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Independence of the telecommunications regulatory authority in Palestine: Institutional challenges

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Independence of the telecommunications regulatory authority in Palestine: Institutional challenges

Abstract

This paper identifies view points of the Palestinian telecommunications sector's stakeholders with regard to regulatory independence and analyzes reasons behind the rejection of the 2009 Telecommunications Law that establishes an independent telecommunications regulatory authority. It sheds a light on the everlasting debate about necessity and viability of an unbiased, autonomous, and accountable regulator under occupation and political instability.

The paper looks at the historical developments of the concept in the US and Europe and discusses political and social factors that played part in establishing regulatory authorities and placing safeguards that strengthen their independence and prevent them from being captured by any stakeholder.

Then, through interviewing main stakeholders, the paper presents key issues of regulatory independence in Palestine. It first discusses the 2009 Telecommunications law and compares proposed safeguards to international best practices. Then it presents stakeholders' opinions and position regarding these safeguards. Finally, the paper makes some policy recommendation to ensure that a regulatory authority would be truly independent.

JEL codes: L96 or Z00

Key words: Telecommunications, Regulatory Independence, Institutional Reform

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1. Introduction

Independence of the regulatory authority has been at the core of regulatory debate. Although reasons for independence differ from country to country and depends on social and economic factors, the concept of independence is considered as an important regulatory practice to shield the regulatory authority from favoring one or more stakeholder's interests at the expense of others.

For example, independence of the regulatory authority in the EU has been raised during liberalization of the telecommunication sector. Operators were owned and regulated by Member States. Separation of operations and regulation was considered the first step in regulatory authority's independence. The goal of regulatory independence was to ensure that governments' interests are not favored at the expense of other stakeholders (especially new entrants who will be competing with state-owned incumbent operators). The situation was different in the US since telecommunications operators were privately owned from the start. However, monopolization of the sector resulted in regulators being captured by operators and seeking to protecting them from any form of competition. Thus, new entrants found it hard to enter the market for several years because the Federal Communications Commission ruled in favor of the incumbent AT&T in many occasions. The cases of Hush-A-Phone and MCI microwave network provide an example of regulatory capture. Therefore, the goal of regulatory independence was to ensure that incumbent operator's interests are not favored at the expense of other stakeholders.

The story in Palestine is different. The Ministry of Telecommunications and Information Technology (MTIT) is still regulating the sector. A new telecommunications law that liberalizes the sector, starts a regulatory reform, and creates an independent regulatory authority has been rejected in two separate occasions for different reasons. In 2006, the Telecommunications Law of 2006 was rejected because of "technicalities and formalities", while the Telecommunications Law of 2009 was rejected in early 2010 because the Palestinian Territories still effectively under occupation.

What is interesting about the discussion concerning the 2009 Telecommunications Law is that the issue of regulatory authority's independence was highly debated during all stages of legislative process. For example, at the preliminary meetings of the national committee the government's representative (cabinet secretariat) called regulatory independence as "absurd" reflecting on the possibility of corruption due to the absolute powers of the regulator and arguing that government should have a role in authority's decisions. After being drafted and signed by the President, the law was referred to the Legislative Council for adoption. In their meeting, parties' representatives declared that they will vote against the law. Once gain the issue of independence were raised and cited among the reasons of rejection. In particular, the issue of board appointment and dismissal was severely criticized. The following day, the minister of Telecommunications and Information Technology criticized the decision and accused parties of political corruption and protecting the interests of some operators.

The 2009 law did not help either. Independence is vaguely defined and articles concerning selection and dismissal of the authority's board give all powers to the President of the Palestinian Authority. Also, vague definition of regulatory accountability created confusion among several stakeholders to a point where they have questioned the degree of power the proposed independence regulatory would have. Other stakeholders expressed their fear that the ministry's role in setting the telecommunications policy will undermine the regulatory authority's independence. Thus, it was obvious that each stakeholder has a different understanding of the term "regulatory independence."

To understand stakeholders' views on regulatory independence an interview was designed that focus on stakeholders' definition of independence, position on the need for independent authority and degree of its discretion, position on board members' appointment and removal, position on regulatory accountability, position on resources and their affect on regulatory independence, and the impact of political parties' influence on regulatory independence.

The remaining sections of this paper consists of the following: Section two provides a theoretical framework on regulatory independence, section three provides an overview of the regulatory independence debate in Palestine, section four presents stakeholders' views on issues related to regulatory independence, section five provides some policy recommendations towards an efficient design of an independent Palestinian regulatory authority and; finally, section six provides a brief conclusion.

2. Theoretical framework

The subject of regulatory authority independence gained importance since liberalization of the telecommunications sector took momentum. Before that, since most telecommunications operators were state-owned, the state used to supply and regulate telecommunications services. (Kerf et al, 2001, page 1) The exception was in countries where the telecommunications operator was privately owned and regulated by a state institution. The United States and Canada provide an example for such exception. (Berg et al, 2000, page 5)

2.1 What is independence?

Independence and autonomy are sometimes interchangeable. At the broader sense, a regulatory authority should be able to make decision without pressure from any stakeholder. Smith (1997) defines regulatory independence as the ability of regulatory authority to achieve an arm's-length relationship with stakeholders (firms, consumers, and political authorities) and have the attributes of organizational autonomy that allows it to "foster the requisite expertise and underpin those arm's-length relationships."

2.2 Why independence?

According to Smith and Wellenius (1999, page 2) regulatory authorities main role is to promote

the interests of customers by containing abuse of market power, fostering competition, creating a favorable investment climate, and narrowing development gaps between rural and urban areas.

Historically, independent regulatory authorities suffered from capture and favoritism, which led to companies[2] abusing their market power and political authorities pursuing short term political goals that negatively affected investment. When regulatory reform took place during 1990s, it was essential to make sure that regulatory authorities are independent from both operators and political authorities to prevent capture and favoritism.

According to Baldwin and Cave (1999, page 36), regulatory capture occurs when "regulators became the protectors of the regulated industry, rather than of the public interests." The US experience with telecommunications regulation provides an example of regulatory capture. After AT&T became the dominant player in the US market by purchasing many independent telecommunications companies and became the only owner of a long distance network. (Brock, 2002, page 50) Vail (1915), AT&T's CEO, was advocating for regulation as an alternative to competition. During a speech in Vermont State Grange, he declared:

"*I am not only a strong advocate for control and regulation but I think I am one of the first corporation managers to advocate it. It is a necessary for the protection of corporations from each other as for protection to, or from, the public.*"

In 1934, the Communications Act was passed, and the Federal Communications Commission was established. The Commission consisted of five members[3] that were appointed by the president and confirmed by the Senate. The Commission's members serve for fixed term and were protected from arbitrary removal. Unlike other agencies, the Commission was not under direct control of the President. It was able to decide on its own structure and appoint its own staff. (Brock, 2002, page 52)

It can be argued that the Telecommunications Act enabled the FCC to establish an arm's-length relationship with the government and political authorities. Nonetheless, such arm's-length relationship was not fully achieved with the operator, AT&T. Brock (2002, page 53) argues that "the early FCC was an ideal regulatory agency from AT&T's perspective." The first formal investigation of AT&T's interstate telephone rates came after 30 years of the FCC's establishment. During that period, the FCC did little to control these rates. In addition, the FCC prevented competition from arising.

Two historical events show how the courts had to intervene for competition to arise. The fist case was the Hush-A-Phone case, where a device that can be attached to the telephone speaker to prevent noise from the surrounding environment and provide privacy to the speaker was invented by a third party. AT&T tried to stop the sale of the device on the basis that it deteriorates quality and that if the user wants more privacy she/he can use their hand to do so. The owner of the device filed a complaint to the FCC protesting that AT&T was interfering with his business. The FCC ruled in favor of AT&T citing "telephone equipment should be supplied by and under the control of the carrier itself." The manufacturer of Hush-A-Phone appealed the decision to the

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[2] The regulated monopoly.

[3] Initially consisted of seven members

appeals court, which overturned the FCC decision on the basis that as long as customers do not cause any public harm they have the right to use the telephone in privately beneficial ways and that the telephone company cannot interfere with that right. Later on, the legal principle "harm to the network" was established, which gave telephone companies the right to prevent "foreign" devices if only they cause harm to the network. (Brock, 2002, page 55) The Hush-A-Phone set a precedent that allowed competition in terminal equipment.

The second case was the MCI case. Microwave Communications, Inc. (MCI) was given a license in early 1960s to build and operate a private microwave network that connects St. Louis and Chicago. Later on, MCI started to offer the Execunet service, which is a service that allowed its subscribers to reach each other regardless of its original network (MCI, AT&T, or other microwave network). This meant that MCI was offering switched calls service, which, in the opinion of AT&T, was out of the scope of MCI's service authorization. AT&T filed a complaint against MCI, and the FCC was in agreement with AT&T's opinion that MCI has gone beyond the scope of its service authorization. The court of appeal overturned the FCC decision on the basis that the FCC had not specifically defined the scope of services at the time it granted MCI the authorization. (Brock, 2002, page 60)

The two cases provide sufficient evidence that the FCC has protected the interests of AT&T at the expense of other stakeholders. Regulatory capture came under much criticism. Perhaps Gray's (1942) is the most direct one at the time:

"*The public utility status was the heaven of refuge for all monopolies found it too difficult, too costly, or too precarious to secure and maintain monopoly by private action alone. Their future prosperity would be assured if only they could induce government to grant them monopoly power and to protect them against interlopers.*"

The role of judicial system was vital in minimizing regulatory capture, introducing competition to the sector, and providing new entrants with necessary legal means to fight for their rights.

As for favoritism, it happens when governments try to influence regulators' decisions to achieve short-term political goals. The telecommunications industry is one that requires high level of investment. A significant part of these investments are long-term sunk investments, i.e. once spent, they can't be recovered. Therefore, investors need a commitment from governments for a stable investment environment. (Smith, 1997, page 1) Investors need to be assured that governments won't make arbitrary interventions (new obligations, or tax) so that they can rely on the rules of the game they are investing in. (Smith and Wellenius, 1999, page 3). Short-term political goals might affect long-term investments, change the rules of the game, and affect operator's ability to recoup profits from investments made before the change. For example, the labor government's decision to install a windfall tax in 1997 to capture past profits resulted in many firms pulling out of the UK. (Jamesion, 2005, page 4)

2.3 How to achieve independence?

Creating the above arm's-length relationships requires establishing an institution that has solid attributes. The design of such institution depends primarily on the law and norms of the country. For example, (Smith, 1997, page 2) explains that countries with solid institutional experience,

where the rule of law is well installed and judicial system is independent would have a relatively easier task in setting up an institution compared to countries with limited or poor experience. (Smith and Wellenius, 1999, page 3) argues that effective regulation needs commitment from stable government, a judiciary that is impartial and immune to government and political pressures, a strong administrative tradition, and substantial professional staff.

Also, eliminating regulatory capture and favoritism depends, inter alia, on the design of the independent regulatory authority. Smith (1997), Estache (1997), and Berg et al (2000) have discussed the necessary elements needed to design an effective independent regulatory authority and foster the arm's-length relationships.

Berg et al (2000, page 2) present a model where successful regulatory activities depends on the authority's legal mandate, values, and resources. With regard to the legal mandate, this translates into the authority's jurisdiction, its functions and the ministries', and the period for the next law review. With regard to authority's values, it's concerned with the methods and processes necessary to gain stakeholders trust and confidence in the system. Effective communications, transparency, and accountability are attributes that shape values of the authority. With regard to resources, regulatory performance is affected by funding, recruitment of professionals, and development of employees' skills.

Smith (1997, page 3), argues that insulation from improper influences[4] and measures to foster development and application of technical expertise constitute main elements of regulatory authority's independence. To that effect, he suggests the following safeguards to shield these elements from abuse:

- Providing the regulator with a distinct legal mandate, free of ministerial control
- Prescribing professional criteria for appointment
- Involving both the executive and legislative branches in the appointment process
- Appointing regulators for fixed terms and protecting them from arbitrary removal
- Staggering terms so that they do not coincide with the election cycle, and, for a board of commission, staggering the terms of the members
- Exempting the agency from civil service salary rules that make it difficult to attract and retain well-qualified staff
- Providing the agency with reliable source of funding, usually earmarked levies on regulated firms or consumers

These safeguards address authority's legal mandate, values, and resources. They help the authority in strengthening its autonomy. The legal mandate would ensure that political influence is eliminated or kept to minimal by clearly defining responsibilities of the authority and protect it from ministerial control; protecting management staff (whether a board or executive) from arbitrary removal and prescribing a professional criteria for appointment, while involving the legislative branch in confirmation of staff.

[4] Regulatory capture and short-term political interference are examples of improper influences

Accountability and transparency would eliminate or keep to minimal regulatory capture by ensuring that all stakeholders are involved in the authority's decision and that their opinions are considered. In addition, providing an appeal procedure, which stakeholders can use to appeal against a regulatory decision, would strengthen the regulatory authority's impartiality.

Resources play an important role in regulatory independence. Regulatory authorities should have an adequate funding to cover its activities and have its own resources. Being financially independent from political authorities strengthens their autonomy. (Estache, 1997, page 1) Skills and personal integrity are essential for correct and accurate decision making and implementation. Regulatory authorities must have the autonomy to determine the size of its staff (Estache, 1997, page 1) and the ability to deviate from civil service salary rules and offer market-based salaries in order to attract qualified professionals. (Smith, 1997, page 3) (Stanford et al, 2000, page 10)

Achieving regulatory independence is an evolutionary process. Smith (1997, page 3) argues that independence should be understood as a relative rather than absolute concept, with the aim of reducing risks to improper political interference. The EU experience in this regard provides a good example of how the concept of independence has evolved.

Telecommunications operators were owned and regulated by the state across the EU Member States. In the late 1990, the EU liberalized the telecommunications sector to promote competition after decades of monopoly. Liberalization and competition meant that a) operations and regulations of telecommunications markets should be separated establishment of independent national regulatory authorities (NRAs); and b) NRAs should be responsible of enforcing regulations.

Therefore, regulatory independence debate was more concentrated on the arm's-length relationship with political authorities. Kerf (2001, page 1) argues that regulators' bias in favor of the historical operator and short-term political pressure were among the issues at the heart of the debate.

The 1998 regulatory framework addressed regulatory independence in article 5a (2) of the ONP Framework Directive (Directive 90/387/EEC)[5]. The article calls the national regulatory authority to be "legally distinct and functionally independent of all organizations providing telecommunications networks, equipment or services." The article also calls Member States that still retain ownership or significant control of operators to ensure structural separation between regulatory functions and ownership/control related activities.

Directive 97/51/EC sets out the requirements of NRAs' independence. Recital 9 acknowledges that guaranteeing national regulatory authority (or authorities) independence is a measure necessary for the principle of separation of regulatory and operational functions in order to ensure impartiality of NRAs' decisions. Recital 9 also emphasizes that NRAs' possession of adequate staffing, expertise, and financial means are necessary for their performance[6].

[5] Article 5a was amended by Directive 97/52/EC
[6] Recital 9 of Directive 97/52/EC

In the 2002 regulatory framework, NRAs' institutional design and tasks were clearly defined in chapter II (article 3 – 7) and chapter III (article 8 – 13) of the Framework Directive. (Directive 2002/21/EC) The principle of separation between regulatory and operational functions reemphasized in article 3 (2) and NRAs' impartiality and transparency in article 3 (3) the right of appeal against regulatory decisions in article 4, and consultation and transparency mechanism in article 6.

According to the Communications Committee (2010, page 5), the revised Framework Directive (Directive 2002/21/EC) has introduced several measures to strengthen independence of NRAs. Recital 13 of the Better Regulation Directive (Directive 2009/140/EC) states that NRA's independence should be strengthened for effective application of the regulatory framework and increased authority and predictability of decisions. It also calls for the protection of NRAs from external intervention or political pressure during the application of ex-ante market regulation or dispute resolution. Article 3 of the amended Framework Directive (Directive 2002/21/EC) explicitly refers to the political independence of NRAs from other state bodies:

"Without prejudice to the provisions of paragraphs 4 and 5, national regulatory authorities responsible for *ex-ante* market regulation or for the resolution of disputes between undertakings in accordance with Article 20 or 21 of this Directive shall act independently and shall not seek or take instructions from any other body in relation to the exercise of these tasks assigned to them under national law implementing Community law. This shall not prevent supervision in accordance with national constitutional law. Only appeal bodies set up in accordance with Article 4 shall have the power to suspend or overturn decisions by the national regulatory authorities."

With regard to dismissal of the NRA head, Article 3 of the amended Framework Directive (Directive 2002/21/EC) states that NRA head/board members may only be dismissed if their performance is not up to the required conditions. These required conditions should be specified in advance in national law.

As for resources, article 3 of the amended Framework Directive and recital 13 of the Better regulation Directive call Member States to ensure that NRAs have separate annual budget that allow them to recruit a sufficient number of qualified staff and to contribute (financially and through expertise) to the Body of European Regulators for Electronic Communications (BEREC)

2.3 How much Independence?

Since regulatory functions were historically performed by governments there has been a debate on the degree of independence. On the one hand, regulatory authorities should have the necessary discretion while regulating markets. On the other hand, such discretion affects the degree and nature of the accountability of regulatory authorities (Stern and Trillas, 2002, page 3) Therefore, the discussion is whether regulatory authorities should set policies or implement policies that are set up by other institution, primarily ministries of telecommunications.

Queck (2000, page 252) states that, within the EU, a NRA is not an institution entrusted with setting up the rules but one that applies and implements rules. This is in agreement with Melody

(1999) "The regulator's task is to implement government policy." However, Queck (2000, page 253) also suggests that some of NRA's tasks could be viewed as rule making, where an NRA can come up with procedures to facilitate their work such as numbering plans or spectrum management.

According to Stern and Trillas (2002, page 20), providing regulatory authority with discretion is essential to ensure investors that successive governments would not renege on commitments, especially those commitments that might affect long term investments. In their comparison between central banks and regulatory authorities they point out to the difference between their primary tasks[7]. However, both institutions have a common goal to pursue, which is to attract investment. To do so, governments should solve the problem of establishing a reputation for sound long-run behavior that assures investors of their long-term investments, while resisting short-term political goals.

The solution has been political and goal independence. With regard to political independence, this involves safeguards that Smith (1997) introduced, which are mentioned above[8]. With regard to goal independence, the discussion is about the degree of discretion an agency should have. With regard to the central bank of England, Stern and Trillas (2002. Page 8) point out to an interesting fact; the bank is not goal-independent in the UK, while it is goal-independent in the EU. The goal of the central bank is to set inflation target. In the UK, the target is set by ministries, while an inflation target for the EU is set by the central bank itself.

Similarly, the issue of setting telecommunication policy goals is debatable. Would the regulator be goal dependant or independent? According to Stern and Trillas (2002, page 9), separation between policy and regulation is found in most countries, where ministries would set the policy framework, and regulators would regulate based on the framework. Therefore, the predominant model is an authority with limited discretion and accountability that implements rules rather than making them.

Accordingly, for discretion to work effective accountability and transparent procedures are required. High mode of discretion that gives agencies goal independence requires high accountability and transparency. Granting discretion without ensuring proper level of accountability would lead to capture and irresponsible decision making. (Yilmez et al, 2008, page 4) According to Stern and Trillas (2002, page 20), stability and sustainability of institutions depend on constitutional, political, and legal issues in addition to economic factors. OECD (2000, page 4) also refers to the fact that regulatory independence can be influenced by a country's political and legal tradition in addition to the degree of market development. Level of discretion would vary from one country to the other depending on their political, legal, and constitutional settings as well as their history and tradition in institutional setting (Smith 1997, page 2)

For example, Levy and Spiller (1996, page 9) points out to the strong political and judicial

[7] Central banks operate national monetary policies that do not regulate banks, while telecommunications regulatory authorities regulate operators (incumbent and competitors), which affects their behavior in the market. (Stern and Trillas, 2002, page 20)

[8] Page 5

structure and tradition in the UK alongside social norms that foster strong respect for bureaucratic process and judiciary, while the Philippines has a weak and corrupt political, judicial and bureaucracy. In the UK, an institution with high discretion is most likely to work, while it would certainly fail in an environment similar to the Philippines'. Therefore, effective accountability and transparent procedures are two regulatory values that should be established, maintained, and promoted.

However, regulatory independence and degree of autonomy and discretion are not the goal of regulation. Therefore, there could be arrangements where market is liberalized, competition is introduced, consumer welfare is increased, and investors are given commitment for their long-term investments while discretion and independence of a regulatory authority is limited. For example, according to OECD (2000, page 8), Japan and South Korea do not have a separate and independent regulator. Regulatory functions are still being carried away by ministry of Posts and Telecommunications in Japan and ministry of Information and Communications in South Korea, while ministries of Finance in both countries are the shareholders of state operators. Both countries are doing well compared to the EU and US in terms of teledensity, mobile penetration, investment in infrastructure, etc[9].

2.4 Strengthening independence: Accountability and Transparency

Whether political or goal independence is sought, regulatory values are too important to be neglected from the independence debate. In particular accountability and transparency are two essential values to ensure independence of regulators.

Accountability is defined as "the procedures, mechanisms, and instruments aimed at guaranteeing an adequate level of control of the agency's budget and performance by political authorities, namely the parliament." (Andres et al, 2008, page 8) or "checks and balances required to ensure that the regulator does not stray from its mandate, engage in corrupt practices, or become grossly inefficient." (Smith, 1997, page 3)

From the above definitions, accountability (procedural and performance) measures are important safeguards that ensure regulatory authority abides to its mandate and efficiently manages its resources. It is important that accountability measures are spelled out in the law. It is also important to specify to whom the authority is accountable. Since the Parliament provides the authority with its mandate, then it is only normal that authority is accountable to the Parliament.

Therefore, the law should maintain Parliament's right to arrange for hearing sessions, either pre-determined or on ad-hoc basis and requirements of reporting to the parliament (format, frequency, etc). The Parliament, in the other hand, should establish a telecommunications committee that communicates and coordinates with the regulatory authority for an effective relationship.

Also, since no one should be above the law; and since judiciary is the body that interprets the law in case of a dispute, then the regulatory authority should also be accountable to judiciary.

[9] OECD telecommunications indicators (2007) available at: http://stats.oecd.org/index.aspx#

Although everyone has the right to take any governmental agency to the court, an explicit reference to authority's accountability to courts, that is clearly defined in terms of scope and procedures, via judicial reviews builds towards better credibility and legitimacy of the regulatory authority. The law should also explicitly emphasis on stakeholders' right to appeal regulatory decisions that have a merit in timely fashion.

Is some countries, such as the UK, accountability is extended to include citizens, consumers, regulated companies, and interest groups.[10] In the long term, the authority should embrace this as part of its mentality to further encourage all parties to actively participate in the regulatory process and build a balanced, neutral, effective, and professional relationship with all its stakeholders

With regard to transparency, it is an important concept that helps in strengthening regulatory authority's credibility and a safeguard that reduces the chances of regulatory capture. Transparency is defined in its most operational sense as "the capacity of regulated entities to identify, understand and express views on their obligations under the rule of law." (OCED, 2002, page 65)

According to Bertolini (2006, page 1), regulatory transparency fills three primary needs; 1) to assure investors that their rights and obligations are clearly and predictably defined, 2) to build legitimacy about sensitive decisions by engaging interested parties in the decision making process, especially for socially sensitive issues, and ensuring an open access to regulatory rules and agreements, 3) to reduce corruption by reducing suspicion of mal-occurring through publishing and justifying their decisions. (Smith and Wellenius, 1999, page 9)
Argue that transparency enhances credibility of regulatory authority, strengthens legitimacy of decisions, and increases investors' confidence, while Coglianese et al (2009, page 927) state their believe that transparency and public participation are tools that can a) enhance regulators' ability to achieve society's goal of high quality and legitimate rules; b) contribute to a more robust record for judicial reviews; c) allow agencies to obtain information that may help them better understand how current policies could be improved; and d) give agencies an idea about public or regulated parties response to a change in policy.

In a world where corruption is high, accountability and rule of law is low, and risk of capture and/or political influence is significant, transparency becomes an essential safeguard for regulatory authority to stay impartial and independent. Public consultations, a transparency element, increase participation and help regulatory authorities and stakeholders in understanding each other's own world (Spiller and Tomassi, 2004 page 24, footnote 53) In addition, it educates regulatory authority of particular interests and helps it to forecast potential political problems (Spiller and Tomoassi, 2004, page 26) For example, in India, about 302 "substantive" arguments from various participants (consumers, political parties, public entities, industry, unions, and consumer organizations) helped regulator reshape its tariff order, while appreciating the quality of arguments in the process.[11] (Dubash and Rao, 2006, page 13)

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[10] This is known as "Accountability to all parties" or "360° view of accountability", introduced by the House of Lords.
[11] The regulator has described public opinion as "almost equivalent to Commission staff caliber."

However, there are two problems that regulatory authorities should pay attention to; too much transparency and participation, and proportionate representation of participants. According to Coglianese et al (2009, page 928), too much transparency and participation slows down decision making and forces the agency to expand its resources to filter and read comments, which increases the cost of regulation. Regulatory authorities should find an optimal level of participation where the cost of processing participations does not exceed their marginal benefit.

As for proportionate representation, participation from consumers tends to be low compared to regulated companies. Correa et al (2008) compare different regulatory qualities attributes, including transparency and participation, among Brazilian regulators (at state and federal level). They argue based a case study on the telecommunications regulator, that participation by consumers in the regulatory process is still low. The problem does not only lie with low participation level, but also with the ability of regulated companies to impose their comments in an organized fashion. Even if consumers' participation is high, dispersed interests of consumers makes it hard to compete with organized businesses[12]. (Correa et al, 2008, page 214)

To summarize, regulatory independence and the level of adequate discretion depends on political, social, legal, and economic factors. Developing countries with limited experience and tradition in institutions are not expected to achieve regulatory objectives with high discretionary model due to low accountability and transparency. Therefore, attention should be made to the design of regulatory authorities. In particular, primary law and second legislations should focus on establishing, maintaining, and promoting regulatory values in terms of accountability and transparency.

3. The Palestinian Independent Regulatory Authority – Coming soon

3.1 Background

In 1994, the declaration of principles (Oslo agreement) between Israel and the Palestinian Linearization Organization (PLO) has given the newly established Palestinian Authority (PA) the right to operate and construct telecommunications networks within its controlled areas of West Bank and Gaza Strip, while keeping matters like international connectivity and spectrum allocation under the Israeli control. Shortly, in1996, the PA President signed the 1996 Telecommunications Law that saw development of the sector being handed to the private sector[13]. The telecommunications law of 1996 assigned the Ministry of Telecommunication and Information Technology (MTIT) with setting the sector policy and regulating its activities. The 1996 law is still effective to date.

In 1997, Paltel was officially incorporated as a public, shareholding company that offers telecommunications services. The PA then awarded Paltel an exclusive license to build Palestine's telecommunications network for twenty years and operate it for ten years. MTIT

[12] Authors point out that although 24.3% of all suggestions were incorporated into the law, 24.4% of all proposals were targeted at the interest of businesses.
[13] The law was never sent to the PLC for voting. It came into effect the minute the president signed it.

would regulate prices and quality of service. Paltel started offering its fixed phone services in 1997. In 1999, its subsidiary Jawwal started providing mobile services after securing frequencies from the Israeli authorities. Jawwal was awarded with an exclusive license from 1997 – 2004. In 2005, Paltel, Jawwal, and Hadara (an ISP) merged o form Paltel Group.

In 2003, MTIT started a series of steps towards liberalizing the market. Being aware that Paltel's license expires in 2006, it started to draft a new telecommunications law with the help of international organizations such as the World Bank, USAID, and the EU; and with response to pressure from Palestine Information Technology Association of Companies (PITA), Internet Society - Palestine chapter (ISOC.PS) and several professional entities and individuals. During that year, PITA issued a position paper listing some considerations related to the creation of a telecommunications regulatory authority with regard to the regulator's independence, structure, scope, legislative mandate, and relationship with the Ministry (Licensing and promulgation of regulations). (PITA 2003)

In 2006, the new Telecommunications Law that promotes competition and establishes an independent regulatory authority was signed by the PA President and sent to the Palestinian Legislative Council (PLC) to adopt it. In May 4, 2006, the PLC rejected the new law on the basis of "technicalities and formalities." ISOC.PS issued a letter to the council urging its members to adopt the new law and warned that without the law, competition in the market and liberalization process would be delayed. It blamed the absence of a regulatory agency and effective laws for such a result. Council's rejection of the new telecommunications law was, indeed, a major setback regarding market liberalization.

MTIT, however, proceeded with its plans to liberalize the sector, and issued a second mobile operator license. In 2006, Wataniya International was awarded the license, and started operating in October 2009 after securing spectrum frequencies from the Israeli authorities.

Due to the political conflict between Fatah group and PLO in general and Hamas group, the year 2007 saw two governments in Palestine; a Hamas government in Gaza Strip, and a PLO government in the West Bank. At the same time, the Palestinian Legislative Council had been paralyzed by the Israeli arrests of Hamas representatives, who constituted the majority in the Council.

The above events gave MTIT and the PLO government of the West Bank the liberty to enact laws without the need for the Legislative Council to pass them. It is remain to be seen if such laws will still stand once the Legislative Council returns to function. Nonetheless, MTIT started working on a new draft of the telecommunications law. Meanwhile, it also assumed its role as the market regulator and took additional step towards market liberalization. This step involved the licensing of new telecommunications companies regarding Voice over IP (VOIP), broadband telecommunications services, and Wi-Fi. As a result, 16 new companies were licensed by the end of 2007.

During 2008, there were several meetings to discuss a new version of the telecommunications law. These meetings were initiated by MTIT and the PA cabinet. They involved various stakeholders including PITA and several professional individuals. Participants' reservations

about the law were centered on:

- The regulator's independence: While the cabinet's secretariat dismissed absolute independence and insisted that the government should be involved, PITA representative asked for complete independence
- Regulator's mandate: MTIT's deputy minister stated that the proposed regulator will face many troubles regarding decision making since it lacks necessary (expanded) privileges
- Redundancy: Many of the new law articles deal with MTIT's responsibilities that are already defined in the 1996 Telecommunications Law. The mix of laws concerning regulatory issues and ministerial responsibilities creates confusion

After extensive discussions, the new "2009 Telecommunications Law on establishing an independent telecommunications regulatory authority" was signed by the president on June 2009. The law creates an independent regulatory authority with a board of directors and an executive manager, details its functions and functions of the Ministry, and promotes competition through chapters that discuss dominance and mergers.

However, in January 2010, political parties' representatives at the PLC declared their intent to reject the law when the PLC returns to function, which means that all attempts to create the authority and liberalize the market will be in jeopardy.

3.2 The 2009 Telecommunications Law

The law (Telecommunications Law of 2009, 2009) consists of ten major sections that deal with objectives and institutional design of the regulatory agency and the ministry, and their privileges and roles, licensing, universal service, spectrum frequencies, competition, interconnection, price regulation/control, operator-consumer relationship and disputes, numbering and remedies to unauthorized/hazardous use of public networks. The following discusses articles related to the regulatory authority's design and functions

1. **Structural Design:**

Articles 3, 7, 9, 10, 11, 15, 16, and 17 govern the design of the authority in terms of its structure, members, budget, salaries, etc. Appendix A contains a translation of these articles.

The law designates the authority with an independent legal personality and full legal capacity. (Article 3) The authority is managed by a board, which consists of 7 members including the chairman. Board members are appointed by the PA president upon recommendation from the cabinet. (Article 9) Criteria for a board member: (Article 10)

a. Should be a Palestinian citizen
b. Should not have nor his/her partner or any relative up to the second degree a stake in firms that provide telecommunications services
c. Should have at least a bachelor degree and be an expert in his/her field
d. Should not have a criminal record

Board members stay in service for 4 years with a possibility of one time extension for 2 years for up to two members. This requires approval of the PA president upon recommendation from the cabinet. (Article 11) Membership expires in the following cases: (Article 15)

1. Resignation of the member
2. End of term
3. Termination of service based on:
    a. Unjustified absence from 3 consecutive or 6 meetings during the year
    b. Article 10 (b) becomes applicable
    c. Committing a crime
    d. Incapability of performing his/her duties due to mental of physical reasons
    e. Bankruptcy

Upon the recommendation of the cabinet PA president should appoint a replacement within a month.

The Cabinet shall decide on compensation for board members. (Article 17) An executive manager is appointed by the PA president upon recommendation of the board. The authority is designated with a private budget that is part of the general budget of the PA. (Article 3) The authority's funding sources are the PA general budget, unconditional donations, licensing fees, spectrum fees, numbering fees, fees on new services, fines, and any other funds that are generated by activities related to the authority. (Article 7)

2. **Activities**

The law identifies functions of the authority and Ministry. With regard to the regulatory authority's functions, it is responsible, inter alia, of: (Article 5)

- Setting up all polices related to the telecommunications sector
- Setting up of ICT sector regulation policy in compliance with MTIT's public policy for the sector
- Regulating telecommunications services in the Palestinian Authority to ensure high quality and competitive prices
- Setting up of ICT sector regulation policies in compliance with MTIT's public policy for the sector
- Implementing Universal Service policy
- Defining and establishing quality criteria for licensed operators to comply with
- Defining and establishing terms for telecommunications licenses and spectrum frequencies
- Regulating interconnection among different networks
- Ensuring consumer protection
- Publishing all related information about service providers in newspapers and the agency's website
- Publishing an annual report about the agency's achievements and activities

With regard to the Ministry's functions, it is responsible, inter alia, of: (Article 6)

- Setting up public ICT policy in the Palestinian Authority, coordinate with relevant stakeholder, if necessary, and present to the cabinet for approval
- Setting up plans to encourage investments in the ICT sector
- Setting up Universal Service policy
- Following up of the Palestinian Authority obligations
- Encouraging training and educational programs in telecommunications, Information Technology, and post including programs about the Internet, e-commerce, and e-services
- Drafting legislation related to ICT and post
- Regulating Information Technology sector in the Palestinian Authority according to the public policy to ensure high quality services with competitive price

The mandate provides the authority with limited discretion. The authority is supposed to regulate the market according to detailed guidelines. For example, the ministry has already developed an interconnection guideline.

3. Regulatory values

Perhaps the most lacking in the law is regulatory values. There is no emphasis on accountability or transparency. Apart from article 5 (19-21) that is concerned with publishing annual reports and "required Information to service providers and the public" mechanisms of accountability and transparency and the concept of "right of appeal" are nonexistent. For example, article 21 (3) states that the regulatory authority can prevent licensed operators from obtaining a license for a new service if it concludes that providing the service would result in restricting competition. There is no mechanism to appeal against such decision. Also, Paragraph 4 (j) of the same article states that a licensed operator must comply with any decision or instruction issued by the authority. Again there is no mechanism of appeal.

4. Resources

In principle, financial resources should be covered from the various sources of funding mentioned in article 7. However, the issue of staff compensation is left to the cabinet. The law does not exempt nor embraces civil service salary rules[14], which means that decision on this issue will be left to the cabinet to decide.

3.3 Critical assessment of the 2009 Telecommunications Law

There are several issues with the 2009 Telecommunications Law that might compromise regulatory independence. These issues are related to the legal mandate, accountability, transparency, and public confidence.

With regard to the mandate, the law provides the authority with contradictive forms of discretion.

[14] The law, however, states that the cadre level of the executive manager should be identified, which might be used to set the salary according to civil service rules and set a precedence for other employees

Article 5 (1) gives the authority privilege to set up all polices regarding sector regulation; however, the subsequent articles set polices regarding licensing, interconnection, and competition-related issues. This results in a broad discretion alongside tightly-specified rules, which could result in misinterpretation of the law.

Also, articles 5 and 6 detail the functions of the regulatory authority and the ministry. Although the regulatory authority is legally independent from the ministry, the ministry still set up ICT sectors polices, while regulatory authority is given discretion to set up polices regarding telecommunications sector regulation. This also might compromise the discretion of regulatory authority if the ministry abuses its privilege and uses it to interfere in regulatory activities. In addition, the ministry regulates the IT sector. This split between telecommunications and Information Technology is vague and might lead to conflict between the two institutions.

As for accountability, the law does not mention anything about it. The authority is required to publish annual reports and submit them to the cabinet. There is no mentioning of accountability towards the parliament, nor a reference to the fact that the authority, as much as any other institutions, is accountable to courts. The reader of the law gets an impression that the authority is "absolutely" independent from all stakeholders and obliged to only report to the government, "absolute independence" in the sense that authority's actions and decisions can't be challenged. This term was used by some opposing the law during discussions. In addition, the concept of right to appeal is not mentioned, giving a small chance for stakeholders to be confident that the authority will use its discretion in a professional and impartial manner.

The same thing goes for transparency. Other than article 2 (2), which states that the law aims to ensure effective regulation and monitoring of telecommunications sector through maximum degrees of transparency, there is no obligation for the authority to publicly consult stakeholders on regulatory issues or share and publish information for the wider public. Nonetheless, in practice, MTIT, which is assuming the role of regulator until the law is enacted, did conduct a public consultation on Bit Stream Access. This might an indication that the future regulatory authority will rely on the principles of transparency to reach out to its stakeholders. This is not obligatory, though, and would still constitute a concern on the way the authority would use its discretion.

Finally, the issue of board members appointment raises concerns. Leaving the parliament outside the process of appointing and confirming board members weakens public perception of the authority's impartiality. Even if professional criteria are followed during appointment process, there are no guarantees that that the board will not be pro government and risk of political influence will be higher.

4. Independence at the core of the debate – Stakeholders views

What is interesting about the discussion concerning the 2009 law is that the issue of regulatory authority's independence was highly debated during all stages of legislation. For example, at the preliminary meetings of the national committee[15] the government's representative called

[15] The National Committee is responsible of the final drafting of laws before they are referred to the President and

regulatory “absolute” independence as “absurd” reflecting on the possibility of corruption due to the powers granted to the regulator. Also, after being drafted and signed by the President, the law was referred to the Legislative Council for adoption. In their meeting, parties’ representatives declared that they will vote against the law. Once again the issue of independence were raised and cited among the reasons of rejection. During the last 2 years, different issues regarding creating and maintaining regulatory authority independence were criticized. Among these issues are:

- Authority’s mandate and possible abuse of powers
- Board members’ appointment and dismissal
- National/economic need for an independent authority given that MTIT is regulating the sector
- Presence of occupation and its role in affecting regulation of the sector

To understand the nature of different views of regulatory independence, major interested stakeholders were interviewed[16]. The interview aims to capture stakeholders’ position on the above issue. The interview was constructed as follows:

- Section 1: stakeholders’ understanding of regulatory independence and arms’-length relationships
- Section 2: Stakeholders’ position on the need for independent authority and degree of discretion it should have
- Section 3 Stakeholders’ position on board members’ appointment and removal
- Section 4: Stakeholders’ position on regulatory accountability
- Section 5: Stakeholders’ position on resources and their affect on regulatory independence
- Section 6: Political parties’ influence

Participants

Targeted participants were the ministry of Telecommunications and Information Technology (MTIT), Paltel Group (The incumbent fixed, mobile and ISP operator), Wataniya Palestine (2nd mobile operator, Palestinian Information Technology Association of Companies (PITA), a representative of the newly licensed VoIP, Wi-Fi, and broadband Internet operators, and three independent experts that have been involved in the regulatory debate. A brief description of participants can be found in appendix B. Only Paltel Group, Wataniya Palestine, and two independent experts have sent their responses.

Although number of participants is limited and the view of ministry and political parties are essential to have a comprehensive overview of regulatory independence debate, their position are expressed in official documents and press releases. Nevertheless, results are still considered to be inconclusive until formal position of MTIT, political parties, and other non-responsive stakeholders are shared.

Legislative Council.
[16] The interview was sent to participants by e-mail.

Results

With regard to regulatory independence, it seems that stakeholders have a solid understanding of the concept. They view an independent regulator as an empowered body that can perform its duties without interference (financial, political, and commercial) from third parties (government, political parties, and commercial firms) with an adequate budget and the ability to take non-biased and transparent decisions.

Also, stakeholders agree on the importance of establishing arms'-length relationships between the regulatory authority and operators, consumers, and political authorities. They also agree that it will be a hard task and would require more than the usual actions. They cite different reasons; among them are strong social cohesion in Palestine and possibility of corrupt decisions, lack of human resources, lack of experience in regulation, political instability and interference, and the Israeli control over significant telecommunications components. Among the suggested responses to these problems are separation of commercial and family interests between the regulatory authority and commercial operators, full separation between the regulatory authority and political authorities, and full autonomy to strengthen arms'-relationship.

With regard to the need of independent regulatory authority, stakeholders agree that the sector needs an independent authority in order to effectively regulate the market. They refute the argument that such authority would be redundant since MTIT is regulating the market, economically unjustified, or has called for because of pure political pressure. They do, however, differ in the issue of discretion.

First, apart from Paltel, stakeholders see that regulatory authority should be confined to implementing policies that are set by the ministry, while Paltel feels that the authority should be independent from all players, where separation of duties between regulator and ministry should be defined. One of the experts, though, expressed a concern that MTIT would use its privilege of setting sector policies to interfere in regulations' implementation. Secondly, with regards to discretion in implementing regulations, stakeholders' positions are mixed. For instance, Platel is in favor of tightly specified rules with little discretion for enhanced transparency and control over the regulatory process. One of the experts also prefers tightly specified rules for transparency reasons as well. In the other hand, Wataniya sees that a broad discretion is better for a fast developing and complex sector. The other expert sees that the authority should start with broad discretion and as its staff gains experience, it should move to tightly specified rules; however, a broad discretion remains a source of concern for him under the current law.

With regard to board members' appointment and removal, Paltel sees that appointments should be the responsibility of the President, while the Parliament should be confined to approving budget new regulations. The other stakeholders think that the Parliament should be involved in the appointment process by approving candidates. All stakeholders, but an expert, agree that the law should explicitly protect board members from arbitrary removal.

With regard to accountability of regulatory authority, all parties agree that regulatory authority should be accountable to the Parliament. However, upon asking whether absence of

accountability measures in the law could give the perception that authority might abuse its independence, opinions were mixed. With regards to accountability to courts via judicial reviews, Paltel does not see it should, while Wataniya and experts see it should be accountable[17].

With regard to resources, all parties agree that regulatory authority should be well resourced, with an adequate budget, and with ability to attract skilled workers by offering market-based salaries instead of complying with civil service salary rules.

Finally, the issue of political interference seems to have the bigger impact in regulatory independence. There is unanimous opinion that the delay in adopting a new telecommunications law and creating the independent regulatory authority is because of political corruption/struggle. Also, all parties agree that there is a high risk that a newly regulatory authority would be affiliated and controlled by a political party. This has been demonstrated by political interference in the selection of board members[18], where political parties tried to influence selection process. To minimize such interference, Wataniya and one expert proposed for transparent selection process based on professional criteria as a safeguard.

5. Designing the Independent Palestinian Regulatory Authority

Based on interview results and MTIT and political parties' position regarding regulatory independence, the following remarks would help in decreasing controversial issues and provide safeguards to maintain regulatory independence.

5.1 Recommendations regarding the 2009 Telecommunications Law

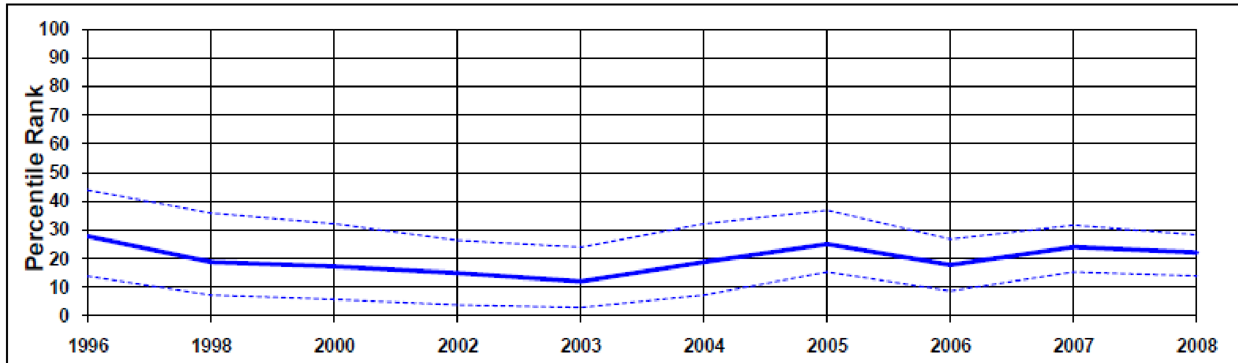
The law as is maintains confusion about regulatory independence, and provides people that oppose sector liberalization and establishment of a regulatory authority with a chance to argue against it. In particular, authority's discretion, accountability to Parliament and Judiciary, appointment of board members and explicit protection of arbitrary removal of the board or one of its members, autonomy in hiring staff and exemption of civil service salary rules, and the right to appeal are all measures that strengthen authority's legitimacy, credibility, and independence.

Authority's discretion

It is expected that an independent authority is supported by an adequate mandate and reasonable discretion to effectively do its job. However, a high level of discretion requires a high level of accountability. In countries where culture of accountability is not established, expecting high degree of accountability is unrealistic. This would lead to a situation where the authority would have high discretion but low accountability, which increases the risk of regulatory capture or

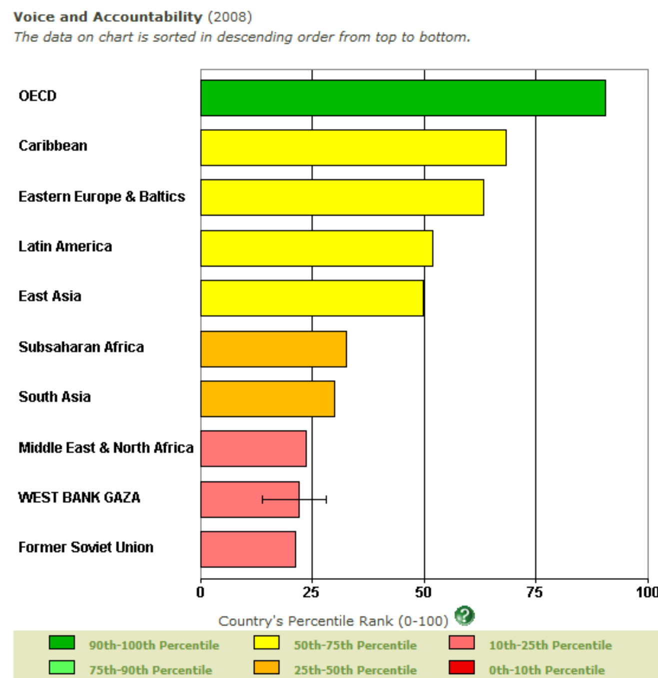
[17] One of the experts' opinions is that the authority is already accountable to courts in the sense that anyone can take it to the court.
[18] Although the law is not yet enacted, and the intent of political parties is to reject it, once the Parliament resumes, the government has gone ahead with its plans and the cabinet has screened possible candidates.

irresponsible decision making. (Yilmaz et al, 2008, page 4) The following graph shows the status of voice and accountability in Palestine from 1996 to 2008:



Source: Governance Matters 2009

The following graph shows voice and accountability in 2008 compared to the regional average in different parts of the world. As shown, Palestine (West Bank and Gaza) score is very low.



Source: Governance Matters 2009

As shown in the graph, accountability in Palestine is low, which means that the risk of regulatory capture is great; and therefore, the regulatory authority should not be delegated with a broad discretion, but rather with tightly specified rules.

Although low discretion might limit or reduce independence, it should always been noted that independence itself is not an end, but a mean to an end, which is a liberalized, competitive sector that maximizes consumer welfare. Thus, to avoid regulatory capture or irresponsible decision making that would significantly minimize consumer welfare, reduced independence through

lower discretion is advised. Berg et al (2000, page 10) suggests a period of 2-3 years of reduced independence that is used as a learning curve for stakeholders, where they will be more familiar with regulatory processes and the regulatory authority will gain experience.

Accountability to Parliament and Judiciary

In addition to the executive branch, the law should explicitly hold the authority accountable to Parliament and judiciary. Accountability to Parliament (the Palestinian Legislative Council – PLC) comes from the fact that PLC provides the authority with its mandate, and therefore, it should ensure that the authority is not drafting secondary legislations that are astray from the mandate and that objectives of the law are met.

Accountability should remain as a long-lasting measure to ensure that regulatory independence is not abused. It should transform into a governance value. Therefore, accountability is meaningless if it's mentioned in the law but not enforced.

Appointment and removal of board members

The law should involve the PLC in the appointment process. The PLC should be provided with authority to confirm board members' candidates. For more transparent measure, executive branch should involve the PLC (via the telecommunications committee) in the screening process. To minimize conflict of interest, the law should exclude PLC members or government officials from being considered as candidates.

With regard to removal of board members, although the law mentions a set of circumstances upon which a board member is removed, an explicit reference that protects members from arbitrary removal would strengthen credibility.

Autonomy of authority to hire staff

Restricting board members and the executive manager compensation to civil service salary rules would severely hinder quality of regulation. The regulatory authority will not be able to compete with private sector and experts would prefer to work for a better compensation package. In small states this problem is magnified because they usually suffer from the "brain drain" problem (Read 2001, page 15), where experienced staff migrates to other countries for better living conditions. This would mean that the pool of experienced staff is smaller, and competition between private and public sector would be fiercer. This restriction would most likely be applied to every position at the authority, which would severely affect technical, operational, and support staffs' quality.

Also, the authority should be given the autonomy to outsource some of its activities, since this approach is used and recommended, especially in countries with little regulatory experience. (Smith and Wellenius, 1999, page 11; Berg et al, 2000, page 11)

Authority's budget

To minimize possible political influence, in the long run regulatory authority should not depend on funding from the government. According to Berg et al (2000, page 12), there might be a need for government funding at early stages of authority's setup but once adequate funding from licenses and other means, government funding should end.

5.2 Transparency and participation as a safeguard

In Palestine, promoting transparency should be an important pillar of regulatory design. Political influence and strong social cohesion would have a significant impact on the regulatory process. It is important for the regulatory authority to strengthen its credibility by engaging stakeholders in discussions at early stages. It should include political parties in such discussion, at least in politically-loaded issues. Keeping political parties in the dark will harm the regulatory authority since corruption is high and interests of politicians and businesses intersect. Including political parties in discussions will also give them impression of control they much aspire. For example, when political parties announced their intent to reject the new telecommunications law, one of their reasons was the fact that they have already reached an agreement with the President to not sign any law before allowing them to discuss it, which never happened with regard to the new telecommunications law. Also, records of the National Committee's meeting regarding the law do not show any participation from political parties[19].

Consumers and Consumer organizations should also be included in discussions and the regulatory authority (MTIT for the time being) should aim to increase their participation. For example, there was no input from consumers regarding the Bit Stream Access project that was announced in May 2010.[20]

Of course, political split between Fatah and Hamas groups and the "underground"/passive clash between reformists (Current PLO government) and traditionalists (mainly some Fatah group members) constitute, by far, more important reasons for the law rejection. Nevertheless, including political parties in regulatory discussions and keeping a transparent agenda will strengthen regulatory authority's credibility and support its independence.

5.3 Effective negotiations with the Parliament

As mentioned earlier, political parties' representatives at the PLC showed their discomfort at the way the law was issued. According to their spokesman, the government should have sent them a draft of the law for their comments before sending it to the President to sign it. This could have been avoidable had MTIT engaged political parties in discussions for the new law, and negotiated terms. The process of signing the law has isolated the government and gave political parties an excuse to reject the law.

MTIT can argue that the Parliament is inactive and; therefore, it has the right to go on with

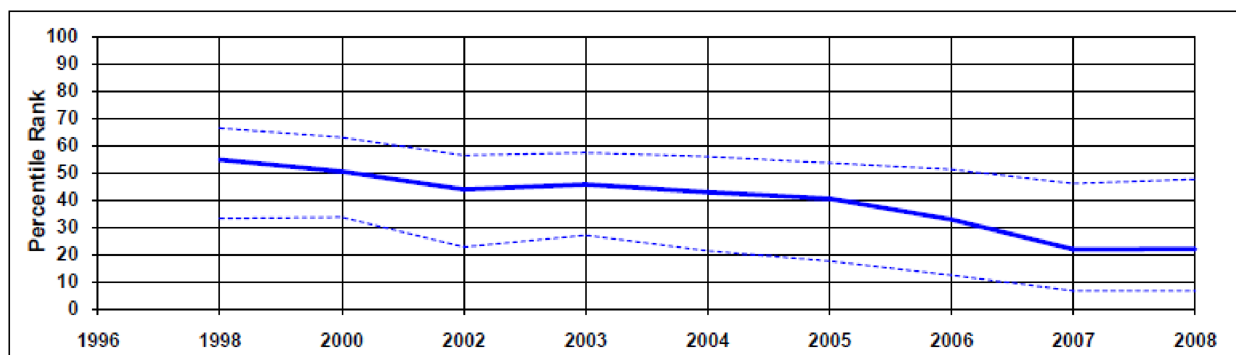
[19] The National Committee is responsible of discussing proposed laws to ensure their compliance with the constitution. Interested stakeholders are usually invited to those meetings.
[20] http://www.pmtit.ps/ar/index.php?pagess=QQ

issuing laws under the emergency status[21]. Nevertheless, all these laws will be referred to the Parliament once it resumed its activities. If, by that time, the Parliament rejects the law in its first reading, then MTIT would have to negotiate. Negotiating with political parties' representatives would have led to a faster adoption of the law and minimized conflict between the two parties.

5.4 Rule of law as a long term guarantee of independence

Tightly specified rules work better when the rules are respected and the rule of law is present. According to Smith and Wellenius (1999, page 3) regulatory authorities in emerging economies need the support of several initiatives that ensure stable commitments from successive governments, impartial judiciary that is immune from government and political parties, and strong administrative tradition. In addition, judiciary decisions should be enforceable.

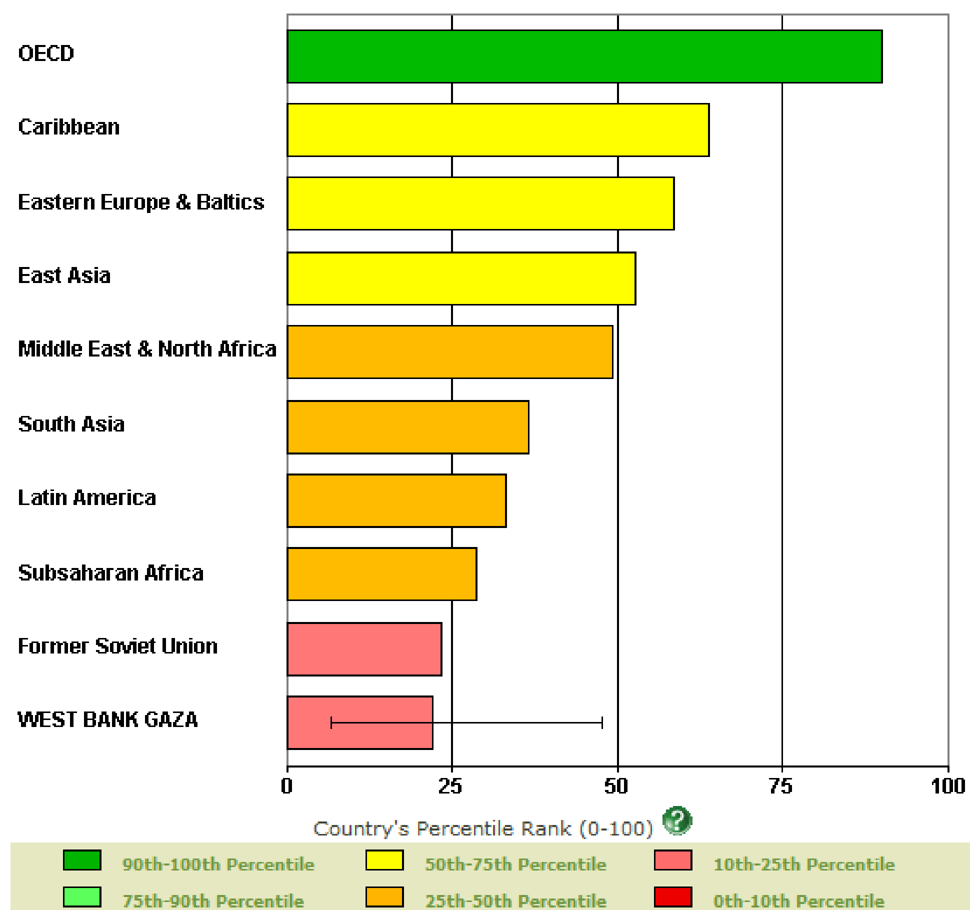
Since 1998, rule of law has been declining in Palestine as illustrated in the following graph:



Source: Governance Matters (2009)

The following graph shows rule of law in 2008 compared to the regional average in different parts of the world. As shown, Palestine (West Bank and Gaza) has the lowest rank.

[21] Emergency status started after the conflict between Fatah and Hamas Group in 2007, where the President fired the Hamas-led coalition government, declared emergency status, and appointed a caretaking government. The caretaking is still active to date.



Source: Governance Matters (2009)

Declining rule of law has a significant effect on regulatory independence. Trebilcock and Daniels (2008, page 29) argue that procedural aspect of rule of law include transparency in law making and adjudicative functions, predictability and consistency of law enforcement, stability, and enforceability of law. Declining rule of law means that these aspects are declining too, which put regulatory independence at jeopardy.

Simply, enforcing these procedures would help, on the long run, in creating a pattern of shared basic assumptions stakeholders shall learn while solving their problems. If these procedures work well, then they will be integrated and become the way stakeholders would choose to perceive and solve problems. This is Schein's (1992, page 12) definition of culture[22], which Berg et al (2000, page 4) use to define regulatory shared values.

In other words, practicing rule of law would integrate independence, transparency, and accountability of regulator as a pattern of shared values stakeholders will use to perceive and

[22] The exact definition of culture is "a pattern of shared basic assumptions that the group learned as it solved its problems of external adaptation and internal integration that has worked well enough to be considered valid and, therefore, to be taught to new members as the correct way to perceive, think, and feel in relation to those problems."

solve regulatory-based problems.

Rule of law is being developed in Palestine during the last two years at a slow pace. As it develops, values of accountability and transparency would be also developed and regulatory independence should be strengthened.

Rule of law, transparency, accountability, credibility, etc need a strong commitment from all branches of government (executive legislative, and judiciary). Personal integrity remains a unique characteristic in key positions. Head of the regulatory authority (whether a board or an individual) is no exception. Legislative and executive branches should work together (above political and party differences) to appoint qualified, skilled, and honest staff based on professional criteria and make sure that such staff is supported to implement its mandate and accountable to achieve its objectives.

6. Conclusion

Since the beginning of telecommunications liberalization, independent regulatory authorities have been created to ensure that regulatory frameworks are implemented with partial and professional matter. Like regulations, regulatory independence has been an evolving concept that depends on accumulated experience and best practices.

However, most of these practices and procedures were crafted in developed countries. Transplanting such practices in developing countries without paying attention to other elements that supports their successful implementation has led to creating weak institutions that can hardly be described as independent. Small states add to this complexity, strong social cohesion (if used improperly could lead to increased corruption), and limited pool of expert staff that threatens quality of regulation.

In Palestine, political parties in the Parliament used regulatory independence as an excuse to reject the 2009 Telecommunications Law. Lack of understanding of regulatory independence, sometimes deliberate misuse of the concept, and the inability of law to protect the proposed independent authority from possible abuse of powers or regulatory capture are all issues that participated in the debate. From the one hand, political parties and some government officials have used the term “absolute independence” or simply “independence” and associated it with abuse of powers as a way to dismiss the legitimacy of the regulatory authority. From the other hand, the laws inability to spell out accountability measures that act as safeguards to abuse of power helped in magnifying the problem and served political parties and other opposing stakeholders’ purpose.

Although responses were low, the conducted interview shed a light on stakeholders’ position of regulatory independence. MTIT and political parties’ documented positions were also analyzed to add for a wider perception. However, work is still to be done in order for non-responsive stakeholders opinions to be heard and analyzed.

The 2009 Telecommunications Law in its current set up maintains confusion about regulatory independence, and provides people that oppose sector liberalization and establishment of a

regulatory authority with a chance to argue against the principle of creating such authority. Confusion around authority's discretion should be eliminated; accountability of the authority to Parliament and Judiciary should be explicitly defined; parliament should be consulted and approve appointment of board member; and the authority should be able to attract skilled people through market-based salary structure.

In addition, rule of law in the long run should help in establishing transparency, accountability, and independence as regulatory values that all stakeholders promote and protect. Rule of law is currently picking up at a slow pace after long term of declining.

Without proper regulatory independent safeguards including effective accountability and transparency and without strong rule of law the proposed regulatory authority would suffer in keeping away any political or commercial interference while implementing its mandate.

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Appendix A: The 2009 Telecommunications Law – Regulatory independence-related articles

The following is a personal translation of articles related to institutional design of the regulatory authority:

Article 3:

Under the provision of this law, a public authority called "The Palestinian Telecommunications Regulatory Authority" is established with a private budget under the Palestinian Authority's public budget. The authority shall have an independent legal personality with full legal capacity to pursue all its tasks and activities that guarantee achieving its goals.

Article 7:

Funding of the authority consists of:

1. Funds allocated in general budget
2. Unconditional funds and donations
3. Levies on new and renewed licensing
4. Levies on usage of numbers based on national numbering plan
5. Levis on new services
6. Fines and penalties
7. Other revenues generated by related activities

Article 9:

1. The authority is managed by a board that consists of a Chairperson and six members with expertise in telecommunications. The board is appointed by the President of the Palestinian Authority upon recommendation from the cabinet
2. Board members would elect a vice chairperson
3. Executive manager shall attend board meetings without a right to vote
4. The board can invite anyone to attend a board meeting. Guests shall not have a right to vote

Article 10:

A board member should:

1. be a Palestinian citizen
2. not have nor his/her partner or any relative up to the second degree a stake in firms that provide telecommunications services
3. have at least a bachelor degree and be an expert in his/her field

4. not have a criminal record

Article 11:

Board membership lasts for four years. There is a possibility of extension for each member (including the chairperson) once for two years under the condition of two extensions at each cycle. Extensions are valid by a presidential order upon recommendation from the cabinet.

Article 15:

Board membership ends in the following cases:

1. Resignation
2. Membership expiry
3. (1) Termination based on the following cases:
    a. Unjustified absence from 3 consecutive or 6 meetings during the year
    b. Article 10 (b) becomes applicable
    c. Committing a crime
    d. Incapability of performing his/her duties due to mental of physical reasons
    e. Bankruptcy

   (2) Within a month, the President of the Palestinian Authority shall appoint a replacement upon recommendation from the cabinet

Article 16:

Salaries and remunerations of board members and the executive manager are set by the cabinet.

Article 17:

Upon recommendation from the Cabinet, the President of the Palestinian Authority appoints an executive manager with expertise in telecommunications and Information Technology and indicates her/his cadre level.

8.

Appendix B: Stakeholders' profile

Ministry of Information Technology and Telecommunications (MTIT):

The ministry of telecommunications and post was established in 1995 upon the creation of the PA. Later on, it was renamed to the ministry of Information Technology and Telecommunications (MTIT). MTIT regulates the telecommunications market according to the 1996 Telecommunications Law. Some of the ministry's responsibilities are:

- **Licensing**: Telecommunications and Information Technology services, and post services including spectrum frequencies, Radio and TV stations, and courier services
- **Spectrum allocation**[23]: The ministry assigns frequencies though licenses in compliance with ITU guidelines and recommendations
- **Financial/technical/administrative control/audit**: Monitors operators and service providers through price control, quality of service, etc
- **Supervising radio and TV stations**: Supervises and regulates radio and TV stations
- **Coordinating and communicating with regional and international agencies**: Represents the PA in several regional and international telecommunications and post organizations such as ITU
- **Drafting new laws and decrees**: Responsible of drafting new laws to create a legal environment that supports market liberalization
- **Building/creating an independent government network**: Preparing a study to connect all ministries and government agencies through a private telecommunications network
- **Negotiating with the Israeli counterpart**: Follows up negotiations through the joint technical committee for issues such as international gateway, and spectrum frequencies
- **Managing Postal services**: Manages basic postal services through postal offices across the territories

Paltel Group:
Paltel group was established in 2005 to offer integrated ICT services that include fixed, mobile, Internet, IT business solutions, and media services. The group was originally composed of Paltel, the incumbent fixed operator, and Jawwal, the mobile operator (who were established in 1997). In 2004, it acquired the largest five Internet Service Providers (ISPs) and formed Hadara, an ISP. In 2006, it acquired Arab Technology Systems, one of the largest IT software development companies, and formed Hulul, an IT business Solutions company. It also established Palmedia for digital content, media, and advertising. The group's revenues in 2008 were around JOD290M (US$408M) and it accounts for 12% of Palestine's GDP[24]. The following table shows the group's revenues and profits during the last three years:

	2006	2007	2008

[23] After it is released by Israel
[24] Some of Paltel activities/investments are non-ICT related

Creating and Facilitating economic Opportunities			
Sales(000JOD)	194,165	226,202	291,106
Revenue from financial investments	7,442	11,392	1,590
Total Revenue(000JODs*)	186,335	214,811	289,516
Profit(millions JOD)after tax	56,16	65,52	89,17

(Paltel 2008, Sustainability report, page 3)

As of December 31, 2008, PADICO owns 29.66% of Paltel's stock; while the remaining 70% are distributed among several investors with no single investor owning more than 5%.

Palestinian Information Technology Association of Companies (PITA):

PITA was established in 1999 by a group of Palestinian entrepreneurs to represent them and act for the sector's interest. It is legally registered as a trade association. PITA started with 25 members representing all ICT sub sectors. Today, PITA represents 80 members. PITA objectives are:

- Advocate business- enable policies, mechanisms and environment through public-private partnership.
- Promote the Palestinian ICT sector locally and internationally through facilitating access to markets for the benefit of PITA members.
- Engage the technical and non-technical ICT human resources and related institutions in-order to expand qualified pool of qualified ICT sector personnel and uphold the level of its professional standards

PITA has been involved in discussions related to the new telecommunications law and the creation of a regulatory agency. It has issued several position papers and organized workshops and public discussion sessions regarding this matter.

Wataniya Palestine:

Wataniya Palestine, the new mobile operator, is a part of Wataniya International, Kuwait's first private mobile operator. 40% of Wataniya Palestine stock is owned by Wataniya International, 30% by the Palestinian Investment Fund, and 30% by the general population through an IPO. Wataniya Palestine was awarded the second mobile license back in September 2006. However, it did not start operating until October 2009 due to the delay of spectrum frequencies allocation by the Israeli authorities.