

Viktoria Wagner

**PALESTINIAN
JUDICIARY
AND THE
RULE OF LAW
IN THE
AUTONOMOUS AREAS

- An Introduction**

**PASSIA
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1 . P r e f a c e

The general elections held in January 1996 for the Palestinian Legislative Council (PLC) marked a turning point in the history of the Palestinian people. The democratic election of their government introduced a new era for a people whose history has been characterized by foreign domination and oppression. It was also unique for the Arab region whose regimes have been distinguished by autocracy and traditionalism. Whatever the weaknesses of the new Palestinian administration, the inauguration of the Palestinian Legislative Council expressed the most crucial aspect of Palestinian self-government, that is, national sovereignty.

Prior to the election of the PLC, the Israeli and Palestinian leaders, looking at a common legacy of conflict, had reached a consensus that the struggle for sovereignty over Palestine should be addressed in political rather than military terms. The Israeli-Palestinian peace process, launched in 1993, envisaged a self-government regime for the Palestinian people in portions of the West Bank and the Gaza Strip, who had previously been subjected to occupation by the State of Israel. In the course of the implementation of the interim agreements, which were since concluded between the Israeli and Palestinian parties to the peace process, a number of obstacles pertaining to Palestinian internal and external sovereignty, have been revealed.

On the one hand, the Palestinian right to self-determination and their claim to the whole of the West Bank and Gaza Strip territories clashed with Israel's security demands. Israel argues that it must retain control over various areas, including settlements and military installations, in order to protect her citizens and the overall security of the state. Moreover, the Palestinian self-government regime surrendered to considerable Israeli demands for the organization and the tasks of the 'autonomous' institutions with the purported objective of guaranteeing security to the Jewish State. On the other hand, the democratic system, which was prescribed for Palestinian self-government, did not develop quite as positively as was hoped. The atmosphere of oppression under which the Pal-

estinian people had to dwell for the longest time and the military struggle of the Palestinian Liberation Organization (PLO), withheld the population including the political elite from the experience of democratic statehood. The majority of the new Palestinian leadership has been recruited from among the cadres of the PLO and other resistance movements. Members have kept alive an ideology of autocracy rather than of pluralism and compromise. Furthermore the various foreign occupying powers have left the Palestinian people with a blurred legal system and ineffective government institutions. As a result, the Palestinian entity and her people have had to struggle not only with state-sponsored human rights violations and a semi-autocratic régime, but with unconsolidated state institutions that discourage not only the improvement of democratic standards, but also the recovery of the Palestinian economy.

While an elected parliament represents the people's will in a democratic system, an independent judicial branch is indispensable for the protection of citizens' rights and the rule of law. The judiciary not only guarantees the legality of both the authority's and citizens' actions, it also balances the other branches of government and limits their powers.

The objective of this study is to evaluate the quality of the young Palestinian democracy through an examination of the judicial branch of government. It will be suggested herein that the Palestinian judiciary, with the problems and the history it has to confront, represents the reality of the Palestinian political system in a nutshell. Moreover, it will be claimed that it is a combination of internal and external factors, such as the troubled history of the Palestinian people, the pressure exerted by the Israeli side and the worrisome performance of the Palestinian leadership that has created the present precarious situation, regarding not only the rule of law and human rights standards, but the prevailing near-stalemate in the peace process.

The findings of this inquiry stem not only from the elaborate study of books, reports, articles, press releases, and other documents published on the topic, but from my personal experience acquired through numerous interviews and visits to the territories throughout the years 1998/99.

Due to limited transportation facilities, most of the research represented herein relates to the West Bank. None the less, while the findings of this research may reflect the status of the West Bank judiciary in greater detail, enough material on the situation in the Gaza Strip could be accumulated so that the study applies accordingly there.

The material part of this work will be divided into five sections. While the main portion of this work is dedicated to the internal dimension of Palestinian sovereignty, I considered a short introductory abstract on the dilemmas of a people's right to self-determination in its external aspect, (i.e. the quest for national independence), as indispensable for the reader's understanding of the complex intermingling of the two features of sovereignty. In many cases, this being especially true for the Palestinians, a people feels that only the acquisition of national independence can ensure their inalienable right to internal self-determination, that is, to construct their own models of government and society. Here, I will look at the right to self-determination as it is portrayed in International Law before addressing the Palestinian quest for national self-determination.

Following this is a discussion of the rich Palestinian legal heritage, and the status of contemporary Palestinian law in section 2. As pointed out earlier, the Palestinian people are characterized by their common history of foreign occupation by Ottoman, British, Jordanian, Egyptian and Israeli forces. Naturally, the occupiers left bits and pieces of their own respective legal systems as a legacy of their presence in Palestine. Thus, the Palestinian legal system today consists of various laws of reference and legal traditions.

Section 3 deals with the structure of the Palestinian judicial system since 1994, when West Bank and Gazan territory was delivered into self-rule.

After having acquainted the reader with the foundations of the Palestinian legal system, I will engage in an evaluation of the effectiveness of the judicial system in section 4.

I have chosen a comprehensive approach to portray the status of the Palestinian judiciary. Looking at all aspects which contribute to the competence, productivity and respect for the judicial branch in the Palestinian Authority, I have surveyed the civil and criminal procedure, the institutional strength of the judiciary, and the rights and duties the judiciary and its officials enjoy by virtue of Palestinian law. Subsequently, I examined how the promulgated balance of power between the judicial and executive branches of Palestinian government is converted in real life.

The final section of the study deals with the relationship between the judicial and executive branches of government in greater detail. The judiciary is rendered powerless if an agency for the implementation of the courts' rulings and the protection of the law remains absent. Nevertheless,

2.1 Early Claims to the Right of Self-Determination

US President Woodrow Wilson, who after World War I promoted the granting of independence to European peoples who had formerly been confined within the Austro-Hungarian and Ottoman Empires, is often named as the single most famous precursor for the international recognition of people's right to self-determination. However, quests for internal self-determination, i.e. "the right of a people to choose its own system of government and to participate in governing through a representative government in a democratic regime,"¹ caused the outbreak of the French Revolution as early as in 1789. The Declaration of Independence of the United States of America in 1776 from the British mother country paved the way for the realization of the more problematic quest of self-determination in its external dimension. External self-determination describes the right of a people to determine not only their system of government as well as their cultural, economic and political status, but to also determine their status within the international community, which consequently results in the disintegration of existing states. The 1848 revolutions in Europe were other manifestations of peoples' desire to self-determination. In the Austro-Hungarian Empire, for example, the middle class pressed for liberal reforms while the Magyars and Czechs rose against their foreign rulers as oppressed minorities.

Narrowly defined, self-determination is the sovereign control of one's self, the aspiration of human beings to be 'free', or to be 'free from' what they perceive as others. "The quest for self-determination, at its core, is not a national or any other group aspiration, but the aspiration of the individual human being to the vague notions of 'freedom' and 'the good life.'"² The right to rule one's self, perhaps a basic human aspiration, was written in the American Declaration of Independence and became the motivating force of the French Revolution.

After the end of World War I, the founding of the League of Nations and the granting of independence to a number of European peoples such as the Czechs and the Slovaks, the Hungarians, Poles, Lithuanians and Latvians, consolidated the idea of peoples' right to freely choose their political status, at least for European ethnicities.

¹ Ruth Lapidoth, *Commentary in Wolfgang Danspeckgruber-Arthur Watts (eds.), Self-Determination and Self-Administration. A Sourcebook* (London, 1997), p. 63.

² Dov Ronen, *The Quest for Self-Determination* (New Haven, 1979), p. 8.

The then US President, Woodrow Wilson, was to become one of the most illustrious advocates of the inalienable right to self-determination after World War I. The Bolshevik leader Vladimir Iljic Lenin also held it as a guiding principle. In his famous Fourteen Points speech to Congress of 8 January 1918, Wilson addressed the issue of self-determination, saying that

“peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game. All well defined national aspirations shall be accorded the utmost satisfaction that can be accorded to them without introducing new or perpetuating old elements of discord and antagonism that would be likely in time to break the peace of Europe and consequently for the world.”³

Wilson aimed at the export of democracy, saying,

“We are fighting for liberty...self-government, and the undictated development of all peoples...No people must be forced under sovereignty under which it does not wish to live. No territory must change hand except for the purpose of securing those who inhabit it a fair chance of life and liberty.”⁴

Hence, Wilson’s concept of self-determination was founded on the democratic idea of people’s sovereignty; being that the only legitimate basis for government is the consent of the governed. This was the concept that Wilson offered as a solution for the European national minorities issue. Participatory government instead of suppression would channel peoples demands and so contain revolution and instability. Wilson regarded the satisfaction of those groups’ demands for national independence and ethnic self-government as a guarantee for peace and stability in Europe. The famous British economist John Stuart Mill forwarded the same opinion in his *Considerations on Representative Democracy*: “It is in general a necessary condition of free institutions that the boundaries of governments should coincide in the main with those of nationalities.”⁵ However, Wilson did not think in anti-colonial terms, but rather in terms of stability for those European peoples who had been ruled by the Austro-

³ Cited in Hurst Hannum, “Self-Determination in the Post-Colonial Era,” in Donald Clark-Robert Williamson (eds.), *Self-Determination - International Perspectives* (London, 1996), p. 13.

⁴ Cited in Ronen, *The Quest for Self-Determination*, p. 31.

⁵ Cited in Hannum, “Self-Determination in the Post-Colonial Era,” p. 13.

2.2 The Right of Self-Determination and International Law

The 1945 Charter of the United Nations provided regulations for the interaction between sovereign states and rules of conduct in the international community at large. Articles 1(2) and 55 oblige the member states “to develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples.” Likewise the Charter prohibits the “threat or use of force against the territorial integrity or political independence of any state” (Art 2.4). It is obvious, that here, the right to self-determination refers to the peoples constituting the populations of sovereign states, rather than ethnic groups, when until the mid-1960s, nation and state, and not ethnicity, were the central concepts in International Law.¹¹ Moreover, the UN Charter does not prescribe a ‘right’ of self-determination, but a ‘principle’, which defines an idea or a concept rather than a legal right. So, while the UN Charter of 1945 aims at the maintenance of international peace and security through mutual recognition and respect of sovereign states, it does not deal with ethnic groups’ quests for self-determination aiming at secession. Only in Article 73 is the right to self-determination recognized, for peoples who “have not yet attained a full measure of self-government,” thus for peoples inhabiting non-self-governing territories. However, while the Charter acknowledges the interests of the non-self-governed people to be paramount, it does not oblige the metropolitan power to deliver respective people and territory into independence at the earliest possible moment. On the contrary, the UN Charter stresses the alien administrator’s duty to uphold international peace and security, while ensuring the people’s advancement in political, economic and social terms. The development of self-government is recommended, but not the right of the people to self-determination. The Charter’s failure to provide a right to self-determination for colonial peoples’ may stem from the western powers’ concept of the underdevelopment of indigenous peoples who necessitated European assistance, which prevailed at that time. Moreover, the European imperialist powers were not ready in 1945 to surrender their domains of influence.

Some 15 years later, however, the international community came to agree on an inalienable *right* of peoples not to be ruled by a foreign power. The UN General Assembly Declaration on the Granting of Independence to

¹¹ Ronen, *The Quest for Self-Determination*, p. 41.

Colonial Countries and Peoples of 1960¹² reads: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." It furthermore declares that "inadequacy of political, economic, social or cultural preparedness should never serve as a pretext for delaying independence." Thus, the international community for the first time recognized not only existing states' right to sovereignty and independence within the international community, but also acknowledged the right of *all* peoples to *enter* into the community of states, as long as the integrity of existing state entities remains protected.

While a right to self-determination was enshrined in International Law by virtue of the 1960 Declaration, upon its adoption, it was clearly understood to be applicable first and foremost to colonial countries and peoples, when those countries' campaigns for de-colonization were at their height. At the time, a movement toward the legal recognition of the right of self-determination involving secession for colonial peoples, was caused by multiple factors: (1) the European colonial powers' capacity had been weakened as a result of two world wars, (2) an ideology of nationalism and enhanced self-awareness and self-confidence of the colonial peoples, (3) the support of the anti-colonial struggle by the Soviet Union.¹³ It was not aimed, however, to apply universally to all ethnic groups who claim the right of self-determination. As a result, it should be noted that self-determination has been considered an absolute right, involving secession, only in the context of classic colonialism, where a European power dominated a non-contiguous country the majority of which was indigenous. Moreover, the Declaration emphasized the fact that the granted rights were subject to limitations brought along by the international legal principle of the inviolability of the territorial integrity of existing states. Article 6 of the Declaration stipulates that "any attempt at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." Only such peoples and countries could claim the right of self-determination, who were non-self-governing, and who were known as colonial upon the adoption of the UN Charter. Non-self-governing territo-

¹² See United Nations, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGA Res. 1514 [XV] of 14 December 1960. 15 UNGA OR Suppl. (no.16), UN Doc. A/4684 (1961), p. 66.

¹³ Falk, "The Right to Self-Determination Under International Law," p. 52.

ries are such territories, which are geographically separate from the metropolitan state and ethnically and/or culturally distinct.¹⁴

The 1970 Declaration on Principles of Friendly Relations and Cooperation among States¹⁵ introduced a democratic component to the discussion on the right to self-determination, opening a new era in the discourse about self-determination. While the principle of the territorial integrity of existing states is again emphasized as being superior to the right of self-determination, only the sovereignty of such states will be protected by the international community, which are “possessed of a government effectively representing the whole of their population.” Those states

“shall be considered to be conducting themselves in conformity with the principle of equal rights and self-determination of peoples...Nothing shall be construed as authorizing any action which would impair, totally or in part, the territorial integrity, or political unity, of such States.”

The meaning of the paragraph is simple. Once a state has established full sovereignty and independence, the population of said state has to express their aspirations for self-determination through the framework of the state, since secession is prohibited by International Law. Only in the case of a government who does not represent the whole of the population by formally excluding a particular group from participation in the political process, based on that group’s race, creed, or color, as promulgated by above article, and acts profoundly undemocratically and discriminatorily against any minority fraction of the population, can separation be considered as a last resort. The Resolution clearly draws upon the right of self-determination as promoted by Woodrow Wilson, which stresses political participation and representative, democratic government, coupled with the guarantee of human and minority rights, as a solution to conflicts pertaining to minority groups. International Law obliges states to act democratically, allowing for all citizens, or groups of citizens, participation in the government, and to share power to run the state. Although the international community discourages secession as a remedy for abuse of

¹⁴ United Nations, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGA Res. 1514 [XV] of 14 December 1960, principle IV.

¹⁵ See United Nations, *Declaration on Friendly Relations and Cooperation Among States*, UNGA Res. 2625 [XXV] of 24 October 1970. 25 UNGA OR Suppl. (no.28), UN Doc. A/8028 (1971), p. 121.

fundamental rights, by virtue of various international legal documents, it does not rule it out completely.¹⁶

In the past, it was generally agreed that self-determination enshrined in International Law as a universal human right was particularly relevant to colonized peoples and oppressed nations. Hannum states that

“United Nations and State practice up to the 1990s provides evidence that the international community thus far has recognized only a very limited right to self-determination which includes: (1) freedom from a former colonial power, and, once independence has been achieved, (2) freedom of the whole State’s population from foreign intervention or undue influence.”¹⁷

In the past, the international community held a consensus that the right of self-determination, other than in the cases mentioned above, was a matter to be resolved within the framework of existing states no matter how ethnically artificial or nationalistically oppressive. International Law doctrine confirmed this political and moral consensus that the ‘self’ in self-determination was to signify, in all circumstances, the existing states. Before the end of communism in Eastern Europe,

“one of the strictest taboos on the international relations field, for almost half a century, was to question the principle of territorial inviolability of existing states, a principle upon which the United Nations itself was founded.”¹⁸

The drafters of the various documents pertaining to the right of self-determination left the question of who is to constitute a people, in contrast to a minority group, unresolved. The lack of a precise definition has today become an obstacle to further legal and political development in the field. “On one hand, the right of self-determination is clearly established in International Law; on the other, it is so hedged around by escape clauses that it is virtually meaningless as a basis for legal or political debate.”¹⁹ Thus, while a right to self-determination is clearly allocated to peoples, the realization of such a right is rendered impossible when clear criteria of who qualifies for the right of self-determination remain absent.

¹⁶ Falk, “The Right to Self-Determination Under International Law,” p. 54.

¹⁷ Hannum, “Self-Determination in the Post-Colonial Era,” p. 26.

¹⁸ Stavenhagen, “Self-Determination: Right or Demon?” p. 6.

¹⁹ *Ibid.*

The most widely cited definition of a minority group, as opposed to a people, was established by UN Special Rapporteur Francesco Capotori in 1977. Accordingly, a minority is a

“group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.”²⁰

In contrast, an indigenous people is defined as having the additional characteristic of “a historical continuity with pre-invasion and pre-colonial societies that developed on their territory. [They] consider themselves distinct from other sectors of societies now prevailing in those territories.”²¹ Hence, a people does not only have the features of common language, culture and/or religion, but also a distinct and unique historical heritage. Moreover, in contrast to a minority group within a state, a people are bound to a distinct territory to which it refers its culture and history. International legal scholars claim, however, that international legal documents understand the concept of a people in somewhat different terms. Gudmundur Alfredsson argues that in International Law a people describes

“a population of a separate political unit, with delimited territory and with a background in mainly colonial or recent occupation. This emphasis on the geographical entity rather than the popular entity, i.e. the nation, the people, the ethnic group, is repeated in a long series of human rights and other international law texts.”²²

The superior principle of the inviolability of frontiers is stressed, through applying the right of self-determination to such peoples as represent the whole population of states, rather than sub-state or ethnic groups, with their distinct linguistic, religious and cultural identities. Also, the definition as outlined above, which the international legal community has chosen, helps to limit group claims to self-determination since it is often a matter of

²⁰ UN Special Rapporteur Francesco Capotori, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (22 June 1977), E/CN.4/Sub.2/384, p. 96.

²¹ *Ibid.*, p. 50.

²² Gudmundur Alfredsson, “Different Forms of and Claims to the Right of Self-Determination,” in Donald Clark-Robert Williamson (eds.), *Self-Determination. International Perspectives* (London, 1996), p. 60.

construction whether an ethnic group can rely not only on a common cultural identity but on a common history and territory of reference.

What the international community offers as a solution to quests of self-determination voiced by sub-state ethnic groups, is the obligation of states to provide representative and participatory government for the whole population. Citizens, or groups of citizens, must be free to enjoy their own culture, to profess and practice their own religion, or to use their own language, as stipulated in Article 27 of the International Covenant on Civil and Political Rights.²³ Today, the majority of scholars argue that there are means to satisfy the quest of peoples, ethnic groups and minorities to self-determination even without resorting to the disintegrative model of secession. The primary need is for a model of internal self-determination in Wilsonian terms which emphasizes the principles of democratic government and human rights. Often, it is suggested, it is only the existence of discrimination against, or persecution of, minorities by the state or its majority population, which leaves separation as the last hope for those fearing for not only their distinct identity but their lives. Autonomy arrangements have been proposed and successfully established in various states to satisfy mutual demands, namely the preservation of the existing state structure as well as the provision of a right of self-determination.

In recent years, the number of ethnic claims for self-determination has risen sharply. As pointed out earlier, the past decade saw the disintegration of the former Soviet Union and Yugoslavia. At present, the conflicts in Chechnya and Kosovo, as well as the struggle of the Cashmere province in India or the coercive integration of Tibet with the People's Republic of China reinforce the discussion about the appropriateness of international legal instruments to settle respective conflicts in a mutually acceptable way. In contrast to national quests for self-determination, which international legal texts exclusively address, cases of ethnic claims for self-determination usually emerge in existing nation-states, and have a tendency for disintegration. While national quests for self-determination aim at changing the *regime*, ethnic claims aim at changing the *framework* of the state, and demand a separate state or autonomous status within a state. Groups seek self-determination on the basis of their common language, history or general cultural identity, that is, their ethnicity. In most cases, the ethnic group demanding external self-determination has suf-

²³ See United Nations, *International Covenant on Civil and Political Rights* (1966), 6 International Legal Materials 368 (1967). [Also on internet: <http://www.etc.ca/pages/law/un/intl-covenant-civil-political-rights.html> (visited on 15 November 1999)].

ferred discrimination or persecution by the majority population. Today, various ethnic movements resort to violent means to underpin their secessionist demands. Connor suggests three explanations for the emergence of militant ethnic consciousness.

“First, it is not the amount of contact that causes ethnic awareness, but the perceived threat to the group that the intensity of contact creates. Second, improved communication has carried the message, recently accepted as the universal truth, that any self-differentiating people, simply because it is a people, has the right, should it so desire, to rule itself.”²⁴

Furthermore, Connor states, ethnic consciousness requires an awareness of other groups. The sense of being unique or different presupposes a referent, that is, the concept of ‘us’ versus ‘them.’²⁵

While International Law does provide protection to oppressed peoples, the international community has failed to enforce the right to external self-determination in cases where a government refuses to grant participatory and minority rights to sub-groups of the population. This has happened because on the one hand, criteria for the determination of a violation are hard to be defined, and on the other hand, the international community has been reluctant to introduce an explicit right to secession for ethnic groups, which would give way to the disintegration of existing state structures, followed by instability and a threat to international security. Nevertheless, a movement toward a less stringent interpretation of international legal principles, and a gradual acknowledgement of the right to secession in extraordinary cases has been observed throughout the past decade. In cases of the disintegration of existing states where the formation of a new state appears as a *fait accompli*, the international community has shown its readiness to recognize the sovereignty of these new state entities.

²⁴ Walker Connor, “Nation-Building or Nation-Destroying?” in *World Politics* 24 (April 1972), no. 3, p. 331.

²⁵ *Ibid.*

2.3 The Palestinian People's Quest for Self-Determination

The Palestinian quest for self-determination involving the establishment of a sovereign state in Palestine has been confronted with numerous dilemmas. Firstly, the foundation of the internationally recognized sovereign State of Israel foiled the Palestinian intention to rule over territory, which they can claim to be their homeland. The conflicting claims of Jews and Palestinians over the same portion of land have produced hostility and war. Secondly, the notion of a Palestinian people that differs from the larger community of Arabs has been contested by an Israeli establishment seeking to ideologically further its territorial mandate and thereby legitimize its actions, and hence so has the Palestinian right to self-determination. Thirdly, the hostility between Israel and her Arab neighbors has so far resulted in five wars which have produced an enormous Palestinian refugee problem and placed the West Bank and the Gaza Strip, inhabited almost exclusively by Palestinians, under Israeli occupation for more than 30 years. Ever since, the realization of Palestinian self-determination has heavily depended on Israel's consent. Finally, the hundreds of thousands of Palestinians who fled from their homes on what is now Israeli soil during the Arab-Israeli War of 1948 claim a right of return, which Israel is not ready to grant under any circumstances.

As pointed out earlier, the perception of which ethnic group constitutes a people and which is merely a minority group within a state, remains an issue of controversy, and is often dependant on other states' readiness to recognize the group's demands rather than on clear rules of International Law. As for the Palestinians, it is primarily their ancient reference to the territory of Palestine, apart from a common culture, history and language, that qualifies them as a people following Francesco Capotori's definition.

Around 1917, when the British government announced its intention to support the Zionist aim of erecting a Jewish homeland on Palestinian territory in the Balfour Declaration, Palestinian Arabs found their notion of people hood increasingly under threat and a counteractive resurgence of their national identity naturally took place. This chronology has been used by pro-Israel historians, politicians and scholars over the last half a century in an attempt to 'belittle' the notion of a Palestinian identity separate from the wider Arab population of the region, and to claim instead that the Palestinians never existed, and therefore should not warrant self-determination rights as a people. Yet, the mere fact that a group does not at all times activate its identity as a people, does not equal the assumption

that such a people does not exist. On the contrary it can be argued that attempts to distort the ethno-historiography of the region belie a process of denial that has fuelled the separation of the two peoples and hence activated and increased their sense of 'otherness.'

Dov Ronen suggests that it is the perception of 'them,' versus 'us' that creates ethnic groups. Only the perception of another group that is different from what we perceive as 'us' activates ethnic consciousness.²⁶ Ronen argues that ethnicity as well as class or nationality are mere sociological constructions, an idea that an aggregation of individuals uses to differentiate their identity from the identity of others. Yet, Ronen believes in the concept of a people. He holds that

“under the impact of situations, either a racially or culturally distinct ethnic group awakens or a usually territorially delimited aggregation of human beings awakens and uses - or better, activates - a self-identity-race and/or language and/or religion and/or common history and/or culture - which outside observers take to be ethnic or associate with the term ethnic.”²⁷

It can be concluded from the above explanation that while a people, as we define it, may exist continuously, their ethnic identity is only consciously perceived if confronted with a group that differs.

If we recognize the existence of a Palestinian people, they must be granted a right to self-determination as stipulated in International Law. In the Palestinian case, however, their quest to self-determination implying independence on their ancient homeland of Palestine, contradicts the already realized claim for statehood of the Jewish people in the State of Israel. Thus, a dilemma is created, of the accommodation of conflicting rights when one group enters into contradiction with an equally valid right of another.²⁸ While even the Israeli government has recognized the right of the Palestinian people to self-determination by now,²⁹ a Palestinian state cannot simply be erected on the territory of the sovereign State of Israel, since, as pointed out earlier, the international community up-

²⁶ Ronen, *The Quest for Self-Determination*, p. 9.

²⁷ *Ibid.*, pp 145-46.

²⁸ This situation prevailed prior to 1948, when both Palestinians and Jews struggled for, on the one hand, independence from the British government who ruled Palestine, and on the other hand, the erection of a state dominated by Jews or Palestinians respectively, on the same portion of land.

²⁹ See Preamble of the Declaration of Principles of 13 September 1993.

holds the principle of the inviolability of the territorial integrity of existing states. While it is claimed by Palestinian spokesmen that the existence of Israel on today's territory is illegitimate since it violates the UN Partition Plan of 1947,³⁰ and Palestine has been inhabited by Palestinian Arabs for hundreds of years, the sovereignty of the state within the so-called 'green lines'³¹ has, for the most part been accepted as a '*fait accompli*' by the international community. Israel's admission to international organizations such as the United Nations has further strengthened the country's independence.

The above argument does not apply to the territories occupied by Israel in the War of June 1967, when the Gaza Strip and the Sinai peninsula were taken from Egypt, the West Bank from Jordan, and the Golan Heights were seized from Syria. From an international legal viewpoint, the foundation of a Palestinian independent state on the territory of the West Bank and the Gaza Strip occupied by Israel, where today about three and a half million Palestinians are confined and deprived of some of their most fundamental rights, appears unproblematic. The area does not belong to the sovereign domain of the state of Israel nor did other states successfully present their case for the annexation of those territories, after the administration had been entrusted to the League of Nations subsequent to World War I. As a consequence, the establishment of a Palestinian state in the West Bank and Gaza would clearly not violate the territorial integrity of existing states in the area. Furthermore, the West Bank and Gaza areas belong to the land of Palestine which the Palestinian people can truthfully claim to be a part of their ancient homeland. Moreover, the occupation through conquest of these territories by Israel in June 1967 and their continued presence in the area for more than 30 years contradicts the rules of International Law. Israel does not retain a sovereign right to administer the West Bank and Gaza area.

³⁰ After Great Britain had surrendered the Palestine Mandate to the United Nations, the UN General Assembly voted for the partition of Palestine despite Arab opposition. The two independent states envisaged were to maintain an economic union. Jerusalem was to be placed under international trusteeship. See Nicholas Bethell, *The Palestine Triangle. The Struggle Between the British, the Jews, and the Arabs, 1935-48*. (London, 1979), pp. 344-46.

³¹ Subsequent to the 1948 Arab-Israeli war, the green lines demarcated the preliminary armistice lines of the State of Israel with her Arab neighbors, as agreed upon in the Armistice Agreements between Israel and her Arab war enemies. Since Israel retains a state of war with her Arab neighbors, with the exception of Jordan and Egypt, Israeli national borders that are binding in a strict legal sense remain absent. Israel, meanwhile, unilaterally declared the green lines to be the borders of the sovereign Jewish state which has been more or less officially recognized by the majority of states.

As outlined earlier, international legal documents clearly establish a rule which allows for the independence of non-self-governing territories from the rule of a foreign power, especially if the indigenous people is ethnically and/or culturally distinct and their territory is geographically separate. Also, International Law provides protection for peoples who are confined within the domain of a government which is not representative and deprives part of their population of the right to participate in government, based on their race, creed or color. Palestinians differ from the Jewish people in almost every aspect conceivable, such as their ethnicity, their language, culture and religion, and the territory contested is not geographically but politically separate due to its status of occupation. Upon occupation, the territories were placed under Israeli military government. All decision-making power was concentrated upon the Israeli Military Commanders for the West Bank and Gaza respectively. The indigenous population was not permitted participation in the administrative bodies, nor was the protection of their fundamental rights guaranteed due to the situation of military occupation. Prior to the establishment of the Palestinian Authority, the population was denied the right to participate in the election of their government. Also, the majority of Palestinians are to this day deprived of one of their most fundamental rights, namely the right to a nationality. Thus, Palestinians of the West Bank and Gaza territory cannot enjoy the civil and political rights which citizenship brings along. Finally, the Palestinian people do not constitute a part of the Israeli population since they do not hold citizenship, nor of any other state in the area. As a result, the above arguments suggest that the Palestinian people qualify for the right to self-determination in their respective territories.

2.4 Conflicting Rights of Palestinians and Jews

Since the first Zionists immigrated to Palestine in the late 19th Century, Jews and Palestinians have claimed a sovereign right to the same portion of land. The Arab position was and for the most part remains that the establishment of a Jewish state in Palestine was an illegal and illegitimate act. The Palestinian spokesmen point out that Palestine had been inhabited by Palestinians for hundreds of years, until the organized immigration of Jewish settlers began to arrive in the late 19th Century.³² Supporters of Israel meanwhile argue that a Jewish right to Palestine is derived from a historical connection with the land which was established through

³² Mark Tessler, *A History of the Israeli-Palestinian Conflict* (Indianapolis, 1994), p. 286.

God's covenant with Abraham when he promised the Jewish people the land of Canaan "as an everlasting possession."³³ In more recent times it has been argued that the Jewish people have always been involved with what they perceive as their homeland in a national and religious sense, despite the fact that only very few Jews have been physically present in Palestine. Like all peoples, they claim, the Jewish people have a right to self-determination.

In the Arab-Israeli War of 1948,³⁴ the Zionists succeeded in realizing their quest for self-determination through the establishment of the State of Israel while the majority of Palestinians were either dispersed as war refugees in various Arab countries, or confined to the refugee camps of the West Bank and the Gaza Strip. The population of the new Israeli state was predominantly composed of Jews, as Israel, upon the end of the war, denied the Arab refugees the right of return to their homes which were then lying within the borders of Israel. The minority group of Palestinians who had remained in their homes were allocated Israeli citizenship. However, for 18 years the government placed them under military government, limiting a number of fundamental rights and freedoms such as the freedom of movement, in fear of atrocities aimed at the destruction of the state. Today Israeli Arabs are officially treated equally under Israeli law and while there are numerous instances where this legal parity seems to belie a reality of unofficial discrimination, Israeli Arabs, at least formally, enjoy equal legal rights with their Jewish countrymen. For Israel, it has been out of the question to grant the Palestinian refugees the right to return to their former homes within the boundaries of Israel. It has been argued that Israel cannot realistically readmit hundreds of thousands of persons whom it sees as desiring its destruction. This policy, which clearly contradicts International Law, was motivated by the fact that the young state, heavily depended on popular consent about the legitimacy of its establishment, which, considering its nature and the nature of its inception, only a Jewish majority could guarantee.

The main causes for the several hundred thousand Palestinians to flee in the exodus of 1948 were well documented at the time and have been recently described as representing a policy of ethnic cleansing. However, this has not prevented Israeli denials and 'counter-histories' from throw-

³³ See *The Holy Bible* (East Brunswick, 1978), Genesis 18,8.

³⁴ The surrounding Arab countries attacked the newly founded State of Israel on 15 May 1948, one day after its declaration of independence in order to prevent the establishment of Israel in Palestine.

ing doubt upon the question of whether or not Israel is legally obliged to grant them a right of return. This despite the fact that most detailed documentary evidence and historical research supports the first hand accounts of a deliberate campaign of terror and intimidation by the Zionist forces. While Israeli acceptance of the brutal course of events is unlikely to be forthcoming, numerous documents and several statements of Israeli politicians provide evidence that at least "it was not [Israel's] intention to prevent the flight of the Arab population."³⁵ Moreover, even the most conservative of Israeli scholars agree that at least half of the 400,000 Palestinians who left their homes during the war did so as a direct or indirect consequence of Haganah/IDF operations.³⁶ Amongst those Israelis who do accept the historical version of events, disagreement prevails as to whether these operations were governed by a general policy of the Zionist leadership to expel and destroy the local population from the territory which was to belong to Israel, or whether these attacks happened upon the arbitrary initiative of individual army units. Benny Morris holds that there was no explicit expulsion policy, while many documents provide information about specific abuses committed by the Israeli armed forces.³⁷ Emphasis is also placed upon the Zionists' use of psychological warfare, that is, intimidation of the Arab population to encourage them to leave their homes. As Zionist leaders have at least considered the idea of a mass deportation of the Arab population at various stages of their struggle for independence, it is worth noting that this was a policy deemed quite admissible for the solution of ethnic conflicts prior to World War II³⁸. Salman Abu-Sitta has conducted the most recent and incontrovertible study relating to the 1948 Palestinian exodus and its causes. Drawing on UN eyewitness accounts and interviews with Jewish fighters as well as with community elders of destroyed villages, Abu-Sitta presents a clear picture of an organized, premeditated and efficient policy in action³⁹.

Whatever this historical dispute's eventual outcome, International Law establishes that these refugees of war must be granted the right to return to their homes in safety.

³⁵ Statement by Israeli politician Yigal Allon, cited in Tessler, *A History of the Israeli-Palestinian Conflict*, p. 296.

³⁶ *Ibid.*, p. 297.

³⁷ Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949* (Cambridge, 1987), p. 293.

³⁸ The 1923 Treaty of Lausanne, ratified by the League of Nations, for example, provided for the forced exchange of two million Greeks and Turks.

³⁹ Salman Abu Sitta, "1948 Ethnic Cleansing of the Galilee-From Reports of The United Nations," in *News From Within*, vol. XVI, no. 6. (June 2000), pp.19-25.

The Universal Declaration of Human Rights provides the right to return to one's country in Article 13 (2). Moreover, the UN General Assembly, recognizing the right of return of refugees, called upon Israel in December 1948 to provide respective right to Palestinian refugees who wish to return to their homeland and intend to live in peace with their neighbors.⁴⁰ The forced resettlement of populations and ethnic cleansing were regarded as a crime after World War II. Having observed Hitler's *Lebensraum* policy which involved the mass expulsion of whole populations from areas which were considered a part of the German Fatherland, the Nuremberg Court of 1945 came to the conclusion that resettlement of populations and the settlement in occupied territories of members of a foreign population constitutes a war crime as well as a crime against humanity.⁴¹ The Nuremberg Principles, in which the Court's opinions were incorporated, were adopted by the UN General Assembly in Resolution 95(1) of 1946. Hence, the settlement of foreign populations in territories inhabited by the native population for long periods of time was prohibited. Finally, the IV Geneva Convention of 1949 explicitly condemned the forced resettlement of populations in Article 49 which reads: "The occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." This provision follows the assumption that the occupying power is not the legitimate sovereign of the territory, and thus is not entitled to change the status of respective territory, including the law of the land or the composition of the population.

Also, the traumatic events of the recent war in Yugoslavia caused the international community to take a stance in the issue of forced resettlement, ethnic cleansing and the right to one's homeland. While the resolutions that were passed by the UN General Assembly do not constitute binding law, they are nevertheless of political significance for the member states. Accordingly, Resolution 1994/24 of 24 August 1994 recognizes the right to a homeland, in adopting the right of return and the right to remain in one's homeland during times of war and peace alike. The resolution emphasizes the right of refugees to return to their countries of origin.⁴²

⁴⁰ See United Nations, *Palestine-Progress Report of the United Nations Mediator*, UNGA Res. 194 (III) of 11 December 1948. 3 UNGA OR, UN Doc. A/810 (1948), pp. 21-25. [Also available in John Norton Moore (ed.), *The Arab Israeli Conflict. Vol. III: Documents* (Princeton, 1974), pp. 373-376].

⁴¹ See Alfred DeZayas, "Das Recht auf die Heimat, ethnische Säuberungen und das Internationale Kriegsverbrechertribunal für das ehemalige Jugoslawien," in *Archiv des Völkerrechts* 35 (Hamburg, 1997), no. 1, p. 50.

⁴² *Ibid.*, p. 51.

As a result, the establishment of a prohibition to resettle populations in order to change the original composition of the population inhabiting a given territory implies that people have an inalienable right to live in their homeland. If this right is being violated as a consequence of political events, the population must be granted a right of return at the earliest possible moment.

During the British Mandate, many ideas about how to settle the conflicting claims of Jews and Palestinians to the same portion of land were being presented. The British administrator promoted the establishment of one state, where Jews and Palestinians would have equal rights to participate in the government. The hostile atmosphere between the two groups proved that the conflict between Jews and Palestinians would put the stability of such a state at risk. Finally, the international community came to the conclusion that only the establishment of two ethnically homogeneous states would guarantee peace for Palestine, when the General Assembly adopted the UN Partition Plan in 1947.

Since only the Jewish right to self-determination has been realized with the establishment of the State of Israel, it has been argued that granting Palestinian Arab refugees the right to return to their homes would endanger the existence of the Jewish State. Their common history of conflict could create friction between the ethnic groups in the country, and loyalty toward a state which by definition was to be the Jewish homeland cannot be expected from the Palestinians, it is held.

Bosnia-Herzegovina, where three hostile ethnicities, Serbs, Bosnian Croats and Bosniaks are squeezed into one state in order to uphold the legitimate right to their homeland, illustrates the difficulties, which such a construction brings along. The memories of the recent war enhance hostility between the ethnic groups who might well slip into civil war, were international organizations not present to maintain the fragile state construction. A complicated constitution aims at guaranteeing equal rights to the three ethnicities. Accordingly, the presidential election system, for example, permits citizens to elect a candidate of their ethnicity only; a rotational system for the three ethnic presidents has been introduced. Meanwhile, the population can only very slowly adapt to the idea that they have to share their state with the former war enemy.

Moreover, the example of Bosnia-Herzegovina illustrates the problems which evolve around property rights in cases of war refugees who claim property upon their return to the original place of residency, such as

houses and apartments which they had abandoned as a consequence of the war. Alongside the elaborate campaigns of ethnic cleansing which were affected during the years of war, thousands of peoples who had been resettled or had lost their own houses, often of a different ethnicity, moved into deserted houses and apartments of people who had fled as a consequence of expulsion. The international organizations operating in Bosnia-Herzegovina cite the conflicting claims of people to the same property and the often impossible return of refugees to their original place of residence due to the changed composition of the population, as one of the main difficulties in restoring peace in the region.

While Palestinian refugees have had a legitimate right to return to their homes in Israel since the War of 1948, this right cannot easily be exercised now. Israel's identity as a Jewish state has been consolidated, the same as the political system which does not provide for division of power based on ethnicity. Moreover, the friction between the Israeli and the Palestinian peoples has increased over the past fifty years, so that neither Palestinians nor Israelis would necessarily like to share a living in one state. Finally, the repatriation of real property to the original owners after a period of more than 50 years, during which the cities and villages in Israel have undergone fundamental changes through extensive construction activity, is virtually impossible. Hence, as of 1993, when the Declaration of Principles was signed between Israel and the PLO for the Palestinian people, the idea of two states in Palestine has been revived.

The interim agreements signed between Israel and the PLO provide for self-administration rather than for the eventual establishment of a Palestinian state in the West Bank and the Gaza Strip. Nevertheless, it has been accepted as a common truth that all parties involved have envisaged Palestinian statehood and not self-administration as the ultimate goal of the peace process.

The word autonomy derives from the Greek words *auto*, which means self, and *nomos*, which means law or rule. Today, the word is used in different domains such as philosophy, where it describes the power of the individual to define himself and his will. In political science, autonomy is used as a synonym for a regime under which a certain territorial unit has exclusive power over legislation, administration, and adjudication in certain defined fields.⁴³ The juridical term autonomy is properly used only when

⁴³ Ruth Lapidoth, "Defining Autonomy," in Robin Twite and Tamar Hermann (eds.), *The Arab-Israeli Negotiations* (Tel Aviv, 1993), p. 196.

a special arrangement is made to the benefit of a particular ethnic, religious, or linguistic group within the boundaries of a certain province or state, so that other groups and other provinces are excluded from the arrangement.⁴⁴ The objective of territorial autonomy is to guarantee to a group which differs from the majority a certain amount of self-determination if they form the majority in one specific area of the state. Usually powers are transferred in the areas of culture, economy, and social affairs while the fields of foreign affairs and security matters are reserved for the federal government. Legislation by the autonomous regime usually requires confirmation by the central authorities, but this confirmation must be granted except when respective law contradicts the terms of autonomy or applicable law.⁴⁵

While an autonomous regime depends on the consent of the central government to exercise self-administration, and has to abide by already established arrangements of the state pertaining to its legal system and the system of government, as well as by decisions of the central government in fields not delivered into self-rule, an independent state enjoys full sovereignty and freedom of action from other states. Sovereignty means to be protected from undue influence by other states, and to enjoy equal rights to join and participate in the international community.

Although I have suggested that the Palestinian people have an inalienable right to self-determination implying independence supported by international legal documents, numerous obstacles have to be overcome before the Palestinian autonomous regime can be transformed into a sovereign state. The territorial question may be the single most controversial issue between Israel and the Palestinians. While for the time being, the Palestinians, at least at the negotiation table, have laid their quest for the whole of Palestine on ice, the territory of the West Bank and the Gaza Strip is claimed for the establishment of a sovereign Palestinian state. As pointed out earlier, Israel cannot retain a sovereign right to these areas since they were taken by conquest and do not belong to the internationally recognized territory of the State of Israel. Furthermore, the West Bank and Gaza had been exclusively inhabited by Palestinians until 1967, when Israel occupied the territories. Since then, however, Israel has engaged in the erection of settlements inhabited by a majority right wing nationalist Jews who claim Judea and Samaria, as the West Bank of the Jordan River

⁴⁴ Yoram Dinstein, "Federalism and Autonomy," in Robin Twite and Tamar Hermann (eds.), *The Arab-Israeli Negotiations* (Tel Aviv, 1993), p. 201.

⁴⁵ Lapidot, "Defining Autonomy," p. 198.

was called in biblical times, as part of the ancient Jewish homeland. Today, Israel argues that they are forced to maintain their occupation throughout large swathes of the West Bank and Gaza Strip, once a final status between Israel and the Palestinian people is reached, for the purported purpose of protecting these settlements and for reasons of strategic security. The policy of ongoing settlement expansion and establishment throughout the occupied territories which Israel has put into effect, has been frequently condemned by the international community since it clearly presents a significant violation of International Law. The *Fourth Geneva Convention* explicitly prohibits the settlement of a foreign population in occupied territories. Article 49 stipulates that "The occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies." Furthermore, the UN International Law Commission condemns the settlement of foreign populations in occupied areas since it constitutes a severe abuse of power in the objective to annex the territory. So such intentional alterations in the composition of the population of the territory are considered a crime as severe as genocide by the Commission.⁴⁶

Another dilemma revolves around the question of whether or not Israel will agree to grant a future Palestinian state a full measure of independence and whether this state will be self-sustainable. The armed struggle of Palestinian organizations against their oppressor understandably caused Israel to take precautions in order to protect the integrity of their state, and its population. Israel is not ready to surrender to the eternally perceived threat of her Arab neighbors and the Palestinian people, which has become a part of the common ethos of the state. Accordingly Israel designed the self-government arrangement for the Palestinians and accordingly Israel will arrange a final status agreement which will provide utmost security for that country. Consequently, it is most probable that the Palestinian state in the making will not be permitted armament, since Israel entered the peace process in order to decrease potential threats rather than to produce a new one, which a militarized Palestinian state would still be understood to be.

The limited territory available for the exercise of self-determination presents another obstacle to the sovereign Palestinian state. Similar to Israel's Law of Return, issued to grant all people of Jewish religion a right to immigrate to Israel, the Palestinians, who now share a history of Diaspora, will want to readmit the entire Palestinian people to their ancient homeland. Eventually, however, this endeavor could reach beyond the absorp-

⁴⁶ See DeZayas, "Das Recht auf die Heimat", p. 54.

tive capacity of the country. Finally, the decades of occupation left the West Bank and Gaza Strip with a devastated economy, as a consequence of the virtual absorption of Palestinian human capital in the economy of Israel, which was in the need of cheap but relatively skilled laborers. Consequently, the Palestinian economy will continue to depend on foreign donations, and Israel as their primary trade partner, which the recently concluded free-trade agreement between Israel and the PLO indicates.

So, the real challenges will only be faced upon the establishment of Palestinian independence. For the time being, the Palestinian leadership will have to work on creating a democratic and prospering Palestinian autonomous entity, which can pass on political experience and stable institutions to a future Palestinian state.

3. The Palestinian Legal System

3.1 Historical Background: The Legal and Judicial System in Palestine

A people's legal culture is a multi-faceted mixture of the institutions, doctrines, practices, and structures that are bound up within the historical development of their area. The lack of territorial, political and jurisdictional boundaries that has defined the Palestinian people and their legal culture is indicative of the current state of their legal orientation and administrative organization, which draws from multiple sources of law and varied legal traditions. The long history of occupation law, which includes Ottoman, British, Egyptian, Jordanian and Israeli occupation periods, has left a rich residue of doctrine, process and procedure. Raja Shehadeh has claimed that it is, however, a misconception that the laws in force are a confused amalgam of laws from different historical periods. Rather, he states, a clear progression can be observed and a determination is always possible as to which law applies to any given situation.¹

In order to understand the current state of the Palestinian legal system in the autonomous territories of the West Bank and Gaza Strip, I will firstly outline the broader history of Palestinian legal and judicial traditions.

Subsequently, I will discuss the most recent developments in Palestinian law, the provisions set forth by the interim agreements between Israel and the PLO for the Palestinian people, as well as by the legislation of the Palestinian Legislative Council (PLC), which complete the Palestinian legal heritage.

¹ Raja Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories* (The Hague, 1997), p. 74.

3.1.1 Ottoman Rule over Palestine

Ottoman rule over Palestine extended from 1517 to 1917.² In 1839, the Ottoman Sultan initiated a far-reaching movement of legal reform, known as *Tanzimat*,³ which resulted in the codification of a wide range of laws. The new codes were more often than not based on modern European models, such as the French legal system, in an attempt to update Ottoman Imperial legislation. By the time of the collapse of the Ottoman Empire, most of the law had been given over to secular codification. Those areas of law reformed were removed once and for all from *Shari'a* religious law, which had previously formed the foundation of the Ottoman legal system, although they did not always shed their Islamic 'flavor'. The Ottoman Land Code of 1858, for example, consisted of an Islamic core, which was extended to incorporate customary law and traditional practice to deal with the matter of land in the Ottoman Empire. The *Mecelle* (Civil Code) of 1869-1876 is also an important example of the intervention of the secular legislator into the material part of *Shari'a* law for the purpose of updating it. The *Mecelle* is a compilation of pure Islamic *fiqh* following the Hanafi school, and was compiled primarily as a legal handbook or digest.⁴

In contrast, the Islamic heritage was entirely eliminated from the Ottoman penal code, procedure, and commercial law. The Ottoman Code of Civil Procedure of 1879, to name but one example, was based on the French Civil Code, "and many of its provisions were word-by-word translations." This law was intended to be used in conjunction with the *Mecelle*, and, accordingly, made numerous references to it.⁵

² Ibid.

³ The Islamic root of *Tanzimat* is *nazama* and means to arrange, to regulate. The process of legal reform can thus be referred to as 'Reorganization.'

⁴ The Hanafi school of *fiqh*, i.e., religious law, is one interpretation of Islamic Law, named after its author Abu Hanafi An-Numan b. Thabit. "The Hanafi school became the favourite school of Ottoman *Saldjukid* rulers and of the Ottoman Turks; it enjoyed the constant favor of the dynasty and exclusive official recognition in the whole of the Ottoman Empire. As a legacy of former Ottoman rule, the Hanafi doctrine has retained official status, as far as Islamic law has remained valid, even in those former Ottoman provinces where the majority of native Muslim population follows another school, e.g., in Egypt, Sudan, Jordan, Israel, Lebanon and Syria." B. Lewis, V.L. Ménage, J. Schacht (eds.), *The Encyclopedia of Islam*. New Edition (Leiden, 1971), Vol. III, p. 163.

⁵ See Robert H. Eisenman, *Islamic Law in Palestine and Israel* (Leiden, 1978), pp. 1-7.

Both the Ottoman Land Code and Civil Code are largely still in force today.⁶

When the modernized Ottoman legal system was introduced, the *Shari'a* court system and its judges, who had previously assumed the entire administration of justice within the Ottoman Empire, and were solely trained in Muslim religious law, could not satisfy the challenges posed by the new legal developments. As a consequence, alongside the development of codified, secular law, the introduction of a civilian judicial system became necessary, and was established in 1871.⁷ The Ottoman legal system produced a three-tier system of local, first instance and appeals courts. The courts were referred to as *Nizamiye*, the civilian courts, which were governed by statute law, in contrast to religious courts. The *Tanzimat* Council in Istanbul became a Court of Cassation for the whole Empire.⁸

The *Shari'a* court jurisdiction, meanwhile, was being limited to personal status matters only such as marriage and divorce, burial and juvenile questions for Muslim citizens, while the Jewish and Christian communities had the right to adjudicate over such matters in their own, respective tribunals.

3.1.2 *The British Mandate Period*

After World War I the political geography of the Middle East was substantially altered. Great Britain occupied Palestine in 1917, and assumed civil administration in 1920. The intervening three-year period of military rule saw the setting in place of most of the legal practices and structures, which would henceforth characterize Palestine. As early as June 1918, when Chief Administrator of the British military government in Palestine, General Allenby, issued a proclamation for the reopening of the courts and prescribed the law which they should administer, the Palestinian judiciary was restored.⁹ The authorities decided that the law in force in Palestine on 1 November 1914, the effective date for the commencement of hostilities between Great Britain and the Ottoman Empire, was to be

⁶ Raja Shehadeh, *The Declaration of Principles and the Legal System in the West Bank* (Jerusalem, 1994), p. 18.

⁷ Anis F. Kassim, "Legal Systems and Developments in Palestine," in *The Palestine Yearbook of International Law* 10 (The Hague, 1984), p. 21.

⁸ See Eisenman, *Islamic Law in Palestine and Israel*, pp. 14-16.

⁹ Norman and Helen Bentwich, *Mandate Memories* (New York, 1965), p. 201.

maintained in civilian courts.¹⁰ British mandatory rule was sanctioned by the Council of the League of Nations on 24 July 1922.¹¹ Unlike Syria or Iraq, which were Class A Mandates to be prepared for independence, Palestine was considered a Mandate of Class B. As a consequence, the idea of eventual independence, even of local self-government, was not considered for the Palestine Mandate entrusted to Great Britain by the League of Nations, due to the problematic situation that prevailed in Palestine, pertaining to the tensions between the Jewish and Arab populations. As a result, Britain was given full legislative and administrative power over the territory.¹²

The Mandatory Government declared its intention to preserve existing Ottoman Law in Palestine and did not aim at radically or suddenly changing the law of the land in the early years of the mandate. When practical needs and glaring discrepancies became evident, however, the authorities began to gradually modify the legal system. Once legislative activity started, it became elaborate. The British policy was to leave local custom and traditional practice as far as possible undisturbed where it did not intervene with the needs of public order and good administration. The part of local law, which the British considered good public policy to conserve, was that based on religio-customary practices. Hence, the codes stemming from the Ottoman period which remained in force were the Land Code of 1858, the Civil Code or *Mecelle* of 1869-76, and those parts of the Ottoman Code of Civil Procedure based on it.¹³ The British replaced those parts of the Ottoman codes which had a French model, and introduced new ordinances based on English Common Law. "The criminal, commercial and maritime law, and the civil and criminal procedure, which were derived from French codes badly translated in the middle of the 19th Century, and little amended to meet new circumstances,"¹⁴ were repealed.

One reason for the vast modifications that were introduced by the end of the mandate, according to Eisenman, was the "alien and unscientific character of the Ottoman legal system to the British bureaucrat, which had been taken over indiscriminately by the British regime."¹⁵ Bentwich

¹⁰ See Proclamation No. 42 in Norman Bentwich, *Legislation of Palestine 1918-25* (Alexandria, 1926), 2 Vols., p. 605.

¹¹ Tessler, *A History of the Israeli-Palestinian Conflict*, p. 158.

¹² Eisenman, *Islamic Law in Palestine and Israel*, p. 73.

¹³ *Ibid.*, p. 12.

¹⁴ Norman and Helen Bentwich, *Mandate Memories* (New York, 1965), p. 204.

¹⁵ Eisenman, *Islamic Law in Palestine and Israel*, p. 75.

simply suggests that “it is the English habit to leave as a permanent legacy of overseas rule her system of law.”¹⁶ By 1940, most of the Ottoman Law based on French codes was replaced for the reason of being unsuitable for the purpose of the British administration. This development helped the integration of Palestine in the British Empire, and fostered trade relations with the mother country.

In August 1922, Palestine received a semi-constitutional document, the Palestine Order-in-Council, promulgated by His Majesty’s Privy Council in England. It dealt with the organization of the government, but neglected such issues as representation in the government and individual rights. All legislative and executive rights were vested in the High Commissioner for Palestine, by virtue of an amendment of the Order-in-Council in 1923.¹⁷ Only the Secretary of State for the Colonies had the right to disallow ordinances promulgated by the High Commissioner, and His Majesty’s Privy Council held the power to issue legislation for Palestine directly.¹⁸

Article 46 of the document provided for the virtual reorganization of the legal system during the Mandate period, declaring non-statute British Law, the doctrines of equity¹⁹ and common law, as the basis of the legal system, especially in those areas where local law did not apply. The article deals with the civilian courts and the material law to be applied in them, and reads:

“The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November 1914, and such later Ottoman Laws as have been or may be declared in force by Public Notice and such Orders in Council, Ordinances, and Regulations as are in force in Palestine at the date of the commencement of this Order...and so far as the same shall not extend or apply, shall be exercised in conformity with the sub-

¹⁶ Norman and Helen Bentwich, *Mandate Memories*, p. 201.

¹⁷ See Palestine (Amended) Order-in-Council of 1923, Article 3 (a), in J.M. Machover, *Governing Palestine* (London, 1936), Appendix III, p. 253.

¹⁸ They held these rights by virtue of the British Foreign Jurisdiction Act of 1890.

¹⁹ Equity is a body of legal principles that evolved mainly in the 15th and 16th Centuries in order to complete, and occasionally correct the English Common Law system that had become insufficient and defective. From 1873, when the organization of the English judiciary was reformed, all English courts were able to order the equitable remedies as well as apply the rules of common law. See René David-John Brierley, *Major Legal Systems in the World Today* (New York, 1978), pp. 315-319.

stance of the common law and the doctrines of equity in force in England.”²⁰

Hence, in all matters of judicial nature where existing Ottoman Law was not deemed sufficient for proper adjudication, or even if the court considered English legal doctrines more appropriate for the administration of justice, courts could resort to British laws of reference. Moreover, British Law thus became the background of any new law to be promulgated in Palestine. As a result, the courts emerged as the arena where adoption or rejection of English Law was decided. The transformation of the Ottoman legal heritage into a Palestinian body of law based on the doctrines of common law and equity was accelerated in 1932, when a Privy Council decision endorsed a more deliberate application of English Law. An intense Anglification of statute law took place, and courts began to use English legal practices wherever possible. Advocates quoted English and also American law reports, adopting the rule of judicial precedent from the common law system.

When the British Administration was established in the winter of 1917, the judicial system was in suspense. The Turkish judges had fled, and the Arab and Jewish members of the courts were unable to carry on. The physical condition of the courts, which the British administration found upon their occupation of Palestine

“certainly did not reflect the dignity of the law. They were held in dirty and unkempt rooms, the chairs and benches were broken, the clerks were shabby and down at heel, the records were kept on scraps of paper.”²¹

The structure of the Ottoman court system was absorbed almost completely into Palestine of the mandate period. Courts of First Instance, later known as District Courts, were set up to deal with more serious suits and take appeals from local Magistrate Courts. A Court of Criminal Assize dealt with cases punishable by death. A Court of Appeal was established in Jerusalem to take over the duties of the former Court of Cassation in Istanbul.²² Separate religious courts for the Christian, Muslim and Jewish communities continued to rule in matters of personal status. In cases of

²⁰ See Palestine Order-in-Council of 10 August 1922, Article 46, in John Norton Moore (ed.), *The Arab Israeli Conflict. Vol. III: Documents* (Princeton, 1974), p. 96.

²¹ Norman and Helen Bentwich, *Mandate Memories*, p. 203.

²² Kassim, “Legal Systems and Developments in Palestine,” p. 24.

conflicting jurisdiction such as if the parties involved belonged to different religious communities, civilian courts assumed jurisdiction.

Upon the promulgation of the Palestine Order-in-Council the Court of Appeal was transformed into a Supreme Court which would also sit as a High Court of Justice. Supervision of the courts was vested in the Senior Judicial Officer of the Mandate. He was empowered to adopt rules of law dealing with procedure, fees and jurisdiction, even if those rules contradicted the former Ottoman Law. The British authorities greatly reduced the number of judges and courts. They introduced courts of three judges. Some British judges were appointed to the District Courts and the Supreme Court, which would sit with two British and four Palestinian judges.²³ The Supreme Court would sit as a High Court of Justice to hear claims "which are not cases or trials but petitions and applications necessary to be decided for the administration of justice."²⁴ The High Court became an important instrument for the protection of individual rights, and the protection from abuse by the bureaucracy. The final Court of Appeal for Palestine was the Judicial Committee of the Privy Council. English, Arabic and Hebrew were permitted as pleading languages. Also, a Government Law School was established in order to grant aspiring members of the legal community a proper legal training. Only those advocates who held a diploma of an accredited law school and had passed two years of apprenticeship with an admitted lawyer, held the right to plead cases in the courts.

I conclude that the British authorities made a considerable effort to modernize the Palestinian legal system and reform it in accordance with the standards of an independent judiciary. The alien and authoritative character of the British administration, which regarded Palestine and her people as an underdeveloped and non-sustainable entity without foreign assistance, imposed certain undemocratic traits upon the system of government in Palestine, however. This happened partly in order to support the overall British policy of establishing a Jewish National home in Palestine, against the will of the Arab majority. The British High Commissioner and a number of his colleagues in the administration held broad authority to legislate, and implement decisions often without resorting to the local

²³ The Palestinian judges represented all groups in Palestine. They were composed of two Muslim, one Jewish, one Christian judge.

²⁴ Norman and Helen Bentwich, *Mandate Memories*, p. 207.

people's wishes and criticism.²⁵ Eager to fill the legal gaps, which the Ottoman administration had failed to work on in order to update their body of law, the British naturally resorted to the common law system, which proved to be most familiar to them. Consequently, the British authorities did not make an effort to leave the legal system they found upon occupation in place, but transformed it into a system drawn from the British doctrines of common law and equity, which suited their customs and convenience.

3.1.3 *Jordanian Annexation of the West Bank: 1948-1967*

From 24 May 1948 to 24 April 1950, when the West Bank was finally annexed by the Hashemite Kingdom of Jordan,²⁶ all laws and regulations that were in force on 15 May 1948 continued to be valid,²⁷ except for such laws that contradicted the Jordanian Defense Law of 1935.²⁸ The Jordanian King assumed all powers that the King of England, his minister, and the High Commissioner of Palestine enjoyed by virtue of the Palestine Order-in-Council of 1922.²⁹ After the incorporation of the West Bank of the Jordan River into the Hashemite Kingdom, no attempt at a unification of legal systems was made. A law of 16 September 1950 provides that "laws and regulations that are in force in each of [the two Banks] shall remain in effect until new unified and universal laws for both Banks are issued."³⁰

Since new legislation enacted by the Jordanian Parliament applied equally to both parts of the Kingdom, a *de facto* harmonization of the legal sys-

²⁵ It has to be noted however, that an attempt to establish a Legislative Council, composed of ten members of the administration alongside 12 Jews and Palestinian Arabs, who would have taken over the right of legislation from the High Commissioner, was made. The election of the Council was boycotted by the Arabs however, who disagreed not only with the quotas of British and Palestinian members on the Council, but with the existence of a foreign government altogether. As a result, the right of legislation was vested in the High Commissioner alone. Moreover, both Jewish and Arab representatives exercised considerable influence on the policies of the Mandatory government. See ESCO Foundation for Palestine (ed.), *Palestine: A Study of Jewish, Arab and British Policies* (New Haven, 1947), 2 Vols., pp. 278-283.

²⁶ The annexation of the West Bank by Jordan was not recognized by the international community however, since it happened by force.

²⁷ Kassim, "Legal Systems and Developments in Palestine," p. 27.

²⁸ Internet, Birzeit University Institute of Law, *Legal Status of Palestine: West Bank*, <http://lawcenter.birzeit.edu/publications/resources/westbank.htm> (visited on 9 November 1999), p. 2.

²⁹ Raja Shehadeh, *From Occupation to Interim Accords*, p. 77.

³⁰ Kassim, "Legal Systems and Developments in Palestine," p. 28.

tems happened. The West Bank legal system moved away from the English Common Law system toward the Civil Law system.³¹ A great portion of the law in force in June 1967, when Israel occupied the West Bank, stemmed from the period of Jordanian rule. Since most judges and lawyers practicing in the West Bank at that time had obtained their training in countries such as Syria, Jordan or Lebanon, even the judicial system after the end of the British mandate was influenced by the continental, Latin tradition of law, so named for its organization and maintenance in the continental European legal systems, in contrast to the Anglo-Saxon tradition of common law.³²

Nevertheless, the court system during the Jordanian period of rule over the West Bank formally resembled the British model, since as mentioned, the legal as well as the judicial systems of the two banks of the Jordan River were not completely harmonized. First Instance courts were divided into Magistrate and regular First Instance courts, the former of which dealt with minor criminal offences and small civil claims that did not exceed a sentence of three years in prison or a fine of 200 Jordanian Dinars. Regular First Instance Courts ruled in criminal and civil matters that surpassed the competence of Magistrate Courts. A Court of Appeal, situated in Ramallah, adjudicated in cases of appeal to First Instance Courts' judgments. Finally, a Court of Cassation in Amman functioned as a Supreme Court which performed the function of judicial review of legislation and executive action.

3.1.4 *Egyptian Administration of the Gaza Strip: 1948-1967*

In contrast to Jordan, which annexed the West Bank to its kingdom in 1950, Egypt regarded the Gaza Strip as part of a future Palestinian state. As a result it perceived the Egyptian role to be a temporary administrator of a territory belonging to a foreign people. Thus, Egypt retained the legal system inherited from the British and Ottoman rule in Palestine, of which the Gaza Strip was part, and did not, (or did, but to a very limited extent), enact new ordinances.³³ New legislation was largely regulatory, procedural and administrative in nature. An Egyptian Administrator-General, who assumed all powers of the former British High Commissioner, was

³¹ Internet, Birzeit University Institute of Law, *Legal Status of Palestine: West Bank*, p. 2.

³² Glenn E. Robinson, "The Politics of Legal Reform in Palestine," in *Journal of Palestine Studies* 27, no. 1 (Autumn 1997), p. 53.

³³ Shehadeh, *From Occupation to Interim Accords*, p. 77.

appointed.³⁴ Two pieces of legislation, however, can be regarded as an exception of the overall Egyptian policy. In 1955, Basic Law No. 255 for the Gaza Strip was issued by the Egyptian government, which served as its constitution. Furthermore, in 1962, the Constitutional Order was proclaimed, which emphasized the Palestinian national identity by stating that the Gaza Strip should constitute an integral part of the Palestinian territory.³⁵

The Gazan Court system resembled that of the West Bank, since both entities had inherited the judicial structure of the British Mandate. As in the West Bank, the court system consisted of Magistrate and First Instance (District) Courts, which dealt with minor offences. For severe criminal offences, a First Instance Court would sit as a Criminal Court, in panels of several judges. The Gazan Court of Appeal also functioned as a High Court.

3.1.5 *Israeli Occupation: 1967-1994*

The occupation of the West Bank of the Jordan River and the Gaza Strip by IDF troops in June 1967 was followed by a replacement of the Jordanian and Egyptian administrations by separately organized Israeli military administrations. The Israeli Regional Commander for the West Bank assumed all powers previously vested in the Jordanian King and the Jordanian Council of Ministers. According to the Jordanian constitution, they,

“with the approval of the King may issue regulations to determine the administrative divisions in the Kingdom, the formation of governmental departments, its stages, titles, manners of administration, the appointment and dismissal of its employees, their authorities and functions.”³⁶

The Commander for the Gaza Strip seized comparable executive and legislative rights. Alongside these vast administrative powers concentrated upon the Regional Commanders, they were authorized to issue military orders which had the status of binding law.

³⁴ See Egyptian Ministerial Order No. 274 of 8 August 1948.

³⁵ Kassim, “Legal Systems and Developments in Palestine,” p. 29.

³⁶ Shehadeh, *From Occupation to Interim Accords*, p. 84.

During the 27 years of Israeli occupation of the West Bank and the Gaza Strip, over 1,400 such military orders were issued for the West Bank, as well as about 1,100 for the Gaza Strip,³⁷ which constituted a substantial transformation of existing law. Mr. Abu Halthria, of the *Al-Haq* human rights organization, says that about 40 percent of military orders concern land and military zones and 40 percent relate to security issues.³⁸ Raja Shehadeh suggests that while a considerable number of military orders were enacted, existing Jordanian and Gazan laws remained in force except as amended,³⁹ and, in cases of conflict between local law and Israeli military orders, replaced by the latter.⁴⁰ Especially in civil matters the amendments tended to be minor.⁴¹ Local courts were not empowered to invalidate enactments issued by the Regional Commander, due to the fact that such enactments became part of local legislation, thus constituting binding law.⁴² The *Fourth Geneva Convention*, however, states as the main principle governing laws and courts during occupation, that the occupier

“is not the sovereign of the territory. He has no right to make changes in the laws, or in the administration, other than those which are temporarily necessitated by his interest in the maintenance and safety of his army. On the contrary, he has the duty of administering the country according to the existing laws and the existing rules of administration.”⁴³

³⁷ Interview with Mohammed Abu Halthria, human rights lawyer at *Al-Haq*, the West Bank Affiliate of the International Commission of Jurists, in Ramallah (3 April 1999).

³⁸ *Ibid.*

³⁹ Shehadeh, *The Declaration of Principles and the Legal System in the West Bank*, p. 23.

⁴⁰ The International Commission of Jurists, *The Civilian Judicial System in the West Bank and Gaza: Presence and Future* (Geneva, 1994), p. 43.

⁴¹ Shehadeh, *The Declaration of Principles and the Legal System in the West Bank*, p. 23.

⁴² Israel National Section of the International Commission of Jurists, *The Rule of Law in the Areas Administered by Israel* (Tel Aviv, 1981), p. 23. The legality of Jordanian and Egyptian administration in the West Bank and Gaza Strip was neither sanctioned by international law. The Palestinian people at large, however, did not perceive those foreign powers as oppressive as the Israeli one.

⁴³ The International Commission of Jurists, *The Civilian Judicial System in the West Bank and Gaza: Presence and Future*, p. 20. See also Art. 64 of the Fourth Geneva Convention which reads: “The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or amended by the Occupying Power in cases where they constitute a threat to its security. (...) The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to

International legal norms do not contest the principle that the legitimate government retains its sovereignty over the occupied territories after it has been replaced, but sovereignty is suspended during the occupation period. Consequently, the occupant is to maintain the status quo until the final status is determined.⁴⁴ Furthermore, Article 43 of the *1907 Hague Convention IV* states that “[the occupant] shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”⁴⁵ So, the *Fourth Geneva Convention* and the *Hague Convention* emphasize that the promulgation of laws by the occupying power is to be avoided except for provisions that are needed to ensure the maintenance of orderly government of the territory, the restoration and protection of public order and safety, and the protection of the occupant, its military forces and officials. The vast amount of military orders introduced by the Israeli occupational forces, however, far exceeded the scope of interference with the occupied territories’ law as permitted by International Law. Israeli military rule and legislation in fact severely disrupted the Palestinian civilian justice system and the independence of the judiciary. The Israeli Government puts forward two main arguments in rejection of this position. The first argument is that sovereignty over the West Bank and Gaza was undetermined since Jordanian rule over the West Bank was not internationally recognized. Israel, therefore, claims that it administers the area as *terra nullius*. The second argument is that the occupation of the West Bank and Gaza is *sui generis*, as it is of long duration.⁴⁶

The entire civilian judicial system of the West Bank, following Military Order (hereinafter MO) 412 was controlled by the Israeli military administration through an Israeli officer entitled, by virtue of this order, to assume all the powers and privileges previously vested in the Minister of Justice under Jordanian Law.⁴⁷ MO 528, furthermore, vests the same offi-

ensure the security of the Occupying Power.” in *Geneva Convention IV relative to the Protection of Civilian Persons in Time of War* (1949), 75 UNTS 287. [Also available on internet, <http://www.unhcr.ch/html/menu3/b/92.htm> (visited on 11 November 1999)].

⁴⁴ Riziq Shuqair, *Criminal Jurisdiction under the Gaza-Jericho Agreement* (Ramallah, 1994), p. 25.

⁴⁵ See 1907 Hague Convention IV and Regulations, Section III, Article 43 in Adam Roberts-Richard Guelff (eds.), *Documents on the Law of War* (Oxford, 1989), p. 55.

⁴⁶ Israel National Section of the International Commission of Jurists, *The Rule of Law in the Areas Administered by Israel*, p. 26.

⁴⁷ Raja Shehadeh, *Occupier's Law. Israel and the West Bank* (Washington D.C., 1988), p. 76.

cial with the powers of the Bar Association.⁴⁸ Since the Jordanian Judicial Council, which formerly had been responsible for the administration of the judiciary and the selection of judges, had lost its sovereignty in the West Bank, an Israeli Judges Appointment Committee assumed the task of the appointment of judges.⁴⁹ This Committee was appointed by the Regional Commander and was entirely composed of military officers.⁵⁰ Hence, the abolition of the independence of the judiciary rendered the judges mere employees of the Israeli commander with no judicial protection or immunity.⁵¹ As a consequence of Jordanian institutions such as the Jordanian Bar Association and the Jordanian Judicial Council responsible for the West Bank being truncated off the now occupied territory, both the admission of Palestinian lawyers to the bar, as well as the nomination of Palestinian judges left Palestinian hands. Also, the Jordanian Court of Cassation, acting as the highest appellate court as well as the High Court of Justice, became inaccessible for Palestinian residents in the West Bank. The Court of Cassation in Amman represented not only the highest appellate court, but also exercised sole jurisdiction over all appeals regarding constitutional and administrative matters, thus keeping the executive branch overseen.⁵² Also, the court was responsible for the administration of the judiciary through occupying the majority of seats at the Jordanian Judicial Council. Hence, the Court of Cassation's judges played an important role in the appointment and disciplining of judicial personnel, and guaranteeing the proper functioning and independence of the judiciary.⁵³

The opportunity to appeal against judgments of First Instance Courts remained intact during the period of occupation thanks to the existence of a Court of Appeal, which was transferred from Jerusalem to Ramallah. However, West Bank residents were deprived of a government that provided judicial review of legislation and executive actions. While the Gazan Supreme Court remained unimpaired, the restrictions imposed upon the judiciary through military orders, which resembled those men-

⁴⁸ Riziq Shuqair, *Criminal Jurisdiction under the Gaza-Jericho Agreement*, p. 31.

⁴⁹ The International Commission of Jurists, *The Civilian Judicial System in the West Bank and Gaza: Presence and Future*, p. 23.

⁵⁰ *Ibid.*, p. 48.

⁵¹ Shehadeh, *The Declaration of Principles and the Legal System in the West Bank*, p. 62.

⁵² Frederick M. Russillo, *Preliminary Judicial System Needs Assessment: The Autonomous Areas of Palestine and the West Bank. Final Report* (San Francisco, November 1994), p. 15.

⁵³ Shehadeh, *The Declaration of Principles and the Legal System in the West Bank*, p. 64.

tioned for the West Bank, rendered the judicial branch in both territorial entities ineffective.

The establishment of an Israeli Military Court system enhanced the process of extension of Israeli jurisdiction in the occupied territories, by taking away the right to adjudicate on vital matters from local Palestinian courts, and over Israelis who committed offences within the occupied territories.⁵⁴ The courts were staffed by Israeli military officials with legal training, where a single-judge tribunal could impose prison sentences not exceeding five years or fines of up to NIS 5,000.⁵⁵ MO 378, by virtue of which a military court system was maintained in the West Bank, allowed for these tribunals to rule over “any crime specified in any security provision or other legislation without prejudice to the security legislation.”⁵⁶ This broad definition of the military courts’ scope of jurisdiction allowed for a large part of criminal jurisdiction of the Palestinian civilian courts to be taken over by military tribunals. Also, cases pending before civilian courts could be suspended at any time by the Regional Commander.⁵⁷ Hence, the military courts acquired concurrent jurisdiction over all criminal matters under the Jordanian Criminal Code⁵⁸ In practice, the military courts ruled over cases that did not touch on issues of security. These included traffic offences, drugs and taxation.⁵⁹ Not only did the Israeli Regional Commander’s habit of deciding whether a case should be tried in a civilian or military court help the occupying power ensure tight control over the Palestinian judicial system, it also served their interest to keep certain categories of individuals from being tried in Palestinian courts. Thus, the military courts have tried cases of murder committed by Palestinians against other Palestinians. The decision to transfer such cases to a military court often appeared to be due to the fact that the accused was a Palestinian collaborator whom the military was interested in protecting.⁶⁰ Also, charges against the State of Israel, the IDF and any of their officials as well as against members of the military administration in the occupied territories were excluded from being adjudicated in local

⁵⁴ Riziq Shuqair, *Criminal Jurisdiction under the Gaza-Jericho Agreement*, p. 32.

⁵⁵ Israel National Section of the International Commission of Jurists, *The Rule of Law in the Areas Administered by Israel*, p. 27.

⁵⁶ Article 7 of MO 378.

⁵⁷ Interview with Ghassan Faramand, Deputy Director, Birzeit University Law Institute, in Ramallah (1 April 1999).

⁵⁸ Shehadeh, *Occupier’s Law. Israel and the West Bank*, p. 81.

⁵⁹ The International Commission of Jurists, *The Civilian Judicial System in the West Bank and Gaza: Presence and Future*, p. 43.

⁶⁰ Shehadeh, *Occupier’s Law. Israel and the West Bank*, p. 85.

courts. (MO 164, 1967) Greenspan argues that bringing troops of the occupying power before local courts “would be paradoxical since their status in International Law derives from conquest.”⁶¹ Furthermore, since the Regional Commander was authorized to decide whether a case was to be convened in military courts, a tendency toward trying Israeli criminal offenders in the occupied territories under Israeli jurisdiction developed, while Israeli settlers and citizens residing in the West Bank and the Gaza Strip benefited from the rights and protections of the Israeli legal system, which had been extended extra-territorially as of 1 November 1978. They petitioned either Israeli civilian courts or settlement courts.⁶² Before that date, holders of Israeli ID cards, at least formally, could be tried in local courts in civil and criminal matters unless the military or government was involved. Appeals against military court judgments, in light of the absence of a Court of Cassation, could be filed only with the Israeli Military Objections Committee, (established through MO 172) whose rulings were recommendations to the Regional Commander. He could accept, reject or amend the recommendations. Thus, convicts were subject not to an orderly process of law, but to the goodwill of the Regional Commander.

The destruction of judicial independence and a competent administrative structure through not only replacing the Judicial Council, the Minister of Justice and the Court of Cassation for the West Bank, as well as the corresponding institutions of the Gaza Strip, but also through impairing the authority of local courts to adjudicate in civil and criminal offences, has had telling impacts on the Palestinian judiciary. Judicial practitioners and the public have noted laxity, inadequate administrative performance, corruption and the erosion of judicial integrity.⁶³ The significant lack of resources allocated to the Palestinian courts further illustrates the neglect of the local civilian justice system by the occupying power, which increased the pre-existing inefficiency of the Palestinian judiciary. Judges were extremely badly paid and basic office facilities such as computers and fax machines, as well as legal libraries and reference books were lacking. Court records and registry work were done manually.⁶⁴

⁶¹ Israel National Section of the International Commission of Jurists, *The Rule of Law in the Areas Administered by Israel*, p. 13.

⁶² Shehadeh, *The Declaration of Principles and the Legal System in the West Bank*, p. 9.

⁶³ Russillo, *Preliminary Judicial System Needs Assessment: The Autonomous Areas of Palestine and the West Bank. Final Report*, p. 17.

⁶⁴ The International Commission of Jurists, *The Civilian Judicial System in the West Bank and Gaza: Presence and Future*, p. 51.

jurisdiction during the occupation period, as explained above, when “a dual system of public administration assured unequal and discriminatory opportunities for both the quality and extent of the development available to the two communities.”⁶⁹

Article 9 of the DoP deals with the law in the autonomous territories. There it says that “both parties will review jointly laws and military orders presently in force in remaining spheres.” (Art. 9.2) Thus, although no explicit reference to the law of the land is given, it is understood that the law in force during the occupation period will remain intact, including all military orders issued by the Israeli Regional Commanders for the West Bank and the Gaza Strip. Also, since the review of all law is subject to veto by the Israeli party, military orders directed against the Palestinian population, such as enactments limiting individual rights and freedoms, cannot be cancelled through legislation of the Council.

The only explicit reference to the judiciary is given in Article 7.2 of the DoP. A future interim agreement is to specify the functions of independent Palestinian judicial organs, as well as their scope of jurisdiction. Different degrees of elaboration on items such as the rights which Israel retains in the occupied territories, or the independence of the Palestinian judiciary show the attention paid to these subjects by the negotiating parties. The autonomy of the Palestinian judicial branch is obviously not identified as an issue which deserves a detailed discussion in the DoP.

3.2.2 *Israeli-Palestinian Agreement on the Gaza Strip and Jericho Area (Interim I Agreement of 4 May 1994, signed in Cairo)*

The second agreement signed between Israel and the PLO for the Palestinian people specified the general guidelines for self-government as established in the DoP. It served the implementation of preliminary Palestinian self-rule for the Jericho area in the West Bank, and agreed upon areas of the Gaza Strip. Article 4 describes the structure and composition of the Palestinian self-government authority. Since the Palestinian Council had not been elected when self-government was introduced in respective areas, a Palestinian Authority was to be a 24-member body which would “carry out and be responsible for all the legislative and executive powers and responsibilities transferred to it under this Agreement and shall be responsible for the exercise of judicial functions,” (Art. 4.1) until

⁶⁹ Shehadeh, *The Declaration of Principles and the Legal System in the West Bank*, p. 4.

against legislative presents a constr authority. While by autonomous this confirmati the terms of a

Also, the Af and military ment, unles Israeli acc that "the exceede dled and that du Strip i legal froze on o adr Or fo o

a Palestinian Council will be democratically elected. This new concept of early empowerment represents a deviation from the understanding as pro- claimed in the DoP that only upon the election of a Palestinian Council will powers be transferred.

The Palestinian Legal System

The Israeli civil administration shall transfer authority, as specified in the agreement, to the Palestinian Authority (Art. 3.1); Israel shall withdraw its military forces from the Gaza and Jericho area within three weeks from the date the agreement was concluded and hand authority over to a strong Palestinian Police force, established by virtue of Article 9 of the Gaza-Jericho agreement to, "assume responsibility for public order and internal security of Palestinians"(Art. 2.6).

The agreement explains the scope of jurisdiction for the Palestinian authority in territorial, functional and personal terms. Article 5.1 (a) states that "territorial jurisdiction covers the Gaza Strip and the Jericho Area territory, except for Settlements and the Military Installation Area." In its functional dimension, Palestinian jurisdiction encompasses all powers and responsibilities as agreed upon, such as internal affairs, legal admini- stration, labor, social welfare, education, tourism, commerce and indus- try, health and transportation.⁷⁰ Personal jurisdiction extends to all per- sons within the territorial jurisdiction except for Israelis (Art. 5.1c).

The exclusion of Israeli citizens, settlements and military installations, where Israel retains their administration, from Palestinian jurisdiction in all civil and criminal matters, even if falling within Palestinian territorial jurisdiction, however, constitutes a severe constraint to the autonomy of the Palestinian Authority. Furthermore, Israel assumes responsibility over external security in the West Bank and the Gaza Strip, all of which allows Israeli Defense Forces to preserve their presence in the territories. Israel maintains its military government, vested with all legislative, executive and judicial powers, for those territories resting under its rule. The possi- bility of residual intermeshing of Israeli (settlers) and Palestinian popula- tion concentrations, and the prospect of mixed and overlapping jurisdic- tions, with attendant administrations, as well as security and political complications⁷¹ are two principal arguments that speak against the sepa- ration of jurisdictions. Territorial jurisdiction means that

⁷⁰ See Annex II of the agreement.
⁷¹ Yezid Sayigh, "Redefining the Basics: Sovereignty and Security of the Palestinian State," in *Journal of Palestine Studies* 24, no. 4 (Summer 1995), p. 6.

Thus, the notion of the rule of law intends, in particular, to oblige the administration to respect the law. By imposing respect for stable norms on state bodies, law reduces the risk of arbitrary behavior. As is illustrated by the above statements, the Interim I Agreement attributes importance to democratic and accountable government in the autonomous territories, in which the independent judiciary should play an important role.

3.2.3 *Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip (Interim II Agreement of 28 September 1995, signed in Washington D.C.)*

The Interim II agreement dedicates much attention to the establishment of democratic institutions to govern the Palestinian autonomous territories. Chapter I, Articles 1 through 9, exclusively deal with the establishment and the powers of a Palestinian Council to be elected by the Palestinian people. In addition, provisions for accountable government and the protection of the rule of law are elaborately outlined in the document. Accordingly, Article 14, once again, declares the parties' commitment to the rule of law and internationally accepted norms and principles of human rights. Article 8 provides for judicial review of administrative acts for every Palestinian who feels that his fundamental rights and freedoms have been violated by the public authorities. It reads:

“Any person or organization affected by any act or decision of the *Ra'ees* of the Executive Authority of the Council or of any member of the Executive Authority, who believes that such act or decision exceeds the authority of the *Ra'ees* or of such member, or is otherwise incorrect in law or procedure, may apply to the relevant Palestinian Court of Justice for the review of such activity or decision.”

While an explicit right to petition a Court of Justice in case of administrative abuse is herewith proclaimed in the Interim II Agreement, the Palestinian authority has not undertaken actions so far to establish laws and regulations which provide for judicial review.

The emphasis which is put on the protection of democratic and accountable Palestinian government in various paragraphs of the agreement may constitute a response to documentation by various non-governmental organizations and the media of massive abuse of power and human rights violations committed or sponsored by the Palestinian authorities, in the

period between the inauguration of self-rule in 1994 and the conclusion of the Interim II agreement. It is to note that in contrast to the previous agreements, here, the necessity of unconditional protection of the rule of law, democracy and human rights by the Palestinian autonomous regime is stressed through the promulgation of democratic principles such as free elections or judicial review as early as in the first chapter.

The Gaza-Jericho (Interim I) Agreement does not mention the Palestinian Council, which was to become the representative of Palestinian sovereignty and the supreme decision-making body in the Palestinian autonomous regime, as proclaimed in the DoP of 1993. On the contrary, the Interim I Agreement provides for the transfer of all powers to an appointed 24-member Palestinian Authority rather than to an elected body. The Palestinian Authority held legislative and executive rights in all spheres which were delivered into self-rule. Moreover, it was responsible for the establishment of an independent judiciary which was to provide for the proper administration of justice. The Interim I Agreement does not deal with the election process for a Palestinian parliament and the *Ra'ees* of the Authority which was to mark the advent of a democratic regime for the Palestinian people. The idea of holding elections only after the establishment of an autonomous regime and only after the Palestinian Authority had started operating, can be identified as one cause for the prevailing weakness the PLC suffers from vis-à-vis the Executive Authority⁸³ which previously had assumed the entire administration without being restricted by another branch of government. Much more than with the creation of democratic institutions, the Interim I Agreement is preoccupied with producing guidelines for the administration, and ensuring a regime that guarantees utmost security for the State of Israel. The preliminary establishment of a Palestinian Authority, an appointed body rather than one elected by the Palestinian people to administer the autonomous territories, as pointed out, contradicts the DoP which foresaw the transfer of powers and responsibilities to the Palestinian self-government institutions only after the election of a Palestinian Council. The 'early empowerment' may have formed a compromise between the negotiating parties. The Palestinian negotiators may have insisted on the immediate introduction of autonomous rule while the holding of elections, which requires organization and a considerable period for campaigning, was postponed.

⁸³ The majority of former Palestinian Authority members, including *Ra'ees* Yasser Arafat, have entered the Executive Committee subsequent to the elections of the Palestinian Council.

Only the Interim II Agreement deals extensively with the creation and powers of a Palestinian Council, which, from the time of its election, was to replace the Palestinian Authority as the highest representative of Palestinian sovereignty and to which all powers were to be transferred. Article 2.1 of the Agreement ensures “direct, free and general political elections ... for the Council and the *Ra’ees* of the Executive Authority of the Council.” The parliamentary elections, which were to be convened at the earliest possible moment after the conclusion of the Agreement, were to allow the Palestinian people the right “to govern themselves according to democratic principles” (Art. 2.1). The body which formerly constituted the Palestinian Authority was to become the Executive Committee of the Council and had to surrender all executive and legislative powers and responsibilities. Article 1.2 of Chapter I states that

“pending the inauguration of the Council, the powers and responsibilities transferred to the Council shall be exercised by the Palestinian Authority, which shall have all rights, liabilities and obligations to be assumed by the Council in this regard.”

Article 3 defines the structure of the Palestinian Council which constitutes, together with the elected *Ra’ees*, the Palestinian Interim Self-Government Authority (Art. 3.1). While the Council may establish committees and ministries for the administration of the Palestinian territories, the Executive Authority of the Council forms the executive branch of government (Art. 3.2). All of its members are proposed by the *Ra’ees* of the Executive Authority (Art. 3.4b).

Article 9 of the Agreement describes the powers and responsibilities of the Palestinian Council. All legislative rights are allocated to the Legislative Council, the parliamentary body of the autonomous regime. The Executive Authority is to implement approved legislation. Moreover, the Executive can issue such regulations as are needed for the purpose of implementing promulgated laws or for the realization of self-government in its broadest sense. Moreover, the Executive may “formulate and conduct Palestinian policies and supervise their implementation” (Art. 9.2). Hence, a whole host of powers, which do not require parliamentary approval, are awarded to the Executive. Article 9.6, ironically, emphasizes the need for an independent Palestinian judicial system, “composed of independent Palestinian courts and tribunals.”

Chapter II of the Interim II Agreement deals with Redeployment and Security Arrangements, being the withdrawal of Israeli military forces

and civil administration from the territory delivered into Palestinian self-rule. Following Annex I, Article 1.9 of the Agreement, the withdrawal of Israeli forces was to be conducted in three phases, each to take place after an interval of six months, with the first phase being concluded prior to the Palestinian elections (Art. 10.1). For the West Bank, the Interim II Agreement introduces a distinction between territories, which are to enjoy different degrees of autonomy. Accordingly, in Areas A, the Palestinian Authority exercises “powers and responsibilities for internal security and public order” (Art. 8.1). Israeli forces will withdraw completely from those territories. In Areas B, however, the administration is conducted jointly by Israeli and Palestinian authorities. While Palestinians assume civil administration for Palestinians in these areas, Israel provides for internal security “for the purpose of protecting Israelis and confronting the threat of terrorism” (Art. 8.2). Areas A and B comprise populated areas, i.e., towns, villages, refugee camps, and Waqf land. Palestinian police may undertake action in these areas in order to satisfy the needs of public order pertaining to Palestinians only. The number and identity of Palestinian policemen operating in Areas B, their equipment and vehicles, however, must be known to the Israeli authorities. Finally, Areas C of the West Bank, which are areas outside the A and B territories, remain under full Israeli civil and security administration. These areas, according to Article 6.3c. “will be gradually transferred to Palestinian jurisdiction.”

The territorial jurisdiction of the Palestinian Council extends to Areas A and B in the West Bank, as delivered into self-rule except for Israeli settlements and military installations (Art. 17.2a), while the Council retains functional jurisdiction in Areas A, B, and C (Art. 17.2d). For those areas, which are not put under Palestinian territorial jurisdiction, Israel retains jurisdiction and all legislative, executive and judicial rights.

The Interim II Agreement stresses the territorial unity of the autonomous areas in the West Bank and the Gaza Strip, as well as the integrity of the Palestinian people not only in Chapter II, Article 11.1, but also in Annex I, Article 1.2 and 4. Article 11.1 reads as follows: “The two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which will be preserved during the interim period.” Annex I, Article 1 states that

“in order to maintain the territorial integrity of the West Bank and the Gaza Strip as a single territorial unit...both sides [shall respect] and [preserve] without obstacles, normal and smooth movement of

people, vehicles, and goods within the West Bank, and between the West Bank and the Gaza Strip.”

While the Interim II Agreement was concluded in September 1995, only in autumn of 1999 did Israel concede to the opening of the ‘Safe Passage’ route between the autonomous areas of the West Bank and Gaza Strip. The location and operational modalities of this route, which was to guarantee the Palestinian residents of the West Bank and Gaza unimpeded freedom of movement between the two entities, were negotiated and agreed upon as early as in the Gaza-Jericho Agreement of 1994, in Annex I, Article 9. Prior to the consent of the Israeli side on safe passage, near total restriction of movement of Palestinian residents between the West Bank and the Gaza Strip meant a considerable inhibition of the development of independent economic activity. For an entity as small as the Palestinian autonomous areas, domestic trade is particularly indispensable. Also, many Palestinian families were torn apart for long periods of time when relatives were prevented from attending family reunions or simply joining their nuclear family, living in the West Bank or Gaza respectively, due to the necessity of hardly obtainable Israeli travel permits.

As in the Gaza-Jericho Agreement, considerable attention is paid to the maintenance of security. The establishment of a strong Palestinian Police Force is again being emphasized. The Palestinian role in the combat of ‘terrorism’ is exceedingly stressed. Accordingly, Article 15 of Annex I calls on both sides to “take all measures necessary to prevent acts of terrorism, crime and hostilities directed against each other.” Article 2 of Annex I which deals with the ‘Prevention of Terrorism and Violence’ is more explicit about which Palestinian agency is to take action and allocates the Palestinian Police a crucial role in the struggle against ‘terrorism’. “The Palestinian Police will act systematically against all expressions of violence and terror” (Art. 2b). Furthermore, Article 2d allows for the Palestinian Police to “arrest and prosecute individuals who are suspected of perpetrating acts of violence and terror.” Hence, the Agreement provides the Palestinian Police with considerable freedom to act against any form of public discontent, which could possibly include the prohibition of the fundamental freedom of assembly, since peaceful public protests and demonstrations could evolve into upheaval. The powers and responsibilities of the Palestinian Police Force will be discussed in section 6. *The Palestinian Police Services*, below.

3.3 The Palestinian Legislative Council

Democratic elections for the Palestinian Council were held in the autonomous territories of the West Bank and the Gaza Strip on 10 January 1996. With Palestinian residents of the West Bank and the Gaza Strip as well as Palestinian Jerusalemites as eligible voters, an 88 member parliamentary body, as well as the *Ra'ees*⁸⁴ and 89th member of the Council, were elected. Following the regulations set forth in the DoP and the Interim II Agreement of 1995, the Palestinian Council constitutes the supreme interim self-governing body in the autonomous areas, vested with all executive and legislative rights within the authorities transferred to it.⁸⁵

The Council's executive powers are performed by one of its committees, while the full parliamentary body does legislative work. The Executive Authority's members are appointed jointly by the Council and the *Ra'ees* from among the members of the PLC. The *Ra'ees*, who proposes the Executive's members to the PLC, is an *ex officio* member of the Executive Authority. He is, moreover, entitled to choose some persons, in number not exceeding 20 percent of the Executive Authority's membership, who are not Council members.⁸⁶

In order to create the preconditions for a sound Palestinian self-government committed to the principles of democracy and the rule of law, which could eventually lead to statehood, the Council, in its legislative role, should occupy a prominent role. It should transform the Palestinian legal heritage from the different occupation periods into one uniform legal system, and fill the legal gaps which were created through the new reality of autonomy. Not only has a constitution been needed to clarify the organization of government and ensure the rule of law, but also laws that were to form a clear economic legal environment, or legal provisions for individual and liberal rights. An ineffective legislative branch that fails to create a healthy legal environment would obstruct the development of accountable and democratic government. The extremely challenging context in which the PLC is operating, however, has to be recognized. Since the final status of relations between Palestinians and Israelis has yet to be

⁸⁴ Yasser Arafat was elected *Ra'ees* of the Palestinian Council with an overwhelming majority. The term *Ra'ees* means both the English word 'chairman,' proposed by the Israeli side and 'president,' proposed by the Palestinian side.

⁸⁵ See Agreement on the Gaza Strip and the Jericho Area (Interim I Agreement) of 4 May 1994), Article 3.1-2.

⁸⁶ See *ibid.*, Article 5.4.c.

clarified, the PLC, by definition an interim institution in itself, is prevented from legislating on a wide range of issues, extending from the economic sphere and matters pertaining to the penal code, to foreign relations.⁸⁷

In political terms, the elections marked a historical moment for the Palestinian people, both in terms of their struggle for sovereignty, and through the inauguration of a democratic model of government. An elected Palestinian Authority on Palestinian soil represents the embodiment of an important part of statehood and of the democratic process.⁸⁸ "The Council is the first elected body in the history of the Palestinian people. It is looked on as an indicator of their right to self-determination and an expression of their natural hopes for independence," argues the JMCC.⁸⁹ The comparatively high voter-turnout of 75 percent⁹⁰ illustrates Palestinian residents' interest in the composition of their government and the future of their people. Moreover, the elections marked a transformation of the Palestinian political system by shifting the "center of the political life from the 'outside' to the 'inside' - that is, from abroad to Palestine itself." Ali Jarbawi further suggests that

"the new institutions will gradually occupy a pre-eminent place in the Palestinian political arena, while the Palestine Liberation Organization (PLO) and the Palestine National Council (PNC), primarily Diaspora organizations, will lose their effectiveness in the practical, though not necessarily, in the theoretical sense."⁹¹

The fact that the majority of the elected Council members are members or affiliates of Fateh, the most popular Palestinian party which maintains strong ties to the PLO, many of whom have only recently returned to Palestine, can be held against this argument. Rather, a movement from the 'outside' political establishment to only 'inside' institutions can be

⁸⁷ United States Agency for International Development (USAID), *Developmental Needs of the Palestinian Legislative Council*, (Washington, April 1997), p. 3.

⁸⁸ Center for Palestine Research and Study, *Parliamentary Research Unit: The Palestinian Legislative Council* (Nablus, October 1996), p. 2.

⁸⁹ Internet *Special Reports from Palestine: The Palestinian Council*, <http://www.jmcc.org/research/special/council2.html> (visited on 15 March 1999), p. 1.

⁹⁰ Human Rights Watch, *Palestinian Self-Rule Areas: Human Rights under the Palestinian Authority* (New York, September 1997), p. 35.

⁹¹ Jamil Rabah, *Palestinian Public Opinion since the Peace Process* (Jerusalem, July 1998), p. 49.

observed, meaning that Palestinian political institutions, especially the executive branch, are predominantly staffed with officials from organizations such as the PLO or the PNC that previously, when a concrete territorial option for the manifestation for Palestinian self-determination was lacking, operated in the Diaspora. While Fateh won 54 and Fateh Independents won 12 of the 88 PLC seats, local Palestinian parties altogether occupy only 22 seats.⁹²

The conflict which is embodied in the overlapping authorities assumed by the PLO and the PNC on the one hand (organizations that have represented the Palestinian people in Palestine as well as in the Diaspora) and the Palestinian Council on the other hand (an institution whose task is to govern the portion of the Palestinian people which resides on defined and limited territory within the West Bank and the Gaza Strip for a limited, interim period of time), has contributed to the inhibition of the Council's legislative performance. The young parliamentary body had to struggle for legitimacy, while the PLO has united the Palestinian people in and outside Palestine for decades. Not only has it provided a justification of the right to return but it has since been the symbol of the Palestinian struggle for self-determination. Since a solidification of the PLC implies a weakening of the PLO and a strong and effective Legislative Council will always be limited by the Interim Agreement which is the PLC's term of reference, while the PNC is neither restricted by the Agreement nor subject to Israeli pressure, many Palestinians favor the PNC as a term of reference for the Palestinian people. In a survey conducted by the JMCC, 37.7% of interviewees said the PLO should have the upper hand while 32% said PA and PLO should be equal, 19.2% said PA should be stronger.⁹³ A marginalization of the PLO, finally, alongside a strengthening of the interim institutions and a weakening of the unity of local and Diaspora Palestinians, could endanger Yasser Arafat's popular backing, as he himself has only returned to Palestine with the advent of self-rule and must consolidate support. As a consequence, the strong position rendered to the PLO weakens the PLC and its local staff, the powers of which are shifted to the Executive Authority most of whose representatives, including Yasser Arafat, are PLO officials.

Presently, the involvement of the PLO in the Council's affairs is elaborate. Ziad Abu-Amr argues that

⁹² *Ibid.*, p. 51.

⁹³ *Ibid.*, p. 61.

“since its formation, [the Executive Authority] has not held a meeting of its own. Instead, it meets within broader ‘leadership meetings’ that are also attended by members of the PLO Executive Committee, members of the Fatah Central Committee, and heads of security services.”⁹⁴

Ahmed Qrei’a, head of the PLC in 1997, confirmed the opinion that the PLO is still the leading power behind the Palestinian people. He defined the role of the PLC, as being that of issuing legislation relating to the daily life of the Palestinian people in the autonomous areas.⁹⁵

In the struggle for power between the PLC and an Executive Authority which was used to governing by decree while the inauguration of an elected Council was pending, the latter institution is clearly favored by the Interim II Agreement which allows for the *Ra’ees* to not only issue regulations and initiate legislation, but to promulgate all legislation passed by the Council (Art. 18.3). A report prepared by the Speakers’ Committee of the Legislative Council, examining the achievements and failures of the Council’s first term, states that the Executive Authority has attempted to control the Council and marginalize its role. It does so by failing to implement the Council’s decisions or to hear the Council’s opinion. The Executive delays legislative work by their frequent reluctance to provide the Council with a response to draft legislation presented a long time ago. The report furthermore criticizes the lack of binding mechanisms that would regulate the relations between the Legislative and the Executive. Such mechanisms would vest the Council with rights to monitor and question the Executive Authority whose ministers currently refrain from informing the Council about their policies and plans.⁹⁶ Council members have complained that “the executive branch of the PA does not take the Council seriously.”⁹⁷ Rafat An-Najjar, a PLC member from Gaza said:

“We have passed 75 resolutions and we feel that the authority does not cooperate... The Legislative Council passes resolutions on

⁹⁴ Ziad Abu-Amr, “The Palestinian Legislative Council,” in *Journal of Palestine Studies* 26, no. 4 (Summer 1997), p. 91.

⁹⁵ “Palestinian Legislative Council-Year One,” in *The Jerusalem Times* (14 February 1997), p. 8.

⁹⁶ “The Palestinian Legislative Council after One Year of Existence,” in *People’s Rights* (March 1997), p. 17.

⁹⁷ Human Rights Watch, *Palestinian Self-Rule Areas: Human Rights under the Palestinian Authority*, p. 36.

problems like torture, the prisoners, laws - but the PA does not carry out most of these [resolutions]."⁹⁸

Also, some laws which would better the separation of powers and responsibilities, and improve the rule of law as well as increase the accountability of the government, which have been passed by the PLC have not been signed into law by the *Ra'ees*. Marwan Barghouti, a legislator from Ramallah, illustrates very well the balance of power between the Executive Authority and the PLC. He states that "Presidents everywhere have to respect the decisions of the parliament. Mr. Arafat does not always do that. Sometimes he agrees with decisions. Sometimes he is against them, and then he does not always sign them."⁹⁹

In the absence of a Basic Law, which is to constitute the organization and basic principles of Palestinian self-government for the interim period, the executive's ministries and departments operate without a clear framework or understanding of the restrictions on their powers.¹⁰⁰ The relationship between the executive, legislative and judicial branches of government remains unclear and the actual legal status of the PLC is ambiguous.¹⁰¹ Democratic government, however, requires not only elections but meaningful rotation of power, including the highest office in the land, oversight, the rule of law, separation of powers, respect for human rights and freedom of assembly, expression and the press, which is to be ensured by a constitution. The present situation leaves the authority without a basic law. A constitution represents the authority, which governs all others, regulates societal relations and controls various institutions. "It regulates the relations between the governor and the governed, and identifies duties and responsibilities," says PLC member Ahmed Nasser who represents the governorate of Khan Younis, Gaza.¹⁰² Moreover, the promulgation of the Basic Law is considered an important step towards statehood. The creation of guidelines for government and common principles of societal relations deepens Palestinian unity and fosters the integration of the Palestinian people in Gaza and the West Bank.¹⁰³

⁹⁸ Ibid.

⁹⁹ "PA lawmakers debate efficacy of council," in *The Jerusalem Post* (8 March 1999), p. 2.

¹⁰⁰ Ziad Abu-Amr, "The Palestinian Legislative Council," in *Journal of Palestine Studies* 26, no. 4 (Summer 1997), p. 91.

¹⁰¹ USAID, *Developmental Needs of the Palestinian Legislative Council*, p. 3.

¹⁰² "Wherefore art the Basic Law?" in *The Jerusalem Times* (27 June 1997), p. 7.

¹⁰³ Center for Palestine Research and Study, *Parliamentary Research Unit: The Palestinian Legislative Council*, p. 2.

As of 9 February 1999, the PLC has passed 19 laws, 16 of which have been ratified by *Ra'ees* Arafat.¹⁰⁴ A draft Basic Law was passed by the Council and submitted to the President's office on 10 October 1997, but has not been promulgated to date. This is happening despite the 1996 Palestinian Election Law's provision which states that "the first task of the elected PLC is to establish a constitutional system for the interim period."¹⁰⁵ Other draft laws, passed by the PLC and referred to the *Ra'ees* but not signed into law include the Judiciary Law, the Non-Governmental Organization Law, the Public Assembly Law, and the Civil Status Law, all of which relate to liberal and individual rights or accountable government.¹⁰⁶

In practice, the legislative as well as the judiciary, despite the fact that it has not been signed by the *Ra'ees*, commonly use the Basic Law as a reference when evaluating judicial independence. The authority of the document is derived from the manner in which it was legislated, and its content. The Basic Law was passed through the Legislative Council, the principal lawmaking body of the Palestinian government, in all three readings. Following the Council's Standing Orders, the legislative may override a presidential veto if a two-third majority of Council members approve the bill subsequent to its third reading. This happened on 2 October 1997 in the Legislative Council. Moreover, the Basic Law derives authority from the widespread popular support it has received. Additionally, the law draws upon international legal principles.¹⁰⁷ Finally, however, the enforcement of the Basic Law depends upon the Executive's will to publish it in the official gazette. The Executive Authority, has regularly ignored and undermined the authority of the Basic Law's provisions concerning the independence of the judiciary, defying court sentences and interfering with the judiciary.¹⁰⁸

¹⁰⁴ See internet, *Laws and Projects* at <http://www.pal-plc.org/english/laws/laws.htm> (visited on 25 July 1999). The 16 laws that have been ratified were exactly those which were initiated by the Council of Ministers, i.e., the Executive Authority itself.

¹⁰⁵ Internet, *PCHR's Report on the Palestinian Legislative Council*: http://www.pchrgaza.com/files/REPORTS/English/promoting_96.htm (visited on 15 March 1999), p. 23.

¹⁰⁶ Internet, *Laws and Projects*, <http://www.pal-plc.org/english/laws/laws.htm> (visited on 25 July 1999).

¹⁰⁷ LAW - Palestinian Society for the Protection of Human Rights and the Environment, *The Justice Unit* (Jerusalem, unpublished manuscript, on file with LAW, May 1999), p. 4.

¹⁰⁸ *Ibid.*, p. 5.

Especially in the Palestinian legal environment, with multiple sources of law stemming from the Ottoman, British, Jordanian, Egyptian and Israeli periods of occupation, a clear framework of legal principles is needed to bring into order the sometimes equivocal legal heritage, as well as a constitutional structure which establishes essential rules of government. The present situation of legislative ineffectiveness has discouraged many PLC members. The Council holds the means of a no-confidence vote against the executive, which often seems to deny respect for and cooperation with the Council, but has been reluctant to use it. Salah Tamari, a legislator from the Bethlehem district gives the supreme importance of internal Palestinian unity as a reason for this conduct, in face of pending conflict with the Israeli occupation power: "The main requirement of the Palestinians now is to face up to Israeli occupation. We don't want any issue to overshadow the main conflict, with the Israeli government."¹⁰⁹

The novelty of a democratic model of government for the Palestinian people, including the process of legislation through parliament, plays another key role in the insufficient performance of the PLC. Council members, inexperienced in the parliamentary process, lack the capacity to review and draft legislation, which, however, is a common deficiency for new legislatures.¹¹⁰ Standardized processes and procedures for the conduct of business need to be further systematized with regard to floor debate, setting and distribution of the agenda, voting in the plenary and in committees.¹¹¹ The PLC has yet to deal with much draft legislation, but a large portion of floor activity has been devoted to the discussion of reports from the Council's standing committees while the legislative purpose of these debates is questionable. The deviation from normal parliamentary conduct of centering floor debate on the proposed laws developed from the committee report's findings, which resulted in a backlog of draft legislation to be passed,¹¹² creates frustration among the Council members about the ineffectiveness of their legislative work. Moreover, shortage of and deficits in the training of staff and a lack of infrastructure such as basic office equipment or the access to information as a result of inadequate communication between the governmental departments and a

¹⁰⁹ "PA Lawmakers Debate Efficacy of Council," in *The Jerusalem Post* (8 March 1999), p. 2.

¹¹⁰ USAID, *Developmental Needs of the Palestinian Legislative Council*, p. 4.

¹¹¹ *Ibid.*

¹¹² Associates in Rural Development (ARD), *Developmental Needs of the PLC* (Washington, June 1997), p. 21.

lack of libraries, impede parliamentary work and decrease its quality.¹¹³ Also, a well-functioning legislature needs extensive connections with other branches and agencies of government in order to obtain information, facilitate agreements and provide oversight, a capacity which is virtually non-existent in the PLC.¹¹⁴

Also, an administrative confusion results from the Council's movement throughout Palestinian governorates since the PLC is faced with the unique dilemma of having to serve as the legislative representative of an entity that is not geographically contiguous.¹¹⁵ There are two sites where PLC sessions are convened, one in the West Bank town of Ramallah, and one in Gaza. This problem is exacerbated by restrictions on PLC members' movement between the two entities imposed by Israel.¹¹⁶ Even though members have been granted special authorization to travel between the West Bank and Gaza, they often confront considerable difficulty, while staff members are not permitted such movement at all.¹¹⁷

Another indicator for a strong and effective legislative branch is its involvement in the policy-making process, i.e., the ability to initiate and enact its own proposed laws. This ability has been minimal for the PLC since a large portion of legislation passed by the Council remains unimplemented by the executive branch. Also, some of the PLC members are ministers in the Executive Authority where most legislation is currently being drafted.¹¹⁸ Of 19 laws that have been passed by parliament as of 9 February 1999, 16 have been initiated by the Council of Ministers.¹¹⁹

Increasingly, the electorate voices its discontent with the performance of their representatives. A local salesman said the role of the PLC was a minor one and referred to its resolutions and laws as nothing more than "ink on paper."¹²⁰ Council members have difficulties in establishing and keeping relations with their constituencies. They complain about the lack

¹¹³ ARD, *An Assessment of the Palestinian Legislative Council* (Washington, May 1997), p. 3.

¹¹⁴ ARD, *The PLC's Oversight Function* (Washington, November 1996), p. 2.

¹¹⁵ ARD, *Developmental Needs of the PLC*, p. 19.

¹¹⁶ "The Palestinian Legislative Council after One Year of Existence," in *People's Rights* (March 1997), p. 17.

¹¹⁷ ARD, *Developmental Needs of the PLC*, p. 19.

¹¹⁸ ARD, *The PLC's Oversight Function*, p. 2.

¹¹⁹ See internet, *Laws and Projects*, <http://www.pal-plc.org/english/laws/laws.htm>.

¹²⁰ "Palestinian Legislative Council - Year One," in *The Jerusalem Times* (14 February 1997), p. 8.

of media coverage of the PLC's activity, such as the broadcasting of the Council's sessions,¹²¹ since an official media blackout was imposed on the Council's work in June 1997.¹²²

The legal system on which judicial practitioners have to rely has yet to be consolidated. The young and inexperienced Palestinian Council is overburdened with the task of creating a sound legal environment out of the legal remains from different occupation periods. Moreover, the PLC has to confront an Executive Authority, which denies its cooperation and inhibits the legislature's development into a strong body within the Palestinian government, capable of guaranteeing accountable government and the rule of law. Currently, the governmental branches are placed in a situation of blurred responsibilities and overlapping authorities. Within this system, the Executive Authority clearly holds a dominant position.

¹²¹ ARD, *An Assessment of the Palestinian Legislative Council*, p. 6.

¹²² Human Rights Watch, *Palestinian Self-Rule Areas: Human Rights under the Palestinian Authority* (September 1997), p. 38. In early 1997, the independent Al-Quds Television launched a program to broadcast PLC sessions, which proved to be very popular among the Palestinian population. In June 1997, however, the executive detained Al-Quds director Daoud Kuttab for a week and the program was cancelled. This happened supposedly because Palestinian citizens could follow the PLC's effort to improve the human rights situation in the autonomous territories by means of questioning PA officials about unlawful detention and torture.

4. The Judicial Structure in the Autonomous Areas Since 1994

The dual legal heritage for the West Bank and Gaza Strip portion of the autonomous areas extends to the judicial structure. Since the Israeli civil and military administration withdrew from the territories that were delivered into self-rule, the judicial structure, which existed in the two entities before June 1967 was basically re-established. The qualitative changes, brought about by extensive interference with the local judiciary of the Israeli military justice system, which occurred in the Palestinian judicial system and rendered it increasingly ineffective,¹ as well as a lack of the Amman-based Court of Cassation for the West Bank, truncated off upon occupation, could not be reversed, however.

4.1 The Judicial Structure of the West Bank

According to Jordanian Law, the judiciary is to be composed of a four-tier system, consisting of independent *Shari'a* courts; Municipal and Magistrate courts as well as Courts of First Instance; a High Court of Appeals; and a Court of Cassation.² Upon Israeli occupation, however, the Court of Cassation for the, then Jordanian-ruled, West Bank of the Jordan River, was cut off from the territory of the West Bank. The Court of Cassation in Amman functioned not only as a High Court of Justice hearing appeals against constitutional matters and administrative actions, and reviewing legislation, but was responsible for the independent ad-

¹ Global Bureau Center for Governance and Democracy, *Judicial Administration Project in the West Bank and Gaza. Final Report* (Jerusalem, March 1996), p. 1-2.

² Palestinian Independent Commission for Citizens' Rights (PICCR), *Third Annual Report. 1 January to 31 December 1997* (Ramallah, 1998), p. 68.

ministration of justice,³ roles that were taken over by the Israeli Military Commander in 1967.

At the advent of Palestinian self-rule, the remainder of the Jordanian judicial system was a three-tier system, with independent *Shari'a* Courts,⁴ two Municipal and nine Magistrate Courts as well as four Courts of First Instance all of which were based in the major West Bank towns,⁵ and one Court of Appeal sitting in Ramallah.

4.1.1 *Magistrate and Municipal Courts*

Magistrate Courts (*Mahkamat Al-Sulh*) rule in cases concerning claims of right and commercial cases related to debts, moveable property and real property, which do not exceed 250 Jordanian Dinars in value, as well as claims for damages, claims for relief from repossession of real estate, eviction actions and the trial of misdemeanor crimes limited by the penal code to a sentence of less than three years.⁶ Single judges, who in criminal cases also act on behalf of the public prosecution, consider all cases.⁷

Municipal courts (*Mahkamat Al-Balada 'iyya*) usually enforce local ordinances, regulations and public health codes. They also rule in matters falling within the municipality of a similar nature as treated by Magistrate Courts.⁸

³ Russillo, *Preliminary Judicial System Needs Assessment: The Autonomous Areas of Palestine and the West Bank. Final Report*, p. 15.

⁴ As the *Shari'a* Court system is administered independently, this study will not evaluate these courts' performance. Rather, it will concentrate on the secular court system, which forms one of the three branches of Palestinian government. There are *Shari'a* Courts of First Instance in various districts, and there is a permanent *Shari'a* Court of Appeal seated in East Jerusalem. The *Shari'a* Courts are empowered to decide personal status matters involving marriage, divorce, inheritance, guardianship of children etc., between Muslims, and to review cases concerning Waqf holdings and their administration. See PICCR, *Third Annual Report, 1997*, p. 68.

⁵ See Birzeit Law Institute, *Palestinian Courts Statistics* (unpublished manuscript, April 1999, on file with the author). Magistrate Courts are based in Ramallah, Nablus, Tulkarem, Jenin, Qalqilya, Salfit, Jericho, Bethlehem and Hebron; First Instance Courts are based in Ramallah, Nablus, Jericho and Hebron.

⁶ LAW, *The Justice Unit*, p. 1.

⁷ Interview with Deputy Attorney General As'ad Mubarak in Ramallah (10 April 1999).

⁸ PICCR, *Third Annual Report, 1997*, p. 69.

4.1.2 Courts of First Instance

The Courts of First Instance (*Mahkamat Al-Bida'iyya*) rule in all civil and criminal matters not falling within the jurisdiction of the Magistrate Courts. They also take appeals from Magistrate Courts' rulings, if so authorized by procedures or controlling laws. In criminal cases which carry a possible sentence of death, life at hard labor or life imprisonment, three judge panels rule, while two judge panels preside over all other criminal matters. Civil cases are considered by single judges.

4.1.3 Court of Appeal

A minimum of three judges are appointed to this court, and other judges can be called to the Court of Appeal (*Mahkamat Al-Isti'naf*) bench from time to time, if required, since the Court sits in three judge panels. It hears all appeals in criminal and civil cases rising from lower courts and is the final Court of Appeal. Since the Court formally assumed the powers of the Court of Cassation, it is vested with the right to issue decrees for the release of prisoners, according to Art. 10 of the Jordanian Law of the Composition of Regular Courts, 1952, which states: "The Court of Cassation, in its role as a High Court of Justice, rules on petitions for the issuance of release orders for individuals who are detained illegally."⁹ The same as the Supreme Court of the Gaza Strip, however, the West Bank Court of Appeal cannot rule in cases brought before it that involve offences committed by members of the executive branch. Hence, neither the Court of Appeal nor the Gazan Supreme Court hold the authority to exercise judicial review of administrative action. While the Jordanian Constitution of 1952 did not formally provide for judicial review, those Palestinians who were Jordanian citizens could call on the Court of Cassation to review actions that allegedly violated their rights as citizens. Moreover, the Court of Cassation did not have to apply or implement those acts or laws that were considered to be unconstitutional.¹⁰

If the PA removed the restrictions of the Court of Appeal in the West Bank and the Supreme Court in the Gaza Strip to rule in cases involving the public authorities, it would create a certain balance between the

⁹ Ibid., p. 77.

¹⁰ Adrien Wing, Sonya Braunschweig, and Quais Abdel-Fattah, "Judicial Review in Palestine," in *The Palestine Yearbook for International Law* 9 (1996/97), p. 118. [also on internet: <http://lawcenter.birzeit.edu/publications/publications/wing2b.html>].

branches of government. In the present situation where the courts cannot exercise oversight of decisions and orders of the executive branch, the Court's important oversight function remains absent.

4.1.4 *Public Prosecution*

The Attorney General is a government appointed functionary with the role of the Chief Legal Officer in the government. Together with his staff, deputy attorneys and public prosecutors, who number 15 for the West Bank Courts, and 22 for Gazan Courts,¹¹ he performs prosecution and defense for the state before the courts. While public prosecutors assume this capacity before Magistrate and First Instance Courts, principally by prosecuting for the public in criminal matters, the Attorney General himself, and his deputies, appear before the Court of Appeal. Eligible candidates for the position of Attorney General are judges who have served in the Palestinian judiciary, while public prosecutors have to be lawyers admitted to the Palestinian Bar and must have one year of experience in the legal profession.¹² Presently, the position of Attorney General is vacant, since Attorney General Fayez Abu-Rahmeh was urged to resign in June 1998 for his insistence on the protection of the rule of law and human rights.¹³ The Attorney General's duties are currently assumed by his deputies.

In the West Bank, a number of public prosecutors are assigned to each of the nine departments of jurisdiction, where the prosecutors may act independently. In contrast to Gazan prosecutors, here, they cannot act interchangeably in the whole area.¹⁴ In cases where claims are made against members of the government's executive branch before First Instance or higher courts, the Attorney General has to give permission for the case to be tried. In practice, however, such cases are brought before Military or State Security Courts, which do not fall within the Attorney General's responsibility.

The Attorney General has the right to engage in examination and prosecution of all criminal acts, and is obliged to do so in cases of felony

¹¹ Interview with a senior member at the Birzeit University Law Institute, in Ramallah (1 April 1999).

¹² Interview with Deputy Attorney General As'ad Mubarak in Ramallah (10 April 1999).

¹³ "Who's Next? In the Aftermath of the Resignation of the Attorney-General of the Palestinian National Authority, Mr. Fayez Abu-Rameh," in *People's Rights* (July 1998), p. 40.

¹⁴ Interview with Deputy Attorney General As'ad Mubarak, in Ramallah (10 April 1999).

crimes, such as homicide or theft. Also, he may advise the government on law. The Attorney General's office reviews court judgments and has the right to appeal.¹⁵

While one Attorney General assumes authority over the West Bank and Gaza entities of the autonomous areas, his staff are recruited locally and act according to Jordanian or Gazan law respectively.¹⁶ This situation renders the position of the Attorney General, who must have excellent knowledge of both, West Bank and Gazan law, especially difficult. He not only has to switch between two laws of reference when acting in West Bank and Gazan courts respectively, but must change from the Latin, continental tradition of law to the Anglo-Saxon model of common law. Also, the formal position of the Attorney General differs significantly between Gaza and the West Bank. While in Gaza, the Attorney General is part of the Executive, in the West Bank he belongs to the judicial branch.¹⁷ As a result, the duality of legal systems decreases the protection of the rule of law, since the danger of intermingling the two legal systems augments.

4.1.5 *The Minister of Justice*

The Minister of Justice is the member of the cabinet who holds principle responsibility for the courts and the judiciary at large. The Minister of Justice represents the judiciary to the public and is also the Executive's representative to the judiciary.¹⁸ According to Jordanian law proper, the Minister's sole task is to head the prosecution in its administrative sense, when the courts are governed by an - albeit non-existing - High Judicial Council. Under Jordanian Law, the High Judicial Council consists of the Minister of Justice and five representatives of the judiciary.¹⁹ It provides the governance and administrative mechanisms for all judicial and non-judicial personnel within the system. The Judicial Council serves the judiciary, disciplines its members and supervises their functioning as judicial

¹⁵ Ibid.

¹⁶ PICCR, *Third Annual Report, 1997*, p. 70.

¹⁷ Interview with Deputy Attorney General As'ad Mubarak in Ramallah (10 April 1999).

¹⁸ LAW, *The Justice Unit*, p. 2.

¹⁹ As of March 2000, the position of Palestinian Chief Justice is vacant. In the Gaza Strip, the nomination of judges has been administered by the executive branch, relying on the practice of the British Mandate, where a Senior Judicial Officer was in charge of the administration of the judiciary. Such practice does not comply with the principles of an independent judiciary, however, and has been criticized.

agents.²⁰ It assumes the administration of the judiciary and holds the right to appoint judges, and thus, guarantees the independence of the judiciary from other branches of government. Since this institution is presently lacking, the Minister's powers are extended to the administration of the judiciary, which constitutes a severe attack on the judicial system's independence and the basic principle of democracy which guarantees the separation of powers. Not only does the Executive appoint judges, but it increasingly interferes with the courts' as well as the Attorney General's conduct of office. To give an example of the Executive Authority's patrimonial mode of allocating government posts, West Bank Deputy Attorney General As'ad Mubarak tells of the case of two prosecutors who were appointed by President Arafat in late March 1999, shortly after their graduation from university. According to Mr. Mubarak, the two young men were neither admitted to the Bar nor did they have the slightest experience in the legal profession, both of which form a precondition to being appointed public prosecutor.²¹ As is the case with many judges, members of the Attorney General's office are often appointed due to nepotism and personal recommendation instead of qualification.

A further argument for the immediate establishment of a High Judicial Council lies in the chaotic state of both law and justice system after decades of Israeli occupation during which time the Palestinian judiciary was paralyzed. Only a single and independent Judicial Council for the West Bank and the Gaza Strip can lay the groundwork for reform and the stabilization of a now fragmented judiciary marked by a vacuum of institutional structure. The adjudicative machinery of law, procedure, courts and governance system has to be integrated.²² In the continuing absence of a unifying Judicial Council, equipped with a truthful desire to transform the judiciary into a powerful and single institution of government, capable of protecting the rule of law, the legal divides that plague the West Bank and Gazan entities of the judiciary will only multiply. The West Bank and Gaza will drift further apart on the questions of choice of law, administrative structure and judicial leadership.²³

²⁰ Russillo, *Preliminary Judicial System Needs Assessment: The Autonomous Areas of Palestine and the West Bank. Final Report*, p. 15.

²¹ Interview with Deputy Attorney General As'ad Mubarak in Ramallah (10 April 1999).

²² Russillo, *Preliminary Judicial System Needs Assessment: The Autonomous Areas of Palestine and the West Bank. Final Report*, p. 21.

²³ *Ibid.*, p. 25.

4.2 The Judicial Structure of the Gaza Strip

British Mandate Law, which Gazans refer to as 'Palestinian Law,' continues to operate today in the autonomous areas of the Gaza Strip as the main law of reference.²⁴ The judicial structure as well as the allocation of powers and responsibilities between the judicial agents differs from West Bank practice. A major deviance is the Anglo-Saxon legal tradition according to which Gazan courts function, while the West Bank judiciary takes the continental Latin tradition of law as their reference. The Gazan judiciary consists of a three-tier system. There are independent *Shari'a* Courts; Magistrate and Municipal Courts as well as Central Courts and Criminal Courts; and a Supreme Court.

4.2.1 *Magistrate and Municipal Courts*

A single judge presides over Magistrate Courts which try misdemeanor crimes and criminal offences as specified in the Conciliation Courts Law of 1948.²⁵ Appeals against Magistrate Courts' judgments can be brought before Central Courts. There are six Magistrate Courts in the autonomous areas of the Gaza Strip, staffed with 15 judges.²⁶

As in the West Bank, Municipal Courts rule in cases similar to those within the jurisdiction of Magistrate Courts, but do so only within their municipality. They enforce local ordinances, regulations and public health codes.

4.2.2 *Central and Criminal Courts*

Two Central Courts, staffed with six judges in the Gaza Strip, adjudicate in matters brought before them that do not fall within the jurisdiction of a lower court. They rule on all crimes except for those brought before the Criminal Court, and decide on appeals against judgments of Magistrate and Municipal Courts. Criminal courts, which in practice were transformed into military courts and thus are not staffed with independent

²⁴ Global Bureau Center for Governance and Democracy, *Judicial Administration Project in the West Bank and Gaza. Final Report*, p. 1-4.

²⁵ PICCR, *Third Annual Report, 1997*, p. 71.

²⁶ Interview with a senior member at the Birzeit University Law Institute, in Ramallah (1 April 1999).

judges but with military personnel, try cases of capital crimes, involving treason, unintentional killing, and rape, when the perpetrator is in the service of the state.

4.2.3 *The Supreme Court*

The Gazan Supreme Court rules as a Court of Appeal in matters tried before Central Courts, and tries cases for which there is no other specialized court. Eleven judges, including a Chief Justice, sit in three or five judge panels. Furthermore, the Gazan High Court occupies an important role in supervising the judiciary, but it cannot consider petitions brought before it pertaining to public authorities. Thus, the judiciary is prevented from exercising any oversight of the decisions of the Executive branch,²⁷ and from protecting citizens' rights, a function which the Supreme Court, sitting as a High Court of Justice, normally assumes. Criminal acts committed by members of the Executive are tried before military courts, which do not belong to the civilian judicial system.

4.2.4 *The High Court of State Security*

Established by virtue of a presidential decree issued by Yasser Arafat on 7 February 1995, for both entities of the autonomous territories, the High Court of State Security was introduced in order to try cases pertaining to internal or external security of the autonomous territories.²⁸ Since the creation of the court occurred as the result of an executive order, and its personnel, including judges and prosecutors, are recruited from among the military, the High Court cannot be considered part of an impartial and independent judiciary. Also, the Executive Authority's head, Yasser Arafat, instead of the Attorney General, holds the right to decide whether a case is to be brought before the High Court of State Security, or even, whether a case pending before a regular court is to be transferred.

The legality of such a tribunal, not complying with internationally recognized norms of the independence of the judiciary, within a democratic regime, will be discussed in section 6.5 *Special Courts: The State Security Courts and the Military Courts* below.

²⁷ PICCR, *Third Annual Report, 1997*, p. 76.

²⁸ Amnesty International, *Trials at Midnight: Secret, Summary, Unfair Trials in Gaza* (June 1995), AI Index: MDE 15/15/95, p. 12.

5. The Effectiveness of the Palestinian Judicial System

5.1 The Palestinian Basic Law Draft and Its Significance for the Protection of the Rule of Law

The Palestinian draft constitution, which is to form the legal framework for Palestinian self-government during the interim period, and most likely thereafter, currently awaits ratification by *Ra'ees* Arafat, followed by publication in the official gazette, in order to become enforceable law.

Constitutions form the legal context of political activity. A precondition for a healthy political environment is a constitutional structure, which establishes the essential rules of lawmaking, an individual's basic rights and freedoms, and supports national unity among communal groups.¹ In new legislatures, the challenge facing the constitution's drafters is to establish the rule of law and respect for fundamental rights while avoiding the type of patrimonialism which can replace the rule of law with arbitrary dictate.² For the Palestinian autonomous areas, too, the best means to ensure the separation of powers, as well as democratic and accountable government, including the protection of human rights, is within an explicit constitutional framework, a set of clear legal guidelines by which citizens and government have to abide. The urgency with which a Palestinian constitution is presently needed in order to ensure lawful government becomes clear if we look at the extent of patrimonial rule the Executive Authority, with Yasser Arafat as its head, has created in the past five years of self-rule. It also explains the *Ra'ees'* refusal to sign the respective document into law that would decisively curtail the scope of powers which the Executive can, in the absence of a clear legal framework, currently assume. While I will explain some of the realities of Pal-

¹ Anthony Tirado Chase, *The Palestinian Authority Draft Constitution: Possibilities and Realities in Search for Alternative Models of State Formation* (Jerusalem, June 1997), p. 24.

² *Ibid.*, p. 25.

estinian government, characterized by a most dominant executive authority that neither respects the democratic principle of separation of powers nor the rule of law, in sections 5.5 *Arafat's Regime: A Neo-patrimonial System?*, and 6. *The Palestinian Police Services* in great detail, two cases will epitomize how personal sentiment arbitrarily takes precedence over the rule of law in Palestine and how state power is abused in order to silence critique and disrupt pluralism. The affair of Eyad Sarraj, former director of the Palestinian Independent Commission for Citizens' Rights (PICCR), not only throws light upon the PA's conduct regarding the 'protection' of the freedom of expression but also exemplifies the judiciary's and citizens' current inability to challenge human rights violations. Mr. Sarraj, frustrated about the human rights situation under Palestinian self-rule, openly described the PA's arbitrary acts of imprisonment and torture in an interview granted to the *New York Times* in May 1996. Among others, he provocatively said that conditions under Israeli occupation were 100 times better than under Arafat's regime. On 18 May 1996, Eyad Sarraj was arrested without formal charge. Following international protests, he was released on 26 May, but rearrested on 9 June. Afterwards Attorney General Khaled Qidwah told the press that Mr. Sarraj's detention had nothing to do with his statements about Palestinian government, Sarraj was charged with drug possession. When Sarraj was released by a Gazan Magister after having been brutally tortured during custody, he was brought before a State Security Court³ for allegedly having assaulted a police officer. Shortly thereafter, the Gazan High Court's Chief Justice ordered the State Security Court to show cause to its authority over Sarraj's alleged crime, upon a petition of Sarraj's lawyers. Without ever responding to the High Court, the police released Eyad Sarraj on 26 June. However, the Attorney General emphasized, the investigations in Sarraj's case had not been concluded and he still faces possible arrest.⁴

Another prominent case of intimidation and violation of the freedom of expression occurred in August 1996, when the Ramallah High Court ordered ten students of Birzeit University who had been detained without charge since March to be released. The students had been arrested without warrant after the suicide bombings of February and March 1996. The release order followed a two-month period during which the PA refused to show cause to the court as to why the students were held in custody.

³ For a detailed discussion of the Palestinian State Security Courts, see section 6.5 *Special Courts: The State Security Courts and the Military Courts*.

⁴ See "Sarraj arrest raises questions," in *The Jerusalem Times* (14 June 1996), p. 3.

However, the executive refused to follow the court's ruling, but forced Chief Justice Amin Abdel Sala'am to resign.⁵ The way in which his successor, Chief Justice Qusay Abadlah, was dismissed in the same way in January 1998 shows equal features of disrespect for the judicial branch. Thus, the absence of the rule of law prevails not least because the agency, which ought to guarantee citizens' rights and freedoms, is rendered powerless. Chief Justice Abadlah was forced into retirement after his criticism of the Executive's, (in particular the Minister of Justice Freih Abu Meddein's), obstruction of and intervention with the work of the judiciary.⁶ The former Chief Justice had complained that he had become aware of the appointment of 15 judges only from the newspaper and warned that those appointed were unqualified and that their judgments would therefore be unreliable.⁷

One may ask how the adherence to a Palestinian Basic Law committed to the principles of democratic and accountable government and the protection of individual rights and freedoms can possibly be imposed upon a regime that has continuously shown its reluctance to abide by agreements and laws already in force. The interim agreements signed between Israel and the PLO on behalf of the Palestinian people, for example, repeatedly emphasize the mutual commitment to the respect for human rights and the rule of law in their future governments.⁸ It could be held that a future Basic Law, including within it provisions that protect and enhance both the independence of the judiciary as well as the legislative and supervisory role of the Palestinian Legislative Council might help those agencies to consolidate their positions. Thus, once these branches of government have strengthened their positions, relying on the constitution, their highest law of the land, as well as on a self-conscious civil society, and on the pressure of the international donor community, there is hope for development towards an accountable Palestinian government. Also, the *United Nations Framework for the Strengthening of the Rule of Law*⁹ in

⁵ LAW, *The Justice Unit*, p. 17.

⁶ Internet: *The Dismissal of Chief Justice Councilor Qusay Abadlah*, see <http://www.pchrgaza.com/files/PressR/English/1998/abadlah.htm> (visited on 15 March 1999), p. 1.

⁷ LAW, *The Justice Unit*, p. 18.

⁸ See, for example, Gaza-Jericho Agreement (Interim I Agreement), Article XIV, which states that "Israel and the Palestinian Authority shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally-accepted norms and principles of human rights and the rule of law."

⁹ See *United Nations Framework for Strengthening of the Rule of Law* (1994), UNGA Doc. A/49/512 (annex) reprinted in Office of the UN Special Coordinator in the Occupied Territories, *Rule of Law Development in the West Bank and Gaza Strip-Survey and Status of Development Effort* (Jerusalem, July 1997), p. 62.

its first article promotes the establishment of a strong constitution, which “incorporates internationally recognized human rights and fundamental freedoms, establishes effective and justifiable remedies at law for violations of those rights, empowers an independent judiciary and defines and limits the powers of government,” as a primary means to foster the rule of law.

The history of the Basic Law’s drafting is long. After several independent agencies, such as the Birzeit University Law Institute, the NGO *Al-Haq* as well as the PLO legal advisor Anis Al-Qassem, had produced several drafts of a to-be constitution for Palestine,¹⁰ the PLC Legal Committee finally adopted its 8th version, and, after having made significant departures from the original version in what regards detail, passed the Palestinian Basic Law in its third reading on 4 October 1997.¹¹

The draft Basic Law declares a democratic parliamentary system based on political and party pluralism to be the government system in Palestine (Art. 5). While it declares that “the rule of law is the basis of government in Palestine. All authorities, organs, assemblies, institutions and individuals are subject to the law,” in Article 6 and makes a profound commitment to accountable government, and hence to an independent judicial authority, it remains vague about the adherence to internationally recognized human rights norms. Article 10 proclaims that “basic human rights and freedoms are obligatory and must be respected,” but fails to specify any internationally recognized declarations, covenants or agreements, which contain the norms referred to. Anthony Chase mentions two essential functions international standards can play in the process of creating a new body of Palestinian law out of the maze of pre-existing law, edicts, and regulations. Firstly,

“as an entity striving to be recognized as a full member of the international community, the PA must recognize that this includes respect and protection of all internationally accepted human rights. Thus, it is important to pledge to maintain their standards until such time as they can be formally ratified.”

Secondly, “international standards can provide ready-made and quite detailed provisions to fill the gaps which may exist in some sectors of

¹⁰ Chase, *The Palestinian Authority Draft Constitution*, p. 35.

¹¹ For a copy of the Basic Law see internet: <http://www.pal-plc.org/english/laws/blaw.htm> (visited on 25 July 1999).

Palestinian law.”¹² Astonishingly, despite the negligence of international norms, Articles 9, and 11 through 32 deal with the Palestinian interpretation of general rights and freedoms. Here, the rejection of unlawful arrest and restriction of personal freedom (Art. 11) are regulated as are the prohibition of torture (Art. 13). Article 12 prescribes the right of detainees for immediate trial as well as their right “to contact a lawyer.” Also, “every arrested person shall be informed of the reasons for his arrest or detention” (Art. 12). Here, again, the wording leaves space for executive action that does not comply with international standards associated with the criminal justice process. The mere fact that detainees have the right to “contact a lawyer,” does not guarantee defense counsel to all defendants, as the *UN Basic Principles on the Role of Lawyers*¹³ prescribe in Articles 1, 3, 5 through 8. Here, Article 3 says that “Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor.” Article 6 further reads

“Any such persons who do not have a lawyer shall be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance.”

In contrast to these provisions, which call upon governments to provide qualified legal assistance to all indigent defendants, the Palestinian constitution posits upon the accused the responsibility of organizing a defense counsel. Moreover, the draft Basic Law does not regulate a time limit within which the detainee has to be informed about his charge, since the article merely states that “every arrested person shall be informed of the reasons for his arrest.” Moreover, the *International Covenant on Civil and Political Rights* of 1976, which unlike the *Basic Principles on the Role of Lawyers* constitutes a binding International Law for those states who ratified the covenant,¹⁴ stipulates in Article 14.3 (d) that

¹² Chase, *The Palestinian Authority Draft Constitution*, p. 41.

¹³ United Nations, *Basic Principles on the Role of Lawyers* (adopted on the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 1990) reprinted in Office of the UN Special Coordinator in the Occupied Territories, *Rule of Law development in the West Bank and Gaza Strip-Survey and Status of Development Effort* (Jerusalem, July 1997). [Internet: http://www.unhcr.ch/html/menu3/b/h_comp50.htm (visited on 15 November 1999)].

¹⁴ Jordan, to which the West Bank refers in establishing its legal system, and Great Britain, the law of which Gazan Law is based on, ratified the covenant. Also Egypt, having administered the Gaza Strip ratified the covenant.

“everyone shall be entitled to defend himself through legal assistance of his own choosing; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”

Hence, everybody, without exception, is entitled to receive legal counsel if accused of a crime, in order to guarantee minimum standards of a fair trial. While both the tribunal and the public prosecution are normally staffed with legal experts, the defendant may be a layman, and discrimination of the accused due to his ignorance of procedure, due process or the rules of evidence and hearing of witnesses, can evolve. If the defendant is unable to cover the, often considerable, cost of a lawyer's services, the state has to organize qualified defense counsel for the accused, in order to guarantee a fair chance for the accused to present his case before court.

Chapter 5 of the draft Basic Law is devoted to the Judicial Authority, which, according to the Law, “shall be independent” (Art. 94). Judges “shall be independent and, in their judicial actions, shall be subject only to the law. No other authority may interfere in judicial actions and affairs of justice” (Art. 95). Also, to obstruct or refrain from implementing the courts' rulings is punishable by law (Art. 102). While the independence of the judiciary is thus guaranteed, the remainder of the chapter is formulated in a vague language, leaving the organization of the court system and the role of a High Judicial Council to be established, as well as the methods of appointment, delegation, promotion and questioning of judges to secondary legislation. The absence of a clear definition as to which court assumes which jurisdiction, however, “opens the path to the PA's security courts usurping the authority of the civil court system.”¹⁵ A High Constitutional Court, which shall interpret the provisions of the Basic Law and legislation and check its constitutionality, “can be established by a law.” Here, again, the basic law remains vague in its wording and leaves the creation of a supreme court to a secondary law which requires ratification of *Ra'ees* Arafat. A supreme court, however, that assumes the right to supervise and sanction the legality of the governmental branches' performance, would signify a big step toward the rule of law. As a result of the vagueness of language, we again do not know whether the

¹⁵ Anthony Tirado Chase, “Minority Rights and Communal Relations in Palestine,” paper presented at the Middle East Study Association 30th Annual Meeting (21-24 November 1996), p. 32.

Supreme Court also forms an agency for citizens to address in cases of administrative abuse. A striking shortcoming of the Basic Law in what regards the independence of the judiciary is the absence of a paragraph referring to judges' tenure of office. Looking at the *UN Basic Principles on the Independence of the Judiciary*, it establishes as an important feature for the impartiality of judges the pledge for tenure "until a mandatory retirement age or the expiry of their term of office" (Art. 12). Moreover, the resolution sees a need for the "security, adequate remuneration, conditions of service, and pensions [to be] adequately secured by law"¹⁶ (Art. 11). Finally, the Basic Law in itself violates the democratic principle of the separation of powers, since it allows for the interference of executive officials with the judiciary. Article 106 states that "a ruling of death penalty issued by any court can only be implemented after it is ratified by the President of the Palestinian National Authority." The President, however, is not in any way part of the judiciary but does rather belong to the executive branch of government.

5.2 Judicial Review

Judicial review can be defined as

"any judicial action that involves reviewing an inferior legal norm to decide whether it conforms to higher legal principle, such as a constitution. [...] Judicial review includes review of statutes enacted by the legislature, as well as the review of actions taken by the administration and executive agencies for their compliance with constitutional rules and principles of law."¹⁷

The development of a democratic society necessitates that there be restrictions on the branches of government so that they will not disregard the rule of law. Judicial review's main purpose is thus to ensure the rule of law and the separation of powers. It is also to safeguard the basic or fundamental rights of the individual or collective population from assault

¹⁶ United Nations, *Basic Principles on the Independence of the Judiciary*, UNGA Res. 146 of 13 December 1985, UNGA OR, 40th Sess. (1985), reprinted in 25-26 CILJL Bulletin 14 (1990). [Internet: http://www.unhchr.ch/html/menu3/b/h_comp44.htm (visited on 29 November 1999)].

¹⁷ Adrien Wing, Sonya Braunschweig and Quais Abdel-Fattah, "Judicial Review in Palestine," in *The Palestine Yearbook for International Law* 9 (1996/97), p. 117. [Internet: <http://lawcenter.birzeit.edu/publications/publications/wing2b.html>].

by the state. Thus, more specifically, judicial review functions to examine the legality and constitutionalism of both, courts' judgments as well as administrative, executive and legislative acts. Democracy demands that the interests of the minority and the individual are respected, at least to the extent that those interests are recognized in the constitution, and to that end judicial review may be essential. Moreover, judicial review can contribute significantly to the development of law and its adaptability to changing conditions within society, since it is the courts that put a law into practice through their interpretation of it.

One could hold against the argument which has been put forward throughout this thesis, suggesting that a written constitution and a strong judicial branch are indispensable ingredients for democracy and the rule of law, that there are democratic countries which can do without a proper mechanism for judicial review, and which obey the rule of law without a formal constitution, such as Great Britain. Because the British constitution is not contained in a single document or bundle of documents which embody the constitution but derives from an aggregation of statutes, customs, common law rules and constitutional conventions, there is no higher law upon which to base judicial review.¹⁸ Constitutional change within the British system occurs in the same manner as any other legislative change: an ordinary act of Parliament may amend or repeal any existing law. The British Parliament is sovereign in legislating domestic law and parliamentary enactments are not questioned by challenging legislative competence. It may enact unwise laws which the courts nevertheless in theory are bound to apply.¹⁹

Thus, the idea of checks-and-balances, where the three branches of government are regarded as profoundly equal to exercise mutual control, and which is regarded as a basic ingredient to a democratic form of government, remains absent. Moreover, the role of judges is profoundly affected by the concept of parliamentary supremacy. The judges cannot act as guardians of the constitution nor can they decide upon the 'constitutionality' of legislative acts. It is not possible to exercise control over Parliament's actions in accordance with higher law. Yet, it is argued, the protection of individual rights is guaranteed due to a legal remedy, which is available in a court of law. Also, the British democracy, despite the lack of a written constitution to ensure the separation of powers, has a proven

¹⁸ See Mary Glendon, Michael Gordon, Christopher Osakwe, *Comparative Legal Traditions* (St. Paul, 1985), p. 648.

¹⁹ *Ibid.*, p. 621.

democratic and accountable tradition of government. Moreover, legislation gains authority only when judicially interpreted, especially in a common law country where courts' decisions have the force of binding law. Methods of judicial interpretation by the English courts are highly refined.²⁰

If we look at the history of government for the Palestinian people, we will find a continuous history of oppression and domination. As previously mentioned, safeguards which ensure the rule of law and the protection of individual rights - being a constitution and judicial review - are favorable to a model of democracy such as the British one, especially for societies which are in the process of moving towards democracy. Also, the International Commission of Jurists, in its report on the mission to Palestine of December 1993, recommended that under the rule of the PA, "the power of judicial review on civil, administrative and constitutional matters be exercised by the highest judicial authority, either by establishing a Court of Cassation or a Supreme Court."²¹ Mustafa Mar'i furthermore suggests that the Supreme Court of Palestine, once established, should have an overall jurisdiction to judicially review all acts of the Palestinian administration, including the power to denounce any illegal or unlawful action as null and void.²² For the inauguration of a meaningful judicial review agency in Palestine, however, the promulgation of a constitution, incorporating a bill of rights, is crucial. In absence of this Basic Law, the other branches of government enjoy supremacy, since the Supreme Court cannot claim to be the guardian of the supreme law of the land if there is no one governing document.

At the advent of self-rule, Palestine lacks proper mechanisms for judicial review, as it does a formal constitution, distinct from and superior to ordinary law. Most of all, however, the Palestinian people lack a tradition of democracy and trust in their government.

While West Bank and Gazan courts can review appeals against civil and criminal judgments of lower instance courts, their findings are not always implemented due to a refusal of the law enforcement agencies, the police services, to respect the authority of the courts, as happened with the unlawful detention of ten Birzeit University students in summer of 1996,

²⁰ Ibid., p. 622.

²¹ Mustafa Mar'i, *Guarantees for Respect of Human Rights in Palestine: Present Problems and Future Prospects* (Jerusalem, December 1997), p. 58.

²² Ibid., p. 58.

when the ruling of the Ramallah Court of Appeal was disregarded, to mention but one prominent case. Palestinian Authority officials do not have to fear judgment before Palestinian civilian courts, since cases of administrative abuse are brought before extra-judicial military and state security courts.²³ An agency to effectively oversee the legality of administrative and executive acts, meanwhile, is still absent, despite the existence of a Supreme Court for the Gaza Strip, which according to Gazan law, should have the right to hear claims which do not fall within the jurisdiction of any other court, such as petitions against administrative abuse.

Palestinian government needs an agency for judicial review as well as a constitution clearly formulating binding norms for the government branches, not only to ensure the rule of law but to offer the Palestinian public constitutional precepts according to which they can determine the effectiveness and legality of their administration. Experts at the Birzeit University Law Institute propose a constitutionally enumerated form of judicial review for Palestine. They argue that Palestine has to overcome a long legacy of foreign domination, "which can be better accomplished by the delineation of constitutional precepts and norms of the Court."²⁴ Also, to help Palestinian people to regain trust in their judiciary, "the rights and duties of the Court must be constitutionally, or legislatively, enumerated so that the public can determine the effectiveness and fairness of the jurists."²⁵ The system of review shall be centralized, so that only one single institution can act as a constitutional judge. In comparison, the United States legal system allows for all justices within the judicial structure to have power to declare acts and laws unconstitutional.²⁶

Another argument put forward in favor of the centralization of judicial review is the fact that at present, only a limited number of lawyers and judges experienced in the study of constitutional law exist within Palestine and that it may be difficult to fill all levels of the Palestinian judiciary with judges proficient to review constitutional issues. Consequently, it is better to place competent legal professionals within a specialized court. Moreover, it is suggested that the Court should not be limited to judges and lawyers, but utilize the experiences of both, scholars and activists who resided inside Palestine during the *Intifada*, and those who lived and

²³ The issue of human rights violations and the conduct of Palestinian police services will be discussed in greater detail in section 6.3 *Arbitrary Arrest and Detention: The Police Force and Human Rights* below.

²⁴ Wing, Braunschweig, Abdel-Fattah, "Judicial Review in Palestine," p. 128.

²⁵ *Ibid.*

²⁶ See Glendon, Gordon, Osakwe, *Comparative Legal Traditions*, p. 71.

worked within Western democratic institutions, in order to combine knowledge of the local legal system and judiciary with democratic thinking.²⁷

Although it is imperative to guarantee tenure of office to the judges, renewable term limits should be advocated. Adherence to the rule of law will thus be encouraged and the right to dismiss those judges who do not live up to the standard of their position, will be preserved. Finally, the Birzeit Law Institute proposes the selection process of judges and personnel serving in the Constitutional Court to be entrusted to an independent commission, whose members are beyond reproach and not political appointees.²⁸

5.3 Civil and Criminal Procedure Effectiveness

When Palestinians regained control over their court system in the autonomous areas in late 1995 and early 1996, they had to face a judiciary whose functioning was severely impaired as a consequence of nearly three decades of Israeli military occupation. During this period the Palestinian justice system was rendered increasingly ineffective not only because of the negligence of the Israelis in allocating resources to the local judiciary, but also as a consequence of the establishment of an Israeli military court system which, to an ever increasing extent, had assumed jurisdiction over matters that would have normally fallen within the civil justice system's responsibilities. Consequently, not only were the Palestinian courts deprived of the right to adjudicate in conflicts pertaining to their fellow Palestinians, but their law failed to develop and modernize. The Palestinian people were not permitted an autonomous legislative authority by the Israeli occupier, and the Israeli military administration, who represented the sole agency holding legislative rights for the West Bank and the Gaza Strip, refrained from issuing legislation relating to the adjustment of the local justice process to challenges posed by modernization. Thus, upon the advent of Palestinian self-rule, when Palestinians began to address their local courts again after a period of 30 years of judicial paralysis, the courts lacked experience, resources and a legal environment which would have helped them to manage a large caseload, and resolve disputes dealing with contemporary legal questions.

²⁷ Wing, Braunschweig, Abdel-Fattah, "Judicial Review in Palestine," pp. 143-144.

²⁸ *Ibid.*, p. 145.

An obsolete and ineffective procedure in the civil and criminal justice process is one cause for the precarious situation of the Palestinian judiciary, which is currently unable to guarantee the rule of law to Palestinian citizens. The development of functional legal processes, however, would both attract commerce and ensure the protection of human rights. Court administration, case management and the introduction of alternative dispute resolution procedures would reduce backlog and delay, and increase the efficiency of the courts through creating greater accessibility and finality.²⁹ Legal procedures designed to increase judicial control and accountability over civil and criminal justice processes would improve both fairness and efficiency in civil dispute resolution and criminal prosecution.³⁰

Presently, the Palestinian civil justice process is a traditional, discontinuous process in which the judiciary, despite insufficient resources to handle an increasing caseload, is responsible for all administrative and decision-making functions.³¹ At all levels of the Palestinian judiciary there serves a total of 32 judges in the West Bank and 33 in the Gaza Strip, a number which is insufficient to ensure justice to a population of more than three million.³²

5.3.1 *Civil Procedure in the West Bank and Gaza Strip*

Major problems that characterize the civil justice process in Palestine are high court fees³³ and a dispute resolution process that takes, on average, three to four years, with the time passing between court hearings amount-

²⁹ Interview with a senior member at the Birzeit Law Institute, in Ramallah (1 April 1999). See also Stephen Mayo and Hiram Chodosh, "The Palestinian Legal Study: Consensus and Assessment of the New Palestinian Legal System," in *Harvard International Law Journal* 38, no. 2 (Spring 1997), p. 6.

³⁰ Mayo and Chodosh, "The Palestinian Legal Study", p. 7.

³¹ *Ibid.*, p. 27.

³² Interview with a senior member at the Birzeit Law Institute, in Ramallah (1 April 1999).

The total population of the West Bank and Gaza Strip in 1999 was 3,119,936, with an annual expected growth rate of 3.8%. Population figures throughout this paper refer to those published by PASSIA. *PASSIA Diary 2000*, p. 250.

³³ The court fees in Gaza have been reduced from 3 percent to 1 percent of the value of the claim by the Palestinian Authority, while Israeli rules still apply in the West Bank. There, court fees amount to 4 percent of the disputed value in addition to 3 percent of the judgment amount, and an execution fee of 4 percent. See Institute for the Study and Development of Legal Systems, *The Restoration and Modernization of the Palestinian Civil and Criminal Justice Process* (San Francisco, 30 June 1995), p. 16.

ing to about two months.³⁴ As a result, access to justice is severely limited. In addition to their inability to develop a manageable schedule of hearings, judges are reluctant to enforce scheduled appearances and pleading deadlines³⁵ and thus, temporal discipline and continuity are absent. Even if courts do occasionally attempt to take more aggressive procedural action, e.g., sanctions against unjustifiable delay, the appellate courts overturn them. Thereby institutional judicial passivity is reinforced. Procedural regulations such as limited permission to use written testimonial evidence, which prolong the duration of a court session as a result of an exceptionally high number of witness appearances, or the parties' dependence on the opposing party to voluntarily produce documents, further delays the justice process.

Resulting from the low number of serving judges, a single judge is usually scheduled for 35 to 45 cases per day in the civil justice process, while he can only handle about six cases within a workday. The remaining caseload is then reshuffled back into the system. In Nablus Magistrate Court, for example, 800 cases are dealt with each year while 1,200 are filed in the same period of time.³⁶ As a consequence of limited access to the courts and the long time it takes to get a case through the court, many people seek informal ways of conflict resolution such as arbitration or mediation through communal or political figures. Often, lawyers negotiate a bargain with the opposing party in private and only afterwards address a court for judicial approval.³⁷ While alternative methods of conflict resolution are a favorable tool to reduce the overburdening of regular courts, these methods must be based on law and supervised by the judiciary. If not approved by court, arbitration and mediation often raise new conflicts between the parties, which lead to de novo appeals and trials.³⁸

With the implementation of case management, traditional judicial responsibilities could be separated from administrative and managerial functions

³⁴ Interview with lawyer Lubna Katbeh, in Ramallah (10 April 1999).

³⁵ Interview with a senior member at the Birzeit Law Institute, in Ramallah (1 April 1999). The court may dismiss a case if the authority of the court is repeatedly disrespected by the plaintiff, such as if he fails to present evidence or does not appear before court repeatedly. See Institute for the Study and Development of Legal Systems, *The Restoration and Modernization of the Palestinian Civil and Criminal Justice Process*, p. 19.

³⁶ LAW, *The Justice Unit*, p. 19.

³⁷ Interview with lawyer Lubna Katbeh, in Ramallah (10 April 1999).

³⁸ Cable to the US Consulate in Jerusalem, containing a summary of key problems affecting the legal system of the West Bank and Gaza (June 1995; unpublished manuscript, on file with the author), p. 4.

of investment in the courts there has not occurred.⁴⁹ Palestinian courts cannot satisfy the new demand of Palestinian citizens for jurisdiction provided by an impartial judicial branch, due to a lack of human and financial resources available to them. The courts have additional personnel needs for qualified notaries, court administrators, research clerks, court reporters, secretaries, court clerks and process servers.⁵⁰ At the Qalqilya Magistrate court, which holds jurisdiction over 80,000 residents as well as over the population of 26 nearby villages, only one judge sits on the bench to hear citizens' claims. The court is furthermore severely understaffed with only one public prosecutor, one notary, one head of the administration, three court reporters and one bailiff. While the judge is usually present for only two days a week, 20 to 30 cases are filed every day, not including the cases filed by the police; such as transport fines.⁵¹ Currently, court personnel in all courts often occupy more than one position simultaneously. Also, the judges themselves sometimes undertake work normally assigned to court personnel, due to the shortage in staff.⁵² A single court clerk, for example, is responsible for processing all cases in the Ramallah Governorate, which extends to five towns and 95 villages.⁵³ Consequently, the disposition of cases is often delayed because they are not being processed in due time and prosecutors complain about the backlog of paperwork at the courts. The idea of an internship program for law students, who could occupy multiple functions at the court not only represents an opportunity for prospective lawyers to gain professional experience but also an inexpensive option for the judiciary to increase effectiveness.

The administration suffers from a lack of training. As a result of ineffective administration, a session can happen to be adjourned because the client has not been notified.⁵⁴ Management techniques and administration are rudimentary so that court stenography for example is done by hand.⁵⁵ Many buildings are inappropriate to serve as courts. Also, basic office facilities

⁴⁹ LAW, *The Justice Unit*, p. 18.

⁵⁰ Institute for the Study and Development of Legal Systems, *The Restoration and Modernization of the Palestinian Civil and Criminal Justice Process*, p. 11.

⁵¹ "2,700 cases at the Qalqilya and Salfit Conciliation Courts ... but only one judge," in *People's Rights* (December 1998), p. 34.

⁵² Global Bureau Center for Governance and Democracy, *Judicial Administration Project in the West Bank and Gaza. Final Report* (March 1996), p. 1-2.

⁵³ PICCR, *Third Annual Report. 1997*, p. 86.

⁵⁴ LAW, *The Justice Unit*, p. 19.

⁵⁵ Cable to the US Consulate in Jerusalem, containing a summary of key problems affecting the legal system of the West Bank and Gaza, p. 3.

such as telephones, photocopy machines, fax machines and computers are not available which considerably lowers the pace of work, since documentation and correspondence has to be done entirely by hand.⁵⁶ Record keeping at court is poor, making access to previous decisions and decisions based on precedent difficult.⁵⁷ At the Ramallah courthouse, people register on the street in front of the courthouse where a clerk's office desk is placed. The attorney general's secretary has an ancient typewriter at her disposal for correspondence.

The backlog of cases is now so bad that there are cases pending which date back to the 1980s because the low number of judges cannot manage the caseload.⁵⁸ The Parliamentary Research Unit of the Center for Palestine Research and Studies (CPRS) recommends the establishment of specialized courts such as land courts, traffic courts, labor courts and administrative courts, in order to reduce the caseload of the regular courts.⁵⁹

Legal research and library resources available to judges and court personnel are extremely limited. In most cases, material available does not cover the period beyond 1967 since Israeli military orders issued by the occupation power were not extensively documented by local courts. The primary reference resource for judges is their small private collections of legal literature. When touring West Bank and Gaza courts, Frederick Russillo found that while the Ramallah, Nablus and Gaza courts at least offered a small library room to their judges, prosecutors and attorneys, the Jericho court did not have a reference library at all. Furthermore he found that the laws of reference differed a lot between Gazan and the West Bank court libraries. While the collections of the latter included almost exclusively Ottoman, British and Jordanian codes, the Gazan collection contained mostly English and Egyptian Law.⁶⁰ Both for judges and attorneys as well as for law students the lack of reference books on Palestinian law impedes the preparation of cases, and their study. Due to

⁵⁶ Interview with Deputy Attorney General As'ad Mubarak, in Ramallah (10 April 1999).

⁵⁷ Global Bureau Center for Governance and Democracy, *Judicial Administration Project in the West Bank and Gaza*, p. 1-2.

⁵⁸ Center for Palestine Research and Studies, *Palestinian Judicial Independence. The Vision of Workers in the Judicial Branch* (Nablus, May 1997), p. 4.

⁵⁹ *Ibid.*

⁶⁰ See Russillo, *Preliminary Judicial Systems Needs Assessment: the Autonomous Areas of Palestine and the West Bank. Final Report*, p. 35. Russillo names the books available as being treatises of Ottoman Law, books of case law from the British Mandate, the Jordanian Code through 1967, manuals of Jordanian procedure, collections of Israeli Military Orders. In the Gaza Strip newly issued volumes of Egyptian procedural rules as well as complete sets of English case law until the end of the mandate were in evidence.

the extensive period of occupation and the fact that Palestinian lawyers and judges obtained their legal education exclusively abroad, a knowledgeable legal elite to establish reference books on Palestinian law, write articles and share their experience, has been lacking.⁶¹

5.4.2 *Difficulties Pertaining to the Position of Judges*

Most judges sitting on the Palestinian bench today served during the Israeli occupation, while only a few of them were initially appointed by the Palestinian Authority. Almost all judges suffer from poor training and inexperience. During the period of occupation, the scope of jurisdiction of local courts was severely limited and the allocation of resources to the Palestinian judiciary was neglected. Not only was an expanding number of cases pertaining to Palestinians transferred to Israeli military courts, but Palestinians increasingly addressed other forms of conflict resolution since judges who had been appointed by the Israeli military commander were mistrusted, and courts whose personnel were poorly paid and poorly trained did not enjoy high enough respect among the population. Thus, judges had little opportunity to gain experience, lacked self-esteem and were likely to take bribes as a result of their low salaries.

The Palestinian history of oppression and alien rule extends to its judiciary, which misses a background of independence and authority. Today, the judicial branch has faces great difficulty in developing its position as a strong institution within the government. It depends on the Executive Authority, which is in charge of financial resources and which assumes the right to appoint and dismiss members of the judiciary.⁶² As for the judicial selection criteria, there are no clear procedures and requirements, such as years of experience or professional reputation.⁶³ Usually vacant positions are not publicly announced, but informally allocated.⁶⁴ Thus, some judges do not have the necessary experience in, or knowledge of,

⁶¹ Interview with lawyer Lubna Katbeh, in Ramallah (10 April 1999).

⁶² A senior member at the Birzeit Law Institute noted that on 14 April 1999, a judicial committee was appointed by the Ministry of Justice, with the task of accepting and reviewing applications for judges and public prosecutors. See interview with a senior member at the Birzeit Law Institute, in Ramallah (second meeting, 18 April 1999). It remains obscure, however, according to which standards and when new appointments will be made. Furthermore, it is not clear, whether this committee, nominated by the Executive will only give recommendations for the selection of new members of the judiciary, or whether it will independently decide upon their appointment.

⁶³ Mayo and Chodosh, "The Palestinian Legal Study", p. 53.

⁶⁴ Interview with lawyer Lubna Katbeh, in Ramallah (10 April 1999).

procedure and law. Neither do they possess the authority to preside over a case in court which further the lowers the respect for the judiciary among the population. No constructive fora of any kind, such as commissions, institutes or seminars, exist for much needed dialogue, training, and co-operation within the judiciary.⁶⁵

The Executive's reluctance to allocate resources to the courts, who, in contrast to other agencies of government, lack the most basic office equipment, and its aim to keep tight control over the appointment of judicial personnel, indicates its lack of desire for an independent judiciary.⁶⁶ A continuous dependence of the judiciary on other branches of government reinforces the pattern of resignation and ineffectiveness described above.

The fact that judges do not have immunity for their decisions severely impairs their sovereignty and impartiality since they have to fear forced retirement, transfer or suspension, and even harassment in their private lives such as their houses being searched, assaults or threats on their physical health and their telephones being tapped.⁶⁷ The salaries of judges are low, ranging from NIS 3,000 to 6,000 per month.⁶⁸ As a consequence, only the lower strata of law graduates are attracted to the public service, which does not help the quality of Palestinian jurisdiction. Also, judges will commit their time and interest to other opportunities for earning money. In return for the guarantee of a comfortable life and an income adjusted to their position and responsibility, however, judges would, it is hoped, not only devote themselves to their job, but increase their self-esteem and standing in society.⁶⁹

Personnel, including judges, public prosecutors and court staff, are extremely few in number. Gaza employs 33 judges for a population in excess of 1,100,000, while in the West Bank there are 33 judges for a population of over 1,900,000.⁷⁰ The Ramallah Court of Appeal employs only three judges. If one judge is not available, the court might summon a first instance court judge, to fill the three-judge panel required to hear a

⁶⁵ Mayo and Chodosh, "The Palestinian Legal Study", p. 53.

⁶⁶ PICCR, *Third Annual Report, 1997*, p. 89.

⁶⁷ Center for Palestine Research and Studies, *Palestinian Judicial Independence*, p. 3.

⁶⁸ Interview with Ghassan Faramand, in Ramallah (1 April 1999).

⁶⁹ Center for Palestine Research and Studies, *Palestinian Judicial Independence*, p. 3.

⁷⁰ Birzeit Law Institute, *Palestinian Courts Statistics* (April 1999; unpublished manuscript, on file with the author).

case.⁷¹ Only three of the nine courts⁷² in the West Bank have a public notary at their disposal, and court staff ranges from eight to 23 employees, at the largest Court in Ramallah.⁷³

Judges' rulings are worthless if there is no law enforcement agency to implement court decisions. The Palestinian Authority's Police Services have shown a pattern of disrespect for court orders, since they have repeatedly failed to enforce the courts' decisions. Continuously, the police have refused to implement decisions of the Court of Appeal and the Supreme Court to release prisoners unlawfully detained.⁷⁴ One of the many examples of illegal detention disrespecting even High Court rulings is the case of Rajab Hasan Al-Baba who was arrested on 17 March 1996 during a crackdown on Hamas and Islamic Jihad militants following a wave of suicide bombings in Israel. In December 1997, the High Court in Gaza ordered his immediate release as he had neither been presented with a charge nor brought before a judge since the day of his arrest. Before, in August of 1997, attorney general Abu-Rahmeh had ordered his release, which was implemented, but Al-Baba was rearrested the same day.⁷⁵

Also, it is common practice that the police take actions, which normally require judicial approval, without such permission. They arrest suspects and conduct house searches without warrants. In an interview with the magazine *People's Rights* two Palestinian lawyers noted:

“Unfortunately, the security services’ intervention in the Palestinian Judiciary undermines the course of justice and the rule of law. We emphasize the need to separate the three authorities [i.e. executive, judiciary, legislative], and to promote the rule of law and judicial independence.”⁷⁶

⁷¹ Interview with lawyer Lubna Katbeh, in Ramallah (10 April 1999).

⁷² Each of these nine courts comprises a Magistrate and a First Instance Court.

⁷³ Birzeit Law Institute, *Palestinian Courts Statistics* (April 1999; unpublished manuscript, on file with the author).

⁷⁴ See also *The Palestinian Human Rights Monitor*, especially vol.1, issue #3 (August 1997); Internet: *Amnesty International Report on Palestine*, <http://www.amnesty.org.uk/reports/palestine/1.html> (visited on 10 March 1999).

⁷⁵ “High Court Cases,” in *The Palestinian Human Rights Monitor*, vol. 2, issue #1 (January 1998), p. 13.

⁷⁶ “2,700 cases at the Qalqilya and Salfit Conciliation Courts,” in *People's Rights* (December 1998), p. 34.

There is no balance of power between the judiciary and the different police services, as the former have no authority over the police. This has contributed considerably to the undermining of public confidence and trust in the judicial services.⁷⁷

Many representatives of human rights organizations agree that the Palestinian judiciary presently lacks self-confidence, and is extremely weak and disrespected among the population.⁷⁸

5.4.3 *The Unification of Legal Systems*

As we have extensively described in the foregoing sections, the laws of reference in the two entities of the autonomous areas, the West Bank and the Gaza Strip, differ significantly.

This situation produces confusion for the Attorney General and the Minister of Justice, both of whom act in the West Bank as well as in the Gaza Strip. They have to be experts in the legal system of both entities and they have to be careful not to confuse Jordanian with Gazan legislation when performing their duties for the two areas of jurisdiction separately.

Deputy Attorney General As'ad Mubarak claims that the present duality of legal systems helps the executive to undermine the rule of law. Often, he notes, there is no differentiation made between the law applicable in the West Bank and the Gaza Strip, and the law which suits the executives policies better, is applied.⁷⁹

Different laws of reference also produce friction between Gazan and West Bank Palestinians and their respective lawyers, prosecutors and judges, each of whom has a vested interest in retaining his own laws, procedures, and traditions. A lawyer practicing in the West Bank, whose training was conducted in the French tradition of civil law will have great difficulty assuming defense counsel before a Gazan court which follows the Anglo-Saxon tradition of common law. Although nearly everyone agrees on the need to unify the divergent legal systems in the West Bank and Gaza, legal unification cannot be achieved without significant up-

⁷⁷ LAW, *The Justice Unit*, p. 21. For an in-depth discussion of the different security bodies and their policies see section 6. *The Palestinian Police Services*, below.

⁷⁸ Interviews with Mohammed Abu Halthria at *Al-Haq*, Rhys Johnson at LAW, and Ghassan Faramand at the Birzeit University Law Institute.

⁷⁹ Interview with Deputy Attorney General As'ad Mubarak in Ramallah (10 April 1999).

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⁷⁷ LAW, *The Justice Unit*, p. 21. For an in-depth discussion of the different security bodies and their policies see section 6. *The Palestinian Police Services*, below.

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⁷⁹ Interview with Deputy Attorney General As'ad Mubarak in Ramallah (10 April 1999).

heaval in the lives of legal professionals.⁸⁰ A unified code of laws, however, to which all Palestinian citizens can adhere is of great importance for a Palestinian people striving for the creation of a single state, and would also further the protection of the rule of law, as

“an effective rule of law structure is one where all the components of society are operating under the same legal constraints and with the same legal rights. The system must exist not only on paper but also in practice. Written laws must be understood, used, implemented and enforced.”⁸¹

Presently, many legal procedures are affected by the reality of different legal systems, for example laws regarding detention. In the West Bank, the law permits detention for interrogative reasons for 15 days before a court hearing. In the Gaza Strip, the law permits such detention for 48 hours only.⁸² Thus, an unequal treatment of detainees exists within the autonomous areas, which are by definition considered one jurisdictional entity.⁸³

A second major problem resulting from the fragmentation of legal systems is the blurred lines of authority between the Minister of Justice, the Chief Justice and the Attorney General. In the Gaza Strip, both the Chief Justice and the Minister of Justice believe they hold authority over any number of matters, such as the appointment of judges, the composition of a Judicial Council, and a number of administrative issues. Such confusion stems from the fact that the Anglo-Saxon tradition of Gazan law does not prescribe the appointment of a Minister of Justice since the Chief Justice assumes his tasks.⁸⁴ In the West Bank, in contrast, law does not require the appointment of a Chief Justice, and a High Judicial Council assumes the administration of the judiciary.⁸⁵

⁸⁰ See Glenn E. Robinson, “The Politics of Legal Reform in Palestine,” p. 54.

⁸¹ Cable to the US Consulate in Jerusalem, containing a summary of key problems affecting the legal system of the West Bank and Gaza, p. 5.

⁸² “Two legal systems—one people?” in *People’s Rights* (November 1997), p. 33.

⁸³ See Declaration of Principles, Article IV, which reads: “the two sides view the West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved during the interim period.”

⁸⁴ See Glenn E. Robinson, “The Politics of Legal Reform in Palestine,” p. 55.

⁸⁵ Interview with Mustafa Mar’i, Head of the Legal Division at the PICCR, in Ramallah (4 April 1999).

The meaningful long-term development of an effective judiciary necessitates the establishment of unified laws and administrative procedures, as well as unitary and clear lines of authority within the legal community. In the absence of a single agreed upon Palestinian legal system teachers can refer to, Palestinian law schools⁸⁶ follow the Jordanian and Egyptian curricula. Naturally, overlapping legal systems that were adopted by the Palestinian legal community during alien rule, produce contradiction between laws stemming from different legislatures. The existence of various laws applying to the same legal issue results in citizens' uncertainty about just and non-disputable adjudication.

Upon the inauguration of self-rule, attempts were made to unify the legal systems. *Ra'ees* Arafat allowed for a committee of experts to review the legal systems, work on the evaluation of conflicting legislation and the drafting of new laws. In 1995 however, the Ministry of Justice communicated its unwillingness to sponsor the committee as an official body, and the efforts for unification ceased.⁸⁷ The law reform process has remained essentially stalled as of July 1997.⁸⁸ Lack of resources for the recruitment of law commissioners, lack of a permanent secretariat for the law reform commission as well as the lack of office, libraries, and equipment can be identified as reasons for this state of affairs.⁸⁹

Furthermore, while most members of the legal community favor a unitary Palestinian legal system, a strong tendency for unification on one's own terms evolved. Thus, Gazans want West Bankers to adopt Gazan law, while West Bankers promote the adoption of their law of reference.⁹⁰ Raja Shehadeh, in an address at the Birzeit Symposium "Teaching Law in Palestine" suggested that the existence of a legal system, in itself, is an ideological issue. Questions like "Which law will be applied?" and "Shall we have one single body of laws in Palestine?" are all issues which are ideologically and politically colored. The fact that the Legislative Council has not yet made an attempt to produce a singular body of laws as was

⁸⁶ Al-Quds University in East Jerusalem, An-Najah University in Nablus and Al-Azhar University in Gaza City offer BA degrees in Law while Birzeit University offers an MA degree in Business Law.

⁸⁷ Global Bureau Center for Governance and Democracy, *Judicial Administration Project in the West Bank and Gaza. Final Report*, p. 1-4.

⁸⁸ Office of the Special Coordinator in the OT, *UN Rule of Law Development in the West Bank and Gaza Strip - Survey and Status of the Development Effort*, p. 26.

⁸⁹ *Ibid.*

⁹⁰ Global Bureau Center for Governance and Democracy, *Judicial Administration Project in the West Bank and Gaza. Final Report*, p. 1-4.

expected, is very significant, Shehadeh notes, since it shows that it is not yet clear in the mind of the Palestinian legislator that there must be one single legal system in Palestine. Shehadeh finally emphasizes the tremendous importance of the link between the legal system and the existence of a nation and a state.⁹¹

5.4.4 *The Birzeit Judicial Training Project*

As one of the many organizations attempting to assist the Palestinian Authority with the establishment of an effective and law-abiding administration, the Birzeit University Law Institute has been devoted to the creation of a working judiciary.

An analysis of the Palestinian judiciary's most urgent needs have produced the Institute's two-fold emphasis, which is, on the one hand, the creation of a legal database⁹² accessible to all Palestinian judges, prosecutors and attorneys, and on the other hand, the implementation of a judicial training program. The creation of a judicial training institute is regarded as

“perhaps the single most important step to bring about a more efficient and effective court system over the longer run. Efforts to modernize laws and procedures will come to naught if those who must put them into practice are not professionally competent.”⁹³

Moreover, the Birzeit Law Institute has been active in offering regular seminars on specific topics of concern to the legal community, and has organized a number of conferences, presenting the work of local and international experts.

The aim of establishing a computerized legal database of Palestinian law is to clarify the often (even for members of the legal community) chaotic state of Palestinian law. Experts at the Birzeit Institute accumulate and

⁹¹ Raja Shehadeh, Remarks at the symposium “Teaching Law in Palestine,” held at Birzeit University, 9-10 January 1997. (Report available at: <http://lawcenter.birzeit.edu/publications/publications/sympo.html>, visited on 9 November 1999).

⁹² The Ministry of Justice and PECDAR have commissioned the Institute of Law, with funding from the World Bank, to compile an inventory of all laws, regulations, and military orders in force. See Internet, Birzeit University Institute of Law, *Legal Databank*, http://lawcenter.birzeit.edu/legal_databank.htm (visited on 9 November 1999), p. 2.

⁹³ Cable to the US Consulate in Jerusalem, containing a summary of key problems affecting the legal system of the West Bank and Gaza, p. 10.

file West Bank and Gazan laws pertaining to different fields of jurisdiction, such as commercial law, banking law, administrative law, taxation, land disputes or labor law. In addition, guidelines covering civil and criminal procedure as well as case law are accessible. As a result, legal practitioners will be able to rely on '*Al-Muqtafi*',⁹⁴ the Palestine Legal Databank System, a modern and comprehensive source of Palestinian law. Furthermore, a codex of the entire law in force in the West Bank and the Gaza strip avoids not only uncertainty about what legal principles are to be applied to any given legal issue, but also potential intermingling of Gazan and West Bank laws of reference. The Palestine Legal Databank System contains three components, a referential, or bibliographic, database (already completed), a full text database, and an image database of the original sources. Once completed, it will comprise all legislation applied in Palestine since the middle of the 19th Century.⁹⁵

The Judicial Training Program sets as its goal the improvement of the qualifications of judges, prosecutors and court staff and, to a lesser extent, lawyers. It is funded by the World Bank for a period of three years, and administered by the Palestinian Ministry of Justice. The ultimate idea of the program is to lay the foundation for a permanent training institute.⁹⁶ As of April 1999, the program had not been started, but needs assessments as well as a curriculum were being worked on.⁹⁷ Structurally, training will take the form of workshops and seminars, for which eight days a year are scheduled for judges,⁹⁸ and four days for court staff. Court staff require most basic organizational and computer skills. However, they are so accustomed to a slow and inefficient way of work that it has been noted that an entirely new generation of staff is needed to improve the situation.

A judicial education committee, consisting of ten trained Gaza and West Bank judges has already been formed. The program for judges consists of a basic orientation, which aims at building a common background due to the very different qualifications of the judges. It acquaints the participants with the foundations of the Palestinian legal system, civil and criminal

⁹⁴ *Al-Muqtafi* is the acronym in Arabic for "Judicial and Legal System in Palestine."

⁹⁵ Internet, Birzeit University Institute of Law, *Legal Databank*, http://lawcenter.birzeit.edu/legal_databank.htm (visited on 9 November 1999).

⁹⁶ Interview with a senior member at the Birzeit University Law Institute, in Ramallah (second meeting, 28 April 1999).

⁹⁷ *Ibid.*

⁹⁸ In comparison, judges' continuing training in the US covers 5-12 days per year; *ibid.*

procedure and the modes of enforcing judgments.⁹⁹ The in-depth continuing education program, then, consists of three levels of training: substantive law, skills and 'attitudes'. Most judges lack basic judicial qualifications such as a proper knowledge of local and International Law, basic legal standards, guidelines to follow in court procedure, trial management, courtroom communication, how to keep authority and how to interact with witnesses, as well as the management of court staff. Besides developing these skills, the judicial training program will also deepen the participants understanding of substantive law, especially in the sphere of commercial law. In the face of Palestine's need for investment, the knowledge of tax law and accounting (to understand financial reports) is of the utmost importance. The 'attitudes' segment of the program gives the judge a perception of his position and the responsibility for representing a model for society that goes with being a judge, as well as an understanding of the independence of the judiciary and the importance of the enforcement of their rulings. The teaching of international human rights standards and conventions, which does not form a part of the curriculum in local law schools, gives the judges an idea of what is regarded as right and wrong in international terms, so that they can differentiate between law and local cultural customs.¹⁰⁰

Especially long-serving judges who have been sitting on the bench throughout the Israeli occupation period, however, are reluctant to engage in continuous training. On the one hand, they fear to be embarrassed, as their own incompetence might be revealed in course of the training, while, on the other hand, some judges have become 'comfortable' in their positions and do not have the ambition to improve their judicial skills.¹⁰¹ Deputy attorney general As'ad Mubarak is concerned about the standard of training of Palestinian judges. He notes that

"in many parts of the world, I have seen judges training at the age of 60 or 70 to update their knowledge. In our country judges think that they are authorities on law simply because they have been appointed judges. This is a dangerous attitude. The standard of the law profession is in danger and its independence jeopardized."¹⁰²

⁹⁹ Birzeit Law Institute, *Judges' Training Needs* (April 1999; unpublished manuscript, on file with the author).

¹⁰⁰ *Ibid.*

¹⁰¹ Interview with a senior member at the Birzeit University Law Institute, in Ramallah (second meeting, 28 April 1999).

¹⁰² "Two legal systems-one people?" in *People's Rights* (November 1997), p. 33.

5.5 Arafat's Regime: A Neo-patrimonial System?

In the course of discussing the Palestinian judiciary, I have attempted to illustrate the deficiencies of the Palestinian political system which affect and inhibit the quality of democracy and the rule of law in the West Bank and the Gaza Strip. The evaluation of the way in which government is conducted and power is distributed between the government agencies of the Palestinian Authority, the observation of the Palestinian political culture, forms an important aspect of this study.

Several scholars¹⁰³ have suggested a theory describing the Palestinian political system, or at least its executive branch under the leadership of Yasser Arafat, as a system of 'neo-patrimonialism'. A neo-patrimonial system "variously combines and overlays the informal structures of patrimonialism with the formal and legal structures of the state."¹⁰⁴ In contrast to a patriarchal system, which denotes "the hereditary passage of wealth and power in family units from father to son," Max Weber notes that patrimonialism is to be found within a more complex political system, "wherein the power of the ruler is extended through a complex network of functionaries and subordinates." Finally, Christopher Clapham claims:

"In a system held together by a patrimonial logic, those lower down the political hierarchy are not subordinates, in the sense of officials with defined powers and functions of their own, but rather vassals or retainers whose position depends on the leader to whom they owe allegiance. The system as a whole is held together by the oath of loyalty, or by kinship ties (often symbolic and fictitious) rather than by a hierarchy of administrative grades and functions."¹⁰⁵

Patrimonial rule coincides with the practice of government in Palestinian traditional society where a handful of *hamulah*, or clans, set the rules for the distribution of power. A *hamulah* describes a group of several families related by blood and subject to a strict hierarchical order, who con-

¹⁰³ See, for example, Helga Baumgarten, "The Palestinian Political System; Chances for more Participation," in Asseburg and Perthes, *Surviving the Stalemate: Approaches to Strengthening the Palestinian Entity* (Baden-Baden, 1997); Rex Brynen, "The Neo-patrimonial Dimension of Palestinian Politics," in *Journal of Palestine Studies* 25, no. 1 (Autumn 1995); Chase, "Minority Rights and Communal Relations in Palestine."

¹⁰⁴ Rex Brynen, "The Neo-patrimonial Dimension of Palestinian Politics," in *Journal of Palestine Studies* 25, no. 1 (Autumn 1995), p. 25.

¹⁰⁵ Christopher Clapham, *Third World Politics* (Madison, 1985), p. 48.

stitute the political leadership of the land. Kinship, resulting in loyalty toward the clan, and nepotism provide for the accomplishment of personal interests.¹⁰⁶

The theory of neo-patrimonialism can finally be applied to a modern state where the governing individual or clique disregards the rule of law in favor of arbitrary governance based on personal connections, individual interest, and the use of the instrument of the state to enforce this interest.¹⁰⁷

Looking at the present Palestinian political system, numerous incidents prove a correspondence with the theory of neo-patrimonialism. *Ra'ees* Yasser Arafat, who not only holds the right to appoint his cabinet ministers from outside the Palestinian Council but, due to the absence of an independent Judicial Council, also selects the members of the judiciary by presidential decree, can be seen as the center of the system upon whom everything depends. Front page advertisements in every Palestinian newspaper in which personal thanks are extended in flowery and flattering language to PA officials for their provision of a service or some form of governmental support point to the oath of loyalty one has to make with the leadership in order to receive assistance. Also, when numerous congratulatory greetings filled the local East Jerusalem newspaper *Al-Quds* on the occasion of the Declaration of Principles, out of 87 announcements only 11 referred in their main headings to collective and institutional concepts. The fact that as many as 65 personally congratulated *Ra'ees* Arafat, employing his official title, and 11 congratulated Abu Amar 'the commander and symbol,' indicates to what extent the leadership effectively employs strategies based on patronage.¹⁰⁸

Those who refuse unconditional cooperation with the regime, such as members of the judiciary who aim at protecting the independence of the judicial branch, are removed from the political leadership since criticism is not permissible. This happened in January 1998, when West Bank Chief Justice Councilor Qusay Abadlah was dismissed as a consequence of publicly disapproving of the Executive Authority's extensive interference with the judicial branch in the *Ar-Risala Weekly* newspaper.¹⁰⁹ He blamed the then Minister of Justice Abu Meddein of severely obstructing

¹⁰⁶ John Marlowe, *Rebellion in Palestine* (London, 1946), p. 7.

¹⁰⁷ Chase, *Minority Rights and Communal Relations in Palestine*, p. 7.

¹⁰⁸ Hillel Frisch, "Modern Absolutist or Neopatriarchal State Building? Customary Law, Extended Families, and the Palestinian Authority," in *International Journal of Middle Eastern Studies* 29 (1997), p. 349.

¹⁰⁹ See *Ar-Risala Weekly* newspaper of 15 January 1998.

the work of the judiciary and illegally promoting judges and prosecutors. Also, Chief Justice Abadlah complained about the executive's reluctance to implement court rulings which are not to their liking.¹¹⁰ As mentioned, Amin Abdul Sala'am, former Head of the West Bank High Court, was dismissed, apparently for ordering the release of some ten students of Birzeit University who had been arrested after the suicide bombings of February and March 1996. They had been held in custody without being charged.¹¹¹ Eyad Sarraj, former Director of the Palestinian Independent Commission of Citizens' Rights (PICCR),¹¹² an organization established by the PA to independently monitor the human rights situation in the autonomous areas, was detained in May of 1996 and had to suffer torture during custody for making critical remarks about the Palestinian government in a New York Times interview.¹¹³

The provision of jobs in the PA bureaucracy is often based on personal connections and allegiances with the leadership rather than qualification. Criticism of the regime is followed by arbitrary dismissal. Rhys Johnson, from the LAW organization, notes that: "If Arafat can appoint an official, he thinks he can dismiss him, too."¹¹⁴ Not only positions in the judiciary and the cabinet ministries are allocated according to principles of patronage but also police officials in order to ensure the support of influential families, or simply to return a favor, says Bassem Eid of the Palestinian Human Rights Monitoring Group (PHRMG).¹¹⁵ The *hamulah* system, characterizing traditional Palestinian society, is thus being reinforced, while the development of a civil society and of effective, law-abiding bureaucratic arms of the state is being inhibited.

¹¹⁰ Internet: *The Dismissal of Chief Justice Councilor Qusay Abadlah*, www.pchrgaza.com/files/PressP/English/1998/abadlah.htm (visited on 15 March 1999), p. 1

¹¹¹ LAW, *The Justice Unit*, p. 17.

¹¹² The PICCR was founded in 1994 by a number of human rights activists who relied on a presidential decree issued on 30 September 1993 which established a theoretical commission for the protection of human rights in Palestine. Decree No. 59 of 1994, which finally established the Commission in real terms, reads: "The Commission shall follow-up and ensure the existence of the requirements for the protection of human rights in the various Palestinian laws, legislation, and regulations, as well as in the work of the various departments, organs, and institutions of the State of Palestine and the PLO." See Mar'i, *Guarantees for Respect of Human Rights in Palestine: Present Problems and Prospects*, p. 68.

¹¹³ See Anthony Lewis, *Darkness in Gaza*, in *The New York Times* (6 May 1996).

¹¹⁴ Interview with Rhys Johnson, international human rights lawyer at LAW, in Jerusalem (24 March 1999).

¹¹⁵ Interview with Bassem Eid, Head of the Palestinian Human Rights Monitoring Group, in Jerusalem (30 November 1998).

As for the judiciary, the appointment of unqualified judges and prosecutors who cannot guarantee impartiality due to their dependence on the leadership's goodwill, endangers the authority of the judicial branch and reduces the citizens' trust in the rule of law. Deputy Attorney General As'ad Mubarak, however, tells of the nomination of two young lawyers, who had only graduated from university one week prior to their appointment to the position of public prosecutor by *Ra'ees* Arafat. The two young men, who did not have any experience in the courtroom since they had not finished their '*stage*' (one year of practical legal work) were selected due to their personal bonds with Arafat or his associates rather than for their outstanding qualification. Mr. Abu Halthria from the *Al-Haq* human rights organization confirms that the best requirement for being selected as a judge is "being close to Arafat," and that there are no regulations set governing the number and time of the appointments except for *Ra'ees* Arafat's goodwill.

Helga Baumgarten emphasizes the limits that the democratic framework of Palestinian government imposes on the Palestinian Authority's patrimonial conduct of governance. A patrimonial system, she explains, differs from mere dictatorship insofar as that the reigning individual heavily depends upon the authorization of his associates, as well as popular support in order to keep his position of power. The limitation of freedom of expression and the avoidance of criticism are thus instruments essential to the regime. Also, the person in the center of the system, the ruler, and his positions, are very much influenced by the kind of people in his entourage.¹¹⁶ *Ra'ees* Arafat is dependent on maintaining control over so-called 'elections', over the upper circles of the elite, over his image in the press and his standing in the population, especially because he himself has returned from the Diaspora to Palestine where he must consolidate support among local Palestinians. "Arafat is considered by the population as responsible for the well-being of the Palestinian society, but criticism and participation, to relieve him from this burden of responsibility, are refused."¹¹⁷ Thus, a contradiction emerges between the need for legitimacy on the one hand, and the overarching power of Arafat on the other hand. A tight and centralized control of power by Arafat serves the twin-purpose of re-focusing power after years of decentralization during the *Intifada*, as well as enforcing the position of an exiled leadership upon its

¹¹⁶ Helga Baumgarten, "The Palestinian Political System: Chances for More Participation," in Asseburg and Perthes, *Surviving the Stalemate: Approaches to Strengthening the Palestinian Entity* (Baden-Baden, 1997), p. 41.

¹¹⁷ *Ibid.*, p. 42.

return to Palestine, against a local elite. Glenn Robinson claims that the cleavage between local political leaders who were responsible for leading and enduring the *Intifada* has been a point of tension since the Oslo agreement. A dual strategy of integration and marginalization has since proceeded to absorb, or undermine, the various grassroots organizations that could have endangered the legitimacy of a Palestinian Authority largely staffed by “outsiders.”¹¹⁸

Jamil Rabah supports this theory of the relationship between ‘inside’ and ‘outside’ leadership. Upon the advent of self-government, power did not shift from the PLO that had represented the Palestinian people from the Diaspora, to a local leadership. Local institutions, such as the newly established Palestinian Authority were rather staffed with outside representatives, thus overriding the local elite. Arafat’s policy of centralization aims at strengthening the “outsiders” still fragile position of power.¹¹⁹ “Personalized authoritarianism is the rational political response to the problems of power consolidation for a returning leadership socially and politically removed from the realities of Palestinian life since 1967,”¹²⁰ notes Glenn Robinson.

5.6 The Legal Profession and the Palestinian Bar Association

Institutional and professional development within the legal profession in Palestine, which is of the utmost importance in the creation of an effective judiciary, necessitates strong institutions that organize and discipline members of the legal community. An independent bar association not only assumes the task of setting clear minimum standards for the admission of lawyers, including the application of clear licensing requirements; it also symbolizes the supremacy of the rule of law as an organization of those who defend citizens’ rights before the state. Being a pool of academics excelling in the field of law, the bar association, or affiliated organizations, can become a place of legal exchange, research and training, where experienced lawyers pass on their knowledge to the younger generation. Also, the bar association could encourage among its members, if not require, public service and *pro bono* work, in order to provide legal

¹¹⁸ Glenn E. Robinson, “The Growing Authoritarianism of the Arafat Regime,” in *Survival* 39, no. 2 (Summer 1997), p. 43.

¹¹⁹ Jamil Rabah, *Palestinian Public Opinion since the Peace Process*, pp. 49-50.

¹²⁰ Glenn E. Robinson, *The Growing Authoritarianism of the Arafat Regime*, p. 48.

aid and defense to the indigent. Experts can further the construction and accreditation of local law schools, so that the population can rely on legal services of a high standard.¹²¹

Presently, the Palestinian Bar Association, however, is inactive and minimum regulations for the legal profession are absent. Formally, a BA degree in law of an accredited university, and an ensuing '*stage*', are required to be admitted as a lawyer in the West Bank. Gazan lawyers need a BA degree in law and two years of *stage* or an MA degree and one year of practical work in the legal profession. To assume defense counsel in criminal cases and to train prospective lawyers, a minimum period of five years of experience as a lawyer is needed.¹²² Lawyer Lubna Katbeh notes, however, that many law graduates in Palestine are only formally registered at a law firm for their *stage* while they pursue another occupation in the meantime.¹²³ Thus, with a strong and respected bar association absent, lawyers with insufficient legal experience are being admitted to the Bar.

Another dilemma for Palestinian lawyers is their lack of practice in defense counsel before civilian courts following due process. During the time of Israeli occupation, many cases were tried in military courts according to military law and procedure. Often, informal deals between the defendant's lawyer and the court were made, instead of proper judgments. Taking the imbalance of power between the Israeli military court and the Palestinian party into account, this was done in the client's best interest even in cases of the defendant's innocence, notes Mustafa Mar'i of the PICCR, since a low sentence without defense was preferable to a proper trial. As 95 percent of court decisions were reached upon the defendant's admission of guilt, the presentation of evidence or the examination of witnesses in the courtroom seldom occurred.¹²⁴

The minimum standards for selection as a Palestinian judge are equally blurred. Deputy Director Ghassan Faramand of the Birzeit Law Institute states that in practice, there are no clear requirements, but that he recalls having read an advertisement in a newspaper outlining respective regulations in December 1998. As I have previously noted, Mohammed Abu

¹²¹ See interview of lawyer Lubna Katbeh, in Ramallah (10 April 1999). See also Mayo and Chodosh, "The Palestinian Legal Study," p. 62.

¹²² Interview with Mohammed Abu Halthria, in Ramallah (3 April 1999).

¹²³ Interview with lawyer Lubna Katbeh, in Ramallah (10 April 1999).

¹²⁴ Interview with Mustafa Mar'i, in Ramallah (4 April 1999).

Halthria, of the *Al-Haq* organization believes that “being close to Arafat,” is the best prerequisite for appointment to the bench.

Before West Bank and Gazan territory was delivered into self-rule, three different bar associations existed in the occupied territories. There was the Jordanian bar of the West Bank, the members of which were on strike throughout the period of Israeli occupation and thus did not practice after 1967, and the Gazan Bar Association which continued to function.¹²⁵ After one year, in 1968, many of the West Bank lawyers were forced to return to work, calling themselves The Working Lawyers, in contrast to the Jordanian Bar Association members in Palestine, who remained on strike. In 1980, The Working Lawyers applied for a permit from the Israeli administration to establish a Bar Association while in the meantime they operated as an unofficial organization called The Arab Lawyers Committee (ALC). When they were permitted to establish a Bar Association under Israeli authority in 1986, they refused, and remained an unofficial organization of lawyers. Today, 200 West Bank lawyers are members of the Jordanian Bar, while 1,200 are members of the ALC.¹²⁶

A Palestinian Bar Association was established by virtue of a presidential decree in 1996, merging the three bar associations in existence during Israeli occupation.¹²⁷ Since the newly founded bar association and also its governing board were created by virtue of an executive order and not founded through the independent efforts of Palestinian lawyers, concerns about the autonomy of the organization were raised. As a result, it was announced that elections were to be convened within a year of the establishment of the bar association and the transitional board be replaced by an elected one. The transitional board is, however, operating to this day, as a consequence of its decision not to hold elections.¹²⁸

¹²⁵ Interview with Mohammed Abu Halthria, in Ramallah (3 April 1999).

¹²⁶ “The New Palestinian Bar Association,” in *Palestinian Human Rights Monitor* vol.1, issue #4 (August 1997), p 16.

¹²⁷ “The Law Profession in Palestine,” in *People’s Rights* (December 1998), p. 33.

¹²⁸ Interview with lawyer Lubna Katbeh, in Ramallah (10 April 1999).

5.7 *Sulha* as a Means of Alternative Dispute Resolution

Alternative methods of dispute resolution (ADR) are desirable instruments to reduce the burden presently upon the regular courts and to settle minor civil disputes through informal reconciliation rather than judicial rulings. ADR, however, must be embedded in the framework of the formal legal system and accredited by the judiciary in order to guarantee a due process and the rule of law.

At any one stage in the process of extra-judicial conflict settlement the judiciary must retain the right of overview and interference in case the law is disregarded. The judicial branch has to retain its sovereignty as the sole agency to guarantee the legality of administrative acts as well as society's adherence to the law. Thus not only must clear guidelines for ADR be established, but the administration of alternative dispute resolution must be set within the judiciary.

In the territories administered by the PA, *Sulha*, a traditional form of conflict resolution rooted in tribal law, represents a popular alternative to dispute settlement at state sponsored civilian courts. *Sulha* has not been incorporated in state law, since it is conducted according to traditional, ancient and unwritten rules. *Sulha* is rooted in Muslim society, yet it is not purely Islamic, because it existed prior to the establishment of Islam in the Arab World.¹²⁹ It was, however, adopted by Islam; and a mingling with *Shari'a* law occurred. *Sulha* applies to any kind of criminal matter or civil dispute between Muslims, ranging from communal disputes between neighbors to conflicts concerning capital offences such as murder. The use of *Sulha* under Palestinian administration relies on Jordanian practice. The Hashemite Kingdom, however, cancelled the use of tribal law 25 years ago, when mechanisms of alternative dispute resolution were incorporated into the Jordanian legal system.¹³⁰ In contrast to countries like Saudi Arabia, who exercise *Sulha* according to *Shari'a* law,¹³¹ the PA applies traditional *Sulha* rules not rooted in Islamic law.

¹²⁹ Darwish Musa Darwish, Mukhtar of Issawiyya in East Jerusalem, "*Sulha* Conflict Resolution," Address at Yakar's Center for Social Concern, Jerusalem (6 December 1998).

¹³⁰ Interview with Palestinian Deputy Minister for Christian Religious Affairs, Ibrahim Kandalaft, in Jerusalem (20 October 1998).

¹³¹ The *Sulha* procedure which is based on *Shari'a* law, for example, prescribes cutting off a hand for stealing or stoning for adultery. No such sentences are applied

“In Palestinian society, *Sulha* is the principal means of conflict resolution. It is not only used for minor offences but for crimes such as murder,” notes Sami Musallam,¹³² Director General of Yasser Arafat’s office in Jericho. Furthermore, he says, “*Sulha* settlements are more respected in society than legal judgments.” Ibrahim Kandalaft, deputy minister for Christian affairs in the PA, confirms Musallam’s view, stating that “it is quite common to apply *Sulha* instead of [a] proper legal procedure for conflict resolution in the PA territories.”

The lack of proper legal structures, and an informal and ineffective administration not abiding by the law of the land, which Palestinians had to endure throughout the years of Israeli rule, in other words, the absence of a tradition of the rule of law for the Palestinian people, can be identified as a reason for the population to mistrust formal institutions for dispute resolution. Also, while at a regular court, a civil case may be pending three to four years on average,¹³³ *Sulha* holds the added attraction of being a fast and un-bureaucratic method of setting disputes. “Most Palestinians prefer a *Sulha* settlement to a civil court because it is quicker. While a *Sulha* takes the conflicting parties three months at most, the legal procedure at civil courts works very slowly,” argues Tom’i Dawod,¹³⁴ a Greek-Orthodox priest from Zababdeh in the West Bank.

Sulha is aimed at reconciling the conflicting parties rather than judging and sentencing the accused through an impartial tribunal. An experienced (though not legally trained) mediator, or *Jaha*, who is usually a respected family elder of the community or village, acquainted with *Sulha* rules, proposes a conflict settlement through *Sulha* to the victimized party.¹³⁵ However, often the parties do not agree to a *Sulha* settlement immediately.

by *Sulha* mediators under PA rule. See “*Sulha* Conflict Resolution,” Address at Yakar’s Center for Social Concern, (6 December 1998).

¹³² Interview with Director General of Yasser Arafat’s Office in Jericho, Sami Musallam, in Jericho (14 October 1998).

¹³³ Interview with lawyer Lubna Katbeh, in Ramallah (10 April 1999).

¹³⁴ Interview with Tom’i Dawod, a Greek-Orthodox priest in the West Bank village of Zababdeh, in Zababdeh (14 November 1998).

¹³⁵ Ryad Salhab, a family elder from East Jerusalem, “*Sulha* Conflict Resolution,” Address at Yakar’s Center for Social Concern, Jerusalem (6 December 1998).

“Generally, the *Jaha* must return to the household several times before obtaining consent. Despite the rejection the mediators may initially receive, this persistence is necessary in order to demonstrate proper respect for the crisis and honor for the injured family.”¹³⁶

As soon as both parties have agreed on entrusting the case to the *Jaha* and accept his ruling, the *Sulha* procedure begins with a *Hodna*, a truce specified by the *Jaha*, which usually lasts three to six months. Ryad Salhab, a family elder from East Jerusalem notes, however, that a *Hodna* period of 20 days for small conflicts and a month for severe crimes is usually sufficient. During this period, the assessment of damages takes place, injured victims can recover and both parties agree not to attack each other. During the *Hodna*, a kind of bail is paid to the victim’s family, called ‘*Atwa*. The payment is a gesture to signal the offender’s family’s readiness to settle the conflict, and reestablish peace. ‘*Atwa* can also be given in form of a pledge, a commitment to *Sulha* and the truce, but a monetary payment is more normal. Then, the *Diya* follows - a period of investigation. The *Jaha* verifies evidence, examines the damages and finds out how the conflict came about, and who is guilty of the crime. After the completion of these procedures, the actual *Sulha* ritual takes place. The conflicting families and members of the community come together and the parties confirm their readiness for a peaceful resolution. They then make pledges and reach an understanding of how the damages will be compensated.

According to Darwish Musa Darwish, Mukhtar of Issawiyya in East Jerusalem, intentional murder, for example, traditionally requires the compensatory payment of 100 camels. Today, this equals the sum of 100,000 Jordanian Dinars, or NIS 600,000. Furthermore the murderer must leave the country. The *Sulha* ritual is normally ended by a common meal at the offender’s house.

Normally, no documentation of the *Sulha* procedure and its findings is required.

The PA allows for a *Sulha* agreement to replace a proper legal judgment in most cases. If both parties tell the court they have achieved an under-

¹³⁶ Wi’am Palestinian Conflict Resolution Center, *The Role of the Jaha* (19 March 1998; unpublished manuscript obtained at Yakar’s Center for Social Concern, on file with the author).

standing, no legal procedure will be implemented. In general, civilian courts and *Sulha* coexist so that if a proper trial follows the *Sulha*, the courts will take the *Sulha* agreement into consideration, and only deal with those aspects of a crime which have not yet been resolved. The courts “will take the *Sulha* agreement into account and apply, if at all, only a light additional sentence.”¹³⁷ Sami Musallam emphasizes that for serious crimes such as murder, a criminal procedure will follow the *Sulha* judgment in any case.

For Palestine, lacking a tradition of democracy and proper respect for the rule of law, the incorporation of ADR into the framework of laws is especially urgent. Facing a weak and ineffective judicial branch, *Sulha*, which fosters people’s confidence in informal and illegal methods of dispute settlement rather than drawing their attention to the reestablished civilian court system, must be carefully considered and sensibly applied. It is natural that citizens seeking adjudication for their disputes turn to alternative methods of dispute resolution whilst the judiciary cannot guarantee to fulfill their assigned duties in proper time or quality. *Sulha*, however, is not the only alternative form of conflict settlement that enjoys rising popularity as a consequence of the weaknesses in the regular court system. Law offices have begun to offer their clients the negotiation of informal conciliation agreements in order to avoid addressing the ineffective court system, especially in civil disputes pertaining to commerce. Once an agreement is completed, the court approves their decision.¹³⁸

Sulha, as such, is certainly a favorable form of reconciliation pertaining to communal and civil disputes. Corresponding with local culture and tradition, and having a long history in the Arab world, it would seem highly advantageous for *Sulha* to be taken as a model for ADR methods, and incorporated into the Palestinian legal system. Clear legal guidelines concerning its procedure have to be established first, however. Presently, *Sulha* seems to offer no option in case the parties cannot agree on the terms of a settlement. In the absence of clear and documented rules, if one party refuses to accept a *Sulha*, the probability of pressure being exerted in favor of acceptance, is high. As for criminal offences such as murder, it is questionable whether the *Sulha* procedure is the right tool to do justice to those victimized, and society at large. The destruction of human life

¹³⁷ Interview with Palestinian Deputy Minister for Christian Religious Affairs, Ibrahim Kanadalaft, in Jerusalem (20 October 1998).

¹³⁸ Interview with lawyer Lubna Katbeh, in Ramallah (10 April 1999).

cannot be refunded in form of a monetary payment and mere eviction of the offender from the land. Furthermore, modern, democratic societies have come to the consensus that certain categories of criminal offences are assaults on society as a whole, and which cannot be reversed through monetary payment. Thus the conviction of murderers by courts does not only represent a punishment for a singular act of violence. It represents a statement that all citizens have to abide by a distinct and agreed upon set of laws.

6. The Palestinian Police Services

6.1 The Interim Agreements

The inauguration of a Palestinian police force, which, in the eyes of many Palestinians, was expected to provide security and justice to the population after decades of arbitrary terror exercised by the Israeli military regime, caused initial euphoria.¹ Critics who took a closer look at the wording of those passages in the agreements pertaining to the establishment of a 'strong police force' voiced their concern about the creation of a possibly authoritarian and oppressive Palestinian police merely representing Israel's hegemonic security objectives within the now autonomous areas. From the outset, the emphasis was put on the task of the Palestinian police to maintain security, with no hint as to the way in which security was to be achieved. In the Oslo II Agreement, Graham Usher claims, "the subordination of the Palestinians is underlined by a depth of cooperation between Israel and the PA security forces."² Regular comments voiced by members of the Israeli military establishment about their ideas of the functions and duties of a Palestinian police force, support the idea of Israel's policy to replace their military regime with a Palestinian security force equally repressive toward opposition movements, and dependent on Israel's goodwill to further the peace negotiations. General Amnon Lipkin-Shahak, then Deputy IDF Chief of Staff states in an interview with *Yedioth Aharonot*, on 13 April 1994:

"They [the Palestinian police] will also have an intelligence outfit in order to control the Palestinian streets. Controlling Hamas means knowing what's going on in the refugee camps, what's going on in the neighborhoods and the mosques, knowing who is calling for what. It means knowing about new organizing and recruiting. They

¹ See Raji Sourani, "Human Rights Over One Year Since Oslo," in *Palestine Report* (18 September 1994), p. 8.

² Graham Usher, "The Politics of Internal Security: The PA's New Intelligence Services," in *Journal of Palestine Studies* 25, no. 2 (Winter 1996), p. 21.

will also need to take preventive action in these [sic] areas that, in their opinion, can organize hostile actions against Israel, Israelis, or against Israeli settlements in Gaza.”³

Also, Israeli officials have repeatedly declared that progress in the peace process is dependent on Palestinian efforts to combat what Israel sees as ‘terrorism’ and act against those who engage in political violence. In a Jerusalem Post interview of 10 March 1995, an Israeli Foreign Ministry official said

“the implementation of empowerment will be clearly linked to very specific actions undertaken by the Palestinians against terror. We are talking about Palestinian moves to arrest and bring to trial those Palestinians suspected of terror.”⁴

While for the Palestinians the establishment of an indigenous police force initially indicated the end of Israeli oppression, Yitzhak Rabin expressed Israeli strategies about the function of such a security agency as early as 1993, noting that

“the Palestinians will be better at it [combating terrorism] than we were, because they will allow no appeals to the Supreme Court and will prevent the Israeli Association of Civil Rights from criticizing the conditions there by denying access to the area.”⁵

The establishment, structure, functions and duties of the Palestinian Police Force rely entirely on the provisions set forth in the peace accords between the PLO and Israel. More specifically, the Palestinian Police was created by virtue of the Gaza-Jericho Agreement (Interim I Agreement of May 1994), the regulations of which were specified and elaborated upon in the subsequently concluded Agreement on the West Bank and the Gaza Strip (Interim II Agreement of September 1995). When identifying the functions of the Police Force, the emphasis on the maintenance of Israel’s security, and, increasingly (when analyzing the successive documents of the peace process), on combating so-called ‘terrorism’, is paramount.

³ Cited in Tikva Honig-Parnass, “Internal Security. The Palestinian Police Force’s Main Task,” in *News from Within* (April 1994), p. 8.

⁴ Cited in Amnesty International, *Trial at Midnight. Secret, Summary, Unfair Trials in Gaza* (June 1995), AI Index: MDE 15/15/95, p. 5.

⁵ See interview with Yitzhak Rabin in *Yedioth Ahronot* (7 September 1993), as cited in Graham Usher, “The Politics of Internal Security,” p. 28.

Moreover, a gradual change of language, regarding firmness, can be discerned when looking at the different peace accords.

Article 8.1 of the Gaza-Jericho Agreement calls for the establishment of “a strong police force, in order to guarantee public order and internal security for the Palestinians of the Gaza Strip and the Jericho area,” while “Israel shall continue to carry the responsibility for defense against external threats, including the responsibility for protecting the Egyptian border and the Jordanian line.” So, while the Palestinian Authority holds executive rights within the area delivered into self-rule, Israeli military forces retain the control of borders and authority over external security. Furthermore, Israel assumes personal jurisdiction over all Israeli citizens throughout the territories, as well as territorial jurisdiction over settlements and Israeli military installations (Art. 5.2). The Palestinian Police shall constitute the sole Palestinian agency to be armed for the purpose of maintaining public order and security, aside from the Israeli military forces (Art. 9.2).

Annex I to the Agreement deals with the “Withdrawal of Israeli Forces and Security Arrangements” in greater detail. Here, particular functional and organizational aspects of the Palestinian Police are discussed. Accordingly, the Palestinian Police is to

- “(1) perform normal police functions, including maintaining internal security and public order;
- (2) protect the public and its property and act to provide a feeling of security and safety;
- (3) adopt all measures necessary to prevent crime in accordance with the law” (Annex I, Art. III.2a).

The emphasis of the Police Force’s functions is put on the maintenance of security. Since the document fails to define the term ‘maintenance of security’, it allows for broad interpretation. As a result, ‘maintenance of security’ could, in the worst case, involve the inhibition of citizens’ individual rights and freedoms, while at the same time, the agreement calls for the police to appear as a protector of the public and their interests. Article 8.3 points to the extent to which Israel understands their stake in the preservation of Palestinian internal security. “A Joint Coordination and Cooperation Committee for mutual security purposes, as well as joint District Coordination and Cooperation Offices are hereby established,” each composed of six Israeli and six Palestinian officers, providing Israel

with the right to observe and obtain information about not only the overall situation within the autonomous areas but about specific activities of the Palestinian Police, and the population. More precisely, the DCO is immediately to be informed on occasion of “events that pose a threat to public order; a terrorist action of any kind and of any source”⁶ (Annex I, Art. 2e). Alongside the DCOs, joint patrols and joint mobile units, composed of Israeli and Palestinian officers are assigned to ensure “free, unimpeded and secure movement along the roads and in the areas” (Annex I, Art. 3a). Thus, Israeli police retains the right to monitor and even actively interfere with the security situation in the autonomous areas.

While the number of Palestinian police officers shall not exceed 9,000 in all its branches, police officers may be recruited locally and from abroad, among Palestinians holding Jordanian passports or Egyptian identification documents (Annex I, Art. 3c). Palestinians who have engaged in terrorist activities subsequent to their employment are not eligible for recruitment. The Israeli side holds the right to veto against the engagement of certain Palestinians in the police (Annex I, Art. III.4b). Also, arms, ammunition and equipment allocated to the Palestinian Police are subject to Israeli consent.

Obviously, there is an imbalance of rights to interfere with and monitor the actions of the other side pertaining to security, between Israel and the Palestinian people. The Gaza-Jericho Agreement allows for the elaborate institutional presence and intervention of Israeli forces in Palestinian affairs, while the Palestinian police is apparently subjected to Israeli security demands. Annex I, Art. VIII.4b and VIII.9b support this argument, describing the difference in measures to be taken by Israeli forces and the

⁶ The pejorative and politically motivated use of the terms *Terrorist*, *Terrorism* etc. to describe those who have in the past opposed or continue to oppose today Israeli and American agendas in the region by use of force permeates not only the Interim accords referred to above, but the ongoing political and social discourse surrounding the Israeli-Palestinian conflict. Any use of such terms in this paper, where not in the form of directly quoted speech, occurs exclusively in quotation marks to indicate the notional and controversial nature of the word. As the use of the word in our context is, as noted, almost monopolized by Israel and the US for their own purposes it is to their ‘perception’ of ‘terrorism’ that the terms refer; namely; ‘those who have opposed in the past or continue to oppose today Israeli and American agendas in the region.’ For further discussion and analysis of the American and Israeli use and propagation of these terms, especially with reference to the Palestinian quest for self-determination, see; Robert Fisk, *Pity the Nation - Lebanon at War*, Oxford University Press (UK, 1991). *The author, while recognizing the nature of Israeli acts of violence against Palestinians as well as those of Palestinians against Israelis, would like to add that she is utterly opposed to any form of political violence and believes violence to be counter-productive in terms of the long term aims of both Palestinian and Israeli parties.*

Palestinian Police when confronted with a Palestinian or Israeli perpetrator respectively. Art. VIII.4b reads:

“Israelis shall under no circumstances be arrested or placed into custody or prison by Palestinian authorities. An Israeli suspected of having committed an offense [within the territorial jurisdiction of the PA] may be detained in place by the Palestinian Police until the arrival of a Joint Patrol.”

In contrast, Israeli authorities are not prohibited from taking measures against Palestinian perpetrators: “Israeli authorities may carry out engagement steps in cases where an act or incident requires such actions. The Israeli authorities will take any measures necessary to bring an end to such an act.” Moreover, “engagement with the use of firearms shall not be allowed, except as a last resort after all attempts at controlling the act such as warning the perpetrator or shooting in the air have failed.” Consequently, while Palestinian Police may not detain an Israeli suspected of having committed a crime in the autonomous areas, Israel is free to apply any measure deemed necessary in order to inflict their own justice upon an offender whether he be Israeli or Palestinian.

The Interim II Agreement on the West Bank and the Gaza Strip applies the regulations as set forth in the Gaza-Jericho document to the extended area of Palestinian self-rule, and elaborates or amends the legal provisions for the establishment of the Palestinian Police where deemed necessary. While the Palestinian Police assume the power of internal security and public order in Area A, Israel will retain the overriding security responsibility in Area B “for the purpose of protecting Israelis and confronting the threat of terrorism,”⁷ where the Palestinian Police only provides for the maintenance of public order. The Interim II Agreement accentuates the importance of ‘combating terrorism’⁸, introducing new obligations for cooperation between the two sides. Article XV of the Agreement and Article II of Annex I deal with the issue of so-called ‘terrorism’. Here, both sides are called upon to “take all measures necessary in order to

⁷ See Interim II Agreement on the West Bank and the Gaza Strip, Article XIII.2a. By virtue of the agreement, Areas A comprise limited and scattered areas populated by Palestinians, that is, a few selected towns and villages of the West Bank and the Gaza Strip. Areas B and C describe the remaining parts of the occupied territories. The territory under PA rule (Areas A) covers 4 percent of the West Bank and 60 percent of the Gaza Strip, as of 1996. Approximately 60 percent of the Palestinian population in the occupied territories live under PA rule: See The Palestinian Human Rights Monitoring Group and B’Tselem, *Human Rights in the Occupied Territories Since the Oslo Accords. Status Report* (Jerusalem, December 1996), p. 16.

prevent acts of terrorism, crime and hostilities directed against each other” (Art. XV.1). Moreover, the Palestinian police are “to act systematically against all expressions of [Palestinian] violence and terror,” and “arrest and prosecute [Palestinian] individuals suspected of perpetuating acts of violence and terror” (see Annex I, Art. II.1b). Thus, the combat of ‘terrorism’ is explicitly added to the duties and functions of the Palestinian Police body as such. However, the document fails to mention one distinct branch of the police force established with the sole purpose of enforcing, by use of specific, and usually severe measures, this Israeli security program. Instead it continues, stating that “to this end, they [Israel and the Palestinians] will cooperate in the exchange of information and *coordinate policies and activities*” [emphasis added] (Annex I, Art. II.2). The Israeli side ensures the Palestinians’ ‘coordination of policies’ and the transfer of information in security matters, thus leaving Israel room for imposing their policy objectives on the Palestinian authorities. “Each side shall immediately and effectively respond to the occurrence or anticipated occurrence of an act of terrorism, violence or incitement and shall take all necessary measures to prevent such an occurrence.” The second passage of Article II.2 in Annex I leaves the Palestinian Authority with the obligation, or right, to suppress any expression of potential violence. The ambiguous wording implies the permission to restrict any opposition group that could become a source of violence or to restrict the right to freedom of assembly since a demonstration could possibly evolve into conflict.

Alongside the expansion of territorial and functional duties of the Palestinian police, the number, and also the branches of the Palestinian Police are increased by virtue of the agreement. While the Interim I Agreement allowed for the creation of four police branches: the Civil Police; the Public Security Police; the Intelligence Police and the Emergency and rescue Services, as well as a Coastal Police; the Agreement on the West Bank and the Gaza Strip led to the establishment of two other Police branches, the Preventive Security Service and the *Amn Ar-Ri'asah* (Presidential Guard). The agreements, however, fail to specify the precise tasks of these new police forces. In order to meet the increased demand of law enforcement agencies due to the expansion of self-rule, the document allowed for the recruitment of up to 30,000 policemen, of which 18,000 are to be deployed in the Gaza Strip and 12,000 in the West Bank (Annex I, Art. V.3a). Interestingly, the West Bank seems to require a police force only two-third of the strength of the Gazan police, while the population there exceeds that of Gaza by some 750,000. The greater anticipation of upheaval and ‘terrorist’ activity in the Gaza Strip might be identified as a motivation for the regulation. The uneven distribution of weapons and

equipment for the West Bank and the Gaza Strip could support the argument. While The West Bank police may possess up to 4,000 rifles, 4,000 pistols, 120 machine guns and 15 “light unarmed riot vehicles” (Annex I, Art. IV.5b), the Palestinian police of the Gaza Strip will obtain up to 7,000 light personal weapons, 120 machine guns, and remarkably, 45 wheeled armored vehicles.

The ever growing emphasis which is placed on ‘combating terrorism’ throughout the successive peace agreements culminated in the Wye River Memorandum, concluded between Israel and the PLO on 23 October 1998. The document dedicates considerable attention to the maintenance of security and ‘the combat of terrorism’, referring to the issue of security cooperation and measures appropriate to decrease the rate of ‘terrorist activities’. There it says

“the struggle against terror and violence must be comprehensive in that it deals with terrorists, the terror support structure, and the environment conducive for the support of terror. It must be continuous and constant over a long-term, in that there can be no pauses in the work against terrorists and their structure.”

It must be noted that the strikingly frequent use of the term ‘terror’ or ‘terrorist’ continues throughout the document and characterizes the policy objectives of its main Israeli negotiator, then Prime Minister Benjamin Netanyahu. Further on it reads, “the Palestinian side will make known its policy of zero tolerance for terror and violence against both sides.” (Section II.A.1a) The insistence with which the Israeli side urges the Palestinians to take action against ‘terrorism’ becomes apparent in Article 1d of Section II.A, which states that

“The Palestinian side will apprehend the specific individuals suspected of perpetrating acts of violence and terror for the purpose of further investigation, and prosecution and punishment of all persons involved in acts of violence and terror.”

According to this provision, the Palestinian Police is to prosecute all those who are, in one way or another, suspected of having engaged in ‘terrorist activities’. While prosecution and punishment are steps which might be considered in cases where there is a well-founded suspicion, and evidence exists, the memorandum apparently presses the Palestinian Police to implement far-reaching measures aimed at intimidating opposition groups and presenting them as ‘terrorists’ quickly, especially when Israeli secu-

rity demands are strictly tied to the transfer of West Bank and Gazan territory into self-rule.

The Interim Agreements foster the establishment of a Palestinian police force which is not only to guarantee public order and law enforcement, but a police which implements Israel's security demands; that is, the destruction of sources for potential violence or active opposition in a more or less oppressive manner. Vague language that leaves a final interpretation of the agreement's terms to the reader and the failure to include regulations on a wide range of issues such as the distinct tasks of each of the security branches, specific measures to be used in order to combat this 'terrorism' and guarantee security and public order, indicates the parties' disregard for the protection of human rights and the rule of law. In the long run, however, it would seem clear that only the development of a fair and democratic police system, free from the fetters of Israeli security and foreign policy directives, combined with the creation of a strong civil society and a democratic Palestinian government abiding by the rule of law, can bring about a Palestinian state within which human rights and international principles can be upheld.

6.2 Organization of the Police Services

The exact number of Security Services existing under PA rule remains a big secret. Sami Musallam, Director of Yasser Arafat's office in Jericho, names five Security Services,⁹ Eric Marclay, Head of the ICRC Delegation in Jerusalem,¹⁰ has said that there are at least eight Security Services, and Bassem Eid finally admits that "nobody really knows," although he is personally aware of the existence of ten Security Services. These are: The Civil Police, the Presidential Guard (Force 17), the General Intelligence Service, the Military Intelligence, the National Security, the Coastal Police, the Preventive Security Service (PSS), the Public Security, the Border Crossing Security Service, and the University Police.¹¹ Amnesty International furthermore mentions the Criminal Investigation Department, the Special Forces, whose apparent remit is to oversee the operation of other security force branches, and the Civil Defense, charged with emergency

⁹ Interview with Sami Musallam, in Jericho (13 October 1998).

¹⁰ Interview with Eric Marclay, Head of the ICRC in Jerusalem, in Jerusalem (27 September 1998).

¹¹ Interview with Bassem Eid, in Jerusalem (30 November 1998).

services and rescue.¹² The responsibilities and tasks of each of the above named security forces are blurred and their position within the hierarchy of the PA unclear. The Coastal Police, for example, was found operating in the land-locked city of Nablus in August 1996, where its members were found guilty of torturing a detainee to death. Also, the Presidential Guard, Force 17, appears to conduct arrests and interrogations in criminal and civilian cases that are unrelated to presidential security.¹³ “The most ominous feature of the security forces,” Graham Usher notes, “is their proliferation, amorphousness, and lack of terms of reference, which makes it impossible to define their different responsibilities.”¹⁴

The Interim I Agreement in Annex I, Article III.3a states that “the Palestinian Police shall consist of one integral unit under the control of the Palestinian Authority. In each district, all members of the police branches shall be subordinate to one central command.” Interior Minister, *Ra’ees* Yasser Arafat, who, according to the above regulation, is to assume supreme authority over the actions of law enforcement agencies, does not enforce his power to establish clear lines of command and decision-making, or a clear separation of responsibilities between the different police bodies. The granting of freedom of action to the influential police services secures their support and loyalty to Yasser Arafat. Finally, it is the police force to whom *Ra’ees* Arafat owes his position in the neo-patrimonial system of Palestinian government.

Normally, the security forces are subject to the directives of the Head of Public Security, General Nasser Yousef, based in Gaza, who derives his authority from the security council headed by Yasser Arafat.¹⁵ Although Arafat does interfere in singular cases of administrative abuse when brought to his attention, he appears unable, or unwilling, to exercise some form of institutional control over the police. In practice, different branches of the security forces appear to be independent entities, who frequently neither coordinate their activities nor even communicate with each other. On several occasions, one police force has arrived to arrest a person, when another has already arrested him. “The peculiar thing about my arrest is that, although I was under detention by the *mukhabarat* [General Intelli-

¹² Amnesty International, *Palestinian Authority. Prolonged Political Detention, Torture and Unfair Trials* (December 1996), AI Index: MDE 15/68/96, p. 37.

¹³ Human Rights Watch, *Palestinian Self-Rule Areas. Human Rights Under the Palestinian Authority*, p. 9.

¹⁴ Graham Usher, “The Politics of Internal Security”, p. 24.

¹⁵ Amnesty International, *Palestinian Authority. Prolonged Political Detention, Torture and Unfair Trials*, p. 8.

gence], other security forces were looking for me, and in fact went so far as to erect street barriers in order to find me," a detainee stated.¹⁶

Bassem Eid notes that "the Security Services hold a position of excessive power within the PA and are involved in everything that happens under PA rule, even in ministerial work."¹⁷ Decisions within the PA cannot be made without the consent of the Security Services. Considering the extent to which progress in the Palestinian struggle for statehood depends on the fulfillment of Israeli security demands, the Police Services, who undertake the main responsibility for law enforcement, appear to have become the crucial agency. This situation may explain the fact that police officers feel responsible solely to the head of their respective police body rather than to the Minister of Interior. Thus, a state of anarchy is established between numerous security apparati, lacking a clear and limiting framework of responsibilities, and competing with each other. Among the numerous police bodies, Bassem Eid identifies the PSS and the General Intelligence, as those who bear the ultimate responsibility for the vast catalogue of human rights violations.

The Preventive Security Service (PSS), comprising of about 4,000 salaried members and thus by far the largest of all branches of the Palestinian Police, has launched operations throughout the occupied territories since as early as 1994, upon the advent of self-rule, assuming a threefold mandate. Firstly, the PSS acts as a normal police, attempting to fill the law-and-order vacuum that has been created by the *Intifada* and the withdrawal of IDF forces from the autonomous territories. PSS agents intervene to fight crime, solve family disputes and exercise adjudication to those accused of 'moral offences' such as drug abuse or prostitution. All of these actions are carried out illegally and beyond judicial authorization. Secondly, the PSS appears to solve so-called 'unfinished business' with Palestinian collaborators, despite the pledge for amnesty as promulgated in the Interim II Agreement.¹⁸ Finally, the PSS is also to observe and contain Palestinian internal opposition movements against the peace process, such as Hamas, Islamic Jihad and any number of movements and individuals opposed to the Arafat-Israel agreements. While officially, PSS activity is confined to the autonomous areas, and senior officials insist that acts carried out in the

¹⁶ Ibid.

¹⁷ Interview with Bassem Eid, Head of the Palestinian Human Rights Monitoring Group, in Jerusalem (30 November 1998).

¹⁸ See Article XVI.2 of the agreement.

patrimonial mode of government in the PA have also been detained, harassed and intimidated. Palestinian human rights organizations operate in a climate of fear, always facing potential arrest. Since the establishment of the PA, several renowned human rights activists have been arrested, among them Bassem Eid of the PHRMG, Eyad Sarraj, former director of the PICCR, and Raji Sourani, director of the Gaza Center for Rights and Law. None of them were presented with a charge during their arrest, which lasted from 16 hours to 15 days.⁵⁰

Another case of illegal arrest that was highlighted by the media was the detention of Professor Fathi Soboh, a teacher at Al-Azhar University in Gaza. After having posed students examination questions about corruption within the PA, he was taken into custody for five months, during which he was tortured.⁵¹ Finally, the Authority has engaged in closing a number of newspapers, critical of the Palestinian government. Palestinian officials prohibited the distribution of newspapers such as *An-Nahar*, an East Jerusalem daily, and the weekly magazine *Akhbar Al-Balad*. The authorities claimed that the pro-Jordanian papers “advocated a line that contradicts the national interests of the Palestinian people.”⁵²

Eyad Sarraj derives an explanation for the Palestinian Police Force’s arbitrary conduct from the recent history of the Palestinian people. The large majority of policemen were affiliated to different military wings of the PLO prior to the establishment of Palestinian autonomy. He suggests that “their mentality lingers on the idea of a police state administered by elitists who consider themselves above the law,” for the sake of Palestinian nationalism. The Palestinian revolution inflamed the feelings of many Palestinians who internalized a self-conviction inseparable from that of nationalism, revolution and weapons. Consequently, many Palestinian policemen, having grown up with such an attitude, view any criticism of their performance as a form of treason. Human rights activists are thus regarded as outcasts supported by foreign parties. Opinions such as ‘democracy cannot be applied to us,’ and ‘people can only be ruled by force’ are widespread among the Palestinian police, Sarraj claims.⁵³

⁵⁰ PHRMG and B’Tselem, *Human Rights in the Occupied Territories Since the Oslo Accords. Status Report*, p. 22.

⁵¹ “Illegally Detained Teacher Released,” in *The Jerusalem Times* (28 Nov. 1997), p. 3.

⁵² “Which Way are Things Heading in Jericho and Gaza?” in *The Middle East Justice Network* (August-September 1994), p. 2.

⁵³ “Human Rights under the PA,” in *People’s Rights* (January 1999), p. 23.

detention facilities such as sleep deprivation, suspension in the air in painful physical positions, burning with cigarettes and electric shocks.⁴⁶

The International Covenant on Civil and Political Rights explicitly prohibits the use of torture, and inhumane treatment of prisoners. Article 7 proclaims, "no one shall be subjected to torture or cruel, inhumane or degrading treatment or punishment." Article 10.1 further adds that "all persons deprived of their liberty shall be treated with humanity and with the inherent dignity of the human person." Also, in Article 14.3(g), the Covenant prohibits the law enforcement agencies from the usage of any means, including torture, which would urge a detainee to testify against himself: "Everyone shall be entitled ... not to be compelled to testify against himself or to confess guilt."

The PA, however, continuously refuses to conduct public and fair investigations into alleged human rights violations committed by the Palestinian Police. Yet, in March 1998, Ramallah District Court Judge Abdullah Ghuzlan set a precedent in not allowing confessions acquired through torture as evidence. Nine residents of Al-Khader village south of Bethlehem were arrested by the Palestinian Military Intelligence⁴⁷ in March 1996, for the alleged murder of seven people. The detainees were denied family visits and the consultation of their lawyer for four months during which they were held by the Military Intelligence before being brought before the Bethlehem District attorney. All nine defendants could moreover prove, through concrete alibis, that they were innocent of their charges.⁴⁸

The media is becoming more alert toward human rights violations committed by the police. In February 1998, the death in custody of Nasser Hiroub was followed by broad media coverage. The Jerusalem Times, on 6 February 1998, called for another autopsy of the detainee's corpse after the Head of Hebron Police, Tareq Zaud, announced that Hiroub had committed suicide.⁴⁹

Not only collaborators and political activists have to fear the Palestinian police, human rights activists and journalists who dare to criticize the

⁴⁶ "The LC's Human Rights Watch Committee Report," p. 28.

⁴⁷ Here, the blurred and overlapping responsibilities of the different security branches become evident. Normally, the Military Intelligence would be solely responsible for law enforcement pertaining to military matters. They would not in any case be involved in the prosecution of crimes committed by civilians.

⁴⁸ Muna Hamzeh-Muhaisen, "Confession Under Torture: Court Ruling Sets Precedent," in *Palestine Report* (3 April 1998), p. 6.

⁴⁹ "Demand for 2nd Autopsy in Hiroub Case," in *The Jerusalem Times* (6 Feb. 1998), p. 2.

The PA has not taken steps to outlaw any of the opposition movements or membership in any factions. Nevertheless, almost all of those detained in the round-ups have been arrested for their suspected affiliation with opposition groups, rather than their direct involvement in any specific activity. Many were taken into custody in the middle of the night, at their homes, rather than near the scene of an alleged crime.⁴⁰ Thus, since all the parties against which such raids are directed exist legally, these actions constitute a violation of the right to free expression and association.⁴¹

The category of political prisoners suffers most from the police force's failure to follow due legal process. Since, as explained, the police do not hold criminal charges against the majority of those detained, only a very few are actually tried and convicted by court. In 1996, only 50 cases were heard by the State Security Court, which tries the cases of defendants arrested on political grounds, while 1,000 others were detained during the same period.⁴²

As early as July 1994, only two months after the inauguration of the autonomous government in the Gaza and Jericho area, the first death of a Palestinian occurred while under interrogation by Palestinian security.⁴³ As of December 1997, 16 people have died in PA prisons.⁴⁴ Additionally, by March 1999, at least 26 death sentences have been passed by the State Security Court, most of which have been transformed into sentences of life imprisonment. Three people have been executed.⁴⁵

Torture and degrading treatment are common tools used to extract confessions from detainees or to obtain information about their political affiliation and activity, when in many cases, the police arrest residents arbitrarily rather than based upon a concrete suspicion or any evidence. The methods of torture applied resemble those used in Israeli prisons and

⁴⁰ Human Rights Watch, *The Gaza Strip and Jericho. Human Rights under Palestinian Partial Self-Rule*, p. 16.

⁴¹ Articles 19 and 20 of the Universal Declaration of Human Rights provide for the freedom of expression and the freedom of assembly. Article 19 reads: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers." Article 20 states that, "Everyone has the right to freedom of peaceful assembly and association."

⁴² PHRMG and B'Tselem, *Human Rights in the Occupied Territories Since the Oslo Accords. Status Report*, p. 17.

⁴³ Raji Sourani, "Human Rights Over One Year Since Oslo," p. 8.

⁴⁴ "Deaths in Custody in the Palestinian Authority," in *Palestinian Human Rights Monitor*, issue #5 (December 1997), p. 3.

⁴⁵ Renate Capella, *The State Security Court* (April 1999; unpublished manuscript, on file with LAW), p. 6.

Moreover, the accused are frequently denied the right to meet with their attorney throughout the criminal process.

During the past five years of self-rule, the Palestinian Authority has engaged, to an ever increasing extent, in launching campaigns against political opposition groups such as Hamas and Islamic Jihad, factions of which have been involved in activities aimed at destabilizing the present status quo vis-à-vis Israel and the PA. This has happened as a consequence of Israeli pressure to fight Palestinian terrorism and bring the perpetrators to justice, as well as a result of the Palestinian Authority's need to consolidate their power base against autonomous and indigenous sociopolitical movements enjoying broad support among the Palestinian population. Graham Usher notes that

“Hamas in particular represents a mass, indigenous, and authentic political constituency in the occupied territories by virtue of having its own finances, structures, organization, and, above all, ideology. It is because Hamas represents a genuinely independent force outside the PA's sway that it is perceived as the main internal threat, the most difficult of all Arafat's internal and external oppositions to ‘tame’.”³⁶

The Palestinian police has carried out periodic round-ups of members of political opposition groups. Few of the hundreds that have been arrested during such sweeps have been formally charged.³⁷ The first large-scale round-up of opposition activists took place in November 1994, after three Israeli soldiers were killed in Gaza. The police arrested 140 people, most of whom were released within two weeks.³⁸ As early as September 1994, a Palestinian newsmagazine voiced their concern about the implementation of these mass detentions, stating that

“There are worrying signs as the recent police operations against Hamas, Islamic Jihad and the DFLP showed that the Authority will simply round-up people according to their religious and political beliefs, rather than on proper legal grounds.”³⁹

³⁶ Graham Usher, “The Politics of Internal Security,” p. 30.

³⁷ PHRMG and B'Tselem, *Human Rights in the Occupied Territories Since the Oslo Accords. Status Report*, p. 16.

³⁸ Human Rights Watch, *The Gaza Strip and Jericho. Human Rights under Palestinian Partial Self-Rule*, p. 16.

³⁹ Raji Sourani, “Human Rights Over One Year Since Oslo,” in *Palestine Report* (18 September 1994), p. 8.

be established in the self-rule areas,³⁰ rather than a police state. Often, the personal resentment of a police officer, or a rumor that the accused engages in political activities not approved by the authority, will prove sufficient for a resident to be accused of being a drug dealer, collaborator, or having committed a 'crime of immorality' such as sexual offences, even where no evidence of a violation of any law is available.³¹ Officers seldom show arrest warrants to the detainees, nor are they informed about the charge held against them, or their rights. The PSS frequently employs a strategy of summoning suspects to the police office, "in order to clarify something," without mentioning their intention to arrest the person.³² The arbitrary nature of many arrests is illustrated by the number of cases where security forces have taken a second person in addition to the person sought. One former detainee from the West Bank told Amnesty International: "My younger brother is bigger than me, so they arrested him as well and kept him for two days."³³ The families are usually not informed about the place of detention of their relative. In most cases, information about a detainee's whereabouts derives from inside informants, such as former prisoners who happened to meet a given prisoner during their own detention. In each Palestinian prison, the different security branches administer their separate detention facilities, however. As a result, due to the frequent failure of the police officials to identify themselves upon the event of arrest, and a notorious refusal of the law enforcement agencies to cooperate with the population, it usually takes relatives weeks and even months to find their sons and husbands.³⁴ Most political and security prisoners, in addition, are not permitted to receive family visits.

In most cases, the police do not feel obliged to follow the due legal process as set forth in West Bank and Gazan law respectively, so that detainees are most often not brought before a Conciliation judge in due time. In most cases political and security prisoners do not see a civilian judge at any stage of their detention. The police often undertake investigations independently, without notification of the Attorney General. In addition, the period of detention is undetermined, leaving suspects without any idea of how long their imprisonment will continue. The commander of the security apparatus usually decides when a detainee will be released.³⁵

³⁰ *Ibid.*, p. 15.

³¹ B'Tselem, *Neither Law Nor Justice*, p. 17.

³² *Ibid.*, p. 18.

³³ Cited in Amnesty International, *Palestinian Authority: Prolonged Political Detention, Torture and Unfair Trials*, p. 12.

³⁴ "The LC's Human Rights Watch Committee Report: Human Rights, Public Freedom and Political Detainees," in *People's Rights* (January 1999), p. 28.

³⁵ *Ibid.*, p. 27.

While Bassem Eid of the PHRMG claims that about 90 percent of all human rights violations can be traced to the two intelligence branches of the Palestinian police, the Preventive Security Service and the General Intelligence, other police forces such as the Presidential Guard and even the Coastal Police have been engaged in the unlawful arrest and torture of Palestinians. A distinction can be made between three categories of prisoners, namely; suspected collaborators with Israel (including land dealers), political prisoners (mostly from Hamas and Islamic Jihad), and those accused of criminal offences. Bassem Eid estimates the total number of inmates in Palestinian prisons at 1500, of whom 500 are accused of being collaborators, 500 are political prisoners, and 500 serving time for criminal violations.²⁷ Since both security and political prisoners are seldom convicted, most inmates are held for an indefinite period of time without being presented with their charge.

The Oslo Accords prohibit collaboration of Palestinians with Israel subsequent to 1993, when the Declaration of Principles was concluded, and land dealing to be considered a crime by the Palestinian Authority.²⁸ However, when the PA assumed power it came under immediate pressure from Palestinian militants to take action against collaborators. Beginning in 1988, the identification of suspected collaborators became one of the chief activities of street activists in the occupied territories. Shortly prior to the beginning of self-rule, Hamas and the Fateh Hawks had agreed to stop killing collaborators on the condition that the PA would direct all efforts toward dealing with the issue.²⁹ Thus, a newly established Palestinian Authority, attempting to reestablish order and centralize the administration of justice and law enforcement in a state-sponsored judiciary and police force, felt obliged to address the subject of collaboration in order to prevent militants from taking the law into their own hands.

However, the methods the police employed in order to tackle the problem of collaboration did not differ greatly from the behavior of the militants. Generally, the Palestinian Police force's performance, and their systematic violations of human rights including torture, unlawful arrest, and negligence of due legal process, especially in respect to political and security prisoners, "have eroded public confidence that a rule of law will

²⁷ Interview with Bassem Eid, in Jerusalem (30 November 1998).

²⁸ See Article XVI.2 of the Interim II Agreement. Here, it reads that "Palestinians who have maintained contact with the Israeli authorities will not be subjected to acts of harassment, violence, retribution, or prosecution. Appropriate ongoing measures will be taken, in accordance with Israel, in order to ensure their protection."

²⁹ Human Rights Watch, *The Gaza Strip and Jericho. Human Rights under Palestinian Partial Self-Rule* (New York, February 1995), p. 23.

cannot tell a prisoner who spent 15 years in jail that I have no job for him.”²³

In September 1996, the PA reportedly employed more than 40,000 policemen. In Gaza, there was one police officer for every 50 people, the highest ratio of police to civil population in the world.²⁴ The largest segment of the PSS, as well as other police forces, is made up of young Fateh activists, who fought as Fateh Hawks (Gaza) or Black Panthers (West Bank), the Fateh military wings, during the *intifada*, and in most cases also served time in Israeli prisons. Both heads of the Preventive Security Service, Jibril Rajoub and Mohammed Dahlan, were Fateh youth leaders and enjoy enormous credibility in Palestinian streets. The level of training of these ‘soldiers-turned-policemen’ varies significantly, and serious doubts about the quality of their performance must be raised.²⁵ Since the majority of policemen are drawn from the Palestine Liberation Army, they received training in war tactics rather than law enforcement in normal situations, or human rights and law. Mustafa Mar’i warns of recruiting unskilled police personnel:

“Without further training in civilian law enforcement and protection of rights within a framework of the rule of law, such a force might not be prepared for handling internal policing issues without major problems.”²⁶

6.3 Arbitrary Arrest and Detention: The Police Force and Human Rights

One of the most recurrent and problematic abuses occurring in the PA autonomous regions is the arbitrary arrest and detention of Palestinian residents. Local and international human rights groups such as the Palestinian Human Rights Monitoring Group (PHRMG), LAW, and Amnesty International, have documented these abuses extensively.

²³ Interview with Mohammed Dahlan in *Al-Quds Al-Arabi* (London, 25 April 1997) as reported in *Foreign Broadcast Information Service, Near East and South Asia*.

²⁴ Amnesty International, *Palestinian Authority. Prolonged Political Detention, Torture and Unfair Trials*, p. 8.

²⁵ Naomi Weinberger, “The Palestinian National Security Debate,” in *Journal of Palestine Studies* 24, no. 3 (Spring 1995), p. 23.

²⁶ Mar’i, *Guarantees for the Respect of Human Rights in Palestine: Present Problems and Future Prospects*, p. 41.

West Bank are conducted by Fateh members and not PSS personnel,¹⁹ it is widely known that the PSS maintains branches in all West Bank cities, including East Jerusalem. In an interview for the Jerusalem newspaper *Al-Quds*, Head of the PSS in the West Bank Jibril Rajoub explicitly states that PSS officers operate throughout the West Bank.

“[The Israelis] try to foil our operations in other areas in the West Bank, but despite our limited means, we are able to enforce the authority of the National Authority against any violation of law that harms the population, its dignity and security.”²⁰

Israel seems to be well aware of the PSS activities in the occupied territories, and seemingly approves of them. A secret agreement was reportedly concluded between Israel and the heads of the PSS for Gaza and the West Bank respectively, Mohammed Dahlan and Jibril Rajoub, in February of 1994, in Rome. The document provides for freedom of action for the PSS throughout the occupied territories in all criminal matters. In return, the Preventive Security declares its willingness to cooperate with Israel in fighting Islamic opposition groups.²¹

The recruitment of police officers is based on personal relations and Fateh membership rather than on qualification. There are no clear regulations for the training of officers. Leading Security Service personnel will receive training abroad, in the United States, Great Britain and other European countries. The average officer, however, may be trained by his department or not at all.²² While the Interim II agreement allows for the recruitment of a maximum of 12,000 policemen in the autonomous areas during the interim period, Mohammed Dahlan, head of the Preventive Security in Gaza, notes that

“we have 36,000 people of whom we only need 10,000 [in the security forces]. This huge number is a burden on the PA and a burden on the security organ. We view it as a social issue because I

¹⁹ Due to the fact that PSS officers are largely recruited from among Fateh members, a distinction as to which operations were undertaken by Fateh members and which by PSS officers appears to be difficult. Also, most PSS offices in the West Bank cities are located in Fateh offices. See B'Tselem, *Neither Law Nor Justice*, (Jerusalem, Aug. 1995), p. 13. The obfuscation of the boundaries of activity of the two bodies makes it impossible to trace the responsibility for their operations and also human rights violations.

²⁰ B'Tselem, *Neither Law Nor Justice*, p. 12.

²¹ See *ibid.*, p. 13. See also Graham Usher, “The Politics of Internal Security,” p. 27.

²² Interview with Bassem Eid, in Jerusalem (30 November 1998).

The PA cannot officially be party to international human rights conventions as long as there is no sovereign Palestinian state. Human rights organizations agree, however, that the PA has to abide by internationally recognized human rights norms, since it has the irrefutable markings of a government, such as a police force and courts. Also, PLO officials, some of whom now occupy senior positions in the Palestinian Authority, have repeatedly stressed their commitment to protect basic human rights and freedoms. Jibril Rajoub, West Bank Head of the infamous Preventive Security Service, stated in a *Jerusalem Post* interview: "When it comes to [the] issue of human rights, anybody, including the Israelis, have [sic.] the right to investigate my people. We will never let any mistreatment take place in our prisons."⁵⁴ Also, the Palestinian Charter of Independence stipulates democratic and lawful government, and the protection of human rights, reading "the State of Palestine proclaims its commitment to the principles and purposes of the United Nations, and to the Universal Declaration of Human Rights."⁵⁵

In June 1989, the PLO even made an effort to become party to the four Geneva Conventions of 1949 and their protocols, sending a 'declaration of intent' to the Swiss government. The request could not be approved to date, however, on the grounds that neither the PLO nor the Palestinian Authority is a state.⁵⁶ These actions and statements did not apparently encourage Palestinian officials to live up to the standards set, once the Palestinian people had gained autonomy, but rather altogether contradict the reality of Palestinian government during the past five years.

6.4 The Police Force's Failure to Abide by Court Orders

The recognition and implementation of court rulings by the law enforcement agencies is crucial to the restoration of an effective judiciary which ensures the administration of justice to the population and oversees the other branches of government, thereby guaranteeing the rule of law. The repeated failure of the Palestinian Executive Authority to implement court orders reveals a pattern of disrespect of the judiciary. Citizens' trust in legal procedures has eroded due to the fact that there is no balance of power between the judiciary and the executive. People are not addressing

⁵⁴ See interview with Col. Jibril Rajoub in *The Jerusalem Post Magazine* (19 May 1995).

⁵⁵ The Palestinian Charter of Independence was proclaimed at the 19th meeting of the Palestinian National Council, which convened in Algiers, 12-15 November 1988.

⁵⁶ Interview with Eric Marclay, Head of the ICRC in Jerusalem, in Jerusalem (27 September 1998).

courts for the adjudication of their disputes any more, since they cannot rely on the implementation of the courts' decisions.

The failure of the Palestinian police to implement even decisions made by the highest judicial organs in the autonomous areas, the Court of Appeal in the West Bank and the Supreme Court in the Gaza Strip, has highlighted the extent to which the judiciary is disrespected by the Executive Authority and the police. On several occasions the High Courts have overturned administrative decisions where individuals were held in detention without charge or trial, and ordered the immediate release of those prisoners. However, the security forces often disregarded the judiciary's decisions and did not follow their orders.

One case concerned the illegal arrest of Sheikh Mahmoud Musleh, a leader of Hamas in Ramallah, who was detained on 4 September 1997, after Israel had pushed the PA to bring to justice the alleged perpetrators of the bomb attacks in West Jerusalem in summer 1997. On 30 September 1997, the High Court in Ramallah decided that the arrest had been illegal and ordered Musleh's release. Musleh was released by the General Intelligence, but rearrested the same day.⁵⁷ Another highlighted case addressed the illegal detention of Dr. Abdel Aziz Ar-Rantissi and Dr. Ibrahim Al-Maqadma, two top leaders of Hamas, on 9 April 1998. When the prison authorities refused lawyers of the Palestinian Center for Human Rights (PCHR) permission of visitation of their clients, the lawyers appealed to the then Attorney General Fayez Abu-Rahmeh. When Abu-Rahmeh granted them permission to visit the prisoners but the police still refused, the PCHR appealed to the High Court in Gaza. Despite the ruling of the High Court to grant the lawyers permission for visitation, the police failed to comply with the order.⁵⁸ Concerning allegations that Ar-Rantissi was illegally detained, PA police chief Ghazi Jabali claims that he is held under administrative rather than judicial detention, and is therefore outside the judicial process.⁵⁹

⁵⁷ See LAW, *The Justice Unit*, p. 22.

⁵⁸ See internet, *Resignation of Palestinian Attorney General due to the Undermining of his Authority*, <http://www.pchrgaza.com/files/Press...torney%20General%20resignation.html> (visited on 15 March 1999), p. 1.

⁵⁹ "Justice, and Other Priorities," in *The Jerusalem Report* (15 March 1999), p. 26. Administrative detention applied in Israel and the Occupied Territories is based on Articles 108 and 111 of the Defense (Emergency) Regulations enacted by the British High Commissioner in September 1945. Especially in cases of detention of political activists the police often argue that their detention is administrative rather than judicial, in order to bypass the civilian courts' procedures and regulations.

Not only in cases involving detention for political reasons but also in civil cases the police refuse to adhere to court decisions. Jiries Handal, a resident from the Bethlehem area, for example, had filed a number of complaints against two of his brothers who illegally used part of his property for construction. The police failed to implement a court order obtained from the Ramallah District Court, demanding the cessation of all construction work. The police arrived at the site and demanded the cessation of construction work. When the laborers came back after the police had left, Handal called the police again. Despite the ensuing detention of several laborers, his brothers did not stop construction and the police refused to take further action in the case.⁶⁰

Bassem Eid claims that some 200 Palestinians, mainly members of Hamas, Islamic Jihad and other opposition factions, have been held for at least a year without trial. If those detained in the few months since the signing of the Wye River accord are included, he reckons that the number could rise to between 500 and 600. Often PA officials justify the systematic practice of illegal and prolonged detention with the precarious situation of the Palestinian entity's struggle for statehood, and pressure from the Israeli side to combat "Palestinian terrorism". Abu Moor, director of the Legal Development Project at the PA's Ministry of Justice explains that

"the PA looks at issues in a comprehensive way. There are priorities, whether to move forward with the peace process, or other issues. It's not that we override the justice system but when it comes to issues that might affect the peace process, let's say hard decisions have to be made."⁶¹

6.5 Special Courts: The State Security Courts and the Military Courts

On 7 February 1995, *Ra'ees* Arafat established by decree the State Security Courts, comprising of a Misdemeanor State Security Court, a General State Security Court and a High Court of State Security.⁶² While the Misdemeanor Court deals with minor offences such as the misappropriation of supplies through state employees and is composed of a single judge, the General Court deals with more serious cases, sitting in three-

⁶⁰ See LAW, *The Justice Unit*, p. 27.

⁶¹ "Justice, and Other Priorities," in *The Jerusalem Report* (15 March 1999), p. 26.

⁶² Amnesty International, *Trial at Midnight. Secret, Summary, Unfair Trials in Gaza*, p.12.

judge panels.⁶³ The State Security Courts are special courts and do not belong to the civilian judicial system, which is independent from the other branches of government.

The High Court of State Security (SSC)⁶⁴ is the most important of the courts mentioned, and tries specific cases which need presidential authorization to be convened. The SSC is worthy of our specific attention due to its composition and jurisdiction which, as will be argued, violates even minimum standards of the right to a fair trial as stipulated in International Law, and inhibits the rule of law in Palestine.

The presidential decree which established the SSC relied on a number of precedents such as the Egyptian Governor's Ordinance No. 55 of 1964, and the Mandatory Emergency Regulations of 1945. The SSC assumes jurisdiction over "crimes which infringe [upon] internal and external state security and felonies and misdemeanors mentioned in Order 555 of 1957." Order 555, issued under the period of Egyptian rule in the Gaza Strip, refers to activities of collaboration with the enemy and establishes punishments for a series of security offences. Hence, the decree limits the court's jurisdiction to security cases. However, defendants have also been tried for offences such as libel, homicide and the sale of rotten food. This suggests that the SSC holds a wide interpretation of security and represents an instrument to bypass the civilian court system in cases that are politically motivated.⁶⁵

Furthermore, the presidential decree refers to Article 59 of the Palestinian Constitution promulgated in Gaza in 1962, which states that

"military courts may be established by order of the Governor General to adjudicate crimes affecting internal and external security, and the security of military forces and their safety. The judgments of such courts are to be ratified by the Governor General."

The decree of 7 February 1995 therefore provides for the SSC to displace civilian courts in trying security cases and provides for security personnel to serve as judges in trying civilians. The verdicts passed should be subject to the ratification by the executive authority's chairman, *Ra'ees Arafat*, rather than appeal to a higher tribunal.

⁶³ PICCR, *Third Annual Report, 1997*, p. 81.

⁶⁴ Hereinafter State Security Court (SSC).

⁶⁵ Renate Capella, *The State Security Court*, p. 2.

The SSC is to be chaired “by a high-ranking officer and two lower-ranking officers.”⁶⁶ As mentioned, State Security Courts are staffed entirely by military personnel, while only the public prosecution is assumed by the Attorney General in the Gaza Strip, and a public prosecutor assigned by the Minister of Justice in 1997, in the West Bank. The involvement of military personnel, who are members of the executive, in judicial affairs represents an attack on the independence of the judiciary. Moreover, the fact that the Minister of Justice appointed a public prosecutor to represent the state before the SSC, exemplifies the dependence of this tribunal on the executive branch. While in principle, the existence of specialized courts does not contradict the rules of a fair trial and the independence of the judiciary, Mustafa Mar’i notes, these courts have yet to be incorporated into the judicial branch and administered by autonomous judicial officers. Also, the specialized courts cannot be exempt from abiding by the rules of due process.⁶⁷

The law used in the SSC is the 1979 PLO Revolutionary Code, which was used for trying dissident PLO fighters. It is not part of domestic law, however. Mustafa Mar’i adds that the law of reference in the SSC is not exactly clear. The court draws from the Revolutionary Code of 1979, as well as from Jordanian and Gazan law.⁶⁸ Both Jordanian Law and Order 555 issued in the Gaza Strip in 1957, allow for the death penalty to be set as a punishment for a number of offences including felonies such as murder, but also crimes relating to security. During the Israeli occupation, however, the death penalty was suspended in civilian courts.⁶⁹

Nevertheless, State Security Courts have applied the death penalty in their verdicts. As of April 1999, 26 individuals were sentenced to death by the SSC, of which three were actually killed.⁷⁰

The SSC started operating on the night of the 9th of April 1995, in the wake of two bomb attacks in Gaza which killed seven Israeli soldiers, a US student and injured about 40 others. The first individuals to be tried before the High Court of State Security were Hamas and Islamic Jihad supporters, accused of planning suicide bombings and possessing weapons without a permit. Since then, the SSC has proven its inability to com-

⁶⁶ Amnesty International, *Trial at Midnight*, p. 12.

⁶⁷ Interview with Mustafa Mar’i, Head of the Legal Division at the PICCR, in Ramallah (4 April 1999).

⁶⁸ *Ibid.*

⁶⁹ “The Death Penalty in Palestine,” in *Palestinian Human Rights Monitor*, issue #1 (January 1997), p. 9.

⁷⁰ Renate Capella, *The State Security Court*, p. 6.

ply with the most basic standards of the rights of the accused, and the right to a fair trial as pointed out in the *International Covenant on Civil and Political Rights*, the *Universal Declaration of Human Rights*, and the *Basic Principles of the Independence of the Judiciary*.

Most trials are held secretly, in the middle of the night,⁷¹ and defendants are not informed about their upcoming trial, nor about the place where the court session will be convened. Neither are they informed about the charge held against them. Amnesty International notes: "They [the defendants] did not know they were to be tried until they were taken from their cells at night - or even until they set foot in the courtroom."⁷² Some sessions reportedly lasted only for minutes, during which the accusation, trial, conviction and sentence is done, leaving the defendant without the chance to present his case, before the verdict was read. Consequently, there could not have been sufficient time to follow due criminal process, involving the hearing of witnesses, and the presentation of evidence. In addition, the defendants are deprived of the right to organize defense counsel of their choice, and to prepare a meaningful defense, since they are not notified of their trial in advance. Most defendants are appointed lawyers by the court, often military officers with little or no legal training.

The trial of Rajeh Hulliel Ali Abu-Sitta, who was sentenced to death, took only 15 minutes, and was convened in the middle of the night. The trial took place minutes after Abu-Sitta's arrest, which happened in October 1996, at 3.00 a.m. The defendant did not have sufficient time to contact a lawyer. Abu-Sitta's family learned about his arrest and the verdict only from the newspaper.⁷³ *People's Rights* tells of two defendants, Nassim Abu Rouse and Yasser Salameh, who were sentenced to 15 years hard labor by the SSC in January 1998. They were supporters of opposition groups and had allegedly violated Articles 174 ("terrorist activities") and 178 of the PLO Revolutionary Penal code by "inflicting damage to national unity." The sentences, which were read after a quick and unfair trial, are irreversible after the ratification by *Ra'ees Arafat*.⁷⁴ The most recent and highlighted case of a contested SSC verdict concerns the death

⁷¹ Renata Capella notes that since 1995, some trials have been open to the public and were convened during daytime. *Ha'aretz* of 11 March 1999 states in a report about the highlighted trial of Raed Al-Attar before a State Security Court that it was "open to the public and (...) credibly covered by the Palestinian media."

⁷² Internet: *Palestinian Authority: Deaths in Custody*, <http://www.amnesty.org.uk/reports/palestine/5.html> (visited on 10 March 1999), p. 2.

⁷³ "The Death Penalty in Palestine," in *Palestinian Human Rights Monitor*, issue #1 (January 1997), p. 9.

⁷⁴ "State Security Court Issues Sentences Against Two Political Detainees," in *People's Rights* (February 1998), p. 25.

sentence of Raed Attar for killing a Preventive Security Service officer, on 1 February 1999. In the aftermath of the trial, riots broke out in Gaza, during which the police killed two young Palestinians.⁷⁵

Most of the cases tried before a SSC pertain to supporters of opposition groups such as Hamas or Islamic Jihad, for allegedly having engaged in “terrorist activities”, such as “transporting explosives, recruiting suicide bombers, or weapons training without permit.”⁷⁶ The courts have also been used, however, as a dangerous tool to silence human rights activists for “inflicting damage on national unity in contravention with Article 178 of the Revolutionary Penal Code of 1979.” Eyad Sarraj and Mohammed Dahman⁷⁷ were charged before the SSC, although they were released without being tried.

The Human Rights Committee that was established under the *International Covenant on Civil and Political Rights* stated that trying civilians in military or special courts

“... could present serious problems as far as the equitable, impartial, independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the covenant does not prohibit such categories of courts, nonetheless, the conditions which it lays down clearly indicate that trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Article 14 [of the covenant which deals with fair trial].”⁷⁸

The doubts voiced by the Human Rights Committee about the establishment of special courts have become evident in the case of the Palestinian High Court of State Security. Here, the court serves the executive branch by circumventing the due criminal procedure as adhered to in civilian courts in order to prosecute and convict quickly individuals who criticize their regime.

⁷⁵ See “PA Police Kills 2 Gazans,” in *Jerusalem Post* (11 March 1999), p. 1. See also “85 Hurt in Second Day of Gaza Riots,” in *Jerusalem Post* (12 March 1999), p. 2.

⁷⁶ Internet, Amnesty International, *Palestinian Authority: Deaths in Custody*, <http://www.amnesty.org.uk/reports/palestine/5.html> (visited on 10 March 1999), p. 1.

⁷⁷ Former President of the Ad-Damir Association in Gaza.

⁷⁸ See UN Doc. A/39/49, Annex VI, p. 144.

It is argued that the High Court of State Security endangers the rule of law in Palestine since this court is

“convened at the behest of the Executive Branch, which is a dangerous infringement of the separation of powers and an intrusion on the jurisdiction of the regular Palestinian courts, which are assigned the principal responsibility for legal matters falling within its jurisdiction.”⁷⁹

Since the SSC is to be convened only upon presidential order, *Ra'ees* Arafat is to decide whether a case is to be tried before a civilian or a State Security court. Hence, a situation evolves where the judiciary has no authority over the protection of the law, and the lawfulness of administrative action anymore, since it does not possess sovereignty in the field of adjudication. Article 3 of the *UN Basic Principles on the Independence of the Judiciary* supports the argument. Here, it reads: “The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.”

It has to be noted however, that considerable external pressure has contributed to the establishment of the SSC in the first place. The Palestinian Authority is placed in a situation where Israel and other countries make adherence to the peace process dependent on the PA's will to maintain absolute control over society in the autonomous areas. The common procedure following suicide bombings or other attacks against Israel allegedly or actually committed by Palestinians, is, on the part of the Israelis, to close their borders and pressure the PA to arrest suspects, while the Palestinian side inflicts mass detentions and an inflating number of cases brought before the SSC. Israeli government officials welcomed the creation of the High Court of State Security. On 12 April 1995, the then Israeli Environment Minister Yossi Sarid expressed satisfaction about the performance of the SCC in a *Jerusalem Post* interview,

“We had specific demands, one of which was to bring terrorists to trial and that was done yesterday, and this is how it should be. If it is clear to us that these are not one-time acts, but are part of a determined and consistent policy, then I think the chances of con-

⁷⁹ PICCR, *Third Annual Report, 1997*, p. 82.

cluding the negotiations by July [for the Oslo II Agreement] and implementing them not later than this autumn will improve.”⁸⁰

Here, Mr. Sarid made explicit connection between the Palestinian will to combat what he called “terrorism” and the conclusion of peace agreements which could lead to Palestinian statehood.

The Palestinian State Security Courts currently violate the right to a fair and public trial by a competent, independent and impartial tribunal, as stipulated in Article 10 of the *Universal Declaration of Human Rights*, Article 14.1 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 5 of the *UN Basic Principles on the Independence of the Judiciary*. Furthermore, defendants are deprived of the right “to have adequate time and facilities for the preparation of [their] defense and to communicate with counsel of [their] own choosing,” as adopted in Article 14.3(b) of the ICCPR. The same document reads in Article 14.5 that “everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to the law.” Once the SSC has ruled, however, only the goodwill of *Ra’ees* Arafat can help convicts to revert their sentence, while a lawful tribunal composed of trained and impartial judges remains absent.

Alongside the civilian court system, there is a Palestinian military court system, which functions independently. These tribunals, established during the period of Israeli occupation, now serve as courts for members of the Palestinian police force, in order to try cases concerning civil and criminal matters arising out of the performance of the duties of the police force. Military courts try civilians only where they have cooperated with members of the military in the commission of a crime, or with regard to civilians who have committed a crime against a member of the police force.⁸¹ The law applicable to these courts is the Revolutionary Penal Code which was instituted by the PLO in 1979.

As with the Security Court, judges who serve on military courts are military officers. A military attorney general assumes public prosecution. Unlike the State Security Courts, however, the military courts have an appeals process at their disposal. An appeal may be filed within ten days

⁸⁰ See interview with Yossi Sarid in the *Jerusalem Post* (12 April 1995). Yossi Sarid referred to the first trial before the State Security Court on 9 April, which sentenced two individuals for having killed seven Israeli soldiers and wounding 40 others in two bomb attacks in Gaza.

⁸¹ PICCR, *Third Annual Report, 1997*, p. 83.

of the time the judgment was passed. If the Director of the Military Judicial Corps decides against the ruling, the original court has to reconsider it. If the court fails to revert its own judgment, it is final.⁸² Military sentences exceeding three years of imprisonment have to be ratified by *Ra'ees* Arafat.

A common deficiency of the Palestinian courts, whether they be State Security, civilian or military courts, is the absence of a defined set of rules, as to who is to be tried in which court. Also, a list of recruited and salaried police officers does not exist, so that it remains ominous as to who belongs to the police forces. Since the Military Intelligence's tasks, as well as those of all other police branches, remain undefined, often civilians are detained by the military police.

Moreover, due to the absence of Palestinian armed forces, the police have taken on the role of a quasi-military force. In general, the police functions to uphold law and order on an everyday basis which involves frequent interaction with the citizenry, whereas armed forces act in situations of emergency or threat for which an adjusted legal environment is needed in order to meet the challenges that situation of enhanced violence entails. To apply the same measures to a police force which is involved in profoundly civilian matters such as the investigation of crimes and the settling of family disputes is questionable. If exempted from civilian adjudication and punishment, and tried according to the Revolutionary Penal Code instead of the civilian law of the land, the civilian judiciary loses its authority to exercise a checks-and-balances function vis-à-vis the executive branch, and to thereby protect the public from administrative abuse such as unlawful police action.

⁸² Ibid.

7. Conclusion

After five years of Palestinian autonomous rule, the Palestinian judiciary has not succeeded in consolidating a respected and authoritative role within the Palestinian political system. Confronted with both a history of disempowerment and paralysis during the period of Israeli occupation, and a Palestinian Executive Authority which has occupied a hegemonic position vis-à-vis the other branches of government, the judiciary is today unable to protect citizens' rights and the rule of law in Palestine.

The numerous causes, which produced the present situation, can be divided into three main categories, namely; the historical causes, those brought about by the imposition of Israeli demands in the peace process, and the mechanisms of the domestic political system in Palestine.

From the outset, the Palestinian quest for national independence was presented with unfavorable conditions. In the struggle between two peoples for the same portion of land, the Jewish people have realized their right of self-determination through the establishment of the State of Israel. The more than two million Palestinians, who settled in the West Bank and Gaza Strip after their homeland had fallen to the Jewish State, were put under Israeli military occupation in the War of June 1967. Thus, while Israel has succeeded in realizing her territorial claims throughout the history of the Israeli-Palestinian conflict, the Palestinians have failed.

In 1993, politicians and the media alike suggested that the peace process launched between Israel and the Palestinian people would set an end to the imbalance of power between Israel and the Palestinians when in fact, it would not. The policy objectives of both parties clearly did not reflect their unconditional desire for positive peace in the region. Rather, Israel wanted to bring military occupation to an end after the traumatic experience of the *Intifada*, while the Palestinians longed for their own state.

Today, the Palestinian autonomous regime is forced to put into practice the security demands, which Israel succeeded to push through at the negotiating table. The interim agreements envisage a "strong police force" empowered to take any action necessary in the struggle against Palestinian internal opposition to the peace process. By continually threatening to suspend the peace process, the Israeli leadership exerts continuing pressure on the Palestinians to tightly control their opposition groups.

The judicial branch, in contrast, is severely impaired by a system of intermingling jurisdictions, proclaimed in the agreements. Accordingly, Israeli perpetrators cannot be brought before Palestinian courts, and Israel must approve legislation passed by the Palestinian Legislative Council. Moreover, the disproportionately important, and unregulated status which is allocated to the police force curtails the agreements' commitment to democratic government, the rule of law, and the protection of human rights. An agency to effectively check the legality of administrative actions and to guarantee fundamental rights and freedoms remains absent. The interim agreements clearly fail to award the Palestinian judiciary a strong position within the Palestinian political system.

The absence of clear guidelines in the peace accords pertaining to the status, rights and duties of the Palestinian judicial branch reflects the disrespect it has endured during the time of Israeli occupation, when an Israeli military court system increasingly assumed jurisdiction over matters that previously had fallen within the local courts' authority. Furthermore, the negligent funding of the local judiciary by the Israeli authority and its dependence on the occupying power, further contributed to the population's mistrust of their judiciary. Today, many Palestinian judges, badly trained and often unmotivated, cannot cope with the new challenges that autonomy brings. The Palestinian legal environment, characterized by multiple laws of reference and legal traditions, produces particular confusion among the legal community.

While the emerging Palestinian state needs a strong and respected judiciary, which can assume the task of restoring trust in the law and government, the Executive Authority with Yasser Arafat at its head, rigorously inhibits the formation of an independent and self-confident judicial agency. In the present situation, it is argued, Palestinian statehood takes precedence over democratic standards and the rule of law. Minimal requirements for the independence of the judiciary are disregarded by an executive that elaborately interferes with the courts' work. Insufficient

funding by the Executive prohibits the employment and adequate payment of a suitable number of judges and court personnel, whilst the Palestinian judiciary is being presented with a rapidly increasing caseload. Furthermore, the lack of financial resources inhibits the modernization of the courts, which in many cases have to do without basic office equipment or law libraries.

The lack of respect for court decisions on the part of the law enforcement agencies, however, presents the most critical feature of the Palestinian judiciary. An alarming record of state-sponsored human rights violations and the fact that the police assume the role of an extra-judicial dispute resolution agency cause greatest harm to the population's trust in their government.

It was claimed at the beginning of this study that an examination of the Palestinian judiciary would reveal problems that are not only true for this branch of government, but affect the Palestinian political system as a whole. The causes for the judiciary's inefficiency, those brought about by Israeli demands in the peace negotiations and causes inherent in the Palestinian political system, serve as an explanatory model for difficulties of other institutions in the Palestinian political system, too.

The Palestinian Legislative Council is restricted in its legislative activity by the Executive branch of government, whose president does not take the Palestinian parliament seriously. Yasser Arafat has refused to sign the Palestinian constitution into law despite the fact that the interim agreements foresaw the promulgation of a Palestinian Basic Law as one of the PLC's primary tasks. Furthermore, the executive does not take action to enforce the numerous resolutions passed by the Council pertaining to issues such as civil and political rights. The Council's effectiveness is furthermore inhibited by a lack of experience in parliamentary work on the part of its members, for many of whom the democratic system of Palestinian government presents a novelty. Finally, the PLC's authority within the Palestinian political system is constrained by the fact that it is, per definition, an interim institution. It is prohibited from legislating on a wide range of policy issues, such as foreign relations, security and border control.

Even when looking at the Executive Authority, which occupies the most dominant position within the Palestinian autonomous regime, our model illustrates the motivating forces behind the Executive's autocratic performance. On the one hand, Israel threatens to suspend the peace negotiations if the Palestinian leadership does not crack down on opposition

groups, and on the other hand, the majority of the Palestinian leadership can look back to a military career in one of the Palestinian resistance movements. As with the vast majority of recruits in the Palestinian police services, these individuals have spent most of their lifetime in a state of war against the Israeli occupation. They have internalized the ideologies of warfare rather than of democracy, pluralism and the rule of law. In their struggle for Palestinian statehood, Yasser Arafat and his entourage have equated central elements of democracy, such as public debate and criticism with acts of high treason that harm the Palestinian people's primary goal of statehood.

Yet, the glaring faults of the Palestinian political system are sometimes justified by the difficult circumstances that accompany the Palestinian people's state-building effort. When asked about the human rights situation in the Palestinian autonomous areas, many Palestinians claim that the Palestinian people needs to surrender some of their individual attitudes and objectives temporarily, for the sake of Palestinian unity. Once national independence is established, they argue, Palestinians will have plenty of time to consolidate a democratic political system. Against this argument, it can be held that once a political system is established and the leadership has strengthened their positions of power, changes and adjustments can hardly be brought about by actors outside the elite, especially when the system is organized strictly hierarchically. It is for this reason that human rights activists urge not only the Palestinian people, but also the Israeli political leadership and the international community, to press for improvements in the fields of human rights and the rule of law, while it is still possible. During the past five years of Palestinian autonomous rule an intensive debate about the character and direction which Palestinian democracy should adopt has occurred. At present, the Palestinian legal system is still open for change; the Palestinian entity's basic directives and values have not yet been proclaimed in a constitution; the interim political institutions, their organization and balance of power, can still be reversed. If the Palestinian people claim not only the right of self-determination through the establishment of an independent state, but the right to freely choose a democratic system of government, they have to demand it immediately, and not in two or five years time since individual and fundamental rights are inviolable and their implementation cannot be postponed.

The Palestinian people have to free themselves from occupation, in order to erect a prosperous Palestinian entity. If the parties to the peace process can reach a final status agreement that allocates the Palestinian people a

reasonable foundation for their independent state, then the people's profound political conscience and awareness which were created during the periods of foreign rule, and have continued to develop since 1994, will help the Palestinians to establish an accountable and democratic government. The turmoil in which the Palestinian entity presently finds itself will hopefully come to an end, the rights and duties of the government branches will become clearer and the Palestinian legal system will develop independently.

BIBLIOGRAPHY

- Asseburg, Muriel and Volker Perthes, *Surviving the Stalemate: Approaches to Strengthening the Palestinian Entity* (Baden-Baden, 1997).
- Bentwich, Norman, *Legislation of Palestine 1918-25* (Alexandria, 1926), 2 vols.
- Bentwich, Norman & Helen, *Mandate Memories* (New York, 1965).
- Bethell, Nicholas, *The Palestine Triangle. The Struggle between the British, the Jews, and the Arabs, 1935-48* (London, 1979).
- B'Tselem, *Neither Law nor Justice* (Jerusalem, August 1995).
- Clapham, Christopher, *Third World Politics* (Madison, 1985).
- Clark, Donald and Robert Williamson (eds.), *Self-Determination. International Perspectives* (London, 1996).
- Danspeckgruber, Wolfgang and Arthur Watts (eds.), *Self-Determination and Self-Administration. A Sourcebook* (London, 1997).
- David, René and John Brierley, *Major Legal Systems in the World Today* (New York, 1978).
- Eisenman, Robert H. *Islamic Law in Palestine and Israel* (Leiden, 1978).
- ESCO Foundation for Palestine (ed.), *Palestine: A Study of Jewish, Arab and British Policies* (New Haven, 1947), 2 vols.
- Fisk, Robert, *Pity the Nation—Lebanon at War* (Oxford University Press, 1991).
- Glendon, Mary, Michael Gordon and Christopher Osakwe, *Comparative Legal Traditions* (St. Paul, 1985).
- The Holy Bible* (East Brunswick, 1978).
- The International Commission of Jurists, *The Civilian Judicial System in the West Bank and Gaza: Presence and Future* (Geneva, 1994).
- Israel National Section of the International Commission of Jurists, *The Rule of Law in the Areas Administered by Israel* (Tel Aviv, 1981).

Lewis, B., V.L. Ménage, and J. Schacht (eds.), *The Encyclopaedia of Islam. New Edition* (Leiden, 1971), 7 vols.

Machover, J.M. *Governing Palestine* (London, 1936).

Mar'i, Mustafa, *Guarantees for Respect of Human Rights in Palestine: Present Problems and Future Prospects* (Jerusalem, December 1997).

Marlowe, John, *Rebellion in Palestine* (London, 1946).

Moore, J. N. (ed.), *The Arab Israeli Conflict. Vol. III: Documents* (Princeton, 1974).

Morris, Benny, *The Birth of the Palestinian Refugee Problem, 1947-1949* (Cambridge, 1987).

Rabah, Jamil, *Palestinian Public Opinion since the Peace Process* (Jerusalem, July 1998).

Roberts, Adam and Richard Guelff (eds.), *Documents on the Law of War* (Oxford, 1989).

Ronen, Dov, *The Quest for Self-Determination* (New Haven, 1979).

Shehadeh, Raja, *From Occupation to Interim Accords: Israel and the Palestinian Territories* (The Hague, 1997).

Shehadeh, Raja, *Occupier's Law. Israel and the West Bank* (Washington D.C., 1988).

Shehadeh, Raja, *The Declaration of Principles and the Legal System in the West Bank* (Jerusalem, 1994).

Shuqair, Riziq, *Criminal Jurisdiction under the Gaza-Jericho Agreement* (Ramallah, 1994).

Tessler, Mark, *A History of the Israeli-Palestinian Conflict* (Indianapolis, 1994).

Twite Robin and Tamar Hermann (ed.), *The Arab-Israeli Negotiations* (Tel Aviv, 1993).

Anthony Tirado Chase, *The Palestinian Authority Draft Constitution: Possibilities and Realities in Search for Alternative Models of State Formation* (Jerusalem, June 1997).

Interviews

Interview with Tom'i Dawod, Greek-Orthodox priest in the West Bank village of Zababdeh, in Zababdeh (14 November 1998).

Interview with Bassem Eid, Head of the Palestinian Human Rights Monitoring Group (PHRMG), in Jerusalem (30 November 1998).

Interview with Ghassan Faramand, Deputy Director of the Birzeit University Law Institute, in Ramallah (1 April 1999).

Interview with Mohammed Abu Halthria, human rights lawyer at Al-Haq, the West Bank Affiliate of the International Commission of Jurists, in Ramallah (3 April 1999).

Interview with Rhys Johnson, international human rights lawyer at LAW society, in Jerusalem (24 March 1999).

Interview with a senior member at the Birzeit University Law Institute, in Ramallah (1 April and 18 April 1999).

Interview with Palestinian Deputy Minister for Christian Religious Affairs, Ibrahim Kandalaft, in Jerusalem (20 October 1998).

Interview with lawyer Lubna Katbeh, in Ramallah (10 April 1999).

Interview with Eric Marclay, Head of the ICRC in Jerusalem, in Jerusalem (27 September 1998).

Interview with Mustafa Mar'i, Head of the Legal Division at the Palestinian Independent Commission for Citizen Rights (PICCR), in Ramallah (4 April 1999).

Interview with Deputy Attorney General As'ad Mubarak, in Ramallah (10 April 1999).

Interview with Director General of Yasser Arafat's Office in Jericho, Sami Musalam, in Jericho (14 October 1998).

Periodicals

Abu-Amr, Ziad, "The Palestinian Legislative Council," in *Journal of Palestine Studies* 26, no. 4 (Summer 1997).

Abu Sitta, Salman. "1948 Ethnic Cleansing of the Galilee - From Reports of the United Nations," in *News From Within* (June 2000), pp. 19-25

Byren, Rex, "The Neopatrimonial Dimension of Palestinian Politics," in *Journal of Palestine Studies* 25, no. 1 (Autumn 1995).

Connor, Walker, "Nation-Building or Nation-Destroying?" in *World Politics* 24, no. 3 (April 1972).

"The Death Penalty in Palestine," in *The Palestinian Human Rights Monitor*, vol. 1, issue #1 (January 1997), p. 9.

Monitor, vol. 1, issue #5 (December 1997), p. 3.

"Deaths in Custody in the Palestinian Authority," in *The Palestinian Human Rights DeZayas*, Alfred "Das Recht auf die Heimat, ethnische Säuberungen und das Internationale Kriegsverbrechertribunal für das ehemalige Jugoslawien," in *Archiv des Völkerrechts* 35, no. 1 (Hamburg, 1997).

Frisch, Hillel, "Modern Absolutist or Neopatriarchal State Building? Customary Law, Extended Families, and the Palestinian Authority," in *International Journal of Middle Eastern Studies* 29 (1997).

"High Court Cases," in *The Palestinian Human Rights Monitor*, vol. 2, issue #1 (January 1998), p. 13.

Honig-Parnass, Tikva, "Internal Security. The Palestinian Police Force's Main Task," in *News from Within* (April 1994), pp. 8-9.

"Human Rights under the PA," in *People's Rights* (January 1999), pp. 23-25.

Kassim, Anis F. "Legal Systems and Developments in Palestine," in *The Palestine Yearbook of International Law* 10 (The Hague, 1984).

"The Law Profession in Palestine," in *People's Rights* (December 1998), pp. 32-33.

"The LC's Human Rights Watch Committee Report: Human Rights, Public Freedom and Political Detainees," in *People's Rights* (January 1999), pp. 26-29.

Mayo, Stephen and Hiram Chodosh, "The Palestinian Legal Study: Consensus and Assessment of the New Palestinian Legal System," in *Harvard International Law Journal* 38, no. 2 (Spring 1997).

"The New Palestinian Bar Association," in *The Palestinian Human Rights Monitor*, vol. 1, issue #3 (August 1997), pp. 16-17.

"The Palestinian Legislative Council after One Year of Existence," in *People's Rights* (March 1997), pp. 14-37.

"PLO Chairman Yasir Arafat, decree reinstating pre-1967 laws in West Bank and Gaza Strip," in *Journal of Palestine Studies* 24, no. 1 (Autumn 1994).

Pomerance, Michla, "Self-Determination Today: The Metamorphosis of an Ideal," in *Israel Law Review* 19, no. 3-4 (1984).

Robinson, Glenn E. "The Growing Authoritarianism of the Arafat Regime," in *Survival* 39, no. 2 (Summer 1997).

Robinson, Glenn E., "The Politics of Legal Reform in Palestine," in *Journal of Palestine Studies* 27, no. 1 (Autumn 1997).

Sayigh, Yezid, "Redefining the Basics: Sovereignty and Security of the Palestinian State," in *Journal of Palestine Studies* 24, no. 4 (Summer 1995).

Sourani, Raji, "Human Rights Over One Year Since Oslo," in *Palestine Report* (18 September 1994), pp. 8-9.

"The State of Human Rights in Palestine II," in *The Palestinian Human Rights Monitor*, vol. 1, issue #3 (August 1997), pp. 2-19.

"State Security Court Issues Sentences Against Two Political Detainees," in *People's Rights* (February 1998), pp. 25-26.

"Two Legal Systems - One People?" in *People's Rights* (November 1997), p. 33.

"2,700 Cases at the Qalqilya and Salfit Conciliation Courts... But Only One Judge," in *People's Rights* (December 1998), p. 34.

Usher, Graham, "The Politics of Internal Security: The PA's New Intelligence Services," in *Journal of Palestine Studies* 25, no. 2 (Winter 1996).

Weinberger, Naomi, "The Palestinian National Security Debate," in *Journal of Palestine Studies* 24, no. 3 (Spring 1995).

"Which Way are Things Heading in Jericho and Gaza?" in *The Middle East Justice Network* (August-September 1994), p. 2.

"Who's Next ? In the Aftermath of the Resignation of the Attorney-General of the Palestinian National Authority, Mr. Fayez Abu-Rameh," in *People's Rights* (July 1998), pp. 40-41.

Wing, Adrien, Sonya Braunschweig, and Quais Abdel-Fattah, "Judicial Review in Palestine," in *The Palestine Yearbook for International Law* 9 (1996/97). Also on Internet: <http://lawcenter.birzeit.edu/publications/publications/wing2b.html> (visited on 9 November 1999).

Newspaper Articles

"Demand for 2nd Autopsy in Hiroub Case," in *The Jerusalem Times* (6 February 1998), p. 2.

Hamzeh-Muhaisen, Muna, "Confession Under Torture: Court Ruling Sets Precedent," in *Palestine Report* (3 April 1998), pp. 6-7.

"Illegally Detained Teacher Released," in *The Jerusalem Times* (28 November 1997), p. 3.

"Interview with Col. Jibril Rajoub," in *The Jerusalem Post Magazine* (19 May 1995).

"Interview with Yossi Sarid," in *The Jerusalem Post* (12 April 1995).

"Interview with Mohammed Dahlan," in *Al-Quds al-Arabi* (London, 25 April 1997) as reported in *Foreign Broadcast Information Service*, Near East and South Asia.

"Justice, and Other Priorities," in *The Jerusalem Report* (15 March 1999), pp. 26-27.

Lewis, Anthony, "Darkness in Gaza," in *The New York Times* (6 May 1996).

"PA Lawmakers Debate Efficacy of Council," in *The Jerusalem Post* (8 March 1999), p. 2.

"PA Police Kills 2 Gazans," in *Jerusalem Post* (11 March 1999), p. 1.

"Palestinian Legislative Council - Year One," in *The Jerusalem Times* (14 February 1997), pp. 8-9.

"Sarraj Arrest Raises Questions," in *The Jerusalem Times* (14 June 1996), p. 3.

Sourani, Raji, "Human Rights Over One Year Since Oslo," in *Palestine Report* (18 September 1994), pp. 8-9.

"Wherefore art the Basic Law?" in *The Jerusalem Times* (27 June 1997), p. 7.

"85 Hurt in Second Day of Gaza Riots," in *Jerusalem Post* (12 March 1999), p. 1.

Legal Documents

1907 Hague Convention IV and Regulations, in Adam Roberts-Richard Guelff (eds.), *Documents on the Laws of War* (Oxford, 1989).

Declaration of Principles on Interim Self-Government Arrangements of 13 September 1993.

Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (1949), 75 UNTS 287. [Internet: <http://www.unhchr.ch/html/menu3/b/92.htm> (visited on 11 November 1999)].

Israeli Palestinian Interim Agreement on the Gaza Strip and the Jericho Area (Interim I Agreement) of 4 May 1994.

Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Interim II Agreement) of 28 September 1995.

United Nations, *Universal Declaration of Human Rights*, UNGA Res. 217A [III] of 10 December 1948, UN Doc. A/810 (1948), p. 71.

United Nations, *Palestine-Progress Report of the United Nations Mediator*, UNGA Res. 194 (III) of 11 December 1948. 3 UNGA OR, UN Doc. A/810 (1948), pp. 21-25. [Also in John Norton Moore (ed.), *The Arab Israeli Conflict. Vol. III: Documents* (Princeton, 1974), pp. 373-376].

United Nations, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGA Res. 1514 [XV] of 14 December 1960. 15 UNGA OR Suppl. (no.16), UN Doc. A/4684 (1961), p. 66.

United Nations, *International Covenant on Civil and Political Rights* (1966), 6 International Legal Materials 368 (1967). [Internet: <http://www.efc.ca/pages/law/un/intl-covenant-civil-political-rights.html> (visited on 15 November 1999)]

United Nations, *Declaration on Friendly Relations and Cooperation Among States*, UNGA Res. 2625 [XXV] of 24 October 1970. 25 UNGA OR Suppl. (no.28), UN Doc. A/8028 (1971), p. 121.

United Nations, *Basic Principles On the Independence of the Judiciary*, UNGA Res. 146 of 13 December 1985, UNGA OR, 40th Session (1985), reprinted in 25-26 CIJL Bulletin 14 (1990). [Internet: http://www.unhchr.ch/html/menu3/b/h_comp44.htm (visited on 29 November 1999)].

United Nations, *Basic Principles on the Role of Lawyers* (adopted on the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, 1990); reprinted in Office of the UN Special Coordinator in the Occupied Territories, *Rule of Law Development in the West Bank and Gaza Strip - Survey and Status of Development Effort* (Jerusalem, July 1997). [Internet: http://www.unhchr.ch/html/menu3/b/h_comp50.htm (visited on 15 November 1999)].

United Nations Framework for Strengthening of the Rule of Law (1994), UNGA Doc. A/49/512 (annex); reprinted in Office of the UN Special Coordinator in the Occupied Territories, *Rule of Law Development in the West Bank and Gaza Strip - Survey and Status of Development Effort* (Jerusalem, July 1997).

UN Special Rapporteur Francesco Capotori, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (22 June 1977), E/CN.4/Sub.2/384.

The Wye River Memorandum of 23 October 1998.

Material from the Internet

Amnesty International, *Palestinian Authority: Deaths in Custody*, <http://www.amnesty.org.uk/reports/palestine/5.html> (visited on 10 March 1999).

Amnesty International, *Report on Palestine*, <http://www.amnesty.org.uk/reports/palestine/1.html> (visited on 10 March 1999).

Birzeit University Institute of Law, *Legal Databank*, http://lawcenter.birzeit.edu/legal_databank.htm (visited on 9 November 1999).

Birzeit University Institute of Law, *Legal Status of Palestine: West Bank*, <http://lawcenter.birzeit.edu/publications/resources/westbank.htm> (visited on 9 November 1999).

Bourlond, Anne, *Teaching Law in Palestine*, <http://lawcenter.birzeit.edu/publications/publications/sympo.html> (visited on 9 November 1999).

The Dismissal of Chief Justice Councilor Qusay Abadlah, www.pchrgaza.com/files/PressR/English/1998/abadlah.htm (visited on 15 March 1999).

Laws and Projects, <http://www.pal-plc.org/english/laws/laws.htm> (visited on 25 July 1999).

The Palestinian Basic Law, <http://www.pal-plc.org/english/laws/blaw.htm> (visited on 25 July 1999).

PCHR, *Report on the Palestinian Legislative Council*, [http://www.pchrgaza.com/files/REPORTS/English/promoting 96.htm](http://www.pchrgaza.com/files/REPORTS/English/promoting%2096.htm) (visited on 15 March 1999).

Resignation of Palestinian Attorney General due to the Undermining of his Authority, <http://www.pchrgaza.com/files/Press...torney%20General%20resignation.html> (visited on 15 March 1999).

Special Reports from Palestine: The Palestinian Council, <http://www.jmcc.org/research/special/council2.html> (visited on 15 March 1999).

Studies and Reports

Amnesty International, *Israel and the Occupied Territories Including the Areas Under the Jurisdiction of the Palestinian Authority. Human Rights: A Year of Shattered Hopes* (May 1995), AI Index: MDE 15/07/95.

Amnesty International, *Trials at Midnight: Secret, Summary, Unfair Trials in Gaza* (June 1995), AI Index: MDE 15/15/95.

Amnesty International, *Palestinian Authority. Prolonged Political Detention, Torture and Unfair Trials* (December 1996), AI Index: MDE 15/68/96.

Associates in Rural Development (ARD), *Developmental Needs of the PLC* (Washington, June 1997).

Associates in Rural Development (ARD), *An Assessment of the Palestinian Legislative Council* (Washington, May 1997).

Associates in Rural Development (ARD), *The PLC's Oversight Function* (Washington, November 1996).

Birzeit Law Institute, *Palestinian Courts Statistics* (April 1999; unpublished manuscript, on file with the author).

Birzeit Law Institute, *Judges' Training Needs* (April 1999; unpublished manuscript, on file with the author).

Cable to the US Consulate in Jerusalem, containing a summary of key problems affecting the legal system of the West Bank and Gaza (June 1995; unpublished manuscript, on file with the author).

Renate Capella, *The State Security Court* (April 1999; unpublished manuscript, on file with LAW).

Center for Palestine Research and Studies (CPRS), *Palestinian Judicial Independence. The Vision of Workers in the Judicial Branch* (Nablus, May 1997).

Center for Palestine Research and Studies (CPRS), *Parliamentary Research Unit: The Palestinian Legislative Council* (Nablus, October 1996).

Chase, Anthony Tirado, *Minority Rights and Communal Relations in Palestine*, paper presented at the Middle East Study Association 30th Annual Meeting (Rhode Island, 21-24 November 1996).

Global Bureau - Center for Governance and Democracy, *Judicial Administration Project in the West Bank and Gaza. Final Report* (Jerusalem, March 1996).

Human Rights Watch, *The Gaza Strip and Jericho. Human Rights under Palestinian Partial Self-Rule* (New York, February 1995).

Human Rights Watch, *Palestinian Self-Rule Areas: Human Rights under the Palestinian Authority* (New York, September 1997).

Institute for the Study and Development of Legal Systems, *The Restoration and Modernization of the Palestinian Civil and Criminal Justice Process* (San Francisco, June 30, 1995).

LAW - The Palestinian Society for the Protection of Human Rights and the Environment, *The Justice Unit* (Jerusalem, May 1999; unpublished manuscript, on file with LAW).

Office of the UN Special Coordinator in the Occupied Territories, *Rule of Law Development in the West Bank and Gaza Strip-Survey and Status of the Development Effort* (Jerusalem, July 1997).

The Palestinian Human Rights Monitoring Group and B'Tselem, *Human Rights in the Occupied Territories Since the Oslo Accords. Status Report* (Jerusalem, December 1996).

Palestinian Independent Commission for Citizens' Rights (PICCR), *Third Annual Report. 1 January to 31 December 1997* (Ramallah, 1998).

Russillo, Frederick M. *Preliminary Judicial System Needs Assessment: The Autonomous Areas of Palestine and the West Bank. Final Report* (San Fransisco, November 1994).

United States Agency for International Development (USAID), *Developmental Needs of the Palestinian Legislative Council*, (Washington, April 1997).

Wi'am - Palestinian Conflict Resolution Center, *The Role of the Jaha* (19 March 1998; unpublished manuscript obtained at Yakar's Center for Social Concern in Jerusalem, on file with the author).

Speeches and Adresses

Darwish, Darwish Musa, Mukhtar of Issawiyya in East Jerusalem, *Sulha Conflict Resolution*, Address at the Yakar's Center for Social Concern, Jerusalem (6 December 1998).

Salhab, Ryad, a family elder from East Jerusalem, *Sulha Conflict Resolution*, Address at the Yakar's Center for Social Concern, Jerusalem (6 December 1998).

Shehadeh, Raja, Remarks at the symposium "Teaching Law in Palestine," held at Birzeit University (9-10 January 1997). [Report available on internet: <http://lawcenter.birzeit.edu/publications/publications/sympo.html>, (visited on 9 November 1999)].