

**MAX PLANCK INSTITUTE
FOR FOREIGN AND INTERNATIONAL
CRIMINAL LAW**

**INTRODUCTION TO THE PALESTINIAN
CRIMINAL JUSTICE SYSTEM**

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Introduction

The study on the Palestine System of Criminal Justice presents a theoretically exciting and politically most relevant case study on the transition of criminal justice under conditions of military conflicts, social unrest and limited economic resources. The situation in Palestine insofar parallels that of other countries which have gone or are still going through transitional periods characterized by a range of social problems among which insecurity and violence, a weak state, a weak economy and a weak civil society figure prominently. Problems of insecurity, however, are related to mistrust and with that to the obvious need to re-establish trust as a basic social condition. The challenges that come with the task of building up trust are manifold as complexity of this task and the need for parallel processes of building state institutions, providing for the rule of law and justice, building a strong market economy and a civil society do not lend themselves to a simple and straight forwarded answer. The attempt to build trust always carries the risk of failure. A basic condition for building trust concerns the accommodation for concerns of security and justice which will be possible only if institutions and procedures are established that convey the credible message of being impartial and effective in delivering security, justice and freedom from the fear of physical violence.

Insofar, at the core of the process that has to be initiated lies building and maintaining of administrative and judicial institutions that can provide for security and justice. In many cases this will amount to building up a state and those powers that are essential elements of a state: executive powers, judiciary and legislature. In fact, most of the proposals that have been made with respect to re-building societies after extended periods of violence clearly speak out for re-establishing a state and state institutions. A strong state, although sometimes perceived to be the source of many problems, certainly is required. In many conflict and post conflict areas it is not the strong state but the lack or the weakness of a monopoly of legitimate power (and violence) which is the problem. Only a functioning state will be able

to create again “trust among people”. Insofar, relevant links are assumed to exist between security, the state and trust.

The study on the Palestine system of criminal justice presented by Mr. Abdelbaqi provides for basic information on the existing legal structures and institutions as well as the reforms needed to improve the existing legislation, institutions and practices. The study is part of the Max-Planck-Institutes ongoing research on criminal justice in transitions and will certainly result in substantial theoretical advances.

Hans-Jörg Albrecht

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1. Background

By virtue of the declaration of principles on interim self- government signed in Washington on September 13, 1993 (hereinafter “the declaration of principles”)¹ between the Palestinian Liberation Organization (PLO) and the Government of Israel, a Palestinian Authority (PA) was established to take over the rule in the two occupied areas of the Gaza Strip and Jericho district in the West Bank. This agreement was followed by other agreements between the two sides which widened the domain of the Palestinian Authority of self rule to include other areas in the territories².

According to the interim agreements, the Palestinian territories in the West Bank and the Gaza Strip are classified into three areas: Area A, now comprises the whole area of the Gaza Strip (after the Israeli withdrawal in September 12, 2005) and the main towns in the West Bank, this area is under the full control of the Palestinian National Authority; Area B, comprises the small towns and villages in the West Bank, in which both the Israeli and the Palestinian authorities share responsibilities, the Israeli side applies the security authorities, whereas the Palestinian side applies the civil authorities on the Palestinian residents; and Area C, which is the biggest part of the West Bank, comprises the lands outside the towns and villages in areas A and B, this area includes the Israeli settlements in the West Bank in addition to East Jerusalem. In this area, Israel applies its full control on both the land and the Palestinian residents (in addition to the Israeli settlements and settlers). The Palestinian Authority does not have a real jurisdiction in this area, but a limited authority over the Palestinian residents³.

The Palestinian Interim Self-Government Authority was intended to last for a transitional period not exceeding five years, leading to permanent settlement based on the United Nations Security Council resolutions 242 and

¹ This agreement was the fruit of the secret negotiations held by delegations from the Palestinian Liberation Organization and the Israeli government in Oslo, Norway in 1993.

² For example, Gaza-Jericho Autonomy Agreement (Cairo Agreement), signed in Cairo on May 4th, 1994; the Israeli- Palestinian Interim Agreement on the West Bank and Gaza Strip signed in Washington, D.C. on September 28th, 1995.

³ Since the Israeli invasion to the West Bank in March 2002, all the West Bank areas are under the full control of the Israeli occupational authorities. As a result, the Israeli authorities cancelled the distinctions delineated in the interim agreements between areas A, B & C.

338⁴. Moreover, the UN Security Council resolution of March 2002 called for the creation of a Palestinian state. This goal has not yet been fulfilled although more than ten years has passed since the signing of the declaration of principles. On the other hand, the president of the United States in his speech of 24 June 2003, expressed his opinion of finding a solution to the Palestinian- Israeli conflict in a two- state settlement in the borders of the historical Palestine. His plan, the “Roadmap”, had recommended for the establishment of a survival Palestinian state within the borders of the 1967 war, in the West Bank and Gaza Strip by the year 2005.

As the Israeli government hindered the enforcement of the “Roadmap” plan in 2005, President Bush confirmed his consent for the establishment of the Palestinian state by the year 2009. The “Roadmap” was welcomed by the international community; *inter alia*, the European Union, Russia, and the United Nations. Moreover, a critical majority of the Palestinians and the Israelis support the “Roadmap”.

2. Approach

During the last ten years, especially after the outbreak of the second uprising (*Al Aqsa Intifada*) in 2000, inside and outside calls for reform in the Palestinian institutions, in particular the criminal justice institutions, have been made. The insiders’ motives for the calls of reform are different to those of the outsiders. The insiders criticized (and still criticize) the performance of the criminal justice institutions due to their inability to guarantee rule of law and order, or to provide protection against the continuous Israeli attacks. All sectors of the Palestinian people urge the PA to improve its performance and transform itself into an effective set of institutions capable of meeting the basic needs of the Palestinian people. The outsiders, especially the Israelis, demanded for reform in the security units and other related institutions with the aim of impeding the struggle against the occupation.

In response to these calls, the PA has brought forward a prominent plan called the rule of law strategic development plan 1999-2003, which sets

⁴ They were issued by the United Nations Security Council after the wars between the Arabs and Israel in the years 1967 and 1973 respectively. The two resolutions asked for the withdrawal of the Israeli military forces from the occupied Arab territories, including the West Bank, Gaza Strip and East Jerusalem.

out the major priorities to be addressed in the rule of law development⁵. The development points include: ministry of justice capacity development; judicial system development; prosecutorial system development; legal practice development; law enforcement development; penal institution development; national human rights/ rule of law policy development; Non-Governmental Organization development; independent national human rights institution development; legislative council capacity development; law reform development; forensic science capacity development; electoral system development; conflict resolution capacity development; and human rights and public information development⁶.

This paper will illustrate the Palestinian criminal justice system and explore the impacts of the policy adopted by the PA over the last few years⁷ upon the criminal justice institutions. It will focus on the different inside and outside challenges of the criminal justice system and suggest solutions.

3. The Challenges of the Palestinian Criminal Justice System

A recent public opinion poll published by the Development Studies Program at Birzeit University⁸ shows dramatic figures regarding the Palestinian people's assessment of the criminal justice institutions, in particular the judicial system, and their roles in achieving justice, supporting rule of law, and fighting corruption. The poll indicates that 57% of the Palestinian people have no confidence in the judicial system at all, and 43% of the public believe that the judiciary in Palestine is corrupt. Moreover, 89.2% of the Palestinian people believe that the weakness of the judicial system is an important or very important cause for the existence of and the increase in corruption⁹.

⁵ Friedrich, Roland, "Security Sector Reform in the Occupied Palestinian Territories," PASSIA, November 2004 (website: www.passia.org).

⁶ Office of the United Nations Special Coordinator in the Occupied Territories, Rule of Law Development in the West Bank and Gaza Strip, May 1999. Website:

<http://www.arts.mcgill.ca/programs/polisci/faculty/rexb/unsco-ruleoflaw/>

⁷ Since the promulgation of the basic law of the PA and the different judicial laws in 2002, the administration of justice has been improved tremendously.

⁸ Birzeit University, Development Studies Program, Public Poll No. 17, 4-6 June 2004.

⁹ Birzeit University, Development Studies Program, Palestine Human Development Report 2004. Website: <http://home.birzeit.edu/dsp>

Such a result is the natural consequence of the failure of the criminal justice system in addressing the following challenges. The system is greatly affected by the heavy inheritance of the different legal systems which were applied in the West Bank and the Gaza Strip. Multiple layers of accumulated legislation survive following the succession of administrations in both areas, resulting in considerable confusion. Although a high percentage of legislation is new and unified, some legislation from the whole arenas is still applied. Some Ottoman legislation, British Mandate Acts, and Israeli Military Orders persist in both areas, as well as laws used by the PLO prior to the establishment of the PA, in addition to legislation from the Jordanian rule in the West Bank (1948- 1967), and Egyptian administration in the Gaza Strip (1948- 1967). The different legislations which were applied in the Palestinian territories constituted an obstacle for attaining a common approach in the legal mentality and the practice of the criminal justice stakeholders even after the partial unification of the legislation in the West Bank and Gaza Strip.

However, the Palestinian criminal justice system was not as fractured, politicized, nondependent, and negligent as it was under the Israeli occupation (1967- 1994). The growth of the law stopped effectively in 1967, and remained frozen on all doctrinal and philosophical fronts as of that date¹⁰. More than 2500 military orders were applied in the West Bank and Gaza Strip which mainly drove the Palestinian legal system to serve the plans of the occupier. The police were Israelis which aimed at maintaining the stability for the occupiers against the interests and the freedom of the Palestinian people. The judicial system did not handle cases related to security or political matters. No doubt that the most critical act against the judicial system was the transformation of many of the competences of the Palestinian regular courts to the Israeli military tribunals and military committees. Consequently, the Israeli inheritance still constitutes one of the major impediments of reform.

At present, the system suffers further from Israeli responses to *Al Aqsa Intifada*, including the destruction of police stations, prison and detention centres, the harassment of human rights lawyers and drastic restrictions on freedom of movement. The Palestinian territories are not contiguous, either because of the division between the West Bank and Gaza Strip; the con-

¹⁰ Office of the United Nations Special Coordinator in the Occupied Territories, *Ibid*.

struction of the Israeli settlements; the security barrier (or the apartheid separation wall, as the Palestinians name it) which is being constructed along the green line within the Palestinian territories, separating Israel from the Palestinian territories and the Palestinian towns and villages from each other; and the presence of large numbers of checkpoints among the West Bank regions. These matters hamper law enforcement coordination; require duplicative and therefore expensive capabilities; and result in immense operational security problems¹¹.

On the other hand, the system of patronage and the multiplicity of security units undermine the rule of law in the now governing PA¹². The justice system has been further damaged by the PA's failure to give sufficient authority, respect, and financial backing and other resources to the judiciary. The system is plagued by an insufficient number of judges, a lack of properly qualified and trained judges, prosecutors, lawyers, and court officials¹³.

One of the critical challenges to the formal justice system is the “street justice” phenomenon. In 2004, the Palestinian Independent Commission for Citizen’s Rights (PICCR) estimated that at least (90) Palestinians, mostly alleged or suspected collaborators, had been killed by unknown attackers¹⁴. The security units could not guarantee safety to the victims. On the contrary, some of the chiefs and officers of those units were killed or kidnapped¹⁵. The senior PA officials have condemned taking the law into one’s hand, but up to now no single perpetrator has been brought to justice.

The criminal process in Palestine has certainly many deficits, some of them have been inherited from the different legal systems in Palestine during the successive eras, others are due to the lack of rule of law situation prevailing under the control of the PA. The deficits of the system are both structural and procedural, among others: the constitutional court has not yet

¹¹ The RAND Palestinian State Study Team, *Building a Successful Palestinian State*, page 8. It can be accessed through the website: www.rand.org.

¹² Douglas Ierley, *Law and Judicial Reform in Post-Conflict Situations: A Case Study of the West Bank Gaza*. Can be accessed through the website: http://www4.worldbank.org/legal/Ijr_01/doc/Ierley.pdf.

¹³ Human Rights Watch, 2001.

¹⁴ PICCR, annual report 2004.

¹⁵ On 12 July 2004, the chief of the civil police and the head of the military liaison committee were kidnapped in Gaza by unknown militia. In September 2005 the ex- chief of the military intelligence unit and the present military consultant of PA President were assassinated by a faction in Gaza city.

been established; the lack of regular training for the judges, prosecutors and courts' staff because of the absence of a judicial training institute; the procedures during the pre-trial stage are applied away from the supervision of the court; the law grants the judicial officers wide jurisdiction in investigation; the criminal justice stakeholders, especially the security units officers, usually misuse their authority granted to them by laws, so it is prevailed during the pre-trial stage that they get signed (blank) detention warrants and house inspection warrants from the public prosecutors without any limits and free from any supervision by the court or the public prosecutors themselves; and the courts usually depend on the evidence gathered during the pre-trial stage, to give their final judgments (documentary evidence).

Of course, Palestine's poor economical situation, especially over the last five years, constitutes one of the major challenges to the criminal justice system. The Palestinian economy is now so battered, that it has lost its ability for independent growth and self sustenance because of its dependence on the Israeli policies of border closure and inter-city travel restrictions. Because of the limited internal resources, the criminal justice institutions are increasingly reliant on external assistance, especially in matters of training, expertise, equipping, computerization, and physical infrastructure. Any further funds from the international community for the system should be invested in the rehabilitation of the criminal justice institutions as a network system, instead of dealing with each institution separately.

4. The Independence of the Judiciary

The principles of the rule of law; fair trial; and the independence of the judiciary are dependent on each other; the absence of which negatively affects the means to achieve justice and protect the rights of the people. These principles which stem from international instruments and covenants on human and civil rights are not fully respected in the PA territories. For example, the UN principles on the independence of the judiciary, articles (1) and (4) state that: (1) "... It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary, etc." (4) "There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision." Article (8) of the universal declaration on human rights states that: "Everyone has a right to an effective remedy by the competent national tri-

bunals for acts violating fundamental rights granted to him by the constitution or by law". Although the PA is not an independent state¹⁶, it exercises "state like" functions in complying with the Human Rights standards. It always issues statements obligating it to the international instruments regarding Human Rights. For all these reasons the PA is considered accountable to comply with the above mentioned principles.

The principles concerning the rule of law and the independence of the judiciary are usually pinpointed among the articles of the constitutions because of their great importance. The Palestinian basic law (amended) of 2003 is not an exception. For example, it includes, in accordance with the UN basic principles on the independence of the judiciary¹⁷, the principle of the independence of the judiciary in chapter six which deals with the judicial authority. Article (97) states that: "The judicial authority shall be independent and shall be exercised by the courts at different types and levels. The law shall determine the way they are constituted and their jurisdiction, etc." Article (98) states that: "Judges shall be independent and shall not be subject to any authority other than the authority of the law while exercising their duties. No other authority may interfere in the judiciary or in judicial affairs".

These general principles mentioned in the basic law should be interpreted and clarified in the related laws and bylaws. Unfortunately, the judicial law of 2002 tackled the principle of independence of the judicial authority in a few and vague provisions without any details or clarifications. The only two provisions related to the independence of the judicial authority mentioned in the judiciary law are the following: "The judicial authority is independent. No other authority shall interfere with the judiciary or with the affairs of justice"¹⁸. And "The judges are independent and shall not be subject, in the exercise of their judicial function, to any authority other than the authority of the law"¹⁹.

Moreover, the policy of the Palestinian legislature made it impossible to draw the line differentiates between the competence of the different bodies

¹⁶ In public international law none- state entities are not supposed to ratify international instruments.

¹⁷ Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

¹⁸ Article (1) of the judicial law.

¹⁹ Article (2) of the judicial law.

competing to control the judicial authority, especially the ministry of justice and the high judiciary council. Although the role of the executive authority (mainly the ministry of justice) has decreased and the role of the high judiciary council has increased in controlling the judicial system, after the judiciary law of 2002, the independence of the judiciary has not yet been fulfilled. The role of the ministry of justice is now confined to the administrative issues related to the courts, but there are many provisions in the law which give competence to the minister of justice in some of the judiciary's affairs. Such provisions create clashes between the two bodies, each of which alleges its competence. The legislature is now advised to solve the problem of vagueness through an amendment to the law of judiciary, taking into consideration mapping the roles of both of the two entities and giving some details to the concept of "independence of the judicial system and judiciary".

The independence of the judiciary includes internal independence and external independence. The former means the independence of the judges from their colleagues of higher ranks, i.e., no judge is allowed to affect the judgement of his colleague, although the judges are responsible before the heads of their courts and the high judiciary council in non-judicial matters; The latter means the independence of the judges, and of the judicial system as a whole, from the intervention of the other authorities. The executive authority and the legislative authority are not allowed to intervene in the affairs of justice. Judges are irremovable except according to the conditions indicated in the law²⁰.

Nevertheless, appointment, transfer, secondment, delegation, promotion, questioning of judges and prosecutors, etc., should be regulated in details in the judicial laws. The law provides for the appointment of judges to be pursuant to a decision by the president of the PA, based upon a nomination from the high judiciary council. The appointed judge in a certain court is one of the following: initially appointed from those graduated from a faculty of law or a faculty of law and *Shari'a*; by promotion based upon seniority while taking competence into consideration; through transfer from public prosecution; by secondment from an Arab country²¹. (an Arab judge on secondment must satisfy all the criteria stipulated for the Palestinian judge,

²⁰ Article (27) of the judiciary law.

²¹ Article (18) of the judiciary law.

except for the requirement of Palestinian nationality)²². The following may be appointed judges in the magistrate courts, courts of first instance and appellate courts, or members of the public prosecution: Former judges and members of the public prosecution; lawyers; teaching staff of faculties of law and faculties of *Shari'a* and law. Meanwhile, the high judiciary council shall issue general guidelines regarding the length of experience required for appointment from each category mentioned, and any other experience deemed comparable to a judicial function.

The law provides for the conditions of appointment in some of the positions in the courts: To be appointed as a presiding judge of a court of appeal, the judge must have sat and worked for a period of not less than five years on a panel of a court of appeal²³; a judge appointed to the high court must have worked for at least three years as a judge in a court of appeal, or for the equivalent in public prosecution, or for at least ten years as a lawyer; to be appointed as president or vice-president of the high court, the judge must have sat and worked for not less than three years on chambers of the high court, or worked as a lawyer for not less than fifteen years²⁴. The reason for discussing the conditions of appointment in some of the judicial positions and ignoring or leaving the others to be tackled by secondary legislation issued by the high judiciary council is not clear. The Palestinian legislature is advised to determine the conditions of appointment in all the judicial positions according to reasonable and fair criteria.

Unfortunately, the conditions of appointment were not fully respected by the ex- president of the PA. The vast majority of appointments and promotions of judges and public prosecutors took place just a short time before the promulgation of the judiciary law with the aim of avoiding the conditions of the law. It was found that the majority of the appointments and promotions were not based on qualifications, expertise, or seniority²⁵. It should be frankly mentioned here that the situation did not improve after moving

²² The criteria are set forth in article (16) of the judiciary law. The criteria are: must hold a licence (BA degree) in law or *Shari'a* and law degree from a recognized university; must not have been condemned by a court or a disciplinary council on a matter involving breach of honour, even if having since been rehabilitated or covered by a general amnesty; must be of good conduct and repute as well as medically fit to assume the position; must terminate membership in any party or political organization upon appointment; must have a good command of the Arabic language.

²³ Article (19) of the judiciary law.

²⁴ Article (20) of the judiciary law.

²⁵ PICCR, annual report 2004.

the competence of appointing judges to the high judiciary council; no public and transparent competitions were arranged to fill in the vacant judicial position. In order to consolidate the independence of the judiciary and attain transparent criteria for the selection of judges, a neutral selection committee should be formed. This committee should comprise members from the three authorities (the parliament, the judicial authority, and the executive authority (the ministry of justice), in addition to members from the bar association.

The new leadership of the PA declared its interest in supporting the judicial authority. To attain this aim, a governmental committee (composed of government members and experts from outside the cabinet) was established in late 2004 to provide the government with consultations on the matters related to improving the work of the courts and enhancing their mission to achieve justice.

Among the suggestions of the committee are: attaining the principle of separation of powers within a cooperative atmosphere; improving the wages of judges; the establishment of the administrative judicial system; consolidating the independence of the judiciary; etc. Moreover, the committee prepared an amended draft judiciary law, to be submitted to the Parliament²⁶.

One of the main steps towards attaining the independence of the judicial authority was achieved recently through the allocation of a special budget for the judicial authority within the general budget of the PA. The judiciary law provides that the judicial authority shall have its own budget, which shall appear as an independent section in the annual public budget of the PA. The law adds that the high judiciary council shall prepare the draft budget and transmit it to the minister of justice in order for the latter to fulfill the legal requirements. On the other hand, the law grants the high judiciary council the right to supervise the implementation of the budget of the judicial authority²⁷. Unfortunately, the budget allocated to the judicial authority is not enough to modernize the courts although it made it possible to improve the salaries of the judges and the public prosecutors.

²⁶ The judiciary law (amended) draft and its memorandum are available on: <http://muqtafi.birzeit.edu>.

²⁷ Article (3) of the judicial law.

The recent courageous steps of PA to enhance the independence of the judicial authority are probably not adequate. The justice system still needs wider steps to attain its dependence. In fact, the system has little power over the security units although the law provides it the right to prosecute the security officer who commits any crime or abuse of power. Unfortunately, the criminal justice system did not bring any of these officers to justice. On the contrary, the security units still intervene in the affairs of justice. Some of these units play the role of the courts. When it suits its interests the security unit, it obliges the litigant(s) to appear before its officers. The most shocking part however, is the involvement of some the attorneys illegal behaviour. No doubt that the appearance of the lawyer in the security unit gives some “legitimacy” (in the eyes of the ordinary people) to the security unit “court”.

5. The Organization of the Criminal Justice Institutions

It is unlikely that the criminal justice institutions in Palestine (both the inherited ones from the past arenas like the courts and the public prosecution, or the newly established ones like the civil police and the corrections) fulfills the needs of a modern society: the judiciary remains hampered by a poor physical infrastructure, few means to convey its decisions to the legal community, and a lack of institutionalized training; the prosecutorial system, like the judiciary, remains understaffed, lacks some of the most basic materials and facilities to carry out its functions, including the ability to apply modern criminal law and a developed and reliable forensic science capacity; penal institutions also suffer from a poor physical infrastructure, lack basic materials and, as is the case for the police, lack a comprehensive standardized training which incorporates international standards²⁸.

The following table illustrates some facts regarding the numbers of the stakeholders in the different institutions of the criminal justice system in Palestine in comparison with selected countries. These figures show the imbalance in the number of staff in each of the four main institutions. It shows the relatively high number of police staff, in contrast the relatively low percentage of the prosecutions, judges and court staff.

²⁸ Office of the United Nations Special Coordinator in the Occupied Territories, *Ibid*.

Table 1²⁹: Staffing Ratios for Criminal Justice Institutions, Selected Countries***

	Police	Prosecution	Judges and Court Staff	Prison Staff
Bosnia	714	NA	22	75
Egypt	38	28	2	2
Palestine	370	2	2	NA
USA	244	10	10	141

* Number of personnel per 100,000 populations.

** The comparison states have been chosen according to different criteria: Bosnia because it is a transitional state like Palestine; Egypt because of the similarities of its conditions with Palestine; and the USA because it could stand as a reference country.

In the following, I will shed some light on the structure and the functions of each of the four main criminal justice institutions in Palestine, namely: the judicial police; the public prosecution; the judicial system; and the correctional institutions.

5. 1. The Judicial Officers³⁰

There were many and different security forces operating in the Palestinian territories under the auspices of the president. The functions of those units were mainly duplicated and poorly coordinated³¹. With little accountability, they ignored the judicial system and the laws governing their actions. Most of them had two commanders, equal in rank: one in the West Bank and the other in the Gaza Strip. Competition, suspicion, and tense relations existed between the security chiefs to the extent that in several cases armed clashes occurred between members of competing services. Recently, those security forces have decreased and unified, at least theoretically, to three units under the auspices of the ministry of interior. The new

²⁹ The RAND Palestinian State Study Team, *Ibid*, p. 48.

³⁰ The laws which regulate the formation, tasks, duties and responsibilities of the judicial officers, inter alia, are: the basic law; the judiciary law; the criminal procedures law; the police law; the revolutionary criminal procedures law; the revolutionary criminal law; and others which tackle one or more of its different tasks.

³¹ Luft, Gal, "Palestinian Military Performance and the 2000 Intifada," Middle East Review of International Affairs, Vol. 4, No. 4, December 2000, p. 1-8.

unified units are: the national security force; the internal security force (which comprises the civil police, the preventive security unit, and the civil defence unit); and the intelligence.

Unfortunately, the functions of these security units, regarding the abuse of power and none complying with the human rights standards during investigation and detention, have been criticized widely on the internal and the international scale. Despite condemning such abuses by the high ranks officials in executive authority, perpetrators enjoy impunity. The Human Rights Watch organization considers that absence of clear instructions by the security force commanders, and the lack of proper training for all security forces personnel have impeded the development of a culture of respect for the human dignity of the detainees³².

The civil police are the main law enforcement apparatus in the Palestinian territories. They also handle ordinary police functions such as directing traffic and keeping public order. A police service is generally defined as: "an organized civil force for maintaining order, preventing and detecting crime, and enforcing the law"³³. The officers who are invested with judicial powers include the following: the police commissioner and his deputies and the police chiefs of governorates and general districts; officers and non-commissioned officers of the police, each within his bailiwick; captains of vessels and aircraft; functionaries who are statutorily invested with judicial powers³⁴. The judicial officers will be under the control of the Public Prosecution, each within the circuit of his jurisdiction³⁵.

The judicial branch of the police (*Ma'mori al Dabt al Qadai'*) are the main judicial officers among the aforementioned judicial officers. The judicial police are specialized in following up crimes and their perpetrators. Meanwhile, the executive branch of the police is specialized in keeping public order and protecting the political system in the country and preventing crimes.

The Palestinian system, as in most of the legal systems in the world, does not distinguish between the two branches of the police. The distinction is

³² Human Rights Watch report, 2001.

³³ Webster's Encyclopedic Unabridged Dictionary of the English language (New York: Gramercy Books, 1989), s.v. "police," p. 1113.

³⁴ Article (21) of the criminal procedures law.

³⁵ Article (19) of the criminal procedures law.

only attained according to the tasks in the police station. This means that there is no special department in the Palestinian police called the judicial department, but some of the police members hold the title (*ma'mori al Dabt al Qada'i*) when they are assigned to act so by the head of the police station. The Palestinian civil police, including the judicial police, are controlled by the head of the police force under the auspices of the ministry of interior. On the other hand, the judicial police come under the auspices of the public prosecution when they handle judicial tasks, but the public prosecution controls only the functional aspect of the judicial police, whereas the administrative aspects continue to be under the control of the ministry of interior. Hence, if a judicial policeman commits a disciplinary wrongdoing or negligence, the attorney general is only entitled to recommend disciplinary measures to their agencies³⁶.

It is well-known in the judicial systems of democratic states that the role of the judicial police is to assist the courts to enforce law. Furthermore, the judicial police do not give orders without assignment from the judge or the public prosecutor, and the citizens are not obliged to obey the orders of the police without being sure that they have a legal assignment from the competent body. The situation in Palestine in this regard is, to some extent, different. One of the major deficits in the criminal process is the ignorance of the police (and the other executive bodies) to enforce the judgements of the courts. Some police officers do not obey the orders of the judges and the public prosecutors, although this abstention constitutes a crime punishable with imprisonment and dismissal from position³⁷.

To sum up, the judicial officers are supposed to apply the following tasks in accordance with the provisions of the law:

- Gather information and evidence about the crimes and their perpetrators³⁸.

³⁶ Article (20) of the criminal procedures law.

³⁷ Article (106) of the basic law states that: "Judicial rulings shall be implemented. Refraining from or obstructing the implementation of a judicial ruling in any manner whatsoever shall be considered a crime carrying a penalty of imprisonment and dismissal from position if the accused individual is a public official or assigned to public service. The aggrieved party may file a case directly to the competent court and the National Authority shall guarantee a fair remedy".

³⁸ Article (19/2) of the criminal procedures law.

- Conduct examinations and searches and obtain all clarifications as are necessary to facilitate the investigation, as well as seek the assistance of experts and witnesses without administering the oath³⁹.
- Accept the reports and complaints addressed to them in connection with the crimes, and present them without delay to the Public Prosecution⁴⁰.
- Take all necessary measures to preserve the evidence of the crime⁴¹.
- Transcribe all the procedures taken in the official minutes signed by them and by the party concerned⁴².
- In a case of flagrant felony or misdemeanour, the judicial officer, who is advised thereof, has to proceed immediately to the scene of the crime in order to inspect the material evidence and secure it. He shall establish the condition of the premises, of persons and of everything which may serve to make the truth manifest, and hear the testimony of whoever is present at the scene or of any person capable of furnishing information on the crime and its perpetrators. He is held to notify the public prosecution immediately, and the competent member of the public prosecution shall, promptly upon being notified of a flagrant felony, proceed to the scene⁴³.
- If there is sufficient evidence to charge a person with a felony or with a misdemeanour of which the punishment is the imprisonment for a term of more than six months, the judicial officer may ask the public prosecution to issue an arrest warrant against such a person⁴⁴.
- The judicial officer is held to hear the statement of the person arrested immediately and, if that person fails to come forward with a justification for his release, to send him within twenty-four hours to the competent deputy prosecutor⁴⁵.

³⁹ Article (22/2) of the criminal procedures law.

⁴⁰ Article (22/1) of the criminal procedures law.

⁴¹ Article (22/3) of the criminal procedures law.

⁴² Article (22/4) of the criminal procedures law.

⁴³ Article (27) of the criminal procedures law.

⁴⁴ Article (31/2) of the criminal procedures law.

⁴⁵ Article (34) of the criminal procedures law.

- Entering and searching homes is an act of investigation which may not be conducted except pursuant to a search warrant from the public prosecution or in its presence, either on the basis of an accusation charging a person living in the house required to be searched of committing or participating in the commission of a felony or misdemeanour, or on the basis of strong evidence that he is in possession of items related to the crime. In all cases, the search warrant must be reasoned, and made out in the name of one or more judicial officers⁴⁶.

5.2. The Public Prosecution

Before the establishment of the PA, there were two administrations for the public prosecution in the two areas, the West Bank and the Gaza Strip. The presidential decree no. (287) of the year 1995, unified the two departments, granting the attorney general the powers of the public prosecution in the two areas. Under that decree the public prosecutor in the West Bank and the prosecuting attorney in the Gaza Strip was equivalent, so each could exercise the same powers in his respective location. The unified name granted for both positions was the prosecuting attorney⁴⁷. After the promulgation of the basic law and the new judicial laws in the years 2001 and 2002, the public prosecution in the two areas became totally unified in terms of formation, administration and jurisdiction.

The basic law provides that the law shall specify the manner how the public prosecution service and its jurisdiction is formed, and shall determine the conditions for appointing, transferring and dismissing members of the public prosecution service and the rules of their accountability⁴⁸. Furthermore, the basic law specifies how the attorney general shall be appointed, his jurisdiction, functions and duties⁴⁹. It states that, “the attorney general shall be appointed pursuant to a decision issued by the president of the PA, based upon a nomination submitted by the high judiciary council.” A paragraph from this article which stipulates the improvement of the legislative council on the appointment of the attorney general was cancelled

⁴⁶ Article (39) of the criminal procedures law.

⁴⁷ The name which was used in the Gaza Strip has been adopted for both areas. In the West Bank, the name was public prosecutor.

⁴⁸ Article (108) of the basic law (amended) of the year 2003.

⁴⁹ Article (107) of the basic law (amended) of the year 2003.

after the basic law was promulgated. The president of the PA cancelled the paragraph. Unfortunately, *Diwan Al- Fatwa wal Tachrie*⁵⁰, in the ministry of justice, allowed publication of the cancelled, illegal basic law in the official gazette.

The public prosecution consists of the following positions: the attorney general; one or more assistants to the attorney general; heads of prosecutions; prosecuting attorneys (public prosecutors); prosecutor assistants (*Mu'wano Al- Neyabah*)⁵¹. However, the judiciary law does not specify the conditions of appointment, transfer, secondment, delegation, promotion, or questioning of the members of the public prosecution, as the basic law stipulates. All the law has provided, in this regard, is a referral to the measures prescribed for the judges, without taking into consideration the differences between the position of the judge and that of the public prosecutor.

The law provides that, the public prosecution has the sole right to file and initiate criminal cases unless the law provides otherwise⁵². The attorney general, or any member of the public prosecution, shall perform the functions of public prosecution before the courts. Prosecutor assistants (*Mo'aweno al Niyabah*) shall perform the work assigned to them, under the supervision and responsibility of those members of the public prosecution office assigned to train them⁵³.

The law prescribes how to handle the event in case the position of the attorney general or any of the public prosecution members becomes vacant, or an impediment prevents him from exercising his responsibilities. According to the attorney general, the position shall be filled by the assistant attorney general with all of the powers that it entails for a period not exceeding three months. In case of absence or incapacity of a member of the public prosecution, the attorney general shall appoint a replacement.

Concerning the public prosecution before representation the different levels of courts, no member below the rank of head of public prosecution shall perform public prosecution functions before the high court.

In general, the public prosecution has two main tasks:

⁵⁰ The department which is responsible for publishing the Official Gazette.

⁵¹ Article (60) of the judiciary law.

⁵² Article (67) of the judiciary law.

⁵³ Article (68) of the judiciary law.

I. Investigating the crimes (The elementary investigations)⁵⁴: The public prosecution is exclusively competent to investigate all the crimes and to take action in respect thereof. But, in practice, the attorney general or the competent public prosecutor can mandate some of the investigation procedures to the judicial officer in certain cases and in determined conditions. The conditions are: the judicial officer would not be mandated to perform interrogation of the accused in a felony; the mandate must not be general; and within the scope of his mandate, the mandatory exercises all the powers conferred on the public prosecutor⁵⁵.

It should be mentioned here that, the Palestinian legislature did not create the position of the investigation judge. This position is known in many judicial systems in the world. The Palestinian legislature, in this respect, contradicted the policy of the Egyptian legislature in the Egyptian criminal procedures law, although this law is the historical source of the Palestinian criminal procedures law. The distinction of the tasks of investigation from that of accusation is almost certainly a guarantee for due process.

II. Accusation: After the investigations are finished, if the public prosecutor finds that the evidences are satisfactory for trial, he accuses the suspect. But, the accusation bill is not obligatory in all crimes. It is a must in felonies, whereas in contraventions and misdemeanours the public prosecutor transfers the file directly to the specialized court without the accusation bill.

If, on the basis of the evidence-gathering minutes, the public prosecutor believes that a case, involving a contravention or a misdemeanour is ready for judicial review, he orders the accused to appear immediately before the competent court⁵⁶. The Palestinian legislature does not explain what the public prosecutor should do if the file organized by the judicial officer is not complete. In such a situation, should the public prosecutor complete the investigations or should he ask the judicial officer to do so?

⁵⁴ They are called the elementary investigations to distinguish them from the preparatory investigations which are applied by the judicial officers in certain circumstances.

⁵⁵ Article (55) of the criminal procedures law.

⁵⁶ Article (53) of the criminal procedures law.

The public prosecution has, *inter alia*, the following secondary tasks:

- Supervising the judicial officers each within the circuit of his jurisdiction⁵⁷.
- Receiving information from people about suspects who commit crimes. The law asks any person who learns of the occurrence of a crime to report to the public prosecution or to the judicial officer. Reporting some crimes is conditional on a complaint, a requisition, or a warrant⁵⁸.
- Issuance of memorandums for inspection in the house of the suspect. The house here is defined as, "the house prepared for living and its surroundings which is connected within one wall, this includes the garden, the garage, the office, etc." The search warrant must be reasoned and made out in the name of one or more judicial officers⁵⁹.
- Seizure of letters, printed materials, parcels, and telegrams; supervision and taping private telephone calls of the suspect, under the following conditions: a- The person who is entitled to do so is the attorney general or one of his assistants. b- The approval of the magistrate court. c- This procedure is allowed only in crimes which are felonies and the misdemeanours, the punishment of which imprisonment is not less than one year. d- The necessity of such supervision and taping to uncover the perpetrator. e- The permission of the magistrate judge must have full reasoning. f- The validity period of this procedure against the suspect must not exceed (15) days which may be extended for the same period once only⁶⁰.
- Disposition of the case: When the judicial officers have gathered the information related to the misdemeanours and felonies, they have to submit the file to the public prosecution. The public prosecutor weighs the evidence and decides whether it is satisfactory to file a case before the court or not. If he decides to file the case, he asks the suspect to appear before the competent court⁶¹.

⁵⁷ Article (19/1) of the criminal procedures law.

⁵⁸ Article (24) of the criminal procedures law.

⁵⁹ Article (39) of the criminal procedures law.

⁶⁰ Article (51) of the criminal procedures law.

⁶¹ Article (53) of the criminal procedures law.

- Filing a case against a member of the judicial officers or the public servants if he commits a misdemeanour or a felony while carrying out his formal tasks. The member of the public prosecution who is entitled to do so is the attorney general or one of his assistants only⁶².
- Mandating the judicial officers to take part in the investigation process, except for the interrogation of the accused in a felony. The mandate must not be general, and within the scope of his mandate, the mandatory exercises all the powers conferred on the deputy prosecutor⁶³.
- Assigning the task of performing some investigative procedures to a public prosecutor in another governorate. This happens when it is necessary to gather evidence for a certain case outside his jurisdiction⁶⁴.
- When the suspect rejects the jurisdiction of the court, or when the case is annulled the public prosecutor has to pass the case to the attorney general within 24 hours to decide upon the matter. The decision of the attorney general can be appealed before the court of first instance.
- Issuing writs of summons and attachment against the suspect. First, the public prosecutor issues a memorandum of invitation for the suspect to appear before the court on a certain date and time. If the suspect does not obey, or if it is feared that he may flee, a coercive memorandum is issued. In all cases, the judicial officers perform the memorandums⁶⁵.
- Detention of the suspect. The public prosecutor has the right to detain the suspect for a maximum of (24) hours. After that, he must send the suspect to the competent court. If the investigation entails the detention of the arrestee for more than twenty-four hours, the public prosecutor may request the magistrate judge to do so. The magistrate judge can extend the detention for a period not exceeding fifteen days⁶⁶. Under certain conditions, the magistrate judge can re-

⁶² Article (54) of the criminal procedures law.

⁶³ Article (55) of the criminal procedures law.

⁶⁴ Article (57) of the criminal procedures law.

⁶⁵ Articles (106 & 111) of the criminal procedures law.

⁶⁶ Article (119) of the criminal procedures law.

new the detention of the suspect, the sum of which must not exceed (45) days. On the other hand, if there are satisfactory reasons for an extension of the detention of the suspect, the attorney general has to request that from the first instance court. The following conditions should be fulfilled: a- The whole period of detention may not exceed six months. b- The time of detention may not exceed the time of imprisonment which the law provides as a punishment for the crime. c- After the elapse of the six months the public prosecutor has one of two choices, to ask the suspect to appear before the specialized court or to release him⁶⁷.

- Supervising the jails and detention centres within their jurisdiction⁶⁸. The public prosecutor is not obliged to visit the prisons and the detention centres, but it is up to him to do so when ever he deems it appropriate. It should be obligatory for the public prosecutors to supervise the application of the related legislation by the prison officials.

Even though the public prosecution has a wide jurisdiction; it still suffers from many shortcomings and deficits. Among others: the attorney general rarely intervenes or practices his authority over the security forces, especially in relation to "political" and "security" prisoners; the security forces do not often inform the attorney general about detentions, nor apply to him for extensions of detention although they are required to do so by law⁶⁹; the office of the attorney general employs less than 90 prosecutors, who handle over hundreds of thousands of criminal cases each year. The following table provides the ratio of the number of the public prosecution members to the number of inhabitants in each of the Palestinian governorates.

⁶⁷ Article (120) of the criminal procedures law.

⁶⁸ Article (126) of the criminal procedures law.

⁶⁹ Douglas Ierley, Rule of Law Development in the West Bank and Gaza Strip, May 1999, p.25.

Table 2: Staffing Ratios of Prosecution by Governorate

District	Population ⁷⁰	Prosecution ⁷¹	Ratio (for 100,000 people)
Jenin & Tubas	300,862	4	1.33
Tulkarm	167,873	3	1.79
Qalqilya & Salfit	156,335	2	1.28
Nablus	326,873	3	0.92
Ramallah & Al-Bireh	280,508	4 + (2) ⁷²	1.43
Jerusalem	398,333	-	-
Jericho	42,268	3	7.10
Bethlehem	174,654	4	2.30
Hebron	524,510	8	1.53
West Bank	2,372,216	33	1.39
Gaza & North Gaza	753,836	42 + (3) ⁷³	5.57
Deir Al – Balah	201,112	2	0.99
Khanyunis	269,601	6	2.23
Rafah	165,240	2	1.21
Gaza Strip	1,389,789	55	3.96
Palestinian Territories	3,762,005	88	2.34

⁷⁰ The source of these statistics is the Palestinian Central Bureau of Statistics: Projected Mid- Year Population in the Palestinian Territories by governorates (2001- 2007). Web site: www.pcbs.gov.ps

⁷¹ The source of these statistics is the Database prepared by the Birzeit University, Institute of Law. <http://muqtafi.birzeit.edu>

⁷² There are two attorney general assistants situated in Ramallah. They are counted with the total number of prosecution in the West Bank and in the Palestinian territories as well, but they are not counted within the Ramallah prosecution because, according to law, attorney general assistants represent the public prosecution before the high court for all cases of the West Bank governorates.

⁷³ The attorney general and two of his assistants situated in the Gaza. They are not counted with Gaza & North Gaza prosecution for the same reason mentioned in footnote (71).

Through this table, we find the following results:

- The number of public prosecution members in Palestine is very low. There are approximately 2.34 public prosecution members for each 100, 000. This ratio is much lower than the ratio in most of the countries in the world. For example, the ratios in Egypt & USA are 28 & 10 respectively⁷⁴.
- Jerusalem district, which is the highest populated area in the West Bank, has no prosecution at all due to the occupation.
- There is poor distribution of the public prosecution members on two levels: first, on the Gaza Strip/ West Bank level: the number of public prosecution members on the Gaza Strip is approximately three times its counterpart in the West Bank; second, within each of the two areas: in the West Bank, Jericho has the highest ratio with approximately 7.2 public prosecution members for each 100, 000, whereas Nablus has the lowest ratio with approximately 0.92; in the Gaza Strip, we can find a similar phenomenon, for example, Gaza City & North Gaza has the highest ratio with approximately 5.57 public prosecution members for each 100, 000 people, whereas Deir Al Balah has the lowest ratio of approximately 0.99.

5.3. The Regular Criminal Courts

The promulgation of the basic law and the judicial laws in 2001 and 2002 contributed in restructuring the regular courts, consolidating their independence, and unifying the judicial systems in the two areas of the West Bank and Gaza Strip⁷⁵. The new package of judicial laws unified the types and levels of courts in the two areas. The unification includes the structure, the jurisdiction and the functions. Moreover, the same names are now used for the equivalent courts⁷⁶.

The regular courts take cognizance of all disputes and crimes except those that are exempted by a special legislative text; and exercise judicial

⁷⁴ See table 1 of this study.

⁷⁵ Despite the unification of the judicial laws in both the West Bank and the Gaza Strip, there are still many separate laws and secondary legislation prevalent in the two areas which negatively affects the goal of unifying the legal system in the two areas.

⁷⁶ The effect of the judicial laws is confined to the regular courts and does not include the military and state security courts which are still governed by the revolutionary laws of PLO.

authority over all legal persons. The rules of the jurisdiction of courts are determined by law, and the courts exercise their jurisdiction in accordance with the law⁷⁷.

The judicial system now faces many obstacles: It is still in great need of physical structures (building of new courts, and rehabilitating of the old ones); it has no central training institute; it has insufficient library resources, and it has no ongoing consistent capacity to compile and publish important court judgments; equally significant is the underdeveloped court administration system; technical staff, including court clerks and researchers, process servers and court managers are needed; and all the judicial system staff are in need of expert training; furthermore, the backlog in the criminal courts exceeds the international standards (the average period the criminal case needs to precede within the judicial system ranges from three to five years)⁷⁸. Not surprising that the lack of judges in the different levels of the Palestinian courts constitutes one of the causes of the backlog, especially in the magistrate and the first instance courts. The following table provides some statistics.

Table 3: Staffing Ratios of judges in substantive courts (Magistrate & First Instance) by Governorate

District	Population	Judges (Magistrate & 1st Instance)	Ratio
Jenin & Tubas	300,862	6	1.99
Tulkarm	167,873	2	1.19
Qalqilya & Salfit	156,335	2	1.28
Nablus	326,873	8	2.45
Ramallah & Al-Bireh	280,508	6	2.14
Jerusalem	398,333	-	-
Jericho	42,268	5	11.83
Bethlehem	174,654	6	3.44
Hebron	524,510	5	0.95
West Bank	2,372,216	40 + (14)⁷⁹	2.28

⁷⁷ Article (2) of the composition of regular courts and article (14) of the judiciary law.

⁷⁸ Al- Haq (West Bank affiliate of the International Commission of Jurisits- Geneva) 2002.

⁷⁹ In the West Bank, there are 8 appellate judges and 6 high court judges.

Gaza & North Gazaz	753,836	23	3.05
Deir Al – Balah	201,112	4	1.99
Khanyunis	269,601	10	3.71
Rafah	165,240	3	1.82
Gaza Strip	1,389,789	40 + (16) ⁸⁰	4.03
Palestinian Territories	3,762,005	80 + (30) ⁸¹	2.92

Through this table, we can conclude the following results:

- The ratio of judges to the population in Palestine is very low. It is approximately 2.92 for each 100, 000. This ratio is much lower than the ratio globally in the world. For example, the ratios in Bosnia & USA are 22 & 10 respectively⁸².
- Jerusalem district, which is the highest populated area in the West Bank, has no courts, although presidential decrees were issued calling for the establishment of two courts in Jerusalem suburb. These decrees were not applied because of the occupation.
- There is poor distribution of the judges on two levels: first, on the Gaza Strip/ West Bank level: the number of judges in the Gaza Strip is approximately double its counterpart in the West Bank; second, within each of the two areas level: in the West Bank, Jericho has the highest ratio with approximately 11.83 judges for each 100, 000, whereas Hebron has the lowest ratio with approximately 0.95; in the Gaza Strip, is found in a similar phenomenon, for example, Khanyunis has the highest ratio with approximately 3.71 judges for each 100, 000, whereas Rafah has the lowest ratio of approximately 1.82.
- The number of judges in the appellate courts (one in the West Bank and one in the Gaza Strip), and the two rooms of the high court in

⁸⁰ In the Gaza Strip, there are 2 appellate judges and 14 high court judges.

⁸¹ The 30 judges are the judges of the two appellate courts in the West Bank and Gaza Strip; and the two rooms of the high court in Ramallah and Gaza City

⁸² See table 1 of this study, p. 16.

Ramallah and Gaza City is not consistent. The Gaza high court room has 14 judges, whereas its counterpart in Ramallah has only 6 judges (the inconsistency would be clearer when we take into consideration the fact that the West Bank is about 15 times bigger than the Gaza Strip geographically, and approximately twice its size in population). On the other hand, the number of judges in the appellate court of the West Bank is 8 whereas the number of judges of the appellate court of Gaza is only 2 (two judges do not constitute one committee, so a judge from the first instance court is seconded to the court of appeal).

The different types of regular courts in Palestine are:

1. The high court, which consists of:
 - a) The court of cassation; and
 - b) The high court of justice.
2. Courts of appeal.
3. Courts of first instance.
4. Magistrate courts (conciliation courts)⁸³.

5.3.1 *The Magistrate Courts*

Within the circuit of each court of first instance, there is one or more magistrate (conciliation) court established. The minister of justice has to issue a decision specifying their respective seats and jurisdictional circuits⁸⁴, whereas the high judiciary council regulates the activities of the magistrate courts and assigns them specializations, if needed⁸⁵.

The magistrate court is composed of a single judge who exercises administrative control over it⁸⁶. In the event of multiplicity of judges, this task is performed by the most senior one among them⁸⁷. Conciliation courts may convene in any place within their jurisdictional circuit, whenever necessa-

⁸³ Article (6) of the judiciary law; see also article (7) of the court organization law.

⁸⁴ Article (13) of the judiciary law, and article (8) of the court organization law.

⁸⁵ Articles (8-11) of the judiciary law, and article (10) of the court organization law.

⁸⁶ Article (299) of the criminal procedural law.

⁸⁷ Article (9) of the court organization law.

ry, pursuant to a decision issued by the president of the court of first instance.

The magistrate courts are responsible for all contraventions and misdemeanours which come under their jurisdiction, unless otherwise prescribed by law⁸⁸. The magistrate court exercises jurisdiction over all contraventions and misdemeanours, in the absence of a contrary legislative provision⁸⁹.

The magistrate courts in Palestine have gained greater importance in the last three years, because the jurisdiction value of these courts in civil cases increased from (250) Jordanian *Dinars* (JD) ⁹⁰ to (20,000) (JD)⁹¹. This constituted a heavy load on the magistrate courts which caused the legislature to intervene again, in January 2005, to reduce the limit to (10,000) JD⁹². Of course, any change in the civil section of the magistrate courts affects, either negatively or positively, the criminal section because there is no separation between the two sections; the same magistrate judge trials both the civil and the criminal cases.

5.3.2. *The First Instance Courts*⁹³

The seats of courts of first instance are situated in the centres of the governorates. Each court of first instance comprises a president and a sufficient number of judges. The law does not determine any percentage or ratio of the number of judges according to the number of inhabitants within the local jurisdiction of the court.

The courts of first instance may convene (in criminal matters) in any place outside their local jurisdiction whenever necessary, pursuant to a decision issued by the president of the high court⁹⁴.

The sessions of the court of first instance are comprised of a panel of three judges and presided over by the most senior one among them. They

⁸⁸ Article (167) of the criminal procedural law.

⁸⁹ Article (300) of the criminal procedural law.

⁹⁰ Jordanian Dinar is one of three formal currency units adopted in Palestine since the establishment of the PA.

⁹¹ Article (39) of the law on civil and commercial matters.

⁹² Article (1) of the law on civil and commercial matters (amended) of 2005.

⁹³ The new judicial laws adopted the term "First Instance Courts", which was used in the West Bank judicial system, other than the term "Central Courts" which was used in the Gaza Strip.

⁹⁴ Article (12) of the judiciary law, and articles (12 & 13) of the court organization law.

may be convened by a single judge in the cases defined by law⁹⁵. The court organisation law (amended) of 2005 stipulates a panel of three judges only in: felonies and misdemeanours concurrent therewith; in civil cases the value of which exceeds 100,000 JD; and in cases seen by the court when sitting in its appellate capacity⁹⁶.

Courts of first instance review crimes that fall within their jurisdiction, as well as those transferred to them by a bill of indictment. They are responsible for all felonies as well as all misdemeanours concurrent therewith and refer to them by means of a charging instrument⁹⁷. If one act constitutes several crimes, or if several crimes are committed with one object and are so connected as to be indivisible, and one of those crimes comes under the jurisdiction of the court of first instance, that court shall be competent to review them all.

5.3.3. *The Courts of Appeal*⁹⁸

The law provides for the establishment of three courts of appeal in Palestine. They shall be situated in Jerusalem, Gaza City, and Ramallah. Actually, only two of the three are working. The appellate court of Jerusalem has not yet started work, because of the Israeli occupation. However, the president of the court has been already appointed⁹⁹. Each court of appeal consists of a president and a sufficient number of judges¹⁰⁰.

The sessions of the court of appeal are comprised of three judges and presided over by the most senior one among them. The same judges hear both criminal and civil actions¹⁰¹. The high judiciary council organizes the work of the courts of appeal and divides them into specialized circuits¹⁰².

⁹⁵ Article (14) of the court organization law.

⁹⁶ Article (1) of the court organisation law (amended) of 2005.

⁹⁷ Article (168) of the criminal procedural law.

⁹⁸ The term “court of appeal” or “appellate court” adopted by the new judicial laws. It is different from the old names used in both the West Bank and Gaza Strip: In the Gaza Strip the term “the high court of appeal”; in West Bank the term “the high court, acting in its capacity as a court of appeal” were used according to the annulled laws on court organisation in the both areas.

⁹⁹ He is acting as a member of the high court.

¹⁰⁰ Article (11) of the judiciary law; articles (18 & 19) of the court organization law.

¹⁰¹ Article (20) of the court organization law.

¹⁰² Article (21) of the court organization law.

The courts of appeal are competent to review appeals filed to them in respect of judgments and decisions rendered by the courts of first instance in their capacity as courts of initial jurisdiction¹⁰³. The parties may appeal to judgments rendered or deemed to have been rendered in their presence in penal actions as follows:

- a- If rendered by the conciliation courts, they are appealed before the courts of first instance in their appellate capacity.
- b- If rendered by the courts of first instance in their capacity as courts of original jurisdiction, they are appealed before the courts of appeal¹⁰⁴.

5.3.4. *The High Court*

The high court comprises the court of cassation and the high court of justice¹⁰⁵. It is composed of a president, one or more vice-presidents and an adequate number of judges¹⁰⁶. The number of judges of the high court is not determined in the law, but they should be proportionate to the number of judges in Palestine. The high judiciary council organizes the work of the high court and divides it into specialized circuits¹⁰⁷.

The permanent seat of the high court shall be the capital, Jerusalem, and it shall convene temporarily in Gaza city and in Ramallah as necessity dictates¹⁰⁸. Because there is no freedom of passage between the West Bank and the Gaza Strip, two rooms of the high court have been established in the two areas. The two rooms work separately as if they constitute two courts.

The high court convenes with the attendance of at least two thirds of its members, on the basis of a request by its president or one of its circuits in the following cases:

¹⁰³ Article (22) of the court organization law.

¹⁰⁴ Article (323) of the criminal procedural law.

¹⁰⁵ Article (23) of the court organization law.

¹⁰⁶ Article (8) of the judiciary law; article (24) of the court organization law.

¹⁰⁷ Article (28) of the court organization law.

¹⁰⁸ Article (24) of the court organization law.

1. To reverse a legal principle previously established by the court or to remove a contradiction between previous principles.
2. If the case brought before it revolves around a new or complex legal point or involves a point of particular importance¹⁰⁹.

The two components of the high court are:

5.3.4.1 The Court of Cassation

The court of cassation convenes under the presidency of the president of the high court and with four judges. In the absence of the president, the court is presided by the most senior vice-president, then by the most senior judge in the panel¹¹⁰.

The court of cassation exercises jurisdiction over:

1. Challenges which have been raised from the courts of appeal in felonies, civil cases, and personal status matters for non-Muslims.
2. Challenges which have been raised from the courts of first instance in their appellate capacity.
3. Matters related to changing the terms of reference of a case.
4. Any claims raised by virtue of any other law¹¹¹.

5.3.4.2. The High Court of Justice

The administrative court system has not yet been established. The high court of justice is the only one- level administrative court in Palestine to date. One should mention here, the systematical ignorance and for refusal of the security units to the judgments and orders of the high court of justice, especially regarding the release of detainees. A report issued by the nongovernmental Palestinian Human Rights Monitoring Group (PHRMG) in June 2000, found that out of eighty-three high court orders for the release of detainees since January 1997, only three had been implemented. In October

¹⁰⁹ Article (25) of the court organization law.

¹¹⁰ Article (29) of the court organization law.

¹¹¹ Article (30) of the court organization law; see also articles (346- 347) of the criminal procedures law.

2000, the PICCR listed thirty-nine "political" prisoners who were still in detention despite the fact that the high court had given orders to release them¹¹².

5.4. The Irregular Criminal Courts

I will be discussing, hereby, the juvenile courts, the state security courts, and the military courts.

5.4.1. The Juvenile Courts

There are no separate courts for juveniles in Palestine. The juveniles stand trial in the same courts as adults, and their cases are processed through procedures that are not entirely different from those applied to adults. The juvenile justice differs from adult justice only in some procedures, the extent of punishment and disciplinary measures, and the locations where punishments or disciplinary measures are carried out (for juveniles, imprisonment is carried out in "juvenile welfare and rehabilitation centers").

Numerous articles in the two juvenile laws, the law of the criminal juveniles no. 2 of the year 1937 and the law of welfare of juveniles no. 16 of the year 1954 operative in the Gaza Strip and West Bank respectively, contravene international standards of juvenile justice. One of the most obvious shortcomings is the lack of comprehensive understanding and specialization in juvenile justice among those who apply the law¹¹³.

5.4.2. The High State Security Court

The high state security court is a special semi-military tribunal. It was established in 1995, under the presidential decree no. (49) of 1995 with strong encouragement from the United States and Israel¹¹⁴. The decree provided that the court shall be composed of a president and two original members, in addition to two other secondary members. The president of the

¹¹² PICCR annual report, 2000.

¹¹³ Abdelbaqi, Mustafa, *Penal Justice for Juveniles: Reality and Aspirations*, PICCR, 2004.

¹¹⁴ Human Rights Watch report, 2001.

court and all original and secondary members are high rank military officers¹¹⁵. Another secondary member was added to the court in 1995¹¹⁶.

The high state security court is neither independent nor impartial. The PA president convenes it *ad hoc* for each individual case; and he appoints and dismisses its judges at will. The PA president also ratifies the judgments of the court. Assumedly the high state security court marginalized the regular courts because the jurisdiction over an increasing number of crimes has been transferred to it, many of which have little to do with national security. In general, the jurisdiction of the court ranges from the most serious cases, usually those that carry a maximum penalty of death or life imprisonment to normal criminal cases, including rape, murder, bank robbery, tax evasion, public health and the pricing, weighing, and quality of foodstuffs (such as selling food that has expired), and violations of regulations on food supplies, price monitoring, and control. The PA president used to transfer some cases to the high state security court to meet public demands for retribution following serious crimes, including human rights abuses.

The procedures of the high state security court do not comply with international fair trial standards. Most trials convened during night and lasted only a few hours. In violation of international standards and usual procedures in Palestinian laws, the judgments of the court are not appealed to higher courts. Except in rare cases, the accused are defended by court-appointed counsel who are not practicing lawyers, but serving members of the security forces. They usually say little on behalf of their clients, fail to present a proper defence and sometimes use language showing they consider their clients to be guilty¹¹⁷.

A distinct public prosecution for the high state security court was established and composed of the three high rank military officers¹¹⁸. The competence of the public prosecution of the court is investigating the crimes and issuing accusation bills on the crimes which the court is specialized in, and what the PA president assigns it to do¹¹⁹. In 1999, a new attorney general for the state security court was appointed pursuant to a

¹¹⁵ Article (1) of the presidential decree no. (49) of 1995.

¹¹⁶ Article (1) of the presidential decree no. (51) of 1995.

¹¹⁷ Human Rights Watch report, 2001.

¹¹⁸ Article (2) of the presidential decree no. (49) of 1995.

¹¹⁹ Article (2) of the presidential decree no. (32) of 1999.

presidential decree¹²⁰. On 27th December 2002, a presidential decree was issued providing that the public prosecution of the state security court would be merged with the civil public prosecution and appointed the attorney general of the state security court as the attorney general of PA. This decree was widely criticised on the basis that it contradicts the basic law, either because the high state security court should be abolished or because the appointment of the attorney general was not consistent with the provisions of the judiciary law.

With the promulgation of the basic law in 2002, many scholars and human rights activists interpreted some of its provisions, particularly article (114), as providing for the abolishing of the high state security court. The aforementioned article provides:

“all provisions regulating states of emergency that were applicable in Palestine prior to the entry into force of this basic law shall be cancelled, including the [British] mandate defence (emergency) regulations issued in the year 1945”.

The other factor which consolidates such an interpretation (according to the scholars and the human rights activists) is that the judicial laws promulgated in the years 2001 and 2002 did not refer to the state security court¹²¹.

5.4.3. The Military courts

The basic law assigns the formation of the military courts to a special law. This law has not been promulgated. Meanwhile, the military courts in Palestine are still applying the revolutionary penal code of 1978 and the revolutionary criminal procedures code of 1978 as the substantive law and the procedural law respectively, although these two laws were promulgated and applied by the PLO judicial system outside Palestine.

¹²⁰ Article (1) of the presidential decree no. (32) of 1999.

¹²¹ PICCR Annual Report, 2002.

The jurisdiction of the military courts does not go beyond military affairs¹²². The military courts have jurisdiction over the review of crimes committed by the members of the security forces and those collaborating with civilians. They have penal as well as disciplinary competence.

The military courts are of three types: the county military court; the permanent military court; and the special military court.

5.4.3.1. The County Military Courts

The county military court is composed of a single judge. It has jurisdiction over the review of crimes, the punishment of which does not exceed one year imprisonment. The crimes committed by officers are excluded from the jurisdiction of the county courts. These courts are convened in different locations.

5.4.3.2. The Permanent Military Courts

The permanent military court is composed of three judges. It has jurisdiction over the review of all crimes that fall outside the jurisdiction of the county military courts.

5.4.3.3. The Special Military Courts

The special military court is composed of three judges and is formed for each particular crime upon a presidential decree under the recommendation of the director of the military judiciary for the police and national security forces. The special military courts have jurisdiction over the review of crimes committed by officers of the rank of major and higher¹²³.

5.5. The Corrections

The Palestinian penal institutions fall into three categories: the formal prisons known as “the reform and rehabilitation centres”; the pre-trial detention centres at the police stations; and the illegal detention centres situated

¹²² Article (101/2) of the amended basic law, 2003.

¹²³ See the annual report of the PICCR, 2001, p. 106.

in the different security units stations which operate outside the law and are unsupervised by the outside bodies¹²⁴.

The inmates in the different Palestinian corrections¹²⁵ fall into three categories: security inmates who are alleged to have collaborated with the occupation forces in the territories; political inmates who are suspected members of nationalist and Islamic factions alleged of opposing the Oslo Accords; and the criminal inmates who are accused of committing ordinary criminal offences without a political motivation.

The law on reform and rehabilitation centres (prisons) no. (6) of the year 1998, adopted modern theories in imprisonment punishment, at least theoretically. It abandoned the penal sanctions which were adopted during the past occupational eras. On the other hand, the law established a new body called “the directorate general of reform and rehabilitation centres” which manages and supervises the rehabilitation centres (prisons). According to the law, the prisons are attached to the ministry of interior¹²⁶. The presidential decree no. (23) of the year 1998, provides that the prisons are to be attached to the directorate of civil police. It grants the director of the civil police the rights and the competence of the minister of interior in this regard¹²⁷.

Nearly, all the prisons; the pre- trial detention facilities; and the juvenile welfare centres have been suffering from miserable situations for more than five years. Most of them were destroyed during the second *Intifada*, especially during the Israeli invasion to the West Bank in March- April 2002. The Israeli attacks against the Palestinian prisons threatened the lives of detainees and their guards, the consequence of which was the release of most of the detainees. In an Israeli F-16 aircraft attack against several locations in

¹²⁴Barghouti, Iyad, *Punitive Institutions between Actuality and Aspiration: Socio- Legal Study*, Birzeit University Institute of Law, 2003.

¹²⁵ It should be noted that there are approximately nine thousand Palestinian political detainees in the Israeli jails. Some of them were convicted, whereas the rest were classified among the administrative detainees who did not appear before the Israeli courts but detained because they were suspected of being activists against the occupation.

¹²⁶ Article (3) of the law on reform and rehabilitation centers no. (6) of the year 1998.

¹²⁷ This presidential decision, like many others, amended laws enacted by the PLC (the Parliament). The basic law does not grant the president the right to legislate except under certain conditions.

Nablus city on May 18, 2001, eleven members of the Palestinian police were killed, including seven prison guards, thirty-two others were injured¹²⁸.

These centres have not yet been rebuilt, and the new inmates are detained in extremely condensed private apartments. Moreover, the penitentiary treatment in these centres is insufficient: the number of the professionals, doctors, psychiatrists, social workers, etc. is low; the staff are not well qualified. Israel has repeatedly criticized the PA for failing to take into custody the Palestinian activists allegedly responsible for attacks against Israelis. Actually, the PA should control the activists and meet the measures addressed by the international instruments within the over mentioned conditions.

The law grants many bodies any appropriate right to access any prison or detention centre with the aim of inspection and expressing comments or suggestions. Those who are granted the right of inspection include: the minister of interior; the minister of justice; the attorney general or his deputies; governors; judges of the higher and central courts; and the director general of the reform and rehabilitation centres directorate¹²⁹. The aim of inspection in these centres would be to achieve one or more of the following: Correctness of records, papers and entries relating to the centre's management, discipline and regulation; inspection the inmates' food in its quantity and quality; applying the stipulations of the laws and by-laws as well as taking whatever steps they deem necessary in respect of the committed violations executing the court's judgements and orders of the prosecution and investigation judge so as to be implemented in the manner shown therein; accepting the complaints of inmates and expressing their comments¹³⁰.

The policy of the Palestinian legislature, regarding the rights of the inmates, is criticized: it would be more practical if the magistrate judges and public prosecutors, each in his area, were granted the right of inspection in the centres as well; it would be wise if the above mentioned people are obliged (not only granting them the right) to inspect and search the centres, since an optional right does not guarantee protecting the rights of the inma

¹²⁸ PICCR, annual report 2001

¹²⁹ Articles (10-12) of the law on reform and rehabilitation centers no. (6) of the year 1998.

¹³⁰ Article (11) of the law on reform and rehabilitation centers no. (6) of the year 1998.

tes and applying the legislation in this concern. In fact, only few of the above mentioned people inspect the centres.

6. The System of Criminal Sanctions and Settlements

The penal legislations applied in Palestine are mainly conservative and traditional. The penal laws applied in the Gaza Strip dates back to the thirties of the last century during the British mandate; while the penal law applied in the West Bank was enacted in 1960, during the Jordanian rule. The penal law draft did not achieve much modernization in this regard, but there is still a good chance of convincing the legislature to adopt a less sanctioning model.

Hereby, I will discuss the traditional criminal sanctions applied; and the alternative sanctions and settlements.

6.1. Traditional Criminal Sanctions

The penal laws applied in the Palestinian territories prescribe the penalties according to the severity of the crime. The main sanctions are ¹³¹:

6.1.1. Capital Punishment

Capital punishment is prescribed for committing the most dangerous felonies such as, crimes threatening the security of the state, crimes aimed at changing the political regime violently, collaborating with the enemy, manslaughter under certain conditions, etc. No doubt that this heavy sanction was adopted by all the occupational legal systems in Palestine to deter the Palestinians from struggling against the occupiers. Unfortunately, the applied penal laws in Palestine still adopt the capital punishment and it has been prescribed heavily by the high state security court. On the other hand, the penal law draft adopts this sanction relentlessly, and more than (14) crimes are sanctioned with capital punishment, despite appeals from high-

¹³¹ Article (14) states that the penalties of the felonies are: capital punishment; permanent penal servitude imprisonment; detention for life; provisional penal servitude imprisonment; provisional detention. Article (15) states that the penalties of misdemeanours are: imprisonment; a fine; and bail. Article (16) states that the penalties of the contraventions are: imprisonment; a fine.

ranking people inside and outside Palestine to abandon this heavy punishment.

The European Union (EU) called on the PA for the abolition of capital punishment, or at least, the abstention from executing the judgments of the high state security court which prescribe it. In some cases, the EU threatened the PA of stopping its donation to the Palestinian economy unless the PA complies with its demands in this regard. It would be beneficial to shed some light on the stand of the EU on capital punishment through tackling the relevant articles of the European Convention on Human Rights and its Protocols, and also the judgments of the European Court on Human Rights.

The European Convention on Human Rights, article 2 par. 1 provides:

“Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”.

Protocol no. 6 to the European Convention on Human Rights provides, Article 1: “The death penalty shall be abolished. No one shall be condemned to such penalty or executed.”

Article 2: “A State may make provision in its law for the death penalty in respect of acts committed in time of war or of the imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.”

The Preamble to Protocol No. 13 reads: “The member States of the Council of Europe signatory hereto,
Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings;

Wishing to strengthen the protection of the right to life guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as 'the Convention');

Noting that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of the imminent threat of war;

It is obvious from the above-mentioned provisions that capital punishment has not yet been abolished in the European Convention on Human Rights and its Protocols, but all the member countries in the council of Europe have complied with the calls of the European Council to abolish this punishment in their internal legislation as a condition for becoming members in the council.

Meanwhile, the Judgments of the European Court on Human Rights have prohibited the execution of capital punishment. For example, the judgment of the Grand Chamber of the European Court on Human Rights in (*Öcalan v. Turkey*) case¹³², was consistent with its previous judgments prohibiting capital punishment. The assessment of the Court for the allegations of the applicant, Abdullah Öcalan, the head of the Workers' Kurdish Party, regarding the violation of Turkey, to the articles 2, 3 and 14 of the European Convention on Human Rights, relies upon its analysis to the aforementioned articles of the Convention and its protocols. The court took considered that the convention should be interpreted in the wake of its status as a human-rights treaty. The court confirmed that the convention should be interpreted in harmony with the public international law of which the convention constitutes a part. It adds that the convention is a living instrument which must be interpreted in light of present-day conditions. The court asked whether "it is necessary to await ratification of Protocol no. 6 by the three remaining States before concluding that the death penalty exception in Article 2 has been significantly modified".

¹³² (*Öcalan v. Turkey*), application no. 46221/99, Strasbourg, 12 May 2005.

6.1.2. The Imprisonment

The imprisonment, which is the punishment most prescribed by the criminal judges, includes depriving the offender of his liberty for a certain time in prison (the reform and rehabilitation centre). The imprisonment punishment in the penal law no. (16) of the year 1960 is divided into three categories:

- The penal servitude, which is the punishment for committing a felony. The offender executes this punishment under severe conditions and hard work¹³³. The penal servitude is of two kinds: the perpetual penal servitude; and the provisional penal servitude. The range of the provisional penal servitude is between three and fifteen years¹³⁴.
- The detention; the punishment prescribed for committing a political felony. The convicted person is granted a private (better) situation inside the prison, such as: he does not wear the prison clothes; or is not involved in the hard work¹³⁵. Detention is of two kinds: the perpetual detention; and the provisional detention. The range of the provisional detention is between three and fifteen years¹³⁶.
- The normal imprisonment is the punishment prescribed for committing a misdemeanour or a contravention. The range of imprisonment for committing a contravention is between 24 hours and one week¹³⁷. The range of imprisonment for committing a misdemeanour is between one week and three years¹³⁸.

6.1.3. The Fine

The fine is an amount of money determined by the court to be paid by the convicted person to the treasury of the state. This amount ranges from 5 JD up to 200 JD, unless the law states otherwise. If the convicted person can not pay or does not want to pay the fine, it will be replaced by impri-

¹³³ Article (18) of the penal law no. (16) of the year 1960.

¹³⁴ Article (20) of the penal law no. (16) of the year 1960.

¹³⁵ Article (19) of the penal law no. (16) of the year 1960.

¹³⁶ Article (20) of the penal law no. (16) of the year 1960.

¹³⁷ Article (23) of the penal law no. (16) of the year 1960.

¹³⁸ Article (21) of the penal law no. (16) of the year 1960.

sonment, each half JD for one day imprisonment, under the condition that the total imprisonment does not exceed one year¹³⁹.

The Islamic criminal legislation, which has affected the Palestinian criminal legislation and their interpretations, has another kind of fine as punishment for unintentional offences against life and limb. This fine, which is called *Diya*, is paid to the victim or his family, thus it stands as a penalty and a compensation for the victim at the same time¹⁴⁰.

In addition to the main sanctions, the penal laws applied in Palestine prescribe auxiliary penalties, such as: closing an institution or a shop, prohibiting the exercising of a profession, forfeiture of property¹⁴¹, withdrawal of driving licence¹⁴², etc.

6.2. The Alternative Sanctions and Settlements

Most of the totalitarian regimes justify achieving their goals by means of searching for the material truth, although this may oppress procedural fairness and underestimate the principle of legal security¹⁴³. That is to say that these systems seek the substantive justice instead of the procedural justice and the legal security principle, which is adopted in the democratic regimes.

The judicial systems in the western countries achieved wide steps towards simplification and non formalisation in the criminal procedures. The legislatures in these countries were mainly pushed to adopt settlement out of court to attain cost efficiency, avoiding time consuming procedures, and minimizing the heavy loads of cases in the courts. The principle of disposing of the criminal cases within a “reasonable time” is assured in articles 5, III, 2 and 6, I, 1 of the European Convention on Human Rights which provides:

¹³⁹ Article (22) of the penal law no. (16) of the year 1960.

¹⁴⁰ Hosni, Naguib, *Imprisonment in Egyptian Penal Law and Alternatives for Incarceration in Egyptian Penal Law*, The National Review of Criminal Sciences, Cairo, 1998, p. 9

¹⁴¹ Article (28) of the criminal law no. (16) of the year 1960 applied in the West Bank.

¹⁴² Article (100) of the traffic law no. (5) of the year 2000.

¹⁴³ Karoly Bard, *Trial and Sentencing: Judicial Independence, Training and Appointment of Judges, Structure of Criminal Procedure, Sentencing Patterns, the Role of the Defence in the Countries in Transition*. *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 7/4, 433-447, 1999. Kluwer Law International, p. 437.

Article 5, III, 2 states that: “Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial”.

And article 6, I, 1 of the Convention states that: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, etc.”

It is obvious that the above mentioned articles of the convention deal with the main factors affecting a fair trial. The delay in proceeding the case within the criminal justice system is considered as an abuse of power since it violates the right of the suspect to be relieved of the indictment as soon as possible if he is innocent, or to convict him if he is guilty. That is to say, the delay in processing the case in the system is considered as a violation of the human rights deserves the intervention of the European court on Human Rights. The Court usually deals with dissolving the case within a “reasonable time” in the wake of the determination of one’s civil rights. Although the European Convention on Human Rights considers dissolving the case within a “reasonable time” as one of the human rights, it did not define the “reasonableness”, but the European Court on Human Rights provided, in many judgments, some criteria to determine this term. In (Krasuski v. Poland) case¹⁴⁴, in which the applicant (Krasuski) alleged that his case was not heard within a “reasonable time” in violation to article 6 § 1 of the European Convention on Human Rights, the Court assessed the reasonableness of the impugned period “in the light of the circumstances of the case and with reference to the criteria established by its case-law, particularly the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute”.

Therefore, the European policy maker usually takes into consideration the contradicting factors affecting the simplification and the acceleration of the criminal procedures, i.e., achieving the above mentioned aims (cost ef-

¹⁴⁴ Application no. 61444/00 of 14 June 2005.

iciency, avoiding time consuming procedures, and minimizing the heavy loads of cases in the courts) must not undermine the rule of law and the basic standards of a fair and just trial¹⁴⁵.

There are many reasons which justify the adoption of alternative procedures in the Palestinian judicial system. The ineffectiveness of the criminal justice institutions has the sequences of the high backlog of the criminal cases in courts of different levels, especially the magistrate and the first instance courts. This fact threatens the criminal justice system and pushes the people to mistrust the formal system and seek instead the “tribal justice”.

The following forms of alternative sanctions and settlements will be discussed further:

6.2.1. Non- Prosecution

The Palestinian legislature tackled the issue of non- prosecution, but in a very narrow domain. The public prosecutor and the judicial officer are granted minor jurisdiction in this regard. According to the law, non- prosecution may be reached in contraventions and misdemeanours which are punished only by a fine. The competent judicial officer is held to propose a settlement to the accused or to his attorney in the contravention. The proposal for a settlement out of court in the misdemeanours is made by the public prosecution¹⁴⁶.

On the other hand, the public prosecutor is given jurisdiction to drop cases in certain conditions, such as: the lack of importance; and to protect the relationships within the family. If the public prosecutor is of the opinion, depending on the circumstances of the case, that the act entails that it should be dismissed because of lack of importance, for example, he sends a memorandum with his opinion to the attorney general for further action. If the attorney general, or one of his assistants, agrees with the opinion of the public prosecutor, he issues a reasoned decision to dismiss the case and orders the release of the accused if he is detained¹⁴⁷. The legislature does not

¹⁴⁵ Albrecht, Hans-Jörg, Settlements out of Court: A comparative Study of European Criminal Justice Systems, South African Law Commission, Research Paper 19. p. 5

¹⁴⁶ Article (16) of the criminal procedures law.

¹⁴⁷ Article (149) paragraphs (1&2) of the criminal procedures law. The article provides for other causes to drop the case, which are: the action has lapsed by prescription; death; general amnesty; or because the accused was previously tried for the same crime; or is not penally liable by reason of his youth or mental illness.

define “the lack of importance”, but it is within the discretion of the public prosecutor under the auspices of the attorney general.

6.2.2. Summary Procedure

The judge may apply the summary procedures on certain cases under certain conditions. These procedures are provided in the law as an alternative to the prolonged procedures usually applied. The judge is advised to apply the simple procedures, instead of the normal ones, when the conditions are met, so as to save time and effort and to decrease the backlog in the system.

The simplified procedures apply only to contraventions of laws and regulations, which are related to: health; municipal affairs; and road traffic¹⁴⁸. The contraventions in concern are those, the punishment of which does not exceed a fine¹⁴⁹. The simplified procedures are not applicable when there is a civil claimant in the case¹⁵⁰. These types of cases constitute a low percentage of the cases tried in the courts in Palestine. They are tried by the municipality courts. A magistrate judge sits one day per week in the municipality court to hear these cases. The judge renders his judgment within ten days, unless the law requires its rendition within a shorter period¹⁵¹. Typically, such types of cases do not need a long time to be settled because the judge gives full faith and credit to the facts set forth in the documents establishing the occurrence of the incident when such are in conformity with the required procedures¹⁵².

6.2.3. Suspension of the Punishment

One of the new procedures, the criminal procedures law no. (3) of the year 2001 provides, is the suspension of the penalty by the court¹⁵³, according to certain conditions. The law provides for objective and subjective conditions for the suspension.

¹⁴⁸ Article (308) of the criminal procedures law.

¹⁴⁹ Article (309/1) of the criminal procedures law.

¹⁵⁰ Article (313) of the criminal procedures law.

¹⁵¹ Article (309/2) of the criminal procedures law.

¹⁵² Article (310) of the criminal procedures law.

¹⁵³ This procedure was not known in the legal systems prevalent in Palestine.

- The objective measure: the crime is a contravention or misdemeanour, the punishment of which is a fine or imprisonment for a term which does not exceed one year;
- The subjective measures: the characteristics of the offender, his past record, his age, and the circumstances in which he committed the crime is conducive to the belief that he will not violate the law again¹⁵⁴.

The order to suspend the penalty is issued for a period of three years running from the date on which the judgment becomes final¹⁵⁵.

This alternative settlement is a step in the right direction for the reform in the criminal justice system in Palestine, i.e., achieving a wise policy of punishment. On the other hand, this procedure decreases the number of inmates in the prisons, which normally affects positively any policy to decrease the costs of the penal system in Palestine. In fact, this step is not enough; it would be more effective if the range of the punishments are widened to include, at least, offenders who have been convicted of imprisonment up to three years.

6.2.4. Change of Imprisonment Penalty

Any person sentenced to imprisonment for a term of time not exceeding three months can petition the public prosecution to put him to work outside the “reform and rehabilitation centre” instead of executing the sentence of imprisonment against him, unless the judgment deprives him of such an option¹⁵⁶. The legislature was advised to widen the range, so more offenders could benefit from this option.

On the other hand, the penal law, applied in the West Bank, provides for the replacement of the imprisonment penalty by a fine according to certain conditions: if the imprisonment does not exceed three months; if the court issuing the judgment of imprisonment finds that the fine is punishment e-

¹⁵⁴ Article (284) of the criminal procedures law.

¹⁵⁵ Article (285) of the criminal procedures law.

¹⁵⁶ Article (399) of the criminal procedures law.

nough for the criminal; the amount of the fine is calculated on the basis that each day equals half JD¹⁵⁷.

6.2.5. Tribal Justice

Tribal justice is a traditional justice widely known within the Bedouin societies in the Arab countries. It was organized for the first time in historic Palestine during the British mandate. The legislation enacted during that era established the tribal courts and regulated the procedures of the tribal justice. The high commissioner was privileged the right to establish tribal courts in the region of *Bir Saba'* city and the *Negeb* desert. These courts applied the customs of the tribes living in those regions, unless these customs contradicted with the natural justice or morals¹⁵⁸. The tribal courts were of two levels: the first instance tribal courts which heard some determined criminal cases and civil cases; and a court of appeal which was established to revise the judgements of the first instance tribal courts¹⁵⁹. This kind of formal tribal judicial system is not present anymore in Palestine, and all legislation which established and controlled this system has been annulled.

Tribal justice resembles mediation, with some special features due to the uniqueness of the traditions and procedures applied in the Arab traditional society's justice. Tribal justice could be defined as "conflict resolution between the perpetrator (and his kin) and the victim of a crime (and his kin) with the help of a chosen well-known conciliator (*Sheikh*), outside the formal criminal justice system and without a criminal record". The arguments in favour of the tribal justice can be summarized in the following: quick and less costly proceedings; the litigants and their tribes would be more involved in the settlement; there would be no criminal record for offenders, so the stigma of committing a crime in the offender's file would not be present; it provides a more lasting solution. The preconditions for settling cases through tribal justice are: the offender and the victim are identified; both of them agree to solve the dispute through tribal justice.

¹⁵⁷ Article (2) of the penal law (amended) no. (40) of the year 1963.

¹⁵⁸ Article (45) of the constitution of Palestine.

¹⁵⁹ Article (5) of the law on composition of courts of the year 1923.

In present, the tribal justice in Palestine takes two forms:

- Tribal justice maintained according to an assignment by the regular courts, pursuant to the law. This form, which is called “*Solh*” (conciliation), is processed under the control of the regular courts. Its procedures commence when the magistrate court or the first instance court asks for the assistance of a well-known person (*Sheikh*), or a tribal committee to conciliate between the litigants. If the litigants (with the help of the “*Sheikh*”) reach a certain settlement, they have to write down the agreement they concluded (*Sak Al Solh*) and submit it to the court. In this case, the court would decrease the punishment of the offender¹⁶⁰. In unintentional offences against life and limb, the offender pays an amount of money (*Irsh or Diyah*) to the victim or to his next of kin as compensation.
- Tribal justice without an assignment from the court. This form, which is called “*Qada’ Asha’iri*”, proceeds in contradiction with the law. Unfortunately, this form, which is considered as a “parallel justice”, proved to be unjust and unreliable, but is adopted widely especially within the present state of weakness of the regular courts. The bodies which control this form of tribal justice are: well-known people (*Sheikhs*) or committees in the different regions; the legal offices attached to the different governorates; the security units; and the political parties and factions. The substantive norms applied are norms derived from traditions and usages of the Palestinian society (some pretend that these norms are derived from the Islamic law (*Share’a*)¹⁶¹. These norms and procedures are not codified, but they are inherited, generation after generation illiteracy.

People who are familiar with this form of tribal justice provide unrealistic justifications related to the transition state and

¹⁶⁰ Articles (99, 100) of the penal law no. (16) of the year 1960.

¹⁶¹ The author of this article met many of the tribal justice conciliators (*Sheiks*) in 2002, with the aim of implementing a research project on “the Criminal Justice System in Palestine“. See Nadera Shalhoub & Mustafa Abdelbaqi, *Tribal Justice and its Effect on Formal Justice in Palestine*, Birzeit University Institute of Law, 2003.

the weakness of the regular judicial system¹⁶². In my opinion, this form of tribal justice was justified during the occupation eras, because the Palestinian people were against the “justice” of the occupiers, but nowadays it should be cancelled, since it is against the law and fail to attain fair trials.

7. Results and Recommendations

The rule of law and the independence of the judiciary have certainly been affected negatively during the last five years, either because of the Israeli army attacks and invasions to the Palestinian territories during *Al Aqsa Intifada*, or the abuse of powers of the Palestinian security units. As a result, the observer can notice the following points of weakness in the criminal justice system: the executive authority continues to transgress the jurisdiction of the judicial authority by giving legitimacy to non judicial bodies to trial criminal and civil cases in contradiction to the basic law; the executive authority is used to refrain from executing some of the judgments of the regular courts; the lack of commitment of many of the officials in the criminal justice system; the transfer of the powers of the regular courts to the special courts; the illegitimate interference of the executive authority in the judicial administration; the inconsistency in the functions of the different authorities among the PA which affects negatively the criminal justice system.

Despite this a situation the PA has made some progress regarding qualifying the criminal justice system. The PA has re-established the court of cassation, so the judicial system is once again on of three levels¹⁶³; after the promulgation of the basic law and the judicial laws in the years 2001-2002, the position of the public prosecutor was shifted more towards the judicial authority and away from the ministry of justice, although many questions are still being raised concerning the competence of the public prosecutors and whether they should be controlled by the ministry of justice or the high judiciary council; much training in the field of human rights has been provided to law enforcement officials, members of the judiciary, prosecutors and other members of the legal profession.

¹⁶² Meetings with *Sheikhs* conducted by the author in 2002.

¹⁶³ After the occupation in 1967, the Israeli authorities abolished the jurisdiction of the court of cassation which was situated in Amman.

To conclude, the following reforms are of critical importance for consolidating the rule of law; and supporting the criminal justice system:

- A comprehensive revision of the judicial laws is crucial to attain a good rate of consistency between their provisions, and to be consistent to the basic law as well.
- Amending the judiciary law so as to map the roles of the different bodies involved in the administration of the judicial system, especially the high judiciary council; the presidents of courts; and the ministry of justice.
- Enacting the unified penal law as soon as possible.
- Simplifying the criminal procedures, taking into consideration attaining fair trial and decreasing the backlog in the judicial system as well.
- Adopting the plea bargaining process.
- To attain accountability, the criminal justice system should accept supervision: internal supervision from the competent bodies among it, i.e., the courts and the public prosecution should supervise the police and the correction institutions; external supervision from national institutions like the Parliament, the media, the civil society organizations, and the ombudsman (PICCR).
- The security units should be accountable for implementing the law and enforcing the courts' judgments and orders, and respecting international human rights standards.
- Establishing a specialized criminal statistical centre to help in drawing the criminal justice policy.
- Completing the structure of the judicial system through the formation of the constitutional court; and administrative courts.
- Improving the judiciary's physical infrastructure through building new courts and rehabilitating the old ones.
- Streamlining the different criminal justice institutions' roles, and in particular re-estimating the role of the public prosecution and the judicial officers in the investigation stages.
- Enhancing the alternative dispute resolution capacity.

- Rebuilding the forensic science capacity. Some personnel should undergo training in drug identification, explosions and other forensic work. Forensic pathology and other forms of forensic medicine training and equipment also are needed.
- Continuing support to the legal database established in Birzeit University Institute of Law, including technical and financial support to implement the judicial component through accessing the leading cases in the judicial system. Added commentary on judgments would also be helpful to respond to the needs of the legal community in Palestine.
- Establishing the following two committees in the high judiciary council and under its auspices: the committee of appointing the new judges; and the committee of evaluating and promoting the judges.
- Determining, according to reasonable and fair criteria, the conditions of appointment, transfer, secondment, delegation, promotion, and questioning for all the judicial positions.
- Consolidating the position of the defence council in the criminal process as a whole, and, in particular, in the pre-trial stage.
- Of course, the above-mentioned reforms would be useless if the Israeli occupation to the Palestinian territories did not come to an end. In fact, the Palestinian territories are not contiguous, either because of the division between the West Bank and the Gaza Strip or because of the checkpoints throughout the West Bank regions. The checkpoints must be removed and the West Bank should be connected with the Gaza Strip through a safe and unrestricted passage route, so no hindrances may hamper law enforcement coordination.

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