

The Challenge of the Enforcement of the Rule of Law and Governance in Palestine: The Tribal Justice System and the Rule of Power

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Abstract

The article addresses the system of tribal justice and the rule of power in the Occupied Palestinian Territories as two key obstacles to the enforcement of the rule of law and governance. The article presents the legal grounds for the involvement of tribesmen in resolving disputes among citizens outside the rule of law. It goes on to analyze the role and interest of the executive authority in encouraging the involvement of tribes while the authority continues to interfere in the affairs of the official judiciary in both functional and structural terms. It also explores a number of illegal legislative and regulatory interventions made by the president of the executive authority with the effect of undermining official institutions supporting good governance and transparency. The article finds that it is impossible to enforce the rule of law in the Occupied Palestinian Territories as a result of existing practices that are difficult to change without renewing constitutional legitimacy by referring to the people as the source of authority for criminalizing any act contrary to or impeding the rule of law, or impeding or encroaching on the jurisdiction of the official judiciary.

Keywords: Tribe justice; Rule of law; Governance; Legal reform.



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1. Introduction

The Occupied Palestinian Territories (OPT; the West Bank, Gaza Strip, and Jerusalem) were not governed by any Palestinian national political system until the Oslo Accords signed between Israel and the Palestinians in 1993. Before then, the OPT were governed under Ottoman rule, the British Mandate, and Jordanian rule in the West Bank, under Egyptian rule in the Gaza Strip, and then under the Israeli occupation. Finally, Israel and the Palestine Liberation Organization agreed to grant the Palestinian Authority (PA) areas of control and influence in line with the Oslo Accords. In the absence of a nation state, tribes have played a vital role in resolving disputes in society. Political parties have cooperated with tribes in this, especially after the 1987 uprising, when lawyers refused to plead before the courts of the Israeli occupation, leading to the people's boycott of these courts (Al-Agha, 2006). The resulting cultural heritage requires, on the one hand, tribal involvement in the resolution of disputes between people in line with customs and practices, and, on the other hand, a public sense of the importance of resorting to the tribe for justice and protection.

After the formation of the PA, tribesmen were heavily used to consolidate its rule and control over different areas. The PA continued to invest in tribesmen even after the adoption of dozens of new Palestinian laws requiring the rule of law, separation of powers, and official jurisdiction to settle disputes between conflicting parties. In particular, the executive branch has used the power it draws from tribal support to dominate political and administrative decision-making in the OPT. The first president, the late Yasser Arafat, is seen by the people as a revolutionary and militant who wanted to build an independent state on the ruins of the occupation. This symbolism gave him wide-ranging and absolute authority to build an organizational and legislative framework that gives wide powers to the president of the executive authority. The most important of these powers is the ability to set a framework for the administrative formations of the regions to guarantee the control of the president and his party over the masses, in the absence of political pluralism and given the limits of the democratic experience at the time.

This article argues that enforcement of the rule of law in the OPT is impossible because of two fundamental obstacles: the masculine tribal justice system that is equivalent to a formal justice system with the support of the executive branch; and tribal control of the logic of power and partisan interests over the structures and institutions created by the PA, especially those concerned with accountability, transparency, and anti-corruption. These issues will be discussed in turn, drawing on previous studies and analyzing legislative texts. The researcher will draw on information available to him from his experience in the field and as a lawyer, and on his acquaintance with the origins of the work of formal and informal justice systems, without ignoring the requirements of common sense.

2. The System of Tribal Justice and its Role in Distorting the Rule of Law

By the tribal justice system, we mean the resolution of various conflicts between citizens by tribal leaders in accordance with customs and traditions, established over time, that lie outside the framework of official justice institutions. The tribal justice system is old, and it has a well-established presence in tribal and regional areas (Thabet, 2010). Studies point to its long-standing presence in Palestine (Al-Aref, 1933), dating back to the fundamental role played by the Bedouin in the Beersheba region (Al-Mezni, 2005). The system still exists in various

areas under the control of the PA, although its role has receded to some extent; this is largely because of the existence of official justice institutions and legislation that limits the power of imposing criminal penalties to the regular judiciary on the grounds of human rights and fundamental freedoms. This section discusses the legal basis of the tribal justice system in Palestine, and its relationship to the formal justice system and gender justice.

2.1. Legal Basis for Tribal Justice

Palestine has been ruled by different political regimes, ranging from the Ottoman rule to the PA, in both the West Bank and the Gaza Strip and in accordance with the spatial mandate specified in the interim agreements with Israel. Most of these political systems have relied on conciliation men and tribal leaders (“Mukhtar”) in certain matters, given their influence on families or tribes in accordance with the cultural heritage of the society, its customs, and traditions. For example, such individuals play a role in calming souls and satisfying disputants when conflicts of a tribal nature occur. Nevertheless, the position of these regimes in terms of the legislative and regulatory aspects of the tribal judiciary has varied. The Egyptian administration of the Gaza Strip, for instance, maintained the previous British Mandatory legislation, whereas the British Mandate and the Ottomans tended to enact their own legislation. The PA officially acknowledged and dealt with existing legislation without regulating by special legislation the scope of its work, its powers, or its responsibilities (Al-Agha, 2006; Birzeit University Institute of Law, 2006). All these regimes used tribesmen to settle disputes, to consolidate their own rule, and to keep the situation stable, as was particularly evident in the Ottoman and British periods (Bentwich, 1948; Robinson, 2009).

On 9/11/1994, the late president of the Palestinian National Authority, Yasser Arafat, issued Decree No. 161/1994 establishing a tribal affairs department affiliated to his office. He also assigned a manager to this department. This decree did not specify any tasks or powers of this department (or of tribesmen), nor did it mention the origins of the tribal judiciary or its relationship to the official system of the emerging authority and its various institutions. This situation persisted even after the elections of the first legislative council in 1996, which enacted dozens of laws governing affairs of public life, including the judiciary. Because laws relating to judicial matters made no reference to the tribal judiciary, they lacked the legal value of decisions and measures taken by conciliators and tribal judges.

When the amended Basic Law of 2003 came into force, the tribal judiciary was, in theory, outside the formal judicial system of the country. The Basic Law recognized the right of every citizen to have recourse to his natural judge. It also assured the independence of the judiciary, which is assumed by courts of various types and degrees, leaving the nature of its formation and competence to special laws. Article 6 of the Judicial Authority Law No. 1 of 2000 defines the types of courts, and Article 14 of the same law specifies the jurisdiction of these courts. The Law on the Formation of Statutory Courts No. 5 of 2001 set out the manner of the formation of the courts and their jurisdictions. These laws made no reference to the tribal judiciary; moreover, they explicitly canceled any provisions that contradicted their own provisions.

On 5/8/2012, the president of the PA issued Decree No. 89/2012 establishing and forming the Higher Commission for Tribal Affairs for the Southern Governorates (Gaza Strip), which relates to him in person. The commission’s membership included 21 members, all men and from different clans. A member was assigned to the functions of the general coordinator of the commission until general elections took place. This decision gave the body the authority to form subcommittees in the provinces to follow up on tribal affairs. As in the past, the decision did not regulate the work of this body, nor did it refer to the powers and authorities of its members, or even of clansmen and tribal representatives in the Gaza Strip. This left the executive authority free to interpret the matter in a way that served its own interests. Although the decision was based on the amended Basic Law of 2003, this authority was not appropriate; in accordance with Article 69 of the Basic Law, the establishment of bodies and their regulation must be made by law, not by presidential decree. Moreover, establishing such a body is contrary to constitutional principles and constitutes an attack on the legal and constitutional jurisdiction of the official judiciary. The purpose of the decision appears to have been to consolidate the authority of the PA’s president in an area controlled by an opposition political party, to limit that party’s influence, and to try to extend the influence of the ruling party in that area. (Hamas has controlled the Gaza Strip since 2007.) This understanding can be inferred from the text of Article 3 of the same resolution, which ruled that the mandate of the coordinator of the commission would continue until legislative and presidential elections were held.

Furthermore, on April 18, 2019, the president of the PA issued a decision to establish a Higher Commission for Tribal Affairs in the Northern Governorates (West Bank) under his own authority. This decision allowed the commission to form subcommittees in the provinces to follow up on tribal affairs. On May 30, 2019, on the recommendation of the head of general intelligence, the president issued a decision to revoke the previous decision. This followed a meeting between the head of general intelligence and some tribesmen who had not been represented in the higher commission. This clearly indicates the concerns of the executive authority about loss of tribal loyalty and the risk that tribal divisions would result from a lack of representation of some tribes within a commission.

From the foregoing, we can infer that the executive acknowledges the presence of tribesmen; that it does not, however, wish to legitimize their actions relating to the resolution of disputes between citizens clearly and explicitly within the legal system formed since the advent of the PA; and that it wishes to avoid giving the impression to the public and the international community that it is not committed to the enforcement of the rule of law. By examining the timing of the presidential decisions discussed above, one can discern the political objectives of the executive authority from its dealings with the tribes. The first decision, issued at the beginning of the formation of the national authority, was preceded by a long period during which tribesmen dominated the affairs of citizens and families. This domination was due to the absence of a nation state and its institutions, a lack of public confidence in the justice

administered by the Israeli occupation, and the refusal of the population to recognize Israeli courts and legislation (Al-Agha, 2006). The second decision was made at a time when the influence of the executive authority and of the president in the Gaza Strip had receded and Hamas was in control of the Gaza Strip. The third decision was made following the executive authority's rejection of what has become known as the "deal of the century" aimed at ending the Palestinian-Israeli conflict, and thus in the context of the executive authority's fears of being besieged and of having its role limited by the Israeli occupation. At the same time, the constitutional court, loyal to the president, had decided to dissolve the elected legislative council, the majority of whose members belonged to several tribes.

The question now is this. As long as the executive authority recognizes tribalism, and as long as the legislations issued by the PA are devoid of any legal regulation of the interventions of tribal judges, what is the legal basis for tribal judges' involvement in the resolution of public disputes? What is the legal value of their procedures and their decisions?

The answer to this question begins with the determinants of the first presidential decree, Decision No. 1, issued in Tunisia on May 20, 1994. The decision kept the laws, regulations, and orders that were in force in the West Bank and Gaza Strip before 5/6/1967 until their consolidation, modification, or abolishment. This means that the regular, Sharia, and sectarian courts of various grades and the public prosecution continue to operate in accordance with the laws and regulations in force. In reviewing the legislation that, in accordance with the aforementioned decision, has remained applicable and in force till now, we have found no legislation that recognizes the existence of tribal courts or the power of clansmen and tribal judges to adjudicate any dispute. Specifically, the Basic Law of 2003 abolished all inconsistencies with its own provisions. Article 39 of the Law on the Formation of Courts of 2001 repealed the Law of Courts No. 31 of 1940 (then in force in the Gaza governorates, and which explicitly recognized the existence of tribal courts). The Law on the Formation of Courts No. 26 of 1952, which was in force in the governorates of the West Bank, canceled all provisions that contradict with its own provisions. The Formation of the Courts Act of 1952 repealed all previous Jordanian or Palestinian laws that contradict its own provisions; this involves the repeal of any Ottoman or Mandatory legislation governing the work of the tribal judiciary, including the Tribal Courts Ordinance of 1937. It should also be noted that Article 2/11 of the Sharia Courts Law of 1959, which is in force in the West Bank, has given the Sharia courts exclusive authority on *Diyaa* (compensation for death or personal injury), which entails the abolition of Article 70 of the British Mandatory Civil Violations Act of 1944, which had granted this authority to tribal courts.

We conclude from this that legislation (whether Ottoman or issued by the British Mandate authorities or others) governing the work of the tribal courts prior to the entry into force of the aforementioned laws issued by the PA has been repealed, and that there is no longer any legislation in force for the basis of the judiciary tribes in the OPT.

Nevertheless, the regular courts have always considered the conciliation deeds issued by tribesmen as a mitigating circumstance for a perpetrator's punishment, as they involve the abolition of the victim's personal right. In addition, a request for the release of the accused on bail may in some cases be facilitated by tribal involvement; the contribution of clan conciliators to the maintenance of civil peace and public security can be a factor in a judge's belief that releasing the accused will not constitute a threat to public order. The Penal Code of 1960 sets out the legal effects of a victim's forgiveness toward the accused and the crime committed, including the cessation of the case and the execution of the sentence handed down, in the event that it did not acquire a definitive degree and where the case was contingent upon the claim of a personal right (Article 52 of the Penal Code No. 16 of 1960). In addition, the law grants the competent court the discretion to reduce penalties if mitigating articles are available (Articles 99 and 100 of the 1960 Penal Code). These texts can be used to demonstrate the legal value of conciliation instruments in acts constituting crimes.

Conversely, however, studies (Birzeit University Institute of Law, 2006) indicate that the tribal judiciary has not been affected by judgments made by the regular judiciary. Tribal judges have often convicted defendants despite court rulings of their innocence; because of the speed of the informal judiciary in the resolution of disputes compared to the regular judiciary, decisions of tribal judges are likely to be issued before decisions of the competent courts. This can be considered as a further major reason for the continuation of the work of the tribal judiciary.

2.2. Gender Justice and the Rule of Law

The system of tribal justice lacks representation of women, as it is limited to men as representatives of the tribe or family. In this regard, women do not contribute to the resolution of disputes or conciliation. A woman does not even appear in procedures and ceremonies of reconciliation as a victim; consequently, she does not govern, defend herself, or present her requests before the mediating body. What is more serious is that, in most cases, the tribesman imposes himself as conciliator or judge regardless of the woman's wishes. She is often not consulted on the matter and must accept the decision of the men in the situation.

The tribal judiciary deals with a range of cases, including those directly related to women's rights and crimes committed against women.¹ Based on the customs and traditions of the so-called *Al-Suttra* "occultation" and the

¹ In fact, the tribal judiciary deals with various societal issues as well as financial, criminal, and personal status disputes. Conflicts usually relate to women in criminal and personal status matters, rather than in financial transactions. In the field of the family, clansmen intervene to resolve differences between spouses, through their relatives, in order to reach reconciliation; this may include issues of alimony, abuse and violence against the wife, child custody during divorce or separation, and inheritance. On the basis of social relationships, community customs, and religious beliefs, the majority of society accepts these efforts. However, there is some criticism relating to solutions where the participation of the woman concerned is limited through the agency of her father, a "mahram", or those who have authority over the family. If a woman insists on her position on a particular issue, often her financial rights are waived in return for the securing of other rights. This is not uncommon when a woman requests a divorce. It is

preservation of the “honor of the family,” the Penal Code established provisions that enshrine the customs which prevailed when the law was adopted; the lack of women’s participation in drafting its texts is another factor that led to the consecration of a discriminatory male philosophy (Birzeit University Institute of Law, 2012). A case in point is Article 308/1 of the Penal Code of 1960, which stipulates that “if a valid marriage is concluded between the perpetrator of one of the offenses set forth in this chapter and the victim, the prosecution shall be suspended and if a judgment in the case is suspended, the execution of the punishment imposed on the convicted shall be suspended.” The solution reached by tribesmen in such cases often obligates the aggressor to marry the victim, even without her consent. In effect, the Penal Code legislator codified tribal practices that were, and still are, widespread in society.

Until recently, Articles 98 and 340 of the Penal Code of 1960 granted a mitigating circumstance in the punishment for murdering a woman if the murderer had been angry because of an act committed by the woman and classified as a violation of family honor.² The Code also provided mitigation for a husband who kills his wife found in adultery in the matrimonial bed.³ Under pressure from human rights organizations and women’s rights organizations, these two articles were amended by two law decrees to lift the privilege granted to the perpetrator. In practice, however, the situation has not changed much, as there is still discretion for the competent courts to rely on other legal texts as grounds for mitigating the punishment, including the aforementioned tribal reconciliation instruments through which the victim loses a personal right, even under the coercion of tribesmen.

The tribal judiciary attempts to reduce the exacerbation of conflicts and to manage reactions to juvenile offenses that are punishable by law by making public the “thoughts” of the families of the victim and by moving “relatives” to family headquarters or residences. Such behavior is required by the culture of the society, and the customs of the tribe are used to achieve the rehabilitation of the family and its prestige and reputation in front of other families. This contrasts with the weakness of the institutions of the formal justice sector, which may be unable to operate in certain areas because of the political divisions in the OPT. Nevertheless, the tribal judiciary approach works to the detriment of the principles of the rule of law and of guaranteed fair trials for individuals, whether perpetrators or victims.

Previous studies indicate that tribal judgments tend to favor positive discrimination in favor of women when they are the victims of conflict (Birzeit University Institute of Law, 2006). This may reflect the prevalence of a view in Palestinian society, by virtue of customs and traditions, that women’s issues, especially those related to honor and consideration, are private and confidential. This view entails the rapid resolution and containment of conflicts that involve such issues. In addition, the tribal tradition considers women as honest in what they say, which entails a hardening of penalties for those who dare to violate them (WACS, 2015). However, this does not mean that the situation is fair and equitable for women, for several reasons, notably the impact of the size of the family, its social, economic, and political status, and the influence of its members in political organizations and forces on the formula and content of the tribal solution to the issue. The solution may be marriage between a raped woman and her rapist or the imposition of financial sanctions on the perpetrator’s family, in either case without the consent of the victim. The conflict is often ended with the intervention of the elected tribesman of the family, the woman’s guardian. If the woman comes from a small family or a refugee family, this may be brought about even without the consent of her family. Likewise, a solution may be imposed through pressure from somebody with political or social influence. It is unsurprising, therefore, that studies show that people who have been in these situations consider that the solutions of the tribal justice system are unfair (Birzeit University Institute of Law, 2006). Victims may not be consulted, even as parties to the conflict; the tribe’s rulings may be imposed on them under the threat of abandonment by the tribe; tribesmen may not verify alleged incidents fairly and adequately. Even after resolution of a conflict, the consequences continue, not only in the form of the obligations imposed on the accused, but also in the burden of the collective penalties sometimes applied, which may involve the deportation or division of the family, or prohibition on family members entering certain areas (Birzeit University Institute of Law, 2006). Decisions may be accepted for reasons other than perceived fairness: out of respect for the intervention of the “seniors of the tribe” on the basis of custom and tradition; in the hope of avoiding the escalation of conflicts and revenge actions (such as the scourge of “bloodshed” from burning property and homes in the wake of an offense); or even to prevent interference from people who seek advantage by prolonging conflicts.

As previously stated, the interests of the executive authority in respect of clan conciliators and tribesmen have been noted, with no positive interference from the legislative and judicial branches in particular. This means that in practice the tribal judiciary, a tributary of the executive branch, carries out functions exclusively assigned to the official judiciary. This contradicts numerous explicit provisions enshrined in the Basic Law of 2003: namely, that the people are the source of power exercised through legislative, executive, and judicial powers only on the basis of the

the man who has the power to divorce in the first place, and it is contrary to the customs and culture of the society that a wife can set conditions on her husband before entering into marriage in order to ensure her right to divorce.

² Article 98 stipulates that “The perpetrator of a crime committed while in a revolution of anger resulting from an unjustified act of gravity committed by the victim, shall benefit from the mitigating excuse.” However, this provision was amended by Decree Law No. 10 of 2014 to prohibit the perpetrator from taking advantage of this mitigating excuse if the act was committed on the grounds of honor. Article 18 of the Penal Code No. 74 of 1936, in force in the Gaza Strip, has been amended by the addition of a phrase (not including the murders of women for “family honor”) under Article 2 of Law No. 7. (2011) on the amendment of the Penal Code in force in the northern governorates and the Penal Code in force in the southern governorates.

³ Article 340 was repealed by Decree Law No. 7 of 2011 amending the Penal Code in force in the Northern Governorates and the Penal Code in force in the Southern Governorates. This article reads as follows: “1 –the perpetrator may benefit from the excuse of committing the crime, who surprised his wife or one of his incest in the act of adultery with another person and killed or injured or hurt both or one of them. 2. The perpetrator of murder, injury or abuse shall benefit from a mitigating excuse if his spouse or one of his assets, branches or sisters is surprised with another on an unlawful bed.”

principle of separation of powers (Art. 2); that the rule of law is the basis of government in Palestine and that all bodies, commissions, institutions, and persons are subject to the law (Art. 6); and that the right of all to equality before the law and the judiciary without discrimination is guaranteed (Art. 9).

However, the working procedures of the tribal judges, and the penalties they decide on, are contrary to the stable rules of the various legal systems, treaties, and international conventions, and also to the Palestinian laws in force. They contradict the principle of personal punishment, the prohibition of collective punishment, and the principle that there is no crime and no punishment or penalty except by written law. Except by a judicial ruling, the accused is innocent until proven guilty in a legal trial, in which he is guaranteed the right to defend himself (Articles 14 and 15 of the Basic Law of 2003). In addition to guaranteed freedom of residence and movement for individuals, the arrest or restriction of freedom of any person is prohibited except by a judicial order (Articles 11 and 20 of the Basic Law). These legal principles are binding on all, and nobody may violate or derogate from them with impunity. This contrasts markedly with the work of tribal justice and the measures it imposes when resolving disputes of a criminal nature, as there the accused is not given the opportunity to defend himself in a fair way (and a woman who is accused does not appear in tribal court proceedings at all). Tribal punishment is not based on the text of the law but is inspired by customs and traditions. Often such punishments are collective and violate the rights of residence and movement, for example, deporting the family of the accused (*Al-Jalwah*), preventing them from walking on certain streets, and imposing sums of money that the tribe or the family must pay. This also has the effect of punishing the accused twice, once through the decisions of the tribe and a second time through the authority of the official judiciary. Such punishments are therefore contrary to the principle of personal responsibility and inconsistent with the most basic human rights.

We conclude from the above that the tribal judiciary is an obstacle to the strengthening of the official judiciary, and that it violates the principle of the rule of law and the right to a defense. However, the executive branch supports this type of litigation for what it deems to be its best interest, even at the expense of the rule of law.

3. The Rule of Power vs. The Rule of Law

The amended Basic Law of 2003 is a provisional constitutional document, pending the drafting of the permanent constitution of the State of Palestine. It regulates fundamental rights and freedoms, and defines the form of government, the functioning of the public authorities in the state, and the limits of their powers. According to this law, the principle of the rule of law is the basis of governance in Palestine, and all authorities, organs, bodies, institutions, and persons are governed by law. The government is accountable to the president of the PA and the legislative council, within the framework of the principle of separation of powers.

The executive branch, according to the Basic Law, has two heads: the head of the PA and the council of ministers. Part 3 of this law specifies the powers of the president exclusively, while Part 5 regulates the powers of the council of ministers and its president without restriction. The powers of the president of the authority are summarized in the sovereign affairs not related to the administration of the normal affairs of the country, and assisted by the council of ministers in accordance with the law. Pursuant to Article 63 of the Basic Law, the council of ministers (the government) is the supreme executive and administrative organ of the country. With the exception of the president of the authority's executive powers in accordance with the Basic Law, executive and administrative powers is the prerogative of the council of ministers. The relevant competences (set out in Article 69) include the preparation of the administrative apparatus, the establishment of its structures, the provision of all necessary means, the supervision and follow-up thereof, and the establishment or abolition of bodies, institutions, and authorities, or similar units of the administrative apparatus covered by the executive branch of the government. Each such body and institution is regulated by law, and the heads of such bodies and institutions are to be appointed and supervised in accordance with the provisions of the law.

In addition, Article 85 of the Basic Law stipulates that the country is regulated by law in local administrative units with legal personality, each of which is to have a directly elected council. This special law specifies the competencies and financial resources of the local administration units, their relationship with the central authority, and their role in the preparation and implementation of development plans. It also takes into account the various aspects of these units and their activities, including the preservation of the territorial integrity of the country and the interests of the communities. Law No. 1 of 1997 on Local Authorities was amended by Law No. 9 of 2008 and still regulates the relationship between local authorities and the ministry of local government, on the one hand, and their relationship with the council of ministers, on the other. Article 15 of this Law granted the council of the local authority wide regulatory powers and the issuance of regulations or executive regulations necessary for the authority's work and to secure its interests and needs.

It is noted that the executive powers granted to the president of the authority are constitutionally limited. Nonetheless, the president has in fact exercised legislative and regulatory powers outside the framework of the constitution to give himself greater powers to manage the affairs of the country and to interfere with the work of the constitutional institutions of the PA. He has thus extended his own political influence and that of his ruling party, contrary to the rule of law. The main interventions are presented below.

4. Appointment of Governors in the Palestinian Governorates

The first president of the PA issued Presidential Decree No. 22 for the year 2003 regarding the powers of the governors, giving the governor the highest executive authority and placing the head of the general administration in

his governorate.⁴ This decree set out several powers for the governor intersecting those of municipalities and the police. As a result, the governor has authority in the administration along with the directly elected local government bodies, the council of ministers, and the president of the PA. According to Presidential Decree No. 22 of 2003, the governorate's administrative apparatus consists of the governor, his deputy, and a number of advisors and administrative staff. Article 5 of the decree defines the powers of the governor: to maintain public security, morality, public order and morals, and public health; to protect public freedoms and the rights of citizens; to protect public and private property and to ensure security in the province; and to work on economic, urban, and social advancement in the province, achieving equality and justice, ensuring the rule of law, and implementing instructions and orders issued by the president of the national authority.

In practice, this decree undermined the principle of administrative decentralization and confiscated the will of local constituency voters by granting the governor, appointed by the president, powers parallel to those accorded to democratically elected municipalities. The president used to appoint all governors from the members of his Fatah party, the ruling party in the West Bank. Moreover, the appointment of governors by the president in the Gaza Strip after 2007 (the year in which the opposition party Hamas took power in all areas of Gaza) has constituted an equivalent authority to Hamas's *de facto* government as heads of all local administrative bodies belonging to Hamas. By means of this legislation, the president was able to create areas of influence throughout the OPT without interference from the legislative authority or even the council of ministers; he appoints and dismisses them, without restraint and with no accountability to any constitutional authority. This is a departure from the provisions of the constitution, which did not endorse the idea of governorates. The constitution, rather, admits the organization of local administrative bodies being subject to a special law issued by parliament.

The executive branch did not content itself with the above, but insisted on the entry into force of the Administrative Formations System No. 1 of 1966, issued during the Jordanian rule of the West Bank. This was, however, implicitly repealed under the provisions of the Basic Law of 2003 and the Local Authorities Law of 1997 because of the contradiction between its provisions and the administrative organization set out by these two laws. The 1966 regulation provides for the establishment of an executive council in the governorate to facilitate its affairs. The executive council consists of the governor as president, the assistant governor, the chief of security for the region, and the heads of the ministerial departments in the governorate, excluding the courts (Article 6). The executive authority aims to uphold this system to emphasize the role of the governor and the security agencies appointed by the president of the authority in the management of public affairs of the governorates as a parallel authority to local bodies. This ensures the creation of a public base for the executive authority at all times.

These actions have resulted in a lack of clarity and overlapping of powers and responsibilities between the Presidential Decree and the System of Administrative Formations of 1966, on the one hand, and the two legislation and local government systems, on the other. The powers granted to the governor under Article 5 of the decree are broad and absolute, and fall within the jurisdiction of other bodies such as local government bodies, the police, and ministry directorates. In the absence of any balance with the powers of the said bodies, the general provision of these powers would confuse work in the field, creating a state of conflict among the authorities at the expense of the implementation of their responsibilities and duties. Such conflict reinforces the role of the executive authority in intervening to interpret and resolve issues to its own advantage and in using the tools and possibilities made available by third parties. This status quo disrupts the will of the voter, circumvents the rules for the election of local bodies, and undermines the rule of law.

5. The Dissolution of the Legislative Council and the Supreme Judicial Council

The first legislative council was elected in 1996 and approved the Law of the Supreme Constitutional Court of 2006. (The council's membership was dominated by Fatah because of the refusal of opposition parties at the time to participate in the elections.) In accordance with Article 5 of this Law, the president of the PA has the sole power to appoint the chief of the court and its judges. In fact, after the failure of reconciliation talks between Fatah and Hamas, the president issued Decision No. 57 of 2016 on the formation of the Supreme Constitutional Court: no member of the opposition was appointed, and the majority of the members of the formation were loyal to the Fatah movement in the West Bank. We believe that the formation of this court was designed to legitimize the subsequent actions of the president in a struggle with Hamas for influence. Indeed, after the court began to exercise its powers, the president violated the provisions of the constitution by dissolving the legislative and judicial branches. On December 23, 2018, the Supreme Constitutional Court issued a decision to dissolve the legislative council elected in 2006, a majority of whose members were from the opposition Hamas party. This decision was taken in response to

⁴ The Department of Governors Affairs was transferred from the Ministry of the Interior to the headquarters of the PA pursuant to Presidential Decree No. 74 of 2003, issued on May 5, 2003. The Department of Governors Affairs carries out the following tasks: forming the Secretariat of the board of governors and coordinating its meetings; following up the needs of governors with ministries, government departments, public authorities, and institutions; following up the implementation of policies and general plans adopted in the governorates; receiving the reports of the governors and informing them of the orders and instructions of the president of the national authority; and establishing a database and reporting on the activities of the governorates. The board of governors, chaired by the president of the PA, meets regularly every two months or when necessary at the request of the president (Presidential Decree No. 15 of 2005 on Governors' Meetings, issued on June 27, 2005).

an interpretation request submitted by the Minister of Justice at the behest of the executive authority. The court also decided that the president obtained the right to administer the state and to issue decisions in accordance with Article 43 of the Basic Law, in light of the disruption of the work of the legislative council, and in order to preserve the status of the political system as the main title and the central authority in the absence of legislative authority (Request for Interpretation No. 10/2018). As a result of this decision, more powers have been concentrated in the president's hands, and Hamas is marginalized in the event of a power struggle. Pursuant to the constitution, the speaker of the Palestinian legislative council (Hamas) will temporarily assume the presidency of the PA for 60 days in the event of a vacancy. This means that the president of the PA has a judicial justification for administering the country at the political, legislative, and organizational levels individually, away from the constitutional institutions.

Moreover, on July 18, 2019, the president of the PA issued a decision to dissolve the supreme judicial council and called for the establishment of a transitional council for a year. This transitional council is to assume the functions of the supreme judicial council and the restructuring of the courts in all degrees. The president gave himself the power to dismiss any judge on the recommendation of the president of the judicial council, who is appointed solely by the president. This decision came as a surprise, and appears to have been taken without the knowledge of the judiciary. A law to reduce the retirement age of judges to 60 years, has also been issued by the president, resulting in the forced retirement of 50 judges. This is in clear violation of the provisions of the Basic Law and the Judicial Authority Act of 2002, the provisions of which are characterized as constitutional; they address one of the three authorities in the state, granting judges immunity from dismissal except by a disciplinary decision issued in accordance with law.

6. The Anti-Corruption Commission and the Financial and Administrative Control Bureau

Article 3 of the Anti-Corruption Law No. 1 of 2005 stipulates that the Palestinian legislative council will approve, by absolute majority, the appointment of the head of the anti-corruption commission proposed by the executive authority. However, the PA Chairman took it upon himself to appoint a head of the said commission from the leadership of his ruling party, without referring to the legislative council (still in place prior to the decision of the constitutional court to dissolve it). Despite the fact that Article 6 of the same law prohibits the renewal of the chairmanship of the anti-corruption commission under any circumstances, the president of the PA issued Decision No. 19 of 2017 to extend the term of the incumbent, who had been appointed by the president, for a further year. On May 13, 2019, the president of the authority appointed a new chairman of the anti-corruption commission, again without reference to the legislative council.

The executive branch has thus prevented the chairman of the commission from being held accountable by the legislative council, contrary to the provisions of Article 6 of the Anti-Corruption Law. In addition, the chairman of the PA has disrupted the role of the legislative council by refraining from calling upon it to be in session, as required by the legislative council's by-laws, and by instructing non-Hamas members of the council to influence the council's quorum by not attending sessions (Israel had arrested a large number of Hamas's elected representatives).

On the other hand, Articles 4 and 10 of the Financial and Administrative Control Bureau Law No. 15 of the year 2004 state that the chairman of the bureau is to be appointed on the approval of the absolute majority of the members of the legislative council, and may not be removed for any reason except by an absolute majority of the council. Nevertheless, the president of the PA has consistently appointed and dismissed chiefs of the bureau on his sole decision. This was followed by the issuance of a law decree on the ratification of appointment or dismissal through forced retirement, on the grounds that it is constitutionally authorized under Article 43 of the Basic Law to replace the legislative council in the event of a breakdown (Decrees No. 236 of 2010; No. 236 of 2010; No. 56 of 2012; Decree Law No. 15 of 2012 on the Approval of the Appointment of the Chairman of the Bureau of Financial and Administrative Control; Decree No. 62 of 2014; and Decree Law No. 11 of 2014 approving the retirement of the Chief of the Financial and Administrative Control Bureau).

Article 43 of the Basic Law grants the president of the authority the right to issue decisions by law only in non-legislative sessions (i.e., during a legally prescribed period of leave of members of parliament or when delay is unacceptable, as in the case of natural disaster or armed conflict). In the present case, the legislative council is in place, but its work has been disrupted by the political will of the executive branch, as the majority of its members are from the opposition. On the other hand, the appointment and dismissal of the chairpersons working in the fight for transparency and accountability and against corruption is extremely dangerous, as the constitutional legislator assures the involvement of the elected legislative authority in order to promote democracy, good governance, and the rule of law. This cannot be achieved by placing the chairman of the executive branch himself in the area of the legislature. Likewise, Article 43 is limited to the legislative side without the supervisory role; such appointments do not fall within its scope. However, the executive branch appears to be unconcerned by this incursion, given the existence of the constitutional court, which has helped the president to make decrees by law as already outlined. Statistics show that the president of the PA has passed law decrees in accordance with this article on three times as many occasions as the first legislative council (1996–2006) (official gazette 2006-2019).

7. Conclusion

This study shows that the executive authority in Palestine continuously seeks to exploit social traditions and invest in tribes to consolidate their influence and domination, even at the expense of establishing the rule of law. The study also identifies organizational, legislative and administrative measures and interventions made by the chairman

of the PA to strengthen his dominance and his party's hegemony against the opposition in clear violation of the constitution. This means that the constitutional texts in force in the Palestinian territories contain two types of discourse: one addressed to the international community and international organizations suggesting respect for political pluralism, human rights, and the rule of law; and an internal discourse, in which these texts are interpreted, and sometimes derogated, to achieve special partisan interests and undermine the principles of justice and rule of law. To this end, we believe that the principle of the rule of law and good governance cannot be achieved in the context of the existing organizational and structural distortions. It is therefore necessary to consult the people, the source of authority, in order to arrange a new social contract that will effect a revision of all existing systems and structures. The new contract will help to ensure that the values of justice, equality, political pluralism, accountability and the rule of law are respected. This, of course, can only be achieved after free and transparent parliamentary, presidential, and local elections to enable people to exercise their legislative, supervisory, and executive roles in accordance with the parameters of the social contract. In accordance with international best practice, a law should also be enacted that explicitly prohibits political parties from pursuing personal or partisan interests in violation of the public interest and the rule of law. Legislative provisions relating to criminal prosecution could usefully be amended in connection with the crime of breach of public function to grant individuals and human rights organizations legal status and an interest in the registration of public interest cases, even if they are not parties to a given conflict.

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