



An Advisory Opinion

A Legal and Political Opinion on Holding Elections Under Current Conditions



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I will express the legal opinion in accordance with the Basic Law, and on a national political level, by discussing holding the elections under current circumstances; before taking the necessary legal and practical measures to correct the fundamental violations of the Basic Law, achieving reconciliation according to one strategy for the Palestinian national project, and agreeing to unify the Palestinian constitutional institutions. Also by discussing the repercussions of holding such elections on the actual participation of all the Palestinian forces in the Palestinian Authority (PA), and on democracy as determined by the constitutional and democratic laws. I will address the most important legal and political aspects as follows:

First: The Constitutional and Democratic Framework of the PA Practices

The introduction to the Palestinian Basic Law states that the enactment of this law constitutes a fundamental step towards the realization of the firm national and historical rights of the Arab Palestinian people and that it shall not in any way whatsoever abrogate or cancel their right to continue to strive to achieve their rights of return and self-determination, including the establishment of a Palestinian state with Jerusalem (al-Quds al-Sharif) as its capital. Also,



the introduction says that the provisional character of the Basic Law shall not abrogate the right of any Palestinian, wherever residing, to exercise equal rights with his/her fellow citizens on the soil of the homeland. It stresses that it draws its strength from the will of the Palestinian people and their firm rights.

Accordingly, the provisions of the Basic Law regulating the Palestinian political system affirmed that the people are the source of power (Article 2 of the Basic Law), and that the system of government establishing it is a democratic parliamentary system based on political and party pluralism (Article 5 of the Basic Law), and that all governmental powers, agencies, institutions and individuals shall be subject to the law (Article 6).

The agreement to hold elections before reaching understandings on essential matters, which are the core of the disagreement and conflict between the Palestinian factions, raises several questions, the most important of which are: Is it permissible to agree to hold the elections outside the scope of the Basic Law and to make amendments to this agreement in accordance with the provisions of the Basic Law based only on the political factions

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consensus? What about the Basic Law in light of this agreement? Was there an agreement to freeze it and work according to selected decisions? If there is an agreement to hold the elections outside the provisions of the Basic Law on the grounds of the necessities of the supreme national interest, who guarantees that the Ramallah-based Authority, which has a constitutional court affiliated with it, will not ask the court to cancel the results of the elections if they do not serve its interests? According to Article 24 of the Constitutional Court Law No. 3 of 2006, the Constitutional Court is exclusively competent to oversee the constitutionality of laws and regulations. Under Article 25 of the same law and to exercise the jurisdiction stipulated in Article 24, the court is authorized to exercise all powers to consider and rule the unconstitutionality of any provision of a law, decree, regulation or decision. It adds that when the court decides that an act is unconstitutional, its application is prohibited and the legislative authority or the authorized body should amend it to be consistent with the provisions of the Basic Law. The law stipulates for restoring the right to the complainant or compensating him for the damage, or both. Is it possible to agree not to appeal to the Constitutional Court on the election results, on the grounds that these elections violate the Basic Law?

Second: Elections in the Basic Law and the General Elections Law

In accordance with Articles 34 and 48 of the amended 2003 Basic Law, the PA President and the members of the Palestinian Legislative Council (PLC) shall be elected in a direct and general election in accordance with the provisions of the Palestinian Election Law. The approval of holding legislative and presidential elections raises the question about the election law under which the elections will be held as there is the general election law approved by the PLC in 2005, and Presidential Decree No. 1 issued by the PA president in 2007 to amend it.

The 2007 Presidential Decree No. 1 amending the Election Law of 2005 issued by the PLC as the original legislative authority, came in violation of Article 26 of the Basic Law, which states that Palestinians—individuals and groups— have the right to participate in political life, and in particular they have the right to vote in the elections to choose their representatives, who are elected by universal suffrage in accordance with the law. The 2007 decree abolished this right in violation of the Basic Law, as it stipulated in Article 4 that candidacy should only be made through the electoral list system. It cancelled Article 3 of Law No. 9 of 2005 regarding elections, which stipulated that Palestinian electoral law shall be based on the mixed electoral system evenly (50%-50%) between the relative majority (multiple constituencies) and proportional representation (list system), considering the entire Palestinian territories as one electoral constituency. Is it possible to agree to circumvent this violation of the



Basic Law by agreeing to detail the deficiency of Paragraph 4 of Article 4, which states that “The electoral list shall be formed by a party or a coalition of parties or grouping of voters for the purpose of elections provided that the lists shall be in compliance with the requirements for candidacy as per the election law.” Is it possible to agree to explain this as it is permissible for a number of individuals—whose number was specified in Article 49 of the 2007 Decree—to agree to present a closed list of independents for the purpose of elections without requiring that they be a registered party, while it is sufficient for their platform to state that they will act as a group to monitor legislative policies and protect the authority from corruption.

Also, the Presidential Decree of 2007 has violated the Basic Law, for it required the candidates for the PA presidency and the PLC membership in Articles 36 and 45 to uphold the Palestine Liberation Organization (PLO) as the sole legitimate representative of the Palestinian people. Does this mean adherence to the policies committed by the organization, including the political commitments imposed by Oslo Accords alongside other commitments? This contradicts the provision of Article 5 of the Basic Law, which adopts political pluralism as the basis for the Palestinian representative democratic system. This condition makes the Palestinian political system resemble a one-party system, as is the case with the totalitarian regimes that recognize only one direction of democracy, if it is in favor of the only party in power. There is no democratic solution to this problem except by abolishing this condition, or at least agreeing that the PLO, according to the national framework enshrined in the introduction of the Basic Law, is essential to achieve the inalienable national and historical rights of the Arab Palestinian people, and that it does not confiscate the right to work for the return and self-determination, including the establishment of the Palestinian state with Jerusalem (al-Quds al-Sharif) as its capital. In addition, the PLO does not abolish any Palestinian right, and its national action derives its strength from its representation of the will and inalienable rights of the Palestinian people.

Third: The Impact of Approval of Elections on the Basic Law

Will the rest of the Basic Law texts be complied with, except for the foregoing?

There must be an explicit commitment by all parties to the Basic Law and the dictates of the provisions of the democratic system that regulate the political life. It is not clear which matters have been agreed to be implemented or suspended in order to hold the elections this time. For example, who will form the government? Is it the winner of the majority of representatives in the PLC? The provision of Article 45 of the Basic Law is general and does not explicitly restrict the PA president choice of the prime minister to the rules of representative democracy, which give the party that wins the majority of parliamentary seats the right to form the government. This article states that “The President of the National Authority shall appoint the Prime Minister and authorize the latter to constitute his government. The President shall have the right to dismiss the Prime Minister or to accept his resignation... .” So, will there be an agreement to implement the representative democratic logic, which provides for the holder of the majority of elected representatives to form the government?

Accepting to conduct the elections on the basis of the Presidential Decree of 2007 means accepting the decree that contravenes the Basic Law, and approving the amendment

of the Basic Law. This is not constitutionally permissible because neither the decree, nor even the ordinary law, can amend the Basic Law, as it is the organizer of the constitutional institutions of the Palestinian political system.

Fourth: Can Elections be Held Sequentially at Predetermined Dates?

On 7/1/2021, it was announced on social media that the PA president has agreed to hold elections within four months. This period is insufficient for the factions to have agreements between them, or for making the necessary preparations to hold them. Thus, there is no confidence regarding the seriousness of holding the elections, and there are no guarantees that one party would not evade the obligation to conduct the three elections if the first election results turn out to be against its interests. In part, a legal way out would be by setting a text that specifically includes consecutive dates within the time limit specified by the presidential decree.



To clarify this: The General Elections Law stipulates that the PA president would issue a decree, within a period of no less than three months before the end of his term or the end of the PLC term, calling for legislative or presidential elections in Palestine to be held and setting the voting date. This decree is published in the official gazette and announced in the local daily newspapers. This means that the law has set a time limit of not less than three months, but did not put a time limit that must not be exceeded. Thus, the three dates can be stipulated in the presidential decree calling for elections. In practice, many political systems announce future dates for elections that exceed three months, and there are no provisions specifying the maximum time limit for holding future elections.

Fifth: The Priority of Agreeing on the National, Legal and Practical Bases of the Elections

Instead of regional and international changes prompting us to rush to issue a decree setting the date of the elections, which makes us look like that we have agreed on a deal to solve the Palestine issue, and where this decree would recognize the violations of the constitution and laws issued by the PLC, why not discuss the legal and national bases of holding the elections instead of this legislative confusion and political ambiguity?

It is possible to lay legal basis for successful elections in a possible manner by withdrawing the wrong decision to dissolve the PLC, claiming that it has not been in session for a long time. This dissolution was due to the power dispute between Fatah and Hamas—after the latter won the PLC majority seats—and the rejection of some PA institutions to work with the Hamas government that was approved by the PLC and the PA president. Notably, Article 52 of the Basic Law has given the PA president the competence to open the first ordinary session on the basis of the principle of separation



of powers, mentioned in Article 2 of the Basic Law as follows: “The President of the Palestinian National Authority shall open the first ordinary session of the Council and deliver an opening address.”



However, Article 16 of the PLC internal statute has amended Article 52 of the Basic Law, in addition, it violated Article 51 of the Basic Law which required the internal system of the Council not to contradict the provisions of the Basic Law and the general constitutional principles, thus giving the PA president alone the competence to invite the Council to convene. It stipulated that:

The Council shall convene, at the invitation of the President of the National Authority, its regular annual session over two periods of four months each. The first begins in the first week of March and the second in the first week of September, or in an extraordinary session if convened by the Speaker based on a request of the Council of Ministers or a quarter of the members of the PLC. If the Speaker does not convene this session, the session shall be deemed convened in the place and time specified in the request of its members or the Council of Ministers.”

The internal statute of the PLC stipulates that only the Speaker may call the Council for an extraordinary session, based on a request from the Council of Ministers or from quarter of the of the Council’s members. And even if the Speaker does not call for such a meeting, the meeting is considered to be a de facto session.

This unconstitutional amendment by the statute of the PLC to Article 52 of the Basic Law has allowed the PA president to control the convening of the PLC or suspend its sessions whenever and as much as he wants. For the Article 16 of the PLC statute did not only stipulate that the PA president opens the first ordinary session, but it also amended the Basic Law, and granted the PA president the sole competence to call the PLC to convene in all its sessions, whether the first ordinary session or all annual regular sessions in March and September.

Accordingly, the PA president, who was given the jurisdiction by the PLC statute to call the PLC to convene its regular sessions and to dissolve the Council, may invite the PLC to convene in one continuous session to consider the amendments, and approve what would unify the PA territories which are scattered geographically and politically—instead of legally deepening their disparity. In this session, the president would build trust that the objectives of these elections will not be to gain the legitimacy of people’s representation, continue the struggle over state power, monopolize the Palestinian right of self-determination without the consent of all Palestinians, and limit national action to the peace talks.



PLC Session Headed by Aziz Dweik

What strengthens the election-based national political partnership is that Palestinian parties must agree on how to get out of the current crisis, especially since it is not certain whether the occupation will allow elections in the West Bank (WB) and Jerusalem, or arrest those who do not agree with the PA’s peaceful negotiations program, as happened following the previous PLC elections, which makes it necessary to search for guarantees for these elections.

Sixth: The Dilemma of the Adjudication in Electoral Appeals in Gaza Strip

In accordance with Law No. 9 of 2005 regarding general elections, as well as the Presidential Decree No. 1 of 2007 amending the previous law, jurisdiction for hearing appeals is given to one court, which is the Election Cases Court formed by a presidential decree and comprising nine persons including its president, as it stated the following: “The Election Cases Court shall be composed by virtue of a presidential decree of a President and eight judges, upon the recommendation of the Supreme Judicial Council.”

Article 21 of the Presidential Decree of 2007 states that “The court shall be duly convened of at least three judges, and at least five judges in the crucial cases according to what the Court’s President decides.”



It is noted that the provision is ambiguous as to the requirements of the president of the court: Does it mean that the matter is left to the Supreme Judicial Council to recommend whoever it wants? Or is the matter entrusted to the PA president to appoint whomever he pleases?



Moreover, according to Article 21, when there are crucial cases (without specifying what they are) the court convenes when there are at least five judges, as decided by the president of the court. Is it possible to convene it in Gaza? Can judges from Gaza courts be members of the court? Also, in accordance with the provision of Article 21 regarding crucial cases, the court convenes with a panel of at least five judges. Therefore, convening this court in Gaza to hear these cases (in the presence of those who file the electoral appeals and want to protect their legal rights) is not possible unless there are five judges from the Electoral Cases Court residing in Gaza Strip (GS).

Therefore, to solve this problem, the PA president must issue a decree amending his decree No. 1 of 2007 regarding general elections, stating that the Electoral Cases Court shall consist of at least 11 judges from among the judges of appeal, and that 5 of them should reside in GS. From these 5, a vice president shall be named to chair the GS court sessions to hear cases brought by the residents of the Strip.



PLC Session Headed by Ahmad Bahar

Seventh: International Guarantees to Protect the Elections and their Results

There is talk about a number of regional countries guaranteeing the commitment of the PA to hold legislative and presidential elections and the elections of the Palestinian National Council (PNC) sequentially. To safeguard the seriousness of this guarantee, the Palestinian parties must add international influential powers to those supporting them

regionally before the presidential decree is issued, in order to ensure the international protection of the elections and those who are elected democratically. For example, there is talk from the representative of Palestine in the US that the United Nations (UN) Security Council will hold an open session in late January 2021 to discuss the issue of an “international peace conference.” It is possible to seize the opportunity and make the Palestinian elections the gateway to respecting the Palestinians’ right to self-determination, in accordance with the international legitimacy resolutions that affirm the inalienable national rights of peoples, including the Palestinian people. Among these resolutions is UN General Assembly (GA) Resolution 194 of 1948 which provides for the recognition of the right of Palestinian refugees to return to their homes, and UNGA Resolution 2672 a, b, c, and d of 1970, in addition to many other resolutions that provide for the recognition of the Palestinian people’s right to self-determination. Also, there is UNGA Resolution 2787 of 1971 which affirms the legitimacy of peoples’ struggle for self-determination, freedom from colonialism, foreign domination and subjugation, including the Palestinian people.

In order to protect the inalienable and legitimate rights of the Palestinian people before the elections, it is politically more appropriate to seek regional and international approval, to protect the election results and make the international community recognize the legitimacy of the constitutional powers of the Palestinian state resulting from them. It would avoid international bargaining, and the Palestinians would not pay the price for recognizing the legitimacy of the constitutional powers representing them by accepting the international liquidation of their inalienable rights and self-determination. This is necessary to preserve what was stated in the introduction of the Palestinian Basic Law; that its enactment constitutes a fundamental step towards the realization of the firm national and historical rights of the Arab Palestinian people, and that it shall not abrogate or cancel their right to continue to strive to achieve their rights of return and self-determination, including the establishment of a Palestinian state with Jerusalem (al-Quds al-Sharif) as its capital, and that constitutional institutions will not nullify the basic rights of the Palestinian people, while the governing bodies in Palestine will continue to derive their decisions and strength from the will and inalienable rights of the Palestinian people.

On the internal level, what protects the legitimacy of the elections and those elected by the people is the international and internal supervision of the elections, in order to ensure that the occupation does not interfere in favor of an electoral team or list and that the elections are not locally rigged, especially since more than 20 thousand people in the committees that supervise the elections were chosen by one party; thus, the approval or consent of the Palestinian political parties must be obtained regarding how they are chosen.

Perhaps there are favorable conditions at the regional level, such as the reconciliation of the Gulf Cooperation Council (GCC) states. Their final statement affirmed their support for the permanent sovereignty of the Palestinian people over all the Palestinian territories occupied since June 1967, and the establishment of an independent Palestinian state with Jerusalem as its capital, and their support to guarantee the rights of refugees in accordance with international legitimacy resolutions



and their right to return, besides stressing the centrality of the Palestine issue and activating the international community to resolve the conflict and meet all the legitimate rights of the Palestinian people.

Eighth: Nomination in a Way that Overcomes the Occupation Restrictions on the Elections and Their Results

All Palestinian parties are aware of what the occupation did after the previous PLC elections and its refusal to recognize or deal with their results. Thus, to prevent any similar interference in the coming elections. For example, candidates should be from areas outside the direct occupation control, in fact their majority should be from these areas to take advantage of the full proportional representation system, for example the majority of nominees could be from GS, since those from WB will be subject to pressure from several sides.

Ninth: The Seriousness of the PNC Elections and the Structuring of the PLO Institutions

What about the PNC elections? Has an agreement been reached to separate the PNC, which is supposed to represent all Palestinians in occupied Palestine and in the diaspora, from the PA whose components are only the Palestinians of WB (including Jerusalem) and GS? Also, even if the members of the PLC could be members of the PNC, the rest of the PNC institutions should not be merged with the PA institutions. For example, it is not in the national interest that the PA president be the chairman of the PLO executive committee.

Accordingly, is there any consideration of nominating a Palestinian abroad to head the PNC and another to head the PLO executive committee to avoid being bound by the Israeli restrictions imposed on the PA in the latter's territories? For those restrictions prevent the Palestinian people from defending themselves against the occupation and claiming their rights by means other than that of negotiations?



A Palestinian National Council Session

Tenth: The Practical Difficulties in Holding Elections in Palestine and for the PNC

In light of the growing threat of the COVID-19 pandemic, which needs millions of dollars to ensure better treatment and vaccines for the millions of Palestinian people, how will the elections be held, especially when there is need to ensure social distancing in public places?

According to Articles 34 and 48 of the Basic Law, voting is the right of the Palestinian voter, and the election is general and direct, as was stipulated in Article 2 of the Palestinian Election Law No. 9 of 2005 issued by the PLC.

The presidential decree amending the previous law restated the provision in Articles 3 and 4 stating that elections for the position of the President and members of the PLC should be held by secret balloting in general, free and direct elections.

Direct elections mean that they take place when the voter him/herself chooses his/her representative, without an intermediary. This requires setting up a legal voting process in a way that takes into consideration the exceptional circumstances, and at the same time ensures that the results are not tampered with. The risk even increases if electronic voting is introduced, noting the lack of technical means and lack of knowledge by voters on how to safely exercise this right. This gets further complicated in the case of the PNC elections, in which the Palestinians in the diaspora participate, where in addition to the above, there is no database of voters and no voter registry as well as other major problems that impede the possibility of holding elections in the diaspora. For example, there is a practical and political difficulty in accepting holding elections in Jordan, which makes many Palestinians who hold a Jordanian passport fear the negative impact of their participation on the rights they have under their Jordanian nationality.



Eleven: Elections Procedures

It seems that some parties are not sincere about holding the PNC elections, as we do not see, for example, attempts to convince Jordan that the elections serve the Jordanian interests and thwart the alternative homeland notion, besides being in favor of protecting the rights of Jordanians of Palestinian origin. Also, no efforts are being made to achieve what Jordan already agrees to—i.e., a Palestinian state alongside the Kingdom of Jordan, to stress that the Jordanian sovereignty will not be affected, and convince Jordan to not make the Jordanians of Palestinian origin, who support the establishment of PLO institutions and take part in the elections, lose their civil and political rights in Jordan.

In addition, in Palestinian communities in other countries, as in Jordan, there are no data available on eligible voters. In practice, no actions are being made by the PA to prepare for elections in the diaspora, hence the agreement to hold the elections is not serious nor is the the issuance of the decree that sets the dates of the elections within



the deadline specified by the presidential decree, i.e., 4–6 months from the date of the decision.

Those who doubt the seriousness of holding the elections add that there is no dialogue with the Palestinian forces on the basis and guarantees of political partnership in the Palestinian constitutional institutions nor on the national goal, forms of struggle and resistance, what can and what cannot be negotiated. There was no Palestinian agreement that the resistance against the occupation is a legitimate way to achieve self-determination and freedom from colonialism and subjugation, as confirmed by international law and international decisions regarding Palestine, some of which have already been mentioned above.

In this context, did all Palestinian forces agree on everything that would ensure that the elections will achieve national goals? or conducting comprehensive elections is inapplicable? Here, many cite the struggle for power following the previous elections; when Hamas won the majority of legislative seats and consequently had the constitutional right to form the government, the PA leaders threatened to declare GS a rebellious region governed by a “terrorist” movement, which made some Arab and foreign countries classify the resistance factions as “terrorist movements.” Many wonder, “Have the attitudes changed and has the PA been making serious attempts to stop labelling the resistance “terrorism”?”

In conclusion, we pray to *Allah* that the intentions to serve the supreme national interest are pure, and an agreement would be reached on what makes the elections complementary to the efforts of ending the schism. May the political and practical efforts be united so that the occupation would recognize the inalienable Palestinian rights, which cannot be cancelled by negotiations and are not subject to statute of limitation.