

PONTIFICIA UNIVERSITAS LATERANENSIS  
INSTITUTUM UTRISQUE IURIS  
Theses ad Doctoratum in Utroque Jure

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**WHICH CONSTITUTION  
FOR THE PALESTINIAN LEGAL SYSTEM?**

**ROMA 2003  
PONTIFICIA UNIVERSITA' LATERANENSE  
Piazza S. Giovanni in Laterano, 4**

## TABLE OF CONTENTS

LIST OF ABBREVIATIONS	III
PROLOGUE	1
<b>PART ONE</b>	<b>5</b>
THE PALESTINIAN LEGAL SYSTEM AND INSTITUTIONS	
<b>CHAPTER ONE:</b>	<b>6</b>
THE PALESTINIAN LEGAL SYSTEM FROM THE OTTOMAN EMPIRE TO THE OSLO AGREEMENTS	
<b>CHAPTER TWO:</b>	<b>55</b>
THE PALESTINIAN INSTITUTIONS	
<b>PART TWO</b>	<b>88</b>
THE PALESTINIAN CONSTITUTIONAL SYSTEM AND THE INTERNATIONAL STANDARDS OF GOOD GOVERNANCE	
<b>CHAPTER THREE</b>	<b>89</b>
THE CONSTITUTIONAL ARRANGEMENT OF POWER BETWEEN THE AUTHORITIES IN THE BASIC LAW AND THE DRAFT PALESTINIAN CONSTITUTION	
<b>CHAPTER FOUR</b>	<b>124</b>
THE CONSTITUTIONAL PROVISIONS REGARDING HUMAN RIGHTS AND RELIGION	
<b>POST SCRIPTUM</b>	<b>154</b>
<b>EPILOGUE</b>	<b>162</b>
<b>BIBLIOGRAPHY</b>	<b>165</b>

## LIST OF ABBREVIATIONS

<b>AEC:</b>	Arab Executive Committee
<b>AHC:</b>	Arab High Committee
<b>BL:</b>	Basic Law
<b>CC:</b>	Central Council
<b>CM:</b>	Council of Ministers
<b>DBL:</b>	Draft of Basic Law
<b>DOP:</b>	Declaration of Principles of 1993, Oslo I
<b>DPC:</b>	Draft of the Palestinian Constitution
<b>EC:</b>	PLO's Executive Committee
<b>GS:</b>	Gaza Strip
<b>HR:</b>	Human Rights
<b>IA:</b>	Interim Agreement, Oslo II
<b>IDF:</b>	Israeli Defence Force
<b>LC:</b>	Legislative Council
<b>LDC:</b>	Less Developed Countries
<b>MC:</b>	Military Commander
<b>NC:</b>	National Council
<b>OETA:</b>	Occupied Enemy Territories Administration
<b>OPT:</b>	Occupied Palestinian Territories
<b>PANU:</b>	Palestinian Arab National Union
<b>PLC:</b>	Palestinian Legislative Council
<b>PLO:</b>	Palestine Liberation Organization
<b>PM:</b>	Prime Minister
<b>PA:</b>	Palestinian Authority
<b>PNA:</b>	Palestinian National Authority
<b>PNC:</b>	Palestinian National Council
<b>PNCh:</b>	Palestinian National Charter of 1968
<b>PS:</b>	President of the State
<b>RL:</b>	Rule of Law
<b>SJC:</b>	Supreme Judicial Court
<b>7<sup>th</sup> DBL:</b>	Seventh Draft of the Temporary Basic Law
<b>TP:</b>	Transitional Period
<b>UN:</b>	United Nations
<b>UNGA:</b>	United Nations General Assembly

**WB:** West Bank

**WBGs:** West Bank and Gaza Strip

**WF:** Al-Waqa'a al-Felasteeniyya {PNA Official Gazette}

## PROLOGUE

The Israeli-Palestinian conflict is one of the oldest conflicts of the last century. Many wrote books, made researches, and took position. The UN resolutions are numerous and can provide the basis for a pacific resolution. The international community seems to reach the belief of the necessity to create a Palestinian state, a pacific and democratic one, which, together with Israel, would live side by side. Palestinians accept the principle of land for peace; Israel wants security for peace. Interests are not contradictory but complementary. Palestinians suffer the occupation, movement restrictions, cities' closure, economic underdevelopment and daily humiliation. Israelis suffer insecurity, suicide attacks, fear of the Arabs and the sensation of persecution. The peaceful resolution of this long conflict needs good will from both sides and the intervention of a big power (USA) and the imposition of a fair solution with the participation of the European Union, the UN, and Russia. Compromise is the way; still, any solution needs to be based on major UN resolutions, which take into consideration the Palestinian people right to self-determination, to their national resources, and to dignity, peace and security since the international community is based on the equality of sovereign states and people. Human rights are exclusive of no one. Every person, Palestinian and Israeli included, has equal rights to life, progress and dignity.

The constitutionalism of the Palestinian entity is part of this big project: peaceful resolution. Respect of rule of law, democratic principles, human rights, accountability and transparency of government, distribution of power, respect of minorities are the principles that the Palestinian people share with most of civilized populations of the world, since those principles are not strange to his Arab-Islamic culture. Israeli occupation hinders democratization of the Palestinian society. Any constitution, in this sense, is useless when population are in daily contacts with the occupants, facing the impotence of their National Authority that was elected to represent and govern them. Still, Palestinians decided to make their part, approving a Basic Law, and drafting a Constitution for the future Palestinian state. Western academics showed a lot of interest in those documents that were described as the most liberal of the Arab world. The value that constitutional

documents have in the Arab world is under serious discussion. The Palestinian one also has to be considered in that context. The Palestinian state would have in common many aspects of other Arab states, such as the centralization of power or the personification of power. The Palestinian state needs to be different. The Palestinian people, after a century of suffering, deserves a different Arab state for their own interest and for peace and development the region.

This research wants to be the first approach to the Palestinian legal system and to the constitutional development in the Palestinian context. The question that many may ask is: “which constitution for the Palestinian legal system?” This research intends to give answers and to ask many other questions. Many are the documents collected here; for this reason, the bibliography constitutes a fundamental part of this thesis. Many are the articles taken from the web, since the Palestinian constitutional system is in continuous progress. The research is written in English, since my interlocutors are not only Palestinian constitutionalists but also western academics. I used various data from the Palestinian National Authority (PNA) official publications. Other documents were simply the contribution of the Palestinian civil society, including Palestinian individual intellectuals and NGO’s from the Occupied Territories and from abroad, which showed continuous interest, although with many doubts on the utility of these efforts. Besides, I used many official documents, such as UN resolutions.

The occupation of the Palestinian territories (one state only: Israel, for the Jewish people) was totally contrasted by Palestinian people and expressed in their different experiences: all-Palestine government, the Palestine Liberation Organization (Palestine is only for Palestinians) causing continuous hostility and conflict between parties. The Oslo-Agreements seems to structure the principle of land for peace. Parties in conflict and the international community reached the belief of the two-states solution (two states, Israel and Palestine, living side by side in peace and security). The Palestinian reality is very complex. I limited myself in studying three elements: the applicable law in the Palestinian territories, the Palestinian expressions of nationhood and the legal order that will be applicable in the Palestinian state, for Palestinian citizens, and territories. Those

three elements (territory, people, and sovereign legal order) are in continuous progress. They would be the three elements of the future Palestinian state.

The terms used here need to be clarified. For example, the term 'Palestine' when treating the Ottoman Caliphate and the British mandate is the territorial unit that the League of Nations demarked and defined at the close of First World War. Later on, this term would be indicated by 'historical Palestine' or 'mandatory Palestine'. When we say West Bank (WB) from 1948 to 1967, Jerusalem is included. While in the terms of Oslo agreements and the further studies made on it, WB is considered as not including Jerusalem. This was possible because Jerusalem was left for final status negotiations.

The methodology that I followed in this dissertation was inevitably the analytic methodology. Since the beginning, when collecting documents, the major work to do was to distinguish periods, documents, and separate them. In the first Part, in fact, it was a study of the different legal systems in the Palestinian territories in the different historical periods. I tried to distinguish the causes and the results. After four centuries of the Ottoman control, of the British occupation and Mandate, of the Jordanian and Egyptian control of WB and Gaza Strip (GS) and the changes made by the Israeli military government after the occupation of 1967, what are the legal changes in the Palestinian territories? Then I analyzed the Oslo agreements and its impact to the Palestinian legal system. In the second chapter, it was also the analytic methodology since I distinguished and separated the three experiences and institutions in Palestinian history: the All-Palestine government, the PLO and the PNA, which are the three different expressions of Palestinian nationhood.

In the second part, I used also the analytic methodology, since it was also a study of the two constitutional documents: the BL for the PNA and the 1<sup>st</sup> DPC. At the end of every chapter, in a kind of small conclusion, I followed the synthetic methodology, trying to put together the different elements collected and analyzed previously in the same chapter. In making that, I followed also the deductive methodology: I derived from some preliminary observations some particular and logic conclusions, regarding the main principles of good governance, democracy,

and respect of human rights in the constitutional documents, taking into consideration the special context in which the Palestinians are living now.

In the last months the PLC amended the BL and the constitutional committee of the PLO re-considered the DPC. I reported these changes in the POST SCRIPTUM that updates my work.

## **PART ONE**

### **THE PALESTINIAN LEGAL SYSTEM AND INSTITUTIONS**

## **CHAPTER ONE**

# **THE PALESTINIAN LEGAL SYSTEM FROM THE OTTOMAN EMPIRE TO THE OSLO AGREEMENTS**

<b>CHAPTER ONE</b> .....	6
<b>THE PALESTINIAN LEGAL SYSTEM FROM THE OTTOMAN EMPIRE TO THE OSLO AGREEMENTS</b> .....	6
INTRODUCTION .....	9
§1 THE PALESTINIAN LEGAL SYSTEM BEFORE OSLO AGREEMENTS .....	11
I. THE PALESTINIAN LEGAL SYSTEM BEFORE THE ISRAELI OCCUPATION.....	11
1. THE PALESTINIAN LEGAL SYSTEM WITHIN THE OTTOMAN EMPIRE .....	11
2. THE PALESTINIAN LEGAL SYSTEM UNDER THE BRITISH RULE .....	13
A. THE BRITISH OCCUPATION .....	13
B. THE MANDATE FOR PALESTINE.....	14
3. THE PALESTINIAN LEGAL SYSTEM FOLLOWING THE WAR OF 1948.....	17
A. THE LEGAL SYSTEM IN THE WEST BANK FROM 1948 TO 1967 .....	18
B. THE LEGAL SYSTEM IN GAZA STRIP FROM 1948 TO 1967.....	20
II. THE LEGAL SYSTEM IN WEST BANK AND GAZA STRIP AFTER 1967 .....	23
1. INTERNATIONAL LAW RESTRICTIONS TO LEGAL CHANGES IN OCCUPIED TERRITORIES .....	23
2. THE HAGUE REGULATIONS AND THE 4 <sup>TH</sup> GENEVA CONVENTION WITH REGARDS TO THE PALESTINIAN OCCUPIED TERRITORIES .....	24
3. THE DEFENSE (EMERGENCY) REGULATIONS .....	26
4. MAIN CHANGES INTRODUCED TO THE LEGAL AND ADMINISTRATIVE SYSTEM IN THE OCCUPIED TERRITORIES.....	26
A. THE CREATION OF THE ISRAELI MILITARY GOVERNMENT .....	26
B. MILITARY ORDERS REGARDING LAND AND WATER .....	28
C. CHANGES INTRODUCED IN THE JUDICIAL SYSTEM .....	28
D. ADMINISTRATIVE SEPARATION BETWEEN PALESTINIANS AND ISRAELI SETTLERS .....	29
§2 THE LEGAL CHANGES INTRODUCED INTO THE PALESTINIAN OCCUPIED TERRITORIES AFTER THE ISRAELI-PALESTINIAN AGREEMENTS .....	32
I. PRELIMINARY NOTES .....	32
II. THE ISRAELI-PALESTINIAN AGREEMENTS .....	34
1. HISTORICAL BACKGROUND.....	34
2. THE PARTIES IN THE AGREEMENTS .....	35
2. LEGAL NATURE OF THE AGREEMENTS BETWEEN ISRAEL AND PLO.....	35
4. THE MAIN AGREEMENTS BETWEEN ISRAEL AND THE PLO .....	37
II. THE PALESTINIAN NATIONAL AUTHORITY .....	39
1. THE AUTONOMOUS TERRITORIES .....	40
A. THE STATUS OF WEST BANK AND GAZA STRIP .....	40
B. THE NATURE OF THE PALESTINIAN AUTONOMY .....	41
C. THE EXTENSION OF THE PALESTINIAN AUTONOMY.....	44
2. THE PALESTINIAN ‘COUNCIL’ AS PROVIDED BY THE INTERIM AGREEMENT..	46
A. INTRODUCTION .....	46

B. THE PALESTINIAN ‘COUNCIL’ .....	47
a. THE JURISDICTION OF THE COUNCIL.....	47
b. LEGISLATIVE, EXECUTIVE, AND JUDICIAL POWER OF THE COUNCIL.....	49
c. THE STRUCTURE OF THE COUNCIL.....	50
d. ELECTION OF THE COUNCIL.....	50
III. SECURITY AND PUBLIC ORDER IN THE INTERIM AGREEMENT .....	52
1. COORDINATION AND COOPERATION .....	52
2. THE PALESTINIAN POLICE.....	53
3. AIRSPACE AND THE COASTLINE TO THE SEA OF GAZA.....	53
4. POWERS OF ISRAELI FORCES UNDER PALESTINIAN JURISDICTION.....	53
IV. CONCLUSIVE NOTES .....	54

## INTRODUCTION

This chapter treats the Palestinian legal system. Scholars used to divide their study into four periods: Palestine under the Ottoman Empire, Palestine under the British Mandate, Palestine after the war of 1948, and the WBGS under the Israeli occupation since 1967. Some started to speak about pre-agreements and post-agreements, in which they present the changes in legal system following the Oslo agreements and the creation of the PNA. Recently, some consider the situation after the 'end' of Oslo agreements. Here, a different division is adopted. I will study first the legal system in the Palestinian territories until 1967. In a second moment, I will study the changes in the Palestinian legal system, which the Israeli occupation introduced, and consolidated later with the Oslo agreements while occupation continued.

The historical-legal study serves as introduction to the next sub-chapter dedicated to the Israeli-Palestinian agreements, and to understand the context in which the PNA exercised its legislative activity within its jurisdiction, especially regarding drafting a Basic Law. The laws in force in all these different periods have two things in common: first, laws destination were the Palestinians; second, laws were not a product of Palestinian law-making<sup>1</sup>. Following Rousseau's social contract theory, Palestinian exclusion from deciding on laws applicable on them means the exclusion of the legitimacy of these laws, since there is no social contract established between the rulers and the ruled. This may not be the case -as many may rightly object- of the West Bankers from 1948 to 1967 since they were equally represented in the Jordanian parliament, neither the case of Palestinians under the Ottomans since the Caliphate did have legitimacy based on Islamic religion.

Chapter one of this research will consider only *de facto* situation, the laws in force and the approved and effective constitutional documents applied in Palestine through the twentieth century. Palestinians failed attempts to express their national rights will be considered in the second chapter. The division

between *de facto* situation, from one side, and the legitimate Palestinian national claims from the other side is artificial here, since there is no way to understand the first without the second, and vice versa. Despite that fact, the distinction outlined here still valid to show the difference between effective laws applied in Palestine and Palestinian national claims expressed in popular protests (since the British mandate), government establishment (the All-Palestine government of 1948), liberation movement creation (PLO) or political declarations (PLO charter, declaration of Independence) which influenced the legal system of Palestinian territories only indirectly.

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<sup>1</sup> Cf. BOURLOND A., *Teaching Law in Palestine Strategies and Challenges*, p.5. For detailed information about books and articles cited in this thesis please see bibliography.

## §1 THE PALESTINIAN LEGAL SYSTEM BEFORE OSLO AGREEMENTS

### I. THE PALESTINIAN LEGAL SYSTEM BEFORE THE ISRAELI OCCUPATION

#### 1. THE PALESTINIAN LEGAL SYSTEM WITHIN THE OTTOMAN EMPIRE

Palestinian legal system in that period is that of the four centuries Ottoman Empire, that means a legal system that is rooted in Muslim law and jurisprudence<sup>2</sup>. In other words, the Ottoman Empire was responsible for the Islamic heritage of the Palestinian legal system<sup>3</sup>. On the other hand, it is the same Ottoman Empire to be held responsible for the progressive development of the principle of secularization of the state<sup>4</sup>.

Palestine existed as a distinguished territorial entity, without political independence, within the Ottoman Empire since 1517 until 1917 as it was the case of most Arab and Muslim countries. Yet, Palestine was not an administrative unit, but part of different administrative units called *Sanjaks*<sup>5</sup>. Palestine did not have its own constitution, but the Ottoman's. The Ottoman Empire had had two "constitutions"; the first was promulgated by sultan Abd-al-Hamid in December 2<sup>nd</sup>, 1876 influenced by the Belgian constitution of 1831 and the Prussian Constitution of 1850. The second followed the revolution of Young Turks in 1908 that was never abolished, but implicitly suspended<sup>6</sup>. These two constitutions confirmed full citizenship for Palestinians, as ottoman citizens. Since then, Palestinian people started to have their representatives within the ottoman parliament.

The Ottoman Sultan started a legal reform - known as *Tanzimat* - on 1839. The Ottoman Empire had had a codification movement: the Penal Code of 1840, the commercial code of 1850, the Commercial (1861) and Criminal procedures (1879) and Maritime code 1863, which were drawn on French model. The Land

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<sup>2</sup> Main sources for the Palestinian legal system within the Ottoman Empire are: KASSIM A., *Legal Systems and Developments in Palestine*, p.19-20; AL-QASEM A., *Commentary on Draft Basic Law for the Palestinian National Authority in the Transitional Period*, p.188; Idem, *The Draft Basic Law for the Palestinian National Authority*, p.102.

<sup>3</sup> Cf. BOURLOND A., *ibid*, p.9.

<sup>4</sup> *Ibid*.

<sup>5</sup> Cf. SHEHADEH R., *From Occupation to Interim Accords: Israel and the Palestinian Territories*, p. 74.

<sup>6</sup> Cf. NATALONI C., *Per una Analisi del Concetto di Popolo nell'Islam*, pp.44-45.

Code of 1858 was French in style, but amended with regard to the inheritance of state land following the German Civil Code. The Ottoman Civil Code, better known *Majalla*, was promulgated in 1877 and was the codification of *Shari'a Law* according to *Hanafi* School of Muslim Jurisprudence, although some provisions borrowed from other Muslim schools. The *Majalla* articles were not innovative but compilation of pre-existing laws. It was Napoleonic in form and Islamic in substance. The *Tanzimat* also affected the Ottoman Court System. This was inevitable when new codes could not be administered in the *Shari'a* courts, since *Qadis'* training was solely in Islamic Law. Special commercial court were set up to adjudicate disputes between European and Ottoman merchants; a civil court system was established in 1871 to deal with civil and commercial matters while *Shari'a* courts retained exclusive jurisdiction over matters pertaining to personal status and *Waqf*.

The Ottoman Empire was defeated in World War I while the independent Arab State -the price of Arab revolution against the Ottoman Empire, as promised in the Hussein-McMahon letters- did never see the light. The Arab territories felt under French and English rule (occupation and then mandate), as agreed in Sykes-Picot. Turkey formally agreed on the detachment of Arab Territories (including Palestine) from the Ottoman Empire only on August 6, 1924, the date in which the treaty of Lausanne came into force. The High Commissioner for Palestine designed that same date as the day of the end of the state of war with Turkey. On November 1<sup>st</sup>, 1924 the Grand National Assembly at Ankara resolved to abolish the Sultanate and the Ottoman Government ceased to exist.

There are only three areas where ottoman legislation still relevant nowadays in the Palestinian territories. The first area is civil matters since the *Majalla* continues to be partial basis of law in Palestinian territories including contract, property, and sale law. The second area is Land, since it's structure as provided by the Land Code of 1858 –that brought the state into direct relation with the cultivators of Land- remains almost the same although modified through the

different following legislations. The third area related to the jurisdiction left to religious courts, leaving only residual jurisdiction in matters of Personal status<sup>7</sup>.

## 2. THE PALESTINIAN LEGAL SYSTEM UNDER THE BRITISH RULE

We can distinguish two phases: The British occupation (1917-1924) and the British Mandate (1924-48)<sup>8</sup>.

### A. THE BRITISH OCCUPATION

At the close of World War I, Palestine fell under British occupation. Palestine was an occupied territory from 1917 until 1924, with Britain the belligerent occupant. General Allenby entered Jerusalem on December 9<sup>th</sup>, 1917 while the northern part of Palestine was occupied only on September 1918. From September 1918, a military administration called the Occupied Enemy Territory Administration (O.E.T.A south) was established with the British commander-in-chief, General Edmund Allenby, assuming the supreme authority in the land. All laws, proclamations and orders were issued in the name of "O.E.T.A South". In July 20<sup>th</sup>, 1920, the military administration was terminated and a new civil administration was established headed by Sir Herbert Samuel with the title of High Commissioner for Palestine. All laws, proclamations and orders were then issued in the name of the government of Palestine.

Notwithstanding that, Great Britain was still bound by the restrictions of Hague Convention of 1907, both military and civil administration issued laws with immediate effect on Palestine. The proclamation of November 18, 1918 Granted to O.E.T.A. (south) the right to sell, purchase, mortgage or dispose in any form of any immovable property or lease the same for any period of time. The Land Transfer Ordinance of September 1920 provided that no transaction involving land would be valid without the prior consent of the administration. Besides, it amended ottoman law which restricted ownership of land to ottoman nationals only, while the only restriction left on corporate entities, was that they

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<sup>7</sup> Cf. the voice LAW, prepared by Raja Shehadeh in: MATTAR P. (edit.), *Encyclopedia of the Palestinians*, p.254-258

<sup>8</sup> Mains sources for the Palestinian Legal system under the British rule are: Cf., KASSIM A., *Legal Systems and Developments in Palestine*, pp.21-24; AL-QASEM A., *Commentary on*

should be “registered” in Palestine. The British also amended the civil procedures regarding the Land, stating that all summons of Land Courts should be issued in three languages (English, Arabic and Hebrew –first time official status for Hebrew in Palestine). An English President, a Palestinian member, shall man the court together with a judicial secretary authorized to appoint suitable persons “resident in Palestine” as assistants to the court. All these provisions of British military and civil administration, especially regarding land, correspond to the British support for a “Jewish National Home” in Palestine, expressed in the Belfour declaration on November 2, 1917. That same declaration will be part of the mandatory text approved by the League of Nations.

Still, occupied Palestine, at this historical conjuncture, was part of Syria, and consequently felt under the jurisdiction of King Faisal’s short-lived government established in Damascus between October 1919 and July 1920<sup>9</sup>. Elections to the Syrian Congress were held in early June of 1919 and it was convened on June 6, 1919, with 83 representatives, 17 of whom came from various Palestinian Cities and towns. The Congress enacted the first Constitution of the state which granted autonomy to the administrative units constituting the State; namely what are know as Syria, Lebanon, Palestine and Jordan<sup>10</sup>.

#### B. THE MANDATE FOR PALESTINE

The League of Nations decided to entrust –or confirm- British rule with the mandate over Palestine on July 24<sup>th</sup>, 1922. Officially, the Mandate became operative once the Council of the League of Nations approved the decision on September 29<sup>th</sup>, 1923. During the British mandate, the first documents, which were issued, acknowledged Palestine’s existence as a legal entity. These documents contained hints to popular participation. The effective authority was left with the British High Commissioner<sup>11</sup>.

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*Draft Basic Law for the Palestinian National Authority in the Transitional Period*, pp.188-190; Idem, *The Draft Basic Law for the Palestinian National Authority*, p.102-103.

<sup>9</sup> For more details about King Faisal government, cf. *Encyclopédie générale de l’Islam, l’Islam Contemporain*, pp. 55-60; NATALONI C., *Per una Analisi del Concetto di Popolo nell’Islam*, pp.45-46.

<sup>10</sup> Cf. KASSIM A., *Legal Systems and Developments in Palestine*, p. 22.

<sup>11</sup> Cf. BROWN N.J., *Drafting a Palestinian Constitution: Hope for Democratic Governance?* in : <http://www.palestinecenter.org/cpap/pubs/20010301ib.html>.

According to Amedeo Giannini<sup>12</sup>, the Palestinian Constitution has three sources: first, the rules included in article 22 of the Pact of the League of Nations and in those established in San Remo Conference and specified in the Sèvres Treaty (art. 95-96)<sup>13</sup>; second, the Mandatory text, approved by the Council of the League of Nations on July 24<sup>th</sup>, 1922<sup>14</sup> in conformity with the decisions taken at San Remo; and third, the “Palestine order-in-council 1922”, which is an internal law that the mandatory power, in virtue of the sovereign powers to which it is entrusted, can modify when necessary. The precedent two sources, on the contrary, are international engagements, and as such can be considered as limits to the third source, that will be only integrative and complementary. On the other side, the Palestine Order in Council was a *law* issued by the British Crown, while the British High Commissioner for Palestine issued *ordinances*, under which authority subsidiary enactments issued by the head of a governmental department under the name of *regulations*. In this sense, the Palestine order-in-council can be considered the constitution for Palestine, which was issued to conform to the international framework of the mandatory text. The Order-in-Council, in any case, was not a rigid constitution since it provided the possibility to modify it every time it was determined as necessary. That is what happened with the decrees issued on 1923, 1933, 1935 and 1939<sup>15</sup>. Besides, on 1932, the British king issued instructions for Palestine that integrated and modified the “Palestine order-in-council”. In 1940, the king issued instructions that made further modifications<sup>16</sup>.

The Palestine Order-in-Council of 1922 stated that the government of Palestine shall be entrusted to a High Commissioner, appointed by the King of England, who shall be assisted by the Executive Council appointed by the British Government. It also provided the Establishment of a Legislative Council, while

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<sup>12</sup> In an article introducing the Constitution of Palestine entitled “La Costituzione della Palestina”, published in “Oriente Moderno” in 1923, cf. GIANNINI A., *La Costituzione della Palestina*, in: Oriente Moderno, vol. III, 1923, pp. 129-150; Ibid, *Le Costituzioni degli Stati del vicino Oriente*, in: *Istituto per L’Oriente*, 1931 (IX), p. 284-332.

<sup>13</sup> « La tâche de la puissance mandataire étant, selon le régime du mandat, de conseiller l’état naissant et de le conduire à la pleine souveraineté », in FLORY M., KORANY B., MANTRAN R., CAMAU M. et AGATE P., *Les Régimes Politiques Arabes*, 349.

<sup>14</sup> Cf. The text of the Treaty of Sèvres in: Oriente Moderno, vol. II, 1922-23, pp. 395-399. The English version of the Mandate text can be found in: LAQUEUR W. (edited with introduction and comments), *The Israel-Arab Reader (A Documentary History of the Middle East Conflict)*, pp.34-42.

<sup>15</sup> Cf. SISALEM M., MAHNA E., ADDAHDUH S. (prepared and collected by), *Collection of Palestinian Laws (The Constitution)*, p. 5.

the date had to be fixed by the High Commissioner. The High Commissioner has never fixed that date since Palestinians refused the structure of the Legislative Council as provided by the Order-in-Council: the High Commissioner and the twenty-two members. Ten members were to be official (the Executive Council, and the British Head of Departments), and twelve were to be unofficial elected members, in sectarian divisions (Jews were also present). It is obvious, therefore, that “the British introduced the first model of corrupt democracy in Palestine when the Executive became the major part of the legislative and the elections would be conducted on discriminatory basis”<sup>17</sup>. This structure would ensure a majority necessary to apply the Balfour promise while ignoring Palestinian national rights<sup>18</sup>. The Order-in-Council did not include any specific provisions to guarantee civil or political rights. On the contrary, the British Mandatory imposed Emergency Regulations on 1945, that were later abused by Zionists in relation to Palestinians who remained within the borders of the newly created state of Israel.

During the British mandatory substantial changes in legislation and the judicial organization of Palestine were introduced, with exceptions made to contracts where *Majalla* continued to operate, and personal status. Legislation based on English common law (and equity<sup>19</sup>) were introduced, since it became residuary law that could be applied in the absence of Palestinian/Ottoman legislation (art. 46 of Palestine Order-in-Council 1922). Mandatory years are the period in which the legal asset was established in Palestine, in a semi-complete way, and influenced by the Anglo-Saxon system<sup>20</sup> but not fully equivalent to the English system<sup>21</sup>.

As for the Judicial Organization, the Palestine Order-in-Council of 1922 defined the jurisdiction of civil and religious courts. The civil courts were to be

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<sup>16</sup> Ibid, p. 58.

<sup>17</sup> That was the position of Dr. Anis F. Kassim during the International Convention held in Perugia from 9-10 May 2002, about Constitutions and Constitutionalism in the Arab World.

<sup>18</sup> The number of Palestinian Arabs in Palestine was 89% according to British census of 1922. In 1931, Palestinians were 72%, and in 1946 they were 69%, while Jewish-owned land was still 7% on 1947. Cf. MATTAR P. (edit.), *Encyclopedia of the Palestinians*, 2000, pp.294-302.

<sup>19</sup> BOURLOND A., *ibid*, p.9

<sup>20</sup> Cf. ASSORANY R., *The Legal System in Gaza Strip 1948-1967 (Arabic)*, pp. 27-32. The author believes that “all innovations in the future touched new arguments, or in any way do not touch the essential part”. This can be the case of Gaza (the legal tradition of the author) but it is not the case of the West Bank.

<sup>21</sup> BOURLOND A., *ibid*, p.9.

Magistrate Courts, District Courts, Land Courts, Court of Criminal Assize for offences punishable by death, and Supreme Court. The Supreme Court played the role of: *first*, Court of Appeal from judgments rendered by District Courts, Land Courts and Court of Criminal Assize; *second*, High Court of Justice to hear and determine such matters as petitions or applications not within the jurisdiction of any other court and whose determination was necessary for the administration of justice. Besides, it decided usual cases concerning Habeas Corpus applications and petitions for the cancellation of an administrative decision. Religious Courts were to decide matters of personal status. They were Muslim, Christian and Jewish Religious Courts, each concerned with matters related to personal status of its own constituent members. There were sixteen different religious communities in Palestine. In case of conflict over whose jurisdiction it was, the matter was referred to a special tribunal.

The British government referred the question of the future of Palestine to the UN, who decided the Partition of Palestine on November 29, 1947, UNGA Res. 181, in two States, with economic unity, and *corpus separatum* for Jerusalem with international guarantees. British forces withdrew from Palestine on May 14, 1948, and the Zionist community declared independence under the name of “Israel”. The British Mandatory ended on 15 May 1948 and war started.

### 3. THE PALESTINIAN LEGAL SYSTEM FOLLOWING THE WAR OF 1948

The first Arab-Zionist war signaled the beginning of the territorial division of Palestine. On 1949, Israel and Egypt, and Jordan and Syria signed armistice agreements. The Zionists occupied *de facto* 78.5% of mandatory Palestine<sup>22</sup>, and *ivi* declared the State of Israel<sup>23</sup>. The Jordanian Army entered the West Bank, including East Jerusalem; and Egypt administered Gaza but always considered it

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<sup>22</sup> The UNGA confirmed the Partition Plan on November 29, 1947 (resolution 181, 33 votes to 13 with 10 abstaining). Palestine was to be divided in two states: the Arab state would have covered 49% of mandatory Palestine with 715,000 Arabs and 8,000 Jews, while the Jewish state would have covered 51%, with a population of 500,000 Jews and 416,000 Arabs. Jerusalem was to be under international Trusteeship.

<sup>23</sup> The 1947-1948 war caused the first serious problem of Palestinian Refugees. 700,000 Palestinians were constricted to leave their houses and proprieties, and never been able to return. The war of 1967 caused a second huge refugees emergency.

as a separate entity. The repartition of mandatory Palestine meant its legal division: the Legal System of Israel took its own road<sup>24</sup>, while the WB was united with the East Bank of the Jordan River, and thus its Legal System was modified by legislation made by the Jordanian parliament<sup>25</sup> and approved by the king<sup>26</sup>. In Gaza, the mandatory Order-in-Council remained in force, with the authority of the government to administer Egypt. The next two sub-chapters will deal with the legal system in WB and GS<sup>27</sup>.

#### A. THE LEGAL SYSTEM IN THE WEST BANK FROM 1948 TO 1967

Three days after the end of the British Mandate on Palestine<sup>28</sup>, the Arab Jordanian army crossed the Jordan River and the day after that, declared their responsibility to the West Bank, applying the Jordanian “defense law” of 1935 and related legislations<sup>29</sup>. On that date (May 19, 1948), the West Bank came under the Jordanian Military administration. General Military Governor exercised his authority in accordance with the said Defense Law. On May 24, 1948, the Jordanian Military Governor issued his Order concerning the continuing validity of all laws and regulations that were in force in Palestine on May 15, 1948, and their applicability as much as they did contradict the Defense Law of 1935. On 1949, the West Bank was no longer under Military order but passed under civilian administration. All previous powers of the British king, the High commissioner, and ministers passed to the king.

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<sup>24</sup> After almost two decades of military government with emergency regulations, Palestinians started a process of full integration. The Israeli government started to recognize them citizenship. Nevertheless, they are looking forward to obtain equal political, social and economic rights. For more details about the Israeli Legal system, cf. KREZMER D., *The New Basic Laws on Human Rights: a Mini-Revolution in Israeli Constitutional Law?* in: *Israel Law Review*, No.26 (2), 1992, pp.238-246; id., *Constitutional Law*, in : SHAPIRA A. (ed.), *Introduction to the Law of Israel*, London, 1995, pp.39-58; id., *Domestic Politics, Law and the Peace Process: a View from Israel*, in: COTRAN, CHIBLI M. (ed.), *The Arab-Israeli Accords: Legal Prospective*, CIMEL Book Series No.1, London-the Hague-Boston, 1997, pp.81-99.

<sup>25</sup> General elections were held in both banks after the unification, 20 members were elected from each bank.

<sup>26</sup> The Jordanian king assumes the powers of the King of England, his minister and the HC, enjoyed by Palestine-Order-in Council, until the 1952 new constitution was adopted.

<sup>27</sup> The status of Palestinians in the state of Israel will be considered later, cf. §7.

<sup>28</sup> The British Mandate ended on May 15, 1948.

<sup>29</sup> The main sources for the Palestinian legal system in the West bank for the period 1948 to 1967 are: KASSIM A., *Legal Systems and Developments in Palestine*, pp.27-28; AL-QASEM A., *Commentary on Draft Basic Law for the Palestinian National Authority in the Transitional Period*, p.191; AL-A'SALY W., *The Legal System in the West Bank 1948-1967 (Arabic)*, pp. 11-20

On April 24, 1950 after a general election, the two banks of the Jordan River were united after a resolution of the two houses. with equal representatives of the two banks. Palestinians became Jordanian citizens. Different laws in force in the two banks remained in effect until unified and universal laws that the parliament approved and the king endorsed<sup>30</sup>, while laws of Parliament from 1950 to 1967 were applicable on both sides of the Kingdom. Legislative activities aimed to unify laws in the two banks. Although the WB was occupied on 1967, the unity between the two banks finished officially only on 1988, when the Jordan's King Hussein relinquished responsibility for the WB.

The result of the unification was the change of most mandatory legislation present in the WB, and aimed for progress in society. Jordanian legislation was inspired by other Arab countries' legislations, especially Egypt and Syria, which were in their turn inspired from French system, while the mandatory was Common Law system; meanwhile *Shari'a* principles were not neglected in the legislation, though not formally mentioned. The result was the presence of many ways of thinking law.

Palestinians appointed to the Council of Ministers in the two Houses were in equal number, but the Prime Minister was always Jordanian. General and municipal elections were held in both banks and no one-party system adopted in Jordan. Although most powers were concentrated in the king's hands, Palestinian participation in governmental and parliamentary life was positive *in se*.

The new situation needed a new Constitutional Charter, which was prepared on December 1, 1952<sup>31</sup> which replaced the precedent mandatory constitution. It was the fundamental law: Laws, decrees, regulations could not contradict the Constitution. The problem was that there was no way to indict constitutionality of laws, directly or indirectly. with the exception of the High Court of Justice which had the right to do it within the limits of the law. Ordinary

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<sup>30</sup> As established by Jordanian law No. 28 of September 16, 1950.

<sup>31</sup> Cf. ALA'SALY W., *The Legal System in the West Bank 1948-1967*, in: *Which Legal System for Palestine?* Conference Proceedings, p. 11-12. For more details about the Jordan Constitutional Charter of 1952, cf. TWAL M., *La Constitution Jordanienne de 1952 et ses Amendements: un Équilibre Évolutif entre les Pouvoirs, une Garantie et une Protection des Libertés Fondamentales et des Droits Politiques*, in: *Les Constitutions du Monde Arabe*, and idem,

Laws were competence of the legislative authority (Parliament and the King). The Parliament was composed of two chambers for four years each. The king nominated the upper house members while the people elected the Parliament. The executive had the power to issue Decrees with force of law within the limits of the constitution. International treaties were the competence of the king, and the confirmation of the parliament was not necessary except in some cases, including changes in state territory.

The Sixth Chapter of the Jordanian Constitutions (art. 97-110) is dedicated to Judicial authority and confirms the independence of the Judges that had to be subject to the law only. The “independence of the judges”, law no.19 of 1955 confirmed that principle and established the Judicial Council. The Courts were three types: *first*, Ordinary Civil courts as provided by law no.26 on 1952; *second*, Religious Courts as established by law no. 41 of 1951 plus the law no. 9 of 1958 regarding religious communities; *third*, the special Courts, established with special law.

#### B. THE LEGAL SYSTEM IN GAZA STRIP FROM 1948 TO 1967

After the end of the war of 1948, Gaza was separated from the rest of Palestine and came under Egyptian control<sup>32</sup>, but was never annexed to it<sup>33</sup>. Gaza passed officially under the administration of Egypt from May 16, 1948, as established by Order No. 153 of 1948 issued by the Egyptian Minister of National Defense. An administrative Governor for the Gaza Area was nominated and charged with certain responsibilities. The Egyptian government described these areas as “areas Subject to the Supervision of the Egyptian forces in Palestine”. The government was represented by an army officer called “Administrative governor”.

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*Jordanie*, in: CANAL E. et FORGUES (sous la direction de-), *Recueil des Constitutions des Pays Arabes*.

<sup>32</sup> The main sources for the legal system in Gaza strip from 1948 to 1967 are: ALAGHA R., *The Legal System in Gaza Strip 1948-1967 (Arabic)*, pp. 21-26; ASSORANY R., *The Legal System in Gaza Strip 1948-1967 (Arabic)*, pp. 27-32; KASSIM A., *Legal Systems and Developments in Palestine*, pp.28-29; AL-QASEM, *Commentary on Draft Basic Law for the Palestinian National Authority in the Transitional Period*, pp.190-191.

<sup>33</sup> Cf. ASSORANY R., *The Legal System in Gaza Strip 1948-1967*, in: *Which Legal System for Palestine?* pp.27-29.

Order No. 6 issued by Administrative governor on June 1, 1948 established that Courts continue to apply laws, orders and regulations that were in force before May 15, 1948, to the extent that they did not contradict what was issued or to be issued by competent authorities in these areas. Order No. 274 of August 8, 1949, issued by the Egyptian minister of War and Navy granted the administrative governor all authorities and powers that were vested in the British High Commissioner". The governor's orders, instructions and directions were deemed law in these areas.

Most Egyptian legislation was procedural, regulatory and administrative in nature, with the exception of the two constitutional documents issued for Gaza<sup>34</sup>. Both constitutions did not cancel all precedent laws unless contrary to the new constitution<sup>35</sup>. The Basic Law No. 255 issued by the Egyptian Government provided that Palestine Order-in-Council and other laws were respected, unless contradicted by Basic Law. While the Constitutional Order proclaimed in 1962, which was issued by the Egyptian Government, emphasized a Palestinian identity and laid down that Gaza strip should be an integral part of Palestine territory and that Palestinians living there should constitute a national entity along with Palestinians living elsewhere. All laws and judgments were to be issued and executed in the name of the "Palestinian people". The 1962 Constitutional Order replaced the British Order-in-Council<sup>36</sup> and provided that the Governor General for Gaza shall be a high ranking Egyptian officer appointed by the Egyptian President. He was competent to promulgate laws passed by the Legislative Assembly, with right of veto. The Assembly could overpass the veto only if it voted again with  $\frac{3}{4}$  majority<sup>37</sup>. The Executive Council was composed of the Governor General, his deputy (appointed by the Egyptian Minister of War), and nine head of departments, also appointed by the Egyptian Minister of War.

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<sup>34</sup> Cf. ALAGHA R., *The Legal System in Gaza Strip 1948-1967*, in: *Which Legal System for Palestine?* pp. 25-26. For the Arabic text of both constitutions, cf. SISALEM M., MAHNA E., ADDAHDUH S. (prepared and collected by), *Collection of Palestinian Laws (The Constitution)*, p.69-89.

<sup>35</sup> Art. 45 of the Constitution for Gaza of 1955, and art. 69 of the constitution of 1962

<sup>36</sup> Text in the official Gazette (Gaza) Extraordinary Issue, March 29, 1962. It did not do it directly, since it cancelled only provisions in contradiction with new constitution. See also ASSORANY R., *The Legal System in Gaza Strip 1948-1967 (Arabic)*, in: *Which Legal System for Palestine? Conference Proceedings*, Birzeit University Law Center, 1996, pp. 31.

Executive Council members were never Palestinians, although the Constitution of 1962 did not prevent it. Legislative Assembly was composed of the Governor General, its Chairman, ten Members of the Executive Council, and thirty-two Palestinians. Palestinians elected members to the local committees of the newly created single party Palestinian Arab National Union (PANU)<sup>38</sup>. All Palestinians were *ipso facto* member of PANU and were to choose the twenty-two members of the committees that were also members of the Legislative assembly. The Governor General chose the other ten members. Laws were issued only with the approval of the Assembly and the endorsement of General Governor<sup>39</sup>. Laws were published in the official Gazette in Gaza (al-waqa'e al-filastinyya). Legislation before 1948 was not published again, and Drayton copy was possessed by old lawyers only, while private initiative to publish them again were realized only by the end of the Israeli occupation<sup>40</sup>.

The approval, removal, elaboration and amendment of the Constitution remained out of the competence of the Assembly. The presence of the Governor General as chairman did not encourage independency of the Assembly.

Sources of laws effective in Gaza Strip for that period, according to Radwan Alagha, a judge in the High Court of Justice in Gaza, were the following: *first*, Shari'a law, the primary source of legislation during the Ottoman empire 1517-1917; *second*, Palestine Order-in-Council of 1922, the Royal instructions of 1932, Gaza Strip Constitution of 1955 (issued by the Prime minister of Egypt), and Constitution of Gaza of 1962 (issued by the President of the United Arab Republic); *third*, the Judiciary since it is an Anglo-Saxon system and the importance of the precedents; *fourth*, Egyptian Law: especially in Palestinian Administrative law. In other words, sources of legislation in Gaza Strip are Shari'a (Ottoman Legislation), Common law principles (British mandate influence), and Civil Law rules (French influence on Egyptian law).

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<sup>37</sup> The thirty-two elected Palestinians for the Legislative Assembly are more than  $\frac{3}{4}$  of the votes in the legislative Assembly composed of 42 members plus the chairman, only if the Chairman (Egyptian governor) has not the possibility to vote.

<sup>38</sup> The unique party system was also in United Arab State, Egypt.

<sup>39</sup> Governor general can issue orders with power of laws, cf. Assorany, *ibid*, p.29.

<sup>40</sup> Cf. SISALEM M., MAHNA E., ADDAHDUH S. (prepared and collected by), *Collection of Palestinian Laws, The Constitution (Arabic)*, 1985.

For Raji Assorany, President of Palestinian Centre for Human Rights, there was no legislative vacuum in Palestine in general and in Gaza in particular. Besides, the constitution of 1962 served as a constitutional framework in which all laws have to fit.

## II. THE LEGAL SYSTEM IN WEST BANK AND GAZA STRIP AFTER 1967

The next sub-chapters are dedicated to international law restrictions regarding changes in the legal system of the occupied territories in general, and the changes that the Israeli occupation had made through legal maneuvers. The result of decades of occupation was in some way consolidated by the Oslo agreements, once the settlements were expressly excluded from being subject to negotiations during the Interim period<sup>41</sup>.

### 1. INTERNATIONAL LAW RESTRICTIONS TO LEGAL CHANGES IN OCCUPIED TERRITORIES

The international law sets the limits to the occupying country regarding the law in force in the occupied country<sup>42</sup>. The occupying authority may alter existing legislation strictly in the following cases: the maintenance of ‘public order and civil life’, the concern for the welfare of local population and the ensuring of security. The debate is how Israel interpreted these limits and how these changes were thus introduced for ‘security reasons’<sup>43</sup>. The problem is to define what security is; otherwise, a restriction of the occupying authorities will convert to an absolute extender of powers, that the occupying authority will abuse the control of the population under military occupation. The restrictions imposed on the occupant shall be interpreted in the light and in harmony with the general obligation of states to respect people’s right to self-determination.

The first and most important indication of the occupant well to respect the ‘law of occupation’ is to acknowledge the status of ‘occupant’<sup>44</sup>. Denying the status of the occupant is far from disappearing in modern occupations, and thus

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<sup>41</sup> The main sources for legal system after Israeli occupation are: Cf. QUBTY M., *The Military Orders in the West Bank 1967-1994 (Arabic)*, pp. 33-43; U’AIDA N., *The Military Orders in Gaza Strip 1967-1994 (Arabic)*, pp. 45-51.

<sup>42</sup> Cf. art. 43 of the Hague Regulations of 1907.

<sup>43</sup> Cf. SHEHADEH R., *From Occupation to Interim Accords: Israel and the Palestinian Territories*, pp.93-97.

forms a serious challenge for the international law of occupation as codified in the 1907 Hague Regulations and the 4<sup>th</sup> Geneva Convention. Article 42 of Hague Regulations stated that “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army”. The foundation of the entire international law of occupation is the principle of inalienability of sovereignty through the actual or threatened use of force<sup>45</sup>.

Article 43 of the 1907 Hague Regulations that forms the framework of the law of occupation, states<sup>46</sup>:

**The Authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the country<sup>47</sup>.**

This article was generally recognized as expressing customary international law<sup>48</sup>. While Hague Regulations dealt with the relations between governments, the 4<sup>th</sup> Geneva Convention focused on the welfare of individuals. The modern law of occupation has to also consider the claims of peoples as distinct subjects of international law<sup>49</sup>.

## 2. THE HAGUE REGULATIONS AND THE 4<sup>TH</sup> GENEVA CONVENTION WITH REGARDS TO THE PALESTINIAN OCCUPIED TERRITORIES

The period that followed the 1967 war is a period of occupation. Israel had the international obligation to apply 4<sup>th</sup> Convention of Geneva regarding the protection of civilians<sup>50</sup>. Israeli Military Order no. 3, issued on June 7, 1967, art. 35 states that “the Military Court... must apply the provisions of the Geneva Conventions dated 12 August, 1949 Relative to the Protection of Civilians in Time of War with respect to judicial procedures. In case of conflict between this Order and said Convention, the Convention shall prevail”. This article was deleted

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<sup>44</sup> BENVENISTI E., *The International Law of Occupation*, p.5.

<sup>45</sup> Ibid.

<sup>46</sup> For detailed explanation of article 43 of the 1907 Hague Regulation: Cf. Ibid. pp.7-30.

<sup>47</sup> The official French version reads: “l’authorité du pouvoir légale ayant passé de fait entre les mains de l’occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d’assurer, autant qu’il est possible, l’ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays”.

<sup>48</sup> BENVENISTI E., *The International Law of Occupation*, p.8.

<sup>49</sup> Ibid, P.107.

by virtue of Order No. 144 of October 22, 1967. Hence, the population was stripped of the protection of Geneva Convention of 1949<sup>51</sup>. On the other side, Israel's official position was the refusal to apply *de iure* the Hague Regulations indicated that the West Bank was annexed to Jordan and as such the Israeli presence is not an occupation but an administration in absence of sovereignty<sup>52</sup>.

Following the Common Law tradition, Israeli Courts distinguish between Customary international law, considered part of domestic law -binding without transformation by statute, unless in conflict with existing statute- and Treaty-based law, that have no legal effect as such unless incorporated by statute. As such, the Hague Regulations of 1907 are enforced by the Israeli Supreme Court with respect to governmental action in the occupied territories, whereas the Fourth Geneva Convention of 1949, deemed a constitutive treaty, is not enforced by the Court. According to Benvenisti, the rationale by the court can be found in the same principle as the separation of powers<sup>53</sup>. For the same author, the decision of the Supreme Court to invoke the doctrine with respect to the status of the treaties, rather than with respect to the government's ratification power, is a political decision aimed at granting the government more leeway in the international arena. For the same author, the Supreme Court was quite willing in the early days to embrace international norms by adopting a monist approach to international law.

<sup>50</sup> Cf. MATTAR P. (edit.), *Encyclopaedia of the Palestinians*, 2000, p.256.

<sup>51</sup> Cf. KASSIM A., *Legal Systems and Developments in Palestine*, pp.29-32; AL-QASEM, *Commentary on Draft Basic Law for the Palestinian National Authority in the Transitional Period*, pp.191-192.

<sup>52</sup> Cf. DORNIER N., Rapport: Audience du 21 Novembre 1988 Devant la Haute Cour de Justice de Jérusalem Relatif à la Fermeture de l'Association In'Aash-El-Usra, in: *Palestine et Droit*, n°3 (1989), p. 32-33.

<sup>53</sup> Israel signed and ratified a number of International Human Rights instruments:

Human Rights Conventions	Signed	Ratified
The 1966 Covenant in Civil and Political Rights <sup>53</sup>	19/12/1966	18/8/1991
The 1979 Covenant on Economic and Social Rights	19/12/1966	18/8/1991
The 1979 Convention on the Elimination of Discrimination Against Women	17/7/1980	23/7/1991
The 1984 Convention against Torture	22/10/1986	4/8/1991
The 1989 Convention on the Rights of the Child	3/7/1990	4/8/1991

Cf. BENVENISTI E., *The Attitude of the Supreme Court of Israel Towards the Implementation of the International Law of Human Rights*, pp. 207-221.

Yet later, security considerations came to the fore, altering the court attitude<sup>54</sup>. On the contrary, the Israeli High Court recognizes the necessity to apply *de facto* the humanitarian provisions of the 4<sup>th</sup> Geneva Convention<sup>55</sup>.

### 3. THE DEFENSE (EMERGENCY) REGULATIONS

The Israeli authorities applied the Defense (Emergency) Regulations of 1945 as legal justification for extra-judicial punishments, such as deportations, house demolitions, and administrative detention. Israel claimed those regulations to be law of the land in 1967, although abrogated by the same power that had issued it<sup>56</sup>, by virtue of the Palestine (revocation) Order in Council, 1948 made on 14 May, repealing Mandatory Orders in Council, including the Order in Council of 1937, in which the 1945 Defense Regulations were based<sup>57</sup>. Besides, the Jordanian Government imposed the Jordanian Defense Regulations of 1935, which means that if the Mandatory Defense (Emergency) Regulations of 1945 were still in force, they would have been replaced since laws in the West Bank would continue to apply “unless inconsistent with any provision of the Defense of the Trans-Jordan Law, 1935...”<sup>58</sup>

Finally, we have to take in consideration the fact that the Defense (Emergency) Regulations were issued before the Fourth Geneva Convention of 1946. Those regulations would be inconsistent with humanitarian law, and “unparalleled in any civilized country”<sup>59</sup>.

### 4. MAIN CHANGES INTRODUCED TO THE LEGAL AND ADMINISTRATIVE SYSTEM IN THE OCCUPIED TERRITORIES

#### A. THE CREATION OF THE ISRAELI MILITARY GOVERNMENT

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<sup>54</sup> Ibid, pp. 207-221.

<sup>55</sup> BENVENISTI E., *The International Law of Occupation*, pp.110-11.

<sup>56</sup> Cf. DORNIER N., Rapport: Audience du 21 Novembre 1988 Devant la Haute Cour de Justice de Jérusalem Relatif à la Fermeture de l'Association In'Aash-El-Usra, in: *Palestine et Droit*, n°3 (1989), p. 33-34.

<sup>57</sup> Cf. SHEHADEH R., *Occupiers Law, Israel and the West Bank*, p.xiv. “This fact was confirmed by a letter dated 22 April 1987 from the British Ministry of Foreign Affairs to Al-Haq, the West Bank affiliate of the International Commission of Jurists. The letter states: “I confirm that, in view of the revocation order in Council of 1948, the Palestine (Defense) Order in Council of 1937 and the Defense Regulations, 1945, made under it are, as matter of English Law, no longer in force”.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid, p.xv.

Studying the legal system in the WBGS after 1967, called since then the occupied territories, we notice that “Israel’s occupation was legalistic: most changes have been enacted through legal orders<sup>60</sup>”. A separate military administration was established for WB and GS. The military commander is an Israeli officer with all the three powers concentrated in him. His orders are laws for the Palestinian territories. The military Order No.2 issued after the occupation<sup>61</sup>, in which the commander of the WB declared:

**The law in existence in the region on June 7, 1967 shall remain in force, insofar as it does not in any way conflict with the provisions of this Proclamations or any other proclamation or Order which may be issued by me, and subject to modifications resulting from the establishment of government by the Israeli Defense Forces in the Region.**

This meant gradual changes for existing laws and constitutions<sup>62</sup>. In fact, the local law was subordinated to the Military government “security enactments”. Those enactments have a hierarchy that depends upon the rank of the promulgator: the Military governor issued primary legislation, while other army commanders and civil administrator issued secondary legislation<sup>63</sup>. In the basic statement that established the military government, the Promulgation concerning Law and Administration (the WB region) (no.2), 5727-1967, the military commander, announced that the publication of enactments could be made “in any manner I may deem fit”<sup>64</sup>.

In 1981 the Israeli area commander<sup>65</sup> established a civil administration. He used his power of delegating as provided in order 130 without restrictions to the powers of the area commander as confirmed later in military order 950, 1982.

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<sup>60</sup> Ibid, p.vii.

<sup>61</sup> Order No.2 for the West Bank on June 7, 1967. Identical Order No. 2 was issued for Gaza strip on June 8, 1967.

<sup>62</sup> Cf. QUBTY M., *The Military Orders in the West Bank 1967-1994*, in: *Which Legal System for Palestine?* pp. 33-35 and U’AIDA N., *The Military Orders in Gaza Strip 1967-1994*, in: *Which Legal System for Palestine?*, pp. 45-46.

<sup>63</sup> BENVENISTI E., *The International Law of Occupation*, p. 115.

<sup>64</sup> Ibid. p.116.

<sup>65</sup> With military order 947.

The area commander remains the reference, and was also empowered in civil affairs. The area commander remained any way the source of power<sup>66</sup>.

## B. MILITARY ORDERS REGARDING LAND AND WATER

In order to secure land and water, the Israeli Military government issued Order 291, on December 19, 1968, which suspended the land registration process that had been going on since 1928, after which Israel started to declare unilaterally private Palestinian lands as 'state' or 'public' land. The Military Order 569, issued on December 17, 1974, entitled "Order Regarding Registration of Transaction in Special Lands", created a separate register for the purpose of registering transactions involving lands that have come to be declared public land, or which were seized for military purposes. Furthermore, the Palestinians right to cultivate land was systematically restricted by the Israeli authorities, since planning permission was always needed and rarely conceded. In 1982 the water system came under the exclusive control of the Israeli national water company Mekorot, that privileged settlers over Palestinians in the distribution of the WB water reserves<sup>67</sup>.

## C. CHANGES INTRODUCED IN THE JUDICIAL SYSTEM

The most relevant change in the legal system is that concerning the Judiciary. Jordanian Courts operating in the WB were brought under the authority of the Officer in Charge of the Judiciary (officer of the Israeli Military government). He replaced the Jordanian Minister of Justice. The competence of Jordanian Courts was narrowed: Jerusalem and environs was removed from their jurisdiction, the Court of Cassation (Supreme Court) was abolished, the Court of Appeal of Jerusalem was abolished.

Courts were encroached upon with Military Courts, Israeli quasi Judicial tribunals, established by Order No.3, and responsible for security related cases. Its competence was gradually broadened and the Order was changed 40 times. Decisions of military courts are final and not subject to appeal. According to Benvenisti, a military court of appeals was established in April 1989, following

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<sup>66</sup> SHEHADEH R., *Negotiating Self-Government Arrangements*, in: *Journal of Palestine Studies*, pp.27-29.

the Israeli Supreme Court's recommendation<sup>68</sup>. The military Courts has jurisdiction to adjudicate infringements of security legislation, especially violations of the Security Code which defined offences against the occupation forces. The military courts sat in panels of three army officers, at least one of them a lawyer, and all appointed by the area commander on the recommendation of the IDF's advocate-general<sup>69</sup>. In 1988 amendment to the Security Code added a provision to the effect that "[t]hose who exercise judicial functions are, in judicial proceedings, subordinate to nothing but the law (local law<sup>70</sup>) and the security enactments". The outcome of this amendment was that it blocked the opportunity for military tribunals to invoke international law against the authorities<sup>71</sup>.

#### D. ADMINISTRATIVE SEPARATION BETWEEN PALESTINIANS AND ISRAELI SETTLERS

There was both a legal and an administrative separation between Israeli Settlers and Palestinians living in the Occupied Territories. In order to secure extension of Israeli jurisdiction over Israelis living in the WBGS (settlers) and exclude them from restrictive laws applicable to Palestinians, five regional councils were established in 1979 with jurisdiction over the entire area under Israeli control. Military Order number 892 established local councils (similar to Israeli municipalities) and defined their jurisdiction, making it possible to have two kinds of local councils subject to two different legislations: one for Israeli Jews and the other for Palestinians. Knesset law of 1982 (art. 4), on the other side, established the extension of the concept of Israeli resident to include also those Israelis living in occupied territories. The appendix listed nine laws that were applicable to the residents thus defined, with the faculty to the minister of justice to alter the appendix: that means that it will be possible to extend Israeli laws to the occupied territories also after the establishment of the 'Council'. Local or Municipal Council (now called 'Courts of Domestic Affairs'<sup>72</sup>) had two level

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<sup>67</sup> Ibid, pp.24-25.

<sup>68</sup> BENVENISTI E., *The International Law of Occupation*, p.116.

<sup>69</sup> Ibid.

<sup>70</sup> Law here means local law, as provided in the Order Concerning Interpretation which considers law as "an enactment of legislative body which was effective in area on the eve of June 7, 1967, including every rule pursuant to such enactment, and excluding security enactments. Ibid.

<sup>71</sup> Ibid. p.116-117.

<sup>72</sup> For detailed information about competence of these courts cf. SHEHADEH R., *From Occupation to Interim Accords: Israel and the Palestinian Territories*, p.93.

courts. Court of appeal decision is final. The Settlers Courts applied Israeli Procedure and evidence Code. Judges and public prosecutor was designed by the Area Commander. Military Order 981 established a Rabbinical Court for personal affairs of Jewish settlers. Objection Committees (called also Appeals Committee<sup>73</sup>) were established by military order No.172. They are quasi Judicial administrative Courts, competent in 26 subject (including land expropriation, absentee-owned property, etc.). These courts are not bound by any law or civil procedures, and their decisions are only recommendations to the Military governor. The Palestinian judges were informed that Israelis are immune against prosecution by their courts<sup>74</sup>. Settlers were considered ‘local population’ when convenient: for example to give a justification for the building of an alternative road network in the WB to bypass the Palestinian centers. Thus in rejecting the appeal against it in 1982, Israel pretended that every thing was legal since Hague Regulations provided that the occupier could change for the benefit of the ‘local population’, and the road network benefited the settlers, ‘the local population’<sup>75</sup>.

As a conclusive note we have to notice that WBGs, after the Israeli occupation of 1967, continued to be considered different legal entities. The military administration was different, and thus the military orders were issued separately although almost simultaneously. The two different legal systems of WB and GS were maintained by the Israeli occupation. Still, they have something in common: changes served the occupier interests. During the Israeli occupation the Rule of law suffered and the Israeli courts did not protect Palestinian civilians. Emergency defense regulations were revived and applied, and cancelled any Palestinian constitutional institutions. Additionally municipal elections were suspended, preventing the creation of a Palestinian civil society<sup>76</sup>.

### **Conclusive Notes**

Running through the Palestinian legal history we reach the conviction that there is not one “Palestinian legal system”, as may suggest the title of this chapter,

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<sup>73</sup> Cf. BENVENISTI E., *The International Law of Occupation*, p.117.

<sup>74</sup> SHEHADEH R., *Negotiating Self-Government Arrangements*, in: *Journal of Palestine Studies*, p.26.

<sup>75</sup> *Ibid*, pp.26-27.

<sup>76</sup> U’AIDA N., *The Military Orders in Gaza Strip 1967-1994 (Arabic)*, pp. 45-51.

but rather a plurality of coexisting legal systems<sup>77</sup>. This legal plurality was not the fruit of Palestinian self-determination, but imposed on them while Palestinians continued to express –in very different and some times disputable ways- their refusal to their exclusion from the decision on their own destiny. Many Palestinian jurists were not familiar to Palestinian plurality of legal systems, because they have studies in law abroad<sup>78</sup>. In fact, law faculties were created in Palestinian universities only after the Oslo agreements. The only prior teaching experience goes back to the “Palestine Law Institute” created in Jerusalem in 1922, and closed at the end of the British mandate<sup>79</sup>. After the Israeli occupation, the lawyers in the WB went on strike, giving proves of the prevalence of political on legal considerations in the Palestinian side. It was the longest lawyers’ strike in the history<sup>80</sup>.

The Palestinian Lawyer Raja Shehada, author of different books about the legal system in Palestine<sup>81</sup> especially about the changes made by the Israeli occupation on the Palestinian legal system, wrote recently that “It is commonly held misconception that the laws in force in the West Bank are a confused amalgam of laws from different historical periods. Whereas it is true that the laws derive from different periods, a clear progression can be observed and a determination is always possible as to which law applies to any given situation”,<sup>82</sup>.

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<sup>77</sup> Cf. BOURLOND A., *Teaching Law in Palestine Strategies and Challenges*, p.4.

<sup>78</sup> *Ibid*, p.19

<sup>79</sup> *Ibid*, p.4.

<sup>80</sup> Cf. SHEHADEH R., *From Occupation to Interim Accords: Israel and the Palestinian Territories*, p.162.

<sup>81</sup> SHEHADEH R., *Occupiers Law, Israel and the West Bank*, 2<sup>nd</sup> ed., Institute of Palestine Studies, Washington D.C., 1988; *Negotiating Self-Government Arrangements*, in: *Journal of Palestine Studies*, Vol. XXI, No.4, Summer 1992, pp.22-31; *A Legal Reading of the Declaration of Principles*, in: *Facing Palestinian Society in the Interim Period*, JMCC, 1994, pp. 19-26; *From Occupation to Interim Accords: Israel and the Palestinian Territories*, London, 1997.

<sup>82</sup> SHEHADEH R., *From Occupation to Interim Accords: Israel and the Palestinian Territories*, p.74.

## §2 THE LEGAL CHANGES INTRODUCED INTO THE PALESTINIAN OCCUPIED TERRITORIES AFTER THE ISRAELI-PALESTINIAN AGREEMENTS

### I. PRELIMINARY NOTES

After a brief presentation of the legal system in Palestine, this chapter is totally dedicated to Oslo Agreements and the jurisdiction of the elected Council as provided by the same Agreements.

The Oslo agreements are not political declaration only but legal documents that created new facts and necessitated legal adaptations. Palestinian legal experts may rightly raise many critics, since political considerations for Palestinian delegation prevailed over legal ones in Oslo agreements.

The Palestinian Autonomy, in the terms of the Agreements, will coexist with the Israeli military government, which is illegal under international law. The Israeli military proclamations and Orders since 1967 will continue to be in force, until revision by the Council within the powers transferred to it. All legal changes introduced by Israeli occupation, and in contradiction to the Hague Regulations and the Geneva IV convention, were indirectly accepted by PLO and would remain in force until further revision, at least in the transitional period. The two parties accepted, for example, to leave the issue of the settlements, condemned by international community and contrary to the international law, to final negotiations. The parties, in other words, agreed that direct negotiations will be the principle instrument to find a solution for the Israeli-Palestinian conflict. International law might only indirectly influence within the limits of the 242 and 338 Resolutions and within their ambiguous terms. The logic of Oslo was that parties have to agree on everything, including the very details. In case of disagreement or conflict, Palestinians and Israelis had only one way: to negotiate. In the joint committees, Israel could actually block any decisions. We can call this the “Israeli veto power”. Direct negotiations is obligatory, whereas other instruments (conciliation, arbitrary) are facultative<sup>83</sup>.

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<sup>83</sup> The Israeli-Palestinian Liaison Committees creation was to coordinate and to handle other issues in common interest and disputes. Names of members were exchanged, and both

According to Raja Shehadeh, Israel, through the Oslo agreements, “consolidated what was already in place rather than broke new ground”<sup>84</sup>; in other words, the agreements were “consolidation of its (*Israeli*) legal, strategic, and political hold over the Palestinian territories”<sup>85</sup>. For the mentioned author, the agreements are the culmination of a legal process that began much earlier and the consolidation to what Israel made illegally and unilaterally during occupation. Those actions led to a re-structuring of the legal system. Thus, the ‘Interim self-government arrangements’ is not the result of negotiations, but the negotiations helped in formalizing them. The same author wrote an article after the beginning of the negotiations on the self-government arrangements, in which he exposes the result of his investigations in the changes in law and administration implemented by Israel since its occupation, by unpublished military Orders<sup>86</sup>. Signing the Agreements in the terms of the letter of invitation to the Madrid Conference means the participation or the complicity of the PLO on consolidating the system of apartheid put in place by Israeli military government in the territories: annexation of land without the people, “legalization of manifestly illegal measures involving land ownership and use, water distribution, zoning plans, and all other restrictions denying the Palestinians the enjoyment of their natural rights and resources”<sup>87</sup>.

The next two sub-chapters are dedicated to the legal and administrative situation the Palestinian occupied territories present and consolidated through the Israel-PLO agreements, and the new Palestinian entity, called “Palestinian National Authority”, that also exercised territorial jurisdiction in the “autonomous territories”.

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parities had equal number of members. Decision were made by agreement, that became a kind of Israeli *veto*.

<sup>84</sup> SHEHADEH R., *From Occupation to Interim Accords: Israel and the Palestinian Territories*, p.99.

<sup>85</sup> As . wrote Mr. Edward Said in: *Ibid*, p.xiii.

<sup>86</sup> SHEHADEH R., *Negotiating Self-Government Arrangements*, in: *Journal of Palestine Studies*, Vol. XXI, No.4, Summer 1992, pp.22-31.

<sup>87</sup> SHEHADEH R., *Negotiating Self-Government Arrangements*, in: *Journal of Palestine Studies*, p.28.

## II. THE ISRAELI-PALESTINIAN AGREEMENTS

### 1. HISTORICAL BACKGROUND

Negotiations between Israel and the Palestinians began on October 30, 1991 at the Middle East Peace Conference held in Madrid, Spain, sponsored by the United States and Russia. The U.S.-Soviet letter of invitation to the Madrid Conference included the agenda of the talks, and the terms of reference for the talks: “negotiations will be conducted in phases, beginning in talks on Interim-Self government arrangements”. Dr. Haidar Abdul Shafi headed the Palestinian delegation, within a joint Palestinian-Jordanian delegation. The PLO was initially excluded; therefore the challenge for Palestinians was to bring the Palestinian Liberation Organization (PLO) the unique legitimate representative of Palestinian people to the negotiation; on the other side, the challenge for Israel was to exclude any negotiations on its unilateral actions regarding land, water and administrative separateness between Israelis and Palestinians living in the occupied territories. Palestinians elaborated different drafts and proposals that reflected the way in which they imagined their negotiated Interim Self-Government Authority to be. The key issue for Palestinians was to extend its jurisdiction to all territories occupied in 1967 that constituted a single territorial unity<sup>88</sup>. The Israeli side proposed different drafts to be the basis for negotiations. They insisted that negotiating territorial jurisdiction “starts from the premise that issues relating to the exercise of sovereignty are outside the scope of the Interim status negotiations”<sup>89</sup>.

Negotiations continued in Washington between the two delegations, and others secretly were held in Oslo between Israel and PLO. The Government of Israel and PLO, ‘the representative of the Palestinian people’, signed the Declaration of Principles on Interim self-Government arrangements<sup>90</sup>, in

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<sup>88</sup> For more details about early negotiations cf. SHEHADEH R., *From Occupation to Interim Accords: Israel and the Palestinian Territories*, pp. 103-131.

<sup>89</sup> *Ibid*, p.114.

<sup>90</sup> Better known Declaration of Principles (DOP), or simply Oslo I.

Washington D.C on September 13, 1993<sup>91</sup>. This gave birth to a phased “peace process”<sup>92</sup>: the interim period and the permanent status settlement.

## 2. THE PARTIES IN THE AGREEMENTS

The two parties that negotiated and signed the Agreements are the government of the State of Israel and the PLO, the representative of the Palestinian people, as appears clearly in the preamble and in the end of the agreements. The fact that the Israeli side signed the agreement with the words “the government of the State of Israel” and not the state of Israel is curious since only the state has the international personality and is subject to international law, not the government. The state has the capacity to produce international juridical acts, not the government. This fact can be explained as being the normal reflection in the dual system in Israel regarding international law, since in Israel the government negotiates international agreements, signs and ratifies them, while the only way for conventional law to be binding in Israeli internal law is by its conversion into a law by the Knesset (the Israeli parliament).

## 2. LEGAL NATURE OF THE AGREEMENTS BETWEEN ISRAEL AND PLO

Clarifying the legal nature of agreements under international law is important since that means the necessity of serious changes in internal law. In Israel, Customary law is binding. Treaty law can be part of domestic law, but needs to be converted in internal law. If the Accords are binding under international law the parties shall comply with it, and other members of international community are also involved in assuring that.

To resolve the question of the legal nature of the Israeli-PLO agreements many scholars proposed that the Accords are an exchange of unilateral declarations<sup>93</sup>, that they are binding codifications of customary international law, that they are only loosely binding as ‘soft law’, or that the accords have no

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<sup>91</sup> Israel Knesset ratified the agreement by a vote of 61-50 with 8 abstentions, on 23 September 1993. The PLO central Council approved the DOP on 11 October 1993, meeting in Tunis, 63-8 with 8 abstentions (27 over 107-member council did not attend meeting).

<sup>92</sup> It can be useful to mention that the first time was projected a phased peace process was in the Camp David agreement between Egypt and Israel.

<sup>93</sup> The Permanent Court of Justice -regarding the legal status of Eastern Greenland- held that Norway was bound by its promise to acquiesce in Danish claims to Greenland.

binding effect whatsoever<sup>94</sup>. Geoffrey Watson introduced, criticized and rejected these theories and concluded that although they do not fit under 1969 Vienna Convention's narrow definition of treaty<sup>95</sup> since one of the parties (PLO) is not a state, the Accords are binding under International customary law, since it is concluded by subjects of international law<sup>96</sup>. The same Oslo agreements indicate that they are legally binding<sup>97</sup>. The agreements have to be binding, since they created facts. For the author, it is difficult to imagine Palestinians without their partial autonomy. Although there are serious doubts to the legal nature of those agreements, it seems doubtless that the Oslo agreements have legal effects on the ground<sup>98</sup>. The same preamble of the Interim Agreement affirms the determination of parties to sustain the peace process since it is 'irreversible'.

We can conclude by saying that the Oslo Agreement was an "agreement to agree"<sup>99</sup>, that constituted the framework for the subsequent agreements and declared the "principles" for the negotiations. On the other side, the Interim Agreement is more to be considered a treaty as defined by Vienna Convention, but

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<sup>94</sup> Some scholars urged that they are not since they violated Palestinian rights of self-determination or because they violated Israeli rights to peace and Security. In 1969 Vienna Convention on the law of treaties, a treaty is illegal –and as such not legally binding- if it violates the *Ius cogens*. If people self-determination is *ius cogens*, as such, an agreement is not legally binding if it violates Palestinian self-determination. Although it is difficult to understand who is the "people" subject of that right, and the content of "self-determination". In the other hand, security or the right on self-preservation, which is a *mélange* of self-determination and self defense, is considered a *ius cogens* and constitutes a valid reason to consider agreements as not binding. Cf. WATSON G. R., *The Oslo Accords*, pp.52, 83-90.

<sup>95</sup> It is an authoritative codification of customary international law. Neither Israel nor PLO is a party to the Vienna Convention. A treaty is defined as "an international agreement concluded between states in written form and governed by international law..." The Convention excluded other subjects of international law. That means that Vienna Convention is not applicable. Still, the agreement between states and other subjects are legally binding under customary law. Article 3: "the fact that the present Convention does not apply to international agreements concluded between states and other subject of International law... shall not affect... the legal force of such agreements". It does not fit in the narrow definition of the Vienna Convention. Some consider agreement as between states since the PLO has the state institutions. PLO declared unilaterally independence of Palestine on 1989, but it seems that the agreements do not reflect this position. The two parties did failed to register the Oslo Accords with the UN. Important to the terms used. Some spoke about treaty, other agreements or accords. It is not treaty under narrow definition of Vienna Convention. PLO is not a state since it has not control over territory, PA is not a state since it has control over territory but lack power to sign agreements, have relations with foreign countries, that are exclusive to PLO, considered as such a subject of international law, although put in doubt by some scholars. Some believe –rightly- that PLO was more state-like when signed the agreements than now, while Palestinian claim to statehood is now stronger.

<sup>96</sup> Cf. WATSON G. R., *The Oslo Accords*, pp.73-102.

<sup>97</sup> Interim preamble §4

<sup>98</sup> Cf. WATSON G. R., *The Oslo Accords*, p.56

<sup>99</sup> To use the words of Dr. Anis F. Kassim, cf. KASSIM, *The Oslo Process: Just A Solution*, p.247.

it is not between two states but rather between two subjects of International Law, one of which is a traditional one, a state (Israel), and the other is a “liberation movement”. It intends to be binding and is regulated by customary law related to international treaties. The PLO is not equal to a state, but this does not effect the validity of treaty it concludes with a state under international law<sup>100</sup>.

#### 4. THE MAIN AGREEMENTS BETWEEN ISRAEL AND THE PLO

The main agreements<sup>101</sup> between Israel and the PLO are the followings:

a. The DOP was signed in Washington on September 13, 1993<sup>102</sup>: The main message of the DOP –also called Oslo I- is the mutual recognition as appears clearly in the preamble of the agreement. This recognition was the object of the exchange of letters four days earlier between Israeli Prime minister Mr. Rabin and PLO Chairman Mr. Arafat. Calling the agreement “declaration” may give the impression of being only a political document and therefore not binding. The provisions of the DOP are ambiguous and full of a passive voice. The presence of lawyers in the Israeli side, and the critics for the absence of lawyers in the Palestinian side, shows how parties intended the agreement to be binding. As indicated in the text, the DOP was intended to be the ‘framework’ for further agreements.

The parties, in the DOP, express their common will to reach an agreement for the autonomy during the transitional period, while their implicit aims are different: one thinks about Autonomy and the other thinks about a state<sup>103</sup>.

b. The Agreement on Economic Relations on April 29, 1994 (became Annex V of Interim Agreement), signed in Paris.

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<sup>100</sup> MALANCZUK P., *Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law*, pp.488-489.

<sup>101</sup> The official language is English while Arabic translation was made by Non governmental organization.

<sup>102</sup> The Oslo agreements were signed between Israel and PLO. PLO leadership still the same, but the Israeli government changed. When Israel started peace negotiations, Shamir (Likud) was prime minister, while Mr. Rabin was Prime Minister when Israel signed the Main agreements -Oslo I and Oslo II- with PLO. Mr. Rabin was assassinated in November 1995.

<sup>103</sup> CALVO-GOLLER N.K., *Le Régime d'Autonomie Prévu par la Déclaration des Principes du 13 Septembre 1993*, p.437.

c. Agreement in Gaza Strip and Jericho area, signed in Cairo on May 4, 1994 (will be superseded by the Interim Agreement): The Gaza-Jericho agreement is more formal than the DOP. It includes commitments for Israel and the PA. It is called an 'agreement' and not a declaration. Palestinian Police arrived in Gaza on May 11, in Jericho on May 13, and Mr. Arafat returned to the Palestinian territories on June 26 of the same year. The Palestinian 'self-governing entity', also called the 'Palestinian Authority' or 'Palestinian Authority', was established. The Palestinian 'Council', in the terms of this agreement, shall be composed of 24 members.

d. Agreement on preparatory transfer of powers and responsibilities signed in Erez checkpoint between Gaza and Israel, on August 29, 1994.

e. Protocol on Further Transfer of Powers and Responsibilities was signed in Cairo in August 27, 1995

f. The Interim Agreement was signed in Washington on September 28, 1995. The Interim Agreement – called also Oslo II- superseded agreements “c, d and e”, while agreement “b” became Annex V. The main agreements were embodied in two: The result then was that all those precedent agreements were embodied in two: The Declaration of Principles (Oslo I), with 17 articles and four annexes and the Interim Agreement (Oslo II), with 31 articles, seven annexes, and nine maps. The Interim Agreement established important organs of Palestinian self-government: elected 82 Council<sup>104</sup>, Ra'ees<sup>105</sup> as head of 24 Executive Authority, most of them chosen from the Council, nominated by the Ra'ees, and approved by the Council. Besides, the Interim agreement established new and more detailed arrangements for the 'redeployment' of Israeli forces from areas of the WB.

g. The Hebron Protocol signed on January 15, 1997 that modified and elaborated the Interim Agreement<sup>106</sup>. At the time of Hebron protocol more powers were assigned to PA in civil matters, but still limited in territory control and

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<sup>104</sup> Extended later to 88 members.

<sup>105</sup> Arabic word used as a compromise between President (Palestinian) and Chairman (Israeli).

<sup>106</sup> Mr. Netanyahu (Likud Party) was Prime minister of Israel.

foreign relations. The protocol also includes a 'note for the Record' made by US Ambassador Dennis Ross, that makes part of the binding agreement although not signed by parties, since they expressed in different way their consensus.

h. The Wye River Memorandum signed on October 23, 1998 is less formal than earlier agreements. It is called a Memorandum and includes "steps to facilitate implementation" of earlier agreement, like 'note for the record' but it is signed by the parties.

i. The Sharm el-Sheikh Memorandum was signed on September 4, 1999<sup>107</sup>. With the same structure and name. The memorandum is not a treaty in the narrow definition. Arafat did not declare statehood on May 4, 1999<sup>108</sup>, and even if he did it is doubtful that the Palestinian entity would have qualified as a state. This was the last agreement between Israel and the PLO. In July 2000 Camp David negotiations failed, and the "second Intifada" started in September 2000, after the provocative visit of Mr. Sharon to the Al-Aqsa Mosque. Since then the situation in the Palestinian territories is fragile and ambiguous. Most of the Palestinian cities live under continuous siege and curfew. The autonomy of the Palestinians is reduced to the minimum, becoming a big jail for an entire people.

## II. THE PALESTINIAN NATIONAL AUTHORITY

The main result of Oslo Agreements was the creation of a new entity, the PNA which will govern the Palestinian territories after the redeployment of the Israeli military forces from the populated areas, and the transfer of powers to the elected 'Council'. Before its election, the Council should be composed of 24 members, as provided by the Cairo agreement of May 4, 1994, which would be appointed by the PLO and approved by Israel. The PNA had functioned as a temporary government until the election of the Council, and organized for the election after the redeployment of Israeli military forces from the populated areas. The extension of the Council jurisdiction will be subject of negotiations with Israel. It would cover WBGS, considered as territorial unit. Meanwhile, the

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<sup>107</sup> Barak (Labor Party) was Prime Minister of Israel.

<sup>108</sup> The date chosen fall at five years of distance from Gaza and Jericho agreement (4 May 1994), where parties agreed that the Interim period would be for five years since the Gaza and Jericho agreement.

military government will continue to be a source of authorities, and assume responsibilities not transferred to the Council. Hot issues are left for final negotiations and with them also Palestinians accepted

## 1. THE AUTONOMOUS TERRITORIES

### A. THE STATUS OF WEST BANK AND GAZA STRIP

The status of the Palestinian territories occupied by Israel in 1967 (including Jerusalem East) is controversial. For Israel, these territories are not part of their sovereign territory but only ‘territories under the control of an Israeli military government’; as such, Israel did not attempt their *de iure* annexation with the exception of Jerusalem East<sup>109</sup> (annexation is not recognized by international law as a method to acquire territory). Palestinians claims of sovereignty over these territories are based on people’s right on self-determination, and UN resolutions 242 and 338. The international community considers these territories as occupied territories, and frequently called for Israeli withdrawal from all territories occupied in 1967, including East Jerusalem, and condemned *de facto* annexation of territories in WBGS, and did not recognize *de iure* annexation of Jerusalem East<sup>110</sup>.

According to the Oslo Agreements, negotiations regarding the final status of WBGS are left for final negotiations. Meanwhile, the status of WBGS will be preserved during the interim agreements: ‘Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations’ (IA.XXXI.7). Besides, ‘Neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims or positions’ (IA.XXXI.6).

The status of WBGS as occupied territories did not alter with the creation of the Palestinian Autonomy. The new institutions created after the withdrawal of the Israeli forces from populated Palestinian areas shall not deprive Palestinian population from the protection that the international humanitarian law guarantee

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<sup>109</sup> And the Syrian Golan Heights.

<sup>110</sup> Cf. MALANCZUK P., *Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law*, pp.494-495.

them, as in article 47 of the Fourth Geneva Convention of 1949, which is applicable to the WBGS, and states:

**Protected persons who are in occupied territories shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any changes introduced, as a result of the occupation of a territory, into the institutions or government of the said territory, nor by an agreement concluded between the authorities of the occupied territories and the Occupying power, nor by an annexation by the latter of the whole or part of the occupied territory.**

## B. THE NATURE OF THE PALESTINIAN AUTONOMY

The idea of “autonomy” for the Palestinians of the territories occupied on 1967 by the Israeli military forces is not new, although in new form. The first plan for autonomy was put forward in 1971 by Professor Gidon Gottlieb<sup>111</sup>, who proposed a “commonwealth of Palestine”. Begin Plan in Camp David was for an “administrative autonomy”, and it is intended to be a “full autonomy” except for “security and Public order” that “Israeli authorities” will maintain<sup>112</sup>. An interesting study was made by Hurst Hannum and Richard B. Lillich about the concept of autonomy in international law, in the experiences of the last hundred years<sup>113</sup>. For the mentioned authors, the “full autonomy” of Camp David means “general political and governmental autonomy” and not merely cultural and religious autonomy. The autonomy in WBGS will not resolve the problem of sovereignty to consider as exclusive of the central government in relation to the separatist “autonomy” or as residual in the people who has the right on self-determination. For the authors, it has needed an international dispute mechanism that would definitively resolve the outstanding questions of law and fact.

The autonomy for the Palestinians of the WBGS, as provided by the conventional agreements of Oslo, has a complex nature since it does not result from a decentralization of governmental powers but from the bestowing of rights to a specific population living in a predetermined region<sup>114</sup>. Consequently, the

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<sup>111</sup> Cf. OTT D.H., *Autonomy and the Palestinians : A Survey*, pp.68-73.

<sup>112</sup> Ibid, pp.74-81.

<sup>113</sup> HANNUM - LILLICH, *The Concept of Autonomy in International Law*, in: 74 Am. J. Int'l L., 858-889 (1980). This article was analyzed in: OTT D.H., *Autonomy and the Palestinians : A Survey*, pp. 81-87.

<sup>114</sup> CALVO-GOLLER N.K., *Le Régime d'Autonomie Prévu par la Déclaration des Principes du 13 Septembre 1993*, p.443.

redeployment of Israeli military forces are not to be considered concessions, since concedes who has the right on the thing, and then concede this right to others; the occupation confers only *de facto* authorities since occupation does not, under international law, confer legitimization. Israel's point of view is different since they consider the WB (that they call Samaria e Judea) part of the Eretz Israel that is the homeland of the Jewish people. Consequently, any retire of the Israeli forces from the WBGS will be considered a very painful concession. Some authors consider the Palestinian Autonomy an internal autonomy that is the rule in Gaza and Jericho first, and in the rest of the WB populated cities, second. Except powers expressly excluded and left for final negotiations, the autonomy of the Palestinians is only within the powers transferred to the Council<sup>115</sup>.

In the Israeli view, the regime established in WBGS during the transitional period 'is that of a Palestinian Autonomy under the supreme authority of the Israeli military government'<sup>116</sup>. The arguments used in favour of this theory are taken from the same Agreements. In fact, the Civil Administration was dissolved but the Military Government was not and would continue to exercise powers and responsibilities not transferred to the Council (IA.I.5). We read also in article XVII.3:

**a. Israel, through its military government, has the authority over areas that are not under the territorial jurisdiction of the Council, powers and responsibilities not transferred to the Council and Israelis.**

**b. To this end, the Israeli military government shall retain the necessary legislative, judicial and executive powers and responsibilities, in accordance with international law. This provision shall not derogate from Israel's applicable legislation over Israelis in personam.**

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<sup>115</sup> For Alain BOCKEL, professeur à l'université d'Orléans, "le statut d'autonomie ainsi reporté est original du point de vue du droit international et du droit compare" BOCKEL A., *L'Autonomie Palestinienne, la Difficile Mise en œuvre des Accords d'Oslo-Washington*, p. 263, 273. .

<sup>116</sup> Cf. J. SINGER, *Aspects of Foreign Relations Under the Israeli Palestinian Agreements on the Interim Self-Government Arrangements for the West Bank and Gaza*, in: *Israel Law Review* 28 (1994), p.8, cited in: MALANCZUK P., *Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International*, p.495.

The Legal Adviser of the Israeli Ministry of Foreign Affairs, Joel Singer, who negotiated, on behalf of Israel, the DOP and the subsequent Agreements with the PLO, concludes from these provisions:

**“It follows that, unlike the Civil Administration, the Military Government does not dissolve. Instead, it simply withdraws physically from its former location, but continue to exist elsewhere as the source of authority for the Palestinian Council and the powers and responsibilities exercised in the West Bank and the Gaza Strip”<sup>117</sup>.**

Although the DOP considers WBGS as a territorial unit, GS and WB are still two separated regions. Despite the fact that the integrity of the Palestinian territories is a key principle of the Oslo agreements, the separation and the division between GS and WB and within the WB was aggravated. The Palestinian Autonomy does not exactly fit either under the concept of “territorial autonomy”, since it does not cover all those living in WBGS nor “personal autonomy”, since the agreements excluded Israeli citizens (not only Jewish Israelis). The Palestinian Autonomy is neither an absolute territorial nor an absolute personal autonomy<sup>118</sup>. Subject to this autonomy are only the Palestinians of WBGS. The autonomy shall cover WBGS, exclude the settlements and the military areas, and left for final negotiations<sup>119</sup>. The extension of that autonomy, meanwhile, depends on the agreement of the parties over the procedures and the modalities to realize the Autonomy. The agreements provided a precise schedule, but the Israeli part did not respect timetables since priorities were left for security reasons and the PNA collaboration to stop attacks over Israeli targets.

We can conclude by saying that the autonomy is the minimum in comparison to the Palestinians desire for statehood, based on the right of people self-determination and the UN resolutions. In case some support the assertion that the autonomy for WBGS is politically the only possible solution, there is a need to know if there is any model of autonomy that might avoid bestowing legitimacy on

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<sup>117</sup> Cited in: MALANCZUK P., *Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law*, p. 495.

<sup>118</sup> CALVO-GOLLER N.K., *Le Régime d'Autonomie Prévu par la Déclaration des Principes du 13 Septembre 1993*, p. 444.

<sup>119</sup> We did not mention Jerusalem here, although left to permanent status negotiations, since we have a lot of reasons to believe that the Agreements, when speaking about WBGS does not include also Jerusalem.

illegality and provide the basis towards progress towards lasting peace<sup>120</sup>. Do the Interim Self-Government arrangements reflect that ideal model of autonomy? Serious doubts can arise in studying the Agreements, and in observing realities emerging in the Palestinian territories after the agreements.

### C. THE EXTENSION OF THE PALESTINIAN AUTONOMY

The main commitment of Israel was to withdraw its military forces from the WBGS, but in reality, Israel redeployed them only. In Gaza the Israeli forces redeployed around settlements and dissolved civil administration. In Jericho Israeli forces redeployed around the city. The redeployment from other areas of WB was guided by some principles: *first*, Israeli military forces shall stay outside populated areas; *second*, they would gradually assign internal security to Palestinian Police forces. In other words, the Israeli military government would not dissolve and would coexist with the PNA. The Israeli occupation, then, continued in the interim period although in different form.

The main obligation for Israel was to ‘redeploy’ from portions of WBGS. The main obligation for the PLO was to amend the PNCh. and to clamp down on terrorism. The DOP trades land for Peace but the extent of land was deliberately left ambiguous. The two phases provided were the ‘redeployment from Gaza Strip and Jericho area’ realized in May 1994, and the ‘redeployment of Israeli military forces in the West Bank and Gaza Strip’ to ‘specified locations’. The negotiations to the second stretched into 1995. The Interim agreements sets four phases for redeployment over two years. The first redeployment covered the most populated areas. The other three phases are not defined, but art. XI.2 provided that the result will be that WBGS will be under jurisdiction of Palestinians, excluded issues left to permanent negotiations. Beside the territorial jurisdiction, the Agreement envisioned a functional transfer of authority to Palestinians<sup>121</sup>.

The IA divided the WB that covers around 5860 KM<sup>2</sup> into three areas ‘A’, ‘B’, and ‘C’ and provided authority of each party in each. Residual powers (not transferred to the ‘Council’) remain with Israel (IA.I.1).

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<sup>120</sup> OTT D.H., *Autonomy and the Palestinians : A Survey*, p. 87.

<sup>121</sup> Cf. WATSON G. R., *The Oslo Accords*, pp.105-107.

### ***Area A***

"Area A" means the populated areas (IA.XI.3.a). In area 'A' the PA have full authority over internal security, public order and civil affairs, while Israel retains responsibility over external security (IA.XIII.1). It consisted from Jericho area and the seven WB towns: Jenin, Nablus, Tulkarem, Qalailyah, Ramalla, Bethlehem, and four-fifth of Hebron<sup>122</sup>. These cities cover only 3% of the WB.

### ***Area B***

In area 'B' the PA exercise civil authority and maintain of public order of Palestinians, while the responsibility for protecting Israelis and confronting the threat of terrorism is left to Israel, besides to the external security (IA.XIII.2.a). Area 'B' comprises almost 450 towns, villages, refugee camps and hamlets that are populated by Palestinians<sup>123</sup>. As provided by the IA, zone B would cover 27% of the WB.

### ***Area C***

That is defined in negative, being that part of the WB that is not comprised in areas 'A' and 'B'. This area is under complete Israeli control, and has to be transferred gradually to areas 'A' and 'B' excluded issues left for final status talks (IA.XI.3.c).

By the Wye River Memorandum, and since joining agreement over Hebron in 1997, Area 'A' comprised 3% of the West Bank, Area 'B' 24% and Area 'C' 73%. The Wye River Memorandum provided further redeployments that would be configured so that 17.2% was Area 'A', 21.8% Area 'B', and 60% Area C<sup>124</sup>. By 1999, Israel still did not have carried out the further redeployments. The Wye River Memorandum would be configured so that 11,1% was Area 'A', 26,9% Area 'B', and 62% area C in three phases. Only the first phase of

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<sup>122</sup> Ibid, p.109.

<sup>123</sup> Ibid, p.109.

<sup>124</sup> Ibid, p.113.

redeployment was accomplished, that means only 3% Area 'A', 31% Area 'B', and 66% area C<sup>125</sup>.

Although left for final status negotiations, settlements were always a hot issue. Building new ones in Area C shall be considered contradictory to the Agreements since they prejudice final negotiations, while it is forbidden in areas 'A' and 'B'<sup>126</sup>. Besides, building new settlements or enlarging the existent ones is contradictory to the Israeli commitment to respect WBGS unity and integrity (DOP.IV, IA.XI.1, XVII.1-2, XXXI.8). Israel, in the terms of the Agreements, remained free to create facts during interim period, and remained the ultimate source of authority, limited only by the general principle of International Law to act in Good faith.

The redeployment –in the terms of the agreements- shall respect WBGS unity, and smooth movement between them. A principle that was not respected since Palestinian villages and towns were put under siege, the safe passage between Gaza and WB is not yet constructed, Students of Gaza were ordered to leave the WB universities and to present themselves to be transferred to GS. Division between GS and WB and within the WB became more evident. Movement within the WB became also difficult if not impossible sometimes. The Israeli military forces installations moved to the entrances of the Palestinian cities, making it impossible to move from one 'autonomous' Palestinian city to another.

As a conclusive note, we have to take in consideration the fact that all details provided here do not correspond at the actual situation in the Palestinian territories. The peace process is blocked, and most of Palestinian autonomous cities were reduced to big jails, and the division to zone A, B, and C became only symbolic.

## 2. THE PALESTINIAN 'COUNCIL' AS PROVIDED BY THE INTERIM AGREEMENT

### A. INTRODUCTION

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<sup>125</sup> Ibid, pp.114-115.

<sup>126</sup> Ibid, p.136.

The Interim Agreement specifies that Israel shall transfer powers and responsibilities to the elected 'Council'. In the framework of these agreements, the Council shall have legislative and executive powers (IA.III.2). Pending the inauguration of the 'Council', the PA, established by Gaza and Jericho Agreement, shall assume all powers, responsibilities and duties of the 'Council' (IA.I.3). The 'Council' and the 'Ra'ees shall constitute the Palestinian 'Interim Self Government Authority' (IA.III.1). Israel shall dissolve the Civil Administration in the WB and the Israeli military government after the inauguration of the 'Council' (IA.I.5). The fact that Israel shall transfer powers and responsibilities to the 'Council' means that the jurisdiction exercised by the 'Council' find its legality through the transfer of powers, not through election; still, election provided the indispensable legitimacy for the exercise of powers.

## B. THE PALESTINIAN 'COUNCIL'

### a. THE JURISDICTION OF THE COUNCIL

The Jurisdiction of the 'Council' would cover gradually West Bank and Gaza Strip that constitute a unit (DOP.IV, IA.XI.1, XVII.1-2, XXXI.8), excluded 1) issues left for final status negotiations: Jerusalem, settlements, specified military locations, Palestinian Refugees, borders, foreign relations and Israelis and 2) powers and responsibilities not transferred to the Council (IA.XVII.1). The problem is that those issues are so ambiguous; e.g. which are the territorial boundaries of Jerusalem? Which settlements are excluded, those territorially existent or those who will be constructed? Which Israelis are excluded: those resident in the WBGS, living there or all Israelis wherever they are resident or living? On the other side, the non-use of the article "the" in article IV of the DOP, as it was the case for the UNSC 242, can be interpreted as accepting that the jurisdiction of the Council would cover territories in WBGS rather than the WBGS<sup>127</sup>.

Since 1967 the Israeli Military government assumed all Legislative, executive and Judicial powers (Military Proclamation n. 2) and exercised it as *de*

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<sup>127</sup> for example, cf. CALVO-GOLLER N.K., *Le Régime d'Autonomie Prévu par la Déclaration des Principes du 13 Septembre 1993*, p.446.

*facto* sovereign, without any formal annexation or extension of Israeli sovereignty over WBGs, except for Jerusalem. Knesset legislations were applicable over Israelis that settled in the Territories. The de facto source of the three powers is the military commander (MC). The MC exercised a portion of his powers through the head of the civil administration whom he appointed in accordance with Military Order 947 of 1981. Israeli Jurisdiction remained over excluded territories, powers not transferred, and over Israelis.

Following the Interim Agreement, we can distinguish three kinds of jurisdictions for the 'Council': territorial, functional, personal (IA.XVII.2).

### **i. Territorial Jurisdiction**

The territorial jurisdiction of the 'Council' shall encompass Gaza Strip except settlements and the military installation area, and West Bank except area C. Transfer of area C shall be accomplished in three phases, and within 18 months, except issues left to permanent status negotiation. Territorial jurisdiction includes land, subsoil and territorial waters (IA.XVII.2.a)

### **ii. Functional Jurisdiction**

The functional jurisdiction of the Council extends to all powers and responsibilities transferred to the Council (IA.XVII.2.b). Functional jurisdiction shall cover also area C except issues left for permanent status, and in accordance with the agreements. The powers and responsibilities of the 'Council' shall cover agriculture, health, education, land registration, local governments, and parks. The jurisdiction of the 'Council' is limited by Israel who continues to be source of Authority. Israel transfers these powers to the 'Council'. Nevertheless, Israel continued to issue military orders unilaterally since powers to the council were very generic. In other words, Israel remained competent for functional powers not transferred to the 'Council' and all functional powers regarding Israelis. Area C stayed under Israeli jurisdiction. The difference from before is that this jurisdiction was no more exercised through military government. Was this a step towards the annexation of settlements and areas around it?

Besides, the Agreement is full of Generic powers, regarding the question of water, and the fact that Israel, since 1967, increases using territories aquifers, while Palestinians use them much less. Negotiation will not consider it; the same regarding Archeological sites which are excluded. There is a list, and Israel shall notify other sites to add to this list. Exceptions to the 'Council' functional jurisdiction were also made to Custodian of government and Absentee property in the WBGs: in Area C of course. Palestinians will respect "legal rights" of Israeli... which were obtained after occupation! Courts when dealing with disputes regarding land, should refer to a Professional joint committee... always to confirm and register in Israel's name...provision intends to preserve those territorial gains made by Israel.

### **iii. Personal Jurisdiction**

Israelis were excluded from Council Jurisdiction (IA.XVII.2.c). Criminal jurisdiction over Israelis is always for Israel. Civil jurisdiction over Israelis of Council is excluded unless in specific cases.

The Agreement excluded also from the Council Jurisdiction all matters regarding foreign relations (except in some economic agreements), security matters, to protect Israelis and confronting terrorism<sup>128</sup>.

#### **b. LEGISLATIVE, EXECUTIVE, AND JUDICIAL POWER OF THE COUNCIL**

"The Council has legislative, within its authority, executive and judicial powers and responsibilities" (IA.17.3). The Council "posses legislative power and executive power" (IA.III.2)

1) Legislative powers: The PLC was empowered to legislate, in accordance to the interim agreement, within all authorities transferred to it.

2) Executive powers: the Council exercises these powers through a committee called the "Executive Authority" (IA.V.1). The Executive power is in the hand of the Ra'ees who is Council ex-officio member, and other members are

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<sup>128</sup> Mr. Arafat mentioned in his letter to Mr. Rabin dated on September 9, 1993, that "the PLO renounces the use of terrorism and other acts of violence". The word "terrorism" is mentioned three times in the IA. In the preamble, XIII.1.a, XV.1.

chosen and proposed by Ra'ees and approved by Council. Ra'ees can choose max 20% of members from outside the Council. Those members of the Executive Authority not elected shall not vote in the Council (IA.V.3). It is clear that the provisions of the agreement followed the same logic of the British mandate and the Egyptian Constitution, which did not separate totally between Executive and legislative organs.

3) Judicial powers: the system adopted here is the independence of Judiciary. No jurisdiction for Palestinian courts over lands of settlements, civil and criminal matters with limits mentioned before.

#### c. THE STRUCTURE OF THE COUNCIL

The aim of negotiating is creating a Palestinian Interim Self-government Authority, which consists in the Council and the Ra'ees, both for 5 years, since the Gaza-Jericho agreement of May 4, 1994. Council shall approve a Basic Law that would determine the organization, structure and functioning of Council. The BL shall not be contrary to the IA (IA.III.7), otherwise void *ab initio*. The Speaker of Council shall be elected at inauguration, preside over meetings, administer council, committees, agenda, lay proposals, declare results, propose internal procedures for decision makings (IA.III.5). The Council shall be composed of 82 members and the Ra'ees (IA.IV). Mr. Arafat issued a decree in which the Council members became 88. The locations of Council offices are in areas under the territorial jurisdiction of Council, in the WBGS (IA.1.7).

#### d. ELECTION OF THE COUNCIL

Article III.1 of the DOP explains the reason for which elections are held in GSWB: "In order that the Palestinian people in the West Bank and Gaza Strip may govern themselves according to democratic principles, direct, free and general political elections". The election does not constitute an act of people sovereignty; still, it will "constitute a significant interim preparatory step toward the realization of the legitimate rights of the Palestinian people and their just requirements" (DOP.III.3) without specifying which rights. These provisions were almost totally reproduced in article 2 of the IA. The mode and conditions of elections of the PLC (or simply the 'Council') are developed in Annex II of the

Interim Agreement. The election system itself forms a point on which the two parties would have to agree on (Annex I.2 of the DOP).

The Election Law was made by Yasser Arafat in accordance with the DOP on December 7<sup>th</sup>, 1995. The PA Chairman had the power to call for elections (IA.II.4). Palestinians that have the power to vote are only those of Gaza and West Bank, included Jerusalemites (Annex I.1 of the DOP, IA.II.3, IA.III.1,3). The elections were to be held five months after the agreement but timetable was not respected, finally done on January 20<sup>th</sup>, 1996. The importance of the election is validating the Oslo agreements, giving them popular legitimacy. Although there were elections, many Palestinian fractions refused the DOP, and Palestinian police force was needed. Israel and PA shared security responsibility for Palestinians in WBGS, while Israel remains responsible for security against external threat and Israelis.

The Council was directly elected in universal suffrage. The majority system favored Fatah, Mr. Arafat's party. In the election held in January 20<sup>th</sup> 1996, voters chose among 672 candidates vying for eighty-eight seats from sixteen districts<sup>129</sup>. The vote percentage was 79.9%. The members of the PLC were elected according to the quotas system, in which a precise number of seats shall be conferred to the different communities: eighty-one seats for Muslims, six for Christians, and one for Samaritans. Women got five seats over eighty-eight. Gaza strip with its 788,000 inhabitants which cover 378 KM<sup>2</sup> was divided in the five districts, with 347 600 registered, 498 offices to vote for 37 seats in the Council. The WB with its 1,450,000 inhabitants, which cover 5,800 KM<sup>2</sup>, was divided into eleven districts, with 665,600 registered, 1,198 offices to vote for 51 seats in the Council (included East Jerusalem)<sup>130</sup>.

Israel insisted always on elections for political reasons, since Israel always wanted a local authority in WBGS. Although PLO negotiated and signed agreements, for permanent status, Israel wants to negotiate with a local Council, legitimated by elections made by Palestinians in the occupied territories. By

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<sup>129</sup> Cf. MATTAR P. (edit.), *Encyclopedia of the Palestinians*, p.315.

<sup>130</sup> Cf. BENCHIKH M., *L'Accord Intérimaire Israélo-Palestinien sur la Cisjordanie et la Vabde de Gaza du 28 Septembre 1995*, p.19.

Palestinian decision, all PLC are members of PNC, and meetings can be held in the territories. Besides, some PLO factions, especially Hamas and the Islamic political movement (non-members of PLO), refused the DOP and other agreements with Israel; the election will provide the Council with the legitimate powers needed. For these same reasons, strong police forces were created in order to control population and oppositions, with great benefit for Israeli forces...

### III. SECURITY AND PUBLIC ORDER IN THE INTERIM AGREEMENT

Most of the security and Public Order arrangements are not functioning since the Second Intifada and the following re-invasion of the Palestinian Autonomous Cities. Israel continued to occupy the Palestinian cities every time it retained it necessary for its security. Still, it is quite interesting to go through the security arrangements as provided in the IA.

According to the IA, there should be no armed groups other than Palestinian Police and Israeli army in the WBGS. Weapons for Palestinians can not be bought from abroad. Security arrangements in Hebron are different and are regulated by the Hebron Protocol. The Palestinian Security Police is the only Palestinian security authority. They have to act against terror and violence, confiscate illegal arms, arrest and persecute people involved in terror and violence, cooperate and exchange information, which secure no harm to infrastructure (including settlements!). For security arrangements, Gaza was divided into a northern and eastern part. In the yellow area the responsibility was of both. In WB, different arrangements for A, B,C, for Jewish Holy sites, for Hebron, for Gaza beach, for Borders and passages of VIP's.

#### 1. COORDINATION AND COOPERATION

The coordination and cooperation between Israel and the PA was insured by six means:

- 1) Joint security Coordination and Cooperation Committee (JSC): Most important with five to seven members on each side. Decisions are made with agreement

2) Regional security committee (RSC). There are two: one in Gaza and one in WB. The RSC has overall responsibility to guide the DCO's.

3) District coordination office (DCO). They are two in Gaza and eight in the WB, with six officers each from both sides. All events are notified as explained in the agreement.

4) Joint patrols: they secure free movement in certain roads

5) Joint mobile units: they secure rapid response on incidents, leading vehicle depends of territorial elements

6) Joint liaison bureaus: working at crossing points and terminals .

## 2. THE PALESTINIAN POLICE

The Palestinian Police forces were divided into Civil Police, Public Security, Preventive Security, Amn Al Ri'asah (Presidential Guard), Intelligence, Emergency services and Rescue. Policemen were chosen from local Palestinians or from abroad, with Jordanian or Egyptian issued passports, and if proposed to and accepted by Israel. Their munitions were agreed between the two parties. Their duties also fight terrorism and prevent incitement to violence.

## 3. AIRSPACE AND THE COASTLINE TO THE SEA OF GAZA

Palestinian use of airspace is limited, while the Israeli one is neither limited, nor for civil or military use.

## 4. POWERS OF ISRAELI FORCES UNDER PALESTINIAN JURISDICTION

Israel has the overall responsibility for security, while power of Council was for internal security and public order. Israel has the power to protect Israelis and to combat terrorism. Military government continued to exist, and in practice Israeli had continued to arrest Palestinians and detain them. It can carry out "engagement" also in areas under Palestinian security responsibility. Israel made a meticulous work regarding security. Israel and PLO made secret arrangements for the return of some of Palestinians from abroad. The PLO head became elected

PNA; the PNC members returned home; and the Palestinian armed group from outside became policemen in PA.

#### IV. CONCLUSIVE NOTES

There are differences between DOP provisions and Interim Agreement since Israel did not dissolve Military government in the WB upon creation of Council as agreed in DOP, and the WB was divided in areas A,B and C, making it possible for Israel to exclude more territorial jurisdiction of Council. Israel started to build by-pass roads preparing for the annexation of settlements and areas around it. In area B the Council has only functional jurisdiction. In fact, Israel realized what it wanted. It had the political coverage, and the astute and expert negotiators. During those years, they prepared a legal context in which put these political realization. For years they made legal changes that prepared for such agreements. The Palestinians preferred personal loyalties, beside less experience in legal terms, and less time for preparation for such negotiations; according to Raja Shehadeh “the Palestinian Authority that resulted from the negotiations remained with the limited jurisdiction which Israel had sit”<sup>131</sup>

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<sup>131</sup> Cf. SHEHADEH R., *From Occupation to Interim Accords: Israel and the Palestinian Territories*, p.128.

## **CHAPTER TWO**

### **THE PALESTINIAN INSTITUTIONS**

<b>CHAPTER TWO</b> .....	55
<b>THE PALESTINIAN INSTITUTIONS</b> .....	55
§3 THE ALL-PALESTINE GOVERNMENT.....	57
I. THE ARAB EXECUTIVE COMMITTEE AND THE ARAB HIGH COMMITTEE.....	57
II. THE ALL-PALESTINE GOVERNMENT .....	58
§4 THE PALESTINE LIBERATION ORGANIZATION .....	62
I. THE PLO’S ORIGINS AND DEVELOPMENT .....	62
II. THE PLO INSTITUTIONS .....	64
III. RECOGNITION OF THE PLO UNDER INTERNATIONAL LAW .....	65
§5 THE PALESTINIAN NATIONAL AUTHORITY .....	67
I. THE LEGISLATIVE ACTIVITY OF THE ‘COUNCIL’ AS PROVIDED BY THE OSLO AGREEMENTS.....	68
II. THE LEGISLATIVE ACTIVITY OF THE PALESTINIAN NATIONAL AUTHORITY PRIOR TO THE ELECTION .....	70
III. THE LEGISLATIVE ACTIVITY OF THE PALESTINIAN LEGISLATIVE COUNCIL .....	71
IV. THE LEGISLATIVE ACTIVITY OF THE “EXECUTIVE AUTHORITY” .....	72
CONCLUSION .....	73
ANNEX I: ORIGINS OF THE PALESTINE LIBERATION ORGANIZATION (PLO)* .....	74
ANNEX II: MAJOR PLO INSTITUTIONS* .....	75
ANNEX III: THE PLO POLITICAL INSTITUTIONS * .....	76
ANNEX IV: THE PALESTINE NATIONAL COUNCIL SESSIONS* .....	77
ANNEX V: LEGISLATIVE PROCEDURE IN THE PNA PRIOR TO THE ELECTION OF THE PLC ACCORDING TO LAW #4 ISSUED ON 17 APRIL 1995 .....	78
ANNEX VI: LIST OF THE TEMPORARY LAWS ISSUED BY THE PNA BEFORE THE ESTABLISHMENT OF THE PLC* .....	79
ANNEX VII: LEGISLATIVE PROCEDURE IN THE PLC .....	80
ANNEX VIII: LAWS ISSUED BY THE PLC AND ENDORSED BY THE PRESIDENT OF THE PA BY 2000* .....	81
ANNEX IX: LAWS ISSUED BY THE PLC NOT ENDORSED BY THE PRESIDENT OF THE PA BY THE END OF THE TRANSITIONAL PERIOD* .....	82
ANNEX X: THE LEGISLATIVE ACTIVITY OF THE EXECUTIVE AUTHORITY .....	82
DURING THE TRANSITIONAL PERIOD* .....	82

Palestinian nationalism has known different experiences, evolving from a government without effective jurisdiction, to a liberation movement representing the Palestinian people, to a national authority over some of the Palestinian territories of WBGs. Through these experiences, Palestinians expressed their right to their territory, to self-determination, and to statehood. The progress of the positions of Palestinians and the Arab states regarding the Palestinian question is clear: from the defense of Arab Palestine, the liberation of Palestine, to statehood in WBGs. This chapter is dedicated to these three experiences.

### §3 THE ALL-PALESTINE GOVERNMENT

The All-Palestine government was established in Gaza in September 1948. It is one of the “more interesting and instructive political experiments in the Palestinian national movement”<sup>132</sup>. It is not a “historical curiosity, but a subject of considerable and enduring political relevance insofar as it highlights some of the basic dilemmas of Palestinian nationalism”<sup>133</sup>. For these reasons, the All-Palestine government merits to be considered here, after a short presentation of two successive and similar experiences in the history of Palestinian nationalism: the Arab Executive Committee (AEC) established on 1920 and the Arab High Committee (AHC) established on 1936.

#### I. THE ARAB EXECUTIVE COMMITTEE AND THE ARAB HIGH COMMITTEE

The AEC emerged from the Palestine Arab Congress, held in Haifa in 1920. The British authorities recognised the AEC as the entity that represented all “classes and sectors of the Palestine Arab people”<sup>134</sup>. The mandatory authorities proposed to the AEC to occupy “a position exactly analogous to that accorded to the Jewish Agency” under article 4 of the mandate<sup>135</sup>. Furthermore, it proposed AEC participation in the Legislative Council as provided for by the Palestine Order-in-Council of 1922. The AEC refused both these proposals. The AHC was established during the Palestine revolt of 1936. The AHC was a united national front that included all the political parties of the Palestinian people as the AEC,

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<sup>132</sup> SHLAIM A., *The Rise and Fall of the All-Palestine Government in Gaza*, p.37.

<sup>133</sup> Ibid.

<sup>134</sup> KASSIM A.F., *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis under International Law*, p.15.

<sup>135</sup> Ibid.

that it succeeded<sup>136</sup>. Many international authorities regarded the AHC as the entity representing the Palestinian community<sup>137</sup>. The Arab League agreed on 1946 that the AHC is “the one representing all of the Arabs of Palestine and speaking in their name and uniting all their efforts and endeavours for the sake of Palestine”<sup>138</sup>. According to another author, the AHC was re-established on 1946 by a decision of the Arab League and this reflects the dependence on the Arab states in determining the political disposition for Palestine<sup>139</sup>.

The UNGA Resolution n.181 of 1947 recommended the partition of Palestine. The Arabs of Palestine, represented by the AHC, refused the partition plan. This was also the position of the Arab states. Nevertheless, divergent positions were also visible. On the one hand there was Haj Amin Al-Husayni, the *Mufti* of Jerusalem, whose objective was to establish an independent and sovereign Palestinian state over the whole of Palestine. On the other hand there was King Abdallah of Transjordan, whose undeclared aim was to partition Palestine with the Zionists and to annex the Arab part to his kingdom<sup>140</sup>. By 15 May 1948, when the state of Israel was proclaimed, only one solitary member of the AHC, Ahmad Hilmi Abdul Baqi, remained in Palestine. The Arab League, hostile to Haj Amin, rejected any solution that would ensure him a prominent place. On 8 July 1948, the political committee of the Arab League proposed the establishment of a temporary administration with civil competences, under the direct supervision of the Arab League. The new body never got off the ground due to the opposition of King Abdallah, who was supported by Britain<sup>141</sup>.

## II. THE ALL-PALESTINE GOVERNMENT

Consequent to the above brief introduction on the two similar experiences in the Palestinian political history, attention will now be focused on the All-Palestine Government<sup>142</sup>. The Arab States were opposed to King Abdullah’s

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<sup>136</sup> Ibid, p.16.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid, p.17.

<sup>139</sup> SHLAIM A., *ibid*, pp.37-38.

<sup>140</sup> Ibid, p.38.

<sup>141</sup> Ibid, p.39.

<sup>142</sup> Most of the information about the history of the establishment and the disintegration of the All-Palestine government was taken from an article published in the *Journal of Palestine Studies* Vol. XX, No. 1, 1990, pp.37-53, entitled “The Rise and Fall of the All-Palestine Government in Gaza”. The author is Avi Shlaim who was the Alastair Buchan Reader in International Relations at Oxford University and a

position regarding the future of WB, which he intended to annex to his own kingdom. Led by Egypt, these Arab states began to manoeuvre for the creation of an Arab government for Palestine<sup>143</sup>. Despite the British pressure to prevent the creation of such a government, and the opposition of King Abdallah, the Political Commission of the Arab League agreed to create such a government with a seat in Gaza. The Mufti and the AHC played important roles in the formation of the new government<sup>144</sup>. The new body was called the All-Palestine Government, with the intention of highlighting Arab opposition to any partition plan and the Arab refusal to recognise the state of Israel<sup>145</sup>.

The Arab League's announcement spoke of the decision to turn the Palestinian civil administration into a Palestinian government. As for the AHC, it emphatically stated in its communiqué: "the inhabitants of Palestine, by virtue of their natural right to self-determination and in accordance with the resolutions of the Arab League, have decided to declare Palestine in its entirety... as an independent state under a government known as the All-Palestine government which is based on democratic principles"<sup>146</sup>. The new government, within the course of its short life, endeavoured to acquire legitimacy and substance; creating the Holy War Army, at the internal level, and at the international level seeking the

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professorial Fellow of St. Anthony's College. He is the author of *Collusion Across the Jordan: King Abdallah, the Xionist movement and the Partition of Palestine*, New York: Columbia University Press, 1988. To know more about the history of the All-Palestine government, here are some of the books cited in the article (ordered as cited in the article): MATTER Ph., *The Mufti of Jerusalem: Al-Hajj Amin al-Husayni and the Palestinian National Movment*, New York: Columbia University Press, 1988; WILSON M. C., *King Abdallah, Britain and the Making of Jordan*, Cambridge: Cambridge University Press, 1987; SHLAIM A., *Collusion Across the Jordan: King Abdallah, the Zionist Movement, and the Partition of Palestine*, New York: Columbia University Press, 1988; AL-HUSAYNI M.A., *Facts about the Palestine Question* {in Arabic}, Cairo: Dar al-Kitab al-Arabi, 1956; LOUIS Wm. R. and STOOKEYS W. (eds.), *The End of the Palestine Mandate*, London: I.B. Tauris, 1986; SMITH P. A., *Palestine and the Palestinians, 1876-1983*, London: Croom Helm, 1984; RUBIN B., *The Arab States and the Palestine Conflict*, New York: Syracuse University Press, 1981; ALLUSH N., *Arab Resistance in Palestine, 1917-1948* {in Arabic}, Beirut, 1970; TANNOUS I., *A Detailed Documented Eyewitness History of Palestine Under British Mandate*, Beirut: IGT Company, 1988; KHALIL M., *The Arab States and the Arab League*, Beirut: Khayats, 1962; SHABIB S., *Introduction to the Official Palestinian Sources, 1948-1950*, in: *Shu'un Filastinyyah*, no. 129-131, August – September 1982; *The All-Palestine Government*, in: *Al-Mawsuah al-Filastinyyah (Encyclopaedia Palaestina)*, Damascus, 1984, vol.III, pp.342-344; PAPPÉ I., *Britain and the Arab-Israeli Conflict, 1948-1951*, London: Macmillan, 1988; AL-HAWARI N. M., *The Secret of the Catastrophe* {in Arabic}, Nazareth, 1955; DARWAZA M.I., *The Palestinian Problem* {in Arabic}, Sidon, Vol.II; EL-AREF A., *The Catastrophe* {in Arabic}, Sidon, 1956; AL-TALL A., *The Palestine Tragedy* {in Arabic}, Cairo, 1959; SAKNINI I., *The Annexation of Central Palestine to East Jordan, 1948-1950*, in: *Shu'un Felsatinyya*, no. 42-43, February 1975; KIRKBRIDE A., *From the Wings: Amman Memoirs, 1947-1951*, London, 1976 (Chapter 5: "the Government of All-Palestine"); SHUAYBI I., *The Palestinian Entity* {in Arabic}, Beirut: PLO Research Centre, 1979.

<sup>143</sup> Ibid, p.40.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

<sup>146</sup> Ibid, pp.41-42.

recognition of the UN, albeit unsuccessfully. In addition, the government issued passports for some 14,000 Palestinians.

In the aforementioned communiqué – issued on 22 September 1948 – the AHC declared the formation of the All-Palestine government<sup>147</sup>. Ahmad Hilmi Abdul Baqi, who had recently left the AHC to accept King Abdallah’s offer to become military governor of Jerusalem, headed the government. Hilmi’s cabinet consisted largely of the followers of the Mufti. There were twelve ministers in all; most of them were members of the “temporary civil administration” of the previous July<sup>148</sup>.

In order to acquire popular legitimacy, the new government called for a convention. Invitations were sent out to Palestinian representatives in all parts of the country, including the members of the AHC, the mayors and the heads of local councils in Palestine, heads of chambers of commerce and trade unions, Palestinian members of the National Committees, leaders of political parties, and military commanders<sup>149</sup>. The Palestinian National Council<sup>150</sup> convened on 30 September 1948, under the supervision of the Mufti. Of the 150 invitees, approximately half gathered in Gaza for the Convention. Hajj Amin al-Husayni was unanimously elected as President of the Council. The Council adopted a provisional constitution providing for an interim Parliamentary regime with limited effect on the ground<sup>151</sup>. The Council adopted the original flag of the Arab revolt of 1916 and declared Jerusalem as the capital<sup>152</sup>. A declaration of independence was signed by the delegates and issued to the press. It asserted the right of the Palestinian people to a free, sovereign, and democratic state with borders defined as “Syria and Lebanon in the north, Syria and Transjordan in the east, the Mediterranean in the West, and Egypt in the south”<sup>153</sup>. While the Palestinian National Council was being convened in Gaza, King Abdallah invited notable Palestinians for the “First Palestinian Congress” in Amman on the same day (30 September 1948) and denounced the new government. The First

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<sup>147</sup> Ibid, p.41.

<sup>148</sup> SHLAIM A., Ibid, p.40.

<sup>149</sup> Ibid, p.42.

<sup>150</sup> Not to be confused with the PNC of the PLO.

<sup>151</sup> Cf. BROWN N.J., *Drafting a Palestinian Constitution: Hope for Democratic Governance?*, in : <http://www.palestinecenter.org/cpap/pubs/20010301ib.html>.

<sup>152</sup> SHLAIM A., ibid, p.43.

Palestinian Congress declared that Transjordan and Palestine was a single territorial unit, and resolved that no Arab government should be formed for Palestine until the entire country is liberated<sup>154</sup>. The “Second Palestinian Congress”, held in Jericho on December 1, 1948 and attended by more than 3,000 delegates, was a further step towards the annexation of the WB.

Glubb Basha, the transjordanian’s military commander, dismantled the Holy War Army in the WB, as ordered by the King of Jordan. This fact weakened the All-Palestine government. The victory of Israel and the establishment of an Egyptian military government meant inevitably the necessity to transfer the All-Palestine government to Cairo, the Egyptian capital, where its members were under the direct control of the Egyptian authorities, without any effective control over any portion of the Palestinian territories, and without any financial resources<sup>155</sup>. The All-Palestine government attempted a rapprochement with the Jordanian king, but without success. Many ministers resigned, and others stopped participating in the meetings. Ahmad Hilmi remained its nominal head until his death. The All-Palestine government continued to exist in name only, until President Nasir closed its offices in 1959. The power to represent the Palestinians remained with the Arab states and their leaders<sup>156</sup> until the creation of the Palestine Liberation Organization on 1964.

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<sup>153</sup> Ibid.

<sup>154</sup> Ibid, p.44.

<sup>155</sup> Ibid, p.49.

<sup>156</sup> Ibid, p.50.

#### §4 THE PALESTINE LIBERATION ORGANIZATION

The PLO is not a state. It does not administer a defined territory. It does not have the attributes of a government of a state<sup>157</sup>. In 1974, the UN general Assembly invited the organization to participate in the debate regarding the Palestinian question, and the Arab Summit Conference recognized the PLO as the sole legitimate representative of the Palestinian people.

##### I. THE PLO'S ORIGINS AND DEVELOPMENT

The collective Arab governments created the PLO at a summit conference in January 1964 in order to channel revitalised nationalism among Palestinians in exile<sup>158</sup>. The first Palestinian National Council (hereinafter PNC) convened for the first time in Jerusalem in May 1964. The Arab League charged Ahmad Shuqayri with the task of disseminating invitations to the convention. The PNC elected a fifteen-member Executive Committee (hereinafter EC) and elected Ahmad Shuqayri as its chair.

The creation of the PLO represented a step towards the re-establishment of a Palestinian political centre. The PNC adopted the Palestine National Charter, which was amended twice: firstly, in July 1968, during the fourth PNC, and secondly in April 24, 1996, following the Oslo Agreements, during the 21<sup>st</sup> PNC, held for the first time since 1964 in the Palestinian territories<sup>159</sup>. The amendment of the PNCh in 1968, following the 1967 war, reflected the guerillas' emphasis on armed struggle based on popular support. In 1969 and during the fifth PNC, guerilla groups held over half of the seats of the PNC, and elected Mr. Arafat – the chairman of the most important Palestinian party, Fatah, which was founded by him – as chairman of the PLO Executive Committee. The Palestinian National (Qawmiyya – referring to Arab Nationalism) Charter became Palestinian National (Watanyya – referring to Palestinian Nationalism) Charter. This reflects the disappointment of Palestinians with regard to Arab intervention in achieving the liberation of Palestine, and their conviction that only a Palestinian struggle would

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<sup>157</sup> KASSIM A.F., *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis under International Law*, p.2.

<sup>158</sup> Cf. MATTAR P. (edit.), *Encyclopedia of the Palestinians*, 2000, p.288.

<sup>159</sup> We have to take note of the fact that the 1968 amendments of the charter also touched on the procedures to follow in case of future amendment, making it more complicated than before.

restore the Palestinians to their land. The Arab regimes' hostility to the PLO and internal divisions in the PLO characterised the organisation since its inception.

The Arab-Israeli war of 1974 caused a shift in the PLO's position and goals. Accordingly, in the 12<sup>th</sup> PNC in 1974 it advocated the establishment of a national authority over every part of Palestinian territory that was liberated but rejected the idea of permanent peace with Israel<sup>160</sup>. In the 13<sup>th</sup> PNC, there was an internal shift in the PLO since it stressed the Palestinians' right to establish their independent national state on their own land<sup>161</sup>. The PLO went on to consolidate its standing in the Arab world, beginning in October 1974 when the Arab League summit conference at Rabat affirmed the right of the Palestinian people to establish a national authority under the command of the PLO, defined as the sole legitimate representative of the Palestinian people<sup>162</sup>. The PLO's international role was enhanced in November 1974 when, after Arafat's address to the U.N. General Assembly<sup>163</sup>, the PLO secured observer status at the U.N.<sup>164</sup>.

The PLO's strategic shift from the goal of reclaiming all of Palestine to that of forming a state alongside Israel was officially adopted by the PLO in the Declaration of Independence made in Algiers on November 1988, during the 19<sup>th</sup> PNC. This proclamation came after the beginning of the popular uprising (*Intifada*) in WBGS in December 1987, and the unilateral declaration by King Hussein to sever administrative ties between Jordan and the WB. The CC then elected Mr. Arafat as President of the State of Palestine. The state of Palestine was recognised by a hundred states, but did not effectively exercise sovereignty over a territory and a population. The contents and significance of this proclamation are more political than legal. The 19<sup>th</sup> PNC endorsed the establishment of an independent state on the WBGS, with its capital in East Jerusalem. UN Resolutions 181 and 242 would be the state's legal underpinning. The PNC resolution also called for security and peace for every state in the region and

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<sup>160</sup> Cf. MATTAR P. (edit.), *Encyclopedia of the Palestinians*, 2000, p.291.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> The Speech of Mr. Arafat at UN general Assembly was made in Geneva, in 13 December 1988. for the English version of the speech <http://MondeDiplo.com/focus/mideast/arafat88-en> ; for the text in Italian: CAPANNA M., *Arafat*, p.157-179.

<sup>164</sup> Cf. MATTAR P. (edit.), *ibid.*

renounced the use of terror<sup>165</sup>. The PNC promised a democratic government and a constitution<sup>166</sup>.

## II. THE PLO INSTITUTIONS

The PLO has an extensive structure of institutions: political, cultural, economic and social. The political institutions are: the PNC and the EC. The cultural institutions are: the Association for Theatre and Palestinian Popular Art, the Graphic Arts, the Palestine Cinema Institute, The Folklore Dance Troupe, The Palestinian Research Centre and the Exhibition Branch. The economic institutions are: The Palestine National Fund (PNF) and Palestine Martyrs Work Society (SAMED). The social institutions are: the Red Crescent Society, the Department of Education, the Institute of Social Affairs and Multiple Unions<sup>167</sup>. These institutions are complex and have a variety of roles that incorporate meeting the “functional needs of Palestinian people, nation building, instilling the value of education, enhancing the PLO’s international support, and catalyzing the psychological transformation of the Palestinians of having a refugee outlook to seeing themselves as self-reliant, productive, independent individuals”<sup>168</sup>.

The PNC and the EC along with its chairman form the political institutions of the PLO. According to PLO fundamental law, the PNC is the supreme legislative authority. The PNC met periodically in different Arab cities, the first convention being held in Jerusalem<sup>169</sup> in 1964 and the last one (the 21<sup>st</sup> session) in Gaza in 1996. Other sessions were held in different Arab cities: Cairo, Damascus, Amman, and Algiers. From 1970s onwards, the PNC composition reflected different categories of Palestinians: 30% guerilla organisations, 20% affiliated mass movements and trade unions, 20% Palestinian Diaspora in the West, 30% non-affiliated individuals, distinguished intellectuals, and persons deported by Israel. To address the problem of its disproportionate size, the PNC created the Central Council (CC) in 1975. The CC is composed of members of the

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<sup>165</sup> Ibid, p.292.

<sup>166</sup> The declaration of independence, made during the 19<sup>th</sup> PNC was held in Algiers on 15 November 1988, almost a month before the speech of Mr. Arafat at the UN General Assembly. For the English text of the declaration: <http://MondeDiplo.com/focus/mideast/alger88-en>

<sup>167</sup> Cf. MATTAR P. (edit.), *ibid*, p.294.

<sup>168</sup> Ibid, p.294.

<sup>169</sup> The WB – which includes Jerusalem – was part the Hashemite Kingdom of Jordan.

PNC, and has the role to implement PNC resolutions. In practice the CC met irregularly and served as an informal level legislative body. The PNC elected the EC and its Chairman. The EC members had portfolios and supervised part of the PLO bureaucracy.

### III. RECOGNITION OF THE PLO UNDER INTERNATIONAL LAW

The recognition of the PLO is “reminiscent to that of an established government”<sup>170</sup>. An article by Dr. Anis Kassim has presented all argumentations and facts that prove the status of PLO under public international law<sup>171</sup>. *First*, the PLO had been recognized by more than a hundred states<sup>172</sup>, by the Arab League<sup>173</sup> and by the United Nations<sup>174</sup>; *second*, the PLO joined international governmental institutions<sup>175</sup>; *third*, the PLO has been exercising certain powers that can only be exercised by governmental authorities. These authorities are manifested in

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<sup>170</sup> KASSIM A.F., *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis under International Law*, pp. 19.

<sup>171</sup> This is based in part on an S.J.D. dissertation submitted in June 1973 to the National Law Centre, George Washington University, Washington D.C.

<sup>172</sup> For example, the Lebanese Council of Ministers approved in 1964 the establishment of a PLO office in Beirut and granted its Director diplomatic exemptions and immunities. The People's Republic of China recognized the PLO in 1965 and granted its legation in Peking all diplomatic immunities. The Jordanian government agreed to exempt all PLO offices and employees in Jordan from taxes and to provide the members of the EC of the PLO with diplomatic passports. The government of Iraq issued a law according to which Iraq would exempt all imports by the PLO from customs duties and taxes. The government of India issued an official communiqué on January 10, 1975, recognizing the PLO as the sole and legitimate representative of the Palestinian people and approving the opening of a PLO office in New Delhi. Cf. KASSIM A.F., *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis under International Law*, p.19.

<sup>173</sup> The Second Arab Summit Conference held in Alexandria in September 1964 welcomed the establishment of the PLO as the representative of the Palestinian people. The Arab Summit Conference held in Algiers in November 1973 recognized the PLO as “the sole representative of the Palestinian people”. Cf. KASSIM A.F., *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis under International Law*, p. 20.

<sup>174</sup> At its twenty-ninth session, in 1974, the UNGA resolved that the PLO was “the representative of the Palestinian people...” Furthermore, the UNGA called in a resolution adopted in 1975 “for the invitation of the Palestine Liberation Organization, the representative of the Palestinian people, to participate in all efforts, deliberations and conferences on the Middle East which are held under the auspices of the United Nations, on an equal footing with other parties...” The UNSC decided on December 4, 1975, to invite the PLO to participate in its discussion concerning the Israeli raids against Palestinian refugee camps in Lebanon. The invitation was made as it was a member state according to rule 37 and not on basis of rule 39 of its provisional rules of procedures. Based on rule 37, the UNSC made other invitations to the PLO in 1976 and 1978 to participate in discussions concerning the Middle East situation. Cf. KASSIM A.F., *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis under International Law*, p. 20.

<sup>175</sup> The Arab Bank for Economic Development in Africa, established in 1974 by eighteen sovereign states admitted Palestine, represented by the PLO, as a member of the Bank with powers accorded to other member governments. The Arab Monetary Fund, established in 1974 admitted the PLO as a full member representing Palestine in the Fund, as the other twenty-one Arab states members. The Board of Governors of the Arab Fund for Economic and Social Development, constituted in 1969, by Decree o. 4 of 1976, admitted Palestine, represented by the PLO, as a full-fledged member. The Islamic Bank for Development admitted PLO on 1977 as a member on the same footing with other governments. The Arab League, in its sixty-sixth session held in Cairo in September 1976, accepted Palestine, as represented by the PLO, as a full member of the Arab League. Cf. KASSIM A.F., *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis under International Law*, pp. 21-22.

different forms: *first*, in a war situation, the PLO exercised sovereign powers over Palestinians<sup>176</sup>; *second*, the PLO's right to request the extradition of Palestinians responsible for plane hijacking, as a crime punishable under Palestine Penal Code, was recognised<sup>177</sup>; *third*, the PLO exercised taxation powers over Palestinians in various countries regardless of the origin of the passports they currently held<sup>178</sup>.

Various authors that have dealt with the issue of the status of the PLO under public international law have presented numerous arguments similar to those mentioned above. The general impression that is created is a kind of confusion about the real status of PLO. Although its subjectivity under international law per se is not the subject of many critics, the reasons for which this subjectivity is guaranteed are less clear (please check if I've understood the context properly). The PLO's subjectivity under international law is sometimes related to the fact that it is a liberation movement that represents the legitimate aspirations of a people under a military occupation. On some occasions, the PLO is considered as the government in exile of the state of "Palestine". In fact, when the PNC proclaimed the state of Palestine more than a hundred states recognised it. However, the state of Palestine does not exist effectively since it does not possess the elements of state under international law. I personally prefer to insist on the status of the PLO as a subject of international law as a liberation movement representing the Palestinian people. The PLO, in fact, is involved at all levels in finding a solution to the conflict in the Israel/Palestinian territories. In this sense, on the one hand the PLO can perform actions relevant under international law, and on the other hand is therefore subject to international law just as other subjects of international law.

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<sup>176</sup> For example, the PLO concluded an agreement with the Lebanese government in 1969 at the close of the war between them. Another agreement was signed on October 1970 between Jordan and PLO, after the bloody war of black September of 1970. The invasion of Lebanon in March 1978 was declared as a war against the PLO, and the agreement of cease fire recognized the PLO as a *de facto* party to the agreement.

<sup>177</sup> The PLO requested the extradition of Palestinians responsible of such acts. This was the case when five hijackers attacked a Pan American World Airways jet in Rome in December 1973 and then hijacking a Lufthansa airliner to Kuwait where they surrendered. The same thing happened when eleven men hijacked a British Airways jet in Dubai, later surrendering in Tunis. Those hijackers were turned over to the PLO. CF. KASSIM A.F., *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis under International Law*, pp. 24-25.

<sup>178</sup> The Iraqi Law No. 130 of 1965 provided that three percent of the monthly salaries of Palestinians working in governmental and quasi-governmental departments and Companies and in the companies of private sector would be deducted and credited to the account of the PNF. Similar provisions, with deductions ranging, from three to six percent, also existed in Syria, Kuwait, Libya, the United Arab Emirates, and Qatar. CF. KASSIM A.F., *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis under International Law*, p.25.

## §5 THE PALESTINIAN NATIONAL AUTHORITY

The result of Oslo accords was the creation of a Palestinian self-government for the transitional period. The new Palestinian entity in the WBGS was meant to exercise its jurisdiction, especially legislative jurisdiction, within the limits of the same agreements. The Palestinian ‘Council’ in the terms of the IA refers the elected PLC, whose powers would be temporarily exercised by the ‘Council’, appointed by the PLO and accepted by Israel. The President of the PNA was in turn appointed by the PLO Central Committee, charged to form the Council and to prepare for the election. The election of the PLC signaled the creation of the first Palestinian ‘parliament’ in the Palestinian territories occupied by Israel since 1967, that would legislate for the Palestinians of those same territories, within the limits of the Oslo Agreements, and on the legal heritage of different legal contexts and systems. The intention of the Agreements was to create a powerful ‘Council’ that has both Legislative and Executive powers (IA.3.2). The “Executive Authority” is bestowed with the executive authority of the ‘Council’ and shall exercise it on behalf of the Council (IA.V.2).

There is a misuse of the phrase ‘PNA’ and this complicates the understanding of the new Palestinian reality in the aftermath of the Agreements. The PNA or simply the PA is often used to describe the executive branch and indicates “the government of the Palestinian self-rule areas of the West Bank and Gaza Strip”<sup>179</sup>. This would have been true before the election of the PLC. The election of the PLC signaled the distinction between the Executive Authority (also called PNA!) and the PLC that forms (according to the terms of the IA) together with the President of the Executive Authority – both directly elected by Palestinians of WBGS – the Palestinian self-government authority. In this research, the phrase PNA may indicate both meanings<sup>180</sup>. Before the election of the Council, the two mandates were concentrated on the appointed Council and the President of the PNA. The PNA’s restricted definition is the Palestinian ‘Council’ together with the Ra’ees that would be elected directly by the people of

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<sup>179</sup> LAW, *Executive Interference in the Judiciary*, p.4.

<sup>180</sup> The criteria adopted here is as follows: when speaking about the PNA before the election we may mean both meanings mentioned here, but when speaking about the Executive Authority we mean exclusively that branch that is bestowed with the executive authority of the ‘Council’ and headed by the PNA president, Mr. Arafat.

WBGs including Jerusalem East, called in the IA “the Palestinian Interim Self-Government Authority” (IA.III.1). “The term ‘Council’ throughout this Agreement shall, pending the inauguration of the Council, be construed as meaning the Palestinian Authority” and as such the PA assumes all responsibilities transferred to the Council (IA.I.2). The ‘Council’, upon inauguration, shall replace the PA and shall assume all the undertakings and obligations of the Palestinian Authority under the Agreements (IA.XXXI.3). The PA’s wide definition would include all institutions and apparatus through which the Palestinian ‘Council’ and the Ra’ees of the Executive Authority exercise their powers, to rule Palestinians of WBGs, within the territorial, functional and personal jurisdiction of the ‘Council’.

The PA has specific territorial, personal, and functional jurisdiction. This chapter is dedicated to the legislative activity of the PA. It is divided into four sections: *first*, the IA provisions regarding the legislative powers of the ‘Council’; *second*, the legislative activity of the PNA before the elections; *third*, the legislative activity of the PLC; and *fourth*, the legislative activity of the Executive Authority.

#### I. THE LEGISLATIVE ACTIVITY OF THE ‘COUNCIL’ AS PROVIDED BY THE OSLO AGREEMENTS

Legislation, in the terms of the IA, means “any primary and secondary legislation, including basic laws, laws, regulations and other legislative acts” (IA.XVIII.1). The ‘Council’ is empowered with the Legislative powers (IA.XVIII.2) within its jurisdiction (IA.iii.6, IA.XVII). In the case of a legislation, including amendments of existing laws and military orders, inconsistent with Agreements and outside the authorities transferred to it, the legislation shall have no effect and shall be void ab initio (IA.XVIII.3.d) and the Ra’ees shall not promulgate it (IA. XVIII.3.e). The DOP already limited the legislative power of the Council regarding Military Orders regarding remaining spheres (DOP.IX).

The Council was empowered to legislate (DOP.IX). The Council as a whole retains the primary legislation power (IA.XVIII.3). According to the

previous article, “the Ra’ees of the Executive Authority of the Council have the following legislative powers:

- a. The power to initiate legislation or to present proposed legislation to the Council;
- b. The power to promulgate legislation adopted by the Council;
- c. The power to issue secondary legislation, including regulations, relating to any matters specified and within the scope laid down in any primary legislation adopted by the Council”.

The exercise of legislative powers of the Council and of the Ra’ees of the Executive Authority shall be in accordance with Article XVIII of the IA that defines the legislative powers of the Council. Article XVIII, among other things, imposes on the Palestinian side the condition to communicate all legislations to the Israelis of the legal Committee (IA.XVIII.4) that would then refer it to the attention of the ‘Council’ at the earliest opportunity, in order to discuss issues arising from these legislations (IA.XVIII.5). Furthermore, the legislation of the Council is limited by its territorial, personal and functional jurisdiction as mentioned above. “Israel, through its military government, has the authority over areas that are not under the territorial jurisdiction of the Council, powers and responsibilities not transferred to the Council and Israelis” (IA.XVII.3.a). “To this end, the Israeli military government shall retain the necessary legislative, judicial and executive powers and responsibilities, in accordance with international law. This provision shall not derogate from Israel's applicable legislation over Israelis in personam” (IA.XVII.3.b). In addition, legal arrangements detailed in the Protocol Concerning Legal Matters attached as Annex IV to this Agreement shall be observed (IA.XVII.5).

The internal organisation, structure and functioning of the Council shall be in accordance with the Agreements and the Basic Law that the Council had to adopt (IA.III.7). The Agreements confer the speaker of the Council, elected upon inauguration (IA.III.5), the power to present for the approval of the Council the internal procedures, including the decision-making process of the Council (IA.III.9). The Council shall adopt all measures necessary to enforce law and its

decisions and bring proceedings before the Palestinian courts and tribunals (IA.IX.4); as such, the Council shall, within its jurisdiction, have an independent judicial system composed of independent Palestinian courts and tribunals (IA.IX.5)

## II. THE LEGISLATIVE ACTIVITY OF THE PALESTINIAN NATIONAL AUTHORITY PRIOR TO THE ELECTION

Before the election, the PNA was the executive body that assumed the responsibilities of the Council, until its inauguration. In the absence of the legitimate legislative body (the Council) the PNA exercised legislative powers to draft temporary laws and decisions of a legislative nature, besides its capacity as an administrative authority. During the period from 24 September 1994 (the establishment of the PNA) until 20 January 1996 (the election of the PLC), the PNA issued 23 Temporary Laws<sup>181</sup>. The mechanism for passing legislation, until the inauguration of the PLC, was regulated by the President of the PNA in Temporary Law #4 of 1995. However, it seems that there was no regular mechanism for the issuance of laws, since seven laws over 23 were issued before Law # 4 regarding the legislation procedure, and only seven other laws, after its approval, followed the procedures of legislation in Law #4 of 1995. Some laws, such as Law # 16 of 1995, which is an amendment of Law # 13, were approved by the PNC!

In the LAW publication, authors speak about a kind of Temporary Laws that are distinct from ordinary laws, since the executive issued them<sup>182</sup>. This is the case of every temporary law issued by the executive after the inauguration of the Council, but prior to that the appointed Council and the President (that form the PA) assumes all responsibilities, rights and powers of the elected Council, until its inauguration. That means that we have a non-elected council with a President of the Executive that has exactly the same legislative and executive powers as the Council would have after the election. So, the position assumed by the authors in the LAW publication can not be accepted a priori, but depend, on a case specific

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<sup>181</sup> Two laws have been issued in 1994, 17 in 1995, and four in 1996. Cf. LAW, *Legislative Mandate of the Executive Authority in the Palestinian National Authority (Theory and Practice)*, p.6. See table annexed to this chapter.

basis, on the procedures followed and the issuing parties. That could explain the fact that none of the laws – as rightly confirmed by LAW – approved by the PA prior to the creation of the PLC were presented to the latter since its establishment on 7 March 1996<sup>183</sup>.

### III. THE LEGISLATIVE ACTIVITY OF THE PALESTINIAN LEGISLATIVE COUNCIL

Since its establishment, the PLC has passed 27 laws in final readings. They have been referred to the President's office for endorsement. Of the 27 laws, by the end of the transitional period in 1999, the President of the PA had endorsed 22 laws. It is useful to mention that the endorsing of the law by the President of the PA is not sufficient for these laws to become effective: they need to be published and instructions and implementations should be put into place<sup>184</sup>. When studying the table of laws endorsed by the President of the PA as depicted in the table annexed to this chapter, we notice that the differences between referral and endorsement, and between endorsement and publishing is reasonable. What is even more significant here is that these laws were not implemented through rules and regulations of competent authorities that in turn have to be published in the official gazette<sup>185 186</sup>.

The Basic Law and the Judiciary Law were within the five draft laws that the President of the PA had not endorsed by the end of transitional period. These two laws included a number of constitutional provisions that intended to regulate relations between the legislative, executive, and judiciary. The provisions of these laws intended to limit executive interference in the legislative and the judiciary branch. Mr. Arafat endorsed the Basic Law and the Judiciary Law on the same day, 5 May 2002, as a step towards reform.

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<sup>182</sup> Cf. LAW, *Legislative Mandate of the Executive Authority in the Palestinian National Authority (Theory and Practice)*, p.6.

<sup>183</sup> *Ibid*, p.13.

<sup>184</sup> *Ibid*, p.17.

<sup>185</sup> *Ibid*, p.18.

<sup>186</sup> A complete analysis for laws endorsed by the President of the PA that need implementation can be found in: LAW, *Legislative Mandate of the Executive Authority in the Palestinian National Authority (Theory and Practice)*, pp. 18-33.

#### IV. THE LEGISLATIVE ACTIVITY OF THE “EXECUTIVE AUTHORITY”

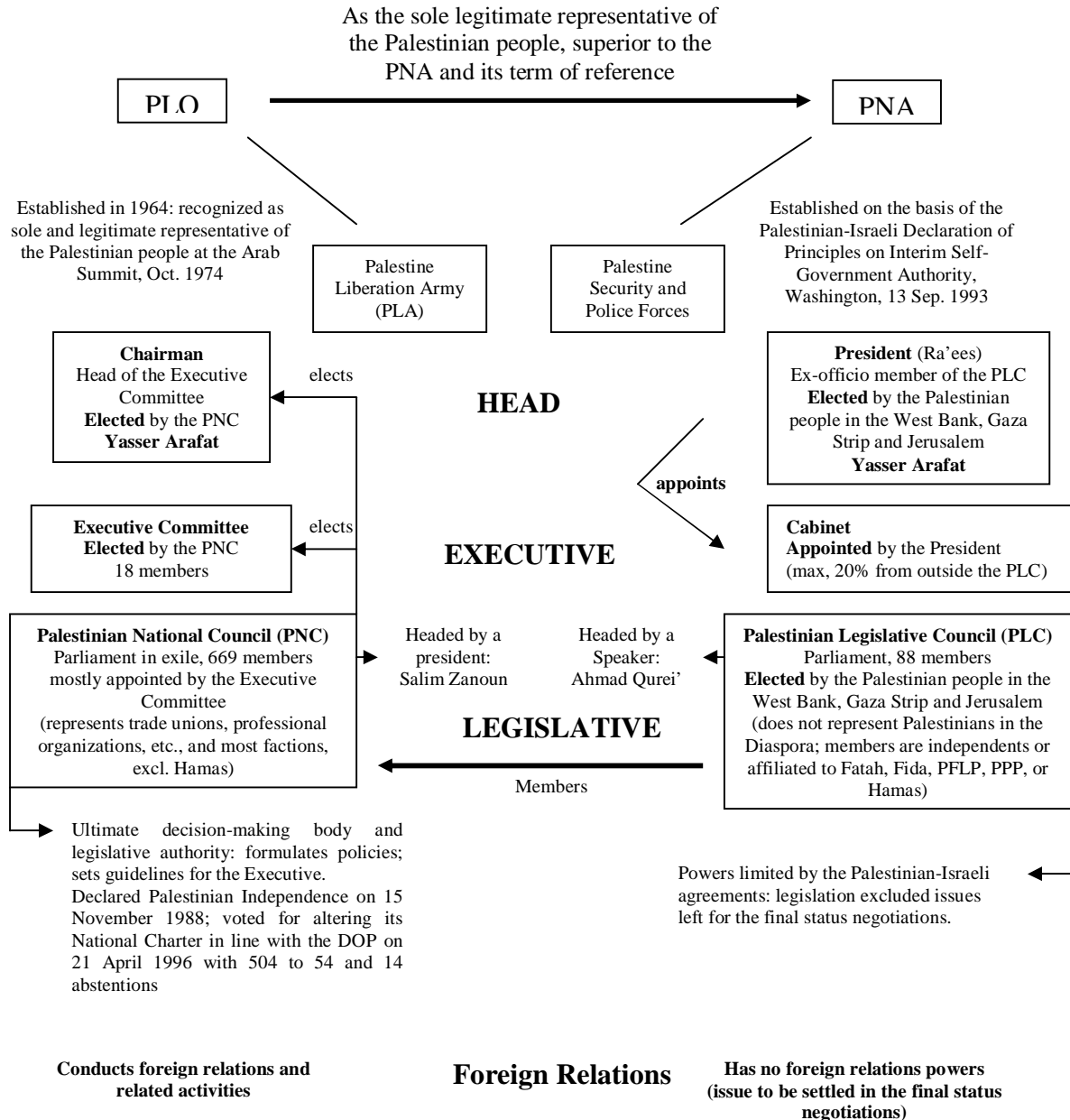
This paragraph discusses the legal activity of the executive authority through decisions, regulations and decrees<sup>187</sup>. As noted in the previous paragraphs, the deadline was the end of the transitional period. In that period the PA issued 137 decisions, six regulations and seventeen decrees. The use of this or that nomination to the “act” of the executive authority does not answer to precise criteria since there were no constitutional limitations under which the PA used its powers. The collection of all these decisions, regulations and decrees will enable us to understand how complicated and unique is the Palestinian case regarding law-making process. The plan includes complete and detailed presentation for these decisions, regulations and decrees. We must outline here the following: *first*, there are decisions and regulations with legislative contents that amended the laws in force as if they were in the same level in the pyramid of legislation; *second*, the executive authority continued to issue decree-laws also after the election of the PLC.

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<sup>187</sup> For more details, cf. LAW, *Legislative Mandate of the Executive Authority in the Palestinian National Authority (Theory and Practice)*, pp.37-58.

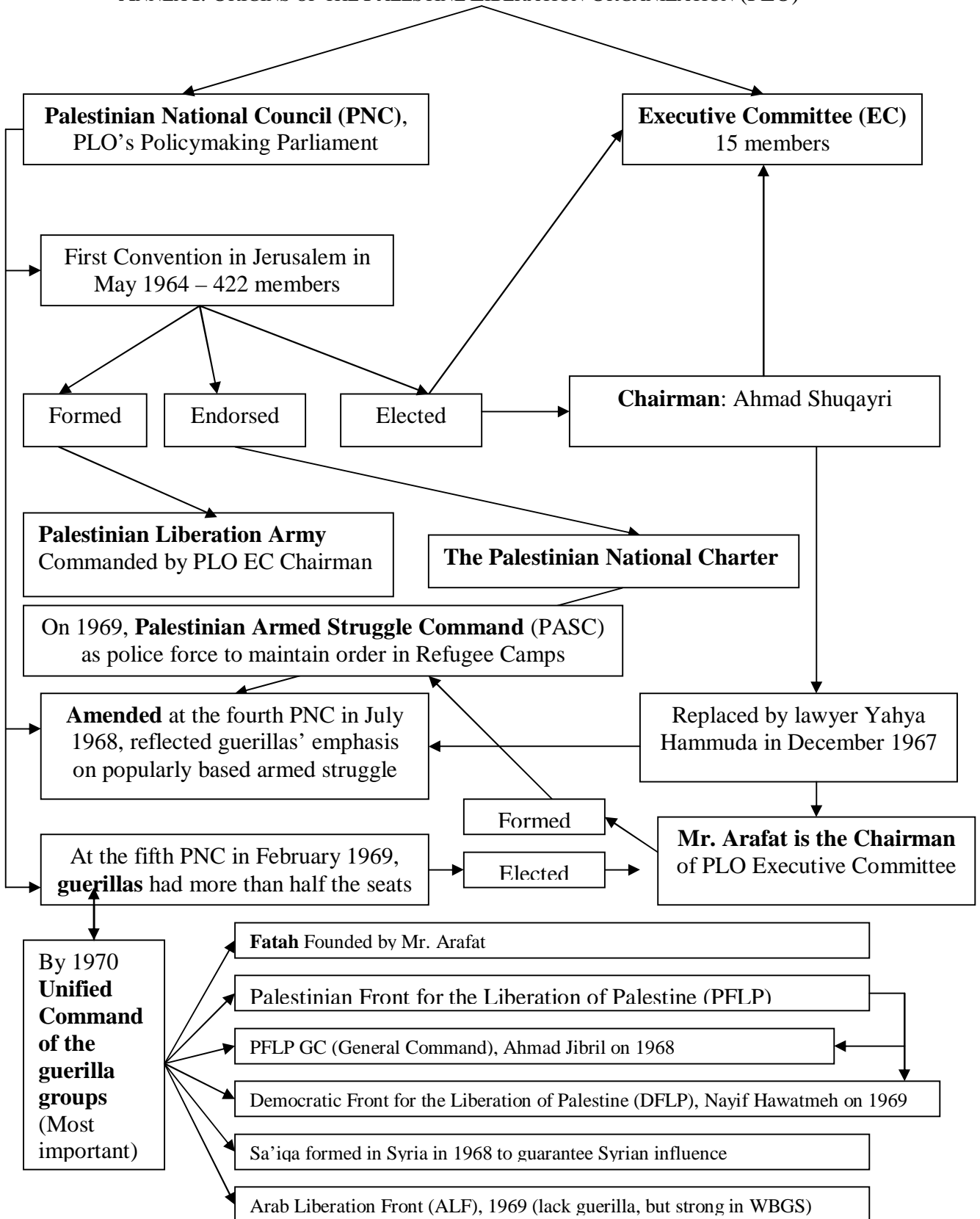
## CONCLUSION

The best conclusion to this chapter is to compare the institutions of PNA and the PLO. The research Center “JMCC” prepared a plan and published in its official website<sup>188</sup>, that is reproduced here.



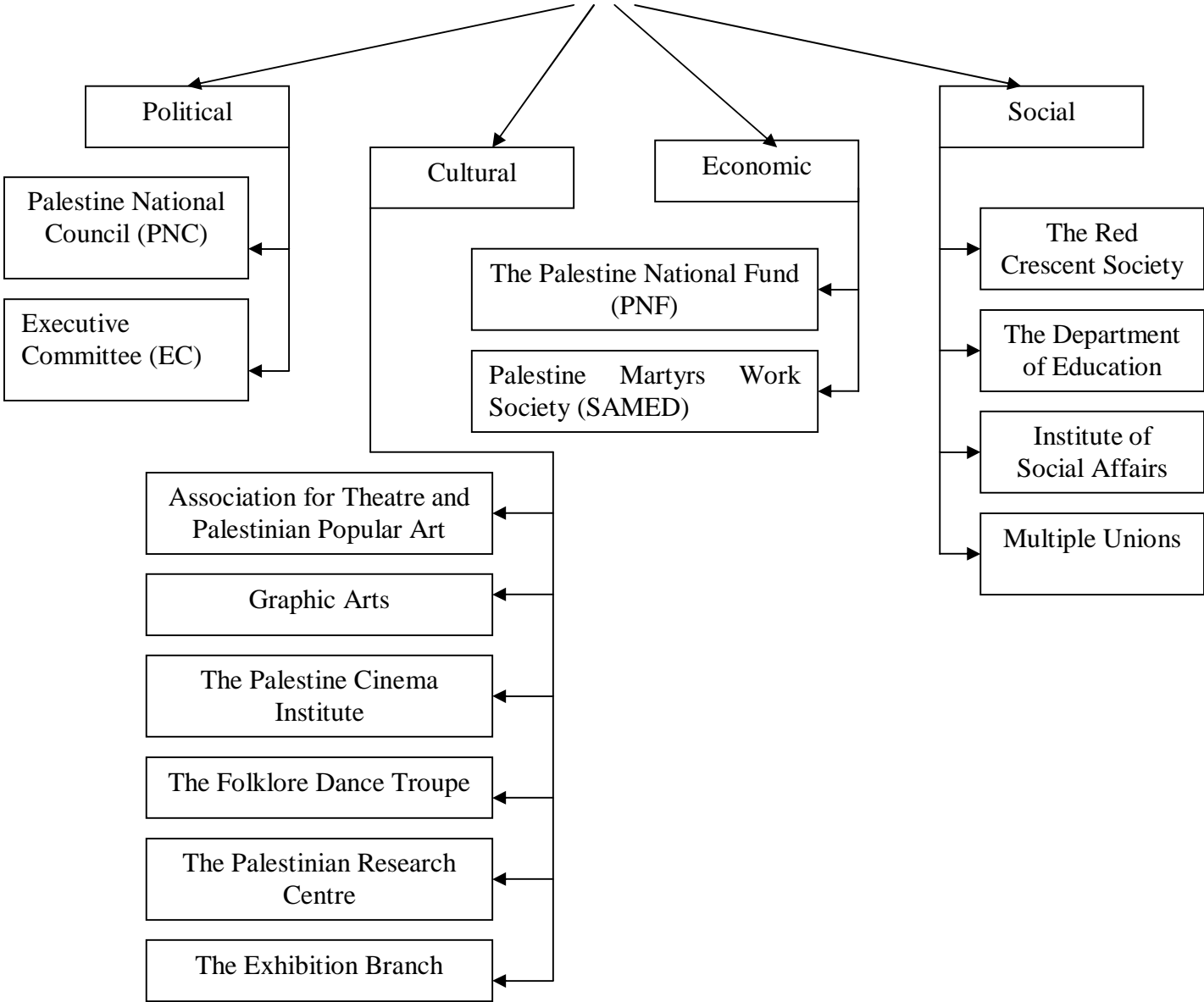
<sup>188</sup> Cf. <http://www.jmcc.org/images/plopna.jpg>

ANNEX I: ORIGINS OF THE PALESTINE LIBERATION ORGANIZATION (PLO)\*



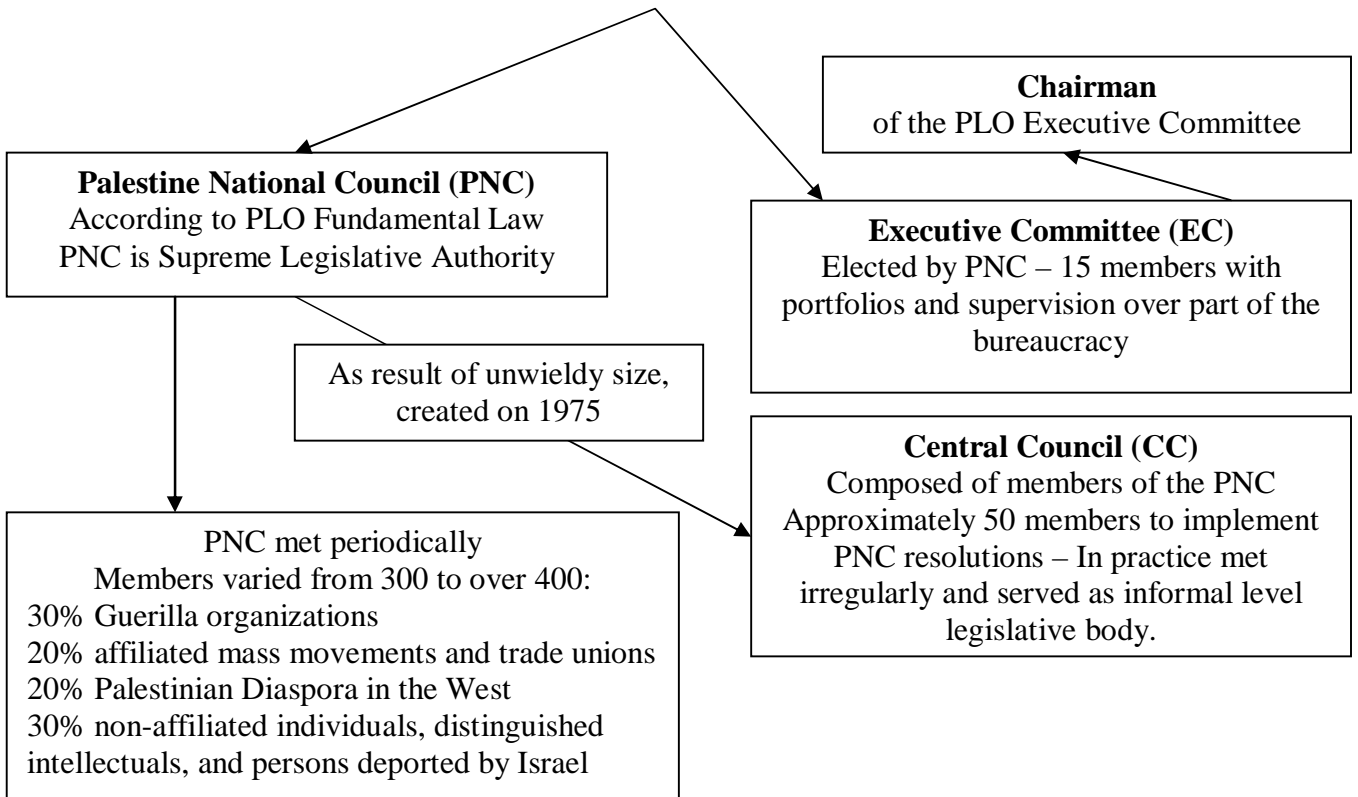
\* Cf. MATTAR P. (edit.), *Encyclopedia of the Palestinians*, 2000, pp.288-294. Table is mine.

ANNEX II: MAJOR PLO INSTITUTIONS\*



\* Cf. MATTAR P. (edit.), *Encyclopedia of the Palestinians*, 2000, p.294. Table is mine.

ANNEX III: THE PLO POLITICAL INSTITUTIONS \*



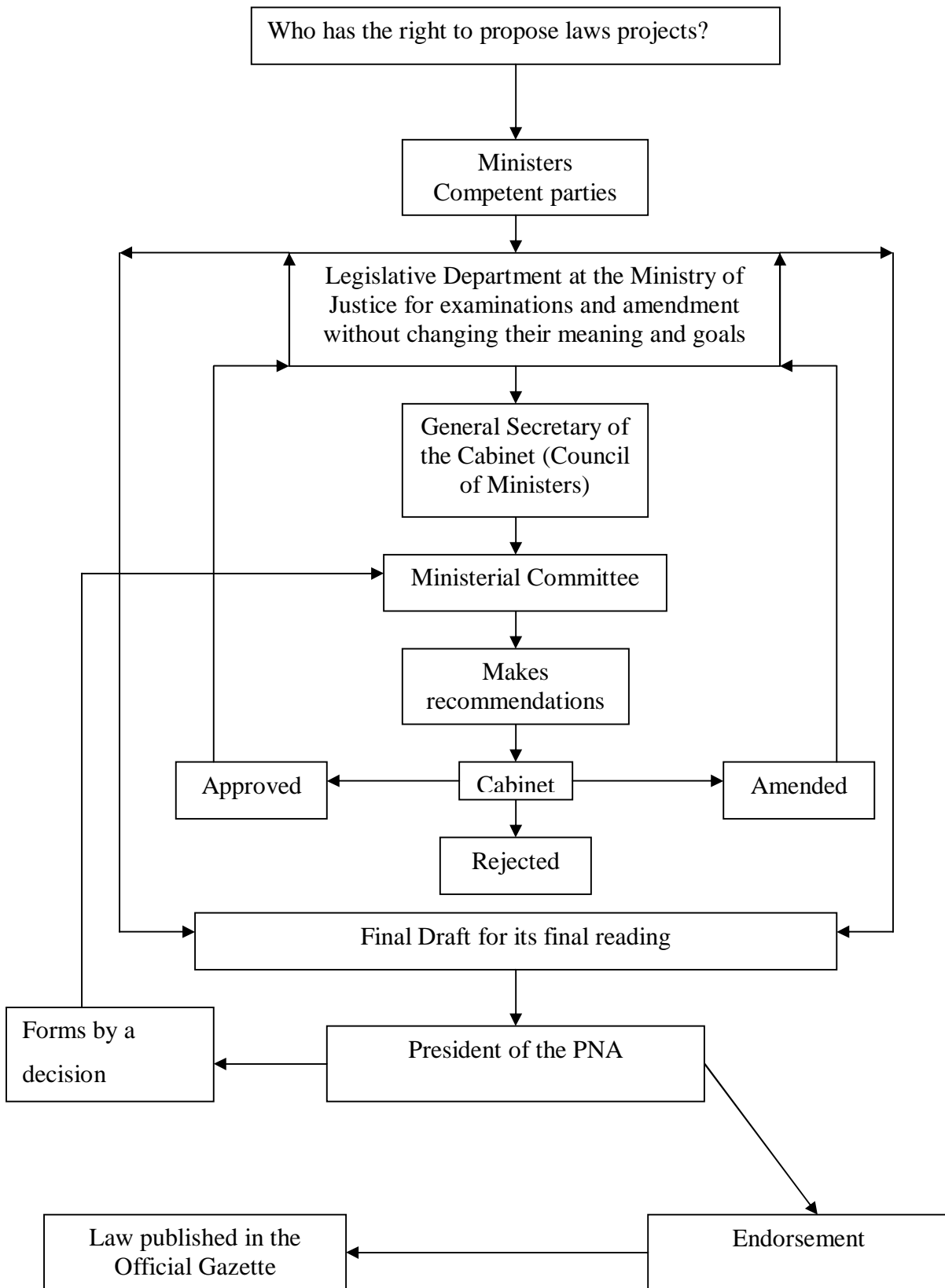
\* Cf. MATTAR P. (edit.), *Encyclopedia of the Palestinians*, 2000, pp.288-294. Table is mine.

ANNEX IV: THE PALESTINE NATIONAL COUNCIL SESSIONS\*

<b>Sessions</b>	<b>Convened</b>	<b>Main results</b>
1 <sup>st</sup> PNC	Jerusalem - May 1964	- Elected the 15-member EC - Endorsed the Palestinian National Charter
2 <sup>nd</sup> PNC	Cairo - May 31- June 4, 1965	
3 <sup>rd</sup> PNC	Cairo – December 24, 1967	- Ahmad Shukeiri resigns as PLO Chairman
4 <sup>th</sup> PNC	Cairo – July 10, 1968	- Amended the PLO Charter
5 <sup>th</sup> PNC	Cairo - February 1-4, 1969	- Guerilla groups held more than half of the seats and ousted the old-guard politicians - Elected Arafat to Chair PLO EC.
6 <sup>th</sup> PNC	Cairo – September 1-16, 1969	
7 <sup>th</sup> PNC	Cairo – May 30- June 4, 1970	
8 <sup>th</sup> PNC	Cairo – February 28-March 5, 1971	
9 <sup>th</sup> PNC	Cairo July 7-13, 1971	
10 <sup>th</sup> PNC	Cairo April 6-12, 1972	
11 <sup>th</sup> PNC	Cairo – January 6-12, 1973	- Resolved in Secret to form an umbrella structure in the OPT that would work politically rather than militarily to end Israeli rule.
12 <sup>th</sup>	Cairo - June 1-9, 1974	- Advocated the establishment of an independent national authority over every part of Palestinian territory that was liberated. - Rejected the idea of permanent peace with Israel
13 <sup>th</sup> PNC	Cairo, March 12-22, 1977	- Stressed the Palestinians’ right to establish their independent national state on their own land.
14 <sup>th</sup> PNC	Damascus – January 15-22, 1979	
15 <sup>th</sup> PNC	Damascus – April 11-19, 1980	
16 <sup>th</sup> PNC	Algiers – February 14-22, 1983	
17 <sup>th</sup> PNC	Amman - November 1984	- Accepting land-for-peace formula - Calling for Confederation with Jordan
18 <sup>th</sup> PNC	Algiers – October 1, 1986	
19 <sup>th</sup> PNC	Algiers - November 19, 1988	- Endorsed the establishment of an independent state on the WBGS, with its capital in East Jerusalem. - U.N. Resolution 181 and 242 would be the state’s legal underpinning. - Called for peace and security for every state in the region, renounced the use of terror.
20 <sup>th</sup> PNC	Algiers – September 1991	
21 <sup>st</sup> PNC	Gaza – April 22-26, 1996	- PNC votes to delete anti-Israel sections of 1968 Palestinian Charter on April 24.

\* Cf. MATTAR P. (edit.), *Encyclopedia of the Palestinians*, 2000. Table is mine.

ANNEX V: LEGISLATIVE PROCEDURE IN THE PNA PRIOR TO THE ELECTION OF THE PLC  
 ACCORDING TO LAW #4 ISSUED ON 17 APRIL 1995

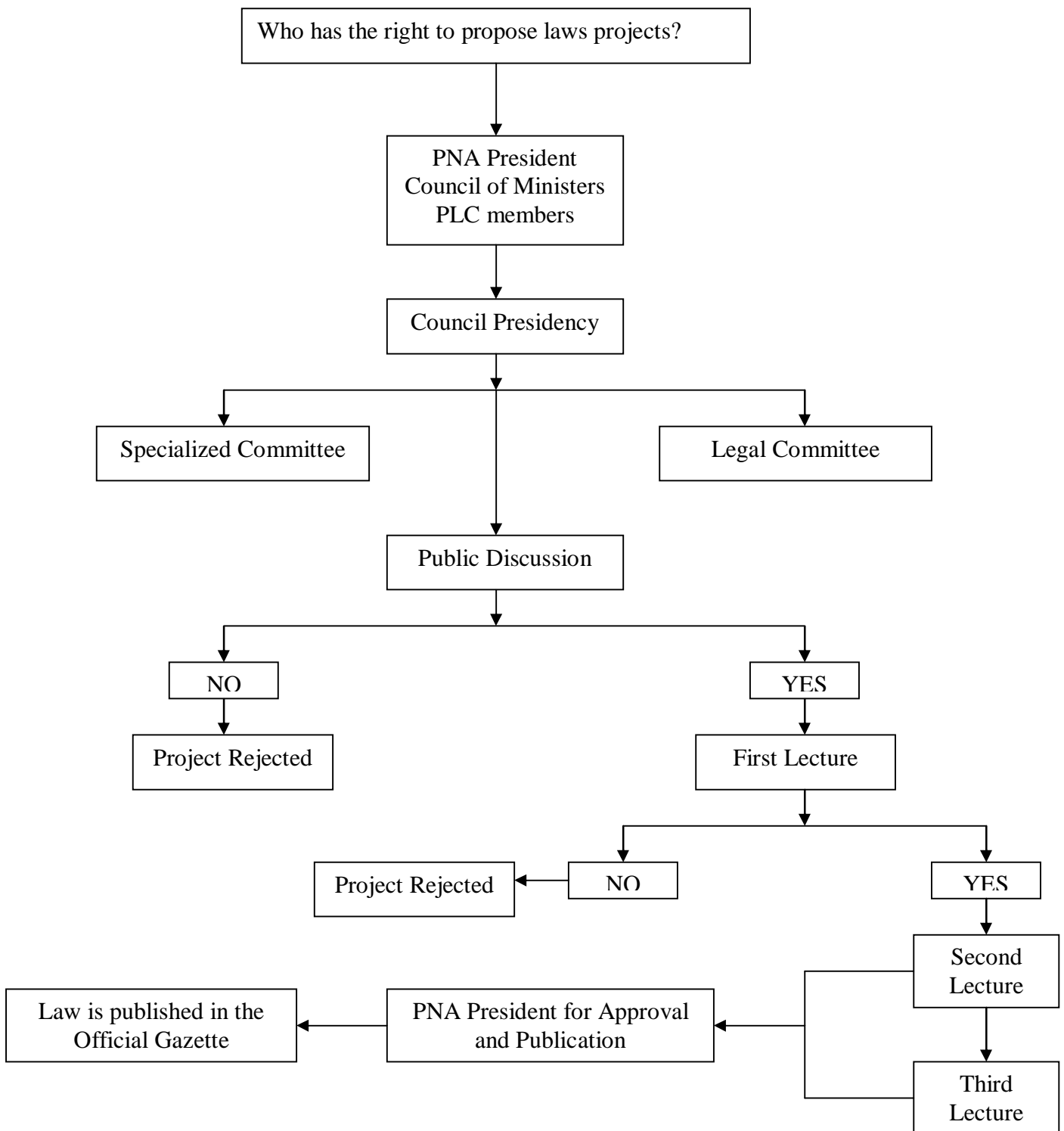


ANNEX VI: LIST OF THE TEMPORARY LAWS ISSUED BY THE PNA BEFORE THE  
ESTABLISHMENT OF THE PLC\*

	LAW #	YEAR	CONTENTS
1)	1	1994	Pertaining to the transfer of the responsibilities of the administrative and municipal affairs in the Gaza Strip to the Ministry of Local Governance
2)	2	1994	Pertaining to the extension of the jurisdiction of the High Court in Gaza
3)	1	1995	Regarding the amendment of the court appeals laws #5 of 1958 and #30 of 1926.
4)	2	1995	Which revokes some military orders and decisions
5)	3	1995	Pertaining to the traffic department
6)	4	1995	Pertaining to the procedures of preparing legislation
7)	5	1995	Regarding the transfer of authorities and responsibilities
8)	6	1995	Regarding the encouragement of investment
9)	7	1995	Regarding the establishment of the council for the administrative of the insurance and wages fund
10)	8	1995	Regarding the amendment of the Money Changing Law
11)	9	1995	Pertaining to the press
12)	10	1995	Regarding the amendment of some ruling in the Law of the Laborers' Union #331 of 1945 and the Labor Law #21 of 1960.
13)	11	1995	Regarding the exemption of the diplomatic and consular missions of registration and licensing fees
14)	12	1995	Pertaining to the establishment of the Palestinian Energy Authority
15)	13	1995	Pertaining to elections
16)	14	1995	Pertaining to the formation of the customs committee
17)	15	1995	Regarding translations and translators
18)	16	1995	Pertaining to amending some of the Election's Law's rulings
19)	17	1995	Regarding the Public Oversight Committee
20)	1	1996	Regarding the ownership of the floors, apartments and stores
21)	2	1996	Pertaining to the establishment of the Palestinian Water Department
22)	3	1996	Pertaining telecommunications and wireless communications
23)	4	1996	Pertaining to the amendment of some rulings in the Insurance and Wages Law

\* Cf. LAW, *Legislative Mandate of the Executive Authority in the Palestinian National Authority (Theory and Practice)*, pp.63-64.

ANNEX VII: LEGISLATIVE PROCEDURE IN THE PLC



ANNEX VIII: LAWS ISSUED BY THE PLC AND ENDORSED BY THE PRESIDENT OF THE PA  
BY 2000\*

#	NAME OF THE LAW	DATE OF REFERRAL	DATE OF ENDORSEMENT	DATE OF PUBLICATION
1)	Local Council Elections	16/12/96	30/1/97	
2)	Local Parties	21/7/97	12/10/97	29/11/97
3)	Monetary Fund	15/12/97	16/12/97	31/1/97
4)	Encouraging Investment	20/4/99	23/4/98	9/6/98
5)	Fire, Weapons & Ammunitions	20/4/99	20/5/98	8/6/98
6)	Civil Service	4/6/97	28/5/98	1/7/98
7)	Hallmarking Precious Metals	24/3/99	28/5/98	1/7/98
8)	Civil Defence	20/4/98	28/5/98	1/7/98
9)	Correction and Rehabilitation Centers	2/5/98	28/5/98	1/7/98
10)	General Budget and Financial Affairs	20/4/98	3/8/98	24/9/98
11)	Protection of Animal Resources	9/3/98	2/11/98	26/11/98
12)	Higher Education	19/8/98	2/11/98	8/11/98
13)	Industrial and Free Zones	9/9/98	2/11/98	8/11/98
14)	General Procurement	14/9/98	2/11/98	26/11/98
15)	Public Meetings	19/12/98	28/12/98	13/3/98
16)	Natural Resources	5/12/98	24/1/99	13/3/99
17)	The Legal Profession	24/6/99	10/10/99	
18)	Civil Affairs	13/1/99	8/6/99	17/7/99
19)	The Rights of the Handicapped	10/10/99		
20)	Governmental Tenders	21/12/98	29/12/98	Not Published
21)	Amendment of the Legal Profession Code		29/12/99	Not Published
22)	The Environment		29/12/99	Not Published

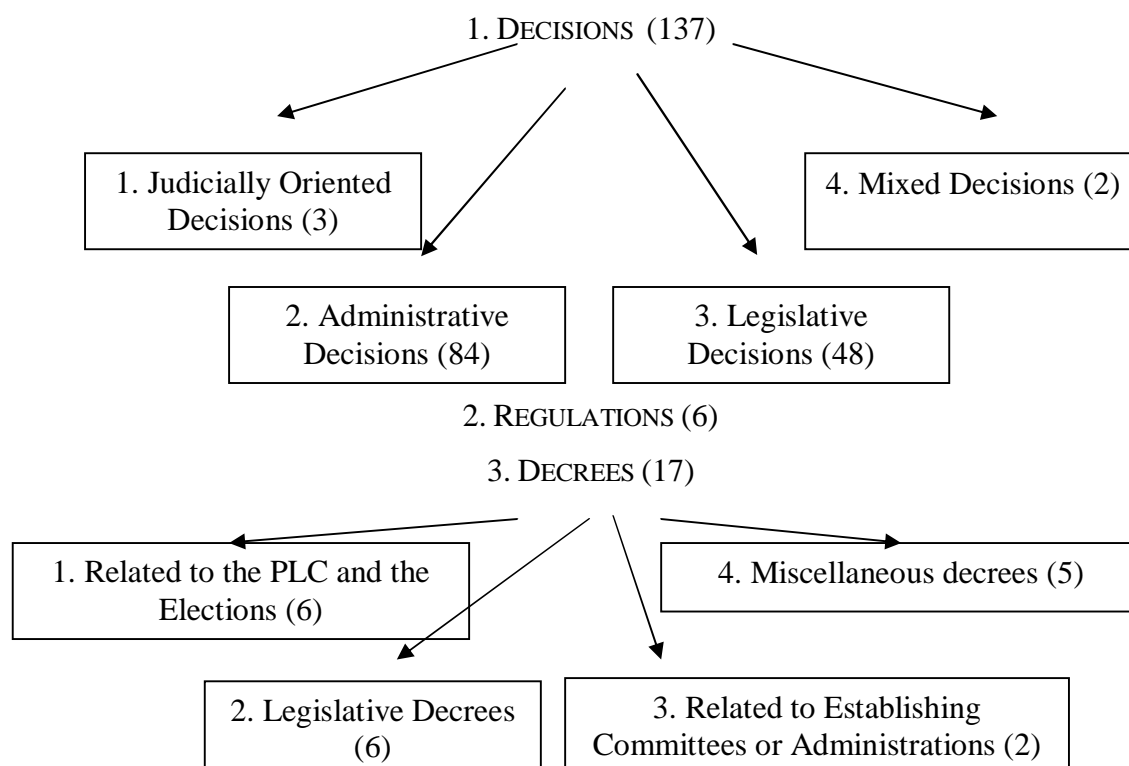
\* Cf. LAW, *Legislative Mandate of the Executive Authority in the Palestinian National Authority (Theory and Practice)*, pp.16-17.

ANNEX IX: LAWS ISSUED BY THE PLC NOT ENDORSED BY THE PRESIDENT OF THE PA  
BY THE END OF THE TRANSITIONAL PERIOD\*

#	NAME OF THE LAW	DATE OF REFERRAL
1)	Basic Law	4/10/97
2)	Regulating the Ownership by Foreigners of Real Estate in Palestine	4/10/97
3)	General Palestinian Petroleum Board	7/12/97
4)	Judiciary	5/12/98
5)	Charity and Non-Governmental Organizations	27/12/98

\* Cf. LAW, *Legislative Mandate of the Executive Authority in the Palestinian National Authority (Theory and Practice)*, pp.34.

ANNEX X: THE LEGISLATIVE ACTIVITY OF THE EXECUTIVE AUTHORITY  
DURING THE TRANSITIONAL PERIOD\*



\* Cf. LAW, *Legislative Mandate of the Executive Authority in the Palestinian National Authority (Theory and Practice)*, pp.36-58. Table is mine.

1. DECISIONS ISSUED IN VOLUMES #1-30 OF OFFICIAL GAZETTE

1) JUDICIALLY ORIENTED DECISIONS: General Pardon, in accordance with Constitution		
Decision	Issued on	Content
# 102	10/11/1997	issued after reviewing the 1962 Gaza Constitution, especially article 23, that reads: “the General Commander shall approve the decisions issued by military courts and he may issue a pardon or eliminate the sentence”.
# 7	4/8/1994	
# 25	7/10/1994	
2) ADMINISTRATIVE DECISIONS: the legislation that vest a person/s with legal positions		
<b>A. Appropriation Decisions (29)</b>		
- Issued by the President		#182 of 1995, #54, 72-75, 100 of 1996, #71,79-99 of 1997, #31,41, 42 of 1998, #4,5,9 of 1999
- Issued by the Cabinet		#2 of 1998, #2 of 1999
<b>B. Decisions related to the formation of regular and special courts (10)</b>		
#101, 157 of 1995, #39 of 1996, #40-43 of 1997		Establishing conciliation and first instance courts in the governorates of WBGS
# 49 of 1995	Establishing State Security Court. Issued after reviewing article 59 of the 1962 Gaza Constitution: “Military courts shall be established upon the decision of the Public Commander...”	
# 106 of 1997	Establishing the tax appeal court in accordance with the rulings of article 57 of the Law #25 in force in the WB to deal with the subject of income tax.	
# 6 of 1995	Establishing the Shari’a Appeal Court	
<b>C. Decisions related to the establishment or dissolving a general committee or authority or annexing departments to an institution or a ministry or the President’s office (46)</b>		
President of PA: #3-6,11,15-16,19-20, 22-24,26,59,84,131,161,163,170,184 of 1994, #2,4-5,17,31,36,90,158,312 of 1995, #41,166 of 1996.		Minister of Local Governance:#1 of 1996, #2,17,70 and other 7 unnumbered decisions of 1997, #1,30,37 of 1998.
Issued without law that governs these committees, with the exception of four decisions: #22,170,184 of 1994, #90 of 1996 (laws issued after decisions)		
<b>D. Other Administrative Decisions (2)</b>		

#45 of 1997: allocating governmental land for public use	#115 of 1997 amending decision #45 of 1997
3) LEGISLATIVE DECISIONS	
<b>A. Decisions that establish committee or general authority, and include details and general rules to govern its work (15)</b>	
#8 of 1994: pertaining to finding the council of Higher Education	
#173 of 1996: regarding air transport	
#65 of 1997: regarding Al Bahr Company	
#22,95,286 of 1995, #4,68-69,78,89 of 1997, #29,38 of 1998, #2,6 of 1999.	
Decision of the Cabinet #3 of 1999.	
<b>B. Decisions include amendments to the texts of some laws (5)</b>	
#287 of 1995 pertaining to the authorities of the attorney general, which revokes the position of the head of the general prosecution, in spite of the fact that this position was found in accordance with article13/1 of 1952's Law #26 regarding the Formation of	
Regular Courts. It amends also criminal law regarding the authorities of the Attorney General.	
# Cabinet Decision #1 of 1997, pertaining to money changing. Amendment for the capital of bank mentioned in the 1941 Law #26 of Money Changing and the 1966 Temporary Bank Law #94.	
#14 of 1994, #38 of 1995	
Cabinet #2 that amends Cabinet's decision #1 of 1997.	
<b>C. Decisions which amend regulations, which give them the power of the amended regulations (3)</b>	
Unnumbered decision issued by the Minister of Justice on 12 September 1994 which amends the court fees system	
#104 of 18 November 1997 which amends the fees for land ownership transfer and amends the 1939 transfer fees system	
#39 of 1998 which amends decision #104 of 1997 (above)	
<b>D. Decisions that revoked some provisions in Israeli military orders (2)</b>	
#55 of 1996: which revoked military order # 23 of 1967 and military order #248 of 22 April of 1986 (related to Israeli's lawyers appearance before the WB courts)	

#1 of 1994: “1. The laws and regulations that were in force before June 5, 1967 in the Palestinian Territories shall remain in force until the territories are unite” that can be understood as revocation of military orders.
<b>E. Executive Regulations or bylaws in accordance of orders (9)</b>
Minister of Justice’s 1996 decision #1 of pertaining to the bylaws of the 1995 Translation and Translators Law #15;
Housing Minister’s decision #2 of 1997 regarding the bylaws of 1996’s Law #1 pertaining to the ownership of floors and apartments;
Communication’s Minister’s decision #1 of 1996 regarding telecommunications issued in accordance with article 103 of 1996 Communication Law which authorizes the Minister to issue regulations.
<b>F. Decision #5 issued on 15 January 1997</b>
Although the PLC was elected, the executive issued this decision. Related to the 1961 Law#10 of Auditing of Palestinian Land. This law was issued for WB, but with its issuance it covered also Gaza Strip.
<b>G. Decision #33 of 1998</b>
Pertaining to judicial officers. The decision provides for authorizing some Ministry of Supplies staff to be judicial officers.
<b>H. Decision with legal rules that are still in force until amended (11)</b>
#10 of 1995 which considers the 12 <sup>th</sup> day of Rabi’ Al Awwal (month) every year as a vacation day.
#147 of 1995 pertaining to collecting public moneys for all the miniseries;
#2 of 1994, #72,122, 299 of 1996, #67 of 1997.
Cabinet #2 of 1998; Ministry of Housing #1 of 1997, #2 of 1998 that amend his decision #1 of 1997; Principles of Court Vacation of 1997 (issued by the Head of the High Court).
4) MIXED DECISIONS: administrative decisions and legislative characteristics
#13, 14 of 1994: Related to the establishing of the High Education Council

2. REGULATIONS ISSUED BY THE PA FROM ITS ESTABLISHMENT UNTIL JUNE 8, 1999

	Name and date	Issued by	Content
1)	September 1994	President of the PA	Multi-stores buildings
2)	February 1996	Head of the Central Committee for City Building and Planning in Gaza	Organizing and licensing Gas stations in the GS
3)	In official Gazette on 22 June 1996	The Central Committee for City Building and Planning in Gaza	Structural plans and divisions projects
4)		The Central Committee for City Building and Planning in Gaza	Approval of plans for public facilities and buildings
5)	#1 of 1998	Palestine Bar Association Council after being approved by the PA's Minister of Justice	Retirement system for Palestinian lawyers
6)	#29 of 1998	Palestine Bar Association Council after being approved by the PA's Minister of Justice	Representation of regular Palestinian lawyers

### 3. DECREES ISSUED SINCE 13 DECEMBER UNTIL THE END OF THE TRANSITIONAL PERIOD

1)	DECREES RELATED TO THE PLC AND ITS ELECTION (6)	
	#1-6 of 1995	Issued in accordance with Law #13 of 1995
2)	LEGISLATIVE DECREES / TEMPORARY DECREE-LAWS	
	#1 of 1998 (21/9/1998)	Pertains to enforcement of the 1965 Law #45 of Tourism on Palestinian Land, to cover GS also.
	#1 of 1999 (17/9/1999)	Amending certain rulings of Law #5 of 1998 pertaining to Hallmarking Law
	#3 of 1998 (19/11/1998)	Pertains to preservation of national unity and banning incitement
	1998 decree	Pertains to fees, services and permits to dig water wells in Palestine. After reviewing Law #2 of 1996.
	#2 of 1999 (24/6/1999)	Pertaining to establishing the Supreme Council for Childhood and Motherhood. It is ties to decree #1 of 1 January 1999.
	#3 of 1999 (19/9/1999)	Pertaining to the fees for services and permits issued in accordance with agricultural laws and followed by the Ministry of agriculture.
3)	DECREES RELATED TO THE ESTABLISHING COMMITTEES OR ADMINISTRATIONS	
	#4 of 1996	Pertaining to the Administration Council of the Palestinian Fund for the Compensation of the Traffic Casualties
	#1 of 1999	Regarding the establishment of a Supreme Council for childhood.
4)	MISCELLANEOUS DECREES	
	#1 of 1996 #2 of 1998	Pertaining to the members of the legislative authority and the structure of the Cabinet
	#3 of 1996	Pertaining to the Palestinian elections committee
	#1 of 1997	Regarding local elections
	#5 of 1998	Pertaining to appointing bailiffs

**PART TWO**

**THE PALESTINIAN CONSTITUTIONAL SYSTEM  
AND THE INTERNATIONAL STANDARDS OF GOOD GOVERNANCE**

## **CHAPTER THREE**

### **THE CONSTITUTIONAL ARRANGEMENT OF POWER BETWEEN THE AUTHORITIES IN THE BASIC LAW AND THE DRAFT OF THE PALESTINIAN CONSTITUTION**

<b>CHAPTER THREE.....</b>	<b>89</b>
<b>THE CONSTITUTIONAL ARRANGEMENT OF POWER BETWEEN THE AUTHORITIES IN THE BL AND THE DPC .....</b>	<b>89</b>
<b>§6 THE CONSTITUTION MAKING PROCESS IN THE PALESTINIAN CONTEXT .....</b>	<b>92</b>
<b>I. THE THEORY OF CONSTITUENT POWER.....</b>	<b>92</b>
<b>II. THE CONSTITUENT POWER APPLIED TO THE PALESTINIAN CONTEXT .....</b>	<b>96</b>
<b>III. A BASIC LAW OR A CONSTITUTION?.....</b>	<b>99</b>
<b>A. THE BASIC LAW FOR THE PALESTINIAN NATIONAL AUTHORITY .....</b>	<b>100</b>
<b>B. THE DRAFT OF PALESTINIAN CONSTITUTION .....</b>	<b>102</b>
<b>§7 THE RELATION BETWEEN EXECUTIVE, LEGISLATIVE AND JUDICIARY IN THE TRANSITIONAL PERIOD AS IN THE BL FOR THE PNA.....</b>	<b>103</b>
<b>I. THE LEGISLATIVE AUTHORITY .....</b>	<b>103</b>
<b>II. THE EXECUTIVE AUTHORITY .....</b>	<b>104</b>
<b>1. THE PRESIDENT OF THE NATIONAL AUTHORITY.....</b>	<b>104</b>
<b>2. THE COUNCIL OF MINISTERS.....</b>	<b>104</b>
<b>III. THE JUDICIAL AUTHORITY .....</b>	<b>105</b>
<b>§8 THE RELATION BETWEEN EXECUTIVE, LEGISLATIVE AND JUDICIARY IN THE FUTURE PALESTINIAN STATE AS IN THE DPC .....</b>	<b>106</b>
<b>I. THE LEGISLATIVE AUTHORITY .....</b>	<b>106</b>
<b>II. THE EXECUTIVE AUTHORITY .....</b>	<b>108</b>
<b>1. THE PRESIDENT OF THE STATE .....</b>	<b>108</b>
<b>2. THE COUNCIL OF MINISTERS.....</b>	<b>109</b>
<b>III. THE JUDICIAL BRANCH.....</b>	<b>111</b>
<b>§9 THE PALESTINIAN STATE AND GOVERNMENT.....</b>	<b>113</b>
<b>I. THE QUESTION OF SOVEREIGNTY .....</b>	<b>115</b>
<b>A. WHO IS PALESTINIAN.....</b>	<b>115</b>
<b>B. PALESTINIAN CITIZENS .....</b>	<b>116</b>
<b>C. THE PALESTINIAN PEOPLE.....</b>	<b>118</b>
<b>II. PALESTINIAN STYLE OF GOVERNMENT.....</b>	<b>120</b>
<b>CONCLUSION: THE BASIC LAW AND THE DRAFT PALESTINIAN CONSTITUTION IN COMPARISON .....</b>	<b>122</b>

This chapter is dedicated to constitutional arrangement of power between the legislative, executive and the judiciary in the PNA as in the BL and in the future Palestinian state as provided by the DPC<sup>189</sup>. It is divided in four sub-chapters: the constitution making process in the Palestinian context, the relation between executive, legislative and judiciary in the transitional period as in the BL for the PNA, the relation between executive, legislative and judiciary in future Palestinian state as in the DPC and the Palestinian State and government.

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<sup>189</sup> Chapter three and four will take in consideration the provisions of the mentioned constitutional documents. The changes introduced to the BL and to the DPC are reported in the POST SCRIPTUM.

## §6 THE CONSTITUTION MAKING PROCESS IN THE PALESTINIAN CONTEXT

### I. THE THEORY OF CONSTITUENT POWER

The theory of Constituent Power appeared almost simultaneously in North America and in France. The constituent power “deals with the Power to frame a very particular norm, namely the Constitution as well as with the power to amend that norm”<sup>190</sup>. In other words, the constituent power is: *first*, the **framing power** (*pouvoir constituant originaire – verfassunggebende Gewalt*); and, *second*, the **amending power** (the Institutionalized or derived constituent power- *Pouvoir Constituant institué ou dérivé – verfassungändernde Gewalt*)<sup>191</sup>. Regarding the constituent power, there are two problems: first, the problem of legitimacy and the problem of limits<sup>192</sup>. Speaking about constituent power is possible only in case of rigid constitutions<sup>193</sup>.

Framing power is possible only when there is no constitution in force as it is the case when a new state is born or obtained recently independence<sup>194</sup>. It is also considered framing power when there are dramatic changes in regime, following a coup d'état or a revolution as it was the case of Russia on 1917 and Egypt on 1952<sup>195</sup>. Since it can be considered the higher power of the state, the framing power invests the entitled of sovereignty<sup>196</sup>. In democratic countries, people are entitled of sovereignty. People exercise this sovereignty through representatives, special assembly or through Referendum. People are the only entitled of the framing power<sup>197</sup>. In case democracy is only theoretical, the framing power is effectively in the hands of the dictator, who can be one person, or a group of people.

The amending power is the one competent to amend the constitution; it presupposes the existence of a constitution that empowers the constituent power, called rightly derived or amending power, to amend the constitution following a

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<sup>190</sup> Cf. KLEIN C., *Théorie et Pratique du Pouvoir Constituant*, p.4. Prof. Claude Klein is a professor of Public Law, Hebrew University of Jerusalem, Israel.

<sup>191</sup> Cf. KLEIN C., *A Propos Constituent Power: Some General Views in a modern Context*, pp.32-33.

<sup>192</sup> Cf. CETERCHI I., MURARU I., *Le Pouvoir Constituant*, p.90

<sup>193</sup> Cf. SHIBA I., *Le Pouvoir Constituant*, p.97.

<sup>194</sup> *Ibid*, p.99.

<sup>195</sup> *Ibid*, p.101.

<sup>196</sup> *Ibid*, p.107.

procedure that may vary from a country to another, but have in common the precise regulation in order to avoid unclear constitutional revision process<sup>198</sup>.

There is no universal modality to adopt a constitution<sup>199</sup>. It depends mostly on the economic, social and political development of the country adopting a constitution on one hand, and on the other hand, it depends on the governing regime and the force relation between classes and categories<sup>200</sup>. The constitution is superior to other ordinary laws. The predominance of the constitution is accepted as axiomatic, presuming that predominance means that there is no higher juridical norm in the state than the constitution<sup>201</sup>. It is not sufficient to consider supreme the modern constitutions because they elevate themselves to a position of predominance. It is necessary to go back to the genesis of the constitutional document and in the authority of its authors<sup>202</sup>. This constitutional superiority, any way, becomes entirely theoretical in the absence of judicial review<sup>203</sup>.

Studying the foundation of the legitimacy of the constitution, we should inevitably consider the social contract as the basis of its legitimacy. Social contract means that popular sovereignty is expressed by the constituent assembly. J.J. Rousseau wrote: "Each one of us puts into the common stock his person and all his power, under the supreme direction of the general will; and we receive as a body each member of an indivisible part of the whole". There are different social contract approaches that we will mention here some: The British, for example -who have had no need for a written constitution- emphasizes the political self-government of society through parliament while the French -who have had few scruples in replacing their constitutions- emphasizes the nation as it is manifested in the state. The American social contract approach reflects the American concern with a society consisting of multitude of individuals whose mutual contract is contained in the Supreme

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<sup>197</sup> Ibid.

<sup>198</sup> Ibid, 107-114.

<sup>199</sup> Cf. CETERCHI I., MURARU I., *Le Pouvoir Constituant*, p.80.

<sup>200</sup> Ibid, p.81.

<sup>201</sup> VENTER F., *Constitution Making and the Legitimacy of the Constitution*, p.9. François Venter is a professor of Law, Potchefstroom University for Christian Higher Education, Potchefstroom, South Africa.

<sup>202</sup> Cf. VENTER F., *ibid*, p. 10.

<sup>203</sup> Cf. KLEIN C., *A Propos Constituent Power: Some General Views in a modern Context*, p.34.

Constitution<sup>204</sup>. Some modern Constitutions express that, in the same constitutional text: the 1949 German Grundgesetz states the German nation has given itself this Basic Law, and that it applies to the whole of the German Nation...”; the 1946 Japanese Constitution: “We Japanese people... do proclaim that sovereign power resides with the people and do firmly establish this constitution”. The 1996 South Africa Constitution: “We the people of South Africa... through our freely elected representatives, adopt this Constitution as the Supreme law of the Republic”.

Some authors expressed serious critics towards the social contract as foundation of legitimacy of the constitution. For them, justifying law by social contract is fiction; law have to be justified by something outside itself. The constitution, indeed, has to be effective. The constitution must be adopted and put into operation with authority. In Constitutional state, authority is characterized by democratic legitimization to which also the democratic minority acquiesces. The Origin supremacy of the constitution is therefore founded in the authority of the constitution-writing entity, but this does not explain the perpetuation of its predominance. In fact, predominance of constitution is maintained by the operation of the legitimately established devices of the constitution itself, which can remain effective only as long as citizenry and the states’ organs of authority that are governed by the constitution, continue to lead legitimacy to its institutions through the due employment of the mechanisms and procedures provided by the constitution. The force outside the constitution, which ensures its primacy, is its practical legitimacy, when it gives reasonable and realistic expression to the principles and needs of the legal community that it serves. In a constitutional state, the revolution, civil war, and the amendment of constitution shall be considered as changing of the ethos, the well of the citizens. Legitimate constitution: solemn codification of basic rules for the operation of the state. It tends to reflect national customs and usages and that the legal culture of the state is strongly influences, if not determined thereby<sup>205</sup>.

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<sup>204</sup> Cf. VENTER F., *ibid*, pp.10-12.

<sup>205</sup> Cf. VENTER F., *ibid*, pp.12ss.

In the last decade of the second millennium, and mostly due to the end of the Soviet Union, 29 new states got independence and became states. The UN members were 156 states until 1990. In 1999, members augmented 15% to become 185<sup>206</sup> (by 2002, the Switzerland became the 190 member part of the UN). This huge number of new states gave constitutionalism a renewed significance and importance<sup>207</sup>. Modern society is characterized by the occurrence of many new constitutions and of certain similarities and differences between them. From the juridical point of view, modern constitutions surpass classical democratic traditions of constitutionality and its techniques although constitution remains as the fundamental law. They contain juridical norms, which seek to offer legal guarantees and judicial protection. In political sense, modern constitutions institutionalize power and political relations; establish rules that are binding on everyone; ensure the continuity of the institutions. They are the highest law of the country and wish to set –though not always also to achieve- the principle of rule of law (as opposite to political opportunism). The written form and the innovation in the structure of the constitution itself characterize modern constitution. Modern constitution is longer than constitutions written in the XIX century, they not only express organization of power but also political and social philosophy of a given society. Besides, there is no unity between theory, ideology of the normative and the real in modern society and constitutions. The relation between the “visible” and the “invisible constitution” raises not only the question of its value and its influence, but also the question of the unavoidable change and correction of theoretical and ideological principles. Modern constitution has a lot of innovations such as the introduction of economic regulations (form of property and planning), the expansion of the classical scale of Human freedoms and rights (socio-economic and cultural), the protection of constitutionality and legality and the revision of procedure for the change of the constitution (shorter and easier)<sup>208</sup>.

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<sup>206</sup> The following states became member of the UN as follows: 1990, Liechtenstein, Namibia; 1991 Democratic People’s Republic of Korea, Estonia, Federated states of Micronesia, Latvia, Lithuania, Marshal Islands, Republic of Korea; 1992 Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Georgia, Kazakhstan, Kyrgyz Republic, Republic of Moldova, San Marino, Slovenia, Tajikistan, Turkmenistan, Uzbekistan; 1993 Andorra, Czech Republic, Eritrea, Monaco, Slovak Republic, The Former Yugoslav Republic of Macedonia; 1994 Palau.

<sup>207</sup> VENTER F., *ibid*, p.9

<sup>208</sup> DJORDJEVIC J., *The Modern Constitution*, 25-28.

## II. THE CONSTITUENT POWER APPLIED TO THE PALESTINIAN CONTEXT

On November 15, 1988, the Palestinian National Council made the famous and disputable Declaration of Independence of the State of Palestine. For sure, the declaration of independence did not succeed to create a central power that would exercise sovereign powers over a region and a population, to fulfil the definition of a state as in the generally accepted theories of state. For this reason, the declaration of the Palestinian State seems to be more a political issue. The same can be said for the recognition of one hundred states, and the modification of the name of PLO to Palestine in the UNGA, since they are related to the Palestinian right of self-determination. In fact, the UNGA acceptance to change the name did not change the status of the PLO as an observer, since full membership of the UN remains an exclusive right of states.

According to the PNC, the new state and the legal heritage that it would succeed to necessitated drafting a BL. The PNC authorizes the Central Council to draft a BL for the new entity. The reason for that is that the CC has higher opportunity to meet, discuss, and act more quickly and effectively than the PNC<sup>209</sup>. The very first idea of a Basic Law, as wanted by the PNC, was related to the “Palestinian State”, which independence is declared in the same day. After the DOP, the IA and the election of the PLC, the BL was related to the new entity created by them, the PNA, that is not a state, but an entity that exercises some territorial, functional and personal authorities, in the limits of the powers transferred to it and for the transitional period only.

The PNC Legal Committee, headed by Dr. Al-Qasem, prepared the first drafts of BL: the first one was forwarded to the PLO’s Executive Committee on December 1993. The second draft was prepared in February 1994, and the third draft in

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<sup>209</sup> Cf. AL-QASEM A., *Commentary to the Draft Basic Law for the Palestinian National Authority in the Transitional Period*, pp.187-211.

December 1994. The third draft was published but the CC did not discuss it<sup>210</sup>. Legal experts and the public discussed these drafts during the conferences organized for that reason; Palestinians from outside and inside the territories had given their contributions. The Palestinian Authority, meanwhile, started to operate.

After the IA or Oslo II agreement, many problems related to legislative council and the elections were resolved. It became necessary to complete the document: that gave birth to the 4<sup>th</sup> Draft of BL on December 11<sup>th</sup>, 1995. A draft produced by Bir Zeit University and al-Haqq Institute is often counted as the fifth draft, while the draft produced by the legal committee of the PLC is generally counted as the sixth draft. In July 9<sup>th</sup>, 1996, the Legal Committee of the PLC published the 7<sup>th</sup> DBL<sup>211</sup>. The different drafts of BL finished on the desk of Mr. Arafat, as many other draft laws approved by the PLC and were not considered by the PNA president<sup>212</sup>.

The PLC had approved the draft of BL in its third reading (Law No.1/96) on October 2<sup>nd</sup>, 1997. The PLC main preoccupation was to approve a Basic Law which defines relations between Council and the Executive, transparency of PNA members on the one hand, protect Human Rights, secure the respect of rule of Law, and

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<sup>210</sup> Their final work, known as the *third draft* was published in: *Palestine Yearbook of International Law*, VII, 1992/1994, pp.171-186 also in: COTRAN, CHIBLI M. (ed.), *The Arab-Israeli Accords: Legal Prospective*, CIMEL Book Series No.1, London-the Hague-Boston, 1997, pp.137-155.

<sup>211</sup> Nathan J. Brown explains the genesis of the several drafts of BL under the PA as this: "Because of the increasingly public nature of the drafting process, earlier drafts were less widely circulated; later drafts were often published in several different outlets and quickly translated into English as well. The first draft was leaked to the Palestinian press in December 1993. The second draft was more widely available; I have relied on the copy published in al-Wahidi, *al-Tatawwurat al-dusturiyya*. The third draft was published in Shiqaqi, *al-Intikhabat*. An English version was published in Cotran and Mallat, *The Arab-Israeli Accords*. The fourth draft was published in Palestine Report (Jerusalem), 9 February 1996. A draft produced by Bir Zeit University and al-Haqq is often counted as the fifth draft; it was published by al-Haqq under the title *al-Musawwada al-Muqtaraha li-Mashru` al-Qanun al-Asasi al-Filastini li al-Marhala al-Intiqaliyya* (The Proposed Design for the Draft Palestinian Basic Law for the Interim Phase) (Ramallah: Mu'asassat al-Haqq, 1996). The draft produced by the legal committee of the PLC is generally counted as the sixth draft; I have relied on a copy circulated by the committee (provided by Muhammad al-Mirghani who advised the committee). An English translation of the final version passed on the third reading by the PLC is available from LAW (The Palestinian Society for the Protection of Human Rights and the Environment) at <http://www.lawsociety.org/reports/1998/dbl.html>." Cfr. BROWN N.J., *Resuming Arab Palestine*, p.56, footnote 21.

<sup>212</sup> Many theories were made about the real reason of the PNA President to sign the BL. The fact is that the BL, although institutionalize the President very high powers, intends to give to the PLC its missed role, during the interim period, oversee over executive, and secure judicial independency against security apparatus.

independence of judiciary on the other<sup>213</sup>. Drafting a BL was possible under the Interim Agreements. The Election Law preamble settled that this was the PLC main task. The President of the PNA refused to sign the law, creating more tensions between the PLC and the Executive Authority in general and the President of the PNA in particular.

In 1999 the PLO Executive Committee created a legal committee to draft a Palestinian Constitution in preparation for statehood. Mr. Arafat appointed Minister Nabil Sha'ath as its' chairman. The Constitution Committee was composed of highly qualified Palestinian constitutionalists and jurists. It was coupled with an agreement with the Arab League to form an advisory committee of experts. The Draft of the Palestinian Constitution (hereinafter DPC) was completed on February 14, 2001<sup>214</sup>, while negotiations with Israel totally collapsed.

The President of the PNA, had signed the BL of the PNA for the Transitional Period on Mai 28, 2002, and came into force the date of its publication in the official Gazette, on July 7, 2002<sup>215</sup>. Signing the BL came in a very controversial political context and as a step towards reforms, in the 100 days reform plan. Although most of Palestinian territories, were under continuous curfew and siege, the PA continued to discuss with Americans and British experts, about the reforms to make in the PA. This was the main goal of the London Conference made through videoconference program on January 14, 2003, since Palestinians were forbidden to leave the OPT. British foreign minister, Jack Setro declared that reforms are necessary for progress in the establishment of a Palestinian state. Palestinians prepared a Draft constitution that will be raised public within two weeks. Abed Rabbo in his speech declared: it is impossible to make reforms while Israeli occupation continues... He advocated to send international forces as a precondition for the "way plan". In agenda: Political,

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<sup>213</sup> For more details about the PLC election, and its significance, cf. ABDUL HAMID R., *Legal & Political Aspects of Palestinian Elections*, IPCRI, 1995.

<sup>214</sup> English version is on the Palestinian Centre for Policy and Survey Research (PSR) website: <http://www.pcpsr.org/main.html> ; In Cooperation with the Konrad Adenauer Foundation. The first and the second chapter of the constitution are respectively in: <http://www.pcpsr.org/domestic/2001/conste1.html>, <http://www.pcpsr.org/domestic/2001/conste2.html>.

<sup>215</sup> The Official Gazette of PNA (called "al-Waqa'e al-felastinyya") was distributed to journalists in a press conference in Gaza, Cf. Al-Hayat, July 8, 2002.

legislative, administrative and constitutional reforms, preparation for elections, laws, and role of prime ministers<sup>216</sup>.

### III. A BASIC LAW OR A CONSTITUTION?

The declaration of independence came after two different experiences: the Intifada, that is the popular insurrection against occupation from one side, and the declaration of king Hussein of administrative separation between the two banks. The constitution in that sense, will accompany the birth of a new state. The Palestinian people are entitled of sovereignty, in the name of their self-determination inner right. The Basic law, on the other hand, is not the fruit of a sovereign act; it consists of a law of a level higher than other laws (in case rendered effective), but subordinated to the agreement between PLO and Israel. Still, the judges will apply only internal law, that is the BL and other laws, decrees, decisions, regulations. The discordance with the agreements would be considered illicit for violation for a treaty or agreement. The BL is a temporal law, that would govern the relation between authorities, during the transitional period, and was approved by the PLC which represents Palestinians of WBGS and Jerusalem only.

The Constitution intends to be simultaneous to the birth of the new state: Palestine. A commission prepared the constitution, with a delegation from the CC that is in complete accordance with the PNC declaration of independence, and its new policy that prevails the two states solution. The PNC is not an elected body. Still, it always represented most of political parties (excluded Hamas), and commercial unions, that reflected the different Palestinian classes. As such, the PLO represents the Palestinian people, and is competent to adopt a constitution for the Palestinian state. Palestinians would have the right to participate through the PLO in the framing power, that is inner to all Palestinian people, entitled of sovereignty, although not all Palestinians, as part of inevitable compromise, would have the right on Palestinian citizenship. The participation of Palestinians of WBGS in the constitution drafting process is relevant. Palestinians showed –at the beginning- enthusiasm that reflected

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<sup>216</sup> Al-hayat, Wednesday 15 January 2003, Issue No 14542, pp.1, 6.

their participation in the public conference organized to give contributions to the BL. That is inevitable, since the BL –and also the constitution- would interest first of all the Palestinians of WBGS, within which space the PA is operating and the Palestinian state would be established. An important question would inevitably arise: will Palestinians through the PLO institutions continue to have the constituent power regarding the amendment of the constitution, in case of the creation of the state? Will it be the competence of Palestinians of WBGS, and citizens of the future Palestinian state (included the new arrived?) Will the PLO participate in the legislation that will have its principle objective the inhabitants of the WBGS?<sup>217</sup>

#### A. THE BASIC LAW FOR THE PALESTINIAN NATIONAL AUTHORITY

The PLC had approved the BL on October 2, 1997 and endorsed by the President of the PNA on May 28, 2002, and came into force the date of its publication in the official Gazette, on July 7, 2002. The BL official language is Arabic<sup>218</sup>. All English translated versions, present on the web or published by NGO's are unofficial. The BL is divided in seven chapters. First chapter, general provisions (art.1-8); second, civic rights and freedoms (art.9-33); third, the Legislative Authority (art. 34-49); fourth, the Executive Authority (art.50-87); fifth, the Judicial Authority (art. 88-100); Sixth, State of Emergency Provisions (art. 101-105), Seventh, General and Interim Provisions (art. 106-112).

The application of this BL is limited in time (the Interim Period, art.106); in space (within the territorial jurisdiction of the PLC, as agreed with Israel), and in persons (only for Palestinians of WBGS and foreigners living in Palestinian Autonomous areas, Israeli citizens excluded). All laws, ordinances and decisions, in

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<sup>217</sup> It is of great importance to keep clear in mind that the PLO Charter remains a document that is in force, and would cease officially when the same power that endorsed it (the PNC) declare its suspension. It influences on the BL and the Constitution but remains distinct since those intend respectively to regulate power relations in the PA or the Palestinian state, distinct entities of the PLO.

<sup>218</sup> My work will adopt one unofficial English translation were made: by Saladin Al-Jurf, in: *Case Western Reserve Journal of International Law*, 31 (2/3) spring/summer 1999 (*Symposium: the Legal Foundations of peace and Prosperity in the Middle East*), pp. 495-519. Other translation of the BL were done by Jamal Abu Khadijeh, <http://www.aman-palestine.org/doc/34-BASIC%20LAW-3RD.pdf> ; also in LAW, *Palestinian Legislative Council Basic Law Draft Resolution, Third Reading Passed 2 October 1997*, (unofficial translation); In JURIST website: <http://jurist.law.pitt.edu/world/palestbasic.htm>

contradiction with the new BL are abolished (art.110), otherwise remains in force until amended or abolished according to the BL provisions (art.109). The BL was approved almost with unanimity; the amendment of the BL needs a qualified majority of two thirds of PLC (art.111). The publication of the BL in the official Gazette signs the date of its enforce (art.112)<sup>219</sup>.

The BL contains provisions similar to most of Arab world Constitutions: Palestinians part of Arab Nation (art.1), people are source of authority (art.2), Islam religion of Palestine<sup>220</sup>, and shari'a principles are a primary source of legislation<sup>221</sup>, Arabic official language (art.4)<sup>222</sup>. In the other hand, some considered the BL the most liberal in relation to constitutions of Arab world, especially for the list of rights and freedoms that contains. It contains also some controversial provisions: *first* Jerusalem is the capital of Palestine (art.3), while Jerusalem shall be one of the issues left for the Permanent status negotiations; *second* art. 56 states that the President of the PNA shall appoint representatives of the National Authority to countries, international organizations and foreign bodies: this provision contradicts the Interim agreements, and prejudice the PLO role; *third* the right to return, since we read in art.28 states that no Palestinian may be prohibited from returning to his homeland. On the other hand, the BL did not mention the Palestinian state, or Palestinian people sovereignty. The only exception is art. 106 that states that this BL is enforced in the Interim Period, and can be extended until the introduction of the new constitution for the Palestinian state.

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<sup>219</sup> The publication of laws in the official Gazette is a competence of minister of Justice only. This meant a further limit to PLC legislative activities. In fact, when the PLC approve a law, the President shall sign it. Once he signs the law, it needs to be published in official gazette. The BL tried to impose limits on executive veto on laws approved by the PLC as in art. 57.

<sup>220</sup> Islam religion of state as in most Arab Constitutions: Algeria art.2, Bahrain art.2, Egypt art.2, Emirates art.2, Jordan art.2, Kuwait art.2, Morocco art.6, Sudan art.16, Tunisia art.1.

<sup>221</sup> Islamic Shari'a is a main source of legislation: Bahrain art.2, Emirates art.7, Kuwait art.2, Syria art.3; Islamic Jurisprudence is the principle of legislation: Egypt art. 2,11; the fundamental source: Sudan art.9.

<sup>222</sup> In the last decades we notice a growing tendency of conversion to Shari'a, in Muslim and Arab legal systems. *Shari'a*, in fact, is imposed legally by the state and not by doctrinal models, cf. CASTRO F., *Diritto Musulmano e dei Paesi Musulmani*, p.14.

## B. THE DRAFT OF PALESTINIAN CONSTITUTION

The first two realities to keep always in mind regarding the DPC are the following: *first*, this document is only a draft; *second*, the Palestinian state does not yet exist. The DPC was prepared by committee that received this charge from the EC of the PLO as a step towards preparation for statehood. It was completed in 2001 but was forgotten for the years that followed almost immediately the end of the transitional period, because of the bloody conflict between Palestinians and Israel. Since then, the Palestinian state is not established and the conflict with Israel rendered situation complex for the PNA. The same text was object of revision in 2003, and of interest in the international arena as a preparation to statehood. The text in question here is the one published in the web as mentioned already above<sup>223</sup>.

The destiny of the constitution is to substitute the BL (art.106 of BL). It will remain in force until revised by the empowered body as will provide the same constitution. Adopting the constitution for the Palestinian state is not a matter that involves only Palestinians of WBGS, and as such, the PA institutions (PLC and the presidency) are not empowered to adopt it. The PLO remains the only representative of the Palestinian people. The PNC is empowered to adopt the constitution for the mini-state that it would call Palestine as already it declared in the early 1989.

The DPC is composed of 220 articles and divided in three chapters. The first chapter is entitled: Foundations of the State and Rights and Duties (artt.1-66); The second: The Branches of Government (artt.67-212); The third: Revision of the Constitution and Concluding Statutes (Artt.213-220). General provisions regarding the official language, religion of the state, Shari'a principles... are similar to those of the BL as provided in the table prepared below.

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<sup>223</sup> Unless provided differently, every reference in this research to the DPC means the text completed on 1999 and published in the Palestinian Center for Policy and Survey Research (PSR) website. I wait to receive the revised draft from the Palestinian delegation.

§7 THE RELATION BETWEEN EXECUTIVE, LEGISLATIVE AND JUDICIARY IN THE TRANSITIONAL PERIOD AS IN THE BL FOR THE PNA

The Arab Palestinian people are the source of authorities; they shall exercise them through those whom the BL invests with the legislative, executive, and judicial power, on the foundation of separation of power (art.2)<sup>224</sup>. The separation of power is connected with the constitutionalism of powers as expressed in the same article. The governing system in Palestine shall be a democratic Parliamentary system (art.5); nevertheless, the system identified in the BL conforms most closely to presidentialism<sup>225</sup>.

I. THE LEGISLATIVE AUTHORITY

The PLC is the elected legislative authority (art.34.1) with limited jurisdiction to the Interim period (art.5.3). A wide margins of liberty is left to the PLC for internal rules, procedures and security as much as it does contradict the BL (artt.34.2, 38). The PLC shall consist of eighty-eight members (35.1) elected directly by the people (art.5). The PLC members shall elect the Speaker, two delegates and the secretary in the first meeting of the Council, whose office shall not be combined with any governmental position, ministry or with the presidency (art.37)<sup>226</sup>. Each member of the Council has the right to present his requests to the executive in order to perform his tasks, propose laws, and direct questions and inquiries to the government or any of the ministers (art.43). Ten members at least are necessary to submit a request to withdraw confidence from the government (art.44).

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<sup>224</sup> All articles cited in this sub-chapter (§10) are citation from the BL, unless mentioned differently.

<sup>225</sup> Cf. FRIEDMAN G., *The Palestinian Draft Basic Law: Prospects and Potentials*, P.I.C.C.R., Legal Reports Studies (8), 1999, P.12.

<sup>226</sup> The BL was approved in 1997, while the PLC has been operative since more than a year! Ahmad Qur'ei, the PLC speaker, is a high rang Palestinian diplomatic and negotiator.

## II. THE EXECUTIVE AUTHORITY

Over 112 articles, the BL dedicates 37 articles to the Executive Authority (artt.50-87) that defines as follows<sup>227</sup>:

**The Executive Authority is the highest executive and administrative apparatus which takes the responsibility of setting forth the program of the executive matter which is approved by the Legislative Council. It is governed by the President of the National Authority and the Council of Ministers, in a manner evident with this Basic Law (art.50).**

### 1. THE PRESIDENT OF THE NATIONAL AUTHORITY

The President is elected directly by the people (art.51) and his jurisdiction is also limited to the interim period (53). He is the High Commander of Palestinian Forces (art.55); appoints representatives to countries and international organizations (art.56); appoints and dismisses ministers (maximum nineteen ministers without a prime minister), and presides their meetings (art.62). Ministers are responsible to him and to the PLC (artt.5, 68). The President has the right to special pardon from punishment and its reduction (art.69). Besides, he may issue decisions, which have the power of law in necessary circumstances (art.60). He also appoints the Attorney General (art.98) and approves the sentence for death (100).

### 2. THE COUNCIL OF MINISTERS

Ministers shall be nineteen (art.65) and are appointed by the President (art.62). They help the President in the execution of his tasks (art.63) and are responsible to him (68.1). Still, the President has the right to dismiss ministers (art.62). The President forms the government that shall present to the PLC for vote of confidence (art.64.1).

The Council of Ministers is competent *inter alia* in placing the public policy within the limits of the ministry and the its program, executing the approved public policies, placing the general budget, establishing the administrative apparatus and

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<sup>227</sup> Many of these articles were modified in the next two drafts. Some of these changes are reported in the POST SCRIPTUM.

executing laws and apply their provisions (art.72). Each minister however has the right to suggest the public policy, supervise the work in his ministry and to prepare proposals for special laws (art.73). Each minister shall present to the CM detailed dispositions of activities of the ministry (art.74).

### III. THE JUDICIAL AUTHORITY

Articles regarding independence of Judicial Authority reflect the preoccupation of PLC for the interference of executive and security forces in the operations of the Judges during the PNA era. In fact, many local NGO's and international Human Rights organizations expressed their concerns with regards to the PNA relations with the judicial authorities in their annual reports. For this reason the BL states that judicial Authority is independent (art. 88), and judges are independent and subject only to the law (art.89); judicial sentences shall be implemented (art.97). Yet, Mr. Arafat signed the law on the independence of judiciary after three years of waiting his approval, on the same day he signed the BL.

The BL mentioned two kinds of special courts: the shari'a and religious courts for shari'a matters and personal affairs (art.92.1) and the Military Courts for military affairs (art.92.2). Besides, the BL mentioned the possibility to create administrative courts with a law that shall determine their specializations (art.93). The BL states that a Constitutional Court shall be established (art. 94). The court shall examine the constitutionality of laws, ordinances or regulations, explain the text of BL and legislation, separate in disputes of standing between judicial parties and administrative parties (art.94). Until its creation by a law, the High Court assumes the responsibilities of the Constitutional Court (art.95). The attorney general is appointed by decision of the President, with the agreement of the High Council of judges and the ratification of the PLC (art.98).

§8 THE RELATION BETWEEN EXECUTIVE, LEGISLATIVE AND JUDICIARY IN THE FUTURE PALESTINIAN STATE AS IN THE DPC

The Arab Palestinian people are the source of authority<sup>228</sup>. They shall exercise it through those whom the constitution invests with the legislative, executive, and judicial power<sup>229</sup> (art.67)<sup>230</sup>. The branches shall be three (art.68): the legislative (art. 70-116), the executive (art.117-170) and the judicial authority (art.171-216). The principle of relative separation of power is consecrated in art.69:

**“The relationship between the three branches...shall be established on the basis of relative separation with cooperation and mutual oversight over them”.**

The separation of power is connected with the constitutionalism of powers as expressed in the same article

**“None of the branches of government shall have jurisdiction not granted it by the provisions of the constitution”.**

I. THE LEGISLATIVE AUTHORITY

The parliament<sup>231</sup> shall exercise the legislative authority as defined by the constitution (art.70)<sup>232</sup>. It shall consist of two councils<sup>233</sup> of 150 representatives each,

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<sup>228</sup> That means “l’ autorità si forma nella libertà e nel consenso”. Cfr. MORETTI R., *Sovranità popolare*, in: *Enciclopedia giuridica*, vol.XXX p.3.

<sup>229</sup> I believe that it is wrong to use “the branches of government” as entitled in II chapter of the DPC, since branches means a “part of”; and government means that whole of organs that have the task to individualize and to convert in concrete programs the general policy expressed by the electoral body and the parliament. In that sense, the government, together with the President invested with the executive power, the parliament invested with the legislative, and the courts invested with the judicial power, are the three expressions or moments of sovereignty of the State. These three powers would not be confused, and are relatively separated. In fact, Arabic text of the constitution we read: Assulutat al’amma that means, the General Authorities, and no more the Branches of Government. Since the official language of DPC is Arabic, the English version shall be corrected.

<sup>230</sup> All articles cited in this sub-chapter (§ 11) are citation from the DPC, unless mentioned differently.

<sup>231</sup> The term Parliament as explicitly provided in art. 70 shall consist of two Councils, nevertheless, it is used sometimes to indicate the only LC as we will try to clarify later on.

<sup>232</sup> Many of the provisions of the DOP regarding the parliament and the executive were changed in the 2<sup>nd</sup> and 3<sup>rd</sup> DPC. Please see POST SCRIPTUM for update.

<sup>233</sup> The seat of the Councils will be Jerusalem (art.73) the capital of the state of Palestine (art.8). it is clear that this will depend on final negotiations and peace agreements between Israel and Palestinians.

elected for five years<sup>234</sup> (art.71), and their immunity shall not be infringed (artt.103-107):

- The Legislative Council: composed of representatives of Palestinian people in the state of Palestine, in accordance with the provisions of the Palestinian election law (art.70 §1)<sup>235</sup>.

- The National Council: represents the Palestinian refugees abroad, in accordance with the election system of the NC until it is amended (art.70 §2).

The President may dissolve only the LC after calling for a referendum and obtained majority (art.74-76). Each council shall elect the speaker's body (one speaker, two deputy speakers, and a secretary general) that may not assume a ministry or a governmental position (art.81). The sessions of the LC - held each year in two ordinary sessions (art.89)- are considered legal only when two thirds of the members (100 deputies) are present at the opening session (art.89) and absolute majority (76 deputies) of members in following sittings (art.89). In case the Speaker or one of its deputies are not present, the meeting of either of the Councils is illegitimate (art.91). Decisions shall be taken by a majority vote of those present, except in case a special majority is stipulated (art.91). In fact, the DPC states the necessity of absolute majority in articles 40, 99§3, 104, 213, and the qualified majority of two-thirds in articles 102, 145, 206, 138. The LC has the exclusivity to the legislative and oversight role in the state (art.70§1), while the NC shares with the LC in legislating laws connected with general national rights (art70§2).

The speaker or five members of the LC have the right to suggest a draft law within the sphere of jurisdiction of the council, and following the proceedings regulated by it (art.93). The DPC states more limitation on discretionarily of the LC regarding taxes (art.106-107), public funds (art.109), investments (art.110) and budget (art.111-116).

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<sup>234</sup> The President shall call for elections of the two Councils (art.72), otherwise the election will not be considered legal. It is not clear that this article will be considered as strictly formalities or it leaves the renovation of the Parliament to the discretion of the President.

## II. THE EXECUTIVE AUTHORITY

The President of the State shall oversee the executive branch through the council of ministers (art.118). Art. 68 states who is to be invested with the legislative power and the judicial authority, but say nothing about who is to be invested with the executive. Under the title: “The Executive Branch”, the DPC treats the President of the State, the Council of ministers, PM, and local government.

### 1. THE PRESIDENT OF THE STATE

The DPC dedicates a lot of articles to the President of the State; for the importance that this institution has in the Palestinian system.

The President of the State:

§ is the head of the Republic and the commander-in-chief of the armed forces (art.118).

§ shall appoint the PM who will name the ministers to the President (art.128); shall charge the council of ministers with drafting public policy and oversee its implementation (art.126).

§ shall appoint the chief of the Fiscal and Administrative Oversight Bureau after nomination of the LC (art.170).

§ has to preserve the state and defend the rule of constitution as the highest law (art.120); may establish advisory councils (art.142);

§ shall promulgate laws after approval of the Council. The President may return them to the council for reconsideration within the 30 days following the transmission of the draft laws, otherwise it is to be considered promulgated (art.136); shall present draft fiscal laws (in the means of art.133 and 134) to the two councils of Parliament (art.132).

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<sup>235</sup> In the DPC, the LC indicates the first chamber of the parliament. In the 1<sup>st</sup> DPC the parliament means the LC and the NC.

§ have the right to give amnesty for a punishment or lessen it (art.135).

§ shall represent the state in foreign relations (art.120); appoint and terminate ambassadors and representatives; receive the credentials of ambassadors of other states and organizations (art.127); approve<sup>236</sup> treaties approved by the LC (art.141) with the limitation to consult the people in a referendum in case of treaties that is connected with the independence of the country and its territorial integrity (art.142)

§ may declare the state of emergency with the limits and powers included in art.138-140.

The President must not be held accountable for actions taken and borne by each minister acting within his jurisdiction. On the contrary, he will be held accountable for his actions that violate the constitution or for high treason (art.144). To indict the President, art. 145 states the necessity that:

§ The request shall be issued by a third of the LC.

§ The bill of indictment shall be issued by a majority of two thirds of the members present. The President shall cease performing his duties.

§ The trial shall be before the CC.

## 2. THE COUNCIL OF MINISTERS

The Council of Ministers (hereinafter CM) shall be composed of the PM and the ministers (art.146). The DPC uses other terms, such as cabinet (art.75, 78, 99) or government<sup>237</sup> (art.75, 76, 96, 98, 100, 112, 133, 147, 153, 160, 161, 163, 165). The decree of formation of the CM shall name and designate the ministry for each minister (art.146). We have already said that the President nominates the PM (art.128); the PM shall undertake the formation of the ministry after his nomination

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<sup>236</sup> The DPC use the same word: the president approves treaties approved by... it may be better to use different words, for example: "Promulgate treaties approved..."

<sup>237</sup> There is confusion relating the term "government" as already mentioned in precedent footnotes. As such, it does not always coincide with cabinet or CM.

(art.146) and propose them to the President (art.147). Consequently, the President is empowered to issue the decree of formation of the government although art.146 does not mention it explicitly.

The CM will be collectively –and individually- responsible to the President and the LC (art.149). The LC members may direct questions, request clarifications from ministers (art.97) or direct interpellations (art. 98). In case of violation of public policy, ten LC members may request the censure the minister (art.99). The government needs to obtain confidence of the LC (art.148) otherwise it will be considered resigned (art.163) without prejudice (art. 75). The government is also considered resigned in case the ministry is dismissed, the PM minister resigns, is dismissed, or dies, when one-third of the CM has resigned or the government resigns, or at the beginning of a new term of a LC (art.63). The government shall be reformed after each legislative election, presidential dismissal, or resignation of the ministry, or the death, resignation or loss of competence of the PM (art.160).

It is the CM, in cooperation with the President (art.151§1) and receiving that charge from him (art.126), who has the task to draft the public policy (art.126, 151§1). The DPC enumerate other competencies for the CM (art.150), for the PM (art.152) and for each minister (art.154). The CM shall undertake to apply public policies, execute the laws and regulations, within their sphere of competencies and in coherence with the Constitution (art.150, 151§1-2, 67), law and other regulations (art.162). The PM and other Ministers would not be necessarily members of the LC (art.128), but the DPC does not prohibit this (art.78). The DPC says nothing about immunity for ministers, while Parliamentarians enjoy immunity as indicated in art.103, 104, 106. Meanwhile, art.158 states that the PS, one third of the members of the LC, or the attorney general may refer ministers for investigation for crimes they may have committed during or because of their performance of their functions.

Under the same title “Executive Branch”, the DPC regulate relations between government and local units (art.165-166), agencies and administration security forces

(art.164), civil services and affairs and public employment (art.167), and the Oversight bureau (art168-170).

### III. THE JUDICIAL BRANCH

Judicial authority shall be invested in the courts (art.68 and 171), and regulated by the constitution and the law of judicial authority (art.68). The Judiciary shall be independent (art.172); judges are independent, and subject only for the law (art.181).

#### A. THE SUPREME JUDICIAL COUNCIL

The courts assume judicial authority and are headed by the Supreme Judicial Council -hereinafter SJC- and supervised by it (art.171, 188). The Minister of Justice that will be entrusted with the administration of judicial facilities shall not infringe on the supervision of the SJC (art.211). The SJC shall make decisions relating to judges (art.185) that will be responsible to it (art.186). Law shall determine its formation (art.188).

#### B. A SHARI'A JUDICIAL COUNCIL

A Shari'a Judicial council shall be established and the law shall regulate it (art.173).

#### C. REGULAR COURTS

It is forbidden to establish exceptional courts, and regular courts shall be entrusted with ruling in all disputes and crimes (art.174). Courts may not abstain from ruling in a case within its jurisdiction, and may not decide in a case not within its jurisdiction (art.175). Sessions can be closed for reasons related to public order, morals, or pursuant to a request by the opposing parties; otherwise they have to be public. There is no mention to monotheistic courts that decides on matters regarding personal status law. In fact, we read in art. 7: "the legislative branch shall determine personal status law under the authority of the monotheistic religions according to their denominations".

#### D. MILITARY COURTS

A military court shall be established and shall not decide any case outside the military sphere (art.191).

#### E. COURT OF CASSATION

A Court of Cassation shall be constructed with jurisdiction over appeal in criminal and civil manners (art.189). The DPC explicitly exclude that this would prejudice competencies of the Shari'a Judicial Council (art.173).

#### F. SUPREME COURT OF JUSTICE

A Supreme Court of Justice shall be constructed to decide in administrative disputes (art.190).<sup>238</sup>

#### G. THE ATTORNEY GENERAL

The office of the Attorney General is an organ of the judicial branch (art.207). He is nominated by the SJC, then the PS shall decide and the LC shall approve (art.208).

#### H. THE CONSTITUTIONAL COURT

A special chapter is dedicated to the Constitutional Court.

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<sup>238</sup> A "High Administrative Court" was mentioned only in art.184. I think that the DPC use two names for the same court with competencies in administrative disputes.

## §9 THE PALESTINIAN STATE AND GOVERNMENT

It is necessary to take in consideration that there is a “quasi discrepancy between formulized institutes in the Constitutional cart and their operating”<sup>239</sup>. The case of Arab countries is a good example to prove this. There is the tendency to consider the constitution in the Arab world –and why not, also in the future Palestinian state- as a further limitation to citizen rights, rather than to assure their respect; as a further guarantee to the power of the executive power rather than to limit it. Considering the Palestinian case, there is a necessity to keep in mind the fact that there is not yet a Palestinian state but is inevitably to be born. Meanwhile, the DPC – on the contrary of the BL- presumes the existence of a Palestinian state, and intends to be the second step to it.

A state can be distinguished as democratic or autocratic<sup>240</sup>. The identification of the form of state will be in the criterion relative to the holder and the exercise of power in the state, to the modalities of the use of power, and to the finalities of the use of power.<sup>241</sup> There is not always complete identification with this or that kind of form of state, as is the case of post-colonial independent state. These classifications made in the West and widespread all over the world shall not be considered absolute and unique. The cultural, historic, religious differences and circumstances’ necessities can determine a new and different form of state, which will not be necessarily considered bad or good for the only reason that they are different.<sup>242</sup> In the next chapter we will dedicate more space to democracy and human rights, as it is in the DPC and other precedent agreements and declarations. This kind of study will not necessarily reflect its concrete application. The same concept of democracy and human rights are sometimes understood in different modalities.

The Palestinian state will have many things in common with other Arab countries. On the other hand, it is a particular case for the following reasons: 1) The

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<sup>239</sup> VERGOTTINI G. DE, *Diritto Costituzionale comparato*, p. 125

<sup>240</sup> This is not the only classification.

<sup>241</sup> VERGOTTINI G. DE, *Diritto Costituzionale comparato*, p. 127

Palestinian people are the only Arabs without their own state yet. 2) The Israeli occupation gave them an identity connected to their struggle for the independence. 3) The Israeli occupation and the sense of injustice and delusion from Arab and Western countries. 4) The huge number of refugees living abroad or in refugees' camps.

A Palestinian State was declared in Algeria by the PNC,<sup>243</sup> basing its international legitimacy on the UN General Assembly Resolution number 181 (1947); the same Resolution considered as a historical injustice inflicted on the Palestinian people, since it caused their dispersion and deprived them the right of self-determination, imposing the partition of Palestine into two states. Besides the right of people on self determination, the declaration of the establishment of the Palestinian state is realized by virtue of the Palestinian people's historic and natural right on their homeland and their continuous claim of their independence, on the resolutions of Arab Summit conference and by international legitimacy based on United Nations Resolutions<sup>244</sup>.

In the DPC we read: Palestine should be an independent state (DPC, art.4) since Palestinians have the right to practice their sovereignty over their lands (DPC, art.2) that should be unitary, indivisible (DPC, art.4) and integral (DPC, art.13). The sovereignty over natural resources has to be preserved as established in the rules and principles of international law (DPC, art.20). The state is the symbol of the national unity (DPC, art.13) that should never be harmed (DPC, art.7). Rights and freedoms of minorities are guaranteed in respect of political pluralism (DPC, art. 11). Mr. Nabil Sha'th declared before his first meeting of an Arab League committee that "Palestinians are looking forward to having a constitution that supports political freedoms, accepts the sovereignty of law and a multi-party system in an independent Arab Palestinian republic"<sup>245</sup>. Jerusalem should be the capital of Palestine and its seat of government (DPC, art.8). In Jerusalem should be the seat of Parliament (DPC,

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<sup>242</sup> This personal opinion can seem destructive to classification that scholars try to do for the forms of state. This is not my intention: I believe that classification is extremely important, but should never dismiss scholars from taking in consideration the particularities of every state.

<sup>243</sup> As already mentioned in the first chapter II.2.

<sup>244</sup> See Yasser Arafat, Speech at UN General Assembly, Geneva, General Assembly 13 December 1988. <http://MondeDiplo.com/focus/mideast/arafat88-en>

art.73). The law shall determine Palestine's flag, motto, seals, emblems, and national anthem (DPC, art.9).

## I. THE QUESTION OF SOVEREIGNTY

Sovereignty is the original, supreme, and unconditional power of absolute authority that, together with the people and the territory, represents one of the constitutive elements of a state. The constitutional charter for the future Palestinian state will not be different from other Arab States, which are an imitation of western constitutional charters. Sovereignty, as in most of Arab and World Constitutions, belongs to the people. The people are part of the Arab and Muslim nations, and as such have their particular way of understanding sovereignty<sup>246</sup>. Sovereignty, therefore, belongs to Palestinian people (DPC, art.10). It is indispensable, that we clarify who is to be considered Palestinian, who has the right to Palestinian citizenship, and to end with some considerations of the Palestinian People, who are the holder of sovereignty.

### A. WHO IS PALESTINIAN

In the PNCh (PNCh, art.5)<sup>247</sup>, a Palestinian is every Arab who normally resided in Palestine until 1947. Nor the BL neither the DPC give a definition to who is Palestinian<sup>248</sup>. It is also the case of the DOP, which recognised the Palestinian people, without providing a definition of who is to be considered Palestinian<sup>249</sup>. The DPC establishes who has the right of Palestinian citizenship within the Palestinian state: "Palestinian citizenship is secure and permanent for any Arab who lived in

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<sup>245</sup> Alahram Weekly, 17-23 June, Issue n° 434.

<sup>246</sup> We ascertain the facts, without studying the problem in depth since the relation with Islam and Shari'a will be in a proper chapter.

<sup>247</sup> As it is in the previous constitutional project (7th DBL art. 9).

<sup>248</sup> While other Arab Constitutions leaves this competition to the law: Egypt, art.6: "The Egyptian Nationality is defined by the Law"; Jordan, art.5: "Jordan Nationality shall be defined by law"; Lebanon, art 6: "The Lebanese Nationality... shall be determined by law, (Nationality in this article seems synonymous to citizenship); While Syria, art.43: "The law regulates Syrian Arab citizenship".

<sup>249</sup> The Constitution does not give a definition as to who is to be considered Palestinian, considering at the same time the Palestinian people as a "totality". This can be explained by the difficulties that present the problem of refugees that are to be resolved in final negotiations together with the Palestinian state. Cfr. Human Rights in the Proposed Palestinian Basic Law, Birzeit University Law Center , 1996. p.11. The fact that this constitution is prepared as a second step for the Palestinian statehood means that other arguments –including the refugees'- should be already discussed.

Palestine before May 1948” (DPC, art.25) while the BL provided that the question of Palestinian citizenship shall be regulated by law (BL, art.7). Since the BL and the DPC do not cancel all previous documents, especially the PNCh, the “Palestinian definition” as presented in the PNCh will not change.

## B. PALESTINIAN CITIZENS

According to the DPC, not all Palestinians are automatically considered to be Palestinian citizens. They will be considered such only in the cases where two conditions are fulfilled: *first*, to be Arab, without discrimination for sex or religion<sup>250</sup>; *second*, having lived in Palestine before 1948. If we examine art. 5 of PNCh<sup>251</sup> and art. 25 of DPC<sup>252</sup>, we can notice the following:

- The year-line is extended in the DPC until May 1948, the month of the proclamation of the State of Israel, and not 1947 (as in PNCh), the year of the UN repartition plan. This apparently meaningless change can totally switch the concept of Palestine: in the PNCh, Palestine can be only synonym to historical Palestine<sup>253</sup> since Israel was not yet created. In the DPC, indeed, Palestine can be considered the rest of historical Palestine, which did not make part of the State of Israel. This may resolve the question of Palestinians with Israeli citizenship,<sup>254</sup> since those Arabs, on the contrary of PNCh, would not have the right to Palestinian citizenship. This argument

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<sup>250</sup> Ethnic minorities (such as Samaritans of Mount Gerezim in Nablus...) although they lived in Palestine before 1948, they will have no right to Palestinian citizenship. The case of Armenians is more difficult also.

<sup>251</sup> Art. 5: “The Palestinians are those Arab nationals who, until 1947, normally resided in Palestine regardless of whether they were evicted from it or stayed there. Anyone born after that date to a Palestinian father –whether inside Palestine or outside it - is also a Palestinian”.

<sup>252</sup> “Palestinian citizenship is secure and permanent for any Arab who lived in Palestine before May 1948. It is transmitted from father to child. It endures and is not cancelled by the passage of time. The law shall determine the ways of gaining and losing it and the rights and duties of multinational citizens”. While article 9 of the 7th DBL was similar to PNCh, since we read: “Palestinians are the Arab citizens who resided, normally, in Palestine until 1947. every son (and daughter) to a Palestinian Arab father or Palestinian mother, is considered a Palestinian”.

<sup>253</sup> Including actual Israel, the occupied territories of West Bank and Gaza.

<sup>254</sup> “Les Arabes israéliens sont des palestiniens qui n’ont pas été contraints de partir après la première guerre israélo-arabe de 1948 et qui se sont donc retrouvés sous juridiction israélienne. Ils représentent 15 à 16% de la population de l’Etat hébreu. A partir de 1952 ils obtiennent la nationalité israélienne, mais demeurent soumis jusqu’en 1966 à un gouvernement militaire.

is very dangerous since those Palestinians who lived in actual Israel before 1948 and were forced to leave it<sup>255</sup>, will not have the right to Palestinian citizenship.<sup>256</sup>

- The PNCh establishes that “Jews who had normally resided in Palestine until the beginning of the Zionist invasion will be considered Palestinians” (PNCh, art. 6). This article can be considered superfluous in the DPC, since Palestinians now recognise the Israeli State (while in the PNCh, many articles speak about destruction of the Zionism and liberation of Palestine, the only Palestinians’ homeland). In this case, every Jewish man or woman<sup>257</sup> is a member of an Israeli nation, and as such has the right to citizenship in the State of Israel<sup>258</sup>. For those who live abroad, they have the right to “return” to Israel<sup>259</sup>.

- Living in a territory is an extremely wider concept in comparison with the residence. That means that the number of people who would be considered to have Palestinian citizenship is more restricted.

- The right to citizenship is transmitted from father to son (DPC, art.25). All sons of Palestinian women and daughters of Palestinian fathers will be excluded.<sup>260</sup> This further limitation on who has the right to Palestinian citizenship is limited to those Arabs that lived in Palestine before May 1948. Palestinian sons or daughters of Palestinian fathers and mothers after that date shall be considered Israeli or

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<sup>255</sup> After the war of 1948, the number of Palestinian refugees was estimated to be 725 000 persons. They live in camps of UNRWA. They now number 2.5-3 million. After the war of 1967, 300 000 Palestinians left the West Bank and Gaza. They now number 800 000- million. The Palestinian Refugees descendants are estimated in the mid-90s to be 4 865 000 (70% of global Palestinian population). Cfr. BALENCIE J.-M. et GRANGE A. de la (sous la direction de-) et RUFIN J.-C. (présenté par-), Mondes Rebelles, Guerres Civiles et Violences Politiques, l’Encyclopedie des Conflits, p. 1122. It is important to mention that the number of refugees is not specifically agreed on.

<sup>256</sup> The War of 1967 repeated the disaster of Palestinian refugees, who still live in refugee camps in the West Bank, Gaza strip, and nearby Arab countries. This article discriminates the Palestinian refugees of the war of 1948.

<sup>257</sup> The same thing is for sons and daughters of Jewish parents. In case of mixed marriages, the sons and daughters of a Jewish woman are considered to be Jewish.

<sup>258</sup> For example, the Old City was occupied only in 1967. Some of the Jews that lived in the Jewish quarter can be considered Palestinians as in PNCh, but they would not have the right to Palestinian citizenship. Following logical and legal arguments, Palestinian Jews (as in the PNCh, art.6) would be discriminated by the DPC. For this same reason, art. 9 of 7th DBL was criticised by the European commission for Democracy and Law. See doc. 018/96 in:

<sup>259</sup> See Israel Basic Law: Human Dignity and Liberty, Section 6, §b, in: <http://www.uni-wuerzburg.de/law/is12000.html>

<sup>260</sup> I think that this article needs to be reformulated. The 7th DBL (art.9), on the contrary, was more specific and clear considering every Palestinian son (and daughter) of Palestinian father and mother.

Palestinian citizens according to the place where they are born. This citizenship is permanent, and will not be cancelled due to passage of time. Ways of losing or gaining Palestinian citizenship are to be determined by law (DPC, art 25). The Palestinian refugees living abroad have the right to participate in designing the national public policies as the Palestinians living in the Palestinian State (DPC, art.67). The 150 members of the National Council are their representatives (DPC, art.70§2).

### C. THE PALESTINIAN PEOPLE

The Palestinian people believe in their right to practice self-determination (DPC, art.2). In case the DPC will be adopted after the creation of the Palestinian State, some may consider this principle as superfluous. It is not so, since the actual political situation imposes to proclaim this right in every occasion so as to avoid any misunderstanding: the Palestinian people do not accept eternal self-government, without a real sovereignty<sup>261</sup>. This claim of the Palestinian people on their right is not on the expense of anyone else. They claim equality with every other people<sup>262</sup>. In the DoP, there is no mention of the right of the Palestinian people in self-determination. Mr. Rabin recognised the PLO as the legitimate representative of Palestinian people; we read in the DoP: “The Government of Israel has decided to recognize the PLO as the representative of the Palestinian people and commence negotiations with the PLO within the Middle East peace process”. The DoP was entitled: “the declaration on self-government arrangements”. It was the first step for the following agreements that gave birth, and later on, to the Palestinian National Authority. In the PNCh, this right of self-determination was continuously repeated in different modalities. It considers the right of the Palestinian people on their homeland, and so, the right to “determine their destiny” (DPC, art.2). Based on the right of self-determination, the Palestinian people have the right of sovereignty on their land<sup>263</sup> (DPC, art.2).

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<sup>261</sup> The same DOP was on Interim Self-government arrangements. See:

<http://www.jmcc.org/research/series/dop.html>

<sup>262</sup> See Yasser Arafat, Speech at UN General Assembly, Geneva, General Assembly 13 December 1988

<http://MondeDiplo.com/focus/mideast/arafat88-en>

<sup>263</sup> Israel is the only state in the world without defined borders; consequently the territory that will make part of the Palestinian state is not yet delimited; and will be the object of political negotiations.

Sovereignty, consequently, belongs to the Palestinian people (DPC, art.10)<sup>264</sup>; they are the source of authorities (DPC, art.67), and their will is the basis of the constitution (DPC, art.1). Similar principle is present in the Constitution of Egypt (art.3, 73), Syria (art.2§2), Libya (art.1) and Tunisia (preamble, art.3)<sup>265</sup>.

The sovereignty of people project in two directions: 1. Towards the outside, and it means independence, within the international community. 2. Towards the inside, and it means originality. Their sovereignty shall be exercised through permanent representatives<sup>266</sup> and it is the source of the legitimacy of the political power. This legitimacy consists in the consensus of those who are governed<sup>267</sup>.

The Palestinian people are a part of the Arab nation<sup>268</sup> (BL, art.1 and DPC, art.3). We have already mentioned that the first condition for Palestinian citizenship is to be Arab. The same thing we can say for the Palestinian State: it has necessarily to be Arab<sup>269</sup>. The DPC follow the steps of other Arab countries<sup>270</sup>. Arabic shall be the official language<sup>271</sup> (BL,4.3 and DPC, art.5), as it is for all Arab countries: Egypt,

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<sup>264</sup> This same article was present also in the previous Constitutional projects. For example: the third draft (art. 6), the fourth draft (art.6) and the seventh draft (art.9), see:

<http://www.jmcc.org/research/series/basic2.htm>

<http://www.jmcc.org/research/series/basic1.html>

<sup>265</sup> The Constitution of Turkey, on the other hand, declares that sovereignty is for the Turkish Nation (preamble, art.6)

<sup>266</sup> If we consider people as “insieme della generalità dei cittadini” and the Nation “in quanto persona giuridica unitaria” (VERGOTTINI G. DE, *Diritto Costituzionale comparato*, p. 100), the sovereignty shall belong to the Palestinian Nation, since the Palestinian refugees living abroad (excluded from Palestinian citizenship) will be represented by the National Council (DPC, art.70). If we do so, the article should be reformulated: the Palestinian nation is part of the Arab nations (DPC, art. 3) and not the Palestinian people part of the Arab Nation. On the contrary, if we consider that Arab Nation is always used as one Arab Nation (see next footnotes), we will find it difficult to go out from the vicious circle.

<sup>267</sup> VERGOTTINI G. DE, *Diritto Costituzionale comparato*, p. 100.

<sup>268</sup> In Arabic, while Arab states (al-duwal al-arabyya) is always used in plural, Arab nation (al-umma al-arabia) is always in singular. The same word is used to indicate the Muslim nation (al-umma al-eslamyya). Nation is used in plural since the article speaks about Arab and Muslim Nations. To prove this, we can take a look at the articles indicated in previous paragraph. We notice that Arab Nation is considered by the Arab Constitutions always in singular.

<sup>269</sup> The characteristic of being Arab is so important. It preceded “Palestinian people” for seven times (DPC, art.1, 2, 3, 10, 13, 25). While in PNCh it is mentioned in 19 articles over 33. See Yasser Arafat, Speech at UN General Assembly, Geneva, General Assembly 13 December 1988

<http://MondeDiplo.com/focus/mideast/arafat88-en>

<sup>270</sup> The Constitution of Egypt is entitled like this: “the Constitution of Arab Republic of Egypt”; then in the first article: “Egyptian people are part of Arab Nation and work for the realization of its comprehensive unity”. The Constitution of Jordan, always in the first article “the Jordanian people form a part of the Arab Nation”. The same thing for Syria (art.1). Special attention can be made to Lebanon where it mentioned Arabic language as the official language (art.11) without any reference to it belonging to an Arab Nation. The Tunisian people, on the other hand, constitutes part of the great Arab Maghreb” (art.1).

<sup>271</sup> The original language of the Constitution is in Arabic: see introduction to DPC.

art.2; Syria, 4; Tunisia, art.1, Lebanon<sup>272</sup>, art.11. In the 7<sup>th</sup> DBL, art.5§A, we read: “Islam is official religion of Palestine and Arabic is its official language” as it is in the Egyptian, and the Tunisian constitution (respectively art.2 and 1). In the BL the two provisions are mentioned in different paragraphs in the same article (BL, art.4.1,3) In the DPC it is divided into two articles (art. 5 and 6). Art.3 of the DPC instead introduced also the concept of Islamic nation, and providing that the Palestinian people are a part of the *Arab and Islamic* nations<sup>273</sup>.

## II. PALESTINIAN STYLE OF GOVERNMENT

The government’s styles mean the form of the state organization assumes to exercise the sovereign power. The system of Palestine shall be republican (DPC, art.4). Constitutional revision of the republican system of the state is not excluded (DPC, art.213). It is to be considered a democratic republic when the people conduct the government powers, whether directly or indirectly (through their legitimate representatives)<sup>274</sup>, which the DPC confirms in art. 67. In case we want to classify the Palestinian form of government as presented by the BL and by the draft within the classical distinction of government forms, it will be clear that we will not be able to consider it a pure parliamentarian or presidential although it has some elements that, usually, distinguish this or that form of government. In the following paragraphs, our attention will be on the form of government as provided by the DPC.

The President of the State shall appoint the Prime Minister (hereinafter PM) who will name the ministers to the President (DPC, art.128). The nomination of the ministers is subordinated to the decision of the President since the nomination is considered as a proposal in the means of art.147, in preparation for presenting them to the Legislative Council. The PM and ministers should obtain confidence of the LC in

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<sup>272</sup> It is interesting to notice that the Lebanese Constitution leaves the competence to the Law to determine when the French language is to be used.

<sup>273</sup> This connection between Arab language and Islam as official language and religion of the state shall not be reason for confusion, since Arabs are not all Muslim and Muslims are not all Arabs. On the other hand, it is true that Arab and Muslim culture is the heredity of all Muslims (including those non-Arabs) and all Arabs (including those non-Muslims). “Most Arab intellectuals consider Arabic language the first mainstay of Arab Nationalism (al-Qawmyya al-arabyya)... Islam includes a lot of nationalities, Arab Nationality is one of it”. See: GABBUR G., *Aluruba wa mathaher alentima alukhra fi addasatir arrahina lilaqtar alarabyya*, p. 32. (in Arabic)

<sup>274</sup> Ibid.

the following session (DPC, art.148). The vote shall be conducted orally by roll call or by counting votes in the case of secret ballots (DPC, art. 94) following the procedures for voting (DPC, art.91) without indicating the majority needed. The government formulates the general policy that should be discussed by the parliament in a joint session and vote confidence in it in a joint session (DPC, art.96) after having proposed it to the President (DPC, art.147).

In case the LC approves the proposal of a withdrawal of confidence of the government before the termination of authority (DPC, art.99), the President shall accept the resignation of the government and reformulate the government (DPC, art.100); besides, the government shall be considered to have resigned when it loses the confidence of the LC (DPC, art.163§4). In case of grave disagreement between the legislative and the executive branch, the President may call for a referendum so as to dissolve the LC (DPC, art.75). This option forms an exception to the rule included in art.74 that states, “The President of the state may not dissolve either of the two Councils”.

The President of state is the head of republic and the commander-in-chief of the armed forces (DPC, art.118); he shall be elected directly by the people (DPC, art.121). Consequently, the form of government in Palestine will be considered more semi-presidential than presidential, since it lacks the rigid separation of powers (DPC, art.69), typical of presidential. The President of the state, in fact, has large powers and is free of counter-signature; however, the government collaborates with the president side by side; even if nominated by the President. The government is always subject to the withdrawal of confidence by the LC.

**CONCLUSION: THE BASIC LAW AND THE DRAFT PALESTINIAN CONSTITUTION IN  
COMPARISON**

As a conclusion we produced this index to show similarities and differences between BL and DPC.

	<b>BASIC LAW FOR THE PNA</b>	<b>DRAFT OF PALESTINIAN CONSTITUTION</b>
Prepared by	Revised by Legal Commission of the PLC, based on different drafts of different commissions.	Committee created by the PLO EC, and presided by Mr. Nabil Sha'ath.
For Period	The PNA Transitional period, until adoption of the Constitution. "This BL is enforced in the Interim Period, and can be extended until the introduction of the new constitution for the Palestinian state". (106)	The Palestinian State Once adopted it will replace the BL and will remain in force until amended.
Competent	PNA: PLC and the President of the PNA.	PLO: the PNC
Status	- The PLC had approved the draft of BL in its third reading (Law No.1/96) on October 2, 1997. - Mr. Arafat endorsed it on Mai 28, 2002. - Enforced the date of its publication in the official Gazette, on July 7, 2002	- The draft was completed on 14/2/2001. - The draft is revised on 2003 in preparation for statehood.
Contents	The BL is divided in seven chapters: 1. General provisions (art.1-8); 2. Civic rights and freedoms (art.9-33); 3. The Legislative Authority (art. 34-49); 4. The Executive Authority (art.50-87); 5. The Judicial Authority (art. 88-100); 6. State of Emergency Provisions (art. 101-105) 7. Seventh, General and Interim Provisions (art. 106-112)	The DPC is divided in three chapters: 1. Foundations of the State and Rights and Duties (artt.1-66); 2. The Branches of Government (artt.67-212); 3.Revision of the Constitution and Concluding Statutes (Artt.213-220)
Articles	120	220
Official Language	Arabic (art.4)	Arabic (art.5)
Islam	Islam religion of Palestine (art.4.1)	Islam shall be the official religion of the state (art.6)
Other religions	The monotheistic religions have its respect and sacristy (art.4.1).	The Monotheistic religions shall be respected (art.6)
Arab and Islamic Nations	Palestinians part of Arab Nation (art.1)	The Palestinian people are part of the Arab and Islamic nations (art.3)
Source of authority	People are source of authority (art.2)	Sovereignty belongs to the Palestine Arab People (art.10).
Shari'a	Shari'a principles are a primary source of legislation (art.4)	The Principles of the Islamic Shari'a are a primary source for legislation (art.7)
Jerusalem	Jerusalem is the capital of Palestine	Jerusalem shall be the capital of

Representatives to other states	(art.3) Art. 56 states that the President of the PNA shall appoint representatives of the National Authority to countries, international organizations and foreign bodies.	Palestine (art.8)
Refugees	Art.28 states that no Palestinian may be prohibited from returning to his homeland.	

## **CHAPTER FOUR**

### **THE CONSTITUTIONAL PROVISIONS REGARDING HUMAN RIGHTS AND RELIGION**

<b>CHAPTER FOUR</b> .....	124
<b>THE CONSTITUTIONAL PROVISIONS REGARDING HUMAN RIGHTS AND RELIGION</b> .....	124
§10 RIGHTS AND FREEDOMS IN THE BASIC LAW AND THE DRAFT PALESTINIAN CONSTITUTION.....	127
I. THE CONSTITUTIONAL PROVISIONS RELATING TO HUMAN RIGHTS PROTECTIONS ....	129
II. RIGHTS AND FREEDOMS ACCORDING TO THE BASIC LAW AND THE DRAFT PALESTINIAN CONSTITUTION.....	131
III. THE CONSTITUTIONAL COURT.....	137
A. COMPOSITION OF THE COURT .....	137
B. THE CONTROL OF THE CONSTITUTIONALITY OF LAWS .....	138
C. FINAL REMARKS ABOUT THE CONSTITUTIONAL COURT .....	139
§11 ISLAM RELIGION OF STATE, AND SHARI’A SOURCE OF LEGISLATION .....	141
I. ISLAM IS OFFICIAL RELIGION OF STATE .....	141
A. THE ARAB STATES.....	141
B. THE CONSTITUTIONS IN THE ARAB WORLD.....	142
C. ISLAM RELIGION OF STATE .....	142
D. ISLAM SHALL BE THE OFFICIAL RELIGION OF PALESTINE.....	143
II. ISLAMIC LAW AND THE CONSTITUTION.....	143
A. DEFINITION OF SHARI’A .....	143
B. SHARI’A IN THE CONSTITUTIONS OF THE ARAB STATES .....	144
C. SHARI’A IN THE PALESTINIAN CONSTITUTIONAL SYSTEM.....	144
III. THE MONOTHEISTIC RELIGIONS .....	146
IV. CONCLUSIVE NOTES .....	148
ANNEX I: MEMBER STATES OF ARAB LEAGUE .....	149
ANNEX II: ARAB STATES, THEIR INDEPENDENCE, AND CONSTITUTION.....	150
ANNEX III: CONSTITUTIONAL PROVISIONS REGARDING ISLAM, SHARI’A, FREEDOM OF RELIGION.....	152

This chapter does not pretend to cover all arguments related to the foundations or principles of governance in the BL and the DPC but will be limited in two arguments: *first*, the respect of HR, rights and freedoms, *second*, the relation between shari'a and Constitution.

## §10 RIGHTS AND FREEDOMS IN THE BASIC LAW AND THE DRAFT PALESTINIAN CONSTITUTION

The Oslo II agreement limits the PLC, and as such, limits the provisions that the PLC can make to guarantee the respect of human rights and rule of law. Indeed, article 19 of the above mentioned agreement states: “Israel and the Council shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally-accepted norms and principles of human rights and the rule of law”. Some consider this provision ambiguous: the “military occupation, indeed, is ruled by international law according to the 1907 Convention of the Hague and the IV<sup>th</sup> Geneva Convention (about civilian protection in war-time)<sup>275</sup>. As such Israel is obliged to guarantee respect for HR of the Palestinian population. Besides, Israel would supervise that the PLC respects these provisions in the areas under the jurisdiction of the same council<sup>276</sup>. This point of view can be tolerated and accepted partially, since the Israeli government has always refused to apply the mentioned conventions on the occupied territories, considered without special status when occupied in 1967<sup>277</sup>.

Others go a little bit further, considering Israel is not only accountable under International HR’s laws for any violation of Palestinian HR in areas under its direct jurisdiction, but also sharing responsibility with PA in other zones under PA direct jurisdiction, since Israel remains the ultimate authority unless final negotiations are terminated and full sovereignty is recognized<sup>278</sup>. Indeed, while BL reflects the concrete absence of effective sovereignty during the TP, it is out of discussion in the DPC –since it presumes creation of the Palestinian State- that Israeli supervision would be accepted. On the contrary, the DPC as most of constitutions of Arab countries served as an important marker of sovereignty<sup>279</sup>. In the new circumstances and context, it is indispensable that the DPC provides legal mechanisms to guarantee HR and RL, and their respect and application. Indeed, the PA suffers “shortcomings

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<sup>275</sup> CHARVIN R., SCHALLER R., DANNA P.P., *Occupied Territories and Law*, p.37.

<sup>276</sup> ALHAQ - BIRZEIT UNIVERSITY LAW CENTER, *Human Rights in the Proposed Palestinian Basic Law*, P. 17.

<sup>277</sup> DORNIER N., *Rapport*, p. 32.

<sup>278</sup> COLTER I., *Palestinian Undertakings to Respect Human Rights – Basic Sources*.

<sup>279</sup> BROWN N.J., *Resuming Arab Palestine*, P. 45.

that range from insufficient institutionalisation of citizens' rights"<sup>280</sup>. Meanwhile, many NGO and independent centres and associations, such as the Palestinian Centre for Human Rights (PCHR)<sup>281</sup>, dedicate a lot of their activities and reports to encouraging respect for rule of law, and promoting development of democracy and democratic institutions in Palestinian society, which are the most efficient guarantees to respect and defend HR.

According to the Palestine Human Rights Monitor (May – June Issue n°3, 1997)<sup>282</sup>, the PA public undertakings to respect human rights can find expressions in five sources: *First*, undertakings made to human rights NGO's, such as Amnesty International<sup>283</sup>; *second*, public decrees and declarations made by the PA undertaking to comply with HR norms<sup>284</sup>; *third*, provisions of the Oslo accords, undertakings under the DBL of the PA; and *finally*, responsibilities under International HR law and Humanitarian Law<sup>285</sup>.

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<sup>280</sup> ROCHARD M. – SIEGMAN H., *Strengthening Palestinian Public Institutions*.

<sup>281</sup> The PCHR (see: <http://www.pchrgaza.org/>) is an independent legal body based in Gaza City dedicated to protecting human rights, promoting the rule of law, and upholding democratic principles in the Occupied Palestinian Territories. It holds Special Consultative Status with the Economic, Social, and Cultural Council (ECOSOC) of the United Nations and is an affiliate of the International Commission of Jurists, the Fédération Internationale des Ligues des Droits de l'Homme (FIDH), and the Euro-Mediterranean Human Rights Network. PCHR is a recipient of the 1996 French Republic Award for Human Rights.

The Centre was established in 1995 by a group of Palestinian lawyers and human rights activists with the following mandate:

1. To protect human rights and promote the rule of law in accordance with international standards
2. To create and develop democratic institutions and an active civil society, while promoting democratic culture within Palestinian society
3. To support all efforts aimed at enabling the Palestinian people to exercise its inalienable rights in regard to self-determination and independence in accordance with international law and UN resolutions.

The work of the Centre is conducted through documentation and investigation of human rights violations, provision of legal aid and counseling to both individuals and groups, and preparation of research articles relevant to issues such as the human rights situation and the rule of law in the OPT. The Centre also provides comments on Palestinian Draft Laws and urges the adoption of legislation that incorporates international human rights standards and basic democratic principles. Due to the illegal restrictions on movement imposed by Israeli occupying forces, the bulk of PCHR's activities focus on the Gaza Strip. To achieve its goals, the Centre has recruited a committed staff of well-known human rights lawyers and activists.

<sup>282</sup> COLTER I., *Palestinian Undertakings to Respect Human Rights – Basic Sources*.

<sup>283</sup> In a radio broadcast of December 31, 1993, Mr. Arafat said: "We want the Palestine that is being revised anew to be... democratic, an oasis in which our people will enjoy freedom, democracy, political pluralism, security and safety, the independence of judiciary, the preservation of public freedoms, stability, prosperity, human rights and equality between men and women", cited in: COLTER I., *Palestinian Undertakings to Respect Human Rights – Basic Sources*.

<sup>284</sup> Such as the PLO decree issued in Tunis on October 30, 1993, right after the Israel-PLO declaration of Principles. Cf. COLTER I., *Palestinian Undertakings to Respect Human Rights – Basic Sources*.

<sup>285</sup> Since the PA, although does not have the character of an independent state, exercises "state-like" power and authority within its jurisdiction under the May 1994 (Cairo Agreement) and September 1995 (Oslo II) Interim Agreements. Cf. COLTER I., *Palestinian Undertakings to Respect Human Rights – Basic Sources*.

## I. THE CONSTITUTIONAL PROVISIONS RELATING TO HUMAN RIGHTS PROTECTIONS

The accelerated preparation for a Basic Law that proceeded and followed the creation of the PNA, was in part the result of the desire that jurists and constitutionalists had to ensure the protection of human rights. In fact, the relations between the President and the Legislative Council were very difficult since the PLC has prepared and approved the DBL, which has been ignored by Mr. Arafat for a long time as already mentioned. Actually, the PLO already confirmed in the declaration of independence in 1988, that the “State of Palestine proclaims its commitment to the principles and purposes of the United Nations, and to the Universal Declaration of Human Rights... It will join with all states and peoples in order to assure a permanent peace based upon justice and the respect of rights so that humanity's potential for well-being may be assured, an earnest competition for excellence may be maintained, and in which confidence in the future will eliminate fear for those who are just and for whom justice is the only recourse”.

The BL provides that basic human rights and freedoms shall be binding and respected (BL, art.10.1) and that the PNA shall work without delay to join regional and international declarations and covenants which protect human rights (BL, art.10.2). As a guarantee the BL provides the necessity to establish by law an independent commission for human rights (BL, art.31) that is already established as mentioned above.

The PA minister Mr. Nabil Sha’th stated, after first meeting of an Arab League committee to draft a constitution for the coming Palestinian state that Palestinians are looking forward to having “a constitution that supports political freedoms, accepts the sovereignty of Law and a multi-party system in an independent Arab Palestinian Republic”<sup>286</sup>. The DPC, indeed, states that the principles of justice, liberty, equality and human dignity –on which the Palestinian people believe (DPC, art.2)- shall be the basis of governance and the motivation of the work of governing

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<sup>286</sup> SAAD R., *State in the Making*, Al-Ahram Weekly 17-23 June 1999, Issue n° 434.

authorities (DPC, art.14). These same authorities have the constitutional obligation to defend public and individual rights and freedoms (DPC, art.12). In the DPC there is a continuous reference to human rights, in strict relation with good governance, rule of law, and independence of judiciary, with respect to the International law standards.

HR and basic freedoms, according to international laws, charters, and treaties, will not be immediately applicable in the Palestinian state. It has to be absorbed by the Palestinian legal system, constitution, or ratified by the legitimate legislative power, in order to make them part of domestic law (DPC, art.27). In case of reception by an ordinary law, the HRs and basic freedoms, may be changed by successive similar range ordinary law, or special law. The Constitution will guarantee human rights and freedoms (DPC, art.26), that is the right of every person (DPC, art.28). The respect of those rights and freedoms should be in accordance with the constitution, the laws issued in application thereof, and the principles of justice (DPC, art.28). In case of violation of those constitutional rights and freedoms, any person can pursue a request directly to the Constitutional Court (DPC, art. 201).

## II. RIGHTS AND FREEDOMS ACCORDING TO THE BASIC LAW AND THE DRAFT PALESTINIAN CONSTITUTION

In the BL and the DPC there are many similar provisions regarding basic rights and freedoms that the constitutional documents intend to protect and guarantee. The real protection depends on the application of the Constitution, the respect of independence of judiciary and the respect of rule of law.

### **Basic Law for the Palestinian National Authority**

#### Chapter Two: Public Rights and Freedoms<sup>287</sup>

##### Article (9)

All Palestinians are equal under the law and judiciary, without discrimination because of race, sex, color, religion, political views, or disability.

##### Article (10)

1. Basic human rights and freedoms shall be binding and respected.
2. The Palestinian National Authority shall work without delay to join regional and international declarations and covenants which protect human rights.

##### Article (11)

1. Personal freedom is a natural right, and shall be guaranteed and protected.
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 law. The law shall specify the period pre-arrest detention. Imprisonment or detention shall only be permitted in places that are subject to laws related to the organization of prisons.

##### Article (13)

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

##### Article (14)

The accused is innocent until proven guilty in a court of law that guarantees the right to defend himself. Any person accused in a criminal case

### **Draft of Palestinian Constitution**

#### Section Two: Rights and Duties

##### Article 24

Palestinians shall equal before the law. They shall enjoy rights and incur duties equally without discrimination for any cause except those constitutionally legitimated

##### Article 27

Human rights and basic freedoms according to international laws, charters, and treaties that become part of domestic law are binding and must be respected.

##### Article 37

Personal security is guaranteed by the constitution. No one may be arrested, searched, detained, or restricted in his freedom in any way except by a judicial order applying the provisions of the law. The law shall define the conditions of provisional detention.

##### Article 30

People have the right of protection from injury, harsh treatment, and subjugation to torture or inhumane and undignified punishment.

##### Article 38

The accused may not be subject to any coercion or torture. The accused must be treated as innocent until his guilt has been proven in a fair

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<sup>287</sup> There are different English versions. None is official. The one used here is that published in MIFTAH official website, see <http://www.miftah.org/Display.cfm?DocId=790&CategoryId=10>

shall be represented by a lawyer.

Article (15)

Punishment shall only be imposed upon individuals. Collective punishment is prohibited. Crime and punishment shall only be determined by law. Punishment shall be imposed only by judicial order, and shall apply only to actions committed after the promulgation of law.

Article (16)

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

Transplantation of human organs, and new scientific developments shall be regulated to serve legitimate humanitarian purposes.

Article (17)

Homes shall be inviolable; thus, they shall not be subject to surveillance, entrance or search, except in accordance with a valid judicial order, and in accordance with the provisions of law.

Any consequences resulting from violations of this article shall be considered invalid.

Individuals who suffer from such violation shall be entitled to fair compensation guaranteed by the Palestinian National Authority.

Article (18)

Freedom of belief and the performance of religious rituals are guaranteed, provided that they do not violate public order or public morals.

Article (19)

Every person shall have the right to freedom of thought, conscience and expression, and shall have the right to publish his opinion orally, in writing, or in any form of art, or through any other form of expression, provided that it does not contradict with the provisions of law.

Article (20)

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

Article (21)

1. The economic system in Palestine shall be based on the principle of free market economy. The Executive Authority may establish public companies which shall be organized in accordance with law.

2. The freedom of economic activity is guaranteed. The law shall organize its supervising rules and limitations.

trial granting him the guarantees of self-defence and the assistance of an attorney.

Article 42

Punishment is individual; collective punishment is forbidden.

Article 29

Life shall not be subject to scientific or medical experimentation. No one shall be subject to medical treatment without his consent.

Exceptional circumstances shall be regulated by law. Organ transplants and other innovations of scientific progress for legitimate humanitarian purposes shall be regulated by law.

Article 45

Residences shall be inviolable. Search and entry shall not be permitted except according to judicial order given for cause, during the day, and in accordance with the provisions of law.

Article 44

The freedom to practice religion and arrive to places of worship shall be guaranteed insofar as it does not disturb the public order or defame monotheistic religion.

Article 46

Freedom of thought and expression, in speech or writing or other means, shall be guaranteed. The law shall regulate it to guarantee the equal respect for the rights of others.

Article 31

The constitution guarantees to every citizen freedom of residency and movement within the state, abroad, and returning to it.

Article 21

The economic order in Palestine shall be established on the basis of free market principles. The law shall regulate its supervision in order to protect free economic activity and to preserve the rights of groups in need of care. The state may establish public companies regulated by law.

Article 49

3. Private property shall be protected and, shall not be expropriated except in the public interest, and for a fair compensation in accordance with the law, or pursuant to a judicial order.

4. Confiscation shall be in accordance with a judicial order.

#### Article (22)

1. Social, health, disability, and retirement insurance shall be regulated by law.

2. The welfare of families of martyrs', prisoners of war, the injured, and the disabled, shall be regulated by law. The National Authority shall guarantee them education services, health and social insurance.

#### Article (24)

1. Every citizen has the right to education. It shall be compulsory until at least the end of basic grades, and it shall be free in public schools and institutes.

2. The Palestinian 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, higher institutes, and scientific research centers, in a manner that guarantees the freedom of scientific research, as well as literary, artistic, and cultural creativity. The Palestinian National Authority shall encourage and support such creativity.

4. Private schools and educational institutions shall comply with the curriculum approved by the Palestinian National Authority, and shall be subject to its supervision.

#### Article (25)

1. Work is a right, duty and honor. The Palestinian National Authority shall strive to

Public property shall be regulated by law in order to protect it and so that it serves the interest of the people. The administration of Waqf funds shall be regulated by law. Private property is protected. It shall be disposed of in a matter that does not conflict with the public interest. It may not be seized or appropriated except for the public benefit, by virtue of law, and in return for just compensation. It may not be confiscated except by judicial decision. Public confiscation of the right of ownership shall be forbidden.

#### Article 51

The state shall protect the private economic activity of individuals in order to realize economic growth and social justice.

#### Article 56

The state shall guarantee social insurance services, pensions for the disabled and aged, care for the families of martyrs and prisoners and orphans, and care for those wounded and injured in the national struggle. This shall be done to guarantee them training, education, and health and social insurance.

#### Article 57

The state shall guarantee health insurance as an individual right and a public interest. It shall guarantee basic health care for those financially unable.

#### Article 58

Education has freedom provided it does not disturb the public order and decency or offend the monotheistic religions. It is a right of every citizen and is supervised by the state. The state shall guarantee education until the secondary level. It is compulsory until the end of the tenth grade.

#### Article 59

Private education has freedom provided it does not violate the public order and public decency or offend the monotheistic religions. The law shall regulate the supervision of the state over its organization and curricula.

#### Article 60

The state shall provide assistance to students who are financially unable. It shall support the outstanding.

#### Article 61

The constitution shall protect the independence of institutions with scientific goals and universities in a manner defined by law in order to guarantee the freedom of scientific research and encourage it.

#### Article 52

Each citizen has the right to work. The constitution shall guarantee the freedom to

- provide it to any individual capable of performing it.
2. Work relations shall be organized in a manner which guarantees justice and provides security, health, and social insurance to all workers.
  3. Organization of unions and guilds is a right which shall be regulated by law.
  4. The right to conduct a strike shall be exercised within the limits of law.

Article (26)

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

1. To establish and join political parties in accordance with the law.
2. To establish unions, guilds, associations, societies, clubs, and public institutions in accordance with the law.
3. To Vote and nominate for election, representatives among them by ballot in accordance with the law.
4. To hold public office and positions in accordance with the principle of equal opportunities.
5. To conduct special meetings without the presence of police members, and to conduct public meetings, processions, and assemblies, within the limits of law.

Article (27)

Establishment of newspapers and all media means is a right for all, guaranteed by this Basic Law. However, their financing resources shall be subject to law. Freedom of audio, visual, and written media, as well as freedom to print, publish, distribute, transmit, together with the freedom of individuals working in this field, is guaranteed by this Basic Law, other related laws. Censorship on media shall be prohibited. No warning, suspension, confiscation, cancellation, or restrictions shall be imposed on media except by law, and in accordance with a judicial order.

Article (28)

form work-related associations.

Article 53

Slave labor shall be prohibited. The law shall regulate compulsory labor in cases of executing judicial decisions.

Article 54

The right to protest and strike shall be exercised in a way that does not violate the law. Strikes are forbidden in the army and policy sectors. The law shall regulate the relations of work in order to guarantee justice for all parties and provide for the protection and security of workers.

Article 55

Every Palestinian has equal right to public positions on the basis of merit and aptitude, in accordance with the law regulating public employment.

Article 64

Each citizen has public, civil, and political rights and freedoms, which shall be guaranteed by the constitution and regulated by law. Specifically, he has the following rights:

1. Direct participation in political life.
2. The right to election and nomination in representation of the people
3. The right to contribute to political activities, form or join a political party, adopt the platform of a legally established party, idea, or political choices and support them peacefully.
4. The freedom to gather and demonstrate with others peacefully and without weapons.
5. The freedom to form public associations according to the legal procedures.
6. The right to present petitions and complaints.

Article 47

Freedom of the press, printing, publishing, and media shall be protected by the constitution. It is not permitted to suspend them except by judicial decision in application of the law. It is not permitted to subject them to censorship. The law regulating these shall guarantee their integrity, the expression of different opinions, encourage scientific, artistic, and literary creativity, and guarantee the freedom of academic opinion.

Article 33

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

Article (29)

Maternity and childhood welfare is a national duty. Children shall have the right to:

1. Comprehensive protection and welfare
2. Not to be exploited in any purpose, and shall not be allowed to perform works which might damage their safety, health, or education.
3. Protection from harm and cruel treatment
4. Law prohibits beating children and treating them cruelly by their relatives.
5. Shall be segregated in case they are sentenced form adults, and treated in a manner which is appropriate to their age and rehabilitation.

Article (30)

1. Litigation is a protected and guaranteed right to all people. Each Palestinian shall have the right to find sanctuary in the legal system. Litigation procedures shall be organized by law to guarantee prompt settlement of cases.
2. Laws shall not make any decision or administrative work immune against judicial control.
3. Judicial mistakes shall result in compensation by the National Authority. Conditions and methods of such compensation shall be regulated by law.

Article (32)

Each aggression committed against any personal freedom, against private life of human being, or against any of rights or freedom, which have been guaranteed by the law or by this basic law, shall be considered as a crime. Criminal and civil case resultant from such infringement shall not be subject to any status of limitation. The National Authority shall guarantee fair indemnity for those who suffered from such damages.

Article (33)

A balanced and clean environment is one of the human rights. The preservation and protection of the Palestinian environment from pollution, for the sake of present and future generation, is a national duty.

Exiling Palestinians from their homeland or denying them the ability to return is prohibited. Neither may they be extradited to a foreign country except according to a treaty approved by the legislative branch.

Article 62

The state and the society shall protect motherhood and childhood. The rights of the child, the mother, and the family shall be regulated by law.

Article 63

Women are the full sisters of men. They have rights and duties as guaranteed by the shari`a and established in law.

Article 43

The right of all to litigation shall be guaranteed by the state. Each individual shall have the right to resort to his natural judge to defend his rights and freedoms and to obtain compensation for their injury. No public or private person shall have immunity from appearing before the judiciary. Trial procedures for exceptional instances shall be regulated by law in accordance with the provisions of the constitution.

Article 66

Any violation of the basic rights and freedoms of the individual guaranteed by the constitution shall be crime for which the resulting civil and criminal lawsuits shall have no statute of limitations.

Article 23

A clean and sustainable environment is a human right. It shall be a societal and official responsibility to preserve and protect the Palestinian environment for present and future generations.

Some articles in the BL regarding rights and duties have no correspondent articles in the DPC such as:

Article (12)

Every arrested person shall be informed of the reasons for his arrest or detention. He shall be promptly informed, in a language he understands, of the nature of the charges brought against him. He shall have the right to contact a lawyer and to be tried without delay.

Article (23)

Proper housing is a right for every citizen. The Palestinian National Authority shall secure housing for those without shelter.

Article (31)

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

Some articles in the DPC regarding rights and duties have no correspondent articles in the BL such as:

Article 25

Palestinian citizenship is secure and permanent for any Arab who lived in Palestine before May 1948. It is transmitted from father to child. It endures and is not cancelled by the passage of time. The law shall determine the ways of gaining and losing it and the rights and duties of multinational citizens.

Article 26

The constitution guarantees the civil, political, social, cultural, and economic rights and freedoms of all citizens, which they enjoy on the basis of equality and equal opportunity.

Article 28

Every person has the right to life and to the protection of his rights, freedoms, and well being in accordance with the provisions of the constitution, the laws issued in application thereof, and the principles of justice.

Article 32

The right of the Palestinian refugee to return to his home and the original home of his ancestors is a natural right which cannot expire. Its exercise may not be delegated nor surrendered.

Article 34

No Palestinian may be extradited for political crimes.

Article 35

No political refugee may be extradited.

Article 36

No person may be deprived of legal competence, citizenship, or reputation for political reasons.

Article 39

A convict deprived of his freedom must be treated humanely and appropriately. Arbitrariness in execution shall be punishable by law.

Article 40

There shall be neither crime nor punishment except as stipulated by law. There shall be no punishment except for deeds committed after a law comes into effect. In non-criminal matters, it may be stipulated otherwise in a law that is approved by a majority of all the members of the Legislative Council.

Article 48

The constitution shall protect the confidentiality and freedom of correspondence and communication. They may not be infringed except in circumstances defined by law.

Article 50

The law shall regulate the conditions of transfer of ownership of real estate to foreigners.

Article 65

The suspension of any right or freedom among the rights and freedoms is not permitted in any circumstance. The law shall regulate the rights and freedoms that may be restricted temporarily in exceptional circumstances.

### III. THE CONSTITUTIONAL COURT

The BL provides that a law shall form a high Constitutional Court (BL, art.94). The establishment of a constitutional court would enhance protection of HR and other rights and freedoms. The DPC, on the Contrary has presented a detailed regulation of the Constitutional Court to establish as follows:

#### A. COMPOSITION OF THE COURT

The constitutional court, composed of a president<sup>288</sup> and eight judges<sup>289</sup>, each for nine years, is un-extendable, and cannot be dismissed without a judicial ruling<sup>290</sup>. Both the president and judges enjoy the same guarantees of the deputies in the PLC (DPC, art. 103-106, 197). All of them are chosen by the PLC<sup>291</sup>, the President of the State and the SJC, who should select three members of the constitutional court each.<sup>292</sup> One third of the constitutional court should be renewed every 3 years. The same three authorities nominate the successor of the constitutional court member in case of the end of term (DPC, art.200). This right of selection or nomination should respect qualifications required by the Constitution (DPC, art.193). Selected constitutional court's members cannot assume other jobs or offices, except academic work (DPC, art.199).

The constitutional court is established by virtue of the constitution (DPC, art.192). Amendment of the constitutional provisions regulating the constitutional court is very complicated. It should, by constitutional law and according to the same conditions and procedures of amending the constitution (DPC, art.206), follow the procedures in articles 213-216. besides the approval of two-thirds of the members of the PLC (DPC, art.206). These procedures guarantee the independency and the stability of the constitutional court. The regulation of constitutional court is included

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<sup>288</sup> The President is elected by the judges themselves (DPC, art.194). Procedure of election is left for the law regulating the work of the constitutional court (DPC, 195). It is quite clear that the election of the President has to be every three years.

<sup>289</sup> The constitutional court of Syria is composed of five judges, all appointed by the President of the Republic (DPC, art.139).

<sup>290</sup> Presumably by the SJC as in art. 199 of DPC.

<sup>291</sup> Procedure and majority needed for this selection is not described.

under the title “Judicial Branch”, but the constitutional court “exercise its authority independently in safeguarding the legality of the work of state institutions” (DPC, art. 192). The constitutional court has no right of taking initiatives<sup>293</sup>. It should examine the questions mentioned in art. 201 of the DPC, “pursuant to a request” from the President of the state, the Speaker of the LC, five members of the LC, the courts, Attorney General, or someone whose constitutional rights have been violated.

## B. THE CONTROL OF THE CONSTITUTIONALITY OF LAWS

The control of the constitutionality of laws is exclusively the task of the constitutional court.

### 1) Before the Promulgation of Laws (DPC, art. 201 §0):

The President of the State should promulgate laws after the approval of the PLC. The President may ask the Council for reconsideration of the proposed Law, if the law is reconfirmed (with the same majority of the first approval), it should be promulgated (DPC, art.136) without prejudice (DPC, art. 201§0).

The President may request to the constitutional court the control of the constitutionality of that proposed bill before they are promulgated (also in case it was reconsidered or approved following the opposition of the President). In this case, the President interrupts the automatic promulgation of the law until the decision<sup>294</sup> of the constitutional court. In case of a negative decision of the constitutional court, the President is obliged to promulgate the law. In case of a positive decision, the Council should change or reformulate the draft bill.<sup>295</sup> In case of a request of five members of

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<sup>292</sup> It is not clear whether the selected judges can be changed every time there will be a new president or a new PLC. It is quite sure that the number of judges will be nine anyway (DPC, art.192).

<sup>293</sup> While the Constitution of Egypt gives the constitutional court the task to control constitutionality of laws and regulations: “The Supreme Constitutional Court alone shall undertake the judicial control in respect of the constitutionality of the laws and regulations” (art. 175). In Syrian constitution (art. 145), after giving the President and a quarter of the People’s Assembly members the right to request to the constitutional court the control of constitutionality of laws, or legislative decrees, add the following: “Should the Supreme Constitutional Court decide that a law or a decree is contrary to the Constitution, whatever is contrary to the text of the Constitution is considered null and void with retroactive effect and has no consequence”.

<sup>294</sup> It is not a simple opinion or advice, but a decision. The decision shall dissolve the conflict of powers between legislative and executive power.

<sup>295</sup> It is not a political control, since the President can request the constitutional court to control the constitutionality of the draft bill, and the judges have to apply the constitution only, without a political valuation.

the PLC, the constitutional court should control the constitutionality of the draft bill. The request shall be made during the period of objecting it (before transmitting it to the President for promulgation).<sup>296</sup>

## **2) After Promulgation of Laws (DPC, art. 201 §1):**

The constitutionality of laws (so as ordinances and regulations) is subject to examination by constitutional court once their constitutionality is challenged. Since it is not specified who can challenge the constitutionality of law, we may presume that they are all those mentioned in art 201 of the DPC. The request can be made directly to the constitutional court, and not necessarily as an accidental case, within another process. Procedures for the courts to refer Constitutional challenges submitted to them are regulated by the law of the constitutional court (DPC, art. 202). In these terms, the control of the constitutionality of the law can be requested by anyone (someone of art. 201!) also in case of hypothetical violation of Constitutional rights (and freedoms?).

## **C. FINAL REMARKS ABOUT THE CONSTITUTIONAL COURT**

As in article 201 of the DPC, the constitutional court shall examine constitutionality of ordinances, regulations, measures of indictment of the President, parties, legislative or presidential elections, signing treaties and the procedures that violate basic constitutional rights. Besides, the constitutional court decides jurisdictional disputes among the three powers. The decision of the constitutional court shall be final, and may not be appealed (DPC, art. 204). The judges (constitutional court), have to apply the constitution<sup>297</sup>. Majority needed is not specified, so we can presume a simple majority of 5 judges. It is not specified also

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The influence of the President of the State on the decision of the constitutional court is indirect, since he has the right to nominate three of the judges (as in 2.1)

<sup>296</sup> It is not clear if the control of the constitutional court shall suspend the transmission of the draft bill to the President to be promulgated.

<sup>297</sup> In art. 7 we read “the principles of Islamic Shari’a are a primary source of legislation”. In case of contradiction of the constitution with those principles, the judges should apply the constitution, since the principles of the Shari’a (not the Shari’a itself) is a primary source (not the primary source nor the only source) of the legislation (not the constitution, considered the highest law, out of the power of the ordinary legislator). The contradiction with the principles of Shari’a can be the object of an amendment to the constitution following the procedures as in art. 206 of DPC.

whether the opinion of the dissident judges could be known or indicated in the decision<sup>298</sup>. Judicial decisions of the constitutional court shall bind all branches of government and individuals, the President of the State included<sup>299</sup>. The constitutional court shall specify whether the law (which was unconstitutionality ascertained) shall be considered void (with retroactive effectiveness, *ex tunc*) or end its effectiveness (*ex nunc*) in accordance with the circumstances and conditions as specified in the law organizing its operation (DPC, art.204).

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<sup>298</sup> In this case the opinion of dissident judges can make part of the doctrine of the constitutional court. The minority of today can be the majority of tomorrow.

<sup>299</sup> Article 120 of the DPC can be used to confirm the contrary, since we find that “The president...('s) duty shall be to preserve the state and defend the rule of the constitution as the highest law”.

## §11 ISLAM RELIGION OF STATE, AND SHARI'A SOURCE OF LEGISLATION

The principles of Islamic Shari'a –we read in article 7 of the DPC- are a primary source for legislation in Palestine, where Islam shall be the official religion (DPC, art.6). For that reason, Shari'a principles are to be considered one of the foundations of the state to be born, and the most important one. In the BL we read similar provisions (BL, art.4). A panoramic vision of other Arab states' constitutional provisions relating to Islam and Shari'a could be indispensable before considering its role in Palestine, and will be inspiring to respond to questions such as: Why constitutionalists had introduced these clauses? Why in these words? Which is the novelty? What does this mean?

### I. ISLAM IS OFFICIAL RELIGION OF STATE

#### A. THE ARAB STATES

In order to avoid discussions about which state is to be considered Arab<sup>300</sup>, objectively all members of the Arab League<sup>301</sup> are considered Arab States. Actually members of Arab League are twenty-one states, plus the PLO or Palestine<sup>302</sup>. In the Arab world, constitutions may describe a variety of political structures: federal, as in the United Arab Emirates and the Sudan; unitary, as in Tunisia; a constitutional monarchy, as in Jordan; a republic, as in Egypt; or a traditional hereditary monarchy, as in Saudi Arabia.

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<sup>300</sup> All information about Arab States can be found in: The Program of Governance in the Arab Region (POGAR): <http://www.pogar.org/>

<sup>301</sup> The league was founded in Cairo in 1945 by Egypt, Iraq, Lebanon, Saudi Arabia, Syria, Transjordan (Jordan, as of 1949), and Yemen. Countries that later joined are: Algeria (1962), Bahrain (1971), Comoros (1993), Djibouti (1977), Kuwait (1961), Libya (1953), Mauritania (1973), Morocco (1958), Oman (1971), Qatar (1971), Somalia (1974), Southern Yemen (1967), Sudan (1956), Tunisia (1958), and the United Arab Emirates (1971). The Palestine Liberation Organization was admitted in 1976. cfr. "Arab League," *Microsoft® Encarta® Encyclopedia 2000*. © 1993-1999 Microsoft Corporation. All rights reserved. Cfr. Annex I.

<sup>302</sup> Palestine or PLO is part of the Arab League, although not yet a state. PLO, in fact, was admitted in 1976, and considered as the unique representative of the Arab Palestinians and their interests.

## B. THE CONSTITUTIONS IN THE ARAB WORLD

While most Arab constitutions<sup>303</sup> are documents with roughly similar provisions, some constitutions are noteworthy products of historical and political circumstances. In Saudi Arabia, for example, the Quran itself is considered the constitution, accompanied by a series of royal decrees compiled to function as a manual for the application of its principles. In Libya, the Constitutional Proclamation, the Green Book written by Muammar Ghaddafi, and the People's Declaration together constitute the Basic Law of the land<sup>304</sup>. Constitutional amendment procedures vary, sometimes requiring direct referenda or legislative action. In some countries, the head of the state may issue amendments by decree.<sup>305</sup>

## C. ISLAM RELIGION OF STATE

Islam is considered the religion of the state (*al-islam din al-dawla*), in most of the Constitutions of the Arab States (as it is in Egypt art.2, Jordan art.2, Tunisia art.1). In the constitution of Syria it is mentioned only that “the religion of the President of the Republic shall be Islam” (art.3 §1), while the constitution of Lebanon, for the particularity of Lebanon and the relations between the communities, has no reference to Islam. To be a confessional state does not contradict, by itself, with the international HR's standards, relating to Freedom of Religion. This was the case of some western democracies that declared Christianity or Catholicism as the official religion of the state, without harming the sensibilities and rights of others<sup>306</sup>. On the other hand, Arab states have shown different ways of assimilation of Islamic principles depending on their particular geographical, historical, and political context. Besides Arab states, including Saudi Arabia and Oman (pretending that they exercise exclusively administrative governmental activities) do have the power to legislate<sup>307</sup>;

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<sup>303</sup> In order to have a good panoramic vision of Arab states, their constitutions, and date of independence, see Annex to this chapter.

<sup>304</sup> See Constitutions in Arab World, in the website of the Program of Governance in the Arab Region (POGAR): <http://www.pogar.org/>

<sup>305</sup> Idem.

<sup>306</sup> About the confessional states in Europe in the beginning of the 20th century, Cfr. CARDIA C., *Manuale di Diritto Ecclesiastico*, II° ed., Il Mulino, Bologna, 1996, p.139-141.

<sup>307</sup> CASTRO F., *Diritto Musulmano e dei Paesi Musulmani*, p.14.

as such it is obvious that the degree of “*islamisation*” change considerably from a state to another<sup>308</sup>.

#### D. ISLAM SHALL BE THE OFFICIAL RELIGION OF PALESTINE

There is no mention for Islam as the “religion of Palestine”, neither in the PNCh (1968) nor in the declaration of independence (1988). The same thing was in the earlier DBL. The first time that a DBL stated that Islam is the official religion of the State was in the 7<sup>TH</sup> DBL<sup>309</sup>. The BL includes this article and was approved by the PLC but not promulgated or ratified by President Arafat until 2002, as we already mentioned. In art.5 §A of the 7<sup>th</sup> DBL, in fact, we read: “Islam is the official religion of Palestine...” The same thing occurred in the BL art. 4.1 and the DPC art.6. Not only the Palestinian constitutionalists added the concept of a Muslim nation, that most of Arab Constitutions had avoided for its ambiguities; in fact we read Palestinian state is “part of Muslim nation” (DPC, art.3)<sup>310</sup>.

### II. ISLAMIC LAW AND THE CONSTITUTION

#### A. DEFINITION OF SHARI’A

The Arabic word *Shari’a*<sup>311</sup> means “the way revealed by God”. In that sense it has three meanings: In a very broad sense, *Shari’a means* the religious rule, including dogma, rituals, moral and juridical precepts, revealed for Jewish, Christians, and Muslims. In a broad sense, it means the way indicated only for Muslims, to rule both internal and external foro<sup>312</sup> of the life of Muslims. In a strict sense, it means the way or the “religious rule” revealed only for Muslims to regulate only the external foro<sup>313</sup>: in this strict meaning, *Shari’a* coincides with *Fiqh*.<sup>314</sup>

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<sup>308</sup> *Islam (L’) Religion de l’Etat*, p. 1.

<sup>309</sup> Drafted by the Legal Committee of the PLC, 9 July 1996. It was published and commented by the European Commission for Democracy through law.

<sup>310</sup> For the importance of the concept of Muslim nation (*umma Islamiyya*) please read: AMOR A., *La Notion d’ «Umma» dans les Constitutions des États Arabes*.

<sup>311</sup> To study the Islamic Law in depth, see bibliography indicated in CASTRO F., *Diritto Musulmano e dei Paesi Musulmani*, p.16-17.

<sup>312</sup> Foro interno e foro esterno

<sup>313</sup> foro esterno

<sup>314</sup> CASTRO F., *Diritto Musulmano e dei Paesi Musulmani*, p.1

## B. SHARI'A IN THE CONSTITUTIONS OF THE ARAB STATES

In the last decades we notice a growing tendency of conversion to Shari'a<sup>315</sup>, in Muslim and Arab legal systems. *Shari'a*, in fact, is imposed legally by the state and not by doctrinal models<sup>316</sup>. On the other hand, the Islamic council of Europe in 1983 proposed a model for an Islamic Constitution in which the substance of *Islam* "Religion of State, *din al-dawla*" is clearly reflected in most of the articles, but without ever mentioning that clause,<sup>317</sup> for example:

§ Art. 1.a. "All power is for God only... the sovereignty belong only to His Divine law";

§ Art.1.b. "The Divine law... is the source of the legislation, and the rule of power";

§ Art.1.c. "Authority is a sacred deposit: people shall exercise it in accordance with the dispositions of the Divine law"<sup>318</sup>.

## C. SHARI'A IN THE PALESTINIAN CONSTITUTIONAL SYSTEM

We read in art.5.b in the 7<sup>TH</sup> DBL of 1996 "Principles of the Islamic *Shari'a* are the main source of legislation in Palestine". It is interesting to read the comments that European experts made about that provision:

**It is questionable, or even dangerous, to set out explicitly that the principles of Islamic *Shari'a* is the main source of legislation in Palestine. The terms used are also ambiguous. Do they mean that the principles of the *shari'a* are as such the basis of the law in Palestine or do they simply mean that these principles should inspire the Palestinian legislator?**

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<sup>315</sup> For an overview of the constitutional provisions relating to Islam, Shari'a and freedom of religions, please see Annex to this chapter.

<sup>316</sup> CASTRO F., *Diritto Musulmano e dei Paesi Musulmani*, p.14.

<sup>317</sup> *Islam (L') Religion de l'Etat*, p.9-41.

<sup>318</sup> English version is mine, while we can read the Arabic and French version in *Islam (L') Religion de l'Etat*, p.13

**In the first case it would be difficult to determine exactly which are the principles and what is their precise signification. The *Shari'a* being at the same time theological and jurisprudential, this task would be obviously uneasy and results uncertain.**

**Moreover, it would come within the competence of the High Constitutional Court to examine whether a law challenged before it is in conformity with the principles of the *Shari'a* or not. However, the court which is competent to interpret constitutional texts will probably be unable to interpret constitutional texts, which seem to have a “supra-constitutional” value.<sup>319</sup>**

These previous comments, seriously worried about the concrete implication of such constitutional provision, were taken into consideration by the Palestinian constitutionalists. In fact, we read in art.4.2 of the BL and 7 of DPC:

**“The principles of Islamic Shari’a are a primary source for legislation”**

Instead of art 5.b, of the 7<sup>th</sup> DBL:

**“Principles of the Islamic Shari’a are the main source of legislation”**

I believe that these formal changes were made as a try to take off ambiguities and embarrassments that western academics and organisations may express when they try to study the DPC, while the substance of the problem stay unresolved: for example, in reference to women rights, DPC, art. 63 states that “Women rights are those guaranteed by the Shari’a”. In case of a conflict between *Shari’a* and constitution, according to the DPC, the principles of Shari’a have the priority. This confirms that there is an internal conflict in the same DPC that must be resolved once adopted<sup>320</sup>. On the other hand, we may need to wait the birth of a Palestinian state, the

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<sup>319</sup> See comments made by Political Affairs Committee (Doc.7636), and approved by the Committee on Legal Affairs and HR on 23 September, of the Council of Europe, on the basis of observations by C. Economides (Greece), J. Helgesen (Norway), and JU. Robert (France).

<sup>320</sup> For more investigation about conflict between occident and Islam, relating to HR, please read: ABU-SAHLIEH S.A., *Dialogue Confectuel sur les Droits de l’Homme entre Occident et Islam*, BARBIROTTI S., *Sistema Arabo-Islamico e diritti umani*, FIORE F., *La Condizione della donna musulmana alla Luce dei principi del Corano*, SAULE M., *Norme Standard e Diritti Umani nelle Nazioni Unite*, LOPEZA., *La Condizione delle Donne in Israele: Risultati, Problemi e Sfide*.

promulgation of the Constitution, the birth of the Constitutional Court, and their jurisprudential activities to discover how the relationship -or conflict- between *Shari'a principles* and constitutional principles, will be resolved. The case of Egypt can be an example<sup>321</sup>.

In article 7 of the DPC there is some thing new: after confirming that the principles of Islamic *Shari'a* will be a primary source for legislation, the constitution confirms that “the legislative power shall determine personal status law under the authority of monotheistic religions according to their denominations” (DPC, art.7). In fact, the DPC intends to guarantee monotheistic religions, their authority and jurisdiction<sup>322</sup>, relating to the personal status law, as established by the Status Quo by the Ottomans. This same article introduces another important provision : the source of the authority of the monotheistic authority and jurisdiction is no longer any of the precedent powers that dominated Palestine, but rather the Palestinian legislator.

### III. THE MONOTHEISTIC RELIGIONS

The fact that Islam is proclaimed as the official religion in Palestine does not raise problems as such<sup>323</sup>. The only question is whether under such constitutional provisions individuals would enjoy freedom of conscience and religion<sup>324</sup>. Indeed, art. 5 of the 7<sup>th</sup> DBL shall be read in light of art.22 of the same draft: “Freedom of belief and performance of religious rituals are guaranteed, in accordance with observed customs in Palestine, as long as that does not violate public order and public morals”. The same two articles are repeated in the BL art. 4 and 18. In the DPC, on the contrary, there is an important change: The “monotheistic religions –we read immediately after stating that Islam shall be the official religion- shall be respected (art.6). While *freedom of belief* is no longer mentioned but simply: “freedom to practice religion” (art.44). Freedom of belief is essential for the realization of a

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<sup>321</sup> DUBRET B., *A propos de la Constitutionnalité de la Shari'a*.

<sup>322</sup> See BORROMANS M., *Statut Personnel e droit familial en pays musulmans*, and PIZZO P.-GUTTEREZ V., *Islamismo*, p.118-131.

<sup>323</sup> As was confirmed by the Political Affairs Committee (Doc.7636), and approved by the Committee on Legal Affairs and HR on 23 September 1996, of the Council of Europe, on the basis of observations by C. Economides (Greece), J. Helgesen (Norway), and JU. Robert (France).

democratic society that Palestinians intend to construct. For the question: why did Palestinian constitutionalists take a step backward? We may answer due to the influence of the principles of Shari'a in the Arab world in general, due to the actual conflict, and the influence of Islamic movements on Palestinian society in particular.

On the contrary, some Arab Constitutions guarantee "freedom of belief". This is the case for Egypt (art.46), for example. In the Arab world this constitutional provision has a stricter content, of that existent in most of the western democracies. Practically, "freedom of belief" means "freedom to practice religion", exactly as it is proclaimed in the DPC, since there is more coincidence between the material and the formal constitution. Since democracy, HR's and other concepts shall be understood, not in their western connotations, but in their concrete understanding, acceptance and application in Arab and Muslim societies. Freedom of conscience and religion has a particular importance in Palestine, for the existence of the Holy Places for the monotheistic religions<sup>325</sup>. This fact was totally ignored by the Palestinian constitutionalists in writing the BL and the DPC.

The PNCh, since 1968, confirms in article 16 that the war against Israel is not a religious one, but a political one:

**"The liberation of Palestine, from a spiritual point of view, will provide the Holy Land with an atmosphere of safety and tranquillity, which in turn will safeguard the country's religious sanctuaries and guarantee freedom of worship and of visit to all, without discrimination of race, colour, language, or religion. Accordingly, the people of Palestine look to all spiritual forces in the world for support."**

In the declaration of independence we read also:

**"Governance will be based on principles of social justice, equality and non-discrimination in 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"**.

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<sup>324</sup> In that sense, see analysis made by *Law Institute*, ALHAQ - BIRZEIT UNIVERSITY LAW CENTER, *Human Rights in the Proposed Palestinian Basic Law*, p.30, in relation to HR standards.

<sup>325</sup> As confirmed in both agreements that the Holy See has stipulated Basic Agreements with Israel (1993, and 1997) and with the PLO (in 2000).

In the DPC, in fact, all these principles will be expressed in many articles:

**“Constitution guarantees the freedom to practice religion and to arrive to place of worship (art.44).**

**Public order and defamation of monotheistic religions are the only limitations for that freedom (art.44).**

**These are the same two limits for freedom of public and private education (art.58, 59).**

#### IV. CONCLUSIVE NOTES

When considering the question of Christian religious minorities, it is important to take in consideration that Christians, although numerically reduced, are part of the Palestinian society, and together with Muslim Palestinians, participate in the process of nation and state building. The fact that Islam is religion of Palestine does not necessarily contradict rights and freedom of religion, or better, not declaring Islam as religion of Palestine does not mean necessarily that freedom of religion is secured. In fact, the same article 4 states immediately after declaring Islam as official religion, that respect and sanctity of all other heavenly religions shall be maintained. On the other hand, freedom of belief and the performance of religious rituals are guaranteed (art.18) and Shari'a principles as source of legislation (art.4, n.2), will continue to rule personal status in respect of jurisdiction of religious tribunals and *status quo*. Equality between Palestinians intends to be factual and not only formal. For example, eight seats of the PLC were dedicated to religious or nationalistic minorities (six for Christians, one for Samaritans, and one for Charkas), in order to secure that minorities members will not be excluded from political and social life.

Annex I: Member States of Arab League

Member State	Admission	الدولة
Jordan(Founder)	22 / 3 / 1945	(دولة مؤسسة) المملكة الأردنية الهاشمية
Emirates	6 / 12 / 1971	دولة الإمارات العربية المتحدة
Bahrain	11 / 9 / 1971	دولة البحرين
Tunisia	1 / 10 / 1958	الجمهورية التونسية
Algeria	16 / 8 / 1962	الجمهورية الجزائرية الديمقراطية الشعبية
Djibouti	4 / 9 / 1977	جمهورية جيبوتي
Saudi Arabia(Founder)	22 / 3 / 1945	(دولة مؤسسة) المملكة العربية السعودية
Sudan	19 / 1 / 1956	جمهورية السودان
Syria(Founder)	22 / 3 / 1945	(دولة مؤسسة) الجمهورية العربية السورية
Somalia	14 / 2 / 1974	جمهورية الصومال الديمقراطية
Iraq(Founder)	22 / 3 / 1945	(دولة مؤسسة) جمهورية العراق
Oman	29 / 9 / 1971	سلطنة عمان
Palestine	9 / 9 / 1976	دولة فلسطين
Qatar	11 / 9 / 1971	دولة قطر
Comoros	20 / 11 / 1993	جمهورية القمر الاتحادية الإسلامية
Kuwait	20 / 7 / 1961	دولة الكويت
Lebanon(Founder)	22 / 3 / 1945	(دولة مؤسسة) الجمهورية اللبنانية
Libya	28 / 3 / 1953	الجمهورية العربية الليبية الشعبية الاشتراكية العظمى
Egypt(Founder)	22 / 3 / 1945	(دولة مؤسسة) جمهورية مصر العربية
Morocco	1 / 10 / 1958	المملكة المغربية
Mauritania	26 / 11 / 1973	الجمهورية الإسلامية الموريتانية
Yemen(Founder)	5 / 5 / 1945	(دولة مؤسسة) الجمهورية اليمنية

From the official website of Arab League:

[http://www.leagueofarabstates.org/e\\_Members.asp](http://www.leagueofarabstates.org/e_Members.asp)

**ANNEX II: ARAB STATES, THEIR INDEPENDENCE, AND CONSTITUTION**

<b>Arab States</b>	<b>Independence</b>	<b>Constitution and amendment</b>
Algeria (Republic/unitary)	Independence July 5, 1962 from France	1 <sup>st</sup> constitution in September 10, 1963 and suspended in 1965 2 <sup>nd</sup> constitution in November 22, 1976 Amended by parliament on June 30, 1979, and by Referendum on November 3, 1988, February 23, 1989, November 28, 1996
Bahrain (Constitutional Monarchy/unitary)	August 15, 1971 From Britain	- December 6, 1973 Abolished in 1975 - National Charter was approved, in 2001 following a national wide Referendum
Comoros*	1975 from France then unstable	- March 1996 Elected president drafted new constitution
Djibouti (Republic/unitary)	June 27, 1977 From France	September 4, 1992 By Referendum
Egypt(Founder) (Republic/unitary)	February 28, 1922 From Britain	September 11, 1971 By referendum
Emirates (Federation of Emirates)	December 2, 1971 From Britain	- Interim Constitution on December 2, 1971 - Made permanent on December 2, 1996
Jordan (Constitutional Monarchy/unitary)	- Emirate 1921 - Kingdom May 25, 1946 From Britain - Kingdom on October 3, 1932	January 1, 1952
Iraq (Republic/unitary)	- Republic July 14, 1958 - Ba'ath revolution July 17, 1968	- provisional constitution promulgated on September 22, 1968 and went into effect on July 16, 1970 - A new interim constitution was adopted in 1990.
Kuwait (Constitutional Monarchy/unitary)	June 19, 1961 From Britain	November 11, 1962
Lebanon (Republic/unitary)	November 22, 1943 From French mandate - December 24, 1951 from Italy	- Adopted in May 23, 1926, amended in 1949 - National Reconciliation Agreement in Taif, Saudi Arabia in 1989
Libya Islamic Arabic Socialist Mass-State/unitary	- Constitutional monarchy on January 2, 1952  - Socialist revolution in 1969	- The constitutional proclamation was adopted on December 11, 1969 - The Declaration on the Establishment of the Authority of people amended the constitution on March 2, 1977
Mauritania** (Republic/unitary)	Independent 1961	1961 Constitution after independence, suspended in 1978 1991: new constitution
Morocco (Constitutional monarchy/unitary)	March 2, 1956 From France	1 <sup>st</sup> Constitution adopted in March 10, 1962, and revised in 1970, 1972, 1980, and 1992 Amended to create bicameral legislature on September 23, 1996
Oman (Monarchy/unitary)	July 1970, Sultan Qaboos came to power	Basic Law promulgated on November 6, 1996 by Royal Decree No. 101 of 1996

Qatar (Monarchy/unitary)	September 1, 1971 From Britain	Provisional constitution drafted on September 1, 1971
Saudi Arabia (Monarchy/unitary)	Unification on September 23, 1932	Basic Law that articulate the government's rights and responsibilities was drafted by King Fahed in March 1992, and introduced in 1993
Somalia (Republic/unitary)	- British Somaliland on June 26, 1960 - Italian- administered UN trusteeship on July 1, 1960 - Unification on June 26, 1960	1 <sup>st</sup> constitution adopted after independence in 1961 by popular referendum 2 <sup>nd</sup> constitution adopted on August 25, 1979, presidential approval on September 23, 1979 In 1993 a commission was appointed to draft a new national charter. The process was stalled due to the civil war
Sudan	1953-1956 from Britain and Egypt	1 <sup>st</sup> Constitution of 1973: established the one-party presidential Republic, and suspended in 1975. 2 <sup>nd</sup> constitution approved by a public referendum in 1998: multiparty politics and guarantees freedom of thought and religion.
Syria (Republic/Unitary)	April 17, 1946 From France	March 13, 1973
Tunisia (Republic/Unitary)	March 20, 1956 From France	July 1, 1959 and amended July 12, 1988
Yemen Republic/unitary)	- North Yemen from Ottoman empire on 1918 - South Yemen from Britain on November 30, 1961 - Establishment of the Republic of Yemen on May 22, 1990	Adopted on 16, 1991 Amended on September 29, 1994

From the Web site of "The Program of Governance in the Arab Region (POGAR)"

<http://www.pogar.org/>

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\*\* "Mauritania," *Microsoft® Encarta® Encyclopedia 2000*. © 1993-1999 Microsoft Corporation. All rights reserved.

**Annex III: Constitutional Provisions Regarding Islam, Shari'a, Freedom of Religion**

State	Islam	<b>Source of law</b>	<b>Head of the State</b>	<b>Other religions</b>
<b>Algeria</b>	Religion of State (art.2)	National Charter 76, and 1986 (art.6)	Candidate to the presidency: Muslim (art.107)	Freedom of conscience (art.53)
<b>Bahrain</b>	Islam shall be the religion of the State (art.2)	Islamic Sharia (Islamic Law) 'a main source' of legislation (art.2)		Freedom of conscience is absolute (art.22)
<b>Egypt</b>	Religion of State (art.2)	Islamic jurisprudence is the principal source of legislation (art.2 and 11)	The person to be elected President of the Republic must be an Egyptian born to Egyptian parents and enjoy civil and political rights. (art.75)	The State shall guarantee the freedom of belief and the freedom of practice of religious rites (art.46)
<b>Emirates</b>	Official religion of the Union (art.7)	Shari'a= a principle source (art.7)		Freedom of religion, in accordance with the customs, and in the limits of the public order (art.32) Freedom of worship for recognized religions (art.3)
<b>Iran</b>	Official religion of Iran – dogma ga'farit duodiciman art.12	Islamic precepts (art.4)		
<b>Jordan</b>	Islam is the religion of the State (art.2)	-----	Legitimate child for a Muslim mother and father. (art.28)	The State shall safeguard the free exercise of all forms of worship and religious rites in accordance with the customs observed in the Kingdom, unless such is inconsistent with public order or morality (art.14)
<b>Koweit</b>	The religion of the State is Islam (art.2)	the Islamic Shari'a shall be a main source of legislation. (art.2)	Legitimate son of Muslim parents (art.4,5)	"...Without distinction as to race, origin, language or religion..." art.29 Freedom of belief is absolute. Art.35
<b>Libya</b>		The green book and	Coran: sources of legislation	
<b>Moroco</b>	Religion of state (art.6)		The king: Amir al-mu' minun (art.19)	Freedom of worship (art.6)
<b>Soudan</b>	Islam is religion	Shari'a: the fundamental		Other religions recognized (art.16).

	(art.16)	source (art.9)		freedom of belief and worship (art.47)
<b>Saudi Arabia</b>	-----	Unique religion	Hanbalite school, Ibn Taymyya The religion of the President of the Republic has to be Islam. (art.3)	-----  Art. 35 (1) The freedom of faith is guaranteed. The state respects all religions. (2) The state guarantees the freedom to hold any religious rites, provided they do not disturb the public order.
<b>Syria</b>	-----	Islamic jurisprudence is a main source of legislation. (art.3)		Art.5. The Tunisian Republic guarantees the inviolability of the human person and freedom of conscience, and protects the free exercise of beliefs, with reservation that they do not disturb the public order.
<b>Tunisia</b>	Tunisia is a free State, independent and sovereign; its religion is the Islam (art.1)		The President of the Republic is the Head of the State. His religion is Islam. (art.38)	

\* Source of this scheme: *Islam (L') Religion de l'Etat*, pp. 129-130

## POST SCRIPTUM

The actual thesis intended to present a first approach to the two constitutional documents in the Palestinian context: the Basic Law for the Palestinian National Authority in the transitional period, approved by the PLC in 1997, and the Draft of the Palestinian Constitution as published in 2001. The violent conflict in the Palestinian territories and Israel caused the end of negotiations between parties. The status of the Israeli-Palestinian agreements is uncertain and the provisions agreed upon until then were violated again. Critiques to the Oslo agreements are made from the inside and the outside, still, the PNA and the “Autonomous Territories” are there to remember us of those agreements which created facts on the earth, impossible to destroy, specially in the context of international consensus on the necessity to resolve the Israeli-Palestinian conflict, and the consensus on the two states solution.

The PA’s minister of planning, Nabil Sha’ath announced on January 4<sup>th</sup>, 2002 that the PC of an envisioned Palestinian state would be drafted soon. It would include 220 provisions and would be based to a great extent on the major Palestinian legal system. This constitution is part of the reforms requested by the backed road map for peace, which calls for reforms and the establishment of a Palestinian state within 2005. Mr. Sha’ath said that he expected that the Constitution would be subject to popular referendum, which would accompany the presidential and parliamentary election, although in separate papers. The PLO Central Council –120 members- is the entity competent to discuss the draft that the committee presided by Mr. Sha’ath is preparing<sup>326</sup>. Reform in the PNA was imposed as a condition to re-start negotiations. Reform in the PNA was first the Palestinian people’s request, although not the real reason for conflict as some may think. In this context, the PNA started reforms according to the 100-days plan for emergency reform presented on June 23<sup>rd</sup>, 2002 by the Ministerial Committee for Reform, appointed by the Palestinian president. We read in the introduction made by the PNA to the constitutional documents:

The plan envisaged Presidential, legislative as well as municipal elections to be held within 6-8 months. The holding of elections would respond to widespread popular Palestinian demand, and was deemed the flagship of reform. Other items on the plan included measures that emphasize the separation of powers between the executive, the legislative and the judicial branches; financial reform; security reform; judicial reform; public administration and civil service reform; economic reform and diverse steps in various aspects of governance that were seen as urgent. These initial steps were to be followed by a longer-term reform plan. The whole exercise was envisaged in the context of strengthening Palestinian steadfastness, laying the foundations for a viable state and supporting Palestinian pursuit of the goals of ending occupation<sup>327</sup>.

Formulating a constitution for the Palestinian state (to create) and, meanwhile, amending the BL recently endorsed by the President, would be necessary to guarantee the respect of the above principles. The first step was to create the office of the Prime Minister that the BL does not provide. The creation of the office of the Prime minister responds, first of all, to the Palestinian popular demand and to the International press to make reforms in the PNA. President Arafat nominated Mr. Mahmoud Abbas as Prime Minister on March 10, 2003. The PLC voted 64-3, 4 abstention in favor of creating the office of prime minister. In the same meeting, the PLC adopted an amendment to the BL since it did not include this office. Besides the number of ministers is extended to a maximum of 24, not 19 as it was in the BL. Mr. Abbas is the secretary general of the PLO Executive Committee, and heads the PLO's Negotiations Affairs Department, created in 1994 to oversee permanent status negotiations. The duties of the Prime Minister at that point were still to be defined.

Personally I do not believe that changing from pure presidential system to a semi-presidential will mean inevitably more sharing powers. Any way, Palestinians need a strong executive a central fast decision making power in this particular moment of negotiation. What do Palestinians need now is the end of occupation and the realization of their right to statehood. Democracy is also necessary; constitution, on the other hand shall give the necessary guaranties to control the power of the

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<sup>326</sup> See article published in the Washington Times: <http://dynamic.washtimes.com/twt-print.cfm?ArticleID=20030104-010945-9942r>

<sup>327</sup> See MOPIC website.

majority, and make it possible for minorities to be well represented and their interests well protected. Constitution shall guarantee transparency, accountability, power sharing, legality, rule of law, pluralism, freedom of speech. These values may exist also in a country with a strong and centralized Executive but not in a country with a one-man rule.

Meanwhile, the DPC published in 2001, was recently reconsidered and the MOPIC published two other drafts for public discussions<sup>328</sup>. I will not publish here those texts but will show some innovations regarding arguments treated in this thesis. The First DPC was published on 14/2/2001, the second on 9/2/2003 (hereinafter 2<sup>nd</sup> DPC) and the third almost one month later, on 7/3/2003 (hereinafter 3<sup>rd</sup> DPC). The number of articles decreased: first DPC included 220 articles, the second 211, and the third 193. The House of Representatives (Parliament) is unicameral (2<sup>nd</sup> DPC 69, 114-116, 3<sup>rd</sup> DPC 67, 110-112) and no more bicameral as it was in the first DPC (1<sup>st</sup> DPC 70). The House of Representatives has the power to ratify international treaties (2<sup>nd</sup> DPC 83, 3<sup>rd</sup> DPC 80) and not the President (1<sup>st</sup> DPC 141).

As for the religion of the state and the principles of Shari'a we read in the 1<sup>st</sup> DPC:

#### **Article 6**

**Islam shall be the official religion of the state. The monotheistic religions shall be respected.**

#### **Article 7**

**The principles of the Islamic Shari'a are a primary source for legislation. The legislative branch shall determine personal status law under the authority of the monotheistic religions according to their denominations, in keeping with the provisions of the constitution and the preservation of unity, stability, and advancement of the Palestinian people.**

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<sup>328</sup> I was personally contacted by Prof. Nathan Brown, one of the international consultant to the constitutional committee, and with whom I was in contact for previous work about the Palestinian constitutional system. I was contacted later on by the office of Mr. Nabil Sha'ath, the President of the committee that asked for a copy of my Licenza thesis.

There is not substantial changes but a kind of clarification, since Islam remains the official religion and the principles of Shari'a are a major source of legislation, but the constitution guarantees equality in rights and duties to all citizens irrespective of their religion. We read in fact in the 2<sup>nd</sup> and 3<sup>rd</sup> DPC:

**Article 5**

**Arabic and Islam are the official Palestinian language and religion. Christianity and all other monotheistic religions shall be preserved and respected. The Constitution guarantees equality in rights and duties to all citizens irrespective of their religion.**

**Article 7**

**The principles of Islamic Shari'a are a major source for legislation. Civil and religious matters of followers of other monotheistic religions shall be organized in accordance with their religious teachings and denominations, while preserving the unity and independence of the Palestinian people.**

There are important changes in articles that consider Palestinian citizenship. In the 1<sup>st</sup> DPC we read:

**Article 25**

**Palestinian citizenship is secure and permanent for any Arab who lived in Palestine before May 1948. It is transmitted from father to child. It endures and is not cancelled by the passage of time. The law shall determine the ways of gaining and losing it and the rights and duties of multinational citizens.**

Commenting this article in a previous work, which I communicated to the Palestinian legal Committee for consideration<sup>329</sup> I wrote:

**In the PNCh (art.5), a Palestinian is every Arab who normally resided in Palestine until 1947... The DPC establishes who has the right to Palestinian citizenship within the Palestinian state: "Palestinian citizenship is secure and permanent for any Arab who lived in Palestine before May 1948" (DPC, art.25) while the BL provided that the question of Palestinian citizenship shall be regulated by law (BL, art.7). Since the BL and the DPC do not cancel all**

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<sup>329</sup> Cf. my Licenza Thesis, The Palestinian Constitutional System, 2002, pp.18-20. These comments were partially reported here (see subchapter § 12 THE PALESTINIAN STATE AND GOVERNMENT)

previous documents, especially the PNCh, the “Palestinian definition” as presented in the PNCh will not change...According to the DPC, not all Palestinians are automatically considered to be Palestinian citizens. They will be considered such only in the cases where two conditions are fulfilled: *first*, to be Arab, without discrimination for sex or religion; *second*, having lived in Palestine before 1948. If we examine art. 5 of PNCh and art. 25 of DPC, we can notice the following:

The year-line is extended in the DPC until May 1948, the month of the proclamation of the State of Israel, and not 1947 (as in PNCh), the year of the UN repartition plan. This apparently meaningless change can totally switch the concept of Palestine: in the PNCh, Palestine can be only a synonym to historical Palestine since Israel was not yet created. In the DPC, indeed, Palestine can be considered the rest of historical Palestine, which did not make part of the State of Israel. This may resolve the question of Palestinians with Israeli citizenship, since those Arabs, on the contrary of PNCh, would not have the right to Palestinian citizenship. This argument is very dangerous since those Palestinians who lived in actual Israel before 1948 and were forced to leave it, will not have the right to Palestinian citizenship

...

The right to citizenship is transmitted from father to son (DPC, art.25). All sons of Palestinian women and daughters of Palestinian fathers will be excluded. This further limitation on who has the right to Palestinian citizenship is limited to those Arabs that lived in Palestine before May 1948. Palestinian sons or daughters of Palestinian fathers and mothers, after that date, shall be considered Israeli or Palestinian citizens according to the place where they are born...

In fact, we read in the 2<sup>nd</sup> and 3<sup>rd</sup> DPC (cursive is mine):

#### Article 12

Palestinian nationality shall be regulated by law *without prejudice to the rights of those who legally acquired it prior to May 10, 1948 or the rights of the Palestinians residing in Palestine prior to this date, and who were forced into exile or departed there from and denied return thereto.* This right is passed *from fathers and mothers* to their progenitor. It neither disappears nor lapses unless voluntarily relinquished (cursive is mine).

A Palestinian cannot be deprived of his citizenship. The acquisition and relinquishment of Palestinian citizenship shall be regulated by law. The rights and duties of citizens are founded in the Constitution and governed by law.

### Article 13

**Palestinians who left Palestine after 1948 and who were denied return there to shall have the right to return to the Palestinian state and bear its nationality. It is a permanent, inalienable, and irrevocable right.**

**The state of Palestine shall strive to apply the legitimate right of return of the Palestinian refugees to their homes and villages, and to obtain compensation through negotiations, and political and legal channels in accordance with the 1948 United Nations General Assembly Resolution 194 and the principles of international law.**

Regarding the Human Rights, we read in article 27 of the 1<sup>st</sup> DPC:

### Article 27

**Human rights and basic freedoms according to international laws, charters, and treaties that become part of domestic law are binding and must be respected.**

We read in article 18 of the 2<sup>nd</sup> and 3<sup>rd</sup> DPC:

### Article 18

**The state of Palestine shall abide by the Universal Declaration of Human Rights and shall seek to join other international covenants and charters that safeguard human rights.**

As for women rights we read in article 63 of the 1<sup>st</sup> DPC:

### Article 63

**Women are the full sisters of men. They have rights and duties as guaranteed by the shari`a and established in law.**

I commented this article in my previous work<sup>330</sup>:

**I believe that these formal changes (*Principles of Shari'a are the or a main source of legislation*) were made as an attempt to take off ambiguities and embarrassments that Western academics and organizations may express when they try to study the DPC, while the substance of the problem is unresolved: for example, in reference to women rights, DPC, art. 63 states that "Women rights are those guaranteed by the Shari'a". In case of a conflict between *Shari'a* and**

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<sup>330</sup> Ibid, p.53. This paragraph was reported here, see subchapter §16.

the Constitution, according to the DPC, the principles of Shari'a have the priority. This confirms that there is an internal conflict in the same DPC that must be resolved once adopted. On the other hand, we may need await the birth of a Palestinian state, the promulgation of the Constitution, the birth of the Constitutional Court, and their jurisprudential activities to discover how the relationship -or conflict- between *Shari'a principles* and constitutional principles, will be resolved. The case of Egypt can be an example.

In the 2<sup>nd</sup> we read:

**Article 19**

**Citizens are equal in general rights and duties before the law, without discrimination on the basis of sex, ethnicity, religion, color, political views or any other reason.**

**Article 22**

**Women shall have their own legal personality and independent financial assets. They shall have the same rights, liberties, and duties as men. The term Palestinian or citizen refers to females and males.**

**Article 23**

**Women shall have the right to participate actively in the social, political, cultural and economic aspects of life. The law shall strive to abolish restraints that prevent women from contributing to the building of family and society.**

**The Constitutional and Shari'a rights of women shall be safeguarded; and any violation of those rights shall be punishable by law. The law shall also protect their legal inheritance.**

While in the 3<sup>rd</sup> DPC we read:

**Article 19**

**All Palestinians are equal before the law, and enjoy same civil and political rights and have the same duties without discrimination.**

**The term Palestinian or citizen refers to females and males.**

**Article 22**

**Women shall have their own legal personality and independent financial assets. They shall have the same rights, liberties, and duties as men.**

**Article 23**

**Women shall have the right to participate actively in the social, political, cultural and economic aspects of life. The law shall strive to abolish restraints that prevent women from contributing to the building of family and society.**

**The Constitutional and Shari'a rights of women shall be safeguarded; and any violation of those rights shall be punishable by law. The law shall also protect their legal inheritance.**

I believe article 19 of the 2<sup>nd</sup> DPC is more appropriate than the 3<sup>rd</sup> DPC since not all Palestinians would have Palestinian citizenship. The Palestinian domestic law is applicable only on the citizens of the Palestinian state, and as such all citizens are equal before the Palestinian law, and have the rights and duties that the constitution guarantees to all citizens without discrimination.

In the Conference of London, the Palestinian team presented a paper in which they present these primary features: I) Declare a state system of representative democracy and political pluralism, based on the rule of law. II) Establish three separate branches of government - Executive, Legislative and independent Judiciary - with a system of checks and balances. III) Introduce a Prime Minister post with specified powers. IV) Delineate the relationship between the President, Prime Minister and Legislative Branch. V) Establish a mechanism for resolving conflict between the Executive and Legislative Branches of government. VI) Provide a "bill of rights", guaranteeing for equality under the law and fundamental civil, political, social and economic rights. Highlight women's equality and women's rights to political involvement. While the obstacles to realizing these efforts are: I) Israeli Movement Restrictions on Palestinian Population. II) Lack of Political Context: without a genuine belief that Israel's occupation of Palestinian Territory will end and that a Constitution will serve a legitimate Palestinian purpose, the constitutional exercise appears to many Palestinians to be at best, pointless, and at worst, succumbing to external dictates. The constitutional process must be tied to

meaningful political negotiations or an international political process on permanent status issues<sup>331</sup>.

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<sup>331</sup> See article of Mustafa Karkouti, published in MOPIC official website.

## EPILOGUE

Some consider the efforts to prepare a constitution for the Palestinian state, or approving a BL for the PNA in the transitional period as superfluous, meaningless or ridiculous. The Palestinian territories, in fact, are still under occupation and continuous closure of the cities; the Authorities that the BL and the DPC intend to separate and rule do not exist effectively. The first obstacle to Palestinians now in their efforts to the of building society that conducts to the state building is the Israeli occupation. Nevertheless, many believe that the BL and the DPC are one of the steps that will conduct Palestinians through the transitional period and the very beginning of the Palestinian state, guided by the principles of good governance and respect of Human Rights, towards the realization of their right to self- determination<sup>332</sup>.

When I started this research, the Palestinian constitutional system appeared very rich, interesting, but at the same time, complicated, and confusing. The situation now is not better (even worse!). The positive results of this research can be general as the following: *First*, the most important stages (although in a very summarizing way, and actually, despite that, for most of its parts still unofficial) of the Palestinian constitutional system were put together for the first time<sup>333</sup>. In fact, the Palestinian Constitution is in a slow process of constituting, and as such, any work done on this item needs to be updated continuously. *Second*, the analysis of the structure of the Palestinian state and government yet to come, as in the BL and the DPC, was not studied by many other academics at the beginning, although progressively returned to be at the centre of the interest of Western and Palestinian academics<sup>334</sup>. Besides, the armed struggle with Israel not only moved the attention away from this topic, but also accentuated the necessity for a Palestinian State, and as such, for a stable Palestinian constitutional and unitary system. *Third*, the comparative study that I tried to follow,

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<sup>332</sup> The necessity of the establishment of the Palestinian state seems to obtain the consensus of the international Community, expressed in the new UNSC resolutions although there is no agreement on which, how, and when this state is to be born.

<sup>333</sup> At least in English, French, or Italian in the books that I was able to find.

<sup>334</sup> For example, I received directly from Prof. Nathan J. Brown, the chapter in which he is now making the last updates on his *Resuming Arab Palestine*, Berkely: University of California Press, forthcoming 2003. **Nathan J. Brown** is a Professor of Political Science and International Affairs at George Washington University.

especially in the last part of this research, can be very useful to having a panoramic vision of the situation in the Arab states, their constitutions, and their constitutional provisions regarding Islam, *Shari'a*, Human Rights... that will be the political, geographical, historical and religious context in which the Palestinian State, to be formed, will grow in its comprehension of democratic values, with respect of to its special and particular identity.

On the other hand, the research has many limits: *First*, there is not yet a Palestinian State, nor an approved constitution but only a temporary Basic Law and different legal systems. This requires a continuous updating of information. *Second*, while libraries are full of books about the Israeli-Palestinian conflict, few books or even articles are available about the Palestinian effort in the state building and the constitution writing processes. *Third*, many books are available in Arabic in Palestinian or Arab libraries, but unfortunately I have no direct access to these libraries. Until I will be able to have a look at them personally, I am obliged to use the books that I found which are mostly in English, French or Italian.

In order to evaluate the role of a constitution in the future Palestinian state, I can say together with Nathan Brown, which commented these efforts: “A constitution alone cannot create a democratic Palestine with an authoritative and accountable leadership, but it can contribute to that effort”<sup>335</sup>. Besides, “the constitution must address some core issues of nation and identity”<sup>336</sup>. In the conclusion of my previous research, I wrote: “As a last comment regarding the Palestinian constitutional system, I believe it would have been more efficient to promulgate at least a Basic Law, in which Human Rights protection, separation and delimitation of power between PLC, the President, and the cabinet are clear, and the rule of law and the independence of judiciary are secured”<sup>337</sup>. This is what happened in the last months, and many efforts are spent to prepare a constitution for the Palestinian state. Then I continued, “a lot of critics and comments can be made on this DPC: this is obviously important and

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He is the author of *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* and *Peasant Politics in Modern Egypt: The Struggle Against the State*.

<sup>335</sup> See article of Nathan Brown in MOPIC official website.

<sup>336</sup> *Idem*.

useful. For the moment, I believe, once a Palestinian State is created, it will have most of the necessary constitutional institutions and rights and freedom guarantees, that every democratic society needs at the beginning”<sup>338</sup>.

Which Constitution for the Palestinian legal system? This research intended to be the first approach to the Palestinian legal system in its diversity and continuous progress, to the Palestinian political institutions, and to its constitutional documents.

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<sup>337</sup> Cf. my Licenza Thesis, *The Palestinian Constitutional System*, 2001, p.58.

<sup>338</sup> Idem.

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