Adrien Katherine Wing

Democracy, Constitutionalism and the Future State of Palestine

PASSIA
Palestinian Academic Society for the Study of International Affairs
Democracy, Constitutionalism and the Future State of Palestine

Adrien Katherine Wing

With a Case Study of Women's Rights

PASSIA
Palestinian Academic Society for the Study of International Affairs
PASSIA is an Arab, non-profit Palestinian institution, with a financially and legally independent status. It is not affiliated with any government, political party or organization. PASSIA seeks to present the Question of Palestine in its national, Arab and international contexts through academic research, dialogue and publication. PASSIA endeavors that research undertaken under its auspices be specialized, scientific and objective and that its symposia and workshops, whether international or intra-Palestinian, be open, self critical and conducted in a spirit of harmony and co-operation.

This paper represents the free expression of its author and does not necessarily represent the judgement or opinions of the Palestinian Academic Society for the Study of International Affairs, PASSIA. This paper is presented as part of the PASSIA Research Studies Programme for 1994.

Copyright © PASSIA
First Edition - July 1994
# TABLE OF CONTENTS

**PART I: INTRODUCTION** ............................................. 1

**PART II: FACTORS INFLUENCING DEMOCRATIZATION** ........ 5

A. Education ..................................................... 5
B. Political Pluralization ....................................... 8
C. Communitarian/Hierarchical Society ....................... 10
D. Distrust of Authority ......................................... 11
E. Multilayered Legal Regime .................................. 12

**PART III: CONSTITUTIONAL STRUCTURES** .................... 23

A. Legislative Branch .......................................... 26
B. Executive Branch ............................................ 29
C. Judiciary ...................................................... 29

**PART IV: CASE STUDY: WOMEN’S RIGHTS** ................. 31

A. The Impact of Custom and Islamic Heritage on Women’s Rights ................................................... 34
   1. Customary Law ............................................. 34
   2. Islamic Religious Law ..................................... 38

B. Constitutional Legal Reforms ................................. 44
   1. Islamic Reinterpretation .................................. 45
   2. Adoption of International Human Rights Norms ........ 51
   3. Intifada ..................................................... 66

**PART V CONCLUSION** ............................................. 83
PART I: INTRODUCTION

The signing of mutual recognition agreements by Israel and the Palestine Liberation Organization has created the opportunity and necessity to immediately expand discussions about the governmental process for the envisioned five year autonomy period and hoped-for future state of Palestine. The Palestinians have professed an interest in establishing the first true democracy in the Middle East. For example, in 1988, the 19th

---


A copy of the Israeli-PLO agreement on Palestinian self-rule can be found in 2(2) MIDDLE EAST POLICY 162 (1993) [hereinafter PLO-Israel Agreement].
session of the Palestine National Council (PNC), declared the existence of the State of Palestine with the goal of achieving democracy and equality.\textsuperscript{3} Democracy is in part constitutionalism, which concerns creating a climate in which the governing document is adhered to as a charter for the exercise of power as well as a limit on that power. "Constitutionalism has to do with making the state into a \textit{Rechtsstaat}, an \textit{etat de droit}, a state that is governed by its own public law."\textsuperscript{4} A state's constitution thus expresses the overarching legal principles by which the government is to function. Framers of any constitution must carefully weigh competing ideas and consider a variety of factors in fashioning the final product.

A constitution also manifests a state's experience and aspirations. Constitution-making remains the preeminent (and institutionalized) constituting act of a country. It serves as a marker and rewriting of where the state has been and expresses where it would like to be going . . . The conflicts between the limiting/legitimating and the self-defining/reuniting/aspiring aspects of a constitutional text create discontinuities and contradictions noticeable to any reader . . . Careful analysis of the text uncovers tensions and contradictions that are hidden within the text, as well as gaps left by conflicts so great that they could not be hidden and therefore have been omitted.\textsuperscript{5}

For the founders of the new nation, a constitution may be like a "marriage consummated through the pledging partners' positive, active


\textsuperscript{4} Crawford Young, \textit{The Debate on Democratization in Africa}, in K. THOMPSON, \textit{THE U.S. CONSTITUTION AND CONSTITUTIONALISM IN AFRICA} 127 (1990). While there is no concrete definition of constitutionalism, "in the broadest terms, modern constitutionalism requires imposing limits on powers of government, adherence to the rule of law, and the protection of fundamental rights . . . [and] the realization of the spirit of constitutionalism generally goes hand in hand with the implementation of a written constitution." Michel Rosenfeld, \textit{Modern Constitutionalism as Interplay Between Identity and Diversity: An Introduction}, 14 CARDOZO L. REV. 497, 502 (1993).

consent to remain a nation for better or worse, prosperity and poverty, peace and war."6

Additionally, in the current phase of the world wide trend toward constitutionalism, there has been a "copycat" approach in which many developing nations have adopted western constitutional norms without evaluating their propriety. "A certain minimum equivalence or identity of underlying societal conditions is a pre-condition to the successful reception or transfer of legal models from one system to another."7

Of course, after the constitution is written, there remains the need for both politicians and polity to engage themselves in a democratic political process. Additionally the citizenry must nurture the elements of the civil society, i.e the nongovernmental elements that are the social foundations of democracy.8

As Palestine considers its first autonomy charter or constitution, it must avoid these problems by carefully studying the experiences of other countries, but adopting only those provisions that can be rooted in Palestinian legal culture and society. Recently, Palestinian National Authority President Yasser Arafat has named a four member High Legal Commission, chaired by British Palestinian barrister Dr. Anis Al-Qasem.9 This Commission has done several drafts of a proposed Basic Law, which will in effect be an interim constitution for the coming period. Such a document "postpones the accommodation of political paradoxes using unstable principles instead for carrying on in the absence of agreement on one or more elements of the basic framework."10

This article raises some of the "constitutional" issues that Palestinian decisionmakers and citizenry might want to consider immediately and over
the coming years. Part II highlights selected characteristics of Palestinian society that will affect the achievement of the goal of a constitutional democracy. While there are many such factors, the ones featured herein are: the relatively high degree of educational attainment; degree of political pluralization; communitarian/hierarchial society; distrust of authority; and the multi-layered legal regime. Part III then presents an overview of some of the potential constitutional structures of the executive, legislative, and judicial branches. Reference is made to the experiences of Middle Eastern and European countries. Part IV discusses some of the issues regarding constitutional rights. It focuses on women's rights as a case study of how the pre-existing multi-layered legal regime with its communitarian heritage will make it difficult to create actual change in the status of women. Part V concludes that elaboration on all of these areas must continue through discussion among Palestinian leaders and community members in order to give themselves the best chance for creating a vibrant democracy in the Middle East.

---

PART II: FACTORS INFLUENCING DEMOCRATIZATION

This part of the article discusses the various characteristics of Palestinian society that will impact the democratization of the country. The factors to be discussed include: education, political pluralization, communitarian/hierarchical society, distrust of authority, and the multi-layered legal regime.

A. Education

Many Palestinians have actively sought out higher education and constitute the most highly educated people in the Middle East. This impressive level of accomplishment will be an important contributor in the struggle to achieve democracy. Some political theorists would even posit that democracy cannot be achieved unless the populace has the level of educational sophistication that is currently most readily found only in western Europe and North America. Existing Palestinian literacy rates will make it possible for the public to actively read about the electoral process, as well as the nuances of the various political party positions and specific candidates. The advanced skill level means that individuals already exist who can staff the new Palestinian controlled governmental sector as well as the various components of civil society: NGOs, corporations, schools, etc. Returning exiles will be able to supplement the talents of "insiders," who

---

12 A version of this part of the article was presented at the Washington, D.C. Center for Policy Analysis on Palestine, Second Annual International Conference on "Statehood," Nov. 18, 1993.
may not have had the opportunity to utilize their professional credentials to the utmost due to the occupation.

On the other hand, there are parts of the Palestinian population who have not had sufficient access to education. Since the Israelis kept the schools closed throughout most of the intifada, many children and young people have lost nearly four years of schooling. Thus many have either never become literate or lost their literacy. The inability to properly conduct the annual high school tawjihi examinations during this time means that existing skill levels are unknown. The college population has of course been equally affected by the inability to complete their courses of study in a timely manner.

Moreover, the younger age of marriage and an increased childbirth rate that has recently taken place may mean that relatively fewer girls have received adequate schooling. Those in the refugee camps both inside and outside the Territories constitute other groups, whose access to education has been severely limited.

Some of those with high levels of education may have governmental service ambitions that cannot be met in the new dispensation. The creation and training for all the various positions will take some years. Yet for

---


14 RIGBY, supra note 14, at 103.

15 Id.

16 Id. at 99.

17 Id.

people denied so long, the wait would seem interminable. Factional
infighting and professional jealousy will complicate these problems.

The same dynamic will hold for the private sector. For example,
the Territories could not possibly accommodate all the trained individuals,
including exiles who may want to work in their chosen professions. Also,
those in exile with high educational attainments may not have been allowed
to practice their profession. For example, a Palestinian woman from Gaza
gets a BA and MBA from the United States, but finds herself working as
a secretary in Washington. Although she wants to go home to Gaza, she
fears there will not be a job accommodating her education in the near
future.

To address these problems, the new Palestinian government will
have to engage in an educational campaign on several levels. First, they
will have to prepare the populace for the inevitable dashing of expectations.
Second, they will have to present information on electoral processes geared
for both the highly literate and the illiterate parts of the public. Third, they
will have to engage in literacy and educational reform aimed at the adult
population - perhaps along the lines of Cuba’s successful campaign against
illiteracy of the 1960’s.

Fourth, they will have to design civil service institutes and
internships for the training of prospective bureaucrats. An example would
be the U.N.Institute for Namibia in Lusaka, Zambia, which trained
Namibians in exile for nearly 20 years for the day when they would run
their own country. Unfortunately, Palestine will not have the luxury of
time that Namibia did, and will have to put inadequately trained bureaucrats
in place almost immediately. These individuals will need on-the-job mini
training programs.

Fifth, the new government will have to engage in massive reform
to make the educational curriculum Palestinian-centered. Without the
school closings and Israeli censorship, students could finally build the self-
esteeem that develops when they can fully learn of the unique contributions
that Palestinians have made to the world. A U.S. example is the effort to
design Afrocentric curricula to meet the need of black American children to learn of their people’s historical contributions.19

B. Political Pluralization

The pre-existing political groupings both within the PLO and outside of it constitute a degree of political pluralization unequalled in the Arab world. Rather than the Monarch/Dictator/one party state model, a full panoply of political factions exists ranging from Islamic fundamentalists to communists. The existence of the government in exile, the PNC, and its various constituencies is a level of democracy that could serve as the nucleus for democratization in Palestine.

But this political pluralization has its impediments as well. Only some of the current political factions inside the Territories even supported the accord with Israel. These include the majority party Fatah, the Palestine People’s party (the former Communist party), and the Palestine Democratic Union-Fida (the Yasir Abd-Rabbuh wing of the Democratic Front for the Liberation of Palestine (DFLP)). The opposition includes both nationalist and Islamic trends;20 the Popular Front for the Liberation of Palestine (PFLP) and DFLP (the Nayif Hawatmah wing) being nationalist, oppose the agreement for tactical and practical reasons. Hamas (the Islamic Resistance Movement) and Islamic Jihad, both Islamic in nature, oppose the agreement because of their doctrinal and political rejection of Israel itself.21 All the opposition groups fear that Fatah may initiate violent activities and suppress them politically. Already internecine conflict has broken out.22

---

21 Abu-Amr, supra note 3, at 78.
22 Id. at 79.
Moreover, the PNC and the PLO in diaspora could never function in truly democratic manners. While various factions were represented, their members had to be appointed rather than elected through a general franchise. Although 1/3 of the seats were reserved for the people from the Territories, these individuals were prevented from participating by the Israeli ban on PLO affiliation. The Israeli banning of the PLO and all the resultant harassment inside the Territories means that the various political factions have not had the opportunity to develop all the trappings of full fledged political parties. The lack of any municipal elections since 1976 in the West Bank and 1946 in Gaza means that there is no deeply embedded ethic regarding political participation.

The fact that the Palestinian-Israeli accord was negotiated in secret even from the appointed Palestinian negotiators in Washington has left a bitter taste in many mouths. Additionally, there is also the sense that despite President Arafat’s periodically elected status as head of the Executive Council of the PNC, he runs the PLO in a rather dictatorial fashion. A recent example occurred in December 1993 when Dr. Haider Abdel-Shafi, former head of the Palestinian negotiating team to the peace talks, went to Tunis with a petition signed by 118 prominent people in the Occupied Territories, criticizing Arafat’s autocratic manner and calling for greater democracy. Can a leader of a national liberation movement convert to a duly elected President or Prime Minister? President Robert Mugabe of Zimbabwe, the late President Samora Machel of Mozambique, and President Sam Nujoma of Namibia are all examples of liberation movement leaders who were able to make the transition, albeit with some difficulty.

It will be interesting to see if more political parties form, either for next July’s elections or for those in five years. It is easy to envision Fatah, currently a broad-based nationalist group, breaking up into several political parties based on more narrow ideological lines. Such a breakdown happened in the Sudan. After the long period of military rule in Sudan ended with the ouster of President Numeiry, more than 42 political parties

---

23 See generally sources in note 1 supra.


formed. Of course, the election results were so fragmented that the plurality winner, Saddiq el Mahdi, did not hold a large enough percentage of the population to stave off the almost inevitable military coup. A similar outcome could occur in Palestine if the winning party and chief executive hold too slim a portion of the populace to govern effectively, leading to violent overthrow or factional turmoil.

Palestinian decisionmakers could address these concerns in the area of political pluralization by discouraging the formation of additional parties for the July 1994 elections. This could be done through behind the scenes discussions with key players, rather than through a ban on the further formation of parties. Second, the decisionmakers could utilize the resources of European and American governments, NGOs, and experts concerning political party organization.

C. Communitarian/Hierarchical Society

Palestinian society is very much oriented on communitarian lines, i.e. there is a central emphasis on family, clan and group loyalty rather than emphasis on individual rights issues as in western society. But this communitarian emphasis, which is found throughout the developing world, should not be confused with a communal society where everyone is equal. This dynamic is also hierarchial, where status (often inherited) is quite critical.


I have written about communitarianism in the African context in Wing, Communitarianism, supra note 12.
This communitarian/hierarchial configuration can be an asset for democracy because it may translate into a willingness to adhere to group norms of a party rather than mere focus on individual needs. The existing party leaders who have acquired or inherited status to some degree, may be obeyed or listened to with a greater degree of loyalty, at least initially, than is seen in the West. In the Palestinian context, if the factional and public leaders endorse democratic norms, programs and candidates, the populace may follow.

On the other hand, the communitarian/hierarchical factor will be a major impediment if political leaders endorse or tolerate nondemocratic or corrupt candidates and programs. There are numerous international examples where this factor caused friction as ethnic group members blindly clung to obviously corrupt leaders who engaged in outrageous activities. The lack of legacy of emphasis on individual rights may lead people to suffer in relative silence, punctuated by homicidal outbursts and military coups to rid the country of one corrupt clique, only to replace it with another.

Palestinian decisionmakers can build upon the strength of the communitarian heritage by designing governing structures and programs that emphasize this heritage through the provision of group rights such as respect for language, culture, education, etc. For example, the Draft Basic Law contains protections for group religious exercise. Protecting the individually oriented civil and political rights, such as freedom of speech, press, assembly, is provided for in the document as well. However, sufficient enforcement mechanisms are essential to provide the foundation for potentially avoiding the fate of so many dictatorial communitarian societies.

D. Distrust of Authority

The twenty-seven year occupation has naturally made Palestinians distrustful of authority. The intifada was the ultimate attempt to 'shake off'

---

29 Id.
30 Id.
an illegitimate regime. This distrust of authority can be an asset in the democratization process because the Palestinians may be overjoyed to finally embrace a Palestinian authority that a majority of them will hopefully believe is legitimate. This passion to finally be governed by one's own people may create a level of tolerance with a high enough portion of the population to ensure political stability in the turbulent transition years.

The negative side is that the distrust of foreign authority may transfer over to distrust in any authority. The dynamic of distrust imbedded for one's whole life may be difficult if not impossible to dispel. The children who have grown up during the intifada may constitute a lost generation not answerable to anyone. Gang formation and religious fundamentalism may prove increasingly popular options for this group - with many unable to transition into "normality." It is hard for warriors, even young ones, to lay down their weapons, especially in a struggle as old as the Palestinians.

Palestinian decisionmakers will have to engage in a variety of educational and governmental programs to build a sense of trust and legitimacy in the young and old. The conduct of political officials should be above reproach, and corruption should be rooted out and prosecuted. The intifada generation must be specially targeted for self-esteem, education and job opportunities. This will ensure that Palestinians do not develop the burgeoning U.S. gang problem. There are preliminary efforts in the U.S. to attempt to reclaim these gang youths. Efforts will also have to be made by both the Palestinian private and public sector to reach to those young people who are already into gangsterism.

E. Multilayered Legal Regime

The Palestinians have one of the most complex legal systems in the world, partially as a result of so many occupations. The legal layers include custom (urf); Islam (sharia); Ottoman land law; British Mandate emergency regulations; Israeli civil law for East Jerusalem and Jewish

---

31 The former U.S. football player and movie actor Jim Brown has started a self-esteem curriculum aimed at American gang members. It is known as the Amer-I-Can program (informational brochure on file with the author).
settlers; Jordanian civil law in the West Bank; Egyptian civil law in Gaza; Israeli military law; and changes wrought in all of the above by the intifada.\footnote{For a full discussion of these legal levels, see Wing, Decisionmaking, supra note 14. Condensed versions of parts of this article can be found in Adrien Katherine Wing, Legitimacy and Coercion: Legal Traditions and Legal Rules During the Intifada, 2(2) MIDDLE EAST POLICY 87 (1993) (hereinafter Wing, Legitimacy); Adrien Katherine Wing, The Intifada: The Emergence of Embryonic Legal Mechanisms for Palestinian Self-Determination, 15(4) ARAB STUD. Q. 63 (1993) (hereinafter Wing, Intifada).}

Custom and customary law occupy a powerful place within Palestinian society. The most ancient legal tradition in the Occupied Territories today is the customary law known as urf (that which is known).\footnote{The term "customary law" is often used in modern anthropological literature in a very vague and often meaningless way, connoting any type of non-legislative law in a tribal society. LEOPOLD POSPISIL, ANTHROPOLOGY OF LAW 194 (1971). For comparisons to Africa, see T.W. BENNETT, A SOURCEBOOK OF AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA (1991); IDEAS AND PROCEDURES IN AFRICAN CUSTOMARY LAW (Max Gluckman ed., 1969); T. OLAWALE ELIAS, THE NATURE OF AFRICAN CUSTOMARY LAW (1956); INTEGRATION OF CUSTOMARY AND MODERN LEGAL SYSTEMS IN AFRICA (University of Ife ed., 1964).} Urf handles disputes outside the official civil or religious courts\footnote{Beginning in the British Mandate period after World War I, the customary law often functioned parallel to or overlapped with the civil court system. Similarly, during the current Occupation, "judges in the civil courts generally appear to tolerate the competing systems, sometimes even consciously accommodating it by delaying actions in a case while awaiting a sulh." GEORGE BISHARAT, PALESTINIAN LAWYERS AND ISRAELI RULE: LAW AND DISORDER IN THE WEST BANK, 42 (1989). The urf system also extended to the refugee camps in Jordan and Lebanon.} on the basis of traditional oral customs and norms that stress conciliation, mediation, and family and group honor.\footnote{If a committee was used instead, it had to be neutral and agreed to by both sides. Its judgment then became binding. The committee members had to be powerful men in order for their judgments to be obeyed in the community. They were often supported physically by the hamula or clan. This enabled the disputants to accept the judgment without losing honor, since it was considered unwise not to accept the will of powerful men. Bisharat, supra note 35, at 142.} Respected elders or reconciliation committees (ludjnat el-islah)\footnote{BISHARAT, supra note 35, at 41. Sulh meetings are also described in Subhi Abu Ghosh, The Politics of an Arab Village in Israel 67, 130-31 (1965) (unpublished Ph.D. dissertation, Princeton). This process of resolving a dispute is known as mediation, even though it might be classified as arbitration in the western sense due to its binding nature.} mediate disputes until a binding settlement (sulha) is reached.\footnote{Id. at 32, 187 n.5 (citing "a plethora of anthropological studies that document the venerated status of mediators in Middle Eastern societies"); see also ABNER COHEN, ARAB BORDER-VILLAGES IN ISRAEL: A STUDY OF CONTINUITY AND CHANGE IN SOCIAL ORGANIZATION 82 (1965). If a committee was used instead, it had to be neutral and agreed to by both sides. Its judgment then became binding. The committee members had to be powerful men in order for their judgments to be obeyed in the community. They were often supported physically by the hamula or clan. This enabled the disputants to accept the judgment without losing honor, since it was considered unwise not to accept the will of powerful men. Bisharat, supra note 35, at 142.} These individuals are always...
powerful and always men.\textsuperscript{38} They might include the local \textit{mukhtar}\textsuperscript{39} and they may be religiously sanctioned.\textsuperscript{40} The parties involved may not only be an individual claimant, but an entire family or clan (\textit{hamula}) since offenses against individuals are also seen as offenses against the family or clan.\textsuperscript{41} The types of disputes include contract issues between businessmen, interfamilial feuds, trespass and other land matters and personal injury.\textsuperscript{42} Settlements include business closure, exile of family members from the village, and \textit{diya} or blood money, which is an amount paid to the victim’s family by the perpetrator’s family.\textsuperscript{43} \textit{Diya} is a pre-Islamic custom that has

\textsuperscript{38} See BISHARAT, supra note 35, at 40.

\textsuperscript{39} A \textit{mukhtar} (pl. \textit{makhateer}) is a village official who has served as a liaison between families, and between clans and state authority to help maintain order and security in the village since the Ottoman era. In the Jordanian era, \textit{makhateer} were nominated by the \textit{hamula} (clan) and confirmed by the Jordanian district commissioner. Although a \textit{mukhtar} is not a judicial officer, there are recorded instances where a \textit{mukhtar} served as an arbitrator of disputes (e.g. the \textit{mukhtar} of Dura settled a land dispute in 1963). \textit{Makhateer} are now appointed by the military government. BISHARAT, supra note 35, at 196 n.27. The unpopularity of Israeli rule and the use of \textit{makhateer} to compel unwanted regulations has diminished the credibility of the \textit{makhateer}. Some are considered collaborators. DAVID MCDOWALL, PALESTINE AND ISRAEL: THE UPRISING AND BEYOND 107 (1989). There are some examples of \textit{makhateer} hearing disputes during the intifada. See, e.g. HELEN WINTERNITZ, A SEASON OF STONES: LIVING IN A PALESTINIAN VILLAGE 253 (1991)(village notable Abu Jafar of Nahalin mediating a \textit{sulha} in April 1989).

\textsuperscript{40} BISHARAT, supra note 35, at 187 n.5.

\textsuperscript{41} Id. at 37. \textit{Hamula} (pl. \textit{hamayil}) is a patrilineal-descent group of males related to the fifth degree from a common ancestor. ROSEMARY SAYIGH, PALESTINIANS: FROM PEASANTS TO REVOLUTIONARIES 192 (1979). See generally COHEN, supra note 37, and Abu Ghosh, supra note 38, for detailed descriptions of \textit{hamula} politics.

\textsuperscript{42} BISHARAT, supra note 35, at 41. Murder occasions a period of vengeance by the victim’s family. Id. at 37. Thus temporary mediators immediately intervene to obtain a three-day truce called an \textit{atwa}, prior to the formation of a formal committee or selection of a mediator. COHEN, supra note 37, at 141. The truce can be periodically renewed. BISHARAT, supra note 35, at 41.

Factors Influencing Democratization

also been incorporated into Islamic law and is awarded by Palestinian religious courts as well, as indication of the intertwining of custom and religion. The settlements are sometimes published in newspapers.

Custom could be utilized as an asset to democratization through building upon such principles as respect for authority and tradition. The polity might obey those in authoritative positions, particularly if from traditional sources of power. Customary law stresses conciliation and mediation, which are both processes that may assist the peaceful resolution of disputes within a democratic framework. Thus customary law mediation might enhance an overburdened civil law court system. Even today, "judges in the civil courts generally appear to tolerate the competing systems, sometimes even consciously accommodating [customary law] by delaying actions in a case while awaiting a sulh [settlement]."

The negative aspect of this factor is that blind reliance on traditional authority is anti-democratic. There needs to be respect for new voices from nontraditional sources, whether they be women, youth, or others. Palestinian decisionmakers must make careful analyses of the role of custom and decide how to reinforce custom where appropriate and when to obviate it. Programs will have to be developed to encourage and train nontraditional actors to participate. For example, secondary school girls and boys need exposure to civics. Many women will have to have child care assistance to allow them to participate in activities outside the private sphere. The new customary law mediators might include younger people and women, in a deviation from traditional practice.

Religion, like custom, is an important component of identity in the Palestinian community. For Muslims, the sharia, which is the Islamic law found in the Koran and other sources, provides rules that govern daily

---

46 Bisharat, supra note 35, at 42.
47 Id. at 32.
48 Id. at 11.
The *sharia* is a comprehensive code of behavior that embraces both public and private conduct, and theoretically governs crimes, torts, contracts, trusts and estates, and family law. In the Occupied Territories, Islamic law is administered by *sharia* courts, which have decided disputes on matters of personal status (marriage, divorce, child custody, alimony) and inheritance, since the eighteenth century. Courts may award *diya* as well, which is less for injury to a woman than a man. The Supreme Islamic Board (*al-haya al-islamiyya al-uliya*) located in East Jerusalem *de facto* supervises the *sharia* courts of the West Bank, even though it is not

---

50 The other sources of law, which are discussed in more detail in Part IVB 1 include the *sunnah*, *ijma*, and *qiyas*.


Prior to the nineteenth century, the only formal courts in Ottoman Palestine were *sharia* courts, located in larger cities and towns, with a chief judge (*qadi*) in Jerusalem. In the mid-nineteenth century, reforms known as the Tanzimat, centralized political authority and modernized the state bureaucracy. BISHARAT, *supra* note 35, at 19. Civil courts were established. Anis Kassim, *Legal Systems and Developments in Palestine*, 1 *PALESTINE Y.B. INT'L L.* 19, 21 (1984). This gradually led to a diminution of power to the *sharia* courts.

recognized by Israel.\textsuperscript{54} There is an appeals court for Gaza in Gaza City.\textsuperscript{55} Cases are heard in Arabic, often without the assistance of lawyers. Judicial determination is fairly rapid; most cases are decided in two months time.\textsuperscript{56}

Additionally, \textit{urf}, as long as it does not contradict the \textit{sharia} is valid for the purposes of interpreting the Koran. For example, the Koran says a man must maintain his wife, but does not specify the amount. This is determined by custom.\textsuperscript{57}

The religious elements who are not fundamentalists can be a major asset for democratization. The U.S. example shows that the church often exhorts its members to endorse certain government programs and candidates. The Palestinian Christian and Muslim leaders and adherents can all become involved in the secular democratic processes and encourage religious and/or moral positions in the legislative process and with respect to certain programs.

The rise of fundamentalism in the region, as exemplified by the growth of \textit{Hamas} in Palestine, presents major challenges for attempts at democratization. While all political groupings should be represented, if they so choose, in the upcoming elections, what should be done about forces that are inherently anti-democratic? If \textit{Hamas} boycotts such elections, then how representative can the new government be? If fundamentalist forces prevail, should they just be permitted to take power - even if the goal is an Islamic state of a nondemocratic nature. Even if they do not win, if fundamentalists constitute a significant minority, they can prove a major disruption. Is this the price of multiparty democracy? Palestinian decisionmakers should

\textsuperscript{54} Israel has set up an alternative court in Jaffa, Israel for East Jerusalem and the West Bank, which the Palestinians generally ignore. Prior to the founding of Israel, Islamic affairs were run by the Supreme Moslem Council. EISENMAN, \textit{supra} note 46, at 77. For more information on the Supreme Muslim Council, see generally ANN MOSELY LESCH, \textit{ARAB POLITICS IN PALESTINE 1917-1939} (1979). There is also a \textit{sharia} appeals court in East Jerusalem as well. Welchman, \textit{supra} note 53, at 109.

\textsuperscript{55} In Gaza, lower \textit{sharia} courts are located in five towns. Paul Hunt, \textit{Some Aspects of Law and Practice in the Occupied Territories}, \textit{2 J. REFUGEE STUD.} 152, 153 (1989).

\textsuperscript{56} BISHARAT, \textit{supra} note 35, at 120-21.

\textsuperscript{57} KAMALI, \textit{supra} note 45, at 284; JOHN L. ESPOSITO, \textit{WOMEN IN MUSLIM FAMILY LAW} 116, 129 (1982).
encourage Hamas to participate in the electoral process. It is far better to incorporate dissenting voices within a democratic framework than to have them outside as revolutionary forces interested in overthrowing the government.

Decisionmakers must consider whether they want a separation of church and state to the degree evident in a society like the United States. For example, there might be no funding to religious run schools unless they adhere to certain nondiscriminatory criteria. Would this mean, for example, that boys and girls could not be separated? Or would they adopt a policy of separate but equal schools for boys and girls. Religious law itself can be a hindrance to democratization since it sanctions the differential treatment of women on the basis of gender. This difference can immediately come into conflict with constitutional norms that stress the equality of men and women. This dynamic will be discussed in Part IV.

The Ottoman land law is a major hindrance to democratization. These ancient convoluted policies make it difficult to sort out who actually owns property, and have been utilized by the Israelis to confiscate Palestinian land. How will the dispossessed be compensated for the loss of their land? Adopting a new land law cannot merely involve placing some people back on some land, since this may overcompensate the more well to do families who previously owned such land. What about the 1948 refugees with claims to land in Israel, or those with several generations in a refugee camp. Placing them on land reclaimed from Israeli security laws may yield protests from those with claims under Ottoman law.

The Jordanian and Egyptian civil law pose similar problems to the Ottoman land law. Those rules still in use constitute a hodge podge of old standards that may be outdated and superseded in their countries of origin. The Israeli administered civil courts have lost whatever legitimacy they once may have had due to inefficiency and corruption. Since a respected independent court system is a vital component of democracy, creating vital institutions out of the current rules, institutions, and processes will be a major challenge to be faced.

59 BISHARAT, supra note 35, at 211, n.3.
The British Mandate emergency regulations of 1945 and the Israeli military laws constitute a special impediment to democratization. Palestinians have been subjected to curfews, expulsions, house demolitions, and a wide variety of other violations of international law. Due to the Occupation, the Palestinian people have thus been denied their basic international human rights. In numerous books, articles, and international resolutions, the desire to achieve those rights has been expressed. These aspirations are an asset to the democratization process because there will be great desire to create a system in which human rights of all can be fully implemented. This burning desire will create a certain amount of internal good will for the fledgling government.

Unfortunately, because such desires are often impossible to fulfill by hard pressed governments, the aspirations may serve as a hindrance as well. For example, although the draft Basic Law abolishes the security regulations, the new government may decide to keep them due to the numerous hostile forces. There are many who find such laws antithetical to human rights norms. How can the very people who suffered under such laws in the past inflict them on their own people?

Palestinian decisionmakers can deal with the human rights aspirations by making sure that they are included in the final version of the Basic Law and later constitution, and that those documents comply with international human rights norms. Many countries that could be considered democratic have security laws, ranging from the U.S. to Zimbabwe. A study could be done on issues such as security laws, death penalty, women's rights, etc. where issues of compliance with international norms may be called into question.

---

60 For discussion of British Mandate law, see generally id. at 21-26; Kassim, supra note 53, at 23-4; Ylana Miller, Administrative Policy in Rural Palestine: The Impact of British Norms on Arab Community Life 1920-1948, in PALESTINIAN SOCIETY AND POLITICS 124 (Joel S. Migdal ed., 1980). While these laws only apply in legally declared states of emergency, Israel has been in such a state since its 1948 independence. ZE’EY SEGAL, DEMOKRATIA ISRAELI 152, 158 (1990).

61 For discussion of military law, see BISHARAT, supra note 35, at 47-69; SHEHADAH, supra note 59.

62 There is a voluminous literature on human rights violations. See e.g. Falk & Weston, supra note 14.

63 See e.g. SHEHADAH, supra note 59; BISHARAT, supra note 35.

64 Al-Qasem conversation, supra note 29.

65 Id.
The final layer of the complex legal regime of Palestine concerns changes wrought by the intifada, which has had a significant influence on Palestinian society. The occurrence of the intifada could be an asset in the democratization process due to the shake up that has taken place in traditional ways of doing things. Changes have occurred in terms of the legal decisionmakers, rules and processes involved. The intifada represented an embryonic attempt to gain control over Palestinian society in a broader way than any previous period of the occupation. The skills utilized in this gestational attempt at self rule may help in the upcoming period. For example, people involved in the popular committees, underground leadership or other roles will now be able to use their talents in an above ground manner.

The negative aspects of the intifada, however, may prove a hindrance in the autonomy period. The loss of legitimacy and confidence in the leadership, rise in gangs, and attacks on other Palestinians may prove difficult to curb, particularly in intifada generation.

Having concluded a brief survey of the multi-layered legal regime, it is evident that any democratizing efforts must take into account the pre-existing legal system. Yet there is not even a complete up to date compilation of all the laws in effect. There is no law school, and no central law library or law professors. There is no body of constitutional law since Palestine has no pre-existing constitution.

This lack of constitutionalism might be an asset in the democratization process since the High Legal Commission does not have to take into account the impact of the prior constitution. The down side of this is that the drafters will still have to figure out the impact of the complicated legal regime on any constitutional principles proposed. For example, the draft Basic Law says there can be no discrimination on the basis of gender. What impact does this have on the aspects of urf, sharia, family law, and inheritance law that sanction the differential treatment of women? These issues will be further discussed in Part IV.

---

66 Id.
Palestinian decisionmakers can deal with these challenges for democratization through the creation of an advisory committee, that includes foreign constitutional scholars that have expertise in dealing with the constitutive problems of new nations. For example, I have served as a legal advisor for several years for the African National Congress Constitutional Committee as it developed a variety of documents examining its own evolving principles on constitutional issues. They produced several versions of a draft bill of rights and documents for public consumption such as What is a Constitution? The ANC had the advantage however of several law schools to draw expertise from and to base its operations. South African constitutional scholars such as Albie Sachs, Kader Asmal, and Dullah Omar should be approached for assistance, along with U.S. based scholars such as Professors John Quigley, and Francis Boyle. The ideal individuals to approach are those with knowledge of Palestine as well as with their own domestic constitutional law, and comparative constitutional law. The advisory committee needs to get started immediately with its deliberations so that it would have proposals ready by the middle of the autonomy period. There should be a variety of efforts to achieve input from the general public as well.

There will also have to be numerous studies undertaken by the High Commission and others to determine which laws need to be revoked or amended and which new laws, including constitutional ones, need to be implemented, to unify the legal system in a democratic fashion. The potential impact of all these changes needs to be carefully assessed. Dr. Ghassan Faramand, Chair of the Technical Committee dealing with Legal Issues has announced the need to initiate the publication of a Palestinian Official Gazette to disseminate laws and regulations.67

In conclusion, the various factors affecting democratization in Palestine will require close analysis by legal decisionmakers. Constitutional structures must be designed that will take account of these factors and enable the new government to function in a productive manner. As discussed in the next part, the draft Basic Law begins to delineate the contours of those structures.

---

PART III: CONSTITUTIONAL STRUCTURES

This part briefly discusses the nature of the potential constitutional structures - executive, legislative, and judicial that might be considered in Palestine. To establish democracy, a nation must establish constitutional structures that provide for individual freedoms and guarantees, while giving the government the power to implement fundamental reforms and social reconstruction. There must also be concern for the structures that generate abuses such as the police and military, bloated bureaucracies, imperial presidencies, rubber stamp parliaments and subservient judiciaries. The most eloquently written document is doomed to fail if the constitutional structures established are not adequately monitored by those groups from the civil society that can promote the awareness, assertion and protection of rights and duties.

Constitutionalism and democracy have not been achieved in the Middle East region, and governments face a persistent crisis of legitimacy. There are traditional absolute monarchies such as Saudi Arabia and the Gulf States; limited or constitutional monarchies such as those in Morocco and

---

68 Since this article was completed in February 1994, I plan to further investigate structural issues in a later article analyzing the various 1994 drafts of Reproposed Basic Law.
69 Dahrendorf, supra note 9, at 109.
and military/single party dictatorships such as those in Iraq and Syria. In the Middle East, there exists the 

patrimonial state, with highly personalized authority; state property scarcely separated from the [ruler’s] personal assets; the conversion of the bureaucracy into and extension of the [ruler’s] household; the undermining . . . of the judiciary so that justice is seen to flow from the [ruler]. 

Celebrations of the goodness and greatness of the [ruler] (equally mandatory in the public and private sectors) replace other forms of legitimacy.72

Some leaders are liberalizing the governing structures by opening up a few outlets for expression and opinion, and by slightly limiting the arbitrary exercise of power.73 Experiments in democracy were attempted in Egypt, Jordan, Kuwait, Turkey, and Yemen. True democratization, however, including popular political participation and freely contested elections, is not occurring. The incipient opening in Algeria was stopped with a coup, when the military called off the second round of elections after the Islamic Salvation Front (FIS) won the first round in December 1991.74 The Tunisia democratic experiment was reversed as well when the regime instituted multiparty elections in 1988, but continued to oppress Islamists. Syria’s President Hafez al Assad won reelection by 99.99 percent in 1992 in an uncontested vote. The 1962 Kuwaiti Constitution only provides for suffrage for males who can prove that their ancestor was in the country prior to 1920,75 effectively excluding the majority of the population.76


73 For more on the trends toward democracy in the Middle East, see Hilal Khaskan, The Quagmire of Arab Democracy, ARAB STUD. Q., Wint. 1992, at 17; Glenn E. Perry, Democracy and Human Rights in the Shadow of the West, 14 ARAB STUD. Q., Fall 1992, at 1, 14.

74 Aicha Lemsine, Only a Return to the Rule of Law can Save Algeria, WASH. REP. ON MIDDLE EAST AFF., Feb./Mar. 1994, at 48.

75 S.H. AMIN, LEGAL SYSTEM OF KUWAIT 125 (1991). For more on Kuwait, see Mary Ann Tetreault, Civil Society in Kuwait: Protected Spaces and Women’s Rights, 47 MIDDLE EAST J. 275 (1993).

76 AMIN, supra note 76, at 127.
The draft Basic Law of the Palestinians is to embody the preliminary structures of their emerging state. Dr. Al-Qasem has stated that the aim is to establish a democratic parliamentary system with free political parties and political expression, due process, and "where the rule of law is respected by all." In order to meet a need to engage in consultation with those inside the Occupied Territories, Dr. Al-Qasem has traveled there to discuss the draft Basic Law. The most recent draft was completed in April 1994. This document would hopefully take effect even prior to elections, and then stay in effect during the five year interim period. It is anticipated that the PNC will approve the Basic Law.

In drafting the Basic Law, Palestinians must confront the inevitable tension between the demands of democracy and Islam. Dr. Al-Qasem has stated that "the influence of the sharia would be limited to the general principles of law which are recognized in any legal system." There will not be an Islamic state, as in the Sudan, Saudi Arabia or Iran. Western secular law has displaced the sharia in most of the Middle East countries, especially in the constitutional and public law areas. This has caused tension because Islam is not only a religion, but a way of life, whereas a democracy is based on the concept of majority rule rather than on God's inspiration. "It is clear that the fundamentalist challenge facing Islamic constitutional theory is how to transform the traditional concept of personal religious legitimacy of political power into conceptually and effectively limited institutional authority." This theory requires the implementation of the mechanisms and institutions for governmental accountability. Such accountability can be achieved, for example by making the Koranic notion

77 Hengstler, supra note 10, at 52, 57.
78 Id. at 60. The April draft of the Basic Law can be found in 23 J. PALESTINE STUD. 137 (Sum. 1994).
79 HENGSTLER, supra note 10, at 61.
81 EMMANUEL SIVAN, RADICAL ISLAM 73-74 (1990); PARVEEN SHAUKAT ALIK HUMAN RIGHTS IN ISLAM 87-182 (1980).
82 An-Na‘im, Civil Rights, supra note 81, at 284.
of *shura*, a leader's consultation with his people, a binding principle of a representative government, rather than merely discretionary.\(^3\) Given the difficult conditions in the Middle East region, the Palestinians have few local role models to follow to structure their constitutional divisions of power. A look at potential legislative, executive, and judicial options follows.

A. Legislative Branch

The PLO-Israel Accord of September 1993 provides for the establishment of the Palestine Interim Self-Government Authority, which will serve as an elected council during autonomy.\(^4\) The Council will have authority over education, culture, health, social welfare, police, taxation, and tourism, and will be empowered to legislate in those areas. Both Israel and the Palestinians will jointly review laws and military orders in the remaining spheres.\(^5\)

I recommend that the proposed legislature remain unicameral, since there are only two million people. New Zealand and Israel have similar population sizes to Palestine and have unicameral legislatures. Initially potential office holders could run at large as is done with the Israeli Knesset. Running for office based on narrowly defined geographic constituencies at this point would be divisive. The experience of South Africa in this regard may be instructive for Palestinians: South Africa has avoided the drawing of separate constituencies for the five year interim period in order to limit the number of issues that must be confronted in the immediate future.

The relative success or failure of the design of other Middle Eastern legislatures may also provide Palestinians with some useful insights.


\(^4\) PLO-Israel Agreement, *supra* note 3, at 162.

\(^5\) *Id.*, Art. IX, at 164.
For example, the 61 member Saudi Consultative Council is a purely advisory body with no real legislative authority. It can be dismissed by the King. The highest legislative authority remains the Council of Ministers headed by the King. The 1953 Egyptian constitution provided for a one-chamber National Assembly, with little control over the executive. All candidates for the 350-member National Assembly had to be nominated by the National Union, which was headed by President Gamal Nasser and three other officers who were authorized to veto the membership of any individual. In 1980, Sadat added a second nationally elected body, the Shura - an advisory council. The Shura's responsibility was to convene annually on the anniversary of the Revolution to advise the President on matters of national importance. Clearly the Palestinians should not emulate a legislative body with only advisory powers beholden to the executive branch. One possibly attractive feature about the Egyptian model is that effort is made to include all classes of people in the National Assembly by setting aside seats for workers and women. Due to the unrepresented nature of women in public life, the Palestinians might want to set aside 10% or more of the seats for women.

The Lebanese experience provides some lessons for the Palestinians as well. Lebanon first became a constitutional republic in 1926 under the

---


89 Id. at 251.
terms of the mandate awarded to France after World War I. The constitution remains the same, with various amendments, to this day. "The model followed was that of the French Third Republic, in which a president and cabinet are responsible to a bicameral legislature. After 1927, the Senate was joined with the lower house to form a unicameral Chamber of Deputies." The 1926 constitution established a system of checks and balances between the executive and legislative branches of the Lebanese native government. The President could appoint and dismiss all cabinet members, including the Prime Minister, and he could adjourn or dismiss Parliament under certain circumstances. Parliament chose the President and controlled finances. Both the executive and legislature could initiate legislation, could delay each other's proposals, although Parliament had the final word. No single electoral group could impose its will on the others (without substantial backing) because the electoral law provided for the distribution of seats on the basis of religion. Relations between the Christians and Muslims were governed by a National Pact agreed to in 1943. This pact assumed that there was a Christian majority. Public jobs were distributed among the ministries according to an agreed upon ratio. This National Pact remained an unwritten part of Lebanon's constitution for the next fifty years. The earlier religious group balance has been upset as the Shi'ites have replaced the Maronites as the majority in the country. The Christians and Muslims continue to fight for control of the country. In

90 This represented the final outcome of negotiations between the French administrators and the Lebanese politicians. The agreement left the internal administration of Lebanon to the natives, but the French were responsible for all foreign relations. But there was such resistance to the presence of the French officials that it was difficult for them to effect any genuine constitutional reform. The Lebanese wanted greater self-rule and the a Lebanese to assume the role of the French governor. K.S. SALIBI, A MODERN HISTORY OF LEBANON 165 (1968).
91 PERETZ, supra note 89, at 364.
92 Id.
93 Lebanon is the only Middle Eastern country without a religious majority: all of the religious groups are minorities. In the 1980s, the Shi'ites were a third of the population, and the Maronites were twenty-two percent. These two groups in addition to the Sunnis, Greek Orthodox, and the Druzes constitute the largest numerical groups. Other religious minorities are Greek Catholics, Armenian Gregorian, Protestants of various denominations, Armenian Catholics, Syrian Catholics, and Syrian Orthodox. PERETZ, supra note 89, at 357. By custom, the President has always been a Maronite, the Prime Minister a Sunni, and the President of the Chamber of Deputies a Shi'ite. Custom has also led foreign affairs to be allocated as a Christian preserve, and defense usually goes to either a Druze or Muslim. PERETZ, supra note 89, at 364.
94 PERETZ, supra note 89, at 368.
1992, Lebanon held national elections, but the turnout was very weak. The Maronites even boycotted the election. Palestinians may consider the Lebanese experience as a warning that the political composition of the population is not static, and that political power should not be distributed on the basis of religion. Thus flexibility must be built into the design of the legislative branch to allow political representation for the entire population regardless of which political faction currently holds the greatest amount of power. Palestinians may follow the Egyptian model of reserving a certain number of seats for minority political factions. However, a countereviling concern at the present time may be the undemocratic nature of the present minority Islamic fundamentalist factions.

B. Executive Branch

The April draft Basic Law names the Chairman of the Executive Committee of the PLO as the unelected President and head of the national authority. I endorse a strong chief executive President, but directly elected and directly accountable to the populace based upon the U.S. model. There could also be a Prime Minister as well who is elected from parliament to manage government, based upon the French model. On the other hand, if there were the continued fear of potential dictatorship, the President could be the ceremonial figurehead, diplomatic representative, and symbol for the nation. The real administrative power could be left in the hands of the Prime Minister.

C. Judiciary

In most of the Middle Eastern nations the judiciary is ineffective or a rubber stamp to the executive branch. In some states like Saudi Arabia, since the Koran and its teachings are the constitution, government appointed clergy are the nominal arbiters of constitutional matters. It is the King, however, who retains the real power. In the former Yemen Arab Republic

---

96 See April draft Basic Law, supra note 7, art. 50.
(North Yemen) all judges had to be chosen from among the "religious scholars" (ulema) of the nation.\textsuperscript{97}

The draft Basic Law provides for a new Supreme Court, with the power to invoke judicial review of the constitutionality of legislation. There will be administrative courts as well. The entire judiciary will be revamped and become an appointed one in which there will be guarantees of independence and tenure.\textsuperscript{98} A high judiciary council will be created to be in charge of appointment and promotion.\textsuperscript{99}

In conclusion, many structural issues remain to be addressed by the Palestinians. A rough survey of Middle East and other developing world nations might be appropriate for constitutional guidance concerning what structures should be adopted. In their efforts to design and implement constitutional structures, Palestinians should carefully balance the demands of religious and public institutions. If the demands of these institutions cannot be harmonized, discord and ideological battles between the different political and religious factions are likely to ensue.

\textsuperscript{97} Manfred W. Wenner, The Yemen Arab Republic: Development and Change in an Ancient Land 146-57 (1991). After the 1979 Revolution in Iran, the constitutional structure became a theocracy. For more on Iran, see Alexandra J. Zolan, The Effect of Islamization on the Legal and Social Status of Women in Iran, 7 Bos. Coll. Th. W. J. 183 (1987). Sudan is an example of state-sponsored Islamization. In 1983, the Sudanese government decreed the sharia as the national law. John O. Voll, Middle East Institute, Sudan: State and Society in Crisis 71-90 (1991). Since 1985, the new government has faced economic crisis, the issue of sharia, the civil war in the south and the insufficiency of the party system. Woodward, supra note 53, at 45.

\textsuperscript{98} See April draft Basic Law, supra note 7, art. 99.

\textsuperscript{99} Id. art. 97.
The human rights record in the Middle East is not a good one. Constitutionally, some states do not meet international human rights norms. For example the 1992 Basic Law of Government issued by Saudi King Fahd ibn Abdel-Aziz codifies the largely unwritten legal system. It does not ban discrimination on the basis of gender or religion; nor does it protect free speech, assembly or association. It does not ban torture or cruel and inhuman punishment. It simply states that the government protects human rights in accordance with the *sharia*. 100

There are many human rights issues that will have to be addressed by the Palestinians. They have already begun the process of establishing institutions that will be able to monitor human rights compliance. For instance, an independent Commission for Human Rights is being created and developed by Dr. Hanan Ashrawi, which will be independent from the government, and serve as a investigative watchdog over the conduct of various government agencies. Dr. Ashrawi has refused any official position in the new regime to work with the Commission, which will be controlled by an appointed Board. Of course its effectiveness will depend on its willingness to act independently and criticize the new government as necessary. 101 It is only natural to anticipate that there will be numerous problems when there is no tradition of respect for human rights that any of the new decisionmakers have experienced. In addition to this quasi governmental agency, there will of course be nongovernmental watch dog

100 Saudi Arabian Basic Law, art. 26.
101 Lawyers Committee for Human Rights, supra note 68.
groups, including the Democratic Development Unit of the Gaza Centre for Rights and Law, and the new Palestinian Institute for the Study of Democracy. Arafat has also announced the formation of the Palestinian Higher Commission for Human Rights, and prominent intellectuals have formed the Palestinian Institute for Human Rights. The Institute may do public education and train public officials as well. Furthermore, early drafts of Basic Law establishes the Office of the Ombudsman where citizens can complain about government actions, as well as the right of any citizen, not only the one affected, to file suit with the judiciary.

Although there are many human rights issues, this article focuses now exclusively on a discussion of the provision of constitutional rights for the majority of the Palestinians - women. The tension for constitutionalism is evidenced by the fact that both customary and Islamic traditions sanction differential treatment on the basis of gender. But the 1988 PNC Declaration of Independence expresses the desire to improve the legal status of women. Additionally, the Draft Basic Law contains an article that men and women are equal under the law, as well as a provision that there shall be no discrimination on the basis of sex. Furthermore, a women's technical committee headed by leading activist Zahira Kamal is designing a draft women's bill of rights, "which is seen as a mobilizing tool to show the interests and strength of women prior to the introduction of key pieces of legislation, like a constitution."
The issue of improving women’s constitutional status is a profound one because deeply rooted customary and religious attitudes are difficult to eradicate through the passage of new laws, even if imposed by newly elected popular regimes. Efforts to grant women a legal status not on par with their social and cultural status often fail due to lack of legitimacy in the community. Often women’s actual social status under custom gives women more equality than their status under religious law, but less equality than their position under secular law. While some sectors of the society will favor equalizing women’s status, other sectors may vehemently oppose such reformation. In the Occupied Territories, sizable communities of Islamic fundamentalists and other traditionalists fall into this latter category. Even the analysis of women’s current status is intricate because of the complex intertwining of the customary and religious heritages. Much of what is considered Islamic was drawn from pre-existing seventh century customary law, and much of what is considered custom has been influenced by Islamic precepts. The "fusion of religiously introduced standards and precepts with customary law [has been] central to the general process of legal development in Islam." Also, both Islam and custom have been impacted subsequently by colonial law, making what today is called custom or religion, in actuality, a response to that impact as well. It is therefore difficult to delineate clearly the influence of the two traditions as opposed to other influences.

Nevertheless, Part IVA of the article attempts to appraise the role that custom and religion have played historically with respect to women’s rights. Regarding the role of religion, this part details the impact on women’s legal status of the Islamic heritage of the vast majority of Palestinians. While there are probably many possibilities for improving the status of women, Part IVB examines three interrelated options. Part IVB 1 begins the discussion for ameliorating that status by focusing on the

109 AHARON LAYISH, WOMEN AND ISLAMIC LAW IN A NON-MUSLIM STATE: A STUDY BASED ON DECISIONS OF THE SHARIA COURTS IN ISRAEL 328 (1975).
110 Pettet, supra 44, at 29, 40 (noting that custom and religion are often confused in the Arab world).
111 KAMALI, supra note 45, at 285.
112 Daisy Hilde Dwyer, Law and Islam in the Middle East: An Introduction in LAW AND ISLAM IN THE MIDDLE EAST 1, 3 (Daisy Hilde Dwyer ed., 1990); NOEL J. COULSON, SUCCESSION IN THE MUSLIM FAMILY 2 (1971).
113 See BISHARAT, supra note 35, at 191 n.35.
potentiality for reinterpretation of Islam as proposed by Islamic and feminist scholars. Part IVB 2 highlights options for codification of constitutional rights through the adoption of international human rights norms. Part IVB 3 proposes building upon the changes wrought by the intifada, and concludes that successful constitutional reform is only likely to occur to the degree it reflects other societal change.\footnote{NAWAL EL SAADAWI, THE HIDDEN FACE OF EVE: WOMEN IN THE ARAB WORLD xiv (1980).}

A. The Impact of Custom and Islamic Heritage on Women’s Rights

1. Customary Law

This subpart analyzes the role of customary law in the Palestinian community, in particular with respect to women’s rights in the period prior to the beginning of the intifada. There are a whole range of offenses concerning the status of women, who are considered repositories of family and clan honor.\footnote{Id. at 37. For a discussion of these offenses among Palestinian bedouin during the British mandate period, see AREF EL-AREF, BEDOUIN LOVE LAW AND LEGEND 79 (1944). For a comparison, see PAUL DRESCH, TRIBES, GOVERNMENT, AND HISTORY IN YEMEN. 56 (1989).} Female chastity and purity must be maintained or it is a great disgrace to the family and clan.\footnote{PHILIPPA STRUM, THE WOMEN ARE MARCHING: THE SECOND SEX AND THE PALESTINIAN REVOLUTION 27 (1992).} These norms must be understood in the Palestinian social context where custom and religion are intermingled.\footnote{The religious aspects of this heritage will be discussed in Part A2.} Historically, women, particularly upper and middle class women, were ideally to be secluded in their homes, behind veils, or more recently hijab (headscarves).\footnote{An-Na‘im, supra note 54, at 13, 38.} The clothing and the seclusion protected the woman and man from her sexuality,\footnote{STRUM, supra note 117, at 25.} which was seen as the cause of fitna or disorder. Woman “is the polarization of what can not be controlled: her sexuality is a lurking danger with a threatening potential.”\footnote{FATIMA MERNISSI, BEYOND THE VEIL: MALE-FEMALE DYNAMIC IN MODERN MUSLIM SOCIETY (1987) (hereinafter MERNISSI, VEIL).}

\footnote{NAWAL EL SAADAWI, THE HIDDEN FACE OF EVE: WOMEN IN THE ARAB WORLD xiv (1980).}
The birth of a girl was not a joyous occasion, since it is through the birth of sons that the father’s line is continued. Education was very limited for most girls, and was separate from boys.\textsuperscript{121} After puberty, clothing had to cover most of the body, including hijab (head scarves) and long skirts. Girls were customarily married soon after puberty in an arranged marriage, often to someone in the same hamula, since marriage was the uniting of families, not only individuals.\textsuperscript{122} This kind of marriage reinforced kinship ties, kept land in the family, and also entailed paying a lower bride price (mahr) to the woman.\textsuperscript{123} Mahr is an amount of money given by the bridegroom to his wife that she keeps for her own use. It is not the sale of the bride to the husband. He does not get to keep or control the money.\textsuperscript{124} There was no equivalent of the western adolescence involving dating and social fraternization with the opposite sex. Failure to prove virginity after the wedding night would be a family embarrassment.\textsuperscript{125} A wife’s status would be enhanced in the new family and the community by the birth of a son, ideally within a year after the wedding. She becomes known as Um (mother of) her oldest son’s name, i.e. Um Khalil.\textsuperscript{126} The subsequent production of more sons further embellished her status. An adult woman could not live independently, and had to live either with her father’s family or her husband’s family. If divorced, she had to return in disgrace to the father’s home.\textsuperscript{127} She had to be always under the authority of a male relative. Depending upon the family or the area, many of these customs still apply today.

A case of honor (qadiyat arad) is synonymous with sexual assault against women.\textsuperscript{128} These cases are heard by special customary adjudicators

\textsuperscript{121} A 1982 study reported that the female education rate was half that of males. STRUM, supra note 117, at 36.

\textsuperscript{122} For a dispute that arose in 1958 when a girl did not want to marry someone within the hamula, see COHEN, supra note 37, at 71.

\textsuperscript{123} Payment by a relative for the bride was customarily less than payment by a nonrelative. STRUM, supra note 117, at 28.

\textsuperscript{124} ABDUL RAHMAN I. DOI, WOMEN IN SHARI’AH 154 (1989).

\textsuperscript{125} Proof of virginity was usually evidenced by a bloody sheet indicating rupture of the hymen. SAADAWI, supra note 115, at 25.

\textsuperscript{126} INGELA BENDT & JAMES DOWNING, WE SHALL RETURN: WOMEN OF PALESTINE 89 (1980).

\textsuperscript{127} STRUM, supra note 117, at 28.

\textsuperscript{128} BISHARAT, supra note 35, at 37.
known as *manshad* (one who is implored). There are only three *manshads* in the West Bank and the position tends to be retained within certain families.\(^\text{129}\) The judgments can run into the thousands of Jordanian dinars, which is still the currency of the West Bank.\(^\text{130}\) The amount depends upon such factors as whether the violation was physical or verbal, whether she was fondled through her clothing, or her dress was actually lifted, and the distance the violation occurred from her home.\(^\text{131}\) If the violation is felt to be the woman's fault, the men in her "dishonored" family would feel customarily justified in severely punishing her or even killing her.\(^\text{132}\) While the jurisprudence is *urf*, it is represented as being consistent if not identical to Islamic law,\(^\text{133}\) an example of the intertwined nature of the two traditions. Actually, none of these *ard* determinations are covered by Islamic law.\(^\text{134}\)

In the view of feminist scholars, the differential treatment of women under custom is due to the ongoing existence of patriarchy.\(^\text{135}\) This stems from historical realities where the physically strongest were responsible for the protection of the family. Thus, gender roles were consigned in such a way as that men were the protectors and providers and women were the child rearers and nurturers.

This customary condition intensified in the context of various occupations by Ottomen, British, Jordanians, Egyptians, and Israelis. Custom and religion became psychological and social refuges against foreign penetration,\(^\text{136}\) providing the basis to confront or at least survive the incursions. These also were traditions with which the occupiers tampered the least, being primarily concerned with areas affecting their ability to physically or militarily control the population.

\(^\text{129}\) *Id.* at 40 and 191 n.33.
\(^\text{130}\) *Id.* at 40.
\(^\text{131}\) The notion was that the closer to the home an offense occurred, the greater the dishonor to the family. *Id.* at 191 n.32.
\(^\text{132}\) BENDT & DOWNING, *supra* note 127.
\(^\text{133}\) BISHARAT, *supra* note 35, at 40.
\(^\text{134}\) *Id.* at 191 n.32.
\(^\text{135}\) See, *e.g.* SAADAWI, *supra* note 115, at 4.
\(^\text{136}\) *Id.* at ix.
This history of multiple occupations has further reinforced the subservient role of women. One of the few areas within the purview of the subordinated men was oversight of their women. For example, if men were asked why they would not let women have more freedom they would say, "What is left for us? We don’t have land, homes or identity - at least let’s have our honor." Additionally, the protection of arad (honor) was intertwined with the protection of ard (land). According to Egyptian feminist Dr. Nawal el Saadawi, one of the factors that caused some Palestinians to leave the West Bank during the 1967 war was the perceived need to protect the honor of their women. Thus, loss of control over the all important public aspects of male lives, including land, was counterbalanced by the maintenance and strengthening of male control over private aspects, including female lives. The centrality of honor thus could remain intact in the private sphere.

Women have often supported the notion of their own subordination, especially in the context of foreign occupation that threatens the entire social fabric. While a few may see female liberation from male patriarchy as inextricably linked with the national liberation struggle, many more women, including the politically active, may be concerned with day to day physical and mental survival under the combined impact of both patriarchy and foreign domination. Like many men, these women will find reliance on custom as both necessary and desirable, one area where their own culture is reaffirmed. As one female political activist said, "If a family can not educate all the children, the man must be chosen, because he will be the breadwinner and the head of the household."

In conclusion, custom and customary law in the Palestinian community are based upon patriarchy that has resulted in women’s continued social and legal subordination. Men govern the public and private lives of women, often limiting them to their historical roles as nurturers and repositories of family honor. The intifada has somewhat affected this situation.

---

137 PAUL COSSALI & CLIVE ROBSON, STATELESS IN GAZA 38 (1986).
138 SAADAWI, supra note 115, at 2.
139 Id.
140 COSSALI & ROBSON, supra note 138, at 35.
2. Islamic Religious Law

This subpart adds to the above analysis of the role of custom by detailing the impact of the Islamic heritage on women's rights in the period prior to the intifada. With respect to the rights of women, the sharia was a vast improvement over seventh century customary law.\(^1\) Rather than being regarded as the mere chattel of their husbands, women were given an independent legal personality, and allowed to own and inherit property in their own right. The sharia also restricted polygamy to four wives, permitted women to obtain divorces on certain grounds, and provided for maintenance. While these rights may not currently appear significant in the western world, they must be viewed in an international historical context in which they compared quite favorably, up until the nineteenth century.\(^2\)

On the negative side, the sharia sanctions differential treatment of women. They only receive half the inheritance share of a man of the same degree of relationship to the deceased. A man can have up to four wives, but a woman only one husband. As long as polygamy or the threat of it exists, women are constrained to agree with the husband and his family. An "offensive" woman may find a new wife in the home sharing the resources and the affections of the husband. Under custom, she also must reproduce the desired sons as quickly as possible, so that she will not be replaced.\(^3\) A man can divorce his wife at will, while the wife must have

---

\(^1\) For discussion of the rights of women during jahiliya (the period of ignorance or pre-Islamic period), see ASGHAR ALI ENGINEER, THE RIGHTS OF WOMEN IN ISLAM 20 (1992).


\(^3\) Elizabeth H. White, Legal Reform as an Indicator of Women's Status in Muslim Nations, in WOMEN IN THE MUSLIM WORLD, supra note 143, at 52, 58.
Case Study: Women's Rights

The ability of a wife to divorce her husband is a topic of disagreement among the four jurisprudential schools. The Hanbali school limits this option to the man's inability to consummate the marriage or his vanishing for so long that he would be ninety years old if he returned. The other schools are more liberal and permit the wife to divorce if the spouse has a disease, is cruel, or deserts her.

There are other differences among the schools. Hanafi and Shiite are more progressive on the rights of women to contract marriage, whereas Malikite is more progressive on the issue of women obtaining divorces.

Men have the right to beat their wives if they do not submit, and the wives must submit and endure his punishments. Muslim women must marry a Muslim man, but a Muslim man can marry Muslim, Christian or Jewish women. Custody is only awarded to women if the children are very young. The notion of qawama, or guardianship also has affected the status of women. It has meant that women could not have authority over their own lives and could not hold general public office because they would supervise men.

In the Middle East, sharia courts do not independently interpret personal status matters directly based on the Koranic sources. Most countries have adopted the European Civil Code model and have personal status codes that are at least partially based on the pre-existing jurisprudential school. Since Jordanian law still generally applies in the

---

144 An-Na‘im, Rights, supra note 143, at 496. Polygamy is based on Koranic verse 4:3. The idea that only the male can unilaterally divorce comes from verse 2:237 which says that the marriage tie is in the hands of the man (bi yadithi ‘ugdatun nikah). Inheritance is covered by verses 4:11 and 4:176.
145 Leites, supra note 52, at 268.
146 SAADAWI, supra note 115, at xiii.
147 An-Na‘im, supra note 54, at 39. Verse 4:34 covers the husband’s right to chastise his wife to the extent of beating.
148 Mayer, supra note 52, at 144.
149 Id.
150 Verse 4:34 of the Koran states: "Men have qawama over women because of the advantage the (men) have over them (women) and because they (men) spend their property in supporting them (women).” HOLY QUR‘AN (A. Ali trans. & commentary).
151 An-Na‘im, supra note 54, at 39.
West Bank, the sharia courts there are utilizing the 1976 Jordanian Law of Personal Status which is based upon the Hanafi school of jurisprudence.

Since it is this code which Palestinian decisionmakers will have as their starting point for making future modifications in women's rights, an overview of its provisions is appropriate. The law determines that the age of legal capacity for marriage is fifteen for women and sixteen for men. Following the qawama concept, a woman marrying for the first time must obtain the consent of her closest male relative from her father's side, regardless of her age. A woman must also have a male guardian, or wali, contract the marriage, whereas a man can do it for himself. If there is no male relative, the sharia judge may act as guardian. The law also reiterates the principle that Muslim women may not marry non-Muslim men. Also, the marriage contract must have at least one male witness, and it takes the testimony of two women in lieu of one man. The mahr, which exists under both custom and religion, must be paid to the woman, and she does not have to use it to furnish the home. One of the

---

152 For an analysis of how these laws have been altered by the Israeli occupation, see SHEHADEH, supra note 3.

153 Jordanian Law of Personal Status, Temporary Law no. 61/1976, Official Gazette no. 2668 of 1 December 1976, which replaced the 1951 Code. One of the exceptions to the 1988 renunciation of all legal claims to the West Bank by Jordan's King Hussein was the sharia courts, so the judges retain their Jordanian appointments, salaries, and supervision. Welchman, supra note 53, at 114. For a discussion of the contents of the 1976 law, see Lynn Welchman, The Development of Islamic Family Law in the Legal System of Jordan, 37 INT'L & COMP. L. Q. 868 (1988) (hereinafter Islamic Family Law). Since access to Jordan has been cut off, these courts no longer refer those in violation of the family code to the West Bank criminal courts since these are under Israeli control. Welchman, supra note 53, at 99. During the British Mandate period from the end of World War One, the 1917 Ottoman Law of Family Rights was in effect for all Muslims. EISENMAN, supra note 46, at 34. A new draft is under consideration in Jordan and its provisions are described by Welchman, Islamic Family Law, supra at 872.

154 Jordanian Personal Status Law, supra note 154, art. 5.

155 Id. art. 13.

156 Id. arts. 9-13.

157 Id. art. 33.

158 Id. art 16.

159 Id. art 44. Mahr is mentioned in the Koranic verse 4:4.

160 Id. art. 61.
problems, however, is that the father or grandfather is authorized to receive the amount on behalf of the bride, which clearly invites abuse and incidents where women do not receive their mahr.161

The law provides that the husband has the obligation to support his wife, and she has the corresponding duty to obey him (taa). The husband does have the duty to provide for the wife items such as housing, food, clothing, and medication.162 Polygamy is permitted, and the man does not even have to inform his other wives of his intent.163 He cannot, however, house them on the same premises without their specific consent.164 It has been estimated that the rate of polygamy is 5-10% in some villages.165 The wife must move wherever the husband specifies, and loses her maintenance rights if she disobeys.166 She cannot leave the house, even to work, without permission, or she loses her maintenance as well.167

With respect to divorce, the law permits the husband to unilaterally divorce his wife with no judicial action (talaq).168 Divorce starts as a revocable event and later becomes permanent. Husbands can divorce a wife three times without fully terminating the marriage, just by the oral announcement, “I divorce you.”169 The wife must wait a three month period (idda) before she can remarry,170 but if the husband changes his mind within the three months, she must resume the marriage.171 The divorce is final only if he divorces her three times on three separate

---

161 Id. art. 63. For a description of how the father of the bride kept the mahr, see KITTY WARNock, LAND BEFORE HONOUR: PALESTINIAN WOMEN IN THE OCCUPIED TERRITORIES 30 (1990).
162 Jordanian Personal Status Law, supra note 154, arts. 36, 66, 67.
163 Id. art. 28.
164 Id. art. 39.
165 STRUM, supra note 117, at 234.
166 Jordanian Personal Status Law, supra note 154, art. 37.
167 Id. arts. 68-69.
168 Id. art. 85.
169 Id. art. 97.
170 Id. art. 135.
171 Id. art. 94.
Each time a husband divorces a wife, she has to leave the house since it belongs only to him. The wife is entitled to alimony to meet minimal needs. If the sharia judge with whom the husband registered the divorce thinks the divorce was arbitrary, he can order compensation of up to one year’s alimony. Needless to say, the divorced woman is often in a financially precarious position. As previously stated, custom dictates that she return to her father’s home in disgrace.

As under general sharia principles, Palestinian women can only divorce under Jordanian law if they meet one of the authorized grounds: impiety; incurable skin or sexual disease; mental disease; desertion of more than one year; inability to pay mahr; inability to provide maintenance; or inability of the wife to live with the husband. If the divorce is requested on medical grounds, the husband is given one year to get medical advice. The divorce is only granted if the husband does not recover during the year. Unlike the traditional doctrine, beating also constitutes a grounds for divorce. The law does allow the wife to specify in the marriage contract that she can get divorced without judicial process. She can also stipulate that polygamy is a grounds for divorce or that she has

---

172 Id. art. 98.
173 Id. art. 36.
174 Id.
175 Id. art. 134. The Jordanian courts have supplemented this provision by ruling that any taloq pronounced without the consent of the wife is arbitrary, with the burden of proof then falling on the husband to establish the existence of a sharia reason for the divorce to defeat his wife’s claim for compensation. Welchman, Islamic Family Law, supra note 154, at 881.
176 Jordanian Personal Status Law, supra note 154, arts. 113-15.
177 Id. art. 116.
178 Id. art. 120.
179 Id. art. 123.
180 Id. art. 126.
181 Id. art. 127.
182 Id. art. 132.
183 Id. arts. 115-16.
184 Id. art. 69.
the right to work. Such stipulations are rarely made, indicating either a reluctance to defy local custom or a lack of knowledge about this option.

With respect to child custody, the purpose is to insure that the children remain in control of the family of the father. The ex-wife can keep the children until they reach puberty, unless she remarries before then to someone outside her husband’s family. Then she may lose custody of a son at age nine and a daughter at age eleven.

Since religious courts have often been ineffectual due to an Israeli military prohibition on enforcement of their orders, much of the work of the courts in the Territories has been currently supplanted by institutions of the intifada. Women activists see replacement of the sharia norms with egalitarian civil legislation as a critical step that would improve the status of women. On the other hand, more traditional women have said: "Our role as women is clear . . . We are able to raise scores of courageous men . . . It is the women’s obligation to bring up her children in the true Islamic way - to spur them on to Jihad in the path of God to elevate the glory of their religion."

In conclusion, the sharia as codified by the Jordanian Personal Status Law and intermixed with customary practice has contributed to the continued legal and social subservience of women. As is the case with

---

186 Jordanian Personal Status Law, *supra* note 154, art. 19. Lynn Welchman researched 8,500 marriage contracts registered in the sharia courts of the West Bank over the past twenty years and discovered only 1.5% contained any stipulations. Welchman, *Islamic Family Law*, *supra* note 154, at 874 n.10.
187 Jordanian Personal Status Law, *supra* note 154, art. 162.
188 Id. art. 156.
190 During the intifada, justice committees, women’s committees, the Unified National Leadership of the Uprising (UNLU), and private individuals often handle various personal status matters. See Wing, *Decision-Making*, *supra* note 14, at 134-139.
custom, the status quo has been altered to some degree by the *intifada*.\(^{193}\) The next part of the article addresses three interrelated ways that custom and religion can be modified to meet the professed national goal of ameliorating women's status constitutionally.

## B. Constitutional Legal Reforms

This part of the article discusses major possibilities for constitutional legal reform. In revising, Palestinian leaders might consider whether they are interested in adopting tinkering, following, or leading law reform in each of the areas under consideration.\(^{194}\) Tinkering basically implies accepting the legal status quo, and merely making tiny adjustments around the margins, e.g. hiring more judges if the backlog becomes overwhelming.\(^{195}\) Following law reform responds to societal change, such as lowering the voting age to reflect the perceived increased maturity of youth. Tinkering and following reforms are least likely to be resisted by the public since they do not greatly impact the existing legal regime or social customs. Leading law reform, on the other hand, utilizes law to implement societal change rather than merely respond to such modifications. While leading law reform characterizes the bulk of modern major law reform,\(^{196}\) it is often the most likely to be resisted since it greatly impacts existing societal customs and religious norms. In some instances, Palestinian leaders may prefer tinkering or following reform to minimize societal upheaval in a population that has undergone massive disruption over the twenty-five years of occupation. In other cases, leaders may decide that the particular legal principle is important enough to undertake leading reform, in spite of predictable opposition, especially from traditionalist groups.

In addition to the equality and anti-discrimination clauses already in the Draft Basic Law, I propose that Palestinian decisionmakers adopt additional examples of leading law reform. There should be a clause that

---

\(^{193}\) See Wing, *Decision-Making*, supra note 14, at 134-139.

\(^{194}\) JOHN BARTON, JAMES GIBBS, VICTOR LI, & JOHN MERRYMAN, LAW IN RADICALLY DIFFERENT CULTURES 8 (1983).

\(^{195}\) Id.

\(^{196}\) Id. at 9.

The adoption of modern constitutions and civil codes, formation of law reform commissions, and "law making" judicial activity are all examples of leading law reform. Id. at 9.
discusses the need for affirmative action or positive measures to improve the status of women. Since there is going to be substantial resistance to these proposals as a necessary component to democracy, I propose three types of justifications: reinterpretation of Islam; compliance with international human rights norms; and building upon changes wrought in Palestinian society by the intifada.

1. Islamic Reinterpretation

This subpart of the article discusses whether and how can sharia be adopted for to enhance constitutional arguments in favor of women’s equality.197 The modern dilemma is that many Muslims have a strong commitment to sharia. Many people may resist proposed reforms because these reforms challenge centuries of male political, economic, and social dominance and patriarchy. On the other hand, secularization, external cultural influences, and international human rights conventions, have transformed the minds of many women and men to accept less inequality between the sexes. They grapple with how to bring the balance down on the side of equality in the face of proponents of more conservative interpretations of sharia.198

As early as the nineteenth century, Muslim feminists, liberals and leftists called for sharia reform, especially in the area of personal status. Today, there is a dialectical relationship between religion and government in which Islamic doctrines, and clerics espousing conservative reform, are impacting governments and legal systems, but in which the governments are also increasingly able to exert reforms and control over many aspects of Islamic law and religion.199 With the exception of Saudi Arabia, nations have revised these laws in a piecemeal fashion. In a few places, the modifications have been quite extensive examples of leading law reform.200

Due to both fundamentalist pressures and an increasing realization of and

197 An-Na’im, Civil Rights, supra note 81, at 267, 284.
198 An-Na’im, Rights, supra note 143, at 514.
199 Mayer, supra note 52, at 184.
respect for the influence of religion in Muslim society, many current reformers feel the need to ground their demands for change not in calls for secular modernism, but in a re-examination of the sharia principles and other sources of law. This could be viewed as attempts to characterize legal change as mere tinkering, rather than the leading reform most likely to inspire organized opposition. The reformers believe that Islam cannot be abandoned to the sole province of traditionalists. They want to show that the rights of women are consonant with Islamic law, rather than merely alien western notions. They know that they must use imaginative techniques that maintain and enhance the legitimacy of Islam and still provide for improvement in the status and rights of women.

Some reformers are thus involved in reappraising the theological justifications for restrictions on women’s rights, and have found these justifications are "patriarchal attitudes and cultural traditions disguised as religious norms." But they realize that facile adoption of western feminist notions that would constitute clear examples of leading and alien law reform is not appropriate. Instead they are attempting to theorize methodologies based upon the historical and cultural realities of Muslim women that could be interpreted as tinkering or following reform.

Counterbalancing this push to liberalize, fundamentalists and other traditionalists have been calling for strict interpretation of Islamic principles, rejecting new reform and repealing pre-existing reforms. There has been a rise in Islamic fundamentalism throughout the Islamic world, including among the Palestinians, for several reasons. First, there has been disenchantment with western and socialist ideologies that stress individualism and modernism as the way to solve problems. These "solutions" are viewed as alien intrusions, as well as neo-colonial, or imperialist. Second, secular Arab nationalism, as espoused by leaders such as the late Egyptian president Gamal Abdel Nasser, failed to solve

---

201 Id. at 178. Examples of the new critics of inequality are WOMEN AND ISLAM (al-Hibri ed., 1982); MERNISSI, VEIL, supra note 121; MERNISSI, WOMAN, supra note 143; MERNISSI, MALE ELITE, supra note 143.
202 An-Na‘im, supra note 143, at 501.
204 An-Naim, Rights, supra note 143, at 516.
eonomic and political problems. Third, there is the continued importance of the oil rich regimes that stress Islamic as opposed to nationalistic solutions. These regimes can fund Islamic groups in various countries. Fourth, there is the pride in a system of indigenous law which might be considered representing the genius of the Islamic community. Fifth, there is the belief that the *sharia* is the will of God, which must be obeyed.  

Fundamentalists reject the secular reforms of the twentieth century as "heretical innovations inspired by western examples that lead to decadence, immorality and the destruction of the family." The reformers have often thus been attacked as western lackeys and agents of western cultural imperialism. The fundamentalists want women to wear veils or head scarves and long dresses, and attend all female schools. They want to exclude women from public functions, repeal any reforms in the area of marriage and divorce, and restrict female education to suitable subjects such as religion, nursing, teacher training, home economics, and gynecology. One of the problems confronting any progressive reform attempt is the restrictive views of individual *qadis* who may constitute latent opposition to change. For example, it was not until 1964, eight years after the Tunisian Personal Status Law was adopted that prohibited polygamy, that the courts were prepared to declare a polygamous marriage invalid. They refused to implement leading law reform. In many countries, the ideological battle continues today between the forces for liberal reform and the fundamentalists.

Palestinian decisionmakers interested in justifying the equalization in the status of women can examine the reinterpretations of *sharia* that

---

206 Mayer, *supra* note 52, at 143.
208 Mayer, *supra* note 52, at 175.
210 Mayer mentions Algeria, Egypt, and Pakistan as places where the battle continues. Mayer, *supra* note 52, at 177.
have been adopted by various countries. For example, Tunisia found an Islamic justification for abolishing polygamy. Under the Koran it is stated that men must treat each wife equally. Since it is actually physically impossible to treat separate unique individuals in an identical fashion, polygamy cannot be rationalized. Palestinian leaders would have to deal, however, with the traditionalist response that polygamy would not be permitted in the Koran at all, if it were impossible to effect in an appropriate manner. A potential rejoinder is that the prophet Muhammad was not generally in favor of polygamy, and therefore meant it to be extremely difficult to undertake.

In another example of leading law reform, Tunisia also abolished the 

talaq, the unilateral divorce by the husband without judicial intervention. The Islamic justification given was that several Koranic verses stress the undesirability of divorce and the need to seek arbitration whenever there is spousal discord. Since a husband's desire to pronounce 
talaq was certainly evidence of marital discord, Tunisian jurists reasoned that judicial intervention was always required. Therefore, Palestinian framers could adopt similar reasoning and justify banning 
talaq.

In addition to examining the experience of various countries in reinterpreting the 

sharia, Palestinians can also peruse the writings of the relatively few scholars that advocate more rights for women. For example, the conservative Egyptian thinker Muhammad al-Ghazali believes the oppression of women is not based on Islam but on misinterpretation of 

sharia. While he does not reject the inequality of the sexes in the Koran,
he does not find it problematic if women occupy political positions.\footnote{216} Since he is a conservative, al-Ghazali’s views may be acceptable to a broader spectrum of the Arab public, conservatives as well as progressives.\footnote{217} It would be useful for Palestinian leadership to cite to conservative thinkers who hold progressive views in certain subjects, in order to increase support for reform in traditional quarters.

Professor Abdullahi An-Na’im of Sudan offers a reinterpretation of \textit{qawama}, the male guardianship provision. The Koranic verse presents \textit{qawama} as based upon two conditions: male physical superiority and financial support of women. Physical strength however, is not relevant in the modern era where the rule of law governs over brute force. Also, in the present more women are able to work outside the home and become economically independent of men. Thus since neither of the two historical conditions is necessarily applicable today, the concept of \textit{qawama} could be revised.\footnote{218} Professor An-Na’im also thinks that reform efforts can be justified today given that there are aspects of the \textit{sharia} that have been modified and generally accepted. For example, Muslim scholars quoted from the Koran throughout the Middle Ages to justify slavery. No one would justify it today.\footnote{219} Thus, Palestinian framers could use the reasoning of Professor An-Na’im to modify \textit{qawama} as well as other concepts.

Another possibility for Palestinian decisionmakers is to engage in reinterpretive justifications of their own devise. In March 1993, I traveled to Egypt, Israel and the Occupied Territories and held discussions with various Palestinian lawyers, academics, and activists, both male and female. They indicated that Palestinian Islamic scholars have either not addressed reinterpretive issues regarding women’s rights at all, or that they have not done so in public fora or journals. Informants indicated that this failure to address these issues may be due to: the conservative and powerful influence of traditionalists like \textit{Hamas}, who are dominating the public fora, and

\footnote{216}{See Muhammad al-Ghazali, \textit{Qadaya al-mar’ah: Bayna al-taqalid al-rukida wa al-wafida} (Women’s Issues: Between Stagnant and Incoming Traditions) (1990), described in As’ad AbuKhalil, \textit{A New Arab Ideology? The Rejuvenation of Arab Nationalism}, 46 \textit{MIDDLE EAST J.} 22, 32-33 (1992).}
\footnote{217}{Id. at 33.}
\footnote{218}{An-Na’im, \textit{Human Rights}, supra note 54, at 47.}
\footnote{219}{AN-NA’IM, \textit{ISLAMIC REFORMATION}, supra note 84, at 91; \textit{ENGINEER}, supra note 142, at 2.}
calling for restricting women's rights; and the crushing nature of the
ongoing occupation which does not afford these scholars the luxury of
theorizing about the future.220

The existence of other sources of Islamic law in addition to the
Koran would aid Palestinians in their reform efforts. For example, the
sunna are the words and deeds of the founder of Islam, the Prophet
Muhammad, his closest companions and the first generation of believers.
The sunna are collected in reports written in the ninth century known as the
ahadith.221 The process of interpretation by the four jurisprudential schools
of the Koran and ahadith is known as ijtihad. The third source of law is the
ijma, which represents the consensus of the Islamic scholars of that era in
each school.222 Qiyas, the fourth source of law, are the interpretive method
which uses analogy. The door to new interpretation technically closed
around the ninth century, leading to devastating consequences for family
law, which has remained unchanged for nearly one thousand years.223
Palestinian reformers could thus claim a modern right to ijtihad and qiyas
to establish enlightened ijma. Therefore, revisions to personal status and
inheritance rules could be justified on this basis, such as the polygamy and
qawama reforms discussed previously. Other potential revisions would
include using ijtihad to justify the raising of the age of consent for
marriage, which is not specifically stated in the Koran. Thus for example,
the Palestinians could raise the female's age of consent from fifteen to
eighteen,224 which would insure that more girls would finish high school,
be more employable, and have later births. All these attempts could be
formulated as mere tinkering, permissible under Islamic law.

One of the theoretical problems with this approach is that ijtihad
cannot be used if the Koran or sunna plainly speak on the issue.225 Thus

220 Interviews in Egypt, Israel & the Occupied Territories, March 16-28, 1993. I was accompanied on
this trip by two research assistants, Douglas K. Burrell and Shobhana Kasruri.
221 Leites, supra note 52, at 254.
222 Id. at 265.
223 Id. at 273.
224 Before the British came, Palestinian law had raised the age of marriage for girls to 17. Thus it was
the western Christian British regime that lowered it. Raising it again would be restoring the Palestinian
pre-existing rule. LAVISH, supra note 110, at 14-15.
225 AN-NA'IM, ISLAMIC REFORMATION, supra note 84, at 58.
traditionalists could claim that the Koran definitely permits a man to have four wives, and therefore *ijtihad* cannot be used to limit this right. A possible response to the traditionalist argument would necessitate adopting the approach of Tunisia in interpreting the polygamy provision.\textsuperscript{226}

The fact that custom came to be part of Islamic law can also help Palestinian reform efforts because "the inclusion of modern social standards or customs can be viewed as consistent with the manner in which law had been formulated to meet particular social needs in the past."\textsuperscript{227} Using the *qawama* example again, an argument could be made that modern custom does not sanction either a physical or social need for all women to be under the control of the physically stronger sex. Thus, it would be consistent with how custom and religion have been intertwined to conclude that Islamic practice no longer requires the implementation of customs such as *qawama* that have outlived their relevance for the Palestinian community.

In conclusion, reinterpretation of Islam holds some promise for Palestinian decisionmakers interested in constitutionally justifying the equality of women. Muslim nations and scholars both provide some examples for consideration. Any push for change, however, will be countered by fundamentalists and traditionalists, who will resist progressive interpretations as examples of inappropriate leading law reform that do not reflect the social consensus of the community. In spite of such opposition, proposed reforms could either be justified solely through non-codified interpretations as suggested above, or they could be justified based upon implementation of human rights norms as discussed in the next part.

2. Adoption of International Human Rights Norms

This subpart discusses the possibilities for justifying gender equality based upon the adoption of international human rights norms. The Palestinians could engage in leading law reform by adopting wholesale revision of various laws on the basis of international human rights conventions (*huquq al-insan*) norms. This could be done by an independent state of Palestine signing the relevant agreements and undertaking methods

\textsuperscript{226} An-Na'im, supra note 54, at 47.

\textsuperscript{227} ESPOSITO, supra note 58, at 129.
to make either the treaties self-executing or to pass domestic legislation to execute them. Even if there is no independent state capable of signing treaties, an interim government with rule-making authority, could enact the substance of these norms under the Basic Law and other domestic laws.

Professor Louis Henkin notes however, that the strongest challenge to the universality of the application of human rights has been culturally based resistance. In the Middle East this resistance comes from the traditionalists and fundamentalists. While there are those who support the full endorsement of international human rights standards, there are many who find these principles antithetical to Islam. Likewise, there have been regimes like Iran that have wholeheartedly embraced Islamization. On the other hand, there have been other regimes like those led by Saddam Hussein in Iraq and Hafez al-Assad in Syria, that have successfully crushed opposition groups calling for Islamization. Some scholars have postulated that the adoption of some form of Islamization is a "strategy adopted by beleaguered elites in an attempt to trump growing Muslim demands for democratization and human rights."

There are also arguments by cultural relativists that international human rights are western in nature, and not suitable for those in the developing world. The cultural imperialism argument can be countered by noting that cannibalism and slavery were once hallowed traditions in certain cultures, and no one attempts to justifying them today. Despite opposition from cultural relativists, Professor Abdullah An-Na’im of Sudan states that the Muslim world must undertake the struggle to reconcile Islam with modern human rights standards.

---

229 MAYER, HUMAN RIGHTS, supra note 204, at 29.
230 Id. at 30-1.
231 Id. at 31.
234 An-Na’im, supra note 54, at 51.
This section now examines selected aspects of the twenty-two international documents related to the status of women in order to highlight potentially suitable provisions for implementation in Palestine. The Islamic nations have devised some mechanisms. In September 1968, the Arab League established the Permanent Arab Regional Commission on Human Rights, which is supposed to advise the League on the means by which states could protect human rights. It has yet to generate an Arab Convention on Human Rights, and has done more in the realm of promoting rather than protecting human rights. There is, however, a draft Charter on Human and Peoples Rights in the Arab World, which is a product of the Islamic Conference, to which all Muslim countries belong. The Charter does endorse human rights as compatible with Islam.

The major protections of rights, however, are to be found in: the United Nations Charter; the Universal Declaration of Human Rights; the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention); the International Covenant on Civil and

---


239 "REAFFIRMING their commitment to the UN Charter and fundamental Human Rights, the purposes and principles of which provide the basis for fruitful co-operation amongst all people," quoted in MAYER, HUMAN RIGHTS, supra note 204, at 14.


Political Rights (ICCPR); and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Preamble of the United Nations Charter reaffirms "the equal rights of men and women." Among the purposes of the United Nations is "promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, and religion." Article 13 of the


245 Id. art. 1(3).
U.N. Charter directs the General Assembly to "initiate studies and make recommendations for the purpose of . . . assisting in the realization of human rights and fundamental freedoms for all without distinction as to . . . sex."246 The Universal Declaration elaborates on the Charter. It is not a treaty, nor does it seek to enforce legal obligations, but rather delineates "a common standard of achievement for all peoples and all nations," rather than enforceable legal obligations.247 The Preamble of the Universal Declaration recognizes "the equal and inalienable rights of all members of the human family" and reaffirms "faith . . . in the equal rights of men and women."248 Despite its lack of treaty status, the Declaration has over time acquired a status greater than anticipated, and domestic courts have utilized it as a way to determine compliance with the United Nations Charter.249

The ICESCR asserts a right to sexual equality. The state parties "undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights."250 Women are "guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work."251 It includes a provision that marriage must be entered into with the free consent of the intending spouses.252 The ICCPR also has provisions forbidding discrimination on the basis of sex253 and ensuring the "equal right of men and women to the enjoyment of all civil and political rights."254 It also guarantees to all citizens, without distinction on the basis of sex, the right to take part in public affairs,255 to vote and be elected,256

246 Id. art. 13.
248 Universal Declaration, supra note 241, preamble.
249 Weston, supra note 248, at 23. An-Na‘im finds that it has both political and moral force. An-Na‘im, Rights, supra note 143, at 491.
251 Id. art. 7(a)(i).
252 Id. art. 10(1).
254 Id. art. 3.
255 Id. art. 25.
256 Id.
and to have access to public services.237 Another section requires parties to "insure equality of rights and responsibilities of spouses as to marriage, during marriage and at dissolution."238 Among the Middle East countries ratifying ICCPR and ICESCR are Afghanistan, Egypt, pre-1979 Iran, Jordan, Libya, Morocco, Syria and Tunisia, and Algeria is a signatory intending to ratify.239 Some authorities would say that these norms have become a part of customary international law and therefore bind states regardless of whether they are signatories.240

The Women's Convention contains the most extensive provisions. Yemen, Egypt, Iraq, Libya, and Tunisia were among the 103 countries ratifying it as of February 1991.241 Article One of the Women's Convention defines discrimination as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field.242

This document is critically important because it covers the private sphere where a large amount of discrimination takes place, i.e. the "areas in which the majority of the world's women live out their days."243 The Convention contains fifteen articles detailing the fields where states must take "appropriate measures," including: education,244 health care,245

237 Id.
238 Id. art. 23.
239 MAYER, HUMAN RIGHTS, supra note 204, at 24.
240 Id.
241 Zearfoss, supra note 242, at 903 n.2.
243 Burrows, supra note 242, at 82.
244 Women's Convention, supra note 243, art. 10(c) and 10(h) states: to "take all appropriate measures . . . to ensure . . . [t]he elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education . . . and, in particular, by the revision of textbooks and school
nationality; cultural; familial and personal; legal and political activities; employment; recreation; and mortgages and other forms

programmes and the adaptation of teaching methods as well as access to specific educational information on family planning. It does not mandate coeducation, but merely encourages it. \textit{Id.} Art. 10(c).

\textit{Id.} art. 12(1) and (2) state: to "take all appropriate measures to eliminate discrimination . . . in health care . . . including [services] related to family planning" and to ensure access to services: in connexion with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."

\textit{Id.} art. 9.

\textit{Id.} art. 5 states: to "take all appropriate measures . . . [t]o modify . . . social and cultural patterns of conduct . . . with a view to achieving the elimination of prejudices . . . which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles."

\textit{Id.} art. 5 also states: to "ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing . . . of their children." Art. 16(1)(d) and 16(1)(e) state: to "take all appropriate measures to eliminate discrimination . . . in . . . marriage," including to ensure "][t]he same rights and responsibilities as parents" and "][t]he same rights to decide . . . responsibly on the number and spacing of their children."

\textit{Id.} art. 2(a) states: "to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation." Art. 6 states: to "take all appropriate measures . . . to suppress all forms of traffic in women and exploitation of (and) prostitution of women." Art.7(b) and 7(c) states: to ensure that women "participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government" as well as in "non-governmental organizations and associations concerned with the public and political life of the country."

\textit{Id.} arts. 11(1)(b), 11(1)(d), 11(2)(b), and 11(2)(c) state: to take all appropriate measures to eliminate employment discrimination against women, including ensuring (1) "[t]he right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;" (2) "[t]he right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value;" (3) "maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;" and (4) "the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities . . . in particular through . . . child-care facilities." Article 11 also includes providing "special protection to women during pregnancy in types of work proved to be harmful to them." Art. 11(1)(f). There is a caveat that such legislation "shall be reviewed periodically in light of scientific and technological knowledge and shall be revised, repealed or extended as necessary." Art. 11(3). Clearly there is great potential for abuse where states could draft protective legislation as a means of discriminating against women. The Convention does not prohibit discrimination in hiring or job assignment of pregnant women. \textit{Meron, supra} note 242, at 74. For a United States case involving protective conditions for women, see \textit{International Union, UAW v. Johnson Controls, Inc.}, 111 S. Ct. 1196 (1991) where the Supreme Court held that a company sex-specific fetal protection policy is forbidden under Title VII of the Civil Rights Act as impermissible sex discrimination. Medical evidence showed that exposure to the lead used to manufacture batteries also hurt men's reproductive capabilities, but only women were banned from working, unless they could prove they were infertile.
of credit. Affirmative action is permitted, but "shall be discontinued when the objectives of equality of opportunity and treatment have been achieved." Palestinian decisionmakers should consider adoption of some of these provisions, including those affecting the private sphere.

One of the major problems with all these international documents is that although a majority of nations have ratified the various covenants protecting the rights of women, inequality nevertheless persists. With respect to the Women's Convention in particular, a major impediment to equality is that many signatories have made reservations to the text; at least 23 of 100 states making 88 substantive reservations. The conflicts between the status of women under religion and custom, and their status under the Convention seem to be the major cause of so many reservations. Some of these reservations, in essence, gut the Convention. For example, Egypt ratified the Convention, but made a substantive reservation "concerning the equality of men and women in all matters relating to marriage and the family," thus purporting to ratify "without prejudice to the Islamic Sharia's provisions."

Palestinians must examine the experience that the rest of the world has had with the Convention. Following the Egyptian approach turns the document into an exercise in mere tinkering, since the major areas of discrimination in the private spheres would be left untouched. On the other hand, the acceptance of just such a reservation on religious grounds might increase support from traditionalist sectors.

\[271 Id. art. 13(c).\]
\[272 Id. art. 13(b).\]
\[273 Id. art. 4. Special measures protecting pregnancy are allowed. As broad as the Convention is, it does not cover abortion, pornography, domestic violence or marital rape.\]
\[274 Albert P. Blaustein, Foreward in RHODIE, supra note 213, at xi.\]
\[275 Zearfoss, supra note 242, at 925. This can be contrasted to the Race Discrimination Convention where only 2 parties out of 127 made substantive reservations (Afghanistan and the German Democratic Republic). Cook, Reservations to the Convention, supra note 242, at 644 n.5.\]
\[276 See A REPORT ON THE NINTH SESSION OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN 10 (International Women's Rights Action Watch CEDAW #9, May 1990), cited in Zearfoss, supra note 242, at 925 n.112.\]
\[277 Multilateral Treaties Deposited with the Secretary General: Status as of 31 December 1986, at 162, U.N. Doc. ST/LEG/SER.E/3 (1985).\]
Professor Theodor Meron has observed serious problems with the Women's Convention's intrusion into the private sphere, particularly infringement of religion.\textsuperscript{278} Although he recognizes that much of women's oppression is located in the private spheres, he is opposed to regulation as a solution, since it "might require invasive state action to determine compliance, including inquiry into political and religious beliefs."\textsuperscript{279} He recommends the modification of cultural and social patterns through education and government incentives, rather than state encroachment into the private sphere.\textsuperscript{280} Meron attempts to reconcile the Women's Convention with the Declaration on Religion and finds that he cannot.\textsuperscript{281} Therefore, he believes that both women's rights and religious freedom will suffer. "The attainment of the goal of equality of women may therefore require encroachment upon religious freedom."\textsuperscript{282}

Palestinians should balance the interference with religious norms against the realization of equality, and come down on the side of equality, a self professed goal of the national movement. They can adopt Professor Meron's recommendations for changing social and cultural patterns through education and government incentives, coupled with tinkering, following and leading law reform of the kind envisioned by the international human rights agreements.

Professor An-Na'im, however cautions that legal reform must not move too rapidly. "It is irresponsible and inhumane to encourage these women to move too fast, too soon and to repudiate many of the established norms of their culture or religious law, without due regard to the full implications of such action."\textsuperscript{283} While one can always argue that the moral force of international agreements signed by a majority of the world is powerful, the reality is that "without a translation of the rhetoric of human rights into enforceable legal rules the individual is in a very weak position

\textsuperscript{278} MERON, HUMAN RIGHTS LAW-MAKING, supra note 242, at 62.
\textsuperscript{279} Id.
\textsuperscript{280} Id. at 62-3.
\textsuperscript{282} MERON, supra note 242, at 155.
\textsuperscript{283} An-Na'im, Rights, supra note 143, at 516.
in respect of a very powerful state." At one extreme, women may find themselves confronted by a backlash from traditionalist forces that causes them personal danger, in the form of harassment or stoning as "loose women." This actually happened in the Palestinian hijab campaign described below. Alternatively, women may find progressive rights are not backed up by government enforcement, thereby negating whatever substantive value provision of the rights was supposed to achieve.

In selecting which internationally recognized rights to adopt, Palestinians must use care in evaluating proposed rights schemes. Because of the increasing international acceptance of human rights norms, opponents of such norms use sophisticated rationales often cloaked in the language of human rights.

The patterns of diluted rights in Islamic human rights schemes should not be ascribed to peculiar features of Islam or Islamic culture but should be seen as part of a broader phenomenon of attempts by beneficiaries of undemocratic and hierarchial systems to legitimize their opposition to human rights by appeals to supposedly distinctive cultural traditions.

As an example of a nuanced attempt by opponents of implementation of international norms, consider the following. The Universal Declaration of Human Rights states, "Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and found a family." The 1981 Universal Islamic Declaration of Human Rights, which was prepared under the auspices of the private organization known as the Muslim World League, which represents the interests of conservative Muslims, contains a similar provision. "Every person is entitled to marry, to found a family, and to bring up

---

284 Burrows, supra note 242, at 91.
285 See Wing, Decision-Making, supra note 14, at 134-139.
286 Mayer, Human Rights, supra note 204, at 214.
287 Id. at 215.
288 Universal Declaration of Human Rights, supra note 241, art. 16(1).
289 For a thorough discussion of this document, see Mayer, Human Rights, supra note 204.
children in conformity with his religion, tradition and culture." The language concerning conformity with religion actually means that *sharia* still governs for a Muslim. *Sharia* restricts Muslim women from marrying non-Muslim men. Thus, the unlimited restriction of the Universal Declaration has been subtly limited by using language that may appear innocuous to the unknowledgable, but maintains the discriminatory strictures of Islamic law.

Professor Mayer also notes that the English and Arabic versions of this document vary considerably, with the English version attempting to approximate western notions of human rights in some cases, that are not carried over at all in the Arabic version. Thus, Palestinians and various scholars need to consult bilingual versions of proposed reforms in great detail, to be sure that English versions written for western audiences are not providing greater rights, than the Arabic versions prepared for domestic constituencies that include traditionalist elements. If documents are printed in both languages, there must be a clause asserting the validity of both versions.

It is also important to note that some alleged proponents of reform, who actually oppose change, may write extensively about the equality of all Muslims. But a careful reading of their proposals indicates that they are not referring to equality between men and women. Professor Mayer analogizes this to the western notion of not considering equality as inclusive of children's rights. For example, young people do not have the right to vote or marry. She goes further and provides the example of the American founding fathers of the Constitution whose notion of political and social equality did not include women, blacks, or Indians. The broad sweeping leading law reform that the U.S. Constitution represented was seen at the time as having no relevance to the status of these particular groups. Thus, it is critical for Palestinian leaders to differentiate between proposals calling for true equality between the sexes and those that are merely calling for equal treatment of all men among themselves and equal treatment of all women among themselves. They should not enact leading law reforms that

---

290 Article 19a, discussed in *Id.* at 120.
291 *Id.*
292 *Id.* at 136. See BELL, supra note 20, at 2.
are intended to have no applicability to half the population, while appearing to be facially valid for everyone.

Another problem facing the Palestinians in the adoption of international human rights norms is that of enforcement. There are several institutions to enforce the international conventions, including the Commission on Human Rights, the Human Rights Committee, the Commission on the Status of Women, and the Committee on the Elimination of Discrimination Against Women (CEDAW). The Commission on the Status of Women, established in 1946 by the UN Economic and Social Council has a mandate to prepare reports for ECOSOC on promoting women's rights. The Optional Protocol to the ICCPR empowers the Human Rights Committee to act on individual complaints. None of these institutions has properly handled enforcement of women's rights.

The Women's Convention enforcement mechanisms are unusually insubstantial, even for human rights agreements, which are notorious for their weak enforcement. A twenty-three person committee meets for not more than two weeks annually to review reports submitted by parties. These parties must submit their first report within one year after the Convention enters into force for them, and then every four years thereafter. There are several major failings with this procedure. First, two weeks is totally insufficient, and the committee is so backlogged with

---

291 The Commission on Human Rights and Commission on the Status of Women are under ECOSOC Council. The Human Rights Committee is set up to enforce the Political Covenant, and CEDAW to enforce the Women's Convention.
293 ICCPR, supra note 243.
294 Reanda, supra note 242, at 11.
295 Zearfoss, supra note 242, at 922; Howell, Book Review, 81 AM. J. Int'l L. 474, 477 ("As with international law in general, enforceability is a serious problem for international human rights provisions regarding women."); Meron, supra note 242, at 213. ([T]he implementation clauses of the convention are far weaker than those in the other U.N. treaty addressed to discrimination, the International Convention on the Elimination of All Forms of Racial Discrimination." (citation omitted)).
296 Women's Convention, supra note 243, arts. 20 and 21.
297 Id. arts. 17 and 18.
reports that a member has estimated that it would take until the year 2000 just to hear the reports submitted as of 1986. No other human rights treaty organ is subjected to such a constraint. Second, the Committee has no authority to do anything other than hear reports. It can not hear individual complaints. The Committee can not even pronounce a party in violation, but instead relies on the public reporting system and on the ability of parties negotiating their disputes. Finally, the Committee is isolated geographically since the Commission on Human Rights meets in Geneva, not Vienna.

Thus, Palestinian decisionmakers can not rely on the international enforcement mechanisms if they adopt the various human rights agreements. They must take care to have domestic enforcement mechanisms that will be accountable to the new government’s policies. A court that holds the new rights invalid, as was the case in Egypt, is ineffective. Reliance on Islamic qadis or sharia courts that also feel the reforms are anti-Islamic, will not work either. Instead, executive branch officials who are politically appointed by the new decision makers could create new administrative institutions to enforce the implementation of rights. This could be backed by stiff penalties and prison time indicating the serious nature of the offenses. An Ombud office could be established to investigate government failures to enforce rights and hear individual human rights complaints. Appointment of additional secular or religious judges could help ensure that the pre-existing institutions are more amenable to implementing new government policy as well. This could be coupled with national educational campaigns in the schools, workplaces, and other parts of civil society to gain additional support and societal change. The ultimate aim would be for the leading law reforms of today to come to be regarded as following reforms that were ultimately only in need of tinkering.

300 MERON, supra note 242, at 80-82.
301 Id. at 84-5.
302 Id. at 56.
303 Zearfoss, supra note 242, at 923.
304 Meron, Enhancing, supra note 242, at 215.
305 For a discussion of the Ombud office in the new nation of Namibia and as proposed for South Africa, see Wing, Communitarianism, supra note 12.
If the leading law reform approach of constitutionally enshrining women's equality is considered too progressive at this time, then various alterations could be proposed to amend the Jordanian Personal Status Code. These options consist of tinkering or following law reform because the fundamental patriarchal structure of the law based on religion and custom would be retained. In other Muslim countries, codes have brought changes in several areas. Some nations, for example, have introduced legislation establishing minimum ages for the capacity to marry.\footnote{306} States have also restricted or banned the husband's right to be polygamous.\footnote{307} Restrictions have also been placed on the husband's right to unilaterally terminate the marriage.\footnote{308} Mothers have been granted longer custody of children.\footnote{309} Inheritance codes have been amended as well.\footnote{310}

Egypt provides an interesting case study of the dynamics of tinkering law reform in the area of women's rights. The Egyptian Family Law Amendments of 1979 were passed by a Presidential decree of Anwar Sadat. These laws gave women some additional rights such as: requiring the husband to register his divorce and notify his wife; increasing alimony; increasing the mother's custody period of minor children; requiring the husband to provide housing for his ex-wife and children; permitting the wife to obtain a divorce if court mediation failed to reconcile the couple; obtaining an automatic divorce if the husband took a second wife; and permitting wives to work without spousal permission.\footnote{311} The Amendments came under attack by fundamentalists who derisively called them (Mrs.) Jihan's (Sadat) laws. The implication was that the First Lady of Egypt was stepping beyond her proper customary role to influence her husband and the Parliament to make unsuitable revisions to the law. Under great pressure from traditionalists, the Constitutional Court overturned these amendments.

\footnote{306} Coulson \& Hinchcliffe, \textit{supra} note 210, at 37, 39. \\
\footnote{307} \textit{Id.} at 40. Tunisia, Israel, Turkey and the former Soviet Union prohibited polygamy altogether. \textit{Id.} \\
\footnote{308} \textit{Id.} at 43. Most countries have restricted the husband's right to unilaterally terminate the marriage. \textit{Id.} \\
\footnote{309} \textit{Id.} at 45. \\
\footnote{310} Reforms in this area have been less far reaching. Tunisia, Somalia, Sudan, Egypt, and Iraq have made some changes. \textit{Id.} at 47. A table of Islamic reforms in the various countries can be found in \textit{Id.} at 49-50. \\
\footnote{311} Kevin Dwyer, \textit{Arab Voices: The Human Rights Debate in the Middle East} 237 n.2 (1991). For more on Egypt, see Rhodie, \textit{supra} note 213, at 363.
on procedural grounds in 1985. The Parliament subsequently passed a nearly identical law, with one major exception. The wife no longer received an automatic divorce after a spouse's second marriage, but had to get a court decision. Given the conservative nature of the judiciary, it therefore became likely that the judiciary might rule against a woman seeking such a divorce. Thus the law retained its fundamentally polygamous nature.

The example of Algeria is instructive as well, although the outcome has not been resolved. The 1984 Personal Status Law embodied sharia principles that relegate women to an inferior status. The law conflicts with the current 1989 Constitution, which includes provisions for equality before the law without discrimination on the basis of gender; a commitment to ensure equality in rights and duties among all citizens; and a guarantee of fundamental liberties and human rights. It has yet to be determined if the new Constitution will empower women to challenge the 1984 law on constitutional grounds, or whether the 1984 law will in practice be treated as inviolable.

The Palestinians could similarly reform the Jordanian Personal Status law. For example, the minimum age for marriage could be raised to eighteen as discussed above. The unrestricted talaq power to unilaterally terminate the marriage could be limited by requiring court mediation, registration, or other intervention. Qawama and mahr could both be modified as well. As in the Egyptian case, alimony could be increased and the wife could be given the right to work outside the home without spousal permission. Since many Palestinian women must work outside the home for economic reasons, amending this provision may be seen as following law

---

312 Id. at 237 n.2.
313 Id.
314 These included permitting men to have four wives, while women can only have one spouse, Algerian Constitution, art. 8. Women must obtain consent to get married, Id. art. 9. The wife must obey the husband, Id. art. 39. The husband can divorce his wife at his discretion, Id. art. 48, whereas women must establish certain grounds, Id. art. 53. Muslim women are barred from marrying non-Muslims. Id. art. 62.
315 Id. art. 28.
316 Id. art. 30.
317 Id. art. 31.
318 Mayer, supra note 106, at 1034-35.
reform. The wife’s custody of the children could also be extended past puberty.

Attempting to provide the right of automatic divorce if the husband takes a second wife, might meet the same resistance in the Occupied Territories as it did in Egypt. An alternate approach would be to make the current ability of women to make stipulations in the marriage contract more widely known through educating young women about this option. On the other hand, it is difficult to generalize about societal reaction based upon the experience of other countries. The Palestinian rate of polygamy may be sufficiently lower than in Egypt, therefore evoking less societal reaction. In the alternative, even if the rate is low, Palestinian culture may see polygamy as such a fundamental custom and religious right, that attempts to further restrict it would be resisted vigorously.

3. Intifada

This subpart discusses a third major way that constitutional reform equalizing women’s status can be justified – by building upon societal changes introduced by the intifada. Changes wrought by the intifada must be put into the context of the women’s movement’s historical fight for reform. This movement has been aimed primarily at obtaining political rights along with men, and only secondarily at obtaining specific women’s rights.\textsuperscript{319}

The political involvement of Palestinian women began after World War I during the British Mandate, whose first goal was to create a Jewish homeland in Palestine. The Palestine national movement developed in protest.\textsuperscript{320} The focus of the upper class Palestinian women’s efforts, like

\textsuperscript{319} This section draws heavily from Wing, Decision-Making, supra note 14, at 134-139.

those of the movement in general, was to end the occupation. In addition to charitable projects to assist the poor, the members of women’s groups also occasionally marched in demonstrations. After the first women’s conference in 1929, a delegation of women went to the British governor’s house and said, “To serve our homeland we shall take off our veil!” This indicated a desire to break with religious and customary norms in order to comply with nationalist needs. The Arab Women’s Committee was subsequently formed consisting primarily of upper class women and students. There were also women who participated as messengers and fighters during the 1936 revolt against the British. After the founding of the State of Israel in 1948 resulted in the dislocation of thousands, turning them into refugees, women expanded their involvement through charitable organizations. After the forming of the Palestine Liberation Organization in 1964, one of the mass organizations formed was the General Union of Palestinian Women.

Since the beginning of the Occupation in 1967: the national question [has been] a major factor which both supports the movement for women’s liberation and simultaneously limits its further development. It supports liberation by calling on women to move beyond the household realm and to face the occupation (side by side) with men. But it deters further development by emptying it of its feminist and class content and limiting it to the confines of the national liberation struggle.

The various Palestinian political factions formed women’s political groups with the same programs as the charitable organizations. These

---

321 Jad, supra note 321, at 126.
322 Id. at 127. For more on this period, see Matti Mоганам, The Arab Woman and the Palestine Problem (1937); Elise G. Young, Keepers of the History 144 (1992).
323 Id., supra note 321, at 127.
324 Bendt & Downing, supra note 127, at 46.
325 Jad, supra note 321, at 127.
326 Id. at 128.
327 Giacaman & Odeh, supra note 321, at 62.
groups established day care, training programs, and literacy projects.\textsuperscript{328} The groups avoided many gender issues either because they truly believed such issues were not a priority, or because they were afraid to sow seeds of disunity in the movement.\textsuperscript{329} In 1978 college educated women activists established the Women’s Work Committee in Ramallah.\textsuperscript{330} This group attracted and sought out professional, clerical, and factory workers for the first time.\textsuperscript{331} Other groups split off based on factional alliances with one of the four political parties affiliated with the PLO: Fatah, DFLP, PFLP, or the Communist Party.\textsuperscript{332}

Custom and religion have been greatly influenced by the \textit{intifada}.\textsuperscript{333} For example, Palestinian legal actors have traditionally been highly respected men of senior stature who have served as religious or customary law mediators, \textit{qadis}, and lawyers (\textit{muhammein}).\textsuperscript{334} The numbers and types of legal actors have expanded during the \textit{intifada}. The Underground Leadership of the Uprising (UNLU), popular justice committees, and private individuals now mediate such issues as spousal quarrels and regulate \textit{mahr} reductions. They do so based upon the legitimacy they have gained for the roles they have played during the \textit{intifada}, rather than through customary or religious status. Of course there are individuals such as Faisal Husseini who have enjoyed great respect both before and during the \textit{intifada}. He continues to hear disputes as well.\textsuperscript{335}

Women’s participation in the \textit{intifada} has been "comprehensive, direct and active."\textsuperscript{336} They were encouraged by the underground UNLU\textsuperscript{337}

\begin{itemize}
\item \textsuperscript{328} Jad, supra note 321, at 132.
\item \textsuperscript{329} \textit{Id.}
\item \textsuperscript{330} STRUM, supra note 117, at 59.
\item \textsuperscript{331} HILTERMANN, supra note 321, at 133.
\item \textsuperscript{332} \textit{Id.} at 134.
\item \textsuperscript{333} Throughout the \textit{intifada}, the Palestinian Press has featured articles on the return to customary law. HUNTER, \textit{supra} note 14, at 3.
\item \textsuperscript{334} See generally BISHARAT, \textit{supra} note 35.
\item \textsuperscript{335} JOHN WALLACH & JANET WALLACH, \textsc{The New Palestinians: The Emerging Generation Of Leaders} 43 (1992).
\item \textsuperscript{336} Rita Giacaman, \textit{Palestinian Women in the Uprising}, 2 J. REFUGEE STUD. 139, 142 (1989).
\item \textsuperscript{337} Darweish, \textit{supra} note 192, at 59.
\end{itemize}
to become involved in executive functions of the newly formed popular committees, especially those functions relating to their traditional role as "sustainers," such as medical relief, food distribution, and fund raising. Women collected donations, ran blood banks, passed out leaflets, watched for soldiers and looked after families of the dead, arrested and wounded. They have been arrested, killed, and wounded as well. In addition, women became the core of the home economy movement to develop Palestinian self-sufficiency and boycott Israeli goods. Women also organized and operated income-generating projects outside their homes. Among the efforts to mobilize women have been a December 1990 conference by the Bisan Center in Jerusalem entitled "The Intifada and Some Women's Social Issues." It was attended by nearly 500 women who discussed such critical issues as the hijab campaign, marital age reduction, and comparative family law.


340 DARWEISH, supra note 192, at 59. For a comparison with the roles of women in Lebanon from 1969-1982, see PETEET, supra note 340, at 8.

341 ZE'EV SCHIFF & EHUD YA'ARI, INTIFADA: THE PALESTINIAN UPRISING-ISRAEL'S THIRD FRONT 247 (Ina Friedman ed. & trans., 1990) [hereinafter ISRAEL'S THIRD FRONT].

342 According to Schiff and Yaari, they were one-fifth of those wounded in the first three months. Id. at 126.

343 Jad, supra note 321, at 136.

Representatives of the women's committees actively intervene in domestic disputes if a woman requests it. Their interventions have met with mixed success. These are all instances where an enhanced awareness about the perceived inequitable treatment of women has led to a delegitimation of the traditional approaches under custom and sharia.

According to Professor Joost Hiltermann, women have not been able to take prominent roles in the leadership of the uprising. This is partially due to a combination of customary norms and community values restricting leadership to males, and the growing influence of Islamic fundamentalism in the Territories. It is also due to women's major responsibilities as de facto heads of large households in which several male family members may be in prison, in hiding, injured, dead, or deported. Although the UNLU may have included women at various times, an analysis of the communiques and the pattern of arrests and deportations suggests the leadership is generally male.

The most striking international evidence of women's participation in the intifada was the PLO's selection of Professor Hanan Mikhail Ashrawi, Birzeit University Dean of the Faculty of Arts, as the principal spokesperson for the Palestinians during the peace negotiations that started in 1991. While her western-educated, urbane demeanor has won admiration in many circles, there are vociferous critics at home that feel these very characteristics and her minority Christian status make her an inappropriate representative of the Palestinian masses. The fundamentalist group Hamas has called her a "loose woman." This is consistent with fundamentalist philosophy that regards women's public participation as anathema to Islamic principles. Thus, the significance of her selection as a

344 Hiltermann, supra note 340, at 53.
345 Id.; Giacaman & Johnson, supra note 192, at 165.
346 WALLACH & WALLACH, supra note 336, at 3.
347 Id. at 30.
female should not be overstated. It is aberrational at this point in time.\textsuperscript{350}

Professor Philippa Strum provides an example in the women's rights area that illustrates the relationship between a pre-intifada institution that has retained some legitimacy in this area, the sharia court, and the intifada institutions. When a husband in the Aqbet Jabr refugee camp refused to permit his wife to find a new job or to participate in the women's groups, she consulted a committee concerning her desire to leave him. The committee encouraged her, and when her spouse threatened to take the children the committee told her to go to the sharia court to obtain custody. Knowing she would not go to the Israeli police for enforcement, he said he would ignore a court order. The committee assured her that local popular committees would enforce the court's decisions.\textsuperscript{351} Women's committees have also started to give lectures about personal status and divorce law.\textsuperscript{352} Various ad hoc groups of women have also been attempting to draft a family status law to replace the traditional laws that govern divorce, inheritance, and other matters.\textsuperscript{353} Two of the main women's groups have demanded a progressive family status code.\textsuperscript{354} The three socialist women's committees (excluding Fatah) have made the abolition of the sharia courts and the institution of civil marriage part of their nominal agenda.\textsuperscript{355} Since Fatah may be representative of the vast majority of Palestinians, its failure to endorse these reforms may be ominous. It may signal a willingness to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{350} The selection of female national leaders, like Benazir Bhutto of Pakistan, Indira Gandhi of India, Golda Meir of Israel, and Corazon Aquino of Philippines may not represent generalized higher female political participation in those countries, but instead derive from unique historical and political circumstances. RHODE, \textit{supra} note 213, at 31. There are two other women in the Palestinian negotiating team, Suad Amiry and Zahira Kamal, but they have received far less media coverage than Professor Ashrawi. WALLACH \& WALLACH, \textit{supra} note 336, at 102.
\item \textsuperscript{351} STRUM, \textit{supra} note 117, at 150.
\item \textsuperscript{352} Hiltermann, \textit{supra} note 340, at 56.
\item \textsuperscript{353} Hiltermann, \textit{supra} note 346, at 32-36. Strum notes that one group included attorney Mona Rishmawi, academic Rita Giacaman, and another attorney knowledgeable about Sharia law. The committee met only twice before the Gulf War crisis interfered with plans to offer a course on women in Jordanian law, with the goal of being able to draft a new law by the end of the course. STRUM, \textit{supra} note 117, at 226-27. During my March 1993 trip, several women indicated that such groups had sporadically met after the Gulf War.
\item \textsuperscript{355} STRUM, \textit{supra} note 117, at 144.
\end{itemize}
\end{footnotesize}
adhere to customary and religious norms for the sake of national development at the expense of women's rights.

Women's groups have also tried to regulate or eliminate the *mahr*. Since many men have been unable to work in a consistent fashion during the *intifada*, they have been unable to raise the large sums customarily required.\textsuperscript{356} Breaking with tradition, some committees have encouraged some couples to refuse to permit the male to pay *mahr* on the grounds that payment for women is a burdensome custom that is not compatible with the goals of the *intifada* in improving the status of women.\textsuperscript{357} Individual women and couples have refused as well,\textsuperscript{358} or lowered the amount paid. One Gazan lawyer indicated that he and his wife agreed that he would only pay 5,000 U.S. dollars, instead of the $10,000 that would have been required for someone of her high educational status before the *intifada*.\textsuperscript{359} It should be noted that even before the *intifada*, there were communities where the *mahr* had been almost abandoned. This occurred in some areas near refugee camps where the family did not have the capital. It also occurred where work was available for both sexes, so women did not need the protection of large marriage gifts.\textsuperscript{360}

In December 1989, the four women's organizations affiliated with *Fatah* (the Women's Committee for Social Work), the DFLP (the Palestine Federation of Women's Action Committees), the PFLP (the Palestine Federation of Women's Committees), and the CP (the Association of the Palestine Working Women's Committees) formed the Higher Women's Council.\textsuperscript{361} These groups "perceive themselves to be fully equal participants in the national movement, not mere adjuncts to the male leaders and combatants."\textsuperscript{362} The aim of the Council is to strike a balance between the

\textsuperscript{356} Darweish, supra note 192, at 56.
\textsuperscript{357} WARNOCK, supra note 162, at 63.
\textsuperscript{358} STRUM, supra note 117, at 151.
\textsuperscript{359} Interview with S, Gaza lawyer, March 23, 1993, in Gaza.
\textsuperscript{360} WARNOCK, supra note 162, at 61. The bride price in 1985 could be between 2000-3500 dinars (1,4000-7000) for marrying a relative and between 4500-6500 dinars for a non-relative. This sum was over twice the annual income. In the 1930's, it was three times an agricultural workers salary. Id. at 61.
\textsuperscript{361} Id. at 135.
\textsuperscript{362} PERETZ, supra note 340, at 97.
national liberation struggle and women's social struggle.\textsuperscript{363} Thus, there remains an incredible tension between the need to assert a feminist agenda and the need to support a nationalist agenda pushing for independence. While some approach the subordination of women from a feminist perspective, others link women's oppression to the "collective weaknesses that impede liberation."\textsuperscript{364} There are some women, like Palestinian negotiating team member Zahira Kamal, an activist formerly aligned with the DFLP and now prominent in the Palestinian Democratic Union, FIDA, who do not adopt the word feminism, but say, "When we are talking about feminism, it is the right of women to work and to get an education."\textsuperscript{365} The feminist discourse might alienate many male and female traditionalists who would view it as western cultural imperialism. But they can relate to the very concrete need to obtain an education in order to obtain a job, whether male or female. There are also many women who do not want to suffer the fate of the Algerian women who were restricted again to the private sphere after the Algerian struggle for independence in the 1950's.\textsuperscript{366} After the grueling liberation struggle, custom and religious norms reasserted themselves as an affirmation of Algerian culture and patriarchy.

In addition to the factional groups and charitable societies, there are a number of women's resource centers that have formed in Ramallah, Nablus, and Gaza. Their purpose is to disseminate materials and educate women from different backgrounds about their legal rights, in order to prepare them to participate in a future Palestinian entity.\textsuperscript{367} Suha Hindiyeh, director of the Women's Resource Centre, has stated:

\begin{quote}
We have to start thinking of laying the basis for a strong women's movement. That's why we're planning to . . . attempt to put forth women's legislation in every aspect - family law, women workers, and many other issues related to women - drafting these legislations and discussing them
\end{quote}

\begin{flushright}
363 Hillemann, \textit{supra} note 340, at 53.
365 \textit{quoted in} WALLACH & WALLACH, \textit{supra} note 336, at 106.
366 \textit{Id.} at 118.
\end{flushright}
with the other Women's Committees, with the Palestinian women's movement as a whole, so as to present it to our government when it comes.\textsuperscript{368}

The \textit{intifada} has not been successful in eradicating customary and religious norms about a woman's role in society. After the initial upsurge in political activity described above, women's position had basically stagnated or reversed.\textsuperscript{369} An important illustration of this retrenchment was the \textit{hijab} campaign launched by \textit{Hamas} in 1989 which resulted in the imposition of head scarves on all women in Gaza. The traditionalists portrayed wearing of the \textit{hijab} as a sign of political commitment to the \textit{intifada}, cultural struggle, and national heritage.\textsuperscript{370} This is consistent with the use of custom and religion as a bolstering force against the cultural and psychological ravages of occupation. Women who refused to wear the scarf were subjected to graffiti attacks and verbal attacks as well. Some men threw stones at these women. This is ironic given that the stone had come to symbolize the Palestinian struggle against the Israelis. In effect, use of stones against such women was saying that they were the enemy, not a Palestinian. There is a potential double meaning to the stoning as well since stoning is a traditional Islamic punishment used against "loose" people who may be adulterers or fornicators. These women were thus being regarded as "vain, frivolous, or anti-nationalist."\textsuperscript{371}

The situation reached a crescendo when traditionalists threatened two activist women who had only recently donned the \textit{hijab}, telling them that their heads were not completely covered. When one woman attempted to protect herself by claiming possession of a knife, and began to unzip her bag, the men retaliated. The group shouted that the women were collaborators and had a tape recorder in the bag.\textsuperscript{372} This is the ultimate insult to a Palestinian nationalist, and invokes the most serious consequences for the accused. Numerous alleged collaborators have been

\textsuperscript{368} \textit{Id.} at 43.
\textsuperscript{369} \textit{Hiltermann}, supra note 321, at 193. \textit{See generally Strum, supra note 117.}
\textsuperscript{371} \textit{Id.} at 26.
\textsuperscript{372} \textit{Id.}
killed by their fellow Palestinians on frequently unsubstantiated grounds. Thus declaration of a potential collaborator by the crowd could have easily resulted in the death of the women. The crowd chased the women and grabbed the bag, but found no recorder. They subsequently dispersed.

An *intifada* justice committee tried the three men who had instigated the incident and sentenced them to pay a fine of 3000 JD ($4500) to the women and their families. The next UNLU communique (*bayan*) condemned "attacks by radical groups on Palestinian women in Jerusalem, Hebron and Gaza." An appendix attached to the communique elaborated on the role of women in the *intifada*:

Woman as we perceive her, besides being a mother, daughter, sister or wife, is an effective human being and full citizen with all rights and responsibilities . . .

We specify the following points:

1) We are against excessive vanity in personal dress and use of cosmetics during these times. This is applied to the same degree for men and women.

2) We believe that any dispute outside the purview of the occupation and its various offices should be resolved and settled in a democratic way with any suggestions offered in the course of normal constructive discussion or advice.

3) We should value highly the role women have played in our society during these times in achieving our national goals and confronting the occupation and they should not be punished without cause.

---

373 For more on the treatment of collaborators, see Wing, *Decision-Making*, supra note 14, at 139.
375 Such committees have been formed to take the place of the Israeli administered legal regime, which has no legitimacy with the Palestinian community. See Wing, *Decision-Making*, supra note 14, at 121.
376 Hammami, *supra* note 371, at 27.
377 Communique No. 43, cited in *id.*
4) The phenomenon of harassing women contradicts the traditions and norms of our society as well as our accepted attitudes about women. At the same time it denigrates the patriotism and humanity of each female citizen.

5) Nobody has the right to accost women and girls in the street on the basis of their dress or the absence of a headscarf.

6) The Unified National Leadership will chase these hooligans and will stop such immature and unpatriotic actions, especially when it is found that many such hooligans consistently engage in their own suspicious activities.378

This appendix provides a snapshot of the intertwining of custom, religion, and rights during the intifada. The preamble clearly establishes that women are entitled to the full array of human rights. It does not limit itself to the public arena as did the Palestinian Declaration of Independence.379 While the hijab is not required to be worn under sec. 6, modest dress that comports with custom and religion is still implied by sec. 1. Sec. 4 clearly states that harassment of women does not comport with Palestinian legal and social norms. What it does not state is that social custom does permit harassment, whistling, and ogling of women who are not modest in dress. Thus one counter interpretation of the appendix is that it does implicitly authorize harassment of women who are excessively vain in dress.

Patriotic graffiti appeared soon after, proclaiming "[t]hose caught throwing stones [at women] will be treated as collaborators."380 In a demonstration of the legitimacy and penetrative ability of UNLU rules, the atmosphere changed dramatically in a few days "and women without head­scarves no longer felt so threatened. Few men dared tell a woman to cover

378 Id. at 27.
379 Id.
380 Id.
her head, and those who did could be accused of considering themselves greater than the unified leadership.

Nevertheless, it has proven impossible to eradicate traditionalist tendencies. Despite the warning by the UNLU to permit women flexibility in their dress or face sanctions, no action was taken to enforce the provisions in the appendix of bayan no. 43. Thus, in February 1990, fundamentalists felt unconstrained to renew the hijab campaign, and attempted to impose the jilbaab (full length dress) as well. Hamas activists have continued to patrol the Gaza streets looking for inappropriately attired women and dousing them with vegetable dye as punishment. In March 1993, informants told me that women had been attacked with acid. Many secular women told me that they dared not leave the house without the headscarf. One elite woman refuses to leave her family compound because she did not want to wear the hijab. The only women I saw without scarves were Christian. In addition to the Gazans, women in parts of the West Bank feared being attacked with stones and pelted with fruit as well. The UNLU and other nationalists have been clearly unable or perhaps unwilling to counter the growing fundamentalist tendency. Feminists have tried to justify the inability of the UNLU to defeat the fundamentalist forces by stressing the ongoing theme of not wanting to create internal differences while fighting the occupation. Once again, however, it is the rights of women which are sacrificed to accommodate nationalist aims, including the continued existence of restrictive customary and religious norms.

The UNLU and justice committee’s handling of the hijab campaign, using both customs and new norms espousing women’s equality to resolve a societal problem, has both positive and negative implications for women’s status. On the beneficial side, the UNLU defined attacks on women as a

---

381 Id.
382 Id. at 28.
383 Roy, supra note 21, at 65.
384 Interviews in Gaza, March 1993 (interview notes on file with author).
385 STRUM, supra note 117, at 222.
386 HILTERMANN, supra note 321, at 207.
387 Interview with woman activist, in Ramallah (June 5, 1990), in HILTERMANN, supra note 321, at 204.
political and social crime. On the detrimental side, "the sulha only feeds into traditional conceptions of women by [involving] the women's families and treating the issue as a question of honor and the women not as political individuals but as family property."388

In addition to the handling of the hijab, UNLU communiques indicate support for the continuance of patriarchy.389 Participants in the intifada are usually "our sons," "brother doctors," "brother workers," or "brother businessmen and grocers."390 When bayanat mention women, it is usually as among the people "who are suffering,"391 or as "mothers," rather than as women in their own right.392 Some communiques exclude women altogether, despite the ongoing activity of the women's committees.393

A few bayanat depart from this marginalizing pattern. For example Communiqué No. 5 called on "mothers, sisters, and daughters to work side by side with their husbands, sons, and brothers."394 In August 1988, the UNLU reminded women's committees that they had to "shoulder a special responsibility in organizing sit-ins and other appropriate activities" in solidarity with male and female prisoners.395 Furthermore, the UNLU has consistently recognized International Women's Day. Each year of the uprising the emphasis on this day has increased. In 1988, the UNLU merely called for demonstrations on March 8 as part of its weekly schedule.396 The following year the UNLU expanded its references to "salute the Palestinian woman" and to declare its "admiration for her heroism in the national

388 Hammani, supra note 371, at 27.
389 Id. at 201.
390 UNLU Communique Nos. 3, 9, and 23, reprinted in Hiltermann, supra note 340, at 53-54. See also UNLU Communique Nos. 1 and 14, reprinted in INTIFADA: THE PALESTINIAN UPRISING, supra note 14, at 328, 347.
391 UNLU Communique No. 24, reprinted in Id. at 377.
392 Undocommunique Nos. 8, 29, and 53, in Hiltermann, supra note 340, at 54.
393 UNLU Communique No. 21 cited in Hiltermann, supra note 321, at 20.
394 Hiltermann, supra note 321, at 201.
struggle.\textsuperscript{397} The UNLU also urged "strengthening the unity of the women's movement in the State of Palestine within the framework of the Unified Women's Council.\textsuperscript{398}

PLO leadership outside of the Occupied Territories has also issued documents that can be interpreted as restrictive of women's rights. As previously discussed, the Palestinian Declaration of Independence states that "[g]overnance will be based on principles of social justice, equality, and nondiscrimination in public rights on grounds of race, religion, color or sex."\textsuperscript{399} The problem here appears to be that the call for equality is limited to the public sphere, maintaining the dichotomy between private and public realms that the Women's Convention seeks to destroy. Thus change in personal status matters most impacted by religion and custom is apparently not contemplated.

The Declaration later "render[s] special tribute to the brave Palestinian woman, guardian of sustenance and life, keeper of our people's perennial flame."\textsuperscript{400} Professor Hiltermann interprets the Declaration to mean that "the only roles assigned to women in the new state are to protect, preserve, and procreate."\textsuperscript{401} A preferable interpretation might be that women are free to participate in public life and obtain the public, civil and political rights in addition to, but not instead of their traditional roles.

Women activists continue to express concern about how to solidify and expand the few gains in women's status that have been achieved during the intifada, so as to prevent the Algerian experience from being replicated in the Occupied Territories.\textsuperscript{402} Many women want to be active participants

\textsuperscript{397} Id.
\textsuperscript{398} Id.
\textsuperscript{399} PNC Declaration, supra note 4.
\textsuperscript{400} Id.
\textsuperscript{401} HILTERMANN, supra note 321, at 202.
\textsuperscript{402} See id. at 198; The newsletter of the Union of Palestine Working Women's Committees (Communist Party) also raised this concern. The Intifada and the Role of Palestine Women, VOICE OF WOMEN, Sept. 1989, at 1, cited in Hiltermann, The Women's Movement, supra note 340, at 55.
in developing legislation and a constitution, which will promote equality.\(^{403}\) It is unclear whether any women are members of the High Legal Commission, but is Chair, Dr. Al-Qasem did meet with women’s groups on his visit to Palestine to discuss the draft Basic Law.\(^{404}\)

Additionally, Professor Hanan Ashrawi has said that "there is an urgent and concentrated need to crystallize a feminist perspective and ideology."\(^{405}\) Yet female Palestinian academics expressed great frustration to me concerning their inability to get scholarly, financial, or emotional support from their male colleagues when attempting to write on feminist issues.\(^{406}\) The political outlook is somewhat unclear. Heightened economic and political problems in the future make it less likely that concerned women’s rights supporters will be able to vigorously pursue a separate feminist agenda.

The stagnation and decline in women’s participation in the intifada is further evidence of fundamentalism’s increasing power. Reinforcement of the family unit and the role of maternity has occurred to the detriment of female political organization. It appears that there are increased pressures on women to assume a more traditional lifestyle. The number of early marriages is increasing, and the average age of marriage has dropped from 21 to 17.\(^{407}\) There have also been both incessant attacks on coeducation and calls for gender segregation.\(^{408}\)

The women’s movement continues to have the "inability to bring a balance between the national conflict needs on the one hand, and needs of women stemming from their class oppression and their oppression as women by a patriarchal system of social organization on the other."\(^{409}\) With

---

\(^{403}\) March 1989 editorial of Federation of Palestinian Women’s Action Committees (DFLP), cited in Hiltermann, The Women’s Movement, supra note 340, at 55. This is the position of three progressive women’s groups, not Fatah.

\(^{404}\) Al-Qasem Conversation, supra note 29.

\(^{405}\) WARNOCK, supra note 162, at 188. For a feminist perspective from an American Jewish author, see YOUNG, supra note 323.

\(^{406}\) Interviews in the West Bank and Egypt, March 1993 (interview notes on file with author).

\(^{407}\) Khalife, supra note 19.

\(^{408}\) Tamari, supra note 355, at 17.

\(^{409}\) Giacaman, supra note 337, at 141.
respect to the future role of Palestinian women, President Yasser Arafat has stated they will not suffer the fate of the Algerian women because Palestinian women have a higher rate of education which enables them to obtain professional positions. He noted that there were 37 female members in the 301 member Palestine National Council, a percentage that compares favorably to developed nations. "I would say that in the new state female representation in parliament and official jobs will (be comparable) to the most advanced nations in the world." While admirable in the Middle Eastern context, this statement does not address the private/public dichotomy in the Declaration of Independence. While some Palestinian women may certainly want to participate in the public spheres, some will certainly also be concerned with the private sphere where they spend the majority of their lives.

In conclusion, it appears that while social change has taken place in the nature of customary and religious norms in the women's rights area during the intifada, there has been retrenchment due to fundamentalist pressures as well. There is the need to determine the full scope of legal extension and penetration of the changes that have occurred in order to evaluate the nature of future modifications needed. Legal extension is the social reach of the law, how society defines and differentiates what is legal from what is non-legal, i.e. that which is left to custom, tradition, religion, informal negotiation, social convention, peer and familial influence. Legal penetration is the social grasp of the law, the degree to which the system actually penetrates and controls social life. Often what the legal system proposes to effect and what it actually does may be entirely different. As an example, the United States legally prohibits: prostitution; drug use; smoking and drinking by minors; and not wearing seatbelts. Yet all these activities exist and flourish to varying degrees depending on the law's penetrative ability. An evaluation of the situation in the Palestinian community is especially complicated, since much of the legal

410 Young, supra note 323, at 49.
411 Id.
412 Id.
413 Barton, supra note 195, at 2. For example, in the U.S., we do not legally prohibit premarital sex (except with minors). We permit religion, the family, and social convention to regulate such behavior.
414 Id.
decisionmaking is based on customary and religious law that involve informal negotiation and settlement. These are elements that other societies might consider outside the legal system altogether. The potential extension of the legal decisionmaking is limited by the existence of: the military occupation which criminalizes participation in any aspect of the intifada; imposed legal traditions and court systems; and Palestinian inability at this juncture to totally control the prior two limitations. Due to the denial of freedom of the press by the Israelis, need for secrecy, and difficulty in conducting research, it is impossible to know how far the new process actually penetrates into the society. I would speculate that it penetrates to a far greater extent than the Israelis or even the Palestinians may realize. The very fact that compliance was high in the pre-Gulf war period, may provide some indication of penetration at that time. On the other hand, it is possible that the compliance with the new rules was and is very sporadic, due to its embryonic nature and inability to publicly evolve and flourish. Thus, its penetrative ability may be quite limited at present.
PART V: CONCLUSION

This article has argued that Palestinian civil society possesses a number of important features that will both be assets and impediments in the long struggle ahead to achieve democracy through constitutionalism. Decisionmakers must take account of these factors when designing constitutional structures. Utilizing a case study of women’s rights, the paper illustrates the interplay between such characteristics as: the high level of education; degree of political pluralization; communitarian/hierarchical society; distrust of authority; and the multilayered legal regime. This article has confronted the question of how Palestinian custom and Islamic religious practices working separately and in conjunction, can be modified to advance the constitutional legal status of women, a professed goal of the Palestinian national movement.

Although there are many possible ways to justify progressive constitutional reforms, this article analyzed three interrelated options. First, there is the reinterpretation of Islamic doctrine as proposed by nation states and Islamic and feminist scholars. This approach involves tinkering or following law reform, leaving intact the basic patriarchal structure of the law. This approach is useful because where religious tradition and custom coincide in their support for a given social order, it is extremely difficult to mount successful confrontations to entrenched patterns of discrimination, until there is further social evolution. Although leading law reform can

\[415\] Mayer, supra note 106, at 1035.
be instituted *de jure*, societal perceptions must change before *de facto* equality for women can be achieved.\(^{416}\)

A second approach to justifying the equalizing of the status of women is through the implementation of international human rights norms. The critical problem here with the adoption of the leading law reform technique is that it is difficult to ensure *de facto* obedience from the existing legal actors who may oppose reform. The constitutions of most Islamic countries have clauses forbidding discrimination on the basis of gender, and many have signed international human rights treaties guaranteeing the same.\(^{417}\) But complying with these norms in the face of traditionalist challenges is the dilemma facing most countries. Thus the Palestinian State must play a critical role in ensuring the enforcement of egalitarian legislation through all stratas of society. For example, Palestine must not only publish a new family code, but enforce it.

The third approach to justify ameliorating women's legal status is a Palestinian-centric emphasis on following the social reforms brought about by the *intifada*. Ultimately, legal change will only be successful if societal change is taking place as well. Since this is the Palestinian case to a certain degree, there is some cause for optimism about the success of proposed reforms. This optimism must be tempered by the fact that traditionalist forces will likely oppose most of the changes as inconsistent with Islamic practice and custom.

Only time will tell if the Palestinian self-governing entity or future independent state will be in the forefront of the Muslim world in adopting and enforcing a democratic constitution. Hopefully, democratic constitutionalism in Palestine will be accepted and become a tradition, habit, and national attitude.
