

The Administration of Justice in Palestine: The Enhanced Role of the High Judicial Council and the Marginalized Role of the Ministry of Justice

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Abstract:

Although the Palestinian legal system is based on the Latin system, the administration of justice in Palestine resembles that of the USA. The judiciary in the Palestinian legal system is a separate branch and manages its own human resources and budget; whereas the judiciary in the continental legal systems, including UK, is dependent on the executive for its administrative and financial functions.

The Palestinian High Judicial Council (HJC) is the national administrator of justice. It has its own peculiarities, which is different from those present in most of the European countries, regarding the composition of the council; the body which has the power to appoint the members of the council; the process according to which they are appointed; and the role of the council.

As a result, the role of the Palestinian Ministry of Justice in the administration of justice is marginalized; meanwhile role of the HJC is enhanced. Recently, the Court Administrator Position has been developed to assist the HJC in managing the judicial system.

1. Introduction

There is no comprehensive definition of the concept “administration of justice”. Instead, most definitions seem to be a kind of listing the

duties of certain components of the system, i.e., the Police, the Public Prosecution and the Courts. Wendell Schaeffer defined the administration of justice as “*the duty to clear the crowded dockets and the more rapid handling of caseload*”⁽¹⁾. *That is to say that the basic purpose of court administration is to relieve judges of some administrative chores and to help them perform those they retain. It should be results-oriented, customer-oriented and works economically.*

Meanwhile, the administration of a judicial system should be adapted to the social, economical and cultural values of the society. Such adaptation should be clear in the structure, process, values, responses, etc. Of course, the protection of the litigants’ rights would be the core concern, but priorities would be activated too. On the other hand, the management⁽²⁾ in the justice field means partially ‘*directing the efforts of the personnel and getting benefit of the available resources to achieve the objectives of the system*’⁽³⁾ The decentralization is an important input in this context⁽⁴⁾.

(1) Schaeffer, Wendell G., Management in the Judiciary, Public Administration Review, Vol. 13, No. 2 (Spring, 1953), pp. (89-96), p. 93.

(2) The terms administration and management are different concepts (not synonyms) and each has a unique meaning, but they are related one to another. Administration is “a process by which a group of people is organized and directed toward achieving the group’s objectives.” Management is “the process of influencing organizational members to use their energies willingly and appropriately to facilitate the achievement of the agency’s goals.” This means that management is closer to the day-to-day operation of the various elements within the organization, whereas the administration focuses on the overall organization, its mission and its relationship with other organizations and groups. The definitions imply also that administration encompasses management. On the other hand, the organization could be defined as “an entity of two or more people who cooperate to accomplish certain objective(s)”. (See Peak, Kenneth J., Justice Administration: Police, Courts, and Corrections Management, Third Edition, Prentice Hall, Inc., New Jersey 2001, pp. 21- 27).

(3) Hoffmann-Riem, Wolfgang, Justizbehörden der Freien und Hansestadt Hamburg vom 15.5.1997, Zwischenbericht zum Reformprojekt: “Justiz 2000”-Ziele und Stand des Projekts, in: Hoffmann-Riem, Wolfgang (Hrsg.), Reform der Justizverwaltung: Ein Bericht zum modernen Rechtsstaat, 1. Auflage, Baden-Baden: Nomos Verlagsgesellschaft, Band 3, 1998, p. 104.

(4) Weber-Hassemer, Kristiane, Professionelles Justizmanagement: Voraussetzung für eine dezentrale Aufgaben- und Ressourcensteuerung, in: Wolfgang Hoffmann-Riem (Hrsg.), Reform der Justizverwaltung: Ein Bericht zum modernen Rechtsstaat, 1. Auflage, Baden-Baden: Nomos Verlagsgesellschaft, Band 3, 1998, p. 152.

Although the other components of the criminal justice system have been characterized as bureaucratic, the characteristics of bureaucracies do not apply to courts. On the contrary, courts have typical organization and different style of administration due to their unique structure. The court is, somehow, an autonomous body which does not report to a certain figure in the chain of command as any figure does in bureaucracies. The bureaucratic management and administration style does not suit the courts⁽⁵⁾ therefore the cooperative and the interdependent relationship between the judge, the public prosecutor and the defense attorney would diminish if the judge insists on being treated with great deference.

2. The Levels of Courts' Administration

The administration of the judicial system is of two levels: the local level; and the national level. Hereinafter, we will be discussing the two levels in some details:

2.1. The Local Level

The local level of judicial administration deals with each court separately. Actually, there is a consensus among the different scholars to vest the responsibility of administering the courthouse on the local level to the presiding judge⁽⁶⁾. However, there exists no uniform pattern of administrative rules on this level. Each court determines its own administrative and management processes, or virtually disregards the subject⁽⁷⁾.

In France and Germany the presiding judge is the administrative head of the court. The presiding judges of the intermediate courts are responsible for the functioning of their own courts and for the other courts that they supervise⁽⁸⁾. Thus, the chief judge of every court of appeal is not the responsible administrative head of his own court only,

(5) Peak, Kenneth J., *Ibid*, p. 159.

(6) Articles 3 & 6 of the Palestinian Code on the Formation of Courts of 2001.

(7) Schaeffer, Wendell G., *Ibid*, p. 93.

(8) In Palestine, the law vests the administration of the magistrate court to the first instance court which sits in the same governorate. However, when no first instance court exists in the town where the magistrate court is situated, then the administration of the magistrate court is vested in the lonely judge or to the more experienced judge, if there more than one.

but also the chief supervisory officer of every inferior court within the jurisdiction of his/her court. He/she, in turn, is the judicial officer most directly in touch with the minister of justice. All the courts of the country are knit together by the supervision exercised from the ministry of justice. This unified interrelated hierarchy of courts in Europe contrasts sharply with court organization in the USA. Independence and lack of administrative unity characterize the American system. However, individual judges can defy the authority of the chief judge. They hold their posts by as good a title as that of the chief judge, election by the people. They cannot be compelled to recognize the authority of an administrative superior. There is therefore little internal unity in individual American courts. There is also no administrative supervision in the European sense by appellate courts over the inferior courts or by a chief appellate judge over the inferior court judges. The only legal tie between inferior and appellate courts is that the inferior courts must abide by the rules laid down by the higher courts⁽⁹⁾.

2.2. The National Level

The continental legal system differs from the American legal system concerning the administration of the judicial system on the national level too. The judiciary in the American legal system is a separate branch and manages its own human resources and budget; whereas the judiciary in the continental legal systems, including UK⁽¹⁰⁾, is dependent on the executive for its administrative and financial functions.

However, the latter vests the administration of the national judicial system to a central department in the ministry of justice, which has an overall responsibility over human resources (excluding judges), automation of case management, buildings and equipments. In this system, the minister of justice is the chief administrative officer of the courts (he/she is responsible for the civil and criminal courts and the execution of penalties). He/she also supervises the courts. But his/her powers over the

(9) Ploscowe, Morris, Crime and Criminal Law, the national law library, 1939, p. 312.

(10) The administrative reform in England included granting the Lord Chancellor powers comparable to those of the minister of justice in the Civil Law countries, combined with the administrative responsibilities usually exercised by the presidents (chief judges) of the courts of appeal.

judges are restricted. Although he/she appoints and promotes judges, they are to a certain extent independent of him/her since they are irremovable during good behavior. If a judge is remiss in his/her duties, in order to effect his/her removal, the minister of justice must bring him/her before a special disciplinary court. Thus the minister of justice holds in his/her hands the government of the judiciary. The cardinal virtue of this system is the power of administrative supervision which is given to the minister. Through the various bureaus of the ministry, the minister can keep in touch with what all agents and agencies engaged in the enforcement of the law are doing. Not only can he/she supervise their activities; he/she can also bring them up to required standards of efficiency. His/her disciplinary powers are ample enough to compel cooperation between various branches of the administration or to remove inefficient or corrupt public servants. Being in close touch with the entire administration of justice is not very difficult for the minister to uncover its weaknesses and take steps for their correction. Reforms can be planned with reference to the manner in which they affect the entire organization⁽¹¹⁾.

The proponents of the continental model argue that the administration of courts is part of access to justice as a public service, which is one of the responsibilities of the executive⁽¹²⁾. Such a function requires managerial efficiency and that judges would be distracted from fulfilling their main function if they have to deal with such matters as hiring support staff, choosing IT platforms or maintaining buildings. They add that the courts' administration at the central level does not constitute such a high stake for judicial independence. They propose that the head of the administrative department in the ministry of justice, who assumes the responsibility of the judicial administration, being appointed as a member of the high judicial council so that he/she could facilitate cooperation between the judicial community and the executive⁽¹³⁾.

(11) Ploscowe, Morris, *Ibid*, p. 307-308.

(12) Abdelbaqi, Mustafa, *The Administration of Criminal Justice in Palestine: Development, Reform and Challenges*, Duncker & Humblot- Berlin, 2009, p. 138.

(13) Interview with Prof. Camille Mansour, the former secretary of the Judicial Steering Committee, Ramallah, June 2007.

In contrast, the American model of courts administration at the national level vests the authority of administering the courts to a department situated at and linked to the judicial authority. Despite that, neither the judges nor the judicial council have to deal directly with administrative and financial matters, but it is the duty of the central administrative and financial department in the judicial authority, which nevertheless has to report to the judicial council for general guidance⁽¹⁴⁾. In general, the supreme court of the United States has never actively exercised direct powers of judicial administration over the lower courts and judges. It addresses questions of administrative nature exceptionally when they arise in litigation and come before it in the normal way⁽¹⁵⁾. The proponents of the American style argue that vesting the authority of courts' administration to a body outside the judicial system is not commended at all, and from a management point of view would be undesirable. They add that, a role for the executive in the administration of the judiciary is not advisable because it would grant or withhold facilities to specific judges or courthouses on a discretionary basis.

Although the continental countries have achieved high levels of independence for the judiciaries under the first model, there is a growing trend in the world now, including Europe, moving toward shifting the judicial administration and budgets away from the executive authority

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- (14) A scholar compared two styles of administration of judiciary within the American model: first, the administration of the judiciary is run by the judicial council, as in California; second, central administrative offices, situated and reports to the judicial council, oversees the administrative issues of the judiciary, as in New Jersey. I quote him: "In California, the judicial council and its chairman serve as a virtual administrative office for the entire state system with authority to transfer judges as the variation in caseload may require and to secure periodic reports on the status of court dockets. However, the judicial council has demonstrated its worth on many occasions, but there are many problems of business administration in the courts that they are not properly equipped or constituted to deal with. From a management view, the need is for a central administrative office that can take up problems of caseload, statistics, and assignment, and that can serve the various court units on a continuous basis and assure the most effective use of the judicial system. Such central management authority and facilities require basic changes in the fundamental laws of most states similar to those embodied in the New Jersey constitution of 1947 which gives to the chief justice of Supreme Court broad administrative authority over a unified judicial system". See Schaeffer, Wendell G., *Ibid*, p. 92.
- (15) Tolman, Leland L., *Court Administration: Housekeeping for the Judiciary*, *Annals of the American Academy of Political and Social Science*, Vol. 328, *Lagging Justice* (Mar., 1960), 105-115. p. 108.

and vesting it to high judicial councils or other bodies within the judicial authority. This is because granting the executive the power over the administration of courts and budgets might expose inappropriate influence or even domination on the judiciaries.

Italy and Spain are among the European countries which abandoned their own model and moved toward adopting the other style. They created judicial councils in the 1980s to assume, from the justice ministries, the management functions of the judicial system. The French judges association recently adopted resolutions supporting the complete separation of judicial functions from the executive. Although Belgium did not abandon its model totally but recently the Belgian courts witnessed attempts to reform their administration⁽¹⁶⁾. According to one of the reformers⁽¹⁷⁾, the court administration was completely unknown as a professional field in Belgium. The first attempt to introduce a modern system of administration was in 1998. A prototype project has been implemented and restricted only to the five Belgian courts of appeal, represented in appointing court managers aiming at modernize the administration system and hold measures to reabsorb the court backlog. However, only few European countries including Germany and the Netherlands have not shown interest in departing from the traditional model⁽¹⁸⁾.

Actually, Palestine has achieved a progressed stage in this endeavor, despite some executive and legislative obstacles which prevent achieve full independence of the administration of justice from the executive, especially regarding the financial matters. However, the deficits in the Palestinian judiciary's capability to take over the administration of courts and budgets are due to the unplanned transfer of the powers to the judicial council without prior tendency.

(16) Mainly under the pressure of Dutrox scandal on one hand, and because of the pressure of the high backlog of cases in the courts of appeal.

(17) Interview (conducted by the present author) with Justice Guy Delvoie, presiding judge and court manager at the Brussels Court of Appeals, Brussels, 2003.

(18) Hammergren, Linn, *Judicial Independence and Judicial Accountability: The Shifting Balance in Reform Goals*, in: Office of Democracy and Governance, USAID, *Guidance for Promoting Judicial Independence and Impartiality*, Revised Edition, Washington DC. 2002, pp. (149-157), pp. 158-159.

3. The High Judicial Councils as the National Administrators of Justice

The high judicial councils worldwide generally vary regarding the following issues:

- the composition of the council;
- the body which has the power to appoint members of the council;
- the process according to which they are appointed; and
- the role of the council.

The composition of judicial councils might include representatives of the different authorities and institutions in the country, i.e. the judiciary (mainly from the high courts); representatives of the executive (the president of the state is the head of the council in some countries, the minister of justice or the deputy minister of justice is mainly a member); the attorney general; reputable figures from the civil society; the head and/or members of the bar association; and law professors.

The body which enjoys the power to appoint the council members varies from one system to another. It is common in many countries that the executive and the legislative authorities share such a power. In other countries, such power is restricted to the judicial authority, e.g., the judges of the high court nominate the candidates, whereas the role of the president of state or the minister of justice is ceremonial in appointing them.

According to the role of the judicial council in the administration of justice, some councils are responsible of the administration and management of the overall issues related to the judiciary, whereas the roles of others are restricted to appointment, promotion, training, secondment, evaluation, and discipline.

Actually, there is no specific criterion would determine which of the aforementioned models is the best. However, the political, social, and cultural contexts mainly influence the choice and determine the process which works better.

On the local perspective, the role of the newly established high judicial council in the administration of the judicial system is a problematic issue in Palestine. The law does not delineate well the borders of the jurisdiction of the council, in this perspective, especially the overlapping competences with the executive, i.e., the presidency and the ministry of justice.

4. The Creation of the First High Judicial Council in Palestine

The first high judicial council under the Palestinian Authority era was formed in June 2000⁽¹⁹⁾. It comprised 11 members, as follows: the head of the high court, as a president; three judges of the high court in Gaza; the head and two member judges of the appeal court of Ramallah; the attorney general; the deputy minister of justice; the head of the appeal court of income tax in the West Bank; and the head of Nablus first instance court.

After the promulgation of the judiciary law in 2002, the transitional high judicial council became illegal because its composition contradicted articles (37) and (81) of the judiciary law. Thus, a presidential decree⁽²⁰⁾ was rendered which extended the validity of the provisional council for one year. The justifications for that were clarified in the decree itself, which were: the critical state which Palestine was passing; the supreme national interest; the aim of giving the provisional council a chance to continue its tasks in appointing new judges and promoting the on-bench judges; and to get benefit of the old judges (who exceeded the age of 70)⁽²¹⁾.

5. The Permanent High Judicial Council of Palestine

The first permanent high judicial council⁽²²⁾ was created in 2003 pursuant to the basic law⁽²³⁾ and the judiciary law⁽²⁴⁾. It comprised: the

(19) The presidential decree no. (29) of 2000.

(20) The presidential decree no. (11) of 28 June 2002.

(21) This contradicts 37 of the judicial authority law.

(22) The presidential decree no. (8) of 2003.

(23) The basic law stipulated the creation of a permanent high judicial council and assigned the legislature to specify its composition, responsibilities, and function.

(24) 81 of the judicial authority law stipulated the establishment of the permanent council within a maximum one year period from the publication of the judiciary law in the Official Gazette.

president of the high court, as president; the most senior vice-president of the high court, as vice-president; the two most senior judges of the high court, selected by the high court assembly; the presiding judges of the courts of appeal in Jerusalem, Gaza and Ramallah; the attorney general; and the deputy minister of justice⁽²⁵⁾.

The permanent high judicial council was also widely criticized by the Palestinian intelligentsia for the following reasons:

- The composition of the council is not balanced because of the lack of representation of the lower courts, namely the first instance and magistrate courts⁽²⁶⁾.
- The lack of transparent measures for selecting the head and members of the council,⁽²⁷⁾
- The membership of the council is open, i.e., not limited to a certain period of time.
- The judges who are members of the council should be elected for such posts by their peers⁽²⁸⁾.
- The deputy minister of justice, who is a member of the council, should be a judge⁽²⁹⁾.
- The vice president and two members, coming from the high court, are not the most senior judges as the law stipulates⁽³⁰⁾.
- The council lacks institutionalization.

(25) 37 of the judicial authority law.

(26) A'raj, Mousa, *The National and International Measures for Filling in the Judicial Post*, Conference on: *The Impartial Judiciary and the Effective Bar Association are the Guarantee of Embodying Justice*, MUSAWA, Ramallah, 2005, p. 142, pp. (133-150).

(27) Mansour, Camille, *The Role of the Executive and Legislative Authorities in Enhancing the Independence of the Judicial Authority*, Conference on: *The Impartial Judiciary and the Effective Bar Association are the Guarantee for Embodying Justice*, MUSAWA, Ramallah, Palestine 2005, pp. (85-87).

(28) Rayis, Naser, *Judiciary in Palestine and its Reform Obstacles "Al Qada' fi Falasteen wa Mo'wiqat Tataworoh"*, Second Edition, Al-Haq Institution on Human Rights, Ramallah Palestine 2003, p. 185.

(29) Interview with Ibrahim Barghouti, attorney at law and head of MUSAWA (an NGO interested in judicial reform), Ramallah, July 2007.

(30) 37 of the judicial authority law.

(31) Except two whose positions are not distinct from the judiciary, namely the deputy minister of justice and the attorney general.

According to the present author, the policy which the Palestinian legislature adopted in composing the high judicial council elicits criticism, especially regarding concentrating the membership of the council in judges⁽³¹⁾. Indeed, such a legislative policy indicates a short vision. The membership of non judges in the council would not affect negatively the independence of the judiciary, as the judges might think. On the contrary, it would raise the level of accountability, efficiency and transparency of the council.

In comparison with some other experiences worldwide, we find that many countries have successful and efficient judicial councils because they are of mixed-membership. In this regard, some light will be shed on the following countries' models:

5.1. Belgium

The Belgian high council of justice is composed of equilibrium between judges elected by their peers, and non judges appointed by the senate on the basis of a majority of two thirds of the vote, which respects the principle of linguistic parity⁽³²⁾.

5.2. France

The French judicial council includes three prominent citizens who are chosen from outside the executive, legislative, and judicial branches, nominated by the president of the republic, the president of the national assembly, and the president of the senate, respectively. Despite that the composition of the French supreme judicial council reflects that the three powers of the government have shared to appoint some members of the council, there are calls for reform to address any inappropriate political influence over the judiciary on the one hand, and to address any inappropriate influence which might result from the dominance of members of the judiciary on the council, on the other hand. In other words, the French reformers seek introducing balanced composition of the council, i.e., balance between the magistrate membership and the non-magistrate membership, or even providing a majority of the external

(32) Depre, Roger and Annie Hondégheem, *The Administration of Justice in Belgium: Assessing its Quality*, Catholic University Leuven, Special Report, 2003, p. 5.

members. The significant involvement of the civil society in the council aims at, first, addressing any potential of judicial dominance, and secondly, it provides for an indirect way in which the judiciary can be held accountable to the society at large without affecting decisional independence⁽³³⁾.

5.3. Italy

The Italian supreme judicial council, which enjoys, pursuant to the constitution of 1948, the competence of all decisions concerning judges and public prosecutors (e.g., promotions, transfers, discipline, and disability) is composed prevalently of magistrates (i.e., judges and public prosecutors) elected by their peers. The percentage of the magistrates in the council is two thirds and the other one third of the members is elected by parliament, among law professors and lawyers with 15 years of professional experience⁽³⁴⁾.

The following table shows the composition of the judicial council in the following countries: Italy, France, Spain, and Portugal, in comparison to Palestine.

(Table 1)
The Judicial Councils of Selected Countries

	Italy	France	Spain	Portugal	Palestine
No. of Members	33	12	21	17	11
Presidency	President of the Republic	President of the Republic	President of the <i>Tribunal Supremo</i>	President of the <i>Tribunal Supremo</i>	President of the High Court (HC)
Ex Officio Members	President of the Supreme Court of Cassation and General Prosecutor of	the Court of Cassation	Minister of Justice (as vice president)		

(33) Aucoin, Louis, Judicial Independence in France, in: Office of Democracy and Governance, USAID, Guidance for Promoting Judicial Independence and Impartiality, Revised Edition, Washington DC. 2002, pp. (72-82), pp. 79-80.

(34) Federico, Giuseppe Di, Judicial Independence in Italy: A critical Overview in a (Non-Systematic) Comparative Perspective, in: Office of Democracy and Governance, USAID, Guidance for Promoting Judicial Independence and Impartiality, Revised Edition, Washington DC. 2002, pp. (83-99), p. 84.

President of HC, Vice President of HC, Presidents of Appellate Courts, Attorney General, Deputy Minister of Justice

cont/ (Table 1)
The Judicial Councils of Selected Countries

	Italy	France	Spain	Portugal	Palestine
No. of Members from Outside the Judiciary	10 law professors or lawyers elected by parliament with a qualified majority	3 appointed members: 1 by the president of the republic; 1 by the president of the chamber of deputies; and 1 by the president of Senate	8 Jurists elected by Parliament	8 appointed members: 7 appointed by Parliament; 1 appointed by the president of the republic	1
No. of Members of the Judiciary, Elected or Appointed	20 elected by their colleagues	7 elected members: 1 judge of the <i>Conseil d'Etat</i> elected by his colleagues; 5 judges and 1 prosecutor elected by their colleagues	12 judges elected by parliament	7 judges elected by their colleagues; 1 judge appointed by the president of the republic	10 (9 Judges and the Attorney General)

In sum, there are many models regarding the composition of the judicial councils worldwide. Some are completely subsidiary to the supreme court, others are partially or completely independent entities, with representation from other branches of government and/or legal and academic communities. However, there is a concern among the legal societies that the judicial councils reflect the same politicization they were designed to help reduce, or create new bureaucracies, and subsequently fail to live up to expectations⁽³⁵⁾. In Palestine, the potential of politicizing the council is real, especially that the present high judicial council became

(35) Popkin, Margaret, Efforts to Enhance Judicial Independence in Latin America: A Comparative Perspective, in: Office of Democracy and Governance, USAID, Guidance for Promoting Judicial Independence and Impartiality, Revised Edition, Washington DC. 2002, pp. (100-132), pp. 104-105.

involved too much in the struggle between Fatah and Hamas parties, as if it has been changed into political entity.

6. The Role, Tasks and Duties of the High Judiciary Council of Palestine

The role, tasks and duties of the Palestinian High Judicial Council can be concluded from the different Palestinian legislations that apply to the judiciary, which are summarized as following:

- Organizing the work of the courts and dividing them into specialized circuits if necessity so dictates⁽³⁶⁾.
- Delegating judges of the first instance and magistrate courts to take cognizance of interlocutory or summary matters⁽³⁷⁾.
- Transfer or secondment of judges⁽³⁸⁾.
- A Judge may be attached to foreign governments or to international agencies pursuant to a decision of the president of the PA, based upon a nomination by the high judicial council⁽³⁹⁾.
- Prohibiting judges from engaging in any work that it deems to be in conflict with the duties of the position and its sound performance⁽⁴⁰⁾.
- The resignation of a judge shall be deemed accepted two weeks after its submission to the president of the high judicial council⁽⁴¹⁾.
- During the judicial vacation, courts shall continue hear urgent matters, the types of which shall be established by the high judicial council⁽⁴²⁾.
- Drafting the necessary by-laws⁽⁴³⁾. It is worth mentioning here that, the present council drafted, in 2006, five bylaws dealing with: the

(36) 1, 21 and 28 of the formation of courts law.

(37) 2 and 17 of the formation of court law. The delegated judge is called the judge of summary matters pursuant to the provisions of the law of civil procedure.

(38) 23 and 24 of the judicial authority law.

(39) 26 of the judicial authority law.

(40) 28 of the judicial authority law.

(41) 33 of the judicial authority law.

(42) 35 of the judicial authority law.

(43) 80 of the judicial authority law.

(44) 63 of the judicial authority law.

- technical office; the duties of the high judicial council; code of conduct; judicial inspection; and promotion of the judges.
- The attorney general is appointed by a decision of the president of the PA, based upon a nomination from the high judicial council⁽⁴⁴⁾.
 - Preparing the draft budget and supervises its implementation⁽⁴⁵⁾.
 - Implementing the disciplinary rulings issued by the disciplinary council once they become final⁽⁴⁶⁾.
 - A judge would not be arrested or detained without special permission from the high judicial council, except in case the judge was caught *in flagrante delicto*. In such a case, the attorney general shall, upon the arrest or detention of the judge, present the matter to the high judicial council within the next twenty-four (24) hours. The high judicial council decides, after hearing the statements of the judge, either to release him on bail or without bail, or to extend the period of detention⁽⁴⁷⁾.
 - An indictment against a judge would not be lodged without the permission of the high judicial council⁽⁴⁸⁾.

According to the present author, the Palestinian judicial council does not function as an institution, as the law provides. Mainly, the head of the council decides over the different matters without soliciting the other members' opinions. Although the ex-head of the council warned from such a method of managing the council, before he assumed the position, his policy during occupying the position did not vary much from his ancestors. I quote his statements, while he was just a judge in the high court: "The role of the head of the high judicial council must be confined to presiding the council without special competences related to transfer, secondment, nomination of appointments, or determining the seniority of judges because such competences would constitute danger upon the judicial authority and its stability."⁽⁴⁹⁾

(45) 3 of the judicial authority law.

(46) 55 of the judicial authority law.

(47) 56 of the judicial authority law.

(48) 59 of the judicial authority law.

(49) Abu Shara, Issa (et al.), Studies and Notices on the Judicial Authority Law Draft, PICCR, 1998.

(50) 39 of the judicial authority law

Nonetheless, according to the law, the president of the high judicial council has no special privileges. He is urged to follow up the implementation of the decisions of the council, and to represent the council in contacts with others and before the judiciary⁽⁵⁰⁾.

7. The Institutionalization of the High Judicial Council of Palestine

The law granted the high judicial council the right to form one or more departments or committees of its members, to which it may delegate some of its responsibilities. However, the law stipulates that any task delegated to a committee must not be pertinent to appointment, promotion and transfer of judges⁽⁵¹⁾. Accordingly, the council created the following institutions, through which it administers the judicial system:

7.1. The Secretary of the High Judicial Council.

It is responsible for preparing the budget of the judicial authority, and managing the day-to-day functions.

7.2. The Technical Office

It is responsible mainly for deducing legal principles from the judgments rendered by the high court; conducting research; and preparing draft bylaws for the high judicial council. The technical office is presided over by a member of the high court. The law stipulates that the chief of the office be assisted by a number of judges, retired judges or prominent lawyers selected by the high judicial council for a term of two years subject to renewal⁽⁵²⁾.

Actually, the technical office did not succeed to perform the tasks assigned to it. Therefore, it is suggested that it lies, henceforth, under the control of the ministry of justice. On the other hand, the fact that a technical office being situated at the high court and run by its judges might shift the focus of the high court to technical issues, which other institutions might be more capable to administer. Moreover, shifting the office to the ministry of justice would save the efforts of the judges to adjudication, especially that Palestine suffers from the scarcity of judges.

(51) 41 of the judicial authority law

(52) 26 of the formation of courts law.

7.3. The Training Department

The high judicial council has established recently a judicial training department. It reports regularly to the head of the council. Among the main goals of the department is to develop a system for training and preparing judges, and the other judicial stakeholders as well, to assume their judicial functions⁽⁵³⁾. In fact, the department has conducted many training activities, either of the orientation type for the newly appointed judges, public prosecutors and support staff; or as continuing education and study tours for all judges. It also supervises and controls the activities of the other national and international institutions which take part in the training activities for the different stakeholders of the judicial authority.

7.4. The Judicial Inspection Department

A judicial inspection department has been recently established and attached to the high judicial council⁽⁵⁴⁾. The high judicial council has set forth regulations⁽⁵⁵⁾ for the inspection department, indicating its responsibilities, the rules and procedures needed to perform its work, and the elements of the performance evaluation, including the results of training courses, and reasons for reversing, cancelling, or amending a judge's rulings.

The main goal of the department is to inspect the functioning of the magistrate, first instance and appeal judges in order to insure that they are operating efficiently and in accordance with the established standards. Although the inspection department is empowered to render reprimands against individual judges, these reprimands are informal and do not necessarily lead to any sort of formal disciplinary proceeding. The department is also entitled to receive claims of grievances from citizens against judges. The department investigates the grievances then submits a report to the high judicial council. The high judicial council, not the department, is empowered to decide upon the grievance, reviewing the evidence and hearing the statement of the aggrieved party. It renders its decision sufficiently in advance of making the judicial promotions⁽⁵⁶⁾.

(53) 17 of the judicial authority law.

(54) 42 of the judicial authority law.

(55) Regulation no. 3 of 2004 rendered by the high judicial council.

(56) 45 of the judicial authority law.

(57) under 44 of the law on the status of the magistracy.

In France, the judicial inspection service has similar powers⁽⁵⁷⁾. Among the differences is that the jurisdiction of the French inspection service is extended to cover all the courts of France. Moreover, the director of the judicial inspection service is a member of the promotion committee, so his knowledge of a judge's performance can be a factor in promotion considerations⁽⁵⁸⁾. Other countries have different experiences in which an executive control over the promotion process is more subtle. In Romania, for example, judges are evaluated by the presidents of their courts, and promotions are approved by the higher council of magistrates, but the ministry of justice retains a role in proposing the promotions to the higher council⁽⁵⁹⁾.

In most countries, however, non-criminal discipline is administered by the judicial council. In Russia and Ukraine, it is controlled by the judicial qualification commissions. The proceedings can usually be initiated by the ministry of justice or a president of the court⁽⁶⁰⁾.

Nonetheless, the Palestinian inspection department has been criticised widely for the following reasons:

- The name of the department "judicial inspection department" was criticized because it gives, according to the opponents, a negative impression as if the judge were already suspect. Therefore, the "annulled 2005 judicial authority law" suggested the expression "evaluation and promotion department" to substitute the present name because it denotes a positive indication⁽⁶¹⁾.
- Its composition is too small (consists of three judges) to inspect all the judges of Palestine⁽⁶²⁾.
- Being attached to the high judicial council is also criticized because it might come under its influence. To be accountable and effective,

(58) Aucoin, Louis; *Ibid*; p. 79.

(59) Rekosh, Edwin, *Emerging Lessons from Reform Efforts in Eastern Europe and Eurasia*, in: Office of Democracy and Governance, USAID, *Guidance for Promoting Judicial Independence and Impartiality*, Revised Edition, Washington DC. 2002, pp. (53-71), p. 60.

(60) Rekosh, Edwin, *Ibid*, p. 60.

(61) The explanatory note of the annulled judicial authority law of 2005.

(62) Dawwas, Amin, *The Judicial Inspection in Palestine between the Theory and Application*, Conference on: *The Impartial Judiciary and the Effective Bar Association are the Guarantee for Embodying Justice*, MUSAWA, Ramallah, 2005, p. 206, pp. (205-212).

(63) Jallad, Farid, *The Role of the PA in Enhancing Judicial Values*, Conference on: *The Impartial Judiciary and the Effective Bar Association are the Guarantee of Embodying Justice*, MUSAWA, Ramallah, 2005, p. 15, pp. (13-15).

the decisions of the inspection department must be respected and enforced by all institutions in the judicial authority, including the high judicial council⁽⁶³⁾.

- The immunity of the high court judges against inspection is criticized too.
- The domain of inspection to be confined to the reasons of reserving, cancelling, or amending the judge's rulings, without evaluating the whole work of the judge, is criticized.
- The department should be composed of high officials of the ministry of justice, or shared composition between the ministry and the high judicial council, in order to attain independence⁽⁶⁴⁾.

8. The Marginalized Role of the Palestinian Ministry of Justice in the Administration of Justice

In their endeavour to free themselves of the influence of the executive, which they consider an actual or potential threat to judicial independence, some judicial authorities went too far in this respect. The recent experience of the Palestinian judicial system constitutes a clear example. The Palestinian legislature, however, built a hybrid legal system through adopting the “cut and paste” policy in drafting laws. For example, it imitated the American model regarding the administration of justice, without taking the whole theory, side by side with the influence of the continental and Islamic legal systems which are deeply rooted in the region. Thus, the localization of foreign provisions from certain legal systems without being consistent with the others in the same law would certainly produce a distorted legislation.

No doubt that, the checks-and-balances mechanism between the different authorities is one of the guarantees of transparency, efficiency and accountability. Accordingly, the separation of powers principle entails that each authority being accountable. In Britain, for example, the chief justice is formally considered as part of the political system,

(64) Rayis, Naser, *Ibid*, p. 175.

(65) Gro?, Thomas, *Selbsverwaltung der Gerichte als Voraussetzung ihrer Unabh?ngigkeit?* In: Helmuth Schulze-Fielitz and Carsten Schütz (Hrsg.), *Justiz und Justizverwaltung zwischen?-konomisierungsdruck und Unabh?ngigkeit*, *Die Verwaltung: Zeitschrift für Verwaltungsrecht und Verwaltungswissenschaften*, Beiheft 5, Duncker & Humblot. Berlin, 2002, p. 224.

therefore he is responsible before the parliament for the proper functioning of the judicial system. The chief of the high judicial council in USA is responsible before the electoral board. Even in the Italian system, the wide self administration of the judicial authority came as a response to the heavy legacy of the fascist regime,⁽⁶⁵⁾ the minister of justice still has the following competences: the organization and functioning of the services of the justice system; the prerogative of initiating disciplinary proceedings against magistrates; he is in charge of preparing and managing the budget of the entire judicial system; and he also has the responsibility for recruiting most of the non-judicial personnel of the courts and of the prosecutorial offices⁽⁶⁶⁾.

Despite the relatively better position of the Italian minister in comparison with the Palestinian, one practitioner indicates that the powers of the minister of justice should be an integral part of the democratic system of constitutional checks-and-balances mechanisms intended to insure court efficiency and accountability. He adds that, the absence or the weakness of which, affects the system negatively, i.e., lowering the guarantees of professional qualifications, accountability, efficiency, and independence⁽⁶⁷⁾.

That is to say, the administration of justice must be connected to the executive authority through a minister, in the parliamentary democratic countries, so as to be responsible before the parliament⁽⁶⁸⁾. In fact, it irrational and considered an aberration when the judicial authority runs the administration of justice totally. It is also doubtful that the judges and public prosecutors are ready to and able to handle such a duty on the long run⁽⁶⁹⁾.

The position of the Palestinian minister of justice, either *de jure* or *de facto*, is much marginalized. However, many factors influence such a

(66) Federico, Giuseppe Di, Ibid, p. 93.

(67) Federico, Giuseppe Di, Ibid, p. 94.

(68) D?stner, Christian, Selbstverwaltung der Gerichte als Voraussetzung ihrer Unabh?ngigkeit im schlanken Staat? in: Helmuth Schulze-Fielitz and Carsten Schütz (Hrsg.), Justiz und Justizverwaltung zwischen?konomisierungsdruck und Unabh?ngigkeit, Die Verwaltung: Zeitschrift für Verwaltungsrecht und Verwaltungswissenschaften, Beiheft 5, Duncker & Humblot. Berlin 2002, p. 203.

(69) D?stner, Christian, Ibid, p. 216.

status. For example, the ambiguous provisions of the judicial authority law of 2002 regarding delineating the borders of jurisdiction of the high judicial council and the ministry of justice; the weakness of the cabinet within the executive (especially the ministry of justice); and the reliance of the high judicial council on the PA president. Therefore, the high judicial council accumulated all the powers regarding the administration of justice in its hands without enabling the ministry of justice to take part. In this realm, the high judicial council ignores the ministry of justice and prejudices its role in checking on the budget of the judicial authority. The council deals directly with the ministry of finance not through the ministry of justice, as the law stipulates. Moreover, such policy of the council encouraged the public prosecution to cut off its connections with the ministry of justice. Recently, the public prosecution became reporting, like the high judicial council, directly to the PA president.

On the other hand, the high judicial council is not responsible before the parliament, but it refuses any role of the legislature in negotiating the budget of the judiciary. Such a policy leads to unbalanced equation; a council holds all powers without being responsible before the parliament, and a ministry out of any power stands responsible before the parliament for the proper functioning of the judicial system.

Such situation, according to an expert in this field, would not only hamper the transparency of the judicial authority and creates a confidence gap with the public, but it is also concerned that the complete marginalization of the ministry of justice in administrative and financial affairs could provoke a backlash detrimental to judicial independence if and when the Palestinian executive (presidency and cabinet) gets its act together⁽⁷⁰⁾. However, all efforts in Palestine must come together to strengthen the accountability measure of the judiciary because the judicial authority will not achieve justice through guaranteeing its independence only. Therefore, the competences of the high judicial

(70) Interview with Prof. Camille Mansour, former secretary of the formal committee on the reform of the Palestinian Judicial System, Ramallah, 2007.

(71) Mansour, Camille, *The Role of the Executive and Legislative Authorities in Enhancing the Independence of the Judicial Authority*, Conference on: *The Impartial Judiciary and the Effective Bar Association are the Guarantee for Embodying Justice*, MUSAWA, Ramallah, 2005, pp. (85-87), p. 86.

council must be confined to the limit of achieving the independence of the judiciary and not controlling all the matters which affect the access to justice negatively⁽⁷¹⁾.

Nonetheless, to find away out of this dilemma “the annulled 2005 judicial authority law” adopted the following two criteria to answer the question related to the distribution of powers between the high judicial council and the ministry of justice:

- If the matter is related to the judiciary as a power, the responsibility shall be in the hands of the judge or the court to render their judgment. The same applies to what is closely related to this, such as the administrative responsibility of the president of the court in his court, or of the high judicial council in the judges’ affairs.
- If the matter is related to the judiciary as a public service, then the responsibility shall be in the hands of the ministry of justice, since the facilitation of citizens’ access to justice is an inherent duty of the executive authority⁽⁷²⁾.

9. The Evolution and Development of the Court Administrator Position in USA

Through practice, the policy makers in the USA found that the creation of a unified judicial system with administrative authority vested in the chief justice or other high judicial officer cannot of itself bring about good court administration⁽⁷³⁾. The administrative function must be organized and procedures have to be developed and placed in operation to tie the court system together administratively and to provide for continuous central supervision of court operation. No chief judicial officer can be expected personally to perform the various administrative and managerial functions assigned to the head of a court system and at the same time has enough time to perform the duties of the bench. Actually, it is a heavy mission to impose authority over all judicial personnel; court officials; infrastructure; logistics; budget; dockets; assigning cases and judges; convening court meetings; coordinating judicial schedules; creating

(72) The explanatory note of the annulled Judicial Authority Law of 2005.

(73) Gable, Richard W., *Development administration: Background, terms, concepts, theories, and a new approach* (SICA occasional papers), p. 135.

and using appropriate court committees; dealing with outside agencies and the media; drafting local court rules and policies; maintaining the court's facilities; and issuing orders for keeping, destroying, and transferring records. What makes such a mission difficult is the fact that the head of the court or even the head of the high judicial council used to assume the position without prior tendency or enough qualifications and skills. This is because the position of the high judicial council or the head of the court is basically assumed by seniority, "first among equals" with his peers, therefore the occupant of the position is not a must qualified to manage the administrative duties. To achieve this goal, judges should be oriented on administrative tasks and other related skills, or other specialized administrator should be employed.

Accordingly, experts began thinking of assigning the task of judicial administration to specialized persons in the courts other than judges. Woodrow Wilson in his essay of 1887 entitled "The Study of the Administration" assigned the trial judge the tasks of judging and fundamental court policy, whereas the task of court administration and handling the business in the court should be assigned to a specialized executive officer working under the auspices of the chief judge or the presiding judge⁽⁷⁴⁾. In 1939, the Congress responded to these concerns by creating the administrative office of the USA courts. Meanwhile, the congress directed that the administrative office be supervised by a council of federal appellate judges (This council is called now the Judicial Conference of the United States comprises 26 appellate and trial judges, with the chief justice as presiding officer). States governments followed suit, starting in the 1940s, creating state court administrative offices, and generally providing for their supervision by the state supreme courts⁽⁷⁵⁾.

Thus, a chief administrative officer appointed by and responsible directly to the chief judicial officer represents the developing pattern of

(74) Peak, Kenneth J., *Ibid*, p. 176.

(75) Gur-Arie, Mira and Russell Wheeler, *Judicial Independence in the United States: Current Issues and Relevant Background Information*, in: Office of Democracy and Governance, USAID, *Guidance for Promoting Judicial Independence and Impartiality*, Revised Edition, Washington DC. 2002, pp. (133-147), pp. 136-137.

(76) Schaeffer, Wendell G., *Ibid*, p. 95.

(77) Mira Gur-Arie and Russell Wheeler, *Ibid*, pp. 136-137.

judicial administrative organization⁽⁷⁶⁾. However, the creation of this position aimed at solving the problems of court administration and management and to assume the responsibility for federal court budget, personnel administration and compiling statistics data on the business of the courts⁽⁷⁷⁾. At the beginning, this position has created challenges with the chief justices or the presiding judges over some competences. Actually, the distinction between the legal and the administrative tasks of the chief justice was problematic. Indeterminate functions in the “grey area” at the intersection of legal and administrative, include: listing of cases; the granting of legal aid; agency relationships; legislative relationship; public information; planning committees; research on rules and procedures; probation; case processing; financial policy; and personnel rules. The lack of clear classification of a task as legal or administrative can make it difficult to determine which officer is ultimately responsible⁽⁷⁸⁾.

In sum, the major functions of the state court administrators are classified into three categories: preparing annual reports and summarizing case load data; preparing budgets; and troubleshooting⁽⁷⁹⁾. According to the U.S. Model Act, the court administrators oversee the following tasks:

- examining the administrative methods and system employed in the offices of the clerks and other adjuncts of the courts;
- examining the state of the dockets and determining the needs for assistance in any court;
- recommending to the chief justice the assignment of judges to courts in need of assistance and following his directions in arranging assignments as needed;
- collecting and compiling statistics and making reports on the transactions of judicial business and transmitting them to the courts for appropriate action;
- preparing and submitting court budgets;
- drawing requisitions for the expenditure of the state appropriated funds;

(78) Abdelbaqi, Mustafa, Ibid, p.141.

(79) Peak, Kenneth J., Ibid, p. 183.

- collecting statistics and reporting on expenditures of state and local money appropriated for the courts;
- obtaining reports for clerks of court on cases delayed beyond specific period of time;
- acting as secretary of the judicial council or conference of judges, if the state has such an institution;
- formulating and submitting to the chief justice or highest court, recommendations of policies which he believes will improve the judicial system; and
- attending to any other matter assigned to him by the highest court or chief justice, such as administrative and research tasks.

However, in some states, the administrators oversee other duties and responsibilities, such as working as a liaison officer for the judiciary in its relation with the legislative and executive branches of the state government or with the federal government or other state governments⁽⁸⁰⁾.

On the other hand, a big debate still takes place in the USA till now regarding two matters related to the court administrators: appointing or electing them; and their qualifications. Some are in favor of the appointment choice instead of the electing choice because such a position needs high qualifications in different fields. According to the qualifications of the court administrators, many judges still argue that the law degree is essential, whereas others are in favor of a public administration background. However, in England and Wales, the requirement of legal qualification has been removed by section 87 of the Access to Justice Act 1999⁽⁸¹⁾.

10. Conclusions and Recommendations

To dissolve the potential conflict between the chief judge and the court administrator, the former should be objective in his supervision

(80) Tolman, Leland L., *Court Administration: Housekeeping for the Judiciary*; *Annals of the American Academy of Political and Social Science*, Vol. 328, *Lagging Justice* (Mar., 1960), pp. (105-115), p. 110.

(81) Abdulbaqi, Mustafa, *Ibid*, p. 142.

(82) Peak, Kenneth J., *Ibid*, p. 189.

over the latter, and from the other side, the latter should comply with the rules and policies of the former. John Greacen suggested the following strategies to attain a successful follow up over the court administrators:⁽⁸²⁾

- Look for the indications of good management. A well-managed organization will have a number of plans and procedures in place, including personnel policies, recruitment and selection procedures, an orientation program for new employees, performance evaluation procedures, a discipline and grievance process, case management policies, financial controls, and other administrative policies (such as facilities and record management).
- There must be an atmosphere of trust and confidence between the administration and the judiciary. The presiding judge must delegate authority to the court administrator sufficient to get the job of reform going. In turn, the court administrator must respect the ultimate authority of the presiding judge.
- The leadership must recognize that the currency of case filing is the priority for a high-volume court. All case files acted upon today must be processed (computer update, manual logging, mailing distribution, calendaring) and filed tomorrow.
- Court administrators and staff must understand the fundamentals of court productivity. The clerk/judge ratio is of compelling importance. However, it would be worthless how much hard working a judges is if such hardworking has not been concluded in appropriate number of cases handled because of lack of clerks to process the cases arriving daily from the bench⁽⁸³⁾.
- A professional manager is dedicated full-time to implementing the policies and procedures of the court, responding to the public, developing budgets, managing the records and purchases, organizing and maximizing the space, and managing the application of technology⁽⁸⁴⁾.

On the other hand, the financial administration comprises four components: budgeting, auditing, accounting, and purchasing. However, I will be focusing on budgeting for the aim of this study.

(83) Peak, Kenneth J.,Ibid, p. 190.

(84) Hambergren, Linn, Ibid, p.164.

(85) Peak, Kenneth J.,Ibid, pp. 387-388.

No doubt that budget is the key to financial administration. Their development involves planning, organizing, directing, and other administrative functions⁽⁸⁵⁾. The budget is defined as a “plan stated in financial terms, which estimates the future expenditures”, or it is a “policy statement that translates financial resources into human purposes, or it is a “contract between those who appropriate the funds and those who spend them”, or it is a “schedule adjusting expenses during a certain period of the estimated income for that period”. In addition, the budget is a management tool, a process, and a political instrument. It is a comprehensive plan, expressed in financial terms, by which a program is operated for a given period. It includes:

- the services, activities, and projects comprising the program;
- the resultant expenditure requirement; and
- the resources usable for their support⁽⁸⁶⁾.

At the local level, although the Palestinian law provides that the judicial authority shall have its own budget, which shall appear as an independent section in the annual public budget of the PA, and that the high judicial council shall prepare the draft budget and transmit it to the minister of justice in order for the latter to fulfill the legal requirements, and although that the high judiciary council is granted the right to supervise the implementation of the budget of the judicial authority,⁽⁸⁷⁾ the possibility of achieving success, in this domain, within the given circumstances is not secured. Some critical scholars and practitioners⁽⁸⁸⁾ refer the failure to the law which does not grant the judiciary full financial independence from the control and vote of the executive and the legislative respectively.

According to the present author, the demand of free judicial budget from any control of both the executive and the legislature is not rationale, because it would be a green light for abuse of power and corruption from the side of the judicial authority. The current procedures of oversight and control by the other authorities is common in all countries worldwide.

(86) Peak, Kenneth J., *Ibid*, p. 388.

(87) 3 of the judicial authority law.

(88) Rayis, Naser, *Al Qada' fi Falasteen wa Mo'wiqat Tataworoh "Judiciary in Palestine and its Reform Obstacles"*, Second Edition 2003, Al-Haq, Ramallah.

(89) Gur-Arie, Mira and Russell Wheeler, *Ibid*, pp. 136-137.

The executive branch, for example can influence judicial funding levels by its recommendations to the legislature to fiscal policy. And, of course, the parliament still determines the level of judicial branch funding⁽⁸⁹⁾. However, if the judiciary is to have full control over its budget, mechanisms must be put into place to prevent waste and ensure transparency in the use of funds⁽⁹⁰⁾.

In sum, in order to overcome any expected problems, rational measures should be incorporated in the judicial law which oblige both the executive and the legislative authorities to allocate a sufficient budget for the judicial authority. Unless, the efforts of the high judicial council for reform would become nonsense. However, the annulled judicial law of 2005 stipulated that the draft judicial budget be approved by the high judicial council and that the latter monitors its implementation. Unfortunately, the amounts of money allocated to the judicial authority are not sufficient. However, the judicial authority budget does not exceed 1% of the general budget of PA⁽⁹¹⁾. In 2006, the amounts transferred to the judicial authority were less than half its expenditures. The rest is considered as a debt upon the judicial authority for the year 2007⁽⁹²⁾.

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(90) Popkin, Margaret, Efforts to Enhance Judicial Independence in Latin America: A Comparative Perspective, in: Office of Democracy and Governance, USAID, Guidance for Promoting Judicial Independence and Impartiality, Revised Edition, 2002, Washington DC., pp. 100-132, p. 104.

(91) Barghouti, Mu'een, Ibid, p. 52.

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