



POLICY BRIEF

Be independent and do as you're told! Closing space for judges in Palestine

Mikael Ekman

ILAC Policy Brief 3 | October 2019

The Palestinian court system is subjected to rapid changes that risk causing irreparable damage to the rule of law and access to justice. An independent judiciary is one of the three branches of government and an essential element to successful state building, including in Palestine. Yet, the current flurry of reforms put forward by the government seems to go the opposite way, undermining separation of powers by solidifying executive control over the judiciary and narrowing personal independence of judges. All the while, international partners and donor countries, who are officially committed to a Palestinian state as part of a peace settlement, have failed to extract the necessary political commitment from Palestinian counterparts to genuine rule of law reform that would bring them in line with binding obligations under international human rights treaties.



**International
Legal Assistance
Consortium**

A change in judicial culture

The Israeli occupation is by far the number one obstacle to access to justice for Palestinians. This paper does not look at the myriad of ways in which the occupation inhibits rule of law and effective Palestinian institutions. Judges, prosecutors and lawyers face a number of challenges that can be addressed by the Palestinians themselves. Indeed, building strong, independent justice institutions that are capable of resisting outside influences probably represents one of the most powerful tools available to Palestine to counter the effects of occupation.

Rapid changes to the Palestinian court system risk causing irreparable damage to the rule of law and access to justice. The Palestinian justice sector has been in crisis for several years. Division between the West Bank and Gaza weakens the court system and has become an obstacle for Palestinians trying to access their human rights. Lack of political will has contributed to failing internal accountability mechanisms and deteriorating institutional quality within the courts. All this has had consequences for Palestinians' access to justice.

On 15 July 2019, Palestinian institutions witnessed a fundamental shift in the balance of power, when Palestinian President Mahmoud Abbas promulgated two laws by decree (a form of emergency laws with the force of law pending the approval of a future elected parliament) with sweeping reforms of the judiciary, effectively bringing it fully under the control of the executive branch of government.

According to the official Palestinian news agency WAFA, the decrees were issued in response to deteriorating public confidence in the performance of the judiciary, unprecedented backlog of cases before the courts and the failure of the High Judicial Council to put a stop to the deterioration in the judiciary.¹ The decrees, which overturned key provisions in the 2002 Judicial Authority Law, were widely criticised for violating Palestinian law. They have since been followed by further decrees and regulations and even tailored decrees targeting specific judges for removal without due process.

Key Points

- ¶ The current reform process of the Palestinian judiciary is not consistent with either Palestinian or international law.
- ¶ There is no system for genuine evaluation and validation of judges and no clarity in why some judges were removed and others not.
- ¶ There is a real risk that the reforms could establish a new culture in the judiciary where judges view the executive as their superiors.
- ¶ Choices made in the current reform process will have vast impact on separation of powers in Palestine for the foreseeable future.

The combined effect is to alter the balance of power between the judiciary and the executive as well as within the judiciary. The deepening crisis means that there is a real risk that the reforms could establish a new judicial culture in Palestine, where judges do not feel free to decide on cases according to their own conscience, and even view the executive as their superiors. In addition, the decrees will not have any effect in Gaza, furthering the divide between the two systems.

Where did all the judges go?

The recent move by the Palestinian President represents a dramatic shift in the balance of power. The first of the decrees (Decree No. 16, 2019) included provisions to lower the retirement age of judges to 60, thereby forcing 52 out of Palestine's approximately 200 judges out of office with immediate effect. Among the judges forced to retire were all 35 judges at the Supreme Court. This was recently overturned by the Palestinian Constitutional Court (PCC) on the grounds that it violated the Basic Law.

In response to the PCC judgement, another decree was issued to force 19 of the judges concerned into early retirement, this time singled out by name rather than by age. Some of the judges were said to have been retired for incompetence and others for harming the reputation of the judiciary through statements they had made to the public. These reasons were not publicly communicated, nor which reason applied to which judge, and no investigation or due process was put in place to explain the selection of these specific judges. This process completely ignored the detailed provisions set out in the original Judicial Authority Law from 2002 for the process that must be followed for each individual judge before dismissal, and which must be followed according to Article 99(2) of the Basic Law.

The result is that both legislative and judicial authority in the West Bank now derive directly from the office of the President, effectively putting an end to separation of powers in Palestine.

With the second of the two initial decrees (Decree No. 17, 2019), the President dissolved the High Judicial Council, a body charged with managing the affairs of the judiciary and protecting its independence. Instead, the Council has been replaced with a hand-picked Transitional Council that is given one year to restructure the judicial authority as a whole. Its powers include the authority to dismiss, force into retirement, or transfer judges to other positions as well as proposing new legislation as it sees fit. It will also be responsible for restructuring the High Judicial Council.

These decree laws fundamentally change the nature of the Palestinian court system. Moreover, legislation by decree shifts the regulatory framework of the judiciary from the Basic Law and the Judicial Authority Law, which was enacted by the Palestinian Legislative Council (the PLC was the now dissolved Palestinian parliament), to direct rule by the President. Rule by decree has become the norm after the PLC ceased to function in 2007 and has also been used to establish a Palestinian Constitutional Court outside the framework of the regular judicial authority.

The PCC, which itself has been accused of being established in violation of the constitution,² has in turn issued a number of controversial decisions furthering the powers of the executive. Notably, it has previously taken steps to limit the powers of the already defunct PLC, including by lifting the immunity of PLC members in November 2016 and even dissolving it completely in December 2018. In its recent decision to uphold Decree No. 17, it has effectively affirmed the right of the President to abolish the High Judicial Council and institute a Transitional Council to control the judiciary. The combined result of these two processes is that both legislative and judicial authority in the West Bank now derive directly from the office of the President, effectively putting an end to separation of powers in Palestine.

An uneven struggle

The events unfolding in Palestine is the same power struggle that is taking place in many parts of the world. In numerous countries, the executive is expanding its reach at the expense of parliaments, civil society and the courts. Increasingly, it is the executive that comes out winning.³

In the absence of democratic elections, some of the fundamental mechanisms that would normally work as incentives for the executive to respect the independence of the judiciary are not there. Simply put: if there are no elections, the government does not need a strong judiciary to protect it in the future when the opposition is in power. Instead, upholding the separation of powers between the Palestinian executive and the judiciary has had to rely on softer forces such as civil society lobbying and monitoring, and international pressure, appealing to the PA's desire for democratic legitimacy. A crucial factor here becomes the level of perceived support for the courts among the public.

This trust largely depends on their ability to uphold rights and guarantees through faithful application of the law. That in turn requires independence.

Among the core state institutions, the judiciary has the weakest democratic mandate in that it is not directly accountable to the people. Rather, the judiciary's accountability to society is made operative first and foremost by ensuring that judges are accountable to the law. That makes it particularly dependent on public trust and support in order to maintain its independence. This trust largely depends on their ability to uphold rights and guarantees through faithful application of the law. That in turn requires independence.⁴

In Palestine, the notion that the public lacks trust in the judiciary is held as a near universal truth. As was mentioned above, it is one of the main reasons cited by the Palestinian Government for the recent reforms. However, in the latest Rule of Law and Access to Justice Survey by the Palestinian Central Bureau of Statistics (PCBS), it looks like Palestinians may have greater trust in their institutions than many have assumed.⁵ Among Palestinians in the West Bank who indicated that they had interacted with the regular courts during the survey period, 65.1% of women and 53% of men said that they were satisfied or very satisfied with the court's performance in their case. When instead asked if they had confidence in various justice institutions, 58.1% of people in the West Bank expressed confidence in the judiciary and 60.7% in the

courts. These figures compare well to those of other justice sector institutions such as the Palestinian Civil Police (PCP) (50,4% women and 56,9% men in the West Bank were satisfied and 65.6% confident). Presidential security and military intelligence show the lowest levels of satisfaction among Palestinians, with respectively 39.7% and 38.1%. Overall the formal justice sector enjoys high level of confidence as 84.6% of women and 84.9% of men reported that they believe courts are the sole legitimate authority through which disputes are settled.

Nevertheless, the idea that the Palestinian public does not trust its judiciary clearly has some traction. Indeed, Palestinian judges themselves have long felt that judicial independence is met with indifference or even outright hostility outside the judiciary itself. This, they say, applies to both the Palestinian public, and international organisations and donor countries.

Judges have traditionally been constrained from directly communicating to the public in their professional capacity. The judges blamed this restriction for contributing to the lack of trust, as it hindered their ability to explain their decisions or defend themselves against criticism. With the introduction of the transitional council, the restrictions to communicate have been tightened. Anyone communicating directly through press, social media or other means face the risk of being forced into retirement. This appears to include communicating directly with international

How judges can build support

Many judges and human rights organisations believe that the executive will likely persist in its attempts to gain control over the courts. Therefore, the argument goes, the judiciary needs to build support elsewhere in order to survive as an independent institution. Such support would have to be based on a more genuine understanding of the court system than has been the case in the past, when they say that talk of judicial reform from donors has failed to translate into real and sustainable change.

Palestinian judges describe a negative cycle, where lack of public trust in the judiciary makes them more vulnerable to interference by the executive.

Yet judges have struggled to build the necessary trust and respect among key actors for this support to take root. Instead, lack of trust and frustration over a judiciary that falls short of its duties has led to growing tension with groups that should otherwise be natural allies for positive reform. One example is the tension between the Palestinian judiciary and some civil society organisations. These organisations, who themselves suffer from a closing space from the executive, often do not speak up in support of the idea of judicial independence.

Palestinian judges describe a negative cycle, where lack of public trust in the judiciary makes them more vulnerable to interference by the executive. The interference in turn renders them less capable of standing up to the executive in protection of human rights, which further contributes to deteriorating public support. The results of the Rule of Law and Access to Justice Survey are consistent with this narrative.

Although confidence and satisfaction with the regular courts is not as low as one might expect, the survey does note a slight drop in the share of the respondents who have confidence that the regular courts contribute to rule of law in Palestine compared to the previous survey (down from 62.9% in 2015 to 59.9% in 2018). This should probably be seen in light of a broader trend of decline in Palestinian public confidence in traditional Palestinian governance structures.

It is also not clear that the drop is due primarily to factors that are within the control of the judiciary itself. According to the survey, the number of people who have confidence that the judiciary is independent from any external influences has dropped 36.8% to 30.6%. This was the third largest shift among the indicators that were included for how the judiciary is perceived, behind a 19.2 percentage point increase in persons who believed that resorting to courts is unaffordable and a 12.2 percentage point increase in persons who thought that courts have competent judges to deal with their case. This raises the question of how confidence in the judiciary can be falling when more people perceive the judges as competent? It seems likely that external interference in the work of the judiciary (real or perceived) and lack of understanding and genuine respect for the separation of powers on the part of the executive are two of the main factors negatively affecting the public's trust in the judiciary.

With this in mind, the measures introduced by the Palestinian Government, and the irregular process by which this happened, risk exacerbating the very problems that they are meant to address.

The reforms will reduce judicial independence

In spite of the recent decision by the PCC to rescind Decree No. 16, the issuance of the decrees will have a significant negative effect for judicial independence on both institutional and individual levels. Conceptually, it is difficult to see how presidential decrees can ever be an effective instrument to ensure that judges are independent of the very president that issues them. Ultimately, until there is a new election and a new Legislative Council in place, any decree is only worth as much as the president wants it to be. It is in his power to change it at any time.

This willingness to contravene higher norms will inevitably create doubt in the minds of judges as to why the government should hesitate to meddle in case of a future conflict with the judiciary.

As such, presidential decrees can never provide the guarantees that the judiciary needs to be able to fulfil its constitutional role to exercise effective and independent scrutiny of the work of the executive. All the more so, as the present decrees appear to have been issued in conflict with Palestinian laws and the Basic Law (in the case of Decree No. 16, this was confirmed by the PCC). This willingness to contravene higher norms will inevitably create doubt in the minds of judges as to why the government should hesitate to meddle with less powerful norms such as decrees in case of a future conflict with the judiciary.

On the personal level, the reforms will certainly have consequences for how individual judges behave and view their own role in relation to the government. Already before the decrees were adopted, judges expressed serious concern at the proposal to reduce the retirement age, which they perceived as a targeted effort to remove particular judges who do not do the bidding of the executive. According to judges, this fits with a pattern of attempts by the executive to bring the judiciary under its control, such as repeated failures to handle appointments of new chief justices in accordance with the law. One egregious example was in 2016, when then Chief Justice Sami Sarsour revealed that he had been forced to sign an undated resignation letter before he took office, a letter which was then used to force him to resign when he refused to follow the bidding of the government.⁶

When the Presidential committee charged with developing proposals for judicial reform made its recommendations, Judges reacted strongly, arguing that the real reason for the proposals was not to actually reform the judiciary, but rather to scare and intimidate judges if their actions do not fit with the political or personal interests of the executive. The adoption of the decrees without any serious effort to alleviate these concerns has done little to counter their argument. Instead, the decision by the Transitional Council to single out specific uncooperative judges for forced early retirement can only have made matters worse.

What happens now matters

Whatever the intention, the overall effect of the presidential decrees is to place the courts and the judiciary in the West Bank as subject to the presidential power. This is a familiar model from many authoritarian states in the Middle East and North Africa, but it is one that Palestinians have previously proudly rejected. The true concern for Palestinians should be what this shift is likely to do to the way in which judges perceive their own role in society. There is a very real risk that with time, judges could come to view themselves as civil servants in the Palestinian Authority like any other. Once such a change in mentality takes hold, it can be extremely difficult to break. In Tunisia, this was part of the legacy of the dictatorship under former president Ben Ali. There, even in the context of revolution and strong political commitment to democratic reforms, judges struggle to rebuild trust in the courts with both the public and with politicians.⁷

The Transitional Council has been given a lot of freedom to shape the process of reform. How it chooses to use it will largely determine the future for rule of law and access to justice in Palestine.

Recently, a draft proposal for a new decree has been circulating in Ramallah. This proposed decree would take one step further by imposing permanent presidential control over the judiciary and minimising the scope for judges to use their own judgement in their work. Proposals such as direct and indiscriminate power for the president to appoint the Chief Justice and head of the High Judicial Council directly undermine the Palestinian judiciary as an independent institution. Other provisions in the proposal would in effect reduce the role of the judge to subordinate officers to the head of the HJC. Some disturbing examples are the proposed lengthy probation

periods with reduced job security for new judges, unclear and flexible means for dismissal of judges even after this period, and concentration of power to the head of the council personally, including the power to discipline individual judges.

The Transitional Council has been given a lot of freedom to shape the process of reform. How it chooses to use it will largely determine the future for rule of law and access to justice in Palestine. These decisions are taken now.

Conclusion

Given the importance of what is at stake, it is crucial that all concerned actors come together to find a constructive path forward. Reforms must be developed in a transparent and inclusive process, with clear goals and timelines, that ensures involvement by all Palestinian stakeholders in an inclusive and relevant manner.

At minimum, all reforms must live up to Palestine's international obligations including, in particular the absolute requirement of competence, impartiality and independence as expressed in Article 14 of the International Covenant for Civil and Political Rights, which Palestine has ratified without any reservations.

The international community has invested heavily in rule of law reform and state building programmes in Palestine over the years. These efforts have contributed to building and maintaining a court system that, although suffering from many weaknesses, remains a positive example when compared to many other countries in the region. Donor countries and international actors should engage with Palestinian partners to demand that separation of powers is upheld and that a system for judicial oversight that guarantees protection from undue external interference is finally put in place. The ability of the courts to provide access to justice and enforce Palestine's human rights obligations for its people will be determined here.

Much is at stake. The space for judges must not close.

Policy Recommendations

- ¶ Most urgently, an effective system must be put in place to protect the position of the judge and the integrity of the High Judicial Council from outside interference.
- ¶ Any change to the Judicial obligatory retirement age must not have retroactive effect. Although some of the judges who were forced into early retirement have been allowed back, clear and credible guarantees are needed to rebuild a sense of security of tenure for all judges.
- ¶ Every decision relating to a judge's appointment and career should follow a transparent process and be based on objective criteria.
- ¶ Disciplinary procedures must be designed to guarantee a transparent and predictable process, defining not just the conduct which may lead to removal from office, but also all conduct which may lead to any disciplinary steps or change of status, including for example a move to a different court or area.
- ¶ Disciplinary measures must be proportionate, and judges should always be entitled to appeal disciplinary sanctions rendered against them to a judicial body.

References

1. WAFA news report, 18 July 2019.
2. See e.g. Council of Palestinian Human Rights Organisations statement on 14 December 2016 in response to the decision by the SCC to lift the immunity of members of the Palestinian Legislative Council.
3. See e.g. Consultative Council of European Judges (CCJE), Opinion No. 18 (2015).
4. See e.g. CCJE Opinion No. 18 (2015).
5. Palestinian Central Bureau of Statistics, 2019, Rule of Law and Access to Justice Survey, 2018.
6. Statement by Palestinian human rights institutions and civil society organisations, 24 October 2016.
7. See e.g. ILAC Discussion Paper Judges as Peacebuilders: How justice sector reform can support prevention in transitional settings, in particular section V.C.
8. For more details on the specific international obligations and how to uphold the requirement of judicial independence, see further, regarding the matter of early retirement or removal from office: UN basic principles on the independence of the judiciary, paragraph 12; Universal charter of the Judge (IAJ Central Council, 1999. 2017), Article 2.2, Security of Office section; Council of Europe Committee of Ministers Recommendation No. R (94) 12 on the Independence, Efficiency and Role of Judges, Principle I(2)(a)(ii) and (3) and Principle VI (1) and (2); and regarding matters related to appointments and disciplining judges see: CCJE Opinion No. 1 (2001), paras. 13 and 15, and Opinion No. 21 (2018), para. 30.

About the Author

Mikael Ekman is a Legal Advisor at ILAC.

The views and opinions expressed here do not necessarily reflect the views and opinions of all ILAC members.



**International
Legal Assistance
Consortium**

ILAC Secretariat
Stockholmsvägen 21,
SE-122 62 Enskede, Stockholm, Sweden
Phone: +46 (0)8-545 714 20
info@ilac.se
www.ilacnet.org

About Ilac

ILAC is an international organisation based in Sweden that gathers wide-ranging legal expertise and competencies from around the world to help rebuild justice systems in countries that are in conflict, post conflict, or in transition toward peace and democracy.

Follow us on:

