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The Judiciary in Islamic Law, Palestinian Legislation, and Guarantees of Its Independence

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Abstract: The contemplating the constitutional and legal system of democratic countries, they unite on the principle of the independence of the judiciary until it became a constitutional principle related to the protection of human rights, which is a natural effect of the existence of a judiciary that stands on an equal footing with the legislative and executive authorities. The principle of the independence of the judiciary is considered the first principle of the general principles governing the work of the judiciary. The independence of the judiciary leads to its immunity by preventing the executive authority from intruding and interfering in its affairs and its work. The importance of this study is that it will clarify the extent to which the principle of the independence of the judiciary is applied in Islamic law compared to Palestinian legislation and the guarantees of this principle. To achieve the objective of this paper, legal socio-legal research was adopted using the qualitative approach to analyse relevant Islamic law and Palestinian legislative texts. The study concluded that the administration and structure of the judiciary in Islamic law differs from Palestinian legislation in terms of the extent of application of the principle of the independence of the judiciary.

Keywords: Islamic law, era of the messenger, justice, judicial authority, palestinian legislation, guarantees of the independence.

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Abstrak: Mencermati sistem ketatanegaraan dan sistem hukum negara-negara demokrasi, mereka bersatu pada prinsip independensi peradilan sampai menjadi prinsip konstitusional terkait dengan perlindungan hak asasi manusia, yang merupakan efek alami dari keberadaan peradilan yang berdiri di atas kedudukan yang setara dengan kekuasaan legislatif dan eksekutif. Asas independensi lembaga peradilan dianggap sebagai asas pertama dari asas-asas umum yang mengatur kerja lembaga peradilan. Independensi peradilan mengarah pada kekebalannya dengan mencegah otoritas eksekutif mengganggu dan mencampuri urusan dan pekerjaannya. Pentingnya penelitian ini adalah akan memperjelas sejauh mana prinsip independensi peradilan diterapkan dalam hukum Islam dibandingkan dengan undang-undang Palestina dan jaminan prinsip ini. Untuk mencapai tujuan artikel ini, penelitian ini menggunakan metode kualitatif dengan pendekatan sosio-legal hukum diadopsi untuk menganalisis hukum Islam dan teks legislatif Palestina yang relevan. Kajian ini menyimpulkan bahwa administrasi dan struktur peradilan dalam hukum Islam berbeda dengan legislasi Palestina dalam hal sejauh mana penerapan prinsip independensi peradilan.

Kata kunci: Hukum Islam, zaman Rasul, keadilan, kekuasaan kehakiman, legislasi Palestina, jaminan kemerdekaan

Introduction

The jurists have differed in defining the judiciary, and their difference is due to the difference in their views on the aspect to be defined. The four jurists defined it, as follows. The Hanafi defined it as "The separation of litigations, and the severance of disputes in particular."¹ The Maliki defined it as "Reporting a legal ruling as a matter of obligation."² The Shafi'i defined it as "The judgment between two opponents or more by the judgment of Allah."³ The Hanbali defined it as "Clarifying the Sharia ruling and obligating it and separating disputes"⁴ All the previous definitions agree that the judiciary is to bind litigants and all people to the Sharia ruling and apply it to them.

¹ Muhammad Amin Ibn Abdin, *Rada Almihtar Alaa Alduri Almuhtari*, Riyad: Book World House For Printing, Publishing and Distribution, 2003, p. 20.

² Burhan al-Din Ibn Faroon, *Tabsirat Alhukkam Fi 'Usul Al'aqdiat Wamanahij Alhakam*, Beirut: Book World House For Printing, Publishing And Distribution, 2003, p. 9.

³ Shams al-Din Muhammad al-Sherbini, *Maghni Almuhtaj 'Tilaa Maerifat Maeani 'Alfaz Almunhaj*, Cairo: Dar Al-Hadith, 2006, p. 282.

⁴ Mustafa Al-Suyuti, *Matalib 'Uwli Alnihaa Fi Sharah Ghana Almuntahaa*, Damascus: the Islamic Office, 1961, p. 493.

The judiciary is defined as "The authority that has the power to issue legal rulings and decide on disputed cases in light of the Book of Allah and the Sunnah of His Messenger, may Allah bless him and grant him peace, and the consensus of Muslim scholars."⁵

Due to the seriousness of the position of the judiciary, and to make the litigants more secure and reassuring when presenting their litigations to the judges, the one who is in charge of the judiciary requires important conditions that must be met by the judge in order to be able to perform his mission most completely and correctly, namely:⁶

To be a Muslim, because Allah Almighty says: " **وَلَنْ يَجْعَلَ اللَّهُ لِلْكَافِرِينَ عَلَى **الْمُؤْمِنِينَ** سَبِيلاً**". To be of sound mind and adult, and he may not be a boy. To be hearing, seeing, and speaking, so it is not correct to assume the blind, the deaf, or the dumb. To be fair, so the assumption of the evildoer is not valid so that he does not lose people's rights.⁷

Some of the jurists stipulated that a male should be in charge of the judiciary, and they considered that it is not valid for a woman to assume the judiciary and to be aware of the legal rulings, also, some of the jurists stipulated that he be diligent, and some jurists said that he should be familiar with the jurisprudence of the doctrine by which he is ruled in the cases brought before him with some knowledge of how to deduce from the Qur'an and Sunnah.⁸ Regarding these conditions, the jurists agreed on some of them and differed in others. They agreed on conditions which are Islam, adulthood, and mind, and they differed in terms of masculinity, freedom, and justice.⁹

In Islamic law, the judiciary is divided into a public and a private judiciary, according to what the judge is authorized to do.¹⁰ On the other hand, Palestinian legislation stated the concept of the judiciary as follows. The judiciary is the competent authority to settle between disputants in disputes

⁵ Attia Adlan, *The General Theory of the System of Government in Islam*, Cairo: Dar Al-Yusr, 2011, p. 356.

⁶ Muhammad Bikras Ismail, *Clear jurisprudence from the Qur'an and Sunnah*, Caior: Dar Al-Manara for Publishing and Distribution, 1997, p. 237.

⁷ Muhammad Bikras Ismail, *Clear jurisprudence from the Qur'an and Sunnah*, p. 237.

⁸ Martha A Myers "Social background and the sentencing behaviour of judges." *Criminology* 26, no. 4 (1988), p. 649-676.

⁹ Khaled Abdel Azim Abu Ghaba, *Methods for Selecting Judges*, Egypt: Dar Al-Kutub Alqanunia, 2009, p. 50.

¹⁰ Maher Ahmed Al-Sousi, "The Relationship Between The Three Authorities In The Islamic State" (Unpublished PhD thesis, University of the Holy Quran and Islamic Sciences, Sudan, 1996), p. 216.

that are brought before it, following what the law stipulates.¹¹ Besides, the judiciary is defined as the application of the legal rules set by the state to protect the various interests in society.¹²

A judge is defined as one who was appointed according to the law to settle disputes between disputants.¹³ Whoever is appointed to the judiciary in the Palestinian legislation must be met the following conditions.¹⁴ To have Palestinian nationality and be fully qualified. To have a law degree or a Sharia and law license from a university recognized. To not have been convicted by a court or disciplinary board for a dishonourable act, even if he/she was returned to him considered or included in a general amnesty. To be of good conduct, of good reputation, and medically fit to fill the position. To terminate his membership upon his appointment with any party or political organization. To be proficient in the Arabic language.

Moreover, the judiciary in Palestine consists of two sides: the first is for courts of all kinds, such as Sharia and religious courts, the Supreme Constitutional Court, regular courts, and the second is the Public Prosecution Office.¹⁵ The independence of the judiciary has two concepts, a personal one, and an objective one.

The personal concept of the independence of the judiciary: the personal independence of the judiciary means that the judge is not responsible for disciplinary or civil errors made by him in the course of his work unless they reach the point of a serious error or fraud, and within the limits established by the law, in order to have the freedom to make judgments, express opinions and prevent malicious cases against the judge, as well as not making his promotion and salary in the hands of the executive or legislative authority, but in the exclusive hands of the judicial authority.¹⁶

The independence of the judiciary means from the objective point of view: the independence of the judiciary as an authority and an entity independent from the legislative and executive powers, and not allowing any party to give orders, instructions, or proposals to the judicial authority related

¹¹ Fathy Wali, *Alwasit Fi Qanun Alqada' Almadani*, Cairo: Dar Alnahda Al-Arabia, 1981, p. 15.

¹² Basem Sobhi Bushnaq, "Separation of Powers in the Islamic Political System - An analytical study in light of the theory of separation of powers in positive law", *IUG Journal of Islamic Studies*, 4 (2063), p. 1-39.

¹³ Basem Sobhi Bushnaq, *Separation of Powers...*, p. 1-39.

¹⁴ Law of the Judicial Authority No. 1 of 2002. Article 16.

¹⁵ Law on the Formation of Regular Courts No. 5 of 2001. Article 7.

¹⁶ Ramadan Ibrahim Abdel Karim, *The Principle of Judicial Independence*, Cairo: Alexandria University, 2012, p. 664.

to the organization of the authority. It also means not to prejudice the original jurisdiction of the judiciary, which is to settle disputes by transferring jurisdiction in the adjudication to other bodies, such as exceptional courts, or legislative councils, or giving the powers of the judiciary to the executive departments by describing the judiciary as an authority and not a function.¹⁷ The independence of the judiciary is not limited to the independence of the judiciary as an authority, but rather includes the independence of its members, as the independence of the judiciary, in fact, reverts to two aspects:¹⁸

First, the independence of the judiciary, as one of the three state powers, stands on an equal footing with both the legislative and the executive branches. Independence of judges as individuals while carrying out their duties, whereby the judge exercises his duty without influence or interference from any party whatsoever.

Second, the Palestinian legislator has stipulated that the judiciary is independent and is exercised by the courts of all types and degrees, as well as that judges are independent and have no authority over them except for the law, and no authority may interfere in the judiciary or the affairs of justice. From this, it appears that the Palestinian legislation followed a philosophy that protects the judiciary from the aggression of the executive authority, as the Palestinian Basic Law affirms in Articles 97 and 98 the principle of the independence of the judiciary, and thus considered it as a constitutional principle.¹⁹

The Emergence and Development of the Judiciary in Islamic Law

The study will deal with the emergence and development of the judiciary in Islamic law, by tracing it into Islamic eras, according to the following division:

1. Judiciary in the Era of the Messenger, may Allah bless him and Grant him Peace

At the beginning of Islam, the three powers were combined for the Prophet, may Allah's prayers and peace be upon him, and this is normal as legislation was still in the process of revelation, and the Prophet was the only recipient of Allah- the Glorious - and then he was the sum of what was

¹⁷ Baraa Abdellatif, "Towards strengthening the independence of the Iraqi judiciary", *Tikrit University Journal of Legal and Political Sciences* 1, No. 3 (2013), p. 251-265.

¹⁸ Farouk Al-Kilani, *Judicial Independence*, Cairo: Dar Alnahda Al-Arabia, 1999, 16.

¹⁹ Palestinian Basic Law of 2003. Article 97, 98.

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revealed to him, and the judiciary is one of these powers, which he used to exercise like others. This is because it was not possible at that time for someone other than him to exercise the judiciary, for the provisions of the legislation were passed down to the Prophet according to the facts presented to him, so the revelation informed him of their provisions, and from him, the questioners took them directly, and although the powers were concentrated in the hands of the Prophet, he used them without being affected one for the other.²⁰

In addition, when the area of the Islamic state expanded during the era of the Messenger, the help with some of his companions in the judiciary, among them Ali, may Allah be pleased with him, he was sent as a young man to Yemen to judge between them, and among them, Muadh bin Jabal, as well as the guardian of the Messenger of Allah, Atab bin Usid, the matter of Mecca and its judiciary after the conquest, and the Messenger assigned him a salary assign him to full-time for his position.²¹

The judiciary during the Prophet's era is distinguished over the rest of the judiciary in the Islamic era with several advantages, the most important of which are, Judiciary in the Prophet's era was one of the most important covenants that the judiciary passed in Islam because it was the era of the first departure and the starting point, and the cornerstone of the judiciary in Islam. Therefore, the judgment, truth, and justice in the Prophet's covenant were linked to the sky, and under direct divine supervision, so the revelation was revealed by judgments, guides to the truth, indicates the right path, and oversees implementation.²²

Moreover, the Messenger, may Allah's prayers and peace be upon him, was the first judge, and the only one responsible for the judiciary. He was in charge of the judiciary himself. The Messenger was chosen the judges, and he was the most famous, the fairest, and the greatest of them, and at the same time, the Messenger was the most qualified of his companions to judge, religious and pious, intellect, intelligent, and experience, strength and activity, and honesty. The jurisdiction of the judiciary was part of the general jurisdiction, so it combined legislative, executive, and judicial jurisdiction, oversight, and inspection, and most of its judges combined the executive and

²⁰ Suleiman Muhammad al-Tamawi, *Three authorities in contemporary Arab constitutions and in Islamic political thought*, Cairo: Dar Alfikr Alerby, 1996, p. 441.

²¹ Ata Rehman, Mazlan Ibrahim, and Ibrahim Abu Bakar. "The Concept of Independence of Judiciary in Islam." *International Journal of Business and Social Science* 4, no. 2 (2013).

²² Mohammed Al-Zuhaili, *History of the judiciary in Islam*, Beirut: Dar Alfikr Almuasir, 2001, p. 75.

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judicial powers, and the two powers were rarely separated. Judiciary in the Prophet's era was often more like Ifta and arbitration, also, the judiciary in the Prophet's era was simple, small, and little.²³

2. Judiciary in the era of the Rightly Guided Caliphs

Abu Bakr Al-Siddiq, may Allah be pleased with him, assumed the caliphate in the year 11 AH, and died in the year 13 AH.²⁴ The era of the Siddiq is considered the beginning of the Rashidun era, whose importance is evident in its connection with the Prophet's covenant and his closeness to it. Abu Bakr took over the judiciary himself during the period of his caliphate and the situation remained the same as it was during the era of the Messenger because Abu Bakr was reluctant to change something from what was - during the era of the Prophet, and there were no needs that would compel him to this change, so he may Allah be pleased with him - was serving himself if he offered him a court, and Abu Bakr approved most of the judges and governors appointed by the Messenger and continued with the rule and judiciary together or one of them during his reign.²⁵

Furthermore, Omar Ibn Al-Khattab assumed the caliphate in the year 13 AH, and his caliphate remained until 23 AH.²⁶ At the time of Umar Ibn Al-Khattab, the cities were conquered and the scope of construction expanded, making it difficult for the caliph or his deputy to combine consideration of public matters and adjudicate disputes.²⁷ Umar, amid his caliphate, began separating the types of states from each other, allocating each state to whoever handles its affairs, and allocating the judiciary to judges to take over it.

Therefore, Abu Al-Darda 'was appointed with him in Medina, Sariha in Kufa, and Abu Musa Al-Ash'ari in Basra and Al-Farouq Omar is considered the first to arrange the livelihood of the judges, so he made for Judge Salman bin Rabia Al-Bahli five hundred dirhams every month, and he arranged for Shurayh a hundred every month.²⁸

²³ Mohammed Al-Zuhaili, *History of the judiciary in Islam*, p. 79.

²⁴ Muhammad Ibn Saad, *Altabaqat Alkubraa*, Beirut: Dar sadir Liltabaeat Walnashir, 1998, p. 186.

²⁵ Ali Muhammad Al-Sallabi, *Commander of the Faithful Omar bin Abdul Aziz*, Cairo: Dar Alnashir Waltawzie, 2010, p. 160.

²⁶ Jalal al-Din al-Suyuti, *History of the Caliphs*, Beirut: Dar Alfikr Liltabaeat Walnashir Waltawzie, 2004, p. 131.

²⁷ Abdul Rahman Ibrahim Al-Humaidhi, "the judiciary and its system in the Qur'an and Sunnah" Published PhD thesis, Umm Al-Qura University, Makkah, 1989, p. 243.

²⁸ Mahmoud Mohamed Arnous, *History of the judiciary in Islam*, Cairo: Al-Azhar Heritage Library, 2008, p. 29.

Moreover, Othman bin Affan took over the caliphate in the year 23 AH and his caliphate ended in 35 AH,²⁹ and upon his assumption of the city was Ali bin Abi Talib, Zaid bin Thabit, and Al-Saib bin Yazid, may Allah be pleased with them. Some researchers mention that Othman did not allow any of these judges the independence to decide on one of the cases, as was the case during Omar's era.³⁰

Ali bin Abi Talib, may Allah be pleased with him, assumed the caliphate in 35 AH, and his caliphate ended in 40 AH,³¹ and by the end of the time of his caliphate, the time of the rightly guided caliphate ended. Ali's inauguration of the caliphate was associated with the strife that resulted from the killing of Othman and the events that followed that split the ranks of Muslims and separated their speech, and facing these events became his constant concern, and diverted him from fully caring for the guardianship including the jurisdiction of the judiciary, especially since the term of his succession is short, not exceeding four years and nine months, and on himself, he was one of the flags of the Islamic judiciary.³²

3. Judiciary in the Umayyad and Abbasid Eras

The Umayyad state was established in the year 40 AH until 131 AH. The successors of the Umayyads were interested in the matter of the judiciary, and after the expansion of the Islamic state during the Umayyad era, which included the countries of the East from the north-western borders of China and India to Andalusia, which necessitated the expansion of the assumption of the judiciary, and this led to the expansion of the districts and many.³³ In some cases, the caliph delegated the emir to appoint a judge, and the emir was the one who chose. No one of the judges had oversight or guardianship over the other judges, however, rather they followed the caliph and his deputies. In the Umayyad era, the judge did not have the authority to consider surgeries and

²⁹ Jalal Al-Din Al-Suyuti, *History of the Caliphs*, p. 135.

³⁰ Hussein Abdo Rababah, "The Translation Movement in the Arab World: From the Periplasmic Era Until the End of Umayyad Dynasty (Before 610–750 AD)." *International journal of language and linguistics* 3, no. 3 (2015), p. 122-131.

³¹ Wijdan Jafar Ghalib. "Human rights in the era of the Rashidun Caliphate." *The Arab Gulf* 48, no. 4 (2020).

³² Manna Al-Qattan, *the judicial system in the era of the Prophet and the era of the Rightly Guided Caliphate*, Cairo: Wahba Library, 1993, p. 56.

³³ Badri Mohammed Fahd, *The History of The Islamic Judiciary and Its Legacy*, Amman: Dar Safa' Lilnashir Waltawzie, 2008, p. 38.

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disciplinary punishments, such as imprisonment, as this is from the authority of the caliph or his guardianship due to its importance.³⁴

As for the Abbasid state, it ruled in the year 132 AH, until it ceased to exist in the year 656 AH,³⁵ and during the Abbasid era Islam spread, and scientific, economic, and social activity increased. The jurisprudential controversy appeared, the four schools of thought were established, the tradition was known, the spirit of jurisprudence was weak, and the rulings of judges differed, so the judge in Iraq ruled according to the Shafi'i school of thought, if two opponents advance against the common doctrine, the judge shall delegate another judge for him, who shall rule according to the doctrine of the litigants. In the Abbasid era, the independence of the judiciary weakened due to the intervention of the Abbasid caliphs.³⁶

The Emergence and Development of the Judiciary in Palestinian Legislation

The state of the judiciary and its independence in Palestine differs from time to time due to the different approaches and legal systems followed by these colonial and Arab countries. Palestine has gone through different periods, which led to the difference in the status of the judiciary from one era to another. Judicial development in Palestine emerged in exceptional circumstances and under non-national sovereignty until it reached Palestinian self-government during the era of the Palestinian National Authority.³⁷

Initially, Palestine, as part of the Ottoman Empire represented in the Levant and Egypt, was subjected to Ottoman rule from 1615 AD to 1917 AD, and Palestine was part of the Levant Province based on the Federal Constitution issued by the Ottoman Sultan Suleiman the Magnificent in 1548 AD, which included the foundations of the administrative and military organization of the Sultanate since that date, Palestine has been subject to the rules of administrative, legal and judicial organization imposed on the rest of the Ottoman Provinces.³⁸

³⁴ Hussein Abdo Rababah, *The Translation Movement in the Arab World...*, p. 122-131.

³⁵ Sami Abdullah Al-Maghlouth, *The History of The Abbasid State...*, p 15.

³⁶ Wijdan Jafar Ghalib. "Human rights in the era of the Rashidun Caliphate." *The Arab Gulf* 48, no. 4 (2020).

³⁷ Birzeit University, Institute of Law, *The Legal System and Legislative Process in Palestine*, Birzeit: Institute of Law, 2008, p. 19.

³⁸ Nathan Brown, *Palestinian politics after the Oslo Accords: Resuming Arab Palestine*, University of California Press, 2003, p. 10.

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Among the features of the judicial system in this era was that it was characterized by the speedy determination of disputes and without written pleadings to the extent that the judicial ruling could be issued and executed in one session.³⁹

Palestine was subject to the British occupation and it was entrusted with the administration of Palestine, which was subordinate to the Ottoman Kingdom, and according to Article 22 of the Covenant of the League of Nations, the Mandatory State has full authority in legislation and administration, except for what is listed in the provisions of this instrument, and accordingly, the Palestine Constitution Decree was issued in 1922 by the King of Britain, which included the chapter Fifth, the judiciary.⁴⁰

The provisions of the Palestinian Constitution Decree of 1922 and its amendments restricted all powers to the hands of the High Commissioner, who alone possessed the supreme and absolute authority for various fields and magazines. The British and Palestinian judges were appointed by the British High Commissioner and the Palestinian judge - who was appointed by the High Commissioner - and they had the authority to transfer or delegate judges from one court to another, and according to the laws that regulate the judiciary, it finds that the High Representative has powers related to the affairs of judges.⁴¹

After the Palestinian Nakba in 1948, the Gaza Strip was subject to Egyptian administration, and the West Bank became part of Jordan, in both the Gaza Strip and the West Bank. Therefore, the authors have found that the mechanism for appointing judges has practically stripped judges of their independence and made them dependent on the executive authority, as a result of this authority possessing the right to appoint, transfer and remove judges from their positions.⁴²

Besides, in 1967, the Israeli occupation occupied the Gaza Strip and the West Bank and issued many military orders to strengthen the pillars of its

³⁹ Mustafa Abdel Hamid Ayyad, *Alwasit in Explaining the Code of Civil and Commercial Procedure*, Palestine, Gaza, 2004, p. 49.

⁴⁰ Yousef Subuh, "A Future Vision of The Unity or Duality of The Palestinian Judicial System", *Al-Azhar University Journal, Human Sciences Series, Gaza*, 3, No. 1 (1994), p. 1-15.

⁴¹ Lynn Welchman, "In the Interim: Civil Society, The Shar'ī Judiciary and Palestinian Personal Status Law in the Transitional Period." *Islamic Law and Society* 10, no. 1 (2003), p. 34-69.

⁴² Issa Abu Sharar, "the judicial system in Palestine." *Palestine, Gaza*, (2016) Accessed: January 13, 2021. Website: <http://www.palestineone.com/arabic/viewdos.asp?=300&id>
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rule over the Palestinian territories, and the Israeli occupier appointed a military governor for the Gaza Strip and another for the West Bank.⁴³

The military governor had the power to appoint, dismiss and transfer judges, and a committee to appoint judges was formed consisting of the head of administration and services in the military governor as chairman, the justice affairs officer as a member, and the legal advisor to the military governor as a member. One of the most dangerous factors that the Israeli occupation authorities have done and that the Israeli occupation authorities have resorted to in terms of undermining the Palestinian judiciary and emptying it of its content, functions, and powers, was to impose participation and functional division of the powers and competencies of Palestinian courts.⁴⁴

When the Palestinian National Authority came to the homeland in 1994, it found an extremely complex legal system that gradually accumulated over decades, which was established by the successive Arab and foreign powers to rule Palestine. The Palestinian legal and judicial system was unstable and unclear due to the exchange between these countries, as each country had its own judicial system that was different from the other, which resulted in a legacy of multiple laws and legislations of different patterns.⁴⁵

Consequently, the first decree issued by the late President Yasser Arafat, stipulating the continuation of the laws that were in effect before the year 1967 in the Palestinian territories, "the West Bank and the Gaza Strip", until they are unified. The decision stipulated that the regular, legal, and sectarian courts of all degrees would continue to practice their work following the laws and regulations applicable.⁴⁶

In addition, the President has issued Resolution No. 29 of 2000, by which the First Supreme Judicial Council was formed in the Palestinian National Authority, and it consists of eleven members, including nine judges, including the Chief Justice, who presides over the Council, in addition to the Attorney General and the Assistant Undersecretary of the Ministry of Justice. The aim of this was to unify the terms of reference for the administration of the judiciary in the Gaza Strip and the West Bank and to limit the interference

⁴³ Abdul Qadir Saber Jarada, *the Palestinian Judiciary, in the Gaza and West Bank*, Gaza: Afaq Library, 2012, p. 89.

⁴⁴ Military Circular No. 2 issued on June 8, 1967, The Israeli Defence Forces, Article No. (3/A).

⁴⁵ Mohamed Kamel Dorai, "The Meaning of Homeland For The Palestinian Diaspora: Revival and Transformation." (2002), p. 87-95.

⁴⁶ Presidential Decree, Issued from President of the Palestinian National Authority, No. (1) of 1994.

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of the Ministry of Justice, which was overseeing court administration and judicial affairs.⁴⁷

After the enactment of the Palestinian Basic Law, the independence of the judiciary developed. This authority was organized through Chapter Six of the Basic Law, which emphasized the independence of the judiciary and it is assumed by the courts of all kinds and degrees. The law defines the method of its formation and its functions, and that judges are independent. They are subject to no authority other than the law, and no authority may interfere in the judiciary or the affairs of justice.⁴⁸

Guarantees of the Judicial Independence in Islamic Law and Palestinian Legislation

1. Guarantees of the Judicial Independence in Islamic Law

a) Guarantees Related to the Affairs of Judges

There are many ways of selecting and appointing judges in Islamic law, and it may be through appointment by the ruler - the imam or caliph - or whoever deputizes for that, and work has been done on this. The Prophet, may Allah's prayers and peace be upon him, appointed Ali as a judge over Yemen and Mu'adh and others, and the Rashidun caliphs used to appoint the judges themselves. Omar, may Allah be pleased with him, appointed Abu Musa to the district of Kufa, and Shriha appointed to the district of Medina, and Kaab bin Siwar to the district of Basra, and Ali, may Allah be pleased with him - and wrote to his ruler over Egypt: "Choose to judge among the people the best of your flock in yourself..."⁴⁹

The method of selecting judges maybe by-election in cases of necessity and that is if the imam is lost and there is no one to represent him. Here, if the people of a country who have been vacant of a judge agree that they appoint them as a judge, the tradition is valid and his rulings are implemented on them, and it is also permissible to elect a judge if Muslims are under the rule of the infidels, as in the countries under the rule of the non-Muslim enemy, so if Muslims agree with a judge, it is permissible to appoint him.⁵⁰

⁴⁷ Presidential Resolution, President of the Palestinian National Authority, No. (29) of 2000.

⁴⁸ Palestinian Basic Law of 2003. Article (97).

⁴⁹ Khaled Abdel Azim Abu Ghaba, *Methods for Selecting Judges*, p. 50.

⁵⁰ Ayoub Al-Jarbou, "Judicial Independence: Case Study of Saudi Arabia." *Arab Law Quarterly* 19, no. 1 (2004), p. 5-54.

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These guarantees ensure that judges will not be subjected to anything that threatens their livelihood, positions, stability, and reputation so that they are not affected during the issuance of their judgments in the cases before them. Rather, the judge's integrity remains above all considerations. The most powerful weapon that could threaten the security of judges is to threaten them with dismissal, and for this, there must be guarantees that reassure judges in their work and protect them from any abuse that may befall them. The judge shall not be dismissed and shall not be referred to retirement unless he commits one of the reasons for his dismissal or retirement and that the dismissal and others shall be undertaken by a competent judicial body far from the executive and legislative authority. The Muslim jurists have discussed the issue of dismissing a judge, and they have identified five reasons for this:⁵¹

Disqualification from a judge as if he becomes completely insane. Losing the conditions of justice in the judge, by taking a bribe, or injustice in judging, and abusing his powers. Loss of hearing, sight, and speech efficiency, all, two, or one of them. The emergence of the judge's professional incompetence, in terms of knowledge and familiarity with the provisions, or in terms of their application.

The prestige of the judiciary and the meaning of this guarantee is that the judge is not responsible for the judgments issued by him, whether they are criminal, civil, or disciplinary unless it appears from him the deliberate error in the case of premeditation, or he deliberately offends a person in his judgment, and this is proven in a way legitimate method of proof, such as testimony and confess, etc. This is what is known recently as judicial immunity. But if the judge deliberately wronged and acknowledged that he deliberately ruled unfair, he must guarantee his money and pay the penalty for committing this crime and he is removed from the court.⁵²

One of the most important things that preserve the continuation of the independence of the judiciary is for the judge to be impartial, away from favouritism from relatives and friends, and away from the oppression of the enemies. What is meant by the judge's impartiality is that he be free from bias and favouritism for a group without a party or opponent without another, applying the laws to all people equally, away from affiliation and political

⁵¹ Muhammad Abd al-Qadir Abu Faris, *Judiciary in Islam*, Amman: Dar Al-Furqan, 2009, p. 215.

⁵² Ahmad Al-Moubayed, *Judge's Powers and Guarantees in Palestine*, Gaza: The First Edition, 1996, p. 50.

leanings.⁵³ The Almighty said: " يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلَّهِ وَلَوْ عَلَىٰ أَنفُسِكُمْ أَوِ الْوَالِدِينَ وَالْأَقْرَبِينَ "

b) Guarantees of Judicial Administration and Budget

In order to affirm the independence of the judiciary from the other two authorities, the independence of the institutional judiciary is essential, as the judiciary must monopolize the management of its internal affairs by itself, through the existence of a judicial council that has hegemony and control over all matters related to the affairs of judges so that the role of the administration is limited to ratification on the decisions taken by the council.⁵⁴

Among the most important tasks of the Judicial Council is to preserve the independence of the judiciary, prevent attempts to attack it, take all measures to ensure that there is no interference in the judicial work on the part of any of the authorities, and provide the necessary respect for the judgments and decisions issued by the courts, and it is responsible for managing the judiciary in terms of appointing, transferring, promoting judges, accepting their resignations, referring them to retirement, disciplining them, delegating them and loaning them.⁵⁵ In the Prophet's era, the one responsible for administering the judiciary in assuming judges, setting their salaries, and transferring them was the Prophet. In the era of the Rightly Guided Caliphs, the head of the Islamic State, the Caliph, was the one who ran the judiciary and they subjected the princes and governors to the authority of a judge.⁵⁶

Judges' budget guarantees, that is, imposing sufficient salaries and livelihood for judges to enrich them from what is in the hands of the people. It was mentioned in the hadith that a judge should not make any decision between people while he is hungry or thirsty, and satiety must be the result of wealth. The scholars said the poor are not appointed to the judiciary until after the imam enriches him until justice and integrity are achieved. Therefore, the authors have found caliphs and princes who honour the judges and respect them, and they pour in abundant money for them and the children and servants

⁵³ Trad bin Fahd Al Sharif, "Judicial independence in Islamic law and its applications in the Kingdom of Saudi Arabia" Master Thesis. Naif Arab University for Security Sciences. Riyadh, 2016, p. 216.

⁵⁴ Adel Mohamed Sharif, *Protect The Judge And Ensure His Integrity*, Cairo: Dar Al-Kutub Alqanunia, 2011, p. 181.

⁵⁵ Farouk Al-Kilani, *Judicial Independence...*, p. 18.

⁵⁶ Muhammad Abd al-Qadir Abu Faris, *Judiciary in Islam*, p.215.

who depend on them. There was no specific salary for a judge, and this varied according to time and place.⁵⁷

2. Guarantees of the Judicial Independence in Palestinian Legislation

a) Guarantees of the administrative independence

One of the most important guarantees of the independence of the judiciary is that the organization of administrative affairs of the judiciary is entrusted to a judicial body, far from interference by the executive, to consolidate the principle of judicial independence, appointing judges, removing them, transferring them, promoting them, delegating them and holding them accountable disciplinary, criminal, or civil, all of these issues must be organized by the judiciary itself, and if the executive authority has a role such as ratifying some of its decisions, then this role must be a formality, as a kind of oversight, it is not interference at the core of the judiciary's function.⁵⁸

The authors shall be addressed here the guarantees of administrative independence, according to the following division:

1. The formation of the Supreme Judicial Council. The Judicial Council is the body entrusted with managing the affairs of the judicial authority and representing judges before other authorities, and it may be headed by the President of the Supreme Court, the Head of State or the Minister of Justice, and this varies from one state to another, depending on the legal and judicial system prevailing in it. Countries that adopt the Anglo-Saxon system assign the President of the Supreme Court all powers related to the administration of the judiciary, and among these countries are the United Kingdom "Britain" and some of its former colonies. As for the countries that adopt the French legal system, or what is known as the Latin system, they are assigned the powers of a council formed of judges themselves. Managing the judiciary while giving some limited powers to the Ministry of Justice, among these countries are most Arab countries, such as Egypt, the Maghreb countries, and the Jordan system.⁵⁹

⁵⁷ Ahmed Shalaby, *History of Islamic Legislation and Judicial Systems In Islam*, Cairo: Maktabat Alnahdat Almasrit, 1999, p. 279.

⁵⁸ Abdul Rahman Ayyad, *Fundamentals of Judicial Science, a Comparative Study of Islamic Jurisprudence and The Systems of The Kingdom of Saudi Arabia*, Saudi Arabia: Institute of Public Administration, 2010, p. 82.

⁵⁹ Ahmed M A Hamad, Haslinda binti Mohd. Anuar, Rohizan binti. Halim, "The Rule of Law and the Reality of the Judiciary during the Period of Palestinian Political <http://jurnal.arraniry.ac.id/index.php/samarah>

It can be said that the Palestinian legislator has adopted a legal and judicial system that is closer to the Latin system than to the Anglo-Saxon system. It has entrusted the authority to administer the judiciary to a council formed of judges themselves called the Supreme Judicial Council. According to the Palestinian Basic Law of 2003, Judicial Authority Law No. (1) of 2002, and Law No. (5) of 2001 on the Formation of Regular Courts, the competent authority to manage the affairs of the components of the judiciary is the Supreme Judicial Council.⁶⁰

2. Functions of the Supreme Judicial Council. The Supreme Judicial Council in Palestine has several specializations, as follows. Recommendation to the President of the National Authority in order to fill judicial positions. Selection of the president and members of the technical office of the Supreme Court. Establishing a system for training and preparing judges before taking on judicial work. Determine the general rules for the length of experience necessary to appoint judges in the Magistrate, and Appeal Courts. The President of the Supreme Court may request that disciplinary action be instituted against judges. The president of the council has the authority to accept the resignation of a judge and then refer it to the Minister of Justice to issue the decision regarding its acceptance. Preparing the draft budget of the judicial authority and referring it to the Minister of Justice for legal action. Supervising the implementation of the budget of the judiciary. Adjudication of grievance petitions submitted by judges. Settling appeals submitted by the judge or the public prosecutor. Implementing disciplinary decisions issued by the disciplinary board after they have become final. Transfer and deputation of judges. Recommending judges to be seconded to foreign governments or international bodies, for the President of the Palestinian National Authority to issue a decision on secondment. The report prohibiting the judge from carrying out any work that he deems to be inconsistent with the duties of the job and its good performance.⁶¹

b) Guarantees of the financial independence

Division”, *International Journal of Multidisciplinary Sciences and Advanced Technology* 1, No. 4 (2020), p. 27-33.

⁶⁰ Ahmed M A Hamad, Haslinda binti Mohd. Anuar, Rohizan binti. Halim, *The Rule of Law...*, p. 27-33.

⁶¹ Judicial Authority Law No. 1 of 2001. Article (37).

<http://jurnal.arraniry.ac.id/index.php/samarah>

The duty of the judge towards the state and society is to improve the performance of his mission in achieving justice and preserving rights and freedoms, and in return for this, the state must take into account its judges financially, because justice is one of the most sacred values that must be preserved from temptation or deviation.⁶²

In Palestine, the judicial authority shall have its own budget and appear as an independent chapter within the annual general budget of the Palestinian National Authority, and the Supreme Judicial Council shall prepare the draft budget and refer it to the Minister of Justice to conduct the legal requirement in accordance with the provisions of the Budget and Financial Affairs Law, and the Supreme Judicial Council is responsible for supervising its implementation.⁶³

c) Guarantees of the functional independence

1. Guarantees of appointment of judges. There are several methods of selecting judges through elections, appointment by the executive authority, or appointment by a judicial body.⁶⁴ In Palestine, judges are appointed by the decision of the President of the Palestinian National Authority based on a recommendation from the Supreme Judicial Council.⁶⁵

2. Guarantees that judges are not dismissed. The rule that judges are not dismissed is one of the most important guarantees granted to judges, and it protects them from arbitrary dismissal if such removal is against the law, and without this guarantee, the dismissal of judges can be used without legal basis, but for political or personal interest or for any of the reasons that do not achieve justice.⁶⁶ In Palestine, judges are not subject to dismissal except in the cases permitted by the Judicial Authority Law.⁶⁷

3. Guarantees to discipline judges. If the judge breaches one of the duties of his position, then he is subject to disciplinary accountability, but the law surrounds this questioning with numerous guarantees so that it does not

⁶² Ahmed Al-Sayed Sawy, *Al wasit in explaining the civil and commercial procedures law*, Cairo: Dar Alnahdat Alearabiati, 1997, p. 110.

⁶³ Judicial Authority Law No. 1 of 2002. Article 3.

⁶⁴ Dina M Obied, "Independence of the Judiciary under the Palestinian National Authority." *New Eng. Int'l & Comp. L. Ann.* 7 (2001), p. 115.

⁶⁵ Judicial Authority Law No. 1 of 2002. Article 18.

⁶⁶ Abdul Karim Alwan, *Political Systems and Constitutional Law*, Amman: Dar Althaqafat Lilnashir Waltawzie, 2010, p. 222.

⁶⁷ Palestinian Basic Law of 2003. Article 99.

become a means to threaten the judge's independence or diminish his dignity or prestige even though this error leads to the cancellation of the judgment through the Court of Appeal, but it does not expose the judge who issued it to disciplinary accountability. This is so that it is sufficient for the judge to have his independence in the judicial opinion. However, it is considered a breach of his job duties, such as his absence from work without leave, or his disclosure of deliberation secrets or committing an act that violates integrity, or if he proceeds in a manner that conflicts with the dignity necessary for the judicial function, or has undertaken a commercial business or any work that does not consistent with the independence of the judiciary, as well as if he performs an act that is prohibited by law.⁶⁸

In Palestine regarding disciplining judges, the disciplinary council consisting of the two oldest judges of the Supreme Court and the most senior judge of the Appeals Courts who are not members of the Supreme Judicial Council, and when one of the members is absent or has an objection to him, he shall be replaced by the most senior, the most senior of those who follow him in seniority from the party he follows. The council is chaired by the most senior member present from the Supreme Court, the method of disciplining judges is according to specific procedures in the Judicial Authority Law.⁶⁹

4. Guarantees of transfer, deputation, and loan of judges. Legislation regulating the judicial authority is keen to lay down rules regulating the transfer and deputation of judges so that the judge can perform his task in the administration of justice, independently, reassuring and safe for his future, and so that the executive does not use this transfer or deputation as a weapon or a mean of compromising the independence of the judge, or subjecting him to its various effects by threat or intimidation.⁷⁰

The Palestinian legislator has set firm rules to regulate the transfer, deputation, and loan of judges, to ensure the independence of the judiciary, and to preserve the dignity and privacy of the judge.⁷¹ In order to ensure the proper functioning of justice and not to be confused in the work of the court, the Palestinian legislator has stipulated that the transfer and delegation of judges shall be by a decision of the Supreme Judicial Council, and the date of

⁶⁸ Wajdi Ragheb Fahmy, *Principles of civil justice*, Cairo: Dar Alnahdat Alearabia, p. 225.

⁶⁹ Judicial Authority Law No. 1 of 2002. Article (48), (2001), p. 225.

⁷⁰ Dina M Obied, *Independence of the Judiciary...*, p. 115.

⁷¹ Judicial Authority Law No. 1 of 2002. Article 23.

transfer or delegation shall be considered from the date of notification of the decision.⁷²

As for the loan of judges, their loan to foreign governments or international bodies is made by a decision of the President of the Palestinian National Authority and upon the recommendation of the Judicial Council.⁷³

The Palestinian legislator did not allow to delegate or loan a judge unless he has spent the previous four years in his work in the court departments, and that he has fulfilled the reports of sufficiency, provided that the period of delegation or secondment does not exceed three continuous years unless required by national interest.⁷⁴

Conclusion

The Palestinian legislator emphasized the independence of the judiciary and considered it as a constitutional principle, whereby no authority may interfere in the judiciary, and also stipulated the principle of separation of powers. However, Islamic Sharia has set special conditions for the executive to control the judiciary that it made this relationship has not followed by the principle of independence of the judiciary. So, this relationship did not affect the principle of separation of powers, given that the nature of the relationship between the authorities was not specified, and that was left to the governor or ruler in proportion to the nature and circumstances of the state and the public interest. Besides, there is no difference between Islamic law and positive legislation in the concept of judiciary except on the one hand that a judge in Islamic law must not contradict Islamic law, unlike a judge in positive legislation whose rulings may be compatible with Islamic law and may not compatible it. Accordingly, the Palestinian legislator should take into account the principles and general rules of Islamic law, which are considered a method for life, when drafting legislation related to the judicial authority and the rights and freedoms of individuals.

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⁷² Judicial Authority Law No. 1 of 2002. Article 23.

⁷³ Judicial Authority Law No. 1 of 2002. Article 24.

⁷⁴ Judicial Authority Law No. 1 of 2002. Article 24.

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