

## **Status of Rights and Freedoms in the Palestinian Law**

**Asem Khalil**

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## **Introduction**

The Basic Law (BL) for the Palestinian Authority (PA) in the transitional period is an important legal text for the respect of basic human rights and freedoms in the occupied Palestinian territory, at least for three different reasons.

- First, the BL aims at creating a functioning system of government that is based on the principle of separation of powers on the one hand and the subordination of state authorities to the law, on the other. The assumption here is that democracy and the rule of law may provide best guarantees for human rights and freedoms.
- Second, the BL includes a list of rights and freedoms that forms a framework of action for the legislator. Those rights and freedoms are not simple declarations of intentions but constitute legal obligations.
- Third, the supremacy of the BL is rendered concrete by the control that may be effectuated by a Supreme Constitutional Court (SCC), empowered to effectuate control over the constitutionality, *inter alia*, of enforced laws.

The law establishing a Supreme Constitutional Court, n.3 of 2006, was adopted. The PA President did not nominate the first panel of judges for the SCC, until this moment. In the meanwhile, it is the Supreme Court which is entitled to control the constitutionality of laws. The OHCHR may find it appropriate to support efforts for establishing the SCC, for the positive impact this court may have with regards to enhancement and respect of human rights in the territories under PA control. Most importantly, the OHCHR may find it opportune to train lawyers and judges, possible future clients and actors in front of the SCC, on human rights and freedoms, their protection, assistance and advocacy.

This means that the legislator needs to consider human rights and freedoms as per the BL whenever legislation is drafted. Nevertheless, the legislative process does not include imperative control of conformity of the draft with basic human rights and freedoms. However, if a law that includes provisions contradicting basic human rights and freedoms is enacted by the legislator, it may be always object of scrutiny by the SCC, with possibility of annulment. This is possible only with the assumption that the principles of separation of power, rule of law and democracy are effectively enforced by the PA.

This report intends to provide a basis for a plan of action aiming at approximating Palestinian laws to rights and freedoms included in the BL and international standards. Article 10 (par.2) of the BL provides that "The Palestinian National Authority shall work without delay to become a party to regional and international declarations and covenants that protect human rights." This provision is explained by the lack of the international legal personality of the PA, not being yet a state. It expresses willingness of the PA which enacted the BL to make part of those covenants forming the basis for the protection of human rights. However, there is no need to be part of international and regional declarations. The later, indeed, do not make part of the so-called hard international law.

There are serious grounds to believe, then, that this article forms an *obligation* for the PA to *voluntary* abide by the contents of international and regional declarations and covenants

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related to the protection of human rights. Certain legislation enacted by the PA goes in that direction.<sup>1</sup>

In all circumstances, the BL provides that "Basic human rights and liberties shall be protected and respected."<sup>2</sup> This general provision may be interpreted as referring to those basic human rights and liberties included in regional and international declarations and covenants that protect human rights. The reference to certain rights and liberties in the BL, accordingly, shall not be interpreted restrictively because article 10, as mentioned above, just before enumerating some of those rights in the BL made a general provision aiming at protecting basic human rights and liberties without defining their contents.

However, only the violation of the rights or liberties that have been guaranteed by law or by the BL are considered a crime, not subject to any statute of limitations and object of remedy, as stated in article 32 of the BL: "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 BL 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."

The use of BL as reference is justified by the following reasons:

- First, the PA is not a state. The Palestine Liberation Organization (PLO), although deemed subject of international law, capable of signing treaties, is not a state. Both entities are incapable of joining basic treaties forming International Human Rights Law and International Humanitarian Law. This means that there are not direct legal obligations under conventional international law on the PA. It means also that the PA is not accountable under international law for the violations of conventional international law.
- Second, there are serious indicators that the PA intends to abide by human rights. The BL's list of rights and freedoms are the most relevant indicator of the existence of such intention. It means also that, despite not being an obligation under conventional international law, basic rights and freedoms form an obligation under domestic Palestinian law.

In other words, basic rights and freedoms in conventional international law, forming only moral and political and not legal obligations for the PA, are transformed into domestic law obtaining the legal power of the text that endorses it. Accordingly, it is more convenient to individualize legal obligations on the Palestinian legislator under domestic law than moral obligations under international law. By doing so, the advocacy of international organizations and national human rights institutions towards more 'human rights-friendly' legal texts is rendered more appealing, for being based on legal obligations rather than moral or political motivations subject to manipulation and continuous change, and for being localized and incorporated into local needs rather than as an outside product.

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<sup>1</sup> This is the case, for example, of Palestinian Child Law no.7 of 2004 for example refers to Child Rights Convention of 1989 in its preamble. This is also the case of (Presidential) Decree no.19 of 2009 concerning the Ratification of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

<sup>2</sup> BL, art.10/1.

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It may be an easy task to show whether the BL’s list of rights and freedoms is in conformity with ‘international standards;’ while international standards here refers exclusively to what can be traced in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).<sup>3</sup> It is harder to study the way those rights are rendered operative by primary and secondary legislation. The reference to the UDHR can be justified by the assumption that rights and freedoms included therein, although not binding as conventional international law may be (partially or as a whole) considered as part of customary international law.

This report intends to realize those previous two tasks, first by presenting those main rights and freedoms included in the BL on the light of the international standards, and second by analyzing the related legislation to check out the way those rights and freedoms were regulated by the law. In both cases, the following report does not have any prejudice or pre-assumptions with regards to the way those rights and freedoms are applied and enforced in reality. In fact, the way those rights and freedoms are applied need a different analysis, methodology and approach, that goes beyond the limited scope of this report. Besides, certain laws (adopted by the PLC and endorsed by the President) or by decree-Laws (adopted by the President as per article 43 of the BL) may be subject to further limitation by the executive rules issued by the executive authority, through decisions of the Council of Ministers or even by the ministers. It is impossible within the limits of this report to cover those decrees which, in case of violation of the law, are to be annulled or at least, should not be applied by the judge, who needs to apply superior law.

## **1. Right to Life**

### **1.1. Introduction**

“Everyone has the right to life.”<sup>4</sup> The right to life is inherent to human being and shall be protected by the law.<sup>5</sup> Surprisingly, the BL does not make a reference to this right.

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| <ul style="list-style-type: none"><li>- The BL needs to be amended. The amendment may serve to abolish death penalty, or, at least, to state clearly that each human being has the right to life and that no one shall be arbitrarily deprived of his life.</li></ul> |
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### **1.2. Related Laws**

Death penalty is not abolished in the territories under PA control. Penal codes in force in the occupied Palestinian territory enumerated number of crimes punishable by death penalty.

- (British) Penal Code Ordinance no.74 of 1936 (in force in GS).
- (British) Criminal Juvenile Ordinance no.2 of 1937 (in force in GS).

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<sup>3</sup> It is impossible within the limits of this research to go beyond the existing texts, to reach customary international law, jurisprudence and opinions of jurists on those rights. Besides, the vast literature with regards to the topics treated in this report that include various opinions and positions, could not be reviewed for the purpose of the preparation of this report. Rather, the legislative texts were used as point of departure to assess status of rights on the light of international standards. Whenever a comment or recommendation is needed, it is provided immediately in a box. In this way, there is no need to have a general conclusion or recommendation list. Finally, this report will be limited to selective civil and political rights.

<sup>4</sup> UDHR, art.3.

<sup>5</sup> ICCPR, Art.6/1.

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- (Jordanian) Juvenile Rehabilitation Law no.16 of 1954 (in force in WB).
- (Jordanian) Penal Code Law no.16 of 1960 (in force in the WB).
- (PLO) Revolutionary Penal Code of 1979 (in force by Palestinian Military Courts).
- (PA) Law Relating to Reformatory and Rehabilitation Centres "Prisons" no.6 of 1998.
- (PA) Penal Procedures Law no.3. of 2001.
- (PA) Law No. 3 of 2005 Concerning the Amendment of Some of the Provisions of the Law of Rehabilitation and Correctional Centers "the Prisons" No. 6 of 1998.

- The fact that there are different penal codes and different crimes punishable with death penalty is disturbing. The adoption of unified and up to date penal code is a priority for the PA.
- The revolutionary penal code adopted by the PLO and still in force in military courts needs also to be reviewed by the Palestinian legislator. In all circumstances, military courts shall not be entitled to judge cases outside its military jurisdiction. They shall not have, in all circumstances, jurisdiction over civilians.
- State Security Courts used to apply the Revolutionary Penal Code on civilians. Those courts were abolished and need not to be established again. Persons who were condemned by those courts need to appear in front of the ordinary judge, and their judgment reviewed.
- Since there are three different penal codes in force in the territories under PA control, one may suggest applying the most favorable clause on criminals, thus, reducing the number of crimes punishable by death penalty to the minimum, i.e. to those serious crimes. This means applying death penalty only on those crimes that are found punishable with death penalty in the three penal codes.

As for Abortion:

- (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).
- (British) Penal Code Ordinance no.74 of 1936 (in force in GS).
- (PA) Public Health Law no.20 of 2004.

As for the killing of newly born babies, two cases are provided in:

- (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).

### ***1.3. Regulating Death Penalty***

Although clearly favoring the complete abolition of death penalty, article 6 of the ICCPR states that 1) sentence of death penalty may be imposed only for the most serious crimes, and that 2) death penalty can only be carried out pursuant to a final judgment rendered by a competent court. It stated also that 3) anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Finally, article 6 states that 4) sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and 5)

shall not be carried out on pregnant women. Those topics will be covered one by one in the section below.

### **1.3.1. Sentenced only for the most serious crimes**

Crimes punishable by death penalty differ according to the location whether it is committed in Gaza Strip (where the British mandate Penal Code Ordinance of 1936, is still in force) or in the West Bank (where the Jordanian Penal Code Law no.16 of 1960 is still in force), or in East Jerusalem, where Israeli law (that abolished death penalty) is applicable since the occupation of the city in 1967, and later on its annexation. Besides, they differ according to the perpetrator, who may fall within the jurisdiction of the military court, thus applying Revolutionary Penal Code, with its own list of crimes punishable by death penalty.

Seen the number of crimes that are punished with death penalty, there is serious ground to believe that death penalty is not limited to punish serious crimes. Besides, there are certain crimes punishable by death penalty that merit to be nowadays called political crimes. Their inclusion in those old penal codes may be explained for the legal and political system in which they were enacted; they are however unable to be accommodated in modern legal system based on the respect of human life, being considered as inherent to every human being.

- Adopting a unified penal code becomes a priority, but there is a need to limit the sentence of death only to serious crimes.
- There is a need to adopt a new penal code applicable in military courts, in which it shall be stated clearly that their jurisdiction shall not exceed the military related crimes.

### **1.3.2. Penalty carried out pursuant to a final judgment rendered by a competent court**

Death penalties are carried out through execution for civilians and through shooting for military.<sup>6</sup> The way execution is carried out is regulated by the law.<sup>7</sup>

Penal Procedures Law<sup>8</sup> provides that sentences of death penalty are appealed and attacked in cassation even if the parties did not request so. By doing so they are coherent with ICCPR,<sup>9</sup> since the sentence of death shall be carried out pursuant to a final judgment rendered by a competent court. This is not the case for military courts, where judged to death penalty has no right of appeal.

State Security courts used to apply military code on civilians, thus applying death penalties to crimes that are not enumerated in the penal codes. They are thus deprived from their natural judge. The State Security Courts were later on abolished.<sup>10</sup>

### **1.3.3. Right to seek pardon or commutation of the sentence**

The BL provides that the "President of the National Authority has the right to grant special pardons or to commute sentences."<sup>11</sup> The president needs also to endorse death sentences,<sup>12</sup>

<sup>6</sup> Art.415 of Penal Procedures Law no. 3 of 2001

<sup>7</sup> In Law Relating to Reformatory and Rehabilitation Centres "Prisons" no.6 of 1998 (articles 59 and 60) and in the Penal Procedures Law no.3 of 2001 (Arts 410-413, 416-418).

<sup>8</sup> Penal Procedures Law no.3 of 2001 (articles 327, 350).

<sup>9</sup> ICCPR, art. 6/2.

<sup>10</sup> For more details about Military and Security Courts, see the report prepared by Mutaz Qafisheh.

<sup>11</sup> Art. 42 of the BL.

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adopted by military or regular courts, in order to be executed. This authority is in conformity with his power to grant pardon or commutation of sentence. It shall be noted that the authority to endorse death sentences was given previously to the British High Commissioner,<sup>13</sup> the King of Jordan upon the recommendation of the Council of Ministers,<sup>14</sup> and the (Egyptian) Minister of War.<sup>15</sup>

#### **1.3.4. Shall not be imposed for crimes committed by a child**

The Juvenile Offenders Ordinance of 1937 (still in force in GS) provides that the sentence of death cannot be imposed on children (below 18 years old).<sup>16</sup> The same provision is present in the Reformation of Juvenile Law no.16 of 1954 (still in force in WB).<sup>17</sup>

In case of the adoption of a new PA Juvenile law, the OHCHR may support the inclusion of a clause forbidding the death penalty for crimes committed by a child. This clause will be in conformity with the previously in force law in the WB and GS. In case it is done, make sure that it applies also that it applies also on Military Courts rulings, which apply PLO Revolutionary Penal Code.

#### **1.3.5. Shall not be carried out on pregnant women**

Penal Code Ordinance of 1936 (in force in Gaza Strip) stipulates that pregnant women condemned with a crime of deliberate killing, punishable with death penalty, is sentenced life imprisonment instead of death.<sup>18</sup> Penal Code Law no.16 of 1960 (in force in the WB) adopts similar provision.<sup>19</sup> Those provisions are in harmony with ICCPR.<sup>20</sup>

The Law Relating to Reformatory and Rehabilitation Centres "Prisons" on the contrary adopted an article that may be considered a regression with what has been stipulated by the above codes. Article 60/1 stipulates that death penalty is postponed to be executed until two years of the delivery of the baby. In this same direction, article 414 of the Penal Procedures Law no.3 of 2001 provides that the "death sentence may not be executed on a pregnant woman. If she gives birth to a live infant, the court which passed sentence on her commutes the death sentence to life imprisonment." Law No. 3 of 2005 Concerning the Amendment of Some of the Provisions of the Law of Rehabilitation and Correctional Centers "the Prisons" no.6 of 1998, amended above mentioned article 60/1 making it harmonious with Penal Procedure Law.

Both penal codes and the newly adopted PA laws (especially following the introduction of the Law no.3 of 2005, amending Law no.6 of 1998), the PA law is now harmonious with international law which stipulates that pregnant woman should not be executed. However, the law stipulates that it is postponed until it delivers a living baby. Only by then, the court may stipulate that the penalty will be life sentence instead of death.

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<sup>12</sup> Art. 109 of the BL.

<sup>13</sup> Art. 48 of Palestine-Order-in Council of 1922.

<sup>14</sup> Art.39 of the 1952 Constitution.

<sup>15</sup> Art.38 of the BL for Gaza Strip no.255 of 1955, and art.60 of the Proclamation of the Constitutional Regime of Gaza Strip of 1962.

<sup>16</sup> Article 13.

<sup>17</sup> Article 12/2.

<sup>18</sup> Art.215.

<sup>19</sup> Art.17/2.

<sup>20</sup> Art.6/5.

## ***1.4. Abortion and Killing of newly Born Children***

### **1.4.1. Abortion**

Abortion is not permitted in Palestine. Penal codes in force in West Bank and Gaza Strip provided different scenarios in relation to abortion. However, both criminal codes in force consider the abortion as a crime, where both the woman, those who assist her or help her are punished with prison (varies from 6 months up to 14 years).

The woman who performs or accepts abortion is punished by 6 months to 3 years imprisonment in the West Bank.<sup>21</sup> While in Gaza Strip it reaches even 7 years, for abortion or even for attempting it.<sup>22</sup>

Penal Code Ordinance (in force in GS) provides that those who help a woman to perform abortion are punished for 14 years imprisonment,<sup>23</sup> while Penal Code Law (in force in WB) sanctions with 1-3 years for those who help woman abort with her approval, and 5 years with forced work if she dies. In case without woman's approval, they are sanctioned with maximum 10 years of prison with forced work, and in case a woman dies, at least 10 years with forced work. The same sanction in case abortion is committed through violence. Being a doctor or nurse aggravate the crime and the sanction to the third.<sup>24</sup>

Both penal codes in force in the WB and GS agree on criminalizing the abortion. This is largely related to different ethical, religious and moral codes that are largely shared within Arab-Islamic cultures. This position is also shared by Christian denominations.

There is a contradiction in the existent penal codes and the rationale for such penalization of abortion. On the one side, they give the impression of protecting life, by forbidding and criminalizing abortion. On the other, the two penal codes deal with abortion, not in the chapter that deals with crimes committed against persons, but rather under the chapter dedicated to 'crimes against morality and public decency'. This tells it all about the way embryos may be perceived by the legislature, that perceive this crime, not a crime against a human being but against morality, honor, or family. The legislature may decide to be coherent with religious and moral standards that protect and prioritize the embryo life, because deemed as a 'person' or cancel this crime of abortion completely, imposing only regulation of abortion.

Permitting abortion, however, seems far from being a realistic proposal. What can be done, on the contrary, is to suggest a law which is 'woman friendly', especially in case of forced abortion, that is to deal with the woman, more as a victim herself, rather as a criminal.

It shall be noticed however, that a woman who commits abortion or a relative (until 3<sup>rd</sup> degree) helps or forces her to do so, enjoy attenuating circumstances if abortion was committed to save honor.<sup>25</sup>

<sup>21</sup> Art.321 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).

<sup>22</sup> Art.176 of Penal Code Ordinance no.74 of 1936 (in force in GS).

<sup>23</sup> Art.175 of Penal Code Ordinance no.74 of 1936 (in force in GS).

<sup>24</sup> Cf. arts.321-336 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).

<sup>25</sup> Art.324 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).

This article is biased in terms of gender. It prioritizes the 'honor' on woman's and embryo's life. Such article, as much as others related to honor (so called 'honor crimes') are contrary to the basic human rights to life. Such provision needs to be amended.

The law of Public Health of 2004 provided the conditions that shall be cumulatively existent to effectuate exceptionally the abortion: 1) to save the mother's life; 2) with the certificate of two doctors (one of whom shall be a specialist); 3) written approval of the pregnant (in case of incapacity, her husband or guardian; 4) the abortion shall be effectuated in authorized health institution.<sup>26</sup> The same law imposes on the health institution shall keep the above documentations and information at least for 10 years. The draft Palestinian Criminal Law makes reference to two possible exceptions to the general rule of forbidding abortion: when the life of the woman is in danger and when the woman suffering is not supportable.

It shall be noted that the law is silent as to the time when an embryo is to be considered a human being; the penal codes in force and the draft Palestinian law seem not to differentiate between kinds of abortion according to the date of pregnancy. This issue, however, may be considered as "religious issue" to be determined by religious authority.

The law shall be clearer and more precise over when abortion, in certain cases that are determined by the law, can be permitted. This was done partially by Public Health Law of 2004, but the issue of timing of pregnancy after which it will be a crime to commit abortion, shall not be left without regulation.

#### **1.4.2. Killing Newly Born Children**

Penal code permits changing the sanction to not less than 5 years imprisonment, for a woman who kills her child before he reaches 1 year, in conditions that merit death penalty, whenever the court is convinced she did that while not completely conscious of her acts, or by effects of breast feeding.<sup>27</sup>

The same applies on a woman who kills her child by an action or by simply leaving him for the purpose of killing him, whenever she does that to prevent shame, because he is born of an illegitimate sexual relationship.<sup>28</sup>

There is no reason to give a reduced sentence for a woman who does kill her child in order to prevent shame. The same comment I made above, with regards to issue of honor, applies to this article too.

#### **1.5. 'Honor Crimes'**

What is often referred to as an 'honor crime' is related to killing of one's wife, daughter, mother, or so on, because of alleged illegitimate sexual or inappropriate relationship. According to the penal code in force in the WB,<sup>29</sup> the killer may enjoy even excusable circumstances (if it was the husband) and attenuated circumstances (if it was a relative).

Article 340 of the Penal Code in force in the WB, is problematic also with regards to discrimination based on sex, and will be dealt with in later stage. This article however is contrary to the right to life, and to the right to due procedure. This article needs to be

<sup>26</sup> Art.8.

<sup>27</sup> Art.331 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).

<sup>28</sup> Art.332 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).

<sup>29</sup> Art.340 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).

amended, or even abrogated to be in coherence with the right to life and the right to due procedure.

## **2. Prohibition of Discrimination based upon race, sex, color, religion, political views or disability**

### **2.1. Introduction**

Equality before the law is a right to everyone. This includes the right to be recognized as a person before the law,<sup>30</sup> entitlement to equal protection,<sup>31</sup> and effective remedy for acts violating the fundamental rights.<sup>32</sup>

Accordingly, equality does not entail prohibiting discrimination or incitement on discrimination only, but also granting protection against discrimination based on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>33</sup> It means also empowerment of (ethnic, religious or linguistic) minority groups that exist within a state, through enjoyment of “their own culture, to profess and practice their own religion, or to use their own language.”<sup>34</sup>

The BL guarantees equality of Palestinians before the law and the judiciary, without discrimination based upon race, sex, color, religion, political views or disability.<sup>35</sup> The BL does not refer to language, national or social origin, birth or other status. It adds however, the disability as a category of persons that need not to be discriminated.

- An amendment to the BL may be suggested to include forbidding discrimination, based also on language, national or social origin, birth or other status.
- The BL refers to equality of Palestinians before the law and the judiciary and not of human beings. However, it shall be outlined, equality is not a prerogative of only citizens. Everyone has the right to equal protection of the law and discrimination shall be prohibited also in relation to national origin. For sure, this does not mean that states have no right to regulate status and rights of foreigners. The regulation of the status of foreigners shall not mean in all circumstances discrimination in the enjoyment of basic rights, including the right to be recognized as a person in front of the law the right to be protected by the law.

Based on the above, this section shall examine whether Palestinian laws guarantees equality before the law and the judiciary, as stated in the BL. This obligation may be translated in legal texts by prohibiting discrimination or by stating equal treatment and equal protection by the law.

- The reference to the prohibition of discrimination or to equality in a legislative text means nothing without state policies, actions and enforcement measures. However, the way those articles are put in practice is outside the limited scope of this report.

<sup>30</sup> UDHR art.6, ICCPR, art.16.

<sup>31</sup> UDHR art.7, ICCPR, art.26.

<sup>32</sup> UDHR art.8.

<sup>33</sup> ICCPR, art.26.

<sup>34</sup> ICCPR, art.27.

<sup>35</sup> BL, art.9.

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In both cases, however, the role of the state is negative in that it abstains from doing certain actions. The non-discrimination clause, however, goes beyond that, meaning that state shall take the necessary steps to make this equality respected by other actors within the state. In other words, the state shall not only abstain (negatively) from discriminating women and religious minorities but needs to undertake (positively) certain actions aiming at empowering them, as full citizens.

Accordingly, the equality before the law and the judiciary will be examined first (section 2.3); then, the positive actions undertaken by the PA in certain areas will be tackled (section 2.4). Despite the above, there are certain areas where religion and sex matter with regards to distribution of rights (section 2.5).

## ***2.2. Related Laws***

- (PA) Palestinian Electoral Law no.13 of 1995
- (PA) Telecommunications Law no.3 of 1996
- (PA) Law Relating to Promulgation of the Civil Service Law no.4 of 1998
- (PA) Law no.6 of 1998 related to the Correction and Rehabilitation Centers “Prisons”
- (PA) Law no.4 of 1999 related to the Rights of the Disabled
- (PA) Labour Law no.7 of 2000
- (PA) Penal Procedures Law no.3 of 2001
- (PA) Law of Evidence in Civil and Commercial Matters no.4 of 2001
- (PA) Judiciary Law no.1 of 2002
- (PA) Palestinian Child Law no.7 of 2004
- (PA) Palestinian Electoral Law no.9 of 2005
- (PA) Local Municipalities’ Councils elections Law No.10 of 2005
- (PA) Law no.12 of 2005 concerning the Amendment of some Provision of Local Municipalities Elections Law no.10 of 1998.
- (PA) Consumer Protection Law no.21 of 2005
- (PA) Decree Law no.1 of 2007 relating to General Elections

## ***2.3. Equality before the Law and the Judiciary***

Unless specified differently, legal texts use the term ‘Palestinian’ or ‘citizen’ with reference to both males and females, Christian and Muslims, indistinguishably. The Draft Palestinian Constitution states clearly that the term Palestinian or citizen refers to both male and female.<sup>36</sup>

Equality between citizens and basic human rights were even considered as forming the basis of Palestinian constitutional system, as much as the principles of popular sovereignty,

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<sup>36</sup> Art.19 of the 3<sup>rd</sup> Draft Palestinian Constitution of 2003.

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democratic rule, separation of powers, and the independence of the Judiciary.<sup>37</sup> Equality between citizens and the empowerment of women are even considered as part of the national consensus.<sup>38</sup> The Declaration of Independence (of 1988) 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, color or sex, and the aegis of a constitution which ensures the rule of law and an independent judiciary".

### **2.3.1. Equal Access to Justice**

Everyone has the right to submit a case to court and each Palestinian shall have the right to seek redress in the judicial system. Accordingly, administrative acts cannot be immune from revision by judicial authority while judicial error shall be remedied by the PA.<sup>39</sup>

The Judicial Authority Law no.15 of 2005, deemed unconstitutional by the High Court acting as a constitutional court in 2005, stated interestingly, that the ministry of justice is responsible for facilitating access of citizens to justice without discrimination based, *inter alia*, on religion and sex.<sup>40</sup> There is no such an article in the Judiciary Law no.1 of 2002, currently in force.

- Article 90 of the abrogated Law no.15 of 2005 could be introduced through amendment to the Judiciary law no.1 of 2002.
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The Judicial Code of Conduct imposed on judges to treat equally with words and actions everyone, without discrimination based on religion, sex, colour, or any other reason. He has also the duty to ask those working under his direction to do the same.<sup>41</sup>

### **2.3.2. Equal Access to Government and to Public Services**

In conformity with UDHR,<sup>42</sup> Palestinian law guarantee right of each Palestinian to take part in the government, through free elections. The law also grants equal access to public service. The BL indeed consecrates Palestinians' right "to participate in political life, both individually and in groups."<sup>43</sup> This right includes in particular the right "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" and "to hold public office and positions, in accordance with the principle of equal opportunities."

### **2.3.3. Equal Access of Children to Rights**

The BL provides: "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

<sup>37</sup> Cf. art.13 of the Palestinian Electoral Law no.13 of 1995. This law was cancelled by Electoral Law no.9 of 2005; however those principles were largely included in the BL of 2002 and later on in the amended BL in 2003.

<sup>38</sup> Point 11 of the National Agreement Document (called also Prisoners Document).

<sup>39</sup> BL, art.30.

<sup>40</sup> Art.90.

<sup>41</sup> Cf. art.18 of the Decision of the High Judicial Council No. 3 of 2006 Concerning the Judicial Code of Conduct.

<sup>42</sup> UDHR, art.21.

<sup>43</sup> BL, art.26.

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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.”<sup>44</sup>

Palestinian Child Law goes in that direction by granting rights to children without discrimination.<sup>45</sup> Rights included in that law are granted to all children, defined as each human being who did not complete 18 years old.<sup>46</sup>

- The interesting thing about this article is that it does not limit to the reference of prohibition of discrimination based on religion, sex and colour (as most legal texts) but also refers to entitlement to rights included in Palestinian Child Law to all children, without discrimination based also on citizenship, language, national or social origin.<sup>47</sup>

The law guarantees the basic rights to life and security,<sup>48</sup> to freedom of opinion and expression,<sup>49</sup> to respect of privacy,<sup>50</sup> prohibition of (less than 15 years old) child labour,<sup>51</sup> to be registered upon birth,<sup>52</sup> and to a name,<sup>53</sup> to have his/her legal personality respected,<sup>54</sup> and to citizenship.<sup>55</sup>

Besides, the law enumerates certain family rights,<sup>56</sup> such as the right to live within a family, to know the parents and to be in contact with them, health rights,<sup>57</sup> such as to health care and services, and the protection from alcohol and drugs, social rights,<sup>58</sup> such as the right to decent level of living, to alternative care, and to receive social aid, cultural rights,<sup>59</sup> such as the right of information, and to make part of associations, educational rights,<sup>60</sup> such as the right to free education, to repose and to play, and finally the right to protection,<sup>61</sup> such as the prohibition of exploitation or harm of children, the utilization of children-soldiers in armed conflicts.

- The above rights are in complete coherence with article 24 of ICCPR: “1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality.”

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<sup>44</sup> BL, art.29.

<sup>45</sup> Art.3 of the Palestinian Child Law no.7 of 2004

<sup>46</sup> Art.1.

<sup>47</sup> Art.3.

<sup>48</sup> Art.11.

<sup>49</sup> Art.12.

<sup>50</sup> Art.13.

<sup>51</sup> Art.14.

<sup>52</sup> Art.15

<sup>53</sup> Art.16.

<sup>54</sup> Art.17

<sup>55</sup> Art.18

<sup>56</sup> Arts. 19-21.

<sup>57</sup> Arts. 22-28.

<sup>58</sup> Arts.29-32.

<sup>59</sup> Arts.33-36.

<sup>60</sup> Arts.37-41.

<sup>61</sup> Arts.42-49.

- The same applies to UDHR provision: “Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”<sup>62</sup> In fact, the BL provides that: “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.”<sup>63</sup>

#### **2.3.4. Equal Access to Citizenship**

In legal terms, there is not a Palestinian citizenship because there is not yet a Palestinian state. However, the BL provides that Palestinian citizenship (or nationality) shall be regulated by law. The PLC did not endorse a nationality law yet.

- This is largely related to the Israeli occupation and the control by Israeli Military commander, of the population registry and of borders of the occupied Palestinian territory. Although a draft nationality law was circulating since early years of the PA, it never saw the light, seen the problematic issue of refugees and residents, etc.

The Palestinian Child Law, though, anticipated this issue, stating that each Palestinian Child (regardless of their religion or sex) has the right to Palestinian citizenship. Contrary to many Arab countries legislation, Palestinian nationality passes from a Palestinian mother or father irrespectively.

- This provision is positive, seen the reticence of many neighbor Arab states to permit or facilitate access to nationality for husband of females’ nationals, and their children.

But if a Palestinian child has a right to Palestinian citizenship, who is to be deemed Palestinian? To answer this question, one may occupied Palestinian territory for an ethnic definition of Palestinians. In this sense, a Palestinian is defined with reference to the Palestinian people. Palestinian nationals, in this sense are not only those who are currently within historical Palestine (Israel and occupied Palestinian territory), but refer to all Palestinians, dispersed in all over the world, including those who have obtained a new citizenship or those still stateless, and including refugees, and non-refugee populations.

However, Palestinians of the West Bank and Gaza Strip, who lived under Israeli occupation since 1967, and now mostly falling under PA jurisdiction, are granted an ID number. Palestinians in possession of an ID number, regardless of their religion and sex, are entitled to a travel document, issued by PA ministry of Interior. The ID number and PA travel document are comparable but not equivalent to national documents for citizens.

- The way the issuance of travel documents is issued is regulated by bilateral agreements with Israel (Oslo Agreements). The absence of a legislation that clarify who is entitled to a travel document, may leave the space open for future limitation on access to a travel document, based on gender, or imposing certain documentations for adult females, that

<sup>62</sup> UDHR, art.2.

<sup>63</sup> BL, art.29.

are not the same for adult males. The clear regulation in a text that is not discriminatory towards women will be a positive step to encourage.

The way ID number is granted changed under Israeli occupation. Population registry, even after Oslo, remains within the hand of Israeli military occupation, in complete control of the borders. Palestinian nationals, with no (Israeli issued ID) are not able to enter the occupied Palestinian territory, including those territories under complete PA control (area A).

### **2.3.5. Equality at Work**

Labour Law provides expressly that it is prohibited to discriminate in circumstances and conditions of work in Palestine.<sup>64</sup> In specific, the law forbids discrimination between men and women.<sup>65</sup>

Civil Service Law does not refer to equal treatment or prohibition of discrimination expressly but defines a civil servant as being "a male or female employee being a person appointed by decision of a competent authority to fulfill a function listed in the civil functional categories regulations and funded by a government department, whatever the nature or title of the function."<sup>66</sup>

## **2.4. Reaching Substantial Equality**

The PA does not only abstain from discriminating between citizens, it shall take certain actions. The PA, indeed, is responsible for ensuring respect of equality by other actors, by prohibiting discrimination based on sex and religion or by forbidding incitement to discrimination (2.4.1). The PA needs also to consider special needs for certain categories of persons within its population, such as women at work or in prison (2.4.2). Finally, the PA shall empower certain categories of persons, aiming at reaching substantial equality rather than formal one, through positive actions (section 2.4.3).

### **2.4.1 Prohibition of Discrimination or Incitement to Discrimination**

The PA is not only obliged not to discriminate, it shall also take necessary steps in order that other actors treat people without discrimination and shall forbid incitement to discrimination. The PA shall finally take necessary steps to protect those who are discriminated.

#### **2.4.1.1. Fair Treatment of Consumers**

This is the case for example the Consumer Protection Law which states that the consumer shall enjoy the right to "receive a fair treatment without discrimination by the supplier of the product or the manufacturer."<sup>67</sup>

#### **2.4.2.2. Protection of Disabled**

The Law no.4 of 1999 related to the Rights of the Disabled also provides that the state must enact "regulations and rules that guarantee for the disabled protection against all kinds of violence, abuse and discrimination."<sup>68</sup> The ministry of Social Affairs is responsible for the application of the above article. In particular way, the ministry shall be responsible of their

<sup>64</sup> Art.16 of the Labour Law no.7 of 2000.

<sup>65</sup> Art.100.

<sup>66</sup> Art.1 of the Law Relating to Promulgation of the Civil Service Law no.4 of 1998.

<sup>67</sup> Art.3 of the Consumer Protection Law no.21 of 2005.

<sup>68</sup> Art.9 of the Law no.4 of 1999 related to the Rights of the Disabled.

protection in their work place, whether in the public or in the private sector. In case of exploitation, the ministry shall draw the attention of the employer to this irregularity. In case of repetition of the same act, the ministry shall take the necessary legal steps against the employer. Finally the ministry shall take the necessary steps to prevent violence against disabled, including establishing a special unit to receive complaints from disabled.<sup>69</sup>

#### **2.4.2.3. Providing Services without discrimination**

Telecommunications Law provides that permits for establishing a telecommunication network is granted upon the satisfaction of certain conditions, including *inter alia*, the commitment of the one requesting the permit to provide services to beneficiaries without discrimination.<sup>70</sup> Based on this law, the Council of Ministers issued in 2004 a decision in which it adds new conditions for granting permits for telecommunications networks, within which the permit shall consider that the network granted the permit does not transmit racist ideas or opinions, based, *inter alia*, on sex and religion.<sup>71</sup>

#### **2.4.2.4. Reaching Substantial Equality in Education**

Palestinian Child Law grants the state the right and the responsibility to take the necessary precautionary steps to cancel all forms of discrimination that obstacle the enjoyment of the right of education. The state shall work out on the realization of equal opportunities for children.<sup>72</sup>

#### **2.4.2.5. Forbidding Incitement and Defamation**

The three different electoral laws that were enforced in the PA territories impose certain conditions on candidates in their electoral campaign, including the prohibition of defamation.<sup>73</sup> However, the Decree Law no.1 of 2007 relating to General Elections was the most explicit with regards to prohibition of defamation based, *inter alia*, on sex and religion: "The electoral campaign, speeches, writings, leaflets, advertisements, pictures shall not include any incitement or defamation of other candidates on the basis of sex, religion, sect, profession, disability, or any provocation that could violate the unity of the Palestinian people." A similar restraint is imposed also on candidates in Local Municipalities' Councils elections.<sup>74</sup>

#### **2.4.2.6. Child Protection**

Palestinian Child Law imposes on the state to take all the necessary precautionary measures for child protection from all forms of discrimination, violence and mistreatment, in order to ensure effective equality and the enjoyment of all rights in the law.<sup>75</sup>

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<sup>69</sup> Art. 10 of the Decision of the Council of Ministers no.40 of 2004 Concerning the Bylaw of the Law no.4 of 1999 Concerning the Rights of the Disabled.

<sup>70</sup> Art.28 of the Telecommunications Law no.3 of 1996. Decision of the Minister of Posts and Telecommunications no.1 of 1996 confirmed this rule.

<sup>71</sup> Art.13 of the Decision of the Council of Ministers No. 182 of 2004 Concerning the Regulation of the Licensing of the Radio, Television ,Satellite, and Wireless Stations.

<sup>72</sup> Art.38 of the Palestinian Child Law.

<sup>73</sup> Cf. art.58 par.4 of Electoral Law no.13 of 1995, art.64 par.5 of Electoral Law no.9 of 2005, and art.66 par.8 of Decree Law no.1 of 2007 relating to General Elections.

<sup>74</sup> Cf. art.28 of Local Municipalities' Councils elections Law no.10 of 2005.

<sup>75</sup> Arts.3 and 42 of the Palestinian Child Law.

#### **2.4.2.7. Women Protection**

The Palestinian Council of Ministers defines violence against women as being physical, sexual, or psychological violence that occur against women in family and society in contradiction to the law in force.<sup>76</sup> The same resolution distributes tasks on various ministries to deal issues related to violence against women, including the Ministry of Interior, Justice, and Health. The Ministry of Women shall have the task to coordinate ministerial work to execute the resolution. It shall be noted that the task of empowering women and enhance her full participation in the public sphere and the decision making is considered as part of the mandate of the Ministry of Planning.<sup>77</sup>

President Abbas, interestingly, ‘ratified’ the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).<sup>78</sup> Since ratification of this convention is limited to only states, and since the PA is not (yet) a state, it is dubious that it will be considered as state party to the convention. However, this ‘ratification’ in harmony with the provisions of the BL (as state by the decree) is considered as a national legal instrument of accommodation of international treaty into domestic law, thus, possibly enforcing by Palestinian courts.

#### **2.4.2. Considering Special Needs**

There is no contradiction between equality and consideration of special needs of certain categories of persons. The Palestinian law undertakes this position with regards to women in prison and at work, but also with regards to religious beliefs.

##### **2.4.2.1. Special needs of Women**

Law no.6 of 1998 related to the Correction and Rehabilitation Centers “Prisons” imposes the separation between prisoners according to sex. However, the law is silent about the special needs of women in prison, for example with regards to hygiene or for women with babies and so on.

- It is possible to suggest amendments to Law no.6 of 1998, to take in consideration women’s needs in prisons.

Labour Law, on the contrary was more detailed with regards to women’s needs at work, while Civil Service Law was silent on those issues. According to Labour Law:

- The employment of women shall be prohibited in: 1. Dangerous or strenuous works which the Minister defines.<sup>79</sup> 2. Extra working hours during pregnancy and the six months following delivery. 3. Night hours with the exception of the works which the Council of Ministers defines.<sup>80</sup>

<sup>76</sup> Art. 1 of the Decision of the Council of Ministers no.366 of 2005 concerning the Promotion of the Protection of Cruelly Treated Women.

<sup>77</sup> Cf. the Decision of the Council of Ministers no.288 of 2004 Concerning the Structural and Functional Organization of the Ministry of Planning.

<sup>78</sup> (Presidential) Decree no.19 of 2009 concerning the Ratification of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

<sup>79</sup> The Minister of Labour had defined those dangerous or strenuous works with Decision of the Minister of Labour no. 2 of 2004 Concerning the Dangerous or Strenuous Works in which Women are prohibited to be Employed.

<sup>80</sup> Art.101. The exceptions to that rule were defined with the Decision of the Council of Ministers no.14 of 2003 Concerning the Work of Women Overnight.

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- Besides, the law imposes on the installation to make available comfort tools pertaining to working women.<sup>81</sup>
- Women shall also have the right to a paid maternity leave for a period of ten weeks, including at least six weeks after the delivery,<sup>82</sup> and shall not be dismissed.<sup>83</sup>
- The suckling mother shall be entitled to a period or periods for breast feeding during work, the total of which shall not be less than one hour a day (counted from daily working hours) for a period of one year from the date of delivery.<sup>84</sup> A woman may even obtain an unpaid leave to foster her child or accompany her husband.<sup>85</sup>

- Although favorable to the woman, the labor law adopts a gender motivated rules; the state, in a sense, is very protectionist towards the woman. This attitude is problematic from the gender perspective. It is problematic from the human rights perspective when this is no more perceived as a privilege that a woman can accept or reject, but rather as an imposed privileged.

#### **2.4.2.2. Special Needs according to Religious Credos**

Palestinian law shows sensibility and respect for other beliefs and credos. Penal Procedures Law for example provides: “If the condemned person belongs to a religion which imposes on him the requirement to make confession or to carry out any other ritual before dying, the necessary facilities must be provided to enable him to meet with a religious dignitary.”<sup>86</sup> The Law of Evidence in Civil and Commercial Matters also imposes that the “oath is administered in accordance with his religious beliefs if he so requests.”<sup>87</sup>

#### **2.4.2.3. Special Needs of the Disabled**

Palestinian Child Law insisting on the right of education for disabled children,<sup>88</sup> to be realized in the same schools of other children, unless their disability imposes their instruction in special centers to be adapted to their special needs.

#### **2.4.3. Positive Actions**

Positive actions refer to actions aiming at empowering certain categories of persons who enjoy legal equality but who may *de facto* be excluded from public affairs and decision making. This is the case of disabled persons, women and religious minorities. Quota for disables in the civil service, and for women and religious minorities in the (legislative and municipal) electoral seats are the presented as examples.

##### **2.4.3.1. Quota for Women**

While the election (right to elect and get elected) is the right of both men and women, without distinction, in presidential, legislative and municipal elections, the Palestinian

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<sup>81</sup> Art.102.

<sup>82</sup> If she has spent at work prior to each delivery a period of one hundred and eighty days

<sup>83</sup> Art.103. Unless it is demonstrated that she was employed in another occupation during it.

<sup>84</sup> Art.104.

<sup>85</sup> Art.105.

<sup>86</sup> Art.412 of the Penal Procedures Law no.3 of 2001.

<sup>87</sup> Art.93 of the Law of Evidence in Civil and Commercial Matters no.4 of 2001.

<sup>88</sup> Art.41 of the Palestinian Child Law.

legislature included certain provisions in both electoral laws certain provisions aiming at ensuring participation of women in the public affairs.

Palestinian Electoral Law no.9 of 2005 imposed on parties forming lists, to compete over the 66 seats<sup>89</sup> to include a woman at least as follows: one woman in the first three names, one woman in the following four names, and one woman in each following five names.<sup>90</sup>

Local Municipalities' Councils elections Law No. 10 of 2005 imposed that woman shall form at least 20% of the Municipalities Councils, and that each list shall contain at least one woman in the first three names, one woman in the following four names, and one woman in the following names.<sup>91</sup> This law was amended some two weeks after its endorsement. According to the amendment,<sup>92</sup> each list shall contain at least a woman in the first five, a woman in the second five, and a woman in the third five. In all circumstances, in municipalities with less than 13 seats, 2 shall be at least for women.

#### **2.4.3.2. Quota for Religious Minorities**

While there is no limitation as to the religion of the President, PLC or Municipalities' Council, or even to non-elected offices, such as the office of Prime minister, ministers, governors, or even judges and high functionaries, the electoral laws dedicated a minimum of seats for Palestinians belonging to religious minority groups.

Palestinian Electoral Law no.9 of 2005 provided that at least 6 seats within the 66 seats dedicated for circumscriptions are for Christians. The President issued a decree distributing those seats as follows: 1 Christian seat out 5 in Ramallah, 2 out of 6 in Jerusalem, 2 out 4 in Bethlehem, 1 out of 8 in Gaza.<sup>93</sup>

- It shall be noted that those 'Christian' seats can be covered by any Christian without specifying a particular religious community; besides, all, Muslims and Christians, can participate in electing candidates, regardless of their religion. In other words, it is far from being enhancement of communitarism, rather it is aiming at empowering all citizens to be fully present in public sphere.

Previously, Palestinian Electoral Law no.13 of 1995 did refer to certain seats for Christians but left it to be determined by decree. Presidential Decree Relating to Elections no.2 of 1995 dedicated 6 seats to Christians and 1 seat for Jews-Samaritans in Nablus.

- In this sense, Electoral Law no.9 of 2005 is a regression if compared to previous one, for two reasons: first, the percentage of seats dedicated to Christians diminished, since 'Christian seats' in previous council composed 6 out of 88 seats, which is almost 7% of the number of seats, much higher than the percentage of Christians in Palestinian territory; while in the second council, the 6 'Christian seats' out of 132 form 4.5% of number of seats. Second, the Jewish-Samaritan community was not represented in the second legislative election.

<sup>89</sup> While other 66 seats divided on the 14 Palestinian electoral circumscriptions.

<sup>90</sup> Art.4. It shall be noted that previous Palestinian Electoral Law no.13 of 1995 did not include such provision.

<sup>91</sup> Art.17.

<sup>92</sup> Law no.12 of 2005 concerning the Amendment of some Provision of Local Municipalities Elections Law no.10 of 1998.

<sup>93</sup> Presidential Decree no.14 of 2005 Concerning the Determination of the Number of Deputies in the Electoral Districts

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Local Municipalities’ Councils elections Law No. 10 of 2005 did not include originally a reference to ‘Christian seats.’ It was only due to its amendment,<sup>94</sup> that article 71bis was introduced, which left to the President to decide the number and distribution of those seats.<sup>95</sup>

#### **2.4.3.3. Quota for Disabled**

The Law no.4 of 1999 related to the Rights of the Disabled imposed on governmental and non-governmental institutions to absorb at least 5% of the workers from the disabled.<sup>96</sup> The Council of Ministers issued a decision in 2004,<sup>97</sup> urging governmental institutions to abide by the 5% rule.

### **2.5. Cases where religion and Sex Matter**

Despite previously mentioned cases of equality and prohibition of discrimination, there are still cases in Palestinian law where sex and religion still matters in the distribution of rights. The freedom of religion and family related rights are the most striking examples. They will be discussed in respectively following sections 3 and 6.

Reference here will be limited to discrimination based on sex and religion in the penal codes enforced in WB and GS and in rules applicable on hereditary.

- In all the following examples, the articles are discriminatory against women. They involve penal codes (pre-PA legislation) that can be cancelled or amended by a new unified PA law.
- Hereditary rules are dependent on existing personal status regulation, largely inspired by Hanafi tradition. It may be very complex to suggest changes in that law, unless by a unified Personal Status law. Even more complex is to suggest a unified legislation that applies on both Muslims and Christian communities. However, it is maybe less complex and more feasible to suggest a new law, from the perspective of anti-discrimination, and human rights, forbidding discrimination in hereditary rules based on sex and religion. This rule apply as an exception to the general rule of competence of the religious communities to rule issues related to personal status issues according to religious denominations.

#### **2.5.1 Penal Codes**

Crimes related to sexuality and family treat differently people according to their sex. Reference here will be done to certain provisions in (Jordanian) penal code in force in WB<sup>98</sup> related to adultery, rape, excusable and attenuated circumstances.

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<sup>94</sup> Law no.12 of 2005 concerning the Amendment of some Provision of Local Municipalities Elections Law no.10 of 1998.

<sup>95</sup> It was done through different presidential decrees, no.9, 10 and 27 of 2005.

<sup>96</sup> Art.10/4/c.

<sup>97</sup> The Decision of the Council of Ministers no.146 of 2004 relating to the Employment of the Disabled at Ministries and Institutions.

<sup>98</sup> Very similar provisions can be found in Penal Code Ordinance no.74 of 1936 (in force in GS).

### **2.5.1.1. Adultery**

In case of adultery, females are punished with 6 months to two years, while the partner is punished with the same punishment only if married, while it is reduced to 3 months to a year if he is not.<sup>99</sup> While a married man is punished with only 1 month to a year if he commits adultery in his same house.<sup>100</sup>

Complain for adultery can be done on females by the husband while married and until 4 months after divorce or by her tutor if not married, while only a wife can present complain for adultery of her husband.<sup>101</sup>

### **2.5.1.2. Rape**

Rape is within what can be called honor crimes. In this sense, penal code is no different from many penal codes in all over the world which perceives rape, not as directed against the same life and body of a female, but for what she represents as values in the society, i.e. the honor, not her necessarily but that of her family! In that same direction, penal code provides that one of the aggravated circumstances is in fact to commit such crimes on a virgin female, causing the lost of her virginity!<sup>102</sup>

Penal code distinguishes between adultery and rape by the non-consent of the female. However, what is shocking about the law is that it excludes the sexual relationship with the wife without her consent from cases to be considered as rape.<sup>103</sup> More shocking is the provision that permit to stop persecuting who commit rape if he marries his victim.<sup>104</sup>

### **2.5.1.3. Excusable and Attenuated Circumstances**

A man who kills or injures his wife, sister, daughter, or mother or so,<sup>105</sup> and the partner, when surprising them committing adultery, enjoys excusable circumstances. While a man enjoys attenuated circumstances, whenever he surprises them on illegitimate bed, even without having necessarily sexual relationship.<sup>106</sup>

## **2.5.2. Hereditary Rules**

Based on a verse from Koran, a female shall receive only half of what a male receives as heritage. However, in certain areas, especially in the rural areas, females are 'encouraged' and even socially coerced to give up their part in the heritage.

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<sup>99</sup> Art.282/1 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).

<sup>100</sup> Art.283 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).

<sup>101</sup> Art.284 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).

<sup>102</sup> Art.301/1 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB), see also art.304.

<sup>103</sup> Art.292/1 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB). Penalties are aggravated if the female is less than 15 years old or if she is unable to resist rape, due to physical or psychological disability. Art. 292/2 and 293 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).

<sup>104</sup> Art.308 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).

<sup>105</sup> The law refers to (ma7arem), which refers to all females a male is forbidden of have sexual relationship with, such as the mother, grand mother, daughter and grand-daughter, nephew and her daughter, sister, and aunt.

<sup>106</sup> Art.340 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).

### **3. Right to freedom of thought, conscience and religion**

#### **3.1. Introduction**

"Everyone has the right to freedom of thought, conscience and religion."<sup>107</sup> This right includes:

- The freedom to change his religion or belief. Coercion that impairs this freedom is forbidden.
- The freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. Such freedom may be limited by a law and are necessary to save public safety, order, health, or morals or the fundamental rights and freedoms of others.

The BL was much more restrained in that:

- It limited this freedom to freedom of doctrine, worship and the performance of religious functions.
- It conditioned the respect of the above freedoms, by the respect of public order or public morals are not violated.

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| <ul style="list-style-type: none"><li>- The BL needs to be amended to meet the criteria set up by international human rights law. The BL provision is particularly restrictive, and is related to the complex issue of freedom of thought and freedom of religion. The existing law seems neutral, but in practice, it means favoring the existing communities. More privileged is the religion of the majority, which is Islam.</li></ul> |
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The freedom to adopt a religion or belief will be discussed first, then the freedom of credo and the freedom to practice religion.

#### **3.2. Related Laws**

##### **3.3. The freedom to adopt a religion or belief**

The general rule is that a Muslim is born of a Muslim father, and a Christian is born from a Christian father. However, even religion of the mother needs to be declared upon registration of the children for reasons explained above.<sup>108</sup> In case of foundling child, the religion is deemed to be Islam unless there is a special sign that indicates clearly the opposite.<sup>109</sup>

Each Palestinian has his own religion indicated on his ID card (Muslim or Christian or Samaritan). This information is within the entries in civil status that may change without a court decision.<sup>110</sup> However, Islam does not permit conversion of Muslim to another religion (considered *ridda*). Accordingly, despite the lack of mandating legal text, a Muslim, even if baptized (becoming Christian), cannot change the religion in his civil status. The opposite is possible.

<sup>107</sup> UDHR, art.18, ICCPR, art.18.

<sup>108</sup> Cf. art.18 of Law no.2 of 1999 concerning the Civil Status.

<sup>109</sup> Art. 22 of Law no.2 of 1999 concerning the Civil Status.

<sup>110</sup> Art.37 of Law no.2 of 1999 concerning the Civil Status.

### **3.4. Freedom of religious denominations, to manifest religion in worship**

According to the BL, the principles of shari’a (Islamic law), are a primary source of legislation in Palestine and Islam is the official state religion.<sup>111</sup> This reference to Islam and Shari’a in a constitutional text does not create *per se* a religious or an Islamic state. It simply means that, even in a secular state, religion may not be totally absent from public affairs.

Such interpretation of the constitutional reference to Islam and shari’a is more concerned with constitutional mechanisms aiming protecting individuals’ and minorities’ rights. Accordingly, the reference to Islam in the constitution should not create any unnecessary perplexities. The same applies to shari’a which is confined to the remit of positive law, as expressed in a legislative text issued by state authorities, mainly confined to personal status issues. In other words, the binding character of the shari’a in the above sense is nothing else but the free will of human authority. The empowerment of shari’a through the BL means that a ‘secular will’ is the origin of its nature and not ‘divine will.’

Regardless of the way constitutional texts refer to Islam and shari’a, the important thing is to ensure the supremacy of the constitution. Shari’a is not a source of law but rather of legislation. This means that, if not codified by the legislature, it does not constitute a source of law.

The BL, immediately after referring to Islam and shari’a, provides that other monotheistic religions (Christianity and Judaism) should have their sanctity respected and maintained. The respect is not enough if not translated into granting to every citizen, regardless of his religion, same rights and duties.

- The text seems not to be open for other religions (Hinduism, for example) that the Palestinian society is not familiar with currently, but that may be interesting to refer to their respect in the constitutional text as much as monotheistic religions.

Penal code in force penalizes insults of prophets,<sup>112</sup> aggression of places of worship or religious signs,<sup>113</sup> and sepulchers.<sup>114</sup> Even the disturbance of religious ceremonies is penalized,<sup>115</sup> as much as the publication of pictures, designs or symbols, or even pronounced words in public places that may offence “religious feelings.”<sup>116</sup>

The respect of religious feeling is left in very general terms, to the appreciation of the judge himself. This may result into a very critical balance between the freedom of opinions and freedom of religious beliefs. The Palestinian legislature seems to more inclined to the protection of the later.

- There is one problematic article in the penal code, related to the manifestation of religious beliefs, where the state is not presenting itself as neutral actor towards free manifestation of religious beliefs, but rather imposes certain actions on persons, even those who do not belief, to effectuate certain actions or abstain from doing others. Penal

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<sup>111</sup> BL, art.4.

<sup>112</sup> Art. 273 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).

<sup>113</sup> Art. 275 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).

<sup>114</sup> Art. 277 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).

<sup>115</sup> Art. 276 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).

<sup>116</sup> Art. 278 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).

code in fact penalizes whoever publicly defies the fasting of Ramadan, with one month imprisonment or a fine.<sup>117</sup>

## **4. Right to freedom of opinion**

### **4.1. Introduction**

Everyone has the right to freedom of opinion and expression.<sup>118</sup> This right includes the freedom:

- to hold opinions without interference, and
- to seek, receive and impart information and ideas through any media and regardless of frontiers.

While the freedom of opinion seems to be considered as absolute, the ICCPR permits for states to impose certain restrictions on the freedom of expression.<sup>119</sup> Those restrictions, however, shall not be arbitrary imposed but duly regulated by the law. Besides, they need to be necessary for the respect of the rights or reputations of others; and for the protection of national security or of public order, or of public health or morals.

In all circumstances, the freedom of expression does not entitle to advocate for war or hatred. In fact, propaganda for war, as much as advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.<sup>120</sup>

The BL provisions seem to be in coherence with the principles provided in both UDHR and ICCPR. Article 19 provides that: “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.”

While article 27 of the BL states: “1. Establishment of newspapers and all media means is a right for all, guaranteed by this BL. 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 BL 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.”

The Press and Publication Law no.9 of 1995 incorporates largely the above right and regulates it. However, the law includes restrictions that go beyond the cases provided in UDHR and ICPPR.

### **4.2. Related Laws**

- Press and Publication Law no.9 of 1995.

<sup>117</sup> Art. 274 of (Jordanian) Penal Code Law no.16 of 1960 (in force in WB).

<sup>118</sup> UDHR, art. 19, ICCPR, art.19.

<sup>119</sup> ICCPR, art.19/3.

<sup>120</sup> ICCPR, art.20.

### **4.3. Freedom of Opinion**

Freedom of opinion is guaranteed for all Palestinians.<sup>121</sup> Nothing much is added concerning holding (religious, political...) opinions and the non-interference clause. The Publication and Press law conceives the freedom of expression as part of the freedom of opinion, while at the same time, seems to reduce the extent of freedom of opinion to that of expression, ending up by imposing limitations on both rights, in contradiction to the words and spirit of the UDHR and ICCPR.

### **4.4. Freedom of Expression**

Freedom of expression explains the grant of freedom to publication and press.<sup>122</sup>

#### **4.4.1. Ramifications of the Freedom of Expression**

The BL refers to the freedom of expression to be covering the expression of opinion orally, in written or in any form of expression and art.<sup>123</sup> While the Press and Publication Law refers only to the opinion expressed orally, in written and by photo or design, in media and expression tools, while referring to publication and press as free.<sup>124</sup>

The freedom of expression through publication covers citizens, but also for political parties, cultural and social institution, and syndicates.<sup>125</sup> Any person, physical or moral, has the right to possess journals and publish them according to law.<sup>126</sup> The freedom of press and publication shall be exercised on the light of citizens' rights to freedom of opinion and expression and access to information.<sup>127</sup>

#### **4.4.2. Limitations imposed on the Press and Publication**

The Press and Publication Law imposes limitations on the press,<sup>128</sup>

- First, by limiting its freedom only in its providing news, information, and comments.
- Second, by defining the objectives of press in contributing in diffusing thoughts, culture, and science.
- Third, within the framework of the law.
- Fourth, within the framework of public freedoms, rights and duties, and with respect of the privacy of others.

The law imposes further limitations on the press, imposing on it to abstain from publishing what contradicts principles of freedom, national responsibility, human rights, and respect of truth. Besides, publications directed to children and adolescents shall not publish pictures, stories or news against morality and Palestinian values and customs.<sup>129</sup>

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<sup>121</sup> Art.2 of Press and Publication Law no.9 of 1995.

<sup>122</sup> Art.2 of Press and Publication Law no.9 of 1995.

<sup>123</sup> BL, art.19.

<sup>124</sup> Art.2.

<sup>125</sup> Art.4/d of Press and Publication Law no.9 of 1995.

<sup>126</sup> Art.5 of Press and Publication Law no.9 of 1995.

<sup>127</sup> Art.7 of Press and Publication Law no.9 of 1995.

<sup>128</sup> Art.3 of Press and Publication Law no.9 of 1995.

<sup>129</sup> Art.7.

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The law also imposes on those working in the press to abide by the profession ethics, including,<sup>130</sup>

- The respect of individuals’ rights and freedoms, and their privacy.
- Presenting objective, complete and balanced press data.
- Commenting news and events with precision, integrity and objectivity.
- Abstaining from publishing any advocacy for violence, fanaticism, hatred, or call for racism and sectarianism.
- The use of the press for the promotion or deprecation of any commercial products or its deprecation.

Other limitations are related to the financial resources,<sup>131</sup> relation with foreign entities,<sup>132</sup> conditions on the editor,<sup>133</sup> and the general director of the institution,<sup>134</sup> the owner of the publication house.<sup>135</sup> The law defines who is responsible for what is published in the press, to be cumulatively of the editor, author, and the owner of the institution.<sup>136</sup>

The law also forbids the publication and the importation of publications that includes any of the following:<sup>137</sup>

- Any secret information related to police or Public Security forces, or its armaments, or placements, movements and trainings.
- Articles and publications that include degradation of religions protected by the law.
- Articles that harm national unity, incitation for committing crimes, hatred and division, and the advocacy for sectarianism.
- The record of secret meetings of the National Council and Council of Ministers.
- News or articles that intends to destabilize the national currency.
- News or articles that harm individuals’ dignity, personally liberties, or their reputations.
- News, reports, letters, articles or pictures that is contrary to morality and public mores.
- Publicity for health products or cigarettes or similar products, unless authorized by the Ministry of Health in advance.

#### **4.4.3. Freedom of the Publication and Press and the Need for Authorization**

In order to publish in Palestine, there is a need for authorization. The authorization is granted for:<sup>138</sup>

- Journalist according to the conditions imposed by the law.

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<sup>130</sup> Art.8.

<sup>131</sup> Art.9.

<sup>132</sup> Arts.9/2, 10.

<sup>133</sup> Arts.11, 13.

<sup>134</sup> Art.14.

<sup>135</sup> Art.16.

<sup>136</sup> Art.12.

<sup>137</sup> Art.37.

<sup>138</sup> Art.17 of Press and Publication Law no.9 of 1995.

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- Journalistic institution that is found and registered for that purpose.
- Political parties.
- Palestinian news agency.
- Foreign news agency, on the condition of reciprocity of treatment, and on the condition of having the editor-in-chief a Palestinian.

The way the authorization is demanded and granted is regulated by the law.<sup>139</sup> The Minister of Information decides within a month on the request of authorization. In case of rejection of the demand, it needs to be justified and can be object of appeal in front of the High Court of Justice.<sup>140</sup> The law regulates the way authorization is granted for printing, publication or distribution houses, or other institutions for research, public opinion and others<sup>141</sup> or a journal.<sup>142</sup> The law also provides for cases where the authorization is cancelled automatically by the law.<sup>143</sup>

## **5. Right to freedom of peaceful assembly and association**

### **5.1. Introduction**

The freedom of peaceful assembly and association is consecrated in UDHR.<sup>144</sup> However, this is a freedom and not an obligation. No one can be compelled to belong to an association.

The ICCPR regulates both rights in two different articles.<sup>145</sup> The right of peaceful assembly and to freedom of association shall be recognized. However,

- No restrictions shall be imposed unless in conformity by the law, and
- Which are necessary in a democratic society in the interests of national security or public safety, public (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.
- It is possible that the state impose lawful restriction on the right to freedom of association on members of the armed forces and of the police in their exercise of this right.

The BL opted for a democratic system in Palestine, during the transitional period,<sup>146</sup> based on the principle of the rule of law, whereas all authorities, institutions and persons abide by the law.<sup>147</sup>

Art.26 of the BL recognizes both rights for Palestinians, providing that: “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

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<sup>139</sup> Art.18.

<sup>140</sup> Art.19.

<sup>141</sup> Art.20.

<sup>142</sup> Arts.21, 22.

<sup>143</sup> Art.23.

<sup>144</sup> UDHR, art.20.

<sup>145</sup> ICCPR, arts.21-22.

<sup>146</sup> BL, art. 5.

<sup>147</sup> BL, art. 6.

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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.”

### ***5.2. Related Legislation in Force***

The PA adopted two laws related to those rights:

- Law No. 12 of 1998 Concerning Public Meetings
- Law No. 1 of 2000 Concerning Charitable Associations and Civil Society Organizations

There is not yet a PA law related to formation of political parties. The Jordanian Political Parties Law n.15 of 1955 (applicable on WB) may be used as a legal document, to be read in conformity with BL article 26.

### ***5.3. Freedom of Peaceful assembly***

The right of Palestinians to hold public meetings, seminars and demonstrations is recognized by the law. Restrictions are forbidden unless in conformity with the law.<sup>148</sup> The law imposes certain conditions on the organizers of such events:

First, the need to inform the authorities:

- The organizers of the public meeting shall send a notice to the governor or the police director at least 48 hours prior to the time of the holding of the meeting.<sup>149</sup>
- The notice shall be written and signed by at least three of the organizers or by the representative of the association or so (enjoying legal personality) calling for the public meeting.<sup>150</sup>
- The notice shall specify the place and time where the meeting shall be held and the purpose thereof.<sup>151</sup>

Second, the authorities do not need to approve the public meeting.<sup>152</sup>

- The Governor or Director of Police, however, may place controls on the duration or route of the meeting aiming at organizing the traffic movement only, and not for political reasons.
- The authorities shall inform the organizers in writing of these controls after a maximum period of 24 hours from the time of delivery of the notice.
- In case the organizing party does not receive any written reply as above, the organizing party may hold the public meeting at the fixed time in the manner stated in the notice.

Third, the authorities, shall take the required precautionary measures,

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<sup>148</sup> Art. 2 of the Law no.12 of 1998 Concerning Public Meetings.

<sup>149</sup> Art.3 of the Law no.12 of 1998 Concerning Public Meetings.

<sup>150</sup> Art.4 / 1 of the Law no.12 of 1998 Concerning Public Meetings.

<sup>151</sup> Art.4 / 1 of the Law no.12 of 1998 Concerning Public Meetings.

<sup>152</sup> Art.4 / 2,3 of the Law no.12 of 1998 Concerning Public Meetings.

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- Upon the request of the organizing parties, and
- Provided that such measures shall not cause any infringement upon the freedom of the attendees and the progress process of the meeting.

Law No. 12 of 1998 Concerning Public Meetings gives the minister of Interior the right to issue the bylaws of the law.<sup>153</sup> President Arafat, by then in his capacity of Minister of Interior issued such a bylaw,<sup>154</sup> which was more detailed than the law and more restrictive also. The bylaw even talks about authorization of the public meeting,<sup>155</sup> which is in complete contradiction with the words and spirit of the law. The bylaw, for example, imposes:

- That the written notice is presented by hand to the governor or the police director.<sup>156</sup>
- The police director may request a meeting with organizers, before responding to the notice, in order to discuss *inter alia* the goals of the meeting.<sup>157</sup>
- The goals of the public meeting shall not be in contradiction with the law and public order.<sup>158</sup>
- The possibility to dissolve the public meeting goes beyond its objective, or against the conditions imposed by the authorization or when it infringes public order and the law.<sup>159</sup>
- The police may intervene also to dissolve the demonstration, when accompanied by acts of turbulence that endanger the security of persons and their properties.<sup>160</sup>
- The participants in the public meeting or demonstration shall not cover their faces or hold weapons of any kind.<sup>161</sup>
- Finally, the bylaw refers to Presidential decree n.3 of 1998 related to national unity and forbidding incitation.<sup>162</sup>

#### **5.4. Freedom of Association**

The freedom of association is recognized by the law.<sup>163</sup> Contrary to military orders, associations and organizations do not need authorization but only registration. However, the

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<sup>153</sup> Art.7 of the Law no.12 of 1998 Concerning Public Meetings.

<sup>154</sup> Decision by the Interior Minister, Relating to Issuance of the Executive Rules of the (Public Meetings Law no.12 of 1998) no.1 of 2000

<sup>155</sup> Art.6 of the Decision by the Interior Minister, Relating to Issuance of the Executive Rules of the (Public Meetings Law no.12 of 1998) no.1 of 2000.

<sup>156</sup> Art.1/1 of Decision by the Interior Minister, Relating to Issuance of the Executive Rules of the (Public Meetings Law no.12 of 1998) no.1 of 2000.

<sup>157</sup> Art.3 of Decision by the Interior Minister, Relating to Issuance of the Executive Rules of the (Public Meetings Law no.12 of 1998) no.1 of 2000.

<sup>158</sup> Art.4 of Decision by the Interior Minister, Relating to Issuance of the Executive Rules of the (Public Meetings Law no.12 of 1998) no.1 of 2000.

<sup>159</sup> Art.6 of Decision by the Interior Minister, Relating to Issuance of the Executive Rules of the (Public Meetings Law no.12 of 1998) no.1 of 2000.

<sup>160</sup> Art.7 of Decision by the Interior Minister, Relating to Issuance of the Executive Rules of the (Public Meetings Law no.12 of 1998) no.1 of 2000.

<sup>161</sup> Art.8 of Decision by the Interior Minister, Relating to Issuance of the Executive Rules of the (Public Meetings Law no.12 of 1998) no.1 of 2000.

<sup>162</sup> Art.9 of Decision by the Interior Minister, Relating to Issuance of the Executive Rules of the (Public Meetings Law no.12 of 1998) no.1 of 2000.

<sup>163</sup> Cf. art.1 of Law no.1 of 2000 Concerning Charitable Associations and Civil Society Organizations

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fact that it is the ministry of interior which is responsible of the registration of the associations and organizations, in collaboration with related ministry according to the kind of association or organization, makes it possible to suspect that the difference is only in the name and not in the spirit. In other words, the law talks about registration, while the process and conditions imposed make it closer to authorization.

The law regulates the way the associations and organizations are registered.<sup>164</sup> The association or organization has the right to property in order to realize its objective. This right is also granted for foreign organizations or associations, provided they obtain an authorization from the council of ministers, upon recommendation of the concerned minister.<sup>165</sup> The registration of foreign associations and organizations is regulated aside.<sup>166</sup>

The law provides three cases in which the Association or Organization shall be dissolved: "1. If the General Assembly decides to dissolve the Association. The Ministry must be promptly informed of such a decision. 2. If it does not commence its actual operations within the first year of the date of registration or of obtaining its license, unless otherwise cessation of activities resulted from circumstances beyond control. In this case, the Ministry abolishes the Association's registration pursuant to a written notification to the association or organization. 3. It is proven that the Association or Organization had substantially violated its By-Laws, and had not adjusted its status within a period not exceeding 3 months after the issuance of a written warning by the competent Minister or Department."<sup>167</sup>

In case the decision to repeal the registration of an association or organization is undertaken by the minister of interior,<sup>168</sup>

- The decision shall be written and shall state the causes.
- The Association or Organization shall have the right to appeal to the decision before the competent court.
- In case the Association or Organization appeal against the decision, it may resume its work until a temporary or final decision is issued to halt its activities or to dissolve it. Otherwise, the passage of the time for appeal means that the association is dissolved.<sup>169</sup>

## **6. The right to form a family**

### **6.1. Introduction**

Nothing in the BL refers to the family as a natural and fundamental group unit of society and is entitled to protection by society and the State. The right of men and women of marriageable age to marry and to found a family is not always recognized for reasons related to religion. While consent is deemed necessary, it is not expressed always by concerned parties, especially the female. Finally, equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution are not respected and ensured by personal status in force (all in contradiction to what appears in UDHR, art.9, ICCPR, art.23).

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<sup>164</sup> Arts.3-8 of Law no.1 of 2000 Concerning Charitable Associations and Civil Society Organizations

<sup>165</sup> Arts.9/2, 3 of Law no.1 of 2000 Concerning Charitable Associations and Civil Society Organizations.

<sup>166</sup> Arts.34-36 of Law no.1 of 2000 Concerning Charitable Associations and Civil Society Organizations.

<sup>167</sup> Art.37.

<sup>168</sup> Art.38 of Law no.1 of 2000 Concerning Charitable Associations and Civil Society Organizations.

<sup>169</sup> Art.67 of the Decision of the Council of Ministers No. 9 of 2003 Concerning the Bylaw of the Law of Charitable Societies and National Commissions No. 1 of 2000

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It is impossible to cover all issues related to personal status laws in force in Palestine. Certain cases will be raised here to show gaps and contradiction basic human rights, as expressed in ICCPR, art.23.

## **6.2. Related Laws**

- (Jordanian) Personal Status Law No.61 of 1976 (in force in WB)
- (Egyptian) Order no.303 of 1954 Concerning Family Law (in force in GS)

## **6.3. The Right to Marry without Limitation Based on Religion**

### **6.3.1. Different Rules according to Religion**

There is one personal status law applicable on Muslims in the West Bank<sup>170</sup> and another one in Gaza Strip.<sup>171</sup> Both laws enacted by state authorities, based on Hanafi Islamic School of thought while Muslims are overwhelmingly Sunnis. Christians are divided into different communities. Each with its own personal status law issued by the respective church and many of them have own tribunals to judge personal status affairs to members of their community.

Ideally, it is possible to amend personal status law for Muslims because in essence it is a state law. A legal reform, aiming at rendering the personal status law more coherent with basic human rights is possible theoretically possible. It is much more complicated with regards to churches, since they keep traditionally the authority to regulate personal status affairs according to their faith. It shall be noticed however, that discussion related to reform of personal status law never joined the point of suggesting a unified personal status law for Muslims and Christians. For this reason, unless specified differently, analyses and examples that follow will be limited to personal status laws applicable in Muslims only.

This means that different rules apply on Palestinians, according to their religion, which may be related to marriage, divorce, separation, etc. A catholic Palestinian cannot get divorced, while an Orthodox Palestinian can, in one case only and by a court decision, get a divorce, while a Muslim Palestinian can get divorced by unilateral will (of the male) or by a court decision. This is why religion is important in Palestine because in personal status affairs, it determine rights and duties. Jurisdiction of the religious and *shari'a* courts depend also on the religion of the concerned person.

It shall be noted, however, that having different personal status laws do not affect only personal status affairs but go beyond that. For example, for a Christian, there is an extra crime called polygamy, which is not so for a Muslim, because his personal status law permit that.<sup>172</sup>

- Although largely consensual, and based on long historical experience, the discriminatory character of different legislation based on religious belonging is uncontested. It may be source of problems and complication with regards to formation of family (mixed marriages are indeed often problematic) but it also means building obstacles towards a unified civic nationality and belonging for all Palestinians.

<sup>170</sup> (Jordanian) Personal Status Law No.61 of 1976.

<sup>171</sup> (Egyptian) Order no.303 of 1954 Concerning Family Law

<sup>172</sup> Cf. art 280 / 1 of Art. (Jordanian) Penal Code Law no.16 of 1960 (in force in WB) and art.180 of (British) Penal Code Ordinance no.74 of 1936 (in force in GS).

### **6.3.2. No Marriage but the Religious One**

Another consequence of such a situation is that a non-believer cannot get married unless through religious marriage. This means also that registration of children is not possible unless within a valid marriage.

### **6.3.3. Mixed Marriages**

Mixed marriage between Christians and Muslims is a complicated issue. For Christians, belonging to different religions is one of the obstacles to marriage. Some churches may exceptionally grant dispensation, others do not.

For Muslims, it is possible for a Muslim male to marry a non-Muslim female. However, the personal status law applicable in the West Bank Muslims, this freedom to choose the partner is limited to Christian or Jewish females only.<sup>173</sup> In both personal status laws applicable in Muslims, however, Muslim female is forbidden to marry but a Muslim. Accordingly, the marriage of Muslim female with a non-Muslim is deemed null.<sup>174</sup>

In case a Muslim female marries a Christian male in the church (after having obtained a dispensation from the church, and got the certificate of marriage from the church) and they have children, they need to register them.<sup>175</sup> It will be a problem because they need to declare religions of both parents, thus registration of children may result impossible, because their marriage is considered null!

## **6.4. Free Consent of the Intending Spouses**

### **6.4.1. Age of Marriage**

Age for a valid marriage varies according to religious belonging. All of them, however, permit marriage of children, since none of them impose the age of 18 years as a sine qua non for a valid marriage.

- (Jordanian) Personal Status Law No. 61 of 1976): 16 years old for male and 15 for female.<sup>176</sup> Penal Code in force punishes who effectuates a marriage of a less-than 15 years old female with 1 to 6 months imprisonment.<sup>177</sup>
- (Egyptian) Order No.303 of 1954 concerning Family Law: 18 years old for male and 17 for female but the judge may decide differently. In all circumstances, it is not possible to marry a male who did not complete 12 years old and female 9 years old. However, as was the case in Penal Code applicable in WB, Penal Code Ordinance no.74 of 1936 states also that whoever punishes who effectuates a marriage of a less-than 15 years old female with 6 months imprisonment.<sup>178</sup>

- The imposition of 18 years old limit for marriage can be introduced to Palestinian legislation; the suggestion would be to do that through amendment to the Child Law.

<sup>173</sup> Cf. art.33 of (Jordanian) Personal Status Law no.61 of 1976.

<sup>174</sup> Cf. art.33 of (Jordanian) Personal Status Law no.61 of 1976 and art.37 of (Egyptian) Order No.303 of 1954 concerning Family Law

<sup>175</sup> Cf. art.18 of Law no.2 of 1999 concerning the Civil Status.

<sup>176</sup> Art.5.

<sup>177</sup> Art. 279 / 2 of (Jordanian) Penal Code Law no.16 of 1960.

<sup>178</sup> Art. 182 of (British) Penal Code Ordinance no.74 of 1936 (in force in GS).

#### **6.4.2. Tutelage on Females**

Personal status law regulates guardianship (wali) of closest male on a female. The role of guardian in the marriage of a female varied during centuries, and according to schools of Islamic of thoughts.

The need of guardian's consent for valid marriage continued in various forms, as is the case in personal status laws, applicable in WB<sup>179</sup> and GS.<sup>180</sup>

Penal code in force in WB provides that whoever effectuates marriage for a girl that did not accomplish 18 years old without consent of the guardian, is punished with 1 to 6 months imprisonment.<sup>181</sup>

#### **6.5. Equal Rights as to Marriage, during Marriage, and at its dissolution**

##### **6.5.1. Polygamy**

A Muslim male can marry four women at a time,<sup>182</sup> unless he divorces one of them. A man married to more than one woman shall be just and equitable between them.<sup>183</sup>

- Polygamy is a serious violation of equality between males and females. There are examples in neighboring Arab (such as Tunisia) and Muslim (such as Turkey) countries that have already abolished polygamy. The adoption of a unified penal code would be the occasion for the Palestinian legislator to make this step to, by abolition, or at least by the imposition of strict regulation making polygamy if not impossible, very difficult to realize. It may at least impose to inform the woman to consent on her husband's will to marry a second wife, and maybe permit her to dissolve the marriage union.

##### **6.5.2. Talak**

Talak is the divorce realized by the Unilateral will of the Husband, and outside the court, without litigation. A woman can end the status of marriage only by a court decision. In case of talak, it is possible to re-marry the wife that has been divorced on the condition she marries a different person and have a complete relationship of husband and wife, then she get divorced again to re-marry her first husband.<sup>184</sup>

## **Conclusion**

In this report, I have presented only a panoramic survey of some of the laws that are still in force in the territories under PA control, which are related to selected human rights and freedoms. Accordingly, this report does not pretend to be exhaustive. It needs to be considered with other, many others, reports and studies, that are available or that can be done in the future. However, the samples selected for this report are sufficiently representative for the main problematic issues, from the perspective of human rights and

<sup>179</sup> Cf. arts. 13 and 22 (Jordanian) Personal Status Law no.61 of 1976.

<sup>180</sup> Cf. art. 9 of (Egyptian) Order no.303 of 1954 Concerning Family Law.

<sup>181</sup> Art. 279 / 3 of (Jordanian) Penal Code Law no.16 of 1960; similar provision in art.182 of (British) Penal Code Ordinance no.74 of 1936 (in force in GS).

<sup>182</sup> Art.28 of (Jordanian) Personal Status Law no.61 of 1976.

<sup>183</sup> Art. 40 of (Jordanian) Personal Status Law no.61 of 1976, and art.42 of (Egyptian) Order no.303 of 1954 Concerning Family Law.

<sup>184</sup> Art.100 of (Jordanian) Personal Status Law no.61 of 1976.

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freedoms. The consideration of this report for future studies related to other laws may be, accordingly, very useful.

The objective of this report was not to accuse or to condemn the PA or to point out the gaps in the Palestinian legal system; rather, as was pointed out in the introduction, the goal was to help the interested actors (especially the OHCHR, which sponsored this report) to develop a plan of action aiming at approximating Palestinian law to human rights and freedoms, to be in conformity with the standards set down by international law; this goal in fact is in harmony with what was largely included in the text and spirit of the BL. The assumption here is that the success of any plan of action will depend on building on what the PA has already as enforced law. Such plan of action would be based on a better understanding of the local reality, more sensitivity towards local needs and more respect for the PA and its national legal system(s).

The exposition of those laws, however, showed a reality of the PA which is largely deplorable, from the perspective of the protection of human rights and freedoms. This is related to the situation of the PA, as limited authority only on parts of the occupied Palestinian territory, and the negative role played by Israeli occupation. This situation, which is in many aspects *sui generis*, produced a very weak and fragmented PA, incapable of enforcing the law. The impossibility of the Palestinian Legislative Council to convene, and the legislation by decrees (by PA president in the WB, and by decrees and by mere force in the GS, since Hamas control in 2007) added more complication to the already complex situation of human rights and freedoms in the occupied Palestinian territory. Such a situation makes it difficult for concerned actors to plan and to realize a legal reform, aiming at protecting basic human rights and liberties.

Most importantly, the legal reform is often – erroneously – perceived as mere change of legislative texts. Rather, for a legal reform to be successful there is a need to take in consideration the way power is exercised in the real life. Accordingly, it is not enough to change existing legal texts, to make them look better for the international community; there is a need for an overall change aiming at changing attitude of the PA, training officials and judges to be more sensitive to human rights and freedoms. There is a need for policies that go beyond the formalities of the law, and convert it to a lived reality. Nevertheless, the 'law on the books' remains an important element for any legal reform aiming at enhancing the protection of human rights; it provides a valid reference for state officials, as a standard that they are supposed to reach and realize.

After having effectuated this survey, it is my impression that the OHCHR may advocate for and provide assistance aiming at ameliorating some of the existing legal texts, which are contrary to internationally and universally accepted standards, or that constitute obstacle towards realizing a better protection of basic human rights and freedoms. This can be realized in different ways, depending on the targeted legislation:

- In some cases, the PA did, indeed, adopt very human-rights-friendly laws; the PA laws appear to be often within the best available legislative texts in the region. This is the case for most articles of the BL, and the laws regulating freedom of opinions and association. The OHCHR may use those provisions as basis for its advocacy and for encouraging the PA to take the necessary step to put those laws in action. Some may be ameliorated others need to be supported against future regression towards a more restrictive policies to freedoms (seen the current prevalence and primacy given to security issues).

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- In some other cases, the PA had ignored adopting a new legislation, and continued to apply (largely archaic) laws. This is the case of penal laws and personal status laws (it is also the case of the civil code, which is Ottoman!). Those laws are particularly problematic from the human rights perspective. They include many socially-sensitive issues, such as those related to ‘honor’ or women in general. Other problematic issues are largely related to issues that may be related to religious precepts and rules; such as the issue of polygamy, freedom of religion and thought, etc. A third domain where the PA did not legislate is related to the competence of the PLO, with regards to military courts. This sector is still outside the control of the PA.<sup>185</sup> In other cases, the PA did not adopt legislation because of its transitional and limited jurisdiction (such as the nationality law). The OHCHR may support the adoption of PA laws, that are modern, adapted to the situation of the West Bank and Gaza Strip in the 21 century, and most importantly, in coherence to standards of human rights and freedoms. The advantage of such a process is enhanced by the fact that it will result in the unification of the law in very important and critical areas of the PA legal system.
- In other cases, the PA laws or those that are still in force in the territories under PA control contain certain provisions clearly contradicting human rights. The OHCHR may help and support the amendment of those provisions, or their abrogation as a whole. They can do that based on existing provisions in the BL itself, or other laws.

The impression I had from the survey of PA legal texts is that the OHCHR may prioritize and give a special attention to the particularly complicated issues of: women and personal status issues. The first being largely socially and culturally, but also religiously contingent issue, while the latter has strong historical roots, that are further strengthened by the consensus within the religious communities and denominations.

It may be difficult, almost impossible to introduce a colossal change in Palestinian laws by simple amendment of the law (for example, by encouraging the adoption of a new, unified, PA personal status law and penal codes). Such change needs a holistic approach that starts by raising awareness of the political leaders, the legal community (mainly the judges and the lawyers) and the general public, and ends up with advocacy for the protection of human rights, not only on the books, but also by the PA officials. This interest may even go beyond the officials themselves, to reach many societal attitudes that may be particularly reticent towards change in those domains.

This colossal change may be one of the long term objectives of the OHCHR in the occupied Palestinian territory. However, I believe that agreeing on unified penal code between WB and GS is very complex in the current situation. I understand also that agreeing on a unified Personal status laws between WB and GS, and, most importantly, between all religious denominations is almost impossible.

What is possible, however, is to suggest targeted reforms, directed towards particularly problematic issues. Throughout the report I provided many examples, but I can refer here to some of them: there is no need to wait the adoption of a unified personal status law, to impose the limit of 18 years for a valid marriage, to impose certain conditions on polygamy, to treat women equally with regards to access to divorce, and so on. There is no need to

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<sup>185</sup> In 21/7/2009, the Supreme Court, acting in its capacity as Supreme Constitutional Court rejected a petition against the PLO Revolutionary Code, and the PLO Penal Procedures Law, based on its lack of jurisdiction to revise those laws.

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amend all hereditary rules, to forbid discrimination based on sex. There is no need to wait a unified penal code to abrogate the provision that tolerate ‘honor killings’, or treat issues of crimes against the integrity of women, based on its being crimes against public morality and decency.

Even in cases where the Palestinian law seems much more advanced, such as in the case of protection of women from domestic violence, or with regards to women’s privileges at work, or even with regards to quotas in the municipal and legislative elections, etc. the PA law is problematic; from a different perspective, though. By targeting her with what can be called ‘positive action’ or ‘positive discrimination’, the PA law continues to treat females in a paternalistic way. In other words, despite the good intentions behind such policies, it seems to me that those policies consecrate the stereotypes, existent within the society, in which a woman is a second class citizen, in needs of continuous protection, from everybody and everything else. The OHCHR, while not negating and supporting positive actions towards full integration of women, need not to fall within the same trap, ending up by supporting policies that consecrate the pre-dominantly male-controlled society. Such policies will have the inconvenience of hindering full equality of women.

Finally, as it is the case in many neighboring countries, considering human rights and freedoms in the constitution or the constitution-like, or in legislative texts may be misleading. In fact those rights and freedoms are often limited by the state, in the name of exceptional circumstances, emergency rule, or security needs and public order. Accordingly, it is important that the OHCHR continues to support all efforts aiming at enhancing rule of law in the territories under PA control. An important role is expected from the judiciary, especially the SCC. As suggested in this report, the OHCHR may support initiatives aiming at familiarizing Palestinian judges, lawyers, and the general public, on the role of the courts, and, in particular, the SCC, in protecting basic human rights and freedoms.