

The Rule of Hamas in Gaza: Reconstruction of Judicial Sector

Hani Albasoos

Faculty of Commerce - Economic and Political Science Department
The Islamic University of Gaza

Abstract: The broad objective of this research is to investigate the impact of the current constitutional crisis in the Palestinian Authority (PA) on the services offered to the public in the Gaza Strip in the judiciary and analyse the policy responses and strategies adopted by the Hamas government to tackle the prevailing state of emergency. This research reviews the empirical experience of the Gaza Government (GG) during the last two years of crisis-management, and deduces some assumptions of Hamas's political and domestic priorities.

This research investigates the progress of the judicial sector in the Gaza Strip, particularly since June 2007. The chapter will, first, give a brief background to the judiciary in Gaza. Second, it addresses the question of to what extent the judiciary has been subject to institutional discontinuity and disruption following the Hamas takeover or to what extent previous practice and norms have been upheld in spite of the crisis. The third part is dealing with how the economic isolation of Gaza has affected the court system, while the fourth part explores how Hamas has coped with the various challenges to its rule in Gaza. Finally, the chapter offers some views on what sort of long-term vision for the judiciary that can be read out of Hamas's performance in power.

حكم حركة حماس في قطاع غزة : إعادة تشكيل مرفق القضاء

ملخص: الهدف العام لهذا البحث هو دراسة تأثير الأزمة الدستورية الحالية في السلطة الفلسطينية على الخدمات المقدمة للجمهور في قطاع غزة في مرفق القضاء وتحليل استجابات السياسات والاستراتيجيات التي اعتمدها الحكومة في غزة لمعالجة الحالة الطارئة السائدة. هذا البحث يستعرض التجربة العملية للحكومة الفلسطينية في غزة خلال العامين الماضيين لإدارة الأزمة، ويقدم بعض الافتراضات السياسية والاجتماعية والقانونية.

هذا البحث يتناول مدى التطور في الخدمات المقدمة من السلطة القضائية في قطاع غزة، وخاصة منذ يونيو 2007. لذلك سيتناول الفصل الأول خلفية موجزة عن القضاء الفلسطيني، خاصة في قطاع غزة. أما الفصل الثاني فيتحدث عن مدى التكامل في عمل المؤسسات العامة ومنها مرفق السلطة القضائية والتي خضعت للتعطيل من خلال استتلاف الموظفين العموميين في أعقاب تولي حركة حماس السلطة في غزة بعد أحداث يونيو 2007. الفصل الثالث من هذا البحث يتولى دراسة كيفية التعامل مع العزلة الاقتصادية المفروضة على قطاع غزة وتأثيرها على عمل المحاكم والقضاة، في حين أن الفصل الرابع يستكشف كيف تعاملت الحكومة في غزة مع التحديات المختلفة. وأما الفصل الأخير فيقدم بعض وجهات النظر لرؤية طويلة الأجل للسلطة القضائية التي يمكن قراءتها من أداء حركة حماس في السلطة.

Introduction:

The broad objective of this research is to investigate the impact of the current constitutional crisis in the Palestinian Authority (PA) on the services offered to the public in the Gaza Strip in the judiciary and analyse the policy responses and strategies adopted by the Hamas government to tackle the prevailing state of emergency. This research reviews the empirical experience of the Gaza Government (GG) during the last two years of crisis-management, and deduces some assumptions of Hamas's political and domestic priorities.

Due to the deficiency of secondary sources and accurate information on the judiciary that was set up following Hamas takeover in Gaza in June 2007, information for this research is gathered by the author who conducted semi-structured qualitative interviews. Three categories of interviewees were chosen: officials of GG, civil servants in judiciary, and courts users. One challenge facing the researcher was the political sensitivity of some of the subjects included in the questionnaire, making some of the respondents to refuse to disclose their names while others declined to answer some of the questions.

This research applies the main research questions of this research project to the judicial sector in Gaza. It investigates the progress of the judicial sector in the Gaza Strip, particularly since June 2007. The research will, first, give a brief background to the judiciary in Gaza. Second, it addresses the question of to what extent the judiciary has been subject to institutional discontinuity and disruption following the Hamas takeover or to what extent previous practice and norms have been upheld in spite of the crisis. The third part is dealing with how the economic isolation of Gaza has affected the court system, while the fourth part explores how Hamas has coped with the various challenges to its rule in Gaza. Finally, the research offers some views on what sort of long-term vision for the judiciary that can be read out of Hamas's performance in power.

Background:

The Palestinian judicial system is a product of the complex, accumulated heritage from different authorities since the time of the Ottoman Empire ruling Palestine, followed by the British Mandate, the Egyptian and Jordanian administrations, the Israeli occupation, and finally the Palestinian Authority.

The judiciary should be an independent authority that makes one among the three authorities according to the Palestinian Basic Law. Following the formation of the Palestinian Authority in 1994, after years of Israeli occupation, the judicial sector was reformed to congregate specific political

The Rule of Hamas in Gaza: Reconstruction of Judicial Sector

realities and political thoughts. According to a Member of the Palestinian Legislative Council, from Hamas Movement in Gaza City¹, the nascent Palestinian Authority, which at the time was completely dominated by the Fatah movement, restructured the judicial sector around factionalism and less professional and competency bases, consequently, produced a lame judiciary which did not live up to the ideal of the courts' independence from the executive power. Court judgments were criticized for being based on nepotism and political factionalism². Such assumptions were the view of many citizens and observers and presented as a sort of common criticism far beyond the circle of Hamas supporters.

Some observers believe the Palestinian Authority and its security forces failed to carry out their responsibilities towards the protection of judges and the execution of judicial decisions. Criminal and civil lawsuits remained in courts for years without a resolution, reflecting the weakness of this sector. Consequently, the judiciary was not effective in general.³

It is believed that the previous judiciary was not perceived as neutral by many people as it was set up by and with Fatah loyalists. The system of "security clearance" that was practiced within the Palestinian Authority as a precondition for employment in the public sector targeted largely Hamas supporters and thus added to the widespread suspicion among the latter against the judicial institutions of the PA. This alleged bias was from the outset a source of tension between the judiciary on the one hand and the Hamas government on the other, setting the stage for the strained relationship between the two following the takeover by Hamas. The victory of Hamas in the 2006 parliamentary elections marked the end of the decades-long monopoly of Fatah in Palestinian politics with repercussions also for the judiciary. The practice of factional appointments in the judiciary, and the applied "security clearance" concept came under pressure with Hamas dominating both the legislative branch with its majority in the PLC and the executive power of the government.[REPETITION]⁴ However, as Fatah remained in control of the presidency, represented by Mahmoud Abbas, the ideological differences between the two parties

¹ S. A. *PLC Member from Hamas*. He preferred to be anonymous in name. Interview was conducted on 15-21 November 2009.

² S. A. *PLC Member from Hamas*.

³ A. D. *Researcher in Legal Affairs*: Director of the Office of the training program for judges and prosecutors in Palestine - the Gaza branch (1998-2001). Interview was conducted on 15-21 November 2009.

⁴ Hisham Abu Nada, *Judge at Gaza Conciliation Court*. Interview was conducted on 15-21 November 2009.

eventually resulted in a conflict over jurisdictions, including conflicting interpretations of the Palestinian Basic Law provisions. That in all produced deep controversies that remained unsolved, leaving many issues suspended. The tenth Palestinian government formed by Hamas with Ismail Haniyeh as prime minister in March 2006 was unable to practice its jurisdictions. Ministers from Hamas were powerless to perform their authority in their ministries because employees were following political directions from the President rather than the Ministers. In an attempt to put an end to the political and military clashes between Hamas and Fateh, the both parties agreed to establish a National Unity Government (NUG) which was inaugurated in March 2007, with Haniyeh taking a second term as prime minister. However, even this unity government failed to assert its authority on the ground. The Fatah-loyal security forces continued to ignore their duty to report to the minister of interior, who resigned after two months in office in protest against the continued security anarchy.⁵ This eventually led to the unexpected events of 14th June 2007, the Hamas military takeover⁶ of the Gaza Strip⁷. This situation resulted in two separate Palestinian governments in Gaza and the West Bank of which both claimed to represent the legal authority in the Palestinian territories.⁸

⁵ "PA Palestinian Minister Quits, as Factions Battle On," New York Times, 15 May, 2007. http://www.nytimes.com/2007/05/15/world/middleeast/15mideast.html?_r=1&pagewanted=print accessed 4 February 2010.

⁶ *Captain in the Police* Unit stationed in the Main Gaza Court. He preferred to be anonymous. Interview was conducted on 15-21 November 2009. He stated that "I had to stay at home from the beginning of the clashes. This is because I did not want to confront my fellow brothers in other political parties in Gaza. It was a very difficult time for all of us. I thought this was a temporary situation and will not last for a long time, and reconciliation will take place very soon. But, this situation lasted for longer than what we expected."

⁷ S. A. PLC Member from Hamas; H. M., *Director of Ratifications and Documentation at the Ministry of Justice*, Gaza Government. Interview was conducted on 15-21 November 2009.

⁸ There were many ideological and methodological problems in the relationship between Hamas and Fatah, where Palestinian security services, associated primarily with Fateh movement, adopted a non-compliance strategy in dealing with orders issued by the Minister of the Justice. This necessitated from the Minister to establish a new security force "the executive force" to control the security situation, to promote law and order, and to preserve the prestige of the government with its people. Members of this force were mostly Hamas affiliated or supporters. Although siege and economic blockade have been tightened and are relentless, Hamas has succeeded in moving forward, by adapting to these circumstances and difficulties. It has restored law and order and achieved cessation to the security chaos, which prevailed before the arrival of Hamas to authority.

The Rule of Hamas in Gaza: Reconstruction of Judicial Sector

Institutional Continuity or Disruption:

Disastrous long-term implications for the judicial sector followed the events of 14th June 2007, as employees of the Palestinian Authority went on strike. The first group to strike was the security forces in Gaza Strip. Almost 95% of security and police officers in Gaza went on a general strike refusing to serve in police stations.⁹ The officers feared that their salaries and pensions, which they received from the Ramallah Government (RG), would be terminated as the RG threatened to do.¹⁰ The Gaza Government (GG) responded to this threat by offering to pay their salaries. However, adhering to the strike was not always enough to secure the continued salary. As a captain in the police said, “Frankly, we were confused about the situation and unwilling to lose our salaries and pension, which was guaranteed by the RG. I have been working in the Palestinian Police from 1999. Despite this, my salary stopped in February 2008 because I was charged of supporting Hamas. I was lately employed by the GG, and was appointed in the Police Unit in the central Gaza Court.”¹¹

As a result, the government had to come up with a new security apparatus to keep control of the security in the Strip. The Gaza Government began employing security and police officers according to its legal mandate to appoint new employees for security services to fill the void of the former employees who refused to work with it.

Attorney General and Judges brake with Gaza Government

However, the Attorney General, prosecutors, judges, and civil servants at Gaza courts refused to deal with the new security force (the Executive Force). As the judges were ordered by the West Bank Government to deal with civil lawsuit and not the criminal complaints, the situation became precarious within the judiciary.¹² This pronouncement apparently allowed criminals to act without prosecution and without punishment. The Attorney General in Ramallah defended the decision by arguing that dealing with criminal cases would imply cooperation with the Executive Force of the GG, which the RG considered illegal.¹³ The GG claimed, however, that the

⁹ Captain in the Police

¹⁰ Ahmad al-Mughanni, *Attorney General, Ramallah*, in an interview (*with Are Hovdenak on behalf of the researcher of this academic article*) on 23.11.2009, said: “one of the reasons why staff members decided not to go back to work because it is against the law and because they would lose all the years of services (pension) and it would be penalties against them from the Palestinian Authority.”

¹¹ Captain in the Police

¹² S. A. PLC Member

¹³ Attorney General Ahmad al-Mughanni, PRIO interview, Ramallah, November 2009.

Ministry of Justice is administratively authorised according to the Palestinian Basic Law to oversee the necessities and functionality of courts without interference from other institutions. The Minister of Justice in the GG ordered the Attorney General to cooperate with other departments in the government and the police force. This order was declined by the Attorney General and public prosecutors, creating a major obstacle for the function of the judicial sector.¹⁴

All cases in which the Palestinian Authority was represented by the Attorney General were suspended due to the termination of the work of the Attorney General and his assistants. This includes criminal cases and cases before the Court of Appeal that have the Palestinian Authority as a party. In addition to the suspension of enforcement mechanisms due to the decision of the President of the High Judicial Council to suspend the execution of courts judgments where police enforcement was required.¹⁵

Due to his refusal to comply with orders from the GG the Attorney General was suspended from his position by the Minister of Justice in Gaza. In response, all staff members working under the Attorney General's command conducted a simultaneous collective walkout. The decision paralysed Gaza's already dysfunctional justice system. In the wake of the takeover, Hamas officers raided the office of Attorney General Ahmad al-Mughanni who was detained for few hours by the Executive Forces in the operation. According to al-Mughanni, the Executive Forces closed down all the prosecution offices and asked the 72 prosecutors and 140 administrative officers to not go to the offices or try to reopen them. Al-Mughanni, who had continued working in Gaza for one and a half month after the takeover, moved then to Ramallah and all the operations of the prosecution department in Gaza were suspended by the RG.¹⁶

The Supreme Judge of the Islamic Shari'a Court in Palestine, Tayseer al-Tamimi, stated that the religious courts in Gaza, the Supreme Shari'a Court, ruling on family matters and religious affairs, were taken over by the Gaza Government, and his colleagues experienced to be evicted from office by armed men.¹⁷ Hamas tried to convince the religious judges to cooperate

¹⁴ Osama Saed, *Director General of Legal and Vocational Affairs, Ministry of Justice, Gaza Government*. Interview was conducted on 15-21 November 2009.

¹⁵ Ali Abu Gyak, *Deputy Minister, Ministry of Justice, Ramallah*. Interview was conducted by Are Hovdenak in Ramallah on 22.11.2009.

¹⁶ Ahmad al-Mughanni

¹⁷ Tayseer al-Tamimi, *Supreme Judge of Islamic Shari'a Courts in Palestine*,. PRIO interview, Ramallah, 17.11.2009.

The Rule of Hamas in Gaza: Reconstruction of Judicial Sector

with the GG, but only one out of twenty Sharia judges did so, while nineteen refrained from working despite receiving their salaries so far.¹⁸

Reorganising the Judiciary

The GG subsequently appointed a new, acting Attorney General and new public prosecutors replacing those on strike. Thus, the appointments were, according to Ismail Jaber, the new Attorney General, constitutional. However, did not mention the constitutional argument in this regard. The Ministry of Justice has, meticulously, developed innovative infrastructure that would bring the structure of public prosecutors to activation. The same happened to the rest of the judiciary sector. This process began with the appointment of Ismail Jaber as Acting Attorney General on 29th August 2007, responsible for the public prosecution after the dismissal of former Attorney General, Ahmad al-Mughanni. Ismail Jaber said, “My obligation was to restructure the public prosecution department in coordination with the Ministry of Justice. I struggled for three months to persuade judges to deal with the prosecution department. Regrettably, almost all the employees in the judiciary sector declined my orders, especially in criminal cases because they reject the legitimacy of the Hamas Government.”¹⁹

After the approval by the Executive and Legislative Authorities in Gaza of Ismail Jaber as the new the Attorney General, he initiated an employment process to appoint public prosecutors. Certainly the prosecutors are part of the judiciary, but are subordinated and overseen by the Minister of Justice in accordance with the provisions of Article 47 of the Judicial Authority Law. This provision justifies the active involvement by the ministry in this regard, according to Attorney General Jaber.²⁰

When the Acting Attorney General and the new public prosecutors began working to implement law and order in Gaza, the previous judges refused to cooperate with them. Ahmad al-Mughanni believed that the courts were faced with a situation in which they could be involved in criminal cases without acting against the law.²¹ However, according to Osma Saed in the Ministry of Justice, their refusal to cooperate represented a violation to the principle that the judiciary is supposed to be politically independent. This was a result of the order made by the Head of the High Judiciary Council, Issa Abu-Sharar, to all judges barring them from working with the Gaza Attorney General and the Gaza police forces. Dr Nafez Al-

¹⁸ Tayseer al-Tamimi.

¹⁹ Ismail Jaber, *Acting Attorney General in Gaza*. Interview was conducted on 15-21 November 2009.

²⁰ Ismail Jaber

²¹ Ahmad al-Mughanni

Madhoun, Director General of the PLC, stated, “We wished that judges would stay away from political disputes, but due to their political affiliation with previous governments and their politically motivated appointment, they followed orders from the RG to leave their work. Judges, persecutors, and other staff members who refused to work in the judicial sector bear the responsibility and legal consequence and must be questioned before courts for these violations of the law.”²² The GG argued that their attendance in the courts became unnecessary since they refused to work and to function as independent judges without political bias. The GG started to appoint new judges from November 2007, and thus former judges received an order from the RB to remain at home.²³

The abstention of the judges led to a crisis in judiciary that forced the GG to construct swift actions in order to avoid a collapse of the judiciary. The appointed acting Attorney General personally oversaw the selection committee which applied written and oral tests as the foundation of the selection criteria.²⁴ Initially, for about two months, it was hard for candidates to apply for the post of judges due to the precarious political situation in Gaza. Several cases were adjourned because the recently appointed judges were incapable of taking decisions. The first to be functioning was the Reconciliation Court.²⁵ Higher courts were rendered inoperative for few months, some judges were promoted from the Reconciliation Court to the Court of Appeal and then to the High Court of Justice.²⁶

Most appointed judges were practicing lawyers with many years of experience. However, they lacked experience as judges. This constituted one of the challenges to the work of the judiciary. This came as a reaction to the nonattendance of the previous judges and employees which caused a state of chaos and controversy within the judicial sector. Subsequently, public prosecutors and judges were working with diminished difficulties.²⁷ In the process of distributing employment and new positions, Hamas was blamed for practicing favoritism by selecting those judges associated with

²² Dr. Nafez Al-Madhoun, *General Director of the Palestinian Legislative Council (PLC)*. PLC Advisor for many projects and law writing commissions. Interview was conducted on 15-21 November 2009.

²³ Osama Saed

²⁴ Ismail Jaber

²⁵ Dr. Mohammed Al-Nahal, *Legal Adviser to the Minister of Justice* and Head of Shari'a and Law Department at the Islamic University. Interview was conducted on 15-21 November 2009.

²⁶ Ismail Jaber

²⁷ Ismail Jaber

The Rule of Hamas in Gaza: Reconstruction of Judicial Sector

Hamas – thus being attacked for the same malpractice as Hamas supporters for years had blamed on their predecessors from Fatah.²⁸

Fearing a similar fate of those employees being replaced due to refusing to cooperate with the GG, the lawyers' association in January 2008 suspended its strike, paving the way for its members to return to work. By February 2008, Gaza's criminal courts were again functioning. They have since enforced rulings more quickly, and judges apparently have been working longer hours than previously, prompting a lawyer to say that "the courts are working better than before the takeover".²⁹

Performance of the Courts

All departments at the Ministry of Justice and the judicial system are currently fully operating. The new judges under the GG maintain that they are interpreting and applying Palestinian law according to the same standards as the previous judges did.³⁰ Also the Deputy Minister of Justice in Ramallah confirmed that the Gaza Judiciary still uses the original regulations of the PA as the legal basis for their judicial proceedings, although he suggested that new legislation may be in the planning on the part of Hamas.³¹

Some criticised the competence of the new judges while others praised their standards. Hamas supporters and other observers would argue that during the era of Fatah rule, the police would carry out rulings against the poor, not against the rich and powerful and that the corruption was terrible. However, others remained critical: "These courts are Hamas courts not legal ones. They were formed in violation of the law and their judges are breaking the law. Lawyers expressed concern about executive interference, politicisation of the judicial system and the longer-term consequences of separating Gaza's jurisdiction from Ramallah. For many, however, the existence of two rival jurisdictions left Gaza in legal limbo".³²

The new judges and prosecutors encountered obstructions, causing inefficiency in their work. Although the judges were fewer than before, their workload was even heavier. For instance, in the Conciliation Court in Gaza City where eight judges worked before June 2007, there were now only three judges – with an ever increasing number of claims and grievances.³³

²⁸ A. D. Researcher in Legal Affairs

²⁹ International Crisis Group, Middle East Report N°73. Also see Azmi Mashharawi, Lawyer from Gaza. Interview was conducted on 15-21 November 2009.

³⁰ A. D. Researcher in Legal Affairs

³¹ Ali Abu Gyak

³² International Crisis Group, Middle East Report N°73

³³ Hisham Abu Nada

According to Abu Nada, a judge from Gaza, there is a backload of thousands of claims in Gaza courts awaiting adjudication, which have been accumulated over the years. This amplifies the burden on judges and the judiciary as a whole.³⁴ Mashharawi stated that “A judge is handling about fifty claims per day. He should not be dealing with more than ten cases. Consequently, the number of cases affects judge’s performance and hinders effectiveness in the implementation of justice and the execution of law.”

Inexperienced Staff

A key challenge for the Hamas appointed courts is that most judges, prosecutors, and civil servants in the judiciary are inexperienced and lack proper training and guidance. This applies to employees in administrative and execution departments of Gaza courts. A female lawyer argued that the role of women, as lawyers and judges, is partly ignored. Most judges and lawyers are males based on the nature of the Palestinian society where males are favoured. Although judges work with sincerity and dedication, the many hours they are working affect their performance and causes exhaustion.³⁵

Though police officers working in the Executive Judiciary Unit alongside the courts, responsible for decisions’ implementation had no sufficient experience in serving people and could not perform their jobs professionally. According to Dr Mohammed Al-Nahal this problem is said to have recently diminished.³⁶ One of the new judges admit that the court personnel, execution officers, and judges are currently functioning but not equivalent to the regular standard.³⁷

While there is awareness about the need for appropriate training within the judiciary sector, the siege imposed on Gaza represent a major obstacle as it has become almost impossible to bring in international experts to teach courses or to send Palestinian judges abroad to enhance their qualifications.³⁸

Furthermore, the infrastructure of the judicial institutions is far from appropriate.³⁹ The courts building are very old and the basic equipment are inadequate. In the Gaza Conciliation Court, the rooms are incredibly small. Judges find themselves with many criminals, police officers, lawyers, and

³⁴ Azmi Mashharawi, *Lawyer*. Interview was conducted on 15-21 November 2009.

³⁵ E. H. Female *Lawyer* from Gaza City. She preferred to be anonymous. Interview was conducted on 15-21 November 2009.

³⁶ Dr. Mohammed Al-Nahal

³⁷ Hisham Abu Nada

³⁸ Dr. Mohammed Al-Nahal

³⁹ Azmi Mashharawi

The Rule of Hamas in Gaza: Reconstruction of Judicial Sector

trainees in the court rooms that are only 3x3 meters. Judge Hisham Abu Nada stated, “We face difficulty with computers, vey old fashion, we do not have good IT facilities in the court. Occasionally, electricity goes off while I am taking witnesses’ statements using a computer, thus, I may lose written statements and have to acquire it again.” He added, “Sometimes I find myself with criminal sitting alone in the court room and the police officers are not there, because of the lack experience of officers working at courts, where they do not know their duties. It can be dangerous to find yourself alone with criminals.”⁴⁰

The Role of the Palestine Legislative Council

The relationship between Palestinian Legislative Council and the judiciary is based on the Palestinian Basic Law and the separation of power and cooperation between the three branches of authority. The PLC Legal Commission facilitates the work of the judiciary sector. Its recommendations constitute an integrated part of the jurisdiction work.⁴¹ The function of the PLC has been obstructed by various Israeli military actions, including detaining scores of its delegates as well as by physically destroying the PLC building in Gaza. By targeting such institutions Israel is apparently seeking to hamper the legislative and judicial processes among the Palestinians. According to the General Director of the PLC, the PA security forces in the West Bank are also conducting a war against PLC members of Hamas, including the council’s Chairman, as they banned them from attending their offices to perform their duties.⁴² Responding to this problem, the PLC in Gaza has established a system making it possible to ratify PLC decisions via telephone conversations and signed by the PLC Deputy Chairman in Gaza on behalf of the Chairman who is located in the West Bank.

The PLC in Gaza has resorted to holding sessions to enact and improve law in summary procedures in different governmental and public buildings in Gaza. It is established a system implying that PLC members who are prevented from attending a session can authorise another to attend on their behalf. This system has enabled the Gaza PLC to convene and pass legislation, although the assembly gathers as a pure Hamas body because non-Hamas delegates have refrained from participating. On 7th November 2007, the PLC convened for the first time since the takeover as an exclusively Hamas body. Its first act was to cancel the fourteen decrees

⁴⁰ Hisham Abu Nada

⁴¹ Dr. Nafez Al-Madhoun

⁴² Dr. Nafez Al-Madhoun

issued by President Abbas since the takeover. Meeting weekly and only in Gaza, it has passed different bills. For instance, a bill on bankruptcy was the most recently modified piece of law by the PLC in pace with development in commerce. There are fourteen laws issued by the Gaza PLC after the crisis of June 2007, addressing both broad national objectives such as the right to resistance against the occupation, as well as more trivial family matters such as the authorisation for women to use their maiden names in the official registry⁴³ and a Zakat law. On security-related issues the assembly, has passed a bill on the formation of a military tribunal.⁴⁴ The RG disputes such legislative amendments as they are considered unconstitutional. Ziad Abu Amr, an independent PLC member from Gaza who has cooperated with Hamas in the past emphasized that “any legislation has to be signed by the president in order to become valid jurisdiction. As long as the PLC is not functioning, it is the president’s mandate that amounts the power of legislation. Article 43 in the Basic Law says that if the council is unable to work, the president has the power to rule by decrees until the PLC can ratify it. When the PLC meets again, they will review all the decrees by the president.”⁴⁵ Yet, according to the Director General of the PLC, constitutional validity is the responsibility of the Constitutional Court⁴⁶ to make a decision in line with the Basic law and its contextual provisions.⁴⁷

No Contact between Gaza and Ramallah Judiciary

A source at the Gaza court affirmed that there is no coordination between the courts in Gaza and the courts in the West Bank.⁴⁸ The West Bank Government rejects any jurisdiction made in Gaza and impeaches all its provisions⁴⁹, while the Gaza Government, on its part, discards the West Bank jurisdiction for being unconstitutional. There is no collaboration or communication between the Ministry of Justice in Gaza and its counterpart in the West Bank.⁵⁰ Cooperation does not exist between the two entities in any form, not even between public prosecutors from the two territories in

⁴³ International Crisis Group, Middle East Report N°73

⁴⁴ Dr. Nafez Al-Madhoun

⁴⁵ Ziad Abu Amr, *PLC member, independent*. Foreign Minister in National Unity Government 2007. PRIO interview, Ramallah, 21.11.2009.

⁴⁶ This court does not physically exist, except in name.

⁴⁷ Dr. Nafez Al-Madhoun

⁴⁸ *Civil Servant at Gaza Court*. He preferred to be anonymous. Interview was conducted on 15-21 November 2009.

⁴⁹ Ali Abu Gyak

⁵⁰ H. M., Director of Ratifications and Documentation

The Rule of Hamas in Gaza: Reconstruction of Judicial Sector

the judicial follow-up in criminal cases.⁵¹ The geographical separation made the need for contact between the two judicial sectors less imperative.⁵² The physical isolation has in other words forced each of the two constituencies to work independently.⁵³

Historically, the judicial entities in Gaza and the West bank were independently created and inherited from different foreign authorities in occupied Palestine, most notable Egypt for the former and Jordan for the latter. Nonetheless, approximately 95% of the legal system in Gaza and the West Bank have been unified under the Palestinian Authority. The separation has created an impediment in the legal and judiciary systems. There is broad political consensus among the Palestinian factions that the division must stop since it causes a serious political harm to the judiciary as well as to the Palestinian polity as a whole. It is not conventional to assume two different legal systems in occupied Palestine.⁵⁴

Coping with Economic Isolation

The GG has encountered many economic challenges. In addition to the Israeli embargo in place on the Gaza Strip, also the PA in Ramallah has taken several steps to limit Gaza's sources of income. On 25 June 2007 the Emergency Cabinet in the West Bank decided to exempt residents of the Gaza Strip of fees for services rendered by the Palestinian Authority to avert this financial source to fall in the hands of the Gaza Government⁵⁵. Three weeks later, the President of the High Judicial Council called on the judges and chief judges of civilian courts to implement that decision. This decision was considered illegal by the GG and unjustified and thus, the judiciary in Gaza did not pay attention to it.⁵⁶

Furthermore, while financial aid from the international community poured into the accounts of the RG, economic blockade was imposed against the GG and siege forced on Gaza. Hamas and its government have encountered a financial dilemma, where severe restrictions were inflicted on its resources of financial support.

Half Salaries for Gaza Judges

The Gaza government's ability to pay the salaries of its employees, predominantly working in the judicial and security sector, was jeopardised because of the financial crisis. Judges and other judicial staff are

⁵¹ Ismail Jaber

⁵² Osama Saed

⁵³ A. D. Researcher in Legal Affairs

⁵⁴ Dr. Nafez Al-Madhoun

⁵⁵ Dr. Mohammed Al-Nahal

⁵⁶ Dr. Mohammed Al-Nahal

consequently affected by this crisis. Judges, at different courts, used to receive a provisional salary of 5000 NIS a month at the time they were appointed. This situation continued until August 2009. A decision was made by the Prime Minister Haniyeh to raise the salary of judges to 75 percent of the salary paid by previous governments. Salaries have been rewarded according to the previous salary scale stated in the Judicial Authority Act. Thus, because of financial intricacy, salaries were reduced by 25 percent in order to help the GG.⁵⁷ Judges at the Court of Appeal and the High Court of Justice have their salaries increased, meanwhile decreased for judges at Reconciliation Courts to become 4500 NIS a month.⁵⁸ This is not a sufficient amount for a judge living in the Gaza Strip. This payment is considered to be half of judges' salary in previous governments, whose payments were about 10000 NIS a month.⁵⁹ It is further provoking for the current judges to know that their fellow judges, working for the RG receive their salaries while staying at home since June 2007, in the longest political strike in Palestinian history. These circumstances would be an impediment for judges to satisfactorily carry out their duties.⁶⁰

This obstacle in Judges' salaries still unsolved entirely. At first, there was no agreement within the government on a fix salary rate. Though, Judges' salaries were adopted by the salary schedule which is included within the Judiciary Authority Law, none of the judges have received their full salary. The Cabinet suspected the legality of old Regulations, and thus refused to pay full salaries approved by previous governments, since the attached schedule to the law was illegally and unofficially attached in the past and did not receive the approval of the PLC.⁶¹

The Budget of the Judiciary

There is no independent budget for the judicial sector in Gaza. The budget is a part of the general budget of the GG. According to Palestinian law, the judiciary budget is provided by the High Justice Council (which replaced the High Judiciary Council) to the Minister of Justice, who then presents it to the Government.⁶² The Council has to plan, approve, and

⁵⁷ Ismail Jaber

⁵⁸ According to Dr Mohammed Al-Nahal, there is a governmental intention to pay full salary for Judges at the Conciliation Courts according to the law.

⁵⁹ However, the Deputy Minister of Justice in Ramallah, Ali Abu Gyak, claimed that Hamas manages to pay their staff in the judiciary the same salary as before. PRIO interview, Ramallah, November 2009.

⁶⁰ Hisham Abu Nada

⁶¹ Dr. Mohammed Al-Nahal

⁶² Hisham Abu Nada

The Rule of Hamas in Gaza: Reconstruction of Judicial Sector

supervise an independent budget for the judiciary authority. This budget, however, is still dealt with through the Minister of Justice.⁶³ It is not proper for officials in the GG to reveal information on the budget of the government due to the confidentiality of different sources of financial support and expenses of the different governmental departments. Thus, it was hard for the researcher to obtain official figures on this subject. Osama Saed, General Director of the Ministry of Justice said, “Revenues collected by governmental departments, in accordance with the General Budget Law must be submitted directly to the public treasury in the Ministry of Finance. I do not have accurate details of the amount of income or the amount of court fees collected.”

Measures were taken to provide basic public services in judiciary. The GG has established a preliminary system of collecting taxes and fees, providing the government with income. Revenues of ratifications of official documentations go principally to the general revenue and then to the main treasury account. This is subjected to the Palestinian Financial System Law of 2005, according to the articles 24 – 25 – 26 – 27 – 28 – 29.⁶⁴ Judge Hisham Abu Nada said that the courts are a good source of income to the GG: “In one case I delivered to the government 9000 NIS that had been collected as a penalty” he revealed.

Internal fund from courts’ fees and taxes are not sufficient source. Thus, , Hamas as a movement has its own sources of external financial support and fund from Islamic charities Some of which are used for provision of public services in this sector of judiciary to keep it running.

Responses to the Various Challenges:

The Gaza Government has endeavored to solve major problems by a variety of means in order to activate the judicial system. The attempt to restore the criminal justice system proved difficult, and faced constant boycott of previous employees of the Palestinian Authority in prosecution and judiciary.

The GG established the High Justice Council, reactivated the traditional *Sulha* reconciliation committees, appointed an acting Attorney General, new prosecutors and judges, assuming the presidential responsibility in the Palestinian Authority to appoint or replace judges. Some argue that After months of confrontations and a paralysed judiciary, the Head of the of the High Justice Council took over the Supreme Court, confirmed himself supreme justice and ordered that judges follow his instructions. By February

⁶³ Dr. Mohammed Al-Nahal

⁶⁴ H. M., Director of Ratifications and Documentation

2008, the Council had appointed and promoted 24 new judges.⁶⁵ Some of the judges have been promoted from conciliation to higher courts.

Hamas was careful to refer to the provisions of the existing legal system in its moves to reactivate the judiciary. Officials claim that almost all the changes took place within the framework of the Palestinian Basic Law – except the appointment of judges, as they should explicitly be appointed by the President of the Palestinian Authority. However, in Gaza the judges were appointment by the Prime Minister, an arrangement that was justified by reference to the theory of emergency conditions.⁶⁶ Dr. Nafez Al-Madhoun said in this regard, “Essentially, the refusal of the judicial employees to serve the Palestinian people was a chock as this sector should not be abandoned for any reason, but cooperation exists between the PLC and a Judicial Committee to overcome and reconstruct the legal structure of the courts. We made efforts to find solutions to the negative response of former staff of the courts. Sulha Committees were able to solve many disputes and thus we could help Palestinian citizens and urge them to use the court services.”⁶⁷

Sulha – Traditional Conflict Resolution

On 22 July 2007, a police spokesperson in Gaza declared the district attorney’s office would be temporary replaced by the Sulha Committee, a traditional, Islamic arbitration body.⁶⁸ By September 2007, Hamas was running about 30 committees in Gaza which moderately applied Islamic regulations. They were originally a temporary solution to stimulate judiciary.⁶⁹ The Sulha Committees have a great function in resolving disputes, and there is a significant cooperation between them and the judiciary to reducing the burden on the courts.⁷⁰ “Sulha Committees are supportive to judges and prosecutors in conflict resolution.”⁷¹

While the Gaza courts were not functioning, the Sulha Committees replaced the formal judiciary for 2-3 months until new judges could be appointed.⁷² However, Dr. Nafez Al-Madhoun believes that the committees did not replace the judicial sector nor was it working on its behalf. For him, the

⁶⁵ International Crisis Group, Middle East Report N°73

⁶⁶ Dr. Mohammed Al-Nahal

⁶⁷ Dr. Nafez Al-Madhoun

⁶⁸ International Crisis Group, Middle East Report N°71, *Inside Gaza: The Challenge of Clans and Families*, 20 December 2007.

⁶⁹ International Crisis Group, Middle East Report N°73.

⁷⁰ H. M., Director of Ratifications and Documentation

⁷¹ Ismail Jaber

⁷² Ismail Jaber

The Rule of Hamas in Gaza: Reconstruction of Judicial Sector

committees were functioning as an instrument to provide law and order awaiting reorganization of the judicial sector. The committees were established at the time when the police force in Gaza was not responding to grievances and claims made by the public because of political and security reasons.

The Sulha Committees are traditional Palestinian bodies responsible for conflict resolutions within Palestinian society. The legal standards that were applied by the Sulha Committees were norms, customs, traditions, and Islamic values.⁷³ Such bodies existed under the previous Palestinian governments in Gaza for the same purpose. The committees were comprised of specialised and professional persons, such as lawyers, teachers, and community leaders. According to Azmi Mashharawi, the cases that came before them were adjudicated according to Islamic and Palestinian traditions, looking at civil cases and some simple retribution cases. Decisions of the committees, however, were only binding when the parties to a conflict have no objection. These committees now serve as arbitrators to assist judges in simple cases.⁷⁴ These committees are a recently structured version of the traditional Sulha Committees, with more educated and professional members. The establishments of the Sulha Committees were governed by the Arbitration Act. The Palestinian legal system allows for the establishment of arbitration committees outside the scope of the courts. But the procedures set forth in the Arbitration Act have to be followed, respected and with the consent of the conflicted parties. There are claims which do not fall under arbitration such as public order cases. If the arbitration is applied in accordance with legal procedures and its provisions and correctly filed by the right party at the appropriate court, then the claim would be effective.⁷⁵ In contrast, the International Crisis Group reported that “such arbitration judgments were quickly rendered and implemented by Hamas’s own forces. Hamas’s longstanding unofficial alternative to the courts, a system operated under Hamas’s executive authority, eroding any resemblance of judicial independence.”⁷⁶ This argument is unjustified because the function of those committees is considered as a legal form of voluntary arbitration committees in Palestine. Decisions of these committees are only customary. They can be effective and applicable if they are

⁷³ A. D. Researcher in Legal Affairs

⁷⁴ Azmi Mashharawi

⁷⁵ Osama Saed

⁷⁶ Middle East Report N°73

combined with the legal conditions of arbitration and approved by the courts.⁷⁷

Replacing the High Judicial Council

The formation of the High Justice Council by the GG was meant to replace the existing High Judicial Council. The Council sought to bridge the deficit of judges in the criminal courts by appointing conciliation judges to cover also criminal cases. The basic task of the Council is the appointment, supervision and follow-up of the work of judiciary.⁷⁸ The Council was decreed by the Gaza Government following the former judges' walkout, and after the President of Palestinian Authority refrained from appointing judges. (Since the GG is in charge of executing, supervising judgments, and preserving public security and order.)

The Gaza Government founded this Council to proceed with appointing and distributing judges in Gaza Strip. This Council consists of a group of 7-9 members, who reconstructed the judicial entity to fully represent the judicial authority.⁷⁹

It is noteworthy that the decision to form this council was not stipulated in the Palestinian Basic Law, but the GG considered it a necessary step to bring order to Gaza. The provisions of the Basic Law are clear about forming one council, not two. In that sense neither of them is more constitutional than the other.⁸⁰ Ismail Jaber said, "There is a constitutional vacuum that exists in the country where there is no president [as his term expired in January 2009], and there is no Legislative Council exercising its jurisdictions according to principles. But there is a real and effective power on the ground in Gaza which has the right to run any matter according to the law where the facts and constitutional principals in the world give this right in the presence of a constitutional emptiness."⁸¹ It must be noted that the High Justice Council is not supposed to interfere in the judges' tasks and does not have the authority to determine the applicable law as that is considered the mandate of the PLC.

Training and Education

Former Minister of Justice, Dr. Ahmed Shwaidah, initiated the establishment of the Academic Institute for judiciary training and education with the aim of improving the competence of the newly appointed staff in the courts. Judicial, legal, administrative and academic plans were set up

⁷⁷ Dr. Mohammed Al-Nahal

⁷⁸ Dr. Mohammed Al-Nahal

⁷⁹ Osama Saed

⁸⁰ Dr. Mohammed Al-Nahal

⁸¹ Ismail Jaber

The Rule of Hamas in Gaza: Reconstruction of Judicial Sector

and approved by the Legislative Council. Courses were held for some judges to build their judicial capacities more efficiently. Sending judges abroad for training is not an option because of the large number of governmental cases awaiting presence at court by citizens, and because of the traveling problems.⁸² The Academic Institute is functioning under the Ministry of Justice and supervised directly by the Minister. Under the leadership of the acting Attorney General, Ismail Jaber, the academy has set up plans for its activation. Although the war on Gaza interrupted its work, it has later been reactivated.⁸³ However, the Judge Hisham Abu Nada complained that he has not received any training at this institute since its founding. He stated, “Judges have not received training courses, though all of us are in need for such courses. Most judges have experience as lawyers or legal experts but when we are taking on the responsibility as judges, it is something different; we need training.”⁸⁴ Al-Madhoun stressed that the Academic Institute is indeed functioning and that he has delivered training to judges there. The institute was inactive for a period because it had to relocate after it was shelled during the War on Gaza.⁸⁵

Increased Workload after Takeover

Significantly, the numbers of complaints, criminal and civil cases, in courts compared to pre-crisis status has greatly increased. According to Hisham Abu Nada, the number of civil cases in 2009 (until November) was 1300, compared to 200 in 2005. In addition come the criminal cases which are even more than this number. This may be interpreted as an indication that people nowadays trust the judiciary system more than previously.⁸⁶ This explanation was confirmed by several interviewees who expressed confidence in the execution of cases in the courts. For instance, a lawsuit of a land dispute could in the past take more than ten years to be settled in the courts while currently it would take few months. Yasser Al-Shurafa, Palestinian citizen said, “I have had a land dispute pending in court since 2000, where the case was overseen by previous judiciary. The current government, in contrast, has accelerated dealing with this issue. In the past the case was adjourned more than 15 times for unimportant reasons. A decision was taken to resolve it in 2008. I feel confident to a large extent of

⁸² Osama Saed

⁸³ Osama Saed

⁸⁴ Hisham Abu Nada

⁸⁵ Dr. Nafez Al-Madhoun

⁸⁶ Hisham Abu Nada

the new judiciary system.”⁸⁷ Another factor mentioned as a reason for the increased number of cases were the execution mechanisms adopted by the police force. The Execution Department at Gaza courts is said to operate in close cooperation with the police.⁸⁸

The High Justice Council was established by the GG for the management and supervision of judicial sector, according to the laws and regulations applied in Palestine, and it continues its work despite the objection of the High Judicial Council in Ramallah.⁸⁹

In a self-appraisal by a civil servant at Gaza Reconciliation Court, he stated that the sincerity and dedication of judges’ work results in a great trust from lawyers and the public. The achievements that have been accomplished in the judiciary and the prosecution have been exceptionally improved. People of Gaza lost confidence in previous judiciary but currently the judiciary has been recovered.⁹⁰ Ismail Hamdona, a Palestinian citizen who is waiting to have a ten year old civil lawsuit settled with a previous business partner of his father said that the judiciary is receiving much attention from Palestinian society where individuals are given the opportunity to launch lawsuits and appeal them in the Court of Appeal. At last, the current judiciary treats people equally without discrimination. He is frustrated because his case has been pending since 2000 and he blames both the previous and the current courts for not having been able to reach to a conclusion.⁹¹

A UN officer from the Gaza Strip, currently working in the West Bank, believed that one of the challenges following the crisis in Gaza was indeed lack of trust in the court system and the lack of independence. He stated that many Fateh members were victims of unjust acts and punishment during the takeover and that such cases have not been taken to court.⁹² This arguments was not supported by any of the three categories of interviewees were chosen by the researcher, officials of GG, civil servants in judiciary, and courts users. Moreover, Dr. Mohammed Al-Nahal, Advisor to the Justice Minister in Gaza, stated that judges are applying law and discretion in

⁸⁷ Yasser Al –Shurafa, *Citizen* from Gaza. Has a civil lawsuit in Gaza Court. Interview was conducted on 15-21 November 2009.

⁸⁸ Osama Saed

⁸⁹ H. M., Director of Ratifications and Documentation

⁹⁰ Civil Servant at Gaza Court

⁹¹ Ismail Hamdona, *Citizen* from Gaza has a Civil Lawsuit at Gaza Court. Interview was conducted on 15-21 November 2009.

⁹² N.N. *UN Officer, Ramallah*. He preferred to be anonymous. Interview was conducted by Are Hovdenak in Ramallah on 26.11.2009.

The Rule of Hamas in Gaza: Reconstruction of Judicial Sector

resolving disputes without interference from any official or unofficial bodies in Gaza.⁹³ In addition, the Director General of the PLC stated that there have been no complaints to the PLC about any obstruction to the work of the judiciary.

Independence of Judiciary

Judges and other staff members are dedicating their efforts and committed to working extra hours.⁹⁴ Dr. Mohammed Al-Nahal said: “All government departments and judicial institutions are functioning better than it did in the past.”⁹⁵ A female lawyer assumed that prior to 2007 there were many interventions by the police, political parties, and the executive authority in courts’ work that harmed the independence of judiciary.⁹⁶ Presently, judges are appointed in accordance to legal standards on merits and neither favoritism nor bribery at present in the judicial apparatus. Measures are taking to sufficiently train all judiciary staff.⁹⁷ In addition, appointing new judges in the conciliation court and increasing the number of employees in the judiciary.⁹⁸ The increased number of claims being adjudicated in a short period time demonstrates trust in the current judiciary. Ziad Abu Amr, an independent PLC Member, presumes that Hamas Government operates like a government, including a system of security and legislation. He said “It is structured in an autonomous way. From the beginning we saw they established independent institutions; created an Islamic order.”⁹⁹

To overcome judicial impediments and sovereignty, an independent of judiciary must be maintained. According to Azmi Mashharawi, legal procedures practiced in courts are compatible with Palestinian law. There is no external influence or interference. Furthermore, coordination with other governmental institutions has facilitated the functioning of the judiciary.¹⁰⁰ According to al-Madhoun, corruption and bribery disappeared and interference by security forces in the judicial sector vanished.¹⁰¹ However, some dispute Hamas’s assurances that the judiciary system in Gaza is independent. A researcher on legal affairs argued that “there is no

⁹³ Dr. Mohammed Al-Nahal

⁹⁴ Ismail Jaber

⁹⁵ Dr. Mohammed Al-Nahal

⁹⁶ E. H. Female Lawyer

⁹⁷ Ismail Jaber

⁹⁸ Dr. Mohammed Al-Nahal

⁹⁹ Ziad Abu Amr

¹⁰⁰ Azmi Mashharawi

¹⁰¹ Dr. Nafez Al-Madhoun

independence [of the judiciary] now and there was no independence before, but at least it is better now than before.”¹⁰² The lack of full independence of the judiciary is not related to the administration of the pre or post June 2007 executive authority. Rather, the lack of full independence is due to the varying political orientations of the many judges. Despite the varying political orientations and overall lack of independence, the law is applied without hindrance of external influences or interventions, maintained a Gaza lawyer.¹⁰³ Ahmad al-Mughanni, Attorney General, Ramallah, envisages Hamas’s failure to respect of the independence of the judicial system as the root of the crisis. He said: “If we wanted to question the root about the crisis, we should remember that the authority in Gaza did not respect the independence of the judicial system and they cancelled the judicial system, and appointed new people.”¹⁰⁴

The long-term vision of Hamas

The long-term ambitions of the Gaza Government with regard to achieving justice and freedom to Palestinian society have begun in Gaza with several procedures encountering enormous challenges, through continuous personnel training, cooperation with relevant institutions and establishing the rule of law that guarantees protection of civilians’ safety and interests. The slogan of Hamas before the 2006 parliamentary election campaign was “Change and Reform” in government, including judiciary.¹⁰⁵ Hamas, in pursuit of this ambition, has sought to achieve independence rather than Islamisation of the judiciary.¹⁰⁶ Ziad Abu Amr believed that Hamas as a branch of Muslim Brotherhood always dreamt to create an Islamic entity, and this is apparently their chance to do so.¹⁰⁷ The term “Islamisation”, for Osama Saed, has been employed as a scarecrow to alienate the international community of dealing with the GG. He maintained that Islam as a religion has been a major source of legislation since the establishment of the Palestinian Authority, and corresponds with Article 4 of Palestinian Basic Law.¹⁰⁸

One issue that created much coverage in international media was a declaration by the High Justice Council requiring that female lawyers and judges wear head scarf in the courtroom. In response to negative media

¹⁰² A. D. Researcher in Legal Affairs

¹⁰³ E. H. Female Lawyer

¹⁰⁴ Ahmad al-Mughanni

¹⁰⁵ Osama Saed

¹⁰⁶ A. D. Researcher in Legal Affairs

¹⁰⁷ Ziad Abu Amr

¹⁰⁸ Osama Saed

The Rule of Hamas in Gaza: Reconstruction of Judicial Sector

attention, the Director General of the PLC stated that the media was misinformed and that the decision made by the Council meant that all lawyers have to abide by the court uniform according to the Palestinian legal system. It is a discipline provision of profession in the judicial sector.¹⁰⁹ The decision intended for the legal commitment to the court uniform according to the law.¹¹⁰ A female lawyer from Gaza stated that “The issue of headscarf was addressed by the High Justice Committee stating that female lawyers were required to wear suitable dress and headscarf. Nonetheless, this decision was not implemented as we, female lawyers, can attend court room without headscarf.”¹¹¹ While government sources claim that this issue was exaggerated and taken out of proportions in international media the HJC apparently backed down on the issue by refraining from implementing the regulation.

Dr Nafez Al-Madhoun argues that there is no process of radicalisation and that Palestinian law is more than 80 percent compatible with the Islamic Law.¹¹² Islamic legal principles are especially prevalent in the area of civil law.¹¹³ However, there is no indication that the Gaza Government is intending to replace or change the nature of the existing laws. Yet, a great number of Palestinian people would be happy to have Islamic law gradually and slowly applied in Palestine.¹¹⁴ There is further optimism among GG officials to adopt Islamic Law.¹¹⁵ This would be effective, particularly, in criminal and commercial law. Muslim scholars believe that Islamic Law covers all aspects of human behavior and would provide justice, fairness and equity. The position of Hamas as a political movement is that Islam is a religion of unity, equality, tolerance and freedom, a movement of human civilization, not hostile to the nation. Accordingly, Hamas considers that living in an Islamic country is the ideal atmosphere for coexistence between people of monotheistic religions. Hamas’ vision for the future would maintain its survival and continuity as a legitimate part of the Palestinian

¹⁰⁹ Dr. Nafez Al-Madhoun

¹¹⁰ Ismail Jaber

¹¹¹ E. H. Female Lawyer

¹¹² Dr. Nafez Al-Madhoun

¹¹³ A. D. Researcher in Legal Affairs

¹¹⁴ Ibrahim Abu Nadr, *Citizen* from Gaza. He has a civil lawsuit in Gaza Court. Interview was conducted on 15-21 November 2009.

¹¹⁵ Ismail Jaber

social fabric, which has been standing strongly against hardships and difficulties.¹¹⁶

Today, Hamas is looking towards a national unity with Fateh. It has called for dialogue to end the dispute and restore unity under the concept of political partnership and the protection of national legitimacy. Hamas believes in the cooperation and coordination with all Palestinian factions to give priority to areas of common ground to deliver services in different aspects of Palestinian life, particularly judiciary and the rule of law and order.

Return to Pre-Crisis Status

Despite the differences between the two parties, Hamas officials have repeatedly affirmed its respect and appreciation of the Fateh movement. Regardless of the contemporary political and judicial situation, Hamas claims that it is seeking reconciliation with Fatah to return to pre-crisis status in a unity government.¹¹⁷ This would necessarily imply the reconstruction of the judiciary sectors in Gaza and the West Bank within the framework of the Palestinian Authority.

One point supporting this claim is the fact that Hamas consequently sought to justify its legal initiatives by assuming they were in harmony with the Basic Law, and furthermore it has not tried to alter the basic foundation and principles in the legal sector.

The possibility of Gaza Government to return to pre-crisis status or permanent control based on status quo will not undermine reform efforts took place in Gaza since June 2007 as long as they correspond with the Palestinian Basic Law. However, it is hard to predict the fact of the reform in Gaza following any reunification in the future. Dr. Mohammed Al-Nahal was asked whether the current legal system would be permanently approved if the current political situation remains indefinitely in Gaza. His answer was that the judicial sector has been functioning according to the Palestinian constitution. He also stated that, according to Palestinian legal system, recently appointed judges are independent and should not be dismissed. This sector should not be affected by political changes. Any unity government would have to accommodate former judges and prosecutors who are on strike.¹¹⁸ Both former and new judges should be incorporated in the Judiciary following reunification.

¹¹⁶ Hani Albasoos (Sep. 2009). *Hamas Political Ideology: Towards National Strategy*. House of Wisdom (HOW), the Palestinian Institute for the Study of Conflict Resolution and Governance.

¹¹⁷ Hani Albasoos

¹¹⁸ Dr. Mohammed Al-Nahal

The Rule of Hamas in Gaza: Reconstruction of Judicial Sector

Conclusion:

Following Hamas Takeover of Gaza in June 2007, the judicial sector went through various challenges. This included a comprehensive strike among judges and prosecutors and then suspension of the work of the Attorney General and public prosecutors. This included criminal cases and cases before the High Court, the deferral of enforcement mechanisms to suspend all decisions requiring police enforcement, the crisis in interpreting and implementing Palestinian Basic Law, and the refusal of the High Judicial Council to cooperate with the Gaza Government and the recently appointed judges and prosecutors. Institutional discontinuity and disruption and financial crisis prevailed in Gaza, consequently led to a most devastating outcome.

The Gaza Government responded to these difficulties by taking measures to re-activate the judicial sector. The measures taken to provide effective public services included replacing those who were on strike with new staff, incorporating the Sulha Committees, the establishment of the High Justice Council to take on the responsibility of the Ramallah-based High Judiciary Council, and the creation of the Academic Institute to improve quality of the newly appointed judicial staff. All these measures contributed to restoring the functions and efficiency of the judicial sector. The GG has succeeded in reactivating the judicial system in spite of the withdrawal of almost all the previous personnel through a combination of emergency and permanent arrangements. It implemented long-term measures to provide legitimacy, law and order. Officials of the judiciary assured that the new courts set up by the Gaza Government have not introduced any new, Islamic oriented practice in their interpretation of the law. However, Hamas emphasized that Sharia is already a major source of legislation in the Palestinian Authority, and that the Hamas majority in the PLC offers represent a popular, legal mandate for strengthening the Islamic jurisdiction.

The Gaza Government is not an ordinary government but was set up as a response to a constitutional crisis. Hamas has claimed that it has adhered to the Palestinian Basic Law to the possible extent during a state of emergency and declared readiness to reunite with Fatah within the framework of the Palestinian Authority institutions. At the same time, the newly established judicial institutions together with the rest of the governmental structures that were established by Hamas following its takeover in 2007 would presumably enable the GG to remain in power for an extended period of time. In the absence of political reconciliation in the Palestinian polity, the provisional arrangements taken by the Gaza Government may thus have far-

reaching repercussions for the judicial system in the Gaza Strip. The lack of coordination in the judiciary between the rivaling governments in Ramallah and Gaza may contribute to institutionalise the territorial and political division between the West Bank and the Gaza Strip.

Bibliography:

1. Ismail Jaber, *Former Attorney General in Gaza*. Interview was conducted on 15-21 November 2009.
2. Dr. Mohammed Al-Nahal, *Legal Adviser to the Minister of Justice* and Head of Shari'a and Law Department at the Islamic University. Interview was conducted on 15-21 November 2009.
3. Osama Saed, *Director General of Legal and Vocational Affairs, Ministry of Justice*, Gaza Government. Interview was conducted on 15-21 November 2009.
4. Hisham Abu Nada, *Judge at Gaza Conciliation Court*. Interview was conducted on 15-21 November 2009.
5. Dr. Nafez Al-Madhoun, *General Director of the Palestinian Legislative Council (PLC)*. PLC Advisor for many projects and law writing commissions. Interview was conducted on 15-21 November 2009.
6. H. M., *Director of Ratifications and Documentation at the Ministry of Justice*, Gaza Government. Interview was conducted on 15-21 November 2009.
7. E. H. Female *Lawyer* from Gaza City. She preferred to be anonymous. Interview was conducted on 15-21 November 2009.
8. Azmi Mashharawi, *Lawyer*. Interview was conducted on 15-21 November 2009.
9. A. D. *Researcher in Legal Affairs*: Director of the Office of the training program for judges and prosecutors in Palestine - the Gaza branch (1998 - 2001). Interview was conducted on 15-21 November 2009.
10. S. A. *PLC Member from Hamas*. He preferred to be anonymous in name. Interview was conducted on 15-21 November 2009.
11. *Captain in the Police Unit* stationed in the Main Gaza Court. He preferred to be anonymous in name. Interview was conducted on 15-21 November 2009.
12. *Civil Servant at Gaza Court*. He preferred to be anonymous. Interview was conducted on 15-21 November 2009.
13. Ismail Hamdona, *Citizen* from Gaza has a Civil Lawsuit at Gaza Court. Interview was conducted on 15-21 November 2009.
14. Ibrahim Abu Nadr, *Citizen* from Gaza. He has a civil lawsuit in Gaza Court. Interview was conducted on 15-21 November 2009.

The Rule of Hamas in Gaza: Reconstruction of Judicial Sector

15. Yasser Al –Shurafa, *Citizen* from Gaza. Has a civil lawsuit in Gaza Court. Interview was conducted on 15-21 November 2009.
16. Tayseer al-Tamimi, *Supreme Judge of Islamic Shari'a Courts, Ramallah*. Interview was conducted by Are Hovdenak on 17.11.2009.
17. Ziad Abu Amr, *PLC member, independent*. Foreign Minister in NUG 2007. Interview was conducted by Are Hovdenak in Ramallah on 21.11.2009.
18. Ali Abu Gyak, *Deputy Minister, Ministry of Justice, Ramallah*. Interview was conducted by Are Hovdenak in Ramallah on 22.11.2009.
19. Ahmad al-Mughanni, *Attorney General, Ramallah*, Interview was conducted by Are Hovdenak in Ramallah on 23.11.2009.
20. N.N. *UN Officer*, Ramallah. He preferred to be anonymous. Interview was conducted by Are Hovdenak in Ramallah on 26.11.2009.

Other References:

- Hani Albasoos (Sep. 2009). *Hamas Political Ideology: Towards National Strategy*. House of Wisdom (HOW), the Palestinian Institute for the Study of Conflict Resolution and Governance
<http://www.howgaza.org/en/home.php?page=dmlld1RocmVhZA==&id=MTA3>
- Middle East Report N°73, *Ruling Palestine I: Gaza under Hamas*: 19 March 2008 <http://www.crisisgroup.org/home/index.cfm?id=5525&l=1>
- Middle East Report N°71, *Inside Gaza: The Challenge of Clans and Families*, 20 December 2007.
- *Israeli Security Agency*
<http://www.shabak.gov.il/English/EnTerrorData/Reviews/Pages/Islamization.aspx>
- PA Palestinian Minister Quits, as Factions Battle On, New York Times, 15 May, 2007.
http://www.nytimes.com/2007/05/15/world/middleeast/15mideast.html?_r=1&pagewanted=print accessed 4 February 2010.