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2018 Global Review of Constitutional Law

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Palestine

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INTRODUCTION

This review briefly introduces the Palestinian constitutional system. It then assesses key and significant constitutional developments that have taken place in Palestine since the endorsement of the institution of constitutional review and seeks to refract the status of liberalism and democracy through historical and political experiences.

The idea of drafting a constitution for the ‘Palestinian state’ was initially floated after the Palestinian National Council (PNC) passed the Declaration of Independence in Algiers in 1988. However, initial drafts were only circulated after the Oslo Agreements between the government of Israel and the Palestine Liberation Organization (PLO). The delay reflected both the intrinsic limitations of these agreements and the continued influence of external impediments, most notably the weak status of the Palestinian Authority (PA) and its limited jurisdiction during an interim period that was originally planned to last from 1994 until 1999.

In 1997, the Palestinian Legislative Council (PLC), the PA’s parliamentary body, decided one year after its members were elected to adopt the Basic Law (BL). This decision was only endorsed by Yasser Arafat, the former PA president, in 2002, three years after the conclusion of the five-year Interim Period. The BL was amended in 2003, and its main change included the establishment of an Office of Prime Minister, and this in turn altered

the role of the President, who, under the previous version of the BL, had presided over a Council of Ministers. A further amendment was added in 2005 to enable elections to take place every four years. The 2003 BL, including the 2005 amendment, is now established as the PA’s valid constitution.¹

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The year 2012 was a turning point for Palestine when it was recognized as a state by the United Nations General Assembly. In addition to other privileges, this meant that the Palestinian state could establish a constitution and was, within the context of international agreements, considered to be a participating member state.

After membership was established, a committee worked together to create a draft constitution with 273 articles, and this was completed by the end of 2015. The committee was established with the intention of building on all preceding work, and with completing a modern Palestinian constitutional project. It included members of the national and central council, in addition to parliamentarians and jurists, who were tasked with addressing problematic or unresolved issues that had arisen during the BL’s lifespan. But at the time of this writing, no constitution has been put in place that establishes sovereignty and the pillars of statehood.

¹ All of this chapter’s references to the BL relate to the 2003 version, unless otherwise stated.

In 2014, Palestine acceded to a number of international conventions and human rights treaties without making any reservations.² It had been difficult for the state to uphold its domestic and international obligations, and this issue was in turn raised in court on multiple occasions because the BL does not clarify the status of international law within the Palestinian domestic legal system. The only reference in the BL is Art. 10(2), which calls on the PA to accede, without delay, to international declarations and covenants that protect human rights.

1. The Constitutional Court

The BL called for the establishment of a Supreme Constitutional Court (SCC), but left the issue to be determined by a law (Art. 103). Law no. 3 (2006) subsequently established an SCC and was later amended by Decree Law no. 19 (2017). Both the BL and Law no. 3 establish the basis for a centralized ‘judicial’ body that is independent of the judicial branch. The Constitutional Court would mainly be tasked with constitutional review and interpretation.

Constitutional Review

There are various ways in which the Court can be engaged; firstly, by original and direct action by the aggrieved; secondly, indirect review of constitutionality after the request is, against the backdrop of concrete litigation, transferred by a court; *thirdly*, by the litigants themselves if certain conditions are met; and finally, by the Court itself if it is persuaded that an unconstitutional provision is linked to the dispute.

The President—authorized by law to propose the SCC’s first panel—nominated the Court’s nine judges in April 2016. Before

this, Constitutional Court tasks were entrusted to the Supreme Court (Art. 101 of the BL). The appointment of SCC judges is a recurrent issue, and this reflects the fact that the power to appoint judges is absolutely limited to the President. This institutes an arrangement in which the authority of the executive is pre-eminent over the judiciary, with the consequence that it can influence its decisions while manipulating its (*de jure*) independence.

From November 2005 until the time of this writing, 58 constitutional decisions have been made, of which almost half (27) have been made by the Supreme Court taking on the function of a constitutional court in the aforementioned manner. Here it should also be noted that the Court preemptively dismissed many cases upon the basis of a technicality or formality, and therefore did not proceed to enquire into its substantive content.

2. Violations of the Basic Law

There have been several violations of the BL, which are often attributed to alternative interpretations or the lack of a provision in the first instance, occurring, for example, in relation to disagreement over the circumstances concerning when an election or referendum can be called or circumstances when the President or government can legitimately invoke emergency powers. When the President’s emergency powers are discussed, further disagreements arise in relation to the relative privilege that should be accorded to the letter and spirit of the BL. The level of factional consensus required to amend existing constitutional arrangements has also created disputes.³

One of the main concerns is that Art. 43 of the BL has been overused as a law-making

tool in the West Bank since 2007, a period when effective parliamentary oversight or scrutiny has, as a consequence of the PLC’s operations being suspended, been entirely absent. Art. 43 establishes:

The President of the National Authority shall have the right, in cases of necessity that cannot be delayed, and when the Legislative Council is not in session, to issue decrees that have the power of law. These decrees shall be presented to the Legislative Council in the first session convened after their issuance; otherwise they will cease to have the power of law. If these decrees are presented to the Legislative Council, as mentioned above, but are not approved by the latter, then they shall cease to have the power of law.⁴

The legitimacy of presidential decrees passed by the President after the expiration of his term in 2010 continues to create heated disagreement, as presidential and legislative elections have not been held in the State of Palestine since 2006. Very few of the decree-laws that have passed can be legitimately argued to meet the requirement of necessity that demands they be approved ‘without delay’. Elections have not been held since 2007 because of ongoing political (Hamas-Fatah) and geopolitical (West Bank and Gaza Strip) divisions. Government authority, functions, and the legislature have become divided as a consequence. Since the Legislative Council has been unable to convene since 2007, Art. 43 was activated.

Although it is possible to invoke legal reasoning in support of such authorization, it is clear that the state must work to overcome these exceptional circumstances and maintain a separation of power. Evidence pro-

² The agreements signed in December 2014 are as follows: The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), The International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Recognition and Enforcement of Foreign Arbitral Awards; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); Protocol Additional to the Geneva Conventions of 12 August 1949; Convention on the Law of Non-Navigational Uses of International Watercourses; Protocol on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents; The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons; Convention in Cluster Munitions; United Nations Convention on the Law of the Sea; and The Treaty on the Non-Proliferation of Nuclear Weapons.

³ Khalil, Asem. ‘Beyond the written constitution: Constitutional crisis of, and the institutional deadlock in, the Palestinian political system as entrenched in the basic law’. *International Journal of Constitutional Law* 11.1 (2013): 36.

⁴ The unofficial translation is available at: <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2003&MID=14138>

duced to date suggests that the state of necessity has been an essential tool in the hands of the executive and, for this reason, there is no reason to believe it will be dissolved in the near future.

III. CONSTITUTIONAL CASES

1. Judgment 5/2017, March 12, 2018, *Constitutional Court's Interpretation of Art. 10 of the BL*

The minister of justice requested an answer for four major questions that the BL fails to answer:

1. Who has the power to sign and ratify international agreements? What is the process of joining and how will it come into effect?
2. What happens when an international treaty contradicts a domestic law?
3. How does the State maintain and promote human rights?
4. What are the mechanisms used to integrate the international agreement and the legal status it occupies?

In order to reach a clearer understanding, decision (04/2017) must be briefly introduced. In November 2017, the SCC issued a short and vague decision that established international treaties were pre-eminent over national laws. The issue of the hierarchy of international treaties came before the SCC after a court of first instance referred a case in which UNRWA (United Nations Relief and Works Agency for Palestine) was a party. The agency pleaded immunity before the lower court by citing a headquarters agreement with the PA. The court was forced to ask if its recognition of this immunity breached Art. 30 of the Palestinian BL, which prohibits administrative decisions from being immunized from judicial review.

The decision in this case did not explicitly confirm if international law takes precedence over the Palestinian BL, and instead only established that international law should be accorded primacy over domestic law. This applies even if the proposed item is not published in the official Gazette, and the only

exception is if it contradicts Palestinian religious, political, and cultural morals. While none of the treaties ratified by Palestine have yet been published, the state must nonetheless honor related obligations to the international community. In addition to concluding that international treaties supersede domestic laws, the decision also affirmed they are 'in-fra-constitutional' and, in so doing, added a new constitutional provision. In addition to highlighting the hierarchical status of international treaties within the Palestinian legal system, this decision also provided insight into the incorporation of international treaties into the Palestinian legal system along with Palestine's human rights obligations and responsibilities.

The decision surpassed the limitations of the BL by clarifying how to sign or ratify conventions and treaties. Practice provides further clarification by establishing that commissions that have been delegated the right to negotiate by the executive (in effect, the President) also have the authority to sign accession decisions. In so doing they do not prejudice the rights of the President, Prime Minister, and Minister of Foreign Affairs in this regard. Ratification is normally the responsibility of the head of state who, in verifying the treaty, ensures that it, and its implementation, is consistent with the interests of the state of Palestine.

In establishing the obligations of the state in relation to human rights, the decision established that treaties must be incorporated domestically in a way that takes religious and cultural identity into account. In the event of a conflict, it would not be enforced, even if a reservation were added to the treaty at the time of ratification.

In addressing the integration mechanism, the Court maintained that treaties are enforced by incorporation within domestic laws, which clearly contradicted its previous assertion that international treaties enjoy primacy in relation to domestic laws. Once Art. 27 of the Vienna Convention on the Law of Treaties is considered, this becomes problematic, as it establishes that states, in seeking to justify non-compliance with their international obligations, are prohibited from citing their

national laws. Here it should also be noted that the decision further clarified that the declaration of independence (issued by the Palestinian National Council of the PLO in Algiers in 1988) enjoys primacy over the written BL adopted by the Palestinian Legislative Council.

2. Judgment 2/2018, July 12, 2018: *The Constitutional Court's Interpretation of the Term 'Military issue' and the Nature of the Police Force and the Prosecution of Its Members*

It should first be noted that the Court, in exercising its jurisdiction to respond to requests of interpretation, exceeds its scope by allowing itself to constitutionally review legislation before declaring it to be unconstitutional. The interpretation request was submitted to the Constitutional Court by the Minister of Justice. In its 12 September 2018 decision, the Palestinian SCC issued an interpretation decision relating to the provisions set out in Art. 84 and 102 of the BL and Art. 53 of Law No. 23. It thereby indicated its interpretation of the legal character of the terms 'military issue' and 'police', along with the importance that it ascribed to determining the competent court when trying police officers.

In the decision under review, the Court contradicted its previous interpretative decision (most notably 01/2017), which held that the police were a regular force of a special nature who exercised civil jurisdiction. Instead, the Court now argued that the police are a predominantly military apparatus with the capacity to specialize in civil cases. In referring to penal provisions, it further expanded its interpretation of 'military issue' and sought to make the military judiciary the rule rather than the exception.

The Court relied on the 1979 penal code of the PLO, and the Revolutionary Penal Code in particular, to determine the criteria (personal, venue, and objective) that needed to be present for the military court to exercise jurisdiction. These laws are, however, controversial and have been accused of being unconstitutional. Critics note, for example, that they are not published in the Official Gazette, as required by Art. 116 of the BL.

They also observe that these laws do not distinguish between civilians and the military as they were enacted in exceptional circumstances, when the PLO was establishing authority and exercising sovereignty over its territory by activating the jurisdiction of the Revolutionary Judiciary.

In the case at hand, the Court decided that the criteria must be met, without clarifying if one or all needed to be met. The decision was issued by a weak majority (four out of seven judges) and it led to Law No. 23 being revoked on the ground that it was unconstitutional to consider the police as a military rather than a civilian apparatus. It was held that the Court, in issuing this interpretation, had erred by considering the police as a military organ and by giving military courts the competence to prosecute its members. In doing so, it had overlooked the fact that these courts must be subject to their natural judge, who is always the regular, and not the military, judge.

This ruling sparked a subsequent lengthy debate, which was enriched by contributions from various civil society actors and specialists in the fields of public law and human rights. It ultimately forced the president of the Court to issue a statement that clarified the decision and negated the Court's stated intention to place civilians under the jurisdiction of military courts.

3. Judgment 10/2018, December 12, 2018: Interpreted Art. 47, 47)bis(and 55 of the BL to clarify if the Legislative Council is inoperative, with the intention of establishing if Legislative Council members should still receive salaries and benefits

The Minister of Justice requested this interpretation from the SCC after a request from the President of the Judicial Council, the President of the Supreme Court. The request highlighted that the Legislative Council had failed because it had not convened from the end of its first session on July 5, 2007 up until the end of its legal and constitutional term on January 25, 2010. The continuation of this

situation in the absence of general elections violates the provisions of the BL and the law of general elections (and related laws), and also prejudices public and national interests. It also violates the basic right, held by all Palestinians of voting age, to periodically elect representatives.

In 2005, an amendment (Clause Three) was added to Art. 47 that established '[t]he term of the Legislative Council shall be four years from the date of it being elected and the elections shall be conducted once each four years in a regular manner'. Art. 47 (*bis*) also establishes that '[t]he term of the current Legislative Council shall terminate when the members of the new elected Council take the constitutional oath'.

This decision clarifies that the Legislative Council is the elected legislative authority and establishes that the Legislative Council is not just individuals or individuals who won the special elections; rather, it is one of three authorities entrusted with constitutional tasks and is, by virtue of this fact, one of the most important authorities in the country. The Legislative Council, elected on 25/1/2006, held only one session, on 5/7/2007. The Court, in registering this fact, proceeded to argue that the Council had 'refused' to carry out the role entrusted to it as a legislative authority and had refused to abide by the laws and regulations governing its work, including the second regular session convened by His Excellency the President in accordance with the law and their oath. As a result, it lost its status as a legislative authority and thus the status of Legislative Council. It finally observed that, although sessions have not been held, representatives still receive their salaries and benefits in accordance with Art. 55 ('A Member of the Legislative Council shall receive a monthly salary determined by law'), which places a further burden on the state of Palestine's budget.

In its interpretation, the Court decided on five main points, which are as follows:

- The legitimacy of the existence of the Legislative Council lies in the exercise of legislative powers and control; since this has not been held since 2007, it lost its legislative authority and, as a consequence, its Legislative Council status.

- Art. 47 (*bis*) shall not apply if the regular elections of the Legislative Council are not held every four years. This means that Art. 47 only applies in the presence of two Councils, a Council that has finished its mandate and a newly elected Council.

- Taking the text of Art. 55 into account, the SCC considers that there are no valid reasons for continued benefits to be provided to members, including financial entitlements and bonuses due from the date when the decision was issued.

- The Legislative Council is entirely absent and has not convened a session since 5-7-2007; its last term expired on 25/1/2010 and it remains inoperative; as such, the national interest requires the dissolution of the Legislative Council.

- The Council called on the President of the State to announce legislative elections within six months of the decision being published in the Official Gazette.

While the decision has a solid factual foundation, it cannot be claimed that the BL did not touch on the issue of the dissolution of the Legislative Council. This is established by Art. 113 of the BL, which clarifies that '[t]he Palestinian Legislative Council may not be dissolved or its work hindered during a state of emergency, nor shall the provisions of this title be suspended'. Taking into account the fact that the constitutional legislature prohibited the dissolution of the Legislative Council during a state of emergency, it is questionable if the decision of the SCC that dissolved the Legislative Council is itself constitutional. But Art. 47 (*bis*) provides clear evidence that the term of the Legislative Council may be extended under exceptional circumstances. This issue was raised in 2016 when the Supreme

Court, acting in its constitutional capacity, addressed itself to the termination of Mohammad Dahlan's official and private immunity, which derived from his status as a Legislative Council member.⁵ The Court decided on this specific matter and did not extend its decision of the dissolution of the whole Council. The Court ruled that the President has the full authority to cancel the immunity of any Parliament member when the Legislative Council is not convened. It also decided that the President's decree was consistent with his legal authority.

The Court's decision is however contrary to the Amended Basic Law and Electoral Law, which establishes that presidential and legislative elections should be held concurrently. In fact, there is no need to dissolve the Legislative Council because the elections have been due since 2010; hence the real constitutional violation is the fact that the president is not calling for presidential or legislative elections!

The dissolution of the Legislative Council has been implemented as a consequence of political will, but it is not expected that the elections will be implemented – if elections do take place, there are no signs that this will be done in accordance with the Basic Law and the Electoral Law (i.e. that presidential and legislative elections will be concurrent). The decisions of the Constitutional Court, if anything, envisage the restoration of the PLO's powers in all its councils.

IV. LOOKING AHEAD

The BL must not be burdened with the stigma of failure for these violations, as it was enacted as an interim constitutional alternative that was created within a particular framework and specific political, cultural and national circumstances. The constitutional court, however, is not entrusted with fulfilling the public's wishes, but is instead tasked with ensuring compliance with the constitution.

The Modern Palestinian constitution is expected to be revived and put back on the table, and the same applies to the various issues and gaps that this review has addressed. It is anticipated that the constitution will put in place a pluralistic parliamentary democracy that fully conforms with International Law and Human rights.

V. FURTHER READING

Asem Khalil, 'Impulses from the Arab Spring on the Palestinian State-Building Process' in Rainer Grote and Tilmann Röder (eds): *Constitutionalism, Human Rights and Islam after the Arab Spring* (OUP, 2016)

Asem Khalil, 'Beyond the Written Constitution: Constitutional Crisis of, and the Institutional Deadlock in, the Palestinian Political System as Entrenched in the Basic Law' (2013) 11 *International Journal of Constitutional Law* 34-73

⁵ Supreme Court, Rammallah, 06/2012, 26/04/2016.