

Historical Evolution Of The Palestinian Legal And Judicial System 1516 To Present

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Abstract

The judicial system in Palestine arose and developed under the rule of the colonial countries, starting with the Ottoman rule, passing through the British Mandate period, then the Arab rule of Gaza Strip and West Bank, and ending with the Israeli occupation, and the return of the national authority as the beginning of the establishment of an independent state. In comparison to other nations, the legal situation in Palestine is both complicated and unique, owing to the fact that a number of authorities throughout history have ruled Palestine. In Palestine, many legal systems have existed. As a result, numerous legal systems have impacted Palestine's political and legal institutions. The division of Palestine has also resulted in the development of complicated and disparate legal systems in the West Bank, Gaza Strip, Jerusalem, and portions of Palestinian areas captured in 1948. This research provides a series of findings and recommendations for strengthening Palestine's legal and judicial systems by reducing uncertainty by harmonising and modernising laws throughout Palestinian regions.

Keywords: Palestinian National Authority; Ottoman rule; British mandate; Israeli Occupation; Egyptian and Jordanian Rule.

INTRODUCTION

Palestinian general set of laws is unrivaled in light of the fact that Palestine has been involved and impacted by various authorities and leaders over the course of the past hundred years, which formed the present legal executive and general sets of laws. Ottoman, British, Jordanian, Egyptian, and Israeli regulations are as yet enforceable in the line-up with Palestinian regulations. Palestinian regulation was established after the formation of the Palestinian Public Authority as the result

of the 1993 Oslo Accord between the Palestinian Freedom Association and Israel (Lafee, 2012). Thus, the Palestinian Autonomous Territories' legal system and execution became part of the peace process between Israel and the Palestine Liberation Organisation (Dieng, 1994).

Since 1993, Israeli occupation and Palestinian Authority have approved many agreements, letters declarations and protocols granting the Palestinian Authority some powers and

responsibilities. Many of those agreements constitute the foundation of the judicial regime of the Territories. Some of texts even rule the daily life of Palestinians. It should not be ignored that the Palestinian legal regime is especially complex as it stems from different origins. These include, in addition to the above-mentioned agreements, Islam custom, Ottoman real property law, British Mandate emergency regulations, Israeli civil law for East Jerusalem and Jewish settlers, Egyptian law in Gaza, Jordanian law in the West Bank, Israeli military law and legislation and executive decrees issued by the Palestinian Authority (Evolution of the legal framework of the Palestinian National Authority - Council of Europe/European Commission for Democracy through Law "Venice Commission" report/Non-UN document - Question of Palestine, 2001).

To know the components of the judicial system in Palestine, we need a comprehensive review of the background of the judicial and legal system in Palestine throughout history.

The period of Ottoman rule and the British mandate 1516- 1948

Palestine, like the rest of the region, was subject to Ottoman rule, which lasted four centuries, from 1516 to 1917, during this period the Ottoman Empire issued many laws and regulations that regulate various areas of life, including the application Ottoman Code of Procedure in Palestine (Paul, Clarke, Grill and Dunigan, 2013). Until the end of the Ottoman rule in 1917, the legal system in Palestine was based – primarily – on principles of the Islamic Law, but it was also influenced by the Latin system in Europe (Legal Status in Palestine, n.d.). the Civil Code (Majala), the Hanafi-based Islamic law had been the official school of law throughout the centuries-long Ottoman rule (Razai, 2019). Most significantly, the Land Law of 1857 and the Ottoman Civil Code (Majala) were enacted during this period. After the defeat of the Ottoman Empire in the First World War, Palestine was placed under the British mandate according to a decision issued by the League of Nations at the time

(British Institute of International and Comparative Law, 1948; Ginat, 2018). Several laws and regulations were issued in the era of the British Mandate to governing Palestine, like the Law of SC Procedure of 1937, The Procedural Law of 1938 governing Trademark Cases as amended, Code of Judicial Procedure of 1938 as amended, Law of Judicial Procedure No 14 of 1938 which concerned to regulate work before the central courts (courts of the first instance) and land courts, as well as The Code of Conciliation Court Procedure of 1940 as amended, which used to regulate work before the Magistrate Courts only, that mean each level of litigation had a Code of Procedure that regulates work before it. In the end Law, No. 45 of 1947 on the Jurisdiction of Conciliation Courts, which included the important rules related to the specific jurisdiction of the magistrates' courts and important procedural provisions regarding the appeal and time-limit for filing an appeal (Bentwich, 1964). These laws clearly defined the rules of jurisdiction, whether value, territorial, or specialty jurisdiction.

The British army occupied the entire territories of Palestine in 1917 and exercised all administrative and legislative powers therein. Ottoman laws, which had been operative until 1917, were still valid taking into account amendments or replacements introduced to them according to the British Mandate laws (Legal Status in Palestine, n.d.). It can be said that the process of legislation in those days was simple and fast. The first two and a half years the High Commissioner (Sir Herbert Samuel), by a constitutional Order in Council issued in 1922 by the Privy Council in England, had full legislative authority for developing legislation and public order concept of Palestine. There was no Parliament to create, amend or reject laws (Bentwich, 1964).

As mentioned in an email to me from Salim al-Sakka former Minister of Justice in Palestine, October 20, 2020, these laws, despite their multiplicity and differing source sometimes, were clear, specific, and categorical regarding the rules of jurisdiction. Most of these rules were rules related to public order, and it is not

permissible to violate it, this is what the court rulings have settled on throughout that period. For example, a plea of lack jurisdiction was one of the pleas related to public order, so the regular courts could not interfere in the work of the Sharia courts regard to matters of the personal status of Muslims, otherwise, this interference will be null due to violation rules of public order i.e., rules of jurisdiction. As for the personal status of non-Muslims, there were clear legal texts regulating this, for example, there was a church court that was responsible for issuing an inheritance inventory for the deceased non-Muslim, and if heirs did not agree to go to the church court, the jurisdiction becomes to the courts of the first instance as a court of personal status for non-Muslims.

The legal system in Palestine was classified as following the Anglo-Saxon system in the past, which often relies on judicial precedents as one of the sources of law on which the judge relies on his judgment. This matter has led to the stability of legal centres in Palestine to a large extent.

The period of Jordanian and Egyptian Rule over Palestine 1948-1967

After the 1948 war, three-quarters of Palestine were occupied by Israel. Meanwhile, Jordan ruled over the West Bank and Egypt over the Gaza Strip. West Bank was virtually annexed to the Kingdom of Jordan at the beginning of the fifties of the last century, it became part of the Kingdom, including East Jerusalem and Jordanian laws were applied to it, including the Jordanian Law of Judicial Procedures No. 42 of 1952. At that point in history, Jordanian Governor announced that other laws and legislation that had been effective in Palestine would still be operative to the extent with which they do not contradict the Law on the Defence of the Trans-Jordan of 1935 until they are replaced by Jordanian laws (Al-Dahdouh, 2004).

While the situation was completely different in Gaza Strip (the southern governorates of the State of Palestine). It must be noted first that the West Bank (the northern governorates of Palestine) is very close to Jordan and shares

land borders together, while the Gaza Strip is close to the State of Egypt and shares land borders with it also. Therefore, the West Bank was annexed to Jordan and most Jordanian laws were applied to it. As for the Gaza Strip, the Egyptian administration did not annex the Gaza Strip to Egypt as Jordan did with the West Bank. There was even a so-called Egyptian administration over the Gaza Strip (the Egyptian military ruler) (Dieng, 1994). Therefore, little Egyptian civil legislation was effective in the Gaza Strip (Almuaqat and Dreaway, n.d.). furthermore, Egyptian military forces ruled over the Gaza Strip and managed all public departments and civil affairs therein. However, the legal system work in the Gaza Strip before 1948 did not drastically change during Egyptian Administration (Robinson, 1997).

The Israeli Occupation in the West Bank and Gaza Strip 1967 – Present

After the 1967 war, (Six-Day War, also called June War or Third Arab-Israeli War or Naksah, took place June 5–10, 1967 between Israel and Arab states: Egypt, Syria and Jordan. Israeli seized the Sinai Peninsula and the Gaza Strip from Egypt, the West Bank and East Jerusalem from Jordan, and the Golan Heights from Syria). The legislative, judicial, and executive authorities became under Israeli occupied. Thus, all of Palestine became occupied by the Israeli occupation forces.

Initially, the Israeli forces issued Military Order no. 2 of 1967 (Robinson, 1997), that provided for the annulment of any effective laws in Occupied Palestinian Territories in the event they contradicted military orders issued by the Administration of the Israeli Occupation after that "Civil Administration" was established in this period (Dieng, 1994). which was dependent on the issuance of military orders by the Israeli occupation and all legal and administrative powers were transferred to it in the West Bank and Gaza Strip and East Jerusalem. Israeli military Created military tribunals. Although these courts only nominally covered 'security matters', they increasingly began to become engaged in other

civil and criminal matters, such as taxation and land litigation (Kelly, 2004).

These courts applied at that time military orders instead of laws, whether on criminal or civil cases and any other cases related to land, rents, taxes ... Or any other dispute. Under the Israeli military regime in the Occupied Palestinian Territories, the executive authority is vested in the armed forces, giving military commanders the power to issue arrest orders. Israel establishes this power on the British Mandate defence (emergency) systems of the British Mandate government of 1945, supported by a series of military orders imposed from 1967 onwards. Such military legislation is enforced by the military court system which seems to be inconsistent with essential international standards concerning due process and the administration of justice (Dugard and Reynolds, 2013). Israel issued approximately 1,400 military orders in the West Bank and more than 1,000 military orders in the Gaza Strip that effectively replaced existing law in all significant areas. (Robinson, 1997). On August 15, 2005, the Israeli occupation withdrew from Gaza Strip, (Israeli Disengagement from Gaza) while the West Bank still occupied until now (Hasan, 2009).

The Palestinian National Authority: 1994 – Present

After Declaration of Principles on Interim Self-Government Arrangements of 1993 (Oslo Agreement I) it's also called "a peace treaty" between Palestine Liberation Organization and Israel. (The Oslo Treaty included to create a Palestinian Authority tasked with limited self-governance of parts of the West Bank and Gaza Strip on September 13, 1993) (Wing, 1999). Based on this treaty the powers, responsibilities and legal issues in the criminal and civil fields were transferred to the Palestinian Council (the Palestinian Authority,

represented by the Palestine Liberation Organization)* Formally, Israeli oversight of the Palestinian Authority was particularly overbearing in the field of law making. Israel retained the power to veto any primary legislation enacted by the Palestinian Authority during the duration of the interim period (Frisch and Hofnung, 2007). Under the Oslo Accords, the West Bank was divided into three areas. Area A, which covered the main Palestinian towns, the PNA had civil and security control. Area B, which covered most Palestinian villages, the PNA was given civil control but shared security control with the Israeli military. Area C, which covered most of the land in between the towns and villages, the Israeli military had full control (Kelly, 2004).

Palestinian Authority inherited various legal systems in the West Bank and Gaza, each with its own multiple layers of accumulated laws. cannot change or replace it easily. Complicating things more, there are at least two segments of legal and judicial life that coexist in Palestine: Codified laws and regulations, which include the religious laws (Sharia), and informal laws of dispute resolution based on customs (urf) (Salem and Stettner, 2013). So, President of the Palestinian Authority issued his first decision on 20 May 1994 which provided that legislation and laws that were effective before 5 June 1967 in the West Bank and Gaza Strip would remain effective for example, Jordanian criminal law No. (16) of 1960 application operate in the West Bank until now. while British Mandate criminal law No. (74) for the year 1936, reflecting the Anglo-Saxon system operates in the Gaza Strip also until now (HRW: Justice Undermined: Balancing Security and Human Rights in the Palestinian Justice System, 2001).

As for matters related to the family, such as marriage, divorce, child custody and alimony, they are subject to the Personal Status Laws. These laws derive their source from Islamic

* The Palestinian National Authority (PNA) was officially created in May 1994 as an institution affiliated with the Palestine Liberation Organization,

under the leadership of President Arafat for nearly three decades. On the other hand, the Legislative Council was elected almost two years later (Jan 1996).

law for Muslims, however, the personal status law applied in the West Bank differs from its counterpart in the Gaza Strip. Muslims are governed by the Jordanian Personal Status Law of 1976 (in force in the West Bank) and the Egyptian Law of Family Rights of 1954 (in force in the Gaza Strip). While family affairs of Christians are governed by Personal Status Law for Orthodox Christians and the Personal Status Law of the Coptic Orthodox Church of 1938 (Botmeh, 2011).

Palestinian Legislative Council since 7 March 1996) has assumed the power to promulgate legislation which regulate the public life of the Palestinian society such as, a prison law (the Reform and Rehabilitation Centers Law, No.6 of 1998) was passed and ratified in May 1998. Also, Criminal Procedure Law No. (3) of 2001, Labour Law No. (7) of 2000 are applied in the West Bank and Gaza. and High Judicial Council was established in accordance with President of the Palestinian Authority decision issued on 1 June 2000 and a few new courts were also established in a number of Palestinian governorates[†] (Hasan, 2009). The Palestinian Authority attempted at that time to build a legal and judicial system based on the foundations of democracy and freedoms. Hence the idea of enacting the Basic Law. (The Palestinian Basic Law is the set of laws that govern the Palestinian Authority. The Palestinian Legislative Council originally passed it in 1997, and President Yasser Arafat

ratified it in 2002. In sum, the Constitution).

Says Professor Adrien Katherine Wing who served as an advisor of Palestinian Legislative Council regarding several drafts of the Basic Law during the summer of 1996. "Any efforts at democratization and constitutionalism will be affected by the extremely convoluted Palestinian legal regime. It is one of the most complex in the world, partially as a result of numerous occupations. The legal layers include custom (urf)[‡] (Khalil, 2009), Islam (shari'a), Ottoman land law, British Mandate emergency regulations, Israeli civil law for East Jerusalem and Jewish settlers, Jordanian civil law in the West Bank, Egyptian civil law in Gaza, Israeli military law, changes wrought in all of the above by the intifada, and legislation and executive edicts passed by the Palestinian National Authority" (Wing, 1999).

In addition, the Palestinian Civil and Commercial Procedures Law No. 2 of 2001 was also issued, which had a great impact in organizing and unifying procedures before courts of all kinds and determining the jurisdiction of each court. This law hereby repealed those laws previously mentioned it, as well as unify of procedures before the regular courts in the State of Palestine, especially between West Bank and Gaza Strip, as stated in Article 292 thereof in Chapter Fifteen under the heading of Final Provisions of this Law. When the PCPL No. 2 of 2001 was promulgated in Gaza City on May 12, 2001,

[†] Until the 2000 summer, Palestinian new legislation amounted to approximately 48 laws as well as 200 other items of legislation. As a result, many military orders, which had been issued by the Israeli occupation in the West Bank and Gaza Strip, were annulled.

[‡] Informal justice "a system of tribal or customary law" refers to the social phenomenon depending on solving disputes among litigants without state courts, customary law frequently becomes a function of tribal or village elders in the absence of a functioning formal justice system. The principles of informal justice stem from various sources: general Arab and in particular Palestinian historical, social and cultural heritage. It includes tribal sulh (reconciliation) and tribal law, which based on the accommodation of custom,

religion and tribal traditions. In recent years, though, conciliation committees were placed, some- times spontaneously, but most of the time, by the direct intervention of the Palestinian Authority, most specifically the executive authority, or through political factions. 'Tribal conciliation' is used to describe the process and the result of the dispute resolve carried out by tribal judges or by conciliation panels. For more details, see, Khalil, Asem. 2009. "Formal and informal justice in Palestine: Dealing with the Legacy of Tribal Law". *Études rurales* (184): 169-184. Open Edition. doi:10.4000/etudesrurales.10550. & "International Legal Systems - An Introduction". Justice.gov. <https://www.justice.gov/nsd-ovt>.

and has ratified by the Palestinian Legislative Council at its session held on September 28, 2001, and published in the Official Gazette, it has become the only law applied to all lands of Palestine with regard to all civil and commercial court cases, claims, motions and challenges before the regular courts in Palestine.

As mentioned in an email to me from Salim al-Sakka former Minister of Justice in Palestine, October 20, 2020, the Palestinian Legislator in the modern era, when promulgating Palestinian Civil and Commercial Procedures Law No. 2 of 2001, no longer follow the Anglo-Saxon system, but rather followed the ((Latin)) or mixed system. Also, the PL adopted when issuing the PCPL No. 2 of 2001 The method of drafting and tabulating the new Egyptian Civil Procedure Law (ECPL) No. 23 of 1986.

Under this law, courts hear civil lawsuits pertaining to Palestinians and foreigners. The law devotes a special chapter to dealing with urgent cases, which gives more flexibility to the judiciary to consider and act on a large number of exceptional issues that are considered particularly pressing. This is intended to limit any ongoing damages that may be caused to the parties in a dispute (The Palestinian Judicial System, 2008).

While on the civil side with regard to civil law, until 2014, the Ottoman Judicial Code was applied in the Gaza Strip and the West Bank, but the Hamas government-approved, through the dissolved Legislative Council by the president, to start implementing the Palestinian Civil Law No. 4 of 2012, and became operational in Gaza Strip only, while the West Bank is still applying the Ottoman court of judicial rulings. So, you can imagine how two regions in one country apply two different laws to the same lawsuit.

In addition to civil law problem, draft Palestinian Criminal Law No. 93 of 2001 has not been approved by PLC to this day. This is due to several factors, the first one: internal political situation and the reality of the

occupation, especially the beginning of the onset of the second Intifada (uprising against Israeli military occupation) in 2000. The legislative process suspended before it resumed in 2003. The last of these factors was the parliamentary reform process was suspended again in 2007 as a consequence of the internal fight between Hamas and Fatah (Botmeh, 2011).

The Palestinian Legislative Council has not been in session since 2007 due to the Palestinian division (the battle) that took place in the Gaza Strip between June 10 and 15, 2007 between Fatah and Hamas (Zanotti, 2018). This happened after elections that took place in Palestine on January 25, 2006 (the Gaza Strip, the West Bank and Jerusalem), which ended with the Hamas movement winning the majority of the seats in the Legislative Council. The conflict between Fatah and Hamas led to the dissolution of the unity government and the de facto division of the Palestinian territories into two parts, West Bank controlled by Palestinian National Authority (Fatah) and Gaza governed by Hamas (Historical Timeline: 1900-Present - Israeli-Palestinian - ProCon.org, 2021). In the West Bank, a Fatah-led Palestinian Authority (PA) exercises limited self-rule in specified urban areas, in same time Israel maintains overarching control. In Gaza, Hamas maintains full effective facto control on the ground after Hamas fighters (Qassam Brigades Hamas military faction) dominate of the Gaza Strip and expelled by force Fatah members. Palestinian Independent Commission for Human Rights (official body for human rights in the West Bank and Gaza Strip established by the Palestinian Authority) says that more than 600 Palestinians have been killed in these events and subsequent conflicts (Zanotti, 2018).

All these events led Palestinian President Mahmoud Abbas to declare a state of emergency in accordance with the powers granted to him by Basic Law No. 2003 (the Basic Law, it is considered as a constitution in Palestine) and he dismissed the government of Ismail Haniyeh (the representative of Hamas),

the prime minister at the time, and ordered the formation of an emergency government headed by prime minister Salam Fayyad (Historical Timeline: 1900-Present - Israeli-Palestinian - ProCon.org). the President considered Palestinian Legislative Council suspended (disabled and incapable), due to the absence of members of the Fatah and other parties from attending the sessions of the Legislative Council, which made the attendance limited to some members of Hamas, what made matters worse was the arrest of a number of Hamas representatives (members of the Legislative Council) by the Israeli occupation in west bank. Hamas rejected the president's decisions and considered them illegal. As a result, Ismail Haniyeh continued to exercise his responsibilities in the Gaza Strip as prime minister.

The President of the Palestinian Authority, Mahmoud Abbas, took advantage of this matter and issued many laws and decisions. This was justified by the existence of a state of necessity to issue these laws and decisions in light of the declaration of a state of emergency and the inability of the Legislative Council to convene.

The matter did not stop at this point, the president established the High Constitutional Court, which had not existed before, although the Basic Law provided for the establishment of a Constitutional Court but created was delayed for technical problems, and "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" (Article 104) of 2003 Amended Basic Law until the establishment of the Constitutional Court.

Article 103 of 2003 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.

What matters in this point is that the establishment of the court was carried out in a way that breach the law and the rules for establishing the court, in clear and explicit violation of the amended Palestinian Basic Law and the Constitutional Court Law No. 3 of 2006. In addition, and immediately after the establishment of the Constitutional Court, its first decision was to consider the Palestinian Legislative Council dissolved, in a dangerous judicial precedent, in the explanatory request No. 10/2018, Application No. 10 of the Judicial Year 3, the Supreme Constitutional Court "Interpretation", on 12/12 / 2018, where it decided (Constitutional Court decision regarding legislative dissolution and holding of elections, 2018):

((The Legislative Council derives its legitimacy through the exercise of its legislative and oversight powers, and since it has not been in session since 2007, it has lost its capacity as a legislative authority, and as a result, the status of the Legislative Council. ... The Legislative Council has been in a state of suspension and complete absence and has not been in session since 5/7/2007, and the term of office expired on January 25 2010, during the period of its suspension and absence, and it is still completely suspended and absent until now. Accordingly, the supreme interest of the Palestinian people and the interest of the homeland requires the dissolution of the Legislative Council, which was elected on January 25, 2006, thus be considered dissolved since the date of this decision)) (Bdair, 2020).

The President of the Palestinian Authority announced the dissolution of the Palestinian Legislative Council on December 22, 2018,

based on the interpretative decision issued by the Supreme Constitutional Court. Although the provisions of the amended Palestinian Basic Law did not allow the dissolution of the Palestinian Legislative Council, as Article 113 of it stipulates that: "The Palestinian Legislative Council may not be dissolved or its work hindered during a state of emergency, nor shall the provisions of this title be suspended." This matter was categorically rejected by Hamas.

After that, the President transferred to himself the power of enact laws under Article (43) of the Basic Law, which permits him to issue decisions that have the force of law in cases of necessity that cannot be delayed and in other than the sessions of the Legislative Council.

"The President of the National Authority shall have the right, in cases of necessity that cannot be delayed, and when the Legislative Council is not in session, to issue decrees that have the power of law. These decrees shall be presented to the Legislative Council in the first session convened after their issuance; otherwise, they will cease to have the power of law. If these decrees are presented to the Legislative Council, as mentioned above, but are not approved by the latter, then they shall cease to have the power of law". Based on this mandate, President Mahmoud Abbas issued (156) decrees by law, while in the Gaza Strip, Hamas continued to hold sessions of the Legislative Council in the Gaza Strip, where it approved (58) laws based on this on what is known as the power of attorney system, which is not governed by legal justifications. This means that the failure to convene the Legislative Council gave the justification to President Abbas to issue decrees by laws. Since then, no elections have taken place and the Legislative Council has not legally convened.

Until this moment, Hamas controls the Gaza Strip and considers itself an official government and exercises its functions normally. The Palestinian Authority (Fatah) govern the West Bank, while it can be said that Jerusalem is effectively controlled by Israel (The International Covenant on Economic,

Social and Cultural Rights the State of Palestine, 2020). As for the major calamity, it went to the judicial authority, because of the Palestinian division between Hamas and Fatah, and Hamas's control of the Gaza Strip, while the Palestinian Authority (Fatah) governs the West Bank, and both of them consider themselves the official and elected government by people, thus, there a judicial authority in the Gaza Strip, consisting of the Supreme Judicial Council and a number of judges under it, as well as the Attorney General, and a number of members of the Public Prosecution Office, and there are regular, sharia, military and administrative courts, and these differ from the judicial authority in the West Bank by the difference of persons, components, tasks and powers (Abu Musameh and Abu Musameh, 2021). Where there is a Supreme Judicial Council in Gaza and another one in the West Bank. In all countries of the world, there is one court of cassation, a supreme administrative court, the Supreme Court of Justice, while in Palestine there is a court of every kind in Gaza and another in the West Bank.

The Supreme Court in the Gaza Strip with all kinds (cassation, supreme justice, and Supreme Administrative Court) considers that its ruling is enforceable and had acquired *res judicata*, and it became a judicial precedent that must be followed by the lower courts, as well as the same situation with regard to the Supreme Court in the West Bank, so what is the solution and to what judicial precedents the parties will be based on. In addition, there are some laws that are applied in the West Bank that differ from the Gaza Strip, such as the civil and criminal law.

All this means that we are before two *de facto* judicial authorities, one in the Gaza Strip, which has local jurisdiction over the Gaza Strip only, and the other in the West Bank, which has local jurisdiction over the West Bank only. Despite the issuance of some judgments from courts in the West Bank and the Gaza Strip, which affect some people in each of these two areas. These rulings are not executed and cannot be implemented, due to the lack of control of the executive authority in the West

Bank over the Gaza Strip, and the lack of control of the executive authority in Gaza Strip on the West Bank. As well as for no recognition of the legitimacy of any of these bodies by the governing authorities in either the Gaza Strip or the West Bank (Abu Musameh and Abu Musameh, 2021).

The practical problem in this respect consists of several questions: Is it possible to merge between the Supreme Judicial Council in Gaza and the Supreme Judicial Council in the West Bank, or not? What is the fate of the judges here and there? Will a judge accept to change his position and capacity, for example from a high court judge to an appeals judge, or a first instance judge? Or he will be enforced to retirement? What is the mechanism? In light of the lack of recognition of the legitimacy of the courts in the Gaza Strip, will the situation remain the same in the post-elections phase if it takes place in the near future? What is the fate of the principles, rulings and case law issued by the courts in the Gaza Strip? Can these judgments issued by the Supreme Court and the Court of Cassation be considered principles and judicial precedents, or what will their description be? (Abu Musameh and Abu Musameh, 2021).

In light of this tragic situation, in late 2019 and 2020 the President of the Palestinian Authority issued new law decisions related to the judicial authority. He issued (Decree-Law No. (39) of 2020 regarding the formation of regular courts, 2021), (Decree-Law No. (40) of 2020 regarding the amendment of the Judicial Authority Law No. (1) of 2002, 2021) And (Decree-Law No. (41) of 2020 regarding administrative courts) (The Palestinian Official Gazette, Al-Waqi'a, 2021). Moreover, President Mahmoud Abbas dismissed the head of the Supreme Judicial Council in the West Bank and installed another person, in addition to referring a number of judges to early retirement, all of this based on individual decisions from the president without observing the legal procedures in this regard (Barakat, 2019). Furthermore, the decision was issued to dissolve the Council (the Supreme Judicial Council in the West

Bank) (Lahlouh and Harb, 2020). This means that the executive authority, represented by President Mahmoud Abbas, is all that left of the Palestinian political system at the present time (Abu Shahma, 2019).

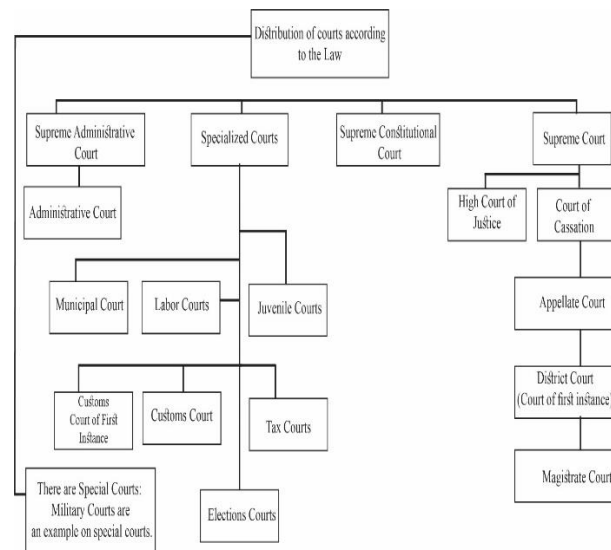


Figure 1. Distribution of Regular Courts in Palestine

The official Palestinian agency "Wafa" stated, "Based on the constitutional powers of President Mahmoud Abbas, the two decisions have the force of law (WAFA Agency, 2019). The first one is the dissolution of the current Supreme Judicial Council, and the establishment a transitional Supreme Judicial Council for a year to assume the duties of the Supreme Judicial Council, in addition to restructuring courts of various levels. While the second decision amended the Judicial Authority Law and lowering the retirement age for judges from seventy to sixty. This amends will refer more than 50 judges over sixty to retirement (Lahlouh and Harb, 2020).

These laws clear and explicit violation power of the judiciary authority by the executive authority, throw out the principle of separation of powers, as well as the principle of independence judiciary. Judicial independence does mean that judges must be free to practice their judicial authorities without interference from litigants, the State, the media or powerful

individuals even President (Ghazlan, 2021). Moreover, the law amending the Judicial Authority Law, and the new laws related to the restructuring of regular courts and administrative courts, contain legislative texts that fundamentally undermine the independence of the judge, as well as stripping judges of the most important guarantees of their independence (Boies, 2006; Helmke and Rosenbluth, 2009).

Most of civil society institutions (Palestinian Centre for Human Rights, 2020) opposed the decrees viewing them as incompatible with the Basic Law and the Law of the Judiciary and that they represent a blatant executive interference (Lahlouh and Harb, 2020). The Palestinian Bar Association announced, in a statement, its absolute rejection of the package of decisions issued by the President, considering that a violation of the Judicial Authority Independence Law (Abdelbaqi, 2016). The Bar Association considered that the aim of these decisions is to tighten the grip of the executive authority on judicial matters outside the framework of the principle of separation of powers and the principle of the rule of law, before the Palestinian elections. All this led to protests by the Palestinian Bar Association against the president's decisions and the Bar Association's announcement that work inside the courts would be suspended and not attending courts sessions (The official website of the Palestinian Bar Association on Facebook, 2021). Protests are still ongoing and continuing until the date of writing this article.

Conclusion

At the outset, it should be noted that the Palestine's judicial system is relatively new, but it reflects of its origins in French, Islamic and British Law and dispute between the laws in force in the West Bank and the Gaza Strip began to shrink due to legislative unification to some extent until 2006. Unfortunately, after the events that took place after the 2006 elections (Palestinian division and Hamas's control of the Gaza Strip), the process of unifying laws stopped. In fact, the legal and judicial gap

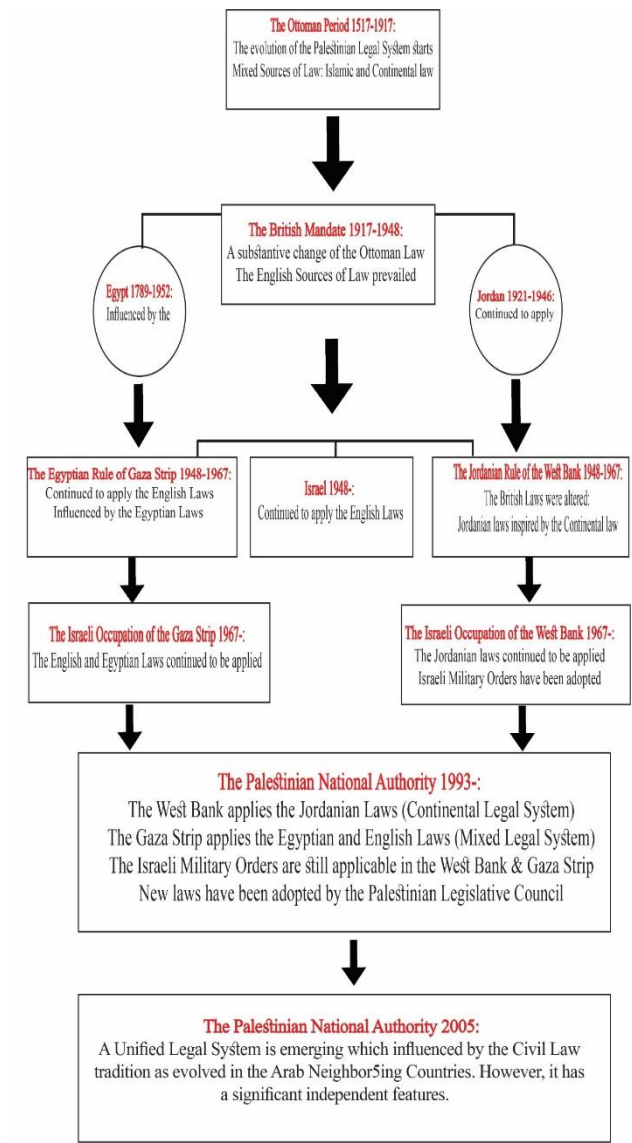


Figure 2. The Historical Evolution of the Palestinian Legal System

between the West Bank and the Gaza Strip increased, especially with the establishment of a new Supreme Judicial Council in Gaza and the appointment of new judges, not affiliated with the Supreme Judicial Council in the West Bank.

Likewise happened to the Public Prosecution Office, a new attorney general was appointed in Gaza by Hamas's, thus it is becoming in Palestine a public prosecutor in the West Bank and another in Gaza, as well as for the Supreme Court, so there was a supreme court in the West Bank and another in Gaza. Consequently, the

Judicial system problem was greater than the legal system problem since late 2006 until now. In short, all this can be expressed in one phrase (two states for one people or one nation). All this happened because of politics. Hamas and Fatah have a different approach from the other in dealing with anything, as each has a completely different ideology from the other. Simply Politics corrupting everything. There is an urgent need to remove this confusion by unifying and updating the laws throughout the Palestinian areas, therefore, it is the duty of all governmental and other institutions to promote, respect and observe the independence of the judiciary. This will be as follows:

First: The political dispute between the West Bank and the Gaza Strip (Fatah and Hamas) must be put aside, and work to build a single judicial and legal system.

Second: The Executive Authority and the Palestinian President must stop direct interference in the affairs of the judiciary, especially removing judges from their positions without following proper legal procedures.

Third: hold a meeting between the Supreme Judicial Council in the West Bank and Gaza among all of Supreme Court judges, whether the High Court in the West Bank or Gaza, to adopt a clear and understandable standard regarding judicial precedents to remove contradictions between judgments issued by both courts since 2007 until now.

Fourth: Establishing a committee from the Ministry of Justice and the Supreme Judicial Council to look into the files of judges and members of the Public Prosecution Office that were appointed in light of the Palestinian division and settle their legal status according to the Judicial Authority Law.

Fifth: Calling for democratic legislative and presidential elections in all parts of the country (West Bank, Gaza Strip, Jerusalem) and presenting all laws, decrees and regulations that have been issued since 2006 until now to the Legislative Council, which will be elected in the first session to take the appropriate decision

regarding them, taking into account Consider the stability of legal position and judicial rulings issued and implemented in accordance with these laws.

Sixth: Create a specialized committee consisting of judges, lawyers and university professors with long experience in the field of work to review the laws in force in the West Bank and Gaza Strip and work to amend and develop them in line with the present time.

Seventh: Restoring the situation to what it was in the past with regard to the existence of only one council for the Supreme Judiciary, which includes the West Bank and Gaza Strip, as well as the matter for the Public Prosecution.

References

- [1] Abdelbaqi, M., 2016. The Reality of the Palestinian Judicial System between Independence and Effectiveness. *Dirasat Shari a and Law Sciences*, 43, pp.1611-1624.
- [2] Abu Musameh, O. and Abu Musameh, I., 2021. Legal Paper: Questions about the constitutional and legal problems following the elections for the third Palestinian Legislative Council. [online] Al-Zaytuna Center for Studies & Consultations. <https://www.alzaytouna.net/2021/02/05/#.YCv3Co8zaT8>.
- [3] Abu Shahma, M., 2019. Abbas's control of the judiciary .. Implications for citizens' rights to access justice. [online] Felesteen online: <https://felesteen.ps/post/55049/>.
- [4] Al-Dahdouh, S., 2004. Towards a unified Palestinian law. Workshop on 01/15/2004. [online] Palestinian National Information Center. https://info.wafa.ps/ar_page.aspx?id=2770.
- [5] Almuaqat, F. and Dreawy, D., n.d. Bright signs in the provisions of the Arab judiciary,

Palestine.Arabwomenorg.org.

<http://www.arabwomenorg.org/Content/IlluminatedSignsStudies/palastin.pdf>.

[6] Al-Saka, S., October 20, 2020. Former Minister of Justice. Public order concept in the Palestinian Civil Procedures Law. The Researcher Interview by. In person, "Via WhatsApp".

[7] Barakat, J., 2019. Referring 19 Palestinian judges to early retirement. [online] The new Arab: <https://www.alaraby.co.uk/>.

[8] Bdair, N., 2020. (Decisions of the Palestinian Constitutional Judiciary: Part II (2018-2019) [Arabic]). SSRN Electronic Journal,

[9] Bentwich, N., 1964. The Legal System of Israel. International and Comparative Law Quarterly, 13(1), pp.236-255.

[10] Boies, D., 2006. Judicial Independence and the Rule of Law. Journal of Law & Policy, 22(57), pp. 57-70.

[11] Botmeh, R., 2011. A review of Palestinian legislation from a women's rights perspective. [online] Database.shemera.eu. <http://database.shemera.eu/shemera182/handle/123456789/120>.

[12] British Institute of International and Comparative Law, 1948. Termination of the British Mandate for Palestine. The International Law Quarterly, [online] 2(1), pp. 57- <https://www.jstor.org/stable/763114>.

[13] Dieng, A., 1994. The civilian judicial system in the West Bank and Gaza. Geneva, Switzerland: International Commission of Jurists, Centre for the Independence of Judges and Lawyers.

[14] Dugard, J. and Reynolds, J., 2013. Apartheid, International Law, and the Occupied Palestinian Territory. European Journal of International Law, 24(3), pp.867-913.

[15] Facebook.com. 2021. The official website of the Palestinian Bar Association on Facebook: <https://www.facebook.com/Palestinebar/>.

[16] Frisch, H. and Hofnung, M., 2007. Power or Justice? Rule and Law in the Palestinian Authority. Journal of Peace Research, 44(3), pp.331-348.

[17] Ghazlan, A., 2021. A brief overview of amending judicial laws. [online] Palinfo.com. Available at: <https://www.palinfo.com/articles/2021/1/17/>.

[18] Ginat, A., 2018. British Mandate for Palestine | International Encyclopedia of the First World War (WW1). [online] Encyclopedia.1914-1918 https://encyclopedia.1914-1918-online.net/article/british_mandate_for_palestine/2018-12-07?version=1.0.

[19] Hasan, N., 2009. The Palestinian Judiciary: Reform or Reconstruction. Bethlehem University Journal, [online] 28, pp.54-93. <http://www.jstor.org/stable/26447477>.

[20] Helmke, G. and Rosenbluth, F., 2009. Regimes and the Rule of Law: Judicial Independence in Comparative Perspective. Annual Review of Political Science, 12(1), pp.345-366.

[21] Hrw.org. 2001. HRW: Justice Undermined: Balancing Security and Human Rights in the Palestinian Justice

System.<https://www.hrw.org/reports/2001/pa/index.htm#TopOfPage>.

[22] Palestine Investment Conference. 2008. The Palestinian Judicial System. [online] Bethlehem: Palestinian Economic Policy Institute (Mas): <http://WWW.PIC-PAL.ES.TINE.PS>.

[23] Israeli-Palestinian.2021. Historical Timeline: 1900-Present - Israeli-Palestinian ProCon.org.<https://israelipalestinian.procon.org/historical-timeline-1900-present/>.

[24] Kelly, T., 2004. Access to justice: the Palestinian legal system and the fragmentation of coercive power - LSE Research Online. [online] Eprints.lse.ac.uk. <http://eprints.lse.ac.uk/28224/>.

[25] Khalil, A., 2009. Formal and informal justice in Palestine: Dealing with the Legacy of Tribal Law. *Études rurales*, (184), pp.169-184.

[26] Lab.pna.ps. 2021. special issue, 22. [online] Available at: <https://www.lab.pna.ps/mumtaz/12480.html>.

[27] Lafee, W., 2012. Palestinian Law and the Formation of Regular Courts. [online] Jurist.org. <https://www.jurist.org/commentary/2012/06/wael-lafee-palestine-judiciary/>.

[28] Lahlouh, A. and Harb, J., 2020. Strengthening the Supreme Judicial Council to ensure that the independence of the Palestinian judiciary is protected. [online] Palestinian Center for Policy and Survey Research: <https://pcpsr.org/ar/node/791>.

[29] Lawcenter.birzeit.edu. n.d. Legal Status in Palestine.

<http://lawcenter.birzeit.edu/lawcenter/en/homepage/legal-status-in-palestine>.

[30] Palestinian Centre for Human Rights. 2020. Opinion article issued by human rights institutions about the independence of the judiciary. <https://www.pchrgaza.org/ar/?p=19434>.

[31] Paul, C., Clarke, C., Grill, B. and Dunigan, M., 2013. UK in Palestine, 1944–1947: Case Outcome: COIN Loss. In *Paths to Victory: Detailed Insurgency Case Studies*. Santa Monica, California: Rand Corporation, (pp. 1-13).

[32] Question of Palestine. 2001. Evolution of the legal framework of the Palestinian National Authority - Council of Europe/European Commission for Democracy through Law ("Venice Commission") report/Non-UN document Question of Palestine. <https://www.un.org/unispal/document/auto-insert-209986/>.

[33] Razai, S., 2019. Law and legal systems in the Arab Middle East: beyond binary terms of traditionalism and modernity – IEDJA. <https://iedja.org/en/law-and-legal-systems-in-the-arab-middle-east-beyond-binary-terms-of-traditionalism-and-modernity/>.

[34] Robinson, G., 1997. The Politics of Legal Reform in Palestine. *Journal of Palestine Studies*, 27(1), pp.51-60.

[35] Salem, J. and Stettner, I., 2013. Informal Justice in The Palestinian Legal System. *TRADITION AND JUSTICE*. [online] Berlin: Konrad Adenauer Stiftung, pp.49-61. <https://www.jstor.org/stable/resrep10120.6>.

[36] Tbinetnet.ohchr.org. 2020. The International Covenant on Economic, Social

and Cultural Rights The State of Palestine. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=ar&Treaty_ID=9&DocTypeID=29&ctl00_PlaceHolderMain_radResultsGridChangePage=3_50.

[37] WAFA Agency. 2018. Constitutional Court decision regarding legislative dissolution and holding of elections. <https://wafa.ps/Pages/Details/16179>.

[38] WAFA Agency. 2019. The president lowers the retirement age for judges and creates a transitional judiciary council: <https://wafa.ps/Archive/Details/901846>.

[39] Wing, A., 1999. The Palestinian Basic Law: Embryonic Constitutionalism. *Case Western Reserve Journal of International Law*, [online] 31(2), pp.383-426. <https://scholarlycommons.law.case.edu/jil/vol31/iss2/4/>.

[40] Zanotti, J., 2018. The Palestinians: Background and U.S. RELATIONS. *Current Politics and Economics of the Middle East*, [online] 9(4), pp.685-730. <https://search.proquest.com/openview/362190942721a1c79c9bc003b01ac268/1?cbl=2034880&pq-origsite=gscholar>