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A Constitutional Framework of a Future Palestinian State

Synthesis of Leading Palestinian thinking and Public Perceptions

Working Paper presented within the context of the Project:

“The Contours of a Future State”

A multi-part compendium of Palestinian Thinking

Commissioned by the Institute of Law – Birzeit University

Prepared by: Dr. Asem Khalil

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List of Abbreviations

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

Constitutional Framework of the Future Palestinian State

Synthesis of Leading Palestinian thinking and public perceptions

Asem Khalil*

1. Introduction

A. The "Anomalous" Palestinian Constitutional System

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

The Palestinian Authority (*hereinafter* the PA)¹ is a good example of the contradictions inherent in the role of a constitution and its place in a particular (non-state, pre-state or quasi-state) legal system. At present, there is a Basic Law (*hereinafter* the BL) which is enforced in the territory under PA control, and a Draft Palestinian Constitution (*hereinafter* the DPC) is also circulating.² At the same time, the 1968 Palestinian National Charter (*hereinafter* the Charter) remains, formally, in force, although considered by many as 'old fashioned' since it renounced the armed resistance as a means to national liberation (Nofal 1997, 87). Furthermore, the Palestine Liberation Organization (*hereinafter* the PLO) unilaterally proclaimed the establishment of a new independent state called the ‘State of Palestine’ in 1988 but this did not lead directly to the realization of statehood. Therefore it remains an aspiration and future objective as the Israeli occupation persists and the ‘State of Palestine’ has still to be established. Throughout this report, reference will be made to both the BL and the DPC as these documents represent the current and the future Palestinian constitutional framework.

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

¹ It is commonly used with the term ‘national’ in between the two words, relating to the temporary nature of its authority over the Palestinian national project. Without prejudicing this concept, this paper will use the term PA.

² The BL endorsed by the President of the PA in 2002 was adopted by the Palestinian Legislative Council (PLC) in 1997. The version adopted by the PLC was prepared by its legal committee who took on the task from a PLO committee. As for the DPC, it was prepared by a special committee nominated by Yasser Arafat in his capacity as Chairperson of the PLO Executive Committee.

The first attempt to prepare a BL or a constitution followed the Palestinian Declaration of Independence in Algiers in 1988.³ However, the situation changed after the signing of the Declaration of Principles (1993) and other agreements between the PLO and the Government of Israel (commonly known as the Oslo Accords). Therefore all subsequent efforts to prepare a BL were intended to regulate the PA, acting in its institutional capacity as a temporary body with authority to administer a limited part of the occupied Palestinian Territory (*hereinafter* oPt) until a final agreement is reached with Israel. The first drafts of a BL started to circulate immediately after the establishment of the PA.

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

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

According to the provisions of the BL it shall only apply during the interim period and may be extended until a new constitution of the State of Palestine is enforced (BL, Article 115). In preparation for statehood, different drafts of the DPC were prepared by a committee nominated by President Arafat in 1999. The first DPC was finalised in 2001 and the second and third drafts in 2003.⁴ It shall be noted that drafting a constitution for Palestinian statehood was one of the Palestinian obligations under the 'Road Map'⁵.

Mahmoud Abbas was inaugurated as the first Palestinian Prime Minister following amendments to the DPC in 2003 but resigned less than six months afterwards after disagreements with the President on matters relating to his constitutional powers and, according to some analysts, for political visions (Al-Masri 2003, 20). Ahmad Qurei replaced him as Prime Minister and remained in this post during Abbas' Presidency. In both cases, the issue of power relations between the Presidency and the Prime Minister remained an internal party political issue.⁶ It was only after *Hamas'* victory 2006 elections that these constitutional issues, related to the institutions and processes of governance, surfaced again. This time, fundamental issues such as the right of the President to call for a referendum or early elections; the limitations of adopting decree-laws; the separation of powers between the President and the Office of the Prime Minister mainly with regard to control over the security forces; and the controversial adoption of a law establishing a Constitutional Court were widely debated in public and became the focus of inter-party dialogue.

³ More precisely, the first BL was drafted following the establishment of an 'All-Palestine Government' in 1948. However, it was only following the Declaration of Independence of the State of Palestine that a BL was needed to regulate the newly declared state. Therefore, for this reason, no further reference will be made to the 'All-Palestine Government' related BL.

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

⁵ A Performance Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, published 1 May 2003.

⁶ See for example parts of the speech delivered by Ahmad Qurei to the PLC on 26/10/2005: *Majallat Adderassat Al-Falastenyaya*, 65, 137.

B. Preliminary Methodological Notes

This paper will look at leading Palestinian thinking and public perceptions on the following:

- The relationship between the three powers of state; different perceptions of the principle of the ‘separation of powers’ in Palestinian literature including the potential separation between the PLO and the PA;
- The systems which create, amend and enforce laws such as the PLC and the judiciary;
- The basic rules which govern public finances including a presentation of the main principles included in the BL and DPC and also the reform process; and
- The degree to which normative orientation (secular/religious) should direct state formation, institution building and the application of law.

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

First, it is important to mention that the thoughts and positions of so-called Palestinian ‘elites’ (e.g. PA and PLO officials, academics, representatives of civil society and others who influence public opinion) as represented in this paper do not necessarily reflect the perceptions of Palestinian society as a whole. As recent public opinion surveys and studies have shown, there is a gap between what the ‘elites’ think and what the public thinks,⁷ while recent political developments (following the 2006 elections) have shown that ‘elites’ may not be the only section of Palestinian society to influence the constitutional shape of a future State of Palestine.

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

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

Fourth, although the issue of Palestinian statehood and related constitutional matters is of vital interest to the international community, and has also been widely discussed and debated by international academic experts, this paper is primarily focused on Palestinian perspectives. Therefore only minimal reference will be made to the contributions of non-Palestinians.⁸

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

⁷ See for example the Opinion Leaders' Survey published on 28 February 2007 by Birzeit University Development Study Programme, <http://home.birzeit.edu/dsp/opinionpolls/elitepoll/>.

⁸ For example, Nathan Brown and Katherine Wing who worked as expert consultants on the drafting process of the BL and the DPC respectively.

C. Typology of Constitutional Contributions

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

1) Talking about the PA while imagining the state

The discussions on the constitutional framework of the PA (taking into account the provisions of the BL and limitations of the Oslo Accords) indirectly contribute to an understanding of how a future State of Palestine would look. This approach can be considered pragmatic and realistic. Some look at the existing institutions and *imagine* the possible political system of their future state (Kubba'a 1997, 97) while others look at the PA and simply *see* the state (at the same time seeing Palestine as an existent reality under occupation or *in status nascendi*). Conversely, when talking about a 'state, reference is made to a totally different experience from that of the PA with its limited powers, jurisdiction and related uncertainties of the interim period: indeed the BL was enacted for the interim period although there is always the possibility that the transitional becomes permanent.

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

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

2) Imagining the Palestinian state *tout court*

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

First, the Palestinian state in abstract

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

Second, the 'official' version of the state

The contributions of this group stem from a particular text (the DPC) drafted in response to the PA's international obligations under the 'Road Map' peace plan: the first DPC was completed in 2001 and draft two and three in 2003.⁹ The publication of the three drafts initiated several discussions and studies at different levels although arguments were presented according to party political affiliations (Said 2004a, 7-8).¹⁰

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

For Palestinian civil society, notwithstanding the importance of PA obligations to the international community, the importance of the constitution stems from its role in determining the social contract between the state and the individual (Said 2004a, 7). The DPC, in comparison to the BL, does not introduce any substantial changes to the legal and political system under the PA. However the issues that were left untreated in the BL find a place in the DPC.¹¹

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

⁹ One is conscious of the absence of the legal value of such a text before its adoption; however, nothing forbids treating the document as a text that expresses one (or more) vision(s). The DPC may provide a vision of how Palestinians (or at least the committee that drafted it) conceive the state, the way powers will be separated and the principles that will guide public institutions, and most importantly how the new constitution would be adopted! This vision best expresses the official approach but in places is in contradiction to other approaches to a constitution, including those of Palestinian civil society and academia. The formal approach was criticized for being too concerned with the international obligations of the PA rather than with Palestinian aspirations, and also more with the needs of the diaspora than the residents of the oPt.

¹⁰ See for example the Executive Summary of the conference organized by the University of Birzeit, Development Study Program (27-28/9/2003) in: *Majallat Adderassat Al-Falasteniya*, 157, 137ff.

¹¹ These differences will be outlined throughout this report and more clearly presented in Annex 4.

2. Different Concepts of the ‘Separation of Powers’

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

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

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

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

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

- a. Separation of the PLO from PA institutions;
- b. Separation as checks and balances between the legislative, executive, and judiciary;
- c. Separation between the Presidency and the Cabinet;
- d. Separation between the public and the private spheres.¹²

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

¹²See Annex 1 of this report.

A. Separation of the PLO from PA institutions

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

1) The PA challenges the PLO

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

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

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

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

2) Comparing the "Council"¹³ and the PLO system

Interestingly, few comparisons have been made between the Palestine National Council-Executive Committee relationship, as determined through the PLO Basic System (*Nezam Assasse*) and the PLC-PA Executive Authority relationship as outlined in the BL. Similarly, few researchers have outlined the similarities in the way that the PLO and Oslo-envisaged Council separate power between the legislative and executive branches of government.

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

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

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

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

3) The PA legitimized by PLO mandate

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

It is interesting to note that the above resolution enabled the PLO-EC to choose the members of the PA Council, both from its own membership and others (either from 'inside' the oPt (West Bank and Gaza Strip) or 'outside' (in the Diaspora). This indirectly led to a potential

¹³ Oslo Agreements referred to the "Council" as the elected body to which all transferred authorities shall be exercised. For more details, see paragraphs below.

overlapping of functions between PLO and PA institutions. The PA Election Law of 1995 and the new Election Law of 2005 did not impose any limitation on the participation of PLO personnel in either PLC or Presidential elections. This meant that a person could be both a member of the PLO-EC (thus a member of the PNC as PLO-EC members are chosen from PNC members) and the PA Council, and after the 1996 elections, a member of the PLC. This potential duplication of functions has had a negative impact on the accountability of PA personnel (Shikaki 1997, 61). This is particularly true for the position of the PA President as in current practice he is directly elected to the position of PA president while at the same time acting as the Chairperson of the PLO-EC (Kubba'a 1997, 77).¹⁴

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

4) The PLO gradually marginalized

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

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

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

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

At the same time, the transition has inevitably been made away from the direction of a national liberation struggle and towards the process of state-building to include the administration of the population of the oPt. The Palestinian cause, which once centered on the rights of the entire Palestinian nation (including a geographically dispersed Diaspora) to self-

¹⁴ If PNC members can be candidates in the PLC elections, and if PLC deputies, once elected, can become members of the PNC, it is possible to conclude that some individuals may be members of the PNC twice, one by nomination to the PNC and one after their election to the PLC. This would suggest that the overlap between the PLO and PA was inevitable and that the principle of the separation of powers has been undermined (Kubba'a 1997, 76).

determination, has increasingly been reduced to the question of autonomy and sovereignty over a limited territory and Palestinian population (Khalil 2005c). This is perhaps what Azmi Bishara (2007) calls the 'privatization of the Palestinian cause' which has marginalized the rights of the refugees.

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

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

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

5) The PLO-PA Conflicting Domains

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

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

First, the BL reference to the PLO

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

Second, the endorsement of the PA laws

All laws are endorsed by the PA President although he always signs as Chairman of the PLO-EC in addition to his function as the elected PA President. So if the two functions can be distinguished in practice, then it is theoretically possible to have the two functions covered by two different people in the future. In which case, only the signature of the PA President would be needed for the adoption of laws.

Third, the prior approval of the PLO EC of the Elections Law

Elections Law no.13 of 1995 was adopted "after the approval of the PLO-EC, in the presence of the Presidency of the PNC" (check the preamble of the Law). The same procedure was applied to the adoption of Law no.16 of 1995, amending the Elections Law no.13 of 1995. However, following the election of the first PLC, no prior approval of the PLO-EC was sought. This was also the case with the passing of Elections Law no. 9 of 2005 and its amendments (Law no.19 of 2005 and Law no.4 of 2006). On the contrary, a new phrase was inserted into the text: "In the Name of the Arab Palestinian People". This suggests that the PLC, as an elected institution, carries the necessary legitimacy to approve laws. This vision is reflected in legislative procedures that are codified in the BL and the PLC by-laws. A contrasting position is held by Faruk Al-Kaddoumi, Head of the PLO Political Department, who wrote in a letter addressed to Mahmoud Zahhar (*Hamas*) Minister of Foreign Affairs that "...all legislations issued by the Council of Ministers or the PLC shall be endorsed by the PNC and the PLO EC before its entrance into force".¹⁵

Fourth, the PLC deputies are members of the PNC

The above mentioned Law no.4 of 2006 which amended Elections Law no. 9 of 2005 is interesting because it adds a paragraph to Article 2 in which it is stated that PLC members become members of the PNC (Kubba'a 1997, 71). This article was included in the first Elections Law but surprisingly disappeared from the second one. This omission was criticized by PNC President Salim Zanoun in a letter (2/2/2006) addressed to President Abbas in which he suggested that neither the PA nor PLC is 'competent' to make this decision as it relates to a sovereign decision taken by the Chairman of the PLO-EC prior to the election of the PLC.¹⁶ The new Elections Law (no. 4 of 2006) does not provide for PLC members become, *ex officio*, members of the PNC, but rather after taking the oath according to the Basic System of the PLO. However, there is nothing in the cited reference concerning the way the oath shall be taken.

Fifth, the nomination of delegates to foreign countries

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

¹⁵ The letter was published in *Majallat Adderassat Al-Falasteneya*, 67, 184.

¹⁶ The letter was published on: http://www.safsaf.org/mot/taamor_ala_majles_watani.htm

6) The Consultative Council

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

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

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

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

B. Separation as checks and balances

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

The separation of powers should not undermine the unity of the state; on the contrary, it encompasses mutual cooperation and control (through the use of so-called checks and balances) in order to ensure the continuation and functioning of the state, and the protection of citizens from the possibility of corruption and despotism by either one person or a group (Nassar 2004, 74). The goal of consolidating a political system based on the separation of powers was primary the motivation for drafting a democratic Palestinian constitution according to Dr. Nabil Sha'ath, Chairman of the Constitutional Committee (Kayed 2004, 30). The constitution is presented as the most appropriate instrument to determine the margin of maneuverability of each power towards the others, and towards the citizens (Nassar 2004, 75) which essentially converts the issue from the theoretical to one of practical mechanisms and procedures. For this reason, Palestinians opted for the adoption of a BL to regulate and separate the three main powers although under PA limited jurisdiction.

1) Which Political System for Palestine?

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

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

Interestingly, the DPC defines the Palestinian political system as a 'parliamentary representative democracy' (Article 8) while the BL defines it as a 'representative democracy' (Article 5). However, the type of political system (whether Presidential or Parliamentary) depends on how the three main powers are organized and how the relationship between each of them is regulated. Accordingly, most Palestinian analysts define the Palestinian system (according to the BL) as 'mixed' (Al-Bargouthi 2004, 20; Al-Khalidi 2004*b*, 105). It has elements of a Parliamentary system mainly in the form of a government that is answerable to Parliament (PLC) and a Presidential system whereby the elected President enjoys wide-ranging executive authority but is not answerable to the PLC.¹⁷

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

2) Reconsidering the Palestinian Political System

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

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

¹⁷ For a different position see (Hassan 2004, 5).

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

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

3) To Separate Powers, they should exist first!

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

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

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

4) Emergency Regulations

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

The DPC also added a further limitation on the President's power to declare a state of emergency: He first has to agree with the Prime Minister and also 'consult' with the Speaker of the Council of Representatives. Some consider this to be a weak provision that may undermine the possibility for oversight of the initial emergency declaration (Brown 2003b,

50-53). For others, the DPC provision is a step towards a more participatory process in the declaring of an emergency, one that limits the possibilities of misuse and manipulation by the President, despite the fact that declaring the state of emergency remains entirely in the hands of the President (Kayed 2004, 32).¹⁸

5) The Possibility to Dissolve the Legislative Assembly

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

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

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

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

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

- 1) Justifications based on the BL:
 - There is nothing in the BL that entitles the President to dissolve the PLC, but nothing that prohibits him from doing so either.
 - The electorate is the ultimate source of authority and can be called upon to vote in times of political instability and uncertainty.
- 2) Justifications based on provisions in legal documents other than the BL:
 - The President as PLO chairman can call for early elections;
 - In the absence of a clear reference in the BL, reference can be made to previous constitutional texts. For instance, the Palestine Order-in-Council and the Jordanian Constitution give this power to the Head of State.
 - The political system created by the BL is a Parliamentary system with an elected President who is not formally accountable to the PLC. In Parliamentary systems, the separation of powers is not absolute. There is no contradiction *per se* in giving the President the power to dissolve Parliament on condition that it is provided for in the constitution or other law.

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

¹⁸ There is on occasion confusion between the ability to declare a state of emergency and the ability to create an 'emergency government'. There is no provision in either the BL or DPC for the latter.

C. Separation of the Presidency from the Cabinet

The issue of the separation of powers has been at the centre of internal Palestinian discussions not only to clearly define the relationship between the executive, legislative and judiciary but also to define and separate the powers within the executive itself: between the elected President (not accountable to the PLC) and the appointed Prime Minister and Government (accountable to both the President and the PLC (reference: PLC in BL Article 5, or reference: Representative Council in Parliament in DPC Article 86). However, in practice, their respective roles and responsibilities have generally not been clarified or interpreted according to the various laws and constitutional texts when conflict has arisen. The preference, in practice has been to resolve all conflicts through ‘fraternal dialogue’ using the same approach of the National Agreement Document drafted by a group of Palestinian prisoners in 2007.¹⁹

1) Separation as Cohabitation

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

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

All commentators are clear about the provisions in Articles 38 and 63 of the BL concerning the exercise of Presidential executive authority. However, the office of the PA President currently has certain competencies normally assigned to a head of state. The problem is that the BL makes no mention of these, or provides for mechanisms of control over the President’s exercise of these competencies (Khalidi 2004a, 5). The DPC is more explicit on this point.²⁰

2) Separation of Powers as Partition of Gains

Following the ‘Mecca Agreement’ in 2007,²¹ the main Palestinian political factions agreed to resolve their political differences by establishing a Government of National Unity, essentially a quasi-tribal arrangement between factions based on repartition of the public sphere between political factions. This solution is considered by some to be technically outside of the law and/or existing constitutional arrangements.

¹⁹ The document was produced by Palestinian prisoners representing all Palestinian factions; it proposes principles intended to be basis of unity between Palestinian factions. The document was published in *Majallat Adderassat Al-Falasteneya*, 67, 186-198.

²⁰ More details are provided in Annex 4 concerning the President’s prerogatives vs. the Prime Minister, Cabinet, and PLC.

²¹ Based on the initiative announced by Saudi King Abdullah Ben Abdul Aziz, Fatah and Hamas Movements held in the period February 6-8, 2007 in Mecca the dialogues of Palestinian conciliation and agreement. This agreement has took the name of "Mecca Agreement".

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

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

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

D. Separation of the public from the private sphere

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

3. The Legislative process and Enforcing

A. *The Legislative process*

The legislative process²² involves three phases:

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

The actors and skills needed for each phase are various.²³

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

The procedures gave complete control to the executive (mainly the President) over the legislative process. The President's role in the legislative process was in accordance with the Oslo Accords which state that the President shall not enact laws in contradiction to agreements between Israel and the PLO. The 'veto right' of the President was the object of criticism by several local and human rights organizations.²⁴

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

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

1) Anomalies in the Legislative Process

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

²² Here referring exclusively to procedures regulating Law making process, not secondary legislations.

²³ This is not, however, the main issue here. The Institute of Law at Birzeit University has undertaken several studies on the different phases in the process of legislation. For more details, see the table in Annex II.

²⁴ See for example the annual reports of the Palestinian Independent Center for Citizens Rights (PICCR) at: <http://www.piccr.org/index.htm>

First, in the preparatory phase:

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

Second, in the discussion phase:

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

Third, in the promulgation phase:

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

2) Legislation is not just a technical issue

Legislation should not be limited to being technical issue left only to jurists and religious experts; nor should its substance be left for politicians alone to decide upon. On the contrary, it is a process that expresses the spirit of a society, including its contradictions and homogeneity. Legislation is a process of debate, agreement and disagreement between different interest groups who use their resources to impose their vision or to influence the decision makers (Said 2004b, 13).

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

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

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

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

3) The Executive's Legislative Powers

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

B. Law enforcement

1) The Independence of the Judiciary

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

In 2005, an amended Judiciary Law no. 15 was adopted and endorsed by the President. The High Court in Gaza, acting as a Constitutional Court, for the first time in Palestinian history declared this Law unconstitutional. Most of the amendments included in the Law were adopted by decree-law no.2 of 2006, less than twenty days before the legislative elections, thus creating a controversial situation. The Decree Law effectively gave enormous power to the High Judicial Council (*hereinafter* the HJC) and its President received most of the powers that were previously held by the Minister of Justice.²⁵

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

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

One impediment towards a professional, independent and functioning judiciary and HJC is the territorial fragmentation of the oPt whereby the West Bank including east Jerusalem has

²⁵ In 4/5/2006, President Abbas issued decree no.364 of 2006 abrogating, *inter alia*, decree-law no.2 of 2006.

become increasingly fragmented internally as well as separated from the Gaza Strip (Abu Sharara AND Khashan 2004a).

2) The High Judicial Council

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

At the same time, Judiciary Law no.1 of 2002 dedicated the fourth section to the HJC. In his Presidential Decree no.11 of 2002, the President considered the previously established HJC as a transitional body, as provided for in Judiciary Law 2002 (Article 81). In 2003, the President reconstructed the HJC with Presidential Decree no.8 and nominated Issa Abu Sharara as its President, replacing Zuheer Sourani. According to Abu Sharar, the last Decree refers to a permanent Council, as provided for in the BL and the Judiciary Law, and not a temporary one (Abu Sharara AND Khashan 2004a, 3).

3) Duality of Jurisdiction between religious/*shari'a* and regular courts

One of the salient features of a future Palestinian state will be the inevitable adoption of a dual system of jurisdiction consisting of religious (*shari'a*) courts and civil or regular courts therefore ensuring the independence of (recognized) religious communities to adopt legislation on so-called personal status issues and have their own courts for this purpose. This was one of the important provisions of Decree No. 1 of 1994 that President Arafat issued from the PLO in exile in Tunisia concerning the ‘Continuation of the Laws, Regulations and Rules Operative in the Palestinian Territories (West Bank and Gaza Strip) before and since 5 June 1967’ until it was replaced by unified PA legislation.

This topic has not been central in the discussions held by Palestinian scholars regarding a future Palestinian constitutional framework. On the contrary, the independence of religious communities in regulating their own personal status issues, and the jurisdiction of their courts to decide on cases involving members of their communities, was confirmed by the Article on Islam delineating it as the official religion of the state.²⁶ In other words, the autonomy of religious communities to decide and legislate on personal status issues is considered to be part of the solution rather than the problem.

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

The Palestinian women’s movement has been campaigning for the last decade for reform of the family law system. Following the Oslo Accords when the prospect of statehood appeared realistic, the movement began to focus more closely on the BL (Abdo 1999, 44) and the different drafts of the Palestinian constitution. However, calls for reform were not necessarily

²⁶ Article 4 of the BL and Article 5 of the DPC.

accompanied by a call for the abolition of the distinction between regular and religious (shari'a) courts and thus the adoption of a unified civil code that covers personal status issues.

4) High Constitutional Court

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

5) Administrative, Military and Security Courts

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

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

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

4. The Administration of Public Finance

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

A. *The constitutional protection of public finance*

1) **The constitutional procedure of budgeting process**

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

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

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

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

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

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

2) Constitutional principles in managing the Public finance

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

3) Constitutional mechanisms for protecting public finance

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

The BL establishes two agencies: the Palestinian Monetary Authority and the Financial and Administrative Control Bureau²⁷ (*hereinafter* Bureau), which was created by law no.15/2004, replacing the previously established Public Control Authority established by decree no.22/1994. The Monetary Authority, which is equivalent to a central bank, has a President which is nominated by the President of the PA with accreditation from the PLC (Article 93, BL). This guarantees both its independence from any other administrative body as well as its independence in decision-making because the nomination is issued from the highest authority in the PA which is controlled by the elected PLC.

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

These institutions are not mentioned in the DPC which is important to note considering the positive impact they have had in terms of protecting public finances and exposing corruption. But what both constitutional documents contain are mechanisms for ensuring transparency in public accounting. These documents require deputies, Ministers and the Prime Minister (once elected or nominated) to submit a financial disclosure of their total wealth (including family) both inside and outside the country to a judicial body such as the HCC (DPC) or the HCJ (BL). These documents will remain confidential unless the court concerned authorizes their

²⁷ For more information about the Bureau see their official website: <http://www.facb.gov.ps/>

consultation for investigative purposes (Articles 54 and 80, BL; Articles 108 and 140, DPC). The DPC requires the future President of the Palestinian State to also submit a financial disclosure (Article 116) but the BL does not.

B. Reforming the public administration of money

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

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

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

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

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

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

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

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

5. Secular / Religious Orientations of the State

According to the BL and DPC, the principles of *shari'a* (Islamic law), are a primary source of legislation in Palestine. Indeed, Islam is the official state religion and for that reason, *shari'a* principles should be considered as one of the most important legal foundations of the state-in-waiting.²⁸ It should be noted that earlier drafts of the BL made no mention of Islam as being the 'official religion of Palestine'; not until the 7th draft BL was it mentioned.²⁹

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

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

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

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

²⁸ This section does not examine all existing literature on the topic of religion and state, neither does it cover all discussions on the existing religious or secular orientation of the PA and a future Palestinian state. This chapter presents only some of the discussions on Islam and *shari'a* that preceded the drafting of the BL and DPC.

²⁹ Drafted by the Legal Committee of the PLC, 9 July 1996 and circulated to the public.

A. Islam as official Religion

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

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

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

1) Religion (Islam) and state are interlinked

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

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

This would guarantee, for the majority of the Palestinian people, a national identity that directly corresponds to their own personal religious beliefs. This reference therefore carries more political than religious significance as it could be construed as the first step towards the establishment of an Islamic state in the future. In the interim period, a modern, democratic state is preferable on condition that it respects, or at least does not contradict, Islamic principles. This position relates to the increase in religiosity in Palestinian society and not necessarily to the increase in support for Islamic movements.

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

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

2) Religion and state shall be separated

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

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

B. Constitutional Reference to Shari'a

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

1) The Constitution shall refer to *shari'a*

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

First, shari'a as a primary source of legislation is enough

The current reference to *shari'a* as a primary source of legislation would be acceptable if *shari'a* enjoys a high level of credibility within Palestinian society, and only if no other laws that contradict the spirit of *shari'a* are adopted. Otherwise a constitutional amendment would be needed and requested. For this group, *shari'a* takes priority even over international law and conventions (Nasser Deen Sha'er in: Kayed 2004, 14).³⁰

Second, shari'a should be 'the' (not a) principle source of legislation

In this case, all laws and legislation in the Palestinian state will be taken from *shari'a*; it being inherently a source of social justice and political, economic and social stability.³¹ Furthermore, these laws would contain articles that contain the phrase "without contradicting Islamic *shari'a*". It is interesting to note that *Hamas*' political manifesto for the 2006 elections included a proposition to amend Article 4 of the BL, from "a" to "the" principle source of legislation.

³⁰ This the position taken by Nasser Deen Sha'er, cited in Kayed (2004, 14).

³¹ Conference at *Dar Al-Fatwa wal Buhouth Islameyya* on the Palestinian Constitution (23/7/2003) cited in Kayed (2004, 15).

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

Third, a shari'a expert should become one of the judges of the Constitutional Court

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

2) The constitution shall not refer to *shari'a*

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

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

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

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

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

For the Constitutional Committee, as expressed by its President, references to religion and *shari'a* take into account the reality of Palestinian society and its Arab and Islamic identity (Nabil Sha'th in: Kayed 2004, 17) as confirmed by several public opinion polls.³²

According to Dr. Sha'ath, Christian communities who are the most concerned by references to *shari'a* in the constitution, were consulted and agreed on the version adopted in the DPC and the religious leaders having provided their comments on the DPC (Fr. Raed Awad, cited in: Nawahda 2004, 122).³³

C. A third way to perceive the state-religion relationship

1) Islam is only religion?

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

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

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

2) Political Islam

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

However, following the first *Intifada*, the residents of the oPt (so-called 'inside' Palestinians) witnessed the increasing popularity of Islamic groups who began competing with national or

³² See Public Opinion no. 14 of 2003 prepared and published by the Development Studies Program – Birzeit University, Ramallah in Annex 5.

³³ However, other researchers have reached a different conclusion concerning this consultation process (Kayed 2004, 17-18)

secular groups at the level of syndicates, associations, and local institutions for local support (Odwan 2005, 96). The references to Islam and *shari'a* in the BL and DPC are therefore included in order to 'legitimise' these documents in accordance with the perceived wishes of Palestinian society. In other words, the references to Islam and *shari'a* are really expressions of a 'power struggle' between the 'insiders' and exiles or 'outsiders', reflecting the wider dialectic between the PLO and the PA and their respective visions of a state.

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

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

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

3) Referring to Islam to recognize culture and history

There is a third group that has an interest in the issue of the relationship between religion and state but this group is less concerned with constitutional references in this regard. What is important is the particular constitutional mechanism established to protect individual and minorities rights. Thus, their perceived indifference to constitutional references to Islam is dependent on the degree to which Islam will have a determining role in the Palestinian legal system.

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

The constitutional reference to Islam simply recognises the common belonging of all Palestinians to Arab and Islamic culture. This experience is not unique or exclusive to Arab

and Islamic countries. However, the reference to *shari'a* as a source of legislation gives the Articles mentioned above an authority that surpasses the cultural dimension of Islam. For this reason, some authors have called for the cancellation of the constitutional reference to *shari'a*. Furthermore, it has been argued that the reference to *shari'a* is a political issue and thus vulnerable to changes in the internal or external political environment. Moreover, this reference could be used by state authority to legitimize (on religious grounds) an undemocratic government or simply to strengthen its own authority (Habib 2005, 103).

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

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

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

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

In other words, *shari'a* is implemented in accordance with the law by the state and not according to fixed doctrinal models (Khalil 2006b, 272). This is the case in neighboring countries where Arab and Islamic systems reflect a reality whereby religion is separated *de facto* from the state, such as in a codified (positive) constitution (Hani El-Masry in DSP 2004, 156).

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

D. Possible conflicts between constitution and shari'a

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

1) Women's rights

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

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

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

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

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

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

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

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

2) *Shari'a* Principles and International Law

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

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

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

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

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

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

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

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

3) Religious Minorities

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

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

For all Palestinians, including the Muslim majority, there is no doubt that Christians, although they are a minority, form a constituent part of the Palestinian nation. However, there have been various debates and discussions on the future of Palestinian Christians with regard to the constitutional references to Islam and *shari'a*. The position of an authoritative Christian leader, Msgr. Michel Sabbah, perhaps best expresses the view commonly held by most Christian leaders: "It is useless to discuss this question if different communities, Muslim or Christian, have the mentality of winning or losing, at the expense of the other, as if we are in different teams, each trying to catch the ball and take it to their side or camp, as the victor. Daily life pushes us to be in the same camp, and no one wins if the other loses. We both win if a new Palestine, with a new face, is born, that inspires mutual trust and security for Muslims and Christians... if we nurture this mentality, we will find the best expressions that reflect this new culture, for the Constitution" (Cited in: Nawahda 2004, 122).³⁴

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

³⁴ The speech was made at the University of Bethlehem, and published in Arabic on the internet, translated by the author of this report <http://www.lpi.org/Nonviolence/Patriarch/BUniversityara.htm>

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Annex 1: Various Concepts of "Separation of Powers"

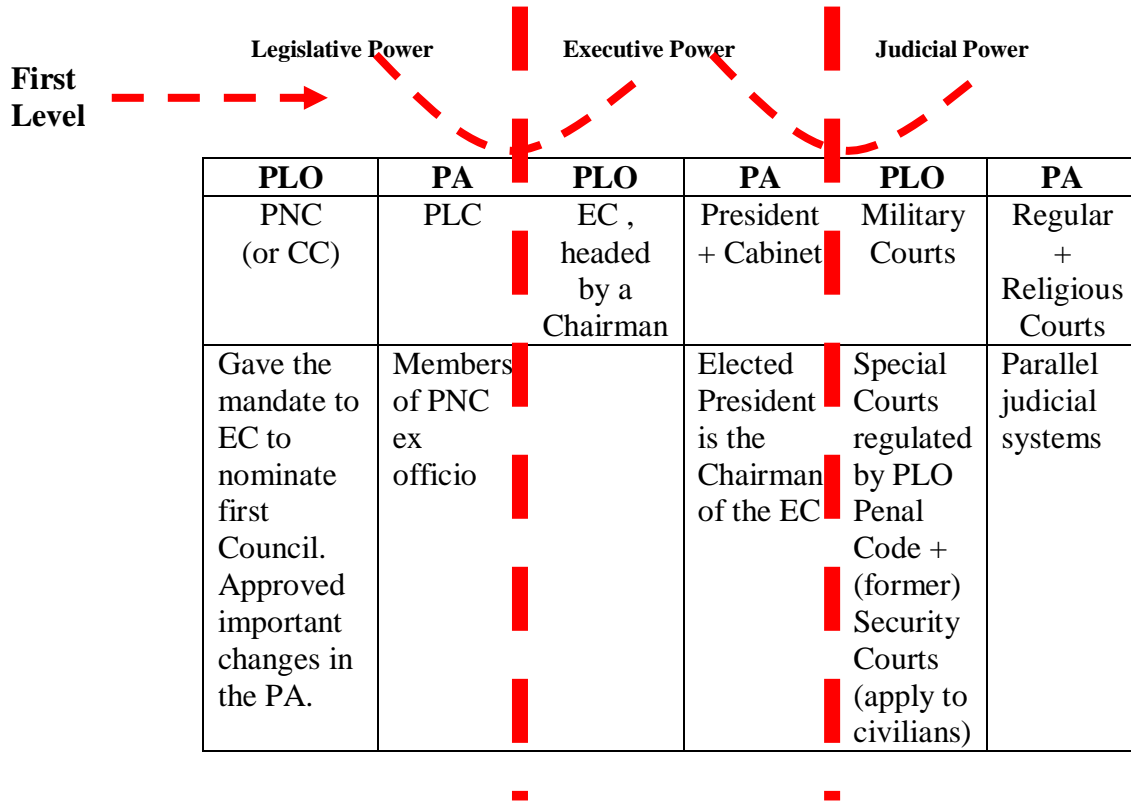
In the Palestinian literature, the "separation of powers" does not reflect only the classical concept, i.e. the separation of the Legislative, executive and judicial powers and their reciprocal oversight and collaboration. On the contrary, Palestinians talk about the "separation of powers" but mean at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

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

List of Abbreviations:

PLO: Palestine Liberation Organization
PA: Palestinian Authority
PNC: Palestinian National Council
PLC: Palestinian Legislative Council
CC: Central Council
EC: Executive Committee

The Separation of Powers
First Level:
The Separation of Legislative, executive and Judiciary

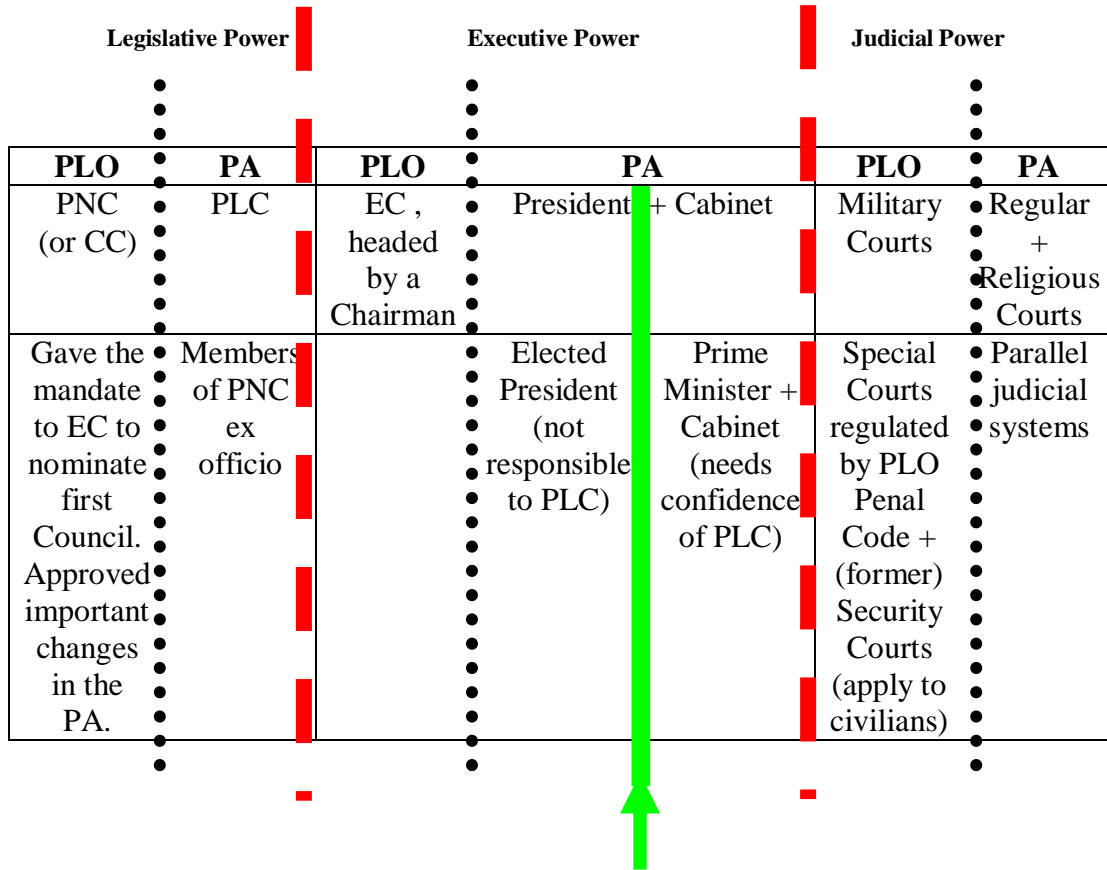


The Separation of Powers:
Second Level:
The Separation of PLO from PA institutions

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

The Separation of Powers:
Third Level

The Separation between the PA President and the Prime Minister + Cabinet



The Separation of Powers:
Fourth Level:
The separation between the public and the private sectors

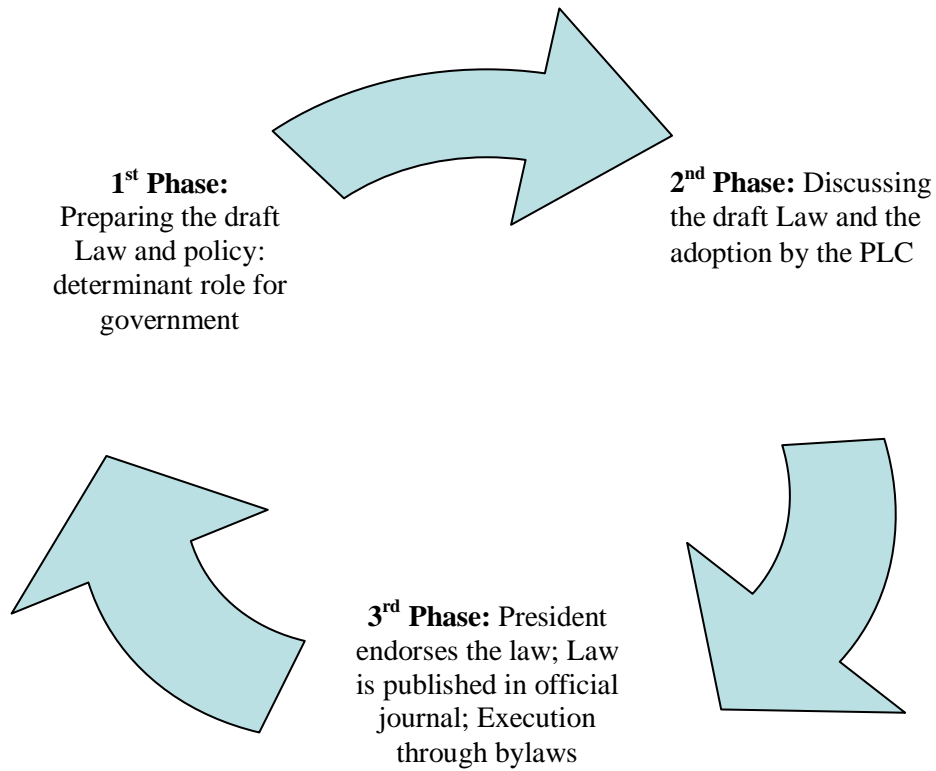
| Legislative Power | | Executive Power | | Judicial Power | |
|--|------------------------------------|------------------------------------|--|---|--|
| PLO | PA | PLO | PA | PLO | PA |
| PNC (or CC) | PLC | EC , headed by a Chairman | President + Cabinet | Military Courts | Regular + Religious Courts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

Fourth Level



Private Sector, Civil Society...

Annex 2: The Legislative Process



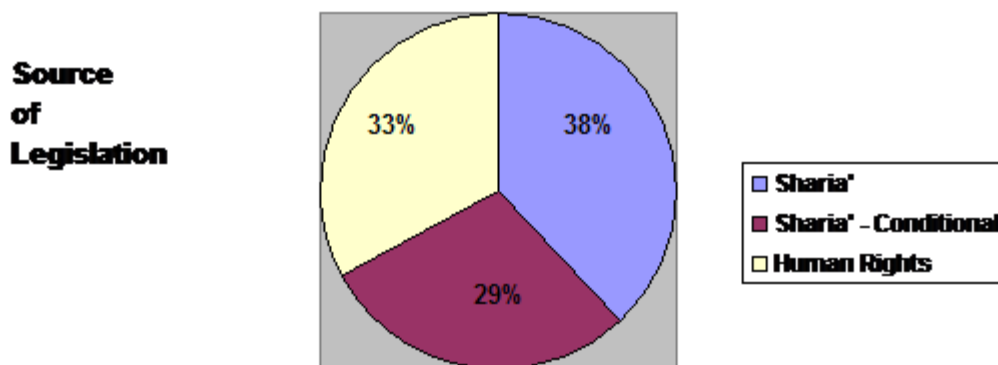
Annex 3: Public Opinions

Development Studies Program – Birzeit University

Public Opinion n. 10 of 2002

Division over use of Islamic Sharia (Law)

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



Shari'a in governance might lead to abuse of power

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

Support for democracy

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

All Palestinians are born equal

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

Public Opinion n. 14 of 2003

Sources of Legislation

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

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

Characteristics of the State

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

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

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

Annex 4: Amended Basic Law of 2003

The Amended Basic Law³⁵
Promulgated on 18 March 2003³⁶
(Consolidated Version)³⁷

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

Introduction

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

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

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

This Basic Law has established a firm foundation, representing the collective conscience of our people, including its spiritual components, its national faith and its nationalist loyalty. The titles of the Basic Law include a group of modern constitutional rules and principles that address public and personal rights and liberties in a manner that achieves justice and equality for all, without discrimination. Further, they ensure the rule of law, strike a balance between the executive, legislative and judicial branches, and draw lines between their respective jurisdictions in a manner that ensures independence to each of them while coordinating their roles to achieve a high national interest that will serve as a guide to all.

³⁵ Translation into English for the Palestine Yearbook of International Law, published in Al-Muqtafi – Institute of Law, Birzeit University. Some changes to the translation were effectuated by author and shall be indicated each time is done.

³⁶ Published in the *Palestine Official Gazette*, Special Issue No. 2, March 19, 2003. The original Basic Law was published in the *Palestine Official Gazette*, Special Issue, July 7, 2002.

³⁷ The 2003 Basic Law was amended by the **Basic Law of 2005 Concerning the Amendment of Some of the Provisions of the Amended Basic Law of 2003**, published in *Palestine Official Gazette*, Issue No. 57, August 2005. This consolidated version is done by the author of the report, thus unofficial and under his own responsibility. The articles amended or added in 2005 were duly underlined, while providing also the original text in footnote, for information.

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

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

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

Explanatory Memorandum for the Amended Basic Law

Article 111^{38[2]} of the Basic Law provides the Legislative Council with the authority to amend the Basic Law by securing a majority vote of two-thirds of its members. The Council believes that it is necessary to amend the Basic Law to allow for the creation of the position of a Prime Minister in the Palestinian National Authority and to determine his powers and the legal and political controls that will regulate his work, as well as to define and clarify the form of the relationship between him and the President of the Palestinian National Authority and the legislative branch.

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

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

The Council decided during the review of the amended law that it would not be necessary to add provisions dealing with the Prime Minister's presentation of all matters related to the formation, resignation or dissolution of the cabinet to the President of the National Authority, on the grounds that this is a political tradition that does not require being put into a separate article in the text of the law.

Ahmed Qurei' (Abu Ala')
Speaker
The Palestinian Legislative Council

TITLE ONE

Article 1

³⁸ Editor's note: Article 111 refers to the original text of the Basic Law as published in July 2002. In the Amended Basic Law, it becomes Article 120. The reason for this apparent discrepancy is that the Palestinian Legislator has chosen to integrate the March 2003 amendments into a consolidated text. This has involved numbering anew a substantial part of the original articles.

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

Article 2

The people are the source of power, which shall be exercised through the legislative, executive and judicial authorities, based upon the principle of separation of powers and in the manner set forth in this Basic Law.

Article 3

Jerusalem is the capital of Palestine.

Article 4

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

Article 5

The governing system in Palestine shall be a democratic representative³⁹ system, based upon political and party pluralism. The President of the National Authority shall be directly elected by the people. The government shall be accountable to the President and to the Palestinian Legislative Council.

Article 6

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

Article 7

Palestinian citizenship shall be regulated by law.

Article 8

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

TITLE TWO: PUBLIC RIGHTS AND LIBERTIES

Article 9

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

Article 10

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

Article 11

1. Personal freedom is a natural right, shall be guaranteed and may not be violated.

³⁹ Original translation was: Parliamentary. I prefer to use the term "representative" to indicate *neyabee* used by Arab original text.

2. It is unlawful to arrest, search, imprison, restrict the freedom, or prevent the movement of any person, except by judicial order in accordance with the provisions of the law. The law shall specify the period of prearrest detention. Imprisonment or detention shall only be permitted in places that are subject to laws related to the organization of prisons.

Article 12

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

Article 13

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

Article 14

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

Article 15

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

Article 16

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

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

Article 17

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

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

Article 18

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

Article 19

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

Article 20

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

Article 21

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

Article 22

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

Article 23

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

Article 24

1. Every citizen shall have the right to education. It shall be compulsory until at least the end of the basic level. Education shall be free in public schools and institutions.
2. The National Authority shall supervise all levels of education and its institutions, and shall strive to upgrade the educational system.
3. The law shall guarantee the independence of universities, institutes of higher education, and scientific research centers in a manner that guarantees the freedom of scientific research as well as literary, artistic and cultural creativity. The National Authority shall encourage and support such creativity.
4. Private schools and educational institutions shall comply with the curriculum approved by the National Authority and shall be subject to its supervision.

Article 25

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

Article 26

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

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

Article 27

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

Article 28

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

Article 29

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

1. Comprehensive protection and welfare.
2. Not to be exploited for any purpose whatsoever, and not to be permitted to perform work that might damage their safety, health or education.
3. Protection from harmful and cruel treatment.
4. Not to be subjected to beating or cruel treatment by their relatives.
5. To be segregated – in cases where they are sentenced to a penalty that deprives them of their freedom – from adults, and be treated in a manner that is appropriate to their age and aims at their rehabilitation.

Article 30

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

Article 31

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

Article 32

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

Article 33

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

TITLE THREE:

The President of the Palestinian National Authority

Article 34

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

Article 35

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

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

Article 36

The term of the presidency of the National Authority shall be four years. The President shall have the right to nominate himself for a second term of presidency, provided that he shall not occupy the position of the presidency more than two consecutive terms.⁴⁰

Article 37

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

Article 38

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

Article 39

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

Article 40

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

Article 41

1. The President of the National Authority shall promulgate the laws voted by the Palestinian Legislative Council within thirty (30) days of their transmittal to him. The President may refer a law back to the Legislative Council with his observations and the reasons of his objection within the same period. Otherwise, the law will be deemed promulgated and will be published in the *Official Gazette*.

⁴⁰ Original text: "The term of the presidency of the National Authority shall be the interim phase, after which the President shall be elected in accordance with the law".

2. If the President of the National Authority returns the proposed law to the Legislative Council in conformity with the time limit and conditions specified in the previous paragraph, the Council shall debate the law again. If the Council passes the law a second time by a majority of two-thirds of its members, the proposed law shall be considered approved and shall be immediately published in the *Official Gazette*.

Article 42

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

Article 43

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

Article 44

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

Article 45

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

Article 46

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

TITLE FOUR: THE LEGISLATIVE AUTHORITY

Article 47

1. The Palestinian Legislative Council is the elected legislative authority.
2. The Legislative Council shall assume its legislative and oversight duties as prescribed in its Standing Orders, insofar as they do not contradict the provisions of this law.
3. The term of the Legislative Council shall be four years from the date of its being elected and the elections shall be conducted once each four years in a regular manner.⁴¹

Article (47 bis)

The term of the current Legislative Council shall terminate when the members of the new elected Council take the constitutional oath.⁴²

Article 48

1. The members of the Legislative Council shall be elected in general, free and direct elections in accordance with the provisions of the Elections Law, which shall determine the number of members, electoral constituencies and electoral system.

⁴¹ Original text: "The term of this Council shall be the interim period".

⁴² This article was added in 2005 amendments.

2. In the event the position of a member of more than a member of the Legislative Council becomes vacant, the vacancy shall be occupied in accordance with the provisions of the Elections Law.⁴³

Article 49

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

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

Article 50

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

Article 51

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

Article 52

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

Article 53

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

Article 54

⁴³ Original text: 1) The Legislative Council shall be composed of eighty-eight (88) Members elected in accordance with the law. 2) If the position of one or more Members becomes vacant due to death, resignation or loss of capacity, partial elections shall be conducted in the relevant district to elect a successor, in accordance with the law.

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

Article 55

Allocations, rights and obligations of the members of the Legislative Council and Ministers shall be determined by law.⁴⁴

Article 56

Each Member of the Council shall have the following rights:

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

Article 57

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

Article 58

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

Article 59

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

Article 60

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

Article 61

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

⁴⁴ Original text: "A Member of the Legislative Council shall receive a monthly salary determined by law".

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

Article 62

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

TITLE FIVE: THE EXECUTIVE AUTHORITY

Article 63

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

Article 64

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

Formation of the Government

Article 65

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

Confidence in the Government

Article 66

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

3. Confidence shall be granted to the government if it obtains the affirmative vote of the absolute majority of the Members of the Palestinian Legislative Council.

Article 67

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

Powers of the Prime Minister

Article 68

The Prime Minister shall exercise the following powers:

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

Powers of the Council of Ministers

Article 69

The Council of Ministers shall exercise the following powers:

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

Article 70

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

Article 71

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

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

Article 72

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

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

Meetings of the Council of Ministers

Article 73

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

Accountability of the Prime Minister and Ministers

Article 74

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

Article 75

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

Article 76

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

3. The above provisions shall apply to Deputy Ministers, Assistant Ministers and others of similar rank.

Vote of No Confidence

Article 77

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

Article 78

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

Article 79

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

Financial Liability of Members of Council of Ministers

Article 80

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

Remuneration and Allowances of Prime Minister and Ministers

Article 81

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

Article 82

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

Article 83

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

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

Security Forces and Police

Article 84

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

Local Administration

Article 85

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

Public Administration

Article 86

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

Article 87

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

Public Finance

Article 88

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

Article 89

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

Article 90

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

Article 91

1. All revenues received – including taxes, duties, loans, grants and profits accruing to the Palestinian National Authority from managing its property or activities – shall be paid to the Public Treasury. No part of the Public Treasury funds may be allocated or spent for any purpose whatsoever except in accordance with the law.
2. In accordance with the provisions of law, the Palestinian National Authority may form a strategic financial reserve, to encounter fluctuations and emergency situations.

Article 92

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

Article 93

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

Article 94

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

Article 95

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

Article 96

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

TITLE SIX:
THE JUDICIAL AUTHORITY

Article 97

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

Article 98

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

Article 99

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

Article 100

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

Article 101

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

Article 102

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

Article 103

1. A High Constitutional Court shall be established by law to consider:
 - (a) The constitutionality of laws, regulations, and other enacted rules.
 - (b) The interpretation of the Basic Law and legislation.
 - (c) Settlement of jurisdictional disputes which might arise between judicial entities and administrative entities having judicial jurisdiction.
2. The law shall specify the manner in which the High Constitutional Court is formed and structured, the operating procedures it will follow and the effects resulting from its rulings.

Article 104

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

Article 105

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

Article 106

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

The Public Prosecution

Article 107

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

Article 108

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

Article 109

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

TITLE SEVEN: STATE OF EMERGENCY PROVISIONS

Article 110

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

Article 111

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

Article 112

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

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

Article 113

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

Article 114

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

TITLE EIGHT: GENERAL & TRANSITIONAL PROVISIONS

Article 115

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

Article 116

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

Article 117

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

Article 118

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

Article 119

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

Article 120

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

Article 121

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

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

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

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

| Topic | Basic Law with latest modifications (2005) ⁴⁵ | 3 rd draft of DPC (2003) ⁴⁶ | Comments |
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| Reference to the PLO | In the introduction it was mentioned that: "the enactment and ratification of this law by the Legislative Council does spring from the fact that <i>the Palestine Liberation Organization is the sole and legitimate representative of the Arab Palestinian people</i> ". | | <ul style="list-style-type: none"> - The DPC does not refer to the PLO. - The state, once established, will replace the PA but there is no possibility to understand from the DPC what shall be the consequences on the PLO and the perspectives of its cooperation/relation with the state. |
| Reference to Arab Nation and/or Islamic Nation | Article (1) Palestine is part of the larger Arab world, and the Palestinian people are part of the Arab nation. (...) | Article (2) Palestine is part of the Arab nation. <i>The state of Palestine abides by the charter of the League of Arab States.</i> The Palestinian people are part of the Arab and <i>Islamic</i> nations. (...) | <ul style="list-style-type: none"> - Only the DPC refers to the Islamic Nation and to the charter of the League of Arab States. . |
| Separation of Powers | Article (2) The people are the source of power, which shall be exercised through the legislative, executive and judicial authorities, based upon the principle of separation of powers and in the manner set forth in this Basic Law. | Article (64) National sovereignty belongs to the people, who are the source of the authorities. They exercise their duties directly <i>through referenda</i> and general elections or through representatives of the electorate, within its three general powers (...) Article (65) The relationship between the three public authorities shall be based on equality and independence. <i>They shall exercise their authority on the basis of relative separation with respect to their duties and mutual cooperation and oversight.</i> (...) | <ul style="list-style-type: none"> - DPC provides possibilities to put in practice popular sovereignty through referendum in equal terms with general elections and through representatives. - The DPC is an explanation of the principle of separation of powers understood as checks and balances. |

⁴⁵ Translation into English for the Palestine Yearbook of International Law, published in Al-Muqtafi – Institute of Law, Birzeit University. http://muqtafi.birzeit.edu/LegTextE.asp?FORM_LEG_ID=14138

⁴⁶ English version used here was published by Jerusalem Media and Communication Center (<http://www.jmcc.org/documents/palestineconstitution-eng.pdf>); the english version was compared to Nathan Brown translation (<http://www.pcpsr.org/domestic/2003/nbrowne.pdf>) and Arabic version published by Palestine Media Center (<http://www.palestine-pmc.com/arabic/inside1.asp?x=779&cat=3&opt=1>) and sometimes changed accordingly.

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| <p style="text-align: center;">Rule of Law</p> | <p style="text-align: center;">Article (6) The principle of the rule of law shall be the basis of government in Palestine. All governmental powers, agencies, institutions and individuals shall be subject to the law.</p> | <p style="text-align: center;">Article (9) Government shall be based on the principles of the rule of law and justice. All authorities, agencies, departments, institutions and individuals shall abide by the law.</p> | <ul style="list-style-type: none"> - The rule of law constitutes a basic principle for both constitutional documents. |
| <p style="text-align: center;">State's responsibility</p> | | <p style="text-align: center;">Article (10) All activities of the Palestinian public authorities shall, in normal and exceptional circumstances, be subject to administrative, political, legal and judicial review and control. There shall be no provision of law which grants immunity to any administrative action or decision from judicial supervision. <i>The state shall be bound to compensate for damages resulting from errors, and risks resulting from actions and procedures carried out by state officials in the pursuit of their duties.</i></p> | <ul style="list-style-type: none"> - DPC intends to create a compensation administrative jurisdiction. - It shall be noted that according to existent legal system in territories under PA control, the High Court of Justice is the only level of administrative Courts and it has only nullification power, in cases provided by law. |
| <p style="text-align: center;">Reference to Islam and Shari'a</p> | <p style="text-align: center;">Article (4) 1. Islam is the official religion in Palestine. Respect for the sanctity of all other divine religions shall be maintained. 2. The principles of Islamic <i>Shari'a</i> shall be a principal source of legislation.</p> | <p style="text-align: center;">Article (5) Arabic and Islam are the official Palestinian language and religion. Christianity and all other monotheistic religions shall be equally revered and respected. <i>The Constitution guarantees equality in rights and duties to all citizens irrespective of their religious belief.</i></p> <p style="text-align: center;">Article (7) The principles of Islamic <i>Shari'a</i> are a principle source of legislation. <i>Civil and religious matters of the followers of monotheistic religions shall be organized in accordance with their religious teachings and denominations</i> within the framework of law (...).</p> | <ul style="list-style-type: none"> - DPC gathers language and religion as if they are both considered as part of Palestinian traditions. - For this reason, the same article provides that this article will have no legal consequences on non-Muslims. - Only the DPC refers to possibilities of monotheistic religions to (continue to) legislate in personal status issues. |

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| <p style="text-align: center;">System of Government</p> | <p style="text-align: center;">Article (5) The governing system in Palestine shall be a democratic representative system, based upon political and party pluralism. (...)</p> | <p style="text-align: center;">Article (8) The Palestinian political system shall be a <i>parliamentarian</i> representative democracy based on political pluralism. (...)</p> | <ul style="list-style-type: none"> - DPC provides expressly that Palestinian political system is parliamentary. Something that is not supposed to be declared or provided in a constitutional text but rather should be understood from the kind of separation of powers the constitution creates. - Following the analysis of the system in Palestine, one may note the existence of some elements of presidential system. - For this reason, some ended by qualifying the Palestinian political system as being semi presidential, rationalized parliamentary or mixed system. |
| <p style="text-align: center;">President's Mandate and Election</p> | <p style="text-align: center;">Article (5) (...) The President of the National Authority shall be directly elected by the people. (...)</p> <p style="text-align: center;">Article (34) The President (...) shall be elected in a general and direct election (...)</p> <p style="text-align: center;">Article (36) The term of the presidency of the National Authority shall be <i>four years</i>. The President shall have the right to nominate himself for a second term of presidency (...)</p> | <p style="text-align: center;">Article (115) The President shall be elected directly by the people for a <i>five year term renewable once</i>.</p> | <ul style="list-style-type: none"> - The DPC provides for five year term and renewable once only. - The newly amended article 36 (the 2005 amendments) provides for four years mandate renewable only once. - Original text had extended mandate of President to the Interim period. |
| <p style="text-align: center;">President's oath</p> | <p style="text-align: center;">Article (35) Before assuming office, the President shall take the following oath before the Legislative Council and <i>in the presence of the Speaker of the Palestinian National Council</i> and the President of the High Court: (...)</p> | <p style="text-align: center;">Article (116) The elected president shall assume his duties immediately upon conclusion of his predecessor's term. Prior to exercising the duties of his office, the president shall take the following constitutional oath, before the House of Representatives and in the presence of the head of <i>the supreme judicial council</i>: (...)</p> | <ul style="list-style-type: none"> - In the DPC, the speaker of the PNC is not present while the reference is done to the President of the High Judicial Council and not the President of the High Court (although, they are to be covered by the same person). |

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| President's Prerogatives | | <p style="text-align: center;">Article (113)</p> <p>The President of the State is the President of the Republic. He shall uphold the Constitution and the unity of the people. He shall guarantee the continuity of the existence of the state and its national independence. He shall guarantee the proper functioning of the public authorities. He shall exercise his jurisdiction, and his responsibilities shall be determined pursuant to the provisions of the Constitution. (...)</p> | <ul style="list-style-type: none"> - The DPC presents list of powers and qualifications that are related to the President in his capacity of "head of state". - The DPC states a complete list of prerogatives (art. 125) including the co-signature power to engage responsibility of ministries. |
| Executive Authorities of the President | <p style="text-align: center;">Article (38)</p> <p>The President of the National Authority shall exercise his executive duties as specified in this law.</p> <p style="text-align: center;">Article (63)</p> <p>(...) Except for the executive powers of the President of the National Authority, as specified in this Basic Law, executive and administrative powers shall be within the competence of the Council of Ministers.</p> | <p style="text-align: center;">Article (113)</p> <p>(...) Except those powers that are constitutionally attributed to the president of the State, the government's executive and administrative duties shall be the responsibility of the Cabinet.</p> | <ul style="list-style-type: none"> - Executive authority of the President is exclusive to the provisions of the BL and DPC. - Other powers of the President of the PA, in his capacity of an elected President, are not necessarily provided in the BL in exhaustive way. |

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| Executive Authority | <p style="text-align: center;">Article (63)</p> <p>The Council of Ministers (the “government”) is the highest executive and administrative instrument; it shoulders the responsibility for implementing the program that has been approved by the legislative branch. (...)</p> <p style="text-align: center;">Article (68)</p> <p>The Prime Minister shall exercise the following powers: (...) 3. To preside over sessions of the Council of Ministers. (...)</p> | <p style="text-align: center;">Article (145)</p> <p>The executive authority shall be entrusted with the council of ministers.</p> <p style="text-align: center;">Article (140)</p> <p>The prime minister practices the following competencies: (...) - He calls the council of ministers to meet, sets its agenda of which he informs the president of the state, he presides its sessions except the ones attended by the president of the state. (...)</p> | <ul style="list-style-type: none"> - Government (Cabinet) and Council of Ministers are used as synonymous in the BL and the DPC. - The Prime Minister presides the Council of Ministers, unless in those cases when the President is Present in the meetings of the Council of Ministers. - In other systems, with similar constitutional arrangements like France, the President of the Republic is the President of the Council of Ministers and exceptionally the Prime Minister. Thus, in France, the Council of Ministers is distinguished from the cabinet; the later being synonymous to the Prime Minister and the Ministers only. - Executive powers of the Prime minister and the Council of Ministers are provided in specific articles. However, all other executive powers, except those expressly done to the President, are of competence of the Cabinet. |
| President vs. Government | <p style="text-align: center;">Article (45)</p> <p>The President of the National Authority shall appoint the Prime Minister and authorize the latter to constitute his government. The President shall have the right to dismiss the Prime Minister or to accept his resignation and to request him to convene the Council of Ministers.</p> | <p style="text-align: center;">Article (122)</p> <p>After consultations with the representative parties, the president shall nominate the prime minister <i>from the party that obtained the largest number of seats</i> in the House of Representatives. If the formation of a government is impossible within a three week period, the President nominates a prime minister from the party that obtained the second highest number of seats (...).</p> | <ul style="list-style-type: none"> - The DPC had codified the constitutional 'urf (custom) of the President assigning for the office of prime Minister, first to the nominee of the party in majority at the Parliamentary assembly. In case of failure, he may nominate the nominee of the second party and so on. |
| | <p style="text-align: center;">Article (46)</p> <p>The <i>Council of Ministers shall assist the President in the performance of the President’s duties and exercise of powers</i>, in the manner stipulated in this Basic Law.</p> | <p style="text-align: center;">Article (121)</p> <p><i>The president of the state may direct the Cabinet in setting the general policy.</i></p> | <ul style="list-style-type: none"> - Article 46 was important in the 2002 BL where there was not the office of Prime Minister; following the 2003, it is unclear the relevance of such a provision and the legal consequences on the President's power towards the Cabinet members. |

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| | | | <ul style="list-style-type: none"> - The DPC, on the contrary, added a problematic article in which the President may involve in setting the general policy, which is normally the prerogative of the cabinet, responsible in front of the parliamentary assembly. |
| President vs. Palestinian Forces | <p>Article (39) The President of the National Authority is the Commander-in-Chief of the Palestinian Forces.</p> | <p>Article (127) The president of the state is the supreme commander of the Palestinian national security forces which is headed by a concerned minister.</p> | <ul style="list-style-type: none"> - The DPC tries to figure out how possibly the relationship between President-Cabinet (or Minister) concerning security forces. |
| Foreign Representation offices | <p>Article (40) The President of the National Authority shall appoint and terminate the services of the National Authority's delegates to foreign countries, international organizations and foreign agencies. The President shall accept the credentials of foreign delegates to the Palestinian National Authority.</p> | <p>Article (126) <i>Upon the recommendation of the minister of foreign affairs</i>, the president of the State shall appoint, and terminate the duties of, ambassadors and representatives of the state of Palestine to states, regional and international organizations. He shall receive the credentials of representatives of foreign states and representatives of regional and international organizations to the state of Palestine.</p> | <ul style="list-style-type: none"> - According to Oslo agreements, foreign affairs are not of competence of the PA. - The PLO remained, theoretically, the representative of the Palestinian people and had (originally) the power (through political department and Executive Committee) to nominate Palestine's representative offices. - However, the PA had acquired <i>de facto</i> power over Palestinian representation offices that became also financially dependent on the PA. - The PLC had adopted a controversial Diplomatic Corps law n. 13 of 2005. - The DPC provides that nominations are done upon recommendation of minister of foreign affairs. |

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| <p style="writing-mode: vertical-rl; transform: rotate(180deg);">PA President 'Legislative powers': Promulgation of & objection on Laws adopted by Parliamentary assembly</p> | <p style="text-align: center;">Article (41)</p> <p>1. The President of the National Authority shall promulgate the laws voted by the Palestinian Legislative Council within thirty (30) days of their transmittal to him. The President may refer a law back to the Legislative Council with his observations and the reasons of his objection within the same period. Otherwise, the law will be deemed promulgated and will be published in the <i>Official Gazette</i>.</p> <p>2. If the President of the National Authority returns the proposed law to the Legislative Council in conformity with the time limit and conditions specified in the previous paragraph, the Council shall debate the law again. If the Council passes the law a second time by a majority of two-thirds of its members, the proposed law shall be considered approved and shall be immediately published in the <i>Official Gazette</i>.</p> | <p style="text-align: center;">Article (123)</p> <p>The president of the state shall ratify laws after their approval by the House of Representatives, within thirty days of their referral to him, and he orders their publication.</p> <p>The president of the state may object to a draft law that was approved by the House of Representatives, and may request its reconsideration accompanied by the reasons for his objection within thirty days of having received such draft law. If the mentioned legal time limit ends without ratifying the law or objecting to it, it would be considered effective and should be published in the official gazette.</p> <p>If the president of the state returns the law previously approved by the House of Representatives within the legal time limit, and such draft receives a second approval by the House of Representatives by a majority of two thirds of its members, it shall be considered a law and so promulgated.</p> | <p>- There are no changes between the BL and the DPC concerning the procedures of ratification or objection of laws. However, the DPC is –here again- more detailed.</p> |
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| Decree-Laws | <p style="text-align: center;">Article (43)</p> <p>The President of the National Authority shall have the right, in cases of necessity that cannot be delayed, and when the Legislative Council is not in session, to issue decrees that have the power of law. These decrees shall be presented to the Legislative Council in the first session convened after their issuance; otherwise they will cease to have the power of law. If these decrees are presented to the Legislative Council, as mentioned above, but are not approved by the latter, then they shall cease to have the power of law.</p> | <p style="text-align: center;">Article (130)</p> <p>After the declaration of the <i>state of emergency</i>, the <i>Council of Ministers</i> may, if events necessitate the taking of speedy measures to confront situations that cannot be delayed, issue decrees that gain approval by the president within a period not exceeding fifteen days and then have the force of law. They are to be presented to the House of Representatives in its first meeting after the declaration of the state of emergency, or in the session to extend the state of emergency, whichever occurs first, to decide upon it, otherwise they lose their legal force retroactively. Should the House of Representatives not approve them, they shall cease to have legal effect, and the house would decide how to remedy its effects without any prejudice to material rights of third parties.</p> | <ul style="list-style-type: none"> - The DPC changed substantively the article concerning decree-laws. It is the Council of Ministers who may adopt decree-laws (endorsed then by the President) and only in the state of emergency. |
| Accountability of Government to the President | <p style="text-align: center;">Article (5)</p> <p>(...) <i>The government shall be accountable to the President</i> and to the Palestinian Legislative Council. (...)</p> <p style="text-align: center;">Article (74)</p> <p>1. The Prime Minister is accountable to the President of the National Authority for his actions and the actions of his government.</p> <p>2. Ministers are accountable to the Prime Minister, each within the limits of their jurisdiction and for the actions of their respective ministry.</p> <p>3. The Prime Minister and members of the government are jointly and individually accountable to the Legislative Council.</p> | <p style="text-align: center;">Article (137)</p> <p>The prime minister shall preside over the activities of the government. Every minister shall be answerable to the Cabinet in accordance to the procedures as specified by the constitutional rules. The prime minister and the ministers are individually and jointly responsible before the House of Representatives for the actions of the government.</p> | <ul style="list-style-type: none"> - The BL provides that the Prime Minister is also accountable to the President. There is no similar provision in the DPC - Article of BL 74, Contrary to article 5, states that only Prime minister is accountable to the President. However, it is only apparent contradiction since the resignation of the Prime minister means the dissolution of the government (art. 83: 3-4). |

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| In case of vacancy of the President's office | <p style="text-align: center;">Article (37)</p> <p>(...) 2. If the office of the President of the National Authority becomes vacant due to any of the above cases, the <i>Speaker of the Palestinian Legislative Council</i> shall temporarily assume the powers and duties of the Presidency of the National Authority for a period not to exceed sixty (60) days, during which free and direct elections to elect a new President shall take place in accordance with the Palestinian Election Law.</p> | <p style="text-align: center;">Article (120)</p> <p>If the office of the president becomes vacant or the House of Representatives decides to charge him in accordance with Article (132) from the Constitution, <i>the President of the Council of Ministers</i> shall assume presidency of the state for a period not exceeding sixty days, during which presidential elections are carried out in accordance with electoral laws. Should the President of the Council of Ministers wish to submit his candidacy for presidency, or should a legal hindrance prevent him from assuming presidency, the <i>head of the Constitutional Court</i> shall assume presidency temporarily until election of the president. The head of the court may not be a presidential candidate.</p> | <ul style="list-style-type: none"> - The DPC provides a very interesting –not very much debated- article: it is the Prime Minister, not the Speaker of the Legislative assembly that will have the presidency ad interim, in case of vacancy of the office of the President. - In case of incapacity, it is the President of the Constitutional Court. |
| Legislative Council Mandate | <p style="text-align: center;">Article (47)</p> <p>1. The Palestinian Legislative Council is the elected legislative authority.</p> <p>2. The Legislative Council shall assume its legislative and oversight duties as prescribed in its Standing Orders, insofar as they do not contradict the provisions of this law.</p> <p>3. The term of the Legislative Council shall be four years from the date of its being elected and the elections shall be conducted once each four years in a regular manner.</p> <p style="text-align: center;">Article (47 bis)</p> <p>The term of the current Legislative Council shall terminate when the members of the new elected Council take the constitutional oath.</p> | <p style="text-align: center;">Article (66)</p> <p>The House of Representatives shall assume legislative power. It shall endorse the general budget, which shall be prepared by the Cabinet. It shall supervise the actions of the executive branch in the manner specified by the Constitution.</p> <p style="text-align: center;">Article (68)</p> <p>Members of the House of Representatives are elected for five years and may be re-elected more than once. The term of the House of Representatives may not be extended except in case of necessity and by virtue of a law ratified by two-thirds of the total number of the House of Representatives.</p> | <ul style="list-style-type: none"> - Clause 3 of the BL was amended in 2005. The original text: "The term of this Council shall be the interim period". This interesting change reflects the fact that transitional PA is becoming more institutionalized into central authority of a state and that the interim period may become permanent. Article 47 <i>bis</i> also was added in the 2005 amendments. - In the DPC, under the title "legislative branch", there is a reference to a House of Representatives who assumes the legislative power (66-109) and a Consultative Council (110-112) with no legislative authority. The last council was at center of debates for being formed of Palestinians of the Diaspora, thus, questioning on the status of the PLO institution, mainly the PNC following the establishment of the state. |

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| Dissolution of the Parliamentary Body | <p>The BL does not provide for the dissolution of the PLC or anticipated elections.</p> | <p>Article (89) In case of necessity, the President of the State, or the speaker of the Council of ministers may suggest dissolution of the House of Representatives. If the dissolution is ratified by two-thirds of the members of the Council of ministers, the President of the State shall issue the decree of dissolution. The Government shall then call for election of a new House of Representatives within sixty days and in accordance to the procedure defined by the election law. If elections are not held, the House resumes its duties until a new House is elected. The House of Representatives may not be dissolved within the first year of its formation, or during the period of a declared 'state of emergency' as provided for in the Constitution.</p> | <ul style="list-style-type: none"> - Contrary to the BL, the DPC contains a possibility of dissolution of the elected legislative body. However, it gives this power to the Council of Ministers although with a decree from the President. - Different interpretations may be given to the absence of provisions in the BL concerning the possibility to end the PLC mandate outside the regular elections each four years. The absence is interpreted as an interdiction or as permission according to the point of view defended. |
| Interdiction of duplicating functions | <p>Article (50) In its first meeting, the Council shall elect a Speaker, two Deputies to the Speaker, and a Secretary-General. Together, they shall make up the Office of the Legislative Council. It shall not be permitted to be a member of the Office and hold at the same time the position of President of the National Authority, or Minister, or any other governmental position.</p> | <p>Article (70) In the first meeting of the first annual session, the House of Representatives shall elect its speaker, two deputies, and a secretary-general. They shall constitute the body of the presidency of the House of Representatives. Members of the body of the presidency of the House of Representatives may not assume ministerial or other governmental post. A member of the House of Representatives may assume the post of minister, provided that the total number of Deputies Ministers in government does not exceed 50% of the total number of ministers.</p> | <ul style="list-style-type: none"> - According to BL, only members of the Office of the Presidency are forbidden from having governmental positions. It is not clear, however, if there are limitations of possible number of ministers that are possibly nominated from within the deputies and whether it is possible for them, once in function, to participate in the vote as other deputies with possible impact on the principle of separation of powers. - The DPC provides expressly that a deputy can be a minister but the total number of deputies-ministers shall not exceed 50%. |

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| Legislative initiative | <p style="text-align: center;">Article (56)</p> <p>Each Member of the [Legislative] Council shall have the following rights: (...) 2. To propose laws. Rejected proposals may not be resubmitted within the same term. (...)</p> <p style="text-align: center;">Article (70)</p> <p>The Council of Ministers shall have the right to transmit draft laws to the Legislative Council, to issue regulations and to take necessary actions to implement laws.</p> | <p style="text-align: center;">Article (78)</p> <p>The President of the State in accordance with a decision of the council of ministers, the speaker of the House of Representatives or five of its members, shall have the right to suggest draft laws. Each suggestion that does obtain the approbation of the required majority may not be submitted for discussion in the same session, except by decision that is approved by a two-thirds majority of the House of Representatives.</p> | <ul style="list-style-type: none"> - DPC gives the right to present draft laws to the President not to the Cabinet. - DPC gives possibilities to five deputies (not one as in the BL) to present draft laws. - Several studies had suggested the adoption of similar provision in the BL where a single deputy is not granted the possibility to initiate legislative process and to give priority to governmental proposed draft laws. |
| Independence of Judiciary | <p style="text-align: center;">Article (97)</p> <p>The judicial authority shall be independent and shall be exercised by the courts at different types and levels. The law shall determine the way they are constituted and their jurisdiction. They shall issue their rulings in accordance with the law. Judicial rulings shall be announced and executed in the name of the Palestinian Arab people.</p> <p style="text-align: center;">Article (98)</p> <p>Judges shall be independent and shall not be subject to any authority other than the authority of the law while exercising their duties. No other authority may interfere in the judiciary or in judicial affairs.</p> | <p style="text-align: center;">Article (162)</p> <p>The judicial branch shall be independent. It shall have original jurisdiction to perform the judicial function, and shall be entrusted with deciding all disputes and crimes. The law shall define the institutions of the judicial branch, and regulate their structure and the types of courts, and their levels, jurisdictions and procedures. Exceptional courts may not be formed.</p> <p style="text-align: center;">Article (171)</p> <p>Judges are independent. There shall be no authority over them in their judicial duties except and their conscience, and shall not be removed. The law shall arrange disciplinary questioning of judges before the Supreme Judicial Council in cases defined by without infringement on their independence in performing their duties. No person whatsoever shall be permitted to obstruct justice or the execution of final judicial sentences. (...)</p> | <ul style="list-style-type: none"> - Article 99 of the BL provides further guarantees for independence of Judges. The same applies for the DPC. - Both the BL and the DPC adopts the double vision of independence related to judiciary: the independence of the (judicial) institution and the independence of the judge himself. |

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| High Judicial Council | <p>Article (100) A High Judicial Council shall be created. The law shall specify the way it is constituted, its responsibilities and its operating rules. The High Judicial Council shall be consulted about draft laws relating to the Judicial Authority, including the Public Prosecution.</p> | <p>Article (163) A High Judicial Council shall be entrusted with the affairs of the judicial institutions. (...) This council shall be consulted on draft laws regulating judicial affairs. This council shall have the right to set its own internal regulation.</p> | |
| Shari'a and religious Courts | <p>Article (101) 1. Matters governed by <i>Shari'a</i> law and matters of personal status, shall come under the jurisdiction of <i>Shari'a</i> and religious courts, in accordance with the law. (...)</p> | <p>There is no direct reference in the DPC of the jurisdiction of religious and shari'a courts.</p> | <ul style="list-style-type: none"> - The DPC does not make direct reference to existent duality of jurisdiction between civil/Shari'a & religious courts; however, it leaves for monotheistic religions the power to legislate in personal status affairs. Indirectly it may mean the continuation of precedent situation; however, it may be interpreted as the beginning of ending such a duality. |
| Military Courts | <p>Article (101) (...) 2. Military courts shall be established by special laws. Such courts may not have any jurisdiction beyond military affairs.</p> | <p>Article (175) A military court shall be established and entrusted with deciding military disputes. It shall not decide any case outside the military sphere.</p> | <ul style="list-style-type: none"> - There are common provisions intending into keeping military courts limited to military affairs. - Both constitutional texts talk about necessity to be established by law. Until now, military courts are governed by PLO penal code. |
| Administrative Courts | <p>Article (102) Administrative courts may be established by law, to consider administrative disputes and disciplinary claims. Any other jurisdiction of such courts, and procedures to be followed before them, shall be specified by the law.</p> | <p>Article (174) A high court of justice shall be established to decide administrative disputes and disciplinary cases as they are defined by their establishing law. Such law shall regulate its rules of operation, the terms of appointment of its judges and employees and the procedures to be followed before it. Lower administrative courts may be established by law.</p> | <ul style="list-style-type: none"> - The BL and DPC left the issue of establishing constitutional courts as an option, contrary to constitutional court. - The High Court of Justice remains the only level of administrative courts. |

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