Palestine Economic Policy Research Institute (MAS)

Individual Employment Contracts: Inconsistency in Law Texts and Application

Fateh Hamarsheh
Hadi Masha'al

2013

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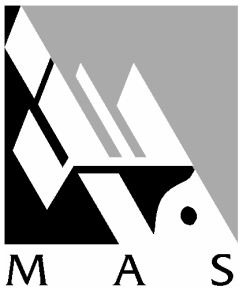

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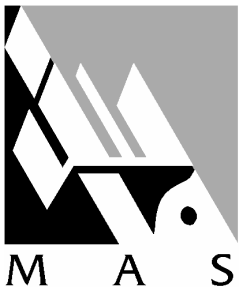

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Project: **Strengthening the Rule of Law and Fostering Economic Development Through Improving Contract Enforcement**

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Individual Employment Contracts: inconsistency in Law Texts and Application

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Foreword

This study is one of the studies of the project: "Strengthening the Rule of Law and Enhancing the Investment Climate by Improving the Enforcement of Contracts". It was conducted by MAS in cooperation with the United Nations Development Program (UNDP). The study assesses the legal framework of labor contracts, which consists of the Labor Law No. 7 of 2000, and its related regulations.

The purpose of the study is to improve the enforcement of labor contracts and increase access to justice, especially for wage workers, who represent a very large segment of the Palestinian population. To achieve this purpose, the study analyzes the text of the law and regulations, and makes an assessment of their practical application. This analysis will help policy makers in detecting weaknesses, ambiguities, and controversies in the Law and its regulations, and the lack of capacity and expertise within the law enforcement bodies. The study's primary goal is to make practical recommendations to deal with these shortcomings in order to improve the efficiency of contract enforcement and access to justice for all contracting parties, including the wage workers.

With the completion of this study, I want to extend my thanks to the main researchers and their assistants, reviewers and discussant of the study, and to all those who were engaged in both the special workshop and the conference during which the findings were presented. In particular, I would like to thank the Minister of Justice for his opening remarks to the conference, the representative of Ministry of Labor, the Trade Unions representative, and the representative of the private sector. Finally, I would like to extend my gratitude and thanks to the UNDP/PAPP - Rule of Law and Access to Justice Program in the oPt, for sponsoring this study.

Dr. Samir Abdullah
Director General

Executive Summary

About two-thirds of the workers in the Palestinian Territory are subject to the provisions of Palestinian Labour Law. The vast applicability of the law requires that its provisions be clear and its enforcement guaranteed and fast, without encumbering employers with financial burdens they cannot bear. The law should aim at creating a balance between the interests of both workers and employers in a way that supports the labour market.

The issuance of Labour Law No. (7) of 2000 was a quantum leap that led to the improvement of working conditions in many aspects. Many of its provisions were directed at protecting the worker as the weaker party in the employment relationship. However, ambiguity and occasional inadequacy affected some texts of the Labour Law, which reduced level of protection for workers. This study aims at identifying the causes of these deficiencies and diagnosing negative practices regarding the implementation of employment contracts in order to formulate proposals that may resolve the issues in question. To achieve this, the study adopted an inductive method to identify the legal texts that need legislative review and to analyse them in the light of jurisprudence. The study also included field research on a sample of lawyers who defend labour cases (39 lawyers in various regions of the West Bank) in order to compare theory with practice and as an attempt to reach conclusions that will serve the objectives of this research.

The study discusses the deficiencies related to the legal framework governing labour relations, the date at which the Labour Law will enter into force, fees associated with labour lawsuits, probation periods, absence from work, substantiating employment contracts, duration of contracts, unfair dismissal, end of service indemnity and work-related injuries.

The study showed that the date at which the Labour Law will enter into force is one of the unresolved issues. There is a contradiction in the jurisprudence. This is because the law does not contain any text that clarifies this issue, even though reference could have been made to the general rules of interpretation concerning the date of entry into force. Regarding the labour lawsuit fees, it is not clear from the text whether the conflicts stipulated in Article (4) of the Labour Law are stated as restrictions or just examples of situations in which workers are exempt from the judicial fee. The Palestinian judiciary has determined that this article merely denotes the labour market conflicts for which workers do

not have to pay the fee and as a result issues not included in article (4) are subject to fees. By adopting this interpretation, the judiciary violated the spirit of the law, that is, to facilitate litigation procedures for workers and enable them to obtain their rights as quickly and easily as possible without any expense.

The study also notes that the wording of Article (29) of the Labour Law regarding the probation period was written ambiguously. It could be read as to indicate that the probation period should be a minimum of three months, when it should state unambiguously that three months is the maximum. The same article also indicates the possibility of renewing the probation period for a similar duration so that it may reach six months. This is not what really takes place in practice according to many accounts and this contradicts the Arabic Labour Standards convention No. (6) of 1976, which does not permit placing a worker under a probation period more than one time for one employer. Amending this article in a way that eliminates its ambiguity and defining the maximum duration of the probation period and clarifying that it cannot be extended is a matter of urgency.

The Labour Law does not contain any provisions on how to calculate a worker’s period of absence between the moment his employer terminates the employment, either during or after the probation period, until the moment that he re-employs him. Some employers appear to conclude fixed-term employment contracts and call back workers some period after contracts expire to sign new employment contracts after settling their labour rights so as to circumvent the provisions of fixed-term employment contracts. Therefore, there is a need to calculate the duration of the interruption period, to be determined by legislature or by the judiciary if not explicitly stipulated by law, of the worker's service as if he was not absent from work so as to protect workers from being abused by employers.

Article (28) of the Labour Law stipulates "the employment contract shall be drafted in Arabic and shall contain the basic terms and conditions of work, especially regarding wages, type of work, its location and duration. It shall be signed by both parties and a copy of it shall be given to the worker. The worker shall also be entitled to prove his or her rights through all legal methods of proof." This article implies the opposite of the purpose for which it was enacted, because it implies that the employee must have a contract in order to prove his legal rights. The second part of this article should be stated first and vice versa. It would have been better written if it

first confirmed that the employee could prove his rights through any legal evidence and then mention the written employment contract in a way that indicates that it is permissible, but not mandatory to have it in writing. This is consistent with the Arab Service levels agreements of 1976 which emphasized a worker's right to prove his rights through any legal evidence, apart from the general rules of evidence, as the weaker party in the employment relationship.

Regarding the temporary employment contract, which in nature requires implementation within a limited term, some disagreements arose concerning its adaptation and whether it is limited or unlimited in its duration. The reason behind this is lack of clarity in the provisions of the Labour Law. Legislative intervention is required to resolve this issue, especially in the light of the widespread temporary work patterns, as defined in the Labour Law. This includes employment situations in which an employee works on a particular project that will come to an end within a specific period, which is typically more than two years.

The Labour Law does not unequivocally explain the cases in which unlimited employment contracts might be terminated without considering such termination unfair. This matter caused many practical problems, especially in cases examined before the judiciary. These problems still exist before the Palestinian Court of Cassation which, until recently, was unable to develop a standard for unfair dismissal because of the ambiguity in the Palestinian Labour Law. However, in 2009, the Palestinian Court of Cassation issued an opinion in which it developed a clear standard for unfair dismissal, stating that "employee dismissal unrelated to one of the cases provided for in Articles (40) and (41) of the Labour Law shall be regarded as unfair dismissal." Despite this opinion, the law still needs to be amended to clarify the standard of unfair dismissal through legislation. This is especially important considering that judges of courts of first instance and courts of appeal may choose to not adhere to what the Court of Cassation has adopted because legal precedents in the Palestinian judicial system are non-mandatory so long as they have not been issued in accordance with the requirements of Article (239) of the Civil & Commercial Procedures Act.

Article (41) of the Labour Law, which allows an employer to terminate an employment contract for technical reasons or loss, is used by employers in a manner that is completely contrary to the purpose for which it was drafted. Employers tend to use it as a means to terminate the unlimited employment contract under the pretext of technical reasons or

restructuring. The reason employers take such action is that the article only requires notifying the Ministry of Labour to terminate such contract. However, notifying the ministry does not necessarily mean that the cases alleged by the employer relying on Article (41) will be verified. As a result, this article has become an outlet for employers to terminate unlimited employment contracts without being threatened by a sentence to pay compensation for unfair dismissal. Accordingly, the text of Article (41) fails to achieve its aims by not requiring verification of the reasons for dismissal alleged by the employer. The Ministry of Labour should be granted the authority to do so in order to discourage employers from abusing the article.

In the absence of a provision in the Labour Law that allows a judge to set an interest rate in the case of any delay in fulfilling labour rights, including end of service dues, an argument was raised about the extent to which such a judgment is permissible. This argument extended to the provisions of the Court of Cassation, as it had done so in the past on the ground that it is a debt to be affected by the employer and interest should be calculated from the date of the claim until full settlement. Recently, however, the jurisprudence of this court decided that legal interest shall be restricted by agreement or by the text of the Labour Law. While it seems appropriate to permit workers to rely on the Ottoman Murabaha law to claim interest on the grounds that the worker's rights are debts payable by the employer and the Ottoman Murabaha law applies to all civil debts, the Palestinian Court of Cassation declared that the Labour Law must contain a specific provision related to interest rates in order for judgments to include a calculated interest rate.

The study notes that equalising compensation for occupational diseases and compensation for work injuries is not correct. Such equalisation is not in the interest of workers since occupational diseases also affect the worker for a long time after working. Under a regime that equalises payment for disease and injury, if a disease causes total disability or death at an age close to sixty, the worker’s compensation will be small. Thus, it is better to reconsider this issue so as to achieve the intended purpose of compensating workers fairly for occupational diseases. Moreover the table related to occupational diseases, annexed to the law, should be subject to changes based on medical developments that may lead to the emergence of new occupational diseases not mentioned in the table. In this way the table will also be subject to recommendations of competent medical committees, World Health Organisation standards and other relevant authorities.

The Labour Law does not stipulate the possibility of emergency summary procedures for labour lawsuits. Nor did it explicitly stipulate forming specialised courts to consider labour cases. This would speed up decisions in such cases, improving privacy and limiting the impact on the economic and social situation of the worker and his family. It would also create a judiciary that is more familiar with governing employment disputes. The fact that these elements are missing from the Law negatively affected workers' rights to access justice easily and smoothly. Under the pressure of urgent need, the Supreme Judicial Council in 2011 announced assigning specific judges to consider labour cases. This decision included assigning magistrates to examine labour cases in all provinces. However, the assigned judges do not get to consider labour cases as a full-time job, but rather they do so in addition to their previous tasks, which may cause this measure to miss its objectives. After the measure however, a significant improvement in the speed of deciding on labour cases was noticed. According to statistics from the Supreme Judicial Council, the average duration of a labour lawsuit in courts of first degree (Magistrate and of first instance) in all courts operating in the West Bank has been reduced to 140 days after the commencement of the new judicial structure from 798 days before the change. The obvious difference between the two phases shows that assigning judges to consider labour cases filed in the courts of first instance will lead to further reduction in the average duration of workers' lawsuit before the courts of first instance.

No set of executive legislation (regulations) for the Labour Law has been issued up to the date of preparing this study. The Ministry of Labour should pursue such legislation and coordinate with the competent authorities in the Palestinian government in order to approve them. Otherwise a state of legislative emptiness and other problems related to the implementation of the Labour Law will remain.

Under the current state of inspection in Palestine, out of (60.000) organizations subject to the provisions of the Labour Law, the Inspection Authority was able to conduct inspections on (15.528) organizations over the past, i.e. about 26%. In 2011 alone (4842) organizations were inspected, this is (32%) of the number of the organisations inspected and (8%) of the total number of organizations. The number of organizations that have not been subject to inspection and control is quite high. This means that the purposes of the inspection process are not being realised and that this may adversely affect the rights of workers as well as health and safety in the work environment.

In 2011 the General Administration of Inspection at the Ministry of Labour identified 599 complaints from workers related to various violations of the Labour Law by employers. Their study demonstrated a lack of skilled staff and an insufficient number of inspectors. The ministry needs to reconsider the structure of the General Administration of Inspection and how it works, so that it can be equipped with a sufficient number of inspectors to organise its works efficiently and be supplied with the necessary means to perform the duties it is entrusted with according to the provisions of the law.

Field research shows that 69% of the respondents see a negative impact of the number of a judge's pending cumulated cases on the quality of judgments issued and on the judge's ability to accumulate quality experience due to work overload. 76% of respondents support the formation of labour courts.

Based on the aforementioned findings, this study suggests the following recommendations:

First: modifying the Palestinian Labour Law No. 7 of 2000 as follows:

- Reorganise the labour branch of the judiciary to ensure the formation of fully competent labour courts.
- Develop procedures concerning labour cases characterised by rapidity, abridgement and easiness from notification to implementation.
- Remove the ambiguities and contradictions in the text referred to in this study.
- Require labour judges to participate in training courses, taking into account the principle of competence in the curricula of the Palestinian Judicial Institute.
- Issue all the rules and regulations stipulated in the Labour Law and referred to in this study.
- Restructure the General Administration of Inspection and the General Administration of Labour Relations in a way that ensures the availability of a sufficient number of qualified and specialized employees and provide full training to enable these departments to carry out their tasks.
- Develop a comprehensive national plan for a large-scale inspection campaign of all labour firms to ensure the application of legal texts and eliminate violations.
- Take advantage of the role of the Ministry of Labour in intervening to resolve labour disputes through alternative means by: preparing a

qualified and sufficient staff of mediators; forming conciliation and arbitration committees; and developing a training program that grants certificates in arbitration for labour disputes in collaboration with the Ministry of Justice.

- ✧ Add an article to the Labour Law that requires calculating an interest rate for labour claims of any nature if the employer delays in fulfilling them.
- ✧ Amend the Palestinian Labour Law to provide a clear standard for unfair dismissal and to draw clear lines of distinction between different types of employment contracts (limited, unlimited, or contracts that are temporary in nature). Also develop mechanisms to ensure workers' rights to indemnity. The Companies Act should also be amended so that companies are obligated to fix compulsory allocations for end of service compensation in their annual budgets within a separate entry to facilitate the implementation of judicial decisions. Practical experience has shown that many provisions are not implemented due to the lack of funds in the companies' accounts to cover the required expenditures. This would render meaningless the legal texts that consider workers' rights a form of privileged debt.

The study also proposes enacting a Social Security Act or developing a retirement law for private institutions. This would guarantee the rights of workers at the end of their services, thereby reducing the severity of labour disputes. Under this plan, workers' rights would be guaranteed in financially capable institutions that are independent from the control of employers and from the fear of uncertain future. Approving such a law would be reflected positively in the productivity of the working class and would promote a sense of security for workers. Additionally, legalisation creating a safe retirement program in the private sector would lead to the creation of job opportunities for younger people.

The following should also be modified:

1. Civil Service Law, Court Formation Law and Judicial Authority Law so that the system of degrees is adopted in judicial appointments. The Magistrate or first instance judge should receive the same salary and degree as a judge of a supreme court according to level of seniority, so as not to empty courts of first instance from competent judges with extensive experience, as this would be reflected negatively in the quality of work for cases before the courts of first instance.
2. The Palestinian Evidence Act, so as to permit courts to hear the testimony of workers in labour cases. In many cases, workers' rights

are lost because knowledge of the employment relationship is confined to him and the employer, which prevents the worker from being able to meet the burden of proof.