

## Legislative Process in Palestine

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Due to the different regimes that ruled the country since its separation from the Ottoman Empire in December 1917, the applicable law in Palestine is mixed of various legal systems. While the Ottoman legislation was based on Islamic Law and Continental Law, legislation that was enacted by Britain until May 1948 came as a reflection of the Common Law. The West Bank and Gaza were once again subjected to the continental-like legal system from 1948 and 1967. When the West Bank was annexed by Jordan, Jordanian law, largely derived from the Egyptian/French legal school, was extended to the West Bank. Egypt administrated Gaza without imposing its law, retaining the British-enacted legislation, but issuing certain legislation that was influenced by Egyptian law. After its occupation of the West Bank and Gaza in June 1967, Israel did not extend its law. It ruled the territory chiefly by the previous legislation and added a series of military orders.

The Palestinian Authority (PA), upon its establishment in 1994, retained the existing law. It simultaneously started a process of unifying the West Bank law with that of Gaza. After enacting a number of pieces of legislation by presidential decrees for about two years, the PA organized the first general election on 20 January 1996. This election led to the establishment of the Palestinian Legislative Council as the country's Parliament. A number of institutions have been simultaneously set up, including the Bureau of Legal Opinion and Legislation (the 'Diwan'), which was established on 20 November 1994 as a department of the Ministry of Justice, apparently guided by the French model of the *Conseil d'Etat*. The Diwan was given the primary function to draft the PA's bills that would be initiated by the government. The Diwan also administrated the *Palestine Official Gazette* that publishes legislation.

Before setting a foot in the Palestinian territory, the late Chairman of the Palestine Liberation Organization (PLO), Yasser Arafat, who had just become the PA President, enacted Decree No. 1 of 20 May 1994. In it, Arafat proclaimed that all

From the election of the first parliament until June 2007 (when parliamentary life was frozen upon the new election that led to the Israeli blockade on the Gaza Strip and the frequent detention of parliament members by the Israeli army), ninety-seven laws have been adopted for both Gaza and the West Bank. Among the significant pieces of legislation that went through the standard legislative process are: Election of Palestinian Local Authorities' Councils Law of 16 December 1996, Local Government Law of 12 October 1997, Higher Education Law of 2 November 1998, Environment Law of 28 December 1999, Labour Law of 30 April 2000, Law of the Formation of Regular Courts of 12 May 2001, Banking Law of 21 May 2002, Social Security Law of 19 October 2003, Income Tax Law of 28 December 2004, General Elections Law of 13 August 2005, and Medical Council Law of 20 January 2006. Such parliamentary acts have positively shaped the political, economic, social, juridical and security life in the Palestinian territory.

It is apparent, nonetheless, that these enactments have been adopted on an *ad hoc* basis without having a strategy for systematic legislative reform. For this reason, key legislation has yet to be passed, including the civil code, penal code, family law, commercial code, land law, and companies law. Most of these pieces of legislation are still different between the West Bank and Gaza; they were mainly derived from the Jordanian era in the West Bank (1948-1967) or inherited from the British rule period in the Gaza Strip (1918-1948). Legislation often came as a reaction to pressures or as a response to the demands of interest groups; that is to say, not as part of a national strategy. The Basic Law of 29 May 2002 was a reaction to the pressure of the international community on President Arafat in order to reduce some of his absolute powers. The Legal Profession Law of 24 June 1999 constituted a response to the repeated demands of the Bar Association. Security-related legislation, including service in the Security Forces, by Law of 4 June 2005, was part of the reform scheme that was influenced by the U.S. administration. The Associations Law of 16 January 2000 came as a result of hard work undertaken by civil society. Finally, the promulgation of the Child Law of 15 August 2004 was sponsored by the United Nations

laws that were passed before the Israeli occupation on 5 June 1967 would remain in force until such enactments were amended or unified. The decree demonstrated a willingness to legislate for the new entity that the Palestinians view as a State, albeit under occupation. Arafat, without having established institutions in charge of legislative power, issued about eighty legislative pieces in some twenty months from May 1994 until the enactment of the first 'law' adopted by the Legislative Council on 16 December 1996.

One piece of legislation that was enacted at that time deserves some attention, namely Law Relating to the Procedures for the Preparation of Legislation No. 4 of 17 April 1995. This law related to the preparation of the legislation that would be initiated by the government. It established the steps that the government-sponsored bills should pursue from the moment of the bill's initiative until its publishing in the *Gazette*. Eight months later, the Legislative Council was formed. The Council developed its own procedures.

By the time of the legislative election there was no law that regulated the parliamentary legislative process. There was no constitution that determined the powers of the legislator. Neither parliament members, nor the Council's staff, have ever practiced law-making. But everybody knew that parliaments have the primary power to legislate, as they equally knew that governments should apply the law. Using common sense, the Legislative Council adopted its own Standing Order on 22 March 1996.

The Council's Standing Order sets out the legislative procedures that the Council should pursue. The Order prescribes that any parliament member may propose a bill. The bill would be referred to the Council Legal Department, which is composed of staff members specialized in legislative drafting, to frame the legislative idea in the appropriate legal form. The bill will then be placed on the Council's agenda.

At the Council, draft laws undergo two stages of debate and approval; each stage is called 'reading.' In the first reading, the Council discusses the draft law article-by-article. Each article is read publicly and the opportunity to discuss and propose amendments arises. After deliberating each article, parliament members

Children's Fund.

It is to be noted that draft laws have been frequently presented for discussion through conferences and workshops by relevant institutions and experts, particularly NGOs and UN agencies as well as academia, at various stages in the legislative process. Recent examples include: discussing the draft penal code at the Jericho conference that was sponsored by the UN Development Programme in November 2010 with the participation of dozens of experts and civil society activists, the draft civil code that was analyzed at the Hebron University Legal Clinic seminar in December 2011, and the draft legal aid law that was the subject of a Ramallah workshop in December 2012. In a number of instances, experts are recruited to prepare bills, as in the cases of the nationality draft law, juvenile justice draft law, and the draft law relating to the State Audit and Administrative Control Bureau.

A partial strategy, endorsed in 1996, was the forming of Legal Development Commissions. This strategy yielded a series of legislative acts relating to the judiciary: Arbitration Law of 5 April 2000, Law of the Formation of Regular Courts, Civil Procedures Law, Penal Procedures Law, Law of Evidence (all the latter four laws were enacted on 12 May 2001), Judicial Authority Law of 14 May 2002, and the Enforcement of Judgements Law of 22 December 2005. These core laws correlate with each other and regulate the fundamental courts' function. They prove that legislative reform works best when it is based on strategies that stem from the actual needs of a given sector.

The legislative process went a step back with the division between the West Bank and Gaza after the takeover of Gaza by Hamas in June 2007. Since then, Hamas has been ruling the Strip, while the Fatah-led PA retained its self-role over the West Bank. Each party claims legitimacy for governing and legislating. Fatah bases its regime on the presidential elections of 2005 in which President Abbas won; Hamas justifies its regime by its victory in the 2006 parliamentary elections. The four year terms of both Hamas and Abbas have lapsed because no presidential or legislative elections have taken place since 2005 and 2006, respectively. The legitimacy of both parties is questionable.

In addition, the parliament was unable to meet since the 2006 election due to the separation between the West Bank and Gaza by Israel and, as mentioned above, because Israel has arrested

are asked to vote on that particular article. The approved articles would thereafter be considered as final and no further discussion would be allowed. Rejected or modified articles would again be referred to the Legal Department for re-drafting. The new proposed articles or amendments would go to the second reading by the Council plenary. At this stage, only newly-proposed provisions or amendments would be deliberated and each new article or provision would be discussed as in the first reading. Then the whole bill will be voted upon. If the bill acquires the Council's absolute majority, it would then be transferred by the Speaker to the Palestinian President. The Order makes an exception for a third reading based on 'written and reasoned request by the Council of Ministers or by one-fourth of the Council's members.'

At this time, the President faces two options. He may opt for signing the bill as it endorsed by the Council. Here the bill will be gazetted and becomes a binding law. If the President disagrees with the bill entirely or partially, the bill may be blocked. In this case, the bill will be returned to the Council for the incorporation of the President-proposed amendments. The Council will then hold an additional session to deliberate the President's proposed modification. If the Council embraces the President's changes, the bill will be adopted and gazetted. If the Council rejects the President's proposals, the President's proposal is considered overruled and the bill without the President's proposal is gazetted, despite his reservations.

This process has been developed by the Legislative Council itself without having a constitution or a law that establishes it. It becomes the standard process in the Council. As the Palestinian Amended Basic Law of 2003 has not dealt with the legislative process, the Council's practice that lasted over fifteen years may amount in my view to a constitutional custom. This custom has been finally reaffirmed by Article 47(2) of the 2003 Basic Law which stated that 'the Legislative Council shall exercise its legislative and oversight powers in accordance with its standing order.'

On the other hand, the Council of Ministers, or the Cabinet, is charged with adopting bills proposed by the Executive. The Cabinet's legislative tradition is primarily based on the above Law Relating to the Procedures for

dozens of parliament members. These two reasons made it impracticable for the parliament to hold full sessions. While the President continued to rule the West Bank by presidential decrees as shown above; Hamas governs the Gaza Strip based on enactments by its Prime Minister, Council of Ministers, ministers, police and other official bodies. Each party, Hamas and Fatah, has its own legislative bureau (the Diwan) placed within separate ministry of justice that publishes a distinct official gazette. In Gaza, parliament members do hold regular sessions and adopt legislation that applies in Gaza courts, the last of which were the civil code and the law of companies in September 2012. This situation is alarming. If it does not stop in the near future by reaching national conciliation between rivals parties or holding new elections, we will witness the emergence of two *de facto* political entities. Each entity would have its own state apparatus: one in Gaza and the other in Ramallah. This could lead to a catastrophic consequence for the Palestine question.

Since 2007, the President has been using his power under Article 43 of the 2003 Basic Law that gives him the right to issue 'decrees of necessity' that takes the effect of law. These decrees are called sometimes 'temporary law' (temporary until the parliament's first session). Thus far, the President has issued seventy-two decree-laws since 25 October 2007. While some of these decree-laws meet the emergency requirement of the aforesaid Article 43, others do not fulfil the criteria. Examples of the first type can be found in decrees on money laundering, budget law, preventive security law, and penal law. Amongst the second category are: banking law, sports law, and income tax law. Whatever the opinion regarding such type of enactments might be, no one can determine the exact meaning of 'emergency,' notably as Article 43 itself does not define "the emergency that could not be delayed." The fact remains that the President has assumed the power of the legislator, in addition to his executive power. And the country is being ruled by one man without legislative oversight.

Notwithstanding the significant developments relating to legislative drafting, technical deficiencies can still be found in various enactments. Certain provisions of the 2003 Amended Basic Law lacked to the necessary parliamentary laws to enforce them, including the nationality law and the setting up of administrative courts. Some parliamentary laws, in turn, lacked executive regulations to implement them. Until 2002, out of the sixty PA-adopted

#### Preparation of Legislation of 1995.

The legislative idea from the Executive normally comes from a single ministry. The idea would then be referred to the Diwan in order to 'put it in the appropriate legal form.' The Diwan conducts research on the legislative idea, collects data on the topic in coordination with the ministry or the governmental department that initiated the legislation. After putting the legislative idea, or policy, in the technical legislative format, the Diwan refers the 'bill' to the Secretary-General of the Council of Ministers who, in turn, refers the bill to a ministerial committee to study the substantive content of the bill and presents its recommendations to the Cabinet with regard to the draft law. After discussing it by a Cabinet meeting, the bill will be again returned to the Diwan for re-drafting in 'the appropriate legal form.'

Prior to the establishment of the Legislative Council, this Executive-initiated process was the standard norm. The Diwan, according to the aforementioned 1995 law, had the power to re-draft bills after the Cabinet's approval or amendment and refer it directly to the President for enactment/signing. Then the Diwan, which administrates the *Palestine Gazette*, would publish the 'law' in the *Gazette*.

The process remarkably changed after the legislative election in 1996. From that time onward, the Council of Ministers, after accepting the bill, has become obliged to transfer the draft law to the parliament Speaker, accompanied with its explanatory memorandum. The Legislative Council may decide to deliberate the draft law or may reject it. In case of the acceptance in principle, the bill will pass through the steps that were listed above regarding legislation proposed by parliament members. Hence, the legislative power of the Executive has been minimized and the parliament (Legislative Council) assumed its natural legislative function. And the role of the Diwan in the legislative process has become identical to the role of the Legal Department of the Legislative Council; namely to draft the bill in the 'appropriate legal format,' and to adhere to standard legislative drafting techniques.

laws, only seven regulations were adopted. But even when regulations are enacted, they are often postponed to longer periods than those required by corresponding laws; the regulation of Handicapped Law of 9 August 1999 were passed on 12 April 2004, and the regulations of the Traffic Law of 17 September 2000 were adopted on 13 September 2005.

Other laws prescribed rules but failed to incorporate penalties that sanction those who breach them. The 2004 Child Law stipulates that that basic education is 'compulsory' and that the State should take actions to confront school drop-out problems, but no sanction can be found against those who cause a child to drop out of school. Similarly, the 1998 Prisons Law prohibits torturing prisoners by prison officials but no penalty can be found in this law that punishes those who commit torture or degrading treatment. The implantation of a number of laws was indefinitely delayed or even repealed before being enforced, such as Law on the Constitutional Court of 17 February 2006 and Decree-Law on the Court of Criminal Assize of 15 February 2006.

From this discussion, the conclusion can be made that the Palestinian legislative process has become well established. When they started legislating in 1994-1995, the Palestinians had no previous governing experience. Employing common sense, they learned from the legislative history of the country and imported experience from other countries. Should the process have continued without external interventions, Palestine would have offered a model that could be replicated in other transitional States, whether there is a transition from a foreign occupation to independence or from autocratic regimes to democracy. The foregoing proves that, while the technical expertise might be necessary for successful legislative process; the decisive factor remains a political one.

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