

**Academic Study**

**Performance of the  
Palestinian Judiciary and the  
Achievement of Justice  
1994–2013**

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# **The Performance of the Palestinian Judiciary and the Achievement of Justice 1994–2013<sup>1</sup>**

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## ***First: Organizing the Palestinian Judicial Authority: Its Necessity and the Indispensable Elements for Its Independence***

The Oslo Accords between the Palestine Liberation Organization (PLO) and the Israeli government entered into partial implementation on 13/9/1993. The Palestinian Authority (PA), which was founded by the PLO, acquired some semblance of sovereignty in the West Bank (WB) and Gaza Strip (GS). To a lesser extent they gained some control in East Jerusalem, which had been forcefully prevented by Israel since the end of the international mandate over Palestine. According to the consensual principle in constitutional systems around the world, sovereignty is for the people and only disappears when the people cease to exist. The PA practiced some aspects of the judiciary after signing the Israeli-Palestinian Interim Agreement on the WB and the GS in Washington on 28/9/1995. Its bodies applied autonomy during the transitional phase that was not supposed to exceed five years from the signing of the Agreement on the Gaza Strip and the Jericho Area on 4/5/1994 until 1999. This was included in the preamble to the Washington Agreement, which deemed it an integral part of the Agreement as stated in item (a) of paragraph (13) of Article 31 of the Agreement.

Thus, the PLO established the Palestinian government, the “Palestinian Authority,” which received international recognition, after having disappeared from existence since 1948 (the government, not the Palestinian state that was established under mandate with international recognition at the time, including the mandating country, and a constitution was issued for Palestine in 1922). The PA government enjoyed a direct rule. Therefore, the dilemma surrounding the lack of international recognition of the Palestinian government since the formation of the All-Palestine government in Gaza in 1948 was resolved

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<sup>1</sup> This study is an academic study that was published in the Arabic book of al-Zaytouna “The Palestinian National Authority: A Study of the Experience and Performance 1994–2013,” edited by Dr. Mohsen Moh’d Saleh, 2014.

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according to the rules of international law. However, this was not met with acceptance at the Arab and international levels, for reasons relating to the aim of reaching full liberation, which was contrary to international policies at the time. This was reflected in United Nations (UN) Security Council Resolution No. 44 in 1948, requesting the secretary-general, in accordance with Article 20 of the Charter of the UN, to convene a special session of the General Assembly for re-discussing the issue regarding the future government of Palestine.<sup>3</sup>

The PA government represented the interim preparatory step to achieve the legitimate rights of the Palestinian people and their requirements, and to be the democratic base for the establishment of institutions for the Palestinian people, including the Palestinians of Jerusalem (according to the explicit text of Article 2/2). The agreement ratified their right to participate in the political process and legislative elections, according to arrangements stipulated by Article 6 of the Washington Agreement. Also, Article 2, paragraph (e) only excluded “Israelis” from the right to vote.<sup>4</sup>

According to the explicit text of Article 7/1 of the Agreement: Basic Law will be drafted for the transitional governing PA. Indeed, the Authority formed a committee for this purpose, and a draft was prepared under the influence of international developments that were clearly reflected in the texts. The law was approved by the Palestinian Legislative Council (PLC) on 2/10/1997 and referred to the PA president on 4/10/1997 for approval and issuance. It became effective on 7/7/2002.<sup>5</sup>

It is thus that the Basic Law was ratified in the manner of ordinary legislation, by the ordinary legislative authority in the form of a Basic Law, without any referendum of the people being conducted. It was necessary to include a structuring of the judicial authority, because the system of any political entity in the form of state must include the organization of the three authorities, with the

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<sup>3</sup> 44 (1948), Resolution of 1 April 1948 [S/714, II], United Nations (UN), Security Council, site of United Nations Information System on the Question of Palestine (UNISPAL), 1/4/1948, <https://unispal.un.org/DPA/DPR/unispal.nsf/8f4ec1ce53ed321c852574740014cfd7/1b13eb4af9118629852560ba0067c5ad?OpenDocument>

<sup>4</sup> The Israeli-Palestinian Interim Agreement-Annex II, site of Israel Ministry of Foreign Affairs, 28/9/1995, <http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT%20-%20Annex%20II.aspx#article2>

<sup>5</sup> Palestinian Basic Law for the year 2002, *Al-Waqa'i' al-Filastiniyyah* newspaper (Palestinian official gazette), Premier issue, 7/7/2002, Diwan al-Fatwah wa al-Tashri', Gaza, State of Palestine, site of Ministry of Justice, <http://www.moj.gov.ps/official-newspaper> (in Arabic)



judiciary being the most important in light of its necessity to society. This structuring must include the following essential elements to ensure its independence:

### **1. Organizing the Judiciary is a Social Necessity**

Contemporary constitutional systems (preceded in this by the holy books) agreed on the necessity of having a reference authority for settling the inevitable complexity of human relationships in any society. The Imam Malik bin Anas once said about ‘Umar ibn ‘Abd al-‘Aziz, may *Allah* have mercy on his soul, that “People are affected by courts as much as they are affected by immorality.”<sup>6</sup>

Therefore, it became agreed upon in the constitutional principles of contemporary political systems that the judiciary is one of the most important authorities of the state. This is to maintain the state’s existence and stability, and to protect rights and freedoms, through arbitrating in disputes between public authorities and protecting their respective competencies from one another; or in disputes between them and political forces or individuals in the community; or among individuals. This is in addition to ensuring the rule of law in the work of state administrations and the work of ordinary people in general. Indeed, the existence of a judicial authority represents one of the pillars of any political entity, and cannot be dispensed with, regardless of a nation’s degree of civilized progress. The presence of an arbitrator in disputes is necessary to stabilize relationships and dispense justice among human beings in society. Otherwise, the law of the strongest would prevail, and appetites and selfish interests would control relations between the members of society, both rulers and ruled alike.

There is an increasing need for the judiciary in the modern state, which is characterized by deep and complex relationships both inside and outside, to the extent that if there were no independent judicial authority capable of resolving conflicts, chaos would prevail and the existence and development of the political entity would be threatened. Scholars of politics and law see that the state represents a group of essential functions and competencies organized for the benefit of its people, and distributed among various state agencies. The judicial function represents one of the most important functions of the state. The

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<sup>6</sup> Abu al-Hasan ‘Ali Ibn Muhammad Ibn Habib al-Mawardi al-Basri al-Shafi‘i, *Adab al-Qadi* (The Morals of a Judge) (Baghdad: n.p., 1978).

constitutional and political jurisprudence has divided the main functions of the state into three authorities:

- The Legislative Authority.
- The authority that executes laws and ensures the protection of the system that constitutes the basis of such laws.
- The authority that arbitrates disputes about the implementation of these laws, and issues decisions, amendments, or annulments of legal rights or centers, in order to achieve harmony in everyone's interests, and stable social relations.

However, these functions cannot be collected under a single authority and it is imperative that they be separated for the independence of the judiciary in the exercise of its powers. To enable the judiciary to arbitrate disputes and dispense justice between the litigants, there must be a separation between the legislative, executive, and judicial branches. It is this aspect which we will try to explain, to judge the performance of the Palestinian judiciary, and to know whether the negative aspects in its performance are due to the lack of legislation, the poor exercise of its powers, or the result of an attack against it.

Upon observing the application of the principle of separation of powers, one finds that significant progress has occurred to varying degrees in different countries. This has led to the independence of judicial authority from the rulers or the executive authority. People paid and still pay dearly to achieve that and such separation became the basis of democratic constitutional systems. Democracy in its theoretical foundations and prevalent concept is based on the need for the state's functional separation of powers, thus enabling them to independently exercise their jurisdictions.

The separation of powers of each public authority requires the application of their law, which supports the legitimacy of its inception, existence, and performance of its functions. Any authority cannot be legitimate if its practices are illegitimate, as its actions are legitimate as far as the law applies, and as far as its material actions and decisions are in accordance with the provisions of the law. The judiciary's task is to objectively and independently monitor the legality of the work of all public authorities of the State, and the work of their members. However, it is well known that the independence of the judiciary is relative and tied to the rules prescribed for the independence of the judiciary and the judges,



and the ability of other authorities to intervene in the work of the judiciary. It is now agreed that the independence of the judiciary requires the independence of the judge before himself and before the judiciary, as well as his independence in the face of other public authorities and political forces in society.

The comparative constitutional regimes saw that the cornerstone in ensuring the independence of the judiciary is to regulate the relationship between the authorities based on the principle of separation of powers. Interdependence became inevitable between the separation of powers and the independence of the judiciary in most modern constitutional systems.

There is a prevalent belief that the independence of the judiciary implies its independence in the face of executive authority. However, the independence of the judiciary must be seen from several aspects:

- In the face of legislative authority.
- In the face of executive authority.
- Independence of all the different judicial components from each other during the arbitration of a dispute.
- In the face of a public opinion that is contrary to the provisions of the law in the course of adjudicating disputes.
- In the face of opponents.

Trust in the judiciary is based on a legal system that establishes judicial bodies applying legal procedures, and maintains the jurisdiction of ordinary courts, as stated in the UN Basic Principles on the Independence of the Judiciary endorsed by the UN General Assembly Resolution No. 40/146 on 13/12/1985. According to this resolution, “everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”<sup>7</sup> Moreover, the legal system must also ensure the independence and impartiality of judges and provide them with working conditions that protect them from abuse or dismissal. It must also include many control elements that ensure their integrity. In other

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<sup>7</sup> Basic Principles on the Independence of the Judiciary, site of The Office of the United Nations High Commissioner for Human Rights (OHCHR), 13/12/1985, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>

words, the law regulating the judiciary must contain elements that ensure the independence of the judiciary.

Because there is a large gap in the various systems between the basis for the judiciary's independence and its integrity and actual independence, the UN adopted the Basic Principles on the Independence of the Judiciary for 1985. It stated that "The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."<sup>8</sup>

## **2. Necessary Elements for the Independence of Judiciary**

The assessment of the experience of the Palestinian judiciary and its independence under the PA, is based on stating the most important elements of independence of judiciary and its guarantees, which are:

- The judge's commitment to follow legal rules issued by the constitutionally competent Legislation Authority. He may not apply a law that is contrary to the Constitution, as he is constitutionally entrusted with enforcing proper laws in terms of legitimacy, according to the legal rules.
- The Constitution that stipulates that there shall not be any inappropriate or unwarranted interference by the legislative or executive authorities "with the judicial process, nor shall judicial decisions by the courts be subject to revision."<sup>9</sup> The Constitution must include provisions to ensure the accountability of the authority and its members, both politically and criminally, should they refrain from implementing the provisions of the judiciary.
- The Constitution or the legislation governing the judicial authority, which stipulates that the appointment of judges and prosecutors is made at first by the judicial authority.
- This appointment shall be made on the basis of competition, and the selection shall be based on competence and experience, not on bigotry or partisanship.
- The appointed judges and prosecutors "shall be individuals of integrity and ability with appropriate training or qualifications in law,"<sup>10</sup> so as to ensure they

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.



do not fall under the influence of any party whatsoever, in addition to their ability to be independent.

- The upper ranks in the judiciary shall be filled through promotions from within the judicial system, according to the standards set in order to avoid the intervention of preferences or other public authorities in the appointment of judges.
- A judge “shall have guaranteed tenure until a mandatory retirement age,” after which no extension of term shall be possible. Moreover, “judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.”<sup>11</sup>
- There are multiple levels of litigation, thus giving an opportunity to correct a judicial ruling that was issued as a result of misperception, or as a result of ignorance of the law or failure to understand it.<sup>12</sup>
- Hearings are public, except for exceptional cases prescribed by law that allow for secret trials.
- The right of litigation before a judge with impartiality and independence is respected, in addition to the right of defense, and offering the accused the opportunity to have appropriate legal representation.<sup>13</sup>

## ***Second: The Drawbacks in the Organization and Performance of the Palestinian Judiciary***

### **Theoretical and Practical Reasons**

A report entitled The First Legal Monitor on the Status of Justice in Palestine mentioned that:

Judicial security in Palestine did not get adequate attention since the establishment of the Palestinian National Authority. Indeed, the latter did not give the judiciary its independence and the necessary material and human resources to perform its functions in a proper manner. Moreover, the

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<sup>11</sup> Ibid.

<sup>12</sup> Muhammad Sa‘id Majdhub, *Al-Hurriyyat al-Asasiyyah wa Huquq al-Insan* (Basic Freedoms and Human Rights) (Tripoli, Lebanon: Jarrous Press, 1986), p. 199.

<sup>13</sup> Basic Principles on the Independence of the Judiciary, OHCHR.

executive authority infringed on the functions of the judiciary, and the legislative authority failed in its legislative and regulatory competence...<sup>14</sup>

We will discuss below the theoretical and practical reasons behind the drawbacks in the organization and functioning of the ordinary and constitutional judiciary:

### **1. Drawbacks in the Organization and Functioning of the Ordinary Judiciary 1994–2007**

The Basic Law briefly tackled the organization of the judiciary, addressing its structure, jurisdiction, members, the provisions of its independence, and the types and degrees of courts in Article 12 of 97–109.

The judicial authority in the different constitutional systems consists of judges and public prosecutors, in various degrees and types of courts and public prosecution.

Constitutions include a general provision on the principle of the independence of the judiciary from other authorities, because there can be no sovereignty for legitimacy and rule of law without an independent judicial authority that is organized by rules of the highest degrees of the legal system in the Constitution. However, this is not akin to other public authorities, which are organized in the Constitution, it is rather detailed in ordinary laws. Ensuring the judiciary's independence must be clearly stipulated, so that such provisions prevail on public authorities and on relations between individuals. Without this, there would be no meaning for the law and its various levels. This is especially important when the application of the law is inconsistent with the interests of society, or of those who carry state-owned means of oppression, which must be used for the implementation of the law, and not for achieving the illegitimate interests of the members of the governing authority or political forces. Here we find the pressing need for an effective judiciary organized by the highest constitutional rules of law, to adjudicate in this conflict between the law and the interests of the centers of power, and impose justice on the members of governing bodies and on ordinary people.

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<sup>14</sup> The Palestinian Center for the Independence of the Judiciary and the Legal Profession (MUSAWA), *Al-Marsad al-Qanuni al-Awwal li Wad' al-'Adalah fi Filastin* (The First Legal Monitor on the Status of Justice in Palestine) (Ramallah: MUSAWA, May 2010), p. 33.



It is noteworthy that after the establishment of the PA, and in the period prior to the issuance of certain laws by the PA and then the Basic Law, many of the laws that were applied in the WB were different from those applied in the GS. This resulted in drawbacks in the performance of the courts, which saw the scope of their jurisdiction extended by the Authority to include GS and the WB.

The PA then proceeded to the unification of legal rules, and the Palestinian Basic Law stipulated:

The Judicial Authority shall be independent and shall be exercised by the courts at different types and levels. The law shall determine the way they are constituted and their jurisdiction. They shall issue their rulings in accordance with the law. Judicial rulings shall be announced and executed in the name of the Palestinian Arab people.<sup>15</sup>

This was reiterated in the Authority's Judicial Law.

The Basic Law also stipulated: "Judges shall be independent and shall not be subject to any authority other than the authority of the law while exercising their duties. No other authority may interfere in the judiciary or in judicial affairs."<sup>16</sup> This was reiterated in the Authority's Judicial Law.

In accordance with Article 100 of the Basic Law amended in 2003, the judicial administration of the Supreme Judicial Council declared: "A High Judicial Council shall be created. The law shall specify the way it is constituted, its responsibilities and its operating rules. The High Judicial Council shall be consulted about draft laws relating to the Judicial Authority, including the Public Prosecution." This was contained in the Basic Law, 2002.<sup>17</sup>

With regard to the Supreme Judicial Council, the Basic Law in 2002 and then the amended Basic Law in 2003 had provided for the establishment of a supreme body for the management of the judicial authority. The details of this body were referred to the relevant law, which was issued by the legislative authority to determine the way it would be composed, its competence, and rules of action. It

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<sup>15</sup> 2003 Amended Basic Law, Article 97, site of The Palestinian Basic Law, 18/3/2003, <http://www.palestinianbasiclaw.org/basic-law/2003-amended-basic-law>

<sup>16</sup> 2003 Amended Basic Law, Article 98, The Palestinian Basic Law, 18/3/2003.

<sup>17</sup> 2003 Amended Basic Law, Article 100, The Palestinian Basic Law, 18/3/2003.

should be consulted on the draft laws that regulate any affairs of the judiciary, including the Public Prosecution.<sup>18</sup>

An independent text on Public Prosecution was articulated in Article 107 of the Amended Basic Law, as it was in the Basic Law in 2002<sup>19</sup> as follows:

1. The Attorney General shall be appointed through a decision issued by the President of the National Authority, based on a recommendation submitted by the Supreme Judicial Council, and endorsement of the Legislative Council.
2. The Attorney General shall handle and assume public cases in the name of the Palestinian Arab People. The jurisdiction, functions and duties of the Attorney General shall be determined by law.

Article 108 of the amended Basic Law authorized the legislature to organize the formation of the Public Prosecution and its terms of reference, in addition to the terms of appointment of members of the public prosecution, their transfer and dismissal, and their accountability, by virtue of the laws.

Below we present the abridged organization of the judiciary's Basic Law and its impact on the judiciary's performance.

#### **a. On the Organization of the Types of Ordinary Judiciary**

In reference to the Basic Law, its amendments, and the constitutional rules that were in effect when it was ratified, and the laws regulating the judicial authority and its jurisdiction, we find that there are the following types of Palestinian judiciary:

The ordinary judiciary is composed of bodies, which exercise the basic function of the judiciary, as they are the inherent judicial bodies involved in civil and criminal disputes. They are responsible for settling disputes and attacks on rights and freedoms of individuals, in addition to the conflicts that arise between individuals and governing bodies. As is the case in many constitutions, personal status matters have special courts and provisions. Largely based on what was in force in the WB under the Jordanian Constitution of 1952, the Judicial Authority Law No. 1 of 2001 organized four types of ordinary judiciary:

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<sup>18</sup> Ibid.

<sup>19</sup> 2002 Palestinian Basic Law, Article 98, The Palestinian Basic Law, 29/5/2002, <http://www.palestinianbasiclaw.org/basic-law/2002-basic-law>



**1. Regular Judiciary:** Courts adjudicate in civil and criminal matters, according to the Constitution and the laws governing their terms of reference.

The Basic Law of 2002, as amended in 2003, authorized the organization of ordinary laws by the ordinary courts. Hence, the Palestinian Law No. 5 of 2001 for the formation of regular courts specified their degrees as follows:

- Magistrates Courts.
- Courts of First Instance.
- Courts of Appeal.
- The Supreme Court in its two branches; Court of Cassation and the Supreme Court of Justice.

The Code of Civil and Commercial Procedure No. 2 of 2001, and the Criminal Procedures Law No. 3 of 2001, organized the courts' categories and moral and regional jurisdiction.

**2. Religious Courts:** According to the provisions of Article 101 of the amended Basic Law, the new laws organizing religious courts followed the same approach according to the division below:

- Shari'ah courts: Shari'ah Courts adjudicate in personal status matters for Muslims, and indemnities among Muslims or between a Muslim and non-Muslim if both parties agree on the competence of Islamic courts. They are also competent in matters relating to endowments.
- Courts of non-Muslim religious sects: There are laws that define their competence regarding personal status and endowments established for the benefit of the relevant sect.

**3. Administrative Justice:** Palestine adopts a unified justice system. Under Law No. 5 of 2001 on the formation of regular courts, the Supreme Court of Justice, which is on one degree and which issues final and irrevocable judgments, is in charge of resolving all administrative disputes. According to the added Article 33:

The Supreme Court is competent in the following:

- Appeals regarding electoral matters.
- Requests made with regard to abolishing regulations, systems or final administrative decisions related to persons or funds, which are issued by people from the common law, including trade unions.

- Orders with regard to opposition in custody, requesting the release of unlawfully arrested persons.
- Disputes relating to public functions, in terms of appointment, promotion, bonuses, fees, transfer, referral to retirement, discipline, or dismissal, and other related matters.
- The administrative body rejects or refrains from taking any decision that must be taken, according to the provisions of laws or regulations in effect.
- Other administrative disputes.
- Issues that are not cases or trials, but merely petitions or calls beyond the jurisdiction of any court, and that require arbitration in order to achieve justice.
- Any other matters referred to it under the provisions of the law.

Article 34 of the Law on the formation of regular courts in applications submitted to the Supreme Court of Justice by the individuals in the previously mentioned cases stipulated that the reason for an appeal must be related to one or more of the following:

- Jurisdiction.
- The existence of a defect in form.
- The violation of laws or regulations, or an error in their application or interpretation.
- Deviation or abuse of power in the manner prescribed by law.

The annulled Basic Law included what was stipulated in Article 102 of the Amended Basic Law: “Administrative courts may be established by law, to consider administrative disputes and disciplinary claims. Any other jurisdiction of such courts, and procedures to be followed before them, shall be specified by the law.”

This Article paves the way for multiple degrees of administrative litigation, which provides the opportunity to achieve a legal review of the judgments and correct the court’s errors. This was emphasized by the UN Basic Principles on judicial authority. But in fact, up to the time of writing (2013), there remains only one degree in the courts of the PA for the permanent arbitration in administrative disputes, despite the court’s broad and comprehensive mandate to review all administrative disputes, in addition to what was added by Article 33 of the Law on the formation of courts.



**4. Special Tribunals:** Some legal systems establish many special tribunal types for different reasons. These special tribunals often follow rules and procedures that partly differ from ordinary courts. Some of these considerations are related to the litigating parties or to their nature and are submitted to a special court. The laws for the establishment of these special courts regulate their composition, terms of reference, and work system. Among these special courts: the state security courts and military courts, or the courts that specialize in issues of particular persons. Some are criticized for the threat they pose to rights and freedoms, as the exact terms of reference and procedures are not determined. The Amended Basic Law mentioned military courts in Article 101: “2– Military courts shall be established by special. Such courts may not have any jurisdiction beyond military affairs.”

**b. Drawbacks in the Organization Affected the Performance of Ordinary Courts**

Among the drawbacks in the organization of the judiciary, which negatively affected its performance due to external factors, are the restrictions contained in the Oslo Accords and its annexes: delimiting the jurisdiction of the Palestinian judiciary, even in the territories supposedly administered by the PA. This is in addition to internal factors, including the fact that the PA’s President, after its establishment in 1994, set the legal rules governing the judicial authority. These laws and related judicial decisions are too numerous to mention, in addition to the repercussions of that intervention. Therefore, we will simply mention some aspects of the intervention in the judiciary’s organization:

- In spite of the establishment of the PLC as a competent Legislation Authority since 1996, the PA President continues to exercise legislative prerogatives. For instance, he issued decrees, including Decree No. 1 of 1999 amending Law No. 5 of 1998 on branding precious metals, and Decision No. 26 of 1999 on the terms of reference for the President of the Supreme Court.
- Under those laws, the appointment and promotion of judges is done by virtue of a decision by the PA President, upon the recommendation of the Judicial Council, because the legal text did not specify any appointment criteria and did not restrict it to judges. The Supreme Judicial Council was appointed by Decision No. 29 of 2000 issued by the PA President.<sup>20</sup>

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<sup>20</sup> Resolution No. 29 of 2000 on Establishing the Supreme Judicial Council, *Al-Waqa’i’ al-Filastiniyyah*, issue 36, 19/3/2001. (in Arabic)

- Decision No. 33 of 1998 defining judicial law enforcement officers and their terms of reference, and Decision No. 19 of 2000 granting the status of judicial law enforcement. Naturally, this affects the independence of judicial proceedings.<sup>21</sup>
- Decision No. 15 of 1998 defining the terms of reference of the State Security Court.<sup>22</sup> This certainly adversely affects the independence of the judiciary in the face of executive authority.
- Decision No. 32 of 1999 appointed an Attorney General for the State Security Courts. Besides the drawback regarding the presence of State Security Courts, this would impair their independence.<sup>23</sup>
- The PA President's Decision No. 26 of 1999 on the terms of reference of the President of the Supreme Court.<sup>24</sup>
- The formation of the Supreme Judicial Council, by Decision No. 29 of 2000.<sup>25</sup>
- Decree No. 11 of 2002 appointing the members of the Supreme Judicial Council.<sup>26</sup>
- Decree No. 8 of 2003 appointing the Supreme Judicial Council.<sup>27</sup>
- Decision by Law amending the Judicial Authority Law No. 1 of 2002.<sup>28</sup>
- Decision by Law No. 5 of 2006 amending the Law on the Formation of Regular Courts 2001.
- Decision by Law No. 7 of 2006 on the Law on the High Criminal Court.
- Decision by Law No. 8 of 2006 on the amendment of the Criminal Procedure Code 2001.
- Decision by Law No. 9 of 2006 on the amendment of the Commerce and Civil Procedure Law 2001.
- Decision No. 215 of 2010 on the establishment of the Court of Customs Appeal.<sup>29</sup>

There are many more examples that we will not mention here for lack of space.

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<sup>21</sup> *Al-Waqa'i al-Filastiniyyah*, issue 26, 26/11/1998; and *Al-Waqa'i al-Filastiniyyah*, issue 34, 30/9/2000. (in Arabic)

<sup>22</sup> *Al-Waqa'i al-Filastiniyyah*, issue 23, 8/6/1998. (in Arabic)

<sup>23</sup> *Al-Waqa'i al-Filastiniyyah*, issue 31, 13/12/1999. (in Arabic)

<sup>24</sup> *Al-Waqa'i al-Filastiniyyah*, issue 30, 10/10/1999. (in Arabic)

<sup>25</sup> *Al-Waqa'i al-Filastiniyyah*, issue 36, 19/3/2001. (in Arabic)

<sup>26</sup> *Al-Waqa'i al-Filastiniyyah*, issue 43, 5/9/2002. (in Arabic)

<sup>27</sup> *Al-Waqa'i al-Filastiniyyah*, issue 46, 16/8/2003. (in Arabic)

<sup>28</sup> *Al-Waqa'i al-Filastiniyyah*, Premier issue, 14/2/2006. (in Arabic)

<sup>29</sup> *Al-Waqa'i al-Filastiniyyah*, issue 90, 30/3/2011. (in Arabic)



## **2. Drawbacks in the Organization and Performance of the Constitutional Judiciary**

Some constitutions organize constitutional courts that are competent to hear some political, constitutional, or supreme legal issues. Article 103 of the Amended Basic Law stipulates the following:

1. A High Constitutional Court shall be established by law to consider:
  - a. The constitutionality of laws, regulations, and other enacted rules.
  - b. The interpretation of the Basic Law and legislation.
  - c. Settlement of jurisdictional disputes which might arise between judicial entities and administrative entities having judicial jurisdiction.
2. The law shall specify the manner in which the High Constitutional Court is formed and structured, the operating procedures it will follow and the effects resulting from its rulings.

Constitutionally speaking, and in order to achieve the objective of the establishment of the Constitutional Court, it must be organized independently from the regular judiciary. This is stipulated in theory in the first Article of the Law on the Supreme Constitutional Court 2006 (LSCC), saying that under the provisions of this law, a Supreme Constitutional Court shall be formed, which is an independent judicial body in Palestine, referred to hereinafter as the Court.

However, what contrasts with the fact that the court is an independent judicial body, and reflects negatively on the performance of the judiciary, is Article 104 of the Basic Law: “The High Court shall temporarily assume all duties assigned to administrative courts and to the High Constitutional Court, unless they fall within the jurisdiction of other judicial entities, in accordance with applicable laws.” This text puts the Constitutional Court structurally and practically under the ordinary courts. Therefore, even after the enactment of the Supreme Constitutional Court in 2006, the Constitutional Court remains practically dependent on the Supreme Court, and remains so to this day (end of 2013).

Like its predecessor, Article 94 of the annulled Basic Law, Article 103 of the Basic Law, amended in 2003, stipulates that “A High Constitutional Court shall be established by law.” Four years after its establishment was stipulated in 2002, the PLC passed the LSCC No. 3 of 2006, and the Supreme Court still exercises its jurisdictions.

### **a. Drawbacks in Legal Regulations for Constitutional Courts**

The drawback regarding the LSCC is that it includes many violations of the Basic Law, which adversely affect the independent performance of the judicial authority. Indeed, there is a difference between Article 103 of the Basic Law regarding the specified terms of reference of the Supreme Constitutional Court, and Article 24 of the LSCC regarding the jurisdiction of the Constitutional Court. The ordinary law was amended in the Basic Law in a manner that is different from the constitutional one defined in Article 120 of the Basic Law.

For more clarity, the reader will find below the LSCC text, which is contrary to the text of the Basic Law regarding the Constitutional Court's jurisdiction.

Article 103 of the Amended Basic Law:

1. A High Constitutional Court shall be established by law to consider:
  - a. The constitutionality of laws, regulations, and other enacted rules.
  - b. The interpretation of the Basic Law and legislation.
  - c. Settlement of jurisdictional disputes which might arise between judicial entities and administrative entities having judicial jurisdiction.
2. The law shall specify the manner in which the High Constitutional Court is formed and structured, the operating procedures it will follow and the effects resulting from its rulings.

Article 24 of the LSCC:

Article 24 of the LSCC No. 3 of 2006 has a drawback. It adds and deletes in an illegal manner some of the provisions contained in the Basic Law as follows:<sup>30</sup>

The Court shall exclusively have jurisdiction over the following:

1. Oversight over the constitutionality of laws and regulations.
2. Interpretation of the provisions of the Basic Law and laws in the event of conflict over the rights, obligations and capacities of the three authorities.
3. Adjudication of the conflict of jurisdiction between the judicial authorities and administrative authorities with judicial jurisdiction.
4. Adjudication of the conflict which arises in regard of the execution of two contradictory final judgments, one of which is issued by a judicial authority or an authority with a judicial jurisdiction and the other from another authority therefrom.

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<sup>30</sup> International Bar Association: Human Rights Institute, *A Comparative Analysis of the Law on the Supreme Constitutional Court of the Palestinian National Authority*, MUSAWA, August 2009, p. 14, <http://www.musawa.ps/uploads/531e645946fd2307c0f5ba0dc798d225.pdf>



5. Adjudication of the challenge regarding the loss of legal capacity by the President of the National Authority in accordance with the provisions of Clause (1/C) under Article (37) under the Amended Basic Law of 2003 A.D. Its decision shall be deemed to be effective starting from the date of the approval by the Legislative Council thereof by the majority of two thirds of the number of its members.

The violations contained in the LSCC of the principles governing the specific terms of reference of the Constitutional Court in the Basic Law are obvious. The ordinary law that executes Article 103 of the Basic Law may not violate this or amend it by any additions or deletions. Among the grave breaches in Article 24 of the Law on the Court are:

- The text on the competence of the Constitutional Court to supervise regulations was deleted.
- The second paragraph of the legal actions supervised by the Constitutional Court was deleted, excluding the cited legal actions, such as presidential decisions and decrees that were meant by the phrase “and others”, as this phrase implies the other legal actions, which include legal rules.
- Article 24/2 of the LSCC removed the Court’s jurisdiction to interpret “legislation” and restricted it to laws. Legislation is more important than laws, whose interpretation was restricted by the LSCC to the Court’s authority. Decrees are part of the legislation, but they are not laws.
- The LSCC amended in the Basic Law in an illegal manner by adding significant competence for the Constitutional Court that was not prescribed by the Basic Law. This includes what was added by Article 24/4 to Article 103 (C) of the amended Basic Law: “Settlement of jurisdictional disputes which might arise between judicial entities and administrative entities having judicial jurisdiction.” The Basic Law gave the Constitutional Court the jurisdiction to adjudicate in conflicts regarding the competence of judicial authorities and administrative authorities with judicial jurisdiction.
- Article 5 of the LSCC gave the executive authority the possibility of controlling the court through the jurisdiction of the National Authority President by appointing the court’s President and judges as was the case in the first composition. This jurisdiction for the President was not stipulated in the Basic Law, which defined his terms of reference in the provisions of Article 38 thereof: “The President of the National Authority shall exercise his executive duties as specified in this law.” This Article did not include the possibility of

adding other functions to the President through subsequent laws such as what was stipulated in Article 69/11 of the Basic Law regarding the terms of reference for the Council of Ministers (11: “To assume any other responsibility assigned to it, in accordance with the provisions of the law.”) It is not constitutional for the appointment of the head of the State Audit and Administrative Control Bureau,<sup>31</sup> the Governor of the Monetary Authority,<sup>32</sup> and the Anti-Graft Commissioner,<sup>33</sup> to be made by virtue of decisions made by the President of the PA and the approval of the PLC. Indeed, the functions of the latter do not override those of the President of the Constitutional Court, which is the ultimate reference to adjudicate in the conflict of powers and protection of the constitutionality of legal rules. The President of the executive branch is independent in the appointment of the Chief Justice and the General Attorney, who is practically the President of the Constitutional Court, under Article 104 of the Basic Law.

- The permanent (unconstitutional) authorization for more than 11 years (so far in 2013) for the Supreme Court to have the Constitutional Court’s competence on the constitutional oversight.

#### **b. Drawbacks in the Performance of the Constitutional Judiciary**

The above has negatively affected the performance of the judiciary in general, as well as the independence of the Constitutional Court, as it annulled its oversight on the constitutionality of the work of the courts. Moreover, the Supreme Court, which applies the competence of the Constitutional Court, may be an adversary and ruler, and this negatively affects its objectivity and fairness. Here are a few examples:

**First Case:** In its capacity as a Constitutional Court, the Supreme Court had to examine a conflict between the head of the Supreme Judicial Council and the Ministry of Justice, about the subordination of administrative staff working in courts and prosecution offices. The Ministry based their affiliation to it on the

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<sup>31</sup> State Audit and Administrative Control Bureau Act No. 15 of 2004, *Al-Waqa’i’ al-Filastiniyyah*, issue 53, 28/2/2005; and Decision by Law No. 5 of 2010 Concerning the Approval on the Appointment of Employees Public Bureau, *Al-Waqa’i’ al-Filastiniyyah*, issue 85, 6/5/2010. (in Arabic)

<sup>32</sup> Decision by Law No. 13 of 2011 Concerning the Approval on Re-Appointing a Governor of the Palestinian Monetary Authority, *Al-Waqa’i’ al-Filastiniyyah*, issue 92, 25/12/2011. (in Arabic)

<sup>33</sup> Decision by Law No. 1 of 2010 Concerning the Approval on the Appointment of the Anti-Graft Commissioner, *Al-Waqa’i’ al-Filastiniyyah*, issue 85, 6/5/2010. (in Arabic)



provisions of Article 47/1 of the Judicial Authority Law No. 1 of 2001: “the Minister of Justice shall administratively oversee all courts...” However, the Supreme Court, headed by the President of the Supreme Judicial Council, in its capacity as a Constitutional Court, ruled in favor of the head of the Supreme Council of the Judiciary, in spite of the existence of this explicit text. This problem necessitated the formation of a special investigation commission on 25/4/2009 for examining the conflict of jurisdiction between the Minister of Justice, the Attorney General, and the President of the Supreme Judicial Council.

**Second Case:** Another example of the negative impact of the continued integration of the Constitutional Court with the Supreme Court, is its ruling No. 1 of 2006 as a Constitutional Court, which is too long to cite here. It demonstrates the drawbacks of the lack of independence of the Constitutional Court from the ordinary judiciary, which does not have the necessary expertise in the constitutional judiciary. It is also better to avoid saying that it is “subject to external influence,” as it rejected immunity for the internal parliamentary acts of the PLC represented in the minutes of its meetings, which may not be challenged, in order to ensure the independence of the PLC. The Court had to consider that the decision of the PLC in its 6/3/2006 session “to refuse to invoke the unsigned minutes of the Council dated 13/2/2006” was not a parliamentary act, because if it did, then it would not be authorized to oversee it. Hence, the minutes and their content are not constitutionally sound and the LSCC, contained in these minutes, would not be constitutional. The law was sent back by the PA President to the PLC with some modifications on 23/1/2006.<sup>34</sup> These amendments must be approved by the PLC by a signature on the minutes of the session of 31/2/2006. Otherwise, the procedures cannot be considered duly completed, and thus the Constitutional Court loses its authority in addressing the topic. This is because Article 103 of the Basic Law did not stipulate the jurisdiction of the Constitutional Court with what LSCC (which was not constitutionally complete) added in the second paragraph of Article 24 regarding the adjudication “in the event of conflict over the rights, obligations and capacities of the three authorities” (added by the Court Act, in contradiction with the Basic Law). Article 103 of the Basic Law authorizes the Constitutional Court only to consider “settlement of jurisdictional disputes which might arise between judicial entities and administrative entities having judicial jurisdiction.”

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<sup>34</sup> MUSAWA, *Al-Marsad al-Qanuni al-Awwal li Wad' al-'Adalah fi Filastin*, p. 112.

**Third Case:** On 2/1/2013, the Ramallah Magistrate Court rejected the plea about the unconstitutional provision in the Publications Act 1995 in case No. 1231/2012, submitted by the representative of a private moral person, because this moral person did not incur any personal damage, and the criminal liability is upon it. This is despite the fact that the ruling itself decided that the pleader for unconstitutionality was present in his capacity as the representative of the accused party. The court decision established that the damage was not personally incurred by the moral person's representative, but that the responsibility was upon the moral person. It is legally uncommon to reject a plea from the representative of a moral person. From whom then is a lawsuit accepted? The moral person has no natural will, and the will of its representative is its will.

**Fourth Case:** The Supreme Court ruling in the constitutional challenge No. 1 of 2009, rejecting the appeal for lack of litigation validity. This is in spite of LSCC's Article 27/2: "In case one of the courts... manifests during the hearing of an action the unconstitutionality of a provision in a law, decree, bylaw, regulation or decision that is necessary for the adjudication of the dispute, it shall halt the action and refer the papers without fees to the Supreme Constitutional Court in order to adjudicate the constitutional issue." The nature of the case was objective and not subjective, where the law is the litigant, and not a public or private person, and the court should not have rejected it.

### ***Third: The Growing Drawbacks in the Organization and the Performance of the Judiciary After the 2007–2013 Split***

Following the June 2007 events in GS due to Fatah's dispute with Hamas after its election victory, and the rejection of a peaceful transfer of power, the authority was divided, including the judiciary. The Supreme Judicial Council in Ramallah closed the GS courts and halted the work of the Public Prosecutor and civilian police, considering the judgments issued under the GS government to be null and void. It also decided to stop the implementation of judgments in the GS and the collection of fees, dismissing the judges and the Bar Association. Therefore, the government in GS established a judicial body and a Council of Justice to ban the public administration of the PA,<sup>35</sup> including the authority's judicial body, from working with the government, which forms the backbone of

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<sup>35</sup> *Ibid.*, p. 39.



Hamas in GS. There is not space here for an adequate discussion of the constitutionality of this or an assessment of its performance. Therefore, our research will include the situation in GS and the WB in 1994–2007, in addition to the situation in Ramallah in 2007–2013. Certainly, there have been many positive aspects in the performance of the judiciary, and the PA in Ramallah has published reports on its work, including the report of the Palestinian Central Bureau of Statistics (PCBS) with a survey of governance in the Palestinian territories published in 2009. This is in addition to the scoping study on the reality of the judicial authority, which was conducted for the benefit of the judiciary, and other studies that deal with the positive aspects of the judicial authority.

However, our research will focus on the negative aspects in the performance as a constructive criticism, which aims for reform by learning from the negative experience. As for the performance of the judicial system, which was established in GS after 2007, the study of the pros and cons of its organization and performance requires more space than allocated to this research.

In addition to the above, what intensifies the crisis of the independence of the judiciary and the flaws in its performance is the constitutional regulation of the relationship between the judiciary and other public authorities as follows:

## **1. Drawbacks in the Relationship Between the Legislative and Judicial Authorities**

### **a. Drawbacks Resulting From the Regulation of the Relationship Between the Two**

Constitutions theoretically prescribe the independence of the judiciary, but do not clearly define the views, laws and procedures of the judiciary as it does for the legislative and executive branches. They leave this for the legislator to determine, hence the effects of the PLC on the regulation and performance of the judiciary through the organization of the judiciary with laws or decisions by law. In fact, both authorities complete each other on the rule of law. The judiciary rules based on the law issued by the legislator, while defining and interpreting its ambiguities, and filling its shortcomings. This is done with respect for the independence of both authorities from each other.

The independence of the judiciary lies in the existence of the constitutional system that regulates the immunity of the judiciary against the pressures and interventions by public authorities and individuals, especially illegal

interventions, or those affecting the independence of the judiciary, ensuring the independence of judges both legally and financially. This helps achieve justice between individuals, and face other public authorities, establishing a sound relationship between the public authorities themselves.

The independence of the judiciary does not mean that its will is the law or that it is above the law, challenging and exceeding the boundaries established by the legislature for public and private relationships. In fact, the judiciary is entrusted with enforcing the law and subjecting everyone to the rule of law. The independence of the judiciary is not intended to achieve complete separation of powers, or bring privileges to the judicial authority and its staff, exempting them from being subjected to the law established by the legislative authority and from the rule of law. In fact, the judiciary is constitutionally entrusted with enforcing laws on everyone during the performance of its functions and powers. The independence of judges and the judiciary is intended to find a system for the judicial authority, which ensures that it pays its constitutional role with impartiality and integrity, and that the judge and the judicial authority are not influenced. Indeed, if the judiciary was not independent, this would upset the balance of society and the tranquility among public authorities.

If ensuring the independence of the judiciary in the face of ordinary individuals can be achieved through the organization of the judiciary with ordinary laws, then the independence of the judiciary in the face of the legislative and executive authorities can be achieved by including precise constitutional provisions on the relationship among the three authorities. This is especially important as the judiciary acts as a referee that has to force the legislative and the executive authorities to comply with the law.

Legally, there is mutual influence between the two authorities: the PLC establishes abstract general laws, which the executive authority and individuals must observe and implement. As for the judiciary, it adjudicates disputes arising from the application or non-application of those laws by individuals or by the executive or the legislative authority. But this balance breaks down when the legislative authority interferes with the functioning of the judiciary, through laws passed by the legislature, by organizing the judiciary's departments, courts, the terms of reference, and working procedures.



## **b. Drawbacks Resulting From Unconstitutional Legislative Practice**

Among the negative aspects in the performance of the Palestinian judiciary that affect its independence in its function and its relation with the PLC, is the legislator's issuance of laws that are in contradiction with the spirit of the Constitution based on the separation of powers. This includes for example:

1. The PLC-issued Law No. 5 of 2001 to form regular courts, which adopted a policy of the distribution of work between the levels of litigation that did not take into account the drawbacks from the previously implemented regulations. It is evident that, among the things that affect the independence of the judiciary, is the expansion of the powers of the single judge in the Magistrates Courts at the expense of the multiplicity of the judges in the Court of First Instance. This makes the judge, and thus the judiciary, more likely to be affected by many prior considerations that may arise from religious, social, political, security affiliations, or narrow self-interest. It has become certain in many systems that have adopted the system of the individual judge in the Magistrates Courts and the expansion of his powers, rather than a system of multiple judges, that this system does not have a consensus or a majority of legal opinions. Even among its supporters, this system is linked to a judicial system with integrated elements of independence and real legal guarantees for the rights and freedoms of individuals, starting with the judge being of expertise and independence, something that is not available.

2. Following Article 43 of the Basic Law by the President of the PA through issuing decrees to justify the amendment of the Basic Law and several other laws, the President was forced to withdraw those presidential decisions issued from 7/3–15/4/2007.<sup>36</sup>

3. Decision by laws were issued, limiting the right of litigation before the ordinary courts and referring disputes that are within these courts' competence to the extraordinary courts. An example of this is judging civilians before military courts, in breach of international legislation and conventions, and the 2005 resolutions of the UN Commission on Human Rights (UNCHR) regarding the limitation of the competence of military courts only to offenses of a military nature committed by military personnel.<sup>37</sup> Examples of the violation of Article 101/2 of the Basic Law include the rulings issued by military courts to civilians

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<sup>36</sup> Decision No. 291 of 2007 concerning the withdrawal of presidential decisions, *Al-Waqa'i' al-Filastiniyyah*, issue 73, 13/9/2007. (in Arabic)

<sup>37</sup> Nasir al-Rayyis, *'Adam Mashru'iyat Muhakamt al-Madaniyyin al-Filastiniyyin Amam al-Qada' al-'Askary al-Filastini* (Illegal Trial of Palestinian Civilians Before Palestinian Military Courts (Ramallah: Al-Haq Organization, 2010), pp. 91–104.

based on Presidential Decree 28 of 2007, extending the jurisdiction of the military judiciary to prosecute civilians on the basis of a state of emergency, and suspending the laws in effect, and even the Basic Law, especially Articles 101/2 and 107<sup>38</sup> thereof as follows:

- a. The Special Military Court's ruling in Cases No. 18/09 and 75/20/N. 'A.R./2009 prosecuting civilians.<sup>39</sup>
- b. The Special Military Court ruling in Ramallah and al-Bireh in Cases No. 86/09 and 39/154/N. 'A.R./2009 prosecuting civilians,<sup>40</sup> and many others.

4. There were increasing negative aspects to the establishment of special courts by administrative decisions and not the law, as prescribed by Article 101/2 of the Basic Law, such as the establishment of a customs appellate court similar to those provided for by resolution 215 of 2010.<sup>41</sup>

5. Among the serious effects threatening the independence of Palestinian judiciary, is the legislations issued by the executive authority in the form of decisions by law issued by the PA President based on Article 43 of the Amended Basic Law, which regulates cases of necessity, in spite of the lack of such conditions. Even if the necessary conditions were met, this would only entitle the PA President to issue decisions (not laws) to face the necessity only, and does not entitle him to annul any laws with those decisions. This matter is not recognized by most of the legislators and even politicians, to the extent that they submitted an appeal on 25/11/2007 to the PA President saying that:

... We appeal to your Excellency not to issue draft resolutions... as they violate the provisions of the Basic Law and the laws in force. They also represent a threat to the structure of the Palestinian legal and political system, as well as the squandering of the principle of separation of powers and a violation of the principle of the sovereignty of law...<sup>42</sup>

6. Instead of focusing on its own competence, the judiciary exercised the competence of other authorities. Practically speaking, the judiciary's work involved strange paradoxes such as the High Judicial Council's transgression of Article 100 of the Basic Law regarding its competence. The head of the High Judicial Council referred a batch of amended draft decisions by law to a stack of

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<sup>38</sup> *Ibid.*, pp. 111–121.

<sup>39</sup> *Al-Waqa'i' al-Filastiniyyah*, issue 89, 1/1/2011. (in Arabic)

<sup>40</sup> *Al-Waqa'i' al-Filastiniyyah*, issue 90, 30/3/2011. (in Arabic)

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ayn 'ala al-'Adalah* (An Eye on Justice) newsletter, MUSAWA, Ramallah, issue 7, December 2007, p. 16.



laws. This contradicts the constitutional rules specifying his terms of reference, which do not include the submission of draft laws. In addition, it is a violation of the Basic Law to pass decisions by law through the use of a (non-existing) case of necessity, thus opposing the constitutional path of legislation as defined by the rules of the Basic Law. In order to face this, many legal research centers and civil society institutions, in addition to representatives of parliamentary blocs in the PLC, submitted a memorandum to the President of the PA to draw his attention to the violation of the Basic Law, of which Article 43 does not justify the issuance of legal resolutions. Moreover, it is not the role of the judiciary to intervene in issuing laws.<sup>43</sup>

When the Constitution decides the principle of independence of the judiciary as one of the three main state authorities, then constitutionally no other authority may intervene in a manner that would compromise this independence, even if by a law passed by the legislative authority.

## **2. Drawbacks Resulting From Organizing the Relationship Between the Judiciary and the Executive Authority**

### **a. Drawbacks Resulting From Legal Regulations**

Historically, the judiciary was part of the executive authority. There are lingering effects of such dependency, especially in Latin systems and those that emulated them, despite the fact that modern constitutions adopted the independence of the authorities.

The independence of the judiciary from other public authorities in the state was necessary due to the nature of the democratic developments of the contemporary democratic systems. Indeed, a judge cannot rule objectively and impartially if the judicature is not independent, both in form and in content. According to legal logic, the judiciary is synonymous with the legislative authority, complementing its work with the interpretation and exhaustive explanation of the general rules laid down by the legislature. When asked to resolve disputes raised by the application of the law on individuals, between public authorities and individuals, or between public authorities themselves, the judiciary's work is not purely executive like the work of the executive authority in the application of the laws. Rather, it is a decisive act regarding rights, positions, terms of reference and legal powers, in many cases, and is broader than an execution process. It determines the applicable law and details its full rules in

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<sup>43</sup> *Ibid.*, pp. 18–19.

order to apply them to the individual case before the judge. Moreover, the judge must issue a legal ruling for the dispute even if he does not find a direct legal basis. This is because if he refrains from adjudicating the dispute for lack of legal basis, he is deemed “a denier of justice.” This principle applies in constitutional regimes, as a judge may not refrain from adjudicating a dispute submitted before him and falling within his competence, under the claim that he did not find an explicit legal basis for this dispute.

Hence, the constitutions of many countries around the world assert the independence of the Judicial Authority toward the executive, rejecting the latter’s interference in the work of the former. However, the legal regulations regarding the relationship between the judicial and executive authorities allows for the executive branch to enjoy a legal capacity in addition to the practical aspect, in order to influence the work of the judiciary. This leads to practical problems affecting the judiciary’s performance.

This problematic aspect in the relationship between the executive and the judiciary is the result of an overlap between the two that is due to:

1. The role of the judiciary in monitoring the work of the executive.
2. The role of the executive branch in proposing regulations in general pertaining to the functioning of the judiciary in addition to the appointment of judges and their associates and their professions.
3. The judicial role of the executive branch: some departments of the executive perform judiciary functions, such as the departments of taxes, financial judiciary performed by the supervising/ accounting authorities or municipal courts.
4. The ability of the executive branch to control and stop public lawsuits.
5. The ability of the executive branch to constitutionally and practically disrupt the implementation of the provisions of the judiciary, without any ability to make it legally accountable, because after the judiciary issues its ruling, the executive power is required to implement it.
6. The interference of the executive authority in the judicial function by authorizing disciplinary sanctions without resorting to the courts. A prominent example of this in the Palestinian case is the government’s dismissal of employees without trial for allegedly violating legitimacy, or the deprivation of some political classes from equality in public office because of the so-called “security safety” as an appointment prerequisite, although this condition was cancelled in 2006.



7. One of the reasons behind the crisis of judicial independence of the judiciary toward the executive branch is the competence of the judiciary to prosecute members of the executive branch, which made some constitutional regimes remove the trial of members of the supreme executive authority from the jurisdiction of ordinary courts. They gave this prerogative to the Parliament or the Constitutional Council / or Constitutional Court, on the grounds that the trial took place in front of a body independent from the ordinary judiciary.

8. In the Palestinian case, one of the negative aspects in the performance of the judiciary is the result of the absence of an accountability system for judges and public prosecutors in order to ensure their independence. It is acceptable constitutionally and practically to make the members of the PLC and executive authority accountable politically, criminally, civilly, and professionally, with this not being deemed a violation of their independence. Why, then, reject the accountability of judges if the nature of the judicial function and the balance between monitoring the performance and independence of the judiciary's members were taken into account? This is necessary to ensure the transparency of the judiciary by organized methods for reviewing judges' rulings and holding them accountable for their actions. This is to ensure that there is no misuse of their independence in sentencing, and that they are not subjected to illegal pressures or offers. It does not affect their independence as long as this review is done by a higher judicial body. Consequently, there is a lack of confidence in the Palestinian judiciary among the people due to the lack of an effective inspection system scrutinizing the work of judges and public prosecutors.

9. A notable example of shortcomings in performance resulting from regulating the judiciary's jurisdiction is related to the system of judicial oversight in the election law of local councils (Article 1 and 13). This system gives any court of the first instance that has jurisdiction over the appellant's constituency the power to decide on appeals regarding decisions of the Central Election Commission with judicial decisions that cannot be challenged before a higher level court.

There is an absence of a uniform judicial court that hears appeals on the decisions of the Election Commission, and a stipulation that the ruling of the Court of First Instance is final and cannot be challenged. This has resulted in conflicting interpretations of the courts of first instance, which issued contradictory rulings regarding appeals:

1. A court decided to reject the appeal in form because it was submitted after the expiration of the deadline, which it calculated from the date the decision of the Election Commission was issued. Another court accepted the appeal in form because it calculated the duration of the appeal from the day following the issuance of the decision of the Election Commission. This constitutes a breach of the principle of equality between similar legal authorities.

2. In another example of conflicting court rulings in similar cases, a court approved the elimination of the whole electoral list due to an error in one of the candidates' data, while another court decided in a similar case to simply eliminate the candidate who had an error in his registration data.

3. In another stark example, the Court of First Instance of Hebron rejected an appeal in form because it was submitted outside the legal deadline, while the same court accepted in form another appeal and considered it to have been submitted within the legal deadline, although both motions were submitted to the Registry on the same day.<sup>44</sup>

### **b. Drawbacks That Affected the Performance of the Judiciary to Achieve Justice**

In practice, under the PA, executive power is stronger than the judiciary, as it has the force and legal and physical capacity, even in violation of the law. The executive authority also influences the administrative body of the judiciary, through the issuance of rules and regulations as mandated by the Basic Law.

In addition to the foregoing, the judiciary in Palestine is weak, which adversely affects the performance of the judiciary. The following provides evidence of the aforementioned:

1. A Court of First Instance ruled in its appeal capacity in a ruling issued by the Magistrate's Court to accept the appeal in form (error), and the lawyer decided to abandon the appeal, and the court decided to record it.<sup>45</sup>

2. Administrative security forces in the PA detained civilians under administrative detention for six months or more, under an administrative decision

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<sup>44</sup> Ma'n Shahdeh Id'ais, *Al-Intikhabat al-Mahaliyyah fi 'Am 2012* (Local Elections of 2012), Special Reports Series 79 (Ramallah: The Independent Commission for Human Rights (ICHR), 2013), pp. 23–29; and Al-Haq Organization, *Taqrir Mu'assasat al-Haq al-Raqabi 'ala Intikhabat Majalis al-Hai'at al-Mahalliyyah li 'Am 2012* (Al-Haq Supervisory Report on Local Councils Elections for the Year 2012) (Ramallah: Al-Haq Organization, 2012), pp. 26–31.

<sup>45</sup> *'Ayn 'ala al-'Adalah* (An Eye on Justice) newsletter, MUSAWA, Ramallah, issue 10, December 2009, pp. 2–3.



that violates the provisions of the Basic Law and the Code of Criminal Procedure. This represents an encroachment on the judiciary and the Public Prosecutor. An example of such infringements is the detention of a citizen at the General Intelligence Services for nearly three weeks without presenting him to the Public Prosecutor or the judiciary, as confirmed by the Attorney General's messages.<sup>46</sup> Here the weakness is embodied in the Attorney General's conduct in receiving MUSAWA messages informing him about the contravention, while he did not take steps to defend the attack on his constitutional powers.<sup>47</sup>

3. The degree of ignorance in the application of law has reached the extent of detaining an accused for 80 days for a charge punishable by law with no more than 10 dinars.<sup>48</sup>

4. The sovereignty of the law is negatively affected in the performance of courts by the executive authority's interference in the formation of the Judicial Authority and in the appointment of the Chief Justice and the Director of Public Prosecutions by the head of the executive authority. This influence of the executive authority was reflected in the work of the judiciary through the non-commitment of the executive authority to enforce certain provisions of the judiciary for political considerations in violation of the law. There were several cases of refusal by administrative security forces to implement final judicial rulings. We recall, for example, the ruling in case 886/2009 issued for the benefit of Professor Ghassan Khaled.

5. The executive authority's interference to cancel the right of individuals to a fair trial, including the Palestinian cabinet Resolution No. 80 of 2007, the dismissal of employees without trial and without disciplinary means, by claiming that they were not committed to the government's definition of legitimacy.<sup>49</sup>

6. The judges have limited autonomy, especially in the lower level courts where political forces influenced their appointment. In fact, a judge must not spontaneously apply any legislative action that is unconstitutional. However, in spite of the issuance of several legislative acts in the form of resolutions that Article 43 of the Basic Law is not able to bear, there has been no single judicial ruling deciding not to apply them for violating the Basic Law. The President of the PA later cancelled a number of such resolutions by a Presidential Decree

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<sup>46</sup> *Ibid.*, pp. 6, 82–83 and 86.

<sup>47</sup> *Ibid.*, pp. 5–6.

<sup>48</sup> *Ibid.*, p. 39.

<sup>49</sup> *Al-Waqa'i' al-Filastiniyyah*, issue 77, 9/10/2008. (in Arabic)

issued on 11/6/2007 of which the first Article stipulates the cancellation of the following decisions:

- a. Decision by Law No. 5 of 2006 regarding the amendment of the Law on the Formation of Regular Courts of 2001.
- b. Decision by Law No. 7 of 2006 regarding the Law on the Criminal Court.
- c. Decision by Law No. 8 of 2006 regarding the amendment of the Criminal Procedure Code of 2001.
- d. Decision by Law No. 9 of 2006 regarding the amendment of Civil and Commercial Procedure Code of 2001.

7. Article 101 of the Basic Law stipulated that “Military courts shall be established by special laws. Such courts may not have any jurisdiction beyond military affairs.” Moreover, according to Article 30 of the Basic Law, “Submitting a case to court is a protected and guaranteed right for all people. Each Palestinian shall have the right to seek redress in the judicial system.” However, civilians were tried before military courts by virtue of decisions of the executive authority. We recall as an example case No. 236/N.‘A.R./2009 of Salam Sulaiman Sa‘id Zaid of Deir ‘Ammar in Ramallah, a civilian who was arrested on 18/10/2009 and appeared before a military court on 17/11/2009.<sup>50</sup>

### ***Summary***

The Palestinian Center for the Independence of the Judiciary and the Legal Profession (MUSAWA) conducted a study in 2008/2009 entitled “The First Legal Monitor on the Status of Justice in Palestine.” It surveyed sectoral samples of judges, court personnel, members and staff of the public prosecution, lawyers, the public, and university students and professors. Thus, providing important indicators on the status of justice, that can be summarized as follows:<sup>51</sup>

#### **1. The Results of a Survey of the Views of the Judges and Staff of the Regular Courts:**

- 54.51% of the judges do not think that the PA has succeeded in maintaining the independence of the judiciary.

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<sup>50</sup> Decree No. (20) for 2007 Concerning the Annulment of Decisions by Law, *Al-Waqa’i’ al-Filastiniyyah*, issue 73, 13/9/2007. (in Arabic)

<sup>51</sup> MUSAWA, *Al-Marsad al-Qanuni al-Awwal li Wad’ al-‘Adalah fi Filastin*, pp. 16–29.



- 66.7% of the judges stated that there was slowness in the adjudication of cases in regular courts.
- 100% of the judges stated that notifications constitute a fundamental problem in litigation.
- 66.7% of the judges believe that the most significant problem of the judiciary, in addition to the occupation, is the lack of adequate training and rehabilitation for employees and judges.
- 58.4% of the judges consider that there is a lack of political will for reform.
- 50% believe that the executive authority's interference is among the most important problems.
- 72.7% of the judges objected to the statement that the appointment criteria in the judiciary are clear.
- 63.6% of the judges objected to the statement that appointment procedures in the judiciary are transparent and inconsistent with the provisions of the law.
- 90.9% of them objected to the statement that the standards of promotion for judges are clear.
- All the persons interviewed, or 100%, agreed that judges generally need ongoing training programs.
- 72.8% of the judges believe that the Supreme Judicial Council favors the executive authority.
- 60% of the judges believe that the Supreme Judicial Council affects the decisions of the judiciary.
- 91.7% of the judges consider that there is an urgent need to amend the judicial laws.
- 81.81% of the judges believe that the quality of lawyers is generally weak and thus causes the judiciary to be weak as well.
- 63.6% of the judges thought that lawyers are generally lacking in professional ethics.
- According to 46.4% of court officials, *wasta* (nepotism) and favoritism are the bases of appointment and promotion in Palestinian courts.
- According to 72.3% of court personnel, judicial inspection must be activated.

## **2. The Results of a Survey of the Views of the Judges and Staff of Public Prosecution:**

- 51.4% of the public prosecution sample stated that the status of “judicial security” in Palestine is currently bad.

- 63% of public prosecution sample said that public prosecution does not have the necessary equipment to investigate crimes, such as forensic centers and specialized laboratories.
- 84% of the sample said that the performance of members and staff of the public prosecution must be inspected.
- 87% said that there is an urgent need to train members of the public prosecution periodically and continuously.
- Only 40.8% trust lawyers.

### **3. The Results of a Survey of the Views of Practicing Lawyers and Trainees:**

- The majority of lawyers consider that the PA did not succeed in maintaining the independence of the judiciary.
- The majority of lawyers consider that the Palestinian judiciary lacks impartiality, integrity and justice.
- The majority of lawyers still see that the judgments of the judiciary are subjected to external influence and pressures.
- 66.1% of lawyers believe that judges suffer from lack of experience.
- 65.1% of lawyers believe that appointments in the judiciary are not transparent.
- 69% of lawyers believe that appointments in public prosecution is not transparent.
- 76% of lawyers believe that appointments are not based on education and experience.
- 54.1% of lawyers consider mediation and favoritism the basis for recruitment and promotion in judiciary and prosecution.

#### **4. The Results of a Survey of the Views of the Palestinian Public:**

- Most of the public still believe that the PA did not succeed in maintaining the independence of the judiciary. They believe that the Palestinian judiciary lacks impartiality, integrity and justice compared to other Arab countries, and that the judiciary continues to suffer from corruption. They also believe that the tribal justice is more capable than the courts at resolving disputes. 50.4% of the people do not trust regular courts.
- 63.4% of the public do not like to go to court and say that their lack of confidence in getting a fair solution is the top reason for their reluctance to resort to the courts.



- 58.1% of the public believe there is a shortage in the training of judges and court staff, and 56.3% of them do not trust the court staff.
- 56.7% of the public believe that the public prosecution does not have the necessary equipment to investigate crimes, such as forensic centers and specialized laboratories.
- 53.1% of the public believe that the prosecutors do not deal with them in a good manner.
- The majority of the public believe that the intervention of the executive authority and the lack of political will to reform is one of the main problems of the Palestinian judiciary.

دراسة علمية

أداء السلطة القضائية  
ال فلسطينية وتحقيق  
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أ.د. أحمد مبارك الخالدي

