

---

# Enhancing the Accountability of Palestinian Public Institutions:

Strategies for Establishing Checks and Balances  
and Empowering the Private Sector

---

December 2007



---

# Enhancing the Accountability of Palestinian Public Institutions:

Strategies for Establishing Checks and Balances  
and Empowering the Private Sector

---

December 2007



---

*Al-Mustakbal Foundation, 53 Irsal Street, 3<sup>rd</sup> Floor, Ramallah, Palestine  
Tel. +970-2-297-1564, Fax:+970-2-297-1565, info@almustakbal.ps*



Copyright © 2007  
*Al-Mustakbal Foundation for Strategic and Policy Studies*

Translation copyright © 2007  
*Al-Mustakbal Foundation for Strategic and Policy Studies*

Book Design, Layout & Printing

**allevants**

[www.allevants-inc.com](http://www.allevants-inc.com)

*This book was set in Times New Roman*

*All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system without written permission from Al-Mustakbal Foundation, except in the case of brief quotations in reviews for inclusion in a magazine, newspaper, or broadcast. Print. For information write to Al-Mustakbal Foundation for Strategic and Policy Studies.*

53 Irsal St, Awwad Bldg, Suite 303  
Ramallah-West Bank, Palestine  
Tel. +970-2-297-1564;  
email: [info@almustakbal.ps](mailto:info@almustakbal.ps)  
or visit our website: [www:almustakbal.ps](http://www:almustakbal.ps)



Al-Mustakbal Foundation (AMF) for Strategic and Policy Studies is an independent and not-for-profit institution that actively addresses pressing economic, legal and regulatory issues facing Palestinian society on the road to statehood.

AMF works toward strengthening the strategic partnership between the Palestinian public and private sectors by promoting collaboration and mutual understanding within the framework of democracy and free market principles.

As a think-tank, AMF undertakes research, analysis, and advocacy activities with the aim of defining a strategic direction for Palestinian economic and legal development efforts. AMF's programs help inform the public debate on critical questions of national policy, promoting the free and civil exchange of ideas in accordance with every Palestinian's right to self-expression. AMF regards these activities as among Palestinian civil society's most important contributions to concrete and positive state building.



## Table of Contents

Acknowledgments	11
Introduction and Conceptual Framework	15
Paper One: <i>Palestinian Accountability of the Executive Branch and Shared Powers Within</i>	23
Paper Two: <i>The Palestinian Legislative Council and Strengthening Democratic Participatory Politics and Pluralistic Civil Society</i>	47
Paper Three: <i>Independent and Responsible Judiciary, Promoting Respect for the Rule of Law</i>	69
Recommendations	91



## Acknowledgements

Al-Mustakbal Foundation for Strategic and Policy Studies (AMF) gratefully acknowledges a grant from the Center for International Private Enterprise, Washington, DC which made the preparation of this document possible. In particular, AMF is grateful to Richard Kraemer for his invaluable guidance and continued support.

AMF is grateful to Hiba Hussein, Legal and Policy Expert as well as the Director General of this Project for the generous donation of her time to provide oversight to the management of this Project and to the working team in the production of the papers in both English and Arabic as well as her participation in the seminars and working groups. AMF is also grateful to Professor Omar Dajani, of the McGeorge School of Law, the University of the Pacific, California, USA, International Legal Consultant, for his conscientious oversight in finalizing the three papers by providing structure, valuable content and editing. Valuable input and writing was provided by Jihad Harb, Researcher of Policy and Governmental Affairs, on the executive branch where he made significant contributions to the paper on the legislative branch. Valuable input, insights and writing was provided by Hanan Elmasu, Legal Advisor on Public International Law, on the legislative branch paper. AMF is grateful to Paul Prettitore, Public International Law and Policy Expert and Rasem Kamal, Rule of Law and Judicial Reform Advisor for writing the third paper on the judicial branch and for providing their insights and critical analysis.

Special appreciation is extended to Neda Morrar, attorney-at-law, for her management of the project and to Mohammed Kiriish for his contributions to the papers adding the private sector inputs and for moderating the working sessions.

We are also grateful to the participants of the working sessions whose input and comments enabled AMF to prepare a better informed document.



---

## **Introduction and Conceptual Framework**

---



## A. Introduction and Conceptual Framework

With the support of the Center for International Private Enterprise (CIPE), the Al-Mustakbal Foundation (AMF) facilitated dialogue on mechanisms to strengthen democratic governance in Palestine by engaging as representatives of the Palestinian private sector, civil society organizations, and, to the extent possible, government officials. Our efforts have been guided by twin objectives: (1) to build the capacity of AMF to strengthen the voice of the private sector<sup>1</sup> in Palestine; and (2) to raise awareness as to the role and functioning of democratic institutions in Palestine and increase access to information concerning democratic reform. In our view, these goals are related. We believe that a strong, diversified private sector has a critical role to play, not only in Palestine's economic development but also in its political development by ensuring that the Palestinian government is accountable, responsive and effective.

The papers that follow examine how the Palestinian executive, legislative, and judicial institutions interact with one another and with the Palestinian private sector. They chart the major milestones in the development of these institutions over the last decade and identify the obstacles that have impeded private sector participation in the democratic process and have adversely affected Palestinian businesses. Based on the work of our team of experts as well as numerous hours of focus groups with stakeholders, the papers conclude by exploring ways of bolstering the effectiveness of the Palestinian government both through the reform of public institutions and through enhanced private sector advocacy and organization.

In order to place these studies in context, this paper provides an overview of the conceptual framework guiding our analysis. It begins by reviewing the principles of good governance that have informed our work, then turns to reviewing some of the unique challenges faced in implementing those principles in Palestine.

## B. Good Governance: Key Principles

A growing consensus has emerged among international development institutions that the quality of governance is at least as critical to private sector growth in developing countries as the enactment of business-friendly legislation. Governance, as the World Bank has observed, is “the exercise of authority in the name of the people.”<sup>2</sup> Good governance has two dimensions – inclusiveness and accountability:

“*Accountability* in a governance process means that those who are selected to act in the name of the people are answerable to the people for their failures, as well as credited for their successes.”<sup>3</sup>

“*Inclusiveness* means that all citizens are equally guaranteed certain basic rights, including equality before the law and the right to participate in the governance process on an equal basis. Conversely, it means the absence of exclusion and discrimination in all citizens' dealings with government.”<sup>4</sup>

---

<sup>1</sup> Throughout this study, by “private sector” we mean all companies, public and private establishments, and household enterprises, including persons engaged in commercial activity as a source of income. As such, this definition applies to any company or establishment that is incorporated and operates to make profits as well as persons dealing in retailing their own accounts.

<sup>2</sup> World Bank, *Better Governance for Development: Enhancing Inclusiveness and Accountability*, 25 (2003).

<sup>3</sup> *Ibid.* at 26.

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

Although, as discussed further below, this study has focused on ways of bolstering the accountability of Palestinian governmental institutions, we have also given consideration to the means of increasing the inclusiveness of governance processes. For example, our analysis of the barriers to accessing the Palestinian justice system and legislative process is informed by a desire to ensure that small and medium enterprises (SMEs), as well as larger businesses, are able to secure the benefits of judicial remedies and to pursue the enactment and enforcement of laws affecting their interests. Indeed, because SMEs often lack the resources and influence to navigate successfully the dysfunctional institutions of Palestinian government, they are likely to be among the primary beneficiaries of clearer channels of accountability. And because groups that tend to be under-represented in the Palestinian political process (such as residents of rural areas, the poor, women, and refugee communities) are more likely to operate smaller businesses, our hope is that gains in promoting accountability will also help to facilitate greater political enfranchisement of these groups.

The focus of our study, however, is on identifying opportunities for strengthening the external and internal accountability of Palestinian governmental institutions. By *external* accountability, we mean the processes through which the general public, the private sector, and civil society exercise oversight over government institutions. By *internal* accountability, we mean the system of checks and balances within the government that ensure the fair and efficient functioning of its institutions. To be sure, systems of external and internal accountability operate best in tandem. For ease of analysis, however, we will examine each in turn.

## **1. External Accountability**

The ability of the Palestinian private sector and other stakeholders to hold their governmental institutions accountable will depend on the advancement of three related goals: transparency, contestability, and capacity. Each is discussed below.

**a. Transparency.** Palestinians must have access to up-to-date and accurate information about government activities, i.e., which persons and institutions are making the decisions affecting them; through which processes those decisions are taken; the content of the decisions; and their consequences (for example, the cost of government programs, their success at achieving policy goals, etc.). As discussed further in the papers that follow, a variety of mechanisms may be implemented to serve these goals.

- i. Within the judiciary, transparency may be facilitated by: clarifying the mandates of different judicial organs and the procedures by which officials are appointed; requiring that decisions be explained in published opinions that are generally and promptly available, and; by making statistics regarding judicial operations (for example docket size and sub-classification of cases) available to the public.
- ii. Within the legislature, measures to bolster transparency include: the release of voting records; the broadcast of legislative debates; the prompt publication, cross-referencing, and dissemination of laws; the clarification of committee mandates, and; the release of data regarding administrative operations.
- iii. Within the executive (presidency and premiership), transparency mechanisms may take many forms, such as the publication of detailed budgets and regular reporting on all aspects of administration to the promulgation of detailed regulations that define

how the executive will exercise its discretion in enforcing the laws, and the holding of public hearings at which the factors informing policy decisions are discussed.

**b. Contestability.** The Palestinian government must operate on the basis of incentives for encouraging government officials to act efficiently, honestly, and in a manner responsive to the needs and concerns of their constituents. Palestinians must have the opportunity to reward officials who are responsible for fruitful policies and practices and to penalize those who are not. The most obvious mechanism for ensuring contestability is elections, but contestability may also be achieved by providing for judicial relief against the government when it acts wrongfully or otherwise in a manner inconsistent with its mandate, the establishment of appeals processes within administrative agencies, and competition between government institutions or subcontractors in the provision of services.

**c. Capacity.** The strength of accountability mechanisms rests not only on governmental action, but also on the capacity of the private sector itself to assess and pursue its interests. In order to play a constructive role in the governance process, the private sector must educate itself regarding the way government institutions operate, it must dedicate resources to defining its policy preferences, and it must organize itself in ways that allow it to become an effective – and responsible advocate for both its interests and the public interest.<sup>5</sup> In this regard, markets support institutions such as chambers of commerce and agricultural and industrial federations may play an important role in augmenting the voice of the private sector in governance processes.

All three of these goals, moreover, are closely linked: the ability to reward or penalize a government official, party, or institution will offer little benefit if Palestinians lack sufficient information with which to evaluate their government’s performance or if they lack the capacity to convey their preferences to it. Accordingly, the recommendations presented in each of our papers undertake to promote all three of these goals.

## **2. Internal Accountability**

The external accountability mechanisms described above should be complemented by systems of checks and balances *within* Palestinian government so that Palestinian public institutions are accountable not only to their constituents, but also to one another. In this context, as well, reform efforts should focus on the goal of promoting greater transparency, contestability, and capacity.

The classic mechanism of internal accountability is the separation of powers among the branches of government. Separation of powers implies more than merely differentiation of roles among the branches; it also refers to the capacity of the three branches to constrain the abuse of power by the other branches. This principle is incorporated into the constitutions of most countries in the world today, including Palestine’s Basic Law. In different systems, however, it manifests itself in different ways: the United States, for example, possesses a strong, independently-elected presidency balanced against a fully separate bicameral legislature, and independent judiciary; France’s system also provides

---

<sup>5</sup> We do not mean, of course, to suggest that a single entity can or should represent the entire private sector within the political process. The Palestinian “private sector” is not monolithic. The different industries, geographic regions, and types of businesses included within it may often have competing interests. Indeed, the articulation of diverse and even conflicting perspectives by the private sector can contribute to the vibrancy of the political process.

for a strong presidency, though the French prime minister is appointed from the ruling party in parliament; Germany, Japan, and India, on the other hand, have embraced a hybrid system of “constrained parliamentarianism”<sup>6</sup> in which the legislature participates in appointing the executive.

Although a full analysis of these and other options is beyond the scope of this short introduction, it bears emphasizing that each system has advantages and disadvantages. For example, while the United States’ system makes it difficult for a single party rapidly to assume control over all three branches of government (by virtue of staggered elections, independent voting for each office, life tenure for federal judges, and other factors), it is vulnerable to deadlock. Indeed, this kind of deadlock has prompted presidents to dissolve uncooperative legislatures in a number of the countries where the US model has been applied.

Throughout the Middle East-North Africa region, the primary obstacle to achieving separation of powers has been the concentration of power within the executive; and Palestine, in this respect, has been no exception. Accordingly, much of the analysis in our study focuses on the factors that have impeded the legislature and judiciary from serving as an effective counter-balance to the executive, as well as being effective institutions in their own right. We examine questions of capacity, such as the limited competence of the Palestinian Legislative Council to analyze policy initiatives by executive ministries and to suggest coherent alternatives of its own. We also examine questions of institutional design, such as the contested mandates of the Ministry of Justice, the Public Prosecutor’s Office and the High Judicial Council in judicial administration.

In addition to strengthening checks and balances within Palestine’s constitutional system, there is also a need for more administrative measures that promote internal accountability. These measures may include: periodic reviews and audits by public institutions of their own operations, or by independent agencies or external auditors charged specially with the task; the narrowing of bureaucratic discretion through the issuance of clear guidelines to the civil service and monitoring compliance with them; and measures to promote the free flow of information between public institutions.

As noted above, however, internal accountability works best when it is complemented by external accountability. In the ideal situation, multiple channels of accountability operate in tandem to promote good governance: the service provider (e.g., a customs agent) is accountable to the policymaker (the Minister of Trade); the service provider is also accountable more directly to citizens (through transparency of decision-making and the availability of complaints and appeals procedures); and the policymaker is accountable to citizens (through direct elections of the President or oversight by other elected representatives). Conversely, the effectiveness of these channels is undermined when power is concentrated in a single branch of government and when access to government officials is unavailable or offered only to certain constituencies.

### **C. Challenges to Good Governance in Palestine**

Although every government faces challenges in establishing and maintaining robust channels of accountability, Palestine’s young public institutions have confronted

---

<sup>6</sup> See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 644 (2000).

particularly onerous – and relatively unique – hurdles to the promotion of good governance. Although Palestine’s political and security predicament is not the primary focus of this study, some aspects of it have had serious effects on reform efforts and bear emphasis here:

*Continuing Israeli military occupation.* Although Israeli military forces redeployed out of Palestinian population centers in 1994 and 1995 – and out of the Gaza Strip in 2005 – they continue to regulate and control movement between Palestinian cities, towns, and villages in the West Bank, as well as Palestinian movement across international borders and between the West Bank and Gaza Strip. Israeli forces also have made frequent incursions of varying duration and destructiveness into Palestinian territory and hold thousands of Palestinians in long-term administrative detention, including scores of government officials. Israel, moreover, has continued to expand its settlements in the West Bank, at the expense of neighboring Palestinian communities, with particularly negative effects on freedom of movement and economic development. These and other aspects of the occupation have affected the capacity of the Palestinian government to enact reforms – constraining, for example, the scope and timing of elections, the construction of new courts, the ability of the police to enforce legal judgments, and even the ability to convene the legislature. They have also affected the legitimacy of Palestinian public institutions, which have been judged on the basis of both their domestic performance and their success or failure in securing changes in the Government of Israel’s behavior.

*Jurisdictional complexity.* Under the Oslo Accords, the Palestinian Authority possesses limited jurisdiction over discontinuous areas of the West Bank and Gaza Strip (WBGs), lacking not only control over its own borders (as noted above), but also functional jurisdiction with respect to a number of issues of significance to economic development (such as the management of water resources, electricity, and electromagnetic frequencies, where Israeli interests are implicated) and personal jurisdiction over Israelis. This jurisdictional complexity has constrained its capacity to establish a stable space for economic activity and to regulate that space in a uniform manner.

*Palestinian political crisis.* Palestinian economic development and governance reform have suffered severe setbacks as a result of the international sanctions imposed on the PA after *Hamas’* victory in the 2006 PLC elections and the subsequent conflict between *Fateh* and *Hamas*, which culminated last summer in *Hamas’* seizure of control in the Gaza Strip and President Mahmoud Abbas’ dissolution of the *Hamas*-controlled Government. In addition to creating damaging instability across the occupied Palestinian territory (OPT), these developments have paralyzed the PA on many fronts, halting progress in enacting and implementing important legislation and shifting attention away from governance reforms to the continuing political crisis.

*Multivalent channels of accountability.* One of the consequences of Israel’s continuing military occupation of Palestinian territory is that the Palestinian government must answer not only to its own constituents, but also to both the Government of Israel (and Israel Defense Forces, which exercise effective control over the WBGs) and to international donors, who have played a critical role in alleviating the humanitarian crisis caused by Israel’s imposition of severe movement restrictions on Palestinians in the WBGs. Conversely, Palestinian businesspeople in the WBGs must turn not only to their own government for necessary permits, facilitation, and information concerning

applicable regulations, but also to Israeli governmental institutions. In some contexts, they have even turned to foreign donors, whose influence on Palestinian politics or Israeli procedures is sometimes greater than their own. These multivalent channels of accountability can have positive consequences, but can also impede the development of transparent public institutions. To cite one example, while international pressure on late President Arafat to cede power to a Prime Minister and the PLC was likely good for Palestinian governance, efforts driven by donors to shift power back to the executive following the *Hamas* victory in the 2006 Palestinian legislative elections have created opaque and duplicative governmental institutions.

---

# 1

## **Palestinian Accountability of the Executive Branch and Shared Powers Within**

---



## A. Introduction

In most modern government systems, the executive branch sets national public policies and ensures their execution and implementation. Its form, however, varies considerably: in some systems, it consists of a single executive where the president is the sole head of the government; in others, a collective executive exists, where the president shares power with a council of ministers headed by a prime minister; still other systems are a hybrid of these two.

In most instances, there is power sharing within the executive branch, even where it consists of a single executive. In *presidential* systems, in which the president is entrusted with all executive and administrative powers and functions, the president delegates considerable powers to his or her cabinet. In *parliamentary* systems, the council of ministers is entrusted with most executive and administrative functions and answers to the president. In most systems, moreover, the council of ministers answers to the legislative branch.

In Palestine, the executive branch consists of two heads: the President and the Council of Ministers. The President exercises limited executive functions. Real power is concentrated in the Council of Ministers. The Council of Ministers answers to both the President and the Palestinian Legislative Council (PLC).<sup>7</sup>

This paper takes a look at the interplay between the executive branch and the other two branches, particularly in view of PA's obligation under Article 21 of the Palestinian Basic Law to govern in accordance with free market principles.

## B. General Background for the Principle of Separation of Powers<sup>8</sup>

Separation of powers is one of the most important constitutional principles of democracies. It concerns the functional specialization and organic separation between the three branches: legislative, executive and judicial. States adopt and follow relatively clear directions in handling and administering the differences between these branches. Such directions emanate from the necessity for respecting the powers of each branch and their specialized functions, while at the same time refraining from committing acts that may detract or diminish the powers and functions of the other branches.

The principle of separation of powers is premised on the ideal and principle of preventing any one of the three branches from having exclusive power or contravening the powers of the other branches. The principle embodies an ideological and political objective: limiting the powers of leaders and potential infringements between the branches. The separation of powers principle underlies two diametrically opposed notions: the first is distancing the parliament from the administration (council of ministers) and its executive leadership; and the second is distancing the judiciary from both the parliament and the executive leadership. The intent is to permit checks and balances to operate among the

---

<sup>7</sup> Ahmad Abu Daiah and Jihad Harb, "Problems of Separation of Powers in the Political System: Executive Branch, President and Council of Ministers", Amman, Transparency and Accountability Coalition, Ramallah, Palestine, 2006, page 3 (Arabic).

<sup>8</sup> Jihad Harb, "Separation of Powers within the Framework of the National Budget for the Palestinian National Authority", Miftah, the Palestinian Initiative for Promotion of Global Dialogue and Democracy, Ramallah, Palestine, 2006, pages 11-12 (Arabic).

branches with relative harmony where neither branch usurps power nor contravenes constitutional principles.<sup>9</sup>

The principle of separation of powers is a constitutional principle whose primary objective is safeguarding freedom and preventing the exercise of control in a manner that threatens freedoms. To achieve this aim, many political philosophers sought to find formulations for the distribution of powers among the various institutions or branches of a state and created the notion of checks and balances. This principle does not manifest itself in the same way in all countries nor do they experience it to the same degree. Accordingly, the form of separation of powers embraced by different states has hinged on the particular challenges to which each has been obliged to respond. Generally, the principle of separation of powers is reflected constitutionally in most nations. Some systems seek an organic separation while others strive to have both functional and organic separation. Some seek a strict separation while others seek a soft one based on cooperation between the respective branches. Therefore, the nature of the separation differs from one political system to the other. In parliamentary systems, the separation is soft while it is more absolute in presidential systems.<sup>10</sup>

The presidential system may take one of two forms. The first form is where the president is elected directly by the people and becomes head of both state and government. This means no separation between the powers of the president and those of the prime minister and as such the president nominates the ministers. He also has the right to remove them from office. These ministers do not constitute a council of ministers, as in the parliamentary system. They constitute a cabinet.

The second form is one where the president and the council of ministers are separated, but many inter-relationships exist, as discussed in this paper. Where this form is applied, there is greater separation among the three branches. The legislative branch is independent, and the president, though head of state, has no right to convene the parliament. No minister may be a member of parliament. In addition, the judicial branch is functionally independent and judges are elected. They have an independent legal framework.

The parliamentary system is based on striking a balance between the executive and legislative branches. The separation between them is softer than in the presidential system. Thus, the council of ministers answers to the parliament on all actions whereby the parliament may hold the council of ministers accountable and hold hearings to discuss government policies. The parliament has the right to give a vote of confidence in the council of ministers. In return, the executive branch may convene the parliament or suspend its sessions.<sup>11</sup> In the parliamentary system, it is sometimes possible to combine ministerial posts and parliamentary membership. Additionally, the executive branch

---

<sup>9</sup> Maurice DeFourjet, "*Political Institutions and Constitutional Law*", in Arabic, translated by George Saed, the University Association for Studies, Population and Distribution, Beirut, Lebanon, 1999, page 111.

<sup>10</sup> Alzhar Baouni, "*Lectures in Constitutional Law and Political Systems*", College of Law and Political Science, University of Tunis, Tunisia, 1996, pages 13-19.

<sup>11</sup> Aziz Kayed, "*Separation of Powers in the Palestinian System*". Aman, Coalition for Transparency and Accountability, 2005, Ramallah, Palestine, page 13. (Arabic).

prepares the national budget and presents it to the parliament. It presents its agenda to the parliament to obtain a vote of confidence.<sup>12</sup>

### **C. Development of the Political System in the Palestinian Authority**

Since its establishment in 1994, the Palestinian political system has undergone several metamorphoses. This section focuses on two of the most significant: the implementation of the Oslo Agreements and the amendment of the Basic Law in 2003 to introduce the premiership.

#### **1. The Political System in the Oslo Agreements**

The Palestinian Authority was established pursuant to the Declaration of Principles on Interim Self-Government Arrangements signed on September 13, 2003 ("DOP"). The details regarding the establishment of the Legislative Council were stated in the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip signed on September 28, 1995 ("Interim Agreement").

These Palestinian-Israeli agreements constitute the general and legal framework underlying the establishment of the Palestinian Council, its functions, and the parameters of its powers. The Council is to exercise its powers once a general political election had been held in the West Bank (including Jerusalem) and the Gaza Strip. According to the DOP, an aim of Palestinian-Israeli interim negotiations was to establish a Palestinian Interim Self-Government Authority.<sup>13</sup> It further states that the jurisdiction of the Council would include the West Bank and Gaza Strip, which are deemed one "single territorial unit".<sup>14</sup>

Article III of the DOP states that "[i]n order that the Palestinian people in the West Bank and Gaza Strip may govern themselves according to democratic principles, direct, free and general political elections will be held for the Council...". However, under the Interim Agreement, the functions of the Palestinian Council and the Ra'ees [president] of the PA were separated. Article I (1) of Annex II to the Interim Agreement, the Protocol Concerning Elections, states that "direct, free and general political elections will be held for the Council and, simultaneously, for the Ra'ees of the Executive Authority." The separation in the elections of the two branches (legislative and executive) is regarded as one of the aspects of the Oslo agreements that has had the most beneficial effect on the Palestinian democratic process.

#### **2. Powers of the Council**

The council and president were to be elected by Palestinian residents of the West Bank (including East Jerusalem) and the Gaza Strip for an interim period not exceeding five years from the date of signing of the Gaza-Jericho Agreement on May 4, 1994. The powers of the Palestinian Authority during the interim period are defined in the Palestinian-Israeli Interim Agreement, which vests legislative authority in the Palestinian Council and executive authority in the president ("Ra'ees").

---

<sup>12</sup> For further details on the principle of separation of powers and its function in adapting a political system, see, Abdul Ghani Basiouni, *Political Systems*, University House, Beirut, Lebanon, 1998 (Arabic); Numan Khatib, *Introduction to Political Systems and Constitutional Law*, Culture House for Publication and Distribution, 1999, Amman, Jordan, (Arabic); and Mohammed Kamel Leila, *Political Systems: State and Government*, Dar Al Nahdah, Beirut, Lebanon, 1969, (Arabic).

<sup>13</sup> See, Article I of the DOP.

<sup>14</sup> Ibid, Article IV.

The "Interim Government" enjoys civil powers related to education, culture, health, social welfare, police and tourism, among others. Article XVIII of the Interim Agreement specifies the legislative powers of the Council, granting it the power to enact laws and secondary legislation including rules, regulations and instruction.<sup>15</sup> The president signs laws and may, at the same time, initiate legislation and introduce it before the Council. The Council may issue rules and regulations.<sup>16</sup> The PA deviated from this last principle when it vested the power to issue rules and regulations with the Council of Ministers, a step reflecting the trend in all Arab countries.

Executive powers granted to the Palestinian Council, under the Interim Agreement, are exercised, on behalf of the Council, by a committee known as the executive authority headed by the elected Ra'ees of the PA. Its members shall all be from the elected "legislature" except for 20% of the total who may be appointed from outside the Council to exercise executive powers and participate in government functions.<sup>17</sup> The Palestinian Council enjoys executive powers to "...formulate and conduct Palestinian policies and to supervise their implementation, to issue any rule or regulation under powers given in approved legislation and administrative decisions necessary for the realization of the Palestinian self-government...".<sup>18</sup> These powers further include employing staff, legal action and suing, entering into contractual agreements and contracts, maintaining registers for births, deaths, population, and all other related records. The Council may issue licenses, certificates and related documents.

Foreign relations were excluded from the scope of the Council's powers including the establishment of embassies, consulates, attaché offices in foreign countries. The Council was also precluded from accepting the diplomatic representatives of other nations who would perform diplomatic functions in the West Bank or the Gaza Strip. However, pursuant to Article (IX) (5) of the Interim Agreement, the PLO may conduct negotiations, sign economic agreements, agreements with donor countries.

Under the Palestinian-Israeli agreements, the PA may also have an independent judiciary, courts and tribunals.

### **3. Nature of the Political System under the Palestinian-Israeli (Oslo) Agreements**

The Palestinian political system defined by the Oslo accords is a hybrid system. As in the presidential system, the president is directly elected by the people and may not dissolve or remove the Council. As in parliamentary systems, the government is held accountable before the legislature. As in "semi-presidential" systems, moreover, the cabinet is accountable to the president, though in the system implemented under the Oslo accords the president exercises the functions usually reserved for a prime minister.

The Interim Agreement further provides: "(a) The Ra'ees of the Executive Authority shall be an *ex officio* member of the Executive Authority"; (b) "All other members of the Executive Authority, except" the President will members of the Council appointed by him subject to approval of the Council; and (c) the President may appoint persons (constituting 20% of the Council members) who are not elected members of the Council

<sup>15</sup> See, Article XVIII of the Interim Agreement.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, Article V.

<sup>18</sup> *Ibid.*, Article IX.

to exercise executive powers, but who may not vote.<sup>19</sup> Thus, the President of the PA is elected and at the same serves as the head of the council of ministers, which is rare in political systems.<sup>20</sup> This is rare in democratic political systems,<sup>21</sup> especially because a president in a democracy where electoral systems operate may face impeachment due to high treason charge or disloyalty.

#### **4. The Political System following the 2003 Amendments to the Basic Law**

The President of the PA requested that the Legislative Council amend the Basic Law to establish the position of prime minister. In the same session, the Council adopted the amendment in two consecutive readings during one session convened in Ramallah on March 3, 2002, and submitted the change to the President for review. During its session held on the March 16, 2003, at the request of the President, the Council adopted the amendment in its third reading. The amendment was published in the *Official Gazette* on March 19, 2003.

The Basic Law adopted the principle of cooperation between the three branches (executive: presidential and premiership; legislative; and judicial) and the notion of checks and balances. Under the Basic Law, it stipulated the exercise of power by each branch in harmony with the other two whereby no one branch may usurp power from other branches nor exercise absolute powers without checks and intervention where necessary. Article 2 of the Basic Law states that the Palestinian people are the source of all authority and shall exercise its authority by means of the legislative, executive and judicial authorities and in accordance with the principle of separation of authorities.

A close read of the provisions of the Basic Law indicates that its application of the principle of separation of powers is relatively soft, not absolute. The legislative functions are shared between the legislature and executive: it is possible for a legislator to serve both in the Legislative Council and the Council of Ministers; the Legislative Council approves the agenda of the Council of Ministers; it grants a vote of confidence; the Council of Ministers is jointly accountable to the Legislative Council and President; the Legislative Council may withhold its vote of confidence from any minister or from the entire Council of Ministers; and the Council of Ministers prepares the budget and submits to the Legislative Council for approval.

The Basic Law does, however, provide for a fully independent judiciary. The Constitutional Court reviews the constitutionality of laws, rules and regulations. Judges

---

<sup>19</sup> *Ibid*, Article V.

<sup>20</sup> The late President Jamal Abdul Nasser assumed the leadership of the Council of Ministers following the June 5, 1967 war. The same was true when the late President Anwar Sadat assumed a similar function towards the end of his presidency. He exercised emergency powers during the war which resulted in the suspension of Article 131 of the 1964 Constitution related to the formation of cabinet consisting of the prime minister, members of parliament and ministers which states that the prime minister manages the functions of government and heads the council of ministers. See, Ihab Zaki Salam. "*Political Checks on the Functions of the Executive Branch in the Parliamentary System*", Alam Al-Kitab, 1983, p.165. (Arabic).

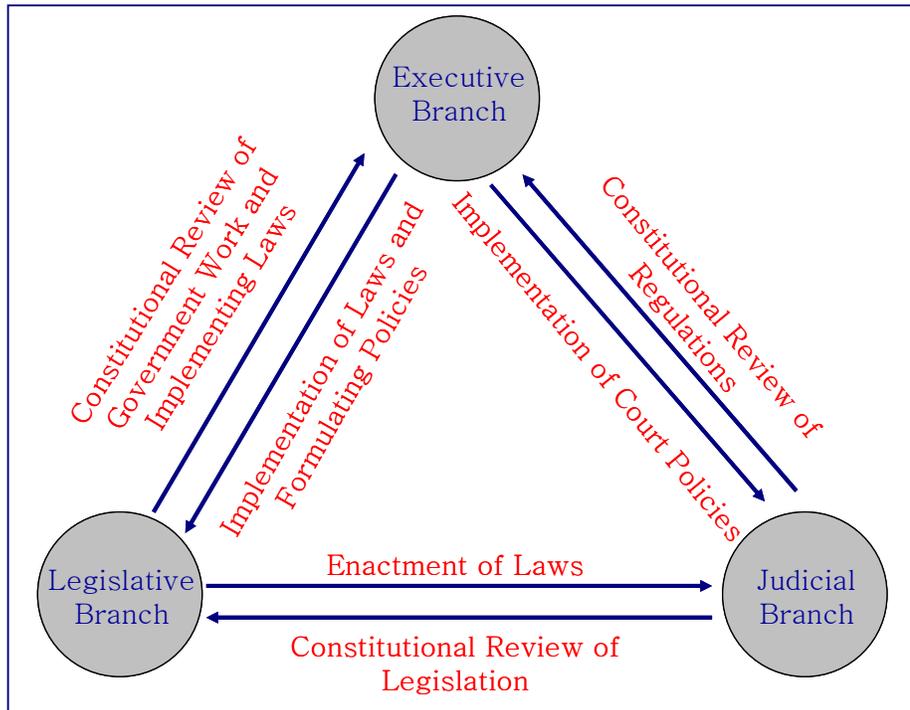
<sup>21</sup> The late President Jamal Abdul Nasser assumed the leadership of the Council of Ministers following the June 5, 1967 war. The same was true when the late President Anwar Sadat assumed a similar function towards the end of his presidency. He exercised emergency powers during the war which resulted in the suspension of Article 131 of the 1964 Constitution related to the formation of cabinet consisting of the prime minister, members of parliament and ministers which states that the prime minister manages the functions of government and heads the council of ministers. See, Ihab Zaki Salam. "*Political Checks on the Functions of the Executive Branch in the Parliamentary System*", Alam Al-Kitab, 1983, p.165. (Arabic).

are fully independent. No branch may intervene in the exercise of judicial powers or the administration of justice.<sup>22</sup>

### 5. Relationship between the Three Branches in the PA

The diagram shown below reflects separation of powers between the three branches in the PA.

**Relations between the Three Branches**



The Palestinian political system is best understood as a hybrid system. In several respects, it resembles a presidential system: the president is directly elected, has veto power over legislation, and the power to declare a state of emergency. But, as in a parliamentary system, members of the legislature may serve on the Council of Ministers, and the government is accountable to the legislature. The table below shows the main characteristics of the Palestinian principle of separation of powers as articulated in the Basic Law compared with the approach taken presidential, parliamentary, and hybrid (in this case, French) systems.

<sup>22</sup> *Ibid*, note 2, pp. 12-13.

**Table 1: Characteristics of the Palestinian Political System Compared to other Modern Political Systems Concerning Separation of Powers<sup>23</sup>**

Functions and Authorities	Presidential System	Parliamentary System	Hybrid (French System)	Palestinian System
<b>1) Election of the President</b>	President is directly elected by the people. The legislature may not remove the president except in narrowly defined circumstances.	Executive is elected by the legislature, which may remove him or her.	President is elected directly by the people, and the parliament may not hold him or her accountable except in high treason cases. President is responsible for executive institutions and safeguards their interests.	President is elected directly by the people (Article 34 of the Basic Law). May be removed by a decision of the Constitutional Court due to loss of legal capacity; decision must be certified by a 2/3 vote of the legislature.
<b>2) Formation of Government</b>	President heads the government and the entire executive branch. He or she appoints the ministers, but must obtain the vote of the parliament for each ministerial nominee.	President does not enjoy real power; the function is ceremonial. The president appoints the prime minister following consultations with parliamentary parties. The prime minister forms the government and presents it to the parliament for a vote of confidence without any intervention from the president.	President tasks the head of majority or the majority party in parliament to form the government following consultations with parliamentary parties to select the prime minister. The prime minister forms the government in consultation with the president who makes appointment decisions after obtaining the confidence of the parliament. The president may remove ministers at the recommendation of the prime minister. The prime minister and ministers take the oath of office before the parliament. The president may remove the prime minister if the government resigns.	The Basic Law is silent regarding a consultation process with parliamentary parties before appointing the prime minister. The prime minister forms the government and presents it to the legislative council for a vote of confidence (Article 65). The prime minister and ministers take the oath of office before the parliament. The president may remove the prime minister.
<b>3) Dissolution of the Parliament</b>	President may not dissolve the parliament.	The parliament is empowered to dissolve itself.	President may dissolve the parliament.	President of the PA may not dissolve the parliament.
<b>4) Combining the Membership of the Cabinet and the Parliament</b>	Combining membership in the council of ministers and the parliament is not permitted.	Combining membership in both the council of ministers and the parliament is possible.	Combining membership in the council of ministers and the parliament is not permitted; a member of parliament loses membership one month after becoming minister.	A member of parliament may become a minister. The Basic Law is silent on any permission or prohibition.
<b>5) Accountability</b>	Ministers are accountable to the president.	Ministers and prime minister are accountable before the parliament.	The prime minister is accountable to the president for his actions and those of his government. The president presides over the weekly meeting of the government. Ministers are accountable before the prime minister in respect to their ministries and their functions. They are jointly and severally accountable to the parliament.	The prime minister is accountable to president for his actions and those of his government. The ministers are accountable to the prime minister for the actions of their ministries. The prime minister and the members of his government are jointly and severally accountable before the parliament. (Article 74) of the Basic Law.

<sup>23</sup> *Supra*, note 5, pp. 14-16.

Functions and Authorities	Presidential System	Parliamentary System	Hybrid (French System)	Palestinian System
<b>6) Defense and Foreign Powers</b>	The President is the chief of the armed forces, and he is responsible for foreign affairs and appoints members of the diplomatic corps.	The prime minister in cooperation with council of ministers is responsible for defense and foreign policy.	The president has primary responsibility for external security and defense. Sets foreign policy and conducts foreign relations in cooperation with the government. The government is responsible for national security.	The President of the PA is chief of the armed forces (Article 39 of the Basic Law). The President appoints and removes foreign diplomats. He receives foreign diplomats to the PA (Article 40 of the Basic Law). The council of ministers is in charge of national security (Article 69) of the Basic Law.
<b>7) Proposing Legislation and Veto Power</b>	Initiation of legislation is a function of the parliament; the president has no role. The president has the right to object to any legislative text during periods set by parliament.	Draft legislation is initiated by the council of ministers or the parliament. No member of the executive branch has the right to veto legislation enacted by parliament.	Draft legislation is initiated by the council of ministers or the parliament. The president has the right to object to any legislative text during periods set by parliament. President may suggest amendments to the constitution. President may communicate directly with parliament.	The council of ministers may initiate draft legislation to parliament (Article 70 of the Basic Law) and so can members of parliament (Article 56 of the Basic Law). The president of the PA has the right to object to any legislative text (Article 41) of the Basic Law.
<b>8) Government Operations</b>	All government actions are subject to the supervision of the president aided by members of the government.	The prime minister and the minister have oversight over government operations.	The government is responsible for running its affairs in coordination with the president. The president approves appointment of senior members of government.	The prime minister has oversight over the actions of government (Article 68 of the Basic Law). The council of ministers sets policies and presents the government agenda for the approval of the legislative council (Article 69 of the Basic Law).
<b>9) Declaration of Emergency Situation</b>	The president announces the state of emergency for a term specified by parliament.	The council of ministers announces the state of emergency for a term specified by parliament, subject to its approval, and may extend the term.	The president announces the state of emergency.	The president of the PA announces the state of emergency for thirty days and may renew for a like term after obtaining the consent of 2/3 of the legislative council (Article 110 of the Basic Law).

Overall, the constitutional amendments of 2003 achieved three important goals: (1) strengthening the legislative council's power to exercise checks and balances, thus furthering the principle of separation of powers; (2) enlarging the scope of powers enjoyed by the prime minister and the council of ministers and holding them accountable before the legislative council; and (3) contracting the powers of the president, setting limits as stipulated in Articles (38) and (63) of the Basic Law. The late President Arafat embraced some of these changes, which moved the Palestinian political system towards a parliamentary system, but did not endorse the severe restrictions on his powers. Those restrictions, in any event, were not truly tested given that he passed away during a political crisis with Israel as a result of which most facets of PA life were paralyzed. His successor, President Mahmoud Abbas, who took office in 2005, infringed the Basic Law

when he issued decrees to have executive agencies like the Palestine Broadcasting Corporation report to him directly instead of to the Legislative Council; he also had the governors, National Security Forces, and the Land Authority, among others, report to him directly. At the same time, the legislature itself contravened the Basic Law when it directed the security forces and the civil services to report to the President directly instead of the Legislative Council. In these instances, checks and balances failed and the constitutional court did not act within its mandated powers to stop constitutional infringements by annulling the decrees or deeming the legislation unconstitutional.

#### **D. Power Sharing in the Palestinian Executive Branch**

The Executive branch in the Palestinian Authority consists of two heads, the President of the PA and the Prime Minister. Although the PA is headed by the President, real power is concentrated in the government. The government is accountable to the President and the Legislative Council. The election of the President directly by popular vote endows the President with the same legitimacy as that enjoyed by the Legislative Council and gives him the power of oversight over the Prime Minister's action. As described below, the President has exclusive powers in some areas, whereas in others the President shares power with the Council of Ministers, the Legislative Council and the judiciary.<sup>24</sup>

##### **1. Powers of the President of the Palestinian National Authority**

The powers of the President have, after the amendment of the Basic Law in 2003, are enumerated and accordingly, subject to constitutional limitations. Article (38) and (63) specify which powers the President must share with the other two branches, which may be exercised through delegation by the other branches, and which may only be exercised with confirmation by the legislature. That said, the President also continues to enjoy powers that may be exercised without reverting to any of the branches, as well as acting with full independence. These powers are listed in Annex 1. The constitutional powers of the President, as stipulated in the Basic Law and subsequent laws, are summarized as follows:<sup>25</sup>

1. The President is commander-in-chief of the armed forces (Article 39).
2. The President shall sign and promulgate laws within thirty days from referral of such laws to him after approval by the Palestinian Legislative Council. If he has no reservations concerning the law, then the law will be deemed to be promulgated. If the President refers a draft law back to the Palestinian Legislative Council, such a draft law will be submitted for discussion and if ratified by a two-thirds majority of the Council members, it shall be deemed law and then be promulgated in the official gazette (Article 41).
3. The President shall have the right to grant a special pardon and to alter sentences, but other general pardons, including criminal pardons, may be granted only by law (Article 42).
4. The President shall be entitled to implement exigent resolutions, which will have the force of law when the Council is not in session. Such resolutions shall be submitted to the

<sup>24</sup> *Supra*, note 1, page 3.

<sup>25</sup> Khalil Shakaki and Jihad Harb, "Towards an Open Palestinian Political System: a Reversion to the Presidential System is a Return to Instability", Palestinian Center for Policy and Survey Research, Ramallah, Palestine, 2005, pp. 2-3 (Arabic).

Council in its first meeting after issuance; otherwise it shall be deemed null and void. If such a law is submitted to the Council, but not approved by Council, it shall be deemed null and void (Article 43).

5. When national security is under threat on account of war, invasion, armed rebellion or natural disaster, a state of emergency of no more than thirty days may be declared by the President and may be extended for another thirty days upon a resolution of the Council, requiring approval of two thirds of its members (Article 110).

6. The President is empowered to appoint the Prime Minister and task him with forming the government, as well as with removing him and accepting his resignation (Article 45); in addition, the President may initiate an investigation against the Prime Minister (Article 75), ask the Prime Minister to convene the Council of Ministers (Article 45), and demand from the Prime Minister, and every other Minister, a financial declaration of all assets along with any debts (Article 80).

7. Subject to the PLC's confirmation, the President is empowered to appoint the heads of public agencies that enjoy financial and administrative independence, including the Palestinian Monetary Authority (Article 93) and the head of the General Diwan for Financial and Administrative Supervision (Article 96).

8. The President is empowered to appoint Palestinian National Authority representatives to states and international organizations and to terminate their missions (Article 40). The President is also empowered to appoint the Attorney General (Article 107).

9. In a number of laws that were enacted subsequent to the 2003 Basic Law amendments, the PLC assigned the President "additional" powers. They are specifically related to security issues, civil service and the judiciary. They consist of the following:

#### **a. Civil Service**

Pursuant to the laws regulating the function of certain public agencies and bodies (see, Annex 1), the President enjoys the power to appoint the heads and/or members of these and other agencies, including: the Illicit Gains and Anti-Corruption Agency; the Social Security and Civil Service Agency; the Central Elections Committee; the Central Bureau of Statistics; the Water Authority; the Standards Institute; the Directorate on Civil Affairs; and the Energy Authority.

#### **b. Oversight of the Security Forces**

Notwithstanding that the Basic Law did not grant executive powers over the security forces to the President, such powers having been granted to the Prime Minister and the Minister of Interior. Laws regulating security matters gave the President significant powers, including the appointment of the Chief Director General of the National Security,<sup>26</sup> the head of the General Intelligence Service and his Deputy,<sup>27</sup> the Director of Officers Matters in the Security Forces,<sup>28</sup> and the Director General of Internal Security.<sup>29</sup>

#### **c. Judicial Matters**

<sup>26</sup> Article 8 of the Law on Security Forces No. 8 of 2005.

<sup>27</sup> *Ibid*, Article 14; and Article (4) and (6) of the General Intelligence Law No. 17 of 2005.

<sup>28</sup> *Ibid*, Article 16.

<sup>29</sup> *Ibid*, Article 11.

In addition to the provisions of the Basic Law on the powers of the President concerning the judiciary (like certifying capital punishment decisions or appointing the attorney general), the President is empowered to appoint judges as stipulated in Article (18) of the Judicial Authority Law No. 1 of 2002. He enjoys powers to remove judges, to second judges to other countries or international organizations as well as to form the court responsible for adjudicating elections-related matters.

10. Article (43) of the Basic Law empowers the President of the PA to issue decrees having the force of law in urgent matters that cannot wait for the Legislative Council to convene. However, these decrees must be approved by the Legislative Council in its first session following the decree. In the event that the Legislative Council does not convene or is unable to convene, the President may rely on this constitutional text to issue decrees having the power of law. This is the case at the present time: the Legislative Council is unable to convene a new session, hold an extraordinary session, or even a regular session because one third of its members are not present (they are absent due to imprisonment by the Government of Israel due to their membership in *Hamas*). There is disagreement on the interpretation of Article (16) of the By-Laws of the Legislative Council. The current First Deputy Speaker, who is a *Hamas* member, objects to having President Abbas convene the annual session of the Legislative Council; he is hesitant to convene an extraordinary session of the Legislative Council for fear that this occasion may be used to call for legislative elections. *Hamas* worries that such a call may go through when put to vote since it would not have absolute majority because one third of its members are “absent” – imprisoned by the Government of Israel.

#### **Text of Article 16 of the By-Laws of the Palestinian Legislative Council**

The Legislative Council shall convene its first annual regular session at the invitation of the President of the PA; it shall meet for two [consecutive] sessions, the term of each is four months, the first commences during the first week of march and the second during the first week of September; or be convened for extraordinary sessions by invitation from the Speaker or at the request of the Council of Minister of 1/4 of the members of the Council. In the event that the Speaker does not call for a meeting, the meeting is deemed convened at the time and place specified by the request of its members of the request of the Council of Ministers.

The continued suspension of the operations of the Legislative Council for prolonged periods means that the President is assuming all legislative functions and is issuing decrees which have the power of law. This will solidify the political divisions between the West Bank and the Gaza Strip and have long-term legal implications, as two governments are emerging.

11. The presidential power to voice objection regarding legislation being enacted by the Legislative Council vests the President with powers that safeguard checks and balances and oversight over the Legislature and act as a safety valve to prevent excess in use of power by the legislature. Additionally, the President enjoys the power to sign legislation into law before publication and prior to going into force as stipulated in Article (41) of the Basic Law and Article (71) of the By-Laws of the Legislative Council.

The right to object under Article (41) of the Basic Law is tantamount to vesting the President with *veto* power over any legislative draft. If the President objects, a two-thirds majority of the Legislative Council is required to override the "*veto*". The Legislative

Council must muster a two-thirds majority; otherwise the law cannot be enacted or remains a draft until this majority is reached.<sup>30</sup>

The Legislative Council's actions show that this rule was contravened when the President's comments were accepted as ordinary changes, without them having been approved by the requisite two-thirds majority vote by the members of the Legislative Council. This occurred during the review of the Charitable Associations and Civil Society Organizations Law of 2000 and the General Elections law of 2005.

12. The President is empowered to oversee the investments of the Palestinian Authority as stipulated in a Presidential Decree issued 10 January 2000 creating the Palestine Investment Fund ("PIF") as a government company wholly owned by the PA. The By-Laws of the PIF were approved by another Presidential Decree issued on 14 August 2002. The PIF aims to consolidate all PA investment and commercial activities under one umbrella where one person manages the PIF as its General Manager and serves as the Economic Advisor to the President.

The PA's participation in business activity or ownership of companies, in whole or in part, constituted a point of contention in both political and investment circles especially since such participation, ownership, and management was not disclosed. There was limited information made public on the value or profit generated or regarding how it was distributed, which was particularly problematic because the money was not transferred to the national treasury. At the same time, there was tension with the private sector because the PA's

**Excerpts from the Letter Sent by the PA to the International Monetary Fund Presented during the Donors Meeting Held in Lisbon in June 2002 "The Economic and Financial Framework for the Palestinian Authority"**

Certain revenues have been used to cover current expenditures in the budget. Most revenues however, were either saved or invested in commercial activity through the Palestine Commercial Services Company ("PCSC") in the West Bank Gaza Strip or abroad. The PCSC is wholly owned by the PA. Its accounts were audited by Saba & Co., member of Deloitte Touche Tohmatsu International in February 2000. Assets were estimated to be around 345 million US Dollars as at 31/12/1999, of which 292 million US Dollars are shares in other companies. The primary four holdings are: 30% tourism resort in Jericho; 100% cement company ownership; 35% in Palestine Cellular ("Jawwal"); 8% in Paltel. These investments constitute one-half of the company's assets. In 1999, PCSC earned profits amounting to 77 million US Dollars. What is relevant here is the disclosure of this information. We are following the highest levels of transparency in accordance with international standards. We are preparing a strategy to privatize the PA's ownership in the PCSC where it becomes a private sector entity. We understand that transformation from public to private enterprises is a time consuming process and, standing alone, is not sufficient. We must therefore take many corrective measures especially from the legal point of view. We must encourage competition in the market. We are keen to divest our smaller holdings in other companies especially the ones listed on the exchange. To carry out the divestment and privatization strategy, we have held consultations with the private sector. This privatization strategy, it is noteworthy, is premised on issues to be raised during the National Economic Conference to be held on 30/5/2000.

<sup>30</sup> Jihad Harb, "Developing the Rules for the Operations of the Legislative Council: Towards a law for the Legislative Branch", Muwatin, the Palestinian Society for the Study of Democracy, 2006, Ramallah, Palestine, pp. 35-36 (Arabic).

business involvement in the cement and fuel products industries was tantamount to establishing a monopoly. The international donor community was equally critical of such investments. In response the PA assured them in 1996 that it would move forward with divestment, but until 1998 no concrete steps had been taken. As a consequence, the international community, especially the World Bank and the International Monetary Fund, put more pressure on the PA, especially in light of the financial crisis experienced by the PA following the second *Intifada*.

As a consequence, the late President Arafat made a decision to establish, in 2000, the Palestine Investment Fund to manage PA investments and assets instead of the PCSC. The PIF was to consolidate such investments and manage them with transparency. The launch of the PIF was slowed down by the then prevailing political conditions and the Israeli incursions into the PA. The PA was simultaneously asked by the international community to introduce significant reforms especially at the financial level. The Minister of Finance, Dr. Salam Fayyad, activated the PIF by creating the legal framework for its operations and embarked on setting transparent systems for financial reporting of the public funds that the PIF would be managing. The By-Laws of the PIF state that the entity would adopt procedures for transparent management, rules for dealing with conflicts of interest and fighting corruption, management and employment policies, mechanisms for selecting investments, reporting, auditing, valuation of assets, and the appointment of an independent board of directors.<sup>31</sup> While these steps were designed to provide a measure of comfort, the Basic Law was contravened when the PIF was established by decree instead of by operation of Article (21) (1) of the amended Basic Law.

On 28 February 2003, a preliminary report was issued on the investments of the PA prepared by Standards and Poor. The report listed the investments of the PA and confirmed the establishment of the Board of Directors with independent management dedicated to managing the assets of the PA. On 4 April 2004, the first annual consolidated PIF financial statement was published. This report made a final consolidation of the PA investments. It revealed that the PA was invested in these investments: telecommunications; cement; and electricity for a total investment of 900 million US Dollars. The PIF answers to the President of the PA. Such a structure, however, precludes the Legislative Council from holding the PIF accountable. The same is true of its Director-General.

#### Article 21 of the Basic Law States

1. The Palestinian economy shall rest on the principles of free economy, and the Executive Authority may establish public companies as regulated by law.
2. Freedom of economic activity is guaranteed, and the law shall provide regulations to monitor and set forth limits of these activities.
3. Private ownership is guaranteed and shall be safeguarded; and it shall not be possible to expropriate estates and movables except as dictated by public interest and subject to law and in consideration of fair compensation or by judicial order.
4. Expropriation shall not be allowed except in accordance with a judicial decision.

<sup>31</sup> Mohammad Abu Sharkh, "Step on the Road: Financial Reforms in the Palestinian National Authority During a Year and a Half mid 2002 - end 2003", Center for Media and Information, Ramallah, Palestine, 2004, pp 16-19 (Arabic).

## 2. Powers of the Council of Ministers<sup>32</sup>

Since the 2003 amendments to the Basic Law, the Council of Ministers is the other arm of the Executive Branch in the PA, next to the Presidency. Under the Basic Law, the powers and functions of the Council of Ministers have been enumerated. They are summarized below.<sup>33</sup>

1. The Prime Minister has the power to appoint members of the Council of Ministers according to Article (65) of the Basic Law. He may introduce changes by removing, or accepting the resignation, of any minister or appointment of one to fill vacancies. He may appoint a deputy in his absence (Article 68). He may initiate investigations against any minister (Article 75) and oversee the functions of the ministries and public agencies as well as preside at meetings of the Council of Ministers (Article 68).
2. The Council of Ministers sets national public policies within the scope of powers enumerated in the Basic Law and within the parameters of the ministerial program approved by the Legislative Council, and it is responsible for implementing public policies (Article 69).
3. The Council of Ministers initiates legislation and presents drafts to the Legislative Council, and issues the rules and regulations for enacted legislation (Article 70).
4. The Council of Ministers is responsible for reviewing and adopting the organizational structure for all ministries and public institutions, supervising these institutions, ensuring that they execute the laws properly, establishing or dissolving public agencies and appointing the heads of these agencies and supervising them (Article 69).
5. The Council of Ministers prepares the national budget and presents it to the Legislative Council for approval (Article 69).
6. Each minister is responsible for proposing the budget of its ministry and overseeing spending at the ministry. The minister is responsible for ensuring that the ministry carries out its functions properly. A ministry may prepare draft legislation and submit it to the Council of Ministers for review before passing it to the Legislative Council.

Under Article (21) of the Basic Law, the Council of Ministers, through the ministries and agencies in charge of regulating economic and commercial activity, must seek to ensure that free market principles are applied in the formulation of policy. The primary responsibilities of these ministries and agencies include issuing rules and directives to ensure that the private sector has sufficient and clear information on registration of companies and doing business rules, as well as adopting proper standards for production and manufacturing and consumer protection. Because the Council of Ministries oversees the budgets prepared by ministries and agencies that provide public services to the private sector, the budgets ought to have provisions for continuous upgrading and improvement of these services to ensure that the capacity of civil servants are improved.

The following section outlines some challenges that face the Council of Ministers and the private sector. Such challenges require formulation of policies and adoption of programs aimed at enhancing reforms in the near future.

---

<sup>32</sup> For more details on the powers of the Council of Ministers, see, Ahmad Abu Daiah and Jihad Harb, *Ibid.* note 1.

<sup>33</sup> *Supra*, note 20, page 2.

## 1. Initiation of Legislation

Despite the reforms started in 2002, the Council of Ministers has yet to formulate a legislative action plan to set priorities regarding which laws must be adopted to continue enabling the private sector. Moreover, the Council of Ministers has not been able to provide comments to the Legislative Council during the review process regarding inconsistencies in the legislation. As a consequence, laws were enacted whose policy direction is likely to have a negative impact on the private sector or which resulted in adverse effects when implemented. Most ministries or agencies that directly regulate private sector activity have not been able to make effective contributions to business legislation during the review stage. This caused greater distrust between these public agencies and the private sector. In addition, failure to prioritize private-sector-oriented legislation caused the Council of Ministers and the Legislative Council to enact legislation that affects only a small portion of society or that is unresponsive to private sector needs. To date, the business legislation package advanced by the private sector institutions back in 1994-1995 and endorsed by the Ministry of National Economy has not been enacted in its entirety.<sup>34</sup>

Because a legislative action plan has not yet been developed, many laws advocated by the Council of Ministers or the international community remain pending. In addition, the amendment of laws inconsistent with the Basic Law is incomplete. The Council of Ministers nevertheless has yet to present a comprehensive scheme to review all enacted laws for consistency with the Basic Law. Because many of the laws requiring amendment address issues relevant to the business community, the effect on the private sector has been serious.

## 2. Issuance of Implementing Rules and Regulations

All enacted legislation requires implementing rules and regulations known as secondary legislation, the purpose of which is to assist in interpreting and properly applying the law. The Council of Ministers, which is responsible for adopting such rules and regulations under the Basic Law, has made limited efforts in this regard. During the period 1996-2005, the Legislative Council enacted twenty-eight laws related to the business sector and economic affairs (as well as eight laws related to the national budget), out of a total of ninety-one enacted laws passed – representing only about 31% of the laws. However, only one set of regulations – those implementing the Telecommunications Law of 1996 – was adopted by the Council of Ministers. Another set of regulations was prepared for the Arbitration Law of 2003, but it has not yet been adopted nor published. Most laws implicating the private sector continue to lack implementing rules and regulations, including foundational legislation like the Judicial Authority Law and the Civil and Commercial Procedures Law.<sup>35</sup>

## 3. Adoption of National Economic Policies

The Council of Ministers has not yet defined clear national economic and financial policies, a pre-requisite for the adoption of investment policies that could improve economic development and upgrade the capacity of the human resources in the PA. It has also failed to articulate policies that deal with the dependence of the Palestinian economy on the Israeli economy or to prepare for a gradual transition away from such dependence.

<sup>34</sup> For a more comprehensive analysis of these issues, see, “*Developing a Palestinian Roadmap for Legislative Reform in the Business Sector*”, Al-Mustakbal Foundation for Strategic and Policy Studies, Ramallah, Palestine, September 2006.

<sup>35</sup> *Ibid*, page, 21.

In addition, it has yet to formulate policies for guiding the energies of Palestine's work force, which is growing substantially each year, or to consult with the PLC regarding this issue. Instead of proposing a plan for national development, it has been focused on managing crisis.<sup>36</sup> The absence of national economic policies resulted in an overly narrow conception of development and the inability of the Council of Ministers to deal with most growth sectors. It was unable to exercise oversight over the actions of ministries and agencies that work with the business sector. Efforts became *ad hoc* and unilateral in nature thus precluding system-wide changes and improvements.

Most importantly, there was no direction or guidance with respect to public monopolies, whose operations contravene Article (21) of the Basic Law, which states that the Palestinian economy is based on free market principles. The PA itself has engaged in monopolistic commercial activities including cement and fuel and petroleum products importation from Israel, among others. For example, the Petroleum Authority has tightened the reins on private sector entities whose business is the production of oil by-products, attempting to ensure that it alone would market these by-products, at large discounts lacking any legal basis or justification. This policy has enabled the Petroleum Authority to generate high profits while disregarding the needs of both the private sector and consumers.<sup>37</sup> The absence of a national economic policy resulted in over exploitation of critical sectors like energy and electricity and caused the PA to reach import agreements at terms and prices that are not necessarily favorable for the Palestinian consumer, private sector, or economy in general.

#### 4. Concession Policy

A concession policy may be an instrument in the hands of the government and policy makers to draw private sector participation into national economic development plans. A concession is granted under special rules and regulations for the management of services while safeguarding competition. The private sector brings in financing, management, and know-how to operate large national projects including infrastructure at concessionary terms benefiting the private sector, the public sector and consumers.<sup>38</sup>

The concession granted to the Palestine Telecommunications Company to establish, manage and operate fixed and cellular telephony is one of the most notable granted by the PA. The 15 November 1996 License/Concession Agreement provided concessionary terms to the company to operate fixed telephony for twenty years and cellular telephony for five years from the date operations commenced or whenever the number of cellular customers reached 120,000, whichever occurred first. The terms of the license, however, were not made public. In addition, the process for selecting the operator at that time lacked transparency: it was not clear what competition rules and terms the PA followed in the selection of the provider; and the License Agreement was not presented to the Legislative Council for approval in accordance with prevailing laws. These problems underscored the PA's failure to develop a policy for granting concessions or an overall economic development plan – failures it has yet to remedy.

---

<sup>36</sup> *Supra*, note 1, page, 21.

<sup>37</sup> *Supra*, note 26, page 20.

<sup>38</sup> Maen Bargouthi, "Concession Contracts: the Case of the Palestinian Telecommunication Company, PLC", The Palestinian Commission for Citizens Rights, Legal Reports Series No. 35, Ramallah, Palestine, 2004, pp 1-3 (Arabic).

## 5. Competition Policy

Competition policy is a crucial tool of economic regulation, defining parameters for the conduct of business activities by both private and government-owned enterprises to ensure that they do not harm overall economic development. Competition policy may affect pricing, productivity, and market forces based on supply and demand and are critical to the proper functioning of a free market. The PA's failure to formulate a clear competition policy and its support for (or acquiescence in) the establishment of public monopolies (like the Palestine Commercial Services Company, Ltd ("PCSC") cement and petroleum operations<sup>39</sup>) and private monopolies (as in the telecommunications sector, as described above) have harmed the Palestinian economy, creating unfavorable conditions for consumers.

## 6. Implementation and Enforcement of Laws by the judiciary

The strength of the Palestinian judiciary has been undermined by the executive branch's unwillingness to respect its decisions and by the slow execution of court judgments by police and security forces – often because of conflicts with their own political, financial or even social interests. Some examples of executive overreaching into judicial affairs include the following:

- a. What is effectively a parallel judiciary has been established in the legal departments of ministries, in courts annexed to the municipalities and in legal units operated by the security forces. Decisions taken in these kinds of proceedings undermine the formal judiciary because they tend to be informal and have limited enforceability.
- b. The Executive Branch places pressure on judges during litigation in an effort to influence the outcome. Judgments are sometimes entered against parties in contravention of the law or procedures, especially if a party to the litigation is a member of the security forces or related to them or other influential members of the executive branch.
- c. The powers and functions of the Ministry of Justice and of the Higher Judicial Council remain a source of dispute, especially with respect to administrative supervision over the courts and the public prosecutor's office. The annual budget of the Higher Judicial Council is subject to approval by the Ministry of Finance before it is considered by the Legislative Council, which creates conflicts. Moreover, the number of judges remains insufficient and subject to financial allocation by the executive branch.<sup>40</sup>
- d. The judiciary rarely reviews the constitutionality of laws enacted by the Legislative Council or decrees passed by the President or the Council of Ministers. The powers of the Executive Branch (President and Council of Ministers) have gone unchallenged. This has caused the Executive Branch to overreach its powers without being held in check.

## E. Recommendations

Separation of powers in the PA is a relative and flexible notion. In principle, the relationship between the three branches is based on cooperation and mutual checks and balances— principles enshrined in the Basic Law. However, this text must be supported

---

<sup>39</sup> In 2002, the PCSC's operation underwent scrutiny and consolidation. Its assets were transferred to a fund named the Palestine Investment Fund which is a more transparent operation with improved financial and management systems.

<sup>40</sup> Aisheh Ahmad, "Reforming the Palestinian judiciary", Center for Media and Information, Ramallah, Palestine, 2004, pp 14 (Arabic).

by legislation that reflects this constitutional principle. The political culture of separation of powers needs considerable development.

The adoption of the following recommendations would place important checks on the powers of the PA's executive branch and, accordingly, would help to remedy some of the institutional dysfunctions that have stymied private sector development:

1. Examine all laws in force that contravene Article (69) of the Basic Law, especially with respect to public agencies, their reporting channels and the appointment of their chairs and boards.
2. Adopt a clear mechanism for interaction between the Council of Ministers and the President's Office under the scope of Article (46) of the Basic Law and create the proper balance for their respective responsibilities.
3. Ensure that the President respects general constitutional principles when exercising his or her power to bypass the legislature by issuing legislation by decree.
4. Ensure that the Council of Ministers adopts a coherent national legislative agenda in tandem with the PLC.
5. Ensure that all draft laws are supported by explanatory notes.

## Annex 1

### Table of Powers of the President of the PA as Stipulated in the Basic Law Amended in 2003 and Other Legislation<sup>41</sup>

Issue	Power	Source
<b>Powers of the President under the Basic Law</b>		
1. Security	President is the chief of the Palestinian armed forces	Basic Law (Article 39)
2. Appoint and remove the prime minister	President appoints the prime minister and tasks him with forming the government; he may remove him or accept his resignation; he may ask the prime minister to convene the council of ministers	Basic Law (Article 45)
3. Initiating investigations against the prime minister	President may initiate investigations against the prime minister in relations to alleged criminal activity committed while performing his duties	Basic Law (Article 75)
4. Call for a council of ministers meeting to convene	President may call for a council of ministers meeting to convene	Basic Law (Article 45)
5. Appoint the governor of the Palestine Monetary Authority	President appoints the governor of the Palestine Monetary Authority subject to the approval of the Legislative Council	Basic Law (Article 93); Law No. (18) of 2004 amending the Palestinian Monetary Authority Law No. 2 of 1997.
6. Attorney General	President appoints the Attorney General at the recommendation of the Higher Judicial Council	Basic Law (Article 107)
7. Head of the Financial and Administrative Supervision Diwan	President appoints the head of the Financial and Administrative Supervision Diwan subject to the approval of the Legislative Council;  President appoints the head of the General Diwan for Financial and Administrative Supervision at the recommendation of the council of ministers subject to the approval of the Legislative Council	Basic Law (Article 96);  Law on the General Diwan for Financial and Administrative Supervision No. (15) of 2004 (Article 4)
8. Issue laws and veto power to object	President may issue laws after being ratified by the Palestinian Legislative Council within (30) thirty days from referring them to him. Otherwise, the President may object within the same specified period, together with his comments and basis for objections, or else, the laws shall be considered approved and enacted immediately and shall be published in the <i>Official Gazette</i> .  If the President objects to any proposed text within the specified term and subject to the stated conditions as stipulated above, and the Council debates it and passes it again with a two third majority, the proposed law shall be deemed ratified and shall be published in the Official Gazette.	Basic Law (Article 41)
9. Limited pardon power	The President enjoys limited pardon power for judicial sentences and may reduce them. Full pardon shall only be rendered by special legislation.	Basic Law (Article 42)
10. Accountability	The prime minister is accountable to the president for his actions.	Basic Law (Article 74)
11. Foreign policy	President appoints representatives of the PA to other countries, international jurisdictions and nominates Palestinian representatives to serve in the PA foreign offices; he enjoys the right to remove them. President receives credentials of representatives of foreign countries to the PA.  New PA foreign representation offices may be established or closed based on a recommendation from the minister and decision of the President.	Basic Law (Article 40);  Law on the Diplomatic Core No. (13) of 2005 (Article 7);  Law on the Diplomatic Core No. (13) of 2005 (Article 2)

<sup>41</sup> See, Jihad Harb, “*The Future of Political Reform in the PA under the Hamas Government*”, the Palestinian Center for Political and Survey Research, Ramallah, Palestine, 2006, pp.7-9.

Issue	Power	Source
12. Declaring state of emergency	President declares a state of emergency for 30 days renewable for another 30 days following the approval of a two-third majority of PLC members.	Basic Law (Article 110)
13. Certifying capital punishment decision	President certifies capital punishment decisions issued by courts.	Basic Law (Article 109)
14. Issuing decrees and decisions	The Basic Law does not grant express authority to the President to issue decrees other than those during the state of emergency; however, it does not outright disallow it. President during times of extreme urgency may issue a decree having binding legal effect if the PLC is not able to convene any sessions. However, the PLC must approve the decree otherwise the decree will not have binding effect.	Basic Law (Article 43); Basic Law (Article 38)
<b>Laws issued following the 2003 Basic Law Amendments permitting the President to issue decrees and decisions</b>		
15. Appoint senior civil service staff	President appoints senior civil service staff based on the recommendation of the cabinet.	Civil Service Law No. (4) of 1998 and amendments of 2005 (Article 17)
16. Appoint head of public agencies	President appoints heads of public agencies with a recommendation from the cabinet.	Civil Service Law No. (4) of 1998 and amendments of 2005 (Article 16)
17. Appoint National Security Chief	President appoints national security chief. This appointment is for three years renewable for an additional year.	National Security Law No. (8) of 2005 (Article 8)
18. Appoint Intelligence Director	President appoints general intelligence director. This appointment is for three years renewable for an additional year. The president appoints intelligence director with ministerial status.	National Security Law No. (8) of 2005 (Article 14)
19. Appoint the Director General for National Security	President appoints the director general for national security. This appointment is for three years renewable for an additional year.	National Security Law No. (8) of 2005 (Article 11)
20. Appoint Security Forces Chief	A security forces department will be established under the regulations of this law, its chief is appointed by the president.	National Security Law No. (8) of 2005 (Article 16)
21. Appoint head of the Illicit Gains and Unjust Enrichment Authority	President appoints the head of the Illicit Gains and Unjust Enrichment Authority recommended by the Council of Ministries, the declaration names the chief and his deputy.	Illicit Gains Law No. (1) of 2005 Article (3)
22. Appoint head of the Civil Service Retirement Authority	President issues a declaration to appoint head of the Civil Service Retirement Authority recommended by the Council of Ministries; the declaration names the chief and his deputy.	Civil Service Retirement Law No. (7) of 2005 (Article 56)
23. Appoint members of the board of directors of the Civil Service Retirement Authority	Without derogating from the stipulation made in Article 39 of this law, the President may issue a decree to appoint members of the board of directors of the Civil Service Retirement Authority, recommended by the cabinet, the decree names the chief and his deputy and the selection will consider professionals to fill the posts.	Civil Service Retirement Law No. (7) of 2005 (Article 43)
24. Appoint the Central Elections Committee	President appoints members of the Central Elections Committee. The head and secretary general are appointed from the 9 members in the same declaration.	Elections Law No. (9) of 2005 (Article 19)
25. Form the Elections Court	Form the Elections Court recommended by the Higher Judicial Council.	Elections Law No. (9) of 2005 (Article 29)
26. Appoint judges and upgrades them	President appoints judges and upgrades them at the recommendation of the Higher Judicial Council based on: a. appointment, b. upgrade based on duration of service, c. appointment by public prosecutor, d. exchange from neighboring countries.	Judicial Authority Law No (1) for 2002 (Article 18)
27. Confirm removal of judges	President approves removal of judges based on Higher Judicial Council decision.	Law issued by Decree of 2006 (Article 3) amending the Judicial Authority Law
28. Seconding judges to third countries	Higher Judicial Council recommends seconding judges to third countries.	Law issued by Decree of 2006 (Article 3) amending the Judicial Authority Law

Issue	Power	Source
29. Appoint the head of the Judicial Inspection Department	Establish Judicial Inspection Department affiliated with the Higher Judicial Council. President appoints head of Judicial Inspection Department from Higher Judicial Council judges, other members are appointed by the court of appeals.	Law issued by Decree of 2006 (Article 7) amending the Judicial Authority Law
30. Approve the Regulations issued by the Higher Judicial Council	President approves the Regulations issued by the Higher Judicial Council and published in the local newspapers.	Law issued by Decree of 2006 (Article 21) amending the Judicial Authority Law
31. Appoint the Chief Justice and the judges of the Constitutional Court	President appoints the Chief of Justice and the judges of the Constitutional Court after consultation with the Higher Judicial Council and the Minister of Justice. This appointment takes place after a majority two-third vote is obtained from the council of the courts.	Constitutional Court Law of 2006 (Article 5)
<b>Powers Assumed Directly by the President</b>		
32. Issue decrees not stipulated by Law	Presidential decree to restructure the National Security Council. Presidential decree to properly use sand slings. Presidential decree to establish negotiation committee. Presidential decree to establish Palestinian orphans committee Article 1 (establish Palestinian orphanage committee to manage its funds and develop it until the PLC passes a law in this regard). Presidential decree setting the criteria for appointments at ministries and governmental agencies. Presidential decree accepting the credentials of the members of the Municipality of Bethlehem Municipality in regards to Christian quota as criteria for all other municipalities, amended on 29 August 2005. Presidential decree to specify the number of local council members for the Bethlehem municipality and similar cities.	Presidential Decree dated 5 September, 2005; Presidential Decree No. (12) of 2005 dated 30 May, 2005; Presidential Decree No. (6) of 2005 dated 5 March, 2005; Presidential Decree No. (7) of 2005 dated 10 March, 2005; Presidential Decree No. (8) of 2005 dated 10 March, 2005; Presidential Decree No. (9) of 2005 dated 10 March, 2005; Presidential Decree No. (10) of 2005 dated 2 March, 2005
33. Specify the duties and responsibilities of the members of the National Security Council	President specifies the duties and responsibilities of the members of the National Security Council.	Presidential Decree on Restructuring the National Security Council dated 29 September 2005 (Article 3)



---

# 2

## **The Palestinian Legislative Council and Strengthening Democratic Participatory and Pluralistic Civil Society**

---



## A. Introduction

Following the signing of the Oslo Accords by the Palestine Liberation Organisation (PLO) and Israel in 1993, the newly established Palestinian Authority (PA) began the process of developing a transitional government that would allow it to govern over parts of the West Bank and the Gaza Strip. A foundational element of this process was the establishment of the Palestinian Legislative Council (PLC). In early 1996, Palestinians elected their first legislative council representatives, who were mandated by the Oslo Accords to be responsible for legislation, monitoring, and accountability of the transitional Palestinian government. In 2002, the Palestinian Basic Law was signed and came into force, forming a new point of reference for the mandate and powers of the PLC.

Since the PA's establishment, the Palestinian leadership has committed itself to developing a free market economy. However, the PA's economic policies have had mixed results, disappointing the high expectations of the Palestinian public and international investors. The economy's poor performance has largely been a result of continued Israeli restrictions on practically all spheres of Palestinian life and the deteriorating security situation in the Occupied Palestinian Territory (OPT). This uneven track record has reflected heavily on the private sector and on the investment climate: the volume of investments in 1998 - even before the outbreak of the *Intifada* - dropped by 52 percent of its 1992 level.<sup>42</sup>

The PLC, following several periods of reform, has slowly assumed a role in ensuring that the executive fulfills its functions regarding policy and legislation development. Efforts to develop a transparent and robust legislative framework for economic development in Palestine have been undermined, however, by the PLC's inability or unwillingness to exercise effective oversight over the executive branch. In order for a free-market economy to flourish, laws and policies that facilitate economic and commercial activity must be in place to protect the private sector.

The PLC plays a critical role in the development of laws and economic policies that directly affect the private sector. There is widespread recognition that the legal infrastructure for business must be further developed if an environment amenable to economic development is to be established, and the PLC continues to be an important address for advocacy with respect to changes in policy and legislation affecting private sector interests. But while legislation important to Palestinian private sector development has been enacted and drafts of a number of new business-friendly laws are near completion, there is still much work to do, especially in ensuring that stakeholders have access to the legislature and the opportunity to raise legitimate concerns during the discussion of new laws and policies directly affecting them. Central to the achievement of this goal is the implementation of greater separation of powers between the three branches of government – and, in particular, the assumption by the PLC of a more robust role in the development of business-related legislation and in overseeing the executive branch's implementation of the laws.

This paper focuses on the structure and development of the PLC, institutional hurdles to private sector engagement with the legislature, and current weaknesses in private sector

---

<sup>42</sup> World Bank, *Institutionalizing and Accelerating Economic Reforms: A Case Study in Palestine*, accessed at [http://info.worldbank.org/etools/mdfdb/docs/Theme5a\\_ConceptNotes\\_cpsdproposal2FinalWeb.doc](http://info.worldbank.org/etools/mdfdb/docs/Theme5a_ConceptNotes_cpsdproposal2FinalWeb.doc).

engagement. It concludes by offering recommendations on improving the PLC's accessibility and to bolster the private sector's capacity to influence economic policies, identifying key areas for reform of the legislative process.

## **B. Mandate, Powers, and Relationship to other Governmental Institutions, Oslo Accords**

The Palestinian-Israeli Agreements (The Declaration of Principles" (DOP) of 1993 and Interim Agreement signed on 28 September 1995) are the legal framework that established the Palestinian Legislative Council "PLC" through public political elections in the West Bank (including Jerusalem) and Gaza Strip. The DOP specifies that "one of the purposes of the negotiations is to establish a Palestinian interim self-government authority represented by a Palestinian elected council to exercise its powers and authorities in certain areas (to be subsequently agreed) for an interim period of five years."<sup>43</sup>

The Agreement assigns the PLC jurisdiction and control over the West Bank and Gaza Strip excluding matters to be discussed in negotiations concerning "permanent status" issues particularly, Jerusalem, settlements, the military sites and the Israelis residing (as settlers) in the occupied territories<sup>44</sup>.

The implementation of the agreement in May 1994 resulted in the Israeli withdrawal from most of Gaza Strip (85% of its area) and from Jericho in the West Bank, as well as the establishment of a Palestinian Authority with full authority over the areas under its jurisdiction except with respect to external security, foreign affairs, borders and settlements. After the conclusion of the Interim Agreement, the Israeli army redeployed in November and December 1995 from the populated areas in the West Bank (excluding East Jerusalem and Hebron). The Interim Agreement provided that the PA would be comprised of the elected PLC and the president of the executive authority, which together would exercise authority during an interim period not to exceed five years from the date of signing the Gaza-Jericho Agreement on May 4 1994. The PLC would be comprised of 82 members (it was agreed later to increase the number to 88 members) elected directly by the Palestinian people in the West Bank, East Jerusalem and Gaza Strip.

## **C. The Powers of the PLC According to the Interim Agreement**

Article (18) of the Interim Agreement confers on the PLC the power, within its territorial and functional jurisdiction, to adopt legislation, which it defines to include basic laws, regulations and other legislative acts.<sup>45</sup> The agreement also grants the PA President the power to initiate drafts laws for consideration by the PLC, to promulgate laws adopted by the PLC, and to issue regulations "relating to any matters specified and within the scope laid down in any primary legislation adopted by the [PLC]."<sup>46</sup>

The Interim Agreement also imposes restrictions on the PLC's legislative powers. Article 18(4) provides that "legislation which amends or abrogates existing laws or military orders, which exceeds the jurisdiction of the Council or which is otherwise inconsistent

---

<sup>43</sup> See article (1) of the "Declaration of Principals", see: the Israeli-Palestinian Agreement for a transitional period concerning the West Bank and Gaza Strip, the "Declaration of Principals" (Oslo) concerning the arrangements of the interim self- government, the Palestinian Documentary Series No. 6, Jerusalem: Alquds Centre for Media and Communications, 1996, p 5.

<sup>44</sup> See article (4) of the "Declaration of Principals" *Ibid*, p 6.

<sup>45</sup> See article (18) of the Israeli-Palestinian Agreement for a transitional period, *Ibid*, p 24.

<sup>46</sup> *Ibid*, p. 24.

with the provisions of the DOP, this Agreement, or of any other agreement that may be reached between the two sides during the interim period, shall have no effect and shall be void *ab initio*.” It also prohibits the PA President (“Ra’ees”) from promulgating such legislation.<sup>47</sup> In addition, Article 18(6) provides that the Israeli side may inform a joint legal committee established by the agreements of any legislation to which, in its view, the restriction in Article 18(4) applies. The legal committee is to review, as soon as possible, the legislation submitted to it<sup>48</sup>.

Despite its slow start, the PLC made significant advances in improving its lawmaking capacity and coordinating with various executive bodies. It established standing orders detailing the mechanisms, tools and procedures of its parliamentary activities, as well as permanent parliamentary committees for oversight, review of draft laws, and discussion of issues referred to them by the PLC or the Speaker.<sup>49</sup> Bound by the Oslo Accords, the PLC can only legislate and reform laws in those limited areas in which the PA has been authorised to legislate, with comprehensive legal reform constrained by the fact that these laws do not bind Palestinians living in East Jerusalem and Israel or settlers residing in the West Bank.<sup>50</sup> Additionally, given the continuing political unrest and the ongoing effects of Israeli occupation, legislation has often been developed to address political fluctuations on the ground rather than the social and economic needs of the Palestinian people.

The interim nature of the Oslo Accords, and the delay in final status negotiations (the conclusion of which were to end the interim period) also contributed to the slow development of the legislative process. For example, the Oslo accords did not provide for the re-election of PLC members, since the agreements were intended to last only throughout the five-year interim period. As a result, the first elected PLC remained in office without re-election for a period of 10 years. Only following changes to the Palestinian election law were terms of office designated and the requirement of regular elections every four years stipulated. Additionally, although the Interim Agreement transferred to the PA certain powers related to economic development, the Protocol on Economic Relations between the Government of Israel and the PLO (the Paris Protocol),<sup>51</sup> signed in 1994, allowed Israel to maintain effective control over critical resources such as electricity, international communications, land, water, trade, and

---

<sup>47</sup> Ibid., paragraph (4) of Article (18).

<sup>48</sup> Ibid., paragraph (6) of Article (18). Regarding the common legal committee see article (7) of the Gaza Strip and Jericho agreement with its annexes 4 May 1994 (official translation), the Palestinian national liberation movement, p. 11.

<sup>49</sup> Palestinian Independent Commission for Citizens Rights (PICCR), *2004 Annual Report*. Article 48 of the PLC By-Laws identifies the following permanent committees: Jerusalem, Land and Settlements, Refugee Affairs, Political, Legal, Budget and Financial Affairs, Economic Affairs, Interior, Education and Social Affairs, Human Rights and Public Freedoms, Natural Resources and Energy. Three additional committees were added following the 2006 PLC elections, including the Domestic Governance Committee, the Social and Health Affairs Committee, and the Detainees Committee.

<sup>50</sup> Birzeit University Institute of Law, accessed at [http://lawcenter.birzeit.edu/iol/en/index.php?action\\_id=63&PHPSESSID=10e6e93bc986e6753fc669139432aa06b676f637/](http://lawcenter.birzeit.edu/iol/en/index.php?action_id=63&PHPSESSID=10e6e93bc986e6753fc669139432aa06b676f637/).

<sup>51</sup> The Paris Protocol defines the rules and procedures governing relations between Israel and the PA during the interim period, designating four areas of interim self-government for the PA in the economic sphere: fiscal competence, monetary competence, labour relations, and trade and trade related questions. This included such powers as licensing and supervising industrial and commercial activity, the commercial register and the register of companies so that Palestinians no longer required permits from the Israeli Civil Administration, as was previously the case. A Palestinian Monetary Authority was also established, despite the fact that the PA could not issue its own currency.

customs. As such, the Palestinian economy has remained inextricably linked to Israel, stymieing the possibility for real independent economic development.

In 2002, amidst growing criticism regarding the corruption and lack of transparency in the Palestinian government, a major effort to reform Palestinian public institutions was undertaken, allowing for significant changes in the legislature. Of particular importance was the ratification of the Palestinian Basic Law, a transitional constitution that delineates a clearer separation of powers between the executive, judicial and legislative branches of government than that of which the Oslo Accords had provided. The adoption of the Basic Law marked a transition towards a system of checks and balances that have limited the possibility of overreaching by a single governmental branch, significantly limiting the powers of the office of the President, in particular.

#### **D. The Duties of the PLC According to Basic Law**

Following elections in 1996, the PLC assumed control over the drafting of the Palestinian Basic Law, which had previously been undertaken by the Legal Committee of the PLO. The Basic Law functions as a transitional constitution during the Interim period, remaining in force until the implementation of a new constitution upon the establishment of a Palestinian state.<sup>52</sup> In 1997, the draft Basic Law was presented for a first reading at the PLC, and subsequently went through three readings during the year, with then President Arafat persistently refusing to comment on the law at the time. It was finally signed into law and promulgated by the President in 2002. Following international and national pressure to undertake wide-scale reform of the PA, the Basic Law was amended in 2003 to create the post of PA Prime Minister and to define the Prime Minister's relationship to the President and the PLC.<sup>53</sup> The amendment to the Basic Law allowed for a significant shift in the concentration of power from the office of the President to the Prime Minister and Cabinet. This was particularly important as there were no mechanisms within the legal framework of the PA whereby the President was accountable to the elected legislature, whereas the position of Prime Minister is subject to PLC oversight.

The Basic Law calls for the advancement of free market principles and provides for a government based on a clearer separation of powers amongst the executive, legislative, and judicial branches. It contains a variety of checks and balances to prevent a single branch of government from dominating another. According to the Basic Law, the President has 30 days to consider whether to sign or reject laws passed by the PLC and submitted to him. The President also has the power to issue decrees in exceptional cases when the PLC is not in session; these decrees, however, must be presented to the PLC upon their next session, where they can be either ratified or rejected. If the decree is not presented to the PLC or is rejected once presented and reviewed, the decree no longer has the power of law. Title Four of the Basic Law stipulates that the PLC assumes its legislative and oversight duties as prescribed in standing orders<sup>54</sup> created by the Council for the execution of its responsibilities. Title Four delineates the process for considering and passing legislation, in addition to the right to question government ministers and the ability to vote no confidence in the government as a whole or in any Minister. The PLC is also assigned the power to approve the annual budget prepared by the executive, to

<sup>52</sup> Palestinian Basic Law, Amended March 2003, Article 115. Work on drafting a permanent constitution effective upon the creation of a Palestinian state has been halted since 2003.

<sup>53</sup> Ibid., Preamble.

<sup>54</sup> Ibid., Article 47.

overturn a Presidential veto of proposed legislation by a two-thirds vote, and to amend the Basic Law with a two-thirds vote. However, despite these checks and balances prescribed in the Basic Law, the PLC has to date failed to employ its powers effectively to ensure the Executive fulfills its duties in the realm of legislation and policymaking, as detailed below.

Article (47) of the Basic Law provides that the PLC is to assume both legislative and supervisory duties, as elaborated in the institution's bylaws. In addition, the PLC is to exercise a number of financial functions. Each of these roles is described in further detail below:

### **1. The Legislative Role of the PLC**

The enactment of legislation is the main role and responsibility of the PLC. The legislative process may be summarized as follows:

**Propose draft laws:** Draft laws may be presented to the PLC either by the Council of Ministers (Article 70 of the Basic Law), by a member of the PLC (Article 65 of the By-Laws of the PLC, Article 56 of the Basic Law), or by any committee of the PLC's committees (Article 67 of the By-Laws).

**Amend and approve of draft laws:** This phase includes the procedures and decrees specified in the PLC by-laws (Articles 65-72), which grant the PLC absolute authority to amend draft laws at a number of different points in the legislative process: during public discussion and during the first, the second and the third readings of the draft. Amendments must be presented by the PLC, or by one fourth of the members of the PLC, prior to submitting the draft law to the President.

**Overturn presidential veto of proposed legislation:** According to Article 41 of the Basic Law, the PA President may return draft laws to the PLC within 30 days of their enactment. The President must offer comments describing his reasons for rejecting the laws. If the President offers no comments on draft laws, they are deemed to be issued and will be published in the official gazette. In the event the President rejects the submitted laws within the specified timeframe, the PLC may override the President's veto with a two-thirds vote.

**Review the laws issued by presidential decrees:** According to Article 43 of the Basic Law the PA President may issue decrees that have the power of law, but only in exceptional circumstances when the PLC is not in session and delay in the issuance of the law would be problematic. These decrees, however, must be presented to the PLC in their first session following their issuance.

### **2. The Supervisory Role of the PLC**

Article 74(3) of the Basic Law states that the Prime Minister and members of his Government shall be jointly and severally responsible to the PLC. The PLC's role in supervising the executive branch's fulfillment of its duties is a critically important means of ensuring the Government's accountability. In exercising this function, the PLC may utilize a range of instruments specified by the Basic Law and the PLC By-Laws, including:

**Debating and questioning:** Article 56 of the Basic Law affirms that every member of the PLC is entitled to call the Government, individual ministers, and persons with similar capacity to appear before the legislature for debate and discussion of their actions and policies.

**Declaring confidence in the government:** Article 66 of the Basic Law indicates that the PLC shall hold a private session for a vote of confidence in the Government after hearing and debating a written ministerial statement outlining the Government's policy and agenda. Similarly, Article (4/15) of the PLC By-Laws states that no minister may exercise his duties unless he obtains the confidence of the PLC.

**Declare no confidence in the government:** Article 57 indicates that ten of the members of the PLC shall have the right, after adequate probe and investigation, to propose the withdrawal of confidence from the Government or from any minister, and Article (58) of the Basic Law and Article 48 of the PLC By-Laws provide that the PLC may form an ad hoc committee or delegate one of its committees to investigate matters of public interest or any public institution.

**Call ministers and officials to parliamentary committees:** The PLC By-Laws affirm the supervisory role of the PLC and its committees. Article 57 indicates that the committees are entitled to request information or clarifications from any minister or official in the Palestinian Authority concerning matters presented to it or within its jurisdiction.

### 3. The Financial Role of the PLC

**Approve the annual general budget of the Palestinian Authority:** The PLC's power to review the annual general budget is a key element of its role in supervising Palestinian public funds. The Government is to submit its draft budget to the PLC at least two months prior to the commencement of the fiscal year. The PLC, in turn, holds a special session to discuss the draft. It may either approve it with amendments before the commencement of the new fiscal year or return it to the Government within a period not exceeding one month from the date it was presented, along with comments. The Government then responds to these comments and returns the draft to the PLC for approval. Voting on the draft is undertaken chapter by chapter, and re-allocations of budgetary amounts as between chapters are prohibited absent agreement between the PLC and the Executive Authority (Article 61 of the Basic Law). If the general budget is not approved before the commencement of the new fiscal year, spending is to continue on the basis of monthly allocations of one-twelfth of the previous budget for each month. (Article 90 of the Basic Law).

**Approve the final accounting of the budget of the Palestinian Authority:** The government is to present the final accounting of the budget to the PLC within one year from the fiscal year-end. The PLC then votes on it chapter by chapter. (Article 62 of the Basic Law).

**Legislate regarding taxes and duties:** General taxes and duties may be imposed, amended, or repealed only by law. (Article 88 of the Basic Law).

**Approve the General Development Plan:** According to Article 59 of the Basic Law, the General Development Plan is subject to approval by the PLC.

**Approve public loans** and approve projects that entail spending public funds. (Article 92 of the Basic Law).<sup>55</sup>

### E. Internal Structure and Legislative Process

The PLC initially began as an eighty-eight seat assembly, which in June 2005 was expanded to 132 seats to form a more representative council. It is elected from sixteen electoral districts in the West Bank, including East Jerusalem, and Gaza Strip. The new

---

<sup>55</sup> See Ahmad Abu Deya and Jihad Harb, the disputes of the separation of powers in the Palestinian political system, the legislative authority case, Ramallah, the coalition for transparency "Aman" 2007, p 3-9.

election law of 2005 transformed the electoral process from a majority system to a mixed system, whereby half of the seats are allocated to parties based on proportional representation and the other half to individual candidates on the basis of majority voting by district. The Council of Ministers, which is chosen by the Prime Minister, must be approved by an absolute majority of the PLC.

According to the Basic Law, the PLC elects a chairman, two deputies and a Secretary General. As noted below, in order to facilitate the work of the PLC, specialised committees are created composed of elected Council members to focus on specific issues within the Government and relevant legislation. In 2004, as part of reforms undertaken to address inconsistencies in the legislative process, the Special Interim Committee was formed to assess the flaws within the general structure of the legislature. They reported on numerous inconsistencies, particularly regarding the internal functioning of the PLC, and suggested a reform development plan; however, it is unclear if any of these reforms were actually implemented following the 2006 PLC elections.

The legislative process currently in effect continues to be cumbersome and non-systematic. When draft laws go through multiple readings, as permitted by PLC by-laws, there can be as many as five readings, as reviewed below:

**Phase One (General Discussion):** The legislative process commences with the presentation of a report by the committee with responsibility for the subject matter at issue. During this phase, the PLC discusses the issue and votes on the general principles of the draft law. Once such principles are approved, the draft is returned to the specified committee for a more thorough review. (Article 65 and 67).

**Phase Two (First Reading):** According to paragraph 1 of Article 68 “during the first reading the draft law shall be discussed article by article after reciting it along with the amendments presented herewith, the voting shall be on every article then voting on the draft entirely”.

**Phase Two (Second Reading):** A second reading of the draft law is to be concluded no more than one month following the approval of the draft in the first reading. This phase is limited to consideration of amendments presented by the members of the PLC or the Government, which the PLC votes on.

**Phase Four (Third Reading):** A third reading may be undertaken on the request of the Council of Ministers or one fourth of the members of the PLC, provided that the application is presented within fifteen days of the second reading, being the period granted to the President to review drafts prepared following the second reading. This phase, too, is limited to consideration of proposed amendments.

**Phase Five (Fourth Reading):** A fourth reading may be undertaken if the President of the Palestinian Authority rejects the draft law. The discussion of the law at this stage is limited, however, to the amendments proposed by the President. According to article 41 of the Basic Law “If the President refers back a draft law to the Palestinian Legislative Council subject to the terms and provisions of Clause (1) above, such draft law shall be submitted for discussion and reconsideration, and if ratified once again by a two-thirds

majority of the Council members, it shall be deemed as law and shall be promulgated in the official gazette”<sup>56</sup>.

#### **F. Committees of the PLC**

PLC Committees operate in three main areas: legislation, oversight, and the review of plans, programs, agreements and treaties. Committees deal with issues referred to them by the PLC Chairman, as well as draft laws, oversight, and initiatives raised by the committee chairperson or members. Often, the work of these committees is driven by the agendas of their members, rather than by clear legislative policy developed by the Executive Authority.<sup>57</sup> The lack of legislative policy has also created an environment in which Committees respond to current or emergency issues, rather than address long-term policy formulation.

Each of the Committees, in addition to holding responsibility for the preparation and review of legislation in their areas of expertise, also monitors the performance of the executive branch to ensure that legislation, laws, plans and policies approved by the PLC are enforced. This is a crucial tool for ensuring that important legislation is not held up at the executive level, but it has been underemployed by the PLC. Committees also study and review plans, programs and agreements and treaties signed by the executive branch and submit recommendations to the PLC for discussion and ratification.<sup>58</sup>

Of the permanent committees established within the PLC, three are of particular importance to the private sector: the Legal Committee, the Economic Committee, and the Budget and Financial Committee. The **Legal Committee** is responsible for issues relating to the Basic Law, laws in general, and the judiciary, in particular drafting and advising on potential legislation. The draft laws are then translated into legal prose, with additional research conducted on relevant issues if necessary. During this phase, civil society organizations, ministries or experts may be engaged to discuss the draft. The Committee also plays an important role in monitoring the activities of the PLC and Ministries.<sup>59</sup>

The **Economic Committee** is primarily responsible for advising on issues related to economic development, including industry, commerce, housing, investments, supply, tourism and planning. It is responsible for monitoring and reviewing legislation, laws, regulations, resolutions and decrees that fall within the economic sphere and submitting recommendations to the PLC accordingly. It plays a significant role in identifying and initiating key legislation that impacts the private sector, as well as probing issues that directly impact the economy, such as the security situation. The **Budget and Financial Committee** is one of the most important permanent committees in the PLC. It is mandated to review draft budgetary laws and ensure consistency in the general budget with governmental activity and financial policy, in addition to reviewing the system of taxation and financial legislation. It is responsible for regulating procedures regarding the preparation, approval and spending of funds of the general budget of the government, as well as budgets related to public institutions and assemblies.

---

<sup>56</sup> See Jihad Harb, development of the PLC functions toward a law for the Legislative Authority, Ramallah, Muwaten the Palestinian Institution for Democracy Study, p25-26.

<sup>57</sup> PICCR 2005 Annual Report.

<sup>58</sup> Palestinian Independent Commission for Citizens’ Rights, 2004 Annual Report.

<sup>59</sup> Abu Amr, Ziad, *The Palestinian Legislative Council: A Critical Assessment*, Journal of Palestinian Studies Vol. 26, No. 4 (Summer, 1997), pp. 90-97

In theory, the PLC Committees are intended to cooperate with relevant agencies within the Executive in order to foster an environment allowing for debate and engagement in policy development. The Ministry of National Economy, the Ministry of Finance, the Ministry of Telecommunications, the Ministry of Labor and the Ministry of Justice all form the counterparts to these three Committees. Committees obtain their information primarily from relevant ministries when drafting laws, and ministries have access to the legislature if they have concerns regarding certain legislation. However, despite the fact that a member from each relevant ministry is included in the committees, there is a lack of defined mechanisms through which these institutions interact, prohibiting systematized policy development. Oftentimes, the executive shows little regard for recommendations made by PLC committees, diminishing the opportunity to review plans, programs and agreements signed by the Executive and to participate in a meaningful manner in the development of public policies.

### **G. Legislative Hurdles to Private Sector Development**

As recognised in a recent report published in 2005 by UNCTAD, empowering national institutions is essential to enhancing the private sector's resilience in the face of crisis.<sup>60</sup> To do so, it is necessary to equip Palestinian decision makers with a range of policy instruments wider than those offered by the Paris Protocol, which has constrained the PA throughout the Oslo process. Concurrently, engagement with the private sector is a priority in order to identify the reforms needed to ensure efficient economic activity and to develop responsive legislative frameworks.

To date, the PLC has failed to construct the legislative framework required for private sector development. At the same time, private sector involvement in the legislative process has tended to be ad hoc and unsustainable. Numerous institutional hurdles within the PA and PLC have made private sector access to the government difficult at best. Despite the ongoing reform process from 1996 till 2005, the government continued to lack transparency, efficiency and effective separation of powers. In particular, the PLC has been plagued with internal dysfunctions that have not only made private sector engagement difficult, but have also detracted from the legitimacy of the institution.

In January 2005, the Special Interim Committee, appointed by the PLC Council Affairs Committee to assess the PLC's institutional shortcomings from an administrative, financial and technical perspective, submitted its first report as part of the PLC's reform and development plan. Among its findings, the Committee included recommendations to enhance the separation of powers between the executive and legislative branch of government, as well as improve the coordination relationship between the two authorities.<sup>61</sup> The PLC reviewed and accepted the recommendations made by the Special Interim Committee, also adopting the proposed structure developed by the Committee to meet the administrative and technical needs of the PLC. However, the structure was never implemented as a result of the political upheavals that occurred following the 2006 PLC elections. As such, institutional problems continue to exist within the legislature, in addition to the ineffective use of checks and balances, the most pressing of which are

---

<sup>60</sup> United Nations Conference on Trade and Development (UNCTAD), *The Palestinian war-torn economy: Aid, development and state formation*, p. 15, UNCTAD/GDS/APP/2006/1, 5 April 2006.

<sup>61</sup> Palestinian Legislative Council, *Reform and Development of the Palestinian Legislative Council*, Report of the Special Interim Committee of the Palestinian Legislative Council Affairs' Committee, Submitted to the Council Affairs' Committee, January 2005.

highlighted below in relation to the private sector and the development of economic legislation.

### **1. Ineffective Exercise of Oversight over Executive Policymaking**

One of the primary roles of the PLC is to monitor the activity of the Executive Authority and ensure involvement in the development of public policies. As described above, the PLC is empowered to use a range of tools to oversee the work of the executive, including the power to pose questions to ministers, to question members of the Executive Authority (excluding the President), and to declare no confidence in the Government or ministers. It must confirm the Prime Minister upon nomination by the President and approve all cabinet positions proposed by the Prime Minister. It may also overturn a presidential veto of its proposed legislation and amend the Basic Law by a two-thirds vote. However, it has rarely used these important tools to check the Executive Authority. Moreover, its recommendations are often ignored by the Executive or garner minimal attention.

Indeed, the PLC has often been marginalised by the Executive Authority, although this situation has improved since the implementation of the Basic Law. One important example of this is the persistent delay by the Executive in submitting its final accounts of the budget to the PLC, a crucial mechanism to ensure transparency within governmental activity and ensure that public funds are appropriately utilised. Despite these delays, the PLC has to date, not used its powers to ensure that budget reports are submitted within the time-limit stipulated in order to conduct proper review of expenditures and address any issues of divergence.

Significantly, there is no clear legislative policy on the national or sectoral level that incorporates the Executive and Legislative branches of government to allow for a streamlined process of policymaking. The majority of existing legislation has been instigated and drafted by the Executive, rather than the PLC, resulting in a legislative body that is not perceived as the primary address for law-making. Rather than initiating legislation or developing and reviewing drafts at the request of ministries, the PLC has taken a secondary role in the legislative process and focuses on review and discussion of draft laws presented to it. The PLC has been ineffective in holding the Executive accountable for laws that have been approved but not promulgated, holding hostage a body of laws crucial for the development of the private sector. Amendments to existing laws discussed and proposed by the PLC also suffer a similar fate, severely impacting the process of modernisation of economic legislation.

#### **Promotion of Investment Law**

The Promotion of Investment Law, enacted in 1995 and amended in 1998, encourages local and international private investment in Palestine through a variety of incentives, including the provision tax incentives, guarantees concerning expropriation and control by government, freedom to move capital and profits, and means to resolve disputes. In 2005, the Palestinian Investment Promotion Agency (PIPA), established to implement this law, proposed an amendment to the Promotion of Investment Law to expand the definition of qualifying investments to be based not only on the size of capital, but also on the type of investment. The amendment would allow for the creation of jobs in the service sector, specifically Information Technology, reflecting a growing WTO trend to encourage labor-based investment. Under the amendment, service enterprises employing five or more employees would qualify for incentives under the law. However, the amendment is still pending, significantly hampering the investment potential of the information technology sector.

The duplication in the legislative process at the Executive level has significantly impeded the possibility of coherent economic legislation, an issue that has caused confusion among private sector representatives wishing to influence economic policymaking. It continues to be unclear to whom representatives should turn in the legislative process to ensure that their concerns are heard. Moreover, the Executive is more advanced in terms of skill and experience with initiating legislative draft and thus the PLC is continuously catching up and making reviews instead of initiating legislation. Legislation developed in this manner is characterised by inconsistency between laws, unclear policy guidelines, and is often developed by international experts in English and poorly translated.

## **2. Ineffectiveness of Market Support Institutions**

Development of the private sector and ensuring that economic concerns are addressed in legislation is best achieved through effective business institutions that can influence policy and the lawmaking process. While there is a diversity of market support institutions to address Palestinian private sector concerns, including the chambers of commerce, industry and trade, consulting firms, and larger national institutions such as the Palestine Trade Center (PALTRADE), many of these institutions remain ineffective in their efforts to influence economic policy and legislation. This is in part due to the lack of access and clear legislative process detailed above, as well as an absence of unified and consistent lobbying mechanisms among private sector institutions. The opportunity to influence economic policy through these institutions remains ad-hoc, depending largely on relationships established between associations and relevant Palestinian ministries. Oftentimes, market support institutions are uninformed of important debates taking place within the PLC regarding legislation directly affecting their sector.

Many market support institutions are still developing and building their capacities, the duplication of mandates hindering possible influence on policy and lawmakers. Despite this lack of capacity development, business associations and private sector trade groups have in the past played an important role in advising the government on policy formulation and ensuring that their members' concerns are voiced. However, many of these associations continue to focus on providing services to their members on the micro level, rather than addressing macro issues such as the effective articulation of their members' views to government. Few private sector institutions have committed human resources to this task, their staffs lacking the skills and time necessary for effective legislative advocacy. Accordingly, private sector input and effectiveness in influencing economic policy has been minimal, resulting in legislation that often seems to conflict with private sector needs.

## **3. Lack of Access and Inclusiveness of Private Sector Enterprises**

PLC engagement with the private sector during the legislative process has been limited, with crucial input based on expertise and identified needs lost in the process. When private sector input is sought, it is often unclear whether it has been taken into consideration by the PLC, which has sought to avoid the appearance of vulnerability to private sector control. Furthermore, interventions by the private sector are often dominated by larger business enterprises and their interests, with small and medium enterprises (SMEs) unable to identify a vehicle through which their policy concerns may be directed. Given that the majority of Palestinian businesses are small, family owned enterprises, the inclusion of SMEs in policy and lawmaking is particularly important.

In situations where the private sector has explicitly articulated its concerns, the PLC has often been unresponsive to the issues raised. One such example was the recommendation that a competition policy be developed in order to discourage public and private sector monopolies of larger enterprises. Thus, although there is an explosive demand for telecommunications services, there is very little market competition to ensure quality of such services. Telecommunications services are concentrated in one company who has monopolized the sector, initially through a fixed-term license and now maintains this hold, *de facto*, despite the expiration of its license.<sup>62</sup> Past experience in addressing and responding to this issue has proven ineffective. In response to private sector concerns, the Ministry of National Economy undertook preparation of a draft Competition Law in 1998 with the assistance of local and international consultants.<sup>63</sup> The draft was submitted to the PLC's Economic Committee for review. However, the draft law has not been reviewed nor issued to date, i.e., 10 years after preparation..<sup>64</sup>

#### 4. Unclear Definition of Institutional Roles

There remains within the PLC an unclear definition of institutional roles, leading to the duplication of responsibilities within the legislative process. For example, within the PLC structure there is a Legal Department, a Legal Committee, and a Research Unit, all of which participate in the drafting of laws on some level. According to the PLC By-Laws, the Legal Department is part of the General Secretariat<sup>65</sup> and assumes a variety of tasks, despite the fact that its role and responsibilities are not explicitly identified. These tasks include providing legislative services such as drafting laws suggested by Council Committees and members, drafting amendments on laws in the final stages of adoption, strengthening various departments through the provision of legal services, providing legal counselling, and reviewing contracts and agreements conducted by the Council. It also provides advice to the Council and its Committees regarding complaints made by the public.<sup>66</sup> The Research Unit

#### Capital Market Authority Law of 2004: Reform in Action

One of the successes of the legislative reform process enhancing private sector development has been the passing of three important laws relating to the business sector in 2005, including the Capital Market Authority Law, the Insurance Law, and the Securities Law. The enactment of the Capital Market Authority Law in particular had an immediate impact on the private sector, particularly after the establishment of the Capital Markets Authority (CMA) in the fall of 2005. The CMA ensured a tremendous improvement in transparency and governance through the regulation of the securities market and other non-banking financial activities. For example, according to the law, all public companies must now be listed on the Public Securities Exchange (PSE), a process which has been ongoing since the establishment of the CMA. The CMA is responsible for licensing, regulation and supervision of all non-banking related financial activities (including insurance, securities, mortgages and leasing), functions and entities.

<sup>62</sup> Interview conducted with Adnan Amr, Office of the President, Palestinian Authority, 15 July 2007.

<sup>63</sup> *Competition Law in Palestine, Final Report On Behalf of the Minister of Economy & Trade, Palestine*, Funded by the Irish Trust Fund at the International Finance Corporation (IFC), Clanwilliam Consulting, Ltd., November 1998,

<sup>64</sup> Al-Mustakbal Foundation, *Developing a Palestinian Roadmap for Legislative Reform in the Business Sector; Policy Options and Recommendations*, 26 September 2006, p. 30.

<sup>65</sup> Article 11 of PLC By-Laws.

<sup>66</sup> Atilgan, Dr. Canan, Resident Representative to the Palestinian Autonomous Territories, Konrad-Adenauer-Stiftung, *Activating Performance of the Palestinian Legislative Council in Legislation, Supervision, and Development of Public Policy*, 2003.

is also responsible for taking requests for specific research on issues related to topics and laws under review. Concurrently, the Legal Committee also drafts and reviews laws, as stated previously.

### **5. Unclear Definition of Stages of Legislative Process**

The lack of clarity in the stages of the legislative process to date has resulted in an environment in which proper review of legislation is hindered and the possibility for unified policies eroded. Lawmaking has often been conducted haphazardly, primarily due to a lack of a national or sectoral development agenda based on the needs of the community. Where such foundational agendas have been developed, they have often responded to emergency situations or been influenced by external factors (i.e., by donors). Additionally, while new legislation continues to be introduced, procedures for repealing, annulling or amending existing legislation are not being developed. This has created confusion in the implementation process, as older legislation remains part of the existing legal framework.

While the *Diwan's*<sup>67</sup> powers have been substantially circumscribed, (for a long while, it competed with the ministries and PLC committees in preparing draft legislation ignoring requests to refrain because it was not capable of addressing policy concerns), it continues to control the publication of laws, a fact that affects and often delays when laws go into force. This has been particularly problematic with respect to business-related laws, which are often not developed in accordance with policy initiatives. The development of legislation by the *Diwan* is also inconsistent with the local context or existing jurisprudence, as the *Diwan* has often copied laws from neighbouring states or incorporated proposals from international consultants. As such, the relationship between the Executive and Legislative branches remains inadequately defined in regards to the development of legislation. Legislation continues to be initiated outside the PLC, with the PLC taking on a reactive role rather than a proactive one in the development of the law.

One resulting problem from the undefined legislative process is the compounding of layers of developed legislation, which are difficult to decipher and implement. In many cases, for example, business legislation is drafted in a language other than Arabic and then translated, causing it to be poorly structured, ambiguous, and riddled with contradictions with enacted laws.<sup>68</sup>

### **6. Conflicts between Applicable Laws**

While significant progress has been made in the development of organic Palestinian laws, particularly following the ratification of the Basic Law and the substantial legislative achievements of the last decade, Palestine continues to be plagued by legal pluralism as a result of successive foreign occupations. Palestinian law in effect draws from different legal codes and traditions, including Ottoman statutes, British Mandate laws, Jordanian laws from the period of Jordanian rule over the West Bank, Egyptian decrees from the period of Egyptian rule over the Gaza Strip, and Israeli military orders. For example, during the Jordanian rule, the West Bank inherited a legal framework that was conservative and interventionist as a result of Jordan's heavy governmental restrictions

---

<sup>67</sup> The *Diwan* is a department at the Ministry of Justice.

<sup>68</sup> Al-Mustakbal Foundation, Developing a Palestinian Roadmap for Legislative Reform in the Business Sector: Policy Options and Recommendations, 26 September 2006, p. 28.

over business operations. The Gaza Strip, however, adopted a common law system that was put in place during the British Mandate era from 1929.<sup>69</sup>

As a result of conflicting laws and varying legal codes between the West Bank and Gaza Strip, there still exists uncertainty regarding which laws are applicable in which cases and which region, weakening the rule of law and undermining efforts to institutionalise comprehensive legal reforms to strengthen the process of state-building. For example, there are significant differences in the procedural rules governing the registration and operation of corporations and limited liability companies in the West Bank and Gaza Strip. Furthermore, new legislation continues to draw from legal traditions within the Arab Region which may not be applicable to the situation in the OPT, further enhancing the difficulties in developing economic policies relevant to the Palestinian private sector. When laws incorporate newer trends in economic transactions, they are poorly adapted to the Palestinian situation and become indecipherable upon implementation. The PLC has in the past undertaken efforts to harmonise existing laws, but the process has been slow and unwieldy, given the vast array of laws in force.

### **7. Lack of Regulations and Codes to Implement Laws**

The current legislative framework suffers from a lack of key foundational laws critical to providing a platform for basic economic transactions and secondary legislation. As such, the majority of Palestinian laws in effect lack implementing rules and regulations, apart from a few rare exceptions.<sup>70</sup> This has led to an environment where laws are applied arbitrarily, with little reference for the private sector to address issues of transparency and objectivity resulting from an informal decision making process by public officials in the implementation of laws. For example, the PLC has yet to pass a Commercial Code, obliging Palestinians and foreign investors to rely on antiquated Jordanian and British-Mandate era statutes which lack modern provisions. The lack of important second-tier economic legislation, such as bankruptcy/insolvency law, leasing law, and a modern intellectual property law, has also created disincentives for long-term investment and financing.<sup>71</sup> The PLC has unfortunately been lax in ensuring that the executive branch promulgates crucial regulations to allow economic legislation that has already been enacted to take effect.

### **8. Inefficiency/Administrative Barriers**

The lack of harmonisation between West Bank and Gaza Strip laws has created significant administrative barriers and transaction costs for companies operating in both jurisdictions. This issue has proved particularly problematic in relation to registration of companies, intellectual property registration, land zoning and municipal permits, industrial licenses, health and safety procedures, and environmental safety. For example, regulation of companies in both jurisdictions is widely divergent; with the West Bank suffering from overregulation from the Companies Controller established by the Jordanian Companies Law in effect in the West Bank, This has prompted many

---

<sup>69</sup> Keith C. Molkner, *Legal and Structural Hurdles to Achieving Political Stability and Economic Development in the Palestinian Territories*, 19 Fordham Int'l L.J. 1419 (1996).

<sup>70</sup> These include, for example, the Telecommunications Law of 1996 and the draft regulations to the Labor Law of 2000.

<sup>71</sup> Al-Mustakbal Foundation, *Developing a Palestinian Roadmap for Legislative Reform in the Business Sector: Policy Options and Recommendations*, 26 September 2006, p. 27.

businesses to register in Gaza simply to avoid the intrusive oversight of the Controller in the West Bank.<sup>72</sup>

To the same effect, the administrative barriers imposed by existing economic legislation have created unnecessary obstacles for Palestinian businesses. The Jordanian Companies Law in effect in the West Bank, for example, requires limited liability corporations to have a minimum stated share capital of JD 50,000, 25 percent of which must be deposited in a bank before receiving a certificate of incorporation from the Companies Controller. Larger businesses circumvent this requirement by depositing the required amount, supplying the deposit slip to the Companies Controller, and then withdrawing the funds the next day. However, for smaller businesses, this poses an insurmountable obstacle for registration.<sup>73</sup>

Public information is not readily accessible under prevailing legislation. The private sector cannot access information about other companies nor real property, for example, under the guise that there are no laws in Palestine permitting release of such information. This limits the ability of private sector to conduct due diligence or be informed when making investment consideration. A draft law on Access to Information has been prepared and pending since 1995, but its review has been considerably delayed.

#### **Draft Law on Access to Information**

In 2005, the PLC began its review of the draft Law on Access to Information of Palestine, which has yet to be enacted. The draft law is based on the principle that public bodies hold information not for themselves but for the public good. It recognizes the right of every Palestinian citizen or resident to access documents held by public bodies, as well as certain documents held by private bodies. Exceptions to free access include information related to State and private interests for the protection of which access may be refused. For example, Article 23 provides a discretionary exception (institution can refuse to disclose certain areas of information to protect certain interests) to disclosure of information if it concerns professional or commercial secrets of the institution, or if disclosure “may inflict material damages to the economic interests of the state, or its capacity to manage the national economy, or may result in special benefits to an individual or an institution.” The enactment of the draft Law on Access to Information would significantly improve transparency within the legislative process and promote open government. Chapter 2 of the draft law provides that public institutions should *actively* publish information, rather than on demand, such as a mandatory annual report including information on documents on internal working matters, audited accounts, regulations, and activities; procedures through which individuals can find out about the institution’s policies and projects; explanation of the types of information kept by the institution contents of decisions taken by the institution, along with an explanation of the implications and repercussions of that decision on individuals, its expected results and reasons behind it; and information deemed necessary by the Public Commissioner (Article 7). The position of Public Commissioner for Information is also established to supervise the implementation of the law. Measures to promote open government include the appointment of an individual responsible within every public institution to handle information requests (Article 4) and for public institutions to keep their information filed and categorized for easy retrieval (Article 5). Publishing such information would significantly assist the PLC in fulfilling its role in checking abuse of power by the Executive branch and ensure the public’s ability to access government documents in an effort to monitor and lobby on specific issues.

<sup>72</sup> *Ibid.*, p. 29.

<sup>73</sup> Al-Mustakbal Foundation, Developing a Palestinian Roadmap for Legislative Reform in the Business Sector: Policy Options and Recommendations, 26 September 2006, p. 31.

## H. Recommendations

The PLC and the private sector must undertake a concerted effort to implement strategies and policies for bolstering transparency and efficiency within the legislative process, an outcome likely to enhance the vibrancy of the Palestinian economy and to attract investment. To this end, a number of steps should be taken: the PLC must fully assume the oversight powers assigned to it by the Basic Law, by ensuring, among other things, that the Executive implements economic legislation critical to private sector development; the legislative process should be clarified and streamlined to develop laws to encourage economic stability; the PLC's competence in substantive areas should be developed to allow proper analysis of executive branch proposals; programs should be developed to facilitate access to PLC committees of SMEs; and a more coherent and responsive legislative infrastructure for business should be developed. Each of these recommendations is discussed, in turn, below:

### 1. Clarifying/streamlining Legislative Process

The legislative process remains burdened by cumbersome bureaucracy and a lack of prioritised agendas to identify policy issues that meet the needs of the Palestinian business sector. Accordingly, there should be a restructuring of the legislative process, development of administrative procedures for the implementation of legislation, and consolidation of divergent laws. In late 2006, the civil society proposed reforms, in consultation with civil society and public sector representatives, to streamline the legislative process to the following four steps:<sup>74</sup>

*Step 1:* Prior to the drafting of legislation, national policy should be set at the Executive level through coordination between the Prime Minister and the President's policy advisors. The Council of Ministers can then request sectoral policy input from different ministers and executive agencies in order to rationalise the process of policymaking at the national and sectoral levels, limit duplication, and introduce efficient means to set policies to guide the lawmaking process.

*Step 2:* The legislature becomes involved in policy development, consulting with the Cabinet and ministries/executive agencies to ensure that legislation is developed in line with national and sectoral policies. At this stage, consultation with the judiciary may also be conducted, which can offer valuable information on coherence of legislation and procedural matters.

*Step 3:* The PLC approves laws and sends them to the President for signature. Upon signature, the laws are gazetted and published by the PLC, eliminating the *Diwan's* role. During this implementation stage, the ministries, agencies and judiciary have an opportunity to test the law and identify possible amendments, which are shared with the Cabinet and Legislature for changes. Any change would have to go through the same review and gazetting process as newly enacted legislation.

*Step 4:* At this stage, the role of the PLC is completed. The Cabinet, ministries and agencies draft and adopt implementing regulations (Executive regulations) for enacted laws. These regulations are also gazetted and published. The judiciary continues to apply the laws, giving it the opportunity to test, implement and determine the constitutionality of laws, and accordingly propose any amendments.

---

<sup>74</sup> Al-Mustakbal Foundation, *Developing a Palestinian Roadmap for Legislative Reform in the Business Sector: Policy Options and Recommendations*, 26 September 2006, p. 45.

In order to facilitate development of policies and laws reflective of the needs of the private sector, the process of law and policy making should be published widely and opportunities for interested parties to provide input made available. This should be done at both the executive and legislative level, incorporating recommendations of private sector representatives knowledgeable about the issues being discussed. While open hearings do take place at the PLC regarding legislation, the private sector should lobby the PLC to initiate hearings specifically for the private sector. This could be done through the creation of formal coordination mechanisms with key ministries, such as the convening of focus groups during the first stages of development of national policy, as well as holding special open sessions during PLC debates on draft legislation. Additionally, once laws have been promulgated, private sector representatives could be engaged to determine how effective the implementation of the law has been, as well as how well codes and regulations have addressed the issues involved.

## **2. Development of PLC's Competence in Substantive Areas to Allow Proper Analysis of Executive Branch Proposals**

The competence of the PLC to review draft legislation and analyse proposals submitted by the Executive should be addressed through the development of the legal capacity of Committee members, as well as the inclusion of specialised experts on areas related to economic legislation. The experience and knowledge base required to formulate legislation that provides a constructive environment for the private sector continues to remain weak within the PLC. Regular training and improvement of the human resource base at the PLC should be initiated in order to bolster the PLC's ability to conduct legal research and analysis. Additionally, multilingual legal resources should be made available to incorporate diverse legal traditions in legislative analysis and the language skills of legislative drafters should be developed.

There is a wealth of experience and knowledge that can be drawn upon from the Palestinian private sector regarding necessary reforms to enable a vibrant economic climate. While it is important to ensure that international expertise in areas of economic legislation be incorporated to assist in modernising and standardising laws related to the economic environment, it is also crucial that these laws reflect the specificity of the Palestinian situation. The inclusion of private sector representatives within Committee debates reviewing executive branch proposals could create an environment whereby proposals can be discussed with an eye to the Palestinian economy and drawn from the extensive experience of those directly involved in business. Of particular importance is ensuring that the private sector is involved in discussions regarding economic issues determined with Israel, as this forms one of the primary obstacles to economic growth.

## **3. Development of Programs to Facilitate Access to PLC Committees of SMEs**

Greater participation and access to the legislative process of SMEs should be fostered through the development of formal mechanisms for public-private sector dialogue. This would assist in developing a broader understanding of laws affecting the private sector and increase participation of stakeholders in the promulgation of laws that enable a more prosperous business environment. Initiatives in the past to incorporate such mechanisms, namely in the form of the Palestinian Private Sector Coordination Council (PSCC)<sup>75</sup>, have

---

<sup>75</sup> Established in 2000, the Palestinian Private Sector Coordination Council includes representation from PalTrade, PFI, the Federation of Chambers of Commerce, the Banking Association, PITA, the Federation of

proven to be ad hoc and ineffective. Other initiatives which proved successful, such as the National Trade Dialogue spearheaded by PALTRADE, have been short-lived. Consultations with members of the private sector have also shown that interventions have often taken place too late in the legislative process to have any positive effect. Furthermore, coordination has been subverted through the promotion of narrow interests or overridden by the needs of larger businesses.

The establishment of a national ‘competitiveness partnership’ for the Palestinian private sector can serve as an effective vehicle for addressing legislative reform related to the business environment. Such a mechanism, composed of leaders from the private sector and civil society, in coordination with public officials, can serve as an address to identify discrete reforms and build momentum for rapid implementation; evaluate the feasibility of proposed reforms; build awareness of changes to laws; develop bi-directional channels of communication; and ensure that access to the legislature is not limited to a few large firms, bolstering the participation of SMEs and facilitating cross-sector discussions of the ramifications of proposed legislation.<sup>76</sup>

However, effective communication platforms to allow for public-private sector dialogue can only take place when institutions representing the private sector have the necessary capacity to understand legislation and have sufficiently developed communication and legal skills to advocate for such reform. In particular, a more explicit understanding of the legal system and legal principles and their relation to the conduct of business should be developed. One possible avenue to bolster the private sector’s comprehension of economic legislation may be to conduct legal education workshops on topics related to laws and procedures relevant to the private sector. This will better equip the private sector in recognising where reform should take place in order to facilitate economic activity. Funding to develop the capacity of private sector representatives in effective lobbying may also be solicited, in order to create a pool of experts to address the issues of specific sectors and to ensure that the skills required to advocate the position of SMEs is developed to incorporate their needs in relevant legislation and policy. This can in turn be used to develop mechanisms, such as the National Trade Dialogue, for each sector to allow for public-private dialogue and debate to take place.

#### **4. Development of Processes to Enhance Coherence and Responsiveness of Legislative Infrastructure for Business**

In order to ensure that legislative reforms are systemic and informed by sound policy goals, processes should be developed to monitor the coherence and responsiveness of the legislative structure for business. One such process could be the establishment of a Legal Reform Commission, mandated to reduce legal inefficiencies and undertake a

---

Insurance Companies, the Businessmen Association, the Tourism Coordinating Group, and elected businessmen.

Insurance Companies, the Businessmen Association, the Tourism Coordinating Group, and elected businessmen.

<sup>76</sup> Benjamin Herzberg & Andrew Wright, *Competitiveness Partnerships: Building and Maintaining Public-Private Dialogue to Improve the Investment Climate*, World Bank (2005), available at <http://www.worldbank.org/>. Discrete reforms identified include: deletion of counter-productive articles; amendments to existing articles; addition of language clarification in laws to avoid contradictions; elimination of laws; addition of new laws; elimination of compulsory requirements; elimination of unnecessary administrative steps; recommendations for by-laws and rulebooks; recommendations for ministerial instructions; streamlining of administrative bodies; creation of centralized agencies and bodies; and extension of municipal powers.

comprehensive review of existing legislation in order to identify gaps in legislation. Such a mechanism may be composed of private sector and legislative experts to conduct public consultation and oversight and offer a forum for thorough analysis of legal obstacles to economic growth. Activities that the commission could address include: the assessment of existing laws and regulations to constitute a cohesive framework to enable economic growth; the identification of business-related laws that need to be harmonized and modernised; the identification of gaps requiring new legislation; the review of existing drafts; the provision of assistance in drafting regulations; and the consolidation of licensing and permit procedures to enable a more fluid business environment.

A Legal Reform Commission could also assist in developing the capacity of legislators by offering training to officials in Palestinian and economic law. It could facilitate the creation of working groups to coordinate directly with the ministries relevant to the private sector, including the Ministries of Economy (Trade and industrial), Finance, Industry and Justice. The focus of such working groups, composed of businesspeople, lawyers and economists, could enhance coordination among ministries and agencies, establishing guidelines to reduce duplicative roles in the administration of private enterprises.

#### **5. Development the Capacity of the PLC to Conduct Checks and Balances and Hold the Executive and Judicial Branches Accountable**

The PLC should improve its capacity to maintain the principle of separations of powers by applying checks and balances to the other two branches of government. It is vested with a number of powers under the Basic Law to perform such functions and should strive to exercise them to ensure implementation of this principle and to develop a governance system based on a constitutional mandate which is effective and maintains the balance between the three branches.



---

# **3 Independent and Responsible Judiciary, Promoting Respect for the Rule of Law**

---



## A. Introduction

The establishment of an independent, impartial, competent, and efficient judiciary that is capable of timely resolution of disputes of all types is critical to the success of efforts to attract and promote local and foreign investment. For the judiciary to play its role effectively, certain basic conditions and requirements must be in place. Since the PA's creation in 1994, and in cooperation with international donors, dozens of projects costing tens of millions of dollars have been initiated in an effort to bolster judicial competence and productivity and to establish the judiciary's independence, in accordance with international standards. The following needs have been identified as urgent: the enactment of legislation relating to the regulation and operation of the Judicial Authority; the unification of judicial institutions; preparing implementing regulations for the laws governing court procedures; the provision of financial resources to the judiciary, including seats, buildings and office equipment; and the provision of human resources, including appointment and qualification of more judicial staff members.

These efforts culminated in the enactment of a package of legislation on judicial affairs in 2001 and 2002, including the *Law Concerning the Formation of Regular Courts*, the *Basic Law* and procedural laws governing civil and penal cases. The PLC so far has issued over 100 laws. Moreover, more courts have been constituted, including the Magistrate Courts and Courts of First Instance in particular. New buildings have also been built for courts, and others were rehabilitated and expanded, as was the case in the cities of Nablus and Ramallah. Approval was also given to the construction and rehabilitation of other courthouses, including a complex of courts in Gaza City. The number of judicial staff members has also risen from approximately 60 judges in 1996 to around 140 in 2007, and the Public Prosecution has grown in size from 40 members in 1996 to over 100 now. During this period, moreover, dozens of specialized training workshops were held in an effort to build the judicial staff's competence.

On the other hand, political and security developments over the past seven years have adversely affected the process of judicial development. Since the outbreak of the second *intifada* on 28 September 2000, Israeli occupation forces have made frequent incursions into PA-controlled territories, especially into Area (A), resulting in the destruction of many PA security and civil facilities, including prisons and detention centers. In addition, security chaos and armed groups prevailed in major Palestinian cities. After the Islamic Resistance Movement (*Hamas*) won the majority of seats in PLC elections in early 2006, and the formation of the tenth Palestinian Government, the ground situation has become increasingly dangerous. As a result of severe political and economic sanctions imposed on the PA by Israel as well as by most members of the international community, the new *Hamas* government was unable to secure the necessary budgetary resources to pay the salaries of public servants, including judicial staff. As such, the judiciary and Public Prosecution were inactive for an extended period of time. In June 2007, the deterioration of the security and political situation sank to an unprecedented level, as infighting between *Hamas* and the National Liberation Movement (*Fateh*) resumed, culminating in *Hamas*' seizure of control of PA security headquarters in the Gaza Strip. As a result, the PA President deposed Mr. Isma'il Haniya, the Prime Minister, and declared a state of emergency throughout PA-controlled territories.

Under such abnormal circumstances, many of the gains achieved as a consequence of judicial development projects have been reversed. Established judicial support projects have been suspended, and new projects have not been launched, despite pressing needs in

an array of areas, including: construction of new offices for courts and the Public Prosecution; establishment of criminal investigation laboratories; creation of a judicial register; creation of a Judicial Police Force; provision of protection to courts, judges and members of the Public Prosecution; and provision and qualification of human and financial resources. As a consequence of the PA's failure to pay public servants, including members of security agencies and the civil police agency, and the deteriorating economic situation, execution of judicial penal and civil judgments has degenerated. Problems associated with the immense backlog of cases have intensified to an extent that threatens to undermine the entire Palestinian justice system. This situation has not only affected the principles of the rule of law and good governance throughout PA-controlled territories, but also has burdened economic enterprises implemented by the Palestinian private sector, prevented attraction of more investment, and prompted the migration of capital to other regions that enjoy stability and public order. Furthermore, this situation has deepened the private sector's distrust of Palestinian government, especially the judiciary. As a result, many commercial enterprises now prefer to have their disputes resolved in any manner other than by the judiciary.

This paper addresses the status of the judiciary in the areas under PA jurisdiction and its impact, both negative and positive, on the development of the free market principle and support to the private sector leading role in fostering economic development and growth in Palestine. It also addresses the relationship between this branch and the executive and legislative branches in solidifying the principle of separation of powers as well as checks and balances and accountability.

## **B. The Judicial Authority: Between Politics, History and Legislation**

### **1. Political Background**

The PA was established pursuant to the Declaration of Principles on Interim Self-Government Arrangements (DOP), signed by representatives of the Palestine Liberation Organization (PLO) and Government of Israel (GOI) in 1993, and ensuing agreements between Palestinians and Israelis, including the 1994 Gaza-Jericho Agreement and the Palestinian-Israeli Interim Agreement on the West Bank and Gaza Strip (Interim Agreement).<sup>77</sup> The Interim Agreement provides that PA jurisdiction will cover the West Bank and Gaza Strip territory as one territorial unit.<sup>78</sup> It also states that the PA will have legislative, executive and judicial powers and responsibilities, providing for necessary cooperation between the PA and GOI on certain civil and commercial issues.<sup>79</sup> Annex IV to the Interim Agreement's Protocol Concerning Legal Affairs addresses in detail issues pertaining to criminal jurisdiction, legal assistance on criminal matters, civil jurisdiction, and legal assistance on civil matters, providing, *inter alia*, for cooperation between the PA and GOI on: the execution of restraining orders; summons and questioning of witnesses; transfer of suspects; and legal assistance in the conduct of judicial proceedings. A number of steps taken by GOI clearly violate these agreements. Moreover, the PA's

---

<sup>77</sup> Of the most important agreements are the Agreement on Preparatory Transfer of Powers and Responsibilities signed at Erez on August 29, 1994 and the Gaza-Jericho Agreement, signed on May 4 1994, and Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, Washington D.C., 28 September 1998. Article (IX/6) under the latter Agreement provides: "Subject to the provisions of this Agreement, the Council shall, within its jurisdiction, have an independent judicial system composed of independent Palestinian courts and tribunals."

<sup>78</sup> Article (XVIII/1) under the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip.

<sup>79</sup> *Ibid.*, Article (XVIII/3).

fragmented sovereignty over Area (A) has been gravely diminished over recent years by frequent Israeli incursions, raids and arrests since 2002.

## 2. Historical Background

The different legal systems in effect in the West Bank and Gaza present difficulties for the private sector – difficulties that may have increased since the *Hamas/Fateh* split. At present, the structure of the judiciary in the West Bank is closest to the French system, whereby the responsibility to manage the judiciary is divided between the Supreme Court and Ministry of Justice (MoJ), and broader powers over the Public Prosecution are given to the Executive. In contrast, the judiciary in the Gaza Strip is an extension of the judicial system that operated under the British Mandate between 1917 and 1948 and is closest to the Anglo-Saxon system. Most prominently, supervisory powers over the judiciary rested with the Chief Judge, who was at the same time the Minister of Justice. Lack of budgets appropriated for the judiciary further prevented appointment of new judges as well as construction of necessary buildings to house courts and offices of the Public Prosecution. As a result, litigants crowded courthouses, the problem of overcrowding dominated in courthouses, and adjudication of actions was delayed. In the mid 1980s (during the Israeli occupation), bribery was a common phenomenon, challenging the judiciary's legitimacy.

### **Israeli violations of concluded agreements on legal matters and judicial jurisdiction: The case of the Palestinian Telecommunications Company (PALTEL)**

Despite explicit provisions governing judicial relations between the PA and GOI, as well as civil disputes between Palestinians and Israelis, such provisions have mostly been ineffective. Although signed agreements provide otherwise, Israeli authorities have further expanded the judicial jurisdiction of Israeli courts. In 2001, PALTEL lodged an action before the Palestinian Court of First Instance in Ramallah against Israeli cellular telecommunications companies for operating throughout the Palestinian territories without having obtained necessary licenses from the PA, complied with relevant Palestinian laws, or paid due taxes to Palestinian taxation authorities. In spite of the fact that the explicit terms of Israeli-Palestinian agreements on judicial jurisdiction and cooperation regulate a case such as this, and notwithstanding PALTEL's compliance with these provisions, Israeli judicial authorities refused to cooperate with their Palestinian counterparts or to receive actions from the Palestinian court.

The most salient challenge faced by the PA has been the consolidation of the divergent judicial systems in the West Bank and Gaza Strip, an effort requiring numerous administrative and legal measures. These measures, however, have taken considerable time and have been impaired by disagreements between judicial and executive officials. Ultimately, such disputes were resolved by repealing previous laws concerning the regulation of the judiciary and replacing them with a single, consolidated law – the Law Concerning the Judicial Authority of 2002. This law provides for the establishment of the Supreme Court and assigns to it the power to appoint, transfer, second, discipline and inspect judicial staff. Undoubtedly, however, recent incidents resulting from *Hamas'* assumption of governance, especially its seizure of control over security agencies in the Gaza Strip as well as *Fateh's* continuing concentration of force in the West Bank, may contribute to furthering the partition between the West Bank and Gaza Strip and to deepening discrepancies between the two legal cultures within the Palestinian homeland.

Due to recent political events during the year 2006, the second PLC has been incapable of enacting any vital items of legislation, let alone certain legal acts pertaining to the regulation of the budget of 2006. It consequently is critical that the PLC resume its efforts to enact laws necessary to regulate the private sector and strengthen its role in economic development. This task takes on added urgency in view of the continuing applicability of many laws and orders enacted under the British Mandate, Jordanian rule over the West Bank, Egyptian Administration in the Gaza Strip, and Israeli occupation in the West Bank and Gaza Strip. This legislation reflects interests of governing authorities, not the needs of the Palestinian population. Moreover, it is unreasonable that a range of economic sectors is regulated by out-of-date, indecipherable laws that are unresponsive to recent economic developments.

## **C. The Judicial Authority: Key Organs**

### **1. Regular Courts**

In Palestine, regular courts include the Courts of Cassation, Courts of Appeals, Courts of First Instance and Magistrate Courts, which examine civil and commercial cases, as well as the High Justice Court, which is competent to adjudicate administrative cases. In addition, there are specialized regular courts, including municipal courts and courts of income tax and customs. One hundred and forty judges work in the regular courts, including ninety-two in the West Bank and forty-eight in the Gaza Strip. These judges are distributed among various courts, as follows: twenty-two judges at the High Justice Court; twelve at Courts of Appeals; fifty-five at Courts of First Instance; and fifty-one at Magistrate Courts.<sup>80</sup> Additionally, the High Justice Court examines constitutional disputes on a temporary basis, pending approval and implementation of the Law Concerning the Supreme Constitutional Court. Major improvements have been made to the regular courts. Over the past ten years, new magistrate courts and courts of first instance have been established covering areas that had not been adequately served, affording Palestinian citizens better access to justice than what existed previously.

Notwithstanding these significant developments, insufficient attention has been paid to the establishment of specialized courts, particularly labor courts, commercial courts, and traffic courts. Given the specialized nature of these kinds of proceedings and their tendency to create backlogs within the court system, their adjudication by specialized courts in summary proceedings would do much to reduce the courts' caseloads. In addition, specialized courts help to produce judges and lawyers who are experts in their fields of specialization, which is difficult to achieve under the current system. This approach, however, is not without opponents: some argue that a departmental system, in which court departments could be tasked to address specified cases, would be preferable, provided that sufficient human and financial resources are secured to keep the courts' workload manageable. Despite several calls by judicial institutions and supporting international organizations over the past years to create an institute for judicial training, formulas for institutionalizing judicial training have not been agreed. Similarly, the PA continues to require a strategy and institutionalized system for judicial inspections.

---

<sup>80</sup> Chapter on the Judicial Authority, PICCR Twelfth Annual Report, 2006

## 2. The Public Prosecution

Under the *Penal Procedure Law* of 2001, the Public Prosecution is competent to initiate penal actions. The Public Prosecution is headed by the Attorney General, who is supported by assistants in the West Bank and Gaza Strip. It also includes district attorneys, prosecutors, and prosecutor adjutants in addition to administrative officials employed in the Attorney General's office and Public Prosecution departments. Over the past decade, the Public Prosecution has developed substantially: the number of Public Prosecution members has increased; their salaries have been raised; and new departments have been created, *inter alia*, to protect human rights, preserve public property and fight corruption. Following the enactment of a package of judiciary-related laws, including the Penal Procedure Law of 2001 and Law Concerning the Judicial Authority of 2002, it is now fair to say that the legal organization of the Public Prosecution is complete.

However, the Public Prosecution's affiliation remains a point of contention in many circles. The Public Prosecution tends to be independent of the Executive Authority and directly associated with the President and Supreme Court with respect to certain administrative matters. Over recent years, however, most Attorney General's have refused any affiliation with the Minister of Justice on the grounds that it would contravene the independence of the Public Prosecution and affect its professional performance. In the Draft Amended Law Concerning the Judicial Authority, the Steering Committee on the Development of the Judiciary and Justice attempted to correct the relationship between the Public Prosecution and MoJ. The Committee's effort in this domain, however, proved fruitless.<sup>81</sup>

### Unstable relations between the Public Prosecution and MoJ

Tension and conflict have characterized the relationship between the Public Prosecution and MoJ. In most cases, the Public Prosecution has been reluctant to comply with the MoJ's authority over its office. Furthermore, the Public Prosecution has refused to cooperate with the MoJ, preventing the MoJ from performing its duties on many occasions. The MoJ's duties include: appointment and promotion of prosecutors and prosecutor adjutants; transference of members of the Public Prosecution outside the area of jurisdiction; and administering the oath by members of the Public Prosecution before the Minister of Justice before they assume their duties.

Like other judicial institutions, the Public Prosecution is challenged by a range of factors that prevent it from carrying out its duties in due form, including the chaotic security situation and the inability of security agencies to access various locations, prosecute criminals and bring them to justice. Indeed, the Public Prosecution's functions are

<sup>81</sup> On 14 March 2005, Mahmoud 'Abbas, PA President, issued a Presidential Decision relating to the Formation of the Steering Committee on the Development of the Judiciary and Justice, which comprises representative members of various relevant organs of the Judicial Authority. The Presidential Decision assigns the Committee a specific topical and temporal, mandate, as follows:

1. Agree to develop drafts of primary and items of secondary legislation pertaining to the Judicial Authority and submit them to the constitutionally competent authorities for approval in due form.
2. Work towards supporting, promoting and raising competence of administrative aspects related to courts at both Supreme Court and the MoJ.
3. Define needs of the Judicial Authority, including human and financial resources as well as offices, and assist in providing them. In this regard, the Committee issued forth two reports about its activities and accomplishments. Copies of these reports are available at the Ministry of Planning, MoJ and Supreme Court.

intertwined in fundamental ways with those of security agencies. Furthermore, the Public Prosecution has been involved in disagreements over the pillars of the Judicial Authority, including those relating to the distribution of powers and supervision. Had the security situation improved throughout the Palestinian territories, the Public Prosecution would be better developed. Even so, declining security conditions should not exempt the Public Prosecution from performing its assigned duties, particularly with respect to detainees, some of whom have been held in prisons and detention centers for extended periods of time without being presented to courts. Likewise, the Public Prosecution does not make necessary efforts to prosecute crimes against private sector organizations and persons, including blackmail against business people and attacks on their property.

### **3. Administration of the Palestinian Judicial Authority: The Supreme Court and MoJ**

The administration of the judiciary has been disrupted by the longstanding dispute between the Supreme Court and the MoJ regarding their respective roles in supervising judicial affairs. Fortunately, this debate was finally resolved by the Law Concerning the Judicial Authority of 2002. This Law assigns the administration of judicial affairs to the Supreme Court, which is composed of judges, the Attorney General and MoJ Under-secretary. The Law also keeps some administrative powers in the hands of the Minister of Justice with respect to administrative supervision over courts staff as well as administrative supervision over prosecutor adjutants. Pursuant to this law, the Supreme Court was established in 2002.

Although the Law Concerning the Judicial Authority includes important provisions regarding the issue of judicial independence, it lacks a clear philosophy for defining the relationship between the MoJ and Public Prosecution, leaving undetermined which party is competent to define the penal policy of the PA. In this regard, the Steering Committee on the Development of the Judiciary and Justice attempted, through the Draft Law of 2005, to resolve this predicament, suggesting that the Executive would be the authority entitled to set forth the penal policy. As mentioned earlier, the Committee's efforts were unsuccessful because prominent figures within the judiciary, including some members on the Committee itself, disagreed with the Committee's methodology and decisions. Consequently, several members abandoned their agreements, thereby surrendering the Committee to an impasse.<sup>82</sup>

The administration of the judicial authority has also been a point of contention among legal practitioners, judges and relevant institutions. Allegations of incompetence, partisanship, and corruption have jeopardized the judiciary and its reputation, a problem that persists today. In this context, much would be gained by the appointment of qualified, disinterested officials to preside over the judiciary.

### **4. The Bar Association**

Through its Council, the Palestinian Bar Association is competent to regulate issues related to the practice of law throughout the areas under PA jurisdiction, in accordance with the Law Concerning the Regulation of the Profession of Legal Practice of 1999. The Bar Association supervises training of new lawyers, issues licenses to practice law, regulates the records of lawyers (including practitioners, non-practitioners, and trainees),

---

<sup>82</sup> This can be inferred from the conclusions of reports issued by the Secretariat of the Steering Committee on the Development of judiciary and Justice, issued in July and November 2005, as well as from the resignation letter of the Committee's Secretary to President Mahmoud Abbas on 12 October 2005.

and holds lawyers accountable for their professional conduct. In addition, the Bar Association manages funds collected through fees and stamps as well as other revenues.

Since the establishment of the PA, unrelenting efforts have been made to form a consolidated union body that incorporates and represents all lawyers in the West Bank and Gaza Strip. These efforts culminated in the promulgation of the Law Concerning the Regulation of the Profession of the Legal Practice of 1999 as well as a number of special regulations to enforce it. Later, election for the Bar Association's Council was conducted in a democratic and impartial manner. The first election took place in 2003, the second in 2005, and the third in 2007. So far, the elections have been transparent and impartial, benefiting the Bar Association and its members. In view of its ability to cope with the many challenges it has faced, it is a credit to the Bar Association that it has managed to conduct periodic and fair elections, which has become a firm tradition. Lawyers have offered an example to be followed by other unions. In addition, the Bar Association has taken part in several activities aiming to promote the rule of law and judicial independence. To a greater extent than others, lawyers are concerned with the establishment of an independent judicial authority that is efficient and capable of issuing judicial decisions in a timely fashion. As a result of successive democratic elections and the emergence of new members each electoral term, new rules have been put in place in recent years to govern the Bar Association's activity. These rules are likely to promote the legal profession and to help address the difficulties that prevent creation of a healthy work environment for lawyers. The Bar association has also defined a role for itself in strengthening the rule of law and judicial independence.

The Bar Association can achieve a great deal through more active participation in raising public awareness regarding the promotion of the rule of the law and judiciary, protecting it against any political disputes and fighting occasional attacks against judges, members of the Public Prosecution and lawyers. Furthermore, the Bar Association is responsible for developing the skills of lawyers, especially young ones, by launching training and continuing education programs. Such programs should cover practical proceedings before courts, management of law offices and handling of complex technical and commercial matters, none of which is taught at law schools. Initial training of lawyers-in-training is important as it helps them to make the transition from theoretical knowledge to actual practice. Continuing training is equally important because it qualifies and re-qualifies practicing lawyers, especially in regard to the practical application of new legislation. On the other hand, the Bar Association must promote stronger relations between its General Assembly and the Palestinian private sector, both to bolster the private sector's awareness of its rights and liabilities and to help lawyers better to understand the commercial environment and the needs of their clients.

In addition, the Bar Association must take practical measures to reform and reorganize the relationship between the judicial staff and lawyers. Palestinian society is mostly dominated by factional, tribal and factional relations, which in turn taints relations between officials and the public, in general, as well as relations between the judicial staff and lawyers in particular. At times, close relationships between some lawyers and judicial staff members are clearly evident. As a consequence, lawyers sometimes receive preferential treatment by certain judges. For example, judges may shorten intervals between court sessions and grant more liberties to certain lawyers throughout judicial proceedings, ignoring procedural requirements. Such preferential treatment erodes both judicial integrity and the appearance of judicial integrity.

Lawyers' effective participation in certain voluntary activities, such as providing legal representation for citizens with limited income, contributes to their broad involvement with all segments of the Palestinian society. The judiciary must also act with fairness toward all parts of society, including the Palestinian private sector. The judiciary should not give inordinate weight to bank creditors' interests, or to those of persons demanding indemnities from insurance companies or of workers demanding compensation from employers who are perceived as the weaker party in these cases. In addition, if continued, this approach will inevitably discourage enterprises from investing in Palestine for fear of the consequences of presenting their disputes before the Palestinian judicial system.

#### **D. Obstacles to Judicial Functioning**

It bears emphasizing at the outset that a key obstacle facing the Palestinian judiciary remains the ongoing Israeli military occupation of the WBGs and the resulting security and political turmoil. Restrictions on Palestinian movement have stymied communication among Palestinian governorates and prevented Palestinian police and security agencies from accessing areas where disputes take place, to impose security and public order and enforce the law. The occupation has also interfered with the PA's capacity both to arrest suspects and to hold detainees and prisoners safely in custody. These obstacles to Palestinian law enforcement have challenged the legitimacy of PA institutions and contributed to an unchecked spread of vigilantism, raging security instability and unprecedented proliferation of arms, especially in the Gaza Strip.

The occupation has also impeded the Palestinian judiciary's capacity to function as a single integrated authority, in accordance with the recognition in the Oslo Accords that the West Bank and Gaza Strip form a single territorial unit. Movement of judicial officials between the two areas is exceptionally difficult due to the suspension of contacts between the Palestinian and Israeli sides since the beginning of 2006 (which continues to this day in the Gaza Strip). Moreover, Israeli military checkpoints set up throughout the West Bank prevent many judicial staff members from accessing their workplaces on a regular basis. Such a situation also applies to administrative staff members working at courts and Public Prosecution departments, litigating parties, lawyers, summoned witnesses and experts. These conditions severely disrupt the operation of courts and Public Prosecution departments.

In addition to the obstacles created by the Israeli occupation and security instability, the other major impediments to judicial functioning include the following:

##### **1. Absent or Unclear Political Will**

Despite abundant statements made by Palestinian officials, especially during presidential and legislative electoral campaigns – and notwithstanding considerable funds expended on the judiciary – observers state that promotion of the Palestinian Judicial Authority has never been among the highest priorities on the Palestinian agenda. Unless foreign aid is provided by the donor community, the Judicial

##### **Absent or Unclear Political Will to Develop the Justice Sector**

Since the PA was created, the position of the Minister of Justice has been held by more than ten persons. Some of these were inadequately experienced in justice issues in Palestine or lacked the administrative and political expertise or decision-making capacity to occupy such a sensitive position. As a result, serious questions have been raised about the genuineness of the Palestinian leadership's commitment to promote the rule of law and judicial legitimacy.

Authority is not allocated a budget commensurate with its significance and needs. Moreover, support rendered to the Palestinian judiciary has been associated with political agendas of donor countries, particularly western ones. Suspension of most judicial support programs at the onset of 2006, following the *Hamas* victory in PLC elections, is but one obvious example on this case. In this context, much can be achieved if the Palestinian political leadership appreciates the necessity of prioritizing development of the judiciary and develops comprehensive strategic plans to promote the judiciary, in coordination with relevant civil society organizations.

## **2. The Judicial Authority has been Paralyzed by Unclear Mandates**

Since PA was established, the Judicial Authority has been held captive by disagreements between various parties and forces. At times, such disagreements stemmed from disputes between officials in the West Bank and those in the Gaza Strip. At other times, disagreements arose from disputes over powers between the MoJ and Supreme Court or between the Supreme Court and MoJ on the one hand and the Public Prosecution on the other. Each of these parties has sought to monopolize power and resist oversight, each citing judicial independence and the national interest as justifications for manipulative expansion of their own powers. These points of contention are a major cause of the judiciary's declining position and have impeded it from fulfilling its duties over time. They have also consumed tremendous effort and time by judicial officials and staff members.

To rid the Palestinian judiciary of ongoing controversies undoubtedly will require more legislative regulation of powers and jurisdiction pursuant to international standards and norms of judicial independence. In addition, there is a compelling need to insulate the judiciary from disagreements among political factions. At the same time, independence should not prevent the exercise of forms of oversight over Supreme Court, either by reinvigoration of internal inspection or by adoption of certain courageous proposals approved by the Steering Committee on the Development of the Judiciary and Justice. These proposals provide for the introduction of non-judicial figures to the Council, such as the Head of the Bar Association, Commissioner General of the Palestinian Independent Commission for Citizens' Rights and an independent person of high standing. Such a step would not prejudice judicial independence, since the majority of members are judges and it would give the operation of Supreme Court greater transparency when it makes decisions regarding the administration of the Judicial Authority's affairs, including decisions on appointments, discipline, inspection, accountability and promotion. This system is in force in several countries, including Israel, and has proved to be successful and effective in promoting judicial independence and efficiency.

## **3. A Crisis of Competence**

Clearly, the Palestinian judiciary has suffered from a crisis on the individual level. Many complaints have been filed regarding the eligibility of certain judges, members of the Public Prosecution and administrative staff members to assume their functions. Particularly after the establishment of the Judicial Authority, those concerned were appointed not according to approved norms, but on the basis on favoritism and nepotism. Many current judges had not passed necessary tests before they were appointed. Moreover, it should be noted that legal provisions under the Law Concerning the Judicial Authority of 2002 with respect to the appointment of judges need to be reviewed, to ensure more transparency and confirm that selection and appointment are based above all on competence. The current law lacks clear mechanisms to appoint members of

prosecutions. In addition, it does not adequately treat and regulate several judiciary-related issues: for example, due to short human and financial resources as well as disagreement among judges, the Judicial Inspection Department has remained unable to make any notable achievements. As a consequence, there is no means of distinguishing judges who are working diligently from those who are not.

These problems may be avoided by ensuring that current and future judicial staff members meet conditions provided by the law. In this context, it should be noted that a number of judicial appointments in 2006 were transparent to a certain extent: a written and verbal quiz was held, and representatives of the Bar Association and certain civil society organizations were invited to participate in the appointment process. Realization of the guarantees mentioned above, however, also requires training of newly appointed judicial staff members and continuing training of present members. Despite the fact that the donor community has invested enormous amounts in judicial training projects, no agreement has been reached regarding an institutionalized system of training for Palestinian judicial staff.

#### **4. Uncontrollable Spread of Security, Chaos and Illegal Arms**

As mentioned above security chaos, which has prevailed throughout Palestinian territories since the outbreak of the current *intifada*, has resulted in the disappearance of central authority and, along with it, the legitimacy of the state, law and security forces. The security vacuum has been filled by armed groups, some affiliated with political factions, some with clans. The resulting instability in the security situation has clearly and increasingly impacted the Judicial Authority. Attacks on judges, members of the Public Prosecution and judicial staff have risen. In addition, some litigants have been murdered in court lobbies and judges' rooms, and judges and lawyers were abducted, threatened, blackmailed and prevented from adjudicating certain cases. These developments have discouraged many citizens, including business people and owners of companies, from resorting to the judiciary for fear that they will be subjected to reprisals.

Also of note is the remarkable decline in the execution of the few judgments that are issued by courts. Particularly in the Gaza Strip and northern West Bank, armed militias and influential families respond with weapons to enforcement efforts by the police and execution departments. Fear has climbed, driving some judicial staff members to avoid adjudicating many cases to delay adjudication thereof until deteriorating political and security conditions throughout Palestinian territories have changed.

#### **5. Poor Performance**

Many lawyers complain of weak performance of judicial staff members in various fields. They claim that judicial staff members are not adequately knowledgeable regarding the methods necessary to enforce the law substantively and procedurally. Other complaints touch on the lack of necessary

#### **Judicial Decisions Issued without Statement of Appropriate, Relevant Justifications**

Palestinian legislation stipulates that judicial judgments be justified so as to achieve maximum justice between litigants. However, many judicial decisions and pronouncements issued by Palestinian courts lack sufficient analysis and justifications required by the law. Often, all that judges offer is an enumeration of the details of a case, rather than a statement of reasons and justifications; i.e. relating and connecting facts and incidents with one another, striking a balance between articles of evidence, and ultimately pronouncing the decision in question.

skills in the administration of litigation sessions as well as in drafting and composing judicial decisions. In addition, lawyers state that considerable contradictions exist between judicial judgments among different courts. Major causes of inadequate quality of performance stem from non-implementation of transparent procedures in appointing judges (especially those appointed before 2005); the unavailability of a specialized institute for judicial training (stipulating that a person should not be appointed as judge in case he/she is not a graduate from such an institute); ineffective judicial inspection; and non-enforcement of accountability and liability measures against unqualified judicial staff members. Unavailable or incompetent support staff and weak lawyering skills have also contributed to poor judicial performance.

## **6. Weak Enforcement Mechanisms for Court Decisions**

With respect to penal decisions, Public Prosecution departments are the party that is competent to execute judicial decisions whereas the Execution Department, located at courts, executes judgments in civil cases. These departments, however, suffer from problems of inadequate equipment, including office equipment, computers and proper offices, as well as insufficient coordination with other security agencies, including the police in particular. In recent years, security instability and lack of Israeli cooperation with regard to areas still under Israeli security control have created further problems, the execution of judicial decisions often confronted by force. As a result, persons in favor of whom judicial decisions are issued have postponed their demands to execute their decisions until current conditions, especially economic ones, change. In addition, the PA is in most instances slow to implement court decisions issued against it, thereby conveying a dangerous message to Palestinian citizens and institutions regarding selectiveness in the execution of court decisions. This is in fact a grave violation of the most important pillar of the rule of law. Leniency by authorities responsible for executing court decision in dealing with convicted influential civil or military officials at PA agencies has eroded the legitimacy of court decisions, contributed to Palestinian citizens' distrust for their Authority and justice institutions, and discouraged the private sector from investing funds in the OPT for fear of the consequences resulting from a probable dispute over investment.

In recent years, many persons have exploited the deteriorating situation throughout the Palestinian territories to avoid their contractual liabilities with the Palestinian private sector. Under the pretext of financial hardship, thousands of citizens have refrained from paying debts to electricity, telecommunications and water companies. These companies are incapable of prosecuting defaulting persons before courts as it is unfeasible that they wait for years for courts to issue their decisions and for those decisions to be executed. As a result, Palestinian companies—which constitute a pillar of the Palestinian national economy incurred major financial losses, which in turn have compromised their ability to continue to render services to citizens.

Moreover, the proliferation in defaults in the satisfaction of debts has prevented courts and departments of execution from solving problems arising from bad checks and mortgages. As a result, several banks have either abstained from granting any additional loans or have imposed conditions upon them that the vast majority of citizens are unable meet. Because Palestinian enterprises rely on banks for financing, these circumstances have had an extremely adverse effect on economic development. In addition, the failure to execute eviction orders has discouraged investment in real estate and has prompted many real estate owners to leave their properties vacant rather than taking the risk of leasing

them. These problems may be ameliorated by the provision of needed financial and human resources for the Departments of Execution and the establishment of a specialized judicial police force tasked with implementation of judicial decisions. Additionally, separating the execution of judgments issued by religious courts from those of regular courts will remove a considerable workload from the Departments of Execution. Even more importantly, the rule of law must manifest itself in the execution of court decisions on an unbiased and equal basis: there should be equal access to justice regardless of whether one is an ordinary citizen, security officer, merchant, government functionary, or minister.

### **E. Difficulties Associated with Coordination and Cooperation by Judicial Officials and Staff with the Donor Community**

In recent years, the donor community and the Judicial Authority have developed a dysfunctional relationship. The judiciary's needs and priorities – and the best means of responding to them – have not been identified in a coherent manner. Efficient participation of judicial staff is required to define the goals of projects and to implement them. In most cases, however, participation has been based on personal ties rather than institutional ones. The unclear division of roles between the MoJ and Supreme Court has also negatively impacted the relationship between the judiciary and donor community; both parties have tended to address the donor community in conflicting ways, confusing donors and prompting them to avoid cooperation with either party for fear of embarrassment, diplomatic problems or difficulties associated with execution. The private sector and the judiciary are not aware of their respective needs.

### **F. The Palestinian Private Sector: Overcoming Obstacles or an Obstacle Itself?**

The Palestinian private sector<sup>83</sup> is affected both by problems of governance with the judiciary, relationship to other branches particularly the executive branch and its power relationship to the judiciary as well as burdens imposed by the Israeli occupation and security related matters. When the judiciary fails to function effectively and efficiently because of these factors, the private sector is affected. This correlation becomes self-evident when the judiciary becomes unable to render judgment because judges, lawyers and witnesses cannot reach the courthouses. Justice is delayed for years. The balance of

#### **Promotion of Code of Conduct for both Judicial Staff and Lawyers**

Based on past experience, the Judicial Authority has reached the conclusion that it must redouble its efforts to promote judicial ethics and a code of conduct in relation to all law practitioners. Judges and members of the Public Prosecution must embrace the highest values and ethics in their careers. They must also carry out their assigned duties reliably and transparently. In addition, the legal community should recognize their full array of legal and ethical responsibilities. These responsibilities oblige judges to treat lawyers on equal footing, to act in an unbiased manner, and to resist the influence of Executive Branch officials on the exercise of their duties. On the other hand, lawyers must refrain from acts inconsistent with their profession's ethics and code of conduct, including inappropriate means of soliciting clients, deliberately delaying or obstructing justice, or disrespecting the confidentiality of information obtained in the course of their duties.

<sup>83</sup> The private sector in Palestine includes all companies, public and private establishments, and household enterprises, including persons engaged in commercial activity as a source of income. As such, this definition applies to any company or establishment that is incorporated and operates to make profits as well as persons dealing in retailing for their own accounts.

power between the judiciary and executive is compromised and susceptible to circumspect pressures tipping judgment on the basis of such power schemes as opposed to independent rulings. These examples create distrust by the private sector and its readiness to rely on the judiciary perceived to be inefficient, subject to political pressure and lacking independence.

Investors today pay particular attention and are sensitive to the legal infrastructure in the countries where they operate. Up-to-date and professional business-related legislation encourages investors to expand and increase the volume of their investments. The converse, however, is also true: politicized, unprofessional interventions in judicial decision-making discourage investment, provoking fears of being subjected to blackmail or fraud. To be sure, investors are often prepared to assume the risks of a project's failure on account of business factors. They are less likely, however, to tolerate the uncertainties created by institutional defects and shortcomings in judicial procedures, execution of judgments, or political accountability.

Accordingly, judicial development and stability – in all aspects, from the enactment of sound laws and regulations governing its work to standards for the appointment of judges to ensuring that litigation is free of fraud and blackmail – greatly contribute to promoting investment in the private sector. To realize the economic dimension of the private sector's role, one should recall that it generates more than 75% of GDP. In addition, the Palestinian private sector employs approximately 78% of the Palestinian manpower. Therefore, the rule of law and judicial independence and efficiency must be promoted.

### **1. The Private Sector is Affected by the Mechanism Adopted for Approving Laws and Regulations:**

- a) The private sector needs sufficient time to prepare itself and adapt to new or amended laws and regulations. It is unacceptable that the private sector be surprised by the suspension of a particular law or regulation or amendment of certain provisions under effective laws and regulations by the Executive without due reference to the Legislature.
- b) Since the Palestinian private sector comprises over 75% of Palestinian economic activity and employs approximately 78% of the Palestinian workforce, its voice should be heard in the drafting of certain legal provisions. Commercial, economic, financial, banking and investment items of legislation, including the Company Law and Labor Law, will have a particularly substantial effect on private sector activities.
- c) The private sector should participate in each stage of the legislative process. To do so, private enterprises and market support institutions will need to prepare themselves thoroughly and to develop the capacity to engage in appropriate advocacy. The private sector must be entitled to express its opinion and forewarn against risks resulting from the approval of specific laws without regard for its advice. Otherwise, it will incur major losses and face impediments that adversely impact its activity (e.g. the Labor Law).

### **2. Delays in Issuing Judicial Judgments**

The Palestinian judiciary continues to suffer the consequences of delayed issuance of judicial judgments – both penal and civil – violating citizens' rights to obtain justice according to the law in a timely fashion. It was hoped that the implementation of a

number of measures would solve or reduce the severity of this problem; these measures included: creating new magistrate courts and courts of first instance; increasing the number of judicial staff members and raising their salaries; introducing a computerized system into many courts; promulgating new pieces of legislation; and equipping court bailiffs. Nevertheless, courts continue to be tardy in issuing decisions. Moreover, very long intervals separate court sessions. Panels of judges who hear a single file frequently change.

The reasons behind delays in the adjudication of cases are numerous: lengthy processes established by Palestinian procedural laws; the use of three-judge panels at the courts of first instance; frequent transferences or delegations of judges to courts or other judicial departments such as committees on inspection and training or transference to the Technical Office; and the misuse of litigation proceedings by some litigants and their representatives. With respect to the latter, certain lawyers attempt deliberately to disrupt the progress of justice when they anticipate that a judgment against their clients, particularly vis-à-vis financial claims and eviction from leased properties. In addition, judges are slow to issue judgments, and the system of serving judicial documents in Palestinian courts is underdeveloped. As noted above, moreover, many judges, litigants, lawyers or witnesses are unable to access their workplaces or courts on a regular basis due to the prevailing security situation, disrupting smooth issuance of judicial decisions.

Tardiness to adjudicate pending cases at courts, extended time to issue judgments, and short execution of court decisions negatively impact the private sector's financial, administrative, production and marketing activities. If it persists, this situation will inevitably curb expansion of business, discourage investment, and diminish economic activity in general.

There is an urgent need to reform a number of relevant items of legislation. Most importantly, procedural laws should be revised so as to simplify litigation proceedings without prejudice to litigants' rights. In addition, work should be restricted to the system of three-judge panels at the courts of first instance; transferences and delegations of judges should be limited due to the low number of judges at other courts by means of appointing more judges; controls pertaining to the right to appeal should be put forward; a time limit should be set for certain types of cases; judges' powers to administer sessions should be promoted; and a system for the expedited service of summons should be created. On the other hand, both judges and administrators within the Judicial Authority must ensure judges' commitment to their work as well as issuance of judgments in a timely fashion. Notwithstanding the obstacles mentioned above, the personal responsibility of judges to work towards and search for the best means to issue judicial decision in an expeditious manner should be stressed. Indeed, a

#### **Delaying Justice is a Denial of Justice**

The problem of prolonged disputes and tardy justice worries both the private sector and the legal community. Rarely is a case submitted to the Court of First Instance adjudicated within one year from the date it is filed. The majority of cases take several years to be settled. Land-related cases, in particular, take over twenty years to be adjudicated. Such unjustifiable tardiness hinders litigants' access to the judiciary to solve their disputes. Instead, parties to disputes implement illegal means to satisfy their rights. Furthermore, this problem prevents the private sector from investing in Palestine. Investors cannot tolerate the unwarranted seizure of their assets or leave their rights pending for extended years in the event they are a party in a dispute.

number of judges were able to effectively manage their courts and cases heard before them and to issue judicial judgments in a timely manner.

### **3. Increasing Resort to Commercial Arbitration and Specialized Courts**

As in many other countries, the Palestinian private sector has responded to deficiencies in the judiciary by turning to alternative dispute resolution. Commercial arbitration is carried out by specialized bodies with extensive legal, commercial and professional experience and background as well as solid grounding regarding the social and economic reality in Palestine. Arbitration helps the private sector expedite the resolution of disputable issues and reduce prolonged times for courts to adjudicate them. Additionally, arbitration enables the private sector – through its broad relations with syndicates, associations, chambers of commerce, and other professional organizations – to reach suitable formulas for developing arbitration standards and principles.

Increasing access to commercial arbitration should reduce the number of cases lodged in courts, lessen burdens of courts, save time, effort and money as to the disputing parties, and resolve disputes in a more amicable manner, thereby preserving business relations in spite of contingent disputes. Accordingly, further institutionalization of commercial arbitration would assist the private sector in expanding its business projects and raise investments.

Likewise, the formation of specialized courts (e.g. labor courts, traffic courts, etc.) should reduce the backlog of cases submitted to regular courts as well as abridge periods of time taken to adjudicate them. The private sector prefers that specialized courts be established so as to facilitate and expedite issuance of judgments and save time and effort resulting from unnecessarily extended years of pending cases or decisions. Naturally, such specialized courts require the appointment of new, specialized judges.

### **4. Adverse Effect on the Private Sector of Political Intervention in the Judiciary**

The private sector has a stake in ensuring that judges, Attorney Generals, prosecutors, prosecutor adjutants, and other officials enjoy a high level of competence as well as academic and practical qualifications. Once appointed, moreover, judges should be insulated from interventions and harassments of all types. Particularly during the first years of the PA's operation, many politicians intervened in the process of appointing judges and Attorneys-General to serve political, familial, or financial interests. Furthermore, on many occasions, the Executive influenced the judiciary to issue judgments in its favor or disrupted

#### **Political Influence on Progress and Result of Cases: the Case of a Palestinian Bank**

In 1999, the PA commenced legal procedures against the chairman of the board of a bank, claiming that he undertook actions that violated the law. The bank's board chairman denied this allegation and deemed it to have been an attempt by certain parties within the PA to take control of the bank, which he himself incorporated. Interestingly, the Supreme Court Chairman decided on 11 December 2003 to replace the president of the court panel that examined this case several days before a scheduled session. The Supreme Court Chairman's decision also suggested that the president of the court panel be transferred to another governorate. Many legal specialists and civil society organizations considered the Supreme Court Chairman's decision a political intervention in the judicial system. Further infuriating the Palestinian legal and reform community was the fact that Supreme Court Chairman, who issued the decision, had himself been the Attorney General who initiated this action against the bank's board chairman.

adjudication of certain cases. For example, the Executive made a decision stating that the administration of a national bank be dissolved and appointing a temporary committee to manage the bank. When the bank's board chairman appealed against the decision before a competent court, the Executive placed political pressure on the court to issue a particular decision.

### **5. Understanding of the Importance of the Judiciary in Economic Development**

When addressing judicial affairs, officials and practitioners tend to focus on the judiciary's role in promoting human rights and protecting fundamental human freedoms. These officials and practitioners pay less attention to the judiciary's importance in developing the private sector and national economy, in addition to social, health, educational, environmental and cultural development. The private sector, specifically Palestinian investors and business people, are partially responsible for this problem: in view of the judiciary's potential role in protecting their investment in Palestine, they should have made greater effort to promote its authority and development. In particular, the Palestinian private sector should have given greater support to civil society institutions that undertake to raise Palestinian society's awareness about the importance of an independent judiciary. Additionally, private sector stakeholders could have, and are still required, to work earnestly towards making available the proper environment to promote alternative litigation proceedings, such as voluntary agreements covering arbitration and mediation in commercial cases.

### **6. Proceed with the Promulgation of Economic Legislation and Land Laws**

The Palestinian legislature has enacted a package of economic legislation, including: laws on investment promotion; the Palestinian Monetary Authority; banks; free industrial cities and zones; the Palestinian Capital Market Authority; financial securities; and insurance. It remains necessary, however, to establish a more integrated body of commercial laws. Particular emphasis should be placed on the enactment of the Company Law and Commercial Law, as well as development of the tax code and laws and regulations concerning commercial agents and telecommunications. Commercial disputes should be examined by specialized regular courts with special rules providing for summary proceedings. Additionally, judicial development efforts should be informed by the need to attract investment to Palestine, by creating a safe environment for capital in Palestine, obliging the Palestinian judicial system to realize principles of justice and equity with respect to investors, and prioritizing promotion of capital and investments as a vital and strategic interest, which must be protected and furthered by the Palestinian judiciary. There is currently a perception in the private sector that courts favor individuals over companies based on the view that a judgment against a company has less impact on the company than a judgment against an individual. That view must be reversed. Furthermore, the formation of a judicial police force is more pressing than ever. Such a force should be tasked with execution of judicial judgments, thereby encouraging Palestinian and foreign capital to resume its trust in the Palestinian judicial system.

With respect to land, the PA has taken significant administrative measures over recent years to reduce land registration fees in an attempt to encourage citizens to register any transactions of land. It is hoped that, as a consequence, transactions will be stable and landowners will be able to use their land as collateral to borrow from banks and financial institutions. However, the basic problem still persists in this regard: the Palestinian legislature has not enacted any consolidated pieces of legislation for land throughout areas under PA jurisdiction. This problem continues to constitute a major obstacle in the

way of private sector development, including banks that use mortgage mechanisms as a guarantee to grant loans. Moreover, land-related cases remain the most complicated cases before Palestinian courts for a number of reasons: unclear and contradictory legal provisions; complex patterns of multiple ownership; wide geographic dispersion of landowners; and the continuing lack of resolution of most land claims.

## **F. Recommendations**

Despite the investment of tremendous time, effort and resources in the Judicial Authority, it continues to suffer from a combination of challenges. It still requires long-awaited reform and development. External factors, including the Israeli occupation, security chaos, weak or unclear political will towards judicial reform, and the nature of relations between the judiciary and relevant actors, continue to undermine the administration of justice in Palestine. In addition, internal factors also have an influence on judicial institutions. For example, the current leadership of the judiciary is unable to take difficult and decisive decisions on numerous issues, the judiciary has failed to address issues pertinent to its administration that should have been solved a long time ago, and, judicial output is low.

With the outbreak of the Palestinian second *intifada* along with the Israeli destruction of the PA's civil and security infrastructure, centralized authority has been downgraded in many Palestinian areas. As a result, armed groups and influential parties have taken over positions of authority, often by force. This situation has further deteriorated due to infighting between *Hamas* and *Fateh* in 2006 and 2007, dissolution of the Eleventh Palestinian Government, and the declaration of the state of emergency. These developments have negatively affected PA institutions, including the Judicial Authority, which has been inadequately protected not only from Israeli attacks, but also from Palestinian armed groups and factions. In addition, *Hamas'* control over the Gaza Strip and the formation of the emergency government and provisional government in the West Bank has resulted in an effective separation between the West Bank and Gaza Strip. Political and security circumstances, under which the Judicial Authority operates, have further intensified the weakness of the judiciary and diminished its ability to establish the rule of law in general, and promote the private sector's role in economic development in particular.

Because Israel's continuing occupation and segmentation of Palestinian territory remains a major impediment to the Judicial Authority's effectiveness, the establishment of Palestinian sovereignty and control over all parts of the West Bank, including East Jerusalem, and the Gaza Strip, is the practical and substantive first step towards promotion of the judiciary. Enforcement of such sovereignty would naturally require reinvigoration of the political negotiations between Palestinians and Israelis or other relevant regional and international parties in order to reach a permanent settlement that enables Palestinians to build a state. In light of the legal status of the PA, which was created under the Declaration of Principles and the 1995 Interim Agreement signed in Washington DC, no sector presently can operate efficiently without Israeli cooperation. Until a sovereign Palestinian State is proclaimed, we recommend that obstacles impeding access to judicial staff members be removed or reduced. Furthermore, movement of Palestinian security forces, including access to areas located outside the Palestinian security control where disputes take place, should be facilitated. Palestinian security forces must also be enabled to arrest suspects, transport them to prisons and detention centers, and execute judicial decisions.

In addition, the following recommendations may usefully be considered as means of strengthening the judiciary and, accordingly, the private sector's contribution to Palestinian economic development:

1. Decisively address the problem of security instability and eliminate the phenomenon of armed groups, which has been a source of insecurity for Palestinian citizens and has adversely affected the progress of development efforts.
2. Build unequivocal political will in support of the establishment of an independent, efficient judicial authority that enjoys broad jurisdiction to adjudicate all disputes. Such political will should find expression in the promulgation of primary and secondary legislation, including by-laws, and the enforcement of them in a manner that is decisive and based on equality between all citizens without discrimination on factional or other grounds.
3. Take the measures and actions necessary to further promote transparency and institutionalization in relation to the appointment and promotion of judicial staff members, ensuring that strong and competent judges and members of the Public Prosecution are appointed to carry out their assigned duties. In addition, any external attempts to influence their examination of disputes, particularly corruption files, must be confronted and prohibited irrespective of the identity of charged persons.
4. Reinvigorate judicial inspection since it is necessary to assess judicial staff members. Judicial inspectors should be provided with the tools necessary to enable them to exercise their powers to inspect operations of courts as well as judges and their decisions. Recommendations made by judicial inspectors must also be implemented, including dismissal of unqualified or inactive staff members. Moreover, any promotion should be based on results of judicial inspections. Reinvigoration of judicial inspection must be conducted in line with training and continuing education of judicial staff members.
5. Approve and adopt a strategic work plan that is designed to promote the judiciary. Such a plan should define essential needs of the judiciary in legal, human and financial fields, provided that necessary budgets are available. Particularly in this context, efforts of the MoJ and Supreme Court should be consolidated. A unified strategy should be developed by both MoJ and Supreme Court that ensures development of the judicial institution and strengthens its legitimacy and independence.
6. Work towards the establishment of a Judicial Police Force to be tasked with execution of judicial judgments. Its duties should include bringing suspects to justice, serving necessary summons, providing protection to litigants and staff members, and ensuring implementation of judicial judgments, using force when necessary.
7. Provide special focus on the private sector, which implements numerous developmental projects throughout PA-controlled territories, plays a vital role in the development of the Palestinian economy, builds physical and social infrastructure, and provides job opportunities to thousands of Palestinians working on its projects. Such attention and care should entail, *inter alia*, providing for legal and judicial

instruments that safeguard the private sector and its properties and interests, including:

- Establishing specialized courts or departments within regular courts capable of expeditious adjudication of commercial disputes.
  - Activating alternative litigation methods such as mediation and arbitration as is the case in other countries. This will reduce the cost and increase the speed of dispute resolution efforts.
  - Provide necessary protection to the Palestinian private sector, curb crime directed against it, and hold accountable perpetrators affirmatively and forcefully.
8. Improve enforcement of judgment and execution. The process is slow and non-transparent. Execution judges must be independent and cannot serve on regular court panels, especially in cases where a conflict of interest is present.
  9. Adopt a code of ethics for judges and train them on conflict issues.
  10. Develop systems for advanced and continuing legal education for judges and other officials involved in administration of justice, a step essential to the progress of this profession and the reduction of costs to the private sector resulting from the inefficiency and ineffectiveness of the judiciary and legal profession. A judicial and legal training institute would contribute much to private sector development.

In conclusion, it bears emphasizing that the political leadership of the Palestinian people must shoulder the responsibility for building an independent, efficient judicial authority that is capable of performing its assigned duties. The adjudication of the tens of thousands of backlog cases by courts and the execution of those decisions against the concerned persons, regardless of their affiliation or position, should be at the forefront of that effort. In addition, political parties, prominent members of Palestinian society, intellectuals and the media must assume a more effective role as partners in achieving the rule of law in Palestine.



---

# Recommendations

---



This study has aimed to identify the governance challenges that have had the most serious effect on economic growth and private sector development in the occupied Palestinian territory. Although AMF recognizes, and deplors, the consequences for Palestinian economic and political reform of Israel's continuing military occupation of the West Bank and Gaza Strip and of the recent Palestinian political crisis, our focus in this survey has been on identifying means of promoting internal accountability (i.e., checks and balances within the government) and external accountability (i.e., public oversight over government) within Palestinian public institutions. With respect to the latter, we have given special consideration to means through which the Palestinian private sector may strengthen its own capacities to advocate on behalf of its interests and hold governmental institutions accountable.

Our recommendations, which are elaborated in the papers presented above, are summarized below:

### **Promoting Internal Accountability**

1. The PLC should examine all laws in force that contravene Article (70) of the Basic Law (which provides that the Council of Ministers is to define and implement national policies within the scope of powers enumerated in the Basic Law and within the parameters of the ministerial program approved by the Legislative Council), especially with respect to public agencies, their reporting channels, and the appointment of their chairs and boards.
2. The Council of Ministers and the President's Office should adopt a clearer mechanism for interaction pursuant to Article (46) of the Basic Law.
3. The judiciary must ensure that the President respects general constitutional principles when exercising his or her power to bypass the legislature by issuing legislation by decree, within the constitutional limits.
4. Ministries and relevant PLC committees should ensure that all draft laws are supported by explanatory notes, to facilitate more informed discussion within the PLC of their rationales, merits, and liabilities.
5. The PLC must fully assume the oversight powers assigned to it by the Basic Law, by ensuring, among other things, that the Executive implements economic legislation critical to private sector development.
6. The legislative process should be clarified and streamlined to develop laws to encourage economic stability. AMF has proposed that the process be consolidated into four steps, which is elaborated on pages 51-52 above.
7. The PLC's competence in substantive areas should be developed to allow proper analysis of executive branch proposals. To this end, regular training and improvement of the human resource base at the PLC should be initiated in order to bolster the PLC's ability to conduct legal research and analysis. Additionally, multilingual legal resources should be made available to incorporate diverse legal traditions in legislative analysis. The language skills of legislative drafters should also be developed.

8. The PA's Higher Judicial Council should take the measures and actions necessary to further promote transparency and institutionalism in relation to the appointment and promotion of judicial staff members, ensuring that strong and competent judges and members of the Public Prosecution are appointed to carry out their assigned duties. In addition, any external attempts to influence their examination of disputes, particularly corruption files, must be confronted and prohibited irrespective of the identity of charged persons.
9. The PA should reinvigorate judicial inspection since it is necessary to assess judicial staff members. Judicial inspectors should be provided with the tools necessary to enable them to exercise their powers to inspect the operations of courts as well as judges and their decisions. Recommendations made by judicial inspectors must also be implemented, including the dismissal of unqualified or inactive staff members. Moreover, promotions, when made, should be based on results of judicial inspections. Reinvigoration of judicial inspection must be conducted in line with training and continuing education of judicial staff members.
10. The Judiciary must understand that independence is not absolute and that it must be accountable, as a branch, to the review of its actions by the legislative branch, a difficult undertaking given that the Judiciary answers only to the President, and in limited instances only. The Legislature should consider amending the relevant laws where judges are elected as opposed to appointed.
11. Allocate additional human and financial resources to meet the responsibilities shouldered by the courts.

#### **Promoting External Accountability**

12. The PLC should enact the draft Law on Access to Information, which recognizes the right of every Palestinian citizen or resident to access documents held by public bodies, as well as certain documents held by private bodies. It also provides for mandatory reporting by public institutions regarding a number of matters including: information on documents on internal working matters, audited accounts, regulations, and activities; procedures through which individuals can find out about the institution's policies and projects; explanation of the types of information kept by the institution contents of decisions taken by the institution, along with an explanation of the implications and repercussions of that decision on individuals, its expected results and reasons behind it; and information deemed necessary by the Public Commissioner.
13. While open hearings do take place at the PLC regarding legislation, the private sector should seek other opportunities to participate in the legislative process. One possibility is the creation of formal coordination mechanisms with key ministries, such as the convening of focus groups during the first stages of development of national policy, as well as the holding special open sessions during PLC debates on draft legislation. Additionally, once laws have been promulgated, private sector representatives could be engaged to determine how effective the implementation of the law has been, as well as how well codes and regulations have addressed the issues involved.

14. Greater participation and access to the legislative process of SMEs should be fostered through the development of formal mechanisms for public-private sector dialogue. This would assist in developing a broader understanding of laws affecting the private sector and increase participation of stakeholders in the promulgation of laws that enable a more prosperous business environment. To this end, the establishment of a national ‘competitiveness partnership’ for the Palestinian private sector could serve as an effective vehicle for addressing legislative reform to the needs of SMEs.

#### **Building Private Sector Capacity**

15. One means of bolstering the private sector’s comprehension of economic legislation may be to conduct legal education workshops on topics related to laws and procedures relevant to the private sector. Funding to develop the capacity of private sector representatives in effective lobbying should also be solicited, in order to create a pool of experts to address the issues of specific sectors and to ensure that the skills required for advocating the position of SMEs is developed to incorporate their needs in relevant legislation and policy. This can in turn be used to develop mechanisms, such as the National Trade Dialogue, for each sector to allow for public-private dialogue and debate to take place.
16. Legislative advocacy should be incorporated more explicitly into the mandate, budget, and funding proposals of market support institutions. Training in legislative process and lobbying may usefully be organized for the staff members of such organizations.

#### **Advancing Substantive Reforms**

17. The Council of Ministers should adopt a coherent national legislative agenda for economic reform, in tandem with the Legislative Council.
18. In order to ensure that legislative reforms are systemic, systematic, and informed by sound policy goals, processes should be developed to monitor the coherence and responsiveness of the legislative structure for business. One such process could be the establishment of a Legal Reform Commission, mandated to reduce legal inefficiencies and undertake a comprehensive review of existing legislation in order to identify gaps in legislation. Such a mechanism may be composed of private sector and legislative experts to conduct public consultation and oversight and offer a forum for thorough analysis of legal obstacles to economic growth.
19. The Council of Ministers should adopt a strategic work plan that is designed to promote the judiciary. Such a plan should define essential needs of the judiciary in legal, human and financial fields, provided that necessary budgets are available. Particularly in this context, efforts of the MoJ and Supreme Court should be consolidated. A unified strategy should be developed by both MoJ and Supreme Court that ensures development of the judicial institution and strengthens its legitimacy and independence.
20. In order to facilitate private sector access to justice, steps should be taken to:
  - a. Establish specialized departments within regular courts capable of expeditious adjudication of commercial disputes.
  - b. Activate alternative litigation methods such as mediation and arbitration as is the case in other countries.

- c. Provide necessary protection to the Palestinian private sector, curb aggression against it, and hold accountable perpetrators affirmatively and forcefully.
- d. Improve execution and enforcement of judgments. Execution judges must be independent and cannot serve on regular court panels especially in cases where they have a conflict of interest.

21. The judiciary should adopt a code of ethics. In addition, it should adopt systems for advanced and continuing legal education for judges and other officials involved in administration of justice should be developed. A judicial and legal training institute would contribute much in this regard.

22. Support and apply checks and balances and accountability between the three branches; create an environment where transparency prevails to establish credibility between the public and the public government agencies to promote stability and support econ growth and respect the rule of law. This can only be achieved by the true separation of powers among the three branches.