

PALESTINIAN AUTONOMOUS AREAS

The Palestinian judiciary is largely under-resourced and subject to frequent political attacks and executive pressure. Judges are overworked and underpaid. Competing sources of law and overlapping court systems with conflicting jurisdiction give rise to confusion and instability within the judiciary. State Security Courts remain the primary concern, with trials occurring at night and without appropriate safeguards to ensure a fair trial. The Palestinian Authority operates in the absence of a constitutional framework guaranteeing the fundamental principles of human rights and the separation of powers.

The Palestinian Authority (PA) was established in 1994 as a consequence of the 1993 Declaration of Principles on Interim Self Government Arrangements (the Oslo Accords) signed by Israel and the Palestinian Liberation Organisation (PLO). The Oslo Accords and subsequent agreements, including the 1994 Gaza-Jericho Agreement, the 1995 Interim Agreement, the Wye River Memorandum and the Harm el-Sheikh Agreement comprise the current constitutional framework in the areas that have been returned to Palestinian control. However, the scope of powers granted to the PA is limited both functionally and territorially. The West Bank is divided into three areas. In respect of Area A, the PA maintains control over civil administration and security. In area B the PA is responsible for civil administration only. Area C remains exclusively under Israeli control. (Upon completion of redeployment specified in the Sharm el-Sheikh Agreement of September 1999, approximately 18 per cent of the West Bank should fall under the full control of the PA. In the Gaza Strip, Israel retains full control over 38 per cent of the territory, in what are referred to as Yellow Areas.) Israel has retained legal jurisdiction over Israeli settlements, all Israeli citizens, foreign relations, and external security, pending an agreement on the final status of the areas. Israeli military courts retain jurisdiction over Palestinians accused of committing security crimes in areas under the control of Israel. Israel controls all borders.

In 1996, 88 members and a President were elected to the Palestinian Council (PC). The 1995 Interim Agreement grants the PC both legislative and executive power. In practice, the legislature has exercised little effective power. The executive branch, headed by President Arafat and his cabinet, has administered the PA without legislative direction. President Arafat has thus far declined to sign the Basic Law adopted by the legislature. The President dominates political affairs and takes major decisions, including those that may interfere with or otherwise affect the judiciary. President Arafat is able to issue new laws and create new institutions through presidential decrees and transfer cases from civil courts to the state security courts (*see section on the judiciary*). The fundamental principles of separation of powers and the rule of law are undermined by the frequent reluctance of the executive to comply with and enforce judicial decisions.

Throughout the second *intifada* (uprising), which began in October 2000, the Israeli authorities have rendered governance by the PA increasingly untenable. Following the murder of Israeli cabinet minister Rehavam Zeevi in October 2001, Israel sent troops and tanks into Palestinian cities in October 2001 and President Arafat carried out arrests against members of Hamas and Islamic Jihad. After the December 2001 attacks on civilians in Jerusalem and Haifa, Israel responded by bombing the premises of the PA and declaring it a “terror-supporting entity”. Yasser Arafat, Chairman of the Palestinian Liberation Organisation (PLO) since 1969 and President of the PA since 1996, also faces domestic problems, as Palestinians become increasingly frustrated with the failure to end the occupation by Israel and secure a Palestinian state, and with high levels of corruption within the PA.

HUMAN RIGHTS ISSUES

Under article XIX of the 1995 Interim Agreement, the PC and the executive authority are required to exercise their powers with due regard to internationally accepted norms and principles of human rights. However, there continued to occur numerous incidents of arbitrary arrest and detention, torture and ill-treatment of prisoners and detainees and severe police misconduct in dealing with mass demonstrations. Additionally, the right to fair trial, freedom of expression and association have in many instances been significantly curtailed. Torture or other ill-treatment by various Palestinian security forces was widespread, with several persons having died in PA custody. Prolonged incommunicado detention in the period immediately after arrest facilitated torture. The use of torture is facilitated by the practice by the State Security Court of routinely admitting into evidence confessions extracted by force (*see section on the judiciary*). The PA has consistently failed to investigate adequately complaints of torture and to prosecute those responsible.

The PA lacks a uniform law on administrative detention, and security officials do not always adhere to the existing laws. The PA is reluctant to use the British Emergency Regulations of 1945 or Israeli military orders and is therefore left with general criminal procedures and the PLO Revolutionary Code. Laws applicable in Gaza, which do not apply to the West Bank, stipulate that detainees held without charge be released within 48 hours. These laws allow the Attorney General to extend the detention period to a maximum of 90 days during investigations. Prevailing law in the West Bank allows a suspect to be detained for 24 hours before being charged. The Attorney General may extend the detention period. In practice, however, many detainees have been held for over a year without being charged with any offence.

Palestinian human rights organisations continued to bring cases on behalf of those detained for prolonged periods without charge or trial before the Palestinian High Court of Justice. During the year 2000, the Court ordered the release of 18 detainees, but the PA failed to implement these court orders in the vast majority of cases. Human rights lawyers have had difficulty in gaining access to their clients in prisons and detention centres. A practical problem faced by lawyers representing detainees is making a determination as to where a person is being detained. While only the PA's civil police force is legally authorised to make arrests, all security forces actively arrest and detain persons. There remains great confusion as to the overlapping authority of a maze of Palestinian security forces. Such uncertainty leads to abuse of executive authority and prejudices detainees, their families and human rights advocates. The security services, including Preventive Security, General Intelligence, Military Intelligence and the Coast Guard have their own interrogation and detention facilities. It has often proven very difficult to track the whereabouts of detainees.

The Press and Publication Law of 1995, regulating every publication produced or imported into areas under PA jurisdiction, gives the PA wide power to control the media, research centres, news agencies, libraries and other institutions which process and disseminate information. The principles of freedom of press, expression and information are affirmed in article 2, but these guarantees are undermined elsewhere in the law, including in article 37 prohibiting the publication of any information considered harmful to religion, morality or national unity, or which shakes confidence in the national currency. Such broadly defined provisions are open to abuse. In November 1998, the PA issued Presidential Decree No. 3 concerning the Strengthening of National Unity and the Prohibition of Incitement. This decree goes far beyond prohibiting violence and punishes a broad range of speech.

LEGAL FRAMEWORK

The law applied in the Palestinian territories derives from a number of sometimes conflicting sources, including those of the Ottoman, British, Egyptian, Jordanian, Israeli and Palestinian regimes. In the Gaza Strip most of the laws date from the British Mandate and derive from the common law tradition. In 1950, the West Bank was unified with Jordan and a new set of legislation based on the civil law tradition was introduced to unify the West Bank and Jordanian legal systems. British Mandate and Ottoman law continued to apply until abrogated by the new unified law, which was further, modified by Israeli military orders following the occupation. The various peace agreements regard the Gaza Strip and West Bank as a single territory. The 1995 Interim Agreement provides for a single unified legal system in force in both geographical areas. In the absence of PA legislation, the courts must determine which laws from previous administrations still apply, resulting in substantial uncertainty. By decree issued in May 1994, President Arafat instructed that the laws, regulations and orders in force before 5 June 1967 are valid and remain in force. A body of PLO laws and regulations were enacted to regulate Palestinians in the Diaspora. The PLO Military Penal Law permits trial of civilians for civil offences before military courts and, problematically, has been used by the PA State Security Courts as a source of law.

Draft Laws

Since its election in 1996, the PC has been debating and drafting the legal framework for a modern democratic state. Two laws, the Basic Law (adopted by the PC in 1996) and the Judicial Authority Law (adopted in 1998), have been forwarded to President Arafat for his signature. The President has thus far failed to sign them. In February 2000, President Arafat sent back the Judicial Authority Law to the PC to amend the provision regarding the appointment of the Attorney General. Although there is a procedure, stated in article 71 of the Standing Orders of the PC, by which the legislature could override executive non-action, it has not been invoked. According to article 71, if the President takes no action on a law within one month, the law automatically returns to the legislature where it enters into force with the support of an absolute majority vote.

The 1996 Basic Law would provide the constitutional framework for the interim period. It provides that the governmental system rests on the principles of parliamentary democracy, the rule of law and the separation of powers. It requires the PA to respect international norms of human rights. The Basic Law expressly secures the independence and impartiality of the judiciary. The Judicial Authority Law sets out in greater detail the structure of the Palestinian court system, as will be discussed below. These two laws are generally adequate and up to international standards, including those reflected in the UN Basic Principles on the Independence of the Judiciary. Without these laws, the PA operates in the absence of a constitutional framework guaranteeing the most basic principles of democracy and the separation of powers. And without such a framework, the executive can and will continue to violate the separation of powers, judicial independence, the rule of law and protection of fundamental human rights.

THE JUDICIARY

The justice system lacks basic operational capacity. There is a substantial deficiency of trained and independent judges, bailiffs, clerks, court buildings, legal texts, and equipment. These conditions apply equally to the prosecution service. Judges and prosecutors are poorly paid and lack the security of tenure. Intervention by the executive authority in judicial decisions has further

demoralised judges. The congestion of courts and overload of casework have invited such intervention. Judges have complained about a lack of respect and support for their authority by the executive. The executive frequently has declined to implement court decisions. A significant number of decisions of the High Court challenging executive actions, namely the arbitrary arrest and detention of certain persons, have been flatly ignored by the executive.

Structure

Article IX (6) of the 1995 Interim Agreement requires the PC to have an independent judicial system composed of independent Palestinian courts and tribunals. This requirement necessitates a creation of a unified judicial system. In the absence of the Basic Law and Judicial Authority Law, there remain competing sources of law and overlapping court systems with conflicting jurisdiction. The existing court system (described in detail in the 10th edition of *Attacks on Justice*) comprises ordinary civil and criminal courts applying different law in the West Bank and Gaza. There exist Magistrate Courts, District Courts (or Courts of First Instance), the Courts of appeal in the West Bank, and the High Court in Gaza, which also sits as a High Court of Justice to review administrative decisions. Religious courts, both Muslims and Christian, deal with matters relating to personal status. Outside the ordinary courts system sit Palestinian military courts and security courts holding virtually unlimited power and jurisdiction. The PA affords itself wide discretionary powers in deciding which cases are to be prosecuted before which courts.

Israeli military orders give concurrent jurisdiction to military and civil courts over criminal matters, and authorise the removal of cases to the military courts. Cases can be removed from Palestinian courts if they involve Israelis or Israel's security. The 1995 Interim Agreement provides that the Israeli military government maintain full judicial powers over all areas not within the full territorial jurisdiction of the PA. This includes settlements wherein Israeli citizens reside, military installations, Area B (which is under partial PA civil control) and Area C in the West Bank and the Yellow Area in Gaza (which are under total Israeli control). Further, article 1 (7) of the Protocol Concerning Legal Affairs included in Annex IV of the 1995 Interim Agreement gives Israel criminal jurisdiction over offences committed within Palestinian territories against an Israeli citizen (see chapter on Israel.)

State Security Court

President Arafat created the State Security Court (SSC) by Presidential Decree No 7/95. This court deals with security matters outside the normal legal process. The Palestinian Authority argues that ordinary courts are not effective to deal with security matters. Analysis of several of the Tribunal's decisions reveals that it is not a "court" in any real sense of the word. The SSC sits at the discretion of the President, who appoints its judges for each particular hearing. Judges are usually selected from the ranks of security officers. The selection process is not transparent and legal training of the officers is inadequate. There is no appeal from a verdict from the SSC. The only appellate procedure is in cases of death sentences, which require personal ratification by the President himself.

These state security tribunals exist to bypass the due process requirements of ordinary courts and serve to curtail the rights of the accused while giving a semblance of "legality" to decisions of the executive. The deficiencies of the procedure carried out within these courts include: trials take place on short notice, often at night; accused persons often do not know the charges against them and are thus prevented from preparing an adequate defence; there is no right to legal representation of

choice and defendants are usually obliged to accept representation by counsel appointed by the SSC. In some cases, entire trial proceedings have lasted only a few hours and have sometimes resulted in death sentences. Since the recent intifada, alleged collaborators with Israel have been tried before the SSC.

Palestinian Military Courts

Although the Oslo Agreement does not allow for a Palestinian army, a Palestinian military court system was established. These courts try members of the PLO armed forces –the police and security forces- as well as civilians accused of crimes related to the armed forces. It is unclear as to the parameters under which the military court may try civilians, On several occasions, military courts have transferred jurisdiction over cases in which the civilian Attorney General has claimed jurisdiction. However, at other times civilians have been tried by Palestinian military courts.

The structure of the military courts is based on the 1979 PLO Revolutionary Code, which addressed all persons, military officers or not, and the offences cover many civilian crimes. This structure consists of District Military Courts, Permanent Military Courts, and other special courts, which may hear all cases on which they assume jurisdiction and crimes involving officers of the rank of major and higher. Palestinian Military Courts are constituted by decision of President Arafat, as Supreme Commander, and they are under his ultimate control. Judges are selected from a separate military judiciary.

Judges

The Draft Basic Law and the Judicial Authority Law guarantee the independence of judges within the Palestinian territories. Articles 88-97 of the Draft Basic Law include many of the UN Basic Principles on the Independence of the Judiciary securing the independence and impartiality of the judiciary and mandating the creation of an independent Higher Judicial Council (HJC). The Draft Judicial Authority Law provides the blueprint for the Palestinian court system. It guarantees an independent budget for the judiciary and entrusts the HJC with the power to nominate judges for appointment to the judiciary. It provides greater detail than the Basic Law on all aspects of the judicial system and guarantees tenure for judges and establishes procedures for judicial discipline.

Until September 1999, the Minister of Justice had *de facto* authority over judicial matters, including the powers to promote, demote, transfer, dismiss, and retire judges at all levels, hire and dismiss court personnel and determine salaries and pensions. In September 1999, President Arafat issued a Presidential Decree transferring the management of the judiciary from the Ministry of Justice to the Chief Justice in Gaza, who was appointed by the President in June 1999. The Decree empowers the Chief Justice with the mandate to appoint judges, to grant judicial vacations and to arrange the conditions of service of the judiciary. Under the terms of the Decree, no person or institution may intervene in judicial issues or interfere in judicial affairs. However, the Decree has also prompted serious concerns. The Chief Justice was appointed by the executive with no involvement of the legislature or the legal profession. In addition, the presidential decree bypassed the PC's draft law concerning the judicial system.

In a subsequent development, on 1 June 2000, the President of the PA issued a decree forming a Higher Judiciary Council (HJC) with mandate for all Palestinian-governed territories. The decree provides that the Council is to carry out its mandate as set out in the Judicial Authority Law.

LAWYERS

Palestinian lawyers face problems similar to those of members of the judiciary. They are frequently subject to executive interference and suffer from a general lack of training and resources. Since June 1999, the PA has instituted a policy effectively denying human rights lawyers access to their clients in Palestinian prisons. This action was allegedly taken as a reprisal against human rights advocates who had criticised police misconduct.

Historically, there have been several different associations of Palestinian lawyers. Before the occupation by Israel, West Bank lawyers were members of the Jordanian Bar Association. During the occupation, they generally refused to practice in the Israeli dominated courts. However, some lawyers did return to practice and consequently were dismissed from the Jordanian Bar and their pensions were revoked. Over the years, lawyers respecting the strike became the minority. In 1979, the Arab Lawyers Committee was established for lawyers from the West Bank. Soon after, in 1980, the Lawyers Union in the Gaza Strip was established for lawyers practising in that territory.

President Arafat, by Presidential Decision No. 78 of 1997, created the Council of the Union of Palestinian Lawyers. The Ministry of Justice then appointed the members to this Council. While the creation of the Council may be a positive step towards the creation of a unified bar, the executive's domination of its creation and composition is highly troubling. In June 1999, Law No. 3 concerning the Organisation of the Law Profession in Palestine was issued. According to article 51, the appointed council would continue its functions until elections were held, which should be no later than six months after the law entered into force. Later, in November 1999, the PC passed and the President signed the 1999 Bar Association Law. This law requires the holding of elections for an independent Bar Council.

CASES

Iyad Alami, Hanan al Bakri, Hanan Matar, Ashraf Nasralla, Khader Shkirat, Ibrahim Sourani, Raji Sourani, Fouad Tarazi {lawyers, members of the human rights groups LAW, Palestinian Centre for Human Rights (PCHR), and the Women's Legal and Social Counselling Centre}: On 10 and 14 May 2000, the Palestinian Bar Association removed these lawyers from the list of practising lawyers. The Acting Bar Council based its decision on Article 7 of the Palestinian Bar Association Law, which prohibits, *inter alia*, the combining of the practice of law with the holding of public or private employment. This action was taken without due process and at the end of the Acting Council's tenure in office. Elections for a new council were due to be held by 9 May 2000. On 17 May 2000, the Palestinian High Court of Justice suspended the Acting Council's decision.

Lawyers of the Palestinian Centre for Human Rights (PCHR). On 18 November 2001, PCHR lawyers submitted a request to the administration of Gaza Central Prison to allow the visit of 19 political prisoners legally represented by PCHR lawyers. On 19 November 2001, PCHR lawyers were informed by the administration of Gaza Prison that lawyers' visits were prohibited by order of Mayor Gahzo El-Jabalai, Chief of the Police.

Yunis al-Jarro {lawyer}: On 18 October 2001, Mr. al-Jarro, a former deputy head of the Palestinian Bar Association in Gaza and leader in the political wing of the Popular Front for the Liberation of Palestine (PLFP). was arrested in Gaza, along with a number of other persons associated with the PLFP, by Palestinian security services. The arrest occurred shortly after the

PLFP had claimed responsibility for the assassination of Israeli cabinet minister Rehavam Ze'evi on 17 October. The detention seemed to be based on his association with the PLFP and not upon any evidence of involvement in the assassination. The Palestinian High Court of Justice reportedly ordered his release, but the authorities did not immediately comply with the ruling.