



المركز الفلسطيني
للبحوث
السياسية والمسحية
Palestinian Center for
POLICY and
SURVEY RESEARCH

Critical Policy Brief
Number 7/2019



How to overcome current impediments to holding Palestinian parliamentary elections

Jehad Harb

Strategic Analysis Unit
November 2019



Jihad Harb is a researcher on Palestinian politics and government with a special focus on parliamentary affairs. He is a co-editor of the ARI's report on the Arab Democracy Index: The State of Reform in the Arab World, and the Arab Security Index. He holds a Master's degree in political science from Tunisia. He writes a weekly article and teaches occasionally at the department of political science at Birzeit University. His publications include work on the Palestinian political system, good governance, parliament, integrity, and the security sector.

The Palestinian Center for Policy and Survey Research (PSR)

PSR is an independent nonprofit institution and think tank of policy analysis and academic research. It was founded in 2000 with the goal of advancing scholarship and knowledge on immediate issues of concern to Palestinians in three areas: domestic politics and government, strategic analysis and foreign policy, and public opinion polls and survey research. PSR conducts policy analysis and empirical surveys and public opinion research and organizes task forces, study groups, meetings and conferences. Its work focuses on current public policy issues with a special reliance on empirical evidence as a tool to advance scholarship and understanding.

PSR is dedicated to promoting objective and nonpartisan research and analysis and to encouraging a better understanding of Palestinian domestic and international environment in an atmosphere of free debate and exchange of ideas. PSR is registered as a nonprofit institution in the Palestinian Ministry of Justice.

This brief is the seventh in the PSR series of Critical Policy Briefs for 2019. These briefs address important domestic and foreign policy-oriented issues confronting Palestinian society today.

The Palestinian Center for Policy and Survey Research (PSR)

P. O. Box 76, Ramallah, Palestine

Tel: +970-2-2964933

Fax: +970-2-2964934

pcpsr@pcpsr.org

www.pcpsr.org

How to overcome current impediments to holding Palestinian parliamentary elections

Jehad Harb

Now that Hamas has consented, in its October 28th meeting with Hanna Nasser, Chairman of the Central Election Commission (CEC), to conduct successive elections, first parliamentary to be followed few months later by presidential elections, the single most difficult impediment to holding legislative elections in the West Bank and the Gaza Strip has been removed. This consent gives strong impetus to the idea that elections could serve as the means of ending the Palestinian split and restore national unity after many failed efforts and aborted agreements that were reached in the past in various Arab capitals and after the failure of the National Reconciliation Government during the past five years to implement past reunification agreements.

Nonetheless, the letter of President Mahmoud Abbas which was handed over to the chairman of CEC on 4 November renewed concerns about potential challenges that might impede the election process as it raises serious questions, such as: What election law must be applied to the upcoming elections? Which court must serve as the election court? Which police force must provide protection to the polling stations? And, what conditions, if any, should be applied to the candidates for the parliamentary and presidential elections.

Palestinians deserve to have a roadmap that answers all election-related questions. The roadmap's answers should be reached through a serious debate, one that would help address those critical issues that have accumulated over time due to internal split and those that are likely to be generated by external dynamics, such as the outcome of the current Israeli government formation. Palestinians still remember the time in 2017 when they failed to hold local elections in the Gaza Strip due to disagreement over some of those issues. A repetition of that failure can be expected in the absence of clarity. Such failure might add further strain to the domestic conditions and abort the current path to reunification through election.

This 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 powers to resolve the political, legal, and technical problems so that elections can serve as the means to restore national unity and legitimacy to the political system.

Elections as a step on the road to restore unity and political legitimacy:

Needless to say, holding general elections is a critical step to build a democratic and 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. Abbas has already committed the PA to such elections when he spoke in September 2019 at the UN General Assembly. The fact that Abbas saw fit to do so from New York, rather than Ramallah, might hint to the possibility that he is under international pressure, particularly from the European Union, the biggest PA donor, to hold these elections.

Palestinians have the right to select their representatives. Indeed, it is their constitutional right. But it can also be seen as way out of the current political crisis which has consumed the legitimacy of the political institutions as it is no longer permissible to claim legitimacy based on elections that had taken place more than 13 years ago. It is also a way out of the current constitutional crisis in which the PLC term has ended long time ago. PLC elections provide an opportunity to restore some balance to the political system, reduce the authoritarian nature of the executive power, bring back accountability, protect the judicial system from outside intervention, provide wider guarantees of freedom and human rights, and reinforce the independence and the pluralistic nature of civil society.

A large majority of Palestinians, standing at 72%, wants the holding of general elections, according to poll 71, conducted by the Palestinian Center for Policy and Survey Research (PSR) in March 2019. Support for these elections increase to 83% in the Gaza Strip compared to 65% in the West Bank. A majority of 59% wants Hamas to participate in the legislative elections and to allow such elections to take place in the Gaza Strip. Needless to say, Hamas' consent to participate in the upcoming PLC elections will strengthen the competitive nature of the elections and will make possible a comprehensive and institutional parliamentary debate. This participation will also unify Palestinian efforts to confront projects that aim at liquidating the Palestinian cause and to confront American and Israeli anti-Palestinian plans. At the same time, these elections give Palestinians the right to determine the direction of their future by voting for the socio-political program they prefer most. For all this, an enabling environment must be created to ensure the integrity and freedom of the elections as well as the guarantees from all political factions to respect and accept the outcome of these elections.

Challenges and impediments to holding elections:

For a successful holding of elections, all political factions must engage in a serious dialogue to agree on the legal and technical aspects of the electoral process. To move beyond the current discussion under the auspices of CEC to the actual holding of elections requires finding solutions to eight challenges or impediments:

The first challenge is to overcome the disagreement over the election law that must serve as the basis for a presidential decree that calls for elections and sets its date. There are two election laws: Law, by decree (1) for 2007 and Election Law (9) for 2005. Item 3 in Abbas' letter to CEC indicates that "elections are to take place based on the full proportionality law." This item defines the electoral system but not the election law. Nonetheless, a full proportional representation system can only be found in the 2007 law as it specifies that election is take place based on a "proportional system in which the country is one single electoral district." But that law contains several controversial issues related to the election court, the police force in charge of protecting the election stations, and several others. These issues require prior agreement in order to ensure an environment conducive to successful elections.

Yet, Fatah insists that a presidential decree must be issued before holding a national debate on these exact issues. According to Hussein al Shaykh, a member of Fatah's Central Committee, "A comprehensive national dialogue can commence after the president issues the election decree. The dialogue can include all political actors and aim at ensuring the success of the election process and make plans for a national partnership. Holding a dialogue before the issuing of the presidential decree is would take us back to square one in the dialogue of the deaf and will go nowhere." By contrast, Hamas and other important factions stress, as indicated in a statement issued on 28 October, that before a decree is issued, a national comprehensive meeting should take place in order to find a common path to renew the national project and confront the dangers faced by the Palestinians and to explore all details related to the holding of elections and the means of insuring the success and immunity of the electoral process and the respect of its results while insuring its integrity and transparency.

Recommendation: President Abbas should call for a factional dialogue to take place within a specified period under the sponsorship of CEC in order to determine the election law which will serve as a basis for the presidential decree that will call the voters to parliamentary and presidential elections.

The second challenge is to ensure that a political will exists, not only to hold parliamentary elections, but also presidential soon after that. PSR poll 71 findings show that 49% of the public do not believe that elections will take place soon in the Palestinian territories while only 38% think elections will take place. This uncertainty reflects public distrust in the main political parties and the public belief that they have no political will to take serious measures to restore the reunification of the Palestinian territories.

It is clear that the two main parties, Fatah and Hamas, condition the holding of elections on an Israeli government approval of holding them in East Jerusalem and/or reaching a national consensus on the terms that would govern the election process. The second condition, obtaining consensus through dialogue, seems to open the door to a lengthy period of discussion that would go far beyond the mere election issues leading to a potential collapse of the dialogue. Fatah's Central Committee member Jamal Muhaisen indicated that the "presidential decree must be the outcome of the deliberations taken place at the international scene regarding the holding of elections in East Jerusalem as well as the dialogue regarding its procedural issues with Hamas, so that when the decree is issued, it would not be blocked."¹ A member of Hamas' political bureau indicated that his movement "wants to prepare the ground so that it can become conducive to holding comprehensive elections, and that holding elections in Jerusalem is a national demand at all levels and that Hamas will be positive and will not impede the efforts to formulate an agreed national vision." He added that "we must go to the elections with a national consensus that provides guarantees for respecting its outcome."²

Similarly, there are concerns about the will to hold presidential elections soon after the holding of the parliamentary election. Some think that the PA president might back track on his commitment either because Hamas won the PLC elections or because he is afraid of losing them. In the past three years, PSR polls have shown that the outcome of a presidential election, between Mahmud Abbas from Fatah and Ismail Haniyeh from Hamas, is uncertain; that a win by Abbas is doubtful.³

Recommendation: President Abbas should issue a decree calling for PLC and presidential elections while setting a different date for each, first for the PLC and few months later for the presidency. This measure might give the elections the needed credibility that is currently lacking.

The third challenge stems from the need for an Israeli approval for holding the elections in East Jerusalem, as has been the case in the general elections that took place since 1996. It might be difficult to obtain such an approval before the formation of a new Israeli government. In fact, Israel might find itself heading towards new elections, perhaps a third elections in 2019. This uncertainty might generate a similar uncertainty about the participation of East Jerusalemites in the Palestinian elections.

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 fourth challenge revolves around the need for a bilateral Hamas-Fatah agreement on the electoral system. Hamas seems to prefer a mixed system, as agreed to in the reconciliation agreement of 2011, which determined that 75% of the seats would be won based on a proportional representation system and 25% based on a district-based majority system. In the 2006 parliamentary elections, Hamas won most of its seats in the districts. By contrast, the 2007 election law adopts a proportional representation system for all the seats. Sabri Saydam,

¹ See: <https://www.alwatanvoice.com/arabic/news/2019/10/31/1287591.html#ixzz63vSifSxk>

² See: <https://www.alwatanvoice.com/arabic/news/2019/10/31/1287645.html#ixzz63vUizu00>

³ See recent PSR polls at: <http://pcpsr.org/en/node/154>

member of Fatah's Central Committee stated that Abbas instructed the chairman of CEC to abide by the 2007 election law with its proportional representation in which the entire country is one single district.⁴

Recommendation: In order to ensure a fair representation for all factions in the Palestinian politics, ensure a buy-in from all small groups, and perhaps prevent the emergence of a hegemon, the proportional representation system for all parliamentary seats should be adopted. But the possibility should be kept open for maintaining the districts. For example, for some seats, proportional representation can be applied to the entire country, serving as one electoral unit, while for other seats the same proportional representation system can be applied to electoral districts. The split into one or multiple districts can be 50/50 or in accordance with the 2011 reconciliation agreement, 75/25.

The fifth challenge is embedded in the 2007 election law, item 6 of article 45, which conditioned nomination of electoral lists on willingness to “*abide by the PLO as the sole legitimate representative of the Palestinian people and by the Declaration of Independence (DoI) and the Basic Law.*” Some aspects of this condition are controversial, as Hamas and some of the other factions are not members of the PLO and do not accept some of the terms of the DoI, such as the endorsement of the UN partition resolution. This condition was inserted in the law in 2007 in an effort to avoid the problems that emerged after Hamas won the 2006 elections and refused to accept the agreements that were signed by the PLO. Nonetheless, some of those who disagree with the PLO leadership refuse to abide by this article in the 2007 election law. If this condition is indeed imposed on all contenders, it would limit competition in Palestinian politics. Abandoning this condition does not undermine the status of the PLO and its representation of the Palestinian people; indeed members of the PLC automatically become members of the PLO National Council and they are obligated, in any case, by decisions made by this body regardless of their personal or factional views. Moreover, the 2005 Cairo Agreement, which was endorsed by all factions, including Fatah and Hamas, and led to the endorsement of the 2005 election law, did not impose at the time such condition on the non-PLO factions for participation in the 2006 elections.

Recommendation: As part of the dialogue underway with the various factions, it is recommended to forgo this condition and allow all factions to take part in the elections without imposing the PLO program on them. Indeed, the goal of the elections is to give the Palestinian public the opportunity to select the program it finds more acceptable.

The sixth challenge is the need to find consensus on the election court that would have to adjudicate all petitions, complaints and objections, related to the elections 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. 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 Supreme Judicial Council 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 current transitional Supreme Judicial Council, under chief justice Issa Abu Sharar, 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.

⁴ <http://maannews.net/Content.aspx?id=999531>

- (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 seventh 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 [PA] 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 eight 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.

Critical Policy Brief

How to overcome current impediments to holding Palestinian parliamentary elections

November 2019

This brief is the seventh in the PSR series of Critical Policy Briefs for 2019. These briefs address important domestic and foreign policy-oriented issues confronting Palestinian society today.

The Palestinian Center for Policy and Survey Research (PSR)

PSR is an independent nonprofit institution and think tank of policy analysis and academic research. It was founded in 2000 with the goal of advancing scholarship and knowledge on immediate issues of concern to Palestinians in three areas: domestic politics and government, strategic analysis and foreign policy, and public opinion polls and survey research. PSR conducts policy analysis and empirical surveys and public opinion research and organizes task forces, study groups, meetings and conferences. Its work focuses on current public policy issues with a special reliance on empirical evidence as a tool to advance scholarship and understanding.

PSR is dedicated to promoting objective and nonpartisan research and analysis and to encouraging a better understanding of Palestinian domestic and international environment in an atmosphere of free debate and exchange of ideas. PSR is registered as a nonprofit institution in the Palestinian Ministry of Justice.

The Palestinian Center for Policy and Survey Research (PSR)

P. O. Box 76, Ramallah, Palestine

Tel: +970-2-2964933

Fax: +970-2-2964934

pcpsr@pcpsr.org

www.pcpsr.org