

With a Case Study of Women's Rights

Adrien Katherine Wing

*Democracy,
Constitutionalism
and the Future
State of Palestine*

PASSIA

Palestinian Academic Society for the Study of International Affairs

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PART I: INTRODUCTION

The signing of mutual recognition agreements by Israel and the Palestine Liberation Organization¹ 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.² The Palestinians have professed an interest in establishing the first true democracy in the Middle East. For example, in 1988, the 19th

¹ For more on the PLO, see ABDULLAH FRANGI, *THE PLO AND PALESTINE* (Paul Knight trans., 1983); ALAN HART, *ARAFAT: TERRORIST OR PEACEMAKER?* (1984); KEMAL KIRISCI, *THE PLO AND WORLD POLITICS* (1986); CHERYL RUBENBERG, *THE PALESTINE LIBERATION ORGANIZATION: ITS INSTITUTIONAL INFRASTRUCTURE* (1983).

² For articles on governing arrangements, see Ziad Abu-Amr, *The View From Palestine: In the Wake of the Agreement*, *J. PALESTINE STUD.*, Wtr. 1994, at 75; Jerome Segal, *Strategic Choices Facing the Palestinians in the Negotiations*, *J. PALESTINE STUD.*, Wtr. 1993, at 17; ZIAD ABU AMR, *EMERGING TRENDS IN PALESTINIAN STRATEGIC POLITICAL THINKING AND PRACTICE* (1992); Raja Shehadeh, *Negotiating Self-Government Arrangements*, *J. PALESTINE STUD.*, Smr. 1992, at 23; PALESTINE AFFAIRS CENTER, *PALESTINE INTERIM SELF-GOVERNMENT ARRANGEMENTS: EXPANDED OUTLINE OF THE CONCEPTS, PRELIMINARY MEASURES AND ELECTIONS MODALITIES* (July 1992); AMERICAN ACADEMY OF ARTS AND SCIENCES, *TRANSITION TO PALESTINIAN SELF-GOVERNMENT: PRACTICAL STEPS TOWARD ISRAELI-PALESTINIAN PEACE* (July 1992); Hisham Sharabi, *A Look Ahead: The Future State of Palestine in THE PALESTINIANS: NEW DIRECTIONS* 155 (Michael Hudson ed., 1990); Laurie Brand, *The Shape of Things to Come: Policy and Politics in the Palestinian State in Id.* at 227; Francis A. Boyle, *Create the State of Palestine*, *AM. ARAB AFF.* 86 (Sum. 1988); John Quigley, *Palestine's Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood*, 7 *BOS. U. INT'L L. J.* 1 (1989).

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.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 *Rechtsstaat*, an *etat de droit*, a state that is governed by its own public law."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/legitimizing 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.⁵

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

³ See Declaration of Independence, U.N. Doc. A/43/827, S/20278, Annex III at 15 (1988), reprinted in 27 I.L.M. 1668, 1670 (1988).

⁴ Crawford Young, *The Debate on Democratization in Africa*, in K. THOMPSON, *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, *Modern Constitutionalism as Interplay Between Identity and Diversity: An Introduction*, 14 CARDOZO L. REV. 497, 502 (1993).

⁵ Barton, *The Paradox of a Revolutionary Constitution: A Reading of the Nicaraguan Constitution*, 12 HASTINGS INT'L & COMP. L. REV. 49, 53 (1988).

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

⁶ Patrick Fitzgerald, *Democracy and Civil Society in South Africa: A Response to Daryl Glaser*, 49 REV. AFR. POL. ECON. 15 (1990).

⁷ E. McWHINNEY, CONSTITUTION-MAKING PRINCIPLES, PROCESS, PRACTICE 4 (1981).

⁸ RALF DAHRENDORF, EUROPE'S VALE OF TEARS, MARXISM TODAY (1990).

⁹ Gary Hengstler, *First Steps Toward Justice*, AM. BAR ASS'N J., Feb. 1994, at 52.

¹⁰ Arthur J. Jacobson, *Transitional Constitutions*, 14 CARDOZO L. REV. 947, 947-48 (1993).

the coming years.¹¹ 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/hierarchical 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.

¹¹ For example, the African National Congress Constitutional Committee of South Africa discussed and published documents on constitutional issues years before a black majority government seemed likely. The author was involved in those discussions. For further information on the South African process, see Adrien Katherine Wing, *Communitarianism v. Individualism: Constitutionalism in Namibia and South Africa*, 11 WISC. J. INT'L L. 296 (1993)[Wing, *Communitarianism*]. Some of the documents written by the ANC Constitutional Committee include: CONSTITUTIONAL GUIDELINES FOR A FUTURE SOUTH AFRICA (1989); A BILL OF RIGHTS FOR A NEW SOUTH AFRICA (1990); A BILL OF RIGHTS FOR A NEW SOUTH AFRICA (MAY 1992); WHAT IS A CONSTITUTION? (1990); ANC CONSTITUTIONAL PRINCIPLES AND STRUCTURES FOR A DEMOCRATIC SOUTH AFRICA (1991). The Guidelines are reprinted in 21 COL. HUM. RTS. L. REV. 235 App. A (1989). For articles discussing these documents, see Albie Sachs, *Post-Apartheid South Africa: A Constitutional Framework*, 6 WORLD POL'Y J. 589 (1989); Hugh Corder & Dennis Davis, *The Constitutional Guidelines of the African National Congress: A Preliminary Assessment*, 106 S. AFR. L. J. 633 (1989); Johan van der Vyver, *Comments on the Constitutional Guidelines of the African National Congress*, 5 S. AFR. J. HUM. RTS. 133 (1989); ALBIE SACHS, *ADVANCING HUMAN RIGHTS IN SOUTH AFRICA* (1992); Nicholas Haysom, *Democracy, Constitutionalism and the ANC's Bill of Rights for a New South Africa*, 18 SOC. JUST. 40 (Spr.-Smr. 1991); Sammy Adelman, *Some Prospects and Problems of a Post Apartheid Constitution for South Africa*, THIRD WORLD LEGAL STUD. 119 (1989); J. Hund, *A Bill of Rights for South Africa*, 34 AM. J. JURIS. 23 (1989); M.C. Jozana, *Proposed South African Bill of Rights: A Prescription for Equality or Neo-Apartheid*, 7 AM. U. INT'L L. & POL'Y 45 (1991); Albie Sachs, *A Bill of Rights for South Africa: Areas of Agreement and Disagreement*, 21 COLUM. HUM. RTS. L. REV. 3 (1989); Masemola, *Rights and a Future South African Constitution: The Controversial and the Non-Controversial*, 21 COLUM. HUM. RTS. L. REV. 45 (1989); Cyril Ramaphosa, *A Constitutional Framework for a New South Africa*, 28 STAN. J. INT'L L. 23 (1991); Craig Gross, Note, *Constitutional Development in South Africa and the Role of the Namibian Constitutional Model*, 16 HASTINGS INT'L & COMP. L. REV. 269 (1993).

PART II: **F**ACTORS **I**NFLUENCING
DEMOCRATIZATION¹²

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*,¹³ many children and young people have lost nearly four years of schooling.¹⁴ Thus many have either never become literate or lost their literacy.¹⁵ The inability to properly conduct the annual high school *tawjihi* examinations during this time means that existing skill levels are unknown.¹⁶ The college population has of course been equally affected by the inability to complete their courses of study in a timely manner.¹⁷

Moreover, the younger age of marriage and an increased childbirth rate¹⁸ 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

¹³ There are many general sources available on the *intifada*, which commenced in December 1987. See e.g. Adrien K. Wing, *Legal Decision-Making During the Palestinian Intifada: Embryonic Self-Rule*, 18 YALE J. INT'L L. 95 (1993)[hereinafter Wing, *Decision-Making*]; INTIFADA: THE PALESTINIAN UPRISING AGAINST ISRAELI OCCUPATION (Zachary Lockman & Joel Beinin eds., 1989); F. ROBERT HUNTER, THE PALESTINIAN UPRISING: A WAR BY OTHER MEANS (1991); INTIFADA: PALESTINE AT THE CROSSROADS (Jamal Nassar & Roger Heacock eds., 1990); ANDREW RIGBY, LIVING THE INTIFADA (1991); Richard Falk & Burns Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. J. INT'L L. 129 (1991). The word *intifada* is derived from the Arabic verb *nafada*, which means to shake. In the context of the current uprising, it means to shake up the status quo of the twenty-five year old Israeli occupation.

¹⁴ RIGBY, *supra* note 14, at 103.

¹⁵ *Id.*

¹⁶ *Id.* at 99.

¹⁷ *Id.*

¹⁸ Lashar Khalife, *Women and the Intifada*, INT'L VIEWPOINT, Oct. 28, 1991, at 21 (Bisan Centre Conference 1991).

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-esteem 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

¹⁹ See DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (1992).

²⁰ For general articles on Islamic resurgence, see e.g. *ISLAMIC RESURGENCE* (Ali E. Hillal Dessouki ed., 1982); *SHI'ISM AND SOCIAL PROTEST* (Cole & Keddie eds., 1986); *ISLAM IN THE POLITICAL PROCESS* (James P. Piscatori ed., 1983). For more on Islamic fundamentalism in the Occupied Territories, see HUNTER, *supra* note 14, at 205; RIGBY, *supra* note 14, at 37; Sara Roy, *The Political Economy of Despair: Changing Political Attitudes Among Gaza Refugees*, *J. PALESTINE STUD.*, Autumn 1989, at 58, 77; Ann Lesch, *Prelude to the Uprising in the Gaza Strip*, *J. PALESTINE STUD.*, Autumn 1990, at 1, 21; Jon Immanuel, *Gaza: Local Needs or National Goals?*, *JERUSALEM POST*, Apr. 17, 1992, available in LEXIS, Nexis Library, Intl File.

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.²³ 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.²⁴

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.²⁵ 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*.

²⁴ Interviews with Palestinians, Washington D.C., November 18, 1993.

²⁵ Rachelle Marshall, *Rabin Holds Out for a Palestinian Bartustan*, WASH. REP. ON MIDDLE EAST AFF., Feb./Mar. 1994, at 6, 46.

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.²⁶ 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.²⁷ 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 hierarchical, where status (often inherited) is quite critical.

²⁶ Peter Bechtold, *More Turbulence in Sudan*, in *SUDAN: STATE AND SOCIETY IN CRISIS* 1, 7 (John Voll ed., 1991).

²⁷ For writings on the theory of individualism, see e.g. Charles Fried, *Liberalism, Community, and the Objectivity of Values*, 96 HARV. L. REV. 960 (1983); WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1989); and the writings of John Rawls. Communitarian critics of individual theory include Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 605 (1992); Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6 (Feb. 1990); MICHAEL WALZER, *SPHERES OF JUSTICE* 291 (1983); MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982). Communitarians also include Amitai Etzioni, Robert Bellah, and Richard Madsen.

For liberal responses to the communitarian critique, see Will Kymlicka, *Liberals and Communitarians*, 18 CAN. J. PHIL. 181 (1988); Robert Thigpen & Lyle Downing, *Liberalism and the Communitarian Critique*, 31 AM. J. POL. SCI. 637 (1987); Allen E. Buchanan, *Assessing the Communitarian Critique*, 99 ETHICS 852 (1989).

I have written about communitarianism in the African context in Wing, *Communitarianism*, *supra* note 12.

This communitarian/hierarchical 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.²⁸ Protecting the individually oriented civil and political rights, such as freedom of speech, press, assembly, is provided for in the document as well.²⁹ However, sufficient enforcement mechanisms are essential to provide the foundation for potentially avoiding the fate of so many dictatorial communitarian societies.³⁰

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'

²⁸ Telephone conversation with Dr. Anis al-Qasem, February 15, 1994.

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.³¹ 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*.³²

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).³³ *Urf* handles disputes outside the official civil or religious courts³⁴ on the basis of traditional oral customs and norms that stress conciliation, mediation, and family and group honor.³⁵ Respected elders or reconciliation committees (*ludjnat el-islam*)³⁶ mediate disputes until a binding settlement (*sulha*) is reached.³⁷ These individuals are always

³² 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*].

³³ 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).

³⁴ 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.

³⁵ *Id.* at 37.

³⁶ *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.

³⁷ 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.

powerful and always men.³⁸ They might include the local *mukhtar*³⁹ and they may be religiously sanctioned.⁴⁰ The parties involved may not only be an individual claimant, but an entire family or clan (*hamula*) since offenses against individuals are also seen as offenses against the family or clan.⁴¹ The types of disputes include contract issues between businessmen, interfamilial feuds, trespass and other land matters and personal injury.⁴² Settlements include business closure, exile of family members from the village, and *diya* or blood money, which is an amount paid to the victim's family by the perpetrator's family.⁴³ *Diya* is a pre-Islamic custom that has

³⁸ See BISHARAT, *supra* note 35, at 40.

³⁹ A *mukhtar* (pl. *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, *makhateer* were nominated by the *hamula* (clan) and confirmed by the Jordanian district commissioner. Although a *mukhtar* is not a judicial officer, there are recorded instances where a *mukhtar* served as an arbitrator of disputes (e.g. the *mukhtar* of Dura settled a land dispute in 1963). *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 *makhateer* to compel unwanted regulations has diminished the credibility of the *makhateer*. Some are considered collaborators. DAVID McDOWALL, *PALESTINE AND ISRAEL: THE UPRISING AND BEYOND* 107 (1989). There are some examples of *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 Jafer of Nahalin mediating a *sulha* in April 1989).

⁴⁰ BISHARAT, *supra* note 35, at 187 n.5.

⁴¹ *Id.* at 37. *Hamula* (pl. *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 *hamula* politics.

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 *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.

⁴³ BISHARAT, *supra* note 35, at 40-41. See PHILIP BALDENSPERGER, *THE IMMOVABLE EAST: STUDIES OF THE PEOPLE AND CUSTOMS OF PALESTINE* 115 (1913) (providing early account of blood dispute); Joseph Ginat, *Blood Revenge in Bedouin Society*, in *THE CHANGING BEDOUIN* 59, 68 (Emanuel Marx & Avshalom Shmueli eds., 1984); EMANUEL MARX, *BEDOUIN OF THE NEGEV* 207, 237 (1967); COHEN, *supra* note 37, at 70, 141 (*diya* dispute in 1928); AUSTIN KENNETT, *BEDOUIN JUSTICE* 60-61 (1925)(Egyptian bedouin handle *diya* dispute). Professor Petect also found *diya* being awarded in the Lebanese camps of the Palestinians. Julie M. Petect, *Socio-Political Integration and Conflict Resolution in the Palestinian Camps in Lebanon*, *J. PALESTINE STUD.*, Wtr. 1987, at 29, 40. Outside of the Middle East, other societies have used the concept of blood money to settle feuds. BENEDICT S. ALPER & LAWRENCE T. NICHOLS, *BEYOND THE COURTROOM: PROGRAMS IN COMMUNITY JUSTICE AND CONFLICT RESOLUTION* 50 (1981)(Middle Ages in Europe).

also been incorporated into Islamic law⁴⁴ and is awarded by Palestinian religious courts as well, as indication of the intertwining of custom and religion.⁴⁵ The settlements are sometimes published in newspapers.⁴⁶

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]."⁴⁷

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.⁴⁸ For Muslims, the *sharia*, which is the Islamic law found in the Koran⁴⁹ and other sources, provides rules that govern daily

⁴⁴ MOHAMMED HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 285 (1991).

⁴⁵ ROBERT H. EISENMAN, *ISLAMIC LAW IN PALESTINE AND ISRAEL: A HISTORY OF THE SURVIVAL OF TANZIMAT AND SHARIA IN THE BRITISH MANDATE AND THE JEWISH STATE* 16 (1978).

⁴⁶ BISHARAT, *supra* note 35, at 42.

⁴⁷ *Id.* at 32.

⁴⁸ *Id.* at 11.

⁴⁹ N. DAWOOD, *THE KORAN* (5th rev. ed., 1990). The Koran was written in the seventh century.

life.⁵⁰ 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.⁵¹ 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.⁵² Courts may award *diyya* as well, which is less for injury to a woman than a man.⁵³ 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 *sunna*, *ijma*, and *qiyas*.

⁵¹ For general discussion of Islamic law, see generally JAMES N. D. ANDERSON, *ISLAMIC LAW IN THE MODERN WORLD* (1959); MATTHEW LIPPMAN ET AL., *ISLAMIC CRIMINAL LAW AND PROCEDURE* (1988); Hassan Afchar, *Muslim Conception of Law*, in 2 INT'L ENCYCLOPEDIA COMP. L. 84 (1975); Chafik Chehata, *Islamic Law*, in 2 INT'L ENCYCLOPEDIA COMP. L. 138 (1975); Ann Elizabeth Mayer, *Law and Religion in the Muslim Middle East*, 35 AM. J. COMP. L. 127 (1987); Farhat J. Ziadeh, *Permanence and Change in Arab Legal Systems*, 9 ARAB STUD. Q. 20 (1987); ISLAM IN TRANSITION: MUSLIM PERSPECTIVES (John J. Donohue & John L. Esposito eds., 1982). For a description of Jordanian religious law, applicable in the West Bank, see Fouad B. Attala, *Jordan*, in 1 INT'L ENCYCLOPEDIA OF COMP. L. J-27 (1973); S.H. AMIN, *MIDDLE EAST LEGAL SYSTEMS* 244 (1985). For an Israeli view of the functioning of the religious courts from 1967-80, see Yaakov Meron, *The Religious Courts in the Administered Territories in MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS* 353 (Meir Shamgar ed., 1982); EISENMAN, *supra* note 46.

Among the Sunni Muslims, who constitute 90% of Muslims, four schools of Islamic thought developed in the ninth century to assist in the interpretation of the Koran: Hanafite, Malikite, Shafite, and Hanbali. Justin Leites, *Modernist Jurisprudence as a Vehicle for Gender Reform in the Islamic World*, 22 COLUM. HUM. RTS. L. REV. 251, 263 (1991). Most Palestinians follow the Hanafite school which is often considered the most liberal. Zeina Ghandour, *Religious Law in a Secular State: The Jurisdiction of the Sharia Courts of Palestine and Israel*, 5 ARAB L. Q. 25, 30 (1990).

⁵² BISHARAT, *supra* note 35, at 20. For concise histories of the *sharia* courts, see Ghandour, *supra* note 52; Lynn Welchman, *Family Law under Occupation: Islamic Law and the Sharia Courts in the West Bank in*, ISLAMIC FAMILY LAW 93 (Chibli Mallat & Jane Connors ed., 1990); EISENMAN, *supra* note 46, at 32. There are also ecclesiastic courts for Christians located in East Jerusalem.

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.

⁵³ Abdullahi A. An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 HARV. HUM. RTS. J. 13, 39 (1990).

recognized by Israel.⁵⁴ There is an appeals court for Gaza in Gaza City.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.⁵⁶

Additionally, *urf*, as long as it does not contradict the *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.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 *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 *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

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, *supra* note 46, at 77. For more information on the Supreme Muslim Council, see generally ANN MOSELY LESCH, *ARAB POLITICS IN PALESTINE 1917-1939* (1979). There is also a *sharia* appeals court in East Jerusalem as well. Welchman, *supra* note 53, at 109.

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

⁵⁶ BISHARAT, *supra* note 35, at 120-21.

⁵⁷ KAMALI, *supra* note 45, at 284; JOHN L. ESPOSITO, *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.⁵⁸ 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 similiar 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.⁵⁹ 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.

⁵⁸ See discussion of the *Elon Moreh* case in RAJA SHEHADEH, OCCUPIERS LAW 28 (1985).

⁵⁹ BISHARAT, *supra* note 35, at 211, n.3.

The British Mandate emergency regulations of 1945⁶⁰ and the Israeli military⁶¹ 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.⁶² 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.⁶³ 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,⁶⁴ 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.⁶⁵ 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'EV 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. SHEHADEH, *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.⁶⁶ 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 Dullar 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.

⁶⁷ Lawyers Committee for Human Rights, Memorandum on Human Rights and Palestinian Self-Government, December 1993 (on file with author).

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.⁶⁸ 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.⁶⁹ 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.⁷⁰

Constitutionalism and democracy have not been achieved in the Middle East region, and governments face a persistent crisis of legitimacy.⁷¹ 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.

⁷⁰ James C.N. Paul, *Developing Constitutional Orders in Sub-Sahara Africa: An Unofficial Report*, THIRD WORLD LEGAL STUD. 1, 34 (1988).

⁷¹ Augustus Richard Norton, *The Future of Civil Society in the Middle East*, 47 MIDDLE EAST J. 206, 206 (1993).

Jordan; 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 multiparties 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

⁷² Yash Ghai, *The Theory of the State in the Third World and the Problematics of Constitutionalism*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 186, 195 (Douglas Greenberg, Stanley Katz, Melanie Oliviero, and Steven Wheatley eds., 1993)(referring to Africa).

⁷³ For more on the trends toward democracy in the Middle East, see Hilal Khashan, *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."⁷⁷ 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.⁷⁸

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."⁷⁹ 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.⁸⁰ 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.⁸¹ "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."⁸² 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.

⁸⁰ Abdullahi A. An-Na'im, *Civil Rights in the Islamic Constitutional Tradition: Shared Ideals and Divergent Regimes*, 25 JOHN MARSHALL L. REV. 267, 283 (1992)[hereinafter An-Na'im, *Civil Rights*]; J.N.D. ANDERSON, *LAW REFORM IN THE MUSLIM WORLD* 1-2, 33 (1976); N.J. COULSON, *A HISTORY OF ISLAMIC LAW* 161 (1964); HERBERT LIEBESNY, *THE LAW OF THE NEAR AND MIDDLE EAST* 56 (1975).

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.⁸³ 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.⁸⁴ 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.⁸⁵

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.

⁸³ *Id.* at 54. See ABDULLAHI AHMED AN-NA'IM, TOWARDS AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 52 (1990)[hereinafter AN-NA'IM, ISLAMIC REFORMATION], for a proposal of a construction of *shura*. This concept is found in verses 42:38 and 3:159. For discussion of what types of matters are appropriate for *shura*, see Azizah Y. al-Hibri, *Islamic Constitutionalism and the Concept of Democracy*, 24 CASE WEST. RES. J. INT'L L. 1, 22 (1992).

⁸⁴ PLO-Israel Agreement, *supra* note 3, at 162.

⁸⁵ *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.⁸⁶ The 1953 Egyptian constitution⁸⁷ 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.⁸⁸ 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.⁸⁹ 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

⁸⁶ For more on Saudi Arabia, see FRANK A. CLEMENTS, SAUDI ARABIA (1979); MIDDLE EAST WATCH, EMPTY REFORMS: SAUDI ARABIA'S NEW BASIC LAWS (May 1992); Ali M. Al-Mehaimeed, *The Constitutional System of Saudi Arabia: A Conspectus*, 8 ARAB L. Q. 30 (1993); Rashed Aba-Namay, *The Recent Constitutional Reforms in Saudi Arabia*, 42 INT'L & COMP. L. Q. 295 (1993).

⁸⁷ Ibrahim Saleh, *The Writing of the 1971 Egyptian Constitution*, in CONSTITUTION MAKERS ON CONSTITUTION MAKING 288, 314 (Robert A. Goldwin & Art Kaufman eds., 1983); For more on Egypt, see ENID HILL, MAHKAMA! STUDIES IN THE EGYPTIAN LEGAL SYSTEM COURTS & CRIMES LAW & SOCIETY (1979); BYRON CANNON, POLITICS OF LAW AND THE COURTS IN NINETEENTH CENTURY EGYPT (1988); JASPER YEATES BRINTON, THE MIXED COURTS OF EGYPT (1968); ASAF HUSSAIN, ISLAMIC MOVEMENTS IN EGYPT, PAKISTAN AND IRAN: AN ANNOTATED BIBLIOGRAPHY (1983); FARHAT J. ZIADEH, LAWYERS AND THE RULE OF LAW AND LIBERALISM IN MODERN EGYPT (1968); Abdel-Mahdi Massadeh, *Disciplinary Actions under the Egyptian Civil Service Legal System: A Constitutional and Administrative Law Perspective*, 12 N.Y. L. S. J. INT'L & COM. L. 363 (1991); Ann M. Lesch, *Democracy in Doses: Mubarek Launches His Second Term as President*, 11 ARAB STUD. Q. 87 (Fall 1989); Fauzi M. Najjar, *Application of Sharia Laws in Egypt*, MIDDLE EAST POLICY, No. 3, at 62.

⁸⁸ DON PERETZ, THE MIDDLE EAST TODAY 235 (5th ed., 1988).

⁸⁹ *Id.* at 251.

terms of the mandate awarded to France after World War I.⁹⁰ The constitution remains the same, with various amendments, to this day.⁹¹ "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."⁹² 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.⁹³ 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.⁹⁴ 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.⁹⁵ 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 countervailing 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.⁹⁶ 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

⁹⁵ Judith P. Harik & Hilal Khashan, *Lebanon's Divisive Democracy: The Parliamentary Elections of 1992*, 15 ARAB STUD. Q. 41-50 (1993).

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.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.⁹⁸ A high judiciary council will be created to be in charge of appointment and promotion.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.

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.

⁹⁸ See April draft Basic Law, *supra* note ?, art. 99.

⁹⁹ *Id.* art. 97.

PART IV: CASE STUDY: WOMEN'S RIGHTS

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.¹⁰² 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.¹⁰³

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.¹⁰⁴ The tension for constitutionalism is evidenced by the fact that both customary and Islamic¹⁰⁵ traditions sanction differential treatment on the basis of gender.¹⁰⁶ 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.¹⁰⁷ 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."¹⁰⁸

¹⁰² *Id.*

¹⁰³ Hengstler, *supra* note 10, at 59.

¹⁰⁴ This part of the article draws upon Adrien Katherine Wing, *Custom, Religion and Rights: The Future Legal Status of Palestinian Women*, 35 HARV. INT'L L.J. 149 (1994) [hereinafter Wing, *Custom*].

¹⁰⁵ Outside of Tunisia, which has a uniform personal status law for all citizens, the trend in the Islamic world has been to continue a system of legal pluralism in which a person's religion determines the applicable law. Ann Elizabeth Mayer, *Islam and the State*, 12 CARD. L. REV. 1015, 1027-28 (1991)[hereinafter Mayer, *Islam*]. Islam is the religion discussed here because 92% of Palestinians are Sunni Muslim, with a Christian minority composed of several denominations centered in Jerusalem, Ramallah, and Bethlehem. BISHARAT, *supra* note 35, at 11.

¹⁰⁶ A number of articles discuss whether religion is the source of women's oppression. Many feminists view patriarchy as the source of oppression, whether manifested in religion, custom or elsewhere.

¹⁰⁷ April draft Basic Law, *supra* note ?, art. 10.

¹⁰⁸ Rita Giacaman & Penny Johnson, *The Palestinian Women's Movement in the New Era*, MIDDLE EAST REPORT, Jan.-Feb. 1994 at 24-25.

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.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ The "fusion of religiously introduced standards and precepts with customary law [has been] central to the general process of legal development in Islam."¹¹² 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.¹¹³ 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 Petet, *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 Hilse Dwyer, *Law and Islam in the Middle East: An Introduction in LAW AND ISLAM IN THE MIDDLE EAST* 1, 3 (Daisy Hilse 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.¹¹⁴

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.¹¹⁵ Female chastity and purity must be maintained or it is a great disgrace to the family and clan.¹¹⁶ These norms must be understood in the Palestinian social context where custom and religion are intermingled.¹¹⁷ Historically, women, particularly upper and middle class women, were ideally to be secluded in their homes, behind veils, or more recently *hijab* (headscarves).¹¹⁸ The clothing and the seclusion protected the woman and man from her sexuality,¹¹⁹ 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."¹²⁰ Therefore, *fitna* means both beauty and turmoil at the same time.

¹¹⁴ NAWAL EL SAADAWI, *THE HIDDEN FACE OF EVE: WOMEN IN THE ARAB WORLD* xiv (1980).

¹¹⁵ *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).

¹¹⁶ PHILIPPA STRUM, *THE WOMEN ARE MARCHING: THE SECOND SEX AND THE PALESTINIAN REVOLUTION* 27 (1992).

¹¹⁷ The religious aspects of this heritage will be discussed in Part A2.

¹¹⁸ An-Na'im, *supra* note 54, at 13, 38.

¹¹⁹ STRUM, *supra* note 117, at 25.

¹²⁰ FATIMA MERNISSI, *BEYOND THE VEIL: MALE-FEMALE DYNAMIC IN MODERN MUSLIM SOCIETY* (1987)[hereinafter MERNISSI, VEIL].

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.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.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.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.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.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.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.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.¹²⁸ These cases are heard by special customary adjudicators

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

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.

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

¹²⁴ ABDUL RAHMAN I. DOI, *WOMEN IN SHARI'AH* 154 (1989).

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

¹²⁶ INGELA BENDT & JAMES DOWNING, *WE SHALL RETURN: WOMEN OF PALESTINE* 89 (1980).

¹²⁷ STRUM, *supra* note 117, at 28.

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.¹²⁹ The judgments can run into the thousands of Jordanian dinars, which is still the currency of the West Bank.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.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.¹³² While the jurisprudence is *wrf*, it is represented as being consistent if not identical to Islamic law,¹³³ an example of the intertwined nature of the two traditions. Actually, none of these *arad* determinations are covered by Islamic law.¹³⁴

In the view of feminist scholars, the differential treatment of women under custom is due to the ongoing existence of patriarchy.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,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.

¹²⁹ *Id.* at 40 and 191 n.33.

¹³⁰ *Id.* at 40.

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.

¹³² BENDT & DOWNING, *supra* note 127.

¹³³ BISHARAT, *supra* note 35, at 40.

¹³⁴ *Id.* at 191 n.32.

¹³⁵ See, e.g. SAADAWI, *supra* note 115, at 4.

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."¹³⁷ Additionally, the protection of *arad* (honor) was intertwined with the protection of *ard* (land).¹³⁸ 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.¹³⁹ 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."¹⁴⁰

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.¹⁴¹ 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.¹⁴²

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.¹⁴³ A man can divorce his wife at will, while the wife must have

¹⁴¹ 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).

¹⁴² Abdullahi An-Na'im, *The Rights of Women and International Law in the Muslim Context*, 9 WHITTIER L. REV. 491, 495 (1987)[hereinafter An-Na'im, *Rights*]. For more on the rights of women, see ENGINEER, *supra* note 142; JAMAL J. NASIR, *THE STATUS OF WOMEN UNDER ISLAMIC LAW* (1990); DOI, *supra* note 125; Layish, *supra* note 110; Judith Romney Wegner, *The Status of Women in Jewish and Islamic Marriage and Divorce Law*, 5 HARV. WOM. L. J. 1 (1982); MERNISSI, VEIL, *supra* note 121; FATIMA MERNISSI, *WOMAN AND ISLAM* (1991)[hereinafter MERNISSI, *WOMAN*]; FATIMA MERNISSI, *THE VEIL AND THE MALE ELITE* (1991)[hereinafter MERNISSI, *MALE ELITE*]; NAILA MINAI, *WOMEN IN ISLAM: TRADITION AND TRANSITION IN THE MIDDLE EAST* (1981); AFZULAR RAHMAN, *ROLE OF MUSLIM WOMAN IN SOCIETY* (1986); *WOMEN IN THE MUSLIM WORLD* (Lois Beck & Nikki Keddie eds., 1978); *WOMEN IN ISLAMIC SOCIETIES: SOCIAL ATTITUDES AND HISTORICAL PERSPECTIVES* (Bo Utas ed., 1983).

¹⁴³ 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.

grounds.¹⁴⁴ An example of a disagreement between the four jurisprudential schools concerns the ability of a wife to divorce her husband. 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.¹⁴⁵ There are other differences among the schools. Hanafi and Shiite are more progressive on the rights of women to contract marriage, whereas Maliki is more progressive on the issue of women obtaining divorces.¹⁴⁶

Men have the right to beat their wives if they do not submit, and the wives must submit and endure his punishments.¹⁴⁷ Muslim women must marry a Muslim man, but a Muslim man can marry Muslim, Christian or Jewish women.¹⁴⁸ Custody is only awarded to women if the children are very young.¹⁴⁹ The notion of *qawama*, or guardianship also has affected the status of women.¹⁵⁰ 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.¹⁵¹

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 'uqdatun 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,¹⁵² the *sharia* courts there are utilizing the 1976 Jordanian Law of Personal Status which is based upon the Hanafi school of jurisprudence.¹⁵³

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.¹⁵⁴ 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.¹⁵⁵ 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.¹⁵⁶ The law also reiterates the principle that Muslim women may not marry non-Muslim men.¹⁵⁷ Also, the marriage contract must have at least one male witness, and it takes the testimony of two women in lieu of one man.¹⁵⁸ The *mahr*, which exists under both custom and religion, must be paid to the woman,¹⁵⁹ and she does not have to use it to furnish the home.¹⁶⁰ 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.

occasions.¹⁷² Each time a husband divorces a wife, she has to leave the house since it belongs only to him.¹⁷³ The wife is entitled to alimony to meet minimal needs.¹⁷⁴ 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.¹⁷⁵ 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;¹⁷⁶ incurable skin or sexual disease;¹⁷⁷ mental disease;¹⁷⁸ desertion of more than one year;¹⁷⁹ inability to pay *mahr*;¹⁸⁰ inability to provide maintenance;¹⁸¹ or inability of the wife to live with the husband.¹⁸² If the divorce is requested on medical grounds, the husband is given one year to get medical advice.¹⁸³ 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.¹⁸⁴ 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 *talaq* 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.¹⁸⁵ Such stipulations are rarely made,¹⁸⁶ 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,¹⁸⁷ 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.¹⁸⁸

Since religious courts have often been ineffectual due to an Israeli military prohibition on enforcement of their orders,¹⁸⁹ much of the work of the courts in the Territories has been currently supplanted by institutions of the *intifada*.¹⁹⁰ Women activists see replacement of the *sharia* norms with egalitarian civil legislation as a critical step that would improve the status of women.¹⁹¹ 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."¹⁹²

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

¹⁸⁵ Welchman, *Islamic Family Law*, *supra* note 154, at 875.

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.

¹⁸⁹ JOHN HENDY, OCCUPIED PALESTINE: TRADE UNIONS AND THE LAW 30 (1989). Decisions of *sharia* courts of the Territories are not recognized in Israel, forcing claimants to start new suits in *sharia* courts in Israel if they want the judgment enforced there. BISHARAT, *supra* note 35, at 141.

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.

¹⁹¹ Marwan Darweish, *The Intifada: Social Change, RACE & CLASS*, Oct.-Dec. 1989, at 47-56. Rita Giacaman & Penny Johnson, *Palestine Women: Building Barricades and Breaking Barriers*, in Lockman & Beinun, *supra* note 14, at 155, 168.

¹⁹² COSSALI & ROBSON, *supra* note 138, at 41.

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 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.

²⁰⁰ See Tunisian Code of Personal Status of 1956; Iranian Family Protection Act of 1967 as amended in 1975 (abrogated in 1979 by Khomeini government); Pakistan Muslim Family Laws Ordinance of 1961, *discussed in* Mayer, *supra* note 52, at 141-42.

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.²⁰¹ 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.²⁰²

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."²⁰³ But they realize that facile adoption of western feminist notions that would constitute clear examples of leading and alien law reform is not appropriate.²⁰⁴ 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.

²⁰³ ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 113 (1991)[hereinafter MAYER, HUMAN RIGHTS]. See works of Fatima Mernissi, *supra* note 143.

²⁰⁴ An-Naim, *Rights*, *supra* note 143, at 516.

economic 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.²⁰⁵

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."²⁰⁶ The reformers have often thus been attacked as western lackeys and agents of western cultural imperialism.²⁰⁷ 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.²⁰⁸ 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.²⁰⁹ They refused to implement leading law reform. In many countries, the ideological battle continues today between the forces for liberal reform and the fundamentalists.²¹⁰

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

²⁰⁵ Ziadeh, *supra* note 52, at 20, 33.

²⁰⁶ Mayer, *supra* note 52, at 143.

²⁰⁷ ABUL ALA MAWDUDI, *PURDAH AND THE STATUS OF WOMEN IN ISLAM* 40 (1979).

²⁰⁸ Mayer, *supra* note 52, at 175.

²⁰⁹ Noel Coulson & Doreen Hinchcliffe, *Women and Law Reform in Contemporary Islam*, in Beck, *supra* note 143, at 48-9.

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.²¹¹ 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.²¹² 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.²¹³

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.²¹⁴ 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.²¹⁵ 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,

²¹¹ See An-Na'im, *Rights*, *supra* note 143; ESPOSITO, *supra* note 58, at 116; An-Na'im, *supra* note 54, at 46; AN-NA'IM, ISLAMIC REFORMATION, *supra* note 84; White, *supra* note 144, at 60 (containing table listing reforms affecting women's status).

²¹² White, *supra* note 144, at 58. For more on Tunisia, see ESCHER M. RHOODIE, DISCRIMINATION AGAINST WOMEN: A GLOBAL SURVEY 363, 369 (1989).

²¹³ *Id.* at 59.

²¹⁴ *Id.*

²¹⁵ For exceptions, see MAHMOUD MOHAMED TAHA, THE SECOND MESSAGE OF ISLAM (A. An-Na'im trans., 1987); An-Na'im, *Rights*, *supra* note 143, at 497.

he does not find it problematic if women occupy political positions.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.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 *qawama*, the male guardianship provision. The Koranic verse presents *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 *qawama* could be revised.²¹⁸ Professor An-Na'im also thinks that reform efforts can be justified today given that there are aspects of the *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.²¹⁹ Thus, Palestinian framers could use the reasoning of Professor An-Na'im to modify *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 *Hamas*, who are dominating the public fora, and

²¹⁶ See Muhammad al-Ghazali, *Qadaya al-mar'ah: Bayna al-taqalid al-rakida wa al-wafida* (Women's Issues: Between Stagnant and Incoming Traditions) (1990), described in As'ad AbuKhalil, *A New Arab Ideology? The Rejuvenation of Arab Nationalism*, 46 MIDDLE EAST J. 22, 32-33 (1992).

²¹⁷ *Id.* at 33.

²¹⁸ An-Na'im, *Human Rights*, *supra* note 54, at 47.

²¹⁹ AN-NA'IM, ISLAMIC REFORMATION, *supra* note 84, at 91; 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 Kasturi.

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. LAYISH, *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.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."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

²²⁶ An-Na'im, *supra* note 54, at 47.

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.²²⁸ 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.²²⁹ 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.²³⁰ 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."²³¹

There are also arguments by cultural relativists that international human rights are western in nature, and not suitable for those in the developing world.²³² 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.²³³ 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.²³⁴

²²⁸ Louis Henkin, *The Universality of the Concept of Human Rights*, ANNALS 506, November 1989, at 12, 14-15.

²²⁹ MAYER, HUMAN RIGHTS, *supra* note 204, at 29.

²³⁰ *Id.* at 30-1.

²³¹ *Id.* at 31.

²³² These arguments are discussed in the context of female circumcision by Alison T. Slack, *Female Circumcision: A Critical Appraisal*, 10 HUM. RTS. Q. 437 (1988). Also see Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984).

²³³ Riane Eisler, *Toward an Integrated Theory of Action*, 9 HUM. RTS. Q. 296 (1987).

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 women²³⁵ 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.²³⁶ 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.²³⁷ There is, however, a draft Charter on Human and Peoples Rights in the Arab World,²³⁸ which is a product of the Islamic Conference, to which all Muslim countries belong. The Charter does endorse human rights as compatible with Islam.²³⁹

The major protections of rights, however, are to be found in: the United Nations Charter; the Universal Declaration of Human Rights;²⁴⁰ the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention);²⁴¹ the International Covenant on Civil and

²³⁵ See Natalie K. Hevener, *An Analysis of Gender Based Treaty Law: Contemporary Developments in Historical Perspective*, 8 HUM. RTS. Q. 70 (1986).

²³⁶ See Council of the Arab League, Res. 2443/48, Sept. 3, 1968; Istvan Pogany, *Arab Attitudes Toward International Human Rights Law*, 2 CONN. J. INT'L L. 367, 373 (1987).

²³⁷ Burns H. Weston, Robin Ann Lukes, & Kelly M. Hnatt, *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT'L L. 585 (1987).

²³⁸ Karen Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 MICH. J. INT'L L. 517, 537 n.67 (1992).

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.

²⁴⁰ U.N. Doc. A/810, G.A. Res. 217 (III) at 71 (1948)[hereinafter Universal Declaration].

²⁴¹ G.A. Res. 34/180, 34 U.N. GAOR Supp. (no. 710.46) at 193, U.N. Doc. A/34/46 (1979) (entered into force Sept. 3, 1981). For sources on the topic of women's rights, see Rebecca J. Cook, *International Human Rights Law Concerning Women: Case Notes and Comments*, 23 VAND. J. TRANSNAT'L L. 779 (1990); Ann Bayefsky, *The Principle of Equality or Non-Discrimination in International Law*, 11 HUM. RTS. L.J. 1 (1990); Bunch, *Women's Rights as Human Rights: Toward a Revision of Human Rights*, 12 Hum. Rts. Q. 486 (1990); Buqicchio-de Boer, *Sexual Discrimination and the Convention on Human Rights*, 6 Hum. Rts. L.J. 1 (1985); Noreen Burrows, *The 1979 Convention on the Elimination of All Forms of Discrimination Against Women*, 32 NETH. INT'L L. REV. 419 (1985); Noreen Burrows & Orucu, *The International Approach to Discrimination*, in THE LEGAL RELEVANCE OF GENDER: SOME ASPECTS OF SEX-BASED DISCRIMINATION 267 (Shiela McLean & Noreen Burrows eds., 1988); Rebecca J. Cook, *The International Right to Nondiscrimination on the Basis of Sex*, 14 YALE J. INT'L L. 161 (1989); Rebecca J. Cook, *Reservations to the Convention on the Elimination of*

Political Rights (ICCPR),²⁴² and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁴³ The Preamble of the United Nations Charter reaffirms "the equal rights of men and women."²⁴⁴ 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."²⁴⁵ Article 13 of the

All Forms of Discrimination Against Women, 30 VA. J. INT'L L. 643 (1990); Rebecca J. Cook, *Women's International Human Rights: A Bibliography*, 24 N.Y.U. J. INT'L L. & POL. 857 (1992); Engle, *supra* note 239, at 517; Sandra Colliver, *United Nations Machinery on Women's Rights: How They Better Help Women Whose Rights are Being Violated*, in *NEW DIRECTIONS IN HUMAN RIGHTS* 25-49 (Ellen Lutz, Hurst Hannum, and K. Burke eds., 1989); Freeman, *Measuring Equality: An International Perspective on Women's Capacity and Constitutional Rights*, 5 BERK. WOMEN'S L. J. 110 (1989-1990); Sarah C. Zearfoss, *Note, The Convention for the Elimination of All Forms of Discrimination Against Women: Radical, Reasonable, or Reactionary?*, 12 MICH. J. INT'L L. 903 (1991); Jack Greenberg, *Race, Sex, and Religious Discrimination in International Law*, in 2 *HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* 307 (Theodor Meron ed. 1984); THEODOR MERON, *HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS: A CRITIQUE OF INSTRUMENTS AND PROCESS* 60 (1986); WARWICK MCKEAN, *EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW* 166 (1983); Noreen Burrows, *International Law and Human Rights: The Case of Women's Rights*, in *HUMAN RIGHTS: FROM RHETORIC TO REALITY* 80 (Tom Campbell et al. eds., 1986); Andrew C. Byrnes, *The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women*, 14 YALE J. INT'L L. 1 (1989); Andrew C. Byrnes, *Women, Feminism and International Human Rights Law -- Methodological Myopia, Fundamental Flaws or Meaningful Marginalization?*, 12 AUSTL. Y.B. INT'L L. 205 (1992); MALVINA HALBERSTAM & ELIZABETH F. DEFELS, *WOMEN'S LEGAL RIGHTS: INTERNATIONAL COVENANTS AN ALTERNATIVE TO ERA?* (1987); Rita F. Taubenfeld & Howard J. Taubenfeld, *Achieving the Human Rights of Women: The Base Line, The Challenge, The Search for a Strategy*, 4 HUM. RTS. 125 (1975); Theodor Meron, *Editorial Comments: Enhancing the Effectiveness of the Prohibition of Discrimination Against Women*, 84 AM. J. INT'L L. 213 (1990); Margaret E. Galey, *International Enforcement of Women's Rights*, 6 HUM. RTS. Q. 463 (1984); Laura Reanda, *Human Rights and Women's Rights: The United Nations Approach*, HUM. RTS. Q., Spring 1981, at 11; Fran P. Hosken, *Toward a Definition of Women's Human Rights*, HUM. RTS. Q., Spring 1981, at 7; Eisler, *supra* note 234; Helen B. Holmes, *A Feminist Analysis of the Universal Declaration of Human Rights*, in *BEYOND DOMINATION: NEW PERSPECTIVES ON WOMEN AND PHILOSOPHY* 250 (Carol C. Gould ed., 1983); Marilyn Waring, *Gender and International Law: Women and the Right to Development*, 12 AUSTL. Y.B. INT'L L. 177 (1992); Shelly Wright, *Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions*, 12 AUSTL. Y.B. INT'L L. 241 (1992).

²⁴² G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 53-56, U.N. Doc. A/6316 (1967) (entered into force Mar. 23, 1976) [hereinafter ICCPR]. See also the Convention on the Political Rights of Women, which was adopted by the General Assembly in 1952, and entered into force on July 7, 1954. 27 U.S.T. 1909; T.I.A.S. No. 8289; 193 U.N.T.S. 135, 7 U.N. GAOR Supp. (no. 20) at 28, U.N. Doc. A./2334 (1952) [hereinafter Women's Convention].

²⁴³ G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (no. 16) at 49-50, U.N. Doc. A/6316 (1967) (entered into force Jan. 3, 1976).

²⁴⁴ Preamble, U. N. Charter, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, 1976 Y.B.U.N. 1043.

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.

²⁴⁷ Burns Weston, *Human Rights, in* HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 22-23 (Richard Pierre Claude & Burns H. Weston eds., 1989).

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-Naim, *Rights, supra* note 143, at 491.

²⁵⁰ G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49-52, U.N. Doc. A/6316 (1966), art. 3 [hereinafter ICESCR].

²⁵¹ *Id.* art. 7(a)(i).

²⁵² *Id.* art. 10(1).

²⁵³ ICCPR, *supra* note 243, art. 2. See also the Convention on the Political Rights of Women, opened for signature Mar. 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135.

²⁵⁴ *Id.* art. 3.

²⁵⁵ *Id.* art. 25.

²⁵⁶ *Id.*

and to have access to public services.²⁵⁷ Another section requires parties to "insure equality of rights and responsibilities of spouses as to marriage, during marriage and at dissolution."²⁵⁸ 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.²⁵⁹ 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.²⁶⁰

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 1991.²⁶¹ 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.²⁶²

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."²⁶³ The Convention contains fifteen articles detailing the fields where states must take "appropriate measures," including: education;²⁶⁴ health care;²⁶⁵

²⁵⁷ *Id.*

²⁵⁸ *Id.* art. 23.

²⁵⁹ MAYER, HUMAN RIGHTS, *supra* note 204, at 24.

²⁶⁰ *Id.*

²⁶¹ Zearfoss, *supra* note 242, at 903 n.2.

²⁶² G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979)(entered into force Sept. 3, 1981).

²⁶³ Burrows, *supra* note 242, at 82.

²⁶⁴ 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;²⁶⁶ cultural;²⁶⁷ familial and personal;²⁶⁸ legal and political activities;²⁶⁹ employment;²⁷⁰ recreation;²⁷¹ and mortgages and other forms

programmes and the adaptation of teaching methods" as well as [a]ccess to specific educational information on family planning." It does not mandate coeducation, but merely encourages it. *Id.* Art. 10(c).

²⁶⁵ *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."

²⁶⁶ *Id.* art. 9.

²⁶⁷ *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."

²⁶⁸ *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."

²⁶⁹ *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."

²⁷⁰ *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. MERON, *supra* note 242, at 74. For a United States case involving protective conditions for women, see *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.²⁷² Affirmative action is permitted, but "shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."²⁷³ 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.²⁷⁴ 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.²⁷⁵ 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.²⁷⁶ 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."²⁷⁷

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 RHOODIE*, *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.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."²⁷⁹ He recommends the modification of cultural and social patterns through education and government incentives, rather than state encroachment into the private sphere.²⁸⁰ Meron attempts to reconcile the Women's Convention with the Declaration on Religion and finds that he cannot.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."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."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

²⁷⁸ MERON, HUMAN RIGHTS LAW-MAKING, *supra* note 242, at 62.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 62-3.

²⁸¹ There is a specific declaration, but no Convention yet on Religious discrimination. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/RES/36/55 (1982).

²⁸² MERON, *supra* note 242, at 155.

²⁸³ An-Na'im, *Rights*, *supra* note 143, at 516.

in respect of a very powerful state."²⁸⁴ 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.²⁸⁵ 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.²⁸⁶

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.²⁸⁷

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."²⁸⁸ 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,²⁸⁹ 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."²⁹⁰ 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.²⁹¹ 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.²⁹² 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).²⁹³ 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.²⁹⁴ The Optional Protocol to the ICCPR empowers the Human Rights Committee to act on individual complaints.²⁹⁵ None of these institutions has properly handled enforcement of women's rights.²⁹⁶

The Women's Convention enforcement mechanisms are unusually insubstantial, even for human rights agreements, which are notorious for their weak enforcement.²⁹⁷ A twenty-three person committee meets for not more than two weeks annually²⁹⁸ 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.²⁹⁹ There are several major failings with this procedure. First, two weeks is totally insufficient, and the committee is so backlogged with

²⁹³ 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.

²⁹⁴ U.N. Doc. E/CN.6/124, at 7 (1949). For more on the Commission, see Malvina H. Guggenheim, *The Implementation of Human Rights by the U.N. Commission on the Status of Women: A Brief Comment*, 12 TEXAS J. INT'L L. 239 (1977).

²⁹⁵ ICCPR, *supra* note 243.

²⁹⁶ Reanda, *supra* note 242, at 11.

²⁹⁷ 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)).

²⁹⁸ Women's Convention, *supra* note 243, arts. 20 and 21.

²⁹⁹ *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 1986.³⁰⁰ No other human rights treaty organ is subjected to such a constraint.³⁰¹ Second, the Committee has no authority to do anything other than hear reports. It can not hear individual complaints.³⁰² 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.³⁰³ Finally, the Committee is isolated geographically since the Commission on Human Rights meets in Geneva, not Vienna.³⁰⁴

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.³⁰⁵ 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.³⁰⁶ States have also restricted or banned the husband's right to be polygamous.³⁰⁷ Restrictions have also been placed on the husband's right to unilaterally terminate the marriage.³⁰⁸ Mothers have been granted longer custody of children.³⁰⁹ Inheritance codes have been amended as well.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.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

³⁰⁶ Coulson & Hinchcliffe, *supra* note 210, at 37, 39.

³⁰⁷ *Id.* at 40. Tunisia, Israel, Turkey and the former Soviet Union prohibited polygamy altogether. *Id.*

³⁰⁸ *Id.* at 43. Most countries have restricted the husband's right to unilaterally terminate the marriage. *Id.*

³⁰⁹ *Id.* at 45.

³¹⁰ Reforms in this area have been less far reaching. Tunisia, Somalia, Sudan, Egypt, and Iraq have made some changes. *Id.* at 47. A table of Islamic reforms in the various countries can be found in *Id.* at 49-50.

³¹¹ KEVIN DWYER, *ARAB VOICES: THE HUMAN RIGHTS DEBATE IN THE MIDDLE EAST* 237 n.2 (1991). For more on Egypt, see RHOODIE, *supra* note 213, at 363.

on procedural grounds in 1985.³¹² 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.³¹³ 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.³¹⁴ The law conflicts with the current 1989 Constitution, which includes provisions for equality before the law without discrimination on the basis of gender;³¹⁵ a commitment to ensure equality in rights and duties among all citizens;³¹⁶ and a guarantee of fundamental liberties and human rights.³¹⁷ 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.³¹⁸

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.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.³²⁰ The focus of the upper class Palestinian women's efforts, like

³¹⁹ This section draws heavily from Wing, *Decision-Making*, *supra* note 14, at 134-139.

³²⁰ Islah Jad, *From Salons to the Popular Committees: Palestinian Women 1919-1989* in Nassar & Heacock, *supra* note 14, at 126. For more on women's movements, see JOOST HILTERMANN, *BEHIND THE INTIFADA: LABOR AND WOMEN'S MOVEMENT IN THE OCCUPIED TERRITORIES* 92 (1991); Hamida Kazi, *Palestinian Women and the National Liberation Movement; A Social Perspective*, in *WOMEN IN THE MIDDLE EAST* 26 (1987); Rita Giacaman & Muna Odeh, *Palestinian Women's Movement in the Israeli-Occupied West Bank and Gaza Strip*, in *WOMEN OF THE ARAB WORLD: THE COMING CHALLENGE* 57 (Nahid Toubia ed., 1988).

those of the movement in general, was to end the occupation.³²¹ 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!"³²² 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.³²³ There were also women who participated as messengers and fighters during the 1936 revolt against the British.³²⁴ 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.³²⁵ After the forming of the Palestine Liberation Organization in 1964, one of the mass organizations formed was the General Union of Palestinian Women.³²⁶

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.³²⁷

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 MATIEL MOGANNAM, *THE ARAB WOMAN AND THE PALESTINE PROBLEM* (1937); ELISE G. YOUNG, *KEEPERS OF THE HISTORY* 144 (1992).

³²³ Jad, *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.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.³²⁹ In 1978 college educated women activists established the Women's Work Committee in Ramallah.³³⁰ This group attracted and sought out professional, clerical, and factory workers for the first time.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.³³²

Custom and religion have been greatly influenced by the *intifada*.³³³ For example, Palestinian legal actors have traditionally been highly respected men of senior stature who have served as religious or customary law mediators, *qadis*, and lawyers (*muhamein*).³³⁴ The numbers and types of legal actors have expanded during the *intifada*. The Underground Leadership of the Uprising (UNLU), popular justice committees, and private individuals now mediate such issues as spousal quarrels and regulate *mahr* reductions. They do so based upon the legitimacy they have gained for the roles they have played during the *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 *intifada*. He continues to hear disputes as well.³³⁵

Women's participation in the *intifada* has been "comprehensive, direct and active."³³⁶ They were encouraged by the underground UNLU³³⁷

³²⁸ Jad, *supra* note 321, at 132.

³²⁹ *Id.*

³³⁰ STRUM, *supra* note 117, at 59.

³³¹ HILTERMANN, *supra* note 321, at 133.

³³² *Id.* at 134.

³³³ Throughout the *intifada*, the Palestinian Press has featured articles on the return to customary law. HUNTER, *supra* note 14, at 3.

³³⁴ See generally BISHARAT, *supra* note 35.

³³⁵ JOHN WALLACH & JANET WALLACH, THE NEW PALESTINIANS: THE EMERGING GENERATION OF LEADERS 43 (1992).

³³⁶ Rita Giacaman, *Palestinian Women in the Uprising*, 2 J. REFUGEE STUD. 139, 142 (1989).

³³⁷ Darweish, *supra* note 192, at 59.

to become involved in executive functions of the newly formed popular committees,³³⁸ especially those functions relating to their traditional role as "sustainers,"³³⁹ such as medical relief, food distribution, and fund raising.³⁴⁰ Women collected donations, ran blood banks, passed out leaflets, watched for soldiers and looked after families of the dead, arrested and wounded.³⁴¹ They have been arrested, killed, and wounded as well.³⁴² 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.³⁴³ 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.³⁴⁴

³³⁸ Ziad Abu-Amr, *The Palestinian Uprising in the West Bank and Gaza Strip*, 10 ARAB STUD. Q. 384, 399. For a discussion of the liberating role of women, see Darweish, *supra* note 192, at 59; Aaron David Miller et al., *Two Years of Intifada: Its Impact on American, Israeli, and Palestinian Political Climates*, 31 AM. ARAB AFF. 29, 36 (1989-1990)(quoting Professor Hanan Ashrawi); Rita Giacaman & Penny Johnson, *Palestinian Women: Building Barricades and Breaking Barriers*, in INTIFADA, *supra* note 192, at 155; Eileen Kuttab, *Community Development Under Occupation: An Alternative Strategy*, 2 J. REFUGEE STUD. 131, 135; Yezid Sayigh, *The Intifada Continues: Legacy, Dynamics, and Challenges*, 11 THIRD WORLD Q. 20, 37 (1989); Jad, *supra* note 321.

³³⁹ DON PERETZ, INTIFADA 96 (1991). Hiltermann also saw women's gains as an extension of their traditional teaching and rendering service. HILTERMANN, *supra* note 321, at 197; Joost R. Hiltermann, *The Women's Movement During the Intifada*, J. PALESTINE STUD., Spr. 1991, at 52-53; Jad, *supra* note 321, at 135. According to Professor Peteet, "long-term conflict makes for flux as gender roles and ideologies are blurred and subject to conscious reexamination. Households are mobilized for communal defense, and women take on tasks usually associated with men. Yet there also occurs a process of feminization of specific sectors of the national movement. Both processes involve a complex reconceptualization of gender." JULIE M. PETEET, GENDER IN CRISIS: WOMEN & THE PALESTINE RESISTANCE MOVEMENT 8 (1991).

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.

³⁴⁴ BISAN CENTRE, THE INTIFADA AND SOME WOMEN'S SOCIAL ISSUES (1991). *Hijab* campaign is discussed in Wing, *Decision-Making*, *supra* note 14, at 134-139.

Representatives of the women's committees actively intervene in domestic disputes if a woman requests it. Their interventions have met with mixed success.³⁴⁵ These are all instances where an enhanced awareness about the perceived inequalitarian 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.³⁴⁶ 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 communiqués and the pattern of arrests and deportations suggests the leadership is generally male.³⁴⁷

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.³⁴⁸ The fundamentalist group *Hamas* has called her a "loose woman."³⁴⁹ 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

³⁴⁵ Joost Hiltermann, *Trade Unions and Women's Committees, Sustaining Movement, Creating Space*, MIDDLE E. REP. May-Aug. 1990, at 32-36. Hiltermann does not detail examples of success or failure.

³⁴⁶ Hiltermann, *supra* note 340, at 53.

³⁴⁷ *Id.*; Giacaman & Johnson, *supra* note 192, at 165.

³⁴⁸ WALLACH & WALLACH, *supra* note 336, at 3.

³⁴⁹ *Id.* at 30.

female should not be overstated. It is aberrational at this point in time.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.³⁵¹ Women's committees have also started to give lectures about personal status and divorce law.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.³⁵³ Two of the main women's groups have demanded a progressive family status code.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.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

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. RHOODIE, *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, *supra* note 336, at 102.

³⁵¹ STRUM, *supra* note 117, at 150.

³⁵² Hiltermann, *supra* note 340, at 56.

³⁵³ Hiltermann, *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, *supra* note 117, at 226-27. During my March 1993 trip, several women indicated that such groups had sporadically met after the Gulf War.

³⁵⁴ Salim Tamari, *Left in Limbo: Leninist Heritage and Islamist Challenge*, MIDDLE EAST REP. 16, 21 (Nov.-Dec. 1992).

³⁵⁵ STRUM, *supra* note 117, at 144.

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.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.³⁵⁷ Individual women and couples have refused as well,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*.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.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.³⁶¹ These groups "perceive themselves to be fully equal participants in the national movement, not mere adjuncts to the male leaders and combatants."³⁶² The aim of the Council is to strike a balance between the

³⁵⁶ Darweish, *supra* note 192, at 56.

³⁵⁷ WARNOCK, *supra* note 162, at 63.

³⁵⁸ STRUM, *supra* note 117, at 151.

³⁵⁹ Interview with S, Gaza lawyer, March 23, 1993, in Gaza.

³⁶⁰ WARNOCK, *supra* note 162, at 61. The bride price in 1985 could be between 2000-3500 dinars (14000-7000) 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.

³⁶¹ *Id.* at 135.

³⁶² PERETZ, *supra* note 340, at 97.

national liberation struggle and women's social struggle.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."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."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.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.³⁶⁷ Suha Hindiye, director of the Women's Resource Centre, has stated:

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

³⁶³ Hiltermann, *supra* note 340, at 53.

³⁶⁴ Rosemary Sayigh, *Encounters with Palestinian Women under Occupation in OCCUPATION: ISRAEL OVER PALESTINE* 269, 282 (Naseer Aruri ed., 1984).

³⁶⁵ *quoted in* WALLACH & WALLACH, *supra* note 336, at 106.

³⁶⁶ *Id.* at 118.

³⁶⁷ MARIA HOLT, *HALF THE PEOPLE: WOMEN'S HISTORY AND THE PALESTINIAN INTIFADA* 14 (1992).

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.³⁶⁸

The *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.³⁶⁹ An important illustration of this retrenchment was the *hijab* campaign launched by *Hamas* in 1989 which resulted in the imposition of head scarves on all women in Gaza. The traditionalists portrayed wearing of the *hijab* as a sign of political commitment to the *intifada*, cultural struggle, and national heritage.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."³⁷¹

The situation reached a crescendo when traditionalists threatened two activist women who had only recently donned the *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.³⁷² This is the ultimate insult to a Palestinian nationalist, and invokes the most serious consequences for the accused. Numerous alleged collaborators have been

³⁶⁸ *Id.* at 43.

³⁶⁹ HILTMANN, *supra* note 321, at 193. See generally STRUM, *supra* note 117.

³⁷⁰ Rema Hammami, *Women, the Hijab, and the Intifada*, MIDDLE E. REP., May-Aug. 1990, at 25, 26.

³⁷¹ *Id.* at 26.

³⁷² *Id.*

killed by their fellow Palestinians on frequently unsubstantiated grounds.³⁷³ 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.³⁷⁴

An *intifada* justice committee³⁷⁵ 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.³⁷⁶ The next UNLU communique (*bayan*) condemned "attacks by radical groups on Palestinian women in Jerusalem, Hebron and Gaza."³⁷⁷ 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.

³⁷⁴ Hammami, *supra* note 371, at 26.

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."³⁸¹

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.³⁸² *Hamas* activists have continued to patrol the Gaza streets looking for inappropriately attired women and dousing them with vegetable dye as punishment.³⁸³ 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.³⁸⁴ In addition to the Gazans, women in parts of the West Bank feared being attacked with stones and pelted with fruit as well.³⁸⁵ The UNLU and other nationalists have been clearly unable or perhaps unwilling to counter the growing fundamentalist tendency.³⁸⁶ 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.³⁸⁷ 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 Communiques Nos. 3, 9, and 23, *reprinted in* Hiltermann, *supra* note 340, at 53-54. *See also* UNLU Communiques Nos. 1 and 14, *reprinted in* INTIFADA: THE PALESTINIAN UPRISING, *supra* note 14, at 328, 347.

³⁹¹ UNLU Communiqué No. 24, *reprinted in Id.* at 377.

³⁹² Communiques Nos. 8, 29, and 53, *in* Hiltermann, *supra* note 340, at 54.

³⁹³ UNLU Communiqué No. 21 cited in HILTERMANN, *supra* note 321, at 20.

³⁹⁴ HILTERMANN, *supra* note 321, at 201.

³⁹⁵ UNLU Communiqué No. 23, *reprinted in* INTIFADA: THE PALESTINIAN UPRISING, *supra* note 14, at 372.

³⁹⁶ Hiltermann, *The Women's Movement*, *supra* note 340, at 54.

struggle."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."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."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."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."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.⁴⁰² Many women want to be active participants

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ PNC Declaration, *supra* note 4.

⁴⁰⁰ *Id.*

⁴⁰¹ HILTERMANN, *supra* note 321, at 202.

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 its 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.⁴¹⁰ He noted that there were 37 female members in the 301 member Palestine National Council, a percentage that compares favorably to developed nations.⁴¹¹ "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."⁴¹² 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.⁴¹³ Legal penetration is the social grasp of the law, the degree to which the system actually penetrates and controls social life.⁴¹⁴ 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.⁴¹⁵ 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.

⁴¹⁶ MERON, HUMAN RIGHTS LAW MAKING, *supra* note 242, at 55.

⁴¹⁷ An-Na'im, *supra* note 81, at 289. For a chart noting the Muslim state signatories to the Civil and Political Rights Convention and Economic, Social and Cultural Rights Conventions, see Aryn B. Sajoo, *Islam and Human Rights: Congruence or Dichotomy*, 4 TEMP. INT'L & COMP. L.J. 23, 34 (1990).