



Palestine

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INTRODUCTION

This review briefly introduces Palestinian constitutional changes that occurred in 2019, building on last year's review of 2018. It refracts significant developments through a liberal and democratizing lens and draws on Supreme Constitutional Court (SCC) rulings to provide new insight into key constitutional developments.

These developments are mainly connected to the SCC ruling of 22 December 2018, which was previously discussed in the 2018 Palestine report.¹ In applying it, the Palestinian President announced the dissolution of the Palestinian Legislative Council (PLC) and refrained from calling for new elections. This ruling is perhaps the SCC's most controversial and significant to date because it resulted in the dissolution of one of the pillars of Palestinian democracy (albeit one that had not functioned for more than a decade). A further note of controversy is elicited by the fact that dissolution and the actions that should immediately follow it are not directly referenced in the 2003 Basic Law (BL).

The President is still using Article 43 to issue decrees that have the power of laws.² Thus, this report will tackle the statutory developments relying on the constitutional

gap the President uses to do so, especially after the formation of the 18th government in 2019. Then the report will move towards the changes within the judiciary after Decree Laws 16/2019 and 17/2019 that respectively made clear intervention within judiciary independence by creating a Transitional High Judicial Council.

2019 also witnessed an active move towards advancing the discussion forward regarding the 2016 Palestinian Constitution – the latest effort to create a constitution for the State of Palestine. Within this constitutional dialogue, the need for elections and the process for them will be introduced. In addition, a discussion over the status of international treaties will also be analyzed. Finally, the decision made by the SCC relating to the two decree laws of 2019 will be addressed to test if the Court's position was indeed helpful in securing separation of powers or whether it undermined this principle further.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

A. Statutory Developments

Since 2007, Palestine has been ruled by decree. The amended BL means that the

¹ Y Khamis and A Khalil, 'Palestine', in R Albert, D Landau, P Faraguna and S Drugda (eds.), *2018 Global Review of Constitutional Law, I•CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College*, 2019, 224-228.

² Article 43 of the Basic Law states: 'The President of the National Authority shall have the right, in cases of necessity that cannot be delayed, and when the Legislative Council is not in session, to issue decrees that have the power of law. These decrees shall be presented to the Legislative Council in the first session convened after their issuance; otherwise they will cease to have the power of law. If these decrees are presented to the Legislative Council, as mentioned above, but are not approved by the latter, then they shall cease to have the power of law.'

President can, in instances of necessity and subject to the meeting of other conditions, issue decrees that have the force of laws. The absence of a functioning PLC has reinforced the emergence of different governing entities in the West Bank and Gaza Strip.

Major statutory amendments that were introduced in 2019 in the form of decree laws will now be discussed. It should be first recognized that the President does not use decree laws as a substitute for the PLC's *law making* power only; it is actually a substitute for the chamber's oversight role, as shown by the fact that the President issues decree laws that bestow confidence on the government he formed! Decree Law 12/2019 was most recently used to express confidence in the government of Mohammad Shtayeh, the current Prime Minister. In normal circumstances, this would instead be provided by the sitting PLC. The existing form of governance, in contrast, is sustained by the *absence* of the PLC and presidential continuity.

Decree Law 7/2019 is the second amendment to Law 3/2006, which established the Supreme Constitutional Court (SCC). Decree Law 19/2017, which concerns the duration of a judge's mandate, was the first amendment made to SCC law. Under the original law, he/she would remain in office until reaching the pensionable age of 70. The amendment then instituted a six-year non-renewable commission. From 2017 onwards, three new judges were/will be added to the Court's assembly on a biannual basis (2017, 2019 and 2021). In 2022, the mandate of the first group of judges, who have been in office since 2016, will expire. The other appointed judges will then continue with their work, which is mainly focused on the constitutional review of laws and bylaws.

The limitation of the mandate of SCC judges can be considered a positive step towards the development of an independent judiciary because it produces judges who are less dependent on the executive. The SCC first appointed judges and then proceeded to create the Court's General Assembly, which nominates future judges through a majority vote. After the outcome of this vote is confirmed, the president of the Court will then submit the

names to the President for his/her approval. Although the Court is inevitably subject to the influence of the executive (not least in its very establishment), there are certain procedures in SCC law that permit independence, and they need to be nurtured and cultivated. The President also issued Decree Laws 16/2019 and 17/2019, which directly affected the judiciary. Decree Law 16/2019 reduced judges' pension age from 70 to 60, which meant that many judges (mainly from the high court) were no longer eligible for their roles. Decree Law 17/2019 dissolved the High Judicial Council (HJC), and nominated nine judges to the new transitional HJC (THJC), which had a one-year mandate that could only be extended by six months. Both of these laws were controversial because they were argued to further enhance executive control over the judiciary rather than reform the justice system. The SCC reviewed both decrees before abolishing Decree Law 16/2019 and maintaining 17/2019. In 2019, decree laws were also used to ratify treaties. This trend was first observed in the preceding year, when laws of this kind were mostly used to ratify bilateral treaties and treaties related to the Arab League. Examples included the Arab Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances (Decree Law 5/2019) and a temporary commercial agreement with the UK and Northern Ireland (Decree Law 6/2016).

The BL does not refer to the place of international treaties in the Palestinian constitutional system, nor does it suggest how treaties should be ratified. The SCC attempted to address this gap in constitutional law by issuing two rulings in 2017 and 2018. This meant that the entry of treaties into force became more complex – treaties are required to be published in the Palestine *Official Gazette* and go through the same processes required for the 'making' of any law. Associated complications have prevented core human rights from being ratified and humanitarian treaties from becoming published in the *Official Gazette*, with the consequence that their enforcement in the Palestinian legal system remains open to question.

Few decree law amendments have helped

to clarify Palestinian human rights obligations. Decree Law 21/2019, for example, establishes 18 as the minimum marriage age for all religious denominations in Palestine, although it does permit some exceptions. It refers to all personal status laws that apply to Muslims (e.g., Law 61/1976, which applies in the West Bank; and Family Law 1954, order 303, which applies in the Gaza Strip) that will be enforced by Sharia courts. It also refers to Christian personal status laws that apply to all recognized Christian denominations, which will be enforced by Christian religious courts.

Decree Law 22/2019, which enables a single 'guardian' woman to open a bank account on behalf of a minor, is a further example of change. Palestinian law was previously discriminatory in this regard as it only recognized the right of single male 'guardians' to do this. Palestine also now honors obligations that were established by the agreement between the PLO and the Holy See. Decree Law 10/2019, for example, establishes that 'found' orphan babies can be registered as Christian if the parent leaves certain signs that indicate his/her wishes (see Article 13). Although it was previously theoretically possible that a 'lost' baby could be registered as Christian, the convolutions of the registration process made this very unlikely. All baby orphans that were previously found were therefore designated as Muslim, irrespective of surrounding signs.

The President suspended Social Security (Decree) Law 19/2016 by issuing Decree Law 4/2019. The suspended decree law relates to a fundamental economic right that is entrenched in the BL, and its passage caused popular unrest as thousands descended on the streets to protest against it. Organized sit-ins and other forms of passive resistance threatened to push the whole political and legal system to the point of collapse.

B. Constitutional Developments

The previous report described how, in December 2018, the SCC officially authorized the dissolution of the PLC and invited the President to call legislative elections within six months. Fatah/PA and Hamas nego-

tiations that followed the dissolution of the council also entertained the possibility that presidential elections might be held. It was agreed that the legislative election could precede presidential elections, although it was understood that this would be within a timeframe established by the same presidential decree. Both Hamas and Fatah made it clear that their support for elections would depend on the meeting of certain key conditions.³

At the time of this writing, no ‘election’ decree has been issued. East Jerusalem is one of the main outstanding obstacles – on 10 December 2019, President Abbas informed the Israeli government of his wish to hold elections and requested that Palestinian East Jerusalemites be permitted to participate, as they had in 1996 and 2005/6.⁴

Israel’s reluctance in this regard creates a clear problem for Fatah and Hamas. If the elections went ahead without East Jerusalemite participation, it could be construed as a de facto renunciation of the Palestinian claim to this part of the city.⁵ Mr. Abbas’s reluctance to push this question has called his commitment into question,⁶ although his reticence was perhaps welcomed by an international community that is reluctant to pressurize Israel on this and other points.

The debate over the implementation of the international Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) also highlights a number of important issues. On 1 April 2014, the State of Palestine acceded to CEDAW without expressing any reservations. The subse-

quent publication of Decree Law 21/2019, which established an age limit for marriage (18 years of age), gave rise to heated debates. During a public event in Hebron, the National Liberation ‘party’ (a fundamentalist Salafi group) and some tribal family representatives voiced their objections to the decree and called on the National Authority to act in accordance with Sharia.

The decree law was consistent with international human rights treaties, and here it is instructive to recall the SCC ruling in Case 4/2017. The Court observed:

International conventions take precedence and acquire superior force to domestic legislation, especially after it is ratified and published; and it has to go through the formal procedures of any domestic law that applies to individuals and authorities, being attentive to the contours of national, religious and cultural identity of the Palestinian Arab people.⁷

This ruling affected the implementation of CEDAW by clarifying that ratification alone would not impose a binding obligation on the domestic legal system. Such an obligation would only exist after publication in the *Official Gazette*. The ruling also suggests that courts will not be obliged to apply provisions that contradict Sharia, and which are therefore contrary to Palestinian religious identity, even after publication.

The State of Palestine, in acting in accordance with its obligations, submitted its of-

ficial report to the Committee on the Elimination of Discrimination against Women on 10 March 2017. The report, which was prepared by a government committee after consultation with civil society institutions, focused on the administrative, judicial and legislative implications of CEDAW provisions, and also situated CEDAW in the wider context of Israel’s continued violations of international law. The report was accompanied by various shadow reports which were prepared by eight human rights and civil society organizations, who worked both individually and collectively.⁸ These shadow reports recognize the need to enforce CEDAW provisions in the domestic legal system, and place particular emphasis on publication in the *Official Gazette*.⁹ The official report was submitted to the CEDAW committee on 11 July 2018; in its concluding observations (which were published on 25 July 2018), the committee expressed its concern that ‘the Convention has not been published in the *Official Gazette* in order to make it applicable in the State party’.

The BL, which was intended to be replaced by the ‘Constitution of the State of Palestine’ (Article 115), does not provide clear answers to most of the constitutional issues and ambiguities that were raised. Although efforts to draft a constitution preceded the United Nations General Assembly’s (UNGA) 2012 recognition of Palestine as a non-member state, UNGA recognition gave a renewed impetus to Palestinian constitutional endeavors, as was shown when the Palestinian National Council (PNC), the legislative arm of the Palestine Liberation Organization (PLO), ap-

³ S Ramahi, ‘Are Palestinian elections going to be held?’, *Middle East Monitor*, December 2019. Accessed January 24, 2020. https://www.memopublishers.com/images/uploads/documents/201912_Are_Palestinian_elections_likely_to_held.pdf

⁴ RA Jalal, ‘Abbas mulls option of postponing Palestinian elections’, *Al-monitor*, January 15, 2020. Accessed January 24, 2020. <https://www.al-monitor.com/pulse/originals/2020/01/palestinian-elections-cancel-abbas-israel-request-jerusalem.html#ixzz6C9fllOVJ>

⁵ RA Jalal, ‘Abbas mulls option of postponing Palestinian elections’, *Al-monitor*, January 15, 2020. Accessed January 24, 2020. <https://www.al-monitor.com/pulse/originals/2020/01/palestinian-elections-cancel-abbas-israel-request-jerusalem.html#ixzz6C9fllOVJ>

⁶ B White, ‘Are Palestinian elections on the horizon?’, *Al Jazeera News*, December 15, 2019. Accessed January 24, 2020. <https://www.aljazeera.com/news/2019/12/palestinian-elections-horizon-191211182354352.html>

⁷ In this decision, ‘domestic legislation’ refers to ordinary legislation. Constitutional Interpretation 5/2017 of 12 March 2018 clarifies the status of international conventions in domestic legislation by observing they are inferior to the (PLO) Declaration of Independence and the Basic Law and superior to various pieces of ordinary domestic legislation.

⁸ The reports are available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=1171&Lang=en

⁹ See, for example, the shadow report by Al-Haq: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PSE/INT_CEDAW_NGO_PSE_31670_E.pdf

pointed a new ‘Constitutional Committee’.¹⁰ The latest draft Constitution was completed in 2016 and it has since been circulated to a limited circle of civil society organizations with the aim of promoting targeted sectoral discussions with human rights, women’s and youth organizations.

In 2019, women’s organizations sought to mobilize popular energies behind an entirely ‘new’ constitution by enhancing women’s political participation. They ultimately agreed that a ‘quota’ of women’s leadership was necessary in order to achieve proper political representation and have sought to achieve this by influencing the future drafting of the 2016 Constitution. The increased participation of women has produced the ratification of engendered articles and growing pressure on the SCC to incorporate a gender-sensitive interpretative method into its rulings. At the time of the writing, however, the Constitution is still in the process of development.¹¹

III. CONSTITUTIONAL CASES

On 27 July 2019, appellants (16 judges) submitted a direct complaint to the SCC that claimed Decree Laws 16/2019 and 17/2019 (published in issue No. 20 of the *Official Gazette*, 16 July 2019) were unconstitutional and should be retracted. The SCC subsequently declared 16/2019 to be unconstitutional on formal and substantive grounds – in the first respect, it observed that the BL (Article 100) establishes a mandatory obligation to consult with the HJC on amendments affecting the judiciary (this did not take place); in the second, it cited Articles 97, 98 and 99 of the BL, which uphold the independence of the judiciary and individual judges. The Court observed that Article 3 of Decree Law 16/2019, which holds that a judge’s service should be terminated when he/she reaches the age of sixty, is tantamount to dismissal

from the judicial function, and noted that this contradicts the provisions of Article 99/2 of the 2003 BL and its amendments. Article 15 of this document also clearly establishes that punishment should be personal, and that such general forced retirement would amount to a collective punishment.

The rights to a fair trial and defense are also enshrined in Article 14 of the BL and are also core principles in international human rights law. While the Court observed that the protection of the judiciary does not mean individual members cannot be punished or dismissed, it noted any such measure should be subject to Judiciary Law 1/2002, which protects members of the judiciary from the unwarranted interference of the executive and the legislative. The Court also referred to Article 43 of the BL, which concerns the President’s use of legislative powers. Its ruling suggested that it held the view that unusual legislative powers should only be used in the circumstances listed in the BL. One way to interpret this is to consider the SCC attempting to indirectly limit the President’s use/s of decree law.

This claim would have been considerably strengthened if the Court had upheld the appellant’s claims vis-à-vis Decree Law 17/2019. The importance of this debate is further underlined by the fact that the THJC, in accordance with its mandate, is now working on a new law that will substantially affect the Judicial Authority Law. However, the Court actually ruled it is constitutional. In doing so, it observed that the judicial council is an administrative institution that does not interfere in the judiciary’s work. The Court cited Articles 39 and 41 of Judicial Authority Law 1/2002, which clearly support this interpretation of the council’s function. On this basis, the Court claimed that its decision did not conflict with the principle of judicial independence. The executive’s nomination of

the THJC did not therefore overstep boundaries that are essential to the rule of law.

The decree could, nonetheless, under a different interpretation, have been viewed as violating judicial independence. This claim could conceivably have been upheld in procedural (the formation of the THJC) and objective (the functioning of the THJC) terms. Both are addressed in Articles 97, 98, 99 and 100 of the BL, which clearly establish that the judiciary must remain independent of the executive.

The question of if Decree Law 17/2019 undermines the BL can be primarily grasped by referring to the BL’s Article 2,¹² which enables the THJC to prepare legislation that could affect laws relating to the judiciary. This problem arises because the THJC has been created by the executive and will presumably rely on it to ensure its continued existence. This brings the independence of the judiciary from the executive into clear question and suggests an overreach of executive influence.

Article 2 (paragraph 3) also refers to the THJC’s right to make recommendations to the President on the delegation, early retirement and dismissal of judges. It cites the Judicial Authority Law but fails to acknowledge that it does not actually contain an early retirement option. This suggests that Decree Law 17/2019 is not only concerned with establishing an administrative body that governs the judiciary but also seeks to amend the Judicial Authority Law. For example, the stipulation that an individual can be removed (if the THJC is of the view that might harm the prestige and status of the judiciary or negatively affect public trust in the judiciary) is clearly an amendment to the law that directly affects the independence of the judiciary. On this basis, we believe the Court should have declared the decree law to be unconstitutional.

¹⁰ The Constitutional Committee is made up of a small group of elected relevant experts who are responsible for amending and drafting the Constitution, and a larger general committee tasked with ratifying the Constitution.

¹¹ S Alsarghali, ‘Palestine and the State of Exception: A Forced Marriage?’, in “States of Exception or Exceptional States: Law, Politics and Giorgio Agamben in the Middle East” (Simon Mabon, Sanaa Alsarghali and Adel Rushaid, eds) (I.B. Tauris, London 2020).

¹² See paragraph four in particular.

The SCC decisions on the two decree laws were supposed to reinstate all judges who had been forced into ‘early’ retirement (60 rather than 70) and maintain the THJC and its powers. The SCC publicly announced its decision on 15 September 2019. On the same day, two presidential decrees were issued on the recommendation of the THJC. They announced the early retirement of 19 judges, 11 of whom were the appellants who originally contested the constitutionality of the two decree laws.

IV. LOOKING AHEAD

The controversial nature of the SCC’s rulings becomes fully apparent when the Court’s interventions are considered in the wider context of the current crisis and unprecedented conflict and polarization within the Palestinian political system. While the establishment and continuation of the THJC could conceivably be justified with reference to the shortcomings of its predecessor, revisions to the age, qualification and quality of judges need to be considered more broadly, not least because they have serious implications for the enjoyment of human rights and fundamental freedoms in Palestine. The PLC’s dissolution and the lack of pressure in support of elections has increased the system’s dependence on the executive and the President in particular.

While Palestine is currently experiencing a ‘double’ transition to statehood and democracy, both outcomes are, however, currently obstructed by the Israeli occupation and the vicissitudes and uncertainties of internal Palestinian politics. In a number of respects, Palestine has entered a state of exception, and the concentration of presidential powers makes it difficult to see when it will end. The (re)establishment of a legislative body does, however, logically precede a government that is held to account and a Palestinian democracy that achieves its full potential.

V. FURTHER READING

S Alsarghali, ‘An (Un) Constitutional Hang-over: An Analysis of the Current Palestinian Basic Law in Light of Palestine’s Constitutional Heritage’, *U. Ill. L. Rev.*, 2017, 497

S Alsarghali, ‘Interpreting Palestine’s Basic Law: A Question of History and Gender Sensitivity,’ in F Biagi, J Frosini & J Mazzone (eds.), *Uses of History in Constitutional Adjudication: Comparative Perspectives*, Brill, forthcoming

A Khalil, ‘Courting Economic and Social Rights in Palestine: Justiciability, Enforceability and the Role of the Supreme Constitutional Court’, *Journal Sharia and Law*, College of Law, U.A.E. University, 2019

Y Khamis and A Khalil, ‘Palestine’, in R Albert, D Landau, P Faraguna and S Drugda (eds.), *2018 Global Review of Constitutional Law, I•CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College*, 2019, 224-228

responsibility to subnational governments spurred intergovernmental conflict and weakened the foundations for federalism, devolution appears to be conferring new forms of legitimacy on government.

New Zealand

In response to the March 15 gun attack on two mosques by a lone far-right extremist, which murdered 51 people and injured another 49, New Zealand had to reconsider a swathe of laws relating to gun ownership and terrorist activity.

Nigeria

Nigeria's democratic trajectory seemed to veer off course in 2019. Pre- and post-election violence and the threat of violence and electoral manipulation marred the 2019 general elections. Also, horizontal accountability mechanisms appeared to weaken during the period. A course correction will be required in the coming years.

North Macedonia

Combatting impunity in high-level corruption cases remained a challenge in 2019 as citizens still awaited the prosecution and punishment of high-level officials involved in wire-tapping scandals from 2015. Fighting corruption is a precondition for the country's EU integration, especially after its historic name change this year.

Norway

Following unlawful administration of social welfare benefits, citizens were wrongfully convicted. The secret police unlawfully collected airline passenger data. Central cases concerned retention of DNA profiles, the Norway-EFTA Court relationship, and children's right to privacy in social media. In the ECtHR, cases about the Norwegian child welfare system dominated.

Palestine

Palestinian President Mahmoud Abbas dissolved the Palestinian Legislative Council but did not call for new elections as per the SCC ruling on the matter. He also replaced the sitting High Judicial Council with a temporary one. This concentration of powers makes it harder to counteract his power/s and ensure accountability in government.

Peru

In 2019, Peru managed to overcome a tough fight between the legislative and the executive, which culminated in the closure of Congress, by constitutional means. Since Peru has a history of overcoming political crises by coup d'états, this cannot be overstated.

Poland

In 2019, the rule of law further deteriorated in Poland, including the undermining of the judiciary's independence. This was possible by applying legal measures that were introduced in previous years. In December, the first chamber of Parliament passed a law allowing the extensive punishment of judges.

Portugal

2019 was a year marked by elections and, subsequently, parliamentary fragmentation, governmental change, and social contestation (with the summoning of several strikes and manifestations by dissatisfied professional sectors). The Constitutional Court dealt with issues such as surrogacy, citizenship, data protection, and paternity proceedings, revisiting some of its previous jurisprudence.

Romania

The most important development of 2019, besides the Constitutional Court's involvement in the political and judicial spheres, was a significant shift in the options of the electorate, manifested in the outcome of three major popular consultations. This led to an unexpected but rather conjunctural

change of parliamentary majority and to the change of Government.

Russia

The Constitutional Court continued a trend of consistent political subordination that dates back to the entry into force of the current Constitution. It has never been an independent actor and does not deal with politically sensitive issues. However, it plays a significant role in the protection of social and economic rights.

Serbia

In June 2019, the Committee on Constitutional and Legislative Issues of the National Assembly accepted the Government's initiative for constitutional changes. However, due to the forthcoming parliamentary elections in spring 2020, it is upon the new legislature to continue and, most likely, finish the procedure.

Singapore

Besides the usual constitutional issues, it was the enactment of the Protection from Online Falsehoods and Manipulation Act that had the strongest constitutional impact in 2019, and beyond. By regulating online falsehoods, the law attempts to balance freedom of speech against the integrity of democracy and other public interests.

Slovakia

In a historic ruling, the Slovak Constitutional Court held that the Constitution contains an implicit material core that cannot be changed through the ordinary amendment process. If an amendment violates a core provision, it will be struck down. The Court's composition changed dramatically in 2019, possibly having implications for the endurance of this ruling.

Slovenia

In 2019, the Constitutional Court rendered several precedential and important decisions, strengthening the protection of