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BUILDING THE RULE OF LAW IN PALESTINE:

RULE OF LAW WITHOUT FREEDOM

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I Introduction

The most accurate characterization of the situation of the Palestinians of the Occupied Palestinian Territories (OPTs) is that it is "anticipating a rule of law system" before sovereignty has been achieved. The current political system in the Palestinian Territories is defined as "interim" under various agreements and is administered by the Palestinian Authority (PA), which formally serves as a branch of the Palestine Liberation Organization (PLO).[1] The laws in force in the OPTs include legislation enacted in the Ottoman Empire, during the British Mandate over Palestine, the Jordanian rule in the West Bank, the Egyptian rule in Gaza, Israeli military orders in Gaza and in the West Bank, and Palestinian Legislation enacted by the PA.

The PA was established in 1994 as a consequence of the 1993 *Declaration of Principles on Interim Self Government Arrangements* (the Oslo Accords) signed by Israel and the PLO. These Accords had many subsequent agreements including the 1994 Gaza-Jericho

[1] The Declaration of Principles (DOP) on Interim Self Government Arrangements signed on 13 September 1993 between the PLO and Israel served as a basic text for subsequent agreements between the two sides. According to Article 1 of the DOP, an Interim Self-Government would be established for the Palestinian people in the West Bank and Gaza Strip. The DOP and especially the Interim Agreement of 1995 have laid down the structure, the powers, and the jurisdictions of the PA. See Israel-Palestine Liberation Organization: Interim Agreement on the West Bank and Gaza Strip, done at Washington, D.C., 28 September 1995, 1997 36 *International Legal Materials*, 551.

Agreement, the 1995 Interim Agreement, the 1998 Wye River Memorandum, and the 1999 Sharm el-Sheikh Agreement.[2]

The Palestinian self-governing entity in the West Bank and the Gaza Strip does not constitute a state. It only meets part of the criteria of statehood under international law.[3] Of the positive criterion, it meets only the criterion of a permanent population.[4] Due to the powers and responsibilities retained by the Israeli military government and due to the fragmentation of the areas under Palestinian territorial jurisdiction, the PA does not exercise overall, exclusive, and independent governmental authority over the territory and its population.[5] The territory is divided into a collection of separate enclaves, most of which are not contiguous. The ability of the PA to enter into relations with other states is also extremely limited and remains predominately under the control of the occupying state.[6]

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[2] For more details and the text of these agreements, see "Israel 1991 to Present Peace Process," online: Palestine Facts <http://www.palestinefacts.org/pf_1991to_now_peace_process_outline.php>.

[3] International Law requires that an entity exercises effective and independent governmental control, a defined territory, the capacity to engage in foreign relations, and a control over a permanent population. P. Fischer & H. F. Köck, ed., *Allgemeines Völkerrecht* (Wien: Linde, 1994) at 69-71, 93-98 (in German).

[4] The status of the Palestinian residents of East Jerusalem is ambiguous. While they are permitted to participate in General Political Elections, they are not allowed to hold Palestinian IDs or travel documents. See Mohammad Shtayyeh, *Scenario on the Future of Jerusalem, the Palestinian for Regional Studies* (Al-Bireh: Palestinian Center for Regional Studies, 1998) at 193-203.

[5] The issue of jurisdictional limits of the PA was given particular attention in all agreements concluded between the PLO and Israel. It was first formulated IV of the DOP and especially Article XVII.1, *supra* note 1 above. The territorial jurisdiction of the PA in the West Bank and Gaza Strip was dealt with in the Interim Agreement. The main principle was similar to the already mentioned provisions. In this respect, territorial jurisdiction of the PA is defined in Article XVII.2 of the Interim Agreement, as including subsoil and territorial waters, except for the areas mentioned in the Article. See *supra* note 1 above. Therefore, the PA would not assume full jurisdiction during the interim period for the exempted issues that would be discussed in the final negotiation, like water, refugees, Jerusalem.

[6] Article IX 5. a. of the Interim Agreement clearly stipulates: "In accordance with the DOP, the Council will not have powers and responsibilities in the sphere of foreign relations, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions,…", *supra* note 1.

The independence and ability for self-governance of Palestine as an emerging state is severely constrained under the Oslo Accords, which define it as being in an "interim period", as well as by the *de facto* realities of the occupation.

Annex I of the "Protocol Concerning Redeployment and Security Arrangements" to the Interim Agreement divides the West Bank into three areas: A, B and C. The logic behind these divisions based upon the gradual transfer of land to the PA (Israel's gradual redeployments). The process of Israeli transfer of land to the PA should have been completed 18 months after the latter's inauguration in 1994, which was in July 1997. However, with the deadlock in the peace process and the start of the second *Intifada* in 2000, the Israeli forces withdrew from only 42.9% of the West Bank. Within such a percentage of restored territories, the A Areas represented 18.2%,[7] (i.e., the big cities and most populated areas, where the PA has full authority), while 24.7% of the territories were B Areas, (i.e., villages and towns where the PA has civil authority, Israel being the one that retained power over security).[8] In the meantime, 57.1% of the territories, which was called Area C, remained under the full powers of the Israeli Military Government. In April 2002, Israel reoccupied areas "A" and "B" and the above three categories have lost their significance: while civil matters inside these areas are still managed by the PA, the Israeli army is acting without constraint in all areas of the West Bank.

[7] Camille Mansour used the plural instead of the singular to cite Areas A and B. He rightly explained the reason behind using the plural as follows: "While area C, under exclusive Israeli jurisdiction, can be crossed from end to end by settlers and Israeli solders without discontinuity, areas A and B constitute numerous small discontinuous enclaves, which is why the plural must be used when speaking of these two areas." See Camille Mansour, "The Impact of 11 September on the Israeli-Palestinian Conflict" (2002) 31:2 Journal of Palestine Studies 6.

[8] This information relating to the Israeli redeployment was taken from an interview with the Palestinian Head Negotiator Saeb Erikate, see article in *Alquds* (1 January 2000) (in Arabic).

In September 2005, Israel took unilateral steps to disengage from the Gaza Strip, removed military installations and dismantled the illegal settlements in the Strip. Israel has claimed that its 'disengagement' has put an end to the occupation of the Gaza Strip. However, Israel has maintained full control over the economy, all movement between Gaza and the West Bank, borders, crossing points, airspace, and water space in this area. Under international humanitarian law, a territory is no longer occupied when the occupying power ceases to exert any form of effective control that undermines the right of self-determination of the occupied population.[9] Since the Palestinian population in the Gaza Strip is *de facto* enclosed in a giant open-air prison completely controlled by Israel, the claim that Israel is no longer occupying Gaza is legally incongruous.[10]

II Constitutional framework of the nascent Palestinian state

The Oslo Accords and subsequent agreements currently comprise the constitutional framework for the West Bank and the Gaza Strip under public international law.[11]

[9] The Disengagement Plan, proposed by Ariel Sharon, 28 May 2004, Section III.A.3 states: "the State of Israel reserves the basic right to self defense, which includes taking preventive measures as well as the use of force against threats originating in the Gaza Strip". In addition, the Plan Israel will unilaterally control whether or not Gaza opens a seaport or an airport. Israel will control all border crossings, including Gaza's border with Egypt. See Section III. A. 1 of the Disengagement Plan. Text of the Disengagement Plan is available online: Mid East Web <http://www.mideastweb.org/disengagement.htm>.

[10] See Mustafa Mari, "The Israeli Disengagement from the Gaza Strip: An End of the Occupation?", Yearbook of International Humanitarian Law (2005) 8 Yearbook of International Humanitarian Law, 356-368.

[11] In 1993, the signature of the DOP prompted the PLO to start drafting a Basic Law. This Agreement on the Legislative Powers, in Article XVIII.1, states that the PA has the right to promulgate the Basic Law: "For the purpose of this Article, legislation shall mean any primary and secondary legislation, including basic laws, laws, regulations and other legislative acts." *Supra* note 1.

However, the scope of powers granted to the PA under the Oslo Accords was both functionally and territorially limited.[12]

The Palestinian Legislative Council (PLC) approved a temporary Basic Law for the PA in October 1997 for the transitional period, and was promulgated on 29 May 2002. It provides the constitutional framework for the PA during the interim period and is expected to serve as a provisional legal framework for a future Palestinian state. The law states that the government of Palestine is a parliamentary democracy based on the principles of pluralism (Article 5 of the Basic Law) the rule of law (Article 6, *legis citatae*), and separation of powers, with consideration for minority rights (Article 2, *legis citatae*).[13]

The Basic Law has recently been amended twice. On 18 March 2003, the President of the PA signed the Basic Law Amendment, which was approved by the PLC to allow the appointment of a Prime Minister who will have important authority over the administration of the government.[14] The second amendment, approved on 18 August 2005, regulated the term of the presidency and the PLC, which should not exceed 4 years.[15] The amendments change the political system from a presidential to a parliamentary one and allow partial proportional representation in political elections.[16]

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[12] *Supra* note 5.

[13] For the text of the Basic Law in English, see Basic Law, online: Palestinian Legislative Council <http://www.mifta.org/Display.cfm?DocId=790&CategoryId=7>.

[14] Palestine Gazette (Palestine National Authority), "special publication" (19 March 2003) 5.

[15] Palestine Gazette (Palestine National Authority),57 (18 August 2005) 5.

[16] The Law No. 9 concerning the Elections states in Article 3: "The Palestinian electoral law shall be based on the mixed electoral system evenly (50%-50%) between the relative majority and proportional representation…" See Palestine Gazette (Palestine National Authority) 57 (18 August 2005) 8.

The PA has committed to the respect of human rights within its jurisdiction as a result of the incorporation of Article XIX of the Interim Agreement, which obliges both sides to respect the rule of law and human rights laid down in international conventions. The Basic Law, in chapter two, contains a catalogue of rights, freedoms, and guarantees.[17] Article 9 stipulates that all Palestinians are equal before the law and the judiciary, without discrimination on the basis of race, sex, color, religion, political views, or disability. Article 18 adds that religious freedom, including performance of rituals, is guaranteed.

The Basic Law guarantees complete independence of the judiciary. It establishes a High Constitutional Court to review the constitutionality of laws and regulations, interpret legislation, and settle jurisdictional disputes. Article 95 of the Basic Law requires the High Court to act as a Constitutional Court until a law creating such a court is passed and judges are appointed to serve on it.[18]

Despite the legal framework that incorporates respect for human rights, independent groups and respected non-governmental organizations have maintained that the Palestinian public authorities have violated many aspects of Palestinian citizens' rights and freedoms. The claimed violations include the right to life, to personal safety, to

[17] An expert describes ch. 2 as follows: "Most Arab documents contain equally lists of such rights and freedoms…Thus the real test for the Palestinian Basic Law is not how many freedoms it can name but how it is constructed to defend them. The document is quite mixed in this regard, though it is stronger than all of its counterparts". See Nathan Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge: University of Cambridge Middle East Studies, 1997) at 39.

[18] Article 95 states: "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".

protection from torture, to freedom of opinion and expression, as well as other rights and freedoms guaranteed in national and international rights covenants.[19]

The Relationship of the Basic Law to International Law Norms

In any debate either related to the Israeli Palestinian conflict or to local issues, (e.g., general rights and freedoms for citizens), the sanction to international law norms are the pillar of such discussion. The notion behind the Palestinian interests in the international law is to make sure that the PA legislation adopts the best practices and international standards related to democracy, human rights, social and economic policies. The sources of the Palestinian Basic Law were drawn from variable documents, specially benefited from countries that witnessed political and legal transitions, such as in Central and Eastern Europe and South Africa.[20]

The constitutions of some Central and Eastern European countries have recently given international norms and treaties a direct effect over their local laws. Some of them have even gone as far as to claim that if a provision of law is contrary to international law, the latter shall apply instead. In that respect, Article 15(4) of the Russian *Constitution* of 1993 states that:

> The commonly recognized principles and norms of the international law and the international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty of the

[19] For more details, see e.g. Amnesty International, *Palestinian Authority Report 2005*, online: AI <http://web.amnesty.org/report2005/pse-summary-eng; and Human Rights Watch, *Israel, the Occupied West Bank and Gaza Strip and Palestinian Authority Territories* (2003), online: HRW <http://www.hrw.org/wr2k3/mideast5.html>. For an overview of the yearly decisions of the High Court, see the Annual Reports of the Palestinian Independent Commission for Human Rights from 1996 until 2004.

[20] See e.g. Adrien Katherine Wing, "Cultural and Postcolonial Critiques in Latcrit Theory: Healing Spirit Injuries: Human Rights in the Palestinian Basic Law" (2002) 54 Rutgers L. Rev. 1087.

> Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply.[21]

The Constitutions of Moldova, Azerbaijan, Kazakhstan and Georgia provide rules that are similar to the above Article.[22] In other countries, the direct effect of international norms is stated, but is restricted only to ratified treaties, such as in the Czech Republic *Constitution*. Article 10 of that country's constitution states that:

> Ratified and promulgated international accords on human rights and fundamental freedoms, to which the Czech Republic has committed itself, are immediately binding and are superior to law.[23]

Similar to the Czech Republic *Constitution*, but with less clarity, the Palestinian Basic Law in Article 10 reads:

> Basic human rights and freedoms shall be binding and respected. The Palestinian National Authority shall work without delay to join regional and international declarations and covenants which protect human rights.

This provision is the only reference to international law in the Basic Law and it does not explicitly state that international norms have a direct effect on domestic law. The provision begs the question whether the legislature intended to make these treaties controlling over domestic law and turn them into formal and binding sources of rights and obligations. The reference in the first part of Article 10 to "basic human rights…" being "binding" indicates that the legislature intended to make at least the core human

[21] For the text of the Russian Constitution, see online: Bucknell University <http://www.departments.bucknell.edu/russian/const/ch1.html>.
[22] For more details, see Gennady M. Danilenko, "Implementation of International Law in CIS States: Theory and Practice 10" (1999) E.J.I.L. 51.
[23] For the text of the Czech Republic Constitution, see online: <http://www.oefre.unibe.ch/law/icl/ez00000_.html>.

rights of the principle human rights treaties binding on domestic law. However, there is no reference to specific treaties or a distinction made between treaties and international custom, so it is unclear what "basic human rights" are being incorporated. The second part of Article 10, moreover, refers not to the immediate effect of international law, but rather requires the PA to take steps without delay to join international treaties and conventions. This means that the PA must first ratify these treaties before they come into force.

Similar to the Czech Republic *Constitution*,[24] the Palestinian Basic Law does not have a general clause regulating the relationship between international and domestic law. Article 10 does not allow the direct effect of international law over domestic law until international treaties are ratified.

Notwithstanding the ambiguity in the Basic Law itself, the Palestinian legislature has incorporated international norms into the legal system of the PA. Newly-enacted Palestinian laws have been modelled on, and sometimes expressly reference, international treaties and conventions, such as labour law,[25] environment law,[26] and social security law,[27] to list a few.

[24] For more details on the Czech Republic Constitution and the treatment of international norms in its domestic legal system, see Dalibor Jilek, "Human Rights, Treaties and the New Constitution" (1993) 8 Conn. J. Int'l L. 407.

[25] Palestine Gazette (Palestinian National Authority) 7 (25 November 2001) 7.

[26] Palestine Gazette (Palestinian National Authority) 32 (29 February 2000) 38.

[27] Palestine Gazette (Palestinian National Authority) 48 (19 January 2004) 7.

III The Independence of the Palestinian Judiciary

The Palestinian judicial system is the legacy of layers of colonial systems inherited from the different political rulers governing the country. The burden of this colonial heritage from the Ottoman, British, Jordanian, Egyptian and Israeli eras cannot be ignored in assessing the current situation. Decades of negligence – the consequences of which have resulted in poor case management, poor recording and book keeping; a shortage of judges and qualified support staff; a lack of equipment, appropriate buildings and offices; a paucity of legal resources for research; and the lack of independent enforcement and police units – have accumulated to seriously undermine the effective functioning of the judiciary.[28]

Over time, the PA has taken measures to deal with these problems. The most important steps taken in recent years were the ratification of the Law of the Formation of Civil Courts of 2001;[29] the Judicial Authority Law of 2002 (JAL);[30] the statements on the independence of the judiciary in the Basic Law; and finally, the decision to establish a Judicial Studies Institute.[31]

Articles 97-109 of the Basic Law include many of the UN *Basic Principles on the Independence of the Judiciary*. These provisions call for the independence and impartiality of the judiciary and mandate the creation of an independent Higher Judicial

[28] For more details, see Nasser Al-Rayes, *Judiciary in Palestine: Obstacles for its Development*, (N.p.: Al-Haq, 2000) 182ff (in Arabic).

[29] Palestine Gazette (Palestine National Authority) 38 (5 September 2001) 89.

[30] Palestine Gazette (Palestine National Authority) 40 (18 May 2002) 35.

[31] The mentioned details are based on an unpublished document that the authors received from the Steering Committee of the Judiciary and Justice entitled "Towards a Master Plan for the Judicial Authority in Palestine".

Council (HJC). Article 97 states: "The judicial system shall be independent, and shall be assumed by the different types and levels of courts". Article 98 adds that judges shall be independent, and shall not be subject to any authority other than the authority of the law. Article 99 emphasizes that the appointment, transfer, delegation, promotion, and questioning of judges are to be regulated by a special law (the JAL).[32] The JAL regulated the Palestinian judicial system, including magistrate, first instance, appeal, and high courts, as well as the office of the attorney general. It guarantees an independent budget for the judiciary and entrusts the Higher Judicial Council with the power to nominate judges for appointment to the judiciary.

Adding to the problems facing an independent judiciary is the ongoing power struggle between the President and the Hamas-dominated PLC. This conflict is seriously hampering the development and adoption of a legal framework that could provide clarity on the relations and division of power between key actors in the judicial system, such as the HJC, the MoJ, the PLC Legal Committee and the President. [33]

Both the Constitutional Court and the amended JAL were issued by Presidential decree just before the presidential elections in February 2005.[34] The amended JAL consolidates the judicial authority and central position of the HJC, including authority over court administration, and the power to appoint, select, inspect, promote and train judges.

[32] Law of the Judicial Authority No. 1, Palestine Gazette (Palestine National Authority) 40 (18 May 2002) 9.

[33] The Palestinian Independent Commission for Citizens' Rights, *The Eleventh Annual Report: the Status of Citizens' Rights in Palestine during the Year 2005* at 181, online: PICCR <http://www.piccr.org> (in Arabic).

[34] The legislative activity of the PA is based on three kinds of legislation: Presidential decrees, decisions and laws. The basis of this classification is not built upon any clear criteria or any clear legislative strategy, such as the formulation of priorities and legislative planning, but rather upon the immediate needs of the newly emerged authority.

However, despite the clarifications made in the amended JAL, controversy over the scope of judicial authority seems to hinder effective organization and management of important sections of the judicial system. The November 2005 amendments to the JAL had given administrative authority over the judiciary to the MoJ, but these amendments were eventually annulled by the High Court in its capacity as Constitutional Court. Under the latest amendment passed by Presidential decree, administrative authority lies with the HJC. However, the HJC lacks sufficient capacity and institutional design to efficiently administer the courts. As it stands, the HJC is simply not equipped to perform this additional task. The same goes for the other duties of the HJC that lie with its secretariat – the training and education department and the technical and inspection offices. There are no by-laws for the different departments of the HJC, so they lack clear institutional guidance or clarity concerning their respective responsibilities. In the absence of such additional legislation on organizational design, division of responsibilities and procedures within the HJC, informal and personal relations determine policy, rather than regulation.

The attempted establishment of a truly independent Palestinian Judiciary within the PA is rather recent and there is still hope that the vision of a judiciary based on the principles of independence and impartiality will be realized in time. The PA has taken several steps in this direction, including legislation, various reforms, and salary raises for the judges, but there is much more to do. The process will take time, and must begin with reforming the education system, implementing the judicial training process, and establishing an effective evaluation process. All of this has become the focus of attention for many actors who are interested in realizing the rule of law in Palestine.

i. An Evaluation of the rule of law and independence of judiciary in Palestine

The promulgation of the Basic Law and the Judicial Authority Law in 2002 were critical steps towards guaranteeing the rule of law in Palestine. However, human rights organisations have criticized the continued interference by the executive branch in the work of the judiciary, and its prevention from the execution of some judicial verdicts, particularly those of the High Court of Justice.[35] On 27 July 2003, the PA took a positive step in this direction by abolishing the State Security Court and transferring its authority to the regular courts and to the Attorney-General.[36] Despite this decision, human rights organisations have reported that new cases that have been brought in the Security Court.[37] Since the promulgation of the judicial laws, the PA has also formed the Court of Cassation and the High Court of Justice. New judges have been appointed in these courts that are expected to protect human rights and promote the rule of law.[38]

In addition to judicial reforms, the PA began implementing crucial institutional reforms, especially in the financial sector. On 16 May 2002, the PLC issued a document entitled:

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[35] The vast majority of these decisions are related to political prisoners who are held under Israeli and American pressure. For details, see Amnesty International, *Palestinian Authority, Report 2003*, online: AI <http://web.amnesty.org/report2003/Pse-summary-eng>. For an overview of the yearly decisions of the High Court, *see* the Annual reports of the Palestinian Independent Commission for Human Rights from 1996 until 2005. There is no publication of court judgments in the PA. The Institute of Law at Birzeit University is working on a project to include such judgments in the on-line databank (*Al-Muqtafi*). For more information, see Al-Muqtafi <http://muqtafi.birzeit.edu/en/index.asp>.

[36] The decision has not yet been published in the Palestinian Gazette. According to the law relating to the procedure for preparing legislation (No. 4) of 1995, see Palestine Gazette (Palestine National Authority) issue 4 (May 1995) 15 (in Arabic), the President of the PA has to sign, issue and publish the law that was approved by the Palestinian Legislative Council in the Palestinian Official Gazette. Interview with Hussein Abu Hanoud, Legal Department, Palestinian Independent Commission for Citizens' Rights in Ramallah, on (23 May 2003) interviewed by Feras Milhem.

[37] See the Press Release of the Palestinian Centre for Human Rights (3 September 2003), online: PCHR <http://www.pchrgaza.org/files/PressR/English/2003/93-2003.htm>. PCHR denounces the continuation of the state security courts, despite the Minister of Justice's recent decision to abolish them.

[38] See the Decision on the Appointment of Judges No. 31 of 2002, which was published in Palestine Gazette (Palestinian National Authority) 43 (5 September 2002) 9.

"Statement Towards Development and Reform of the PNA Institutions" in which it articulated the fundamental principles required for reform, especially in the areas of expenditures, planning, aid coordination and policy, as well as institutional and structural measures.[39] This statement was the basis for adopting the 23 June 2002 "100 Day Plan," in which the PA committed itself to promoting the rule of law, restructuring ministries and official agencies, and creating efficient and effective institutions.[40] This Plan was followed by another, the "Emergency and Public Investment Plan 2003-2004" which aimed at continuing institutional reform and providing better public services to Palestinians.

In practice, the Palestinian judicial system functions in a relatively satisfactory manner, despite facing two significant problems. First, the judicial system suffers from the ongoing political constraints of the occupation. Israel imposes severe restrictions on Palestinians' movement from one major city to another, and between the cities and neighbouring towns and villages of the West Bank and the Gaza Strip, making the work of the judiciary very difficult. Judges, lawyers and litigants who live outside the major cities cannot arrive at the courts. Moreover, the Israeli occupation has destroyed the Palestinian police and prison facilities, making it difficult – if not impossible – to enforce court judgments. The Minister of Justice himself addressed this problem in a conference

[39] For more detailed information, see the text of the "Statement towards Development and Reform of the PNA Institutions", online MIFTA <http://www.miftah.org/Display.cfm?DocId=757&CategoryId=2>.
[40] For more detailed information on the 100 Day Plan and the institutional reform, see Hiba I. Husseini, "Challenges and Reforms in the Palestinian Authority" (2003) 26 Fordham Int'l L.J. 534.

held in Ramallah in 2003, concluding that the rule of law could not become reality as long as the Israeli occupation continues.[41]

Second, despite the legal reforms, the judicial system requires an appropriate case management system, equipment, and adequate court premises, as well as better coordination between the Ministry of Justice and the High Judicial Council. Due to the difficulties discussed above, the work of the judiciary proceeds slowly. Many cases take a long time to conclude; the case overload and unnecessary delays are frustrating for both the judges and the litigants. Recent court statistics issued by the Palestinian High Judicial Council show that despite improvements in the work of the Palestinian courts in the first half of 2004, the number of pending cases is still high.[42] The statistics reveal[43] that there were 39,987 cases pending before the Magistrate Courts of the West Bank at the end of 2003. Another 6,271 cases were filed in the first half of 2004. During that same time period, 14,329 cases were decided, leaving 31,929 pending cases.[44] The number of decided cases in the Magistrate Courts are encouraging, despite all the difficulties the system faces.

However, other courts have a less positive record. For example, the Court of First Instance of the West Bank had 6,927 pending cases by the end of 2003. During the first half of 2004, 1,779 cases were filed. By the end of that period only 1,257 were decided,

[41] See the proceedings of a Conference entitled: Law and Judging under Tension held in July 2002, online: Birzeit University <http://lawcenter.birzeit.edu/fdp/law_under_tension.pdf>.
[42] Report of the High Judicial Council, the Status of Courts in 2004; (The Palestinian Territories, 2004) (in Arabic).

[43] *Ibid*. Appendix 2.

[44] For the Magistrate Courts of the Gaza Strip, the figures are respectively 5745, 5913, 7176 and 4482. See *ibid.* Appendix No. 2.

leaving 7,449 pending cases.[45] Statistics for the enforcements of court judgments reflect a dismal picture. By the end of 2003, 19,046 judgments remained unexecuted. In the first half of 2004, another 2,463 unenforced judgments were added to that figure. If the Palestinian courts continue to have this kind of backlog, undoubtedly litigants will search for alternative means to solve their legal disputes outside the formal judicial system of the PA.

Recent developments in the Palestinian judicial system reflect the immense pressure from the High Judicial Council to remain totally independent from the Ministry of Justice. The High Judicial Council claimed many of the powers traditionally undertaken by the Ministry of Justice such as the establishment and construction of new court houses, negotiating with international donors and signing agreements. In 2006, the High Judicial Council was pushed for a Presidential Decree amending the Judicial Authority Law of 2002. This Decree moves all powers and responsibilities of the Minister of Justice to the High Judicial Council. The decree was repealed by Hamas' majority at the PLC.[46]

The latest challenge to the work of the court system in particular, and the rule of law in general, is the escalating chaos in the OPTs. Part of the blame for this chaos can be placed on weaknesses in the PA institutions directly caused by the oppressive measures of Israeli occupation, particularly Israeli interference in the Palestinian security organisation. The other part of the blame lies on measures taken as a consequence of

[45] For the Courts of First Instance of the Gaza Strip, the figures are respectively 4087, 2084, 1863 and 4308. See *ibid*. Appendix No. 2.

[46] According to the Basic Law, as amended in 2005, the President has 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). In the above case, the PLC used its power not to approve the Presidential Decree.

Hamas' landslide win in the Parliamentary elections of 2006. Hamas' victory led to an international financial boycott and a siege of the Palestinian population, with very negative consequences to the Palestinian people in general, and further institutional and governmental reform has either been postponed or completely halted.

IV Criminal law

The Jordanian Criminal Law of 1960 and the British Mandate Penal of 1963 are still in force in the West Bank and the Gaza Strip. However, the *Diwan Al Fatwah Wal Tashri*[47] has drafted a new Criminal Law which is under deliberation by the PLC. In case of its promulgation, the Criminal Law will eventually be unified between the West Bank and the Gaza Strip and will replace old and scattered rules.

The sources of the draft Criminal Law are taken from Arab neighbouring countries, mainly Egypt. They have also been influenced by the Jordanian Criminal Law of 1960 and the British Mandate Penal Law of 1936.[48] In that sense, we can say that the new draft law is a codification of various sources without adopting a clear policy towards modernization: a case in point is Article 248 of the draft, benefiting husbands with light penalties, up to three years of imprisonment for killing or harming their wives, daughters or sisters committing adultery on the spot. Article 248 of the draft is a copy of Article

[47] *Diwan Al Fatwah Wal Tashri* (the Bureau of Legislation and Opinion) is the main "legislative body" that has been coordinating, drafting and publishing the legislation of the PA in an official gazette. The *Diwan* was formed in 1994 and was formally constituted by the Presidential Decree (No. 286) of 1995. See Palestine Gazette (Palestine National Authority) 4 (6 May 1995) 15.

[48] See Issa Abu Sharar, *The Palestinian Draft Criminal Law: Legal Commentaries*, online: PICCR <http://www.piccr.org/publications/revieiws/panel.pdf> (in Arabic).

237 of the Egyptian Criminal Law, but differs from the Jordanian Law in Article 340.[49] The latter, which is currently applicable in the West Bank, states the following:

1. He who surprises his wife or one of his [first female relatives] *mahrams* committing adultery with somebody, and kills, wounds, or injures one or both of them, shall be exempt from liability [*udhr muhill*: literally, "shall benefit from the exculpating excuse"].

2. He who surprises his wife, or one of his female antecedents or descendants or sisters with another in an unlawful bed, and he kills or wounds or injures one or both of them, shall be liable to a lesser penalty in view of extenuating circumstances [*udhr mukhaffaf*: literally, "shall be benefiting from the mitigating excuse"].[50]

The Palestinian draft Criminal Law did not go as far as the above mentioned Article did in distinguishing between the two cases of surprises pertaining to the act of adultery and to an unlawful bed. Neither did it allow the perpetrator of a crime against a relative female caught in an unlawful bed from mitigating excuse. Notwithstanding this development, the Palestinian legal reformer did not take into account present social life, where women are being killed or harmed by their husbands and relatives for so-called crimes of honour having to do with these female victims' braking of social and cultural taboos, namely with behaviour regarded as immoral because it tarnished the honour of the families in question. In addition, the reformer did not take into account the legal and social debate in Jordan and Lebanon that favoured change in the legal treatment "unacceptable" social behaviour. Like all neighbouring Arab criminal laws, Article 248 of the draft Criminal Law suggested that only males could be exempted from penalty or

[49] The British Mandate Penal Law of 1936 does not have a similar provision to the Jordanian Criminal Law because the origin of the latter was the French Criminal Law.

[50] The translation is done by Lyn Welchman. Quoted in Nadera Shalhoub-Kevorkian, "Femicide and the Palestinian Criminal Justice System: Seeds of Change in the Context of State Building?" (2002) Law and Society Journal Review 580.

benefit from a reduced sentence; a wife who killed her spouse after surprising him in the act of "adultery" could not benefit from a mitigating excuse. In fact, the Palestinian legal reformer failed to take into account two points: First, he did not study the historical circumstances of regulating this Article, which was transplanted to Arab criminal codes from the French Criminal Law of 1810 (Article 324). On 6 November 1975, the French legislator repealed Article 324 and so did Turkey, Spain, Portugal and Italy.[51] Second, the Palestinian legal reformer did breach a superior legislation: the Basic Law calls for full equality between males and females. Indeed, if this provision is enacted, it would infringe an established constitutional right.

On the other hand, several provisions of the draft Criminal Law regulate the capital punishment of more than 23 crimes, while many countries restricted or prohibited the regulation of the capital punishment in local legal systems and constitutions. This type of punishment would trigger discussions within the PLC, since the majority among legal researchers and members of civil society organizations oppose its incorporation or at least call for limiting the number of crimes demanding its application.[52] Those individuals and institutions would probably lobby in order to compel the lawmakers to drop capital punishment completely from the draft.

The *Shari'a* criminal law had no influence on the draft, a matter that prompted some advocates of Islamic law to protest. Several workshops were held by Hamas and other

[51] *Ibid.* at 582.

[52] Capital punishment has been the subject of many studies undertaken by human rights organizations. For example, see Amar Dweik, *Capital Punishment in Palestine and International Standards* (2003), online: PICCR <http://www.piccr.org/publications/reviews/death.pdf> (in Arabic). See also a study by the Parliamentary Research Unit of the PLC on the draft Criminal Law, which highlighted the new trends in the World to cancel or limit the application of this punishment. See Issam Abdeen, *Study on the Draft Criminal Law*, (unpublished study of the PLC No. 85/2001) 45-74.

Islamic organisations, in which speakers criticized the Palestinian reformer as somebody who would encourage adultery and the consumption of alcohol. Yet, real and active pressure came from human rights organisations and NGOs, which managed to halt the legislative process of the draft. In a letter sent to the Speaker of the PLC, human rights organisations highlighted many loopholes in the draft, such as its treatment of women and capital punishment, its inconsistency, and its being transplanted from an old Egyptian criminal law without any consideration of modern developments in this important area.[53]

V Customary law and the informal Palestinian justice system

In spite of the existence of a normative order outside the formal law, historically the political regimes that ruled Palestine did not officially recognize customary law solutions. However, they turned a blind eye to non-state law.[54] After over 500 years of foreign rule and occupation, the Palestinian people view formal legal systems as a tool of domination, control and suppression. In the aftermath of the Israeli occupation of the West Bank and the Gaza Strip, the resort to non-state normative solutions increased.[55] Customary law was used as a tool to preserve the national identity and maintain social order in the absence of a legitimate regime. In addition to these facts, customary law was preserved because the underpinning of the Palestinian society is built upon family ties. In case one of its members caused any harm or was the victim of any act, the onus of responsibility

[53] Feras Milhem, Interview with Issam Abdeen, a legal researcher in the Parliamentary Research Unit of the PLC.

[54] For more information, see Robert Terris & Vera Inoue-Terris, "Case Study: Conflict Resolution and Customary Law in a Neopatrimonial Society" (2002) 20 Berkely J. Int'l L. 469.

[55] *Ibid.* at 470-471.

and obligation would rest on the entire clan, such as in any patriarchal and patrimonial society. The movement from such a society towards modernization and westernization started a century ago when the Ottomans, and later the British Mandate and the Jordanian rulers, started introducing legal reforms. However, customary law has demonstrated a unique ability to adapt itself to the new circumstances of a modern society. For instance, despite the extension of the modern Israeli legal system into occupied East Jerusalem in 1967, the resort to non-state normative solutions in that region has continued and even became stronger.[56] Again, the political aspect has been the reason for preserving customary law and fostering family ties, and not the rejection of modernity. Any attempt to change the Palestinian legal system necessitates particular attention to the future status of customary law.

Upon its establishment in 1994, the PA started the reform of the legal system. Despite the fact that non-state law is evident and part of the socio-legal culture of the Palestinian society, the policy towards customary law can be described as a grey one and one which provokes much contradiction. On the one hand, the PA intended the centralization of the emerging legal system, but on the other hand it continued to enhance the role of customary law as well as to strengthen the power of the heads of clans. In 1994, the President issued the "Resolution Regarding the Establishment of the Tribal Affairs Administration (No. 161), 1994".[57] Being aware of family ties in the Palestinian society, Arafat aimed to consolidate his power in the face of the growing Islamic opposition to the national movement.

[56] See *in* general Ifrah Zilberman, "The Future of Jerusalem: Palestinian Customary Law in the Jerusalem Area" (1996) 45 Cath. L.Rev. 795.

[57] Palestine Gazette (Palestinian National Authority) 3 (20 February 1995) 1.

The relationship amongst the judiciary, prosecutors and the police is currently underdeveloped. Lack of coordination and compliance between these main actors in the judicial process is causing delay in processing court cases, and seriously hampering the enforcement of court decisions. All of these consequences further erode public trust in the judicial system.

Lack of cooperation between officials working in the justice sector is only one example of the factors causing severe erosion of public trust. Additional factors, such as the lack of enforcement of judgments, inaccessibility to courts because of restrictions on movement, lack of Palestinian court jurisdiction (in East Jerusalem), corrupt practices, and the economic crisis, have all contributed to the search for alternative means of justice besides the formal judicial system. Many Palestinians are increasingly resorting to *traditional informal justice*[58] and avoiding the formal justice system.

The informal (mainly tribal) justice system has developed particular procedures and methods, as well as unique evidentiary processes in resolving conflicts. The informal system also issues and enforces judgments and penalties. In general, the informal system of justice is characterized by several key concepts and basic rules.

The informal justice system's rules of determining guilt and innocence, evidence, and punishment have derived primarily from traditions or conventional practices. As such, these conventional rules basically contradict the principles of rule of law. Basic due

[58] This conclusion is based on a study entitled "Informal justice: Rule of Law and Dispute Resolution in Palestine- National Report on Field Research results" (Institute of Law, Birzeit University, 2006), online: Birezeit University <http://lawcenter.birzeit.edu/iol/ar/research/lawSoc/output/inforamal_justice_ar.pdf> (in Arabic).

process in the Palestinian formal legal system requires that no crime or penalty can be enforced without a duly promulgated legal provision issued by an authorized power established under the Basic Law.[59] Thus, the conventional rules do not meet basic due process requirements; they may be appropriate to reduce criminal penalties ordered by a formal court, but they are inadequate to issue such penalties in the first place.

In addition, the type and nature of criminal penalty which the informal judicial system addresses differ from those provided for by the formal penal legislation. For example, penalties involving the deprivation of freedom (i.e., imprisonment) do not exist in the informal judicial system.

Another contrast between the formal and informal systems is that the former requires all penalties be personal and fit the crime, while in the informal system, judgments are enforced on both the criminal and his/her family. A common procedure in the informal judicial system is the so-called *"al jalwah"* (expulsion),[60] by which a criminal's family can be expelled from its place of residence as punishment for an individual family member's crime. In most cases, fines determined by the informal justice system exceed the criminal's financial capacity; hence his tribe or family must bear the financial burden of payment. Such collective penalties violate the principle of individual responsibility.[61]

[59] Article 11 states, "it is unlawful to arrest, search, imprison, restrict the freedom or prevent the movement of any person, except by judicial order in accordance with a law to be enacted".

[60] *Ibid*. at 51-52, 73-74.

[61] Article 15 of the Basic Law states: "Punishment shall be personal. Collective punishment is prohibited. Crime and punishment shall only be determined by the law. Punishment shall be imposed only by judicial order and shall apply only to actions committed after the entry into force of the law."

The informal justice system, like the formal one, attempts to reach a settlement between conflicting parties.[62] However, the informal process is frequently influenced by such factors as the financial situation of the parties to the conflict, their political and partisan affiliations, the size of their families or tribes, whether they are refugees or indigenous, the power and status of the particular tribal judge, and the degree of respect he engenders. Finally, the outcome of the settlement may depend entirely on the means of pressure available to the judge. These factors contribute to developing the contours of the final settlement of the conflict, though not necessarily towards providing justice.

A relationship of sorts has developed between the informal judicial system and executive power in Palestine. There has been a kind of accommodation between the actions of the informal justice system and the agencies of the PA executive, particularly governorates, security agencies and the Presidency itself. An example of this accommodation is in the decrees and instructions issued by the Executive that have regulated and supported the actions of the informal system.[63]

The generally accepted theory behind the rule of law is that governance is determined by the will of the people, and it is the people who delegate this power to the legislative, executive and judicial branches of government. Under that theory, the judiciary exercises a monitoring role over both the executive and the legislative powers. In addition, the judiciary plays a primary role in preserving the rule of law and individuals' rights, a role which it carries out through the guarantees of access to the courts. Another key aspect of the rule of law is the monopoly of judicial power which courts must have to successfully

[62] See *Tribal Justice in Palestine*, Institute of Law, Birzeit University [unpublished] at 51-52, 72.
[63] See e.g. the Presidential Decree No. 161, 1994. Palestine Gazette (Palestinian National Authority) 3 (20 February 1995) 24. Through this decree an Administration of Tribal Affairs was established at the Presidential Office.

adjudicate through all stages of case proceedings. Thus, institutions or entities that undermine this function should not be established. Hence, when the informal judicial system intervenes in criminal conflicts and issues judgments and decisions, it trespasses against the core jurisdiction of the judicial power. In the same vein, when the Executive utilizes or reinforces the tribal judiciary, it also violates the legitimate jurisdiction of the judiciary. These kinds of inroads on the legitimacy of the formal judicial system violate individual rights to fair access to an impartial court system, and violate the basic rule that no penalty should be imposed on any individual except by a duly-executed judicial judgment.

VI Local law versus Military Orders

In the aftermath of the occupation of the West Bank and the Gaza Strip, the General Commander of the Israeli Army issued two separate Military Orders for both the West Bank (Military Order No. 1) and the Gaza Strip (Military Order No. 2).[64] Article 3 of these Orders assumes in the Regional Commander the administrative, legislative and appointment powers for the OPT.

[64] These two Proclamations were called "Proclamation concerning the Administration of Rule and Justice (No. 2) of 1967". For the text of the order of the West Bank, see Proclamations, Orders and Appointments (Israeli Occupation-West Bank) 1 (11 August 1967) 3. For the text of the order of the Gaza Strip, see Proclamations, Orders and Appointments (Israeli Occupation-Gaza Strip)1 (14 September 1967) 5. During the Jordanian rule in the West Bank (1948-1967) and the Egyptian administration in Gaza Strip (1948-1967) two different legal systems developed. When Israel occupied the two regions, it maintained this division. In many cases, Israel used to adopt the same Military Order for both the West Bank &Gaza Strip, but it published them separately in each region.

Despite the Agreements, Israel continues to issue military orders. According to Article I.5 of the Interim Agreement, it is clear that during the transitional period, the Israeli Military Government will be withdrawn, but not dissolved.[65]

In 39 years of occupation, the estimated number of "legislation" is exceeding 2,500 in the West Bank and 2,400 in the Gaza Strip. These enactments cover a wide range of different fields such as commercial, land, judicial and criminal law.[66]

Article XVII.4.b. states:

> To this end, the Israeli military government shall retain the *necessary* legislative, judicial and executive powers and responsibilities, in accordance with international law. This provision shall not derogate from Israel's applicable legislation over Israelis *in personam*.[67]

The reference to "necessary" opens up the possibility that they might be misused to exercise authorities in matters which are transferred to the PA, not least because the description of the powers and responsibilities in most spheres is general and not comprehensive.[68]

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[65] Article I.5 of the Interim Agreement states that "…The withdrawal of the military government shall not prevent it from exercising the powers and responsibilities not transferred to the Council." See Annex IV to the Interim Agreement (on Protocol concerning Legal Affairs), (1997) 36 *International Legal Materials*, 559. It was not clear what the DOP in Article 1 meant by the Palestinian "Council" to be established during the Interim Period. Was it executive or the legislative power? This terminology became clearer in subsequent agreements, which talked about the election of the Council and the formation of the executive members from the Council. Therefore, the "Council" meant the Palestinian Authority (PA), which included both the executive and the legislative powers. For example Article III (2) of the Interim Agreement on the structure of the PA also states that: "The Council shall possess both legislative power and executive power, in accordance with Articles VII and IX of the DOP". For the full text of the agreement of Israel-Palestine Liberation Organization: Declaration of Principles on Interim Self-Government arrangements (done at Washington, 13 September 1993) (1993) 32 *International Legal Materials* 1525.

[66] These numbers are based on the latest statistics of the Legislative Database at the Institute of Law.

[67] The Interim Agreement, *supra* note 1 at 564.

[68] Raja Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories*, (N.p.: Springer,1997) at 41.

Israel was interested in maintaining the legislative changes introduced to the local laws in effect. In reality, the Military Government was most active in "legislating" for land, economy and security. The most effective Military Orders were those issued to facilitate the confiscation of land for building illegal settlements. Though of lesser importance to the Military Government than to the local population other spheres witnessed important changes by means of Military Orders at the same time, such as education, labour, direct taxes, and agriculture.

It was through these means that the Israeli negotiators managed to maintain the legal changes introduced by means of military orders and to incorporate them in the agreements which were signed with the PLO. Examples of Military Orders incorporated in the Agreements were:

1. The Order concerning the Law of Customs and Excises on Local Products (No. 658) of 1976,[69] which created Value Added Taxes, was incorporated in Article III.7 of Annex IV to the Gaza-Jericho Agreement, called "Protocol on Economic Relations between the Government of the state of Israel and the PLO Paris, April 29, 1994".[70] Moreover, the Protocol in Article II.5.a listed the goods which did not fall under the Palestinian local laws. It stipulated that "the Israeli rates of customs, purchase tax, levies, excises and other charges, prevailing at the date of signing the Agreement, as changed from time to time, shall

[69] See Proclamations, Orders and Appointments (Israeli Occupation-West Bank) 38 (1 February 1967) 183.

[70] See Annex IV to Israeli-Palestine Liberation Organization: Agreement on the Gaza Strip and the Jericho Area, made in Cairo, 4 May 1994. This is an Annex of the Protocol on Economic Relations between the Government of Israel and the PLO, made in Paris, 29 April 1994, (1994) 33 *International Legal Materials*, 622 at 696.

serve as the minimum basis for the Palestinian Authority".[71] The implication of this Article is that changes to the laws of the state of Israel including possible future changes will apply to the PA. Israel collects the taxes and transfers them to the PA after deducting administrative fees.

2. Moreover, the PLO, without realizing it, signed up for the continued applicability of Israeli law to the settlers of the occupied territories.[72] For example, Article XVII.4.b of the Interim Agreement explicitly provided Israeli legislation over Israelis *in personam*.[73]

3. In reality, the Israeli-Palestinian Agreements affirmed what the Military Governments did not succeed to achieve before the start of the peace process. A case-in-point was, on the one hand, the local Palestinian courts resisted any Israeli Military Orders that prevented

[71] *Ibid.* at 699.

[72] Raja Shehadeh wrote: "It is clear, then, that the Gaza-Jericho agreement has entirely removed the Israeli settlements-as well as the Palestinians of East Jerusalem- from the legal jurisdiction of Palestinian courts (…) This was done in an agreement to which the Palestinians themselves were a party. At the same time, by confirming the "laws" that were in force prior to the signing of the agreement without defining, which laws are meant, the agreement has left open the possibility that the Israeli side will claim that this constitutes a recognition by the Palestinian side of the applicability of Israeli law to the settlements". See Raja Shehadeh, "Question of the Jurisdiction: A Legal Analysis of the Gaza-Jericho Agreement" (1994) 23 Journal of Palestine Studies 20.

[73] The Interim Agreement, *supra* note 55 at 564.

them from hearing cases against Israeli settlers, but on the other hand, the Israeli-Palestinian agreements regulated these Military Orders.[74]

The Israeli Military Government strategy that emerged from emerged from establishing the Civil Administration in 1981 was, in fact, articulated in the PLO-Israel agreements. It reflected a policy of minimal authority for the Palestinians, limited mainly to the running of daily life; whereas, the real source pf power remains that of the Military Government. It is a policy of recognizing the occupation rather than ending it as required by international law and legitimacy.[75]

The Israeli Military Orders after 1994

Although detailed agreements were signed between Israel and the PLO, the Military Government issued several proclamations on the implementation of the Agreements. Proclamation No. 7 was issued after signing of the Interim Agreement and was entitled: "Proclamation Regarding the Implementation of the Interim Agreement" (Judea and Samaria).[76] It has 10 Articles, most of which are inconsistent with the Interim Agreement. This proclamation is intended to confirm that the source of authority that the PA was to enjoy according to the Agreements is that of Military Commander. Moreover,

[74] See the Order concerning Legal Assistance (West Bank) (No. 348) of 1969 and compare it with Article IV (Legal Assistance in Civil Matters) of the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip in Annex IV (Protocol concerning Legal Affairs).

[75] John Quigley emphasized, in a symposium on "The Legal Foundation of Peace and Prosperity in the Middle East", the importance of solving the Palestinian Israeli conflict within the framework of the rules of international law and legitimacy, especially with respect to the issue of final negotiations such as Jerusalem, refugees, settlements etc. Perry Dane who rejected Quigley's views on the role of international law responded that negotiations shall be the basis of any future settlement of the conflict. See John Quigley, "The Role of Law(s) in a Palestinian-Israeli Accommodation" (2000) 32 Case W. Res. L. Rev. 273.

[76] Proclamations, Orders and Appointments (Israeli Occupation-West Bank) 194 (23 November, 1995) 1947.

Military Order No. 7 did not dissolve the Civil Administration, which was created by the Military Government. Contrary to the provisions of the Interim Agreement in Article I.5, Article 6.a of the Order stipulates that the Israeli Military Commander in the area (OPT) was to continue exercising powers, responsibilities and duties – which included legislative, judicial and executive powers – related to settlements and military locations. It is clear that the Military Order seeks to consider that the Israeli military Commander as the ultimate source of power. As a result, approximately 200 security enactments were issued during the interim period (1994-1999). Out of this number, many Military Orders were issued in spheres and responsibilities under the PA functional jurisdiction. The Israeli Military pamphlet gave us many illustrations of such Orders; here are two of them:

> 1. An amendment Order to Towns, Villages and Building Planning Law (No. 1446) was issued in 1996,[77] even though Article 25 of Annex III to the Interim Agreement transferred the local government sphere to the PA. Israel would argue that this Order was intended to be applicable in Area C, but there were no indications in the Order of this intention. Another clear violation in the sphere of local government was the Military Order (No. 1) of 1997.[78] After forbidding Palestinians in Hebron City to add other constructions to their homes, Article 4 of the Order (No. 1) added that to resume building, permission should be

[77] See Proclamations, Orders and Appointments (Israeli Occupation-West Bank) 169 (16 November 1996) 2129.

[78] See Proclamations, Orders and Appointments (Israeli Occupation-West Bank) 172 (11 February 1997) 2243.

obtained from the Commander of the Hebron region, who could give a conditional permission or refuse the demand.

2. Another enactment, the Regulation Concerning Amending Income Tax Law (without number) of 1999 amended the Jordanian Income Tax Law (No. 25) of 1964.[79] It was introduced although this sphere was transferred to the PA in accordance with Annex III of the Interim Agreement in Article 8 on Direct Taxes, which gave the PA the authority to collect income taxes from Palestinians in all Areas A, B, and C.

In the following section, we shall see how the PA dealt with the Israeli Military Orders.

The PA and the Israeli Military Orders

Upon its inauguration in 1994, the PA issued a Presidential Decree regarding the legislation and the judicial system in the West Bank and the Gaza Strip. In Article 1, it declared the following:

> The laws, regulations and orders of the West Bank and the Gaza Strip, which were in force prior to June 5th, 1967, shall remain in force until unified.[80]

As a result of one interpretation of this Article, the Israeli Military Orders could be considered to be no longer in force in the West Bank and the Gaza Strip. Being aware of

[79] See Proclamations, Orders and Appointments (Israeli Occupation-West Bank) 187 (16 April 1999) 2243.

[80] Palestine Gazette (Palestinian National Authority) 1 (20 November 1994) 10.

political and legal consequences of such a conclusion, the PA issued another Presidential Decree (No. 5) in 1995, in which it declared:

> All powers and responsibilities in accordance to legislation, laws, decrees, proclamations and orders which are in force in the West and Gaza Strip prior to May 19th, 1994, shall be vested in the Palestinian Authority.

Retreating from the position held in the Presidential Decree of 1994, this Article, (which is in conformity with the Article IX of the DOP), confirmed the continuity and the applicability of the Military Orders as long as they are not replaced by the PA. However, the Palestinian courts in the WB&GS distinguished two types of Military Orders. They continue to apply the Military Orders which fill the lacunae in local laws, such as those on the compensation of traffic victims, and others which have no political implication until their replacement by Palestinian legislation.[81] Nonetheless, the presence of the Military Government and Administration with full powers to issue security legislation continues to form the main threat for the development of an independent and influential legal system.

VII Conclusion

The Palestinian legal reformers are faced with complex digests of diverse laws and it could be concluded that the Palestinian legal system is indeed in transition. Policymakers do not always have the freedom to form perfect legislative policy. A country like Palestine, which is under occupation, has to build its own legal system

[81] Interview with Ala Bakri: a professional lawyer in Ramallah, interviewed by Feras Milhem (15 November 2003).

within a difficult political situation. The Palestinian policymakers have already managed to invent practical legal solutions to complex political difficulties imposed by the occupier; for example, the impossibility to travel between the West Bank and the Gaza Strip, the military siege imposed on Palestinian communities and the restrictions on the freedom of movements.

The advent of the Oslo Agreements paved the way for a kind of legal reform that aimed to reflect cultural aspects as well as the legislative priorities and political needs of the Palestinian people. These changes were also perceived necessary to provide the people with basic human rights that were denied to them for over a century. As expected, the Palestinian society anxiously participated in the first and second legislative elections, and effectively influenced several draft laws, especially the draft Basic Law, which was adopted in 2002. Its articles not only provide the basis for the future developments of the Palestinian law, but also elaborate on human rights as formal sources on which the courts are constitutionally obliged to draw. The Basic Law incorporates the values of freedom and democracy as principles that have to shape the Palestinian society.

While the legislative policy of the PA is to build a modern legal system, the established local customs and non-state normative solutions have so far been ignored. The Palestinian legal reformer can, and still has the chance to, incorporate some customs and customary law procedures into the formal state system and act against inappropriate customs and social behaviours. In essence, any legal arrangement towards customary law is a policymaking decision and, as such, must be considered in advance of the law reform.

Notwithstanding the lack of a clear legislative policy and other constraints, the fact remains that legal reform has been proceeding within a complex political situation due to the continuing Israeli occupation, curfews, siege and restrictions on movements between the Palestinian cities, villages and refugee camps. The physical separation of the West Bank and the Gaza Strip has prompted members of the PLC to proceed to law-making and reform, using available technology, such as videoconferences, electronic mail, faxes *etc*. The current political situation will probably have an impact on the future development of Palestinian law if it reaches a dead-end, as a result of the decision of the Quartet to freeze support to the PA after the victory of Hamas in the legislative elections, and Israel's completing the construction of the Segregation Wall, which is already way deep into Palestinian occupied territories. The Palestinian legal reformer will have to think about the impact of the new Segregation Wall on the proper functioning and prospective evolution of the Palestinian legal system.

In addition to the bulk of Military Orders introduced by the Israeli occupation, which has added more complexity to local laws, the Israeli settlements in the OPT will also affect the future independent evolution of the Palestinian legal system, since these settlements apply Israeli laws. The outcome of the Israeli policy, in using sophisticated "legal tools" to extend its law into the OPT, is a complete legal segregation between two peoples living in the OPT. These days, the legal segregation becomes more obvious for the simple reason that the number of settlers and settlements has been increasing.

To conclude, it would be fair to say that a rule of law exists to an extent that is greater than the extent of the sovereignty of the PA. Many limitations, handicaps, and restrictions exist that would make a positive statement about the rule of law in OPTs a

deformation of reality, but the opposite is also a statement that jumps over the basic attribute of the rule of law: sovereignty.

The past few years have witnessed the second Palestinian *Intifada*: an era where every aspect of the life of the Palestinians deteriorated. The GNP went down dramatically, unemployment grew to an unprecedented size, and poverty reached very high levels. The brutality of the occupation was at a peak during the past period.

The fact that the Palestinians were working on the improvement of the general situation of the rule of law, and in particular on the legal and judicial system is worth praising and the fact that the success was limited does not come as a surprise.

The main challenge to the rule of law in Palestine is occupation, and the prevalence of an externally imposed agenda that does not have the wellbeing of the nation as its priority. This agenda is imposed in two different manners that pose different challenges: the first is external and ranges from colonial impositions by Israel to reform agendas perceived by international actors led by the US that do not fully fit the needs of the Palestinians; the second is the lack of a national vision due to the situation in which national liberation stays the ultimate goal that unites Palestinians prevailing over serious and fruitful internal debate on the form of the future life in the nascent state.

Many international organizations are involved in facilitating the promotion of rule of law in Palestine. It is important to couple these efforts in Palestine with efforts on the international level aiming at enforcing a just political solution to the conflict, thus ending the belated colonial reality that the Palestinians face.

The failure of the peace process poses questions, the answers to which lie partly in the inevitability of an integrative approach to reform in Palestine: The political process should be dealt with on the political level as well as on the popular level; the economic development should be more sustainable and its results should reach the wide population; the reform process should be set to respond to a local agenda; and each process should bare a decolonization aspect, that brings the Palestinians closer to freedom, which stays the number one driver of the Palestinians.