



The Rule of Law and the Reality of the Judiciary during the Period of Palestinian Political Division

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Abstract: The Palestinian Basic Law of 2003 affirmed in Article (6) of it that the principle of the rule of law shall be the basis of government in Palestine. All governmental powers, agencies, institutions, and individuals shall be subject to the law. To enhance the implementation of this principle and ensure its application. The Palestinian legislator stipulated a set of principles related to public rights and freedoms and the reality of the judiciary. The principle of the rule of law is the most important legal guarantee to protect the rights and fundamental freedoms of individuals, as it constitutes in its essence a major guarantee for the protection of public rights and freedoms and the reality of the judiciary. In addition, the judicial authority is important, and it is a guarantee of respect for human rights and protection of the interests of individuals, and it is the body entrusted with it to ensure the rule of law. The independence of the judiciary is the basis of justice, and the complete independence of the judiciary means that no political or administrative authority is permitted to interfere in any act of the judiciary, nor that judges be subject to anything except their conscience, and they have no authority other than the law. The objective of this paper is, therefore, to examine the manifestations of the absence of the rule of law, the infringement of public rights and freedoms, have formed the most prominent problems facing Palestinian society, and this phenomenon ranged between expansion and decline, after the Palestinian political division, according to the developments of the Palestinian national reconciliation and its implications. After the Hamas government took control of the Gaza Strip, in contrast, the Palestinian President appointed a corresponding government in the West Bank, which resulted to two governments, one in the West Bank and the other in the Gaza Strip, which contributed largely to the absence of the rule of law, and a serious deterioration in achieving the principle of the independence of the judiciary. Moreover, this article has explained the impact of the Palestinian political division over the principle of the rule of law and the independence of the judiciary. In order to achieve the objective of this paper, the socio-legal research using the qualitative approach was engaged. This study found that the Palestinian political division led to the absence of the application of the principle of the rule of law and the independence of the judiciary.

Keywords: Principle rule of law, the reality of the judiciary, Period of Palestinian Political Division, Independence of the judiciary.

1. Introduction

Article (6) of the Palestinian Basic Law of 2003 affirmed that the principle of the rule of law shall be the basis of government in Palestine. (Palestinian Basic Law of 2003) All governmental powers, agencies, institutions, and individuals shall be subject to the law. To enhance the implementation of this principle and ensure its application, (Palestinian Basic Law of 2003).

In addition, the judicial authority is important, and it is a guarantee of respect for human rights and protection of the interests of individuals, and it is the body entrusted with it to ensure the rule of law. The principle of the rule of law is the most important legal guarantee to protect the rights and fundamental freedoms of individuals, (Issam Al-Debs, 2010).

it is noted that the application of the principle of the rule of law and the independence and unity of the judiciary in Palestine until the date of 2007. After this date, the Palestinian political division occurred, which affected the principle of the rule of law and the independence and unity of the judiciary, as there were two governments, one in the West Bank and the other in the Gaza Strip, (Ahmad Musleh, 2007).

Moreover, the existence of an independent judiciary and the conduct of the necessary legislative reforms for the judiciary are issues of critical importance for ensuring and protecting human rights and respecting and promoting the rule of law, as the judicial system is a very important institution in respecting and strengthening the rule of law, (Adnan Al-Hajjar, 2016).

The realization of the principle of the rule of law is one of the basic guarantees for respecting human rights. The law is the supreme expression of the will of the nation, and the existence of an independent judicial body and the implementation of the necessary legislative reforms for the judiciary are issues of critical importance for ensuring, protecting, and promoting human rights, as the judicial system is an important institution very respectful to the rule of law (Persson T, & Roland G, 2007).

However, after the Palestinian political division took place, Hamas took over the administration of the judiciary, where it took control of the judge's offices and the regular court complex, and in return, Fatah in the West Bank took over the administration of the judiciary, (Jarbawi A, & Pearlman W, 2007).

The author will clarify and analyse here the legal organization to the judiciary in Palestine before the Palestinian political division in addition to the status of the judiciary during the political division and the protection of the rule of law.

2. The Organization of the Judiciary in Palestine Before the Palestinian Political Division.

The judicial organization in Palestine witnessed two main stages before the Palestinian political division.

2.1 The Legal Organization of the Judiciary before the Issuance of the Judicial Authority Law.

When the Palestinian Authority was established in 1994, the Palestinian Authority inherited a set of multiple and different legislations in the West Bank and Gaza Strip, belonging to the successive legal systems governing Palestine, namely Ottoman legislation, the British Mandate legislation, Jordanian emergency laws, and Palestinian legislation issued during the presence of the Egyptian administration in the Gaza Strip. In addition to Israeli military orders, (Birzeit University, legal research issued by the University Institute, 2014).

The diversity of these legal systems has led to the emergence of different legal systems in each of the West Bank and Gaza Strip, and the Palestinian Authority considered the issue of unifying laws in both the West Bank and Gaza Strip one of the most important legal issues that have been worked on, therefore the Palestinian National Authority began when it was established to lay the foundations for a system Judicial of its own and standardized, (Khaled Hroub, 2006).

Several decisions and procedures have been issued that formed the Palestinian judicial system, as the late President of the Palestinian Authority, Yasser Arafat, issued his first decision on justice on 20/5/1994 and stated in the first article thereof “The laws, regulations, and orders that were in effect before 06/15/1967 in the Palestinian Territories West Bank and Gaza Strip until they are unified,...”, (Khaled Hroub, 2006).

After the election of the Palestinian Legislative Council in 1996, this council began enacting and adopting legislation that worked to regulate the work of the judiciary in the West Bank and Gaza Strip,

unifying frameworks and the legal procedures between them, and many Israeli military orders were canceled, (Aisha Mustafa Ahmad, 2004).

2.2 The Legal Framework of the Supreme Judicial Council.

The issuance of the Palestinian Basic Law and the Judicial Authority Law is the legal framework regulating the independence of the judiciary in the following manner:

2.2.1 The Palestinian Basic Law.

The Palestinian Basic Law of 2003 represents the main pillar of the legal framework regulating the independence of the judiciary, as it stipulates that the judiciary is independent, and it is assumed by the courts of all kinds and degrees and that judges are independent, (Palestinian Basic Law of 2003, Article 97) with no authority over them in their rulings other than the law, and no authority may interfere in the judiciary or justice affairs.(Palestinian Basic Law of 2003, Article 98). In its provisions, the Palestinian Basic Law observes the principle of separation of powers and independence of the judiciary, (Kamil Mansour, 2011).

The principle of the independence of the judiciary confirms, so the Basic Law provides for the establishment of a Supreme Judicial Council, and it is required to consult with it on draft laws related to the judiciary, including the Public Prosecution, as Article 100 of the Palestinian Basic Law provides for the establishment of a Supreme Judicial Council, and between the law, its formation, powers, and workflow rules in it, (Palestinian Basic Law of the 2003).

In addition, the Basic Law states that the previous council has the authority to assign the public prosecutor, before appointing him to this position, (Palestinian Basic Law of the 2003. Article 107).

2.2.2 The Judicial Authority Law

Several legal institutions demanded, considering the numerous regulations regulating the judiciary in Palestine, the necessity of issuing the Judicial Authority Law, as the Legislative Council passed the Judicial Authority Law and it was ratified by the President of the State in 2002, (Law of the Judicial Authority of 2006. Article 40).

The Judicial Authority Law of 2002 was issued and entered into force on 14/6/2002, whereby this law put an end to the duplication that existed at the time in the administration of the judicial authority, as previous laws related to the judiciary were abolished, and the administration of the judiciary was entrusted to Head of the Supreme Judicial Council. It granted him powers to manage the affairs of the judiciary, including appointing and promoting judges, conducting judicial formations from transfer, delegation, and secondment, organizing the work of the courts and dividing them into specialized departments, training judges, and other issues related to the work of the judiciary, (Hussein Abu Hanoud, 2000).

This achievement is an important step forward and gives a major boost to the principle of the rule of law and the administration of justice, as it should have been protected and strengthened, (Law of the Judicial Authority of 2006. Articles 13,33,40,47).

3. The Reality of the Judiciary during the Period of Palestinian Political Division and the Protection of the Rule of Law.

After the Palestinian Political Division occurred in the Palestinian territories in 2007 and the completion of effective control by Hamas over state institutions in the Gaza Strip and Fatah in the West Bank, Hamas, through its government, has taken a set of measures aimed at strengthening its control and enabling it to manage the Gaza Strip and manage its affairs, to this end, dozens of decisions were issued

that covered various administrative, organizational, security and financial aspects, (Birzeit University, legal research issued by the University Institute, 2014). The previous government's decisions were not limited to the aspects aimed at preserving security and public order and ensuring the normal functioning of public facilities and departments, but rather exceeded that, to include the Palestinian judicial authority by establishing the Supreme Council of Justice, (Birzeit University, legal research issued by the University Institute, 2014).

3.1 The Formation of the Supreme Council of Justice and the Rule of Law.

The government in the Gaza Strip issued a set of decisions that provoked the condemnation of Palestinian human rights institutions, considered them unconstitutional and unlawful decisions and demanded their repeal, and at the forefront of those decisions was the decision to form the Supreme Council of Justice, where the Prime Minister issued on 9/11/2007 a decision to form the Supreme Council of Justice in the Gaza Strip, (Usher G, 2006) which is an alternate and parallel council for the Palestinian Judicial Council, the Minister of Justice in the Hamas government has been charged with assigning six people to membership of this council, and its founding was later announced under the chairmanship of lawyer Abdel Raouf al-Halabi, (Usher G, 2006).

The formation decision included the nomination of six members of the council, provided that these members assign three other members to the Minister of Justice so that once the membership is completed, the council is made up of nine members. According to the formation, the council is assigned to exercise the following powers: 1. The placement of judges and their promotions to the Council of Ministers after the recommendation of the Appointments Committee. 2. Report on terminating the service of a judge or assigning him to a non-judicial mission. 3. Approve the requests for leave of judges and inform the Ministry of Justice accordingly. 4. Receive grievances from judges and decide on them, (Law of the Judicial Authority of 2006. Articles 13).

Most of the criticism centred on the aforementioned decision regarding the idea that it constitutes a violation and a grave breach of the principle of legality and the rule of law due to its explicit legal violation of the provisions of the Palestinian Basic Law and the Judicial Authority Law, according to the following: 1. Establishing a judicial body in violation of the Basic Law and the Law of the Judicial Authority, the formation of the Supreme Council of Justice in the Gaza Strip and granting it powers and functions that are in full conformity with the powers and functions of the Supreme Judicial Council, formed under the Judicial Authority Law of 2006, represents a flagrant violation of the provisions of the Basic Law and the Judicial Authority Law, as the formation of the Supreme Council of Justice is considered a creation of a judicial body that was not provided for by law, (Hovdenak A, 2009). 2. Exceeding the legal powers entrusted to the Prime Minister and its members, the powers of the Prime Minister were defined exclusively according to the text of Article (68) of the Basic Law, which stated that the Prime Minister shall exercise the following powers: "1. To form or modify the composition of the Council of Ministers, to dismiss or accept the resignation of any of its members, or to fill a vacant position. 2. To convene the Council of Ministers for weekly meetings, or when necessary, or upon a request from the President of the National Authority, as well as to set its agenda. 3. To preside over sessions of the Council of Ministers. 4. To manage the affairs of the Council of Ministers. 5. To oversee the work of the Ministers and public institutions dependent on the government...", (Palestinian Basic Law of 2003). Article (69) of the Basic Law, which stipulated that "The Council of Ministers shall exercise the following powers: 1. To devise general policies within the limits of its jurisdiction and considering the ministerial program approved by the Legislative Council. 2. To implement general policies adopted by the relevant Palestinian authorities. 3. To prepare the general budget for presentation to the Legislative Council. 4. To prepare the administrative apparatus, set its structure and provide it with all necessary means, as well as to supervise it and follow up on it. 5. To follow up on the implementation of laws and to ensure compliance with their provisions, taking necessary actions in this regard...", (Palestinian Basic Law of 2003).

It is clear here that the Prime Minister of Hamas and its members in the Gaza Strip did not adhere to the provisions of the Basic Law, nor did they respect its content, either in terms of exercising their powers, or in terms of respecting the powers of other authorities, (Awad Jameel Abdel-Qader Odeh, 2011).

3.2 The Dismissal of the Public Prosecutor and the Appointment of a Public Prosecutor in Violation of Legal Procedures.

After the Palestinian Political Division occurred in the Palestinian Territories, the designated Minister of Justice of the Hamas movement in the government, Dr. Yusuf al-Mansi, issued a set of decisions, related to the public prosecution, the most important of which, he issued a decision to dismiss the Attorney General Ahmed al-Mughni of the Fatah movement from assuming his duties, against the background of the claim that the procedures were incorrect, as the latter was appointed without the approval of the Legislative Council to appoint the Attorney General as stipulated in Article 107 of the Palestinian Basic Law, (Palestinian Basic Law of 2003).

Concerning the dismissal of the Attorney General, Mr. Ahmed Al-Mughni, affiliated with the Fatah movement, from starting his work, and the appointment by Hamas of an assistant public prosecutor and a number of agents and prosecutors' assistants to exercise the functions of the Attorney General and his assistants in the Gaza Strip, which formed unlawful decisions; The most important of them are: 1. The person who has the authority to appoint the public prosecutor is the president of the Palestinian state. Rather, the most important administrative principles established in this regard are that the person who has the power to appoint has the power to dismiss. 2. The text of Article (64) of the Judicial Authority Law states: "A. The public prosecution members take the following oath before they start their work the following time: I swear by God Almighty to respect the constitution and the law and to perform my duty honestly and sincerely. B. The public prosecutor takes the oath before 3. The President of the Palestinian State in the presence of the Minister of Justice C. The remaining members of the public prosecution office shall take an oath before the Minister of Justice in the presence of the Attorney General.", (Palestinian Basic Law of 2003).

Given that the law explicitly stipulated that the public prosecutor should be sworn in by members of the Public Prosecution, the absence of the Public Prosecutor would constitute a violation and a violation of the formal procedures required by law to appoint members of the Public Prosecution, which would allow the appeal to abolish the appointment of these persons by the Public Prosecutor, or any interested party, (Awad Jameel Abdel-Qader Odeh, 2011).

3.3 The Opinion of Human Rights Institutions on the Judicial Division.

From the first moment that the formation of the Supreme Council of Justice was announced, and the measures taken against the Prosecutor of the Fatah movement and his dismissal. The human rights institutions took positions rejecting all of this and considered it a violation of the rule of law and the independence and aggression over the judiciary, (Alhajri H. A, 2018).

The Supreme Judicial Council in Ramallah issued a press statement following the attack on the Complex of Regular Courts in the Gaza Strip by the Supreme Council of Justice of the government in Gaza, and the statement requires the suspension of work before the regular courts in the governorates of Gaza and considers all the rulings and decisions issued by the courts of the Supreme Council of Justice is absolutely invalid, (Sayigh Y & Shikaki Kh, 2003).

The head of the Supreme Judicial Council in Ramallah, Counsellor Issa Abu Sharer, confirmed that all regular courts will remain suspended until the end of the so-called "Hamas" government's justice council's control of these courts, and exit from them permanently, because this last council is illegal, and its

presence in the court complex contribute to disrupting the judicial facility and politicizing the courts, (Sayigh Y & Shikaki Kh, 2003).

Counsellor Issa Abu Sharer stressed his demand for judges and court officials not to go to the courts until this control is over, because all rulings issued by the courts by the Hamas government are invalid, and they will not be recognized at all, and they are considered non-existent and have no effect, (Jarbawi A, & Pearlman W, 2007).

4. Conclusion

The author sees here that the judiciary has become divided into two judicial systems in the Gaza Strip and the West Bank, after the Palestinian political division to this day. As a result, judicial decisions and rulings issued by the Gaza Strip courts are not applied in the West Bank regions, and the rulings issued by the West Bank courts are not applied in the Gaza Strip. Therefore, the author believes that the solution to all these judicial problems is to end the Palestinian political division in the Gaza Strip and the West Bank. The author believes that the solution to end the Palestinian political division is to hold presidential and legislative elections in Palestine and reach acceptable national reconciliation on the one hand, and applicable on the other hand. To solve all the problems that occurred during the Palestinian political division in the territories, in order to guarantee the legal centres of individuals. The agreement must be made on clear and agreed terms of reference. Therefore, the Palestinian Basic Law must be adopted as a reference for any understandings reached, as the provisions of the Basic Law must be dealt with as constitutional rules, which have supremacy over all laws and regulations, and thus there is a sound application for the principle of the rule of law. In addition, that will achieve the objective of this study.

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