

THE COEXISTENCE OF DIVERSE LEGAL TRADITIONS IN A SINGLE TERRITORY: THE CASE OF FREEDOM OF EXPRESSION IN PALESTINE

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This paper examines the coexistence among the three legal traditions in Palestine (continental law, common law and Islamic law) by revising various legislative pieces relating to the freedom of expression and comparing such instruments with the International Covenant on Civil and Political Rights (ICCPR). The paper proposes certain measures to reform the existing systems, taking into account the assumption that Palestine would be interested to become party to the Covenant as it declared in its 2003 Amended Basic Law (constitution), particularly in the light of Palestine's recent attempts to acquire full membership of the United Nations. Using comparative and inductive approach, the paper adopts a wider definition of the freedom of expression that comprises five components: privacy, freedom of religion, freedom of opinion, right to peaceful assembly, and freedom of association.

1. Introduction

Although the West Bank and Gaza Strip are recognized as a single entity (i.e. Palestine), legislation that regulates the freedom of expression differs in these two areas. In the West Bank, which inherited the Jordanian legal system as Jordan controlled that part of Palestine from 1948 to 1967, the continental law tradition prevails. Gaza retained most of the common law practices adopted by the British authorities during the Palestine Mandate era. In the two parts of

Palestine, certain rules derived from Islamic law remain enforceable today as produced by the Ottoman Empire that governed the territory for centuries. As both areas fell under Israeli occupation in 1967, a set of military orders were imposed, amending a number of pre-existing laws and adding new rules. After its establishment in 1994, the Palestinian Authority, while retaining the previous legislation,¹ launched a process aiming to modernize and unify the applicable law in the two regions of the country.

This paper examines the coexistence among the three legal traditions in Palestine (continental law, common law and Islamic law) by revising various legislative pieces relating to the freedom of expression and comparing such instruments with the International Covenant on Civil and Political Rights (ICCPR).² The paper proposes certain measures to reform the existing systems, taking into account the assumption that Palestine would be interested to become party to the Covenant as it declared in its 2003 Amended Basic Law (constitution),³ particularly in the light of Palestine's recent attempts to acquire full membership of the United Nations.⁴ Using comparative and inductive approach, the paper adopts a wider definition of the freedom of expression that comprises five components: privacy, freedom of religion, freedom of opinion, right to peaceful assembly, and freedom of association. Each of these freedoms/rights would be addressed in a separate section below.

¹ Decree No 1 of 20 May 1994, Palestine Gazette, No 1, 20 November 1994, 10.

² 999 UNTS 171.

³ Palestine Gazette, Extraordinary Ed, 19 March 2004, 5.

⁴ M Qafisheh, ed., *Palestine Membership in the United Nations: Legal and Practical Implications* (2013).

2. Privacy

Privacy may relate to the freedom of expression by a passive sense, namely through the right to preserve one's own personal life.⁵ By this definition, privacy is connected to the choices that one may wish to make regarding the home in which one elects to settle in,⁶ the food he or she wants to eat, customs one follows, spouse one chooses to marry,⁷ the language/accent one prefers to speak,⁸ right to one's own image,⁹ people he or she opt to socialize or refrain from contacting, his or her religious practice or non-practice, and one's sexual life,¹⁰ sexual orientation,¹¹ communications and

⁵ See, in general, W Gordon, 'The Right of Privacy' (1902) 1 *Canadian LR* 196; F Walton, 'The Comparative Law of the Right to Privacy' (1931) 47 *LQR* 219; E Wanderer, 'Right of Privacy' (1948) 34 *Women Lawyers J* 21; J Thauberger, 'Right to Privacy' (1965) 30 *Sask BR* 167; S Skala, 'Is There a Legal Right to Privacy?' (1977) 10 *Univ Queensland LJ* 127; J Williams, 'Invasion of Privacy' (1973) 11 *Alb LR* 1; S Davies, 'Constructing an International Watchdog for Privacy and Data Protection: The Evolution of Privacy International' (1992) 3 *JL & Info Science* 241; A Samuels, 'Privacy: Statutorily Definable' (1996) 17 *Statute LR* 115; J Breslin, 'Privacy - The Civil Liberties Issue' (1996) 14 *Dickinson J Int L* 455; S Uniacke, 'Privacy and the Right to Privacy' (1997) *Bul Australian Society L Phil* 1; R Barrett, 'The Right to Privacy' (1998) 137 *L & Jus - Christian LR* 39; B Markesinis, 'Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany' (1999) 115 *LQR* 47; L Aryani, 'Privacy Rights in Shari'a and "Shari'a - Based" States' (2007) 3 *J Islamic State Practices Int L* 3; E Barendt, 'Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court' (2009) 1 *J Media L* 49; E Reid, 'Rebalancing Privacy and Freedom of Expression' (2012) 16 *Edinburgh L R* 253.

⁶ R Cosman, 'A Man's House Is His Castle-Beep: A Civil Law Remedy for the Invasion of Privacy' (1971) 29 *Faculty L R* 3.

⁷ B Wilson, 'Women, the Family, and the Constitutional Protection of Privacy' (1992) 17 *Queen LJ* 5.

⁸ H MacQueen, 'My Tongue is Mine Ain': Copyright, the Spoken Word and Privacy' (2005) 68 *Modern LR* 349.

⁹ S Barnett, 'The Right to One's Own Image: Publicity and Privacy Rights in the United States and Spain' (1999) 47 *Am J Com L* 555.

¹⁰ K Botha & E Cameron, 'Sexual Privacy and the Law' (1993) 4 *S Afr Hum*

information-sharing,¹² children's education,¹³ clothes he or she wishes to wear, the way he sleeps, his or her health state,¹⁴ and his or her financial situation,¹⁵ etc. In this sense, privacy, or non-interference in the private sphere,¹⁶ is linked to various sets of rights, including the right to housing, food, clothing, religion, education, and cultural life. Some of these rights would be discussed in the subsequent sections of this paper; others are addressed by the present writer somewhere else.¹⁷ In this section, however, we will briefly look at the

Rts YB 219; L Gotell, 'When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records' (2006) 43 *Alb LR* 743.

- ¹¹ R Green, 'Fornication: Common Law Legacy and America's Sexual Privacy' (1988) 17 *Anglo-Am LR* 226; M Hryce, 'The Legal Protection of Privacy and HIV/AIDS' (1993) 3 *Australasian Gay & Lesbian LJ* 46; K Beattie, 'Homosexual Sexual Activity and the Right of Privacy' (1994) *UCL Jurisp R* 43 (1994); G Selvanera, 'Gays in Private: the Problems with the Privacy Analysis in Furthering Human Rights' [1994] 2 *Adelaide LR* 331; R Louw, 'Sexual Orientation, Criminal Law and the Constitution: Privacy versus Equality' (1998) 11 *S Afr J Crim Jus* 375.
- ¹² K O'Connor, 'Privacy and Information Systems' (1980) 5 *L Service Bul* 167; D Dawe, 'Privacy and Freedom of Information' (1988) 36 *Chitty LJ* 1.
- ¹³ V Steeves, 'It's Not Child's Play: The Online Invasion of Children's Privacy' (2006) 3 *Univ Ottawa L & Tech J* 169.
- ¹⁴ B Tigerstrom, 'Protection of Health Information Privacy: The Challenges and Possibilities of Technology' (1998) 4 *Appeal R Current L & L Reform* 44; A Grulich & J Kaldor, 'Individual Privacy and Observational Health Research: Violating an Individual's Privacy to Benefit the Health of Others' (2001) 24 *Univ New S Wales LJ* 298.
- ¹⁵ V Boyd, 'Financial Privacy in the United States and the European Union: A Path to Transatlantic Regulatory Harmonization' (2006) 24 *Berkeley J Int L* 939.
- ¹⁶ Cf W Creech, 'The Privacy of Government Employees' (1966) 31 *L & Contem Probm* 413; E Paton-Simpson, 'Private Circles and Public Squares: Invasion of Privacy by the Publication of Private Facts' (1998) 61 *Modern LR* 318; N Moreham, 'Privacy in Public Places' (2006) 65 *Cam LJ* 606; Z Balogh, G Polyak, B Ratai & G Szoke, 'Privacy in the Workplace' (2012) 150 *Studia Iuridica Auctoritate Universitatis Pecs Publicata* 9.
- ¹⁷ M Qafisheh, 'The Ability of the Palestinian Legal System to Secure Adequate Standards of Living: Reform or Failed State Duty' (2013) *Asian J Int L* (available online; printed version forthcoming).

privacy in its narrow sense as it has enshrined in the ICCPR and its corresponding legal regulation in the applicable law in Palestine.

Article 17 of the ICCPR protects privacy in the following terms:

- (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- (2) Everyone has the right to the protection of the law against such interference or attacks.

This article comprises two rights: (1) personal privacy, and (2) protection against attacks on one's honour and reputation. Let us look at these rights in Palestinian law.

Article 17 of the Amended Basic Law covers one aspect of the privacy; that is the inviolability of homes:

Homes shall be inviolable. Homes may not be subject to surveillance, broken into or searched, except in accordance with a valid judicial order and in accordance with the provisions of the law. Any consequences resulting from violations of this article shall be considered invalid. Individuals who suffer from such violation shall be entitled to a fair remedy, guaranteed by the Palestinian National Authority.

The Palestinian the Penal Procedures Law No 3 of 12 May 2001,¹⁸ in its Articles 39-52, sets out the steps that should be pursued to search homes.¹⁹ Search should be based on a signed

¹⁸ Palestine Gazette No 38, 5 September 2001, 94.

¹⁹ Cf E Geddes, 'The Private Investigator and the Right to Privacy' (1989) 27 *Alb LR* 256 (1989); P Li-ping, 'Criminal Search and Protection to Citizen Right of Privacy' (2007) 4 *US-China LR* 22.

official judicial memo against a person accused of committing a serious crime.²⁰ The memo should be reasoned and include specific information regarding the home's owner, his or her address, purpose of search, name of authorized officer in charge of the search, the memo's period of validity and its date of issuance. The searching of homes should be carried out during the day light;

'a house shall not be entered at night unless it is the scene of a flagrant crime or if the exigencies so warrant'.²¹ 'If the person required to be searched is female, she may only be searched by another female delegated for this purpose by the person in charge of the search operation'.²² And 'sealed or closed documents in any other way found in the house being searched may not be opened by the judicial [i.e. police] officer'.²³

Regarding correspondence, the same law stated:

- a. The Attorney General or one of his assistants may seize letters, communications, newspapers, printed matter, parcels and telegrams at post and telegraph offices when such relate to the crime and its perpetrator.
- b. He may also tap telephone and wireless communications and record conversations in private places on the basis of an authorization from the magistrate judge when such is useful in revealing the truth in a felony or a misdemeanour punishable by imprisonment for a term of not less than one year.

²⁰ Cf R Genderen, 'Trading Privacy for Security' (2009) 1 *Amst L Forum* 95 (2009).

²¹ Art 41.

²² Art 47.

²³ Art 50, para 3.

- c. The search warrant or the tapping or recording authorization must be reasoned and remains in force for a period of not more than fifteen days, subject to renewal once.²⁴

Any procedure contrary to these provisions is deemed null and void.²⁵

However, the General Intelligence Law No 17 of 26 October 2005²⁶ gives the intelligence agency the right to 'collate information related to the functions which the law approves and to request such information from the agencies of the National Authority and others without objection'.²⁷ The law further gives intelligence personnel the power to act as judicial, or police, officers.²⁸ These stipulations open the door for the intelligence agency to act as a judicial authority without adhering to the aforementioned terms of the Penal Procedures Law. Such rules run against Article 17 of the ICCPR and should be modified. Censorship should be subject to judicial review in all circumstances.²⁹

Protection against attacks on one's honour and reputation is guaranteed in both the penal law and law of tort. The (Jordanian) Penal Code No 16 of 10 April 1960,³⁰ applicable in the West Bank, protects privacy under a chapter entitled 'Crimes against Personal Freedom and Honour'.³¹ It punishes anyone who enters the property of others without permission, those who threaten to use arms, officials or professionals in charge

²⁴ Art 51.

²⁵ Art 52.

²⁶ Palestine Gazette No 60, 9 November 2005, 84.

²⁷ Art 11.

²⁸ Art 12.

²⁹ Cf I Vassilaki, 'Crime Investigation versus Privacy Protection - An Analysis of Colliding Interests' (1994) 2 *Euro J Crime, Crim L & Crim Jus* 39(1994); M Ghazvini, 'Respect for a Victim's Privacy during Police Procedure' (2002) 75 *Police J* 67.

³⁰ Jordan Official Gazette, No 1487, 1 May 1960, 374.

³¹ Arts 346-367.

of correspondence, such as postal or phone services, who release confidential information without a legal justification. It also sanctions defamation, slander, verbal or material assaults, like throwing dirt on a person or humiliating dead people. Similar rules can be found in the Penal Code Ordinance No 74 of 14 December 1936,³² applicable in Gaza, in the provisions concerning defamation or destruction of reputation³³ and to the inviolability of homes.³⁴ Those injured as a result of such crimes have the right of compensation for the damages they sustain in accordance with the Civil Wrongs Ordinance of 20 December 1944,³⁵ enforceable in both Gaza and the West Bank.³⁶

Judicial law guarantees privacy in court proceedings. Although judicial hearings should be held publicly, as a general rule; the law gives criminal or civil courts the right to conduct proceeding in private, i.e. in the presence of the parties, their lawyers and the court officials only, in cases when public order or public morals require so.³⁷ Family law cases may be held in confidence to preserve the family honour.³⁸ Judges hearing cases in which children are accused of committing crimes should convene in a different location and time or even outside the court itself. In court, juveniles

Palestine Gazette, Supp 1, No 652, 14 December 1936, 399.

s 201-209.

294-299.

stine Gazette Supp 1, No 1380, 28 December 1944, 149, Arts 15-25. Chester, J Murphy & E Robb, 'Zapping the Paparazzi: Is the Tort of Invasion of Privacy Alive and Well' (2003) 27 *Adv Q* 357; P Telford, 'Towards a Tort of Invasion of Privacy' (2004) 29 *Int L Pract* 211; R Brown, 'Making Privacy: Exclusivity, Private Relation and Tort Law' (2006) *LR* 589.

Procedures Law No 2 of 12 May 2001, Palestine Gazette, No 38, 5 November 2001, 5, Art 115; Penal Procedures Law No 3 of 12 May 2001, 1, 94, Art 237.

Family Procedures Law No 31 of 1959, Jordan Official Gazette, No 1449, 5 November 1959, 931 Art 46 (West Bank); Family Procedures Law No 28 April 1965, Palestine Gazette, Special Ed, 22 May 1965, 3, Art 1 (Gaza Strip).

should be separated from adults. No one is allowed to attend a juvenile court's session except the probation officer, the child's parents or guardian, the court staff, and persons directly related to the case. Courts sessions are confidential, according to Jordanian Juvenile Rehabilitation Law No 16 of 29 April 1954,³⁹ applicable in the West Bank.⁴⁰

Notwithstanding the proceeding provisions, Palestine still needs to adopt specific civil and criminal provisions relating to the protection personal privacy, for example by punishing those who invade health confidentiality of patients,⁴¹ hacking databases and electronic communications,⁴² and releasing private financial records.⁴³ It should draw the border between media freedoms and privacy,⁴⁴ preserving privacy through

³⁹ Jordan Official Gazette No 1182, 16 May 1954, 396, Art 7.

⁴⁰ No similar rule exists in Gaza. The applicable legislation in the Gaza Strip regarding children in conflict with the law is the British-enacted Juvenile Offenders Ordinance No 2 of 18 February 1937, Palestine Gazette No 667, Supp 1, 18 February 1937, 187. See M Qafisheh, 'Juvenile Justice System in Palestine: Current Situation and Reform Prospects' (2011) 25 *Int JL Policy & Fam* 365, 377-378.

⁴¹ N Terry, 'Privacy and the Health Information Domain: Properties, Models and Unintended Results' (2003) 10 *Euro J Health L* 223 (2003); J Loughrey, 'The Confidentiality of Medical Records: Informational Autonomy, Patient Privacy, and the Law' (2005) 56 *N Ireland LQ* 293; N Ries, 'Patient Privacy in a Wired (and Wireless) World: Approaches to Consent in the Context of Electronic Health Records' (2006) 43 *Alb LR* 681.

⁴² J Tealby, 'E-Mail & Privacy at Work' (1999) 10 *JL & Info Science* 207; M Cunningham, 'Privacy in the Age of the Hacker: Balancing Global Privacy and Data Security Law' (2012) 44 *George Washington Int LR* 643; C Scott, 'Our Digital Selves: Privacy Issues in Online Behavioral Advertising' (2012) 17 *Appeal: R Current L & L Reform* 63.

⁴³ N Masete, 'The Challenges in Safeguarding Financial Privacy in South Africa' (2012) 7 *J Int Comm L & Tec* 248; W Voss, K Woodcock, D Dumont & N Wells, 'Privacy, E-Commerce, and Data Security' (2012) 46 *Int Lawyer* 97.

⁴⁴ R Clarke, 'Privacy and the Media - A Platform for Change' (2012) 36 *Univ W Australia LR* 158; J Lipton, 'Digital Multi-Media and the Limits of Privacy Law' (2010) 42 *Case W Reserve J Int L* 551.

electronic social media networks,⁴⁵ and even to protect the right 'to be let alone.'⁴⁶

3. Right to freedom of religion

It is undisputed in international law that the right to freedom of religion is a manifestation of the freedom of expression.⁴⁷ In this connection, Article 18 of the ICCPR protects that right/freedom in the following terms:

- (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
- (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
- (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order,

J Stoddart, 'Privacy in the Era of Social Networking: Legal Obligations of Social Media Sites' (2011) 74 *Sask LR* 263.

Sparks, 'The Right to Be Let Alone: A Violation of Privacy' (1981) 1 *Australian Society L Phil* 58; N Jacoby, 'Redefining the Right to Let Alone: Privacy Rights and the Constitutionality of Technical Surveillance Measures in Germany and the United States' (2007) 35 *Georgia J Int & Comp L* 433.

and, in general, N Smith, 'Freedom of Religion: The Right to Manifest One's Beliefs' (2002) 119 *S Afr LJ* 690; E Wiles, 'A Right to Artistic Expression - An Examination of the Relationship between Freedom of Expression and Freedom of Religion, through a Comparative Analysis of UK Law' (2006) 6 *Univ College Dublin L R* 124; L Junning, 'Freedom of Religion: The Primary Human Right: The World Does Not Belong to Caesar' (2010) 6 *Chinese L & Religion Monitor* 41 (2010).

health, morals or the fundamental rights and freedoms of others.

- (4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

After stipulating that 'Islam is the official religion in Palestine and respect for the sanctity of all other divine religions shall be maintained',⁴⁸ the Palestinian 2003 Basic Law added that

'freedom of belief, worship and the performance of religious functions are guaranteed, provided that public order or public morals are not violated' (Article 18).⁴⁹

The British-enacted 1936 Penal Code Ordinance (mentioned above), applicable in Gaza, incorporated a number of provisions that consider as misdemeanour any act that violates the rights of people to practice religion or to manifest religious beliefs, including by destroying religious materials,⁵⁰ disturbing gatherings of worshipers,⁵¹ attacking places of worship or cemeteries,⁵² and publishing or expressing anything

⁴⁸ Art 4, para 1.

⁴⁹ Cf M Heyward, 'What Constitutes Europe: Religion, Law and Identity in the Draft Constitution for the European Union' (2005) 1 *Hanse LR* 227; T Stahnke & R Blitt, 'The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries' (2007) 5 *Int J Civil Society L* 43; I McLean & S Peterson, 'Entrenching the Establishment and Free Exercise of Religion in the Written U.K. Constitution' (2011) 9 *Int J Const L* 230.

⁵⁰ Art 146.

⁵¹ Art 147.

⁵² Art 148.

that humiliates or disrespects the religious feelings.⁵³ Similar provision can be found in the West Bank 1960 Penal Code.⁵⁴

The law in Palestine allows each sect to organize its own religious affairs, including family status laws,⁵⁵ religious endowments,⁵⁶ or administrating places of worship,⁵⁷ based on religious beliefs and tradition.⁵⁸ The law obliges schools to teach children no religion except their own.⁵⁹ Religious minorities, particularly Christians, are accorded the right to exercise their own sacred holidays and weekends.⁶⁰ A number of seats in parliament⁶¹ and municipalities⁶² are reserved for religious minorities.⁶³

⁵³ Art 149.

⁵⁴ Arts 273-278.

⁵⁵ M Qafisheh, 'The Dilemma of Legislative Reform in Line with International Standards on Gender Equality in the Islamic World: The Case of Palestine' (2013) 1 *Int J Legis Draf & L Reform* 219.

⁵⁶ Charitable Trusts Ordinance of 1 October 1924; in R Drayton (ed), *The Laws of Palestine in Force on the 31st Day of December 1933* (1934), 125.

⁵⁷ Land Registration Fees Law No 26 of 26 May 1958, Jordan Official Gazette No 1385, 1 June 1958, 549, Art 4; Law concerning the Exemption of the Charitable Endowments from Taxes and Fees No 36 of 27 June 1973, Jordan Official Gazette No 2432, 16 July 1973, 1352.

⁵⁸ Law of the Jerusalemite Greek Orthodox Patriarchate No 27 of 26 March 1958, Jordan Official Gazette No 1385, 6 January 1958, 556.

⁵⁹ Education Law No 16 of 11 May 1964, Jordan Official Gazette No 1763, 26 May 1964, 720, Arts 71 and 77.

⁶⁰ Decision of the Council of Ministers No 217 of 23 December 2004 concerning the Official and Religious Holidays for the Government Employees, Palestine Gazette No 55, 27 June 2005, 152; Decision of the Council of Ministers No 125 of 11 November 2006 concerning the Holiday of Christian Private Schools, Palestine Gazette No 69, 27 April 2007, 190.

⁶¹ Decree-Law No 1 of 2 September 2007 concerning General Elections, Palestine Gazette No 72, 9 September 2007, 2.

⁶² Presidential Decree No 10 of 22 March 2005 on the Number of Members of the Municipal Council of the Municipality of Bethlehem and Similar Cities, Palestine Gazette No 55, 27 June 2005, 75.

⁶³ Cf G Gilbert, 'Religious Minorities and Their Rights: A Problem of Approach' (1998) 5 *Int J Minority & Group Rts* 97; J Rehman, 'Accommodating Religious Identities in an Islamic State: International

It can thus be concluded that the applicable law in Palestine is generally in agreement with Article 18 of the ICCPR.

Nonetheless, religious laws of various groups discriminate against or prevent persons from another religion to enjoy certain rights, for instance by prohibiting the marriage with a person because he or she believes in another religion,⁶⁴ the non-acceptance of the testimony of witnesses affiliated with another religion;⁶⁵ and denying the inter-religion inheritance amongst family relatives.⁶⁶ Such religious-based discriminations do not only affect the 'freedom to have or to adopt a religion or belief of his choice' but it also runs contrary to Article 18 of the Universal Declaration of Human Rights that gives everyone the 'freedom to change his religion or belief'. If the person, for instance, risks losing his or her spouse or the right of inheritance; such person's freedom to change religion might be affected.⁶⁷ Such provisions can be changed by, for example, adopting a civil uniformed personal status law in Palestine that could be introduced as an optional possibility for those individuals who opt for governing their family lives under such a law.⁶⁸

Law, Freedom of Religion and the Rights of Religious Minorities' (2000) 7 *Int J Minority & Group Rts* 139; M Crouch, 'Regulating Places of Worship in Indonesia: Upholding Freedom of Religion for Religious Minorities' (2007) *Sing JL Studies* 96.

⁶⁴ Qafisheh, above n 55, 227-228.

⁶⁵ See, for example, [Muslim] Personal Status Law No 61 of 1 December 1976, Jordan Official Gazette No 2668, 1 December 1976, 2756, Art 16; Personal Status Law for Syrian Orthodox of 3 April 2000, enacted in Jerusalem on 9 September 2000, Art 3.

⁶⁶ Qafisheh, above n 55, 231-233.

⁶⁷ Cf M Shava, 'The Effect of a Change of Religion on Jurisdiction in Matters of Personal Status' (1984) 10 *Tel Aviv Univ LR* 177; N Lerner, 'Proselytism, Change of Religion, and International Human Rights' (1998) 12 *Emory Int LR* 477.

⁶⁸ Qafisheh, above n 55, 228.

4. Freedom of opinion

Article 19 of the ICCPR guarantees the freedom of opinion as follows:

- (1) Everyone shall have the right to hold opinions without interference.
- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- (3) The exercise of the rights provided for in paragraph 3 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

In Palestine, Article 19 of the 2003 Amended Basic Law provides similar provision to that of ICCPR; with the rule and an exception:

Freedom of opinion may not be restricted. Every person shall have the right to express his opinion and to circulate it orally, in writing or in any form of expression or art, with due consideration to the provisions of the law.

While paragraphs 1 and 2 of Article 19 of the ICCPR deal with the freedom of opinion and expression, paragraph

2 relates to the restrictions that might be imposed on such freedoms. We will first look at the right then touch upon its exception.⁶⁹

The primary legislation that regulates the freedom of opinion and expression in Palestine is the Press and Publication Law No 9 of 25 June 1995.⁷⁰ This 'law' was enacted by the President Y Arafat before the parliamentary election that took place for the first time in Palestine in January 1996. Thus the law can be considered as rather an executive order as it has never been adopted by the Palestinian Legislative Council.⁷¹

Article 2 of this law draws the framework for the freedom: 'Journalism and press are free. The freedom of opinion is guaranteed. Every Palestinian may express his opinion freely by speaking, writing, filming and painting in all expression and media outlets'. The law continues by prescribing the freedom of expression for political parties, non-governmental organizations, newspapers, professional syndicates,⁷² the right to own media or publishing institutions,⁷³ and obligation of official bodies to facilitate the missions of journalists.⁷⁴ These stipulations can be viewed as concrete materialisation of the principles outlined in Articles 19 of both the ICCPR and the Basic Law.⁷⁵

⁶⁹ J Raz, 'Free Expression and Personal Identification' (1991) 11 *Ox JL Studies* 303; P Horwitz, 'Law's Expression: The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law' (2000) 38 *Osg Hall LJ* 101; D Meyerson, 'The Legitimate Extent of Freedom of Expression' (2002) 52 *Univ Toronto LJ* 331; D Pretorius, 'Freedom of Expression and the Regulation of Broadcasting' (2006) 22 *S Afr J Hum Rts* 47; D Iancu, 'Freedom of the Press - A Component of Freedom of Expression' (2010) *Acta Universitatis Danubius Juridica* 57.

⁷⁰ Palestine Gazette No 6, 29 August 1995, 11.

⁷¹ For a history on legislative process in Palestine, see: M Qafisheh, 'Legislative Drafting in Transitional States: The Case of Palestine' (2013) 2 *Int J Legis Draf & L Reform* (forthcoming).

⁷² Art 4.

⁷³ Art 5.

⁷⁴ Art 6.

⁷⁵ The copyright in the country is guaranteed by the English Copyright

In subsequent articles, however, the Press and Publication Law retracted by imposing restrictions on the freedom of opinion. Certain restrictions can be viewed as a reasonable application of paragraph 2 of Article 19 of the ICCPR. Others are controversial.

The first category of restrictions incorporates a number of reasonable constraints. For example, no publication that targets children or adolescents may contain photos comprising immoral images or stories.⁷⁶ Journalists' code of conduct should comprise the principles of respecting the rights and privacy of others (see section 1 above).⁷⁷ Journalists should behave in balanced, objective, accurate manner and avoid propaganda for violence, sectarian divide or racism.⁷⁸ Publishing houses are under an obligation to pursue transparent funding

Act of 16 December 1911, which was extended to Palestine by Royal Order on 21 March 1924 (Drayton, above n 56, 3204). The Act, which is still applicable in both the Gaza Strip and the West Bank, protects various authors' rights pertaining to literature, music, drama, artistic works, including books, novels, maps, charts, engineering drawings, oil paintings, cartoons, animations, movie direction, statues, photos, carvings, songs, inscriptions, dance tunes and plays. Such protection includes publishing or re-publishing, lecturing, performing, translating, recording, broadcasting, playing in the cinema or the theatre, selling, renting, distributing, granting as a gift or in the form of a will, and passing rights to heirs. For details on the cultural life as a means for expressing tradition and art, see M Qafisheh, 'The Human Rights Obligations of the State of Palestine: The Case of the International Covenant on Economic, Social and Cultural Rights' in Qafisheh (ed), *Palestine Membership*, above n 4, 229-234.

⁷⁶ Art 7, para 2. Cf I Cram, 'Criminalising Child Pornography - A Canadian Study in Freedom of Expression and Charter-led Judicial Review of Legislative Policy-Making' (2002) 66 *J Crim L* 359; M Storrow & R Millen, 'Child Pornography and Freedom of Expression in Canada and the U.S.A.' (2003) 61 *Adv (Vancouver B Asso)* 825.

⁷⁷ S Smet, 'Freedom of Expression and the Right to Reputation: Human Rights in Conflict' (2010) 26 *Am Univ Int LR* 183; B Quistgaard, 'Pornography, Harm, and Censorship: A Feminist Re(Vision) of the Right to Freedom of Expression' (1993) 52 *Univ Toronto Faculty LR* 132.

⁷⁸ Art 8.

channels, clear management structure, and valid legal status.⁷⁹ Obviously, the purpose of such restrictions is to 'respect of the rights or reputations of others' or to preserve 'public order (*ordre public*), or of public health or morals', as enshrined in paragraph 2 of Article 19 of the ICCPR.⁸⁰

Rules that impose restrictions on the freedom of expression are many. It suffices to mention the following instances:

- (I) the series of approvals that one should acquire from the Ministry of Information, such as
 - (a) approval for any foreign financing, without specifying what 'finance' means,⁸¹
 - (b) approval and notification of the Ministry for importing periodicals two weeks in advance,⁸²
 - (c) approval for anyone who wants to sell publications,⁸³ and
 - (d) personal approval of the Minister of Information for importing any 'prohibited materials' by governmental bodies, universities and research institutions;⁸⁴

- (II) the prohibition to work with any foreign news agency without obtaining a permission based on executive regulation;⁸⁵

⁷⁹ Arts 11-16.

⁸⁰ J Moses, 'Hate Speech: Competing Rights to Freedom of Expression' (1996) 8 *Auck Univ LR* 185; A Reichman, 'The Passionate Expression of Hate: Constitutional Protections, Emotional Harm and Comparative Law' (2007) 31 *Fordham Int LJ* 76; O Bakircioglu, 'Freedom of Expression and Hate Speech' (2008) 16 *Tulsa J Comp & Int L* 1.

⁸¹ Art 9.

⁸² Arts 34-35.

⁸³ Art 36.

⁸⁴ Art 38.

⁸⁵ Art 10. The said regulation has not been issued yet.

- (III) widening the types of 'banned items', by using vague language, that would lead to a series of works that cannot be published;⁸⁶ and
- (IV) prescribing a number of strict penalties for the so called 'publishing crimes'.⁸⁷

The said law requires any media agency to own minimum capital of about 35,000 United States Dollars.⁸⁸ This sum is relatively huge and poses difficulties on low income journalists to initiate private media business. Being enacted in 1995, the law has not taken electronic evolutions into account, whereby any individual might initiate media outlet at low or no cost. That is particularly clear regarding the constrains imposed on permitting foreign media agencies and distributing foreign publications;⁸⁹ as if publishers would need permissions to enter the country at this age of open media through the internet, digital communicants and satellite stations. Such restrictions do not only contradict Article 19 of the ICCPR but they are also out of touch and cannot be effectively enforced. Such senseless measures ought to be legally removed.⁹⁰

Penal codes punish what is called 'state security crimes', as depicted in the 1960 Code,⁹¹ or 'offences against public

⁸⁶ Art 37.

⁸⁷ Arts 44-48.

⁸⁸ Art 21, para 1.

⁸⁹ Arts 27-29.

⁹⁰ R Dawkins, 'Online Liberty: Freedom of Expression in the Information Age' (2001) 10 *Dal JL Studies* 102; D Collier, 'Freedom of Expression in Cyberspace: Real Limits in a Virtual Domain' (2005) 16 *Stellenbosch LR* 21; A Marsoof, 'Online Social Networking and the Right to Privacy: The Conflicting Rights of Privacy and Expression' (2011) 19 *Int JL & Info Tech* 110; N Lucchi, 'Access to Network Services and Protection of Constitutional Rights: Recognizing the Essential Role of Internet Access for the Freedom of Expression' (2011) 19 *Cardozo J Int & Comp L* 645.

⁹¹ Arts 107-153.

order', as referred to by the 1936 Ordinance,⁹² posing serious derogation from the freedom of opinion. The problem arises from the broad drafting, in both substantive provisions and terminology, in a number of articles that might be interpreted in conflicting ways whereby the accused person may receive different penalties depending on the authority that exercises judicial power in certain contexts.⁹³ Certain 'security crimes' are harshly punished, often by death sentence. Instances of vague language in the Jordanian 1960 Code of the West Bank include a provision that states that 'any person who commits acts, writings or plans that are not permitted by the government' which 'endangers' the country or 'damages its relations with a foreign States' would be jailed for five years.⁹⁴ Examples of vague terms comprise 'conspiracy',⁹⁵ 'weakening national feeling',⁹⁶ and 'incitement'.⁹⁷ Some of these terms were not defined at all, such as passing 'information to a foreign State',⁹⁸ 'changing the constitution through illegal means',⁹⁹ or preventing the 'authorities from exercising constitutional powers'.¹⁰⁰ Similar instances can be found in the British-enacted 1936 Criminal Code Ordinance, currently valid in Gaza. This legislation used a number of vague words to describe crimes that would be sanctioned by death, such as 'conspiring' and 'treason'.¹⁰¹ The Code regulated what it called 'seditious intention';¹⁰² criminalized individuals who 'conspire' with others to do any act in furtherance of any seditious

⁹² Arts 49-105.

⁹³ Cf R Atkey, 'Reconciling Freedom of Expression and National Security' (1991) 41 *Univ Toronto LJ*38.

⁹⁴ Art 118, para 2.

⁹⁵ Art 107.

⁹⁶ Art 130.

⁹⁷ Art 145.

⁹⁸ Art 111.

⁹⁹ Art 136.

¹⁰⁰ Art 138.

¹⁰¹ Art 49.

¹⁰² Arts 59-61.

intention, or 'publish' any words or document with a seditious intention, or is found in possession of a document containing a seditious intention.¹⁰³ 'Seditious' is 'an intention to bring into hatred or contempt or to excite disaffection' against the head of the state, 'to rise discontent or disaffection amongst inhabitants of Palestine', or 'to promote feelings of ill-will and hostility between different sections of the population'.¹⁰⁴ The Ordinance, furthermore, jails with a three-year term anyone who disseminates statements that 'disturb public peace'.¹⁰⁵

Other types of legislation restrict the freedom of opinion in a violation of Article 19 of the ICCPR, including the following: Political Parties Law No 15 of 30 March 1955,¹⁰⁶ which gives the government an absolute right to issue or withhold permission or to dissolve any political party without a right for that party to challenge such dissolution at courts;¹⁰⁷ Resistance of Communism Law No 91 of 8 December 1953,¹⁰⁸ which criminalize any person who affiliates with 'communism', publish or assist in publishing or distribution of any 'pro-communist publication'; and Regulation No 182 of 14 December 2004 on Licensing of the Radio, Television, Satellite and Wireless Stations,¹⁰⁹ which gives the government an ultimate power to permit and to oversee the media. It retains for the government an exclusive right to run religious channels.

In order to be consistent with Article 19 of the ICCPR, Palestine needs to abolish or modify the legislative stipulations that restrict the freedom of opinion and to replace them with enactments that maintain the restrictions, if any, as exceptional measures for specific situations referred to in paragraph 2 of the said ICCPR article.

¹⁰³ Art 59.

¹⁰⁴ Art 60.

¹⁰⁵ Art 62.

¹⁰⁶ Jordan Official Gazette No 1223, 3 April 1955, 278.

¹⁰⁷ Arts 5-6 and 10.

¹⁰⁸ Jordan Official Gazette No 1164, 16 December 1953, 785.

¹⁰⁹ Palestine Gazette No 54, 23 April 2005, 90.

5. Peaceful assembly

Article 21 of the ICCPR stated:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

The 2003 Amended Palestinian Basic Law endorsed the principle of freedom of peaceful assembly in its Article 26, paragraph 5, which gives Palestinian citizens the right to 'conduct private meetings without the presence of police and to organize public meetings, gatherings and demonstration, *within the limits of the law*'.¹¹⁰

In Palestinian legislation, the right of peaceful assembly has been recognized by the Public Meetings Law No 12 of 28 December 1998.¹¹¹ Article 2 of this legislation stipulates that:

'Citizens shall have the right to feely hold public meetings, seminars and demonstrations. No restrictions may be placed on holding of such meetings except in accordance with this law'.

Restrictions on such meetings include the 'notification' of the police by the assembly's organizers forty-eight hours before the convention of the meeting.¹¹² The police,

¹¹⁰ Emphasis added.

¹¹¹ Palestine Gazette No 28, 13 March 1999, 6.

¹¹² Art 3.

‘without prejudice to the right of meeting, may place restrictions on the duration or route of the meeting [...] for the object of organizing the traffic’.¹¹³

The notification does not mean approval. Thus if the organizers do not receive a response from the police, they ‘may hold the public meeting at the fixed time in the manner stated in the notice’.¹¹⁴ The police may

‘upon the organizer’s request, take precautionary measures, provided that such measures shall not cause any infringement upon the freedom of the attendees and the proceedings of the meeting’.

This shows that the local law does recognize the right of peaceful assembly with limits within the scope of Article 21 of the ICCPR.

On 30 April 2000, however, the Palestinian Minister of Interior enacted Rules to implement the Public Meeting Law.¹¹⁵ The Rules reaffirmed the provisions of the said law, adding certain stipulations that might be deemed as part of the public order purposes, such as organizing the meeting away from places of tension;¹¹⁶ assigning police officers to protect the meeting;¹¹⁷ the power of the police to end the meeting if it exceeds its purposes;¹¹⁸ the possibility for the police to intervene if the meeting turned violent or if the personal safety or property of individuals is endangered;¹¹⁹

¹¹³ Art 4, para C.

¹¹⁴ Art 4, para D.

¹¹⁵ Decision of the Minister of Interior Relating to Issuance of the Executive Rules of the Public Meetings Law No 12 of 1998 No 1 of 2000, Palestine Gazette No 33, 30 June 2000, 68.

¹¹⁶ Art 4.

¹¹⁷ Art 5.

¹¹⁸ Art 6.

¹¹⁹ Art 7.

and the prohibition of those participating in the meeting to wear masks or carry guns.¹²⁰

Yet two provisions of the Rules are problematic.

Article 9 of the Rules made any public meeting subject to the limitations of the Presidential Decree Relating to the Consolidation of National Unity and the Prevention of Incitement No 3 of 19 November 1998.¹²¹ This Decree comprised vague terms that can be interpreted by the police in various ways and might be used as a pretext to restrict the organization of public meetings. Such terms include 'incitement for violence that harms the relations with brother or foreign States', 'disturbing the life', 'provoking people's emotions', 'incitement for sedition' and 'incitement to break treaties signed between the Palestine Liberation Organization and other brother or foreign States'. By using such terms in the context of Public Meetings Law, the Rules imply that any meeting suspected, in the view of the police, of being motivated by any of the aforementioned purposes might be banned.

The preceding conclusion holds particularly true since Article 10 of the said Rules turned the 'notification' by the organizers into 'application'. It likewise turned the response of the police to that notification into 'permission'. This article provided:

'The response of the police to the notification [...] shall take the form of written *permission* according to the formula that can be decided by the Director-General of the Police which may include the following [...] (f) any other conditions'.¹²²

Obviously, the Rules give the police an absolute discretion to decide upon the limitations on public meetings which might

¹²⁰ Art 8.

¹²¹ Palestine Gazette No 26, 26 November 1998, 11.

¹²² Emphasis added.

lead to the actual denial of the right of peaceful assembly. Such derogation, in turn, runs contrary to not only Article 21 of the ICCPR but also to the provisions of the 1998 Public Meetings Law.

Lastly, a note might be made on the right of peaceful assembly for non-citizens. The Public Meetings Law referred only to the right of 'citizens' to hold meetings, a derogation clause that does not exist in Article 21 of the ICCPR.¹²³ The Palestinian legislator might, in order to harmonize its legislation with the Covenant, consider modifying this condition and give the right of peaceful assembly to 'everyone' regardless of nationality.

In order to conform to the ICCPR, the Palestinian legislator needs to contemplate revoking the Minister of Interior Rules of 2000. The 1998 Law by itself is self sufficient and does not need executive rules that undermine its provisions.¹²⁴

6. Freedom of association

Article 22 of the ICCPR relates to the freedom of association, or the formation of non-governmental organizations (NGOs). It reads as follows:

- (1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
- (2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in

¹²³ Human Rights Committee, General Comment No 15, 11 April 1986, 'The Position of Aliens under the Covenant', para 7, UN Doc. HRI/GEN/1/Rev.7 ('Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies', 12 May 2004), 140.

¹²⁴ See, in general, M MacGuigan, 'Hate Control and Freedom of Assembly' (1966) 31 *Sask B Rev* 232; D Barnum, 'Freedom of Assembly and the

the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

- (3) Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

The freedom of association in Palestine is a constitutional right referred to twice in the Basic Law.¹²⁵ Article 26 gives the 'Palestinians', *inter alia*, the right to 'form, establish and join political parties in accordance with the law',¹²⁶ and to 'form and establish unions, associations, societies, clubs and popular institutions in accordance with the law'.¹²⁷ Article 25, paragraph 2, added that the 'organization of unions is a

Hostile Audience in Anglo-American Law' (1981) 29 *Am J Comp L* 59; M Hamilton, 'Freedom of Assembly, Consequential Harms and the Rule of Law: Liberty-Limiting Principles in the Context of Transition' (2007) 27 *Ox JL Studies* 75; C Pakozdy, 'The Power of State versus Freedom of Assembly in the Light of the Case-Law of the European Court of Human Rights and the Hungarian Jurisprudence' (2007) 4 *Miskolc J Int L* 46.

¹²⁵ See, as a background, L Welchman, 'In the Interim: Civil Society, the Shar'i Judiciary and Palestinian Personal Status Law in the Transitional Period' (2003) 10 *Islamic L & Society* 34; A Schwartz, 'The Leadership Role of Palestinian Non-Governmental Organizations: Managing Chaos, Creating Civil Society' (2004) 2 *Int J Civ Society L* 63; R Nicholson, 'Legal Intifada: Palestinian NGOs and Resistance Litigation in Israeli Courts' (2012) 39 *Syracuse J Int L & Comm* 381.

¹²⁶ Para 1.

¹²⁷ Para 2.

right that shall be regulated by the law'. Whereas Article 26 mentioned the 'Palestinians', implying a *citizen's right*, Article 25 used more neutral language, indicating a *human right*. It can be, from the outset, recommended that the Palestinian legislator to recognize the right to associate for all peoples in Palestine, citizens and aliens alike, if it wishes to be fully consistent with Article 22 of the ICCPR.¹²⁸ We will explore the status of foreign associations in some detail below.

On these details, the regularization of the status of associations has been set forth in Law No 1 concerning Charitable Associations and Civil Society Organizations of 16 January 2000.¹²⁹ This law gives civil society organizations the right to operate freely.¹³⁰ It prescribes rules on the registration of an NGO at the Ministry of Interior,¹³¹ the formation of the association's standing order,¹³² NGO's administration (its board of managers and general assembly),¹³³ its financial resources,¹³⁴ programmes, activities, and the right to establish branches.¹³⁵ The law recognizes an independent juridical personality for each association,¹³⁶ whereby an NGO may own property,¹³⁷ establish networks and unions and affiliate with global bodies,¹³⁸ and to have separate budget.¹³⁹ The NGOs law exempts associations from taxation, customs and allows them to raise funds.¹⁴⁰

¹²⁸ Human Rights Committee General Comment No 15, above n 123, para 7.

¹²⁹ Palestine Gazette No 32, 29 February 2000, 71; hereinafter referred to as 'NGOs law'.

¹³⁰ Art 1.

¹³¹ Art 3.

¹³² Art 5.

¹³³ Arts 16-25.

¹³⁴ Arts 32-33.

¹³⁵ Art 15.

¹³⁶ Art 7.

¹³⁷ Art 9.

¹³⁸ Arts 26-27 and 29.

¹³⁹ Arts 30-31.

¹⁴⁰ Art 14.

The NGOs law comprises measures to ensure the freedom of association. Although it gives the Ministry of Interior the power to license associations, it obliges the Ministry to approve the NGO's foundation within two months starting from the date of application by the founders. If no response from the Ministry is communicated to the applicants, or if the refusal of the Ministry does not contain specific reasons exclusively enumerated in Article 21 of the Bylaws No 9 of 29 November 2003 of the Law concerning Charitable Associations and Civil Society Organizations,¹⁴¹ the association would be *ipso facto* considered as being licensed.¹⁴² In case the Ministry rejects the NGO's establishment, the founders can appeal to the High Court of Justice which reserves the final decision on the association's fate.

The law fixed a number of specific instances upon which the association might be dissolved by the Ministry of Interior, such as the cessation of the NGO's activities in its first year of opening.¹⁴³ In case of the NGO's dissolution by the Minister which should be, by the virtue of the law, reasoned; the association may appeal to the High Court of Justice. While awaiting the Court's decision on its destiny, the NGO has the right to continue operating until rendering the Court's final judgment.¹⁴⁴

To remove any doubt on the possibility for non-Palestinians to establish associations in the country, Article 34 of the NGOs law permitted the establishment of 'foreign' associations. Such associations and their status have been set up by the aforementioned 2003 NGO Bylaws.¹⁴⁵ Accordingly, a 'foreign association' has been defined as any NGO that 'its headquarters is located outside Palestine or if the majority of

¹⁴¹ Palestine Gazette No 49, 17 June 2004, 102.

¹⁴² Art 4.

¹⁴³ Art 37.

¹⁴⁴ Art 38.

¹⁴⁵ Arts 24-35.

its members are non-Palestinians'.¹⁴⁶ With a few procedural exceptions pertaining to the required documentations relating to the evidence of the NGO's status in its country of origin, the establishment procedures of foreign NGOs are rather similar to the steps concerning Palestinian NGOs.

The NGOs law and its bylaws referred to professional associations to which additional rules may apply.¹⁴⁷ The legislation relating to these professional associations include, for example, Journalists Syndicate Law No 17 of 29 December 1952;¹⁴⁸ Medical Association Law No 14 of 4 April 1954, which sets rules relating to the rights of those practicing medical profession;¹⁴⁹ Engineers Association Law No 18 of 10 February 1958;¹⁵⁰ Legal Profession Law No 3 of 24 June 1999,¹⁵¹ which regulates the work of the Palestine Bar Association;¹⁵² and Law of General Union of Palestinian Industries and the Specialized Industries Unions No 2 of 21 January 2006.¹⁵³ Moreover, one may consider chambers of commerce as unions, or NGOs, of business people operating at districts' levels, as it appears from the Decree-Law No 9 of 4 August 2011 concerning Chambers of Commerce and Industries.¹⁵⁴ These professional associations or unions depend almost exclusively on their own laws which are self-sufficient and operate independently from the NGOs law. Each of these NGOs is overseen by a given ministry and report to its general assembly.¹⁵⁵

¹⁴⁶ Art 24, para 1.

¹⁴⁷ Art 40 of the Law; Art 68 of the Bylaws.

¹⁴⁸ Jordan Official Gazette No 1131, 17 January 1953, 477.

¹⁴⁹ Jordan Official Gazette No 1179, 17 April 1954, 322.

¹⁵⁰ Jordan Official Gazette No 1373, 13 March 1958, 310.

¹⁵¹ Palestine Gazette No 30, 10 October 1999, 5.

¹⁵² See also Bar Association Bylaws of 22 September 2000, Palestine Gazette No 34, 30 September 2000, 117.

¹⁵³ Palestine Gazette, Special Ed, 14 February 2006, 18.

¹⁵⁴ Palestine Gazette No 92, 25 December 2011, 5.

¹⁵⁵ Cf J Nicod, 'Freedom of Association and Trade Unionism: An Introductory Survey' (1924) 9 *Int Lab R* 467; E Daya, 'Freedom of Association and Industrial Relations in Asian Countries: II' (1955) 71 *Int Lab R* 467;

Most associations are admissible for citizens only.¹⁵⁶ When open for aliens, the membership is made conditional to the principle of reciprocity. Such restriction might contradict Article 22 of the ICCPR. It ought to be modified to allow aliens who meet professional requirements of a given association to obtain its membership without the condition of reciprocity. People with professional capacities should be judged based on the merits of their technical capacities and not be held captive to their governments' politics to which, by and large, they have nothing to do.

It might be relevant to point out that the majority of legislation that govern associations have been developed during the Jordanian rule and apply in the West Bank only, i.e. not in the Gaza Strip. Such laws are not only outdated and need update in the light of universal standards but also contradict the fact that the State of Palestine would be established in both Gaza and the West Bank; setting up modern and unified laws for these associations would strengthen Palestinian national unity.

There is a legislative gap regarding political parties in Palestine.¹⁵⁷ As mentioned above, the 1955 Political Parties

R Vernengo, 'Freedom of Association and Industrial Relations in Latin America: II' (1956) 73 *Int Lab R* 592; J Hallsworth, 'Freedom of Association and Industrial Relations in the Countries of the Near and Middle East: I' (1954) 70 *Int Lab R* 363; T Madima, 'Freedom of Association and the Concept of Compulsory Trade Union Membership' [1994] 3 *J S Afr L* 545.

¹⁵⁶ Journalists Syndicate Law No 17 of 29 December 1952, Jordan Official Gazette No 1131, 17 January 1953, 477, Art 25; Engineers Association Law No. 18 of 10 February 1958, Jordan Official Gazette No 1373, 13 March 1958, 310, Art 7; Legal Profession Law of 1999, Art 3; Pharmaceutical Association Law No 10 of 18 February 1957, Jordan Official Gazette No 1323, 17 March 1957, 283, Art 6; Dentists Association Law No 11 of 27 February 1956, Jordan Official Gazette No 1265, 17 March 1956, 1350, Art 8.

¹⁵⁷ Cf O Akbulut, 'Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties' (2010) 34 *Fordham Int LJ* 46.

Law is still enforced in the West Bank; no law on political parties exists in the Gaza Strip. Although it is effectively impracticable due the lapse of time since its adoption and the subsequent developments that occurred since then, this law might be used to suppress political opponents as it gives the government a power to permit or dissolve any political party. The law provides no right for the dissolved party to challenge such dissolution at any court.¹⁵⁸ As the Palestinian constitutional system has become 'democratic parliamentary system based on political and party pluralism',¹⁵⁹ the *raison d'être* of the Political Parties Law, which was set to suit a regime of absolute monarchy, has ended.

Moreover, the legislative gap with regard to political parties is probably a positive sign. It implies that people are free to form political parties as they wish based on the rule 'everything which is not forbidden is allowed', an uncontested principle in the Palestinian legal system. The freedom of forming political parties can be understood from the said Article 5 of the 2003 Basic Law and from the election legislation that has been applied since the establishment of the Palestinian Authority that based election on multi-party system. In fact, no one is now allowed to run for parliamentary election except if he or she is affiliated with an 'electoral list',¹⁶⁰ i.e. political party.

The foregoing discussion reveals that the freedom of association as it relates to the formation of political parties is effectively guaranteed in Palestine.

Ambiguity surrounds the freedom of association in both the 1960 Penal Code,¹⁶¹ in the West Bank, and the 1936 Penal Code Ordinance of Gaza.¹⁶² Both codes are almost identical regarding the formation of 'unlawful associations'. Without setting a clear definition of such associations, the codes

¹⁵⁸ Arts 5-6 and 10.

¹⁵⁹ Amended Basic Law of 2003, Art 5.

¹⁶⁰ Decree-Law of 2007 concerning General Elections, above n 61.

¹⁶¹ Arts 159-163.

¹⁶² Arts 69-73.

penalize members affiliated with organizations that intend, for example, to overthrow the constitution 'by revolution or sabotage'.¹⁶³ This may justify attacks on NGOs and on political parties that criticize official policies. In particular, Article 161 of the 1960 Code imposes further penalties on any

'person who speaks, writes, advocates, or encourages any act declared to be unlawful under Article 159 [i.e. 'overthrowing the constitution by revolution']'.¹⁶⁴

The latter article considers 'unlawful association' any

'organization that continues to operate despite failing to notify its rules to the government or having been dissolved'.

It also outlaws

'any branch, centre, committee, group or faction of an unlawful association and any institution or school operate under the instruction of an unlawful association'.¹⁶⁵

Such provisions undermine the freedoms of association and expression as enshrined in Articles 22 and 19 of the ICCPR.

After defining the status of non-governmental organizations in the 2000 NGO law, there is no reason to maintain the rules of penal codes relating to associations. One could even conclude that, despite the fact that freedom of association stipulations were not explicitly repealed by the 2000 law; the latter law had implicitly (by introducing rules on identical issues) repealed the older stipulations and may prevail in cases of conflict. Yet it is significant to explicitly revoke the

¹⁶³ Art 159 of the Code; Art 69 of the Ordinance. Both articles are identical, *mutatis mutandis*.

¹⁶⁴ See the identical Art 71 of the 1936 Criminal Ordinance.

¹⁶⁵ See also Art 69(c) of the 1936 Ordinance.

above articles of penal codes to avoid potential confusion and to secure greater freedom of association.¹⁶⁶

A word must be said about paragraph 3 of Article 22 of the ICCPR concerning labour unions.¹⁶⁷ Assuming that it would be interested in becoming party to the Convention concerning Freedom of Association and Protection of the Right to organize of 9 July 1948,¹⁶⁸ mentioned in the said paragraph 3, Palestine will be obliged to give specific rights for labour unions in accordance with the Convention. Palestine should give

'[w]orkers and employers [...] the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation'.¹⁶⁹

'Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority'.¹⁷⁰ Nothing in the Palestinian Labour Law No 7 of 30 April 2000¹⁷¹ prevents workers' or employers' associations to form unions. Article 53, paragraph 3, of the Labour Law on collective

¹⁶⁶ M Qafisheh, 'Human Rights Gaps in Palestinian Criminal System: A United Nations Role?' (2012) 16 *Int J Hum Rts* 358, 366.

¹⁶⁷ See, in general, J Servais, 'ILO Standards of Freedom of Association and Their Implementation' (1984) 123 *Int Lab R* 765; L Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18 *Indus LJ* 1; C Albertyn, 'Freedom of Association' (1990) 1 *S Afr Hum Rts YB* 297; L Pawluk, 'Freedom of Association in Labour Relations' (1991) 49 *Adv (Vancouver B Asso)* 905; K Norman, 'ILO Freedom of Association Principles as Basic Canadian Human Rights: Promises to Keep' (2004) 67 *Sask LR* 591.

¹⁶⁸ ILO No 87. See H Dunning, 'The Origins of Convention No 87 on Freedom of Association and the Right to Organize' (1998) 137 *Int Lab R* 149; L Swepston, 'Human Rights Law and Freedom of Association: Development through ILO Supervision' (1998) 137 *Int Lab R* 169.

¹⁶⁹ Convention concerning Freedom of Association and Protection of the Right to Organize, Art 2.

¹⁷⁰ *Ibid*, Art 4.

¹⁷¹ Palestine Gazette No 39, 25 November 2001, 7.

bargaining between the union of employers' associations and the union of workers' associations, implies that workers as well as employers may establish such unions.

The Labour Law defined 'association' as 'any professional organization established in accordance with the law of unions'.¹⁷² This law of unions has not been enacted yet. Paragraph 3 of Article 22 of the ICCPR would be most suitably linked to this to-be-enacted 'law of unions'. If it interested to conform to universal human rights and labour standards, the legislator may not subject labor unions to the general stipulations of the 2000 NGO law, as elaborated above. Unions should be ruled based on the said 1948 Convention that does not allow any authority to intervene in labour unions' affairs, including the no need to obtain governmental permission for unions' operations and the inability of authorities to dissolve unions.

It is to be finally noticed that the 2000 Labour Law has repealed the Jordanian Labour Law No 21 of 14 May 1960,¹⁷³ which was applicable in the West Bank. The latter law included detailed provisions on the workers' and employers' unions.¹⁷⁴ As just explained, the 2000 law came silent regarding such unions. It merely referred to a law that was projected to be endorsed but it has not been adopted yet. This left labour unions without clear legal basis, a backward step in comparison with the forty-year older Jordanian law. In the Gaza Strip, however, labour unions are regulated by the Labour Unions Order No 331 of 24 October 1954,¹⁷⁵ which has been enacted under the Egyptian rule. This order is still applicable in Gaza as its provisions were not included in the Gazan Labour Law No 16 of 14 November 1964¹⁷⁶ that has been applicable under

¹⁷² Art 1.

¹⁷³ Jordan Official Gazette No 1491, 21 May 1960, 511.

¹⁷⁴ Arts 68-89.

¹⁷⁵ Palestine Gazette No 41, 15 November 1954, 1039.

¹⁷⁶ Palestine Gazette, 15 December 1964, 1859.

Egyptian administration and therefore escaped being repealed by the 2000 Labour Law that revoked the said Gazan labour law. This situation led to different applicable rules on labour unions in Gaza and the West Bank. Such anomalous situation should be changed by adopting a modern Palestinian law on labour unions based on the aforesaid 1948 ILO Convention.

7. Conclusion

Notwithstanding the positive aspects embedded in the applicable local law in the West Bank and Gaza presented above, the lack of clear and comprehensive regulation of the freedom of expression does not only contradict international law, but also give rise to abuses of various components of such freedom.¹⁷⁷ Thus, Palestinian authorities (police, intelligence, ministries, and even courts) do not fully adhere to the law freedom of expression. Crackdown on political parties, notably since the takeover of Gaza by Hamas movement in June 2007,¹⁷⁸ is an ongoing phenomenon.¹⁷⁹ Invading and searching homes without observing even local laws is a standard practice by Palestinian security forces.¹⁸⁰ Attacks on associations and shutting down media stations are practiced.¹⁸¹ Peaceful

¹⁷⁷ The term 'authorities' refers to the two existing Palestinian governments: the government in the West Bank led by Fatah party, and the Gaza Strip government led by Hamas party.

¹⁷⁸ M Qafisheh, 'The State of Emergency in Palestine in Light of the International Covenant on Civil and Political Rights' (2013) *Hebron University Research Journal* (forthcoming).

¹⁷⁹ See, for example, Palestinian Independent Commission for Human Rights, *Report on the Human Rights and Freedoms in the Palestinian National Authority Territory for the Month of January 2013*, 5 February 2013, 6-8.

¹⁸⁰ See, for instance, Amnesty International, 'Fear of torture or other ill-treatment,' AI Index: MDE 21/004/2008, 6 August 2008; *Haaretz*, 'Palestinian Authority arrests more than 100 following death of Jenin governor', 25 June 2012.

¹⁸¹ Qafisheh, above n 166, 366.

assembly (public meetings, demonstrations) are often denied or forcibly confronted.¹⁸² Arbitrary detaining and torturing activists over political views have been repeatedly reported by local and international human rights groups.¹⁸³

Worse yet, Palestinian courts do violate the freedom of expression by endorsing the arrest of journalists who criticize senior officials. The judgment of the Bethlehem Court of Appeal on 28 March 2013, which upheld the Decision of the Bethlehem Magistrate Court to imprison Journalist M Hamamrah who was accused of depicting on his Facebook page President M Abbas through an image that presents Abbas as a collaborator,¹⁸⁴ is a case in point.¹⁸⁵ Although President Abbas exercised his constitutional power to pardon Mr Hamamrah on the same day of the court's ruling, such judgment manifests the gap that exists in the legislative and judicial guarantees that effectively safeguard the freedom of expression in Palestine.¹⁸⁶

Much legislation in the West Bank differs from that of Gaza, threatening the geographical integrity of the Palestine's territory.¹⁸⁷ Significant number of laws relating to the freedom of expression, for example the English Copyright Law of 1911 and the Jordanian 1955 Political Parties Law, are outdated and do not, by their very nature as old instruments, take into

¹⁸² See, *inter alia*, Maan News, '[Palestinian] security forces arrest four while forcibly storming Liberation Party's Demonstration', 4 May 2013.

¹⁸³ See, e.g., Human Rights Watch, *Palestinian Authority: Hold Police Accountable for Ramallah Beatings*, 27 August 2012.

¹⁸⁴ Cf A Mal & J Parikh, 'Facebook and the Right to Privacy: Walking a Tight Rope' (2011) 4 *NUJS L R* 299.

¹⁸⁵ Palestine: Bethlehem Court of First Instance in its capacity as Court of Appeal, Judgment No 128/2012, 28 March 2013; *Al-Hayat*, No 6251, 28 March 2013, 1 and 19.

¹⁸⁶ Cf R Segev, 'Freedom of Expression: Criticising Public Officials' (2009) 2 *Amst L Forum* 77.

¹⁸⁷ See, in general, F Milhem, *The Origins and Evolution of the Palestinian Sources of Law* (Brussel: Vrije Universiteit, Faculty of Law, 2004 – unpublished PhD dissertation).

account subsequent international human rights standards nor the modern evolution of the electronic and digital world.¹⁸⁸ Current problems and needs cannot be solved by legislative tools that were drafted to suit past generations. With the recognition of Palestine as a state by the United Nations General Assembly on 29 November 2012,¹⁸⁹ an opportunity has arisen to unify and upgrade the legal system and corresponding practices. After its recognition, Palestine has acquired the right to become party to all human rights conventions.¹⁹⁰ If it seeks modernization and democratization, as it repeatedly claimed in various settings, the state of Palestine needs to embrace a reform process that should be based on universal human rights law. This mission can be accomplished if the political will towards change is available. Such will, in turn, should be translated into a parallel comprehensive strategy that must be formulated towards achieving that end.¹⁹¹

A shorter version of this article was presented at an international conference on the Legal Tradition in a Diverse World that took place at the Faculty of Law, University of Cambridge, 18-19 May 2013.

¹⁸⁸ W Rothnie, 'Idea and Expression in a Digital World' (1998) 9 *JL & Info Science* 59; A Cunningham, 'Rights Expression on Digital Communication Networks: Some Implications for Copyright' (2005) 13 *Int JL & Info Tech* 1.

¹⁸⁹ GA Res A/67/L.28, 29 November 2012.

¹⁹⁰ B Al-Zoughbi, 'The *de jure* State of Palestine under Belligerent Occupation: Application for Admission to the United Nations', in Qafisheh, above n 4, 163-187.

¹⁹¹ The Palestinian Authority is currently formulating its national development strategy for the years 2014-2016. In parallel, the United Nations Office of the High Commissioner for Human Rights, Ramallah, is assisting the Authority on the development of a National Plan of Action for Human rights to be integrated in the wider development plan. It is to be hoped that such a human rights plan would come up with realistic measures that may forge significant legislative and institutional reform.