

إطار عمل  
لتحقيق الوحدة الوطنية  
والمصالحة في دولة فلسطين

مقترحات  
للإصلاح القانوني

إطار عمل لتحقيق الوحدة الوطنية والمصالحة في دولة فلسطين

A FRAMEWORK FOR UNITY AND RECONCILIATION IN THE STATE OF PALESTINE

A FRAMEWORK FOR UNITY  
AND RECONCILIATION  
IN THE STATE OF  
PALESTINE

PROPOSALS  
FOR LEGAL REFORM

سواسية



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## A FRAMEWORK FOR UNITY AND RECONCILIATION IN THE STATE OF PALESTINE

### **PROPOSALS FOR LEGAL REFORM**

November 2016

A report commissioned by the United Nations Development Programme / Programme of Assistance to the Palestinian People and authored by Professor Mia Swart

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# TABLE OF CONTENTS

## EXECUTIVE SUMMARY

|  |           |
|--|-----------|
| Background                             | 5         |
| Democratic and Legitimacy Deficit      | 7         |
| Summary of Recommendations             | 8         |
| <b>Introduction</b>                    | <b>11</b> |
| <b>Scope of Report and Methodology</b> | <b>15</b> |

## A. BACKGROUND

|  |           |
|--|-----------|
| 1. Historical and Political Background: A Brief Summary                                | 16        |
| <i>1.1- 1993 – 1999: Post-Oslo</i>   | <i>16</i> |
| <i>1.2- 2000 – 2006: Second Intifada, Legal Harmonisation Initiatives</i>              | <i>17</i> |
| <i>1.3- 2007: The 2007 Division</i>  | <i>18</i> |
| <i>1.4- 2014: The Creation of the National Consensus Government</i>                    | <i>20</i> |
| 2. Law-making pre and post Division  | 21        |
| 3. The Strengths and Weaknesses of the Sharia Court System                             | 24        |
| 4. A Divided Judiciary   | 27        |
| 5. Transitional Justice Mechanisms for The State of Palestine Comparative experiences: | 29        |
| <i>5.1- Negotiations: South Africa and Tunisia</i>                                     | <i>31</i> |
| <i>5.2- South Africa and Austria: Constitutional Principles</i>                        | <i>32</i> |
| <i>5.3- South Africa and Yemen: Power-Sharing</i>                                      | <i>33</i> |

## B. RECOMMENDATIONS ON LEGAL REFORM

|  |           |
|--|-----------|
| 1. Proposals on the Re-integration of the Judiciary  | 34        |
| <i>1.1- Vetting</i>  | <i>34</i> |
| <i>1.2- Requirements for Judicial Appointment in the State of Palestine and Proposed Vetting Process in State of Palestine</i> | <i>36</i> |

|    |  |    |
|----|--|----|
| 2. | Evaluation of Current Legal Harmonisation Initiatives  | 38 |
| 3. | <i>Review of post-2007 Laws and Judicial Decisions</i> | 39 |

## **C. RECOMMENDATIONS ON RECONCILIATION**

|    |  |           |
|----|--|-----------|
| 1. | <b>The Road to Elections: Creating Political Will</b>                      | <b>43</b> |
|    | <i>1.1- The role of Civil Society Organisations</i>                        | 46        |
|    | <i>1.2- The role of the international community and organisations</i>      | 47        |
| 2. | <b>Correcting the Legitimacy Deficit</b>                                   | <b>48</b> |
| 3. | <b>Creation of High Transitional Council</b>                               | <b>50</b> |
| 4. | <b>Creation of Independent Advisory Commission on National</b>             | <b>53</b> |
| 5. | <b>Relationship with other Entities</b>                                    | <b>54</b> |
|    | <i>5.1- Creation of Subcommittee on the Harmonisation of Laws</i>          | 56        |
|    | <i>5.2- Creation of Subcommittee on Security Sector Reform</i>             | 58        |
|    | <i>5.3- Creation of Subcommittee on Reintegration of the Civil Service</i> | 58        |
|    | <i>5.4- Creation of Subcommittee on Gender Justice and Reconciliation</i>  | 58        |
| 6. | <b>Time-Frame for Reform</b>   | <b>59</b> |
|    | Conclusion   | 60        |
|    | Bibliography   | 63        |

# EXECUTIVE SUMMARY

## Background

This report was commissioned by UNDP/PAPP (Programme of Assistance to the Palestinian People) to recommend measures to be taken towards the successful review and harmonisation of laws and reintegration of the judiciary between the West Bank and Gaza. The report will focus on the effects of the internal Palestinian political division on the Palestinian legal system.

The conclusions are based on interviews with more than 70 stakeholders in the West Bank and Gaza including judges, prosecutors, lawyers, heads of institutions and senior public servants, senior politicians, academics and civil society organisations. The information obtained during these interviews is the main source of information for the report.

This report focuses on the post Division period. Recent Palestinian history can be divided into the period before and after the Division. The Division refers to the period after the conflict in the Gaza Strip between Fatah and Hamas following the 2006 elections (won by Hamas), from when Hamas asserted control over Gaza.

At the time of writing, the measure of political will to make progress on the goal of national unity that existed at the time of the formation of the Government of National Consensus in June 2014 and the major reconciliation agreements, (most notably the 2011<sup>1</sup> Cairo Agreement and the 2014 Beach Camp Declaration affirming earlier agreements), seems to be almost entirely lacking.

The report aims to find a solution to the crisis of legitimacy in law-making in the West Bank and Gaza, the divided nature of legal institutions and the judiciary and the applicability of Transitional Justice mechanisms as a way to guide the State of Palestine in the period before elections are held. Since general as well as Presidential elections have not been held in the State of Palestine since 2006 and since the Palestinian Legislative Council have not met since 2007, it can be argued that almost all government institutions are tainted by questions of legitimacy. The report recommends the creation of independent advisory structures to guide and assist the formal institutions. Because of the stifling political factionalism that has paralysed legal and political reform since 2007, there is an intense need for independent institutions as well as the input and advice of independent regional and international experts.

Palestinian unity in the legal sector can be anchored in two strong legal instruments that reflect national consensus: the Basic Law of 2002<sup>2</sup> (described as an interim Constitution) as well as the Judicial

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1 Signed in May 2011.

2 Amended in 2003 and 2005.

Authority Law of 2002. In addition, the 2011 Cairo Agreement and 2014 Beach Camp Declaration confirming earlier agreements, represent consensus on many foundational issues.

A primary concern is that the present application of Article 43 of the Basic Law as a law-making tool in the West Bank is considered by many to be unconstitutional and illegitimate. Very few laws will meet the requirement of necessity which is interpreted as meaning ‘without delay’. In addition, the legitimacy of presidential decrees passed by President Abbas after the expiration of his term in January 2009 remains a point of legal contention.

Meanwhile in the Gaza Strip after 2007, Hamas started to make law by convening a PLC through a proxy system which is similarly regarded by many as unconstitutional and illegitimate. As a result there is a deep lack of public trust in the Palestinian legal system. In Gaza specifically, but also in the West Bank, many people have resorted to informal justice mechanisms instead of the courts.

The Transitional Justice mechanisms adopted during the South African transition from apartheid to democracy were copied and celebrated worldwide. A few central features of the South African transition have particular relevance for the State of Palestine: first, the negotiation process that preceded the first democratic elections and that guided the transition, second, the process of drafting constitutional principles and third the solution of interim power sharing. These are the features which the author believes should be adopted to bolster the Palestinian reconciliation process.

The author recommends the adoption of other Transitional Justice mechanisms such as the vetting of judges. It is proposed that inspiration can be drawn from the Kenyan and Kosovan models of vetting judges. A Vetting Board can be created by attaching a Schedule to the Basic Law that will establish a few transitional structures such as a Vetting Board, a High Transitional Council as well as an Independent Advisory Commission on National Reconciliation.

The report is divided into two major sets of recommendations: recommendations for legal reform and recommendations for reconciliation.

## Democratic and Legitimacy Deficit

It has become customary for those in power in the West Bank to describe all legal and judicial institutions in Gaza as illegitimate. Powerful actors in Gaza make a similar claim with regard to the institutions in the West Bank. The report sets out the central reasons for the current crisis of legitimacy in the Palestinian legal sector, legislative process and judiciary.

A central recommendation of the report is that elections should be held as a way to solve the current democratic and legitimacy deficits. Although the holding of elections depends largely on political will, it is argued that such political will can be created or boosted by the mobilisation of civil society organisations as well as the work of international organisations.

A starting point for legal harmonization is to base harmonization on those national legal standards, laws and legal values around which there is already national consensus. Applying this principle, Palestinian legal reform can be founded on two pillars. Firstly such reform can be based on two prominent reconciliation agreements: the 2009 Cairo Agreement (and a follow-up agreement made in Cairo in 2011), and the 2014 Beach Camp Declaration which essentially reaffirmed the principles of previous agreements. Secondly such reform can be based on the variety of legal instruments reflecting national consensus enacted pre 2007.

A further central problem involves the legitimacy of the President. There have been various legal and political responses to the argument that the fact that the President has exceeded his term, renders his actions and decisions illegitimate. Some argue that his legitimacy stems from decisions of the PLO Central Committee, the fact that he is the head of the PLO and that international actors regard him as the Palestinian President. It is also argued that there cannot be a vacuum in governance and that President Abbas stays in power to prevent such a vacuum.

The judicial system in Gaza, and to a lesser extent the West Bank, is severely under-resourced and unable to serve the needs of the population. This has caused various problems to arise, including a rise in the susceptibility of judges to executive influence, amongst others.

The recommendations in this report are made in light of the unsustainability of the current dispensation, and as such, the purported time frame in which to implement these recommendations is within the 6 to 9 month period before the initiation of national elections. Provision should be made for the dreadful possibility of another war on Gaza.

In light of the fact that large question-marks loom over the legitimacy of the appointment of judges in the State of Palestine (particularly after the division), as well as the qualifications of judges, it is recommended here that a vetting process of all judges be undertaken in the West Bank and Gaza. Crucial requirements for the success of reconciliation initiatives include: inclusivity and popular

consultation, negotiation, national dialogue, compromise, re-activation of the Cairo and PLC Committees, judicial independence, separation of powers, creating Transitional Justice mechanisms and reaching out to the grassroots to create national solidarity in the interest of achieving Palestinian unity and reconciliation.

## Summary of Recommendations

The State of Palestine should adopt an interim plan – a roadmap to elections – that will prepare the electorate for a democratic election that will not only be free and fair but the outcome of which will be widely respected and followed by the convening of a new PLC. During this interim period the following steps should be taken:

- (1) It should be announced that General elections and Presidential elections will be held within the next 6- 9 months. This is the most crucial step to correcting the democratic deficit.
- (2) Civil society and the international community should start mobilising to help create political will for the calling of elections. The international community should be prepared to accept the outcome of the next elections.
- (3) Election security arrangements should be negotiated as a matter of urgency to prepare the ground for safe and free negotiations, elections and campaigning.
- (4) The Committees created in the Cairo Agreement ('Cairo committees') should be reactivated and resume their work.
- (5) The Reform of the PLO Executive Committee should become active and contribute to creating a framework for national reconciliation.
- (6) A High Transitional Council should be created to inter alia advise on judicial independence and the vetting of judges. The High Transitional Council will be established in order to oversee the activities of the High Judicial Council and to make recommendations on reform in the justice sector and the status of judicial decisions made in Gaza after the Division. The High Transitional Council will establish a Vetting Board to vet all existing judges in Gaza and the West Bank. The High Transitional Council should also advise on the appointment of judges and prosecutors and pay specific attention to the separation of powers,
- (7) The recommendations of the High Transitional Council should be followed by the High Judicial Council and a Vetting Board should be established to undertake a whole-scale vetting process of all judges in Gaza and the West Bank to establish whether judges have the qualifications set out in the Judicial Authority Law. The Vetting Board will further examine whether judges are guilty of unethical behaviour such as corruption and will rid the judiciary of such individuals.

- (8) An Independent Advisory Commission on National Reconciliation (IACNR) should be established. The mandate of the IACNR will include:
- (A) The Commission should find creative ways of getting the public involved in its reconciliation initiatives and various aspects of its work. Social media and television should be utilised. The IACNR will work in parallel with the committees established under the Cairo Agreement specifically the Conciliation Committee, the Public Freedoms Committee, the Social Reconciliation Committee, the Central Elections committee and the committee on the Implementation of the Cairo Agreement. The committee will be composed of Palestinian leaders who enjoy a high level of respect from the Palestinian public as well as a number of highly respected regional and international experts in fields such as law, diplomacy and politics. The Commission should preferably be supported by a regional ‘broker’ such as the Arab League or Organisation of Islamic States, or an individual Arab country. This should contribute to the impact of the recommendations of the Commission. The suggestion of creating an independent advisory commission with a number of international experts has been very well received by almost all interviewees.
  - (B) The IACNR should make recommendations on Transitional Justice policies except for Transitional Justice policies that involve the judiciary.
  - (C) The subcommittees that will be created under the IACNR should be established and should start their work. These subcommittees should work in parallel with the Cairo committees.
  - (D) The IACNR sub-committee on Legal Harmonisation should start reviewing all laws by presidential decree made in the West Bank and laws made in Gaza post 2007. These laws should be tested against the standard of ‘necessity’ as well as their compliance with the Basic Law and the human rights obligations of the State of The State of Palestine. With regard to the review of post 2007 court decisions in the West Bank and Gaza, it is simply not feasible to review all court decisions. It is suggested that a graduated approach should be followed and that priority should be given to individuals who have suffered severe harm or who have been particularly adversely affected. Criminal law decisions should be prioritised. Those who received severe prison sentences should be able to request a revision of their cases. These tasks can be undertaken by special courts created for this purpose or by a Court of Cassation.
  - (E) The review of key legislation such as the draft Penal Code and Personal Status Law should be prioritised.
  - (F) The IACNR will give advice on the drafting of a future Constitution. To start the process, agreement must be reached on a set of Constitutional Principles. Although the creation of a Constitutional Court is not a pressing priority, steps should be put in place to start the process of eventually creating a Constitutional Court in the post-election period. Questions such as whether such a Court will have the power of judicial review will have to be decided upon.

- (G) The IACNR can further advise on Transitional Justice mechanisms such as the payment of compensation and making symbolic reparation.
- (H) Some civil society organisations have demanded that before the holding of elections international guarantees should be obtained that the Israeli Government and Occupation Forces (IOF) will not intervene and disrupt the elections and that voting be permitted in East Jerusalem.

Since a process of extensive and inclusive dialogue is the essential demand of civil society and many political players, it is vital that the spirit of negotiation and dialogue should guide the process. Communication between political leaders of Fatah and Hamas and other political parties and communication between members of the senior judiciary in Gaza and the West Bank is vital especially in light of the fact that communication almost came to a standstill in recent months. Communication between the IACNR and the Cairo committees is especially important. The work of the IACNR can eventually be rolled into the work of the Cairo committees and PLC Committees.

# A FRAMEWORK FOR UNITY AND RECONCILIATION IN THE STATE OF PALESTINE: PROPOSALS FOR LEGAL REFORM

## Introduction

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

*Art. 2, 2003 Amended Palestinian Basic Law*

The protracted political turmoil in the Middle East has obstructed Palestinian unity for decades. The Israeli occupation of Palestinian territory and the ongoing conflict it has generated has not only arrested the dream of Palestinian statehood but has disrupted attempts to achieve Palestinian democracy and unity in varied and profound ways. But the impact of the Occupation and the root causes of political division in the (State of Palestine), however relevant and foundational, are not the specific focus of this report. This report will focus on the effects of the internal Palestinian political division on the Palestinian legal system. This internal division fundamentally disrupts the role law should play in ordering and civilising social life in a state based on the rule of law. It further renders rhetorical claims made that The State of Palestine is a state based on the will of the people. This report will consider how these divisions can be overcome with a particular focus on legal harmonisation. It is hoped that the recommendations in this report will be considered by individuals and institutions with the power to move the State of The State of Palestine towards unity and reconciliation.

This report will focus on the post Division period. Recent Palestinian history can be divided into the period before and after the Division. The Division refers to the period after the bloody conflict in Gaza between Fatah and Hamas forces following the 2006 elections. The conflict was triggered by the fact that both Fatah and the international community were unwilling to recognise the legitimacy of a popularly elected Hamas-led government. When the hostilities ended, two governments were created – a *de facto* government in Gaza and one in the West Bank. Palestinian institutions were increasingly divided or dysfunctional. The fact that the Palestinian Legislative Council has been unable to convene since 2007<sup>3</sup> means that there is currently no functioning Parliament in the State of Palestine. In the West Bank President Abbas started using Article 43 of the Basic Law as a basis for making laws by

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<sup>3</sup> The main reasons for this were the Israeli-imprisonment of many of its members; the Fatah-Hamas conflict and the indefinite postponement of elections by Fatah leaders.

presidential decrees and as a way of substituting the regular law making procedure by the PLC. In the Gaza Strip Hamas started to make law by convening a PLC through a proxy system which is regarded as unconstitutional, illegal and illegitimate by politicians and decision makers in the West Bank. Those in the West Bank have a view that the Gaza laws and Gaza judiciary are illegitimate and those in Gaza hold the same view of the laws and judiciary in the West Bank. But the debate on reform cannot start and end with the argument that the current system is built on illegitimate foundations. It is unproductive and unfeasible to stop all attempts at unification and cooperation as a result of the legitimacy arguments. The current stasis with regard to reconciliation is partly due to the fact that that the two sides cannot see beyond arguments of legitimacy.

The need to reform and unify Palestinian legal institutions is an essential precondition for national reconciliation and has become urgent in the State of Palestine. Such reform can be based on two significant reconciliation agreements: the 2009 Cairo Agreement and the 2014 Beach Camp Agreement. Secondly, such reform can be based on the variety of legal instruments reflecting national consensus enacted pre 2007. During this eight year period, the *de facto* authorities passed 55 laws in the Gaza Strip and continued to operate their own justice system which in significant ways diverged from that used throughout the rest of the State of Palestine. The Government of National Consensus (GNC) was established in June 2014, a government comprised of non-party technocrats. To date no significant steps have been taken by the GNC to deploy in the Gaza Strip in the absence of a broader and firmer reconciliation framework. No advances have been made with respect to the justice sector in relation to reunification of the core rule of law institutions. There is an urgent need for the resolution of fundamental questions concerning the status of laws and legal decisions adopted during the period of national division since the constitutionality of the laws and decisions is contested.

Since the 2007 takeover by Hamas in the Gaza Strip following the faction's victory in the 2006 national elections, reconciliation initiatives in the State of Palestine have stalled. This can largely be attributed to the lack of political will of the leaders (from both Fatah and Hamas) in both the West Bank and Gaza to take concrete steps towards reconciliation and to make the necessary political compromises required to achieve national reconciliation. The encouraging of reconciliation initiatives were further not prioritised by members of the international community. Calls for reconciliation and unity have often remained merely rhetorical.

At the time of writing, the measure of political will to make progress on the goal of national unity that existed at the time of the formation of the Government of National Consensus in June 2014 and the major reconciliation agreements, (most notably the 2011<sup>4</sup> Cairo Agreement and the 2014 Beach Camp Declaration affirming earlier agreements), seems to be almost entirely lacking. The work of the judiciary has been impacted by the heavy bombardment during the Israeli war against Gaza in

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4 Signed in May 2011.

July 2014<sup>5</sup> in which more than 2100 Palestinians were killed including 1462 civilians, and more than 10,000 others injured.<sup>6</sup> Significant damage was wrought upon judicial infrastructure. Many believe that this latest war placed a significant obstacle in the way of the reconciliation process that was initiated just a few months earlier in the 2014 Beach Camp Declaration and that culminated in the formation of the GNC.

The first vital step towards democracy would be the holding of national elections. Since no national parliamentary or presidential elections have been held in State of Palestine for eight years, the need for elections is becoming particularly urgent. In addition the fact that the Palestinian Legislative Council has been unable to convene since 2007 means that there is currently no functioning national Parliament. Although the PLC in Gaza conducted some sessions, these sessions were not strictly instances of the PLC legally convening. There is therefore no legitimate, democratically elected Parliament to give expression to the voice of the people. The radical democratic deficit created by the absence of elections and the absence of a functional Parliament infects all state institutions and actions with illegitimacy and to varying degrees, with illegality. The holding of elections is likely to help the State of Palestine to break through this ‘democracy’ deficit and ‘legitimacy’ deficit.

But it is not altogether clear that the time is right for elections. It can be argued that a climate conducive for the holding of fair elections should first be created and that certain institutional reforms are crucial conditions for holding a free and fair election. This will prevent an election from being a catalyst for the wrong kind of change. It will be argued that the period leading up to elections should be used to undertake important reconciliation initiatives. One such initiative that should receive priority is the reform of the judiciary and the legal system. It is widely accepted that free and fair elections cannot take place without an independent judiciary to authoritatively and neutrally deal with election related complaints and disputes. It is also vitally important that public trust in the legal system should be restored.<sup>7</sup>

The Palestinian legal system has been particularly negatively affected by the political division. By creating and supporting unconstitutional mechanisms which entrenched factional interests, both the Palestinian Authority in the West Bank and the former *de facto* government in Gaza have further politicised the legal system. Tragically, the Palestinian legal system has been drawn into and corrupted by political factionalism. This has enabled politicians on both sides of the divide to use the law to attain their narrow political goals.<sup>8</sup> Whereas it cannot be said that the legal system is merely an arm

5 Codenamed by ‘Operation Protective Edge’ by Israel.

6 OCHA Gaza Emergency Situation Report, 28 August 2014.

7 The low level of confidence in judicial system is illustrated by the fact that only 51% of households in Gaza believe that they would get a fair trial in a criminal case. For information on public perceptions of the courts in The State of Palestine, see Public Perceptions of Palestinian Justice and Security Institutions UNDP Report, March 2012, 19.

8 The rule of law has also been defined more expansively by Lord Bingham as encompassing values such as respect for international law and human rights. See Tom Bingham *The Rule of Law* (2012).

of government, it is clear that without swift intervention and reform, the current political polarisation could further deprive the judicial system of all independence and legitimacy. The people of Gaza and the West Bank, including those in East Jerusalem, yearn for self-determination, peace and national unity but are held hostage by self-interested politics and the Israeli occupation.

But the picture is not entirely bleak. Astute commentators argue that there are still signs of openness to political transition and that change might still be in the air. In addition, Palestinian unity in the legal sector can be anchored in two strong legal instruments: the Basic Law of 2002<sup>9</sup> (described as an interim Constitution) as well as the Judicial Authority Law of 2002. In addition the 2011 Cairo Agreement and 2014 Beach Camp Declaration represent consensus on many foundational issues.<sup>10</sup> These are strong legal instruments that were drafted on the basis of consensus between the authorities in the West Bank and Gaza Strip. Since the Cairo Agreement does not include provisions on the reform of the legal sector or the re-integration of the judiciary, there is still an opportunity to make constructive proposals in this regard. In addition, Articles 97 to 109 of the Basic Law, the articles on the judiciary, are not sufficient to regulate the judiciary, and – while reflecting an important base of consensus – the Judicial Authority Law is itself often considered weak in terms of its clarity on a number of important issues. This report will recommend that the State of Palestine should view the period leading up to elections as an interim transitional period. During this interim period certain structures should be put in place to work in parallel with the committee structure that was created in the 2011 Cairo Agreement. These committees were created with the aim of furthering national reconciliation but are mostly inactive.

A key recommendation is that the committees proposed in the Cairo Agreement that are currently dormant should become active committees. These committees should work to accomplish their original mandates. Alongside the work of these ‘Cairo committees’ it is recommended that an independent advisory Commission with various sub-committees should be established that will provide independent, non - partisan advice to the Cairo committees as well as to all institutions involved in the reform of the legislative system and the judiciary.

After examining the background to the current fragmented situation in the legal sector, proposals will be made as to how reform should take place. The report will focus on the harmonisation of laws as well as on the re-integration of the judiciary. The recommendations contained in this report draw also on comparative experience in the field of Transitional Justice, particularly experiences in the aftermath of the Arab Spring. Lessons and practices are also drawn from the South African transitional experience and other relevant comparative experience. The PA has drawn from South African experience before. Significantly, South African lawyers advised the PA in drafting and enacting the Basic Law. Because of South Africa’s pioneering contributions to Transitional Justice, South Africa’s creative ways of creating a peaceful transition and ‘negotiated revolution’ will be considered, along with the experiences of other relevant states.

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9 Amended in 2003 and 2005

10 Chehab Inside Hamas 201.

## Scope of Report and Methodology

The current report will consider the political and legal situation since the signing of the Oslo Accords in 1993. With regards to making recommendations for the successful review and harmonisation of laws and reintegration of the judiciary, the focus will be on the post division period (from 2007 onward).

In terms of sources, the author relied primarily on more than 70 interviews conducted in the West Bank and Gaza between 15 December 2014 and 1 February 2015. The author and UNDP consulted a wide range of politicians, heads of institutions, senior civil servants, judges, academics and civil society leaders, tailoring questions according to the expertise and positions of the interviewees. With a few exceptions, the identity of interviewees will not be revealed for reasons of confidentiality. Because of the currency of the topic conducting interviews with key stakeholders was the only way of obtaining certain up-to-date information. The author further relied on reports, studies, international agreements, articles and books. Since the author does not read Arabic, English translations of the decrees and laws made since 2007 were consulted. Against the backdrop of the political and legal situation in the State of Palestine as it has evolved, various examples of human rights violations and instances of the breach of the principle of separation of powers and other principles vital to the rule of law may be identified, it is however beyond the scope of the present study to elaborate on these examples here except where violations are directly relevant to the divided judiciary and system of laws or they directly obstruct reform and reconciliation. As far as possible, the study considers reform through a gender sensitive lens. Because of the limited scope of the report, however, it will not be possible to do justice to the complexities of the political and legal needs of women in the State of Palestine. The rule of law principles that will be focused on are consistency, predictability, the fact that laws must be publically promulgated, non-arbitrary, clear and non-retroactive.

Palestinian legislative and institutional reform lies on the fault line of law and politics. It is therefore difficult to draw clear lines between the political and the legal in this study. Since it is impossible to sensibly make proposals on legal reform without understanding the political context, the report considers the political dynamics and political mood in the contemporary State of Palestine as well as the prospects for political reform that will pave the way for legal reform. Conversely, the report poses the question of whether legal change can pave the way for political change, and suggests concrete proposals in this regard. Crucially, the implementation of recommendations made here will depend almost purely on political will. This is the case particularly with regard to the re-integration of the judiciary. The report focuses on the harmonisation of laws between the West Bank and Gaza but this exercise is not just aimed at achieving the lowest common denominator of non-conflicting laws. The revision and reform process in The State of Palestine present a unique opportunity to initiate some broader dialogue and take stock of what kind of norms and principles Palestinians want to see reflected in their national body of law. This dialogue in itself can further reconciliation. The review process further presents a chance to take the best of both bodies of law from the West Bank and Gaza, and to make recommendation as to how these laws can be adjusted to conform to international human rights treaties that have been signed by The State of Palestine and to make sure that the laws fit into the context of a united Palestinian State. It is hoped that this report will contribute to this wider project of reform.

# BACKGROUND

## 1. Historical and Political Background: A Brief Summary

The Palestinian legal system is one of the most complex and diverse in the Middle East. A mixture of Ottoman, British, Jordanian, Egyptian, Israeli military orders and since Oslo, Palestinian laws have all shaped the current Palestinian legal system. The scope of this report does not allow for a full analysis of the impact of foreign influences on the current legal system in the State of Palestine. But the fact that the Palestinian legal system has historically never been a home-grown system militates in favour of significant law reform. Ideally, Palestinians should establish a single, unified legal system that Palestinians can take ownership of and responsibility for their own home-made legal system. Such an exercise also presents an opportunity to Palestinians to assert a distinct national identity. For reasons that will be explained below, a complete overhaul of the legal system is however not suggested.

The impact of foreign colonial powers and occupation on the Palestinian legal system is still felt. Many laws that were enacted during the Ottoman period or by Egypt are still in force today, most prominently the Jordanian Penal Code<sup>11</sup> and Personal Status Law<sup>12</sup> in the West Bank and the Egyptian Mandate Penal Code<sup>13</sup> and Egyptian Law of Family Rights which remain applicable in the Gaza Strip.<sup>14</sup> In 1967 Israel annexed East Jerusalem and subjected all Palestinians living there to Israeli law.<sup>15</sup>

### 1.1 1993-1999: Post-Oslo

For practical as well as substantive reasons, the 1993 Oslo Accords signed between Israel and the Palestinian Liberation Organisation (PLO) provides the chronological starting point for this report. One such reason is that the Oslo Accords created the Palestinian Legislative Council (PLC). After its establishment in 1996, the PLC became the only body competent to pass primary legislation, with the executive branch of government retaining competence to pass secondary legislation and regulations. Prior to the creation of the PLC, primary and secondary draft laws were initiated by the Council of Ministers and vetted by the *diwan al-fatwa wal tashri*<sup>16</sup> to ensure technical coherence and legality. The *diwan al fatwa* is a legislative drafting committee which drafts and reviews legislation and provides legal advice to the government.<sup>17</sup>

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11 1960.

12 1976.

13 1936.

14 1954.

15 From 1967 Israeli law was applied to East Jerusalem but formal annexation did not occur until 1980.

16 Advisory and Legislation Bureau.

17 Nathan J Brown Palestinian Politics After the Oslo Accords: Resuming Arab The State of Palestine 54.

After the laws were transmitted to the President's Office for approval, laws were published in the Official Gazette.<sup>18</sup> These law making procedures were also followed after the creation of the PLC. On the legal level, the President of the Palestinian Authority issued his first decision on 20 May 1994 which provided that legislation and laws that were effective before 5 June 1967 in the West Bank and Gaza Strip would remain effective.

After the Oslo agreement steps were taken to develop a Basic Law. The Palestinian Authority (PA) established a special committee for this purpose and this committee drafted a Basic Law. The drafters of the Basic Law took international human rights agreements and foreign constitutions into account. The public was however not widely consulted in this process. On 2 October 1997 the PLC approved the draft and transferred it to the president of the PA to endorse it. The Basic Law came into effect on 7 July 2002 and was amended in 2003 and 2005.

In 1994 the PA inherited a judicial authority in ruins. One manifestation of this was the low level of trust the Palestinians had in the judicial system under the Israeli occupation authorities before 1994. As a result many Palestinians resorted to informal justice. Palestinians reduced their use of the police or the courts and replaced this by their own systems within the societies in the communities such as Higher National Leadership Committee at the national level and informal justice and special committees in the various governorates. In addition military courts were established under the revolutionary judicial system that was inherited from the PLO in 1979.

### 1.2 2000 – 2006: Second Intifada, Legal Harmonisation Initiatives

On 1 June 2000 the President signed the Presidential decision establishing the High Judicial Council (HJC). The HJC would exercise powers provided for in the Judicial Authority Law which included managing the regular courts. This law was promulgated in 2002.<sup>19</sup> The promulgation of the Judicial Authority Law brought an end to the dichotomous management of the judicial authority. The Palestinian Basic Law, enacted in 2002 and amended in 2003 and 2005, reinforced the role of the PLC as the holder of legislative competence.<sup>20</sup> Art 100 of the Basic Law established the High Judicial Council (HJC). The jurisdiction and mandate of the HJC was regulated by the Judicial Authority Law.

Different laws in West Bank and Gaza affected the judiciary even though the PA governed in both areas. To a significant extent today, Egyptian law is still applied in Gaza and Jordanian laws in the West Bank. The institutions established by the Basic Law started to unify the legal framework. The Judicial Authority Law further played a unifying role since it aimed to create a unified court system and one set of rules for the judiciary.

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18 Law No. 4 (1995) Concerning the Procedures for Preparing Legislation.

19 The PLC approved the Judicial Authority Law in 1998, but the President did not sign it until 2002.

20 See Article 47 of the Basic Law (2003).

The Second Intifada had a disruptive effect on the judiciary. For example, the Israeli creation of roadblocks and restriction of movements affected the movement of the judiciary, prosecutors and lawyers. Judges and lawyers were often not able to reach courts and citizens could often not move from villages to courts. It also became difficult for the Palestinian police to move freely to carry out arrests or to implement court decisions.<sup>21</sup> Cases were often delayed because of the absence of judges and witnesses.<sup>22</sup>

This time was however also a particularly productive ‘golden’ period of national law making in the State of Palestine. Important laws that remain in force in both territories such as the Criminal Procedure Code were made during this period. However many of the laws enacted by the PLC before 2007 were enacted in a fragmented and piecemeal manner. In addition, because of inadequate legislative policy-making capacities, many of the laws were internally incoherent and difficult to implement.

### 1.3 The 2007 Division

In January 2005, following the death of Yasser Arafat, Mahmoud Abbas was elected president of the Palestinian Authority. In the January 2006 elections for the Palestinian Legislative Council, Hamas won a majority of 74 out of 132 seats. Its victory over Fatah in the popular vote was a much narrower 44.45 to 41.43 percent.<sup>23</sup> A particularly significant feature of the 2007 Hamas takeover of the Gaza Strip is that Hamas created parallel governmental institutions in the Gaza Strip. Increasingly, executive-made decisions treated the judicial authority as a public facility rather than an independent authority. The most prominent example of this was the decree issued on 4 September 2007 by the Gaza cabinet to form a separate High Judicial Council for Gaza.

In response to the Hamas victory in the elections of January 2006, much of the international community cut off financial support to the Palestinian Authority, while Israel immediately withheld the tax revenue it collects on behalf of the PA. Because such tax revenue makes up around two thirds of the PA’s budget equivalent to the entire wages bill, these measures further weakened the already embattled Palestinian economy. More than 150,000 Palestinians in the West Bank and Gaza Strip are on the PA’s payroll and thousands of retirees also depend on PA pensions.<sup>24</sup> Since 2007, the PA has frequently been unable to pay salaries on time or in full.

In June 2007 Fatah moved to oust Hamas from the Gaza Strip. Hamas pre-empted the move and following a conflict between the two sides, established its sole control over the strip. The intensity

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21 Tareq Al Derawi ‘Reality of Legal System in Gaza Strip’, UNDP Report, January 2014.

22 See F Bkeirat The Problematic of Legislative Harmony in the State of Palestine: Preliminary Survey (Arabic), 2005 and ICHR 7th Annual Report 2001 25.

23 On the consequences of the takeover generally, see Beverley Milton Edwards & Stephen Farrell Hamas (2010).

24 Middle East Research and Information Project <http://www.merip.org/primer-the-state-of-palestine-israel-arab-israeli-conflict-new>

of the conflict in Gaza caused some to describe this as an intra-Palestinian civil war.<sup>25</sup> Governance of the West Bank and the Gaza Strip has been divided between the Fatah-dominated PA and Hamas respectively since then.

After June 2007, the High Judicial Council closed courts in Gaza and the AG stopped the work of the Prosecution as well as the work of the civil police. Furthermore, the rulings issued by the Gaza shadow government were considered to be illegal and the HJC stopped enforcement of rulings in Gaza and stopped collecting fees relating to courts. Lawyers and judges in Gaza stopped working and the *de facto* authority in Gaza established its own judicial system and HJC.

The question of how the closing of the courts and the termination of the work of the West Bank officials in Gaza occurred after the division is one of the most hotly contested issues among the parties still today. It is still not clear who exactly bears the responsibility for closing down institutions and stopping the work of the PA-appointed officials. The interviewees presented different versions of this history. Some in the West Bank claim that officials were forcibly stopped from fulfilling their duties and threatened with sanctions if they continued to work. What is relatively uncontested is that the PA instructed its civil servants not to report to work.<sup>26</sup> It seems as if Hamas did apply pressure on West Bank civil servants not to resume their duties but as far as could be established, not force. President Abbas also instructed civil servants from the West Bank not to go to work.

The question of exactly what transpired in the case of the PA appointed judges in Gaza is particularly contested. During an interview the group of seven ‘deposed’ PA judges who were working in Gaza at the time of the division, claimed that they were forcefully removed from their offices. This version is contested by Hamas-affiliated officials.

In 2007 President Abbas issued a decree to abolish all orders made between 7 March and 15 April 2007 relating to appointment or promotions for public servants and government administrations in Gaza. Abbas further issued decree no 28/2007 to give authority to military courts to prosecute civilian under the emergency situation. Abbas increasingly issued orders for establishing Special Courts.<sup>27</sup> Most dramatically, President Abbas started using Article 43 of the Basic Law as a basis for law making and substitute for the regular law making procedure by the PLC. Article 43, intended to be used on the basis of necessity, reads:

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<sup>25</sup> The ICRC estimated that at least 118 people were killed and more than 550 wounded.

<sup>26</sup> Jean-Pierre Filiu writes that after this time the only government officials who were regularly paid were those who absented themselves from their places of work since The State of Palestine’s ‘international paymasters’ made it clear that there should be no cooperation with Hamas. Filiu Gaza 304, 305.

<sup>27</sup> Ahmed Mubarak Al- Khalidi report on The Performance of the Palestinian Judiciary and justice 1994-2013 (Arabic) 21, 22.

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

Making law by presidential decrees under Article 43 is of dubious legal validity since it is highly doubtful that the condition of necessity was met in these laws. It has also been argued that Article 43 does not authorise the President to abolish laws by decrees.<sup>28</sup>

The system of making law by decree has met with considerable criticism from different quarters and has often been described as unconstitutional. On 25 November 2007 a group of activists and politicians sent a memo to the president asking him to stop making laws by decrees because it constituted a violation of the Palestinian Basic Law and because it threatens the basics of the Palestinian legal and political systems and violates separation of powers and rule and law principles. Abbas disregarded this advice.<sup>29</sup>

#### 1.4 2014: The Creation of the Government of National Consensus

As a result of the division, two increasingly divergent legal systems and cultures have emerged, reflecting the differing norms Fatah and Hamas have sought to inculcate. Both of these dimensions - the content of laws and the underpinning legal cultures - will require intensive attention and support to attain a more harmonised legal framework capable of contributing to building national unity.<sup>30</sup> While the diverging directions are clear and the window to reduce these gaps is closing, it is not yet too late to remedy the situation, as many of the post 2007 laws involved procedural matters and only a relatively small number of the laws reflected major ideological differences.

On 2 June 2014 a Government of National Consensus (GNC) was formed under the leadership of Mahmoud Abbas whose primary mandate was to prepare for national Parliamentary and Presidential elections. It was agreed that a technocratic government would be formed. This technocratic government would be independent in the sense that the officials would not be party-affiliated. The war on Gaza however shifted the focus and priorities to the issue of reconstruction. The Palestinian unity government first convened in Gaza on 9 October 2014 to discuss the reconstruction of the Gaza Strip following the war in the Summer of 2014. On 30 November 2014, elements of Hamas declared that the consensus government had ended with the expiration of the six month term. Fatah subsequently denied this and said that the government is still in force. In mid-January 2015, Hamas issued further

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> 'Prospects for Legal Harmonisation Following the Palestinian Reconciliation Agreement', UNDP Position Paper, June 2014.

statements that it had ‘quit’ the National Consensus Government on the basis that the Government had defaulted on its obligation to pay the Hamas appointed civil servants.<sup>31</sup> At the time of writing the NCG remained in place but very tenuously and with seeming limited power or authority in Gaza.

## 2. Law-making pre and post Division

The political division resulted in the enactment of diverging laws in Gaza and the West Bank. In the West Bank 110 ‘laws’ or amendments were passed by presidential decree since the division. All these decrees were passed in terms of Article 43 of the Basic Law. The Palestinian legislation focuses mostly on administrative, regulatory, commercial and financial matters; issues pertaining to lands and services, including health and education; and political issues (e.g. elections as well as the transfer of powers and authorities). But in many cases it is questionable whether these laws met the requirement of ‘necessity’. One West Bank law, for example was enacted for the regulation of sport.<sup>32</sup> As part of a future project of review of post-division laws, the correct interpretation of the requirement of ‘necessity’ should be assessed by an independent body. Legal experts interpret necessity to apply in exceptional, extraordinary situations and to mean ‘without delay’.<sup>33</sup> In his view the fact that the PLC has been suspended for seven years already means that Article 43 of the Basic Law does not provide for extraordinary situations only, but now provides for a ‘new routine situation’.<sup>34</sup>

### *According to Al Haq:*

*Constitutionally, the requirement of necessity has been interpreted as a grave danger that exceeds ordinary risks and poses a serious threat for national unity. This type of danger prevents state institutions from performing their constitutional role, portending a whole or partial collapse of the state interests. Such imminent and grave danger cannot be confronted through ordinary legal procedures in force and therefore, to prevent it, the President may exercise an ‘exceptional intervention’ in the legislative process by means of decisions that have power of law.<sup>35</sup>*

According to this interpretation, in light of the fact that almost none of the decrees are likely to meet the constitutional requirement of association with pre-established imminent and grave danger, the President does not have the power to exercise exceptional interventions in the legislative process. In terms of the Al-Haq interpretation it also seems as if the power bestowed on the President to interfere in exceptional circumstances is a power that was intended to exist alongside the ordinary law making procedures and not as an ongoing substitute for Parliament.<sup>36</sup> Furthermore, Article 43 does not seem

31 <http://www.jpost.com/Arab-Israeli-Conflict/Hamas-threatens-to-exit-national-unity-government-with-PA-387543>

32 Interview with Issam Abdeen of Al Haq, 18 December 2014.

33 Sameer Qirresh ‘Legislative Process in The State of Palestine: The Legislation Development Cycle’ Report for UNDP Rule of Law Programme, 2013, 10.

34 Ibid.

35 See Al Haq <http://www.alhaq.org/advocacy/topics/palestinian-violations/673-unconstitutional-presidential-decrees-look-to-control-civil-society-organisations>.

36 This view held also by a number of prominent PLC members interviewed in the course of this research.

to refer to a state of emergency. Article 110 of the Basic Law expressly provides for the president to declare a state of emergency by decree when there is a threat to national security caused by war. Article 110 (2) and (3) refer to the powers of the PLC during a state of emergency. Since Article 43 expressly caters for law making in the absence of a functioning PLC, it follows that Article 43 was not envisaged as applying to a state of emergency and that currently the State of Palestine is not in a state of emergency.<sup>37</sup>

A further major hurdle to legitimate law making is presented by the fact that all presidential decrees enacted in terms of Article 43 should be signed by the President. This requirement provides further hurdles in terms of legality and legitimacy. Since President Abbas' term of office expired in 2009 it has been argued that the actions performed by the President lack legitimacy and that all laws enacted after 2009 are tainted by this illegitimacy.

Various actors expressed concern about the manner in which laws have been initiated over recent years in the West Bank. The Cabinet currently often initiates laws without consultation or with limited consultation.<sup>38</sup> Under the current PLC there is no systematic legislative policy or practice.<sup>39</sup> Despite the PA's effort to identify annual legislative priorities via the Legislative Plan, there is no clear procedure which is consistently followed on how laws should be initiated. Significantly, Article 43 of the Basic Law does not explain the procedure that should be followed in issuing a decree-law. It is therefore possible that laws can be submitted to the President without any consultation and without referral of the draft law to the Council of Ministers.<sup>40</sup> Whereas in practice the Council of Ministers is usually involved in the discussion of decree laws, the power of the President to issue decrees is a constitutional power which means that he has a significant degree of discretion to issue decrees in the manner he sees fit, even if this entails circumventing the Council of Ministers. For example there have been cases when the legal office of the President made changes to the draft laws prior to its publication without reverting back to the Council of Ministers.<sup>41</sup> Powerful and well-connected people take legislation directly to the President for approval without any consultation.<sup>42</sup> It often happens that laws remain dormant in the President's Office for long periods even after the President has signed a decree.

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37 For more on this see Mutaz Qafisheh 'The State of Emergency in The State of Palestine in Light of the International Covenant on Civil and Political Rights' Hebron University Research Journal 8 (2013).

38 Interview with Issan Abdeen of Al Haq, 18 December 2014.

39 Some PLC Committees continue to meet and informally review some draft laws and provide their feedback directly to the President or to the Council of Ministers but these efforts have no legal status.

40 Ibid.

41 See Sameer Qirresh (note 34).

42 Hassan Abdeen, Al Haq, 18 December 2014.

All of this creates the impression on the part of the public that the law making process is not driven by legitimate procedures but by the political elites. The law on income tax has, for example, been amended four times by presidential decrees. The amended laws of this kind benefit only the political elites. A sign that the President's power is not completely unchecked is that the *diwan* has on occasion determined that a law signed by the President may be in breach of the Basic Law and has sent a law back to the President's office with a recommendation for further amendments. Although the *diwan* is not an independent body what is important is that it does sometimes check the power of the President, although it is still up to the discretion of the President to decide whether to adopt the *diwan's* advice or not.

The role of the *diwan* has however been seriously contested over a long period. It was constituted by a Presidential Decree (No. 4) of 1995. The *diwan* was initially put under the Ministry of Justice and starved of funds. More recently however an executive decision was taken by the Council of Ministers to remove it from the Ministry of Justice and place it under its own auspice. Since this occurred the *diwan* has been able to play a more independent role in reviewing laws for their legality including their compliance with the Basic Law. However it remains the case that the *diwan* can only make recommendations to the President and there is no legal recourse if he ignores or rejects that view. Thus the role of the *diwan* is much weaker than a constitutional court with power of judicial review.

It has been recommended that the process of issuing decree laws should be more strictly regulated. It should be required that a detailed explanatory note accompany any draft to explain the urgency and necessity of the decree.<sup>43</sup> Full coordination with all stakeholders involved and affected by the enactment of legislation should take place and consultation processes as wide and representative as possible. Because of the significant degree of discretion that Article 43 bestows on the President, it can be argued that as long as the mechanism of law by decree remains the only way of law making in the West Bank, the door is open for abuse.

After the division, the authorities in Gaza devised a system of law making that has attracted strong criticism from lawyers and officials in the West Bank. Members of the Hamas affiliated 'Change and Reform block' were elected to the PLC in 2006 and started to convene and pass new laws, continuing to do so in spite of the fact that their terms expired on 25 January 2010. Since the Hamas-affiliated PLC members did not constitute a quorum (partly because of the imprisonment of some Hamas PLC members), a proxy system was developed and relied upon to enact 55 new laws in the Gaza Strip (some of which consisted of amendments to current laws). The proxy system, while resourceful, has no basis in the Basic Law and therefore lacks constitutionality or legality. The *de facto* PLC enacted a new Civil Code in Gaza. Some of the new enacted and proposed laws breached international human rights standards.<sup>44</sup> The most dramatic example of this was the draft penal code drafted after Hamas's

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43 Sameer Qirresh (note 34) 15.

44 For example the Gaza Education Law which arguably breaches sections of the Convention on the Rights of the Child (CRC) and

takeover in Gaza which *inter alia* increased the number of offences punishable by death to 14 and further entrenched corporal punishments for a wide range of crimes. It is fortunate that momentum for passage of the draft code was tempered by internal discord between hard and soft liners' within Hamas itself. The strong outcry by civil society organisations and the mobilisation of the international community also played a role in preventing the draft penal code from being passed. This shows that the executive in Gaza does not control the law making process in an absolute way and is occasionally prepared to yield to civil society and other actors. Still, there are many troubling signs of the lack of political will to re-integrate the judiciary on the part of influential parties. A persistent problem is the fact that authorities in the legal sector in the West Bank largely regard the judiciary and law making in the West Bank to be legal and the judiciary and law-making in Gaza to be illegal.<sup>45</sup> Based on this premise, they refuse to support a mixing of the legal and the illegal and strongly object to the term 're-integration', even though the legal basis of the laws is also in question in the West Bank.

As a result of the division there are two official Gazettes, one published in the West Bank and one in the Gaza Strip. This is a vivid illustration of the divided and fragmented state of the legal sector.

### **3. The Strengths and Weaknesses of the Sharia Court System: A Model for Reconciliation?**

The Sharia court system can be described as a court system which managed to retain a modicum of functionality after the division. Although the division has had a disruptive effect on the unity of the Sharia court system, the Sharia courts on both the West Bank as well as the Gaza side managed to keep working mostly with the same judges before and after the division. In terms of continuity it would however be an overstatement to say that the Sharia court system stayed completely intact since the Sharia courts system in Gaza is still considered to be 'illegal' by those in the West Bank. In terms of continuity of the judiciary, some PA appointed judges continued working and some (such as the Chief Justice) were arbitrarily cut off by the PA and became the administrative responsibility of Hamas. Others who continued to work continued to be paid, as did the PA appointed judges who did not continue to work. This, needless to say, created a confusing situation.

In the wake of the 2014 war upon Gaza, the Sharia courts in the West Bank and Gaza commenced communicating with each other. This cooperation developed spontaneously between technical level staff during the conflict in Gaza to address the acute humanitarian needs created by the war. The West Bank Courts processed thousands of Gaza court documents to assist the Gaza public and continues to provide support in the aftermath. In contrast with the civil courts, there has not been a complete breakdown in communication. Notably, this communication and cooperation was initiated and subsequently maintained by technical level staff, and was not necessarily supported or endorsed

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the gender segregation aspects arguable breaches sections of CEDAW. See 'New Gaza education Law Imposes Gender Separation' The State of Palestine Pulse available at <http://www.al-monitor.com/pulse/originals/2013/04/gaza-education-law-gender-segregation.html>

<sup>45</sup> See summary of the correspondence provided by Omar Al-Assouli, January 2015.

by the Sharia courts leadership in the West Bank. This has provided a modicum of much needed continuity in the legal system. Assuming the high level political impasse can be resolved, the Sharia courts may therefore be a softer entry point for work on integrating the Higher Sharia Council and the reintegration of the judiciary in general. Although many in the West Bank are of the view that the judicial institutions (including the Sharia courts) in Gaza are illegal, most who hold this view still propose that the judgements of the Sharia Courts in Gaza should be confirmed and not subject to appeal, to prevent social chaos and injustice.

What forms of cooperation currently exist between Sharia courts in the West Bank and Gaza? The Head of the Sharia High Judicial Council in the West Bank explains that the Sharia courts in the West Bank will assist when people in Gaza need legal assistance or support in matters such as the certification of documents or transactions. Also, if a person in Gaza is in need of any document held by the Sharia courts in the West Bank (on marriage, divorce and inheritance for example), they will provide it.<sup>46</sup> The Head of the Sharia Judicial Council in the West Bank protests against the idea that the Sharia courts in the West Bank ‘cooperates’ with the courts in Gaza but rather emphasises that they are ‘one body’. He attributes his perspective at least partially to the fact that he was originally from Gaza and has good relations with many of the judges in Gaza. In spite of his statements, the unity and level of cooperation between the Sharia Courts in Gaza and the West Bank should not be overstated.

What explains the ability of the Sharia courts to maintain some level of communication and cooperation at a technical level, in spite of the Division? The reason provided most often is that Sharia courts are considered to be less politicised than their regular court counterparts.<sup>47</sup> The head of the Sharia courts in Gaza, Chief Justice Al Jojo explains the continuity of the work of Sharia courts by referring to the ‘complete separation’ between Sharia courts and the political situation in the State of Palestine.<sup>48</sup> This was re-iterated by the Head of the Sharia courts in the West Bank. The stirrings of cooperation in the Sharia Courts should provide hope to those who are sceptical about the prospects for successful integration. At the same time, one should not underestimate the impact of the division upon the Sharia courts. For example, the Sharia courts in the West Bank have often refused to implement verdicts issued by the Gaza courts and the Gaza courts have similarly on occasion refused to implement verdicts issued by Sharia courts in the West Bank. This has become clear through the increasing number of family disputes as well as the tragedies that resulted after some husbands moved to the West Bank, leaving their wives and children behind in Gaza with no financial support or clarity as to their legal status or rights.

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46 Since many embassies do not recognise the administration in Gaza, the assistance of the West Bank is often required when Gazans need to work abroad.

47 This was the explanation provided by the Head of the Sharia Courts in Gaza, Dr. Hassan Al Jojo.

48 Ibid.

The personal status laws applicable in the West Bank and Gaza Strip provide the legal framework for Muslims concerning divorce, separation, marriage contract disputes, alimony, custody etc. These laws are interpreted in The State of Palestine premised on the Hanafi interpretation of Sharia. Some aspects of Sharia-based decision making are not consistent with human rights principles. For example, the foundation concept of male guardianship over women puts Sharia law at odds with the principle of non-discrimination and gender equality as iterated in many human rights treaties including the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). Nonetheless, and to their credit, the Sharia courts have progressively sought to interpret the laws increasingly with the needs and rights of women and children in mind. Confirmation of Sharia judgements or review of the existing personal status laws, would provide a good opportunity to help the Sharia courts continue their evolution in this direction.

Some have contended that Sharia courts are socially and legally dynamic in the sense that judges interpret the law and seek to reach their judgments with a close eye on the social and economic context in which they are operating.<sup>49</sup> This means that despite the presence of discriminatory provisions in the laws, women are often still able to achieve positive outcomes by utilizing legal loopholes and textual ambiguities.<sup>50</sup> For example, women have been able to use the rules on alimony to achieve other objectives such as fairer divorce settlement or better living conditions. Women are therefore using the law to bring a range of demands into the public sphere.<sup>51</sup>

Concerns have also been raised about deficiencies in the current legal framework for Sharia courts, especially as it relates to judicial appointments and judicial oversight in the Sharia system. At present the Chief Justice of the Sharia courts represents both judicial and executive functions, presenting a conflict in the principle of the separation of powers. A further example of this problem has been recently highlighted by the civil society organisation, Musawa, when they objected to the decision of appointing a Sharia first instance judge as an inspector of Sharia courts. It was argued that the principle of separation of powers does not accept that an inspector of courts come from the same level or the level below the inspected court.<sup>52</sup>

Although, the broader issue of the reform of the Sharia courts falls outside the scope of the present study, it is recommended that efforts to reform Sharia courts should continue to ensure that rule of law principles as well as separation of powers are respected in these courts. In addition, as has been recognised by the Sharia courts themselves, women's organisations and the Palestinian public

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49 L Welshman *Islamic Family Law: Text and Practice in the State of Palestine* WCLAC (2003) as cited in *A Review of Palestinian Legislation from a Woman's Rights Perspective*, UNDP Report, September 2011.

50 N Shahada *Women, the Judiciary and the Law: An Anthropological Study of the Sharia Courts in Gaza*, The State of Palestine Muwatin, The Palestinian Institute for the Study of Democracy (2009).

51 Ibid.

52 Memo About Appointing a Judge of the Sharia First Instance Court as an Inspector of Sharia Courts 19/1/2015.

generally, the different personal status laws applicable in the West Bank and Gaza Strip should be revised and work continued towards the enactment of a national law. Laws concerning personal status are amongst the most foundational to maintaining the coherence and strength of Palestinian society, bearing in mind also that Palestinian society remains under acute pressure from the forces of occupation which are working to erode its identity, character and fabric. As the State of Palestine has now ratified all the core human rights treaties without reservations, it will be important that personal status law reform continues to develop around the evolving needs of Palestinian society, including the protection of the most vulnerable social groups, and in alignment with international human rights conventions such as CEDAW.<sup>53</sup>

#### 4. A Divided Judiciary

The key piece of legislation regulating the judiciary is the Judicial Authority Law of 2002.<sup>54</sup> As emphasised earlier, the Judicial Authority Law is a law based on consensus which can play an important role in moving the country towards reconciliation and to break through the current impasse. The Judicial Authority Law, since it reflects consensus, should first and foremost be used to help unify the judiciary. The process of unifying the judiciary should not be rushed. It is recommended that reform of the judicial sector should take place in stages. The judiciary should first be unified and then the question of amendments to the Judicial Authority Law can be addressed. Such amendments could assist in strengthening judicial independence.

The High Judicial Council in the West Bank has recommended twelve amendments to the Judicial Authority Law.<sup>55</sup> Amendments that can possibly raise difficulties include the rotation of judges and prosecutors. Although this has become a routine practice in the West Bank it is important that this practice should not interfere with the principle of separation of powers. It has also been suggested that the current system for evaluation and promotion of judges should be amended. It has been suggested that judges would qualify for salary increases even if they are not appointed to a higher level court. This will make it possible to retain well qualified and experienced judges in the lower courts and this may be a positive development in terms of ensuring the sustainability of a qualified judiciary at all levels.<sup>56</sup>

It is suggested that the Judicial Authority Law should be amended further to provide greater oversight over judges and over the courts.<sup>57</sup> The process of judicial appointment needs serious reconsideration. Aggressive executive interference in the appointment of judges destroys judicial independence. It

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53 See 'A Review of Palestinian Legislation from a Women's Rights Perspective' UNDP March 2012.

54 The Judicial Authority Law was amended in 2003 and 2005.

55 The suggested amendments include the view of some interviewees that the law should provide for greater oversight over the judiciary.

56 Interview with Azmi Shoabi, 15 January 2015.

57 Interview with Ibrahim Barghoti, 6 January 2015.

is a serious problem that under current law, the President unilaterally appoints the Chief Justice. The President also appoints the Attorney General.<sup>58</sup> This concentration of power in the President is contrary to the principle of separation of powers.

It is also problematic that the Chief Justice moves judges from one court to the other. The legal mandate for the transfer of judges can be found in Article 6 of the amendments to the Court Formation Law which provides the High Judicial Council with the power to transfer judges from one court to another. It is argued that the Chief Justice also has this power.<sup>59</sup> But according to Article 23 of the Judicial Authority Law, judges may only be transferred by the High Judicial Council. It is clear that the Chief Justice cannot unilaterally make such a decision. Another serious concern in terms of the independence of judges is the fact that the Judicial Inspections Office is composed of judges but there are no independent bodies or retired judges serving on this body. In the interest of transparency most European countries judicial inspection bodies are not composed solely of judges but have a mixed composition of judges and lawyers and/or politicians.<sup>60</sup> In Europe there is strong recognition that judges should not be sanctioned only by their peers. In countries such as England, Wales and Poland, an Ombudsman is empowered to take disciplinary measures against judges.<sup>61</sup>

With regard to judicial reform it is suggested that in a context as heavily infused with politics as Palestinian society, the notion of political neutrality and lack of political affiliation needs to be clarified. Political neutrality cannot merely mean the absence of official party membership. Crucially, it has to manifest itself in the form of independence of mind in the decision of cases. Judges should also not be executive-minded. Whereas the Judicial Authority Law states that judges cannot retain their party membership and continue to work as judges, this requirement clearly hasn't depoliticised the judiciary. Although the question of the need for political neutrality falls beyond the scope of this report, it is a question that the IACNR<sup>62</sup> should be able to fruitfully engage with.

Another serious concern is the unwillingness of judges on the two sides to work together. For example, the Chief PA-appointed Prosecutor in Gaza does not want to work with the Hamas-affiliated and appointed judges and prosecutors. This sentiment has also been expressed by the other PA appointed judges in Gaza who are currently not working as judges but are still receiving their salaries from the PA.

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58 Interview with Azmi Shoabi, 15 January 2015.

59 Feras Milhem regarding the transfer of Judge Ahmad Alashqar. It is claimed that the recent decision to transfer this judge is linked to his decision about Oslo and constitutes a clear infringement on his independence.

60 See Aquaviva Nais, Castagnet Florence, Evanghelou Morghane (eds.) 'A Comparative Analysis of Disciplinary Systems for European judges and prosecutors' Themis (2012) 10 available at <http://www.ejtn.eu/Documents/Themis%202012/THEMIS%202012%20ERFURT%20DOCUMENT/Written%20paper%20France%203.pdf>

61 Ibid 11.

62 A body this report recommends be established to support and guide the reconciliation process.

## 5. Transitional Justice Mechanisms for the State of Palestine: Comparative Experience

Over the past three decades Transitional Justice (TJ) has grown into a widely recognised academic discipline and practical ‘toolkit’ to provide guidance to states during and after political transition. Transitional Justice was originally conceptualised to apply to transitions from authoritarian to democratic forms of government.<sup>63</sup> But in recent years Transitional Justice has come to be applied to situations of ongoing conflict such as in Columbia, the DRC, Uganda and the situation in the State of Palestine.<sup>64</sup> Applying Transitional Justice mechanisms in this second context is still fairly controversial. According to one of the most eminent scholars in this field, Ruti Teitel, Transitional Justice is sufficiently capacious to find application beyond the traditional limits of the discipline.<sup>65</sup>

Transitional Justice mechanisms typically include reparations, truth commissions as well as prosecutions or the provision of amnesty to those alleged to have committed serious human rights violations and international crimes. TJ mechanisms can also include apology,<sup>66</sup> memorialisation, vetting processes, lustration and re-education.

Most of these TJ measures are used in the aftermath of political change - typically dramatic change brought about by violent or ‘velvet’ revolution. TJ measures are usually adopted by successor governments or in the interim time-frame between the rule of clearly identified governments. In the State of Palestine however, there is no ‘successor’ government yet. Even though the unique context of Palestinian national division may not always ‘fit’ the contexts in which TJ has traditionally found application, the possibility of finding technically feasible solutions to division problems can help to generate the political will to bring about change. Indeed some elements of the TJ tool box could be appropriately tailored for the problems raised by the Palestinian national division.

Because of the fact that elections have not been announced, there is currently no clear transitional phase. It is certainly not clear what the nascent State of Palestine will be transitioning to, since there is currently no clear vision of what system of government the State wants to adopt. Of course many of the uncertainties relating to the future is directly tied to conditions created by the Israeli occupation. Resolving these political uncertainties is often not in the hands of the Palestinians.

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63 Ruti Teitel *Transitional Justice* (2000).

64 See in this regard T Unger & M Wierda *Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice* (2009).

65 Ruti Teitel, seminar, Hebrew University, Jerusalem, 14 December 2014. See also Ruti Teitel’s chapter ‘Transitional Justice Genealogy’ in Ruti Teitel *Globalising Transitional Justice* (2013) from 49.

66 See Mia Swart ‘Sorry seems to be the Hardest Word: Apology as Form of Symbolic Reparations’ *South African Journal on Human Rights* (2008).

Political will is an essential precondition for the applicability of TJ. To employ TJ without political will can even be damaging if it legitimises a transitional order little different from the old order and risks merely replicating the same defective patterns of governance that characterised the old order.<sup>67</sup>

Although it can be argued that TJ finds limited application in the Palestinian context, it must be kept in mind that transitional measures such as offering amnesty for crimes committed in the course of the political conflict can motivate parties to participate in the peace and reconciliation process. Granting amnesties or pardons is however a political ‘hot potato’. Under certain circumstances amnesties can cause further violence and disrupt the principle of using legal and lawful ways of dealing with atrocities and human rights violations committed in the pre-transitional phase.

It is also better to promote local solutions in light of global experience rather than imposing global solutions. TJ solutions cannot be standardized<sup>68</sup> and even if customised to local context, they usually involve some international involvement. Although this can be interpreted as paternalistic, international expertise and perspective can make the process more open and increase public confidence when the population has become inherently suspicious of the main political actors who control the processes. In the Palestinian context, international expertise can help free the reconciliation process from the stifling factionalism that currently obstructs change.

Rebuilding the integrity of the judiciary may not be enough. If judges have engaged in serious abuse of power, it may be necessary to apply verbal as well as symbolic TJ mechanisms such as apologies that affirm a commitment to overcome the legacy of abuse.<sup>69</sup>

Since TJ is concerned with the prosecution of those who committed serious violations of human rights and humanitarian law, the recent signing of the ICC Statute by the PA can be viewed as a TJ initiative. The object of signing the ICC Statute was to hold Israel accountable for violations. The signing of the ICC Statute also served as an affirmation of sovereignty. Chief Justice Ali Muhanna has expressed enthusiasm for TJ mechanisms as a method to help with reform of the legal system. In Muhanna’s view one of the purposes of activating a Transitional Justice Law is to consider ways of holding Israel accountable for crimes committed during the Occupation,<sup>70</sup> as well as to cement national unity and reintegration of the justice sector.

The recent initiative by the PA to present a resolution to the Security Council to set a deadline for the Israeli occupation is a strong assertion of statehood, regardless of the likely outcome in the Security Council. Palestinians should see this as an opportunity to get its domestic human rights ‘house’ in

67 Abdul El-Fadi ‘Beyond Conventional Transitional Justice: Egypt’s 2011 evolution and the Absence of Political Will’ 6 *International Journal of Transitional Justice* (2012) 330.

68 Ibid. This view is shared by Abderrahmane El Yessa, Interview on 23 December 2015.

69 Lauren Davis ‘Justice-sensitive security reform in the Democratic Republic of the Congo’ *International Centre for Transitional Justice* (2009).

70 Interview with Ali Muhanna, 29 January 2015.

order. President Abbas' signing of the Rome Statute on 1 January 2015 and accession to the ICC confers certain responsibilities on the State of Palestine. These include an expectation to domesticate the Rome Statute and to honour the principles of complementarity and positive complementarity. This means taking measures to reform the judicial system to bring it in line with international standards.<sup>71</sup> The State of Palestine will have to convince the international community that it can hold fair and impartial trials in accordance with international human rights standards under the ICCPR and that its judges are independent and competent.

In terms of judicial reform it is important that the judiciary itself cannot make decisions about the competence and independence of judges. Although it is usually ideal for the judiciary to manage itself with as little outside interference as possible, TJ theory requires that a dysfunctional legal system can often only be cured by outside intervention in the form of international experts and advisers. Such advisers can sit on a Vetting Board, as was the case in Kenya.

The State of Palestine can draw inspiration from restorative justice ideas and mechanisms. The payment of compensation was mentioned by judges in Gaza and by the Chief Justice in the West Bank. A prominent academic has commented that Islamic law embraces the practices of conciliation, compensation, pardon, apology and community service.

The political and legal mechanisms adopted during the South African transition from apartheid to democracy were copied and celebrated worldwide. Three central features of the transition will briefly be discussed: firstly the negotiation process that preceded the first democratic elections and that guided the transition, secondly, the process of drafting constitutional principles and thirdly the solution of interim power sharing. These are the features which could be of great value in the Palestinian reconciliation process.

### 1.5 Negotiations: South Africa and Tunisia

A negotiated revolution:

The South African transition of the early 1990's was based on ongoing negotiations between all political parties. Although secret negotiations between the ANC and the National Party government and other groups took place in the 1980's,<sup>72</sup> the formal negotiation process took off after Nelson Mandela announced on 13 November 1991 that the first constitutional talks would take place in late November 1991 at the World Trade Centre in Kempton Park. The major forum for such negotiations was CODESA (Convention for a democratic South Africa). Five working groups were formed shortly afterwards with the task of taking the work of CODESA forward.<sup>73</sup> The purpose of the working

<sup>71</sup> On positive complementarity see Sarah Nouwen *Complementarity In the Line of Fire* (2013).

<sup>72</sup> For more on these negotiations see Aziz Pahad *Insurgent Diplomat* (2014).

<sup>73</sup> The Working Groups met twice a week. Each group had almost eighty people. A Gender Advisory Committee was established to advise the Management Committee on gender issues.

groups was specifically to make negotiated compromises on a variety of issues. The immediate aim of the ongoing talks was to reach sufficient common ground to achieve a public commitment to a negotiated settlement of a future constitution. Although the negotiations were at times interrupted by political violence, for example the Boipatong and Bisho massacres and the murder of Chris Hani, the process and political will were robust enough for the negotiations not to be derailed by such incidents. The management committee managed to set the agenda in realisable steps. It was the task of one of the Working Groups to draft Constitutional Principles.<sup>74</sup>

Interviewees suggested that in the Palestinian context, inspiration could be drawn from the Tunisian transitional model, particularly with regard to the degree of public participation in the successful transition to democracy.<sup>75</sup> The strong involvement of Tunisian CSO's was particularly inspiring. One hundred and fifty thousand members of the Tunisian public participated in the process of dialogue and transition. Tunisian CSO's were particularly successful in reaching out to the grassroots. As a result of the CSO activism 'a palpable spirit of solidarity enveloped the country.'<sup>76</sup> Just as UNDP played an important role in stimulating and supporting this process, it is similarly well positioned with civil society to play a comparable role in the State of Palestine.

## 2.5 South Africa and Austria: Constitutional Principles

The South African interim Constitution of 1993 was linked to a package of legislation which sought to provide a framework for the holding of free and fair elections. The process of drafting the Constitutional principles assured the South African public that the constitution making process would be principled, rigorous and transparent. The views of ordinary citizens and civil society were integrated into the final text.

During the negotiations it was decided that the Constitutional Assembly would be bound by a set of Constitutional Principles from which the future Constitution could not depart. All the parties at the Multi Party Negotiating Process (MPNP) agreed to the drafting of Constitutional Principles. If the final Constitution did not follow and include all principles then the Constitutional Court, upon its first sitting, would not be able to certify the Constitution.<sup>77</sup> For example one of the Constitutional Principles was that the final Constitution should have a Bill of Rights. The principle of federalism was also included. The objective of the process was to ensure that the Constitution was legitimate and accepted by all South Africans.

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74 Musawa Recommendations from the 6<sup>th</sup> Justice Conference held in January 2015. Kader Asmal 'The Making of the Constitution'.

75 See interviews with Ibrahim Barghouti and Amjad Al – Shawwa and Abderrahmane El Yessa.

76 Alexander Mirescu 'The Arab Spring Comes Home to Roost' Deliberately Considered, 26 August 2013.

77 This is indeed what happened. At the first hearing of the Constitutional Court in September 1996 the judges decided that the text of the Constitution presented to them did not comply with the Constitutional Principles. The drafters therefore had to go back to the drawing board. After changes were made to the text to comply with the principles the Constitutional Court certified the final Constitution.

The model of basing a Constitution on certain fundamental principles was also adopted in Austria. At the time of the drafting of the Austrian Constitution a set of principles were drafted against which the Constitution was tested.<sup>78</sup> The highest ranking law in the Austrian legal system is outlined in the fundamental principles of the Austrian national constitution. The Austrian principles include: the democratic principle, the principle of the rule of law, the principle of separation of powers, the republican principle and the liberal principles.<sup>79</sup> The 34 South African principles were however more comprehensive and detailed than the Austrian principles. In the Palestinian context the drafting of such principles could assist in the process of drafting a final constitution. The process can also assist Palestinians in reflecting upon and deciding what kind of state it wants to be. The process of drafting these principles should be as inclusive as possible. Public input from all layers of society is particularly crucial. Islamic principles can be included in the list of principles to the extent they are considered relevant by the population.

### 2.5 South Africa and Yemen: Power-Sharing

The ANC took the constructive step of conceding to ‘sunset clauses’ which would entrench power sharing for a fixed period and would give some guarantees to regional interests, the security forces and civil servants.<sup>80</sup> Bilateral talks between the National Party government and the ANC led to a joint proposal for power sharing and the establishment of a five year interim government. A Government of National Unity finally emerged from the process.

Notwithstanding recent catastrophic developments in Yemen, interesting models may be drawn from the now scuppered reconciliation process in the country’s post ‘Arab Spring’ transition, including the so-called ‘National Dialogue process that formed a central TJ mechanism during that period. In Yemen, a process of drafting a new constitution was undertaken even though the old one was democratic. This process was seen as having symbolic value and marking a new beginning. Yemen also drafted a list of principles to guide its constitution making process. Informed commentators have suggested that power sharing is crucial in the State of Palestine and that a winner-takes-all political model will not work in the foreseeable future.<sup>81</sup> It is interesting that even senior Hamas official agree, at least in theory, to future power sharing.

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78 Sara Lagi ‘Hans Kelsen and the Austrian Constitutional Court’ *Revista Co-herencia* (2012) 286.

79 Johannes Oelboeck & Immanuel Gerstner ‘The Austrian legal system and laws: a Brief Overview’.

80 Kader Asmal (note 75).

81 Interview with Azmi Shoabi, 15 January 2015.

# RECOMMENDATIONS ON LEGAL REFORM

## 1. Proposals on the re-integration of the Judiciary

The courts in Gaza (and to a lesser extent in the West Bank) are unable to meet the justice demands of the population. Judges currently working in Gaza suffer from a crisis of severely insufficient resources and capacity. Most pressingly, there is a severe shortage of judges and prosecutors in Gaza to serve the population. There are currently only 47 judges serving a population of 1.8 million, far below the average for the region.<sup>82</sup> There is also a severe shortage of prosecutors in Gaza with 3.3 prosecutors per 100 000 people.<sup>83</sup> Unsurprisingly, there is a serious backlog of cases in the courts. It has been argued that overwork will necessarily affect the quality of judicial decision making and can also make these judges more susceptible to executive influence.

The acute shortage of judges in Gaza strengthens the argument that reconciliation and re-integration should not necessarily require the automatic removal of all judges currently working in Gaza, however irregular or controversial their appointment. It is proposed that instead of removing all judges in Gaza, the judges appointed after the division should be vetted. New candidates for judicial positions should similarly be vetted, as should the PA appointed judges in Gaza. This means that the qualifications of the judges as set out in the Judicial Authority Law<sup>84</sup> as well as the work record and competence of each individual judge should be reviewed. Judges in the West Bank should however also be vetted since some judges were not appointed according to law since formal procedures were also sometimes circumvented in judicial selection. Comparative experience of vetting as a transitional justice mechanism will first be discussed after which a proposal will be made on how vetting should take place in the State of Palestine.

### 1.1 Vetting

Many countries in transition have opted for a vetting process for civil servants or judges as part of democratisation and a way of strengthening public confidence in institutions. Vetting, also called lustration, essentially means screening. It can entail the placement of persons in forced retirement, moving persons to less prominent positions, annulment of promotion or temporary suspension of duty.<sup>85</sup> Due to the need for separation of powers and the preservation of high standards of judicial

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82 This represents a ratio of 2.6 judges per 100 000 people, compared to 7.6 per 100 000 in the West Bank, 12.7 in Jordan and 16 in Egypt. A Review of Palestinian Justice and Security Data , UN DP Report, August 2013, 7.

83 Ibid 39.

84 See Chapter 1, articles 16 and 18 of the Judicial Authority Law.

85 Dimitri Sotiropoulis 'Swift Gradualism and Variable Outcomes: Vetting in Post-Authoritarian Greece' 122 in Mayer Reich, Alexander & de Greif, Pablo Justice as Prevention, Vetting Public Employees in Transitional Societies Social Science Research Council, Advancing Transitional Justice Series (2007).

independence, a clear distinction should be made between the processes used for vetting and appointing judicial officers and the vetting and appointing of other regular civil servant justice sector staff, such as court staff and government lawyers. Some countries in transition such as South Africa and Argentina have however chosen not to pursue the route of lustration and vetting, partly to allow for continuity.<sup>86</sup> Interestingly, there has been no country in which vetting has been applied to the entire public sector.

Insight into comparative judicial vetting processes can be drawn from studies on the Egyptian experience<sup>87</sup> and from the recent Kenyan experience of vetting judges. As the first African country to implement a vetting process of judges, the recent Kenyan experience is particularly instructive.<sup>88</sup> In implementing a programme of judicial vetting the Kenyan government relied heavily on the recommendations of a vetting committee of international experts established in terms of the 2010 Kenyan Constitution.<sup>89</sup> The vetting process in Kenya took place through the Judges and Magistrates Vetting Board that was established under the Judges and Magistrates Vetting Law. The Board consisted of three Kenyan judges and three international judges.<sup>90</sup> Judges were vetted in accordance with the criteria of impartiality, integrity, sound temperament, and ‘capacity to apply good sense.’ A significant number of judges were removed for reasons ranging from authoritarianism on the Bench, inconsistency, condoning of torture and accepting gifts from litigants. The vetting process was one of the key mechanisms implemented to restore the public’s faith in the Kenyan judiciary. It is important that unlike the provision of amnesty, vetting does not ‘wipe the slate clean’ for corrupt judges. Judges accused of unethical behaviour should still be subjected to disciplinary proceedings.<sup>91</sup>

Inspiration can also be drawn from the Kosovan experience. Over the last few years, Kosovo has actively been making reforms to its judiciary.<sup>92</sup> The vetting and re-appointment process of judges and

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86 See in this regard Valeria Barbuto ‘Strengthening Democracy: Impugnacion Procedures in Argentina’ and Jonathan Klaaren ‘Institutional Transition and the Choice Against Vetting in South Africa’s Transition’ in Mayer-Reich & de Greif (note 86 above).

87 See study commissioned by the Human Rights Institute of the International Bar Association: Cherif Bassiouni, Amal Alammuddin Separating Law and Politics: Challenges to the Independence of Judges and Prosecutors (2014).

88 See First Report of the Kenya Judges and Magistrates Vetting Board [2012] eKLR.

89 Schedule 6.

90 The three international judges were Judge Albie Sachs (former Justice of the Constitutional Court of South Africa); Frederick Chomba (former Justice of Zambian Supreme Court) and Georgina Wood (Chief Justice of the Ghanaian Supreme Court).

91 Jan van Zyl Smit ‘Restoring Confidence in the Judiciary’: Kenya’s Judicial Vetting Process’.

92 See Jan van Zyl- Smit Reforming the Kenyan Judiciary 2003-2012: A Comparative Perspective (Unpublished paper presented at the African Network of Constitutional Lawyers annual conference in Lagos, Nigeria, Oxford-Brookes University, 2012) [2.http://eeas.europa.eu/delegations/kosovo/press\\_corner/all\\_news/news/2011/20111207\\_kjc\\_event\\_en.htm](http://eeas.europa.eu/delegations/kosovo/press_corner/all_news/news/2011/20111207_kjc_event_en.htm)

prosecutors were funded by the EU and completed in late 2010. This process ensured that candidates for judicial positions were appointed following a professional competency assessment, background investigation, and review of work performance and professional record. The Prosecutorial and Judicial Councils were assisted to develop new procedures for recruitment, transfer and promotion of judges and prosecutors in accordance with EU standards. From April 2009 each of the 450 sitting judges in Kosovo had to re-apply for their jobs.<sup>93</sup> The vetting process was open to all persons who fulfilled the qualifications for office, not only sitting judges and prosecutors. Some 898 people overall entered the process and were subject to a series of tests. A substantial number of candidates did not pass the tests.<sup>94</sup> All candidates also had to write a test on the Code of Ethics.<sup>95</sup> In the end 60% of judicial positions were filled by new applicants. This represented a substantial transformation in the Kosovan judiciary.

Vetting is a transitional justice mechanism that could contribute significantly to the process of creating an independent and legitimate judiciary in the Palestinian context. This is especially the case in light of the large question marks over the legitimacy of the appointment of judges, particularly after the division, as well as the qualifications of judges.

## 1.2 Requirements for Judicial Appointment and Proposed Vetting Process in the State of Palestine

### *Current Judicial Appointment Procedure*

Article 16 of the Judicial Authority Law sets out the requirements to be appointed as a judge:

A member assigned to the judiciary shall fulfil the following requirements:

1. Must possess Palestinian nationality and enjoy full legal capacity.
2. Must hold a license (BA degree) in law or *Shari'a* and law from a recognized university.
3. Must not have been condemned by a court or a disciplinary council on a matter involving breach of honour, even if having since been rehabilitated or covered by a general amnesty.
4. Must be of good conduct and repute as well as medically fit to assume the position.
5. Must terminate membership in any party or political organization upon appointment.
6. Must have good command of the Arabic language.

A Judge appointed to the High Court shall satisfy the following criteria:

1. One must have worked for at least three years as a Judge in a Court of appeal, or for the equivalent in public prosecution, or for at least ten years as a lawyer.
2. To be appointed as President or Vice-President of the High Court, one must have sat and worked for no less than three years on chambers of the High Court, or worked as a lawyer for no less than fifteen years.

If a judge does not meet the criteria in Article 16, such judges should immediately be removed from his or her position. It is submitted that the criteria in Article 16 should only form the minimum core

<sup>93</sup> 'Independence of the Judiciary in Kosovo: Institutional and Functional Dimensions' OSCE Mission in Kosovo, January 2012.

<sup>94</sup> Ibid.

<sup>95</sup> UNMIK Administrative Direction 2008/2 para. 11.

of criteria that needs to be met by judges. According to Article 16 judges are chosen by the High Judicial Council and approved by the President but in reality the President chooses without thorough nomination processes being followed. This practice violates the Judicial Authority Law.

The requirements contained in Article 16 do not seem sufficiently comprehensive. It is suggested that judges in senior positions (such as judges of the Constitutional Court if such a court is going to be created) should also have more than three years of judicial experience. The obligation to attend judicial training courses can also be made a formal requirement to be appointed as a judge. The High Judicial Council shall develop a system to train and prepare judges before they assume their judicial functions. Although the High Judicial Council might have the knowledge and expertise on how to vet judges because of conflict of interest, it is difficult for them to undertake reform themselves.

In the context of the State of Palestine it is suggested that if during the review process a judge proves to have the required qualifications, has passed the competitive examination and if a judge exercised his or her duties in a competent manner and is not guilty of serious wrongdoing (such as corruption or breaches of judicial ethics), such a judge should be immediately re-appointed in his or her position. It is also important that judges should not be ‘card carrying’ members of political parties. Whereas it is unrealistic to expect judges not to have any political affiliation or political opinions, such affiliation should as far as possible not take the form of any active engagement in party politics. Public perception is especially important in this regard. There should be no perception on the part of the public that a judge is strongly affiliated to any political party. But it is not only judges currently working in Gaza who should be vetted. The PA appointed judges, both those who remained at home as well as the small number who continued to work for Hamas-controlled courts in Gaza, should similarly be vetted, as well as all judges working in the West Bank. One interviewee claimed that corruption in the judiciary in the West Bank is a significant problem. Two West Bank judges have been removed on grounds of corruption. Lack of judicial independence is a problem not limited to Gaza but also a significant problem in the West Bank.

Who should carry out the vetting? It is clear that the vetting cannot be carried out by any members of the existing judiciary or by government. The model adopted in countries such as Kenya was to create a special body such as a commission with a mix of national and foreign experts. A similar approach could be adopted in the State of Palestine. It is suggested that the High Transitional Council should create a Vetting Board that will carry out this task. The work of the High Transitional Council will be discussed below. In the alternative, the vetting board can be created in a schedule attached to the Basic Law.

Several options exist for how to deal with judges who have been removed. Except for those found to be corrupt or guilty of other mis-performance, other judges stood down do not necessarily have to be retrenched. Depending on their skills and interests, they could for example be moved to civil servant positions.

## 2. Evaluation of Current Legal Harmonisation Initiatives

Because of the historical legacies of the West Bank and Gaza, it can be argued that there has never been a unified body of laws in the State of Palestine. The need for unification of the laws is acute since it will give substance to the reconciliation initiatives undertaken since 2002, culminating in the Government of National Consensus established in June 2014. The success of the reunification process will largely depend on the forging of a national identity and on a vision of a truly unified Palestinian polity that will be resistant to future pressures that might lead to re-splintering and fragmentation. It is also vital that the legal harmonisation should not be rushed and should focus on inclusive and democratic participation to enhance the legitimacy of the process and to ensure that the results of the process will last.

It is highly doubtful that current, politically-driven attempts to effect legal harmonisation will be successful especially since these attempts do not involve an even handed commitment to reviewing laws on both sides of the divide. A technical committee on legal harmonisation has recently been established under the Ministerial Committee on legal harmonisation that was established by the Council of Ministers.<sup>96</sup> The technical Committee is chaired by the head of the Council of Ministers' legal unit. It is currently staffed exclusively by representatives from Institutions functioning in the West Bank such as the Ministry of the Justice, the Ministry of Social Affairs and a representative from the President's office. Apart from the presence of the executive, a small number of academics serve on this committee as advisors. The work of the committee is intended to be merely technical and not political in nature.<sup>97</sup>

In spite of the good intentions of this committee, it is highly unlikely that this committee will have any significant impact unless its approach can be perceived as sufficiently impartial by all factions. The committee was initially tasked with reviewing the laws in Gaza only. The legal unit of the Council of Ministers has however more recently stated its intention for the committee to review West Bank decrees as a next step, (although this would still fall outside of its formal mandate unless it were amended), assuming that the PLC does not proceed with the review beforehand. According to the Committee Chairman the committee cannot review the West Bank laws because these laws will be reviewed by the PLC in its first sitting as provided for in Article 43 of the Basic Law. Since the focus on Gaza is a decision of the Council of Ministers, it is beyond the remit of the Committee Chairman to change this one-sided approach. The Council of Ministers has taken the view that as the Gaza laws since 2007 have not been enacted through a process provided for under the Basic Law (i.e. they are 'illegal'), they should therefore be subject to a separate review process. This approach does not seem to take into account that the laws passed in the West Bank are arguably similarly legally impugned due to the unclear 'legal' status of the Presidency following expiration of his term in 2009 and do not necessarily meet the legal test of 'necessity' as required by Article 43 of the Basic Law.

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96 [http://www.the State of Palestinecabinet.gov.ps/WebSite/Upload/Decree/GOV\\_17/2101201513083914643.pdf](http://www.the State of Palestinecabinet.gov.ps/WebSite/Upload/Decree/GOV_17/2101201513083914643.pdf)

97 Interview with Fawaz Abu Zir, 18 December 2014.

The recommendations the sub-committee may make, with regard to the review of the laws in Gaza, are unlikely to be taken seriously because aside from the Minister of Justice, to date the process has not involved actors from Gaza and certainly none involved in parallel Gaza institutions. Several senior officials interviewed in Gaza claimed that they had not heard of the creation of the committee and the one or two officials who have heard of the committee complained that they have not been consulted at all. The process so far has been exclusive and lacked transparency. . Given the problems with ‘legality’ in relation to the post 2007 laws passed in both the West Bank and Gaza, the decision to subject the Gaza laws to a different process may reveal a lack of neutrality in how the Government of National Consensus is proceeding to implement its program. For a committee of this kind to have credibility and instil public confidence in its objectivity and non-politicisation, its mandate should either be extended to reviewing both the laws in Gaza and the West Bank made post 2007 or both sets of laws should be left for the PLC to review once it re-convenes. Senior PA officials have expressed openness to the idea of recommending the formation of a similar subcommittee in Gaza and to actively promote communication between the two committees.<sup>98</sup> This would at least ensure a higher level of Gaza participation than at present, although this would only address part of the problem unless the mandate of the committee were also extended to the West Bank laws enacted by Presidential decree. It will of course just be a temporary arrangement in the run-up to the reconvening of the PLC.

Civil society has also played a significant role to support legal harmonisation. Examples include the efforts of Birzeit University since the late 1990s until the present, as well as the efforts of Musawa, UNDP and others to try to open up the discussion to a wider range of actors. This report will, hopefully in itself, contribute to this effort.

### **3. Review of post-2007 Laws and Judicial Decisions**

A starting point for legal harmonization is to base harmonization on those national legal standards, laws and legal values around which there is already national consensus. Palestinian legal reform can be founded on two pillars. Firstly such reform can be based on the reconciliation agreements signed in the 2000’s most significantly the 2011 Cairo Agreement and the 2014 Beach Camp Declaration. Secondly such reform can be based on the variety of legal instruments reflecting national consensus enacted pre 2007. Many pre-2007 national laws such as the Criminal Procedure Code already reflect an important measure of national consensus and can stay intact. Preserving certain important pre-2007 laws will also provide some much-needed continuity and integrity to the reformed legal system.

With regard to the laws made after the Division, various models of revision can be suggested. A minority of stakeholders interviewed hold the view that all post 2007 laws in Gaza and the West Bank for example, violate the Basic Law and should therefore be abolished and that one should start on a clean slate. Some CSOs, such as The Palestinian Centre for Human Rights for example, have taken the firm position that all legislation enacted under the state of fragmentation, whether in the

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<sup>98</sup> Interview with Hassan Al-Alouri, Legal Advisor to the President, January 2014.

form of presidential decrees issued by the president under the pretext of the absence of the PLC or laws made in Gaza, should be abolished and that the process should start afresh under a new PLC.<sup>99</sup> Although this is a highly principled position and appealing for its purity and insistence on legality, it is submitted that a ‘clean slate’ approach is not the most constructive in the Palestinian context and will not create a political climate conducive to national reconciliation. For the sake of continuity, stability and accommodating the realities on both sides, the clean slate approach is not recommended in this report.

Instead, a number of other scenarios are proposed:

As an alternative to a wholesale revision of laws, a second scenario entails the formation of a special committee within the PLC through a decision of the PLC to study the post 2007 laws and make recommendations on these laws. According to this scenario, the PLC in its first session will immediately decide upon the formation of a special temporary committee according to what is mentioned in the texts and rules of procedure of the PLC and in particular Article 48/3 of such rules that deals with the formation of committees within the Council. This task can either be carried out by the ‘old’ PLC or a reconstituted new post-election PLC. Since the legitimacy of the current PLC can be questioned and since the term of the current PLC has expired it is submitted that a newly constituted PLC should carry out this task. The PLC can also choose to start amending the laws immediately after they are presented to it.

The third scenario entails the review of laws based on the existing legislative procedures in accordance with the applicable rules and procedure. Given the lack of clarity as to how these rules and procedures should operate in the absence of a PLC with a democratic mandate, this may not provide the fresh start needed to break from legitimacy deficits.

The fourth scenario involves a review of legislation based on new legislative procedures. This scenario calls for the amendment of the rules of procedure of the PLC. This scenario is to be preferred over the third scenario above.

A fifth scenario will entail the whole-scale adoption of PLC laws, since it will be decided (for reasons of principle or pragmatism) that all laws issued in the West Bank and Gaza are correct (after the examination of a specialized committee). This scenario is dangerous since it legitimizes illegitimate lawmaking and will lead to legal conflict and clashes.

The sixth scenario is to consider all laws issued during the division as legislative proposals.

Different groups of laws can be identified:

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<sup>99</sup> Interview with Raji Surani, 24 December 2014.

There are laws that dealt with the same subject in both the West Bank and Gaza Strip. These laws may be of an administrative nature or based on a legislative bill that would give the power to issue instructions.

There are also laws and instructions issued by the Ministers in both the West Bank and Gaza Strip, and this legislation, including what is new, some of which is linked to previous laws, some of which also dealt with the same subject. There are rules and regulations issued by the Council of Ministers in both the West Bank and the Gaza Strip.

With regard to bylaws and regulations, the question of what the status of these laws will be after reconciliation has been achieved will have to be determined. It is proposed that if the law in terms of which the bylaw was made, is found to be valid and relevant, the bylaw, if still relevant, should similarly be found to be valid.

It is submitted that the proposal of Birzeit University should be followed. According to the Birzeit study, all laws issued in the West Bank and Gaza Strip should initially be considered valid and as being issued by legally valid means. This would prevent legal uncertainty or vacuums during any transitional period. All the laws would then be subjected to scrutiny and review and harmonized by a joint specialized legal committee of experts.

In the case of successful Palestinian elections and reconciliation, a joint legal committee should be established to examine all laws issued in the West Bank and Gaza with a view to harmonizing and unifying the laws.<sup>100</sup> This process is envisioned to determine the possible solution for each law, either by retaining and re-issuing the necessary ones in such a way that preserves the rights contained therein, or cancelling the unnecessary ones, which do not affect any vested rights of individuals.

It is also imperative to work on issuing a unified law for the official gazette and that only one official gazette should appear that covers laws made in the West Bank and Gaza.

A related question is whether all judicial decisions taken by judges in Gaza since the split in the judicial authority, should similarly undergo review. While data on judicial caseloads is limited, judges in Gaza advise that between 2007 and 2014, Gaza caseloads have risen sharply. Taking the available data for the regular courts (excluding family courts) in 2011, there were 63,700 regular court cases pending, approximately 47,000 new incoming cases, and the regular courts were able to dispose of around 34,000 cases within the year.<sup>101</sup> Assuming around 50,000 new regular court cases each year, this would entail around 400,000 cases since Division, not including backlogs and increases in caseloads. The Shari'a Court caseload would likely add at least another 200,000 cases to this sum.

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<sup>100</sup> Summary of scenarios on how the PLC should address post-2007 legislations, Birzeit University.

<sup>101</sup> A Review of Palestinian Justice and Security Sector Data, UNDP and PCBS, 2011,59.

On the West Bank side, in 2014 there were 6,590 criminal case judgments; 218,936 misdemeanor judgments and 95,172 civil case judgments.<sup>102</sup> Especially in light of these very large caseloads, how should the decisions that were made by courts in the West Bank and Gaza after the Division be treated?

Even taking Gaza alone, as previously stated, it will not be realistic or sustainable to review all decisions issued after 2007. The sheer number of cases gives an indication of the fact that it will be an unmanageable task to review hundreds of thousands of decisions. Reviewing all cases will cause a great deal of legal uncertainty, not to mention chaos among the population. As stated above, the courts in Gaza currently lack the infrastructure and judges to deal with the additional workload that such a review exercise would entail.

Thus it is proposed that Gazans who have been ‘adversely affected’ by decisions made between 2007 and the present should be given the option to appeal to a Court of ‘Cassation’ (or possibly a specialised court created specifically for this purpose so as not to further exacerbate the backlog in the ordinary courts). It is suggested that criminal law decisions that had the gravest freedom-depriving effects on Palestinians should first be reviewed, especially decisions made which led to the death sentence or life imprisonment or severe sentences of imprisonment. It is proposed that decisions made in terms of civil laws should not be reviewed unless the rights of a party have been breached to a grave extent. Whereas it is generally not advisable to re-open family law cases, since in many cases decisions would have affected people’s personal status, once determined these should not be changed since this will cause social chaos, legal uncertainty and ongoing instability in the society.

Thus implementation of these recommendations would mean that a substantial number of criminal cases might have to be re-opened but only a small number of civil cases will likely require review. Prior judgments would continue to have legal effect until the review of each case was complete, thus to reduce the risk protracting injustice, a concerted ‘taskforce’ effort would be needed to promptly review appeals lodged by persons currently in custody.

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102 Data extracted from the HJC MIZAN II database.

# RECOMMENDATIONS ON RECONCILIATION

If the State of Palestine is to become a democratic state with respectively unified political, executive and legal institutions, steps need to be taken to fulfil the procedural and substantive requirements for democracy. The holding of democratic elections is an indispensable requirement for the establishment of democracy. As put by a senior justice actor, ‘we have to choose between the election box or the box of bullets.’<sup>103</sup>

Among the Palestinian justice actors consulted in this assessment, many if not all spoke in favour of holding presidential and parliamentary elections as soon as possible. There emerged a fairly clear consensus that the continuing damage caused by the absence of democratic legitimacy outweighed the political, security or other risks attached to holding elections, even should they prove to be imperfect. It is the decision and political will of the President to call for elections that is seemingly the missing piece of this part of the jigsaw puzzle.

While democracy requires much more than the holding of elections, elections are an indispensable condition for even the thinnest form of democracy. After the elections legal institutions will enjoy more public support and legitimacy. Elections and the formation of a re-constituted PLC with a valid democratic mandate would also trigger the process described in Article 43 to regularise a democratic process for harmonising the State of Palestine’s legal frameworks. The role of elections in the reconciliation process is also highlighted in the Cairo Agreement. It has been argued that the ultimate goal of democratisation can be defined as the process that creates mutual trust among citizens.

## 1. The Road to Elections: Creating Political Will

It is clear that Palestinian laws and institutions need to rest on a firm democratic foundation. There currently seems to be a lack of political will on the part of the Presidency to call elections and to follow up on the reconciliation commitments under the Cairo Agreement. Whereas it is often argued that political will is only in the hands of politicians, it is possible to create or encourage political will by effective mobilisation of the population.<sup>104</sup>

It has been argued that elections cannot be held before conditions are considered conducive for the holding of elections. The Palestinian Centre for Human Rights has been particularly vocal in this

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104 Ibrahim Barghoti, Musawa, Interview on 6 January 2015.

regard.<sup>105</sup> At the end of 2009 it argued that in light of the ongoing split between Fatah and Hamas movements, the conditions and environment in the State of Palestine do not ensure free and transparent elections reflecting the will of the electorate. Current conditions do not indicate that this environment will change in the foreseeable future.

It has been said that the Palestinian people fear elections because of the chaos and bloodshed that occurred after the 2006 elections. Furthermore, the Palestinian people have not seen concrete improvements in the material conditions of their lives since 2006. Crucially, since 2006 their fundamental rights have increasingly been infringed upon as a result of the Israeli occupation and impeded by the national Division. It is therefore important to help create enthusiasm for elections and to spread the message that real change may occur after the elections. Successful elections also require commitments from international community not to make the same mistakes as in the past and to provide assurances they will accept a free and fair result. In light of Israeli's very successful mobilisation of the 'counter terror' agenda, it will require creativity and open minded approaches to find a way for many countries to provide such assurances.

It is submitted that it is not advisable to wait for perfect political conditions before elections are held. The relationship between elections and political climate is often symbiotic: successful elections depend on peaceful political climate and a peaceful political climate depends on successful elections. In the absence of a peaceful political climate, international actors such as election monitoring bodies can help prepare the ground and monitor the holding of free and fair elections. Again, a free and fair election may not be enough in the Palestinian case.

Whereas local mobilisation and participation by Civil Society Organisations is clearly vital, mobilisation by the international community including international organisations and stakeholders within Palestine and the region is highly likely to help create or bolster the necessary political will to call for elections. Since international actors do not have the same level of popular legitimacy as CSO's to engage in this form of mobilisation, CSO's should lead the way. It should also be kept in mind that the international and regional actors have often pursued foreign or proxy agendas within the context of this particular conflict.<sup>106</sup> In involving international actors in the process, these real agendas should be kept in mind and addressed as needed, but not permitted to form an impasse to progress on elections.

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105 This sentiment was already expressed by the Centre in 2005. See Palestinian Centre for Human Rights, Annual Report for 2005 available at [http://www.pchrgaza.org/files/Reports/English/pdf\\_annual/ann\\_rep\\_05.pdf](http://www.pchrgaza.org/files/Reports/English/pdf_annual/ann_rep_05.pdf)

106 The 2014 war on Gaza has been described as a Middle Eastern 'proxy war'. Hamas is seen as an extension of the Muslim Brotherhood and Israel's ongoing battle with Hamas is part of a wider regional war on the Muslim Brotherhood. Many countries consider Israel to be fighting the war on the 'Muslim Brotherhood' on their behalf. Josh Levs 'This time, Gaza fighting is 'proxy war' for entire Mideast.' CNN, 1 August 2014.

Whereas many interviewees agreed that elections cannot be held off for much longer and that the holding of elections will solve many problems relating to the current democratic deficit and lack of institutional legitimacy, interviewees were divided on the question of whether the State of Palestine is ready for elections. It is possible to acknowledge that elections are urgently needed but to still express reservations about the timing. The experience in other transitional contexts has shown that the electorate might need to be gradually prepared for the process of elections. It is suggested that the State of Palestine should prepare the electorate and the political environment during a pre-election, interim phase of 6 to 12 months. The extent to which the international community is prepared to accept the results of an election or how the State of Palestine would manage should it face renewed international isolation, is also at the centre of the dilemma. It is therefore not just the domestic electorate that needs to be prepared for the election. The discussion of elections must further acknowledge the role of Israel in obstructing elections, especially in East Jerusalem. Elections are intrinsically linked to the issue of occupation.

Fundamentally, elections are a demand of most national powers and civil society groups. Elections could help interrupt the current impasse by directly asking the people who they want to govern them. This could help drive the reconciliation agenda, especially on security sector reform and the problem of the informal justice sector, especially in Gaza.

First of all, holding elections requires an appropriate electoral environment in which public freedoms are enhanced and treasured. Further steps that could be taken to prepare for democratic elections include releasing political prisoners; lifting the ban imposed on political activities (those imposed on Hamas in the West Bank and on the Fatah movement in the Gaza Strip); reopening hundreds of closed associations; respecting press freedoms and free expression.

A decision will have to be made on which election law will be applied. Should it be Law No. 9 of 2005 according to which the 2006 parliamentary elections were organised or Decision 1 of 2007 related to general elections which was incorporated in a presidential decree, bypassing the elected Palestinian Legislative Council? PCHR argues that a presidential decree of this kind cannot be valid and that Article 43 must not be employed as a means for the executive to continue to appropriate the authority of the legislature under the pretext that the Palestinian Legislative Council is not convened.<sup>107</sup> Many also argue that the current Election Law should be amended or that a new Election Law should be enacted since the current Election Law conflicts with the Cairo Agreement.<sup>108</sup> This does not mean that the electoral system suggested in the Cairo Agreement should necessarily be followed. It means that there should be a consistent approach.

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<sup>107</sup> Annual Report for 2013, Palestinian Centre for Human Rights.

<sup>108</sup> Interview with Feras Milhem, 6 January 2015.

Interviewees repeatedly mentioned that the holding of elections will be obstructed by Israeli interference and that inter-Palestinian reconciliation and state-building is not in Israel's strategic political interests. Some of the interviewees stated that the fragmentation of the State of Palestine is part of Israeli political strategy. The Palestinian Centre for Human Rights has demanded that before the holding of elections international guarantees should be obtained that Israeli Occupation Forces (IOF) will not intervene, as IOF may intervene to destroy the electoral process through bombardments, arrests and restrictions on the freedom of movement between the West Bank and the Gaza Strip and inside the West Bank. Additionally, the participation of East Jerusalemites in the elections must be ensured.

In addressing these challenges to the preparation of the right electoral environment, it is critical that comprehensive national dialogue and negotiations should continue between the major political parties and between civil society and those holding power.

### 1.1 The role of Civil Society Organisations

Historically, the State of Palestine has had a vibrant civil society. Whereas some argue that the CSOs today are not as dynamic as in the past, for example in effectively mobilising the population,<sup>109</sup> civil society remains strong and influential. In Gaza alone there are more than 900 CSOs. The CSO community should partner and engage with the public and the media to effectively mobilise and publicise the need for imminent elections. Such mobilisation can take the form of petitions, letters and other forms of non-violent mobilisation that is particularly suitable to the Palestinian situation. Palestinian CSO's have a tradition of effective mobilisation as is evident from the fact that they engage in a variety of successful lobbying and advocacy activities such as awareness raising sessions, legal consultancy, mediation as well as legal representation and justice sector oversight activities,<sup>110</sup> along with their valuable work in other sectors.

The success of CSOs often lies in their ability to maintain close relations with grassroots mass movements and their ability to unite a variety of groups such as students, workers and women. In the State of Palestine many CSO movements have however strayed away from their original support bases. CSO sector success is only possible if CSO movements show that they are in touch with their support bases and if the CSO movement forms part of a larger social movement pushing for national reconciliation.<sup>111</sup> Another concern that was raised by CSO interviewees in this regard is that CSO's are often more concerned with the interests of donors than the interests of the people. With notable exceptions, even the CSO community has been split along West Bank/Gaza lines. Prominent figures

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109 This is the view of Hanan Ashrawi as well as various Women's Groups.

110 'Reality of Legal System in Gaza', Executive Summary, January 2014, UNDP.

111 NGOs can best serve the national movement, therefore, by returning to their previous mandates as conduits and support networks of socio-political mobilization. For this, though, they need to take the bold step of reversing their de-politicization. See Jesse Lev Minz 'After Oslo: Palestinian NGO's and the Peace Process', accessible at academia.edu

in the Palestinian women's movement confirmed this and stated that in the women's movement civil society leaders often only talk with like-minded actors.

A variety of leaders of prominent women's groups in Ramallah were of the view that there is currently no unified and strong Palestinian women's movement. This stands in contrast with the position in the 1990's when women's groups were known to be far more activist and united on important political and social issues.<sup>112</sup> Even though factions such as Fatah were not liberally minded on issues of women's rights, there was active engagement with the question of women and the law during that time. In spite of the creation of a Ministry of Women's Affairs, the views of women are often not reflected in policymaking or law making. This issue will be dealt with further in the recommendation section below.

### 1.2 The role of the international community and organisations

The international community and specifically the donor community can play a key role in backing the mobilisation efforts of local CSOs and other local actors. Whereas CSOs have popular legitimacy, many international organisations and actors have acquired legitimacy through their contributions to capacity building and other forms of assistance to the Palestinian legal sector. Whereas the international community should tread carefully not to repeat the mistakes of the past including disrupting Palestinian democracy by imposing its own political agendas on the territory (even to the detriment of the Palestinian people), given the fairly critical moment and current impasse in terms of reconciliation, it might be appropriate for organisations to leverage some level of conditionality in their assistance. Whereas it is certainly controversial whether the international community should tie their recommendations to the threat of withholding funding, exerting such pressure on decision makers could lead to much needed progress. Pressure should however only be exerted to advance the rule of law, human rights and reconciliation and not to further particular political agendas of the West or other regions.

It is important to understand the relationship between the international community and the National Consensus Government. The marked lack of progress on reconciliation has significantly contributed to the difficulties experienced by the NCG and caused it to struggle and wane. As the NCG was established as a neutral team of technocrats, most important elements of the international community either endorsed or did not object to working with the NCG. Thus to all intents and purposes the international community gave its support to the NCG. Some analysts say that the failure of the NCG to establish a clearly separate and independent identity from the power of the Presidency (which is embroiled directly in conflict with Hamas), has prevented it from showing leadership and making progress on important issues like the payment of civil servant salaries in Gaza or taking positive steps to establish its authority in the Gaza Strip. At the same time, the strong level of international support for the NCG may have inadvertently strengthened the hand of the Presidency in its struggle with Hamas and reduced the pressure for positive steps to be taken towards reconciliation. Whatever

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<sup>112</sup> Interview with Women's Group, Ramallah, January 2015.

the true situation, Hamas certainly sees the NCG as captive to the Presidency and not playing the anticipated neutral role to help overcome political differences. In this highly charged and sensitive political environment, the international community should tread carefully and constantly be critically examining where it is placing its support and assessing whether or not the placement and channelling of assistance is supporting or eroding the prospects of reconciliation.

## 2. Correcting the Legitimacy Deficit

It has become customary for those in power in the West Bank to describe all legal and judicial institutions as illegitimate and the powerful actors in Gaza make the same claim with regard to the institutions in the West Bank. It is submitted that the deficiency is both one of legality and legitimacy and that the term ‘legitimacy’ is often used when ‘legality’ is intended. It is therefore necessary to briefly consider definitional issues. The term ‘legitimacy’ is most often used in the sense of a ‘pull to compliance’.<sup>113</sup> Legitimacy of state institutions refers to the level of civic trust they enjoy.<sup>114</sup> A legacy of serious abuse by an institution of state seriously undermines such legitimacy. Some put the bar higher and define legitimacy as a belief that institutions are democratically created and constituted. It can however be argued that even an imperfect legal system that suffers from democratic deficit such as the Palestinian legal system, can enjoy a measure of legitimacy.

Legitimacy is a concept that encompasses more than the mere legality of a norm or practice. According to Max Weber, the nature, reason and path by which power consolidates vary according to the demands that brought it about.<sup>115</sup> It is especially important that government should be viewed as legitimate in the eyes of the people.

There have been various legal and political responses to the argument that the fact that the President has exceeded his term renders his decisions illegitimate. Some argue that his legitimacy stems from the fact that he is head of the PLO and from the fact that other international actors including the Arab League continues to regard him as the Palestinian President. Authority for the continued legitimacy of President Abbas’ term can also be found in the Doha Agreement of 2012 which states that Mahmoud Abbas would serve as both President and Prime Minister of the Palestinian Authority. Although this is a highly controversial justification for the continued validity of Abbas’ presidency, it does represent a textual justification for such continued validity.<sup>116</sup>

Others have argued that the fact that the President has signed international agreements including the ICC Statute indicates that in the eyes of the international community he is still accepted as a

113 Thomas Franck *The Power of Legitimacy Among Nations* (American Society of International Law) 1990.

114 Davis (note 70).

115 Max Weber *Economy and Society* (University of California Press) 1978.

116 See Robert M Dahin ‘The Doha Palestinian Unity Agreement: Now the Hard Part’ Council on Foreign Relations, 7 February 2012.

legitimate President.<sup>117</sup> Legal expert Feras Milhem makes a compelling argument for the continued legitimacy of Abbas' presidency.<sup>118</sup> He explains that there cannot be a vacuum in governance and that President Abbas stays in power to prevent such a vacuum. It has also been suggested that the principle of effectiveness can be relevant in this regard.<sup>119</sup> According to the international law principle of effectiveness, an actual established authority is the legitimate government and the coercive order enacted by this government is the legal order.<sup>120</sup> In the view of Milhem, President Abbas's position is legitimate but not democratic.

Article 37 of the amended Basic Law of 2003 states that there are three circumstances under which the president position can be considered vacant: (i) death (ii) resignation handed to the PLC if accepted by a two third majority (iii) loss of legal jurisdiction by a decision of the High Court acting as a Constitutional Court. It is only under these three conditions that the PLC assumes the Presidency for 60 days during which presidential elections are held. Some argue that the validity of the President's term should be judged by the Constitutional Court (in practice the Palestinian High Court currently acting as a Constitutional Court).<sup>121</sup>

The principle of effectiveness is an international law norm which enables a sovereign, in certain situations, to transcend the rule of law in the name of the public good. Some constitutions (for example Article 16 of the French Constitution) provide for the concept of a 'state of exception'. The French Constitution establishes that the President of the Republic may take all necessary measures 'when the institutions of the Republic, the independence of the Nation, the integrity of its territory, or the execution of its international commitments are seriously and immediately threatened and the regular functioning of the constitutional powers is interrupted'.

A considerable number of unity initiatives that were created under the Cairo Agreement of 2009 were either never implemented or collapsed shortly after they were announced. Although the Cairo Agreement can be viewed as the product of consensus, many in Gaza claim that Hamas have not been sufficiently consulted on decisions following its establishment. Prominent feminist CSO leaders in the West Bank and Gaza have raised the concern that their views were not considered with sufficient seriousness during the drafting of major reconciliation agreements such as the Cairo Agreement.

One such unity initiative undertaken under the Cairo Agreement is the Joint Reconciliation Committees that were established to implement reconciliation. Many of these committees were however never created or have remained dormant for the past six years. It can therefore be said that while significant

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<sup>117</sup> Interview with Mutaz Quafisheh, 17 January 2015.

<sup>118</sup> Interview with Feras Milhem, 6 January 2015.

<sup>119</sup> Interview with Mutaz Quafisheh, 17 January 2015.

<sup>120</sup> See Hans Kelsen 'General Theory of Law and State' (originally published 1945), translated by Andres Wedberg (1999).

<sup>121</sup> Position Paper: 'Controversy over End of Presidential Term in Office' Palestinian Centre for Human Rights.

‘milestone moments’ have been achieved between the parties, what has been absent is effective ongoing monitoring and political pressure to press the parties to make good on their commitments.

### 3. Creation of High Transitional Council

#### *Reason for establishment*

There are many reasons why new institutions are necessary in the current Palestinian context. One important reason is that the judicial authority is itself split, so there needs to be a temporary advisory higher council to facilitate the reunification of the judicial authority, and to support it in bringing about the wide ranging reforms of the judiciary itself. The sequencing is important. It is recommended that these reforms should only be addressed once the judicial authority is itself already unified. On a political level, the Presidency is highly politicised and not able to play a ‘neutral’ role. The PLO, while it claims to be the sole representative of the Palestinian people, is not truly representative since it does not include Hamas. In addition, the usefulness of the ‘old’ PLC is doubtful. The ‘old’ PLC cannot be legally reconstituted to perform its legal functions and the lengthy period of time that has elapsed since the 2006 election and the momentous events that have taken place since then (3 wars on Gaza etc.), present a serious challenge to the claim that it can play any useful representative role in 2015. The National Consensus Government is weak and not perceived to be non-partisan by Hamas and by a variety of analysts.

#### *Method of Establishment*

It is proposed that a High Transitional Council should be established that has oversight over the High Judicial Council. The question of precisely how such a body should be established is difficult. Musawa has suggested that the best way of integrating the judiciary is to form a supreme national committee or to establish a transitional high judicial council by decree.<sup>122</sup> Since this report considers the process of creating laws by presidential decree as illegitimate, it is submitted that creating advisory bodies by decree will merely perpetuate the current crisis of illegitimacy. It is therefore proposed that the High Transitional Council can be created by adding a Schedule to the Basic Law. This Schedule can contain transitional arrangements such as the establishment of a Vetting Board, the establishment of a High Transitional Council and the establishment of an Independent Advisory Commission on National Reconciliation.

#### *Composition*

The High Transitional Council should be constituted by figures known for their efficiency, integrity, independence and specialisation.<sup>123</sup> It must be given the authority to recommend the restructuring of the judiciary and the public prosecution.

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<sup>122</sup> This is a view shared by Musawa.

<sup>123</sup> Musawa Recommendations from the 6<sup>th</sup> Justice Conference held in January 2015.

This Council will primarily be a policy making body that will make recommendations to the High Judicial Council. The Council should consist of individuals who held senior positions in the judiciary such as retired senior judges of high standing and integrity. These judges should have the reputation of being non-partisan. The representation of female judges is especially important. Since there will be only one High Transitional Justice that will represent both the West Bank and Gaza and since re-integration of the judiciary will be one of the central tasks of the Council, it is crucial that judges from both the West Bank and Gaza should serve as members of the Council. Membership can possibly be opened up to include persons such as retired senior member of the Bar Association.

### *Mandate*

The High Transitional Council will have the task of making recommendations on the reform of the judicial system and on how the judiciary in the West Bank and Gaza should be reintegrated. Specifically, the High Transitional Council should consider ways of re-installing judicial independence.

The High Transitional Council will focus on the following: (i) how to create a unified High Judicial Council; (ii) assessing the legal effect of the re-opening of cases. When appeal brought by those who have been adversely affected by court decisions made post 2007, the courts will have to assess these appeals on a case by case basis. As an alternative to a Court of Appeal performing this function, complainants can possibly approach specialised courts to complain if they were adversely affected by post 2007 legislation and (iii) the vetting of judges appointed after the Division.

It has been argued that judicial independence in the Gaza Strip has been particularly negatively affected by the Division. To a lesser but still significant extent, this is also the case in the West Bank. The fact that the *de facto* authorities exert control over both the legislature and executive in Gaza has obviously caused damage to judicial independence, although some judges in Gaza including some originally appointed by the PA claimed that this is not the case and that judges are not heavily or universally influenced by the executive in their decision making.<sup>124</sup> Nevertheless, judicial independence in the State of Palestine falls short of international standards. It is submitted that judges in the West Bank and Gaza do not have a comprehensive or deep understanding of judicial independence. When questioned on the meaning of judicial independence, none of the judges displayed a comprehensive understanding of what judicial independence encompasses and requires.

It has been proposed by PA judges in Gaza that the High Judicial Council should study the need for judges in Gaza and open up a competition for judicial positions.<sup>125</sup> The High Transitional Council can assist in giving advice in this regard. PA judges believe that they themselves should not have to go through a competition or vetting process and should automatically be reactivated in their roles as judges. As noted earlier, it is recommended that the PA appointed judges should go through a vetting

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<sup>124</sup> Interview with Judge Enaam Enshasi, 19 January 2015.

<sup>125</sup> Interview of 22 December 2014.

process like all other judges. If they pass this process they should be re-employed as judges in Gaza. Since the judges have not been working as judges since 2007 they would also have to undergo training to re-equip them to work as judges. With regard to the Hamas appointed judges in Gaza, these judges would all have to undergo the proposed vetting process. The small number of PA appointed judges who continued working under Hamas institutions would also need to undergo the vetting process.

(ii) The High Transitional Council can further advise on the complex issue of the re-opening of cases that were decided after 2007. The innovative suggestion has been made that a compensation fund be created to compensate a limited number of Palestinians who have been particularly harshly affected by judgments that have violated their basic rights.<sup>126</sup> As was mentioned by a few of the interviewees, the practice of compensation payment is already deeply rooted in the Palestinian civil court system as well as traditional dispute settlement practices.<sup>127</sup> It is of course unclear how such a compensation fund will be funded.

The Council will consider what laws are needed to facilitate reconciliation as well as which laws should be enacted to facilitate the legal harmonisation process.

The process of reintegration of the judiciary and the vetting of judges provides an opportunity to ensure that the judges who will form part of the ‘new’ unified judiciary have not previously been corrupt or guilty of unethical behaviour and are not associated or perceived to be associated with any political party or movement. With regard to the judges both in the West Bank and in Gaza, it has been claimed that there is proof of judges taking bribes. Since 2007 two West Bank judges have been removed for corrupt behaviour and replaced.<sup>128</sup> There have been incidents of judges telling accused that they will be acquitted if they can recite verses in the Quran.<sup>129</sup> The Council’s mandate can be extended to address certain problems in the post 2007 legislative process.

Chief Justice Ali Muhanna expressed the reservation that a High Transitional Council that is appointed ‘over’ the High Judicial Council can threaten judicial independence. The fact that the High Transitional Council would be comprised of judicial actors and will have no binding powers but rather advisory powers (or ‘soft power’), should alleviate this concern. Since the High Transitional Council will have a recommendatory role but without formal powers, the challenge will be how to ensure it has an impact. The calibre of people appointed on the Council will be key to ensuring its authority and impact. The fact that the Council will be created in a schedule to the Basic Law should add weight to its recommendations.

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<sup>126</sup> This suggestion was made by the PA-appointed judges in Gaza, interviewed on 22 December 2015.

<sup>127</sup> For more on this see Mutaz Qafisheh ‘Restorative Justice in the Islamic Penal Law: A Contribution to the Global System’ *International Journal of Criminal Justice Sciences* Vol 7 Issue 1 (2012).

<sup>128</sup> Interview with Azmi Shoabi, 15 January 2015.

<sup>129</sup> Interview with Ahmad Barak, 6 January 2015.

## 4. Creation of Independent Advisory Commission on National Reconciliation (IACNR)

### *Nature and Method of Establishment*

Because of the politicised nature of the Palestinian judiciary and the political polarisation in the State of Palestine, it is vital that there be a body which is as independent as possible to provide advice on how to achieve national unity in the justice sector and beyond. An Independent Advisory Commission on National Reconciliation could fulfil this role and act as the guardian of the reconciliation process. Such a Commission is needed to short-circuit the monopoly that political parties currently hold over the reconciliation process.

The IACNR could be established in a number of ways. It can, for example, form an Annexure to one of the reconciliation agreements. It is however clear that the Commission cannot be established by presidential decree since this will taint the independence and legitimacy of the Commission. To ensure that the IACNR has the soft power it needs to fulfil its mandate, mechanisms such as the UN Human Rights Council's Special Procedures system can potentially be employed to support the establishment of the IACNR and international experts such as the UN Special Rapporteur on Transitional Justice can be drawn into its work, in an advisory capacity.

A key challenge will be to get the 'buy-in' from the main factions to accept 'soft power' recommendations from the IACNR. Through the quality of credentials, reputation and level of national support generated for the IACNR and through its inclusive processes, (an opportunity for ordinary people to have some say in these important matters), pressure would be brought to bear upon the main factions.

### *Proposed mandate*

The Commission will have both a political and legal mandate. Its political mandate will be to advise on how to achieve reconciliation and overcome the current factionalism and division. The legal mandate will be to provide advice on matters of Transitional Justice and will include (but not be confined to) the creation of a subcommittee on legal harmonisation that will provide technical advice on how to harmonise the post 2007 laws in the West Bank and Gaza as well as the creation of other subcommittees including on security sector and civil servant reform and women's rights.

### *Composition and Method of Appointment*

The committee will be composed of Palestinian leaders who enjoy a high level of respect from the Palestinian public and be inter-disciplinary in nature and approach. Respected retired judges and academics could bring valuable experience and expertise to the commission. Well known and respected leaders and representatives of civil society, academia, business and the media should serve on the Commission. It is important that women and younger people are well represented on the Commission. It is also vital that the Palestinian diaspora should be represented. In addition a number of international experts representing the international community should serve on this Commission. It is important that prominent non-partisan individuals from the region should serve on the Commission.

The composition of the Committee could resemble the nature of Council of Elders in the African tradition.<sup>130</sup>

Whereas it often happens that the President of a state will appoint members of an independent commission, it is crucial for the independence and legitimacy of the IACNR that the selection of Commissioners should be undertaken by an independent party. It is suggested that the selection process be controlled and run by one or two prominent and highly respected Palestinian civil society organisations such as the Palestinian Centre for Human Rights and Al Haq, alternatively a consortium of CSO's. It is vital that the commission should invite input from the public and encourage public participation. The creator of the Commission should think of innovative ways of getting the public and specifically the youth involved in the nomination process. The public should possibly have the option of nominating Commissioners through text messaging or social media. It is important that the selection process should not be a foreign owned process but a process of which Palestinians takes ownership.

The Commission should preferably be supported by a regional 'broker' such as the Arab League or an individual/group of relevant Arab countries such as Egypt, Qatar or Jordan that can help strengthen the impact of the Commission. Ideally, a representative of the 'broker' country will serve on the Commission. As noted above, the Commission can also rely on the advice of the Special Rapporteur for Transitional Justice (a position currently held by Pablo de Greiff).

## 5. Relationship to Other Entities

The mandate of the IACNR will be to provide advice and recommendations on how to achieve legal harmonisation and legal unity and how to implement reconciliation initiatives (for example the Cairo and Beach Camp agreements) that the factions have already committed to. The IACNR will work in parallel with the committees established under the Cairo Agreement, specifically the Conciliation Committee, and the Public Freedoms Committee, the Social Reconciliation Committee, the Central Elections committee and the committee on the Implementation of the Cairo agreement. The Commission will also work closely with PLC committees. This means that the IACNR will advise the Cairo Committees and engage the Cairo Committees but will not be part of the formal Cairo Committee system. Since the IACNR will be a temporary structure to guide Palestinian decision-makers through the period of transition, the lifespan of the commission will necessarily be temporary. Upon completion of its work, its work can be rolled into the committee structure of the PLC and Cairo committees.

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<sup>130</sup> The idea of a Council of Elders derives from African traditional culture where the oldest and wisest men in the village gather to hear domestic and social cases and propose solutions and pass judgments. Membership in such a Council depends on personal integrity and the willingness to listen to the voice of the people. This dispute-solving restorative justice mechanism is used in countries such as Kenya and the Sudan.

The mandates of the Committees established under the Cairo Agreement that the IACNR will advise and work alongside include:

1. The Public Freedoms Committee was meant to supervise the release of political prisoners on both sides as well as make improvements to public freedoms and to end newspaper bans, lift on the ban on travel and movement, re-opening closed institutions and reopen bodies such as charities that were closed during years of political division.<sup>131</sup> The committee met a few times just after it was created but has not accomplished much to date.
2. The Social Reconciliation Committee established under the Cairo Agreement. The mandate of this Committee is to address grievances and damages that resulted from the Fatah-Hamas conflict in 2007. According to the Cairo Agreement this committee should work independently under the Consensus Government and not under the political factions. Its members consist of representatives from all Palestinian political factions in addition to independent actors. Its mandate is to deal with all issues related to citizens killed or injured or suffered from property damages during the conflict in 2007.
3. The Central Elections Committee will be assigned to register votes inside the country.
4. The Implementation of the Cairo Agreement committee has members from both Fatah and Hamas and is supervised by Egypt. This committee was supposed to meet regularly to ensure that the Cairo agreement is executed.

The IACNR will further start the process of drafting constitutional principles for the purpose of guiding the future constitution making process in the State of Palestine. The IACNR will closely study relevant comparative models which may include the South African experience in drafting such principles. This set of principles can also assist in the review of post 2007 laws as well as the review of all laws deemed to be violating human rights standards. The IACNR will further the nature of a future (final) constitution. The Basic Law contains a list of rights and freedoms. However, as Brown observes ‘the real test for the Palestinian Basic Law is not how many freedoms it can name but how it is constructed to defend them.’<sup>132</sup>

The Commission will advise on a suitable model of constitutionalism. In making these recommendations, the Commission should invite wide public participation. Article 94 of the Basic Law calls for the creation of an independent and supreme Constitutional Court to adjudicate disputes relating to the Basic Law. It is however not clear whether ‘supreme’ necessarily means constitutional supremacy which would give the court the power of judicial review – the power to strike down statutes for being unconstitutional or the power to veto legislation deemed to violate the Basic Law. The current arrangement that the duties of the Constitutional Court have been temporarily assumed

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<sup>131</sup> Hamas, Fatah Bypassing Freedoms Committee’ The State of Palestine Chronicle 28 February 2012.

<sup>132</sup> Nathan Brown The Rule of Law in the Arab World: Courts in Egypt and the Gulf (1997) 39.

by the High Court is far from satisfactory.<sup>133</sup> In the view of the author it is however too early to create a Constitutional Court since the Court needs to be built on the foundation of a united Palestinian state. In light of the divided judiciary it would not be beneficial for reconciliation if the Court is created under the current circumstances.

Conversely, Chief Justice Ali Muhanna is of the view that a Constitutional Court should be established as soon as possible for the following reasons: it is clear from the Basic Law that the High Court would merely act as an ‘interim’ Constitutional Court.<sup>134</sup> He believes that it is not right for the High Court to continue functioning as a constitutional court since there is a law on forming the Constitutional Court and this law must be implemented. He fears that if there are any disputes between the judicial authority and the executive authority, the High Court may not be neutral or independent in deciding the case especially since the head of the judicial authority is the head of the High Court. He further believes that any Constitutional Court must be independent from the High Judicial Council. He is of the view that the body forming the court should include legal professionals as well as academics.<sup>135</sup>

It is suggested that the following subcommittees be established under the IACNR:

### 5.1 Creation of Subcommittee on the Harmonisation of Laws (alternatively called Subcommittee on Legislative Drafting)

#### *Mandate*

This committee will consist of technical legal experts. The mandate of the committee will be to make recommendations for the abolition, amendment and harmonisation of laws. It is suggested that the committee should first consider all laws made subsequent to the Division in both the West Bank and the Gaza Strip. In line with the gradual approach explained above, the committee should start with reviewing the post 2007 laws in Gaza and the West Bank and should then seize this opportunity to also review key pieces of legislation enacted both in the West Bank in Gaza before 2007.

Since many of the post 2007 laws merely deal with procedural matters, the actual number of substantive laws that need to be reviewed is not so high. Importantly, a significant number of laws have no continuing effect since they relate to matters such as the approval of a particular budget or a process which has already expired. The ‘procedural’ laws will have to be filtered out. Many post 2007 laws amend laws that already exist. These amendments should similarly be reviewed if they are not merely procedural in nature but make substantive changes to laws.

The committee should select laws that have a particularly strong impact on the lives of citizens.

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133 The Law on the Supreme Constitutional Court was drafted and approved in 2006. Although the Court was promulgated in 2006, it has yet to be implemented and has never been established. Its duties have temporarily been assumed by the High Court according to the transitional provision (Art 104) of the Amended Basic Law.

134 Interview with Chief Justice Al Muhanna on 29 January 2015.

135 Ibid.

Two such laws are the respective Penal Codes and the respective personal/family status laws.<sup>136</sup> The review of laws will present an opportunity to make recommendations on the penal code and the Personal Status laws in both West Bank and Gaza which are both archaic and outdated Egyptian/Jordanian laws. Interviewees in both the West Bank and Gaza recommended the modernisation of Palestinian laws as part of the harmonisation process.<sup>137</sup>

The process of legal harmonisation cannot be rushed if it is to be inclusive and not repeat the same mistakes of the recent past, so realistically this process is likely to take several years and hopefully will be taken over by the PLC committee system as soon as possible after elections.

This is also an opportunity to review laws to be in line with human rights standards tailored to Palestinian national aspirations, norms, culture and needs, as well as international agreements such as the recent international treaties and agreements signed by President Abbas.<sup>138</sup> It is recommended that the committee should not follow a mere thin approach to the revision of laws. A thin approach would involve a revision of laws that merely checks that the laws meet the minimum requirements of legality. Instead, the committee should follow a thick approach to human rights. A thick approach to human rights means that the laws under review should also meet human rights standards that the State of Palestine has committed itself to observe. The technical committee will have to find creative ways of being inclusive in its work. It could for example invite academic and other experts in certain fields to advise on the harmonisation of laws in that field.

With regard to the review of the Gaza and West Bank legislation, the committee will build upon the significant body of work on legal harmonisation already undertaken by Birzeit University, UNDP and others and will build a wider technical team to create capacity for a holistic approach.

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136 For helpful suggestions in this regard see 'A Review of Palestinian Legislation from a Women's Rights Perspective' 9. The report suggests for example that the minimum age of marriage should be raised to 18; restricting the practice of polygamy in a way that protects women's rights.

137 Interview with Judge Enshasi, Gaza, 19 January 2015.

138 The agreements signed in December 2014 are the following: CEDAW, ICCPR, Convention on the Recognition and Enforcement of Foreign Arbitral Awards; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the AdState of Palestineion of an Additional Distinctive Emblem (Protocol III); Convention on the Law of Non-Navigational Uses of International Watercourses; Protocol on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons; Convention in Cluster Munitions; United Nations Convention on the Law of the Sea; and The Treaty on the Non-Proliferation of Nuclear Weapons.

### 5.2 Creation of Subcommittee on Security Sector Reform

In spite of the fact that the Cairo Agreement laid down the general principles for reconciliation in the security sector, no practical steps have been taken to effect such reconciliation. It might be advisable for the PA to establish the ‘Higher Security Committee’ as mandated by the Cairo Agreement. Although there was consensus among the interviewees that security sector reform is urgent and that at minimum, security guarantees and arrangements would need to be in place as a precondition for elections and other steps towards reconciliation, the issue of Security Sector reform might ultimately prove to be the thorniest and most difficult to solve. This topic however falls outside the scope of this paper.

### 5.3 Creation of Subcommittee on Reintegration of the Civil Service

As in the case of the judiciary, the entire civil service needs to be integrated. Although such reintegration is a crucial component of democratic reform and is meant to create public trust in the civil service, the details of the work of civil service reform falls outside the scope of this study. However the development of technically feasible solutions supported by the Swiss, UNDP and others is already well advanced, but like other key areas is stalling due to the broader political impasse between the factions. The work of the IACNR could help break this impasse.

### 5.4 Creation of sub-committee on Gender Justice and Reconciliation

While women should be well represented across all parts of the reconciliation process, this committee will provide some dedicated focus for ensuring that women are wholly involved in the reconciliation process. It will consider ways in which women’s voices can be heard and women’s concerns can be addressed in the reconciliation framework and ensure that women are well represented in emerging processes such as civil service or judicial reintegration. The committee will address the question of how women’s rights can be recognised and be given substance in the processes that will be developed for the pre and post-election period. The committee will also look at how to achieve equality for women as well as other gender rights such as rights issues relating to sexual orientation.

Further subcommittees could be established under the umbrella of the IACNR. The formation of subcommittees focusing on areas in urgent need for reform such as juvenile justice as well as reform of the prison system should be considered.

## 6. Time-Frame for Reform

It is important that a time frame should be set for the implementation of the recommendations in this report. The current lack of democratic institutions and processes and the current vacuum in power, are not sustainable. Elections should be held as soon as possible which, given the preparations needed, should be within 6 to 9 months. It is suggested that the recommendations made in this report, particularly the roadmap to reconciliation, should be implemented within the 6 - 9 month period before elections.

It is further suggested that provision should be made for the possibility that the process can be interrupted by another war. The reasons why the previous time frames were not adhered to should be studied. One obvious reason was the Israeli invasion of Gaza. As far as possible all efforts should be directed to ensuring the process is not derailed by military invasion by Israel. However the blockade on Gaza by both Israel and Egypt is a major possible cause of another war. International actors overseeing the reconciliation process can play a role in this regard. The international or regional broker/s that assist in the enforcement of the IACNR's work can possibly coordinate diplomatic pressure to prevent the derailing of the process by another war on Gaza.

## Conclusion

The holding of elections and the formation of a new PLC is urgent. As stated by an interviewee, ‘the only legislature at present is the President’. The extent of power currently concentrated in the Presidency goes against the essence of democracy. The State of Palestine is thirsty for independent institutions and independent input in a process that has become frozen because of political factionalism. There is a need for renewed focus on the election agenda which takes into account not only the need for the President to have the will to call elections but also the need for the brokerage of Israeli acquiescence and international commitment to the process to ensure access, monitoring and security. Most importantly, the international community should be committed to accept the outcome of the election assuming that procedurally, the election is free and fair.

The suggestion of creating an independent advisory commission with a number of international experts has been very well received by almost all interviewees.

As explained, the signing of the Rome Statute and human rights treaties confers certain responsibilities on the PA and makes the need for reform of the justice sector more urgent. The PA will be obliged to take measures to reform its judicial system to bring it in line with international standards and will have to convince the international community that it can hold fair and impartial trials.<sup>139</sup> Under the present unreformed legal system this is highly unlikely. The desire to be part of the international community and take advantage of its institutions therefore goes hand in hand with domestic legal reform.

Certain central themes were identified in this report. These themes are crucial to reconciliation and include: inclusivity, negotiation, national dialogue, compromise, re-activation as well as monitoring and oversight of the Cairo and PLC Committees, judicial independence, separation of powers, creating TJ mechanisms and reaching out to the grassroots to create national solidarity in the interest of achieving Palestinian unity and reconciliation. It is to be hoped that an enabling environment can be created for the emergency of new political parties and actors to seek election and for a transition of power to the younger generation.

To summarise, the PA should adopt an interim plan – a roadmap to elections – that will prepare the electorate for a democratic election that will be followed by the convening of a new PLC. During this interim time the following steps should be prioritised:

- (1) Civil society and the international community should start mobilising to help create political will for the calling of elections. In this regard a deal brokered with Israel and the international community to respect the result of the elections is particularly important.
- (2) Obtaining strong guarantees of the security of elections should proceed as a matter of urgency to prepare the ground for safe and free negotiations, elections and campaigning.
- (3) The Committees created in the Cairo Agreement should be reactivated and resume their work.

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<sup>139</sup> On positive complementarity see Sarah Nouwen *Complementarity In the Line of Fire* (2013).

- (4) The Reform of the PLO Committee should become active and contribute to creating a framework for national reconciliation.
- (5) A High Transitional Council should be created to work towards the creation of a unified judicial authority. The High Transitional Council will advise on judicial independence and on the vetting of judges. The Council will also advise on how the post 2007 judgments in the West Bank and Gaza should be dealt with. The Council should also advise on the appointment of judges and prosecutors and pay specific attention to the separation of powers in the sense that judges and prosecutors appointed should not have strong political affiliations.
- (6) Pre-agreement should be reached that the recommendations of the High Transitional Council will be followed and implemented by the High Judicial Council and a Vetting Board should be established under the High Transitional Council that will eliminate corrupt or otherwise mis-performing judges and identify from within and outside of the existing pool of judges, those suitable for re-appointment.
- (7) An Independent Advisory Commission on National Reconciliation (IACNR) should be established. The Commission should find creative ways of getting the public involved in its reconciliation initiatives and various aspects of its work. Social media, television and other forms of media should be utilised. The IACNR will work in parallel with the Cairo committees.
- (8) The IACNR should make recommendations on Transitional Justice policies but should not be involved in processes directly affecting the judiciary (such as vetting).
- (9) The subcommittees under the IACNR should be established and should start their work. These sub-committees include the Subcommittee on the Harmonisation of Laws (alternatively called Subcommittee on Legislative Drafting), Subcommittee on Security Sector Reform, Subcommittee on the Re-Integration of the Civil Service and Sub-committee on Gender Justice and Reconciliation.
- (10) The Sub-committee on Legal Harmonisation should start reviewing all post 2007 presidential decrees made in the West Bank and laws made in Gaza. These laws should be tested against the standard of 'necessity' as well as their compliance with the Basic Law and human rights.
- (11) With regard to the review of post 2007 court decisions in the West Bank and Gaza, it is simply not feasible to review all court decisions. It is suggested that a graduated approach should be followed. Criminal law decisions in Gaza should be prioritised. Those who received severe prison sentences should be able to request a revision of their cases. This task can be undertaken by special courts created for this purpose or a Court of Cassation.
- (12) The review of key legislation such as the Penal Code and Personal Status Laws should be prioritised.
- (13) The IACNR will give advice on the drafting of a future Constitution. To start the process, agreement must be reached on a set of Constitutional Principles. Although this is not a pressing priority, steps should be put in place for the creation of a Constitutional Court.

- (14) The IACNR can also advise on Transitional Justice mechanisms such as the payment of compensation and making symbolic reparation.
- (15) Since dialogue is the essential demand of civil society and many political players, it is vital that the spirit of negotiation and dialogue should guide the process. Communication between political leaders of Fatah and Hamas and communication between members of the senior judiciary in Gaza and the West Bank is vital especially in light of the fact that communication almost came to a standstill in recent months. Communication between the advisory commission and the Cairo committees is especially important and most importantly, the voice of the population at large should be heard and should be included in all negotiations.

The belief in the reunification of the Palestinian legal system is an original part of the collective national identity. Palestinian unity will be a historical breakthrough on many levels. It cannot be overemphasised that a crucial requirement for meaningful and substantial reconciliation is the willingness to compromise. As long as both parties are primarily motivated by fear of the other encroaching on its power or planning to ultimately crush the other, the creation of political will look like a distant dream.

In the words of Kader Asmal, the story of the South African transition is the story of human beings 'learning to share one country that was all but fragmented and destroyed by apartheid.'<sup>140</sup> His words imply that sharing a long-divided country might not come naturally. It is something to be learnt. In the Palestinian context, it has to be learnt by all political parties and layers of society. At the same time, undemocratic and divisive practices and political factionalism, needs to be unlearned. An interim process towards national unity and reconciliation such as that suggested here, could start the journey of learning and unlearning.

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140 Kader Asmal 'The Making of the Constitution' (note 75).

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