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The Challenges Confronting the Holding of the Upcoming Public Elections

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The decree issued by president Abbas on the 15th of January 2021 calling for the holding of public elections is a highly significant step toward the actual holding of these elections, both legislative and presidential. The elections are to be held separately, in May for the parliament and in July for the president. The decree indicates that separate elections will follow these two for the National Council of the Palestine Liberation Organization (PLO). The revisions introduced on 11 January 2021 in the amended decreed law of the election law number 1 for the year 2007 remove some of the challenges and impediments and made it possible for the president to call for the elections with the agreement of all factions.

But the presidential decree and the amendments to the 2007 law did not provide answers to several remaining key issues that could derail the process and prevent the holding of elections. These include the manner in which elections can be held in East Jerusalem, the formation of the election court, the policing of the election process, the new conditions required for nomination, and the change in the title of the PA president to that of the president of the Palestinian state.

This policy brief reviews the main challenges and impediments that might derail the upcoming elections. It also offers recommendations to the Palestinian Authority (PA) and the main political factions that are expected to meet in Cairo in the next few days, in the hope of arriving at political and logistical solutions capable of ensuring the smooth running of the elections.

Amendments to the election law: some issues addressed; others ignored

Needless to say, holding general elections is a critical step to build a democratic and a legitimate system; a matter that must be stressed given the fact that the electoral terms of the president and the Palestinian Legislative Council (PLC) have expired nine years ago, back in January 2010, and given the fact that the political system has lost the capacity to affect a democratic transition in case the position of the PA president becomes vacant. Elections are also essential as the means to bypass the failed efforts to restore national unity, renew the legitimacy of the Palestinian political system, and restore the balance between the three branches of that system and ensure the implementation of the principle of the separation of powers.

The revisions expressed by the amended law are a step forward in the effort to facilitate the holding of the elections and are in harmony with the outcome of the recent dialogue held between Fatah and Hamas to overcome the problems that have derailed previous efforts to hold elections. These revisions included the following: (1) the adoption of an agree electoral system allowing full proportional representation in which the entire Palestinian territories serve as a single electoral district; (2) amending the article that required simultaneous presidential and parliamentary election thereby allowing the holding of separate elections, one after the other; (3) cancel the precondition that required participating electoral lists to abide by the PLO as the sole legitimate representative of the Palestinian people and by the Declaration

of Independence and replace those with a commitment to abide by the Basic Law; (4) changing the women quota required in each of the electoral lists by increasing it to a minimum of 26%; and, (5) resolving some issues related to the time allowed for objections to decisions made by the Palestinian Central Election Commission (CEC).

Challenges and recommendations:

The actual holding of legislative election on 22 May and presidential elections on 31 July requires engagement from all factions in a dialogue that addresses those outstanding and disputed legal and logistical issues and comes to an agreement on the following six challenges:

The first challenge stems from the need for an Israeli approval for holding the elections in East Jerusalem, as has been the case in the PA elections that took place in 1996, 2005, and 2006. It is not certain that such an approval can come before the holding of the upcoming Israeli elections in March and the formation of a new Israeli government. Moreover, Israel might find itself having difficulties forming a new governmental coalition, given the precedents of the past three elections, which means that an Israeli response to a Palestinian request might never arrive.

Recommendation: free and fair elections require the effective presence of observers and monitors, both from the Arab world and the international community, in addition to CEC and the Palestinian civil society. Forces should be combined to ensure comprehensive monitoring of the entire electoral process, from A to Z, and should not be restricted to the day of elections. Such extensive presence of observers and monitors can provide a level of confidence in the process and a peace of mind. Such presence can also deter violations and force those in charge, the governments and the police forces, to act in an impartial manner. Recommendations: (1) The Palestinian leadership should enlist international support to bring about pressure on Israel to allow Palestinians to vote in the city in accordance with the interim agreement on elections. (2) Ensuring the participation of East Jerusalemites in the elections should be viewed as an element of Palestinian struggle over Jerusalem and therefore the PA should, if Israel refused to allow them to participate, use this occasion to mobilize the city residents in a popular resistance campaign that aims at forcing Israel to allow the elections to take place in the city. (3) CEC should allow East Jerusalemites to participate in any voting station in the district of Jerusalem once they have registered to vote in that station.

The second challenge is the need to find consensus on the election court that would have to adjudicate all petitions, complaints and objections, related to the election process. Article 20 of the 2007 election law stipulates the formation of an election court by a presidential decree. The court is to consist of eight judges nominated by the Supreme Judicial Council (SJC). Given the fact that the split between the West Bank and the Gaza Strip has led to a split in the judiciary, with one in the West Bank appointed by the PA in Ramallah and one in the Gaza Strip appointed by the Hamas government, a need exists to agree on the means of selecting the members of the election court. The 2011 reconciliation agreement specified the formation of an election court from a chief judge and eight members to be nominated by a newly-created SJC that would be formed in implementation of the agreement. But this agreed upon body was never formed, even after the formation of the reconciliation government in 2014.

Recommendation: it is essential to issue a special law that would stipulate the formation of an election court and to give it immunity against cases that might be brought before the high court and to ensure acceptance and respect from all factions. The following are ways of doing that:

- (1) Provide the Supreme Judicial Council the mandate to appoint the members of the election court from among those of the justice sector in the West Bank among whom there is already Gazan judges residing in the West Bank. This option ensures the legitimacy of the election court while respecting the role of the PA formal justice system and while enjoying the trust of the international community. But this option can be seen as undermining the justice system in the Gaza Strip which has been nurtured by Hamas during the past 13 years and might be seen as blocking any future efforts to integrate its members into a unified justice sector thereby leading Hamas to reject it.
- (2) The formation of an election court from judges from both areas equally, or proportionate to the population size in the two areas. This option helps overcome this impediment but in return it might be seen as conferring legitimacy on the Gazan justice sector, particularly those who were appointed by Hamas since 2007.
- (3) The formation of an election court from retired judges from the West Bank and the Gaza Strip. This option allows the factions to bypass the problem of the affiliation or biases of the judges or their loyalties, to Fatah or Hamas.
- (4) The reconstitution of the election court that existed during the last general elections, in 2006, regardless of their current addresses, the Gaza Strip or the West Bank, and regardless of whether they have retired. Any shortages due to death can be met by enlisting retired judges while maintain the geographic distribution of the previous court.

The third challenge is to find an effective and acceptable security for the election process, particularly on the day of the election: would each of the two police establishments, the one in the West Bank and the one in the Gaza Strip, provide security in its area of operation? According to article 88 of the 2007 election law “the police will ensure the safety and security of the election process and the safety of the citizens.” This poses two questions, one about the neutrality of the police in the two areas and the other about the legitimacy of the police operation in the Gaza Strip. On *de facto* basis, CEC will find it essential to rely on Gazan area police in order to provide security to the voting stations. But this might bring about court cases that might challenge such a decision which in turn might lead West Bank courts to declare the CEC measure illegal thereby preventing the holding of elections in the Gaza Strip. To avoid such scenario, measures should be taken to protect such a step from legal deliberations.

Recommendations: Fatah and Hamas should reach an understanding according to which the two police forces, in the West Bank and the Gaza Strip, would commit themselves to full neutrality, agreeing to operate in accordance with rules set by CEC during the election process and on the voting day. Technical means can also be used to verify police compliance, for example, by installing cameras at all voting stations and in the areas around them. These and similar measures that can provide assurances regarding the safety of the ballot boxes can help provide peace of mind and reduce the concerns about the free and fair nature of the elections.

The fourth challenge is specific to the presidential elections. The January 2021 amendments replaced the title of the president from “PA president” to “president of the State of Palestine.” Moreover, article three of the amended law stated that “the president of the State of Palestine, Chairman of the PLO, the sole and legitimate representative of the Palestinian people, issues a presidential decree calling for presidential or legislative elections...” Article four states that “elections for the office of the president of the State of Palestine will take place in free and secret ballot.” It should be pointed out however that the election for the president of the State of Palestine, who is also the chairman of the PLO, is vitally different from the election for the PA president. The PA elections are limited to the areas of the West Bank (including East Jerusalem) and the Gaza Strip while the president of Palestine is a president for all Palestinians, in Palestine and in the diaspora.

This amendment might generate conflict within the PLO if the winner of the presidential elections is not a member of the PLO Executive Committee or even a member of the PLO itself. It also denies Palestinians living outside the occupied territories the right to select their president because they are entitled to participate in the PA elections and because they have no right to return to the PA areas to participate in the election. Moreover, the amendment will force the PLO to change its own bylaws which stipulate the election process of its chairman. These PLO bylaws stipulate that members of the PLO Executive Committee are the ones who elect their chairman and that member of that committee are elected from within the membership of the PLO National Council.

On top of that, the change in the title of the president requires a revision in the terms of the Oslo Accords and the elections protocols agreed to in these accords if the Palestinians do not wish to provide Israel with an excuse to prevent presidential elections in East Jerusalem. Israel, who does not recognize the state of Palestine, can claim that the Oslo terms call for the election of a PA president and that the change to a president of the State of Palestine is an unacceptable unilateral step that violates these terms.

Recommendations: It is essential to reconsider the change brought about by this amendment with a view to abandon it and return to the original language of a PA president. There are two reasons for this recommendation: (1) to prevent a clash between the two Palestinian political system, the PA’s and that of the PLO while at the same time avoiding a situation in which the PA and PLO become subject of Israeli occupation; (2) to prevent Israel from using the amendment as a pretext to prevent East Jerusalemites from voting in the presidential elections by claiming that existing agreement calls only for the election of a PA president.

The fifth challenge is highlighted by another January 2021 amendment to the election law. This amendment altered article 8 in the 2007 and 2005 election law versions on the nomination process. It requested that for the nomination of certain officials in public and civil society positions, a resignation must be submitted and it must be accepted by the relevant authority, in writing, before that official can submit his or her candidacy application. Indeed, the application is required to be accompanied by a letter of acceptance of the resignation. The resignation must be effective on or before the day set for the closing date of nomination: “The following groups cannot nominate themselves for the presidency or the membership of the PLC until they resign from their positions and provide evidence of the acceptance of their resignation letter.”

This amendment restricts the right of nomination of certain category of official, particularly those in the public sector, by conditioning their nomination to approval by higher authorities including those in the government or the president’s office. Moreover, these higher authorities might postpone the issuance of the letter of acceptance of the resignation until the day after the closing date for nomination. In doing so, they would deprive these officials from the right to nominate themselves while at the same time denying them their jobs, from which they have just submitted a letter of resignation.

Recommendations: The right of elected and appointed officials to nomination should not force them to choose between that right and the right to have a decent job and living condition. Furthermore, given the fact that the Palestinian electoral system is now based fully on proportional representation, it should be clear that employees should be able to remain in their positions because their parties and factions are the ones who mostly organize the election campaign, not the individual candidates themselves. This should ease somewhat the concern that these candidates would exploit the public resources available to them during the election campaign. It is therefore suggested that we return to the original text in the previous versions of the law that assumes that the resignation once submitted would be sufficient and would become valid on the closing date for nomination without requiring evidence of resignation acceptance. The return to the original clause in the election law allows PA and civil society officials to return to their position if they decide in the last minute to cancel their candidacy or alternatively seek an unpaid leave of absence from work until the announcement of the results of the elections.

The sixth challenge is to ensure that the entire election process is fully fair and free, that all factions receive the same treatment in being allowed to campaign freely without constraints or threats and that they are free to mobilize public support and publicize their election platforms. Moreover, the two authorities should strive to create an environment opposed to hate speech, violence, and any forms of coercion or actions that might be interpreted as physical assault on the election campaign of any faction and that the two security sectors commit themselves to refrain from any arrests or detentions targeting the opposition.

Recommendation: free and fair elections require the effective presence of observers and monitors, both from the Arab world and the international community, in addition to CEC and the Palestinian civil society. Forces should be combined to ensure comprehensive monitoring of the entire electoral process, from A to Z, and should not be restricted to the day of elections. Such extensive presence of observers and monitors can provide a level of confidence in the process and a peace of mind. Such presence can also deter violations and force those in charge, the governments and the police forces, to act in an impartial manner.

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