LEGAL DEFENSES AND THEIR RELEVANCE TO PUBLIC ORDER CONCEPT IN PALESTINIAN CIVIL PROCEDURES LAW NO. 2 OF 2001

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ABSTRACT

This article addresses the issue of legal defenses in the Palestinian Civil Procedure Law and its relevance to the concept of public order. It does so by defining the different types and causes of defenses and knowing the principle or rule followed in knowing whether the defenses is related to the public order or not. The article also dealt with the implications of defenses especially nullity of the procedures and the necessity to raise this defenses by the court on its own at any stage of litigation before any court even before cassation court. Palestinian Civil Procedure Law has not set clear standard lead judges to know which defenses are related to the public order. This article proposes a set of recommendations to improve this law and litigation process before the courts by avoiding nullity of procedures and contradicting judgments, furthermore, save time and effort.

Keywords: Public Order, Palestinian Civil Procedures Law, Procedural Defenses, Substantive Defenses, Plea of Inadmissibility, Jurisdiction

INTRODUCTION

The term of defense is refers to all defense means that the opponent may use to respond to the claim of his opponent with the intention of avoiding the ruling in favor of his opponent with what he claims (Abū al-Wafā, 2015). Whether these means are directed against the litigation or some of its procedures or directed to the origin of the claimed right, or to the opponent's authority to use his lawsuit and try denying it (Najajreh, 2016). First of all, it can be said that not every defense can be invoked or waived by any person or at any stage of the litigation procedures, this matter depends on the type and Legal nature of the defense itself (Younis, 2002). Legal defenses are basically divided into three types, each type has its own provisions and consequences, based on are related to public order concept or not. These defenses are either Procedural, substantive defenses or plea of inadmissibility "non-acceptance of the lawsuit". Each of these types is divided into two categories, for example, procedural defenses, there are many procedural defenses that the law talks about, for example, a plea of non-jurisdiction, a plea of nullity, and pleas of litispendency [moving for the referral of the case to another court either because the same dispute is pending before such other court or by reason of connexity], some of these defenses consider by Palestinian law related to Public order because it implies a violation of one of the basic procedural rules in the Civil Procedure Law. The same applies to the plea of inadmissibility. While for the substantive defenses, the matter differs slightly, as will be explained.

The important thing here is the consequence of whether or not the defense is related to public order. There are several important implications: A- It may be invoked before the court at any time in the litigation process. In other words, after talked in merits of the lawsuit, this is an exception of Article (89): (The parties are held to submit their claims and defenses at one time

before the case is examined on its merits). Otherwise, their right to raise it shall be exhausted. B- The defense relates to the public order may be invoked before the Court of Appeal and Cassation even for the first time, and this is also an exception to the rule stipulating that new defenses may not be raised before the Court of Appeal and Court of Cassation. C- The litigation belongs to the parties, however, if the defense related to the public order, the court must raise it on its own without waiting for the parties to invoke it, since this matter is related to the public interest, for example, lack of jurisdiction because the value of the case exceeds the competent of the court...etc.

SIGNIFICANCE OF STUDY

The study came to clarify the legal defenses and their types and shows the extent of success or failure of the Palestinian Civil Procedure Law in organizing and handling this matter to know the defenses related to public order in addition to the principle that was adopted by Palestinian legislator to know which defenses are related to the public order concept and which not.

PROBLEM STATEMENT

Palestinian Civil and Commercial Procedures Law No. 2 of 2001 has not enumerate and specify legal defenses, especially Procedure defenses and pleas of inadmissibility, or at least created a standard or rule that can be followed or measured to determine which defense relates to public order concept and which are not. This matter could help judges as well as Lawyers to know which defenses related to public order and which not, this classification has many consequences, especially the possibility of raising these defenses before any court and at any stage of the litigation procedures in addition to the consequent absolute invalidity if the defense relates to public order. This Legislative insufficiency given the court more discretionary power in determining kind of defense, which leads to contradictory judicial rulings in the future. Especially since the public order-related defense may be invoked by the parties at any stage of the litigation procedures, which leads to the nullity of the procedures after the parties, lawyers and the courts gone a long way in litigationin addition to wasting time and money.

RESEARCH QUESTIONS

Through this study, the researcher seeks to answer the following questions:

1) What is meant by legal defense and their types in the Civil Procedure Law?
2) Has the Palestinian legislator succeeded in classifying and dividing the legal defenses according to their relevance to the concept of public order?
3) What are the implications of considering that the defense is related to public order concept?
4) What is the situation of the Palestinian Civil Procedure Law regarding to plea of referral (Transfer) the case to another court?

METHODOLOGY

In order to reach a comprehensive understanding of the subject of this study, the researcher followed the analytical approach of the articles of the Palestinian Civil Procedure Law and addressing some provisions of the Egyptian Civil Procedure Law in certain points due to the great similarity between it and the Palestinian law. In addition, the researcher relied mainly on the method of interviews through conducted interviews with Palestinian judges, academics and lawyers who

have great experience in this law. Moreover, the researcher referred to some judicial precedents related to the subject of the study, as well as books of jurists and legal research in this regard.

Procedural Defenses in Civil Proceedings

In jurisprudence, procedural defenses are forms of defense challenging the legitimacy of the legal proceeding. A party argues that it should not be held liable for a legal charge or claim brought against them by some legal process, because there is a violation of the legal procedures that must be followed in accordance with the law. This form of defense is applicable in criminal law as well as civil law. In criminal proceedings, the use of procedural defense is separate from the question of guilt or innocence of the defendant and is instead based on misconduct in the criminal procedure (Reed, Bohlander, Bohlander & Reed, 2014). In civil proceedings, it is similarly separate from findings against or for the defendant. Examples of procedural defenses include prosecutorial misconduct and entrapment (COLVIN, 1990; MBITI, 2011; BURRI, 2019).

As for the civil procedures law, procedural defenses can be defined as defenses whose purpose is to challenge the validity of the litigation "adversarial" or its constituent procedures, without prejudice to the origin of the claimed right (Sihamp & Souad, 2013).

Former Attorney-General of Palestine State says: “The aim of these procedural defenses is to issue a court ruling that ends the dispute procedurally without arguments or discussing the merits "Subject" of the case. For example, in the event of a mistake in the procedures for filing the case, if the lawsuit was filed before the non-competent court, the plaintiff invokes about non-jurisdiction for this court this lead to end the dispute procedurally”.

The basic rule in procedural defenses states that they must be invoked before entering into the merits of the case unless these defenses relate to public order. Article 91/1 of the Palestinian Civil Procedure Law states that. "Pleas of lack of local jurisdiction, of litispendency [moving for the referral of the case to another court either because the same dispute is pending before such other court or by reason of connexity], of nullity, and all other procedural "defenses" pleas must on pain of inadmissibility, be raised simultaneously and before raising any claim or defense in the case or moving for its dismissal". The same text in the (Egyptian Civil Procedure Law No. 13 of 1968), Article 108.

The wisdom from invoking of procedures defenses before discussing the merits of the case is based on justice so that the plaintiff does not remain threatened with this defenses at all stages of litigation after the judicial procedures have come a long way and the lawsuit is near to finish and issue a final judgment in this lawsuit. Therefore, these defenses must be adjudicated expeditiously by dropping the defendant's right to invoke these defenses when discussing the merits of the case. The purpose is to shorten procedures and save time and expenses (van Rhee, 2007; Al-Farra, 2016). It is the court’s duty to organise the proceedings in a way that guides all participants in the process to a result that is appropriate, fair and just (Rhee, 2018).

One of a member of the committee drafting Palestinian civil procedures law, he says in this regard: “I emphasize here that there is a big gap between the theoretical and practical perspectives in every issue that is raised about the public order. The practical reality confirms the existence of "terrible diarrhea" in the process of joining the pleas to the subject-matter. This is a matter that the judge can escape from his responsibilities before delving into the merits of the case, it is easy for the judge to decide to join the defense raised by the defendant to adjudicate it together when adjudicating on the merits of the case. Based on the judge’s authority to decide to combine the defense and the subject matter of the case to adjudicate together. Knowing that there are issues that do not need brainstorming that requires delaying the decision on the procedural defense until the case is settled, especially the procedural defense may end the litigation early if it is based on a valid

ground. It has also been pointed out that this issue is a major reason for delaying the adjudication of the cases from the beginning, which prevents the completion of prompt justice".

The researcher agrees with previous opinion, and this is what happened with researcher when he was a lawyer for the defendant in a labor rights case. After two years of litigation, the court ruled that the plaintiff's case was inadmissible because the defendant has no capacity in the case, despite I invoked by the plea in the first session that the defendant has no legal capacity in the case, due to the absence of a working relationship between the plaintiff and the defendant, he was only responsible for him at work and not the employer. Therefore, the defendant is not obliged to pay the plaintiff's severance package. Nevertheless, the judge decided to join this defense with the subject matter of the case to adjudication together, after submitting evidence and hearing witnesses ... etc. Although the judge should have short all of this from the beginning and decide to adjudicate the plea directly which lead to terminate the case early.

This is regard to procedures defenses not related to the public order, the examples of procedures defenses, defense of local jurisdiction, and defense of nullity. For instance, defense to refer the lawsuit to another circuit because of local jurisdiction after discussing the merits of the case is not permissible, like if the defendant disputes ownership of something related to the merits of the lawsuit, the defendant considered here had talked about the merits of the case.

The Court of Cassation has said, "First of all, we point out that the rules of jurisdiction are from the public order except for the issue of the local jurisdiction. The consideration of this defense by the court depends on invoking this defense by the litigants in the case. Accordingly, the defense of local jurisdiction is considered one of the procedural defenses not related to public order". (The judgement of the Cassation Court Convening in Ramallah in Case No. 228/2011, Civil Action, issued on Dec 19, 2012, Court: Cassation Litigation Type: Civil Case). Also, it decided in another two judgements "The defendant allowed to invoke by defense of local jurisdiction before entering into the merits of the lawsuit, otherwise, the right to invoke this defense will be forfeited". (Case No. 4/2017, Apr 10, 2017). "The Cassation Court considers that the inaction to invoke local jurisdiction after discussing the substantive defenses It means the opponent's relinquishment of this defense. This waiver drops the opponent's right to invoke this defense". (No. 327/2016, Jan 11, 2017).

As a result, he cannot invoke the lack of local jurisdiction of the court. Local jurisdiction is one of the issues that are not related to public order, therefore the defendant loses his right to invoke this defense because the legislator considered not invoking here as a tacit acceptance from the defendant to hear this case by this court which has no local jurisdiction to hear this case (Abu Hableh, 2012). In addition to the foregoing, it is considered from procedural defenses the defense of nullity due to a defect or insufficiency in the statement of claim, subpoena, notice, notification, judicial declaration, and invoke of nullity of the expert's report in the case (Younis, 2002). Procedural defenses include also the defense of extinguishing the adversary proceeding "drop of litigation procedures", Interruption of proceedings, and invoke the nullity of notice of appeal.

It is not reasonable for litigants to have the right to invoke these defenses at any time and any stage of the litigation procedures. Suppose that this is possible and the defendant can invoke one of these procedural defenses, such as a defect or a deficiency in the statement of claim, notification, or judicial declaration, and he did not invoke this defect or deficiency in the first session before the court and after a year has passed after hearing the case before the court this defendant wanted to invoke the existence of this deficiency or defect. Is it reasonable to cancel all procedures and decisions made in the lawsuit because of this deficiency or defect? Article 91, which is mentioned above, answered this question, as it is not permissible to invoke these defenses after speaking in the merits of the lawsuit, otherwise the right to invoke these defenses drop. Therefore, all procedural defenses must be invoked in the first session and before entering into the merits of the case. See, the judgment of Egyptian Cassation Court in Case No, 153 for the judicial

year 67, Issued on 15/5/2011 session. Also, judgment, Case No. 2855 for the judicial year 86, Issued on 28/12/2017 session. "Plea of non-local jurisdiction accordance with Article 108 of the Civil Procedure Code from procedural defenses not related to public order, Therefore, must for the opponent who is invoked of this Plea express it before talking on the merits of the case, otherwise, his right to invoke this defense is forfeited, and he must be raised before submitting any request or defense in the case".

As mentioned previously the basic rule in procedural defenses states that they must be invoked before entering into the merits of the case unless these defenses relate to public order. Article 91/1"... All other Procedural "defenses" pleas must on pain of inadmissibility, be raised simultaneously and before raising any claim or defense in the case or moving for its dismissal".

Every rule has an exception and the exception to this rule is that procedural defenses that relate to public order may be invoked at any time, any stage of the litigation procedures and before any court. In addition, litigants can invoke procedural defenses before the Cassation Court even if these defenses were not invoked before the Court of First Instance or Magistrates Courtv (Sime, 2019). It is well known that the Cassation Court examining the challenge from a legal side, and it has no right to examining the subject of the challenge, therefore new grounds may not be raised nor new evidence presented before the Cassation Court. Article (233/1) "The Cassation Court shall look closely into the petition for cassation". But Article (232/1) stated, "New grounds and defenses may not be raised nor new evidence presented before the Cassation Court unless such is related to public order". Therefore, if there is any cause, defense or evidence related to public order, it may be invoked at any time, any stage of the litigation procedures and before any court.

Examples of procedural defenses that relate to public order are the defenses of non-specialty jurisdiction (jurisdiction ratione materiae), non-case Value Jurisdiction (Jurisdictional Amount) and invoking the nullity of a judicial ruling if this judgment is issued against a person who died before filing a lawsuit. In addition to invoking the nullity of the judicial declaration because it does not include the name and signature of the person serving "delivered" the notice and invoking the non-acceptance of notice of appeal because the appeal statement was not signed by a practicing lawyer (Sayed Sawy, 2010).

These procedural defenses can be invoked at any stage of the litigation procedures and before any court, even before the Cassation Court, as previously indicated. As well as, the right to invoke these defenses is not lost if the merits of the case are discussed. Contrary to procedural defenses not related to public order which the right to invoke is lost if the merits of the case are discussed (Younis, 2002). In the end, it should be noted that when a defendant invokes procedural defenses related to public order, it serves as an alert for the judge to do his duty.

There is a very important procedural defense that the researcher must address in detail, the plea of referral (Transfer) the case to another court because reason of connexity or plea of consolidation of the two lawsuits. Article (80/2) states: "If more than one action is filed before one or more courts and such actions are united as to cause and subject-matter, the court may, on the basis of a request by one of the parties, combine the actions in one adversary proceeding and, without prejudice to the rules of jurisdiction, order the referral of such actions to the court seised of the initial action".

This plea is intended to unify and combine the two lawsuits due to the existence of a link between of them by reason of unity of cause and subject matter. This plea shall be by request of the litigants, although there is no direct interest for them in it. The litigants shall not be affected if the two lawsuits are heard separately or they are combined in one case. The purpose of the litigant is to win the lawsuit and ruling a judgment in his favour, whether this it be within one suit or more.

When looking at this issue from public interest side, certainly it is in the interest of the litigation system to unify the two lawsuits that are related to each other at one case heard by one judger to avoid issuance of contradictory Provisions or judgments it is difficult to reconcile them. In

addition, the combine of the two cases saves the judges 'effort instead hearing the two cases by two judges, each of them is obliged to proceed with the procedures independently. But when the matter is limited to one judge, then he can have a comprehensive view of the subject matter of the case and avoid the occurrence of a contradiction in judgments in the future (Flaih, 2005).

Neither the Palestinian nor the Egyptian legislator knew what was meant by the connexity "correlation", while the French legislator defined it in Article 101 of the Civil Procedure Law that (The existence of a close connection between two lawsuits that makes it appropriate, suitable for application of justice to combine them together before one court to hear and render judgment in it).

One of the clearest forms of correlation is existence a connexity in the subject matter and cause of the two lawsuits, for example when one party files a lawsuit to claim implementation of a contract, while the other party has filed another lawsuit demand the avoid, or termination of the same contract. In this case, the court often knows about existence of other case than the one heard before it through the facts of the case and the litigants' statements. The basic principle here is that the litigants must be plea by combine the two lawsuits (the suit of performance the contract and suit of termination) in one case and heard by one court. Provided that both courts have jurisdiction to hear the lawsuits from the original.

The important point in this regard the Palestinian Legislator has given the court which, defense of referral due to connexity raised before it by the litigants, a discretionary power to accept this defense or reject it after estimate there is a connexity between the two lawsuits or not. In addition, the court can refuse to combine the two lawsuits even if have a reason of connexity between them. The court here has absolute discretionary power according to the text of Article 91 of the Palestinian Civil Procedure Law.

What matters to the researcher at this point is that the Palestinian Legislator considers pleas of referral of the case to another court because of connexity with another case not related to public order. when consider any procedural or substantive issue relate to public order will make the judge obligated to raise and implementing it on his own without having a discretionary power, and without waiting for it to be raised by the parties. In addition to the possibility of invoking this issue at any stage of the litigation procedures at any time.

Furthermore, the law gave the judge a discretionary power to decide to combine the two lawsuits or not. The Palestinian law also considers that the Plea of litispendency [moving for the referral of the case to another court either because the same dispute is pending before such other court or by reason of connexity], must be raised simultaneously and before raising any claim or defense in the case otherwise, right to invoke this plea will be dismissed.

In addition to the previous case, which dealt with the existence of two lawsuits unite in the same cause and subject matter, but the type of suit differs. There is another situation, plea of referral the suit to another court because the same dispute is pending before another court "file the same lawsuit before more than one court at the same time" that it is not permissible to file the same lawsuit before more than one court at the same time. Here, the two lawsuits are of the same type and same merits, parties, and causes. For example, suppose that Mohammed filed a lawsuit before Khan Yunis Magistrate's Court against Mustafa, demanding him to pay a debt of 5,000 Jordanian dinars without Mohammed sons knowing that their father had filed a lawsuit. During the litigation, Mohammed died, and Mustafa did not inform Mohammed sons that there was a case filed between him and their father based on the text of Article 128/2 because he was a defendant and for his interest extinguish the lawsuit based on 137/2 (In all cases, the adversary proceeding shall terminate upon the expiry of two years from the date of the last valid procedure taken therein). Therefore, he did not inform Mohammed sons. Especially since the text of Article 128, the second paragraph states that if (Mustafa) does not notify Mohammed sons within the time-limit set by the court without an excuse, the court shall rule the action discontinued as from the date the reason for discontinuance arose. Perhaps from the beginning, Mustafa would not ask for a grace period to

notify Mohammed sons because Article 128 does not oblige Mustafa to notify them. After a period of time and before the adversary proceeding terminate upon the expiry of two years the sons of Mohammed filed a new lawsuit before the Rafah Magistrate's Court to claim the debt of their father from Mustafa, as the rules of local jurisdiction not related to public order, therefore the case may be filed before the Khan Yunis Magistrate's Court or Rafah Magistrate's Court. In this case, there are two lawsuits related to the same dispute before two different and competent courts according to the law. This is what was mentioned in Article 91, paragraph 1 (moving for the referral of the case to another court either because the same dispute is pending before another court).

Another example, this occurs due to the multiplicity of options that the law gives to the plaintiff in some cases in determining the competent court locally, so the plaintiff raises the case before one of the competent courts locally. After that found that the court viewpoint is inappropriate for him so he filing another lawsuit before another competent court, based on the local jurisdiction, perhaps more than one court has jurisdiction over one case for example if there are several defendants and their place of residence is different, or it was agreed to an elected domicile for the performance of a specific legal act (Flaih, 2005).

The researcher believes, from his point of view, this issue may lead to several consequences that affect the validity of litigation. The Palestinian law was not successful in this point when he decided the issue of a connexity between the two suits, whether in the first or second case, not related to public order and give the judge a discretionary power in joining the two suits or not, whether there was a connexity or not.

Palestinian Legislator should have decided that the plea of existence a connexity between the two lawsuits relate to public order because this would achieve the public interest, which is to save time, effort and prevent contradictions of judgments if the two lawsuits have the same merits, cause, and parties. And heard by two different courts and two different judges. Therefore, the judge must be obligated to combine the two lawsuits if it is evident to him that there is a connexity between them. He must also raise this matter on his own without waiting for the parties to raise it.

Consequently, the defense of the existence of a connexity between the two lawsuits must be considered one a plea related to public order and the parties may invoke it before any court at any time even after discussing the merits of the case. Therefore, the researcher proposes to the Palestinian Legislator to amend the text of Article 91 and give the judge the right to raise the issue of joining the two cases on his own and oblige him to do if there is a connexity, without waiting for this matter to be raised by the parties.

Finally, it should be noted, procedural defenses did not come as exclusively and were not clearly defined by Palestinian Legislator. The Palestinian Civil Procedure Law was mentioned some procedural defenses related to public order and left the matter to the discretionary power of the judge (Jandūbī & Bin Sulaymah, 2001). In this case, the judge must examine every defense submitted by the litigants in the lawsuit and determines whether it relates to public order or not. It was better for the Palestinian Legislator to enumerate these defenses, or at least to set a specific criterion that can be relied on it to know whether this procedural defense relates to public order or not (Alamary & Jaber, 2019). Perhaps this judge believes that this defense relates to public order while another judge considers the same defense is not related to public order, which ultimately leads to a contradiction in judicial rulings.

Former Minister of Justice, says: “The Palestinian Legislator has tried, through the legal articles in the Civil Procedure Law, to determine the procedural and substantive defenses. However, I believe that this regulation of procedural and substantive defenses did not include a clear definition or determination of what relates to those defenses to the public order and what is not. He also says Palestinian Legislator may have left here room for the judge’s jurisprudence in these defenses, but this matter needs specific controls and rules. Therefore, the Palestinian Legislator should have put these controls and rules into the body of the law so as not to leave the matter to

contradictory jurisprudence by the judges that might not be in line with the intention of the legislator".

One of the magistrate's court judges, agrees with what Former Minister of Justice said, He adds: "When reviewing the legal regulation of legal defenses in the Civil Procedure Law, I find that the Palestinian Legislator has not been successful in this regulate. The law did not allocate specific texts for each defense separately to determine its provisions, nature, and impact.".

Substantive Defenses in Civil Proceedings

The researcher above talked about the procedural defenses, but what is the situation regard to substantive defenses in the lawsuit. Initially, substantive defenses "Substantive Pleas" can be defined as defenses intended to object to the merits of the lawsuit. These defenses directed towards the origin of the claimed right in the lawsuit. By "dispute" challenging the other opponent's requests to obtain a court decision leading to rejection of the whole case or part of it (Lilia & Yamin, 2018). The substantive defenses relate to the merits of the case contrary to procedural defenses which are related to the existence of mistakes in judicial procedures, lead to the dismissal of the case.

The defendant seeks to prove the lawsuit of his opponent is illegal, by denying the plaintiff's right or denying the amount of the plaintiff's right in his lawsuit. Therefore, these defenses are uncounted, as the law did not specify it because they relate to the merits of the case, so they differ from one case to another according to the different circumstances (Ahmad, 2017; Fathi, 2014). Examples of substantive defenses, defense by Lapse of the right, fulfill the right, and defense by discharge "Release of a deed" (Aladghm, 2007). As well as invoke of nullity, for example, a principle called "nullity of all contracts due to impossibility of performing the commitment" (Maleki & Mohammadzadeh, 2017), or a fictitious of contract, non-performance of the contract due to mutual obligations of the parties are under the same mutually binding contract under principle of pacta sunt servanda, (Căzănel, 2017), also a debt expiration by fulfillment or prescription, in addition, invoke of Legal setoff or illegality or cause of the contract. Substantive defenses include all the means used by the litigant to refute the case of his opponent, in order to obtain a ruling rejecting the lawsuit (Dyson, Goudkamp & Wilmot-Smith, 2017; Al-Wafi, 2017).

The difference between procedural and substantive defense, that the substantive defense argues that the defendant does not have a contractual relationship between him and the plaintiff, meaning that the defendant denies the existence of the defendant's right and he is not right to his claim. While a procedural defense simply says that the plaintiff is not legally entitled to claim the defendant despite having a right (Main, 2010). Palestinian and Egyptian legislators did not define explicitly and clearly what is meant of substantive defenses in the Civil Procedures Law as the Algerian legislator did in the Civil and Administrative Procedures Law. Article 48 of the Algerian Civil and Administrative Procedures Law No. 08-09 states "Substantive defenses are a means intended to refute the opponent's claims. It can be invoked "Submitting" At any stage of the litigation process and before any court. Article 49 "Procedural defenses are every means aimed at declaring litigation procedures null, dismiss, or discontinued".

There are several rules governing substantive defenses. Firstly, substantive defenses may be invoked at any stage of the litigation procedures, unlike procedural defenses that must be invoked before discussing the merits of the case, otherwise, the right to invoke these defenses has been lost unless procedural defenses relate to public order, it may be invoked at any stage of the litigation procedure. Based on the foregoing, the litigant may invoke substantive defense, even for the first time before the Court of Appeal, but he may not invoke this defense before the Cassation Court because this court examines the legal aspect of the case and does not address the substantive side of the case.

Secondly, judgment issued in the substantive defenses is considered implicitly a final ruling on the merits of the case. For example, if someone files a lawsuit to claim a sum of money (debt) from another person, but the defendant defense by prescription of this debt due to lapse 5 years or 15 years depending on the type of debt, in this case, if the court accepts this defense, this acceptance is considered as a final judgment in the lawsuit. What the researcher would like to say on this point is that the decision to accept the substantive defense is considered as final decision in the case. Consequently, it is not permissible for the plaintiff to file the same lawsuit again because the case has been finally decided (Abū al-Wafā, 2015).

Former Attorney-General of Palestine State affirm that: “The judgment issued in the substantive defense is considered a final ruling on the merits of the case as just mentioned. Accordingly, if a suit is filed to claim the same debt, the defendant can invoke not accepting the lawsuit before the court "inadmissibility of the case" because it has already been adjudicated. This defense related to public order and the judge must rule on this on his own”.

Thirdly, it is not permissible for a judge to raise substantive defenses on his own unless one of the litigants invoked from this defense while hearing the case. Because substantive defenses are directly related to special interest of the litigants. While procedural defenses regulate litigation procedures, how to file the lawsuit before the court and the steps that opponents must follow while submitting requests and defenses in the lawsuit, therefore these defenses relate to the public interest and serve all members of society.

One of the magistrate’s court judges says: “one should not confuse the nature and content of the procedural and substantive defenses, because the substantive defenses must be proven or denied through the evidence presented in the case before the court. While procedural defenses relate to the procedures that must be followed as stipulated by law”.

Finally, based on the foregoing, it can be said that the general rule regarding substantive defenses is that it does not relate to public order but rather is related to the private interests of litigants. Therefore, the litigant who has the right to invoke the substantive defenses must invoke it before the court, or to drop his right to invoke it explicitly or implicitly by condoning the invocation of these substantive defenses. In this case, the judge does not have any discretionary authority that authorizes him to raise this defense on his own or alert the litigants to it, because this leads to making the judge like an adversary and a judge at the same time, and this contravenes the principle of impartiality of the judge (Al-Wafi, 2017).

Some jurisprudence like ahmed alsawy and ahmed abu alwafa believes that there are substantive defenses related to public order but a limited, for example, illegality of the cause of the lawsuit. The cause of the lawsuit is the legal event, legal disposal, or legal text that created the claimed right (Mandil, 2006). Such as, if a person requests a sum of money from another person and the cause of this debt is gambling or the drug trade. in addition, someone has pledged to commit a crime for an amount of money another person pays to him (Abu Khabt, 2013). The commitment of the other person to pay the money is legitimate but the cause of the commitment of the first person is illegal because the crime is illegal. If the person who committed the crime filed a civil suit against the other person to claim the amount of money agreed between them (Ibrahim, 2002). In this case, the judge must intervene on his own initiative and reject the case because the legislator considered these actions unlawful because they violate public order and morals, accordingly the judicial claim is considered illegal (Abdullah, 2008). Article (137/2) of the Palestinian Civil Law states "The cause of the contract is considered unlawful if the motive for it is contrary to public order or morals".

On the other hand, Dean of the Faculty of Law, Al-Azhar University, Gaza says: “When look at Articles 89-95 of the Civil Procedure Law, it did not address the substantive defenses and only dealt with procedural defenses and plea of inadmissibility. These articles dealt with general provisions for defenses, including procedural defenses, but they did not regulate in detail what these

defenses relate to public order, with the exception of what was stated regarding lack of jurisdiction in Article 92 of this Law".

Judge of the Supreme Court confirms this; he believes that: "There are some defenses that the legislator has not addressed, such as plea of nullity of the attorney's power".

Plea of Inadmissibility "Non-Acceptance of the Lawsuit"

Article (3) of Palestinian Procedures law "A case, claim, motion or challenge raised by a party devoid of existing legal interest therein shall not be admitted. In the absence of interest pursuant to the two preceding paragraphs, the court shall rule sua sponte not to admit the case".

"Plea of inadmissibility "non-acceptance of the lawsuit" is any method which tends to declare the action inadmissible, without examining the matter on trial, for lacks of the right to act, such as the lack of capacity, the lack of interest, prescription, imperative term "plea exceptio rei judicatae", plea that the time limit to submit challenge by objection or by appeal has finished according of Article (205) "The time-limit for filing an appeal before the court of appeals is thirty days, save as otherwise prescribed by law. 2. The time-limit for appeals in summary matters is fifteen days". In addition, if the matter on trial (Aljarjuriu, 2008).

Through the "plea of inadmissibility" the existence of the cause to action is under discussion and not only a procedure problem; however, the judge is required not to state on the merits. In fact, the inadmissibility stated by the judge stops the examination on the merits.

This kind of defenses is considered the middle of the substantive and the procedural defenses, as they are like the substantive objections because if the court establishes them that would end the dispute, on the other hand as they can't be dismissed unless waived explicitly or implicitly. Because it is related to public order and they are like procedural defenses because they do not address the right that is the subject matter of the case (Ali Hammood & Md Noor, 2018).

Therefore, the "plea of inadmissibility" has a mixed nature: it is closed to the defense on the merits because it tends to be a final obstacle of the action injustice, in comparison to the exception of procedure which, as a rule, represents a temporary obstacle of the claim. On the other hand, it is closed to the civil procedure exceptions because it focuses on the paralyzing of the action without analyzing the merits of the litigious matters (CIUREA & SPÎRCHEZ, 2017).

Head of the Gaza Magistrate's court, and Former Attorney-General of Palestine State says: says: "Plea of inadmissibility of the case is considered a plea of a legal nature different from the procedural and substantive defenses. It is an independent plea and has special provisions that make it a mixed defense or a mixture of substantive and procedural defenses. In other words, the plea of inadmissibility of the case is not a procedural defense because it is not related to the procedures and is not a substantive defense because it not relates to the right claimed "subject matter of the case". The plea of inadmissibility is considered as a tool used by the defendant to deny the existence of the plaintiff's right to file his lawsuit due to absence one of the conditions required by law to accept it before talking in the subject matter of the lawsuit. in another meaning the defendant requests from court to refrain hearing the lawsuit from his opponent because he has no right to submit it for specific reasons". For more details, see the legal description of the plea of inadmissibility in appeal No. 155 of 2006 North Cairo Court of First Instance session on 4/4/2006.

Article 90 of the Palestinian Civil Procedure Law states "The defendant may move a plea of inadmissibility "non-acceptance of the lawsuit" for any of the reasons entailing dismissal before its examination on the merits. "The decision accepting or rejecting the motion to dismiss is appealable".

Dean of the Faculty of Law, Al-Azhar University says: "Plea of inadmissibility maybe relates to public order and maybe not, In the second status, the court cannot raise this a plea on its own initiative. But if the plea is related to the public order can be invoked in any stage of the case

and the interested party does not need to prove the existence of the damage". For example, ((Plea of inadmissibility due to the existence of the arbitration clause is not related to the public order, and the litigants must invoke it before discussing the merits of the case, otherwise the right to invoke it is extinguished. The reason for this is that the litigant asks the court not to accept the lawsuit and hear it because there is a condition that obliges the litigants to resort to arbitration, not to the court if any dispute occurs between the parties)). See, Judgment of the Cassation Court, Ramallah in Case No. 228/2011, Dec 19, 2012. Also, Judgment of the Appeal Court Convening in Jerusalem, Case No. 282/2011, Jul 11, 2011, And case No.108/2011, Issued on Apr 18, 2011.

Former Minister of Justice answers a point if the court can on its own, raise a plea of inadmissibility without waiting for it to be raised or invoked by the parties. "It is not possible to specify a general rule that would apply to all defenses of inadmissibility. There are cases where the court has to decide on its own that a lawsuit will not be accepted. While there are other cases, the defense must be filed by the parties to make the court decide the suit will not be accepted. Therefore, each defense must be studied separately to find out the nature of the motives that called for its existence. The main question in this regard and each case, is the defense was established in favor of the defendant, or, moreover, it was founded for interest of the whole community? In other words, if the plea of inadmissibility is related to public order, the court must decide it on its own, while if it is not related to it, the litigants must invoke it before the court".

Former Minister of Justice continues to say: "Plea of inadmissibility is related to the public order if it relates to the public interest or the principles of litigation and organizes procedures before the courts, such as plea of inadmissibility a new claim on appeal. Based on Article 221 which states: "No new claims shall be admitted on appeal and the court shall rule *sua sponte* not to admit them" . Plea of not accepting the challenging of judgment due to failure to observe the time-limits according to Article 195 which states" Failure to observe the time-limits prescribed for challenging judgments and decisions entails the dismissal of the challenge in form and the court shall rule *sua sponte* to dismiss it". Plea inadmissibility of the case because it already been adjudicated "principle of res judicata" according to article 92, as well as the plea of inadmissibility due to the party's lack of existing legal interest or legal capacity where the court must, before talking in the subject matter of the case, verify the capacity of the litigants accordance to Article (79).". See also (SCHWARTZ and APPEL, 2010).

In these cases, the court must decide not to accept the lawsuit on its own, even if the litigants not invoke it, in addition, can be invoked by these issues in any stage of the lawsuit even for the first time before the Court of Appeal or Cassation. Otherwise, the court will be wrong to enforce the law (Storme, 2012). While an examples of pleas of inadmissibility that are not related to public order, plea of inadmissibility the possession lawsuit due to submitting it after filing a lawsuit to claim of original right and not accepting the creditor's lawsuit against the guarantor before claim the principal debtor. In addition, pleas of inadmissibility the case due to the existence of the arbitration clause in accordance with paragraph (1) of Article (7) Palestinian Arbitration Law No. (3) of (2000).

In the end, it should be noted that the Palestinian Civil Procedure Law did not regulate plea of inadmissibility, as organized by the Egyptian Civil Procedure Law in Articles 115 and 116. The Egyptian legislator was given discretionary power to the court not to rule against non-acceptance if a plea of inadmissibility was raised before it, Instead, the court may decide to correct the case of non-acceptance, if this possible. (Article 115) "If the court finds that the plea of not accepting the lawsuit because of a defect in the capacity of the defendant and this defect is based on legal cause, the court will be adjourned to announce the defendant who's has the correct capacity in this lawsuit. In this case, the court may sentence a fine to the defendant".

This leads to shortening judicial procedures and achieving justice, by completing the missing element without ruling a plea of inadmissibility. Therefore, it is hoped that the PL will

follow the Egyptian legislator in this issue and amend Article (90) of the Palestinian Civil Procedure Law by adding a second paragraph stating “The court may rule "Discretion" accept the case although the reason for not accepting was achieved and obligate the opponent to correct the status leading to non-acceptance if that is possible” (CULDA, 2018).

CONCLUSIONS AND RECOMMENDATIONS

After studying the legal defenses in the Palestinian Civil Procedures Law, the researcher concluded that the word of defense is referred to all defense means that the opponent may use to respond to the claim of his opponent with the intention of avoiding the ruling in favour of his opponent with what he claims whether these means are directed against the litigation or some of its procedures or directed to the origin of the claimed right, or to the opponent's authority to use his lawsuit and try denying it. These defenses are divided into three types, Procedural, substantive defenses or plea of inadmissibility “non-acceptance of the lawsuit”. Palestinian legislator was not successful in dealing with legal defenses. Palestinian Civil Procedure Law has not created a standard or rule that can be followed or measured to determine whether or not the defense relates to public order. In addition, the Palestinian legislator did not enumerate and specify legal defenses, especially Procedure defenses and pleas of inadmissibility.

The researcher proposes to the Palestinian legislator adopt the principle of public interest to classify legal defenses into defenses related to public order or not. If the defense concerns to the basis of the judiciary organization, and fundamental principles and procedures (jus cogens) that must be followed during the litigation procedures, then the defense is related to the public order because it aims to achieve a public interest and regulates litigation procedures in the state such as the rules of value jurisdiction (Jurisdictional Amount) and specialty jurisdiction. Consequently, the court must raise these defenses on its own without waiting for the parties to invoke this defense before it at any time of the litigation process. While if the defense related to the parties interest only, *i.e.,* the private interest, it may not be raised by the court, and the litigants must invoke it on their own before talking about the subject matter of the case, otherwise their right to raise it shall be exhausted, such as rules of the local jurisdiction.

The same situation regards to the plea of inadmissibility, the court must examine each case to ensure the existence of the basic elements of the lawsuit, such as verifying the availability of the legal capacity of the parties, the existence of legal interest for the plaintiff in the lawsuit, is the court competent to hear this type of case? Are the judicial notification procedures were carried out in accordance with the law? Have the required measures been taken before filing the lawsuit, such as sending a notice to the defendant to perform his duty? Have the deadlines for filing the lawsuit and appeals been taken into consideration? Are the data required by the law in the statement of claim existence? All these matters are related to public order, therefore failure to observe it will lead to the absolute nullity of the procedures and the judgment. Accordingly, it must be verified before proceeding to hear the lawsuit, if it does not exist, the court must decide, on its own, not accept the case. in order to avoid nullity of procedures in the advanced litigation stages in light of the possibility of avoiding this from the beginning. All of this contributes to saves time, effort and expenses for the court and the litigants

The researcher suggests, all members of the Supreme court must meet to issue a judgment that explains and clarifies what is meant by the public order, rules and procedures related to it within the scope of the Palestinian Civil Procedures Law No. 2 of 2001 to be as a judicial precedent that must be followed by the lower courts, to ensure there is no contradiction among judgments. As this judgment is considered issued by the highest judicial authority in the country.

In the end, the researcher proposes to the Palestinian legislator some amendments regarding the legal articles that help in improving and consolidating the legal defenses in the Palestinian Civil Procedures Law No. 2 of 2001 as follows:

1) Plea of litispendency [moving for the referral of the case to another court either because the same dispute is pending before such other court or by reason of connexity] must be related to POC because this would achieve the public interest, which is to save time, effort and prevent contradictions of judgments if the two lawsuits have the same merits, cause, and parties. And heard by two different courts and two different judges. Therefore, the judge must be obligated to combine the two lawsuits if it is evident to him that there is a connexity between them. He must also raise this matter on his own without waiting for the parties to raise it. Therefore, the text of the article (80/2) must be modified to read as follows:
    a. (If more than one action is filed before one or more courts and such actions are united as to cause and subject-matter, the court shall on its own or basis of a request by one of the parties, combine the actions in one adversary proceeding and, without prejudice to the rules of jurisdiction, order the referral of such actions to the court seised of the initial action).
2) Also, the phrase (Pleas of litispendency [moving for the referral of the case to another court either because the same dispute is pending before such other court or by reason of connexity]) must be deleted from Article 91 and added to Article 92 to become as follows:
    a. (Lack of competence for absence of jurisdiction or by reason of the type or value of the case or of res judicata or Pleas of litispendency [moving for the referral of the case to another court either because the same dispute is pending before such other court or by reason of connexity] shall be pronounced by the court sua sponte, and may be invoked at any stage of the proceedings).
3) Add a second paragraph to Article 79 to confirm the non-admissibility of the lawsuit if the parties are not enjoying legal capacity, to read as follows:
    a. (If the legal capacity according to the paragraph one not available, the court shall decide by on its own not-admissibility a lawsuit).
4) Modification article (90) and add two paragraphs to read as follows:

(The defendant may move for the dismissal of the case for any of the reasons entailing dismissal before its examination on the merits.

Plea of inadmissibility of the case for any ground that related to public order shall be raised by the court sua sponte or litigants and may be invoked at any stage of the proceedings. The decision of accepting or rejecting the plea is appealable.

If the court deems that the plea of inadmissibility of the case due to existence a defect in the defendant's capacity, it must postpone the lawsuit to notify the right person. In this case, the court may impose a fine on the plaintiff not more than fifty Jordanian dinars or their equivalent in legal tender).

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