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## Strengthen the Supreme Judicial Council to Protect the Independence of the Palestinian Judiciary

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This brief is the first in the PSR series of Critical Policy Briefs for 2020. These briefs address important domestic and foreign policy-oriented issues confronting Palestinian society today.

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# Strengthen the Supreme Judicial Council to Protect the Independence of the Palestinian Judiciary

Alaa Lahluh and Jihad Harb

The latest presidential decisions dissolving the Supreme Judicial Council (SJC) and forming a transitional Judicial Council (TJC), in decrees number 16 and 17 issued on 18 July 2019, raise concerns about possible executive interference in the affairs of the judiciary that might undermine its independence. This is a good opportunity to reexamine the best means of protecting the Palestinian judiciary from the various executive interferences in matters like the appointment of judges, involving the judicial authority in the power struggle within the executive, or using the courts to undermine media liberties.

It goes without saying that the independence of the judiciary represents a basic component of the right to a fair trial and rule of law. The presumption of the integrity and the imperative of the independence of the judges are not privileges granted to judges for their own self-interest; rather, they are justified by the need to empower the judges so that they can play the role expected of them, to ensure the enforcement of the rule of law and to protect human rights and other basic liberties of the citizens. They provide guarantees of truth, freedom, respect for human rights, and a system of justice devoid of external influences. Strengthening the independence of the judiciary is one of demands of the Palestinian civil society and it is one of recommendations of the Justice Sector Development Committee that was formed to formulate a comprehensive vision for strengthening of the judiciary and published its report in 2018.<sup>1</sup> The SJC is the most prominent address to ensure this independence. Doing so requires three things: (1) strengthening the capacity of this body to manage and administer the justice system; (2) providing the means to prevent the executive from interfering in the selection of its members; and (3) putting in place rules and regulations that prevent any biases within this body in favor of its own profession and professional colleagues by widening its membership to include people from outside the judicial system.

The goal of this *critical policy brief* is to provide recommendations to the TJC that aim at consolidating the independence of the judicial institution and protecting it from external interferences whether from the executive, or from those working on behalf of the executive, thereby insuring the implementation of the principle of the separation of powers, guaranteeing the integrity of the justice system, and restoring public trust in the courts. To do so, three options are proposed: broadening the membership of the SJC, democratizing its formation, and/or making it a mixed council.

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<sup>1</sup> See, "A Comprehensive Vision to Reform and Unify the Justice System in Palestine," developed by the Independent Commission for Human Rights and the Civic Coalition for the Reform and Protection of the Judiciary: <http://istiqlal.ps/?q=node/133> (in Arabic)

## The need for reform

The split in the Palestinian political system during the past 13 years has caused considerable damage to the prospects of transition to democracy in the Palestinian Authority's (PA) political system by harming its separation of powers. The Palestinian Legislative Council (PLC) could no longer meet or exercise its legislative and oversight functions and was eventually dissolved in 2018. Since 2007, legislative power has been placed in the hands of the Palestinian president in the form of issuing laws by decrees. This concentration of power in the hands of the executive affected the functioning of the Palestinian judiciary as well. A statement by the Chief Justice, Sami Sarsoor, the former head of the SJC, on 24 October 2016 (in which he, upon being forced to resign, revealed that he was asked by an official from the security sector, to sign his own resignation just before he was sworn in) exposed the extent of executive interference in the justice sector. It was also revealed at that time that other chief justices before judge Sarsoor were asked to do the same.<sup>2</sup> On top of that, evidence grew over time that the judicial authority was unable to locate and address deficiencies within its own institutions. A High Court judge, Abdallah Ghozlan, stated that the judiciary was incapable of reforming itself and that some of the judges would not trust the ruling of the court if they were to find themselves in front of one.<sup>3</sup> Civil society organizations demanded in many occasions the implementation of serious judicial reform, particularly after it failed to reform itself or guard its own independence and after the exposure of internal conflicts and quarrels among the judges.<sup>4</sup>

The functioning of the judiciary was marred by several problems. Among those, the issuance of contradictory rulings regarding the retirement process of the public sector employees raised suspicion of interference from the executive. Interference by groups and individuals associated with the executive was also suspected to be behind court rulings regarding transportation companies.<sup>5</sup> Similar suspicions were seen behind internal decisions within the judiciary, such as the formation of judicial committees or the questioning of judges over instances in which they expressed their own opinion on public matters or their participation in civil society workshops. Years of delays in issuing decisions regarding court cases reduce public trust in the effectiveness of the judiciary leading people to seek alternative mechanisms such as the tribal system of justice.

It should also be noted that according to the 2002 Law of the Judiciary, the formation of the SJC provides for significant independence for that body restricting membership essentially to those filling judicial positions, i.e., judges. This leads to a concentration of power in the hands of one judicial institution which might raise questions about possible biases in favor of other members of the same profession thereby reducing the prospects for accountability. Moreover, the law allows for possible conflict of interest when specifying the responsibilities of the head of the High Court (who is also the head of the SJC) and those of the head of the SJC: it is the head of the SJC who recommends the appointment of the head of the High Court.

## Decline in public trust in the Judiciary

Trust in the Palestinian judiciary declined considerably during the past 10 years among the general public and particularly among those who had the opportunity to interact with the justice system. Findings of the Arab Barometer in Palestine show a decline in trust from 60% during the period from 2007 to 2010 to 42% during the period between 2016 and 2019.<sup>6</sup>

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<sup>2</sup> See statement of judge Sami Sarsoor (in Arabic): <https://www.wattan.tv/ar/news/189737.html>

<sup>3</sup> A radio interview (in Arabic) with judge Abdallah Ghozlan on Radio 24 FM: <https://www.youtube.com/watch?v=Bgdze0t-1vY&feature=youtu.be>

<sup>4</sup> See, A Comprehensive Vision to Reform and Unify the Justice System in Palestine, see footnote #1 above.

<sup>5</sup> This ruling was a subject of a hearing session (in Arabic) at the Civic Organization of the independence of the Judiciary and Rule of Law on 15 January 2017: <http://www.alquds.com/articles/1484587424499930000/>

<sup>6</sup> See: <https://www.arabbarometer.org/survey-data/data-analysis-tool/>

Recent polls conducted by the Palestinian Center for Policy and Survey Research (PCPSR) depicts a similar lack of trust. PCPSR's poll 73, conducted in September 2019, shows lack of trust in the judiciary among most of the public, with 65% believing that they would not receive a fair trial if they find themselves in a Palestinian court. Moreover, the same poll shows that 72% of the public in the West Bank believe that the work of the judiciary in Palestine is marred by corruption or non-independence and that it operates based on interests rather than the rule of law. The internal political split is also reflected in the public assessment of the judiciary and chances for a fair trial, as 37% of Fatah supporters, compared to only 9% of Hamas voters, believe that they would have a fair trial in a Palestinian court.<sup>7</sup>

According to the findings of the fifth report of the Legal Monitor<sup>8</sup>, issued in 2018, only 39% of Palestinian lawyers agree that the judiciary is in continued improvement and 49% disagreed with the statement. Moreover, 62% agreed that court rulings are subject to external influence and pressure while only 16% disagreed with the statement. More than a quarter (27%) agreed that the judiciary is corrupt while 36% disagreed. The overwhelming majority (85%) believed that regular courts are considerably slow in deciding cases.

Those Palestinians who had experiences with the justice system are the most pessimistic about it and the ones who gave it the most negative assessment. According to the second Palestinian Security Sector Index, prepared by PCPSR in 2016, 75% of those with such experiences believed that corruption exists in the courts and among the judges.; 78% thought that the judiciary does not treat people equally regardless of financial, social, or party affiliation or their membership in the security sector of PA institutions. As the case with the lawyers, 78% believe that court procedures are too slow.<sup>9</sup>

## Failed reform efforts

Judicial reforms confronted several challenges during the past 20 years. The most significant has been the split in the political system between the West Bank and the Gaza Strip, the absence of the PLC, and the repeated interferences by the executive. Moreover, the conflict within the justice system, the quarrels between the judges and the manner in which they viewed the judicial authority, in terms that are inconsistent with the of the Basic Law which grants independence to the judges' decision making but rejects conflict of interest. The judiciary has also suffered from a weak performance and limited capacity as well as a huge load of cases. All these problems contributed to a declining public trust in the entire body and the justice system as a whole.

The first PA effort to reorganize the judiciary came in June 2000 when a transitional SJC was formed and entrusted with the task of putting the judiciary house in order. This was followed in May 2002, after the issuance of the Law of the Judiciary, by the appointment of the first SJC. An effort to reform the system was made by a presidential decree, issued on 14 March 2005, to form a Steering Committee for the Development of the Judiciary and Justice. The committee was asked to prepare a draft proposal to amend the Law of the Judiciary and to propose rules and procedures to ensure the independence of the judiciary and maintain the dignity, qualifications, and integrity of the judges. The committee proposal that was soon submitted to the PLC was rendered inoperative as the High Court ruled on 27 November 2005 that the effort was unconstitutional.

In September 2017, Abbas issued another presidential decree, this time to form the National Committee to Develop the Justice Sector by reviewing the various relevant legislative instruments and preparing a comprehensive vision to develop the entire sector. The committee was given 6 months to complete its work, which was eventually completed within a year. The committee's report proposed several recommendations

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<sup>7</sup> PCPSR poll 73, issued in July 2019: <http://pcpsr.org/en/node/775>

<sup>8</sup> See, report issued by the Palestinian Center for the Independence of the Judiciary and the Legal Profession: <http://www.musawa.ps/uploads/61e7b3f38dbc0eff17871eb22f531125.pdf>. For the fifth report, see also (in Arabic): <https://www.alwatanvoice.com/arabic/news/2018/12/23/1203162.html>

<sup>9</sup> See PCPSR's second report of the Arab Security Sector Index, 2016: <http://www.pcpsr.org/en/node/616>

aiming at strengthening the independence of the judiciary by broadening the membership of the SJC, reducing the retirement age of the judges from 70 to 65 years, and addressing the various technical and professional aspects of the functioning of the sector.<sup>10</sup>

Finally, in July 2019, Abbas, as mentioned earlier, issued two decrees in which he amended the Law of Judiciary (reducing retirement age from 70 to 65 years), dissolved the SJC, and formed the TJC. The TJC was given a year to put in place the required reform measures including the reestablishment of court bodies for the various levels of litigation, drafting amendments to the relevant legislative instruments, and the reformation of the SJC. The two presidential decrees were welcomed by many civil society organizations while at the same time cautioning against possible executive interference. Other civil society organizations opposed the decrees viewing them as incompatible with the Basic Law and the Law of the Judiciary and that they represent a blatant executive interference.

Findings of PSR poll 73, mentioned above, showed a split in public response to the presidential decrees. Half of the public (51%) expressed satisfaction. Moreover, about a half (49%) in the West Bank expressed disagreement with the criticism of the decrees, the claim that they addressed matters that were not within the jurisdiction or mandate of the president or that they represent interference in the affairs of the judiciary. Findings also showed that 47% of the public agree with the statement that the decrees were essential in order to introduce judicial reforms at a time when the judiciary has failed to reform itself or earn public trust; 37% of the public did not agree with this statement.<sup>11</sup>

## Strengthening the SJC as a guarantor of judicial independence

Six months after its formation, this brief proposes three options for the TJC to review. All three focus on the institution of the SJC viewing its role as the most critical component in the Palestinian justice sector. Here below is a summary of the main features of each:

- 1) **Broadening the membership of the SJC:** This can be done by adding new elected members from the judicial establishment and increasing the membership of the council to 12. This would include the chief justice, the oldest deputy head of the high court, two of the oldest judges of the high court, the heads of the court of appeal in Jerusalem, Gaza, and Ramallah, the attorney general, the deputy minister of justice, the first inspector, and two judges from the court of the first instance. This option has been proposed by the current TJC in its draft amendment of the Law of the Judiciary. It also proposes that some members of the SJC should be elected. The proposal however keeps SJC membership restricted to members of the profession, the judges, which may undermine the ability of the judiciary to bring judges to accountability. It also does not address the potential conflict of interest mentioned above and it does not allow members of the appeal courts to elect their own representatives in the SJC, a right granted to the judges of the high court and those of the court of the first instance.
- 2) **Democratically electing all members of the SJC:** In this option, all members of the council from the judiciary would be elected by their respective judicial bodies. Council members would elect the chief justice. This option allows representation of all levels of the judicial institution and ensures removal of the potential conflict of interest in the administrative jurisdiction of the chief justice and his role as the head of the high court. By contrast, this option maintains the current concentration of authority in the justice sector in the hands of one judicial body which might raise questions about possible bias in favor of the members of the profession thereby potentially undermining the ability of the SJC to bring judges to accountability.
- 3) **A mixed judicial council:** in this option, members of the SJC would come from within and outside the judiciary. Member judges would be elected by their respective judicial bodies while those from

<sup>10</sup> See, Report (in Arabic) of the National Committee to Develop the Justice Sector. September 2018:

<http://www.istiqlal.ps/?q=node/139>

<sup>11</sup> PSR poll 73, September 2019: <http://pcpsr.org/en/node/775>

outside the judiciary would come from among the lawyers, professors of law, members of professional association and other prominent civil society characters. The chief justice is elected by the council members. Time limit is set to membership in the council. The Steering Committee for the Development of the Justice Sector and civil society organizations recommended that public figures from outside the judiciary and the executive authority be asked to join the SJC. Examples from the international community point to a variety of models for similar bodies as long as they enjoy independence and are able to function effectively. But a trend is evolving in which a mixed membership is preferred.<sup>12</sup>

One of the faults of this option is that given the current political polarization in Palestinian politics and society, it might potentially allow for political interference in the process of selecting the non-judicial members of the council. By contrast, it creates the right balance between the need for to guard against external interference and the need to avoid the negative consequences of the consolidation of power into judicial hands. It also allows for the incorporation of professionals from sectors other than law, such as experts in administration, financial affairs, and social sciences. It allows fair representation to all levels of the judicial institution and show respect for its pluralism. It also removes the concern about potential conflict of interest in the jurisdiction of the chief justice and reduces the concern about potential biases in favor of judges.

## Conclusion

A mixed judicial council, as proposed in the third option above, provides greater legitimacy to the SJC and reduces the concerns about the concentration of power into the hands of one judicial body or potential biases and ensures fair disciplinary procedures while facilitating democratic oversight over the justice sector. However, other measures should also be taken protect the independence of the judiciary. These include the following:

- 1) Those constitutional and legal measures that criminalize interference in the affairs in the judiciary should be activated and implemented and, if not sufficient, should be augmented by additional amendments to the Law of the Judiciary.
- 2) The selection of the SJC members should be done in a public and transparent manner to remove any suspicion of political interference and reduce any potential biases in favor of the members of the judicial profession.
- 3) Measures that promote gender equality should be sought and any discrimination eliminated.
- 4) Steps should be taken to ensure that the election of the non-judicial members of the SJC, as in the third option above, is not placed in the hands of the executive and that non-political bodies are entrusted with overseeing such process.
- 5) It goes without saying that it is the responsibility of the executive to make sure that the judiciary has access to sufficient human and material resources to allow it to carry out its mission in a satisfactory manner.

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<sup>12</sup> See, UN report of the Special Rapporteur on the Independence of Judges and lawyers: <https://independence-judges-lawyers.org/reports/report-on-judicial-councils/>

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