall either ratify it with the necessary amendments prior to the start of the new fiscal year or send it back to the government, within a period not exceeding one month from the date of receipt. The returned draft budget shall include the Council's observations so that its requirements can be fulfilled and the draft budget resubmitted to the Legislative Council for approval.
3. The Council's voting on the general budget shall be title by title.
4. Transfer of funds between the various budget titles is not permitted unless it is agreed upon between the Legislative Council and the Executive branch.

#### **Article 62**

The final accounts of the National Authority's budget shall be presented to the Legislative Council no later than one year after the end of the fiscal year. The Council shall vote on the final accounts title by title.

## TITLE FIVE: THE EXECUTIVE AUTHORITY

### Article 63

The Council of Ministers (the "government") is the highest executive and administrative instrument; it shoulders the responsibility for implementing the programme that has been approved by the legislative branch. Except for the executive powers of the President of the National Authority, as specified in this Basic Law, executive and administrative powers shall be within the competence of the Council of Ministers.

### Article 64

1. The Council of Ministers shall comprise a Prime Minister and a number of Ministers, not to exceed twenty-four (24) in number.
2. The appointment shall identify to which Ministry each Minister shall be assigned.

### *Formation of the Government*

### Article 65

1. Once appointed by the President of the Palestinian National Authority, the Prime Minister shall form a government within three weeks of the date of appointment. There shall be a right to an extension of a maximum of two weeks.
2. If the Prime Minister fails to form a government within the stated deadline or does not obtain the confidence of the Legislative Council, then the President of the National Authority shall appoint another Prime Minister within two weeks of the passing of the deadline or the date of the confidence session, whichever applies. Provisions contained in the above paragraph 1 shall apply to the new Prime Minister.

### *Confidence in the Government*

### Article 66

1. Once the Prime Minister selects the members of the government, the Prime Minister shall submit a request to the Legislative Council to hold a special session for a vote of confidence. The vote of confidence shall take place after hearing and discussing the written ministerial declaration, which specifies the programme and policy of the government. The session shall be held no later than one week from the date of submission of the request.
2. The vote of confidence shall be cast for the Prime Minister and the members of the government together, unless the absolute majority of the members of the Legislative Council decides otherwise.
3. Confidence shall be granted to the government if it obtains the affirmative vote of the absolute majority of the Members of the Palestinian Legislative Council.

### Article 67

After obtaining the vote of confidence and before assuming their offices, the Prime Minister and members of the government shall take the constitutional oath, stipulated in Article 35 of this Basic Law, before the President of the National Authority.



### *Powers of the Prime Minister*

#### **Article 68**

The Prime Minister shall exercise the following powers:

1. To form or modify the composition of the Council of Ministers, to dismiss or accept the resignation of any of its members, or to fill a vacant position.
2. To convene the Council of Ministers for weekly meetings, or when necessary, or upon a request from the President of the National Authority, as well as to set its agenda.
3. To preside over sessions of the Council of Ministers.
4. To manage the affairs of the Council of Ministers.
5. To oversee the work of the Ministers and public institutions dependent on the government.
6. To issue necessary decisions within the Prime Minister's competence in accordance with the law.
7. To sign and issue regulations approved by the Council of Ministers.
8. The Prime Minister shall appoint a Minister to serve as deputy and to assume the duties of the Prime Minister, if the Prime Minister is absent.

### *Powers of the Council of Ministers*

#### **Article 69**

The Council of Ministers shall exercise the following powers:

1. To devise general policies within the limits of its jurisdiction and in light of the ministerial programme approved by the Legislative Council.
2. To implement general policies adopted by the relevant Palestinian authorities.
3. To prepare the general budget for presentation to the Legislative Council.
4. To prepare the administrative apparatus, set its structure and provide it with all necessary means, as well as to supervise it and follow up on it.
5. To follow up on the implementation of laws and to ensure compliance with their provisions, taking necessary actions in this regard.
6. To supervise the performance of the ministries and all other components of the administrative apparatus in respect of their duties and functions, as well as to coordinate between them.
7. To be responsible for maintaining public order and internal security.
8. To discuss with various governmental bodies relevant to Paragraphs 6 and 7 above their proposals and policies with regard to implementation of their respective responsibilities.
9. (a) To establish or dissolve agencies, institutions, authorities and similar administrative units belonging to the executive apparatus of the government, provided that each shall be regulated by law.  
(b) To appoint heads of institutions and agencies mentioned above in subparagraph (a), and to supervise them in accordance with the provisions of the law.
10. To specify the respective areas of responsibilities of all ministries, agencies and institutions, that report to the executive branch, and others of similar status.
11. To assume any other responsibility assigned to it, in accordance with the provisions of the law.

#### **Article 70**

The Council of Ministers shall have the right to transmit draft laws to the Legislative Council, to issue regulations and to take necessary actions to implement laws.

#### **Article 71**

Each Minister shall exercise the following powers and functions within their respective ministry:



1. To propose the general policy for the ministry and to supervise its implementation after approval.
2. To supervise the conduct of affairs in the ministry and to issue necessary instructions therefore.
3. To implement the general budget within the funds allocated for the ministry.
4. To propose bills and legislation related to the ministry and to present them to the Council of Ministers.
5. A Minister may delegate certain powers to a Deputy Minister or to other senior officers in the ministry, within limits set by the law.

#### **Article 72**

Each Minister shall submit detailed reports to the Council of Ministers on the activities, policies, plans and achievements of their respective ministry in comparison with the objectives specified for the ministry within the framework of the General Plan, including the ministry's proposals and recommendations concerning its future policies.

These reports shall be submitted regularly every three months, so that the Council of Ministers remains well informed and has sufficient information about the activities and policies of each ministry.

#### *Meetings of the Council of Ministers*

#### **Article 73**

1. Upon invitation of the Prime Minister, the Council of Ministers shall meet periodically every week, or whenever necessary. Persons other than Ministers may not attend these meetings, unless there is a prior invitation from the Prime Minister.
2. The meetings of the Council of Ministers shall be documented.

#### *Accountability of the Prime Minister and Ministers*

#### **Article 74**

1. The Prime Minister is accountable to the President of the National Authority for his actions and the actions of his government.
2. Ministers are accountable to the Prime Minister, each within the limits of their jurisdiction and for the actions of their respective ministry.
3. The Prime Minister and members of the government are jointly and individually accountable to the Legislative Council.

#### **Article 75**

1. The President of the National Authority shall have the right to refer the Prime Minister for investigation as a result of crimes attributed to the Prime Minister during, or due to, the performance of official duties, in accordance with the provisions of law.
2. The Prime Minister shall have the right to refer any Minister for investigation based on any of the reasons mentioned in the above paragraph 1, in accordance with the provisions of law.

#### **Article 76**

1. Any accused Minister shall be suspended from the performance of official duties immediately upon the issuance of an indictment. The termination of service shall not prevent continuing the investigation or follow-up procedures.
2. The Attorney General, or a representative from the Public Prosecution, shall undertake the investigation and indictment procedures. If a trial ensues, it shall be conducted before an appropriate tribunal and shall follow the provisions and procedures prescribed in the Penal Code and in the Law of Criminal Procedure.
3. The above provisions shall apply to Deputy Ministers, Assistant Ministers and others of similar rank.

#### *Vote of No Confidence*

#### **Article 77**

1. A minimum of ten Members of the Legislative Council may submit a request to the Speaker to hold a special session to withdraw confidence from the government or from any Minister after an investigation.
2. The date of the first session shall be specified three days after the date of submitting the request. The session shall not be held later than two weeks after the date of the request.

#### **Article 78**

1. A vote of no confidence in the Prime Minister and the government shall require an absolute majority of the Members of the Palestinian Legislative Council.
2. A vote of no confidence in the Prime Minister and the government shall result in the termination of their term.
3. Upon the completion of the term of the Prime Minister and the government, they will temporarily exercise their powers in the capacity of a caretaker government, during which they may make decisions only insofar as they are necessary for the conduct of executive affairs until a new government is formed.

#### **Article 79**

1. In case the Legislative Council, by an absolute majority, casts a vote of no confidence in the Prime Minister, or in the Prime Minister and the members of the government collectively, the President of the National Authority shall present a new Prime Minister, who will take over from the former within a period not to exceed two weeks from the date of the vote of no confidence. The new Prime Minister shall be subject to the provisions of this title.
2. In case the Legislative Council casts a vote of no confidence in one or more members of the government, the Prime Minister shall present the new member or members to the following session, provided that it takes place within two weeks of the date of the no confidence vote.
3. (a) Any addition or change that affects a portfolio, a Minister, or more than a Minister shall be considered a ministerial reshuffle, so long as it affects less than one-third of the members of the Council of Ministers.
4. (b) Upon a ministerial reshuffle, the addition of a Minister, or the filling of a vacancy, for any reason, the new Minister or Ministers shall be presented at the very next session of the Legislative Council, which shall occur no later than two weeks from the date of the reshuffle or the occurrence of the vacancy; for a vote of confidence in accordance with the provisions of this article.
5. Neither the Prime Minister nor any of the Ministers shall assume their duties until they have obtained the confidence of the Legislative Council.

## *Financial Liability of Members of Council of Ministers*

### **Article 80**

1. The Prime Minister and each Minister shall submit a financial statement for themselves, their spouse and their minor children that details what they own in real estate, movable property, stocks, bonds, cash money and debts, whether inside Palestine or abroad, to the President of the National Authority, who shall make the necessary arrangements to maintain their secrecy. Such information shall remain confidential and may not be accessed unless permitted by the High Court when necessary.
2. Neither the Prime Minister nor any Minister may purchase or lease any property belonging to the State or to any public entity, or have a financial interest in any contract concluded with any governmental or administrative body, nor may they, during their terms of office, be board members in any company, or practice commerce or any other profession, or receive a salary or any other financial reward or remuneration from any person in any capacity whatsoever, other than the single salary determined for Ministers and the relevant allowances.

## *Remuneration and Allowances of Prime Minister and Ministers*

### **Article 81**

Remuneration and allowances for the Prime Minister, Ministers and others of similar rank shall be determined by the law.

### **Article 82**

The appointed Prime Minister and all Ministers shall be Palestinians, who enjoy full civil and political rights.

### **Article 83**

The government shall be considered dissolved and shall be reformed in accordance with the provisions of this title in the following cases:

1. Upon the commencement of a new term of the Legislative Council.
2. After a vote of no confidence in the Prime Minister, in the Prime Minister and the government, or in one-third or more of the total number of Ministers.
3. Upon any addition, change, vacancy, or dismissal that involves at least one-third of the Council of Ministers.
4. Upon the death of the Prime Minister.
5. Upon the resignation of the Prime Minister, or the resignation of one-third or more of the members of government.
6. Upon the dismissal of the Prime Minister by the President of the National Authority.

## *Security Forces and Police*

### **Article 84**

1. The Security Forces and the Police are regular forces. They are the armed forces in the country. Their functions are limited to defending the country, serving the people, protecting society and maintaining public order, security and public morals. They shall perform their duties within the limits prescribed by law, with complete respect for rights and freedoms.
2. The law shall regulate the Security Forces and the Police.

## *Local Administration*

### **Article 85**

1. The law shall organise the country into local administrative units, which shall enjoy juridical personality. Each unit shall have a council elected directly, as prescribed by law.
2. The law shall specify the areas of responsibility of the local administrative units, their financial resources, their relations with the central authority and their role in the preparation and implementation of development plans. The law shall specify the aspects of oversight over these units and their various activities.
3. Demographic, geographic, economic and political parameters shall be taken into consideration at the time of defining the administrative divisions so as to preserve the territorial unity of the homeland and the interests of the communities therein.

## *Public Administration*

### **Article 86**

The appointment of all public officials and governmental staff, and the conditions of their employment, shall be in accordance with the law.

### **Article 87**

The law shall regulate all affairs related to civil service. The Civil Service Department shall, in coordination with the relevant governmental bodies, upgrade and develop public administration. Its advice shall be sought upon drafting laws and regulations that deal with public administration and civil servants.

## *Public Finance*

### **Article 88**

Public taxes and duties shall be imposed, amended and repealed only by law. No one may be totally or partially exempted, except in circumstances prescribed by law.

### **Article 89**

The law shall state the provisions concerning the collection of public funds and the procedures for spending there from.

### **Article 90**

The law shall specify the beginning and the end of the fiscal year, and shall regulate the public budget. If the public budget is not approved by the beginning of the new fiscal year, expenditures shall continue on the basis of a monthly allocation of one-twelfth (1/12) of the previous fiscal year's budget, for each month.

### **Article 91**

1. All revenues received – including taxes, duties, loans, grants and profits accruing to the

Palestinian National Authority from managing its property or activities – shall be paid to the Public Treasury. No part of the Public Treasury funds may be allocated or spent for any purpose whatsoever except in accordance with the law.

2. In accordance with the provisions of law, the Palestinian National Authority may form a strategic financial reserve, to encounter fluctuations and emergency situations.

#### **Article 92**

Public borrowing shall be concluded by law. It is not permitted to commit to a project which would require spending funds from the Public Treasury at a later stage unless approved by the Legislative Council.

#### **Article 93**

1. The law shall regulate the Monetary Authority, banks, the securities market, foreign exchange and insurance companies and all financial and credit institutions.
2. The Governor of the Monetary Authority shall be appointed per a decision issued by the President of the National Authority and endorsed by the Palestinian Legislative Council.

#### **Article 94**

The law shall specify rules and procedures for granting privileges or imposing obligations related to the utilisation of natural resources and public facilities. The law shall also detail the ways and means of dealing with real estate owned by the state and other public legal personalities, and the rules and procedures regulating them.

#### **Article 95**

The law shall specify the rules for granting wages, remuneration, pensions, subsidies and allowances incurring to the state's treasury. The law shall also specify the bodies that will be responsible for their implementation. No exceptional funds shall be spent except within limits specified legally.

#### **Article 96**

1. A Financial and Administrative Auditing Bureau shall be established by law to provide financial and administrative oversight to all apparatus and bodies of the National Authority, which shall include monitoring the collection of public revenues and spending there from, within the limits of the budget.
2. The Bureau shall submit to the President of the National Authority and to the Legislative Council a report annually, or upon request, about its work and observations.
3. The Chief of the Financial and Administrative Auditing Bureau shall be appointed pursuant to a decision issued by the President of the National Authority and endorsed by the Palestinian Legislative Council.

## TITLE SIX: THE JUDICIAL AUTHORITY

### Article 97

The judicial authority shall be independent and shall be exercised by the courts at different types and levels. The law shall determine the way they are constituted and their jurisdiction. They shall issue their rulings in accordance with the law. Judicial rulings shall be announced and executed in the name of the Palestinian Arab people.

### Article 98

Judges shall be independent and shall not be subject to any authority other than the authority of the law while exercising their duties. No other authority may interfere in the judiciary or in judicial affairs.

### Article 99

1. Appointment, transfer, secondment, delegation, promotion and questioning of judges shall be as prescribed in the Judicial Authority Law.
2. Judges may not be dismissed except in cases that are allowed in the Judicial Authority Law.

### Article 100

A High Judicial Council shall be created. The law shall specify the way it is constituted, its responsibilities and its operating rules. The High Judicial Council shall be consulted about draft laws relating to the Judicial Authority, including the Public Prosecution.

### Article 101

1. Matters governed by Shari'a law and matters of personal status, shall come under the jurisdiction of Shari'a and religious courts, in accordance with the law.
2. Military courts shall be established by special laws. Such courts may not have any jurisdiction beyond military affairs.

### Article 102

Administrative courts may be established by law, to consider administrative disputes and disciplinary claims. Any other jurisdiction of such courts, and procedures to be followed before them, shall be specified by the law.

### Article 103

1. A High Constitutional Court shall be established by law to consider:
  - (a) The constitutionality of laws, regulations, and other enacted rules.
  - (b) The interpretation of the Basic Law and legislation.
  - (c) Settlement of jurisdictional disputes which might arise between judicial entities and administrative entities having judicial jurisdiction.



2. The law shall specify the manner in which the High Constitutional Court is formed and structured, the operating procedures it will follow and the effects resulting from its rulings.

#### **Article 104**

The High Court shall temporarily assume all duties assigned to administrative courts and to the High Constitutional Court, unless they fall within the jurisdiction of other judicial entities, in accordance with applicable laws.

#### **Article 105**

Court hearings shall be public, unless a court decides to make them *in camera* due to considerations related to public order or public morals. In all cases, the sentence shall be pronounced in a public hearing.

#### **Article 106**

Judicial rulings shall be implemented. Refraining from or obstructing the implementation of a judicial ruling in any manner whatsoever shall be considered a crime carrying a penalty of imprisonment or dismissal from position if the accused individual is a public official or assigned to public service. The aggrieved party may file a case directly to the competent court and the National Authority shall guarantee a fair remedy for him.

### *The Public Prosecution*

#### **Article 107**

1. The Attorney General shall be appointed pursuant to a decision issued by the President of the National Authority, based upon a nomination submitted by the High Judicial Council.
2. The Attorney General shall handle and assume public cases, in the name of the Palestinian Arab people. The jurisdiction, functions and duties of the Attorney General shall be specified by law.

#### **Article 108**

1. The law shall specify the manner of forming the Public Prosecution service, and its jurisdiction.
2. The law shall determine the conditions for appointing, transferring and dismissing members of the Public Prosecution service and the rules of their accountability.

#### **Article 109**

A death sentence pronounced by any court may not be implemented unless endorsed by the President of the Palestinian National Authority.

## TITLE SEVEN: STATE OF EMERGENCY PROVISIONS

### Article 110

1. The President of the National Authority may declare a state of emergency by 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 state of emergency may be extended for another period of thirty (30) days if a two-thirds majority of the members of the Legislative Council vote in favour of the extension.
3. The decree declaring a state of emergency shall state its purpose, the region 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 convened after the declaration of the state of emergency or in the extension session, whichever comes earlier, and to conduct the necessary interpellation in this regard.

### Article 111

It is not allowed to impose restrictions on fundamental rights and freedoms when declaring a state of emergency except to the extent necessary to fulfil the purpose stated in the decree declaring the state of emergency.

### Article 112

Any arrest resulting from the declaration of a state of emergency shall be subject to the following minimum requirements:

1. Any detention carried out pursuant to a state of emergency decree shall be reviewed by the Attorney General, or by the appropriate court, within a time period not to exceed fifteen (15) days from the date of detention.
2. The detained individual shall have the right to select and appoint a lawyer.

### Article 113

The Palestinian Legislative Council may not be dissolved or its work hindered during a state of emergency, nor shall the provisions of this title be suspended.

### Article 114

All provisions regulating states of emergency that were applicable in Palestine prior to the entry into force of this Basic Law shall be cancelled, including the [British] Mandate Defence (Emergency) Regulations issued in the year 1945.

## TITLE EIGHT: GENERAL & TRANSITIONAL PROVISIONS

### Article 115

The provisions of this Basic Law shall apply during the interim period and may be extended until the entry into force of the new Constitution of the State of Palestine.

### Article 116

Laws shall be promulgated in the name of the Palestinian Arab people and shall be published immediately in the *Official Gazette*. These laws shall come into force thirty (30) days from the date of their publication, unless the law states otherwise.

### Article 117

Laws shall apply only to that which occurs after their entry into force. It may be stipulated otherwise when necessary, except for penal matters.

### Article 118

Laws, regulations and decisions in force in Palestine before the implementation of this law shall remain in force to the extent that they do not contradict the provisions of this Basic Law, until they are amended or repealed, in accordance with the law.

### Article 119

All legal provisions that contradict the provisions of this Amended Basic Law are repealed.

### Article 120

The provisions of this Amended Basic Law may not be amended except by a majority vote of at least two-thirds of the members of the Palestinian Legislative Council.

### Article 121

This Amended Basic Law shall be effective as of its publication in the *Official Gazette*.

Issued in Ramallah City on March 18, 2003  
Corresponding to Muharam 15, 1424 H.

**Yasser Arafat**  
Chairman of the Executive Committee of the  
Palestine Liberation Organization, and  
President of the Palestinian National Authority

## Annex 5: Comparing the Basic Law and the Draft Palestinian Constitution

Topic	Basic Law with latest modifications (2005) <sup>1</sup>	3 <sup>rd</sup> draft of DPC (2003) <sup>2</sup>	Comments
Reference to the PLO	In the introduction it was mentioned that: «the enactment and ratification of this law by the Legislative Council does spring from the fact that <i>the Palestine Liberation Organization is the sole and legitimate representative of the Arab Palestinian people</i> ».		The DPC does not refer to the PLO.  The state, once established, will replace the PA but there is no possibility to understand from the DPC what shall be the consequences on the PLO and the perspectives of its cooperation/relation with the state.
Reference to Arab Nation and/or Islamic Nation	<b>Article (1)</b> Palestine is part of the larger Arab world, and the Palestinian people are part of the Arab nation. (...)	<b>Article (2)</b> Palestine is part of the Arab nation. <i>The state of Palestine abides by the charter of the League of Arab States.</i> The Palestinian people are part of the Arab and <i>Islamic</i> nations. (...)	Only the DPC refers to the Islamic Nation and to the charter of the League of Arab States.
Separation of Powers	<b>Article (2)</b> 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.	<b>Article (64)</b> National sovereignty belongs to the people, who are the source of the authorities. They exercise their duties directly <i>through referenda</i> and general elections or through representatives of the electorate, within its three general powers (...)  <b>Article (65)</b> The relationship between the three public authorities shall be based on equality and independence. <i>They shall exercise their authority on the basis of relative separation with respect to their duties and mutual cooperation and oversight.</i> (...)	DPC provides possibilities to put in practice popular sovereignty through referendum in equal terms with general elections and through representatives.  The DPC is an explanation of the principle of separation of powers understood as checks and balances.

<p style="text-align: center;"><b>Rule of Law</b></p>	<p><b>Article (6)</b> The principle of the rule of law shall be the basis of government in Palestine. All governmental powers, agencies, institutions and individuals shall be subject to the law.</p>	<p><b>Article (9)</b> Government shall be based on the principles of the rule of law and justice. All authorities, agencies, departments, institutions and individuals shall abide by the law.</p>	<p>The rule of law constitutes a basic principle for both constitutional documents.</p>
<p style="text-align: center;"><b>States Responsibility</b></p>		<p><b>Article (10)</b> All activities of the Palestinian public authorities shall, in normal and exceptional circumstances, be subject to administrative, political, legal and judicial review and control. There shall be no provision of law, which grants immunity to any administrative action or decision from judicial supervision. <i>The state shall be bound to compensate for damages resulting from errors, and risks resulting from actions and procedures carried out by state officials in the pursuit of their duties.</i></p>	<p>DPC intends to create a compensation administrative jurisdiction.  It shall be noted that according to the existent legal system in territories under PA control, the High Court of Justice is the only level of administrative Courts and it has the only nullification power, in cases provided by law.</p>

Reference to Islam and Shari'a	<p><b>Article (4)</b> 1. Islam is the official religion in Palestine. Respect for the sanctity of all other divine religions shall be maintained.</p> <p>2. The principles of Islamic <i>Shari'a</i> shall be a principal source of legislation.</p>	<p><b>Article (5)</b> Arabic and Islam are the official Palestinian language and religion. Christianity and all other monotheistic religions shall be equally revered and respected. <i>The Constitution guarantees equality in rights and duties to all citizens irrespective of their religious belief.</i></p> <p><b>Article (7)</b> The principles of Islamic Shari'a are a principle source of legislation. <i>Civil and religious matters of the followers of monotheistic religions shall be organised in accordance with their religious teachings and denominations</i> within the framework of law (...).</p>	<p>DPC gathers language and religion as if they are both considered as part of Palestinian traditions.</p> <p>For this reason, the same article provides that this article will have no legal consequences on non-Muslims.</p> <p>Only the DPC refers to possibilities of monotheistic religions to (continue to) legislate in personal status issues.</p>
System of Government	<p><b>Article (5)</b> The governing system in Palestine shall be a democratic representative system, based upon political and party pluralism. (...)</p>	<p><b>Article (8)</b> The Palestinian political system shall be a <i>parliamentarian</i> representative democracy based on political pluralism. (...)</p>	<p>DPC provides expressly that the Palestinian political system is parliamentary. Something that is not supposed to be declared or provided in a constitutional text but rather should be understood from the kind of separation of powers the constitution creates.</p> <p>Following the analysis of the system in Palestine, one may note the existence of some elements of presidential system.</p> <p>For this reason, some ended by qualifying the Palestinian political system as being semi-presidential, rationalised parliamentary or mixed system.</p>



<p style="text-align: center;">President's Mandate and Election</p>	<p><b>Article (5)</b> (...) The President of the National Authority shall be directly elected by the people. (...)</p> <p><b>Article (34)</b> The President (...) shall be elected in a general and direct election (...)</p> <p><b>Article (36)</b> The term of the presidency of the National Authority shall be <i>four years</i>. The President shall have the right to nominate himself for a second term of presidency (...)</p>	<p><b>Article (115)</b> The President shall be elected directly by the people for a <i>five-year-term, renewable once</i>.</p>	<p>The DPC provides for a five-year-term,, renewable once only.</p> <p>The newly amended article 36 (the 2005 amendments) provides for a four-year-mandate, renewable only once.</p> <p>The original text had extended the President's mandate to the Interim period.</p>
<p style="text-align: center;">President's Oath</p>	<p><b>Article (35)</b> Before assuming office, the President shall take the following oath before the Legislative Council and <i>in the presence of the Speaker of the Palestinian National Council</i> and the President of the High Court: (...)</p>	<p><b>Article (116)</b> The elected president shall assume his duties immediately upon conclusion of his predecessor's term. Prior to exercising the duties of his office, the president shall take the following constitutional oath, before the House of Representatives and in the presence of the head of <i>the supreme judicial council</i>: (...)</p>	<p>In the DPC, the Speaker of the PNC is not present while the reference is done to the President of the High Judicial Council, and not the President of the High Court (although, they are to be covered by the same person).</p>
<p style="text-align: center;">President's Prerogatives</p>		<p><b>Article (113)</b> The President of the State is the President of the Republic. He shall uphold the Constitution and the unity of the people. He shall guarantee the continuity of the existence of the state and its national independence. He shall guarantee the proper functioning of the public authorities. He shall exercise his jurisdiction, and his responsibilities shall be determined pursuant to the provisions of the Constitution. (...)</p>	<p>The DPC presents a list of powers and qualifications that are related to the President in his capacity as «head of states».</p> <p>The DPC states a complete list of prerogatives (art. 125), including the co-signature power to engage the responsibilities of the ministries.</p>

<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Executive Authorities of the President</p>	<p><b>Article (38)</b> The President of the National Authority shall exercise his executive duties as specified in this law.</p> <p><b>Article (63)</b> (...) Except for the executive powers of the President of the National Authority, as specified in this Basic Law, executive and administrative powers shall be within the competence of the Council of Ministers.</p>	<p><b>Article (113)</b> (...) Except those powers that are constitutionally attributed to the President of the State, the government's executive and administrative duties shall be the responsibility of the Cabinet.</p>	<p>Executive authority of the President is exclusive to the provisions of the BL and DPC.</p> <p>Other powers of the President of the PA, in his capacity of an elected President, are not necessarily provided in the BL in an exhaustive way.</p>
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Executive Authority</p>	<p><b>Article (63)</b> The Council of Ministers (the "government") is the highest executive and administrative instrument; it shoulders the responsibility for implementing the program that has been approved by the legislative branch. (...)</p> <p><b>Article (68)</b> The Prime Minister shall exercise the following powers: (...) 3. To preside over sessions of the Council of Ministers. (...)</p>	<p><b>Article (145)</b> The executive authority shall be entrusted with the Council of Ministers.</p> <p><b>Article (140)</b> The Prime Minister practices the following competencies: (...) - He calls the Council of Ministers to meet, sets its agenda of which he informs the President of the State, and presides its sessions except the ones attended by the President of the State. (...)</p>	<p>The government (Cabinet) and the Council of Ministers are synonymous in the BL and the DPC.</p> <p>The Prime Minister presides over the Council of Ministers, unless in those cases when the President is present in the meetings of the Council of Ministers.</p> <p>In other systems with similar constitutional arrangements like France, the President of the Republic is the President of the Council of Ministers, and sometimes even the Prime Minister. Thus, in France, the Council of Ministers is distinguished from the Cabinet; the later being synonymous to the Prime Minister and the Ministers only.</p> <p>Executive powers of the Prime Minister and the Council of Ministers are provided in specific articles. However, all other executive powers, except those expressly done to the President, are of the competence of the Cabinet.</p>

President vs. Government	<p><b>Article (45)</b> The President of the National Authority shall appoint the Prime Minister and authorise 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.</p>	<p><b>Article (122)</b> After consultations with the representative parties, the president shall nominate the Prime Minister <i>from the party that obtained the largest number of seats</i> in the House of Representatives. If the formation of a government is impossible within a three-week period, the President nominates a Prime Minister from the party that obtained the second highest number of seats (...).</p>	<p>The DPC had codified the constitutional <i>urf</i> (custom) of the President assigning the Prime Minister's office first to the nominee of the party with the majority at the Parliamentary assembly. In case of failure, he may nominate the nominee of the second party and so on.</p>
	<p><b>Article (46)</b> The <i>Council of Ministers shall assist the President in the performance of the President's duties and exercise of powers</i>, in the manner stipulated in this Basic Law.</p>	<p><b>Article (121)</b> <i>The President of the State may direct the Cabinet in setting the general policy.</i></p>	<p>Article 46 was important in the 2002 BL, when there was no Prime Minister's office; after 2003, the relevance of such a provision and the legal consequences on the President's power towards the Cabinet members is no longer clear.</p> <p>The DPC, on the contrary, added a problematic article, which allows the President to get involved in drafting the general policy. This is normally the prerogative of the Cabinet, responsible in front of the parliamentary assembly.</p>
President vs. Palestinian Forces	<p><b>Article (39)</b> The President of the National Authority is the Commander-in-Chief of the Palestinian Forces.</p>	<p><b>Article (127)</b> The President of the State is the supreme commander of the Palestinian national security forces, which are headed by a concerned minister.</p>	<p>The DPC tries to find out the possibility of a relationship between the President and the Cabinet (or Minister) concerning security forces.</p>

<p style="text-align: center;">Foreign Representation Offices</p>	<p><b>Article (40)</b> The President of the National Authority shall appoint and terminate the services of the National Authority's delegates to foreign countries, international organisations and foreign agencies. The President shall accept the credentials of foreign delegates to the Palestinian National Authority.</p>	<p><b>Article (126)</b> <i>Upon the recommendation of the minister of foreign affairs,</i> the President of the State shall appoint and terminate the duties of ambassadors and representatives of the state of Palestine to states, regional and international organisations. He shall receive the credentials of representatives of foreign states and representatives of regional and international organisations to the state of Palestine.</p>	<p>According to the Oslo Accords, foreign affairs are not one of the competences of the PA.</p> <p>The PLO remained, theoretically, the representative of the Palestinian people and had (originally) the power (through political departments and the Executive Committee) to nominate Palestine's representative offices.</p> <p>However, the PA had acquired <i>de facto</i> power over Palestinian representation offices that became also financially dependent on the PA.</p> <p>The PLC had adopted a controversial Diplomatic Corps law No. 13 of 2005.</p> <p>The DPC provides that nominations are done upon the recommendation of the Minister of Foreign Affairs.</p>
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<p>PA President's Legislative powers: Promulgation of &amp; Objection on Laws Adopted by Parliamentary Assembly</p>	<p><b>Article (41)</b>  1. The President of the National Authority shall promulgate the laws voted by the Palestinian Legislative Council within thirty (30) days of their transmittal to him. The President may refer a law back to the Legislative Council with his observations and the reasons of his objection within the same period. Otherwise, the law will be deemed promulgated and will be published in the <i>Official Gazette</i>.  2. If the President of the National Authority returns the proposed law to the Legislative Council in conformity with the time limit and conditions specified in the previous paragraph, the Council shall debate the law again. If the Council passes the law a second time by a majority of two-thirds of its members, the proposed law shall be considered approved and shall be immediately published in the <i>Official Gazette</i>.</p>	<p><b>Article (123)</b>  The President of the State shall ratify laws after their approval by the House of Representatives, within thirty days of their referral to him, and he orders their publication.  The President of the State may object to a draft law that was approved by the House of Representatives, and may request its reconsideration accompanied by the reasons for his objection within thirty days of having received such draft law. If the mentioned legal time limit ends without ratifying the law or objecting to it, it would be considered effective and should be published in the Official Gazette.  If the President of the State returns the law previously approved by the House of Representatives within the legal time limit, and such draft receives a second approval by the House of Representatives by a majority of two thirds of its members, it shall be considered a law and so promulgated.</p>	<p>There are no changes between the BL and the DPC concerning the procedures of ratification or objection of laws. However, the DPC is –here again– more detailed.</p>
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<p style="text-align: center;">Decree-Laws</p>	<p><b>Article (43)</b> The President of the National Authority shall have the right, in cases of necessity that cannot be delayed, and when the Legislative Council is not in session, to issue decrees that have the power of law. These decrees shall be presented to the Legislative Council in the first session convened after their issuance; otherwise they will cease to have the power of law. If these decrees are presented to the Legislative Council, as mentioned above, but are not approved by the latter, then they shall cease to have the power of law.</p>	<p><b>Article (130)</b> After the declaration of a <i>state of emergency</i>, the <i>Council of Ministers</i> may, if events necessitate the taking of speedy measures to confront situations that cannot be delayed, issue decrees that gain approval by the president within a period not exceeding fifteen days and then have the force of law. They are to be presented to the House of Representatives in its first meeting after the declaration of the state of emergency, or in the session to extend the state of emergency, whichever occurs first, to decide upon it, otherwise they lose their legal force retroactively. Should the House of Representatives not approve them, they shall cease to have legal effect, and the house would decide how to remedy its effects without any prejudice to material rights of third parties.</p>	<p>The DPC substantively changed the article concerning decree-laws. It is the Council of Ministers, which may adopt decree-laws (endorsed then by the President) but only in a state of emergency.</p>
<p style="text-align: center;">Accountability of Government to the President</p>	<p><b>Article (5)</b> (...) <i>The government shall be accountable to the President</i> and to the Palestinian Legislative Council. (...) <b>Article (74)</b> 1. <i>The Prime Minister is accountable to the President</i> of the National Authority for his actions and the actions of his government. 2. Ministers are accountable to the Prime Minister, each within the limits of their jurisdiction and for the actions of their respective ministry. 3. The Prime Minister and members of the government are jointly and individually accountable to the Legislative Council.</p>	<p><b>Article (137)</b> The prime minister shall preside over the activities of the government. Every minister shall be answerable to the Cabinet in accordance to the procedures as specified by the constitutional rules. The Prime Minister and the ministers are individually and jointly responsible before the House of Representatives for the actions of the government.</p>	<p>The BL stipulates that the Prime Minister is also accountable to the President. There is no similar provision in the DPC</p> <p>Article of BL 74, contrary to Article 5, states that only the Prime Minister is accountable to the President. However, this contradiction is only apparent since the resignation of the Prime Minister also means the dissolution of the government (Art. 83: 3-4).</p>



<p>In case of Vacancy of the President's Office</p>	<p><b>Article (37)</b>          (...) 2. If the office of the President of the National Authority becomes vacant due to any of the above cases, the <i>Speaker of the Palestinian Legislative Council</i> shall temporarily assume the powers and duties of the Presidency of the National Authority for a period not to exceed sixty (60) days, during which free and direct elections to elect a new President shall take place in accordance with the Palestinian Election Law.</p>	<p><b>Article (120)</b>          If the office of the president becomes vacant or the House of Representatives decides to charge him in accordance with Article (132) from the Constitution, <i>the President of the Council of Ministers</i> shall assume presidency of the state for a period, not exceeding sixty days, during which presidential elections are carried out in accordance with electoral laws.          Should the President of the Council of Ministers wish to submit his candidacy for presidency, or should a legal hindrance prevent him from assuming presidency, the <i>head of the Constitutional Court</i> shall assume presidency temporarily until election of the president. The head of the court may not be a presidential candidate.</p>	<p>The DPC provides a very interesting –not very much debated- article: it is the Prime Minister, not the Speaker of the Legislative assembly, who will have the presidency ad interim in case of vacancy of the President's Office.</p> <p>In case of incapacity, it is the President of the Constitutional Court.</p>
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Legislative Council Mandate	<p><b>Article (47)</b>  1. The Palestinian Legislative Council is the elected legislative authority.  2. The 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.  3. The term of the Legislative Council shall be four years from the date of its being elected and the elections shall be conducted once each four years in a regular manner.</p> <p>Article (47 bis)  The term of the current Legislative Council shall terminate when the members of the new elected Council take the constitutional oath.</p>	<p><b>Article (66)</b>  The House of Representatives shall assume legislative power. It shall endorse the general budget, which shall be prepared by the Cabinet. It shall supervise the actions of the executive branch in the manner specified by the Constitution.</p> <p><b>Article (68)</b>  Members of the House of Representatives are elected for five years and may be re-elected more than once. The term of the House of Representatives may not be extended except in case of necessity and by virtue of a law ratified by two-thirds of the total number of the House of Representatives.</p>	<p>Clause 3 of the BL was amended in 2005. The original text: «The term of this Council shall be the interim period». This interesting change reflects the fact that the transitional PA is becoming more institutionalised into the central authority of a state and that the interim period may become permanent. Article 47 <i>bis</i> was also added to the 2005 amendments.</p> <p>In the DPC, under the title “legislative branch”, there is a reference to a House of Representatives, which assumes the legislative power (66-109) and a Consultative Council (110-112) with no legislative authority. The last Council was at the centre of a debate whether it should consist of Palestinians of the diaspora, which questioned the status of the PLO institution, mainly the PNC following the establishment of the state.</p>
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<p style="text-align: center;">Dissolution of the Parliamentary Body</p>	<p>The BL does not provide for the dissolution of the PLC or anticipated elections.</p>	<p>Article (89)          In case of necessity, the President of the State, or the speaker of the Council of Ministers may suggest the dissolution of the House of Representatives. If the dissolution is ratified by two-thirds of the members of the Council of Ministers, the President of the State shall issue the decree of dissolution. The government shall then call for the election of a new House of Representatives within sixty days and in accordance to the procedure defined by the Election Law. If elections are not held, the House resumes its duties until a new House is elected.          The House of Representatives may not be dissolved within the first year of its formation, or during the period of a declared 'state of emergency' as provided for in the Constitution.</p>	<p>Contrary to the BL, the DPC has the possibility to dissolve the elected legislative body. However, this power is passed on to the Council of Ministers although with a decree from the President.</p> <p>Different interpretations may be given to the absence of provisions in the BL, concerning the possibility to end the PLC mandate outside the regular elections every four years. The absence is interpreted as an interdiction or permission, according to the point of view defended.</p>
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<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Interdiction of Duplicating Functions</p>	<p><b>Article (50)</b> In its first meeting, the Council shall elect a Speaker, two Deputies to the Speaker, and a Secretary-General. Together, they shall make up the Office of the Legislative Council. It shall not be permitted to be a member of the Office and hold at the same time the position of President of the National Authority, or Minister, or any other governmental position.</p>	<p><b>Article (70)</b> In the first meeting of the first annual session, the House of Representatives shall elect its speaker, two deputies, and a secretary-general. They shall constitute the body of the presidency of the House of Representatives. Members of the body of the presidency of the House of Representatives may not assume ministerial or other governmental post. A member of the House of Representatives may assume the post of minister, provided that the total number of Deputies Ministers in government does not exceed 50% of the total number of ministers.</p>	<p>According to the BL, only members of the President's Office are forbidden from having governmental positions. It is not clear, however, if the number of ministers, who can be nominated from within the deputies is limited, and whether they can participate in the vote for other deputies and have a possible impact on the principle of separation of powers.</p> <p>The DPC states explicitly that a deputy can be a minister; however, the total number of deputy ministers must not exceed 50%.</p>
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Legislative Initiative</p>	<p><b>Article (56)</b> Each Member of the [Legislative] Council shall have the following rights: (...) 2. To propose laws. Rejected proposals may not be resubmitted within the same term. (...)</p> <p><b>Article (70)</b> The Council of Ministers shall have the right to transmit draft laws to the Legislative Council, to issue regulations and to take necessary actions to implement laws.</p>	<p><b>Article (78)</b> The President of the State in accordance with a decision of the Council of Ministers, the Speaker of the House of Representatives or five of its members, shall have the right to suggest draft laws. Each suggestion that does obtain the approbation of the required majority may not be submitted for discussion in the same session, except by decision that is approved by a two-third-majority of the House of Representatives.</p>	<p>The DPC has the right to present draft laws to the President, but not to the Cabinet.</p> <p>The DPC allows five deputies (not one, as stated in the BL) to present draft laws.</p> <p>Several studies suggest adopting a similar provision in the BL, which states that a single deputy is not allowed to initiate a legislative process and that priority should be given to governmental proposed draft laws.</p>

Independence of Judiciary	<p><b>Article (97)</b> The judicial authority shall be independent and shall be exercised by the courts at different types and levels. The law shall determine the way they are constituted and their jurisdiction. They shall issue their rulings in accordance with the law. Judicial rulings shall be announced and executed in the name of the Palestinian Arab people.</p> <p><b>Article (98)</b> Judges shall be independent and shall not be subject to any authority other than the authority of the law while exercising their duties. No other authority may interfere in the judiciary or in judicial affairs.</p>	<p><b>Article (162)</b> The judicial branch shall be independent. It shall have original jurisdiction to perform the judicial function, and shall be entrusted with deciding all disputes and crimes. The law shall define the institutions of the judicial branch, and regulate their structure and the types of courts, and their levels, jurisdictions and procedures. Exceptional courts may not be formed.</p> <p><b>Article (171)</b> Judges are independent. There shall be no authority over them in their judicial duties except and their conscience, and shall not be removed. The law shall arrange disciplinary questioning of judges before the Supreme Judicial Council in cases defined by without infringement on their independence in performing their duties. No person whatsoever shall be permitted to obstruct justice or the execution of final judicial sentences. (...)</p>	<p>Article 99 of the BL further guarantees the independence of judges. The same applies for the DPC.</p> <p>Both the BL and the DPC adopt a double vision of independence related to judiciary: the independence of the (judicial) institution and the independence of the judge himself.</p>
High Judicial Council	<p><b>Article (100)</b> A High Judicial Council shall be created. The law shall specify the way it is constituted, its responsibilities and its operating rules. The High Judicial Council shall be consulted about draft laws relating to the Judicial Authority, including the Public Prosecution.</p>	<p><b>Article (163)</b> A High Judicial Council shall be entrusted with the affairs of the judicial institutions. (...) This council shall be consulted on draft laws regulating judicial affairs. This council shall have the right to set its own internal regulation.</p>	

Shari'a and religious Courts	<p><b>Article (101)</b> 1. Matters governed by <i>Shari'a</i> law and matters of personal status, shall come under the jurisdiction of <i>Shari'a</i> and religious courts, in accordance with the law. (...)</p>	<p>There is no direct reference in the DPC of the jurisdiction of religious and Shari'a courts.</p>	<p>The DPC does not make direct reference to existent duality of jurisdiction between civil/Shari'a &amp; religious courts; however, it leaves monotheistic religions the power to legislate in personal status affairs. Indirectly, it may mean the continuation of a precedent situation; however, it could also be interpreted as the beginning of the end of such a duality.</p>
Military Courts	<p><b>Article (101)</b> (...) 2. Military courts shall be established by special laws. Such courts may not have any jurisdiction beyond military affairs.</p>	<p><b>Article (175)</b> A military court shall be established and entrusted with deciding military disputes. It shall not decide any case outside the military sphere.</p>	<p>There are common provisions intending to keep military courts limited to military affairs.</p> <p>Both constitutional papers talk about the necessity for it to be established by law. Until now, military courts have been governed by the PLO penal code.</p>
Administrative Courts	<p><b>Article (102)</b> Administrative courts may be established by law, to consider administrative disputes and disciplinary claims. Any other jurisdiction of such courts, and procedures to be followed before them, shall be specified by the law.</p>	<p><b>Article (174)</b> A high court of justice shall be established to decide administrative disputes and disciplinary cases as they are defined by their establishing law. Such law shall regulate its rules of operation, the terms of appointment of its judges and employees and the procedures to be followed before it. Lower administrative courts may be established by law.</p>	<p>The BL and DPC left the issue of establishing constitutional courts as a Constitutional Court.</p> <p>The High Court of Justice remains the only level of administrative courts.</p>



Constitutional Court	<p><b>Article (103)</b> 1. A High Constitutional Court shall be established by law to consider:</p> <p>(a) The constitutionality of laws, regulations, and other enacted rules.</p> <p>(b) The interpretation of the Basic Law and legislation.</p> <p>(c) Settlement of jurisdictional disputes which might arise between judicial entities and administrative entities having judicial jurisdiction.</p> <p>2. The law shall specify the manner in which the High Constitutional Court is formed and structured, the operating procedures it will follow and the effects resulting from its rulings.</p> <p><b>Article (104)</b> The High Court shall temporarily assume all duties assigned to administrative courts and to the High Constitutional Court, unless they fall within the jurisdiction of other judicial entities, in accordance with applicable laws.</p>	<p><b>Article (181)</b> A Constitutional Court shall be established by virtue of the Constitution to exercise its jurisdiction independently in order to preserve the legality of the work of state institutions. (...)</p> <p><b>Article (185)</b> The Constitutional Court shall examine the constitutionality of the following matters (...):</p> <ul style="list-style-type: none"> <li>- The constitutionality of laws before they are promulgated (...);</li> <li>- Deciding disputes related to the constitutionality of laws, ordinances, regulations, measures and decisions issued by the president or the council of ministers which have the force of law;</li> <li>- Interpretation of constitutional texts when a dispute arises over the rights, duties and competencies of the three branches, and in case of a <i>jurisdictional dispute between the head of state and the prime minister</i>;</li> <li>- Deciding problems that arise concerning the constitutionality of programmes and activities of political parties and associations (...);</li> <li>- The constitutionality of signing treaties and the procedures of their implementation (...)</li> </ul> <p>- Any other jurisdictions assigned to it by the Constitution.</p>	<p>The BL states that a High Constitutional Court shall be established, however, it leaves the issue for a law. Law No. 3 of 2006 establishing a Constitutional Court was finally adopted but it contains several problematic issues that were outlined in the body of the report, as expressed in several public debates on the topic.</p> <p>On the contrary, the DPC provides the establishment of a High Constitutional Court and includes several articles regulating it.</p> <p>Interesting to note is that, according to the DPC, the HCC shall be responsible for resolving possible conflicts between the President and the Council of Ministers.</p>
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1 Translation into English for the Palestine Yearbook of International Law, published in Al-Mustafa - Institute of Law, Birzeit University, [http://muqtafi.birzeit.edu/LegTextE.asp?FORM\\_LEG\\_ID=14138](http://muqtafi.birzeit.edu/LegTextE.asp?FORM_LEG_ID=14138).

2 English version used here was published by Jerusalem Media and Communication Center (<http://www.jmcc.org/documents/palestine-constitution-eng.pdf>), the English version was compared to Nathan Brown's translation (<http://www.pcpic.org/domestic/2003/nbrown/c.pdf>), and the Arabic version published by Palestine Media Center (<http://www.palestine-pmc.com/arabic/inside1.asp?x=779&cat=3&opt=1>) and sometimes changed accordingly.





# 2

**A Legal Framework of Future Palestinian  
Citizenship & Citizens' Rights**

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# **A Legal Framework of Future Palestinian Citizenship & Citizens' Rights**

Synthesis of Leading Palestinian Thinking and Public Perceptions

Working paper presented within the context of the project:

## **“The Contours of a Future State”**

A multi-part compendium of Palestinian thinking

Commissioned by the Institute of Law – Birzeit University

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# Legal Framework of Palestinian Citizenship & Citizens' Rights:

Synthesis of leading Palestinian thinking and public perceptions

Reem Al-Botmeh

## 1. INTRODUCTION

The concept of citizenship has evolved with the creation of the modern state. It defines a direct legal and political relationship between the individual and the state (Kadioglu 2007, 1). Citizenship involves civil, political, social and economic rights that are enforceable, as well as obligations (Kadioglu 2007, 2). Hence, modern citizenship necessitates membership of a sovereign state. The concept of citizenship is not one dimensional - it can be political, social and economic - although it must be distinguished from other relationships between people and their communities that are not defined in a legal terms.

Citizenship, and thus citizens rights, in the Palestinian context is one of the most difficult topics to outline and discuss for a number of reasons: Firstly the Palestinians do not yet have a sovereign state, which is a vital element for determining citizenship; secondly, the fragmented realities of Palestinian experience such as the creation of the Diaspora and continuing Israeli occupation; and thirdly, the issue of citizenship is directly linked to Palestinian national rights and at the same time to universal rights as prescribed in international law such as the Palestinian right of self-determination and the right of return. When the Declaration of Principles (also known as the 'Oslo Accords') was signed in 1993 between the Palestine Liberation Organization (PLO) and Israel, an interim Palestinian Authority (PA) was established. The PA is charged with administering certain aspects of Palestinian political and economic life in the West Bank and Gaza Strip and has assumed a governing role and established state-like institutions to that effect. However, the PLO, through its various institutions and instruments, is still considered to be the legitimate entity that represents all Palestinians, whether in the Diaspora or those resident in the West Bank and Gaza Strip, including Jerusalem, and still retains certain powers and performs a number of functions.

Furthermore, it is important to note that the Palestinians living in the territory administered by the PA are in many aspects of their lives still subject to Israeli occupation laws, which in a number of instances deprive them of their basic human rights. Therefore their rights as Palestinian citizens are most often addressed within the context of the right to self-determination and other rights outlined in the universal principles of human rights and international humanitarian law. The PA is constrained *de facto* and *de jure* by the Oslo Accords from exercising full sovereignty over the Palestinian territory. These constraints influence several areas but in particular the ability of the PA to define all its citizens and their rights (Jad 2004, 4). For example, Palestinians Jerusalemites as well as those in the Diaspora fall outside PA jurisdiction. Although the PA can issue passports to Palestinians in the West Bank and the Gaza Strip, only Israel has the authority to approve the issuance of passports to Palestinian Jerusalemites and the Diaspora. Moreover, Palestinians in Gaza and the West Bank have to obtain Israeli issued permits to visit each other as well as to visit Jerusalem. The PA does not have control over its internal or external borders; therefore it does not have control over the Palestinian territory it administers (Jad 2004, 4).

Nonetheless, with the establishment of the PA in 1994, Palestinians in the West Bank and the Gaza Strip, despite the constraints mentioned above, started to engage with the issue of citizenship and citizens rights with regard to the PA and its governing obligations towards them. Therefore, for the

purposes of this paper, the debate about Palestinian citizenship and citizens' rights will be looked at mainly from the so-called 'post Oslo' era following the establishment of the PA. This is not to undermine the other important dimension of Palestinian citizenship, namely that Palestinian rights are to a great extent linked to basic universal rights according to international law, such as the right to self-determination, which is an important element in the exercise of citizenship as well as the rights of Palestinian refugees. For this reason references will be made to 'pre Oslo' documents as required for the purposes of this paper.

It is not the objective of this paper to examine the so-called final status issues regarding a final peace agreement between Israelis and Palestinians, or the opinions and debates on these issues. However, this paper will explore the various ways, in which the legal issues of citizenship and citizens' rights has been approached in Palestinian literature, laws and expressed opinions. While the debate on Palestinian citizenship can be looked at from different political, social or economic perspectives, in this paper the issue of citizens' rights will be approached from a legal perspective. As the debates covered in this paper refer mainly to the 'post-Oslo' period following the establishment of the PA, they are framed largely within the perspective of the temporary nature of the institutions. The laws and draft legislations will be traced pointing out the main disagreement issues that affect the contours of the citizens' rights. In so doing, this paper will not trace all the legislation but only a selection that are related directly to the question of the debate. It will not cover all the issues for debate but rather the key issues that are likely to impact the construction of a system of citizenship and citizens' rights within the framework of a Palestinian State. The literature examined includes scholarly writings, human rights organisations' publications, laws and other official documents. Moreover, this paper does not examine the status of citizens' rights under the PA, but rather the debates concerning the construction of these rights.

This review will cover three main issues. The first is the construction of Palestinian citizenship, including the right to citizenship, as well as gender equality and citizenship; the second covers citizens' rights and political participation with regard to elections, non-governmental organisations, political parties and local governance; and the third deals with the general framework of citizens' rights, which includes social and economic rights.

It is important to mention that the names used in the citations do not necessarily correspond to the opinion of the person or institution referenced, but rather points to the source of information in regard to the point discussed.

## 2. THE CONSTRUCTION OF THE PALESTINIAN CITIZENSHIP

In the Palestinian context, issues of citizenship and the right to citizenship raise a number of questions regarding the actual construction of Palestinian citizenship, for example: Who is a citizen? What are the criteria and mechanisms for obtaining Palestinian citizenship? Which authority should regulate citizenship? Can Palestinian citizenship be constructed inclusively in such a way that integrates all Palestinians into one citizenship body? These issues, especially after the establishment of the PA, present the Palestinians with a dilemma. In most of the works related to citizenship, the constraints and limitations of the PA are presented as being the main impediments to the construction, definition and function of a Palestinian citizenship. Therefore, research on the construction of citizenship in a Palestinian context is still not an issue that has been extensively debated although there were two clear periods of debate during circulation of the draft Citizenship Law (1995) and the Draft Palestinian Constitution (DPC) (2001).

The general debate regarding the construction of citizenship and the right to citizenship can be grouped into three main categories: the first is related to the legal construction; the second consists of the general scholarship and literature on the subject, which was developed in response to certain law or draft laws produced by the PA; and the third part deals with gender and citizenship. In discussing the issues mentioned above, this paper will try to include these three groups of literature.

### *A. Right to Citizenship*

The Palestinian National Charter (1968), the Palestinian Declaration of Independence (1988), the Basic Law (BL) (2003), the draft Citizenship Law (1995) and the Draft Palestinian Constitution (DPC) (2001) are all formal and/or quasi-formal instruments or draft laws that have attempted to outline the legal contours of Palestinian citizenship. It is important to note, however, that these draft laws, for the most part, attempted to define the future of Palestinian citizenship within a Palestinian State such as outlined in the DPC, whereas others were designed to serve a temporary function, such as the BL. But they serve as an indication of the various trends and debates.

The Palestinian National Charter (*hereinafter* Charter) of 1964 (amended in 1968) states in Article 5 that 'every son and daughter [born] to a Palestinian Arab father, who normally resided in Palestine until 1947 regardless of whether they were evicted or stayed there, is considered to be a Palestinian'. In Article 6, the Charter considered the Jewish people, who had resided in Palestine until the establishment of Israel in 1948, to also be Palestinian. In contrast, the Palestinian Declaration of Independence does not define who is a Palestinian and therefore does not modify or replace the definition of the Charter. The earlier drafts of the BL reflected Article 5 of the Charter but the enacted BL of 2002 did not include such a definition. In accordance with Article 7 of the BL, citizenship shall be regulated by law under the limitation of Article 28, which stipulates that no Palestinian may be deported from the homeland, prevented or prohibited from returning to or leaving it, or handed over to any foreign entity. However, citizenship is one of the areas that Palestinian legislators have not yet ratified although there were attempts before the first Palestinian election in 1995, when a draft Citizenship Law started to circulate but was never adopted. This decision was welcomed by many because of the lack of state sovereignty and consequent constraints this imposes on the PA. (Kassim 1997, 212; Khalil 2007, 40; Qfeisheh 2000, 73).

Article 2 of this draft law defines a Palestinian as being any person, who (1) was a holder of Palestinian citizenship (not including Jewish residents) before 15 May 1948; (2) was born to a Palestinian father;



(3) was born in Palestine to a Palestinian mother even if the citizenship of the father is not known; (4) was born in Palestine to an unknown mother and to a father whose nationality was not known, provided that this person opts for Palestinian citizenship within one year after reaching maturity, that he notifies the minister of interior of his intention to become a Palestinian citizen, that he becomes habitually resident in Palestine, and that the minister does not object to his application within one year from the time he receives the notice from the applicant.<sup>1</sup>

The DPC, envisaged as a constitution for the future Palestinian State, deals with the issue of citizenship. Three drafts were circulated at different periods of time for public debate. In Article 12, the third draft stipulates that citizenship will be regulated by law and is secured for any Arab, who lived in Palestine before May 1948. This notion continues to this day as it has been transmitted orally through successive generations. In Article 13, the DPC states that Palestinians, who left Palestine after 1948 and who were denied re-entry, shall have the right to return to the Palestinian State and obtain its nationality as a permanent, inalienable, and irrevocable right. Furthermore, the state shall continue to apply the right of return to all Palestinian refugees to their homes and villages or obtain compensation in accordance with United Nations General Assembly Resolution 194 (passed in 1948).

In attempting to confer citizenship on all Palestinians, the documents mentioned above have tried to apply various definitions and mechanisms. Hence, the question most debated is to what extent these definitions and mechanisms can meet particular Palestinian challenges, such as the reality of a geographically dispersed Palestinian Diaspora? Generally, most countries citizenship laws enable individuals to obtain their citizenship on the basis of land or the place they are born (*jus soli* or 'law of the soil'), parental citizenship or blood relations (*jus sanguinis* or 'law of the blood') and/or via the administrative process of naturalisation, whereby a non-indigenous person can acquire citizenship after they have resided in a country for a certain length of time. These three mechanisms are conventional methods for dealing with the issue of citizenship (Khalil 2007, 41).

In the Palestinian context, some have argued the importance of adopting a combination of these conventional methods rather than one in particular (Kassim 2000, 220; Khalil 2007, 39; Qfeisheh 2000, 6). At the same time, it has been suggested that new methods and mechanisms to deal with the specific challenges of Palestinian citizenship should also be developed (Kassim 2000, 221; Qfeisheh 2000, 101). There is agreement, however, that the central challenge is that of the Palestinian Diaspora (including refugees) and what impact any definition of citizenship might have on their status. It is important that the instruments of Palestinian citizenship be used to improve the status of the refugees and protect their right to return, and not to consolidate or legitimise their dispossession. (Shiblak & Davis 1996, 72). The fact that the DCL was not clear on the issue of the system of entitlement for refugees provoked criticism that the law was being evasive with regard to the status of the Palestinian refugees and their descendents (Kassim 2000, 220). Moreover, critics asserted that the right to citizenship is an inherent right to each and every Palestinian, hence citizenship should be conferred on all Palestinians (Kassim 2000, 221). One suggestion was to adopt the right of return as a method of acquiring Palestinian citizenship. This would mean that every Palestinian, who is entitled to return according to United Nations General Assembly Resolution 194, should also be entitled to Palestinian citizenship (Kassim 2000, 222; Qfeisheh 2000, 101; Khalil 2007, 5). Acquiring Palestinian citizenship on the basis of the right of return should not jeopardise the refugees' right of return to their homes and villages in accordance with international law (Kassim 2000, 222). It was also suggested that the future Palestinian Citizenship Law should adopt a flexible approach to dual or multi-nationality citizens in order to protect the

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1. This of the draft Citizenship Law was taken from Kassim F. Amis, 'The Palestinians: From Hyphenated to Integrated Citizenship' in Butenschon-A. Nils et al. *Citizenship and the State in the Middle East*, p. 219.

rights of the Palestinians in the Diaspora (Qfeisheh 2000, 102). Therefore the issue of Palestinian citizenship will require reform in the regional legal order as the future Palestinian State will have to deal with these matters (Shiblak & Davis 1996, 72).

The DPC does, however, confer Palestinian citizenship on all Palestinians. Nonetheless, Articles 12 and 13 of the DPC have provoked a lot of criticism with regard to their impact on Palestinian refugees (Kayed 2004, 19-22). It has been argued that attempting to deal with the issue of Palestinian citizenship prior to statehood will have far-reaching political and legal implications that might impact negatively on Palestinian people's rights, especially the refugees' rights (Kayed 2004, 22). The opponents of such position point out that the constitution will not be implemented prior to any final status agreement (Kayed 2004, 22).

On the other hand, although the instruments mentioned above use a combination of land and blood criteria, the emphasis is on the blood criteria to determine one's entitlement to citizenship. Within this framework of entitlement, most of the documents (with the exception of the second and third DPC) have permitted Palestinian fathers, but not mothers, to pass citizenship on to their children. This position was criticised by the women's movement in particular, as well as many other scholars, as being an impediment to the construction of Palestinian citizenship (Jad et al 2003, 182; Abdo 1999, 43; Khalil 2007, 41; Nassar 2004, 47). Following pressure from women's interest groups, the latest version of the DPC in Article 12 specifies the ways, in which Palestinian nationality can be transmitted by both parents. For the first time in an Arab state, women have been nominally given the right to pass on their citizenship to their children (Jad 2004, 9). On the other hand, the issue of whether wives can pass their citizenship on to their spouses still has to be resolved within the realm of the Citizenship Law. The Women Rights Charter<sup>2</sup> has specified these issues of concern and continues to advocate for the right of women to acquire, preserve or change their citizenship. Legislation must also guarantee that a Palestinian woman's marriage to a non-Palestinian, or change in her husband's nationality while they are married, will not necessarily change her citizenship. Some authors argue that women should also be granted the right to pass citizenship to their children and spouses (Hamami & Johnson 1999).

Discussion of the right to citizenship leads naturally to an examination of the authority that regulates citizenship as well as the limits of its regulations. There has been criticism of the approach taken by the draft Citizenship Law, which allows the executive branch the exclusive right to grant, annul, or withdraw citizenship. It has been suggested that such powers be granted to an independent agency, whose decisions would be subject to judicial review (Kassim 2000, 223).

## ***B. Citizenship and Nationality***

The distinction between nationality and citizenship is one of the main issues that has emerged in the Palestinian literature as a topic for discussion. For some, the fact that the PA has not tried to regulate the definition of citizenship is due to the fact that the exclusion of Palestinian refugees and Jerusalemites from PA jurisdiction has made it too controversial and difficult to draft legislation that is inclusive of all Palestinians. Secondly, the PA does not want to be forced into legislating a *de*

2 The General Union of Palestinian Women (GUPW), human rights NGOs and others, in January 1994, formed an umbrella group to produce a «Women's Charter» published in August 1994. The document was presented to the President. The document aimed at «cancelling» the laws that discriminate against women, guaranteeing the rights of women in the political, economic, social and educational spheres, and their equality in front of the law...[It] also demanded that the state of Palestine comply with international women's laws».

*facto* separation between Palestinian nationality (identity) and Palestinian citizenship, therefore the draft BL did not attempt to define citizenship (Hamami & Johnson 1999, 327). In contrast, others have suggested distinguishing between nationality and citizenship in order to create a Palestinian concept of both that encompasses the particularities of the Palestinian case, including its challenges and history (Salem 1997, 10). Nationality is one's relationship to a homeland and community while citizenship defines one's relationship to the state (Salem 1997, 26). This distinction is important in the Palestinian context because it acknowledges the link between Palestinians and their country (territory or 'pre-state' homeland) and the fact that although Palestinian nationality has evolved outside of the homeland or 'pre-state', a Palestinian identity still exists. (Salem 1997, 10).

Some authors have underlined the importance of making a distinction between nationality and citizenship so that once a Palestinian state has been created there will be a distinction between Palestinian nationals and Palestinian citizens. The Palestinian nationals being those entitled to constituent power (the power to frame and amend the constitution) shall not necessarily coincide with those who effectively exercise that power i.e. Palestinian citizens and the institutions that represent them (Khalil 2007, 2). The rationale for distinguishing between Palestinian nationals and citizens is justified by the current envisioned form of the two-state solution as this pre-supposes that some Palestinian nationals will be living outside the state of Palestine (for example within the state of Israel) and that the right of return may not be fully implemented with the obtaining of Palestinian citizenship but rather with the return to their homeland, which can be making part of the territory of the state of Israel (Khalil 2007, 2).

Others have argued for a broader distinction between nationality and citizenship. According to Hanafi, 'the rights and duties of those living in Palestine would not be a function of their nationality (i.e. whether they are Palestinian or not.) At the same time, those of Palestinian origin who live abroad could also enjoy rights and duties, even though not residing permanently in Palestine' (Hanafi 2003). These authors suggest that 'the weakness of the centre of gravity of the Palestinian Diaspora, alongside the relatively new Palestinian national identity, raises many complex questions about Palestinian state formation and the ability of the PA to challenge the classic pattern of citizenship and nation-states'. ..... 'In this case the state is territorialised, but it distinguishes between citizenship and nationality' (Hanafi 2003).

Although the matter of distinction was not discussed extensively within the literature mentioned at the start of this section, others have indicated that on the national level there is no distinction between Palestinian nationality and citizenship, and hence each citizen is a national and every national is a citizen (Qfeisheh 2000, 8). On the other hand, Palestinian legal instruments do not distinguish between nationals and citizens; on the contrary, the right to citizenship is given to each and every Palestinian, according to Article 12 of the DPC.

### ***C. Equality, Gender and Citizenship***

When discussing citizenship, Palestinian scholars always examine to what extent there are constitutional guarantees for equality (Milhem 2006, 137; Nassar 2004, 45). Equality and non-discrimination are considered to be the foundation of human rights and liberties. Equality is an essential element in the definition of citizenship because citizenship requires equal membership in the political community, without which it loses its meaning and content, even if it continues to exist formally (Zaidani 2006, 96). In the Palestinian literature on citizens' rights, the principle of equality is understood to mean equality before the law and the judiciary as well as equality in rights, freedoms and responsibilities (Sammar 1999, 9). It is important to mention that academic literature



and reports by human rights organisations stress the importance of translating this principle into practice, as well as inscribing it formally.

According to the Declaration of Independence, Palestinians will have full and equal rights and will be able to enjoy their national and cultural identity. Further, the Palestinian State will safeguard individual political and religious convictions by means of a parliamentary democratic system of governance, based on freedom of expression and the freedom to form political parties. Moreover, the Declaration has made it clear in the areas of authority and representation that the right of minorities will be respected by the majority. Governance will be based on the principles of social justice, equality and non-discrimination in race, religion, colour and sex under the aegis of a constitution, which ensures the rule of law and an independent judiciary. According to Article 9 of the BI, the principle of equality applies to all citizens, who stand before the law and the judiciary irrespective of race, sex, colour, political views or physical disability. The substance of this article was also reflected in Article 19 of the DPC, which determines that all Palestinians are equal before the law without discrimination; the article adds that the term 'Palestinian' or 'citizen' includes both female and male. When discussing the articles of the DPC that relate to equality, many authors have drawn attention to the specific issues that infringe upon gender equality.<sup>3</sup> The reference made in the DPC concerning a link between women's religious rights and their 'natural' role as women is one of the main issues criticised (Said 2004, 208; Jobran 2004, 199). In the current draft of the DPC, women are defined as equal citizens but they enjoy fewer rights than men in the family realm (Said 2004, 208; Jobran 2004, 199).

Although there are formal expressions of commitment to equality in the construction of Palestinian citizenship, there are still issues arising from within this framework that need to be debated. Most of the debates over citizenship and equality have focused to a great extent on the issue of gender and citizenship, and also on issues of religion and the state.<sup>4</sup>

Nonetheless, the women's movement has always used the principle of equality in order to argue for extending women's citizenship rights (Hamami & Johnson 1999, 319; Jad et al 2003, 180). This equality strategy was behind most of the important initiatives by the women's movement to review existing legislations and lobby for the future ones (Hamami & Johnson 1999, 25). Furthermore, the discussion on gender, equality and citizenship emerged even before the establishment of the PA, when the women's movement engaged in a discussion on their role in state building and position in authority to influence the construction of the Palestinian citizenship (Hamami & Johnson 1999, 326; Jad et al 2003, 183). A so-called 'gender agenda' for legal reform has been developed and ratified through several processes and documents. The Palestinian Women's Charter of 1994 based itself on the equality provisions in the 1988 Palestinian Declaration of Independence and on relevant United Nations conventions, including the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), thereby placing the issue of equal opportunities for women, in terms of their rights and obligations, firmly within the process of building a democratic society (Hamami & Johnson 1999, 328; Jad et al 2003, 185; Abdo 1999, 44). The Women's Charter addressed specific economic and political rights and demanded in general terms full equality regarding issues of personal status (Hamami & Johnson 1999, 319; Jad et al 2003, 180). Several workshops on gender and equality were held during the period from 1994 to 1997, the outcome of which was several

3 Equality, gender and political participation will be discussed in the second part of this paper along with the issue of quotas.

4 Debates concerning religion and the state are covered in more detail in the paper prepared by Asem Khalil: 'The Constitutional Framework of the Palestinian State'.

documents on women's rights and equality in social, economic and political realms (Abdo 1999, 45). One of the main documents prepared by Asma Khader on 'The Law and the Future of Palestinian Women' was introduced as a basis for discussion on a model parliament (Abdo 1999, 45). The idea of a model parliament was initiated by the Women's Center for Aid and Counselling (WCLAC) and a committee consisting of four women's organisations. They started, through a process of debate and discussion, reviewing the many laws and legislations from the perspective of gender equality, and suggested amendments to existing laws and the introduction of new gender sensitive ones (Jad et al 2003, 186). Several laws were reviewed, including labour, social security, penal and education (Jad et al 2003 186; Abdo 1999, 45). However, although discussions and debates were held with regard to the application of the principle of equality into these laws, one of the issues that remains a subject of sustained debate is that of women and religion, specifically in regard to the Personal Status Law and to a lesser extent the Penal Law. But for some, the Personal Status Law is not the major obstacle to the realisation of women's rights and they argue that sufficient attention should be given to other issues (Omary 1999, 31). However, it is important to note that the discussion on women's equality and Personal Status Law is linked to a great extent to the general debate on religion and the state and *Sharia* as a source of legislation.

With regard to personal status issues, the application of the principle of equality has instigated debate and the consequent formation of several different positions. Attorney Khader, in the book 'The Law and the Future of Women' has suggested specific amendments to the Personal Status Law and general suggestion in favour of a unified family law to be applied in civil courts (Hamami & Johnson 1999, 331, Jad et al 2003, 187). Hence, the first position was in favour of applying the principle of equality into the realm of Family Law and favouring a Civil one that is applied in the civil courts (Hamami & Johnson 1999, 331, Jad et al 2003, 186). In contrast, those who subscribe to a more Islamic perspective are clear that matters pertaining to Personal Status Law are religious matters that should only be discussed by the religious authorities and should not be discussed by the PLC at all (Jad et al 2003, 188). However, when debating the Personal Status Law, Islamic opinion appears to be divided into three main streams of thought: those supporting *Sharia* as it is without reform because *Sharia* is already based on the principles of Islamic justice and equality; those supporting reform from within *Sharia* affirming that Islamic law is responsive to change that reflects the needs of contemporary women and society; and those advocating applying the principles of gender equality, as stipulated in the Palestinian Declaration of Independence and various United Nations resolutions, and lobbying for a civil family law that can be applied in civil courts (Jad et al 2003, 186).

Many issues of personal matters have instigated a lot of keen debate in the model parliament. These issues include polygamy, child custody, divorce and inheritance. Some agreement has been made, such as rising the age of marriage to 18 for both men and women (Jad et al 2003, 187). However, many issues have not been resolved yet, the draft Personal Affairs Law has not yet been debated in the Palestinian Legislative Council (PLC) (Jad et al 2003, 187).

It is important to note that the claims around citizenship and the equality argument were made within the context of the Oslo framework (Hamami & Johnson 1999, 325). This context in particular limits the PA from defining the Palestinian Citizenship and confines the International Law as a discourse of the negotiation (Hamami & Johnson 1999, 325). Thus, a tension is evident in tracing the claims around citizenship and equality as it is sometimes in dispute with the notion of citizenship and rights available within the Oslo framework (Hamami & Johnson 1999, 325).

### 3. CITIZENS' RIGHTS AND POLITICAL PARTICIPATION

Political participation in a democracy is an important dimension of modern citizenship, whereby citizens seek to influence public affairs and participate freely in the political process. The right to participation can take many forms, including voting in elections and running for public office, the right to form and join political parties, and the right to demonstrate. In the Palestinian political realm, the issue of political participation is a dual dimensional one arising out of the duality and overlap between the institutions of the PLO and the PA.

The PLO, with its quasi-governmental structure, is a totally different body to that of the PA because its institutional structure operates on the basis of a totally different system of legitimacy. (Hilal 1998, 121). The Palestinian National Council (PNC), often referred to as the legislative branch of the PLO, derives its legitimacy from its representation of all armed political groups within the leading PLO decision-making bodies (Hilal 1998, 121). In contrast, the Palestinian Legislative Council (PLC) bases itself on direct electoral legitimacy (Hilal 1998, 121). Furthermore, the PA includes only one section of the Palestinian people – those who are resident in the oPt – which necessarily marginalises the involvement of other Palestinians, namely the Diaspora, including the refugees (Hilal 1998, 129; Amundsen & Ezbidi 2004, 144). Therefore, the PLO is still the legitimate representative of all Palestinians both in the occupied territory and outside it. So, although the PA acts as the day-to-day governing body, much of the actual authority and legitimacy in terms of representation still rests with the PLO (Amundsen & Ezbidi 2004, 144).

Nevertheless, as this paper is examining the participatory system from the perspective of citizenship, the PA model of governance, and related debates, will be the focus of discussion. This is not to undermine the governing role of the PLO as the representative body of all Palestinians, but rather because the PA has emerged as part of a state formation project, and this aspect is reflected in much of the literature. Within the context of political participation, the related issues of elections, political parties and civil society organisations will be examined from the perspective of citizenship.

#### *A. Election Laws*

The right to vote and stand as a candidate in an election is the corner stone of political participation in a modern democracy. The election system and 1995 Election Law of the PA has provoked debate since the first election in 1996. However, the main legal and political instrument in relation to the Palestinian electoral system is the Palestinian Declaration of Independence. Here it states that the Palestinian State will be based on a parliamentary democratic system of governance based on the following: freedom of expression and the freedom to form political parties. These main principles are reflected in the 1995 and 2005 Election Laws, which outline the overall electoral procedure, including the right to vote or stand as a candidate; the BL, which grants the right to vote to every Palestinian and refers to the Election Law for regulating this process; and the DPC, which in Article 21 of the third draft, grants every 18-year-old Palestinian the right to vote. The same article grants every Palestinian the right to stand as a candidate in a presidential or legislative election. This has been interpreted by some as allowing independent candidates to run for election and not to confine candidature to parties. (Brown 2003, 13). It is important to note that only Palestinians in the oPt, including East Jerusalem, have the right to vote in accordance with the Election Law, hence the Palestinian Diaspora are excluded.

The main debate on the 1995 Election Law during the first elections, and the process leading to the enactment of the law, as well as the second elections are primarily, but not exclusively, centred on the electoral system, including the question of quota for affirmative action. Moreover, the DPC provoked some debate about the issue of political participation of the Diaspora and how this could



be improved. The first election was held in 1996 in accordance with the 1995 Election Law, and the second election was held in 2006 in accordance with the 2005 Election Law. The first election started the debate on the voting system and its efficiency. The fact that the 1995 Election Law had adopted the simple majority, multi-member, multi-constituency district system of elections with regard to the PLC provoked a lot of criticism from Palestinian intellectuals and academics as well as political parties (Shikaki 1996, 18; Andoni 1996, 6; Amr 1996, 20; Jarbawi 1999, 40). This criticism was revived in the debate on reform between 2002 and 2005. The 1995 Palestinian Election Law with its majority system (districts) was mainly criticised for allowing local and clan allegiances to prevail. Indeed, voting by district rather than on the basis of proportional representation (lists) automatically encouraged candidates with a strong clan base or local government connections that enable them to deliver government services (Shikaki 1996, 18; Andoni 1996, 10; Amr 1996, 20; Jarbawi 1999, 40; Hilal et al 2001, 31- 57). The 1995 Election Law made it difficult for representatives of smaller political parties and also women candidates to be elected (Amr 1996, 20). Others objected to the fact that the number of seats allocated in some districts was not proportional to the population (Andoni 1996, 10; Nassar 2006, 191). Calls for reforming the Palestinian election system were accompanied by widely circulated reports assessing the previous electoral system and suggesting amendments to the new system that emerged in 2002. The call for reform was articulated in the Reform Document adopted by the PLC on 16<sup>th</sup> of May 2002. (Awad 2004, 1). Hence various debates have emerged as to which kind of electoral system would be most suitable for Palestine. First a memo issued by the Civil Society organisation demanded to amend the 1995 Election Law and change the system from a majority system (district) to one based on proportional representation (lists), or a mixed system of both (Hilal et al 2001, 59-69; Awad 2004, 2). This position was also adopted by several political parties, and after a meeting with civil society organisations it was articulated in a document submitted to President Yasser Arafat on 10<sup>th</sup> February 2003 and the Head of the PLC on 1<sup>st</sup> March 2003. The document called for the introduction of either proportional representation or a mixed system, increasing the number of seats and introducing quota for women (Awad 2004, 2). Furthermore, a draft law was prepared by a team of experts from the Palestinian Institute for Study of Democracy (MUWATIN) and submitted to the PLC by PLC member, Azmi Shuaibi (Awad 2004, 3).

However, some protagonists in the PLC and the government as well as Palestinian intellectuals wanted to maintain the majority system (districts) arguing that it was a simple system that functions well within the particular context and the constraints of the current Palestinian situation of occupation (Awad 2004, 4; Shtayeh 2002, 69). On the other hand, the issue of the electoral system was one of the recommendations of the Cairo Declaration in <sup>3</sup> March 2005, which proposed adopting a 50/50 system between the majority (district) and proportionate representation systems (lists) (Harb 2007, 17). The PLC initially adopted the mixed system with two thirds of PLC seats being elected by the majority system and one third by the proportionate representation system. This was rejected by President Abbas, who used his constitutional powers to return the law to the PLC for amendment (Harb 2007, 36).

On 18th June 2005, the PLC ratified a new election law (Election Law No. 9 of 2005), which adopted a new mixed electoral system for the PLC elections (the 1996 general elections had been held in accordance with the system of simple majority). The mixed electoral system combines the majority system (districts) with proportional representation (lists). The law (2005) divides the 132 PLC seats equally between the majority system (66 seats) and proportional representation (66 seats). Prior to ratification of the new law, civil society organisations had demanded the candidate age limit

3 The Cairo Declaration is a statement made by 13 Palestinian group after a three- day meeting in Cairo on March, 2005.

The United Nations Relief and Works Agency (UNRWA) was established by United Nations General Assembly resolution 302 (IV) of 8<sup>th</sup> December 1949 to carry out direct relief and work programmes for Palestine refugees.

to be lowered from 30 to 25. But this provision was not adopted by the PLC. However, there are still calls to adopt a fully proportionate system of election rather than the current mixed one (Nassar 2006, 192).

Both the 1995 and 2005 Election Laws granted Christians a representational quota as a means to 'affirmative action', which sparked debate about the merits of such a policy and its compatibility with the principle of equality in the context of citizens' rights. Those who opposed this quota system argued that a quota for religious minorities serves to entrench inter-religious differences and discourage coalition building across religious lines (Amr 1996, 21; Jarbawi 1999, 42). Many Christian and non-Christian Palestinians complained that the creation of a specifically Christian quota was unhealthy in this respect (Andoni 1996, 10). However, the supporters of the quota system have justified it on the grounds of ensuring Christian representation (Andoni 1996, 10).

On the other hand, the 1995 Elections Law did not provide for 'affirmative action' for women. This approach was debated at the time, and although the majority of women's groups supported it, it was not favoured by all of them (Said 1999, 56). The supporters argued that discrimination comes from within the social structures and therefore 'affirmative action', whether temporary or permanent, was necessary to mitigate its impact and to guarantee the participation of women (Said 1999, 56). Opponents argued that the quota system would limit women's participation as it put a ceiling on it, but that it was no longer necessary as the 1995 Election Law had granted formal equality (Said 1999, 57). However, as women candidates did not win many seats in the first national election, this particular debate has continued along with calls for electoral reform, including at the local level. Although not previously supported by all, this motion is now supported by women's groups as well as most of the political parties. The request for electoral reform and women's group's demands for the enhancement of women's political participation was also included in a document on women's political participation presented to President Arafat on 8<sup>th</sup> December 2003. Several women's groups and civil society organisations presented the document, which demanded at least 20 % of the seats to be reserved for women and aimed at encouraging political parties to include women candidates in their lists (Awad 2004, 9).

In contrast, political parties such as Hamas, along with other intellectuals and members of the PLC, have argued against the quota system on the basis that it was discriminatory and women participation should be in the parties lists (Awad 2004, 2-4). Many of those, who stood against the quota system perceived it to be discriminatory on the basis of sex and therefore not conducive to democratic values and the principle of equality (Qasem 2002, 30; Salem 2004).

However, supporters of the quota system argued that it was 'affirmative action', which does not contradict the principle of equality because in practice, formal equality is rarely achieved due to certain social or economic realities, and therefore the law should intervene to provide for equal opportunities (Habashneh 2004, 1-16; Yosef 2005, 67; Nashwan 2002, 16; Alghoul 2002, 17- 19). The 2005 Election Law grants women a minimum level of representation in parliament by stipulating that the proportional representation list of each party should include at least one woman in the 1-3, 4-7, 8-12 sections (Harb 2007, 28). However, this approach has been criticised by many women's groups, who believe the quota system should be applied at the district level, where women face most social discrimination due to the entrenched social structures. They argue that it is not necessarily needed on the proportional lists, where parties have already expressed their commitment to ensure better representation of women (Kitaneh 2006, 54).



## ***B. Political Parties and Plurality***

Political parties are one of the most significant tools in a representative system of governance. They add an important dimension to the quality of citizenship because they enable people to organise themselves on the basis of political, economic and social programmes rather than on the basis of clan, family or tribal loyalty. Therefore, the level of commitment shown by the political system in facilitating the emergence and proper functioning of political parties as part of the electoral process is essential for ensuring the rights of the citizen as political parties must represent the views and wishes of their members and be accountable to its constituency. Both the PLO and the PA have expressed a commitment to ensure political plurality and freedom to both form and join political parties (Hilal 2006, 89). Although until the last elections in January 2006, both institutions had been dominated by one political party. The commitment to political plurality is reflected in the Declaration of Independence and in Article 26 of the BL, which stipulates that Palestinians shall have the right to participate in political life, both individually and in groups. Indeed, they are afforded the right to establish and join political parties in accordance with the law. The DPC also articulates a commitment to the right to join and form political parties, and in Article 182 it grants the power to dissolve parties and decide on the constitutionality of their programmes to the constitutional court. The 1996 Election Law contained an elaborate mechanism for the registration of, and participation in political parties. Article 3 of the 2005 Election Law states that an election list may be formed by a party or a coalition of parties as well as a group of people.

The regulation of political parties was one of the early policies of the PA, which began with the circulation of a draft Party Law in 1995. As this dealt with a number of politically sensitive issues, the draft prompted a lot of discussion and debate. A second draft of the law was circulated in 1996 and a third appeared in 1998 (Jarbawi 1999, 79-89; Awad 2006, 34). It is important to also mention that in 2005, PLC member Azmi Shuaiby introduced a new draft to the PLC. However, a serious discussion about the law emerged again in 2003, when the electoral system as a whole was being discussed. The debates on the draft Party Law can be loosely divided into two main groups: those with general concerns about the timing of the debate; the particularities of the Palestinian situation and the actual need for such a law, and those who assumed that there was a need and focus on the content of the Party Law and what type of Party Law would be most suitable for Palestine (Kayed 2006, 12).

On the issue of timing and particularity of the Palestinian situation, three opinions emerged. The first one argued that there was no need for a Party Law under the current conditions of occupation and lack of real sovereignty (Kayed 2006, 12; Dweik 2005, 1; Awad 2006, 34; Shbeeb 2006 74- 76). Such a law would require these factions to reveal issues of a confidential nature, which would be politically inappropriate under the particular conditions of occupation (Dweik 2005, 1). Within the current political context, it may also have implications for national unity with respect to relations between local residents and the Diaspora (Aman 2005). The second view favours the introduction of a Party Law as a way to formulate a new political future, one that adopts an electoral system of proportional representation. (Kayed 2006, 12; Aman 2005). The third opinion proposes adopting a Party Law that takes into account the reality of the current political situation and specificities of the occupation (Kayed 2006, 12). Although the argument of timing was adapted by most of the Palestinian factions, the content of this law was also an important factor in their argument.

In terms of content, it seems that there is a tendency amongst scholars and human rights organisations to advocate a liberal Party Law that takes into account the particularities of the Palestinian situation. Hence, the first draft of the law was essentially rejected not only because of the right timing but also because of the constraints imposed on the formation of political parties. The second draft did not differ much from the first one (Jarbawi 1999, 80- 85; Shbeeb 2006, 74- 75). The third draft

was considered more progressive than the first one. The main issue of disagreement and debate regarding the draft law concerns political parties: how they are defined, mechanisms for formation and dissolution, internal democracy, external relations and financial resources (Kayed, 2006, 13-19).

During these debates, there were frequent calls to limit the perceived interference of the executive authorities in the formation and dissolution of political parties. Hence, comments included an emphasis on a registration rather than a licensing system, and giving regulatory responsibility to the Ministry of Justice rather than the Ministry of Interior as being a public order ministry or even to establish an independent commission or utilise the Central Election Committee (CEC) (The Palestinian Centre for Human Rights 1995, 10- 15; Shbeeb 2006 74- 76; Kayed 2006, 10- 17). In the debate about how to define a political party, the main concerns were that it should incorporate the principles of democracy, accountability and transparency as well as the particularities of the Palestinian context, especially taking into account the relationship between the Diaspora and those residents in the oPt (Kayed 2006, 10).

### *C. Palestinian Non-Governmental Organisations*

The right of citizens to political participation includes the right to form and join unions, organisations, societies and clubs. This right is protected under the Palestinian constitutional and legal framework of the BL in Article 26, and under Article 54 of the DPC. Article 1 of the Charitable Associations and Community Organization Law, ratified in 2000, stipulates that Palestinian citizens have the right to practice social, cultural, professional and scientific activity in all freedom, including the right to establish and run associations and community organisations. Following the establishment of the PA, relations between the authority and non-governmental organisations (NGOs) became tense and consequently the focus of debate.

The core of this debate concerns the right to freedom of organisations and how to regulate this right by law without infringing upon it. In 1995, the Ministry of Justice advanced a legislation, which the NGOs (especially the Palestinian Non-Governmental Organisations Network (PNGO), the General Union for Charitable Associations and many scholars) considered to be repressive because it subjected them to what they perceived as excessive control of the PA (Hamami 2002, 18; Jarbawi 1999, 92- 94; Salem 1999, 197). Although there were few, who considered regulating this field by law - no matter how liberal it might have been - as a limitation on the freedom of association, most of the debates centred on the law and its content (Salem 1999, 192). There was an agreement that the NGOs would have to be regulated.

However, the question remained what form of regulation? Also, under whose authority (ministry) would NGOs be placed, and what rights and responsibilities would NGOs themselves have? PNGO initiated a new draft containing the NGO vision of a more liberal law, not too dissimilar from the current law (Hamami 2000, 18; Jarbawi 1999, 95). However, prior to ratification, President Arafat returned the last draft of the law, which the PLC passed in 1999, in order to grant regulatory authority to the Ministry of Interior rather than the Ministry of Justice (Hamami 2000, 18). Questions on the legal framework of NGOs can be formulated into three main areas: The first one concerns the legitimacy of forming NGOs and the freedom to operate, which includes debates about registration, formation and dissolution; the second one is about the relationship between the NGOs and the PA; and the third looks at the accountability and transparency of NGOs both to the state and to individual constituents (Abed Alhadi 2004, 19). Some have criticised the debate for focusing on the relationship between NGOs and the PA rather than on how to increase citizen participation (Salem 1999, 204).

In their various discussions and lobbying efforts, the NGOs have focused on creating an independent civil society sector that is protected from the undue influence and interference of the PA. Under this sector NGOs' rights and freedoms, such as the right to register and the right to dissolution, should be guaranteed and regulated fairly under the law (Salem 1999, 197- 200). These issues are still being debated as although the law was enacted in 2000, it is not yet fully implemented in practice. There are still calls from the NGOs for the Ministry of Justice (instead of the Ministry of Interior) to regulate the registering of charitable and non-governmental organisations. These voices argue that the judiciary should be the only body mandated to supervise and monitor these organisations. Further, it should also be the only body empowered to dissolve any institution that violates the law or does not adhere to its objectives (Aman 2007). This was clearly stated in a memorandum issued by the PNGO on 9<sup>th</sup> June 2005 and addressed to the PLC in an attempt to amend the law. In this memorandum, the NGOs emphasised all the issues mentioned above.

#### ***D. Citizens' Rights and Local Governance***

Governments organise themselves centrally through their ministries and other centralised bodies, and locally through decentralised local governance structures and institutions. Political participation assumes that citizens have the right to participate freely in both political processes. In the context of Palestine, the 1997 Local Governance Law and the 2005 Local Governance Election Law constitute the legal framework for regulating this level of governance. The foundation of local governance rests on the principle of the separation of powers, not only horizontally but also vertically to ensure a degree of independence from central government. The system of local governance in Palestine is based on the right of citizens to elect the members of their local governing institutions. When discussing the laws and the system of local governance in Palestine, two main issues can be identified: the first concerns the tri-partite relationship between local governing institutions, the citizen and the central government; and the second relates to the electoral system of local governance, including the participation of refugees and issues of 'affirmative action' in regard to women.

Concerning the tri-partite relationship, many scholars have criticised the approach taken by the law of local governance, which allows for the emergence of local governance as an arm of the central government in the form of local administration. The Local Governance Law gives the Ministry of Local Governance broad authority and power over issues of local governance (Nassar 2006, 173-174; Jarbawi 1999, 73- 75; Rock 1999, 25). The minister has authority to dissolve and suspend local institutions (Amr 2004, 126- 130). This approach is seen to undermine the whole concept of local governance as the role of the citizen is confined to electing these bodies (Jarbawi, 1999, 74). The real participation of citizens in the local public realm is considered to be very limited while the central authority has all the control. The accountability and supervisory function is vested in the central ministry rather than the citizen (Jarbawi 1999, 75).

The issues that have provoked more debate, however, are those related to local elections, specifically the participation of refugees, the women's quota and the tools and mechanisms for elections. In relation to refugee participation, the debate is essentially polarised between those who are for it, and those who are against it. Those who are against it, argue that it will have a negative impact on their rights as refugees, including their status in relation to the United Nations Relief and Works Agency (UNRWA).<sup>6</sup>

6 The United Nations Relief and Works Agency (UNRWA) was established by United Nations General Assembly resolution 302 (IV) of 8th December 1949 to carry out direct relief and works programmes for Palestine refugees.



The 1996 Local Governance Elections Law was amended three times between July 2004 and August 2005. Finally, the law was amended in favour of a list system (proportional representation) of election rather than an individual (district-level) system of election. The original system was criticised because at the local level, voters tended to vote for people they knew, which effectively personalised and therefore undermined the local system of governance. Critics argue that an individual system is more suited to a PLC or national level election (Nasser 2006, 176). Moreover, the new law stipulates that the head of the council has to be elected by the members of the council rather than directly by the citizens. This approach has been criticised by those arguing that it exposes the head of the council directly to internal council politics, which might undermine his or her role in the eyes of the local citizens (Nassar 2006, 176).

As in the case of PLC elections, the women's movement campaigned for a quota for women on the grounds of 'affirmative action'. Party lists were required to contain at least one in the 1-5 and 5-10 sections of the party list. The Local Governance Election Law requires a minimum of two women in the local governance council of a small district and a 20% female participation in large districts. This approach met with a lot of criticism from tribal and conservative forces in particular (Kitaneh 2006, 22).



## 4. THE FRAMEWORK OF CITIZENS' RIGHTS AND FREEDOMS

One of the key dimensions of a democratic state is that it guarantees citizens their rights and freedoms in accordance with international and human rights norms. Citizens' rights include a list of political, civil, social, economic and cultural rights. Although these rights and freedoms might not fundamentally differ from one country to another, a country's commitment to these rights can be determined by the level of endorsement in practice. It is also important to stress that in many contexts, the gap between the written word and the practice is the core problem in relation to citizens' rights. In this section of the paper, the intention is not to examine the status of citizens' rights in practice under the PA but rather to follow the debate on the construction of these rights in the Palestinian domestic context. Indeed, human rights organisations have looked extensively at the status of citizens' rights under the PA. The key questions therefore are how should Palestinian citizens' rights be formally constructed, and what are the main limitations?

### *A. Citizens' Civil and Political Rights and Freedoms*

The Palestine Declaration of Independence, the BL, and the DPC are the main documents to construct a formal position towards the general framework of citizens' rights. These three documents express the commitment to guarantee Palestinian citizens an assortment of rights and freedoms considered liberal compared to other Arab countries in the region. Furthermore, this commitment is made in conjunction with international and human rights norms, for example, Article 18 of the DPC states that the State of Palestine will be bound by the Universal Declaration of Human Rights and will work towards joining international conventions to that end. In the BL, Article 10 stipulates that human rights and basic freedoms are binding and must be respected. This article is considered by some to be the main source of legislation on citizens' rights and will therefore be binding as a constitutional principle (Milhem 2006, 1). On closer inspection, there is an overall tendency towards the recognition of political and civil rights, and in some cases social and economic rights, throughout the various drafts and debates. Indeed, most of the comments on the various legislation have sought to close any loopholes that would allow the government to suspend or narrow these rights, which include: the right to equality, freedom of expression, thought and conscience, freedom of movement, freedom of press, right to litigation, right to political participation and a number of other social, economic and cultural rights.

However, these debates on the BL and DPC have been shaped by considerations as to how Palestinian citizens' rights should be formally constructed. There have always been demands to refer to rights and freedoms in the constitution in a clear way. Vague, eclectic concepts should be generally avoided in favour of clear and obvious expressions so that no future interpretation may undermine the text of the constitution or, as in certain cases, the language be used to weaken the level of protection (Nassar 2006, 44 Aruri & Carroll 1994, 9). During the debate, there were calls to separate the rights and freedoms of the citizens, on the one hand, from their obligations and responsibilities on the other. Rights and freedoms are not conditioned by any other obligation but rather by virtue of being a citizen. (Nassar 2006, 45).

Others also considered the ways in which the DPC or the BL links citizens' rights to the legislative process. As such, in several articles of the DPC as well as the BL special precautions are included to ensure that the granting of certain rights through the regular legislative processes is subject to the determination of rights in the constitutional documents at all times. Allowing the constitutional provision to be subject to ordinary law could weaken or even nullify the right. (Aruri & Carroll 1994, 10; Kayed 2004, 37) Thus, the principles of the constitution may in fact turn out to be rights without substance (Aruri & Carroll 1994, 10). This means it becomes impossible to judge what kind of a system will emerge out of these principles before knowing the laws regulating these rights. For

example, the safeguard of personal rights and the guarantee of personal security are conditioned by an "accordance to law", which means the suspension of the right is subject to the exercise of the legislative will.

Although the legal framework, whether at the constitutional level or in terms of ordinary law, provides a list of rights and freedoms, there is a tendency to use flexible and/or loosely defined concepts and terms such as "public order and morals" as well as "fundamental values of society" (Aruri & Carroll 1994, 10 - 11; Kayed 2004, 36). These terms are generally used within the framework of citizens' rights and amount to limitation or restriction on these rights. In such cases, the executive authority is able to exercise discretion in the implementation of those rights, which infringe upon its efficiency and/or authority (Aruri & Carroll 1994, Kayed 2004, 37).

Although the maintenance of public order is one of the key responsibilities of the state and its institutions, especially the police as determined by the constitutional instruments mentioned above, this does not and should not contradict the responsibility of the state in protecting the rights and freedoms of its citizens. The only exception may be a state of emergency, where in limited circumstances there might have to be a restriction of certain individual freedoms. Within the Palestinian context, the debate on reform of the security sector concerns the issue of public order and protecting citizens' rights. This was reflected in studies on reforming the security sector produced by civil society organisations. Most of the studies outlined the role of the security sector in protecting citizens' rights and freedoms and in protecting national rights through the rule of law and systems of accountability (Shuaibi , 1-10).

### ***B. Social and Economic Rights***

Both the BL and DPC include a list of principles related to economic, social and cultural rights. This list includes freedom of economic activities based on the principles of a free market economy as well as the right to housing, work, and education. There are also provisions that deal with social security and other provisions related to motherhood and children's rights. These citizens' rights entail obligations on part of the state to provide such rights. Indeed, the main constitutional debate on this issue has been whether or not a constitutional commitment to these social and economic rights can be enforced in a court of law. Neither the BL nor the DPC stipulates the degree of enforceability and both documents were consequently criticised for it. However, some consider that the mere mentioning of the applicability of the universal social and economic rights in constitutional texts is sufficient because it means that they are binding by virtue of being a fundamental human right (Milhem 2006). Others believe that the commitment to these rights in the DPC does not reach far enough to ensure their practical applicability (Qazaz 2004).

In debating the DPC, it has been recognised that contrary to the case of civil and political rights, the DPC lacks reference to the fact that the application of social and economic rights should be regulated through legislation. This absence is considered to undermine these rights as their practical application depends on the existence of such legislation. Furthermore, there has been some criticism regarding the fact that many of the social and economic rights are addressed in flexible terms or vague concepts, and phrases such as "depends on state's capabilities" are being used (Qazaz 2004). Some scholars have argued that although there were achievements within the framework of the BL, there are still issues that touch upon social and economic rights, which have not been addressed properly. For instance, the major problem of women's unemployment and lack of access to labour markets has either been ignored or dealt with in a vague way. Similarly, motherhood, childhood, and the family were dealt with in a separate article stating that they should be protected 'as a duty on society' but without a specific commitment by the PA (Jad 2004).

However, on the issues of economic and social rights within the PA, the Palestinian literature examined the status of these rights under the PA and their compatibility with international human rights requirements. Some have pointed out that the unsatisfactory level of social and economic rights under the PA is due to the lack of a coherent legal structure as well as the lack of financial resources to support these rights (Khawaja & Mansi 2001). In early studies before the enactment of the Social Security Law, there were calls for a legal system of social securities to be implemented gradually, but to include health insurance, protection for the elderly, retirement, motherhood and child support, unemployment as well as work injuries (Milhem 1999, 68; Abu Edhaim 2001, 56). The Palestinian system of social security was described as being non-comprehensive and based on a relief system that excludes a large section of its citizens (Khawaja & Mansi 2001). Although the Social Security Law was passed in 2003, it has not yet been implemented after a World Bank assessment pin-pointed serious faults in the proposed system.

The extent to which the system will be dependent on the concept of citizens' rights or needs was also addressed, as was the issue of equality and whether the law and policies will pay sufficient attention to issues of gender and class (Giacaman et al 1996, 11-16).





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# 3

**THE FUTURE PALESTINIAN ECONOMY**

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# THE FUTURE PALESTINIAN ECONOMY

Synthesis of Leading Palestinian Thinking and Public Perceptions

Working paper presented within the context of the project:

## **“The Contours of a Future State”**

A multi-part compendium of Palestinian thinking

Commissioned by the Institute of Law – Birzeit University

*Prepared by: Dr. Nasser AbdelKarim*





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# The Future Palestinian Economy

## Synthesis of Leading Palestinian Thinking and Public Perceptions

Dr. Nasser AbdelKarim

### 1. INTRODUCTION

Israeli economic policies and practices imposed on Palestinian society since 1967, following Israel's military occupation of the Palestinian territory, have deeply distorted Palestinian economic and social infrastructures. With various barriers imposed to restrict independent economic activity, the Palestinian economy has largely been transformed into a supplier of cheap labour and importer of Israeli produced products.

The direct and indirect effects of the policies of occupation on the development of the Palestinian economy during the occupation can be summarised as follows (Naser 2003):

- **Deep distortions in the productive sectors:** **Restricted** market access has resulted in low levels of GDP contribution and low employment in the productive sectors. Also, export levels have remained much lower than they would have been expected in normal conditions. The residential construction sector has expanded but without the necessary attention to long-term infrastructure needs.
- **Distortions in the Palestinian labour market:** Low productivity in the productive sectors has limited the ability of the local economy to generate sufficient employment to absorb the increasing number of job seekers; this has led to an over reliance on the Israeli labour market. Subsequently, due to the higher Israeli labour wages, the relationship between production and revenue inside the Palestinian territory has been dismantled as the increased earnings have led to a rise in the overall demand that has not been accompanied by a corresponding increase in production. As a result, the Palestinian economy increasingly relies on external imports to satisfy internal demand.
- **Distortions in Palestinian economic relations with the outside world:** Restrictions on the movement of people and goods have largely confined Palestinian trade relations with Israel. Export potential has not been utilised, and production costs have increased as imports of raw materials and production means are restricted.
- **Distortions in the level of resources and public utilities:** The systematic expropriation and looting of Palestinian resources (primarily land and water) have limited the Palestinian ability to preserve and manage their national resources, or provide effective and cost efficient public utilities to its population and economic actors.
- **Distortions in the social fabric:** The fact that some people benefit from highly paid jobs in Israel and others are restricted in marketing their products has divided Palestinian society between those whose interests are linked to Israeli interests and those who are harmed by Israeli interests.

The social and economic situation deteriorated further when the Palestine National Authority (PNA) was established as the interim governing institution in 1994. As the PNA was not able to formulate a clear policy or provide a solution to the deteriorating socio-economic situation, its leverage as an effective governing institution has been limited

Despite the PNA's noticeable accomplishments during its first years in terms of building functioning institutions, implementing infrastructure projects financed by donor countries, and enacting

legislation, including economic laws, the opportunity cost of these accomplishments has been relatively high as they were undertaken without the guidance of a clear vision or comprehensive socio-economic reform plan, and without adequate or transparent auditing and accountability systems.

Characterised by overstaffing, structural deformation, duplication and overlapping of powers between institutions and a consistent lack of legal and regulatory controls to manage its work, the public sector proved to be inefficient in its functioning leading to a decline in its performance as a governing body. This, in turn, created a distortion in the relationship between the private and public sectors in Palestine as they began to compete aggressively with each other. Weak public sector performance was further exemplified by its inefficient national tax collection systems and its resulting heavy dependence on the collection of tariffs from Israel, based on the provisions of the Paris Economic Protocol.

The public budget is characterised by low capital expenditure and high levels of current costs, primarily in the form of wages and salaries. With consistent overstaffing of the PNA and the increasing number of security staff, even the current account expenditures for social services (education, health and social affairs) have shown a consistent decline.

As a result, the Palestinian budget is now suffering from a huge deficit, which, in recent years, has regularly exceeded one billion dollars, forcing the PNA to borrow internationally or seek donations in order to cover the deficit. This has resulted in an overdependence on foreign aid and financing loans. The economic crisis in general and the budget deficit crisis in particular, have become more pronounced since 2006, following the formation of a new *Hamas*-led government.

### ***Purpose of the Study:***

During each stage of Palestinian economic development since 1994, questions have been raised, both locally and internationally, about the future viability of the Palestinian economy's potential regarding the current constraints and opportunities.

This paper aims to provide a summary of Palestinian thinking with regard to a number of economic issues associated with the establishment of an independent and economically viable state. The following issues will be explored in greater depth:

- The interrelations between rural and urban markets;
- Striking a proper balance between the productive sectors (agriculture, industry and services);
- Inter-linkages between the public and private sectors;
- Regulating economic activity, including domestic and external trade;
- Prospects for economic integration with Israel, the Arab states, or both; and
- Minimum requirements for a viable Palestinian economy.

This report will reflect the most prominent Palestinian perspectives on these issues and its discussion will be based on the assumption that a final peace deal has been reached resulting in the creation of a contiguous Palestinian State within the 1967 borders.

## 2. INTER RELATIONS BETWEEN RURAL AND URBAN MARKETS

There is little Palestinian literature on the subject of the interrelations between the rural and urban markets in Palestine, except for some references to the problems of urbanisation and internal migration of labourers and jobs from rural to urban areas. In 2005, the MAS Institute published a paper on the 'informal sector' (Barghouthi 2005), which shows that developing countries, including Palestine (although at variant levels), are facing challenges in their economic development as a result of rapid population growth and increased rates of internal migration from rural to urban areas.

The study outlines that the migration of people and jobs from rural to urban areas creates a disparity between rural and urban centres, regarding population numbers and the level of services and resources available in the workplace. In addition, a lack of available housing in the urban areas exacerbates the overall standard of living. Further negative effects experienced in the urban centres, include a widening gap between job seekers and job opportunities, higher rates of unemployment and a decline in the capacity of the formal sector to create new and needed employment opportunities. The situation is exacerbated by the disorganised or ad hoc nature of the migration and the lack of resources needed to cope with the migration.

In another study (MAS, 2006) on the functioning of the informal sector, it was found that micro-financing was a key factor in addressing the low unemployment levels and reducing poverty in areas with a high population density. Other studies equally demonstrated the importance of micro-finance in terms of galvanising areas to deal with unemployment and poverty. (Development Studies Program, Birzeit University, the Human Development Report 2004 Fourth, and AdalKarim, 2004).

## 3. FINDING A BALANCE BETWEEN THE PRODUCTIVE SECTORS: AGRICULTURE, SERVICES AND INDUSTRY

There is an abundance of literature illustrating the importance given to this subject area and the wide variety of Palestinian perspectives on the different alternatives for economic development in Palestine.

A paper prepared by the Palestinian Ministry of Planning for the Arab International Forum on Rehabilitation and Development in the Palestinian Territories in Beirut 2004 found that the vision for a developed economy in Palestine should include the recognition of human capital as the main engine for growth, a national economy capable of absorbing investments in labour through preserving competitive advantages and higher production levels, the adoption of a knowledge-based economy as the main pillar of the Palestinian economy and a requirement to build good relations with Arab and other international economies to maximise the development potential of Palestinian productive capacities.

According to this vision, the following considerations will be important during the development process:

- Investment in human capital is a source of development and a means to bridge existing gaps with more developed countries;
- Development means rejecting dependency on the Israeli economy and liberating the Palestinian economy from being used as a means to serve the economic needs of the Israeli occupation;



- Re-establishing the social fabric of Palestinian society, damaged during occupation, as an integral part of Palestinian social capital that underpins economic development; and
- Linking short-term relief assistance to the long-term sustainable development process.

Another study (Alnaqib and Itiani, MAS 2003) finds that the formulation of a development vision for Palestine should take account of the experiences that have been gained since 1994 as well as the experiences of other developing or transitional economies. These experiences could help researchers identify the developmental policies capable of rehabilitating and building the Palestinian national economy while laying the foundations for growth and sustainable development.

One of the main findings in this study shows that based on the current Palestinian experience, radical reform of the PNA will be needed to allow the PNA to effectively face the challenge of leading the transition to a developed and functioning economy. As part of these reform efforts, improvements in transparency, financial management and other anti-corruption measures should be incorporated.

### *A. Agriculture*

A study prepared by Al-Jaafari (MAS 2003) shows that the agriculture sector plays an important role in the Palestinian economy in terms of its contribution to GDP and the absorption of manpower, especially in light of the crises the economy faces from time to time. However, according to Al-Jaafari, this sector is facing a number of constraints and barriers that negatively affect its performance and weaken its productive capacity and competitiveness on the domestic and export markets. In his paper, Al-Jaafari established a set of agricultural policies that would serve the Palestinian economy in the short, medium and long term, taking into account the extreme restrictions that characterise the current situation.

The short and medium term policies focus on the objective of fulfilling local consumption needs and reinforcing its export capacity. The long-term policies aim at ensuring full coordination and harmony with other economic policies (fiscal, trade and monetary) following the establishment of statehood. The most important policy options are listed below:

- **Adoption of price sensitive policies:** In the short run, it would be necessary to subsidise the agricultural production supplies needed for plant and animal production. The implementation of a long-term pricing policy would be dependent on the creation of an independent Palestinian state with its own fiscal, monetary and trade policies.
- **Adoption of appropriate marketing strategies:** Such strategies should include the diversification of agricultural products, rationalisation of the use of arable land, acceleration of the application for technical and health specifications, and guaranteeing coordination and coherence in implementing the policies of agricultural diversification, irrigation and incentives to producers to improve their production.
- **Adoption of animal production policies:** This would include the provision of fodder for livestock and poultry at subsidised prices, providing extension services and veterinary care (including vaccinations) at nominal prices, and establishing joint ventures with neighbouring Arab countries to boost the import and export of poultry products. The policies related to animal production in the long run should consider the need to establish factories for the production of fodder, the establishment of modern slaughterhouses, and the development of pastures.

• **Policies for research development and agricultural guidance programmes:** These would include training sessions enabling farmers to use modern techniques to increase the efficiency of agricultural production and upgrade its quality, in addition to developing cooperation between the public and agriculture sector.

• **Policies that aim to reduce the risk faced by producers:** These would include providing assistance to help overcome the negative effects of climatic conditions and political instability, and developing a system of insurance against risks, including the adoption of agricultural supports that enable farmers to cope with any difficulties and to stimulate production.

• **Irrigation and land reclamation policies:** These would include practical measures raising the economic efficiency of the use of agricultural resources to increase the output of rain-fed lands and provide incentives for investment and the transfer of technology, in addition to planting crops and trees that safeguard the land against erosion.

• **Agricultural financing policies:** These would include making the necessary arrangements to secure funding for the purchase of supplies for agricultural production as well as the provision of soft loans to finance marketing and export promotion activities.

## ***B. Services***

A large number of papers and reports, including the study prepared by the Palestinian Ministry of Planning for the International Arab Forum (Beirut 2004), highlight the importance of the service sector and the importance of its key functions: distribution services, social services, tourism, financial mediation services, as well as public sector services.

These papers include a number of suggestions as to how the performance of the service sector could be improved, including:

- Fostering the absorption capacity of the private and public sectors to provide paid work opportunities, and reinforcing the networking of the services sector with other economic sectors as an alternative to servicing external elements;
- Strengthening the infrastructure elements that underpin the service industries, such as phone lines, computer and internet connectivity, banking, etc;
- Overcoming current deficiencies in the legislative and judiciary sector and finalising legislation and jurisprudence with regard to the issue of property rights;
- Improving the capacity of the relevant authorities to devise appropriate and effective policies vis-à-vis all service sector activities, including consumption, investment, production, import and export;
- Institutionalising and developing the legislative environment governing all these areas, including internal economic relations with surrounding economies.
- Defining and regulating the role of private and public sector institutions with regard to the prescription of quality standards.

## ***C. Industry and Construction***

Balanced development of economic activity is a major area of interest for Palestinian researchers. However, all studies explored, including those from the Palestinian Ministry of Planning, Nasser,

Aljafar and Lafi, and Makhoul, emphasise the key role of industry (or the production sector) in maintaining sustainable development. Steps that can be taken to enhance the functioning of the production and construction sectors include:

**Industry:**

1. Place more emphasis on developing competitive industries, such as IT and software development.
2. Give more attention to quality standards, which determine the ability of Palestinian products to enter and/or remain in the market, particularly the export market.
3. Re-develop, modernise and build industrial zones, including the necessary enabling infrastructure and support services.
4. Provide integrated packages to support and stimulate industrial investment.

**Construction:**

Most researchers agree that the construction sector could play a big role in strengthening future economic development through the reconstruction of what has been destroyed during the occupation (infrastructure, non-residential and residential buildings) and the improvement and further development of the Palestinian infrastructure as well as the construction of new housing units to meet the growing demand. The following combination of policies and procedures are suggested as means to facilitating the role of construction in development:

1. The provision of reasonably priced housing for local citizens;
5. Encouraging the establishment of cooperative housing associations and institutions to support this activity, as well as the availability of infrastructure services necessary to ensure the success of these initiatives, particularly in areas away from city centres;
6. Developing appropriate financing for these activities in terms of interest and payment schedules, in addition to providing a set of incentives for financial institutions operating in the occupied Palestinian territories (oPt) to facilitate their work in this area; and
7. Stimulating private sector investment in the construction sector through an enabling legal environment.

## 4. INTERACTION BETWEEN THE PUBLIC AND PRIVATE SECTORS

The Declaration of Independence, issued by the Palestinian National Council (PNC) in 1988, clearly identifies the desired parameters of a future Palestinian State and its economy: "the desired Palestinian state is "an Arab independent state on all territory in the West Bank and Gaza Strip, with East Jerusalem as its capital. The Palestinian State will have a modern economy in which human and capital wealth are regarded as the main engines of growth, an economy that is able to accumulate abilities and resources to upgrade products and quality in order to produce skilled labour and highly competitive products. Palestine will be a state that in the long run will have a knowledge-based economy with the private sector playing a leading role in a competitive environment that is economically integrated with Arab countries and open to regional and international markets; it is a state that ensures gender equality and reinforces women's participation in socioeconomic fields on an equal footing with men; it is a state whose social capital constitutes the basis of coherence and consolidation of the Palestinian community and the source of its Arab Palestinian culture and human values with religious tolerance." Furthermore, the Basic Law, or so-called interim constitution, enacted by the Palestinian Legislative Council (PLC) specifies that the Palestinian economy shall be a free market economy.

A number of conference documents and research papers examine the relationship between the private and public sectors, and the impact they have on the economic development in the oPt. Despite the particular challenges the Palestinian private sector encounters, most studies show that the future of the Palestinian economy relies heavily on the ability of private sector enterprises to improve their situation in terms of information technology, empower their human resources and utilise the geographic, religious and historical significance of Palestine to its full advantage, especially in relation to its Arab and other regional neighbours.

One study (Abdelkarim, June 2004) shows that the key role of the public sector, and indeed a core responsibility of the PNA, will be to foster an investment enabling environment that minimises the risk for investors. The same study reaches a number of conclusions on the evolution of investment flows in the oPt and recommends how the investment environment can be improved:

- Developing a legal and institutional infrastructure supporting the Palestinian economy;
- Examining the root causes of over-reliance on the Israeli economy and how to relinquish this dependency; and
- Utilising Arab state investments as leverage for reconstruction, and integration with other Arab economies.

The proceedings of the first and second employment conferences, organised by the Palestinian Ministry of Labour and the annual MAS conferences in 2005 and 2006 reached similar conclusions as to the necessary requirements for the development of an appropriate investment environment. These are listed below:

### **Requirements from the private sector:**

The Palestinian private sector, although shaped by the Israeli occupation, is still able to move toward new horizons and play its desired role as an engine for Palestinian economic growth and development. The most important steps are as follows:

- **Improving commitments to social responsibility.** Private institutions have social responsibilities with respect to their communities, the environment and the health of their employees as



these issues affect overall human development. Private sector institutions also have political responsibilities and should refrain from any activity that may cause harm on a political or economic level.

- ❑ **Adhering to the national system of values:** For example, avoiding illicit trading activities and/or tax evasion.
- ❑ **Producing goods and services that conform to Palestinian quality standards:** This is the case for both local and export markets. Goods and services that do not conform to these standards should not be imported because of the potential damage to the finished product and the consumer. This also applies to raw materials and imported parts.
- ❑ **Effective participation in the formulation of economic laws:** This can be done through the contribution of private sector institutions (groups, unions, associations and trade centres), and by requiring the PNA to modify any existing laws to serve the national economy.
- ❑ **Providing information:** Private institutions should provide the necessary information on global markets, especially in relation to price, technology, trade affairs, and marketing Palestinian products via the Internet in addition to other promotional techniques.

#### **Requirements from the Palestinian National Authority:**

In order for the private sector to play an active role as an engine for growth, the PNA must undertake a number of measures, such as:

- ❑ Provide comprehensive security to protect the fundamental rights of individuals, including economic rights, and their property in addition to creating incentives for domestic and foreign investment;
- ❑ Introduce a modern education system that meets the requirements and needs of the Palestinian labour market;
- ❑ Establish conflict resolution institutions to help eliminate differences and conflicts on trade issues on the basis of equality and protection for the interests and rights of all parties;
- ❑ Improve network and infrastructure services to ensure the flow of people, goods, services, and information to and from the Palestinian market wherever possible, and at lower costs.
- ❑ Improve the banking networks and increase the capacity of local banks to contribute to financing domestic investments in addition to associating development with long-term lending;
- ❑ Organise and maximise private sector benefit in relation to commercial agreements signed by the PNA with other countries and/or groupings.

This listing of respective requirements are consistent with one part of a conference titled "The economic conference in a transformational environment", which discussed the role of development process partners (**the state, private sector and civil society**) in achieving the desired infrastructure development, which was held by the Institute of MAS in 2005. One of the studies presented at the conference (Abdullah, MAS, 2005) noted that an economy based on information and technology would not appear by itself. Such a development would require detailed planning, coordinated implementation, sufficient stimulation through investment and controlled within a clear legal framework. According to Abdullah, the PNA's role is to guide, organise and direct the applications and economic resources based on the existing vision of development.

Abdullah's study further highlights that all three forms of authority, i.e. the executive, the legislative and judicial authorities, impact on economic development. To maximise the positive impact, the actions of all three authorities should therefore be coordinated to avoid the implementation of conflicting policies. The inclusion of civil society and the private sector would enhance the benefits of coordinated action even further, particularly during the implementation stages.

## 5. REGULATING ECONOMIC ACTIVITY, INCLUDING DOMESTIC AND EXTERNAL TRADE

Numerous studies are available on the subject of balancing domestic trade with import and export operations to maximise the benefit to the Palestinian economy. Of particular interest in this regard are the outcomes of three major economic conferences held in recent years:

- Conference on indigenous capacity strengthening for the Palestinian economy (2003);
- The Arab International Forum (Beirut 2004); and
- A Palestinian economic agenda in a transformational environment (2005).

A similar conclusion reached at each conference highlights the fact that in order to develop in a sustainable manner, the Palestinian economy will need to enhance its productive capacity, sever its dependent relationship with Israel and integrate with the global and neighbouring economies.

According to the study by Al-Naqib, there are three ways to integrate the Palestinian economy into the global market. The first is the bilateral route, i.e. through the signing of bilateral trade agreements (usually with countries with which a trade relation already exists). The second is the regional route, i.e. the creation of or participation in regional trade regimes. Finally, full integration into the global economy can be achieved through membership of the World Trade Organization.

Al-Naqib suggests that the first and third options are not amenable to the Palestinian situation at this time as the economy is too small with limited natural resources and thus needs to enhance its negotiating capacity through regional integration. Such a move will also assist in the elimination of its dependence on the Israeli economy. Therefore, the Palestinian economy would benefit from enhanced regional economic cooperation similar to what is already happening in Europe, North America and East Asia.

Abdullah (2004), together with the Palestinian Trade Center presented a paper at the Arab International Forum (Beirut, 2004) emphasising the importance of developing the Palestinian knowledge economy. This would assist and facilitate the accession of Palestine to the Arab Free Trade Zone, attract Arab investment and develop bilateral trade and tourism. In turn, this would enable the Palestinian economy to rebuild independent relations with Arab countries without being constrained by its dependence on Israel.

The Al-Naqib and Abdullah studies highlighted the following steps that could be taken to enhance regional economic relationships:

- Develop cooperation between private sector institutions and Arab partners to build partnerships;
- Arab states to contribute the necessary funds to establish incubators in the relevant sectors, including technology and information systems;
- Open commercial centres to promote and encourage investment and enhance access to financing for economic activity in various areas in Palestine;
- Establish joint production areas, such as industrial free zones; and
- Prepare a set of laws to encourage the production and marketing products from Arab states.

On the topic of regional economic relationships, a paper by Al-Jaafari, Al-Arda, and Lafi (MAS, 2003) offered an analysis of the prospects for trade with the Gulf Cooperation Council (GCC),



the principles and characteristics that govern such trade and the implications for the Palestinian economy.

Moreover, the research shows that an enhanced trade relation with the GCC could reduce Palestinian dependence on Israel, which in turn would lead to increased private investment, increased demand for labour in the private sector, and an overall rise of Palestinian GDP. The study found that the Palestinian economy could strengthen its links with the Arab Gulf States by taking the following steps:

- Controlling the costs of imports and exports, especially with regard to transportation;
- Reducing the difference in import costs between imports from the Gulf Arab States and Israel. This would require the removal of all restrictions on trade and non-trade activities that limit the flow of goods between Palestinian areas and Arab markets in Jordan and Egypt;
- Focusing production on those products that have a high competitive advantage on the GCC markets;
- Enhancing the benefits that can be gained by the untapped potential of human capital and high unemployment, which would allow for enhanced productivity in sectors relevant to GCC markets without the need for large investments; and
- Motivating local industries to apply those standards and production specifications that are required on the Arab Gulf market.

It should be noted that the potential of establishing a trade relationship with the GCC may be affected by a number of obstacles or important obligations resulting from the accession of the GCC countries to the Arab Free Trade Zone.

A study by Suleiman (MAS 2003) on Palestine and the Arab Free Trade Zone concludes that Palestinian decision-makers should give ample attention to this option as it could have significant benefits for the Palestinian economy. Among other issues, Suleiman highlights the following benefits:

- Palestinian participation in the Arab Free Trade Zone would enhance Palestinian access to regional markets and allow for increased experience in dealing with various political and economic standards and regulations; and
- It would allow some protection from potential negative repercussions of globalisation while equally allowing for facilitated access to international markets.

In addition, the study showed the importance of giving Palestine special status as a less developed country in the framework of the Arab Free Trade Zone. Applied studies have shown that trade liberalisation may lead to economic losses borne by the least developed countries. Therefore, appropriate or special treatment, upon accession to the free-trade zones should be given to the least developed members with a time period for adjustment so that they can develop their productivity and participate in the economic gains of joint up economic activity.

A future Palestinian State, after joining the Greater Arab Free Trade Area, should take advantage of the special treatment afforded by the region to a less developed Arab country. This would give the Palestinian economy an advantage over neighbouring Arab countries as they are not classified as least developed and therefore would not qualify for assistance.

While the positive benefits of Palestine joining regional economic alliances are clear, some studies have also outlined some of the possible negative consequences. Most salient among these are the obligations on Palestine that would result from accession to regional trade regimes, which may

restrict Palestinian sovereignty over its economic policies that may in turn lead to a situation of social or political instability.

Moreover, there will be short to medium term financial burdens on the PNA, including reducing the trade deficit with Arab member states as well as costs incurred in the context of the restructuring of the productive sectors and institutions capable of competing with other members. Furthermore, the government will face the possibility of high unemployment as well as the costs of retraining and rehabilitating the Palestinian labour force. There will also be an impact on the level of tax revenues received by the PNA, both locally and on imports from Arab countries. However, despite some discomfort in the short to medium term, these reforms will serve the strategic needs and objectives of the Palestinian economy in the long run.

### ***A. Palestine's external trade and agreements with other states***

Trade agreements and conventions represent the framework that governs the relationship between the Palestinian economy and other countries. A study (Abdelraziq, MAS, 2003) provides a comprehensive review of Palestine's existing international economic agreements and also identifies procedural problems encountered in the implementation of the conventions by way of interviews with relevant parties.

Palestinian economic conventions/agreements are divided into four groups: the agreement with Israel, the Convention with the European Union, the agreement with the United States, and agreements with Arab countries.

The study adopts two sets of criteria for evaluation: The first are the general standards that apply to commercial agreements, in general, and for which there are seven criteria:

#### **1. Market access:**

This is considered to be a primary objective for parties signing trade cooperation agreements because every party hopes to expand the market size for its goods and services by obtaining guarantees to access other markets.

#### **2. Most Favoured Nation (MFN):**

This means that in principle, the parties agree to treat each other better than any other partner in any other convention. In practice, this means that concessions may be granted to partners in regional trading arrangements in areas such as customs, taking into account GATT and WTO rules and obligations.

#### **3. The principle of national treatment:**

This enables imported products from partner countries to compete freely with locally produced products.

#### **4. The principle of exchange of information and transparency in the procedures and laws:**

This ensures that parties agree on the need for transparency and simplicity in the procedures and laws governing imports and exports, investment, and movement.

#### **5. The principle of good faith in interpreting articles of the Convention:**

This ensures the inadmissibility of the use of the gaps that may appear in any text of the agreement that may hinder the movement of goods and services between parties. It can

contain texts on the mechanism of arbitration in cases of disagreement between the parties.

#### **6. The principle of reciprocity (alikehood):**

This means that if one party to the agreement offers certain facilities, the other party must provide the same or similar facilities.

#### **7. The principle of exceptions:**

Most commercial cooperation agreements include certain exceptions to the general rules and principles. This is typically aimed at helping weaker partners achieve economic advancements that narrow any gaps between themselves and their partners.

The second group of criteria for evaluation includes standards that are specific to the Palestinian situation in particular, namely:

##### **1. Strengthening Palestinian sovereignty:**

This evaluation criteria looks at whether the agreement or convention confers the same level of authority on the PNA as governments of other partners, or whether it treats Palestine as a special case in light of its current political situation. In cases of the former, such agreements would strengthen Palestinian sovereign rights over its territory and could assist in the creation of an independent state.

##### **2. Diversifying trading partners and reducing trade with Israel:**

Analysts, such as the World Bank, agree that the biggest problem of the Palestinian economy is its heavy dependence on Israel in the areas of trade and labour. Therefore, diversifying trading partners and reducing dependence on the Israeli economy would enhance Palestinian economic viability.

##### **3. Job creation, export development and promoting investment:**

This is the degree to which the trade agreement will encourage exports, investments and enhance job creation prospects. This is usually determined by special exceptions stated in the agreement.

##### **4. Obtaining approval for low economic development:**

Whether or not Palestine is awarded least developed nation status and the special treatment, which results from such status, will influence the potential benefit of the trade agreement.

##### **5. The importance of public revenue:**

This is the degree to which the trade agreement affects public revenue (through customs duties and taxes) and thus affects the PNA's ability to invest in the economic and social infrastructure.

According to the study, there is consensus on the following:

The conventions enhance (or aim at strengthening) the possibility of access for Palestinian goods to public markets, even though there is an agreement that Israeli actions, with respect to borders and security, make this increasingly difficult.

The agreement with Israel does not match the criteria for general standards in commercial external trade. It was also found that the agreement further exposes the superficiality of PNA sovereignty and neglects to mention the future arrangements for the transference of power in the event of statehood.

The agreement with the EU makes reference to the adoption of GATT and WTO rules and regulations, and is therefore concordant with the general standards. It also recognises the sovereignty

of Palestine and the low development status of the Palestinian economy, however, it does not address the issue of labour relations or export subsidies.

The agreement with the United States differs from that with the EU because the EU agreement does not deal with the Palestinian economy as a separate entity while the US differentiates between Palestine and other Middle Eastern Arab countries.

Regarding the agreements with Arab states, the case of Jordan for example, does not match the general criteria except for access to markets, nor is it consistent with the criteria on strengthening Palestinian sovereignty. But the agreement has adopted commodity lists for starting free trade between the two economies.

The main recommendation of the study is to establish trade agreements that adhere to certain standards necessary to ensure that Palestinian targets are met. Suggestions include:

- Opening world markets for Palestinian products within arrangements that recognise the low developmental status of Palestine and the distorting effects that the Israeli occupation has on the Palestinian economic infrastructure;
- Diversifying trading partners in order to reduce Palestinian dependence on the Israeli economy. This means obtaining concessions for Palestinian products (instead of a customs union) without impeding the import of goods and services from other parties (other than Israel);
- Providing job opportunities for Palestinians in order to reduce Palestinian dependence on the Israeli labour market. This would involve the PNA entering into labour integration agreements with other parties such as the European Union and the Arab Gulf States;

## ***B. Prospects for external trade with the EU***

Access to foreign markets, especially the European market, is essential for revitalising the production and export capacity of the Palestinian economy. Indeed, this has long been a subject for discussion by Palestinian researchers in various local and regional conferences and forums. In particular, attention has focused on the role of the PNA in maximising the benefits from international trade agreements. A study by Jaafari and Lavi (MAS 2003) has concluded a number of points:

- PA institutions have given limited attention to determining whether or not current trade agreements provide optimal protection for Palestinian goods and maximise the potential benefits in terms of export growth, attracting new investment and job creation;
- The Israeli occupation continues to hinder Palestinian export and import transactions;
- There is a lack of services necessary to undertake export and import operations by Palestinian merchants;
- There is a need to establish support institutions for import and export transactions, according to the needs and requirements of the national economy;
- There is a need to improve the role of existing institutions to enable them to provide the requirements for signed investment agreements;
- There is a need to re-audit existing agreements from various commercial, legal and procedural aspects in order to determine whether such agreements should be renewed, abolished or amended;
- Strengthening the partnership between the public and private sectors would aid Palestinian representatives during trade agreement negotiation stages and at representative trade agreement meetings.

It should also be noted that these studies have agreed on the necessity of introducing important amendments to trade and bilateral trade agreements that are favourable to the Palestinian economy. This is particularly true with regard to the commercial relationship with the EU, which is one of the most important agreements. The following are some suggestions for consideration in amending current agreements with the EU:

- The EU should recognise the particulars of the Palestinian development status, with particular emphasis on the distortions resulting from the Israeli occupation;
- The transition period required for the Palestinian economy to adjust should be more than ten years;
- The exemptions granted to Palestinian agricultural goods should be greater than those granted to Israel;
- Replacing the exemptions granted for industrial goods by allowing the PNA to impose taxes of no more than 25% for five years;
- Providing grants for the development of industrial and export support services and research and development;
- Using its influence with EU member states to promote the adoption of the principle of positive discrimination with regard to trade with Palestine.



## 6. PROSPECTS FOR ECONOMIC INTEGRATION WITH ISRAEL, THE ARAB STATES, OR BOTH

Many Palestinian researchers and economists have addressed this topic in important economic forums, such as those organised by MAS (2003 - 2006) and the Ministry of Planning in cooperation with ESCWA (2004), in order to build a practical framework for developing Arab - Palestinian economic relations, which ultimately serve the common interests of both sides. This has indeed become a key component of Palestinian economic strategy along with the following: promotion of indigenous capacity to support Palestinian steadfastness in the face of Israeli expansionism; reduction of Palestinian economic dependence on the Israeli economy; and the elimination of distortions suffered by the Palestinian economy because of this dependence.

It is clear from the papers of these forums, including the study by Al-Naqib and Itiani (MAS 2003), that these developments are necessary for establishing productive economic relations between the Palestinian economy and the rest of the Arab and Islamic world, until such time as full economic integration will be possible. This may help solve the problem of chronic unemployment and the negative effects of the Israeli security barrier and associated checkpoints. In the event that the Israeli-Palestinian conflict continues, Israel will continue to adopt economic and trade policies (based primarily on security considerations) that disrupt the growth and development of the Palestinian economy and prevent it from benefiting from its economic relationship with Israel (e.g. by diminishing the proliferation effect or the benefits gained by a small economy in its economic relations with a larger and further developed economy).

Internationally there is much literature on the subject of economic integration of advanced and well-developed economies. This literature focuses on traditional forms of integration and commercial relations, such as free trade areas, customs unions, the Common Market, and monetary and economic unions. However, much of the analysis included in these studies does not apply to situations of economic integration between small states and larger, more advanced states. In these cases, the gains of the smaller state are known as the "proliferation effect", which includes the transfer of technology and expertise from the macro-economy to the smaller micro-economy. However, the costs are often greater for the micro-economy as both labour and capital will gravitate towards the macro-economy (often referred to as the "polarisation effect"). Often, such polarisation leads to increasing costs in the production sectors (agriculture and industry) of the micro-economy and thus smaller margins and smaller profits. For the macro-economy one often sees an increased demand for its products as immigrant labour transfer earnings back home lead to increased purchasing power in the micro-economy.

All researchers agree that in the case of Palestine, economic integration is considered to be an essential condition for growth and sustainable development. The Palestinian economy is small overall and suffers from low levels of capital and technical know-how, which is exacerbated by the declining demand on the domestic markets. What distinguishes the Palestinian situation is the fact that the population and its resources remain under Israeli occupation. The occupation allowed Israel to single-handedly set economic policy for the Palestinian areas whereby Israeli interests were given priority. This has led to a situation wherein the proliferation effect was diminished while the polarisation effect was enhanced.

The similarities between the Palestinian and Arab economies encourage the prospects for integration despite the inevitability of short-term competition and long-term restructuring. The similarities in the structure of imports between Palestinian and Arab economies raises the likelihood of import substitution projects in the Arab world, which would succeed due to the expansion of the market size



in the event of integration. As for Palestinian exports, the structural similarities with Arab export markets would suggest that Arab markets are capable of absorbing a large part of those exports while opportunities exist to coordinate export operations, including joint ventures in marketing, promotion and research.

The shortcomings of Arab economic integration should not be used as an excuse to limit the possibility of the Palestinians aligning themselves with Arab economies. The Palestinian economy has two choices: integration with Arab economies or continued economic integration and dependence on Israel. The choice should be obvious as the past 40 years of economic integration with Israel has not produced positive results while the Palestinian economy currently does have the right ingredients to be an attractive partner for Arab economies. The most important ingredient is the relatively high per capita income, relatively high volumes of imported commodities and services (both as a percentage of GDP and if compared with commodity and services exports), and the need for huge investments for reconstruction and rebuilding of what was destroyed by the Israeli occupation, underpinned by the need to achieve overall economic and social development.

According to Abdel-Razeq, the transformation of the economic relationship from Israel to the Arab states is likely to also result in a loss for the Palestinian economy as the transfer of technology and expertise (i.e. the proliferation effect) from Israel to the Palestinian territory will cease. However, other researchers feel that this negative effect of cutting economic relations with Israel will or can be mitigated. The following arguments are made:

- The negative consequence of a diminishing proliferation effect can be mitigated through a gradual conversion from a predominantly Israeli-Palestinian economic relationship into an Arab-Palestinian relationship;
- The internationalisation of the global markets enables the Palestinian and Arab economies to access the technology of the external world and bring it to their own markets;
- The fundamental problem with Palestinian production is the size of the market and not a lack of technology or even the required technical skills.

The fear that due to high production costs (labour costs particularly) of Palestinian products, particularly agricultural products, will not be competitive on Arab markets could be mitigated through gradual integration, whereby some protectionist measures can be applied for these products and sectors. Furthermore, integration with the Arab world will enable the Palestinian economy to obtain raw materials at lower costs, which will help bring production costs down.

Various studies have outlined the basic dimensions of Palestinian-Arab economic relations, which include the legal and institutional framework, the movement of goods and services, labour relations, investment opportunities and infrastructure. The author Abdel Razik has summarised the most important proposals and suggestions for improving and developing Palestinian economic agreements with Arab countries, as follows:

#### **Acknowledge that the development situation in Palestine is distorted**

Arab nations will need to acknowledge that the Palestinian economy is severely distorted as a result of the Paris Agreement, which has resulted in the PA to be dependent on Israel for the majority of its revenues. Steps taken by Arab nations must reflect such an acknowledgement.

#### **Apply the general principles of trade agreements**

Probably the most important of these principles is the principle of equal treatment of Palestinian and domestic goods and services, capital investments, and workers. In effect, as economic

processes are concerned, each Arab state should consider Palestine as an integral part of that Arab state.

#### **Grant privileges and exceptions**

This would help the Palestinian economy to adjust and/or find a solution to the distortions caused by the occupation. For the immediate future, the provision of programmes that focus on improving production in the export sectors (especially the agricultural sector) and raising the competitiveness of these products in the Arab, Israeli and global markets would be more beneficial to the Palestinian economy than allowing tariff protection for a period of time as under current circumstances Palestine cannot benefit from such tariff protection.

#### **Coordinate Arab-Israeli agreements**

There are number of political and economic agreements between Israel and some Arab countries (Egypt and Jordan) that directly and negatively affect the Arab-Palestinian economic relationship (particularly with countries other than Egypt and Jordan). It should also be noted that some of these Arab parties persist in their relations with Israel, regardless of the situation in the oPt. Therefore, greater coordination and cooperation between the Arab states and the PNA is required to ensure these conventions do not negatively affect Palestinian economic interests.

### ***A. The movement of goods and services between Palestine and Arab nations***

In the past Palestinian exports and imports of goods and services have mostly been affected by the following factors:

- The signing of the Paris Agreement, which locked Palestine into a customs union with Israel and made the Palestinian economy dependent on Israeli economic policy making, has negatively affected the flow of goods. Moreover, Israeli control over Palestinian imports and exports has influenced the structure of the Palestinian economy in the sense that decisions as to what products to produce were largely determined by the needs of the Israeli market;
- Political and security conditions that have resulted in restrictions on the movement of goods and services from and to the Palestinian areas to Israel and beyond;
- Palestine's economic integration with Israel has also led to the imposition of some trade barriers by Arab nations that were designed to stop or limit trade with Israel but have affected the Palestinian economy equally hard; and
- The cessation of an Arab boycott on Israel following the establishment of the PNA affected Palestine negatively as in some countries the preferential treatment awarded to Palestinian products was dropped at the same time.

In recent years, the MAS institute has undertaken a series of studies on existing and potential future trade relations with Egypt, Jordan and the Gulf Cooperation Council countries (GCC). In addition to providing quantitative data of what trade could be like under a free-trade regime between these countries, the most interesting finding could be that a targeted restructuring of the Palestinian economy could have significant effects on the trade volume.

The MAS studies estimate that the total Palestinian trade volume with Egypt, Jordan and the GCC markets could reach about \$ 2,400 million, of which \$ 720 million would be Palestinian exports and about \$1,680 million would be imports. These figures would constitute about 61% of all Palestinian commodity imports, and 117% of all Palestinian commodity exports in 1999 (i.e just prior to the start of the second *Intifada*). As trade with these three markets normally only

constitutes 50 % of Palestinian trade with all Arab countries, it is clear that Palestinian trade has enormous potential.

However, in order to achieve this volume of trade, important steps have to be made to seriously restructure both the production of export products and the provision of trade facilitation services. Such restructuring will require significant levels of investment by both the private and public sector and will have to entail some level of specialisation for Palestinian products to be competitive on the Arab markets.

Enhanced commodity trade between Palestine and its Arab neighbours will also positively affect the trade in services. Currently, Palestinian trade in services is estimated at about \$ 740 million per year (\$590 million in imports and \$150 in exports). An increase in the volume of commodity trade will increase the accompanying need for services, such as transport, shipping, finance, insurance, etc. Moreover, the MAS studies estimate a great potential for expansion of trade in educational, health, tourism and travel services.

### ***B. The movement of labour between Palestine and Arab nations***

A study by Abdel-Razeq (2003) as well as some working papers prepared for the 2006 annual conference at the Institute of MAS show that the Palestinian economy suffers from a chronic labour problem, which is due to its inability to absorb Palestinian labour and its heavy dependence on Israel as a market that offers sufficient and attractive job opportunities. For instance, these studies show that the Palestinian economy is able to absorb only 62% of the annual increase in the labour force under normal conditions.

Therefore, job creation for Palestinians is the biggest challenge to the PNA in the economic sphere. There is an urgent need to lessen and ultimately bring an end to dependence on the Israeli labour market as this dependency has allowed Israel to use economic pressure to achieve political goals. Many economists and researchers feel that Palestine's dependence on the Israeli labour market limits its ability to take effective steps to end the occupation and therefore promote economic options that focus on enhancing the development of operational capacity as a means to limit this dependency. This approach by Palestinian researchers and decision-makers is not always in line with Palestine's more strategic economic goals and may, in the short-term, lead to further deterioration of average living conditions.

In addition to upgrading domestic operational capacity, many economists have suggested that given Palestine's inability to guarantee employment within the Palestinian territory, migration of workers to Arab states should be part of the solution to limit dependence on the Israeli labour market. The Gulf States constitute the only viable option in this area due to the high unemployment rates in other Arab states.

In recent years, demand for foreign labour has decreased in Arab states, primarily in the Gulf, as these countries have adopted policies that actively promote the employment of domestic labour. However, these countries are experiencing some difficulties in implementing these policies. The private sector in the Gulf States still prefers foreign labour as it is cheaper and the domestic labour force often does not have the skills required. Foreign labour is still high in demand in the health, education, technology and management sectors. As such, the ball oPt may benefit from this labour shortage in the Gulf States even though the temporary displacement of large groups of Palestinians



may pose some political risks. Moreover, the temporary brain-drain from the Palestinian territory may affect long-term economic development.

### *C. Current and future prospects for Palestine-Israel economic relations*

A well known study by Al-Naqib and Itiani (MAS 2003) interprets the nature and distinct features of the economic relationship between Israel and the oPt as well as the manner in which it developed. It studies the emergence of this relationship, and the phases of its development over two main periods: the first is between 1967 (following Israeli occupation) up to the signing of the Oslo Accords; the second covers the period of transitional self-governance up to the time of the start of the second *Intifada* (2000). This study attempts to determine the main features of the relationship and explore the levels of complexity and impact on a future Palestinian State. It also looks at the future options of the relationship.

What distinguishes this study is that it determines and characterises the current relationship through examination of the main variables or factors that governed the relationship between both economies in the so-called preceding period, i.e. before 1994. Is the relationship characterised by a 'de-developed' small size economy and a stronger, more developed one, or is it a relationship between an occupying economy that encourages Palestinians to leave in search of work, and an occupied one that is still seeking independence? It is believed that the answer to this question will determine the type of relationship Israel and Palestine will have in the future.

The available literature on the economic relationship between small and large economies would suggest that the following two opposing processes are at work. As a result of issues that relate to the size and performance capacity, basic sectors (agriculture, low-tech industry) in the smaller economy find that they are unable to compete, and this consequently leads to an erosion of the capacity in those sectors. Furthermore, it negatively affects the domestic labour market (fewer jobs available), investment and capital inflows. All together, these developments lead to a distorted relationship, in which the dependency of the smaller economy is encouraged. This dependency subsequently leads to other economic sectors equally finding that they cannot compete and thus further strengthening the degree of dependence.

The second process is often referred to as proliferation, whereby the smaller economy profits from the relationship through the transfer of various production factors. For one, the transfer of labour from the small to the more developed economy results in an increase in wages and thus in an increase in demand on the domestic market. Subsequently, the increase in demand on the domestic market will attract new investment on that market as well as the creation of joint ventures between the small and larger economies, which are geared towards profiting from low labour costs within the smaller economy. Such joint ventures will, in turn, lead to the transfer of knowledge and advanced technology, which ultimately contributes to the development of the smaller economy.

In the case of Palestine, Al Naqib and Itiani reached the following conclusions:

- The effect of positive proliferation was weak and insignificant in terms of Palestinian economic performance, and for this reason the potential positive process cannot mitigate the distorting effects of the first, more negative, distorting process of growing dependence;
- The amount of cash flow from Palestine to Israel is huge as the negative trade deficit resulting from Palestine's high imports and low exports is many times larger than the wages earned by Palestinian labourers in Israel;
- As a result, operational capabilities and ability to obtain labour for the Palestinian economy are

eroded, resulting in a slowly declining economy.

According to the Al Naqib/Itiani study, the following factors were the reason as to why the negative effects dominated the economic relationship:

- The Israeli policy of seizing control of Palestinian land and natural resources, including water;
- Political actions that attempt to change the demographics on the ground, i.e. Israeli policies that encourage Jewish migration to Palestinian areas;
- Policies that compel the Palestinian economy to be dependent on Israel and isolate it from the Arab world, and those that weaken its productivity and operations through a series of economic, financial and trade policies (e.g. licenses, taxes, the closure of banks, and dumping). As the study indicates, the Israeli occupation, which controls the movement of people and goods across internal and external borders, has led to a deepening of Palestinian dependence on the Israeli economy, which in turn has led to the transference of some Palestinian trade services almost entirely to the Israeli market;
- The policy of systematic looting and robbery of the available Palestinian financial resources by withholding tax revenues collected by Israel on behalf of Palestine (these withheld funds often amounted to a decline in revenues of over 50 percent).

In addition, the study further suggests that the PNA should bear part of the blame as the signing of the Oslo Accords and the Paris Agreement formalised Palestine's economic dependence on Israel and reduced the options for ending the occupation as the interweaving of the two economies made separation more difficult.

The study concludes that vitality in the Palestinian economy can only be achieved by severing the hold that Israeli policies and practices have on the Palestinian economy. This would reduce excessive reliance on one economic partner, and develop and diversify Palestinian economic and commercial relations with the outside world. It should be noted that the severing of economic relations with Israel would not be an automatic or simple process, but could take several years.

## 7. MINIMUM REQUIREMENTS FOR A VIABLE PALESTINIAN ECONOMY

Prior to the signing of the Oslo Accords up to the first years of the second Intifada, much of the literature on this topic was based on the assumption that the occupation would end and the Palestinian economy would be able to benefit from independent Palestinian decision-making and free movement of goods and people between the Palestinian territory and other countries. However, in recent years, much of the literature assumes that the occupation will remain and that therefore economic policies should be focused on using the economy as a means to enhance the self-reliance of the Palestinian people. These thinkers believe that economic independence and progress can be the means to achieve an end to the occupation. For this reason they promote the adoption of more short-term economic policies aimed at enhancing Palestinian economic strength within the confines of the restrictive measures that characterise the occupation.

### *A. Enhancing Palestinian Self-reliance*

Working papers presented by Abdullah and Al-Naqib at the 2005 MAS economic conference note that the cost of resisting the occupation and consequently reducing Israel's gains can be decreased by devising a strategy that alleviates the suffering of the Palestinian people and strengthens their steadfastness. This short-term Palestinian strategy is based on the following key elements:

- Building a strong Palestinian national economy;
- Reducing Palestinian economic and market dependence on Israel; and
- Diversifying economic relations and strengthening foreign trade between Palestine and the Arab Islamic states.

Most recent studies agree that the Palestinian strategy should focus on strengthening Palestinian economic resilience and stabilising Palestinian control over their land and other productive means. Such strategies should have the following components:

#### **Repairing and compensating for damage caused by the occupation:**

The task of reducing the impact of Israeli measures is considered to be a top priority. Emphasis is to be given to alleviating the suffering of the citizens directly affected and to prevent further economic migration. Other tasks in this regard include:

- Accelerating the reform and rehabilitation of the infrastructure of essential public services, especially schools, universities, hospitals, water systems, electricity and sanitation facilities;
- Supporting the private sector and repairing the damage sustained by private property and individuals and others;
- Tying relief aid to the development process for maintaining sustainable aid.

#### **Strengthening national industries**

This includes providing support for the productive Palestinian sectors (especially agriculture, industry and construction) that contribute to the steadfastness of the Palestinian people by providing basic commodities and employment opportunities within the national economy.

#### **Maintaining basic services in health, education, and other social services and to prevent the collapse of Palestinian institutions**



Palestinian institutions can act as enabling bodies in pursuit of economic growth, resilience and independence. Moreover, those institutions with a more social focus play an increasingly important role in alleviating Palestinian suffering, stabilising them and strengthening their steadfastness. Preventing institutional collapse and enhancing the functionality and effectiveness of existing institutions will be key in the pursuit of Palestinian independence and equal in importance as achieving economic prosperity.

### ***B. After the end of occupation***

The actions taken by Palestinians to overcome the effects of the occupation are considered to be important to strengthen and build a viable Palestinian economy. Many consider such actions the minimum requirement for the continuation of Palestinian economic life in particular, and the Palestinian society in general. Most studies on this issue agree on the priority actions that need to be taken:

- **Overcoming production distortions** by improving public sector performance and conducting political and economic reforms necessary to improve the investment environment in Palestine. This should include developing a legal environment that encourages competition and the establishment of investment promotion institutions. Moreover, the rehabilitation of infrastructure will lead to a mitigation of production, transport and distribution costs, which will all increase the competitiveness of Palestinian products;
- **Reforming the distortions of the labour market** by absorbing the bulk of Palestinian labour within the Palestinian economy, particularly the private sector. This will require a new focus (i.e. exporting Palestinian products rather than Palestinian labour) and the adoption of national policies aimed at improving Palestinian productivity. Here, emphasis should be placed on human development and, more effectively, on matching labour market needs with educational programmes;
- **Reducing the Palestinian economic dependence on Israel** and the development of economic and trade relations with the Arab world;
- **Reforming public utility and public resource use** through the restoration of Palestinian control over its natural resources (land and water), receivables and tax, and the allocation of additional resources within the developmental budget of the PNA for infrastructure projects; and
- **Introducing administrative and economic reforms and improving public sector** performance, including through the privatisation of government companies and the issuing of competition laws and control concessions.

Besides overcoming the negative consequences of occupation, Palestinian action will need to be forward looking and responsive to the requirements of a viable economy. Palestinian researchers have identified the following internally oriented action items:

- Updating and developing laws and legislations required to manage the economy and to modernise the regulations and procedures encouraging investment, including the provision of adequate information on investment opportunities, conditions and institutions, and streamlining procedures for registration licensing procedures;
- Developing and improving the efficiency of public institutions and support that increases the level of competitiveness of Palestinian products and providing the appropriate environment to attract foreign investment and stimulate domestic investment;
- Rebuilding and rehabilitating all areas of infrastructure, including the repair of damage sustained during Israeli incursions, especially major infrastructures such as the airport and the main roads between Palestinian towns and villages as well as the completion of major projects such as the Gaza seaport;

- Upgrading human development activities through increased attention to the subject of education, health and social development;
- Taking advantage of the benefits granted to Palestinians in the Arab markets by improving the ability of exporters to enter Arab markets;
- Providing marketing and technical services and promotional products and assisting Palestinian producers to adapt production processes so that final products adhere to international standards;
- Providing Palestinian businessmen with information on market opportunities in order to help them cooperate effectively with foreign businessmen, especially those in the Arab and Islamic states;
- Encouraging Arab investors (especially Diaspora Palestinians) to invest in Palestine; and
- Linking Palestinian areas with the infrastructure networks of the surrounding Arab countries, in particular water and electricity networks, and transport and communications networks.

Finally, improving public sector performance levels is equally important to the vitality of a future Palestinian economy. Many research papers show consistent findings about the requirements in the public sector. The following action items have been highlighted:

- A clear economic policy that takes into account the progress of Palestinian economic priorities, and outlines strategies and plans to achieve those goals;
- Accelerating institutional reforms, including the provision of a legal and institutional framework, which is characterised by transparency and flexibility and emphasises the independence of the judiciary, improving the performance of the courts, providing adequate legal protection for investors, and updating and modernising legislation and laws that encourage economic competitiveness;
- Reforming the tax system in a way that is consistent with the needs of the Palestinian economy, and which stimulates investment and production, and reduces tax evasion;
- Privatising publicly held enterprises in a transparent manner while preventing the granting of special privileges and monopolies, except when this is in the best national interest. In this regard, the PNA must develop legal standards to regulate monopolistic enterprises and to supervise their activities and behaviour.
- Restructuring the PNA budget to reflect the objectives and priorities of Palestinian development, including allocations for the development of education, health care and social services.
- Simplifying and clarifying procedures for public sector employment as well as reducing or eliminating the number of political appointments; and
- Ensuring active coordination between ministries in order to avoid wasting public resources and preventing duplication and overlapping.

### ***C. The role of third parties***

Many Palestinian researchers agree that third parties, in particular the Arab states, play a significant role in the creation of a viable Palestinian economy. Some researchers even go so far as to suggest that Israel's expansion plans do not end at the Jordan river and it is therefore in the interest of the neighbouring states to ensure the creation of a viable independent Palestinian State. The types of support from third parties could range from all forms of material support, economic, political and diplomatic support as well as moral support. The following are some of the specific actions suggested:

- Protecting the rights of the Palestinian people through support in international forums;
- Providing financial support and relief to repair damaged buildings and establishing a fund to compensate those affected;

- ❑ Offering budget support to the PNA to finance current expenditures, especially salaries and operating costs, as well as certain types of investment related activities that promote Palestinian self-determination, which some donor countries might be hesitant to finance;
- ❑ Providing direct support to the Palestinian private sector in the form of tax or tariff exemptions that promote the competitiveness of the Palestinian products on local as well as foreign markets.
- ❑ Setting up joint ventures in all fields, especially agriculture, industry and construction.
- ❑ Establishing a fund to help the Palestinian private sector, similar to the contingency fund proposed by the World Bank or the MIGA guarantee fund administered by the World Bank, to insure against political risks and to look after those cases that are not covered by regular insurance mechanisms.
- ❑ Supporting educational institutions, especially schools and universities, in addition to establishing a fund to support the budget of Palestinian universities and pay the fees of needy students;
- ❑ Providing cash support for the health sector, to buy medicines from local companies, and provide more medical specialists in those locations where deficits are recorded; and
- ❑ Supporting housing projects in the West Bank and Gaza Strip.

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