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PCHR Position Paper: Controversy over End of Presidential Term in Office

Introduction:

There has recently been widespread national controversy regarding the end of Palestinian President Mahmoud Abbas' term in office, which ends in January 2009. National media have published and broadcast conflicting statements and positions by Fatah and Hamas officials and politicians, as well as official statements from the Palestinian National Authority (PNA), which remains split between both sides. These have included statements issued by the Acting Speaker of the Palestinian Legislative Council (PLC), Dr. Ahmad Bahar, and the President of the Fatwa Legislative Office, Abd El-Karim Abu Salah.

Hamas supporters claim the current Presidential term ends on 8 January, 2009, in accordance with the end of the four-year period since the last Presidential Election was held on 9 January, 2005. They state that, unless new Presidential elections are held at this time, the Presidential post will become vacant. At this point the PLC Speaker would temporarily fill the vacancy for 60 days, during which period new elections would be held in order to elect a new President of the PNA, as stated in the Palestinian Basic Law.

However, Fatah supporters claim that Election Law No. 9 (2005), which was passed by the PLC, extended the President's term in order to allow simultaneous elections for the PLC and the Palestinian Presidency to be held at the end of the PLC term in January 2010.

Over the past few weeks, PCHR has conducted rigorous legal discussions over this issue. The Centre recruited the assistance of legal experts, including constitutional law experts. The Centre also conducted a thorough analysis of statements and claims issued by both by Fatah and Hamas supporters.

This position paper represents the conclusions reached by PCHR, which the Centre hopes will contribute to clarifying the issues involved, and undermining the manipulation of law in order to serve political interests. The Centre remains very concerned about the continuing fragmentation of PNA institutions that will lead to further deterioration of the Palestinian people's struggle for self-determination, and place additional burdens on Palestinians across the OPT. The Centre calls for unity in order to end the Israeli occupation and to facilitate the legitimate and inalienable rights of the Palestinian people.



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Conflicting Statements and Positions on the Presidential Term:

One of the first statements PCHR monitored during the continuing controversy over the end of the Presidential term was that of acting PLC Speaker Dr. Ahmad Bahar. His statement, which was published in May 2008, called for adherence to the law regarding the Presidential Election. Bahar stressed that it would be illegal to extend the Presidential term till the 2010 PLC elections. Bahar stated, 'The Presidential Elections are a legal and constitutional obligation that must be fulfilled. If the Presidential term ends on 8 January (2009), the President must submit his resignation in order for the PLC Speaker to assume the responsibilities of the President for 60 days during which [time] a new PNA President will be elected... There is a provision in the [Palestinian] Basic Law that limits the Presidential Term to 4 years; thus any extension of the term till the PLC elections is a clear violation of the law.'

However, Bahar also added that, 'Adherence to the constitution aspect does not negate the need for consensus. We cannot talk about elections without consensus. Therefore, unity and ending the fragmentation is a necessity for any electoral obligation.'¹

National media reported similar statements by Mohammad Nazzal, member of the Hamas Politburo. Nazzal stated that the President has two choices: to resign if he wants to run for the next Presidential elections, which must be called for three months prior to the end of the current Presidential term; or else the PLC Speaker (Aziz Dweik, who is currently in detention in Israel) or his First Deputy Speaker, Dr. Ahmad Bahar, will assume the Presidency of the PNA.²

Opinion of the Office of Fatwa and Legislation:

On 28 June 2008, the Fatwa and Legislation Office of the PNA in Ramallah issued a legal opinion in response to statements issued by Hamas. The Fatwa and Legislation Office opinion stated that the Presidential term extends to the end of the PLC term on 24 January 2010. The Office based its opinion on the Basic Law, but also the General Elections Law No. 9 (2005) and the Law by Presidential Decree No. 1 (2007) issued by President Abbas after the June 2007 Hamas takeover of the Gaza Strip.

The Fatwa and Legislation Office Opinion stated:

- Article 2 of the General Elections Law No. 9 (2005) dealt with the issue of the Presidential term prior to the second PLC elections as an exceptional, transitional status. Regarding this Article, 'We find that it stated unequivocally that the start date for the Presidential term is the date of electing the new PLC; and [therefore] the end of the Presidential term is that of the end of the PLC term in order for elections to be simultaneous.'

¹ Palestinian Information Center, 19 May 2008 – with reference to Quds Press.

² Palestine Now on 12 June 2008 – with reference to Quds Press.



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- Article 111 of the General Elections Law No. 9 (2005) unequivocally determined that the Presidential term prior to the second PLC elections would end simultaneously with the term of the PLC. This Article states, 'The upcoming Presidential Elections are to be held at the end of the first PLC term that ends after the activation of this amended law and in accordance with it.'
- Article 116 of the Law by Decree No. 1 (2007) on General Elections contains the same stipulations as declared in Article 111 of the General Elections Law No. 9 (2005).
- The conclusion of this opinion is that the President's term extends till the end of the second PLC term; that the Presidential term prior to 25 January 2006 was a completion of the previous Presidential term; and therefore the upcoming Presidential Elections should be held simultaneous with PLC elections in 2010.

Response of PLC and Change and Reform Bloc to the Fatwa and Legislation Office

The statements issued by Acting PLC Speaker Ahmad Bahar described the opinion of the Fatwa and Legislation Office as 'An unacceptable legislative massacre of the Palestinian Basic Law.' Bahar rejected the 'Interpretations posed by the President of the Fatwa and Legislation Office regarding the end of the Presidential term.' Bahar stated he considered these interpretations as an 'Attempted bypass that has no legal basis.' Bahar also stated that 'Article 36 of the Basic Law affirms that the duration of President Abbas' term is four years, ending on 9 January 2009; and [political] parties that want otherwise are committing a legislative massacre against the [Palestinian] Basic Law.' Bahar added, 'On the ninth of January, 2009, President Abbas' term comes to an end, and the Presidency is transferred to the PLC Speaker for 60 days, after which a newly-elected President takes office. If Mahmoud Abbas continues in the Presidency and accepts the opinion of his advisors, he will be considered to have seized authority.'³

In subsequent statements Bahar said, 'The Basic Law determines the duration of the Presidential term as four years. This is clear-cut and ought not to be manipulated.' According to a report by Al-Jazeera, Bahar considered any misinterpretation or forgery or breach of the law to be a coup against the Palestinian Basic Law⁴.

The majority Change and Reform Bloc in the PLC rejected the opinion of the Fatwa and Legislation Office. Media statements by the deputy whip of the Bloc, Dr. Yehya Mousa, stating that if President Mahmoud Abbas does not hold new Presidential elections before 9 January 2009, this will 'Create an illegal situation; and the President [himself] will become illegal and unconstitutional.'⁵

³ Al-Quds Newspaper website, 28 June 2008, and web site of Samanews Palestinian news agency, 29 June 2008.

⁴ Al-Jazeera web site, 17 August 2008.

⁵ Palestine Now website, 29 June 2008.



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PLC member Faraj El-Ghoul, Chairman of the PLC Legal Committee, stated that the President's term ends on 9 January 2009; and that his parliamentary bloc will recognize Deputy PLC Speaker, Dr. Ahmad Bahar as the PNA President, unless PLC Speaker Aziz Dweik is released from Israeli jail before this date. However, Faraj El-Ghoul was open to consensus with Fatah in order to extend the President's term, on the condition that a PLC session is held to amend the Palestinian Basic Law. Faraj El-Ghoul suggested holding a PLC session of members from Fatah, Hamas, and the other parliamentary blocs to amend the Palestinian Basic Law in order to allow President Abbas to remain in office.⁶

The spokesman of the Change and Reform Bloc, Dr. Salah El-Bardawil, said, 'Any legal opinion that violates the Basic Law is irrelevant. Thus, we will not recognize President Abbas as President after 9 January 2009. We will strip him of his position; and the PLC will assume the Presidency for 60 days that can be extended by a [second] month till the conclusion of Presidential elections.'⁷

Reply of the Fatwa and Legislation Office in Gaza:

Mohammad Abed, the President of the Office of the Fatwa and Legislation Office appointed by the Government in Gaza, issued a statement on 29 June 2008 against the opinion issued by Abd El-Karim Abu Salah. Mohammed Abed called on President Abbas to disregard other opinions and interpretations, and to ensure the Presidency did not violate the Palestinian Basic Law. Abed issued a legal opinion stating:

- 1- No law, whether it be the elections law or otherwise, can violate the Palestinian Basic Law.
- 2- The Presidential Term is determined by the Basic Law; and the term is granted by the election of the people. No one can attack the constitutional right of election.
- 3- The extension of the Presidential Term requires a constitutional amendment to cover it; and this is the jurisdiction of the people's representatives the 'Parliament blocs.'

Vacancy of the PNA Presidency in the Basic Law:

1- Article 37 of the Amended Palestinian Basic Law (2003) (temporary constitution of the PNA) unequivocally and precisely states three cases in which the post of PNA President is considered vacant:

- a. Death
- b. Resignation handed to the PLC if accepted by a 2/3 majority.

⁶ Maan News Agency and El-Bayan Media Center, 30 June 2008.

⁷ Palestine Now, 23 July 2008 with reference to Quds Press



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c. Loss of legal jurisdiction through a decision by the Higher Constitutional Court and accepted by a 2/3 majority in the PLC.

2- Only in these three cases does the PLC Speaker assume the responsibilities of the PNA Presidency for up to 60 days, during which time Presidential Elections are held in accordance with the law.

3- There is no provision in the Basic Law stating that the end of the 4-year Presidential term (determined in Article 36 of the Basic Law (2005) amending some Articles of the 2003 Amended Basic Law) constitutes a vacancy in the Presidential post. If that was the case, the legislators would have explicitly stated so.

4- In light of the above, the opinion that the end of the Presidential term constitutes a vacancy in the post is an allegation lacking clear constitutional evidence and backing. It is an issue that should be judged by the Constitutional Court (the Palestinian High Court acting as a Constitutional Court).

General Elections Law No. 9 (2005) and its amendments:

1- Article 2 states that the PLC and Presidential Elections should be held simultaneously, 'The President and members of the PLC are elected at the same time in direct and free general elections using secret ballots.'

2- This simultaneousness is not stated in the Basic Law. But it is a concept that is supported in order to save effort and resources in the costs incurred by the PNA if separate elections are held.

3- This law was signed shortly after the Presidential Elections, thus contradicting the concept of simultaneousness. And to deal with this problem, the law stated that the last Presidential Elections (January 2005) are an exception to the provisions of Article 2 above. Article 111 of the said law states, 'The next Presidential Elections are [to be] held at the end of the PLC term of the first elected PLC after the invocation of this amended law, and in accordance with it.'

In light of this, and despite assuming the good intention of legislators, there was an unjustified breach of the Basic Law when the Presidential term was extended, in violation of Article 36 of the Amended Basic Law (2005), which itself amended some articles of the 2003 Amended Basic Law. Legislators should instead have amended the 2003 Amended Basic Law itself. Consequently:

1- Reliance on this Amended law by the Office of Fatwa and Legislation is not sufficient. And in light of the current split in the PNA, this interpretation is not accepted by both sides. PCHR also notes that the Office of Fatwa and Legislation is a manifestation of the ongoing political split as there is an Office of Fatwa and Legislation in Ramallah and a second office in Gaza⁸.

⁸ It is noted that the Government in Gaza appointed Mohammad Abed as President of the Office of Fatwa and Legislation in Gaza. In press interviews, he denied the issuance of any opinions by the Office allowing for the extension of the Presidential



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2- The Constitutional Court (Palestinian High Court in its capacity as a Constitutional Court) is the correct body to rule on this constitutional issue.

3- In light of the ongoing split, it is unlikely that both sides will agree to refer the issue to the High Court. This is a consequence of the impact of the Hamas / Fatah split on the Judicial Authority, and the collapse of the judicial system in the Gaza Strip, as a result of the takeover of the courts and formation of a judicial system by the Gaza Government. It is unlikely that Hamas will agree to refer the issue to a court based in Ramallah that is considered part of the problem, as opposed to the solution.

Holding Presidential Elections:

PCHR has consistently supported the principle of holding periodic elections. This stems from the Center's full support for democratic reform. Elections in contemporary democracy are essential. There is no democracy without periodic, fair, and free elections which enable the people to elect their delegates, who are then fully accountable.

However, holding elections requires certain conditions and an environment that ensures fairness and transparency throughout the electoral process, in order to ensure that the results reflect the choice of the electorate. If we assume that the end of the Presidential term requires the holding of Presidential elections prior to 10 January 2009, the question is - are the conditions and environment suitable for holding these elections in light of the ongoing political split? And are these conditions and environment expected to improve over the next few months? If the PLC will fill the Presidential seat, will free and fair elections be held in 60 days as stated by the Palestinian Basic Law? In this regard, the following points are affirmed:

1- In light of the ongoing split between Fatah and Hamas, the conditions and environment in the Occupied Palestinian Territory (OPT) do not ensure free and transparent elections reflecting the will of the electorate⁹. In addition to the split itself that makes holding these elections practically impossible, the implications of this split reflect on the attack by both sides on public freedoms in the West Bank and Gaza Strip. These attacks include violations of basic rights and freedoms that constitute the basis for elections and the democratic process, such as the freedoms of expression, assembly and association. Furthermore, political arrests are openly perpetrated by both sides, undermining the concept and practice of elections. Regrettably, the two main parties are undermining each other in the West Bank and Gaza Strip, making free and fair elections currently impossible.

term. He asked the media to strive for accuracy and responsibility in their reporting. These statements were published on the Palestinian Media Center.

⁹ In this context, we talk only about the split and its implications while fully knowing that there are multiple elements hindering elections. These include the Israeli occupation as well as technical issues pertaining to organizing the elections.

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- 2- Current parameters do not indicate that this environment will change in the foreseeable future if both sides do not immediately start serious and constructive dialogue in order to end the split and agree on elections or another solution in order to re-unify the OPT and the political leadership of the PNA.
- 3- If the PLC takes over the Presidential post after 9 January 2009, this will lead to further fragmentation that will not allow for free and fair elections in the OPT within 60 days.
- 4- At this point, the OPT will face the same problem of not being able to hold elections within the legal timeframe determined by the Palestinian Basic Law. But this time, the elected President will be replaced by an Acting President who will act for an indefinite period.

No Alternative to Dialogue:

Three days after the June 2007 Hamas takeover of the Gaza Strip, PCHR published a position paper reflecting its vision and stance on the events, and their implications on the OPT. It stated, 'The current crisis in the PNA is a political rather than a constitutional or legal one. There is therefore no alternative to dialogue based on real partnership, respect for the results of the legislative elections that were held in January 2006, and putting the interests of the Palestinian people above the narrow, factional interests of the conflicting parties.'

After more than 14 months, this position is still valid. It increases in importance and relevance in light of the continued split and resulting unconstitutional and illegal steps taken by both sides to deepen the split and render reunification practically impossible. In light of this, PCHR:

- 1- Views the controversy over the end of the Presidential term and vacancy in the President's post without holding elections prior to 9 January 2009 as a manifestation of the split and a key component in the political crisis and ongoing power struggle between the two main parties: Hamas and Fatah.
- 2- Regrets the manipulation of the law and Basic Law in this power struggle, including the selective and double-standard nature of both sides in their attempt to employ the Law to give legitimacy to their narrow political interests. Both sides are violating the Basic Law in various forms.
- 3- Affirms that the crisis between both sides in political, and there is no alternative to political dialogue between both sides in the framework of a comprehensive national dialogue. The Centre calls on both sides to immediately start this dialogue and to take the initiative by implementing mutual good-will measures that will pave the way for reunifying the OPT and PNA institutions, ending the split.
- 4- Affirms its full support for Presidential Elections, but not before the conditions and environment allow for free and fair elections reflecting the will of the entire electorate. The first condition is the consensus between Fatah and Hamas to hold these elections.
- 5- Warns strongly against appointing the Acting PLC Speaker as a new President if it is not possible to hold Presidential Elections before 10 January 2009. This will only lead to further fragmentation and destruction of the ruling institutions in the PNA, including the destruction of



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the Presidency, and will enforce a new status-quo where there are two Presidents, one in Gaza and another in the West Bank.

6- Reminds all parties that the extremely high price paid for this split is paid by the collective Palestinian body – the Palestinian people and their national cause for self determination. The Palestinians will continue to move further from ending the Israeli occupation and attaining their legitimate and inalienable rights of freedom and self-determination until these issues are resolved.