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***E pluribus unum? Palestinian authority and statehood in an  
environment of legal pluralism***

Working Paper 4 | August 2013

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## **About the author**

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**E pluribus unum?  
Palestinian authority and statehood in an environment of legal pluralism**

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Abstract

A key characteristic of the state, in terms of political theory, is law. Thus it seems obvious that a conflict that is as preoccupied with the question of statehood as the Arab-Israeli conflict should also be a conflict of legal nature in the sense that Palestinian statehood can only be achieved through a uniform, comprehensive, and efficient legal system. Using a sociological definition of the term ‘legal system’, this paper argues that the authority of the PA, the Palestinian state in the making, is undermined by its pluralistic legal system, which is characterised by a territorial legal division between the Gaza Strip and the West Bank, legal influence by Israel, the enduring influence of tribal and religious law, as well as an inefficient and badly administered judiciary. The paper also assesses the implications of this legal pluralism for Palestinian state-building in general and the security sector reform in the Palestinian territories (supported by, among others, the U.S. and the EU) in particular. The paper ends with some recommendations, based on these implications, for external actors aiming to advance Palestinian state-building by means of security sector reform.

**Keywords:** Palestinian Authority, legal pluralism, state-building, security sector reform

**Introduction**

“*[U]n Etat, c’est-à-dire [...] une société où il y a des lois [...].*”  
– Montesquieu, *De l’Esprit des Lois*

“*[T]he ordinary administration of criminal and civil justice [...] contributes, more than any other circumstance, to impressing upon the minds of the people affection, esteem, and reverence toward the government.*”  
– Alexander Hamilton, *Federalist Paper 17*

Law and legality, in political philosophy, have long been considered the very basis of statehood. Montesquieu considered a state as nothing else than a society governed by law. Indeed, this idea is also implicit in Max Weber’s often-cited definition of the “state”. A community can only be considered a state, thus Weber, in case it possesses the monopoly on legitimate violence in a given territory.<sup>1</sup> And the monopoly on violence is nothing else than the ability to enforce certain rules that are supposed to govern the society, be they laws, norms, or traditions. The social contract tradition of political philosophy also recognises law as the foundation of the state, since via the social contract a society delegates authority to the state, which, through binding rules, ensures an orderly society and the security of the individual citizen.

Thus it seems obvious, that a conflict that is as preoccupied with the question of statehood as the Arab-Israeli conflict should also be a conflict of legal nature. One could well argue that Palestinian statehood can only be achieved through a uniform, comprehensive and efficient legal system.<sup>2</sup> Indeed, the Palestinian Authority (PA) is often considered a “quasi-state”,<sup>3</sup> which, in order to achieve full statehood and international recognition as a state, has to assert its legitimate monopoly on violence over the territories that are supposed to be under its authority. Conversely, the absence of such a monopoly could be regarded a reason not to recognise the PA as a state.

Indeed, the PA does not possess a monopoly on violence over the territories it claims and from a legal perspective the Authority is characterised by a pluralistic<sup>4</sup> and consequently

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1 Weber, Max (1980): *Wirtschaft und Gesellschaft—Grundriß der verstehenden Soziologie*, 5th Edition, (Tübingen: Mohr Siebeck), p. 822.

2 The term “legal system” is used here in its sociological meaning. It comprises not only the entirety of official laws but also legal institutions (legislative and judiciary), as well as informal law, i.e. law that is not created by officially recognised institutions. See the definition of “legal system” in Painter, Andrew A. (2010): “Legal Systems,” in Couto, Richard A. (ed.): *Political and Civic Leadership—A Reference Handbook* (Thousand Oaks, CA: Sage), pp. 440-450, 440: „[...] [T]he phrase *legal systems* conceptualizes the distinctive manner in which a particular society’s laws are administered and depicts the various historical traditions, body of laws, procedures, and institutionalized functional units that form complex operational systems governing human interaction in a society.”

3 See Asseburg, Muriel (1999): *Palästina auf dem Weg zum Staat—Determinanten, Entwicklungen, Szenarien* (Ebenhausen: SWP).

4 See Merry, Sally E. (1988): “Legal Pluralism,” *Law & Society Review*, **22** (5), pp. 869-896, 870: “[L]egal pluralism [...] is generally defined as a situation in which two or more legal systems coexist in the same social field [...].”

inefficient legal system. There are three reasons for this. Firstly, the PA has, in 2007, lost control over the Gaza Strip to Hamas and consequently the legal systems of the West Bank and the Gaza Strip are diverging. Secondly, neither the Gazan legal system, nor the one governing the West Bank, can be considered uniform and homogenous, but are an amalgam of different laws and norms, owing to the history of the territories. Thirdly, the laws of the PA cannot be properly enforced in the West Bank due to continuing Israeli occupation, numerous security services, an inefficient and badly administrated judiciary, and the plurality of norms that exist. In this perspective the current legal system of the PA undermines its authority since the PA cannot claim the monopoly on norms in the territories it is supposed to administer.

Thus it seems odd that the efforts of external actors to support the development of Palestinian statehood have mainly concentrated on building up the Palestinian security services. The foreign policy of the EU and the U.S. regarding the building of Palestinian statehood is guided by the assumption that a functioning Palestinian state is necessary for the peace process. After all, the lack of control of the PA over the territories it is supposed to administer—i.e. lack of Palestinian statehood—is also cited by Israel as a reason to intervene in and occupy the West Bank.<sup>5</sup> As a consequence, external actors trying to move forward the peace process, aim at strengthening the Palestinian police as a means to strengthening the PA's authority by granting first and foremost material assistance and training. Certainly this form of “external security governance”<sup>6</sup> is necessary to address Israeli security concerns but the reform of the Palestinian legal system should play an equally important role since the Palestinian security services have not ceased to operate in a highly insufficient legal framework.<sup>7</sup> Thus, the reform of the PA's legal system is closely connected to the security sector reform in the Palestinian territories and therefore with the peace process.

Consequently, there are two reasons for addressing the problems of the Palestinian legal system: Firstly, in order to address the Palestinian desire for statehood, and secondly, in order to address Israeli security concerns and thus aid the peace process.

In this regard, the rectification of the intra-Palestinian split, which is accompanied by diverging legal systems in the Gaza Strip and the West Bank, seems key, since, as will be shown later on, this division hinders the effective legal reform in the Palestinian territories. Already in 1997, Glenn E. Robinson called the diverging legal systems of the Gaza Strip and the West Bank “the single most important obstacle”<sup>8</sup> for the development of Palestinian statehood.

So what is the extent to which the legal systems of Gaza and the West Bank are effectively diverging and in how far is this divergence hindering the development of a uniform and

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5 See, for example, Benjamin Netanyahu's speech at Bar-Ilan University on 14 June 2009, available at: <[http://mfa.gov.il/MFA/PressRoom/2009/Pages/Address\\_PM\\_Netanyahu\\_Bar-Ilan\\_University\\_14-Jun-2009.aspx](http://mfa.gov.il/MFA/PressRoom/2009/Pages/Address_PM_Netanyahu_Bar-Ilan_University_14-Jun-2009.aspx)>, accessed 30 July 2013.

6 See Johannsen, Margret (2010): “External Security Governance and Intractable Conflict—Constraints of the EU's Support to Police Reform in the Palestinian Territories,” in Ehrhart, Hans-Georg & Kahl, Martin (eds.): *Security Governance in und für Europa—Konzepte, Akteure, Missionen* (Baden-Baden: Nomos), pp. 169-190.

7 See Khalil, Asem (2007): “The Legal Framework for Palestinian Security Sector Governance,” in Friedrich Roland & Luethold, Arnold (eds.): *Entry-Points to Palestinian Security Sector Reform* (Geneva: DCAF), pp. 31-44; Friedrich, Roland; Luethold, Arnold & Milhem, Firas (eds.) (2008): *The Security Sector Legislation of the Palestinian National Authority* (Geneva: DCAF).

8 Robinson, Glenn E. (1997): “The Politics of Legal Reform in Palestine,” *Journal of Palestine Studies*, 27 (1), pp. 51-60, 54.

comprehensive legal framework in the PA? Is this legal division actually deepening the intra-Palestinian split? What are the implications of this legal division and the PA's legal pluralism, of which it is a factor, for the development of Palestinian statehood?

These questions will be addressed in two parts. First, the complexity of the Palestinian legal system will be examined, while specifically addressing the intra-Palestinian (legal) division. Secondly, the implications of this complexity will be analysed, as well as the different approaches to reforming the Palestinian legal system against the background of the security sector reform in the PA. The paper ends with the conclusion that external actors should further provide the essential financial support that makes the attempts at Palestinian legal and security sector reform *possible*, and that they have to keep linking legal reform to the reform of the security services in the PA. This approach has to be coupled, however, with an active diplomacy aimed at solving the Arab-Israeli conflict in order to have a realistic chance to advance a fully functioning Palestinian state, in which the rule of law is observed.

## **I. The complexity of the Palestinian legal system and the (legal) division of Gaza and the West Bank**

In order to understand the complexity and pluralism of the Palestinian legal system one has to examine the legal heritage of the Palestinian territories (A). This background will allow for an examination of today's legal division of the Gaza Strip and the West Bank (B).

### *A. The complex legal heritage of the Palestinian territories*

Owing to their history, the Palestinian territories are home to a plurality of norms and legal traditions. The legal heritage of these territories is characterised by centuries of foreign rule, from Ottoman to British colonial rule and from Jordanian to Israeli occupation. Each period of foreign rule had its own legal specificities.

After the creation of Israel, the Arab-Israeli War of 1948, and the occupation of the West Bank by Jordan, the Hashemite Kingdom implemented Jordanian law in the territory it occupied. Parts of the legal system from before 1948 were, however, kept. Successively though, Jordanian legal reforms effectively replaced British Mandate law. In Gaza, however, the legal system of the time of British rule was left unaltered by the Egyptian administration after 1948 and only complemented by Egyptian military orders.<sup>9</sup>

During the Israeli occupation of the West Bank and the Gaza Strip after 1967 these different legal systems of the Palestinian territories were maintained. Palestinian courts would still operate officially, but *de facto* the Palestinian legal system was circumvented through Israeli military courts and legislation.<sup>10</sup> At the same time, Israel prohibited any legal reform in the occupied territories as well as the development of legal education for aspiring Palestinian jurists who were thus forced to study abroad, with adverse effects for the development of a Palestinian legal culture.<sup>11</sup>

9 See Robinson, Glenn E. (1997): "The Politics of Legal Reform in Palestine," *op. cit.* p. 53.

10 See *ibid.*; Hajjar, Lisa (2005): *Courting Conflict—The Israeli Military Court System in West Bank and Gaza* (Berkeley, CA: University of California Press); Benvenisti, Eyal (2012): *The International Law of Occupation* (Oxford: Oxford University Press).

11 See Robinson, Glenn E. (1997): "The Politics of Legal Reform in Palestine," *op. cit.*; Khalil, Asem (2007): "The Legal Framework for Palestinian Security Sector Governance," *op. cit.*

After the Oslo Accords, the newly founded Palestinian Authority (PA) was able to reform its legal system independently from Israel, via the Executive and the Palestinian Legislative Council (PLC), if only wholly independently in the territories in which the PA had full control (about 29% of the West Bank)<sup>12</sup>. In his first presidential decree, Yasser Arafat called upon the Palestinians to abide by all existing laws “until they are consolidated”. At Palestinian universities, law faculties were established and there were some attempts at unifying the diverging legal systems of Gaza and the West Bank in a comprehensive legal framework. Thus, the faculty of law at Birzeit University was given the task to establish a database with all laws applicable in both Gaza and the West Bank in order to assess their compatibility with each other and inform their possible modification or abrogation.

The legal integration of Gaza and the West Bank, however, could not be achieved even before the Hamas-Fatah split of 2007, since Palestinians could not agree on the form of the legal system that was to be established. Since the Gaza Strip had a legal system rooted in the Common Law tradition due to the enduring influence of British Mandate law and the legal system of the West Bank was rooted in the Civil Law tradition due to Jordanian occupation, the preference of one approach over the other would have implied the retraining of an entire generation of lawyers and the process of legal consolidation was thus slowed down.<sup>13</sup>

The Palestinian legal system, however, was not and is not only divided between Gaza and the West Bank but also within the territories. Thus, since the creation of the PA, there is no clearly defined separation of roles between the General Prosecutor, the Ministry of Justice, and the High Judicial Council, the PA’s highest judicial authority.<sup>14</sup> These ambiguities are at the heart of the enduring conflicts between the Ministry of Justice and the High Judicial Council about, for example, the administration of courts and public prosecution, the creation and construction of new courts, and about who can conduct negotiations with international donors. Against this background, the High Judicial Council tried, in 2006, by decree, to change the *Judicial Authority Law of 2002* in such a way as to transfer all the competences of the Ministry of Justice to itself, but the decree was rejected by Parliament.<sup>15</sup>

Another feature of the PA’s pluralistic legal system is the existence and enduring use of religious as well as tribal law, inherited from Palestine’s Bedouin tradition. Thus, in nearly all fields of law—be it labour, civil, or penal law—tribal or *Shari’a law* is applied, with personal status law being most heavily influenced by religious law.<sup>16</sup>

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12 Ierley, Douglas (2001): “Law and Judicial Reform in Post-Conflict Situations: A Case Study of West Bank Gaza,” in *Empowerment, Security and Opportunity through Law and Justice* (World Bank Conference), available at: <<http://www.kslaw.com/library/pdf/ierley.pdf>>, accessed 21 July 2013.

13 See Robinson, Glenn E. (1997): “The Politics of Legal Reform in Palestine,” *op. cit.*

14 See European Commission (2013): “Joint Staff Working Document—Implementation of the European Neighbourhood Policy in Palestine—Progress in 2012 and recommendations for action,” available at: <[http://ec.europa.eu/world/enp/docs/2013\\_enp\\_pack/2013\\_progress\\_report\\_palestine\\_en.pdf](http://ec.europa.eu/world/enp/docs/2013_enp_pack/2013_progress_report_palestine_en.pdf)>, accessed 21 July 2013.

15 See Milhem, Feras & Salem, Jamil (2011): “Building the Rule of Law in Palestine—Rule of Law without Freedom,” in Akram, Susan M.; Dumper, Michael; Lynk, Michael & Scobbie, Iain (eds.): *International Law and the Israeli-Palestinian Conflict—A rights-based approach to Middle East Peace* (New York, NY: Routledge), pp. 253-276.

16 See Welchman, Lynn (2003): “In the Interim: Civil society, the Shar’i Judiciary and Palestinian Personal Status Law in the Transitional Period,” *Islamic Law and Society*, **10** (1), pp. 34-69; Welchman, Lynn (2009): “The Bedouin Judge, the Mufti, and the Chief Islamic Justice—Competing Legal Regimes in the Occupied Palestinian Territories,” *Journal of Palestine Studies*, **38** (2), pp. 6-25; Kelly, Tobias (2005): “Law, Culture and Access to Justice under the Palestinian National Authority,” *Development and Change*,

*B. The legal division between Gaza and the West Bank after 2007*

The preceding overview has shown to what extent the Palestinian legal system is both complex and pluralistic. Against this background the influence of the legal division between Gaza and the West Bank on the problems of the Palestinian legal system in general can be assessed. The EU views “the division of the justice systems in the West Bank and the Gaza Strip” as one of the most important problems of the Palestinian legal system.<sup>17</sup> But what is the actual dimension of this division?

In the Oslo agreements between Israel and the PLO, the West Bank and the Gaza Strip are treated as a single territorial unit. However, *de facto*, the territories have politically and administratively been divided since 2007, when Hamas seized control over the Gaza Strip and the PA thence effectively administered only the West Bank. Furthermore, the territories are not to the same extent “occupied territories” since Israel unilaterally withdrew from the Gaza Strip in 2005, with important legal consequences. The question of whether the Gaza Strip should still be considered occupied is controversial.<sup>18</sup> What is certain though, is the fact that there are no more military courts operating in Gaza and that in this perspective the Gazan legal system is independent from Israel; the West Bank’s legal system is not.

Due to these internal (conflict between Fatah and Hamas) and external (legal influence of Israel) factors the Gaza Strip and the West Bank are governed by two distinct legal systems. This furthermore aggravates the differences, existent already before 2007. After the coming into power of Hamas in the Gaza Strip, all officials of the justice sector were forced to go on (paid) strike, since they were still employed by the PA. This prompted Hamas to create its own legislative process in which a council (*Diwan*) and Hamas draft legislation that is then proposed to a rump parliament.<sup>19</sup> Since the Basic Law of the PA stipulates that if the President of the PA does not react to the promulgation of a law and given that Hamas declares the office of the President to be vacant, laws that are promulgated by the Gazan rump parliament are regarded by Hamas as legitimate and binding and are published in the Gazan version of the Palestinian *Official Gazette*.<sup>20</sup>

This means nothing less than an effective legal independence of the Gaza Strip from the PA which leads some scholars to conclude that Gaza and the West Bank should be considered

36 (5), pp. 865-886; Kelly, Tobias (2006): *Law, Violence and Sovereignty Among West Bank Palestinians* (Cambridge: Cambridge University Press).

17 European Commission (2013): “Joint Staff Working Document—Implementation of the European Neighbourhood Policy in Palestine—Progress in 2012 and recommendations for action,” *op. cit.* p. 13.

18 According to the official Israeli point of view the Gaza Strip is no longer occupied. This point of view is furthermore held by some scholars of international law; see Khen, Hilly Moodrick-Even (2011): “Having It Both Ways—The Question of Legal Regimes in Gaza and the West Bank,” *Israel Studies*, 16 (2), pp. 55-80 and Benvenisti, Eyal (2012): *The International Law of Occupation*, *op. cit.* The UN, the USA, the UK, and other scholars, however, regard Gaza as a de facto occupied territory; see Sanger, Andrew (2011): “The Contemporary Law of Blockade and the Gaza Freedom Flotilla,” in Schmitt, Michael N.; Arimatsu, Louise & McCormack, Tim. (eds.): *Yearbook of International Humanitarian Law 2010* (Den Haag: T.M.C. Asser Press), pp. 397-446, esp. p. 430, and Darcy, Shane & Reynolds, John (2010): “An Enduring Occupation—The Status of the Gaza Strip from the Perspective of International Humanitarian Law,” *Journal of Conflict and Security Law*, 15 (2), pp. 211-243. Eyal Weizman argues that the Gaza Strip is “occupied by air”; see Weizman, Eyal (2008): *Sperrzonen—Israels Architektur der Besatzung* (Hamburg: Nautilus), esp. pp. 253-284.

19 See Brown, Nathan J. (2012): “Gaza Five Years On—Hamas Settles In,” *The Carnegie Papers*, available at: <[http://carnegieendowment.org/files/hamas\\_settles\\_in.pdf](http://carnegieendowment.org/files/hamas_settles_in.pdf)>, accessed 21 July 2013.

20 See *ibid.*



independent and autonomous entities.<sup>21</sup> Indeed one could argue that this legal independence perpetuates the intra-Palestinian split, adding to the territorial and political division between the Gaza Strip and the West Bank a legal division. But is this really the case? After all the legal systems of Gaza and the West Bank were diverging already before 2007. What are the limits of the legal division between Gaza and the West Bank and what implications does the complexity and pluralism of the Palestinian legal system have on Palestinian statehood nonetheless?

## II. The implications of Palestinian legal pluralism on Palestinian statehood

Indeed there are limits to the legal division between the Gaza Strip and the West Bank, but the PA's legal pluralism still has adverse effects on the Palestinian bid for statehood (A). Thus, it should be a priority for external actors trying to advance Palestinian statehood to encourage and assist legal reform in the PA. What can they practically do to help solve the problems of the Palestinian legal system (B)?

### *A. Limits to the legal division between Gaza and the West Bank and other implications of Palestinian legal pluralism*

The legal division between Gaza and the West Bank seems to further obscure and complicate the already multi-layered Palestinian legal system, but the main factor in the intra-Palestinian split remains politics. Thus, it is not the legal division of the territories that hinders an accommodation of Hamas and Fatah but the political conflict that divides Palestinians. If the PA—at least until 2007—could have formed a political entity in spite of a profoundly scattered legal system, then the legal division between Gaza and the West Bank does not seem to have a real impact on the intra-Palestinian split. In any case, Palestinians probably identify more with their nationality than with a quasi-state that is constantly undermined by occupation and that possesses no full control over the territories it is supposed to administer.<sup>22</sup> As mentioned before, the formal laws of the PA are perceived as just one element among others, in a pluralistic legal system, which consists of PA law, *Shari'a* law, and tribal law, and is further circumvented by neo-patrimonial structures of governance.<sup>23</sup> In short: since Palestinians do not identify with a specific and uniform legal system, the legal divergences between Gaza and the West Bank do not *per se* divide Palestinians; it is politics that do.

Rather, these divergences, together with the legal pluralism of the PA, are having adverse effects on the building of Palestinian statehood. This is because, due to the political conflict between Fatah and Hamas, no substantial legal reform for the totality of the Palestinian territories is possible.<sup>24</sup> Due to the paralysis of the PLC no substantial legal reform can be

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21 See Khen, Hilly Moodrick-Even (2011): "Having It Both Ways," *op. cit.*

22 See Kelly, Tobias (2006): *Law, Violence and Sovereignty*, *op. cit.*; Palestinian National Authority (2010): *The Justice and rule of Law National Strategy*, available at: <[http://pdf.usaid.gov/pdf\\_docs/PNADW391.pdf](http://pdf.usaid.gov/pdf_docs/PNADW391.pdf)>, accessed 21 July 2013.

23 Kelly, Tobias (2006): *Law, Violence and Sovereignty*, *op. cit.*; Brynen, Rex (1995): "The Neopatrimonial Dimension of Palestinian Politics," *Journal of Palestine Studies*, **25** (1), pp. 23-36.

24 See Brown, Nathan J. (2012): "Gaza Five Years On," *op. cit.*; Interestingly, the political conflict was at times fought in the legal arena for example with regards to the application of *Shari'a* law in the Gaza Strip, see Welchman, Lynn (2009): "The Bedouin Judge, the Mufti, and the Chief Islamic Justice," *op. cit.*, esp. pp. 8.

undertaken and the little reform than can be undertaken has to take the form of presidential decrees.<sup>25</sup>

These decrees, however, are hardly sufficient to reform the Palestinian legal system appropriately. As a consequence the building of Palestinian statehood is effectively hindered, especially with regards to the reform of the security sector. The security sector reform of the PA is supported by the international community, the U.S., and the EU, with the objective of establishing a monopoly on violence by the PA in the territories that it is supposed to administer, thus contributing to the security (first and foremost) of Israel<sup>26</sup> but also Palestinians as well as to the development of Palestinian statehood.<sup>27</sup>

But, as mentioned before, the security sector reform supported by the U.S. and the EU is mainly focused on training and material assistance to the security services of the PA instead of concentrating on their administration or legal basis. It is, however, exactly this type of legal reform that is necessary for achieving a substantial and meaningful security sector reform.<sup>28</sup> There are two interconnected reasons that explain why the legal framework in which the Palestinian security services are operating is problematic: (1) the administrative law governing the security services is full of obscurities and inconsistencies with regards to the competences of the individual services; (2) the penal justice system is inefficient and badly administered.

The insufficient legislation governing the Palestinian security services owes to the history of these services, especially to the time of Yasser Arafat's presidency of the PA. In order to achieve full control over the security services of the PA, Arafat decentralised their administration, thus retaining ultimate control.<sup>29</sup>

After Arafat's death, there were attempts at unifying the fragmented security sector. In 2005 the *Law of Service in the Palestinian Security Forces No. 8* was promulgated and thence organised the Palestinian security services. The multitude of security services was reduced to three (Article 3): the National Security Forces, the Internal Security Forces, and General Intelligence. Article 3 and the remainder of the law, however, failed to stipulate the exact competences of the security services and thus left substantial room for interpretation for each one of them.<sup>30</sup> Further, Article 10 of the law stipulated that the Internal Security Forces would be placed under the "leadership" of the Interior Ministry and the "commando" of a Director-General of Internal Security, neither defining "commando" and "leadership" nor naming the exact competences of the Director-General and the Interior Ministry.

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25 See Palestinian National Authority (2010): *The Justice and rule of Law National Strategy*, *op. cit.*

26 For an assessment of the different agendas of Israel, the US, and the EU with regards to Security Sector Reform in the PA see Johannsen, Margret (2010): "External Security Governance and Intractable Conflict," *op. cit.*

27 Council of the European Union (2002): *Seville European Council 21 and 22 June 2002, Declaration on the Middle East*, available at: <[http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/72638.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72638.pdf)>, accessed 18.07.2013.

28 See Id'ais, Maen (2007): "Security Sector and Judicial Reform—The Missing Link," in Friedrich Roland & Luethold, Arnold (eds.): *Entry-Points to Palestinian Security Sector Reform* (Genf: DCAF), pp. 87-102; Khalil, Asem (2007): "The Legal Framework for Palestinian Security Sector Governance," *op. cit.*

29 See Johannsen, Margret (2010): "External Security Governance and Intractable Conflict," *op. cit.*; Hussein, Ahmad (2007): "Reconstructing the PNA Security Organizations," in Friedrich Roland & Luethold, Arnold (eds.): *Entry-Points to Palestinian Security Sector Reform* (Geneva: DCAF), pp. 45-70.

30 See Id'ais, Maen (2007): "Security Sector and Judicial Reform," *op. cit.*

As mentioned before, the Palestinian judiciary is also characterised by a lack of a proper division of competences and this has important consequences for the security sector reform in the PA. This is because, without a well-functioning judiciary, even security services that have the best equipment and have received the best training cannot fulfil their task of enforcing the rule of law.<sup>31</sup>

The lack of a proper division of competences, however, is not the only problem of the Palestinian judiciary. In addition, the judiciary faces a never-ending backlog of cases that have either not yet been treated or finished. Without an efficient judiciary, the security forces of the PA, especially the civil police, do not have any judgements to enforce. Furthermore, there is the problem of insufficient collaboration between the police and the judiciary. Thus, prosecution often rejects to investigate cases it deems insufficiently investigated by the police, even if this is not the case.<sup>32</sup> Moreover, only a small part of the police is actually aware of the laws that govern their relation to public prosecution. Thus, many policemen operate depending on the situation and as they themselves deem fit. Another problem that characterises the collaboration between the judiciary and the police is the fact that the delegation of criminal prosecution from the public prosecution to the police is insufficiently documented and often the extent, duration, and conditions of the investigation are ill-defined, thus effectively amounting to a *carte blanche* for the police.<sup>33</sup> What is more, the security services of the PA at times systematically refuse to enforce certain judgements, which is, most notably, the case with judgements that demand the release of illegally detained prisoners.<sup>34</sup> Furthermore, the police illegally detain many Palestinians who are deemed “collaborators” without consulting the judiciary, in special prisons upheld specifically for this task.<sup>35</sup>

As a result, the Palestinian security services are not sufficiently accountable to the judiciary, which in turn questions the monopoly on violence of and the rule of law in the PA. Indeed, the multitude of official actors and the fact that either their tasks are ill-defined by law or that they do not adhere to the existing legal order, means that inside the PA there exist many, to a certain extent independent, authorities that undermine the authority of the PA, which, after all, is supposed to be the nucleus of future Palestinian statehood.

The inefficiency of the Palestinian judiciary together with the bad record of actual law enforcement, are, furthermore and as mentioned above, the reasons for the unofficial bypassing of the formal judiciary, which in turn *further* undermines the authority of the PA. Indeed, studies by the United Nations Development Programme (UNDP) and the Geneva Centre for the Democratic Control of Armed Forces (DCAF) show that Palestinians are generally more satisfied with religious tribunals than with the courts of the PA, with regards to their efficiency, fairness, independence, and also cleanliness.<sup>36</sup> Consequently, the courts of the PA are not only bypassed by religious or tribal jurisprudence in matters of labour or family law, but also in penal law, which is, undoubtedly, key to the security promise of the

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31 See *ibid.*

32 See *ibid.*

33 See *ibid.*

34 See *ibid.*

35 Ierley, Douglas (2001): “Law and Judicial Reform in Post-Conflict Situations,” *op. cit.*; Human Rights Watch (2013): “Israel/Palestine,” in *World Report 2013*, available at: <<http://www.hrw.org/world-report/2013/country-chapters/israel-palestine?page=3>>, accessed 21 July 2013.

36 Turner, Lucy (ed.) (2012): *Public Perceptions of Palestinian Justice and Security Institutions* (New York, NY: UNDP); Bocco, Riccardo; de Martino, Luigi & Luethold, Arnold (2005): *Palestinian Public Perceptions of Security Sector Governance* (Geneva: DCAF).

state and its monopoly on legitimate violence.<sup>37</sup> Thus, there have been cases of murder where the PA's justice institutions were bypassed and instead religious rulings that were not compatible with the official laws of the PA were enforced. In the particular case of the killing of the young woman Yusra Jamal al-'Azami by individuals affiliated with Hamas that took place in 2005 in the Gaza Strip, political factions had to issue a statement in order to *call for* the assailants to be handed over to PA security forces and official law to be applied although criminal matters explicitly fall under the jurisdiction of the PA's regular justice system.<sup>38</sup> However, the families of the victims (Miss Jamal al-'Azami was accompanied by her sister and their fiancés, all three of whom were also assaulted) and those of the assailants agreed to settle the matter through *shar'i* adjudication resulting in a fine of 25,000 Jordanian dinars for the assailants.<sup>39</sup>

### *B. Solving the problems of the Palestinian legal system*

Thus it is obvious that the PA's legal system, in spite of the attempts that have already been made, is still in need of reform. This means not only reforming legislation but also the Palestinian judiciary, especially its enforcement mechanisms. In this perspective there are three priorities for legal reform in the PA: (1) Ensuring a proper and exact definition of competences for the different Palestinian security services in administrative law as well as (2) a proper and exact definition of competences for the institutions of the Palestinian judiciary, and (3) an exact definition of the relations between the security services and the judiciary.

These priorities can also be found in the approaches to reform by external actors. The United States has long been a contributor, in terms of financial resources, to the legal reform in the Palestinian territories.<sup>40</sup> Most of the financial aid goes to Palestinian institutions that have the task of providing training for aspiring jurists and officials of the judiciary, such as the Palestinian Judicial Institute. Furthermore, the US is supporting the Palestinian Justice Enhancement Programme, which aims at strengthening public confidence in the justice sector. The US is even making the important connection between the reform of the justice sector and the security sector reform in the PA.<sup>41</sup>

Another large contributor to legal reform in the PA was the World Bank, which introduced the so-called Legal Reform Project, which elapsed in 2003. The programme had five objectives: (1) Unifying legislation, (2) amelioration of the administration of courts, (3) training of future justice sector officials, (4) furthering alternative dispute resolution, and (5) legal information for the Palestinian public. The programme was, however, designed to first and foremost create a legal system that would be beneficial for the economic development of the PA and thus concentrated on legislation in the area of contract and property law.

The EU Action Plan for the Palestinian territories, on the other hand, has a much more extensive claim regarding the legal reform of the PA. Thus, the Action Plan proposes as the objective of cooperation between the EU and the PA the implementation of an independent

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37 See Kelly, Tobias (2005): "Law, Culture and Access to Justice," *op. cit.*; Kelly, Tobias (2006): *Law, Violence and Sovereignty*, *op. cit.*; Welchman, Lynn (2009): "The Bedouin Judge, the Mufti, and the Chief Islamic Justice," *op. cit.*

38 See Welchman, Lynn (2009): "The Bedouin Judge, the Mufti, and the Chief Islamic Justice," *op. cit.*

39 See *ibid.*

40 See Ierley, Douglas (2001): "Law and Judicial Reform in Post-Conflict Situations," *op. cit.*

41 See US Department of State (2013): *Executive Budget Summary—Function 150 and other International Programs, Fiscal Year 2014*, available at: <<http://www.state.gov/documents/organization/207305.pdf>>, accessed 22 July 2013.

and efficient justice sector, as well as the unification of the laws of the West Bank and the Gaza Strip, and explicitly demands the orderly distribution of competences between the High Judicial Council and the Ministry of Justice.<sup>42</sup> Furthermore, the EU wants to contribute to public confidence in the justice sector and the security services of the PA.

These objectives, which date back to 2004, were deemed as not fulfilled by the EU in 2013, and the EU recalled exactly the same reforms as in 2004.<sup>43</sup> Regarding the objectives of 2004, the EU saw the only improvements in the area of the infrastructure of Palestinian courts, but not in the division of competences between the Ministry of Justice and the High Judicial Council. Interestingly, the EU also cites the study of the UNDP about public perceptions of justice sector institutions, but draws some very odd conclusions, namely that “the findings suggest that investments in justice and security institutions are paying dividends”.<sup>44</sup> A consideration of the conclusions of the study’s executive summary, however, might paint quite a different picture: “Several factors underpin a significant gender justice gap. [...] Formal justice is perceived too slow. [...] Access to legal assistance is inadequate, adversely affecting perceptions of justice and the integrity of security institutions.”<sup>45</sup>

So if external actors do make the link between the reform of the Palestinian security sector and the reform of the PA’s legal system and consequently support projects aiming at strengthening the rule of law in the PA, why is it that these attempts did not yield any reassuring results? Why is international aid not solving the problems of the Palestinian legal system?

Seeking answers to these questions, one should remain conscious of the fact that a functioning state where the rule of law is observed cannot be generated *ex nihilo* by simply creating institutions, legislation, and training programmes for justice sector officials. The legal systems of European states, for example, developed over the centuries and build on a long history of self-government and state building, as well as legal traditions and cultures. These conditions in no way exist for the PA, which, as the supposed nucleus of Palestinian statehood, presides over the heritage of centuries of foreign rule. The construction of a well-functioning Palestinian state should be seen as a *process* rather than a sudden *appearance*.

Admittedly, in the case of Palestine there are some aggravating conditions surrounding state building. Thus, the fragmented autonomy of the PA is the cause for many judgements not being enforced.<sup>46</sup> Moreover it is highly questionable indeed if the approach of the Oslo accords could have really led to Palestinian sovereignty, since the institutions of the PA were endowed with extremely limited authority over the territory of the West Bank.<sup>47</sup> Furthermore,

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42 See European Commission (2004): *EU/Palestinian Authority Action Plan*, available at: <[http://ec.europa.eu/world/enp/pdf/action\\_plans/pa\\_enp\\_ap\\_final\\_en.pdf](http://ec.europa.eu/world/enp/pdf/action_plans/pa_enp_ap_final_en.pdf)>, accessed 18 July 2013 & European Commission (2013): “Joint Staff Working Document—Implementation of the European Neighbourhood Policy in Palestine—Progress in 2012 and recommendations for action,” *op. cit.*

43 See European Commission (2013): “Joint Staff Working Document—Implementation of the European Neighbourhood Policy in Palestine—Progress in 2012 and recommendations for action,” *op. cit.*, p. 4: „[...] the Palestinian Authority is invited to: [...] Reform and develop the Palestinian security sector [...] ensuring full respect of human rights [...]. Adopt a unified penal code [...]. Clarify the responsibilities of the three main judicial institutions namely the Ministry of Justice, the Office of the Attorney General and the High Judicial Council [...]”

44 *Ibid.* p. 14.

45 Turner, Lucy (ed.) (2012): *Public Perceptions of Palestinian Justice and Security Institutions*, *op. cit.* p. 5.

46 See Kelly, Tobias (2006): *Law, Violence and Sovereignty*, *op. cit.*

47 See Brown, Nathan J. (2005): “Evaluating Palestinian Reform,” in *Carnegie Papers, Middle East Series*, No. 59 (Carnegie Endowment for International Peace).

the enduring conflict between Israel and the PA separates Palestinians that favour cooperation in order to advance peace and Palestinian statehood from those that consider the latter as “collaborators” who are in fact undermining the Palestinian cause. This division certainly is most extreme between Hamas and Fatah and manifests itself symbolically in the division of the West Bank and the Gaza Strip, but also affects the reform of the justice and security sector and thus the Palestinian legal system. This is because officials of the judiciary and the security services have political convictions or at least certain sympathies that affect their behaviour, which is only natural in such a highly politicised conflict as the Arab-Israeli one. But this also adversely affects the development of the rule of law in the PA as officials rely on their sympathies or convictions rather than on the law. There are of course not only external factors that hinder the development of the rule of law in the PA. Thus, another hindrance to legal reform, as with every process of reform, is the role of old elites, who see their position threatened through the process of reform and thus try to thwart it.<sup>48</sup>

## Conclusions

Thus, external actors should remain patient and further provide the essential financial support that makes the attempts at Palestinian legal and security sector reform *possible*. Further, they have to keep linking legal reform to the reform of the security services in the PA. It is clear, though, that these measures alone, without an active diplomacy aimed at solving the Arab-Israeli conflict, will never achieve a fully functioning Palestinian state, in which the rule of law is observed. Diplomacy and reform have to go hand in hand, complement each other, and, at the right time, have to be prioritised in the right way. This is because, as the analysis above has shown, an efficient, strong, and autonomous Palestinian legal system can only be achieved if this legal system can govern the entirety of the PA’s territory, i.e. the West Bank and the Gaza Strip. This in turn could only be achieved through the termination of Israeli occupation (and the solution of the intra-Palestinian conflict). However, due to security considerations Israel would do so only if it was assured of a peaceful, stable, and well-functioning Palestinian state as its neighbour, which, in turn, requires an efficient, strong, and autonomous Palestinian legal system. This dilemma<sup>49</sup> can only be solved through international diplomacy which, in the case of the Arab-Israeli conflict, should aim at replacing the law of the strongest by the strength of law.

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48 See *ibid.*

49 Ariel Sharon formulated this dilemma in his speech on 4 June 2003 in Aqaba as follows: “Ultimately, permanent security requires peace and permanent peace can only be obtained through security [...].” Available at: <<http://mfa.gov.il/MFA/PressRoom/2003/Pages/Statement%20by%20PM%20Ariel%20Sharon%20after%20the%20Aqaba%20Summi.aspx>>, accessed 23 July 2013.

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