

## Legal and Constitutional Protection Of the Basic Rights and Freedoms- in the Basic Palestinian Law

**Dr. Ahmad Hasan Abu Ja'far**

**Dr. Muhammad Al- Shalaldeh**

Assistant Professor of International Law

Associate Professor

Istiqlal University Faculty of law

Al-Quds University Faculty of Law

### المخلص :

يعتبر الدستور في معظم دول العالم الضمانة الأساسية للحقوق والحريات، ويتولى الدستور أيضا الموازنة بين حقوق وحريات الناس، والمصلحة العامة للدولة. تتمثل مشكلة البحث في عدم وجود رقابة فعالة وحقيقية من قبل المجلس التشريعي الفلسطيني من أجل ضمان حقوق الإنسان والحريات في فلسطين.

تنقسم هذه الدراسة إلى فصلين: يتناول الفصل الأول تطور حقوق الإنسان دوليا وإقليميا، تعريفها وموقعها في القانون الأساسي في فلسطين. ويتناول الفصل الثاني الضمانات الأساسية للفلسطينيين لحقوق وحريات الفلسطينيين المذكورة في القانون الفلسطيني الأساسي.

خلصت الدراسة إلى بعض التوصيات: إن دولة فلسطين تبذل قصارى جهدها لتعزيز وحماية حقوق الإنسان، وعلى دولة فلسطين تعديل التشريعات المحلية الخاصة بها من أجل مواكبة الاتفاقيات الإقليمية والدولية التي تحمي حقوق الإنسان، وعلى رأسها حق الشعب الفلسطيني في تقرير المصير. ومن الضرورة بمكان حماية وتعزيز حقوق الإنسان في فلسطين من خلال تفعيل الدور الرئيسي للمحكمة الدستورية والتي أنشئت حديثا، وهذا يدعو إلى المراقبة الدستورية على شرعية القوانين التي تشكل ضمانات للحقوق والحريات للشعب الفلسطيني.

### Abstract

Constitution in most of the world countries is considered the main guarantee for the rights and freedoms. Constitution also balances between the rights and freedoms of people, and public interest of the state .

The research problem of this study appears in the absence of an effective and real control by the Palestinian Legislative Council in order to guarantee human rights and freedoms in Palestine.

This study is divided into two chapters. The first deals with the evolution of human rights internationally and regionally, defining it and its location in the Basic Law in Palestine. The second chapter deals with the basic guarantees for the Palestinians mentioned in the Basic Palestinian Law.

The study concluded to some recommendations: The Palestine State should do its best to promote and protect human rights. The Palestine State has to change its local legislations in order to keep up with the regional and international conventions that protect human rights, primarily the right to self-determination of the Palestinian people. It is also essential to protect and promote human rights in Palestine through activating the main role of the Constitutional Court which has been founded recently, and this calls for constitutional control on the legitimacy of laws, which constitute a guarantee of the rights and freedoms for the Palestine people.

### **Introduction:-**

A constitution guarantees the protection of rights and freedoms, either directly through its rules or indirectly through its principles. It is always left to the legislator to determine the framework of this protection in a group of general principles controlled and guaranteed by the constitution. It is only through the basic principles of rights and freedoms that a constitution can practice its effective influence on all branches of law.

The constitutional protection of rights and freedoms represents the most important constitutional support to the law and all its branches, in organizing the relationship between the individuals in a community. It also balances between these rights and freedoms on one side, and the public interest on the other side. And thus, the constitutional protection of rights and freedoms can influence all branches of law. It is then, much connected to the state of law, democracy and human rights.

A constitution expresses the common values of the community, and so gives it the legal political structure. Therefore, a constitution is no more a confined work for determining the relations and the powers between the state's authorities. A correlation has developed between rights and freedoms on the one hand, and the constitution on the other hand.

The guarantee and protection of rights and freedoms cannot be achieved unless there is a system for this protection. A constitution is mainly set for two goals: - The organization of the state's structure and the distribution of powers between the different institutions, with the guarantee of the rights and freedoms through adherence with this regulation and distribution <sup>1</sup>.

Here, we see the importance of harmony between these two goals so as to materialize the constitutional guarantees effectively. The subject of this study is to determine the legal state which raises the sovereignty of law as a result of the democracy of its regime. It must give the rights and freedoms the guarantee of all constitutional protection, so as for the ordinary legislator to seek help in all branches of law. So how did the Basic Law in Palestine serve the protection of the constitution? It is with the protection of rights and freedoms set forth, especially as the constitutional protection of rights and freedoms is not merely ideological or philosophical protection, but is legal protection in its most sublime forms observed by the legislator in all

branches of law. It must take into account the balance between rights and freedoms either among themselves, or between them and the public interest <sup>2</sup>

We have divided the study into two chapters. The first section deals with the evolution of human rights internationally and regionally, defining it and its location constitutionally in the Basic Law in Palestine. The second deals with the basic guarantees contained in the Basic Palestinian Law for the protection of rights and freedoms.

### **Statement of the problem**

The Palestinian Basic Law ensured the constitutional and legislative guarantees for the protection of human rights. The research problem herein is the absence of an effective and real control by the Palestinian Legislative Council in order to guarantee human rights in Palestine.

### **Questions of the study**

There are two basic questions related to the above mentioned problem:

- 1.Has the Palestine State modified its local laws to keep up with the international conventions which promote and respect human rights?
- 2.Does the Palestine State exert the suitable effort to join the international conventions which respect and guarantee human rights?

### **Study approach**

The researcher used the descriptive analytical approach and the methodology of content analysis, so as to describe the facts, analyzing the Palestinian Basic Law articles related to the Palestinian rights and freedoms, and trying to know how the articles of the Basic Law are applied to the facts related.

### **The first chapter:**

**The evolution of human rights internationally and regionally, its constitutionally defining and its position in the Palestinian law.**

The constitutional legitimacy aims at protecting individuals from the control of authority, by ensuring their rights and freedoms. But the content of this principle varies from one state to another as far as the difference in its political and economic system.

The constitutional legitimacy also controls law in its two forms: The formal and the substantive. In terms of the formal element, this legitimacy ensures the state's observance of law. In terms of the objective element, the constitutional legitimacy ensures that law provides the guarantees of rights and freedoms, and thus, is considered the supreme guarantee for the sovereignty of law over the state powers.

By the constitutional legitimacy, the power is organized, and so is the practice of its authority in the framework of legality (the second requirement). Then, we will discuss the rights and freedoms which had been dealt within the Palestinian Basic Law, as it is the constitution of the Palestinian State (the third requirement), but before that we must briefly address the development of the idea of human rights on the international and regional levels (the first requirement)

**The First Requirement: - The evolution of the idea of human rights at the international and regional levels and its generations.**

Human rights are a high human value whereby each human being can enjoy natural rights that stem from his humanity and human dignity. These rights have been embodied initially in a set of documents, national statements and revolutionary advertising<sup>3</sup>. They have undergone international and regional development among themselves in one character, which is their connection to human self.

The broad international and regional development in the twentieth century was intended mainly to protect human rights through international charters and conventions that reflect this evolution from civil political rights to social and economic rights that were embodied in the mid- eighties of the last century, to rights of human solidarity. These international agreements and declarations have had an effect on states and international organizations in their interest in the human rights issue.

**Firstly: The efforts of the United Nations in the field of human rights.**

The United Nations – after it was founded in 1945 has focused on the issue of human rights, and implemented a set of achievements in this field. That was clear from the large group of declarations and international conventions, especially after the great loss of human rights and fundamental freedoms and the suffering that followed, in addition to the loss and wasting

of valuable rights and dignity, by the Nazi and the Fascist governments during the Second World War.

### **A-The United Nations Charter and Human Rights**

The UN charter is the first international document of a global nature which included a text on the principle of respect for human rights. According to the preamble of the charter, one of the most important objectives of the UN was to defend human rights, especially the defense of freedom and the international system, as well as the belief in the fundamental human rights. It also states in its first article, that the most important purpose of the organization is promoting the respect of human rights and fundamental freedoms. It pledged to the General Assembly to develop and provide recommendations with a view to assisting in the realization of human rights and fundamental freedoms, for all and without discrimination<sup>4</sup>. It also requires the UN to spread the respect of human rights and fundamental freedoms to all, worldwide<sup>5</sup>.

### **B- Universal Declaration of Human Rights**

This announcement was issued three years after the establishment of the UN from the General Assembly of the UN, in a historical meeting held in Paris, on 10 December, 1948. Despite the passage of sixty-four years since its issuance, it is still considered one of the most famous resolutions. This declaration was connected with the General Assembly as it is the ideal aim that all peoples of the world should reach for the purpose of consolidating and respecting rights and freedoms, through education and taking international and national measures to insure global recognition. The declaration is not just a census of human rights and fundamental freedoms, but seeks to give it a global spirit, especially what was stated clearly in its first statements, which made sure that the adoption of human dignity and equal rights is the foundation for freedom, justice and equality in the world.<sup>6</sup>

### **C. The Two International Covenants on Human Rights, 16-12-1966**

If the covenant is controversial, about its legal nature, despite the fact that the preponderant view does not recognize its mandatory force, then, the two international covenants about human rights would form a means for giving the legal nature to the international declaration of human rights, as it is an extension to it<sup>7</sup>. The two covenants are generally based on the provisions of the international declaration, but in more detail<sup>8</sup>. The

International Convention on civil and political rights and the First optional protocol admitted the rights provided in the universal declaration of human rights. It also clarified them in fifty-three items. The importance of this covenant lies in its statement of basic human rights that cannot be violated in any case<sup>9</sup>.

After the disintegration of the Soviet Union, the Eastern Bloc and the Eastern European countries, especially after the fall of the Berlin Wall, the UN's attention in the human rights and issues grew a lot. It also raised them to a higher rank in the new world framework, and always put it on the agenda of the UN, where the mechanisms of human rights were promoted. It witnessed a significant expansion in the activities undertaken by the Centre of Human Rights in Geneva. It also witnessed the establishment of international courts to prosecute war criminals, and the link between human rights and international peace and security. From here, we can point out the evolution of the universality of human rights that marks the basic stations which constitute the generations of human rights. As a whole, it points out the international heritage of human rights<sup>10</sup>. They are:-

- The first generation: includes the group of civil and political rights which resulted from the liberal revolutions and major legitimacies, among which, and the best of which, was the international covenant on civil and political rights in addition to the two protocol appendixes.

- The second generation: A set of economic, social and cultural rights, which was focused on by the social movements and revolutions, among the best of which was the International Covenant for the economic, social and cultural rights in 1966.

- The third generation: People's rights group, such as the right to self-determination and the rights of independence and sovereignty, people's rights to choose political, economic and social systems, in addition to the right to control their own natural resources, where revolutions and national liberation movements have participated more than others in shaping this generation.

- The fourth generation: The group of rights that are called solidarity or the right to associate with an entity facing the same fate. These rights truly reflect the universality of the human right evolution, the most important of which is what was shaped by the General Assembly of the UN such as the right to peace, the right to a clean environment, the right to a balanced share

of technology and information in various fields, the right to possess the common heritage of humanity and the right of development.

### **Secondly: Human Rights at the Regional Level**

Considerable efforts have been made at the regional level especially after the Universal Declaration of Human Rights, which was considered a source of inspiration for many regional agreements in Africa, Europe and America that have contributed in enriching the rules of international law, as it derives its strength from the cultural heritage of the geographical and regional groups<sup>11</sup>.

### **The Second Requirement: Constitutional Specification of Rights and Freedoms (The nature of rights and freedoms protected by the constitution).**

The concept of human rights and its development at the international level participated in determining the rights and freedoms formed by the constitutional legitimacy. Thus, the research here is on the rights and freedoms which are protected by the constitution.

Constitution as a reference to human rights and freedoms (direct constitutional specification), general principles of constitutional value, and the super constitutional principles (indirect specification of rights and freedoms)

### **Firstly: Constitution as a reference to human rights and freedoms (direct constitutional specification)**

This approach is called the legal status<sup>12</sup>. There are constitutions that directly identify what is meant by the rights and freedoms set forth by the constitution. However, these rights vary from one constitution to another in their identification of these rights and freedoms. So, some have avoided mentioning the basic rights, and used instead, the non-prejudice human rights, and thus opened the way for the constitutional jurisdiction to draw the so-called natural rights which were overlooked by the constitutions. Other constitutions have indicated the principles which have constitutional values.

The general principles of constitutional value were found, so that the constitutional judge can protect what is known as basic human rights. They are called basic human rights because, on the one hand, they are close to human being who is the basis of all rights. On the other hand, because the consequences of their recognition pass or must penetrate each legal system<sup>13</sup>.

The fundamental rights stipulated in the constitutions are designed to protect the individual's freedom against the intervention of authority. They are rights protected by the constitution. After the first generation, the constitution started to consider the rights of the second generation, that is, economic, social and cultural rights, where there was a transition from the personal nature of the basic rights to the importance of taking into account the rest of the economic and social rights. This had led many countries to create positive duties on the state that would oblige it to observe the social justice.

A constitution is the source of rights and freedoms, and legislations organize and regulate their practice and functions as a source of guarantee. In determining these guarantees, it carries out the necessary balance between respecting the rights and freedoms, in one scale, and protection of law and public interest.

**Secondly: - The indirect identification of rights and freedoms (Super Constitutional Principles)**

There are some super constitutional principles<sup>14</sup> or principles that have constitutional values that are not necessary available in the constitutional text. There are special and real super constitutional basics concerning the basic rights and freedoms. Principles such as those known as super constitutional principles of national sources that a legislator cannot change.

A constitutional judge may sometimes resort to inspecting the constitutionality of a certain law, and comparing it to basics taken from the International –Right Declaration or the international conventions and treaties that aim at reserving human rights and freedoms. That is what is known as the super constitutional principles of foreign sources that are not related to national sovereignty which is embodied in people.

These super constitutional principles either in their external or internal framework, make the reference that a constitutional judge may sometimes invoke, to ensure human rights and general freedoms<sup>15</sup>.

The Supreme Constitutional Court of Egypt, as well, adhered to the human rights recognized in democratic counties. It didn't stand at the meaning of personal freedom, which was guaranteed by the constitution, but stipulated that legislation wouldn't influence the rights that are of close relation to it, although it was not clearly stated in the Egyptian Constitution<sup>16</sup>.



### **Third requirement: Rights and freedoms in the Amended Basic Palestinian Law of 2003.**

The second section of the basic law for the Palestinian National Authority of 2003 was devoted to detailing the public rights and freedoms through articles 9-33, which confirmed that Palestinians are equal in front of law and justice, and that there is no discrimination between them because of race, sex, color, religion, political opinion or disability, (article 9). And that human rights and basic freedoms are essential and respected. The Palestinian Authority also acts without delay on accession to regional and international declarations that would protect human rights (article 10).

In this requirement, we are going to talk about the position of the Palestinian Basic law of social and economic rights, cultural rights and public freedoms.

#### **Firstly: - Civil and political rights.**

The Palestinian basic law, focused on rights and freedoms and devoted to that, includes many articles. Here are some examples:-

- Personal freedom is a natural right which is guaranteed and not affected (Article 11).

- Preventing a medical or scientific experiment on any one without his consent. (Article 16)

- Freedom of the press, printing, publishing and media. (Article 27)

- Freedom of residence and movement. (Article 20)

-To form associations, trade unions, federations, associations, clubs, and public institutions (Article 26)

- The right to vote and stand for election (Article 26)

- Hold private meetings (Article 26)

- The presumption of innocence. (Article 14)

According to the text of Article X of the Palestinian basic law, the Palestinian State is committed to respect and apply treaties and international legitimacy for human rights in the Universal Declaration, the International Covenant on Civil and Political Rights, the International Covenant on

Economic, Social and Cultural Rights. The second paragraph of the same article came to confirm the Authority's commitment to join regional and international declarations and charters.

And therefore the responsibility falls upon the Palestinian State to achieve the rights included in the International Covenant on Civil and Political Rights by taking the necessary constitutional and legal procedures and the protection of these rights without any distinction as to race, sex, language, religion, political opinion, national or social origin, residence, quality of birth or others, and the confirming justice before the law for all people.

**Secondly: - Economic, social and cultural rights.** Here are some examples:

The right to work. (Article 25)

- The right to fair working conditions. (Article 25)

- The right to form trade unions. (Article 25)

- The right to strike. (Article 25)

- The right to social security. (Article 22)

The basic law also requires respect for individual freedoms and rights in a state of emergency. Article (111) also states that "no restrictions may be imposed on the rights and basic freedoms but to the extent necessary to achieve the stated goal in a decree for declaring the state of emergency."

Article (31) of the Basic Law confirmed that "by law an independent body of human rights is established and the law determines its composition, the functions and the terms of reference and submit their reports for both the head of the Palestinian Authority and the head of the Palestinian Legislative Council".

The Authority, in its capacity as the National Commission for Human Rights, and the Office of the Ombudsman follow-up and ensure the availability of the maintenance requirements of human rights in various Palestinian laws and legislations, and in the work of the various departments, agencies and institutions in the Palestinian State, and includes dealing with

human rights violations and complaints by citizens about abuses resulting from mismanagement in power<sup>17</sup>.

### **The Second chapter: The constitutional guarantees of human freedoms set forth in the Palestinian basic law**

The Amended Basic Law (2005) states on a wide range of rights and freedoms, as we pointed out, and therefore, these rights are considered a key part of its provisions, and therefore cannot be violated by any authority. The Basic Law stipulated on the device for controlling the constitutionality of laws, i.e. a device that ensures superiority of its rules over the other ordinary laws, and eliminates laws that violate its provisions, including the rights and freedoms of the public. So, what are the most important of these serious violations of the rights and freedoms? Despite the texts stating of the Constitution on the need to form a constitutional court to ensure and guarantee respect for the provisions of the Basic Law, Rights and Freedoms are included, which in turn requires the activation of the role of this court, especially after the enactment of the Constitutional Court in 2006. (The second requirement)

#### **The first requirement: the constitutional guarantees of respect for human rights and public freedoms**

As we pointed out, despite the fundamental guarantees contained in the Palestinian Basic Law, we will refer to the most important of these guarantees through the following: -

**Firstly: The constitutional guarantees of a fair trial.**

**Secondly: The Constitutional guarantees of the right to vote.**

**Firstly: The constitutional guarantees of a fair trial.**

It is not logical to imagine divergence between trial and justice. Laws are dedicated to humans, that the trial and all the trials of a lawsuit, need to be fair, but combining them is always due to the keenness of international and national laws- as a kind of consecration and defense of human rights – but that judicial trials should not deviate in a way that would violate human rights.

There is a correlation between all elements of the trial and justice. If the trial refers in general to the total of the necessary formalities in order for the litigant to receive by a court ruling in force an acknowledgement of the right of the claims, and on this basis, consisting of the total components to win the advocacy case before the judiciary, including the investigation procedures and the use of methods of appeal, and methods of execution of the judgment, the justice in principle provides simply everyone with equal and fair treatment<sup>18</sup>.

Based on the foregoing, the fair trial would be a right of the basic human rights observed in civilized nations, as a principle of the general principles of law based on the following elements:

- The legitimacy of the offense and the penalty
- Equality before the courts
- Respect for the rights of the defense
- The presumption of innocence -
- The impartiality of the judge
- Public hearings
- The judgment in a reasonable time
- The principle of proportionality
- Multiple levels of litigation

These sanctions are divided into two phases of litigation: Between the investigation and the trial and then between the trial and final judgment. It deals with various civil and criminal cases.

According to the previous elements, we turn to study the constitutional guarantees of a fair trial in the Palestinian case within the limits of the available data, the following themes:

- Protection of the Constitution (Basic Law) to the principle of fair trial
- Legislative translation for the Protection of the Constitution to the principle of fair trial
- Protection of the constitutional judiciary to the principle of fair trial

## **Basic Law of the International Criminal Court**

These international conventions and agreements are based on two basic elements in the logic of a fair trial (the right to equality before the law and equal operating under the law), then the right to the presumption of innocence by the comprehensive guarantee of suspicion to conviction or innocence.

Human rights are also distributed in this area between the rights during the trial and the limits imposed on the punishment, and the right to appeal and the right to fair compensation and the right to a fair trial, whether ordinary or specialized court and the right to a fair trial during the state of emergency.

### **1 - At the level of the basic principles (referred to by the Basic Law)**

The basic principles constitute the title of Part II of the Basic Law, which provided for a set of basic principles that recognize the principle of a fair trial and the extent of the safeguards inherent in favor of this principle in terms of what is determined in international covenants to which we referred to earlier of rights related to it.

Section II enables monitoring the following articles: -

Article (30) of paragraph (1) of the Palestinian Basic Law, states that: "The right to litigate is guaranteed for all and every Palestinian has the right to resort to the courts, and litigation law regulates the procedures to ensure prompt settlement of cases".

Article (2) itself also confirmed that: - "A provision in the law prohibits protecting any decision or administrative action from judicial review."

Paragraph (3) of the same article states that: - "An error of justice means compensation

from the Palestinian National Authority , and law would define the conditions and modes."

Article (14) of the Palestinian basic law, as well, states that: - "The accused is innocent until proven guilty in a court of law that guarantees for him the right to defend himself, and every person accused of a felony must have a lawyer to defend him."

This right is in line with one of the full rights on the basis of a fair trial, it is the right to the presumption of innocence and the comprehensive guarantee of suspicion to conviction and acquittal, as is emphasized by the various national legislations and international conventions.

Article (9) of the Basic Law stipulates that "Palestinians are equal before the law and the judiciary, without discrimination because of race, sex, color, religion, political opinion or disability."

This text emphasizes the principle of equality before the law and equal treatment under the law for the benefit of a fair trial.

It also has a relationship through the conflict of this equality with every policy that puts into place rules that do not agree on the equality in women's access to the courts, where women, and on the basis of national legislation democracy and international conventions have the right which gives them equal access to the courts so as to facilitate their demand for their rights more actively.

Article (11) of the Palestinian basic law, also states that "no one may be arrested, searched or detained or have his freedom restricted in any way or prevented from free movement, unless a court order is issued for him and in accordance with the provisions of the law, and law would define a remand, detaining or imprisoning shall not be in places not defined by laws organizing prisons ".

The Basic Law also noted that the law is the supreme expression of the people will and everyone must comply with it, and a law is not retroactive. These principles are in favor of a fair trial because they met with one of the rights that underpin fair investigation procedures (such as the right to equality before the law and equal treatment under the law).

## **2 - At the level of constitutional institutions**

The judiciary in terms of its nature and function is essentially a framing or activating tool depending on its tasks to guarantee what we referred to earlier, as part of the relevant rights to a fair trial. Independence of the judiciary means emancipation of its authority from any intervention by the legislative and executive authorities, and not be subject to the elimination of the law.

The judicial authority is the most remarkable of the three powers in the state, and the most influential to the citizen, and proper performance of the judicial authority could mean for the citizen the proper functioning of the legislative authority through the legislating of clear and consistent legislations that fit the special situation in Palestine. It also means proper performance of the executive power through non-interference in judicial power, and the availability of political will to strengthen the judiciary, and maintain its independence.

Not only that, but the performance of the judicial authority may extend down to improve the image of the legal profession and related institutions such as law schools and bar association<sup>19</sup>.

On the other hand, the judicial authority has a prominent role in protecting the rights of citizens, through the application of the legislation and providing fair trials, in addition to its important role in the control of the executive and legislative branches, through the implementation of the executive branch to the legislations and judicial rulings, and restricting the legislature to international standards and the rule of law<sup>20</sup>.

According to the government's vision in the development of the judiciary and justice in Palestine 2008-2010, the government has worked to achieve strategic planning for the justice sector, which is based on two basic principles<sup>21</sup>: -

**The first** is linked to the principle of the rule of law, which means the subordination of all authorities, agencies, bodies, institutions and people to the law.

**The second is** related to another principle, not less important than the first principle. It is confirmed by Article (97) - "which stipulates that judicial power is independent and sponsored by courts of different kinds and degrees, and the law specifies their composition and terms of reference. They issue rulings according to the law and declare martial and executed in the name Palestinian Arab people. "

Article (98), states that "Judges are independent, with no authority over them except that of the law. Any authority may not interfere in the judiciary or in the affairs of justice".

### **Secondly: - The constitutional guarantees of the right of election**

The right to vote belongs to the political rights, especially the rights of participation. It is under this capacity, one of the basic rights of the citizens, and is dedicated in the constitutions of democratic regimes in the international covenants on human rights. But as it is a fundamental right, the right to vote is not protected by law only, but also by the constitutional rule. On this basis, the right to vote is a fundamental right of a liberal nature with properties that show:-

- It is the right actor, for it opens the right to participate in the formation of the will of the state and in the conduct of public and political affairs.

- It is the self right that enjoys objective guarantees, and a citizen would complain for it in the court as a special right.

This Palestinian basic law, has ensured free and fair elections where it addressed the right to vote as well as the right for the election of the President under the provisions of Article (5), which states that "the regime in Palestine is a system that is democratic and parliamentary, which depends on political and party pluralism. The President of the Palestinian National Authority is elected directly by the people, and the government is responsible before the President and the Palestinian legislative Council).

The Basic Law has also approved a set of political rights in accordance with the provisions of Article 26 that the Palestinians have the right to participate in political life, as individuals and as groups. They have the following rights in particular:

- 1 – To form political parties and to join them in accordance with law.
- 2 – To form unions, associations, federations, ties, clubs and popular institutions in accordance with law.
- 3 - To vote and stand in elections to choose representatives elected by universal suffrage in accordance with law.
- 4 - To hold office and public functions on the basis of equal opportunities.



5 – Holding private meetings without the presence of the police, and the holding of public meetings, processions and gatherings in the limits of the law.

**The second requirement: the state of human rights and fundamental freedoms on the areas of the Palestine State<sup>22</sup>**

The reports of the Independent Commission for Human Rights monitored the situation of human rights in the territories of the Palestinian National Authority from 2010 - 16<sup>th</sup> March 2017. According to these reports, Palestinians were subject to various violations, in many cases of a dangerous nature, resulting from the continuing state of division, and the continued Israeli military occupation and its repressive policies against the defenseless Palestinian people. These violations included bringing an open war on Gaza Strip, and what followed of fear , mass murder and war crimes mainly targeting the civilian population and their property, and the capabilities of the Palestinian people and their public institutions. These events also had a significant impact on the ability of the Palestinian National Authority to enforce the protection and promotion of human rights, the rule of law and its complementary duties of achieving national independence and state-building.

In spite of the consensus and harmonization of the Palestinian basic law with most of the constitutions of the world and the harmony in many texts with international conventions on the legal protection of human rights and fundamental freedoms, and according to political changes monitored by the Independent Commission for Human Rights from 2010-2017, there have been a number of violations of human rights recorded in the West Bank and the Gaza Strip. It was clear that the source was the continuation of the state of division, and mutual reactions between the split parties.

**First: In the West Bank: -**

**1 - Arbitrary detention:** - The continued use of arbitrary detention is one indicator of serious deterioration in the system of public rights and freedoms in the territory of the Palestinian National Authority. Despite denials by the government, we still see "the existence of arbitrarily detaining" by the security services, on the grounds that these detention operations are motivated by security and not against the backdrop of the freedoms of

opinion and expression or political affiliation. But the reality refers to patterns of violations that accompanied the cases of arbitrary detention, in terms of lack of real charges for detainees, sending them to military justice for civil affairs, the original jurisdiction, and not enabling parents to visit them easily, in addition to the inability of their lawyers to contact them by the legal means available, and the lack of implementation of the provisions of courts or slowing down in implementation.

## **2- Torture and ill-treatment: -**

During the years 2010-2017, the Independent Commission received a lot of complaints, including allegations of torture or ill-treatment, and the commission found through regular visits to detention centers and detention and complaints from citizens, that detainees in these centers were subjected to torture and patterns of ill-treatment. That was clear from the allegations received by the Commission through complaints and testimonies of citizens in the West Bank. There were repeated forms of hanging, beatings on various parts of the body, sleep deprivation, punching and psychological torture.

## **3 – Disrespect of the decisions of the Palestinian courts.**

During the above mentioned years, the phenomenon of non-implementation of the decisions of the courts continued, along with continued bypassing of it or stalling the implementation of the provisions in a way that does not match with the law - specifically some of the decisions issued by the Supreme Court of Justice and the First Court. The Commission documented more than 745 violations of the decisions of the courts, whereas the executive branch, both security and civil has not carried out those decisions. Then, as the non-implementation of the decisions of the Palestinian courts of whatever degree, is a clear violation of the provisions of the Palestinian basic law, specifically Article (161) of it. That article stipulates that "judicial rulings are enforceable, and to refrain from implementing any of them is a crime punishable by imprisonment, and removal from office".

## **4 - Violations of the right to hold a public office (provided for security safety): -**

During the same period, the government continued working on what is known as “security safety” where the Ministry of Education and Higher Education still issue decisions of dismissal or stoppage of procedures of giving the job against workers in the field of education. The Commission received complaints in this regard during these years. The commission considers this procedure as contrary to the Civil Service Law and the Palestinian basic law, and a violation of citizens’ right to hold public offices in the state on an equal footing and without discrimination, especially, that the dismissed employees had sat for oral and written exams, and had obtained their jobs according to the law, but the decisions to dismiss were based on the recommendations of the security authorities.

#### **5 - Violations of the right to form associations: -**

During the years 2010-2017, the commission spotted violations of the right to form associations, on the subject of registration through the adoption of the security check as a prerequisite for the approval of the registration of Civil Association, and that was according to the instructions of the Minister of Interior, which constituted a violation of the law of associations, No (1) for the year 2000, and its implementing regulations No. 9 for the year 2003 which did not mention the security safety as a requirement from the registration requirements. It may also hinder the move process of deciding the fate of applications for registration within the two months stipulated in the law.

#### **6. Violations of the right to freedom of expression and press freedom: -**

The Palestinian government in the West Bank still prevents newspapers and media close to the Hamas movement from working in the West Bank, as spotted by the commission and during the years 2010-2017, the authority arrested by the security services a number of journalists, without following legal procedures, and without clear and specific charges by the competent judicial authorities in accordance with the provisions of the Basic Law, and the Palestinian Criminal Procedure Law No (3) for the year 2001. There is also considerable evidence for the intervention of the security agencies in what is published or not published in the written or electronic press.

#### **Second: In the Gaza Strip.**

##### **1 – Capital punishment.**

The judiciary in the Gaza Strip did not stop issuing death sentences. The civil and military courts issued death penalties contrary to the provisions of the Palestinian Basic Law, which requires ratification by the President of the Palestinian National Authority on these death sentences before they are implemented.

## **2 - Arbitrary detention: -**

During the years 2010-16<sup>th</sup> March 2017, the commission documented continuation of complaint claims of arbitrary detention without following legal procedures, in addition to the failure by the Interior Ministry in Gaza to take any measures that would stop the military judiciary prosecuting civilians and arresting them for any reason, and under any justification. It also continued during the same period to prevent the Commission from visiting detention centers of the internal security of the government in Gaza Strip, and put obstacles in front of the commission at Gaza Central Prison. The Ministry of Interior in the government in Gaza Strip has not announced the places of detention of the internal security service so far, and did not take any practical measures to allow the commission to visit places of detention that refer to internal security, in spite of repeated requests by the Commission in order to allow it to make periodic visits to detention centers of the Internal Security Agency.

## **3 - Torture and ill-treatment: -**

During the above mentioned years, the commission documented the continuation of complaints about prosecution of torture received by the Commission from citizens who have been subjected to abuses in this regard. The number has increased compared to the previous year. The Commission has recorded a lot of complaints of torture during detention. Colorful images and patterns of torture or ill-treatment allegations were received by the Commission through complaints and testimonies of citizens in Gaza Strip, including hanging, foot-hitting, beatings with sticks and plastic pipes, kicking legs, beatings with hands on various parts of the body, restricting the body to the back, lifting by a hook to a high place and blindfolding for long periods and the use of electric shocks, in addition to the threats and the use of obscene words.

## **4 - Violations of the right to expression and press freedoms: -**

The security forces of the Interior Ministry in Gaza Strip have carried out numerous detentions of journalists and employees of media in Gaza Strip in the same period. The government in Gaza Strip said that the reason is that these journalists work with media banned in Gaza Strip, such as Palestine TV and Palestine radio. In this context, the Commission received a complaint from many journalists who have been arbitrarily arrested by the security services, and without following the proper legal procedures, and also of journalists who have been attacked and prevented from reporting of certain events.

#### **5 - Violations of the right to peaceful assembly: -**

The government in Gaza Strip restricted the right to peaceful assembly in more than one occasion, by preventing marches and gatherings. The participants were arrested and received bad treatment during their detention.

#### **6 - Violations of the right to travel**

The government in Gaza Strip continued to issue decisions in other ways that violated citizens' right of movement. Internal security in Gaza Strip confiscated several passports of Fatah leaders in Gaza Strip during the mentioned years. The Commission believes that what the internal security in Gaza Strip is doing such as the confiscation of passports and travel bans, and the focus on Fatah leaders, is a violation of the rule of equality in rights and freedoms guaranteed to citizens without discrimination.

Consequently, all of these violations of human rights on the Palestinian territories, whether in the West Bank or in Gaza Strip are caused by the case of the Palestinian division and the continuation of the Israeli repression against the civilian population. And it is disrupting the work of the Legislative Council, which had a negative impact on the main role of the Legislative Council in proposing laws and legislations. It affected all aspects of life for the Palestinian citizens and their rights, and therefore, the continued Israeli military occupation for the Palestinian territories and the failure of the efforts to achieve the Palestinian reconciliation will reflect negatively on the system of rights and public freedoms, because the main reasons of the guarantee to the protection of human rights and fundamental freedoms. It is the existence of independent and impartial judiciary that

constitutes a fundamental safeguard to preserve the rights and freedoms in the areas of the Palestinian National Authority.

And an independent judiciary is the most important fundamental element of the state of the rule of law and if we do not have a constitutional judiciary, it is necessary to activate the main role of the Constitutional Court which has been established recently. Therefore, the presence of the Supreme Constitutional Court in the Palestinian case is not a requirement per se, but means that the Palestinian people have as well as other conditions, the requirements for entering the club of democratic nations that take such a system. It entrenches the idea of independence to join these countries, where the integrated system according to the texts of the provisions of the Basic Law and the Judicial Authority Law<sup>23</sup>. The activation of the Constitutional Court is a fundamental safeguard to protect citizens and the basic freedoms from the existing public authorities.

### **Conclusion**

The Palestinian Liberation Organization (PLO), and since its establishment, the Palestinian National Authority, was always keen to establish the appropriateness of the legal system for the promotion and protection of human rights development, with the principles and standards of international humanitarian and human rights and with the requirements of the reasons, circumstances, and the economic, social, political and national factors. The National Declaration of Independence at the Palestinian National Council, which was held in Algeria on 15 November 1988, stipulates that the Palestinian state would rise under a constitution that believes in the rule of law and an independent judiciary and respect for human rights. And the Palestinian basic law states in the section of public rights and freedoms, that the Palestinians are equal before the law and the judiciary shall have no discrimination because of race, sex, color, religion, political opinion or disability, and that human rights and fundamental freedoms and binding and due respect.

### **Recommendations**

1. The Palestine State has to change its local legislations in order to keep up with the regional and international conventions that protect human rights, primarily the right to self-determination of the Palestinian people

Constitutional protection of human rights and fundamental freedoms in Palestine is one of the most important bases which all the struggles of the Palestinian people turned around under the leadership of the Palestinian Liberation Organization (PLO). Thus, the rules of the constitutional system of protecting society and the state has centered and focused on issues of human rights, social justice and political, economic and social equality.

This system pledged to confirm the basics and constitutional guarantees for the protection of human rights in the light of the legal state, and it issued a series of legislative texts to ensure the protection of human civil, political, economic and social rights. The Palestinian Basic Law ensured the constitutional and legislative guarantees for the protection of human rights.

The constitutional protection of human rights is based on the legal safeguards in the Palestinian Basic Law, and in the Code of Criminal Procedure, and this is in line with international conventions and in particular the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

2. It is necessary to activate the main role of the Constitutional Court which has been created recently, and this calls for constitutional control on the legitimacy of laws, and what is determined by the Basic Law of political and administrative control, which constitute a guarantee of the rights and freedoms associated with the foundations of the constitutional protection to them, represented in the rule of law and democracy, as well as the constitutional selection of the rights and freedoms by the judicial oversight as a guarantee of legal trial and safety of criminal proceedings.

3. The State of Palestine should be based on principles of the observance of human rights and the insurance of citizens' lives in peace and security and that the assessment of a fair balance must be made between the fundamental rights and freedoms of individuals on the one hand and the public interest on the other.

#### **References:**

1 Ameen Atef Salibah, (The Role of Judicial Constitution in Reinforcing the State of Law: A Comparative Study). 2002. Tripoli/Lebanon: Alhaditha books. p. 288-300.

2 For more details regarding this balance see Ahmed Fathi Sorour, (Constitutional Protection of the Rights and Freedoms). second edition 2000. Dar Al-Shorok-Cairo. pp. 13-11. Also see Ameen Atef Salibah, *ibid*, p. 141.

3 The Declaration of the U.S.A Independence in 1776, which was stipulated by the representatives of the American colonies in Philadelphia in 07/04/1776 and which set forth the full independence of the colonies from Britain. The declaration, stipulated by Thomas Jefferson, expressed the philosophy of the fundamental law and the rights of individuals, as well as the organization of the Constitution on the basis of social contract. For more details see (Constitutional Rights and Political Institutions) First part, 1975. Lebanon. p. 206. Also see, Ali Karimi, (Human Rights, its Development and Point of Reference), first edition, 1999. Casablanca / Morocco . pp. 39- 49, 53. As well as Ghazi Hussein Sabarini, (The Essential in Human Rights and Basic Freedoms), fourth edition, 1999. Amman / Jordan: Dar Al Thaqafa for Publishing and Distribution. pp. 39-33.

4 See Article 13 of the Declaration.

5 Article 55, section C of the Charter of the United Nations

6. See, Jean Morang (Public Freedoms) translation of Wagih Alba'ini, first edition, Lebanon: Owaidat Publication. p 39.

7 These two treaties did not enter into force until after ten years from their announcement. As for them to be implemented, the approval of at least 35 countries had to be effective and this was not possible until the 23rd of January 1976 with the agreement on economic, social and cultural rights and in the 23rd of March 1976, with the attached Optional Protocol to the International Covenant on Civil and Political Rights.. See, Boutros Boutros-Ghali, (Facing the New Challenges) , Annual Report on the work of the United Nations, 1992. New York: The United Nations. pp. 209-210.

8 The International Covenant on Economic, Social and Cultural Rights consists of 31 articles. The Covenant did not provide a quota on the right of individual property, but stated the right of people to benefit from their resources and natural wealth and the freedom to exploit it wholly, as the right of peoples to self-determination and to freely decide on their political system, economic and social growth, which was not mentioned in the Universal Declaration of Human Rights.

9 See Abdul Kareem Olwan Khdeer, (Human Rights), first edition, 1997. Amman/Jordan: Dar Al Thaqafa for Publishing and Distribution. p. 30.

10 See Hassan Naf'a, (The United Nations in Half a Century: A study in the Development of the Global System), 1945. Secon edition. Kuwait: Alam Alma'rifah magazine. pp. 209-210.

11 For more details on the African Charter on Human Rights, see Rafe' Ben Ashour, "the African Charter on Human Rights: Its History and Problems" in "International and Regional Charters", prepared by Mahmud Sharif Basiuni et al. Vol.1 1989. Beirut. pp. 397-398. Also, Omar Banduru, "An Introduction to the Study of Human Rights and General Freedoms", first edition, 1998. Casablanca: Dar Alnashr Morocco. pp.115-116

12 Ahmad Fathi Srur, "Constitutional Prevention for Rights and Freedoms", 2000. Dar Alshuruq, ibid, p.45.



13 Ameen Atef Salibah, "The role of Constitutional Law in Advocating the State of Law", *ibid*, p.251.

14. See Ameen Atef Salibah, "The role of Constitutional Law in Advocating the State of Law", *ibid*, p 257.

15 Examples of this can be seen in the Constitutional Court in Germany which extracted a new right that was not found in the German Constitution, which is the public right for the persona, where each individual has the right to respect his/her own persona.

16 See Ahmad Fathi Srur, "Constitutional Prevention for Rights and Freedoms", *ibid*, pp.63-64.

17 The Independent Commission for Human Rights: Complaint handling "The Status of Human Rights within the Palestinian Authority territories", 13th annual report, December 1st, 2007, p. 5.

18 See article 6 of the European Charter for Human Rights.

19 The *Palestinian Center* for the *Independence* of the Judiciary and the Legal Profession- MUSAWA, "Sector Survey on the Judiciary position in Palestine", 2007, Ramallah, p.27.

20 The *Palestinian Center* for the *Independence* of the Judiciary and the Legal Profession, *ibid*, p.27.

21 The Palestinian National Authority. "The strategy of the Judiciary Sector". May 2008, p.7.

22 The Independent Commission for Human Rights (Complaints Handlings). "The Status of Human Rights in the Palestinian National Authority Territories". Annual Reports 2010-2017.

23 Prof. Dr. Fathi AlWhidi. "The Judicial Constitution in Palestine according to the amended Basic Law Provisions and the Supreme Constitutional Court Law project: A Comparative Study". 2004. Faculty of Law, Al Azhar University. p.57.