

# The Role of Constitutional Judiciary in Protection of fundamental Freedoms and Rights

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## **Introduction Honorable ladies and gentlemen**

Let me first convey warm greetings from Palestinian leadership represented by H. E. president of State of Palestine Mr. Mahmoud Abbas and from Palestinian judges and people of Palestine. We as Palestinian judges express our sincere gratitude for your kind invitation wishing success for your conference.

Since 2014, President of the State of Palestine, Chairman of the Executive Committee of PLO, Mr. Mahmoud Abbas, has ratified nearly 50 international agreements, including **International Convention on Human Rights, United Nations Convention against Torture, CEDAW, Convention on the Rights of the Child, OHCHR**, and other relevant conventions; which clearly demonstrate the faith of State of Palestine in human rights message and its active involvement in the international human rights system of United Nations. The vision of Palestinian leadership sees that the protection of human rights has a particular importance to the State of Palestine, since the Palestinian people have suffered and have been subjected to many decades of sever human rights violations by the Israeli occupation.

While international human rights sources generally impose customary or contractual obligations on states to respect human rights principles, the Palestinian judiciary in all its sectors believes in the implementation of international obligations and norms in protection of human rights and always ensures that these rules are applied in good faith in practice. National judicial systems work “to pursue a logical and inclusive interpretive approach

in the search for an interpretation that respects the rights and interests of individuals”.

### **First: Constitutional Sources of Human Rights in Palestine:**

Palestine has suffered from multiple constitutional periods, starting from Decree of Mandate of Palestine in 1922 and its amendments, then the Basic Law of the Gaza Strip of 1955 during the Egyptian administration, which was followed by the constitutional declaration of the Gaza Strip in 1962, and Jordanian constitution for 1952 that was in force in West Bank. These constitutional documents didn't reflect the will of the Palestinian people to protect fundamental freedoms and rights, until the time when the Palestinian Basic Law was passed during the establishing of Palestinian National Authority. The amended Palestinian Basic Law of 2003 stipulates set of rules on public freedoms and rights in chapter 2 - which reinforces its constitutional status - The Basic Law didn't only stipulate these rights, rather it established constitutional rules to control non-violation of these rules, especially what are related to freedoms and human rights because the validity of the constitutional framework in forming a guarantee of Public rights and freedoms not only presuppose the existence of constitutional rules that provide for the rights and freedoms of individuals, but also the existence of judicial control tools to ensure that they are not violated as well; in addition to provide a variety of guarantees related to the process of litigation, such as the independence of judiciary and the right of fair trial.

The amended Palestinian Basic Law in 2003 is similar to many international constitutions that have established a separate chapter on public rights and freedoms; while some Arab constitutions have stated these rights in the context of general provisions and texts. The privatization of the Palestinian Basic Law of 2003 for a separate chapter of public rights and freedoms indicates its interest and concern.

With a brief review of the public rights and freedoms of the Basic Law, we find that article (9) stipulates on the right to equality before the law and non-discrimination on bases of race, sex, color, religion, political opinion or disability. And article (11) stipulates on the right to personal liberty. Article (12) stipulates on the rights of those arrested or detainees. Article (13) stipulates on prohibition of coercion and torture. Article (14) stipulates on the right of the accused to a legal trial. Article (15) stipulates on the individual nature of and the prevention of collective punishment and that no crime and no penalty

except by a legal text and court decision, and the constitutional legislator cited For Palestinians in Article (16) stipulates on constitutional rule requiring the prohibition of medical tests.

As in most modern constitutions, articles (17) to (20) of the Palestinian Basic Law stipulates on inviolability of housing, freedom of religion and worship, freedom of opinion, freedom of residence and movement, while articles (23) to (29) of the Constitution stipulates on the right to housing, the right to education, the right to participate in political life, the rights of the media and its freedoms, the prohibition of deportation, and maternity and childhood care. Article (320) stipulates on prohibition of violation of personal freedoms and the inviolability of private life. Article (33) stipulates on the right of clean environment, Article (30) stipulates on the right of litigation.

It can be noted that the content of the public rights and freedoms contained in the Palestinian Basic Law has generally guaranteed civil and political rights such as the right to political participation, freedom of opinion and others, as well as social, economic and cultural rights such as the right to education, housing and the inviolability of private life.

### **Second: The Impact of the Occupation on Weakening the Ability of Judiciary to Protect Human Rights:**

The violations of the Israeli occupation of human rights have negatively impacted the performance of the judiciary, and the lack of Palestinian control over the entire land has weakened the performance of the Palestinian judiciary. Particularly Article (1) paragraph (2) of the Gaza Strip Agreement and Jericho Area Annex (3) regarding criminal issues, has deprived Palestinian courts from criminal jurisdiction over crimes committed in the 1967 territories over the crimes committed in the 1967 territories; and restricted it to Israel, which alone has the criminal jurisdiction over the settlements, military facilities that subject to the provisions of this annex, in addition to crimes committed by Israelis in the territory. This greatly affects the ability of the Palestinian judiciary to prosecute the occupation for its crimes that violate the basic rights of the Palestinian people. The occupation practices daily violations over Palestinian citizen's right of life by killing Palestinians; as well as their unlawful deprivation of freedom through illegal detention contrary to international law, and deprivation of right to movement and other violations known to all.

### **Third: The Role of the Constitutional Court in Protection of Public Rights and Freedoms:**

The protection of the constitutional judiciary of public rights and movements is reflected by control of the constitutionality of laws. The control over the constitutionality of laws is significance in forming the guarantee of public rights and freedoms, due to its competence to rule unconstitutional legislation that may affect these rights by derogation or restriction.

While public rights and freedoms, and judicial guarantees have the formal and objective status as the constitutional rules, the role of law is to protect these constitutional rules including public rights and freedoms, and to protect them from tampering, in order to remain sublime and enforceable rules.

With the developments in various constitutional systems, the *censorship over the constitutionality of laws* has become common. The jurisprudence describes it as “the process by which the provisions of the law can be made in accordance with the Constitution. It aims at safeguarding and protecting the Constitution and ensuring respect for its rules related to public rights and freedoms.

The first written constitutions were drawn up to be linked with the idea of making this constitution a tool for the protection of freedom through guaranteeing the rights of citizens that the legislature can not affect. The constitution has established a specific mechanism to guarantee these rights. Thus, the authorities established by the Constitution are the tool to achieve this idea, and guarantee the rights of the people, and to achieve the real message aspired by the nation of its Constitution.

In this sense, the supervision of the constitutionality of laws has become legitimate beyond the limits of traditional concepts of law and democracy and the separation of powers. This legitimacy, now reflects the will of the nation and a tool of protecting it from the absurdity of the majority and its domination and passing the limits of the constitutional text which is basically designed to protect the rights and freedoms of individuals. It is not allowed to place nation’s authority in the hands of authorities that have emerged from that nation and have derived their authority from it, so that these powers become a tool to restrict their freedoms and diminish their human rights.

Therefore, it is not right that the separation of powers to be an excuse in the hands of the parliament to destroy the constitutional rules of human

rights, and it is not acceptable that democracy is transformed (in the name of the people) into a tool to waste their rights and freedoms, especially that the control of the constitutionality of laws has derived its historical origins from the ideal theories that prevailed in time before all this controversy revolves around it in modern times.

As a result, many countries stated in their constitutions the creation of judicial or political body to review the constitutionality of laws and legislation. These constitutions differ in the nature of constitutional oversight regarding the terms of the authority that is responsible to do this oversight and the time it takes. The constitutions also differ in the methods of constitutional appeals. We can say that the comparative constitutional systems have settled on two basic forms of control over the constitutionality of the laws: political censorship and judicial control, where the political control of the constitutionality of laws by assigning them to a non-judicial body often called the Constitutional Council, and this body reviews the legislation in terms of the extent of agreement with the Constitution before the issuance, it is also called preventive control.

#### **Fourth: Organizing the Constitutional Oversight in Palestine:**

The amended Basic Law of 2003 was a qualitative leap towards the constitutional organization to control the constitutionality of the laws. Article (103) of the Constitution stipulates on the formation of the Supreme Constitutional Court and referred to the ordinary legislation: the manner of its formation, the procedures must be applied and the implications of its provisions. Article (104) referred the jurisdiction of the Supreme Constitutional Court to the Supreme Court temporarily until the formation of the Supreme Constitutional Court.

It is clear from the purposes of constitutional legislator in article (103) of the Basic Law that the legislator has taken the system of central judicial control over the constitutionality of the laws. The legislator referred the issue of regulating this control in manner of its formation, the procedures must be applied and the implications of its provisions. The jurisprudence "agrees on the importance of organizing the constitutional judiciary in the Constitution, to judge and adjudicate constitutional disputes. Most constitutions or basic laws are keen to establish general and briefed provisions, in manner of formation, degrees and its jurisdictions. This guarantees constitutional justice to confront the three authorities."

- Translated by: Suhair Sharqawi/ Palestinian High Judicial Council