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## A Case Study of Third World Jurisprudence - Palestine: Conflict Resolution and Customary Law in a Neopatrimonial Society

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# A Case Study of Third World Jurisprudence—Palestine: Conflict Resolution and Customary Law in a Neopatrimonial Society

By  
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## PREFACE

The following true story demonstrates in a colorful manner Palestinian legal culture.

Eating in a restaurant one afternoon, Taher,<sup>1</sup> a thirty-seven year old Palestinian living in the Gaza Strip, was distracted from his meal by the sound of a loud crash. Upon exiting the restaurant, he discovered shattered glass strewn

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\* The authors wish to thank Dr. Nazmi Al-Jubeh for his time and effort in overseeing our research and Sara Folchi and Ian Eliasoph for ushering us to the finish.

1. Interview with Taher, in Gaza (Feb. 26, 2001) [hereinafter Taher]. Actual name has been changed.

about the street and two cars enmeshed in a tangle of steel. In one car, a policeman cursed his bad luck. A crowd slowly extricated an elderly man from the other. To Taher's shock and amazement, the policeman did not exit his car to offer help to this injured man. Taher's indignation increased with the suspicion that the policeman caused the accident, as it was his experience that Palestinian security vehicles speed through Gaza's streets at a reckless pace. The bystanders seemed to have come to a similar conclusion.<sup>2</sup>

As Taher relates the story: "His behavior really shocked us. We told him to get out of the car because he was conducting himself in a shameful manner. He behaved as if he didn't care at all about the injured person. But he wouldn't get out. So we pulled him out. He then slapped my friend, the owner of the restaurant, in the face. At this point, I saw him [the policeman] pull out his gun." In a display of misjudged bravado, Taher said to the policeman: "Ah, you think you're tough? Either put away the gun or be a real man and shoot." The policeman shot two rounds. The first bounced off the pavement and hit a person in the crowd. The second lodged itself in Taher's knee.

An ambulance rushed Taher to the hospital. The shooter went to the police station and handed himself in. Because the shooter was a policeman (a personal bodyguard to Ghazi El-Jabali, the Gazan Chief-of-Police), his case was submitted to a military court. The shooter pleaded self-defense, claiming that he shot at the ground to protect himself because the crowd had become uncontrollable. The court sentenced him to a year in prison and released him from his duties on the police force.<sup>3</sup>

While the military trial took place, Taher lay in the hospital with a serious leg injury. The day after the shooting, the shooter's relatives began the reconciliation process required by customary law and commissioned a neutral delegation (a *jaha*) to approach Taher's family.<sup>4</sup> This delegation consisted of about 15 people, including respected elders and members of the police force. The *jaha* called on Taher's extended family and pleaded for a three-day truce (an *atwa* or a *wijh*). Taher's family agreed and promised not to attack or retaliate in any way during this period, despite their right to do so under traditional law.<sup>5</sup> After three days, the *jaha* returned once again, seeking to extend the truce until Taher recovered his health.

Taher was released from the hospital after three months of recuperation, and only then did he inform the shooter's family that he was willing for the *utwa* phase (during which Taher's family puts a monetary price on reconciliation) to begin. Taher's family opened the negotiations by demanding of 20,000 Jordanian Dinars (approximately 30,000USD) compensation, an exorbitant price

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2. *Id.*

3. *Id.*

4. It is traditional that no direct contact be made between the aggrieved and the aggressor's families during this initial, sensitive period. *Id.*

5. This right falls under the general rubric of "an eye for an eye; a tooth for a tooth." *Koran, Sura 5:46*. In Bedouin desert culture, the right is known as *akhaza assar wa nafa el'ar*, which literally means "he took revenge and did away with the shame." AREF EL-AREF, BEDOUIN LOVE, LAW, AND LEGEND 86 (1974).

beyond the means of the shooter's extended family.<sup>6</sup> Through negotiating, the *jaha* persuaded Taher's family to reduce the amount to 5000 Jordanian Dinars (about 7,500USD), which the shooter's relatives promptly collected and delivered.

Taher, however, was not ready to sign any sort of reconciliation (*sulha*) agreement. He knew that the Palestinian National Authority (hereinafter PNA) police were accustomed to releasing prisoners from their jails once they had proof that the perpetrator and victim's families had made *sulha* and he wanted the shooter to suffer for the pain and torment he had inflicted. Thus, Taher continually extended the *utwa* period, postponing final reconciliation. For four months, he staved off the social pressure building around him. As Taher relates: "[The shooter's] buddies approached me, and his friends from all over [Gaza] were coming, to ask me to put this behind me, saying that he didn't mean to shoot me and that it wasn't personal. At the end of this four-month period, I finally decided to make *sulha*."

Taher's family, the policeman's relatives, and the *jaha* gathered in Taher's family's *diwan* (traditional tribal meeting place) for the symbolic ceremony. When they were seated, Taher's oldest and most respected family member, Sheikh Wajih, gave a short speech during which he said: "I am sorry that this event has occurred between our two families and I hope this will never happen again. We have forgiven and all is forgotten."<sup>7</sup> Spokesmen from both the *jaha* and the shooter's family rose next and lavished thanks and praises on Taher's family for being so generous, forgiving, understanding, wise, and honorable. All three speakers quoted various Koranic verses that address the role of forgiveness.

Sheikh Wajih then seized the moment to return the much bargained for 5000 Jordanian Dinars to the policeman's family.<sup>8</sup> In a further gesture, Taher's family consented to the shooter returning to his previous employment as a policeman. The two families signed the reconciliation agreement and sealed the occasion with a cup of coffee. Soon after, the shooter's relatives presented the formal letter of reconciliation to the police whereupon, as Taher had predicted, the shooter was released from jail (after serving only six months of his sentence).

According to Taher, the process described above typifies how Palestinian Arabs resolve their civil and legal conflicts.<sup>9</sup>

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6. The average income in Gaza is about \$1,000 a year. Counsel for the National Interest, *December 2001: A Fact Sheet on Israel and Palestine*, <http://www.cnionline.org/decfsht.htm> (last visited on Apr. 4, 2002). Time Magazine reports that the unemployment rates in Gaza and the West Bank are 48.5% and 30.3% respectively. TIME, March 25, 2002, at 41.

7. Taher, *supra* note 1.

8. According to interviews, this is not an uncommon occurrence. Returning the *firash el-atwa* money has a two-fold significance. The first is social, in effect signifying that the family's honor has no price. What Taher's family forfeited in cash, it subsequently gained in social prestige. The second is religious, affirming that real punishment is in God's sole domain. *Id.*

9. After being told the details of the case above, Ibrahim Shehada, director of the Gaza Center for Rights and Law, said that he, too, thought that all the proceedings described above were

## I. INTRODUCTION

The investigation of Palestinian customary law is important to those in the international community who seek to incorporate Western-style institutions in developing countries, in general, and are interested in “democratizing” and “stabilizing” the Middle East, in particular. On the face of it, the prevalence of customary law is a curious phenomenon, since the PNA (dependent on international aid) is under close European and American scrutiny to adapt its bureaucracy to Western notions of democracy and justice.<sup>10</sup> Therefore, it is important to remind U.N. and international field workers that the Palestinian judiciary did not develop in a vacuum. Rather, the Palestinians’ long history of judicial techniques, and ongoing sociological conditions, perpetuate a customary law system. Understanding these factors is critical for those advocates hoping to create a fundamental change that does not disrupt the social fabric, or offend the cultural values, of Palestinian society.

Furthermore, this Comment rests on the conviction that any comprehensive peace in the Middle East entails both a formal and substantive process of reconciliation between the Palestinian and Israeli peoples. Peace and development researchers interested in facilitating coexistence in the Middle East need to understand the cultural roots, language, and actions of both these partners.<sup>11</sup> Effective communication is only possible when there is a deep appreciation of the social variables that are critical to one’s partner-in-dialogue. In this case, the field of conflict resolution has much to gain from an understanding of Palestinian notions of reconciliation and justice.

Taher’s story typifies the legal dynamics of modern Palestine, where the legal culture accommodates tribal law in conjunction with a nascent Western jurisprudence. For a variety of reasons, the PNA appears to be incorporating customary law into its fledgling bureaucracy. This Comment endeavors to understand the factors that have created this unique hybrid of Arab and Western legal practice.

In Part II, we will provide an overview of customary law as practiced and developed over centuries by the area’s desert-dwelling Bedouins. We will de-

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typical of a criminal case involving two families in Gaza. Telephone interview with Ibrahim Shehada, Gaza Center for Rights and Law (Feb. 8, 2001).

In Taher’s opinion, the only atypical element was the fact that, as a result of the shooter’s family’s connections and clout, the policeman was released from jail early. Taher believes that, had this case not involved a policeman defendant, the perpetrator would have remained incarcerated for the duration of his one-year sentence. Taher, *supra* note 1.

10. Rex Brynen, *Buying Peace? A Critical Assessment of Internal Aid to the West Bank and Gaza*, 25:3 *J. OF PALESTINE STUD.* 80 (1996).

11. For a further discussion of this subject, see GREGORY TILLER, *RESOLVING CONFLICT: A PRACTICAL APPROACH* (1991); see also RAYMOND COHEN, *NEGOTIATING ACROSS CULTURES, COMMUNICATION OBSTACLES IN INTERNATIONAL DIPLOMACY* (1991). Both authors discuss the importance, in diplomatic negotiations, of fathoming the cultural differences between conflicting parties. Tiller emphasizes the importance of realizing that each conflict has a very specific cultural context. And since most conflict resolution facilitators come from a white, Western, educated background, cultural fluency is essential to the ability to facilitate effective communication.

scribe how socio-ecological conditions were instrumental in creating fierce tribal affiliation that, in turn, molded a judicial philosophy wherein individuals were not perceived as legal entities unto themselves, but rather as constituents of the larger, responsible clan. We will then briefly outline how this customary law dynamic persisted in Palestine throughout 500 years of foreign rule, including the advent of quasi-independence.

In Part III, we will explore the sociological underpinnings and patriarchal characteristics of Palestinian society that appear to be encouraging the incorporation of customary law into the PNA. We will argue that the neopatrimonial character of modern Palestine perpetuates traditional dynamics despite the institution of Western modes of government and civil bureaucracy. The manifestations of neopatrimonialism in modern Palestine are numerous, and the political framework, economic structure, and security apparatus all serve to perpetuate clientelism by strengthening tribal politics to the detriment of democratic modes of government organization.

In Part IV, we will provide a contemporary description of Palestinian legal culture. The Palestinian judiciary is beset by many problems inherent in the chaos and bureaucratic shortcomings inevitable to any new state. Customary law has stepped into the void to provide a viable recourse for the local populace to resolve their differences. Consequently, not only do the Palestinian judiciary and customary law exist side-by-side in an often symbiotic relationship, but the PNA appears to be encouraging the incorporation of customary law into its fledgling bureaucracy and officially facilitating the tribal law dynamic.

In Part V, we will conclude that customary law serves a dual function in Palestinian society. For the public at large, customary law supplements a legal system fraught with problems. In addition, this age-old tradition maintains social balance between the clans—an important function for neopatrimonial societies and one which Western legal jurisprudence does not fulfill. For Yasser Arafat, customary law is one of the building blocks augmenting clan politics and empowering clan heads who, because they are also dependent on Arafat for allocation of resources and political prestige, remain loyal to his rule. But by not allowing the judiciary to demarcate clearly its jurisdiction and enforce its rulings, this cultivation of tribal loyalty comes at the expense of democracy.

In the Afterword, we will hypothesize what lies in store for customary law in Palestine's near future and briefly propose some questions for further investigation and research.

## II. CUSTOMARY LAW

### *A. Overview*

Palestinian customary law is based on the socio-judicial traditions developed over centuries by the area's desert-dwelling Bedouins. In the absence of central government, Bedouins used customary law as a way of resolving their

inter-personal and inter-tribal conflicts.<sup>12</sup> From a sociological perspective, the harsh reality of the Arabian deserts dictated that bigger and more united tribal clans had a better chance of survival. The ethos which developed, and which lingers to this day in traditional Arab societies, is that individuals never face trials alone. They always have the support of the wider clan.<sup>13</sup>

Because tribal (or *hamula*) affiliation within Bedouin culture revolved around the ability of the group to defend the life of its members and to protect their honor and property, Bedouins developed a legal system that preserved the clan's strong bond and mutual commitment.<sup>14</sup> No area of social life fell outside the jurisdiction of customary law. Every facet of Bedouin culture was regulated by this system and every conflict resolved through the mediation of its administrators.<sup>15</sup>

Unlike Western judicial philosophy, customary law does not put the rights and obligations of the individual at the epicenter of its legal culture. Rather, the onus of responsibility for any infraction by one of its members is on the entire clan. Thus, for instance, when one individual has a grievance against another, the "plaintiff's" extended family seeks redress as a unit and holds the "defendant's" whole clan accountable.<sup>16</sup> If the defendant is found guilty, the defendant's whole family must make restitution. Individuals are perceived as part of a greater unit, not as separate legal entities unto themselves. During any legal

12. AUSTIN KENNETT, *BEDOUIN JUSTICE: LAW AND CUSTOMS AMONG THE EGYPTIAN BEDOUIN* 13 (1968).

13. See Dan Soen and Mustafa Mashour, *The Influence of the Clan in the Political Life of an Arab Village in Israel*, 25:2 *ORIENT* (Hamburg) 257, 258-59 (1981).

14. KENNETT, *supra* note 12, at 27.

15. Historically, the Bedouin legal system was influenced by Islamic (or *sharia*) law, which deals with a wide range of issues such as property laws, crimes, torts, and family law. The basis of these laws stems from the Koran, the *sunna* (the ways of the Prophet Muhammed), the *hadith* (the sayings of the Prophet), various *fatwas* (authorized edicts issued after the death of the Prophet), *ijma* (problems solved by consensus among learned Islamic jurists), and *qiyas 'aql* (logical deductions made by Islamic judges when there is no appropriate legal text or precedent). For in-depth explication of *sharia* law, see SAYED HASSAN AMIN, *ISLAMIC LAW IN THE CONTEMPORARY WORLD* (1985), and ALHAJI A.D. AJUOLA, *INTRODUCTION TO ISLAMIC LAW* (1989).

It is important to keep in mind, however, that customary and *sharia* law are distinct. While customary law is molded by the tenets of the Islamic faith, customary law incorporates many elements pertinent and specific to clan culture and politics, and its manifestations often vary according to locale.

16. The above may help to explain why some Palestinians can justify "terrorism." Palestinian society as a whole, if not actively supporting terrorists, displays a considerable amount of sympathy with their acts. This is evident in both the fiscal support and well-documented public honor these *shahids* and their families receive within the community. Assuming that Palestinians are not "moral monsters," one is left with the question: How can these people give both tacit and outward approbation to a phenomenon that is so roundly condemned by the international community? The answer may lie in this ingrained, social sense of collective responsibility. According to customary law, it is "just" to seek vengeance on those not necessarily directly responsible for a given crime but who belong to and identify with the aggressor. Within the tribal framework, such a legal philosophy allows an aggrieved tribe to demand retribution (or, in the case of manslaughter, even to kill an innocent member) from the aggressor's clan. AREF, *supra* note 5, at 87. It is reasonable to posit that, on a national scale, the Palestinians view themselves as the aggrieved party in the face of initial Israeli aggression (be it the *nakba*, the refugee situation from '48 and '67, house demolitions, land expropriations, or casualties from the Intifadas). Thus, Israeli society as a whole is collectively responsible, without any "innocent" parties.

proceeding, the honor and social standing of the defendant's entire clan is on trial.<sup>17</sup>

The primary administrators of this legal system are the clan heads, *kibar el-'a ila*, the elders of the tribe. For any problem necessitating an intermediary, clan members will first turn to their clan heads to mediate a solution.<sup>18</sup> If the problem is too difficult for the elders to resolve, they will pass it on to one of the various judges specializing in the matter at hand. Due to his charismatic personality, integrity, and wisdom, such a judge has an honorary status and quasi-legal standing bestowed upon him by the members of the clan.<sup>19</sup> While customary law judges do not have the discretion to impose a death sentence or even imprisonment, punishments can range from heavy fines to expulsion of a clan from a certain geographic area.<sup>20</sup> Usually a judge will specialize in a particular legal area, such as land disputes, debts, or litigation concerning dowries.<sup>21</sup> While judges are entitled to fees for their services, paid for by the relatives of the disputants, these judges often come from wealthy families and have the leisure to attend to the affairs of the *hamula*.<sup>22</sup>

### B. *The Persistence of Customary Law through 500 Years of Foreign Rule*

Palestine has inherited many different legal legacies over the course of 500 years of foreign rule.<sup>23</sup> Throughout, Palestinians have persistently distrusted

17. See KENNETT, *supra* note 12, at 12-31.

18. These individuals are always powerful men. They might include the local mukhtar and they may be religiously ordained. See KATHERINE WING, *DEMOCRACY, CONSTITUTIONALISM AND THE FUTURE STATE OF PALESTINE* 13-15 (1994).

19. Shimon Haat and Avshalom Shmuely, *Customary Law Among the Bedouin Tribes of the Judean Desert who Settled in the Region of Bethlehem* (Hebrew), within a collection of articles written for the Prime Minister's Office on Bedouin Affairs, Israel (1971), 89-90.

20. *Id.* at 61. For example, during September 2000, in the West Bank village of El-Azariye, a man from the Mnazen family stabbed to death an individual from the Shweike family, when the two got embroiled in a heated argument while traveling along a narrow road. Apparently, the killer asked the victim to back up his car so that he could drive his tractor through an alley. The Shweike family member insisted on staying put. Eventually, the argument escalated to the point where the victim said: "Come down and fight if you want to solve the problem." The killer descended from his tractor and stabbed the Shweike family member repeatedly until he died. Interview with Nasser Khamees (a thirty-eight-year-old male from East Jerusalem), in East Jerusalem (Sept. 28, 2000).

The Palestinian police arrested the killer and put him in jail. Despite this arrest, the Mnazen family knew the murder would spark violent emotions and that they would have to act quickly to prevent the Shweike family from attacking them in revenge. They traveled to the surrounding towns and villages to entreat various clan heads to help ward off the Shweike family's vengeance. Tribal judges interposed and instructed the Mnazens to pack up all their belongings immediately and move (*jalla*) the murderer's whole family at least 50 km. away for an indeterminate amount of time while the truce negotiations took place. *Id.*

This relocation should have ushered in a "time-out" period (or *hudna*), ending any reprisal attacks until a truce could be reached. Apparently, however, the Mnazen family did not relocate quite quickly enough and the murder victim's family set fire to the Mnazen home, burning it to the ground. The Mnazen family moved to ward off further attacks and, at the time of the interview, were still in exile waiting for reconciliation. *Id.*

21. Haat, *supra* note 19, at 56.

22. *Id.* at 91.

23. For a complete overview of the judicial legacies inherited by Palestine, see John Quigley, *Judicial Autonomy in Palestine: Problems and Prospects*, 21 UNIVERSITY OF DAYTON LAW REVIEW, 697 (1996) and also ANNIS KASSIM, *LEGAL SYSTEMS AND DEVELOPMENTS IN PALESTINE* (1984).

their various occupiers' legal systems, which they have seen as tools of control and suppression.<sup>24</sup> During those different periods of rule, Palestinians preferred and relied on their own customary law system, which they regarded as an expression of their independence.<sup>25</sup> In general, foreign rulers turned a blind eye to this assertion of local, legal autonomy, thereby enabling customary law to persist.

The Ottomans ruled over Palestine from 1517-1917.<sup>26</sup> Up until 1839, (*sharia*) religious law formed the foundation of the empire's legal system.<sup>27</sup> In 1839, the Ottomans instituted a far-reaching legal reform, based largely on European models of jurisprudence, limiting the *sharia* courts' jurisdiction to matters of personal status, such as marriage and divorce.<sup>28</sup> Unofficially, however, the Ottoman rulers allowed Palestinians to continue to resolve their personal conflicts through the customary law framework.<sup>29</sup> To a large extent, this was due to the decentralized nature of the Ottoman Empire and the symbiotic relationship that developed between the local *mukhtars* and clan heads.<sup>30</sup>

Despite its declared intention to leave the local Ottoman law in place, when Great Britain occupied Palestine in 1917, it gradually began modifying the legal system.<sup>31</sup> The British transformed the national legal system into one that suited their own culture and convenience, and often legislated and implemented decisions without heeding the wishes or criticism of the people.<sup>32</sup> However, "it was [also the] British policy to leave local practice and traditional custom undisturbed as far as possible, where it did not intervene with the needs of the public order and good administration."<sup>33</sup> While the Palestinians were alienated by a new legal system that did not reflect their own traditions and values, they were left to their own devices to resolve local issues as they deemed fit. As a result, customary law continued to thrive, often functioning in parallel to, or in conjunction with, the ruling civil court system.<sup>34</sup>

Under Jordanian rule (1948-1967), the intermingling of the established and customary law intensified.<sup>35</sup> While Palestinians in the West Bank utilized the Jordanian legal system, (especially for civil issues), they often used both sys-

24. Interview with Dr. Nazmi Al-Jubeh, Birzeit University, in the West Bank (Feb. 20, 2001) [hereinafter Jubeh].

25. Ifrah Zilberman, *Customary Law as a Social System in the Jerusalem Area* (Hebrew), in 39 *HAMIRAH HAHADASH*, 71 (1991).

26. *Id.*

27. VIKTORIA WAGNER, *PALESTINIAN JUDICIARY AND THE RULE OF LAW* 30 (2000).

28. *Id.*

29. Zilberman, *supra* note 25, at 71. For more on the Ottoman's judiciary rule over Palestine, see WAGNER, *supra* note 27, at 30-31.

30. Hillel Frisch, *Modern Absolutist or Neopatriarchal State Building? Customary Law, Extended Families, and the Palestinian Authority*, 29 *INT'L J. MIDDLE EAST STUD.* 345 (1997).

The nature of this relationship will be elaborated on later in this Comment.

31. See WAGNER, *supra* note 27, at 32.

32. *Id.* at 33, 35-36.

33. *Id.* at 32.

34. For more background, see also H. E. BAKER, *THE LEGAL SYSTEM OF ISRAEL*, (1968) and GEORGE BISHARAT, *PALESTINIAN LAWYERS AND ISRAELI LAW: LAW AND DISORDER IN THE WEST BANK* (1989).

35. Frisch, *supra* note 30, at 345.

tems simultaneously.<sup>36</sup> This was particularly true for criminal issues, whose resolution necessitated not only punitive measures, an aspect well-suited to the intervention of British-modeled Jordanian law, but also required the resolution of a social component—the reconciliation of two extended families—a component best mediated through customary law. The Jordanian government viewed customary law as a legitimate complement to the official corpus of law in the Hashemite kingdom.<sup>37</sup> This was due, in part, to the influence of the Bedouins east of the Jordan River, as well as the growing power of the traditional Hebronite clans in Amman and Jerusalem.<sup>38</sup>

The Israeli military occupation of the West Bank and Gaza in 1967 brought about far-reaching structural changes to the court system established under the Jordanian and Egyptian administrations, as the existing law was substantially overhauled by new military orders.<sup>39</sup> Concurrently, a considerable portion of Palestinian lawyers and judges went on strike to protest against the occupation.<sup>40</sup> Israeli military officers, entitled to assume all powers formerly vested in the Ministry of Justice, soon controlled the entire civilian judicial system.<sup>41</sup> Israeli military officials staffed the courts and military tribunals superceded the criminal and civil jurisdiction of the Palestinian courts.<sup>42</sup> Consequently, after the Israeli occupation in 1967, use of customary law in the West Bank increased dramatically. The reasons for this were threefold: (1) the absence of a local police force to handle criminal and civil cases; (2) a total lack of faith and trust in the Israeli military judicial system; and (3) the utilization of customary law as an expression of the Palestinians' independence from Israel and an extension of their fight against the occupation.<sup>43</sup>

When the first Intifada erupted in 1988, the Palestinian leadership called on the local populace to boycott the local courts and civil administration altogether.<sup>44</sup> In the midst of rebellion and patriotic fervor, Palestinians refrained from asking the Israeli military to execute court judgments against other Palestinians, and instead resorted to other methods of conflict resolution, such as

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36. The Egyptians ruled over the Palestinians in Gaza, but retained the prevailing legal system largely intact, mainly because they viewed themselves as the temporary administrators of a future Palestinian state. See WAGNER, *supra* note 27, at 37.

37. Frisch, *supra* note 30, at 346.

38. In these cities, for instance, the Hebronites developed the Khalil al-Rahman Association, which functioned as both a bureaucracy for the resolution of conflicts, mediated through customary law, as well as a structure by which to broker political prestige with the Jordanian government. At this time, customary law became part and parcel of the centralized state, incorporated into the country's laws and viewed by the Jordanians (and the Palestinian people under their control) as an integral part of their social and legal order. See *id.* at 345; see also Zilberman, *supra* note 25, at 78-79.

39. WAGNER, *supra* note 27, at 38-39.

40. *Id.* at 44. Once the Intifada began in the late 1980s, almost all resigned. *Id.*

41. *Id.*

42. *Id.* at 42. For an in-depth look at the structural changes of the legal system in the West Bank and Jerusalem after 1967, see RAJA SHEHADEH, *THE WEST BANK AND THE RULE OF LAW* (1980).

43. Jube, *supra* note 24.

44. WAGNER, *supra* note 27, at 44. The "Intifada" is the name given by Palestinians to their uprising against the Israeli occupation in the late 1980s.

traditional mediation.<sup>45</sup> Moreover, “the resulting social unrest of the Intifada devastated the functional operation of the courts by divesting the Palestinians of institutional resources, preventing the development of professional expertise, and halting the development of modern civil and criminal justice processes.”<sup>46</sup> The jurisdiction of customary law expanded during the Intifada, both as a result of the paralysis of the Palestinian civilian judicial system and because customary law was regarded as an important nationalistic instrument abetting separation from Israeli rule.<sup>47</sup>

Customary law thrived despite the fact that young, progressive activists, a dominant force during the Intifada, tried to undermine its traditional authority.<sup>48</sup> The young Intifada leadership emphasized political affiliation more than clan affiliation, and they had many complaints about the system of customary law. Among other things, they felt it was increasingly run by corrupt clan heads who were swayed by money and power and upon whom they were no checks or balances.<sup>49</sup> Attempts were made to establish “national conciliation committees” (*lijan al-islah*) to usurp the power of customary law and mediate conflicts in a more centralized manner.<sup>50</sup>

The young, nationalistic Intifada leadership in the West Bank were not the only ones to oppose customary law. Radical Islamic forces, particularly Hamas, were also unhappy with the clan heads’ degree of control, especially since these clan heads did not always behave in accordance with *sharia* law.<sup>51</sup> The prevalence of customary law stood as a barrier to the Islamists’ desire to expand their political and judicial influence. However, both the Islamists and Intifada leadership had to bow to customary law’s indispensable function during this critical period. People needed mediation more than ever, as economic and social pressures multiplied (due to the sanctions imposed by Israel) and no viable alternative existed for solving their problems.<sup>52</sup> Eventually, both leaderships accepted customary law as a necessary evil that obviated the need for Israeli police intervention.<sup>53</sup>

### III. NEOPATRIMONY

With the advent of quasi-independence, the Palestinians have begun state-building measures. With the international community looking over their shoul-

45. *Id.* at 44.

46. Hiram E. Chodosh and Stephen A. Mayo, *The Palestinian Legal Study: Consensus and Assessment of the New Palestinian Legal System*, 38:2 HARVARD L. J. 377 (1997).

47. Jubeh, *supra* note 24.

48. Frisch, *supra* note 30, at 346.

49. Zilberman, *supra* note 25, at 82.

50. Frisch, *supra* note 30, at 346; Zilberman, *supra* note 25, at 87.

51. Zilberman, *supra* note 25, at 82-83. Islamic leaders often voiced their criticism by calling the clan heads corrupt and illiterate. Interview with Dr. Salim Tamari, Institute of Palestine Studies, in East Jerusalem (Aug. 28, 2000).

52. Zilberman, *supra* note 25, at 84, 87.

53. *Id.* at 88. Soon, customary law even informed the penalties meted out by the “national conciliation committees” and was used to adjudicate labor disputes. Frisch, *supra* note 35, at 347.

der expecting the implementation of Western modes of government, one might assume that the PNA would instill a centrally organized judiciary within Palestine. But Palestinian society is a neopatrimony, clinging to traditional methods of social organization despite the tides of contemporary change swirling around it.

The term neopatrimony connotes the integration of modernity with a patrimonial or patriarchal society.<sup>54</sup> In the sociological literature, neopatrimonies are societies that seem to have adopted (or are in the active process of adopting) Western modes and notions of governmental organization and civil bureaucracy, but whose social, economic, and political lives still revolve around patron-client relations, segmented lineages, and patriarchal hierarchy. In order to better understand this phenomenon, one must first understand the political and social nature of its predecessor—patrimonialism.

### A. Patrimonialism

Political clientelism lies at the very root of a patriarchy's social contract. In societies based on patron-client relationships, power is based on the fact that the ruler, or "patron," is the dispenser of resources within the greater community.<sup>55</sup> The essence of the patron-client relationship revolves around the exchange of resources between the patron and the strategically located "client," in exchange for which the patron receives the political support of the client and his family.<sup>56</sup> The recipient, in turn, then uses these resources for his<sup>57</sup> own political and economic advancement and as a way to increase his network of alliances.<sup>58</sup>

According to Eisenstadt and Roniger, the core analytical characteristics of patron-client relations are as follows:

The interaction on which they are based is characterized by the simultaneous exchange of different types of resources, above all instrumental, economic, as well as political ones (support, loyalty, votes, protection), on the one hand, and promises of solidarity and loyalty on the other . . . Solidarity is often closely related to conceptions of personal identity, especially of personal honor and obligations. At the same time, the relations established are not fully legal or contractual; they are often opposed to the official laws of the country and are based more on informal—although tightly binding—understandings. These relations are undertaken between individuals or networks of individuals in a vertical fashion rather than between organized corporate groups . . . These relations are based on very strong elements of inequality and power differences. The crucial element of this inequality is the monopolization by the patron of certain positions that are of

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54. MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* (1947). Weber distinguishes between patriarchal society (one in which authority is found within the household) and patrimonial society (wherein authority is found within more complex political systems, extending through a network of functionaries and subordinates). Later scholars have blurred this distinction, maintaining that patrimonialism is an extension of patriarchy sustained by patron-client relationships. Patrimonialism is used in this article with the latter meaning.

55. JOHN PIERRE ENTELLIS, *CULTURE AND COUNTERCULTURE IN MOROCCAN POLITICS* 48 (1989).

56. *Id.*

57. The male pronoun will be used, as Arabs' traditional political culture is in the almost exclusive domain of male society.

58. ENTELLIS, *supra* note 55 at 48.

vital importance to the clients; especially, as we shall see later, to the access of the means of production, major markets, and centers of society.<sup>59</sup>

The allocation of resources is the patron's most effective lever of political control.<sup>60</sup> Compounding the patron's leverage is the fact that patrimonial societies are often socially segmented in regard to lineage (exemplified by the very strong *hamula*, or family clan, system predominant in Palestine) and are factionalized politically.<sup>61</sup> The lineage system provides the structure for political and social consolidation, as individuals in patrimonial societies view familial relationships in a manner in which the element of mutual advantage is essential.<sup>62</sup>

The development of segmented lineages is suggested by some general ecological conditions, as when the mode of production involves repetitive or periodic use of restricted, localized resources (such as with irrigation agriculture and pastoralism).<sup>63</sup> The restricted means of subsistence or wealth necessitates the clan's cohesiveness and contributes to their interdependence.<sup>64</sup>

Traditionally, the collective, pan-clan unit, consisting of various segments, is held together by some interclan (or intersegment) marriage and religious institutions. But the pan-clan unit often lacks a strong, cohesive, organic solidarity.<sup>65</sup> When, in the course of daily contact, the need to trade and settle feuds arises, segmented patriarchies resort to a legal culture conducive to their "nationally" fragmented condition. This structure falls short of an organized confederation between the clans, but is a system for resolving conflicts.<sup>66</sup> In Palestine, this necessity culminated in the development of tribal, or customary, law.

### B. Neopatrimonialism and the Perpetuation of Clientelism

Many patriarchal societies founded on clientelism have undergone a political and bureaucratic transformation toward "modernity." Such a formal, politi-

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59. S. N. Eisenstadt and Luis Roniger, *The Study of Patron-Client Relations and Recent Developments in Sociological Theory*, in POLITICAL CLIENTELISM, PATRONAGE, AND DEVELOPMENT (S. N. Eisenstadt and René Lemarchand, eds.) 276-279 (1981).

60. ENTELLIS, *supra* note 55, at 49.

61. PETER B. HAMMOND, CULTURAL AND SOCIAL ANTHROPOLOGY 183-84 (1964).

62. Such societies are mediated by what Clifford and Hildred Geertz have called the "person-centered ethic," in which the most important cultural norms are highly personalistic and sensitive to situational conditions and in which the guiding principle is the mutual advantage to individual, family, and clan. See CLIFFORD GEERTZ ET. AL., MEANING AND ORDER IN MOROCCAN SOCIETY 317 (1979).

63. HAMMOND, *supra* note 61, at 188.

64. Palestine may, some time in the future, be integrated into an Arab regional, or perhaps European/international, economy. At present, European aid notwithstanding, Palestine's resources are still very much "restricted" and "localized." Palestinians primarily rely on agriculture and day labor in Israel for their economy. The latter has been severely constricted due to Israeli security concerns. In a good year, unemployment in Gaza hovers around 25%. *Palestine Economic Forum*, "Recent Economic Developments", at <http://www.palecon.org/update/jun98/developments.html>. The U.N. puts the combined unemployment in the West Bank and Gaza at 12% before the second Intifada and 40% after. *Israeli Ban Tripled Palestinian Unemployment, Says U.N. Report*, at <http://www.cnn.com/2000/WORLD/meast/12/05/mideast.economy>. At least one third of Palestinians live below the poverty line. *Id.*

65. HAMMOND, *supra* note 61, at 182-89.

66. *Id.* at 184.

cal transition often emerges from the process of political and bureaucratic Westernization imposed during the course of colonialization or occupation.<sup>67</sup> When these societies achieve independence, the structural and bureaucratic vestiges of the West remain in a makeshift marriage with the traditional modes of self-rule. The resulting political system is known as neopatriarchy or neopatrimonialism.<sup>68</sup>

While modern, Western political systems champion the rights of the individual vis-à-vis the state, in a neopatriarchal system, the lines between state, society, and family are blurred. Primary dimensions of such a system are “a central bureaucracy that is increasingly subject to rational criteria of organization, recruitment, and training, and political elites that, in terms of education, exposure to outside currents of thought, mental outlook, and career expectations, are ‘somewhat’ removed from the traditionalistic, clientelistic, and particularistic ethos of the patrimonial regime.”<sup>69</sup>

However, characteristic of the neopatriarchal society is the fact that, whatever the accoutrements of the legal, political and bureaucratic systems, the internal structures remain rooted in the patriarchal values and social relationships of kinship, clan, and religious and ethnic groups.<sup>70</sup> Thus, modern and patriarchal elements are wed together in an odd union. Ironically, rather than fundamentally changing, the patriarchal structures of Arab society remain strong in such a union, even if the patriarchal elements now inhabit the guise of a modern bureaucracy.

Neopatrimonies are political cultures still run on the basis of patron-client relationships, superimposed on the facade of Western, democratic political culture.<sup>71</sup> Neopatriarchies differ from patriarchies in that they variously combine and overlay the informal social structures of patrimonialism with the formal and legal structures of the state. However, the “modern” changes have more to do with form and style than substance, because these societies lack the inner force, organization, and consciousness that characterize truly modern formations.<sup>72</sup> Moreover, “neopatrimonialism, in general, and neopatrimonial corruption, in particular, are generally corrosive of political institutionalization, since they suggest the primacy of ‘connections’ rather than the formal structures of law, constitutionalism, and bureaucratic procedure.”<sup>73</sup> Patronage and clientelism overwrite formal lines of accountability.

Economics propels the perpetuation of clientelism. Neopatriarchies generally take root in underdeveloped and dependent socioeconomic societies. Thus, the redistribution of resources becomes focal in controlling clan heads and the

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67. HISHAM SHARABI, NEOPATRIARCHY: A THEORY OF DISTORTED CHANGE IN ARAB SOCIETY 21, 61-83 (1988).

68. *Id.*

69. ENTELLIS, *supra* note 55, at 49.

70. SHARABI, *supra* note 67, at 8.

71. Brynen, *supra* note 10, at 25.

72. *Id.*

73. *Id.*

social elite and in molding subsequent political organization.<sup>74</sup> Some researchers, such as Nelson and Brynen, claim that corruption is at the very heart of the neopatrimonial system.<sup>75</sup> In Morocco,<sup>76</sup> for example, during King Hassan's rule in the mid-1980s, "the view remain[ed] prevalent that power and politics were the monopoly of the few, that political institutions are rather insignificant, and that government service is an opportunity to advance private and family interests, not to work for the betterment of society as a whole."<sup>77</sup>

The observation about Morocco is true of neopatrimonial societies in general, where public office represents an important mechanism of private rent-seeking.<sup>78</sup> The state's ability to extract resources and regulate behaviors creates conditions under which the supply of, and access to, scarce goods can be manipulated. Thus, state resources (and the state's ability to shape resource flows) are used to lubricate patron-client networks—the fundamental foundation of the power of patronage.<sup>79</sup> In turn, families maintain control "over their members by maintaining their importance as sources of capital accumulation in the absence of modern intermediary financial institutions, as a social support system, and as an important link to state-directed patronage."<sup>80</sup>

Despite the allure of democracy, Arabs in neopatriarchal societies are mostly distrustful of Western-style governments and are threatened by the theoretical and practical notion that they are "individual" citizens—legally and culturally "independent" from the family, clan, or religious group.<sup>81</sup> For many Arabs, this distrust is partially rooted in their history of occupation, imperialism, or colonialism. Moreover, dependency on the clan is fostered on an economic dynamic built around agrarianism, pastoralism, and limited trade.<sup>82</sup> In such a precarious financial environment, loyalty to kinship easily supercedes any potential benefits inherent in an abstract, Western concept of nationhood or civil society.

Arab societies are built on the lubricant of the patronage system, known as *wasta*—the distribution of favor and protection.<sup>83</sup> This, in real terms, is what decides the professional and economic fate of citizens in a patriarchal society

74. SHARABI, *supra* note 67, at 1-7.

75. "Corruption" here is defined as "the sharing of spoils available through the linkage of the traditional patronage system with a modern administrative system." MOROCCO: A COUNTRY STUDY (Harold D. Nelson, ed.) (1978). This is "corruption" as defined in the Western sense. A member of a patriarchal society may very well see this as the fair and normal distribution of resources – in many ways no different than the control big corporations in Western countries have over politicians by dint of the social network, business connections, or lobbying power they can afford to buy.

76. Within the body of sociological literature, post-colonial Morocco has been extensively studied and is commonly cited as one of the models of neopatrimonialism.

77. ENTELLIS, *supra* note 55, at 55.

78. Brynen, *supra* note 10, at 25. "Rent-seeking" is when a group or individual extracts money or privilege from the state which is not justified on utilitarian or efficiency grounds for the polity as a whole.

79. *Id.*

80. Frisch, *supra* note 30, at 344.

81. SHARABI, *supra* note 67, at 45-46.

82. *Id.* at 31.

83. For a full discussion, see ROBERT CUNNINGHAM AND YASIN SARAYRAH, *WASTA: THE HIDDEN FORCE IN MIDDLE EAST SOCIETY* (1993).

and consolidates their sense of identity. Confronted with a feeling of impotence against dire economic and social forces, patronage allows even the lowliest individual the possibility to survive and the recourse to be heard and considered through a network of extended family and friends.<sup>84</sup>

### C. Neopatrimonialism in the Palestinian National Authority

Measuring the extent of the patron-client dynamic in Palestine is not an exact science, particularly since the very nature of clientelism is closed, informal, and personal. However, since the 1990s, articles on the subject have proliferated, particularly by those dissatisfied with what they see as corruption within the PNA. It is important to note that there are many contextual factors that create, sustain, and encourage neopatrimonialism in the PNA. Some of these can be directly linked to Arafat's personal leadership. However, neopatrimonialism did not begin with the creation of the PNA. Rather, Palestine's neopatrimonial character has been a process in the making as far back as Ottoman rule.

#### 1. Historical Underpinnings

During their rule, the Ottomans created the official post of the *mukhtar* to maintain control over a vast empire and to mediate between the state and the local inhabitants. Ottoman rulers formed alliances with these *mukhtars*, who were clan heads, and used them as intermediaries between the local people and the Ottoman authorities.<sup>85</sup> In this manner, the Ottoman authorities co-opted sheikhs from powerful clans by entrusting them with various administrative tasks, including the collection of village taxes.<sup>86</sup> In return, the Ottomans allowed the clan heads to retain control over their own tribal practices and to set aside a percentage of the taxes for their personal revenue.<sup>87</sup> As Rex Brynen states, by empowering the *mukhtars* to perform certain official functions, the central Ottoman administration essentially franchised state power in exchange for political loyalty and local influence.<sup>88</sup>

During the Mandate period, the British administration also sought to co-opt the social elites by granting or withholding political access and by awarding loyal notables with administrative powers. After 1948, the Jordanians strengthened this dynamic in the West Bank by continuing the role of the village *mukhtars* and by giving leading Palestinian families cabinet appointments.<sup>89</sup> Even the Likud in the early 1980's, in an effort to establish control over the local Palestinian population, attempted to nurture patron-client relationships with a new breed of social elites (the "Village Leagues"), providing them with funds,

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84. SHARABI, *supra* note 67, at 46.

85. Frisch, *supra* note 30, at 345.

86. ABNER COHEN, ARAB BORDER-VILLAGES IN ISRAEL 5 (1965).

87. Frisch, *supra* note 30, at 345.

88. Brynen, *supra* note 10, at 26.

89. Brynen, *supra* note 10, at 27. It is interesting to note that, even after 1967, Jordan continued to pay civil services salaries (particularly those relating to the Religious Authority) in an effort to maintain influence.

arms, and an intermediary policing role between the local population and the military government. The Israeli civil administration viewed this alternative leadership as vital in weakening the power base of the PLO in the West Bank.<sup>90</sup>

Foreign governments are not the only “culprits.” The PLO itself, in its capacity as a government-in-exile, also encouraged patron-client relationships. With the external funding provided by the oil-producing Arab states, the PLO fostered fealty and consolidated its control by allocating resources and extending services, first in Lebanon and, later, in northern Africa and Palestine. Some estimates put total PLO expenditures in Lebanon between the years 1975 to 1982 at 400 USD million, an amount rivaling the Lebanese state budget.<sup>91</sup> It is estimated that prior to the establishment of the PNA, about 500 USD million was funneled into the territories between the years 1977 to 1985.<sup>92</sup> Some of this went to support housing, agriculture, and education, but an equally sizable amount took the form of patronage—money for nationalist institutions and personalities (the primary beneficiary being Fatah) at the expense of the burgeoning civil society. During the Intifada, the PLO compensated riot casualties and supported families of prisoners. This created gratitude and fidelity to Arafat and solidified a chain of patronage all the way through to small rural villages.<sup>93</sup>

Modern institution-building notwithstanding, clientelism exists in the PNA today as well. Evidence of present-day neopatrimonialism in Palestine may be separated into three categories: (1) politics; (2) economics; and (3) security apparatus.

## 2. Contemporary Politics

Its democratic nature notwithstanding, the results of the 1996 elections in Palestine fall primarily into a neopatrimonial pattern. Prior to the vote, the Palestinian election commission decided on a simple majority system with open lists. Palestine was divided into sixteen electoral districts, which voted on eighty-eight seats in the Palestinian Legislative Council (hereinafter PLC).<sup>94</sup>

As clans in Palestine tend to congregate in certain cities and regions, the decision to hold the elections according to districts (rather than on a national basis, as is done in neighboring Israel) encouraged voting along tribal lines. The majority system gave better chances to candidates relying on their personal reputation, family relations, or tribal connections rather than on political programs or party affiliations.<sup>95</sup> Another factor working against strictly political affiliated voting was a recent decrease in PLO influence in the West Bank and Gaza after a PLO economic crisis (following their much-maligned support of Iraq during the Gulf War), which necessitated that individuals once again look to their ex-

90. Salim Tamari, *In League With Zion: Israel's Search For a Native Pillar*, 12:4 J. OF PALESTINIAN STUD. (1983).

91. Brynen, *supra* note 10, at 28.

92. *Id.*

93. *Id.* at 29.

94. See Lamis Andoni, *The Palestinian Elections: Moving Toward Democracy or One-Party Rule*, 25:3 J. OF PALESTINIAN STUD. 9 (Spring 1996).

95. MOHAMMED DAJANI, *PALESTINIAN ELECTIONS* (1998).

tended families for support.<sup>96</sup> And the contemporaneous fact that the main party opposition, Hamas, boycotted the elections, leaving voters without a serious ideological alternative, was also influential.<sup>97</sup> According to Dr. Nabil Kukali (from the Palestinian Center for Public Opinion): "I was a candidate in the 1996 elections for the PLC. I can tell you from my own experience that people didn't vote according to political affiliations or according to the candidate's knowledge—people voted according to clans."<sup>98</sup>

Many of the leadership returning from exile won seats in the elections, even though this countered the notion that there was strong resentment against this imported leadership.<sup>99</sup> One possible explanation for their success in the elections could be that "the officials returning with Arafat relied heavily, perhaps even more than most Fatah candidates, on the PNA's structures (including security) in their campaigns. In some areas they were called the 'Authority's candidates.'"<sup>100</sup> These winners represent a quasi-clan whose allegiance revolves around Arafat and who are indebted to him for their seats in the Legislative Council. They are political elites, socialized in Arab countries, who are interested in patron-client norms rather than democratic agendas.

As for the PNA, most of the important ministries were given to Arafat's subordinates from Tunis and members from big clans.<sup>101</sup> These individuals are very influential in Fatah and often have academic backgrounds, which allowed Arafat to combine two symbols in one (family association and academic prestige). A more significant indicator of neopatrimonialism is how Arafat handled

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96. Brynen, *supra* note 10, at 29.

97. Interview with Jamil Hillal, Palestinian researcher, in Ramallah (Mar. 22, 2001).

98. Interview with Dr. Nabil Kukali, Director of Palestine Center for Public Opinion, in Bethlehem (Mar. 22, 2001).

The voting patterns within each of these districts substantiate the theory that the local populace voted according to clan affiliation and loyalties. The eight members from the Nablus district who won seats on the Palestinian Legislative Council serve as an example. At least four were Arafat-appointed Fatah/PLO returnees and important clan members.

Dr. Maher El-Masri (now the Minister of Finance and Trade) is originally from Nablus and comes from a large, rich, established clan whose power extends to both the Ottoman period and, in a more pronounced way, to Jordanian rule. The second Nablus representative, Mu'aweh El-Masri, is related to Dr. Maher El-Masri and won because of his tribal affiliations. Ghassan Ash-Shakaa (the mayor of Nablus) is also from a large, wealthy and established clan. Fayez Zeidan, a returnee and Arafat appointee originally from Tel village near Nablus, is not from a large clan. His election is due to his affiliation and loyalty to Arafat himself. Jubeh, *supra* note 24.

The other four PLC members from the Nablus district represent a particular constituency—the refugee camps and the Samaritans—and represent a counter-vote to traditional clan politics. The elected PLC members are Hussam Khader, Kamel Al-Afghani, and Dalal Salameh, from Balata refugee camp, who won the "refugee camp" vote in the area of Nablus (such as Balata, El-Ein, Askar and Fara). Their election embodies that animosity felt towards the well-to-do residents in Nablus and the hope that they will fight to improve the refugee camps' historically ignored predicament and to ease their hardships. The Samaritan sect in Nablus was allocated one seat, which Saloum Al-Kahen won due to this quota. *Id.*

It should be noted that only five of the total eighty-eight PLC seats went to women.

99. Andoni, *supra* note 94, at 15.

100. *Id.*

101. Jubeh, *supra* note 24. The latter include Nabil Shaath, Minister of Planning and International Cooperation; Ahmed Qrei' (Abu Ala), Palestinian Legislative Council Speaker; and Muhammed Zuhdi Nashashibi, Minister of Finance. *Id.*

the charges of corruption levied against his ministers by the PLC in 1998. After an investigative committee was set up to examine the affair, and after its members issued a preliminary report, Arafat suddenly “promoted” the most prominent members of that committee to the rank of ministers.<sup>102</sup> None of the ministers involved in the alleged corruption lost their positions.

Institution-building on the local level is still very vague and in the nascent stages of structuring. The primary principle informing the appointment process appears to be tribal accommodation, as it is of paramount importance to preserve the balance between the major clans in the cities.<sup>103</sup> Accordingly, municipal officials are appointed by the agreement and consensus of the large clans,<sup>104</sup> and the individuals who occupy local and municipal council seats are usually representatives from the various large families. (However, the choices do have to be formally approved by the Minister of Local Affairs.) The official explanation for the lack of citywide, democratic elections for these posts is that these areas are in “Area B” and, therefore, not fully under Palestinian control.<sup>105</sup> But perhaps the real reason is that, since the Minister of Local Affairs has to approve the appointment, Arafat can have better control of officials who are under the constant and looming threat of dismissal.

### 3. *Modern Economics*

The PNA’s dependence on Western aid to finance its fledgling state, and the consequent donations that have poured in from abroad, have maximized the executive branch’s potential for patronage. Western donor countries have high expectations about the accountability and transparency of PNA financial dealings, and Arafat’s (mis)management is hotly debated.<sup>106</sup> Meanwhile, the PNA has inflated its bureaucracy beyond the reach of any rational, objective criteria. For instance, it did not fire the 21,000 Palestinians who worked for the Israeli civil administration, but instead added 20,000 more clerks, who came from Tunisia, and another 40,000 policemen and security apparatus officers. These employees all depend on the government for their salaries.<sup>107</sup>

Many Palestinian academics and officials have gone on record bemoaning the misappropriation of PNA funds sacrificed to the altar of patronage. For instance, Dr. Hisham Awartani, one of the top experts on the Palestinian economy, said: “The inflation of the bureaucracy is a disaster for the economy . . . In

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102. Co-opting the opposition with the lure of access to power and resources is a typical trait of neopatrimonialism. As of September 10, 1998, there were 24 ministers in the PNA government, out of a total of eighty-eight PLC members.

103. An interesting twist on this principle occurred in Bethlehem when, after much deliberation, the various sides could not agree on a governor (since there was no dominant clan in the city). Eventually, Arafat appointed a governor from a prominent Hebronite tribe in order to keep the delicate balance between the Bethlehemite clans.

104. Jubei, *supra* note 24.

105. “Area B” is territory under the civilian administration of the PNA, but the military/security control of Israel.

106. Brynen, *supra* note 10, at 79-84.

107. Ronen Bergman and David Ratner, *The Man Who Swallowed Gaza*, HA’ARETZ Weekend Supplement, Apr. 4, 1997.

reality, no one can be fired . . . Arafat needs these people as a political power base, and therefore he pays salaries out of the slush fund.”<sup>108</sup>

The economic corruption in the PNA has also been much commented upon in the West and by human rights groups in Palestine. This phenomenon is perhaps best summarized in an article in the Israeli weekly, *Kol Hazman*, on January 2, 2001 (describing a rare crackdown on corruption by the paramilitary Tanzim during the most recent “Al-Aqsa” Intifada):

#### SENIOR PA FIGURES FEAR FOR THEIR LIVES

*Kol Hazman* (p. 31) by Hanan Shlein—Senior PA [Palestinian Authority] officials involved in corruption, and in hiding millions of dollars in their private accounts, now fear for their lives. Palestinian sources in Gaza said that some of them have fled from the PA, while some have found shelter in Arab countries. Others have fled to the U.S. and Europe, where they prepared themselves an economic shelter by means of the money they put in their private pockets over the years from money that belongs to the Palestinian Authority.

Senior Fatah Tanzim officials take credit for the initial steps to cleanse the PA of the taint of corruption, which international figures believe has reached hundreds of millions of dollars embezzled from the PA since Arafat arrived in Gaza seven years ago.

The signal to launch the campaign for cleansing the corruption plague was given two weeks ago when masked men in Gaza assassinated Hisham Maki, the director general of Palestinian television. Gazans claimed that Tanzim activists committed the assassination. A month and a half before this killing, a leaflet was published in the city accusing Maki of embezzling millions of dollars. It was said that Yasser Arafat had given him a month’s time to return the money, but he ignored the warning and was consequently eliminated.

The same leaflet accused Ghazi Al-Jabali, the Palestinian chief of police, of corruption. Last Tuesday, Yasser Arafat informed Jabali of his dismissal from the chief of police and of his appointment as PLO ambassador overseas. Senior sources in the PA said that Jabali did not have a lot of choice, what with the leaflet and Maki’s liquidation reverberating in the background. That same day he left Gaza for Egypt on his way to his new posting. A senior Palestinian source said that Jabali was protected by his special relations with Yasser Arafat and with the heads of the Palestinian security services.

Ever since Maki’s execution, the personal safety of senior PA officials has been undermined. For example, reports from Gaza say that one of those who fled to the U.S. was the person responsible for appointing functionaries in the PA. “This was one of the most sensitive positions, and there is suspicion that this senior personage exploited his position to do favors on a large scale,” a senior PA official said. Senior PLO Tanzim figures, which are riding the wave of the Intifada’s success, want to make the most of this success to force Arafat to clean the stables, a move that would also be chalked up to their credit. Ever since Maki’s elimination, senior Tanzim members have not stopped talking about the need to eradicate corruption[. . .]<sup>109</sup>

This article illustrates how economic neopatrimonialism occurs: access by an elite few to government funds; misappropriation of those funds; and re-

108. *Id.*

109. Hanan Shlein, *Senior PA Figures Fear for Their Lives*, KOL HAZMAN, Jan. 2, 2001 (Robert Terris, trans.), at 31.

warding loyal aides, not only with financial resources but by turning a blind eye to their corruption.

The key economic monopolies in the PNA (the fuel, tobacco, and cement monopolies) are all headed by government ministers who are close and loyal Arafat aides dating back to his days in Tunis.<sup>110</sup> The heads of these monopolies buy products from Israeli manufacturers or importers, and sell them in Palestine for much higher prices. The profits finance PNA operations that international donor nations refuse to fund (such as the enlarged security establishment) or disappear into private pockets (according to some allegations).<sup>111</sup>

It could be posited that one reason why the monopolies may be in the hands of a select few is that income tax has yet to be widely implemented in Palestine and government revenues must flow via these monopolies. But such allocation of resources has the inherent danger of corruption. And, because the PNA issues import licenses, few applicants outside of the loop are allowed to operate. Many Palestinian merchants discovered, to their chagrin, that the monopolies led to the elimination of competition and the closing of markets and contracts that had been open under Israel's administration. At present, there is usually only one supplier from whom the populace can buy imported goods.<sup>112</sup>

PLC member Hussam Khader, from Nablus, says of this phenomenon:

They cut up the pie among themselves. The Palestinian leaders thought that our economy was some sort of inheritance due to them and their children. Every senior official got himself a fat slice of the imports into the Authority. One got the fuel, another got the cigarettes, yet another the lottery, and his crony the flour. Gravel is a monopoly belonging directly to the security apparatuses, and the fortune they earn from it finances their operations.<sup>113</sup>

The above patterns are symptomatic characteristics of neopatrimonialism. Asymmetrical power relations and discriminatory access to scarce and desired private goods characterize the very essence of patronage and elite control over resource distribution.<sup>114</sup> The clientelistic model is predicated on the tension between the free flow of resources, on the one hand, and attempts to limit this flow

110. Jubeih, *supra* note 24. The tobacco monopoly, for instance, is headed by Abu Ala, Mohammed Rashid (Arafat's close advisor on economic affairs), and Finance Minister Muhammed Zuhi Nashashibi. *Id.* Rashid, Nashashibi, and Minister of Civil Affairs Jamil Tarifi head the cement monopoly. *Id.* The fuel monopoly is headed by Nashashibi, Rashid, Chief of Preventive Security Services in the West Bank Jibril Rajoub, and Harbi Sarsour (another long-time close associate of Arafat). Bergman, *supra* note 107. Note that Rashid is involved as a partner in each of these three major monopolies.

111. Bergman, *supra* note 107. Thus, for example, Jibril Rajoub, the Chief of Preventive Security Services in the West Bank, directs both the casino in Jericho, which profits about 12.5 million dollars a month, and the fuel monopoly. In his capacity as head of the fuel monopoly, Jibril Rajoub announced right after the PNA took control of the territories that, henceforth, gasoline service station owners would be required to pay an additional tax, at a rate based on their daily sales. Preventive Security "fuel patrols" took daily measurements at the service stations and these funds were funnelled into his security branch. *Id.*

112. These monopolies also filter down to the children of Arafat confidantes. For instance, Paltech, an importer of consumer electronic entertainment (such as television and VCRs) is owned by Yasser Abbas, the son of Abu Mazen. *Id.*

113. *Id.*

114. John Waterbury, *An Attempt to Put Patrons and Clients in their Place, in PATRONS AND CLIENTS IN MEDITERRANEAN SOCIETIES* (Ernest Gellner and John Waterbury, eds.) 334 (1977).

on the other. Patron and brokers try to control access to such economic centers. As Eisenstadt writes: "It is the combination of potentially open access to the markets with continuous semi-institutionalized attempts to limit free access that is the crux of the clientelistic model."<sup>115</sup>

The availability of external resources via donations from the international community has increased the phenomenon of clientelism within the PA, for it has provided more opportunities within the government bureaucracy to reward family members and those loyal to the patrons and to maintain a dominant political coalition. It would appear that Arafat is eager to see the funds from the international community channeled directly through the PA, without the restrictions of earmarking, so as to maximize the potential for patronage and prevent other groups from bypassing his control over these resources.<sup>116</sup> He also appears to be keeping tight control over the reins of political and economic decision-making in order to prevent both the elites and the mass constituencies from gaining power. Thus, corruption perpetrated by subordinates is tolerated so long as they remain loyal.<sup>117</sup>

#### 4. Security Apparatus

Often the most developed and well-organized aspect of a neopatriarchal state is its large internal security apparatus. Ultimately, the civil and political arenas are subordinate to this secret police structure.<sup>118</sup> This is certainly true in the Palestinian Authority.

Despite the fact that the Oslo Accords limit Palestine to a 15,000 member police force, most reports claim that the PNA has far exceeded that number (now around 40,000) by setting up "non-police" security organizations such as the *mukhbarat*.<sup>119</sup> Many of the Fatah former cadres and the PLO's Diaspora military fighters have been integrated into this police force, both as a means of rewarding them for their support and affiliation and as a way of incorporating them into a quasi-military organization.<sup>120</sup>

The proliferation of security forces is an important element in neopatriarchalism, as it decreases the power of any one security agency by increasing the competition among many forces all working in a show of allegiance to one leader (in this case Arafat). Graham Usher states that there are anywhere from four to nine PA intelligence forces operating in the West Bank and Gaza, including the General Intelligence Service, the Preventive Security Service, the Presidential Guard, and the Special Security Guard. The most ominous feature of this division is that it makes it impossible to clearly delineate the separate do-

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115. Eisenstadt, *supra* note 59, at 280.

116. Brynen, *supra* note 10, at 83-84.

117. Brynen, *supra* note 10, 32-33.

118. SHARABI, *supra* note 67, 8.

119. Graham Usher, *The Politics of Internal Security*, 25:3 J. OF PALESTINE STUD. 22-23 (Winter 1996).

120. *Id.* at 28-29.

main of each apparatus. Ultimately, the blurred lines of responsibility increase Arafat's power leverage.<sup>121</sup>

What is marked about the Palestinian security forces is their loyalty to their commanders and Arafat at the expense of civil society. This abiding allegiance can be partly explained by the fact that the plethora of competing security forces gives Arafat enormous scope for influence. The "one boss but a thousand franchises" syndrome consolidates Arafat's rule by increasing the conflict among the various security forces that are in constant contention for Arafat's patronage.<sup>122</sup> This forestalls the coalescing of any alternative power centers. And, in the context of this Comment, the fealty to Arafat undermines the judiciary's ability to enforce its rulings.

#### IV. CONTEMPORARY PALESTINIAN LEGAL CULTURE

Palestinian judicial culture is an amalgamation of *sharia* law (whose jurisdiction, while historically encompassing every aspect of Islamic society, is today primarily relegated to family law), customary law, official *islaah* committees (quasi-official institutionalizations of the customary law forums), and a mosaic of civil and criminal law that is based on Ottoman, British, Jordanian, Egyptian, Israeli, and Palestinian precedents.<sup>123</sup> Compounding the problem of overlapping and inconsistent legal sources is the fact that, as mentioned above, from 1967, the Palestinians have been divested of operational authority. During Israeli occupation, this took the form of military rule circumventing Palestinian judicial autonomy. During the social unrest of the first Intifada, the development of professional expertise and institutional resources halted altogether. When the PA eventually signed the Cairo Accords, they inherited a barely functioning legal process.<sup>124</sup>

In late 1995 and 1996, Palestinians finally had autonomy over their court system, but they were confronted with a dearth of institutional and human resources, which impeded the adoption of Western modes of jurisprudence.<sup>125</sup> In part, this was due to the fact that, for nearly three decades, no local law schools existed. Aspiring lawyers had to pursue their education in foreign countries. If

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121. *Id.* at 22-24. Usher states that another reason for absorbing the Fatah Hawk and Panther wings (which were disbanded in September 1993) into the Preventive Security Forces was to prevent them from "feeling excluded and possibly forming an oppositional constituency. Their absorption into Preventive Security Forces not only pays them a wage, it affords them a political and social status commensurate with their former role as fighters." Moreover, to further decrease the development of rival factions, many of the former "chieftains," as well as some of the former dissident cadres, have been patronized with promotional rankings such as "general" and "colonel." *Id.* at 28.

122. *Id.* at 29.

123. It should be further noted that the legal precedents and codes in the West Bank and Gaza are not identical, due to previously separate Jordanian and Egyptian administrations. However, this Comment will not differentiate between the two so as to focus on the development of customary law among the local populace.

124. Chodosh, *supra* note 46, at 377.

125. *Id.* at 379.

and when they returned, no certification process or regulatory bodies existed.<sup>126</sup> Currently, there are only two law schools in the West Bank and Gaza, one of which engages only in research. There are around 800 lawyers employed in the West Bank and, in Gaza, only 100 of approximately 400 attorneys are considered professionally competent.<sup>127</sup> Palestinian courts do not guarantee indigent defendants the right to counsel.<sup>128</sup> Even when counsel is appointed, there exists no institutional training for attorneys and a severe shortage of funds for appointed counsel.<sup>129</sup> Few with legal experience are willing to take such jobs.<sup>130</sup>

Court resources, in general, are very poor. Gaza employs only about twenty-five judges and twenty prosecutors for a population in excess of one million.<sup>131</sup> The West Bank similarly employs approximately forty-five judges and prosecutors for a population in excess of 1.4 million.<sup>132</sup> Judges are not only poorly compensated for their work (making them potentially susceptible to corruption) but must shoulder the burden of much of the administrative work in their courts (such as that of research clerks, court reporters and administrators).<sup>133</sup> Thus, very few qualified lawyers will even consider offers to become judicial officers.<sup>134</sup> Palestinian legal analyses reveal both an increasing backlog in the Palestinian courts and poor quality of judicial disposition.<sup>135</sup>

Court proceedings are further encumbered by the fact that Palestine's multiplicity of legal sources, reflecting the numerous layers of foreign influence, combined with the lack of published legal texts and judicial decisions within Gaza and the West Bank, creates confusion as to which authorities have precedence in any given case. Moreover, the diversity of foreign training among Palestinian lawyers and the general unavailability of legal education at home cause many lawyers to be uneducated about Palestinian law.<sup>136</sup>

In addition to procedural inefficiency and administrative shortcomings, the justice system has been hampered by interference from the executive branch of the PNA. For instance, the executive branch allows a military court system to function independently of the civilian courts. The various members of the Palestinian police force are answerable only to that system. Moreover, Yasser Arafat has established state security courts, a legal remnant of the British Mandate's emergency laws formally based on the 1979 Revolutionary Penal Code, a

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126. *Id.* at 380.

127. This is in the opinion of leading legal authorities in Gaza. *Id.* at 430-31, note 394.

128. The court will appoint counsel to a defendant only if the crime in question carries a possible sentence of three years or more (in Gaza) or twenty-five years or more (in the West Bank).

129. *Id.* at 419, 423.

130. *Id.* at 423.

131. Chodosh, *supra* note 46, at 428.

132. *Id.*

133. *Id.*

134. *Id.* at 427.

135. For instance, a typical court calendar schedules thirty-five to forty-five cases per day. However, judges typically work five or six hours in court, and each case requires approximately an hour of their court time. For more systemic problems, see *id.* at 408-431.

136. Chodosh, *supra* note 46, at 431.

code which the PLO originally drafted in order to discipline and regulate its military forces dispersed around the Arab world.

The establishment of these military and state security courts has encroached on and stripped the civil judiciary of many of its powers and jurisdictions. For instance, cases which should be in the purview of the state courts (such as bouncing checks, taxation, fraud, drugs, and murder) are sometimes transferred to military courts.<sup>137</sup> And state security courts, which ostensibly only have jurisdiction over crimes which infringe on internal and external national security, are more often used to try alleged members of opposition groups (such as Hamas and Islamic Jihad) and to silence human rights activists.<sup>138</sup> Exacerbating the lack of public confidence in such a judiciary is the fact that the procedures in the state security courts violate minimum safeguards for a fair trial: hasty procedures do not allow the defendant to sufficiently prepare for trial; technical reports, such as those provided by a forensics unit, are not incorporated into trials; and sentences may not be appealed.<sup>139</sup>

#### A. *The Role of the Police*

An important component of any legal system is its coercive element, that which enforces the ruling of the judiciary. In traditional societies, this may constitute social pressure, the fear of ostracism, or the threat of war by a rival family or clan. In modern legal cultures, police fulfill this function.

The role of the police in the young PNA, however, is problematic. The PNA's excessive militarization tends to encroach on the judicial establishment, both actively and passively interfering with the civil judiciary. For instance, Palestinian police are often reluctant to involve themselves in what they perceive to be minor criminal matters.<sup>140</sup> This is due to the deference shown to customary law, to the lack of professional training in this fledgling police force, and to the fact that many PNA police view themselves primarily as freedom fighters—a paramilitary whose main concern is ending Israeli occupation.<sup>141</sup> People who want to find legal recourse through the state courts may be hesitant to do so for fear that they will meet with the indifference of the Palestinian police.

Police passivity is not the only problem. The security services, which see themselves as the long arm of the executive authority, also actively undermine

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137. Apparently this occurs when members of the security services are being prosecuted for the aforementioned crimes. See *LAW Calls for the Compliance with the Court Decisions and the Refrain from Undermining the Judiciary by the Executive Authority*, PEOPLE'S RIGHTS, Mar. 2000, at 35; *How Can We Stop the Decline of the Judiciary?*, PEOPLE'S RIGHTS, May 2000, at 38.

138. WAGNER, *supra* note 27, at 134, 137.

139. See *The State Security Court and Alan Nahel's Case*, PEOPLE'S RIGHTS, Feb. 2000, at 37. Recently, Arafat tried to co-opt civil court members by pushing through the appointment of Attorney General Khalid el-Qidreh as the Attorney General of the State Security Court, a move that was vociferously protested by human rights watch groups. See *Undermining Judicial Independence*, PEOPLE'S RIGHTS, Dec. 1999, at 38.

140. Jubeh, *supra* note 24.

141. Indeed, most police recruits took an active role in the last Intifada and are now on the front lines in skirmishes with the Israeli Defense Forces during the present Intifada.

the judiciary by blatantly disregarding proper procedure and court orders. In some cases, police forces have taken it upon themselves to

fight crime, solve clan or family disputes, and mete out punishment to those accused of “moral offences” such as drug-taking and prostitution. In Gaza and Jericho, these actions occur in the shadow of the PNA’s [Palestinian Authority’s] jurisdiction; in the West Bank, often in the name of Fatah. In both areas, they are being carried out illegally and beyond any remit of judiciary scrutiny.<sup>142</sup>

The police not only act independently of the civil judiciary, but sometimes actively disregard its rulings as well.<sup>143</sup> The Palestinian law journal, *People’s Rights*, cites numerous examples of the Palestinian High Court futilely ordering the release of political detainees who remain in detention, uncharged and untried, for periods ranging from two months to two years.<sup>144</sup> Neither the executive nor the security apparatus had complied with any of these Palestinian High Court decisions.<sup>145</sup>

The above provides one reason why the local populace continues to rely on customary law to resolve its differences. As one prominent lawyer said:

People need a proper trial system they can have faith in. When the PNA first came, Palestinians initially thought that the legal system being set up would be good. But soon there was so much interference in the legal system, especially by the Executive, that people soon lost faith in the system and were forced to rely again, solely, on tribal laws.<sup>146</sup>

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142. Usher, *supra* note 119, at 25. In part, this “police state mentality” may be due to a clash of two cultures—the rule of the law and that of the rifle. The latter culture may originate with the thousands of Palestinians from the Diaspora, affiliated to different military wings of the PLO, who view themselves as the “liberators” of Palestine and consider themselves above the law. For more on this theme, see Iyad Saraj, *Human Rights Under the PA*, PEOPLE’S RIGHTS, Jan. 1999, at 23-25 [hereinafter Saraj]; see also *Visits Banned to Detainee Abed Al Fatah Ghonem*, PEOPLE’S RIGHTS, Aug. 2000, at 24 (reporting a case where the Palestinian police illegally detained a suspect and banned visits by lawyers or relatives for one month).

143. WAGNER, *supra* note 27, at 132.

144. See, e.g., Samih Muhsen, *Last But Not Least: Political Detention*, PEOPLE’S RIGHTS, Dec. 1999 at 40.

145. For example, on July 11, 2000, the Palestinian High Court of Justice issued an order demanding the immediate release of Dr. Abdel Sattar Qassem (who was one of the signatories on a petition, known as the “Petition of the 20,” condemning the rampant corruption in the PNA). Despite the fact that Dr. Qassem had been in continued illegal detention since February 18, 2000, Police Chief Ghazi Al Jabali disregarded the order and only released Qassem two and a half weeks later. The Human Rights and Oversight Committee reported to the PLC that more than fifty High Court orders requesting the release of political detainees were not complied with. *Police Princes Control the Public*, PEOPLE’S RIGHTS, Sept. 2000, at 19, 20. See also *On Non-compliance with the Palestinian High Court Orders*, PEOPLE’S RIGHTS, Jan. 1999, at 19 [hereinafter *On Non-compliance*].

146. Interview with Jonathan Kuttub, Esq., in East Jerusalem (Jan. 28, 2001). The people’s frustration with the fledgling judiciary has received a prominent voice in the human rights law journal *People’s Rights*:

To form a State Security Court in the PA-controlled areas was a mistake. . . It undermines the authority of the regular judiciary. . . Furthermore, it is highly frustrating for the people, who have spent lifetimes yearning to see a strong and fair national judiciary replace the ragged remains of a justice system long ago shattered by the Israeli occupation. Events and trials such as these serve very little purpose other than to undermine public confidence in the national judiciary. . . People avoid courts and tend to seek tribal solutions to problems.

However, there are sectors of the Palestinian population that are not entirely satisfied with customary law as a social mechanism for conflict resolution. Featured most prominently among them are the intellectual elite, businessmen, and individuals who do not belong to powerful or large clans.<sup>147</sup> Many among the intellectual elite yearn for a Western-style democracy with clear separation of power between the judiciary, executive, and legislative branches and an emphasis on individual liberties. Businessmen require objective, contractual criteria and proper enforcement in order to do business and encourage foreign investment. And members of small, uninfluential clans often lack the clout to achieve what they believe is the most equitable resolution.<sup>148</sup> The fact that customary law has no clear documented rules, relying instead on decisions of tribal judges who can be swayed by tribal politics and the active intervention of a clan, potentially undermines the just outcome of traditional proceedings.<sup>149</sup>

### B. *The Intermingling of Customary and Civil Law*

Pockets of dissatisfaction with this process notwithstanding, a cursory glance at the local, daily newspapers provide evidence that the use of customary law is rampant within Palestinian-controlled areas. Even the most prominent newspapers, such as *Al-Quds*, are filled with announcements publishing the successful conclusion of reconciliation between families.<sup>150</sup> Tribal settlements

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Anis Quasem, *How Can Major Al-Jibali Grant or Withdraw "Patriotism" from the People?*, PEOPLE'S RIGHTS, Oct. 1999, at 35, 36.

Disregarding High Court orders is not a new occurrence, but the Executive Authority's complete indifference to the decisions of the highest-ranking court is very sad. It has embarrassed itself and undermined the Judiciary. The people are not likely to have faith in an authority that openly scorns the concepts of judicial independence and the rule of law.

Muhsen, *supra* note 144. See also *On Non-compliance*, *supra* note 145.

147. Jubeih, *supra* note 24.

148. *Id.*

149. Tribal judges often feel the need to appease the stronger party in a conflict, the party whose family has more social clout and is apt to wreak havoc on the weaker party until it receives satisfaction. Judges want to prevent such disorder and, therefore, often feel compelled to side with the party that has brought the most pronounced delegation, both in terms of numbers and in terms of the prestige attributed to the different notables. Interview with Salah Eisah Mousa Qassem, member of Bethlehem's reconciliation committee, in Bethlehem (Sept. 11, 2000).

Of course, one could argue that Western jurisprudence is not immune from such influences. A judge has discretion to maneuver through precedent and the rules of interpretation, and often his or her decision is consciously or unconsciously swayed by political affiliation and the biases of social class.

150. For instance, the announcement below appeared in the newspaper *Al-Quds*:

Tribal Reconciliation and Arab Noble Honor  
From the Abu-Sneineh Family of Jerusalem

Jerusalem—Yesterday afternoon, on Thursday the 1/2/2001, a Reconciliation Delegation, consisting of important personages such as Abu Ali Ashami [goes on to give the names of about 20 sheikhs] went to the home of the Abu-Sneineh family, who live in the A-Tour neighborhood, on account of the sad accident that occurred when their child, Salim Othman Abu-Sneineh, drowned in the Babay Amusement Park, as decreed by fate, around a year ago. Haj Muhammed Abu-Sneineh [et al.] and a big crowd from the Abu-Sneineh family came out to meet our delegation. After welcoming our delegation, Abu Ali A'shami stood and made the condolence prayers for the boy and announced in front of all those present that the delegation was prepared to do

commonly appear in local newspapers, next to business advertisements and sundry solicitations, and are published at the initiative and expense of the family seeking conciliation.<sup>151</sup>

Sometimes, the announcements published reveal an opt-out attitude towards the civil courts. For instance, there is an option, built into modern, customary law agreements, wherein the aggrieved party formally waives the right to pursue the case in the civil courts.<sup>152</sup> On the other hand, sometimes the customary law dynamic directly impacts civil proceedings, one example being that the aggrieved family must consent before a suspect can make bail.<sup>153</sup>

The interview below further illustrates the unique intermingling of the legal courts and customary law:

Two months ago, I got into a fight with someone [after a car crash] and I hit him and he had to get six stitches. We both were put in prison until my grandfather (who is the head of my clan) went to the village clan head and, together with his family [of the person he got into a fight with], they wrote up a *waraqat suluh* [a reconciliation paper]. They gave it to the police and the police let us out [of jail]. Then we had to show up for court where they asked us if we had made up [written

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anything that was asked of them and that the accident was predestined. After this, Haj Abu-Sneineh Abu el-Abed stood up and announced in front of the delegation that the Abu-Sneineh family decided to forgo [any compensation] and allow for God, the Almighty and all Powerful, to exact the payment for the transgression. The Abu-Sneineh family forfeited payment honorably for the sake of God, the Prophet, and the respected delegation. The family returned the whole sum given to them. Coffee was drunk and thus the meeting with the owners of the Babay park, and with all those that had committed themselves as guarantors"[here there are many names], came to an end.

On this occasion, we, the owners of the Babay Gardens of Jericho, call on God to be with the Abu-Sneineh family and may there be many more people like that family. We also would like to thank the [reconciliation] delegation and all those who helped us achieve such an honorable outcome. May God reward them with well-being and may there be many more people like them. He is all-hearing and all-granting.

Said Agha and Adel Alan

The Babay Gardens' administration —Jericho

*Tribal Reconciliation and Arab Noble Honor From the Abu-Sneineh Family of Jerusalem*, AL-QUDS, Feb. 2, 2001 (Vera Inoue-Terris, trans.), at 4. In general, local custom dictates that family and clan feuds be aired in public. Palestinian newspapers are full of public apologies, thanks, and even threats appearing in small advertisements throughout the newspaper. The elements of public exposure and social pressure still play a focal role in resolving conflicts in Palestinian society.

151. See AL-QUDS, Oct. 9; see also AL-QUDS, Oct. 10, 2000

152. For example, *Al-Quds* published an announcement that the Zamari family, from Kalikilya, had reconciled with a family from Gin-saa-fut after losing a relative in a car accident. *Reconciliation Agreement*, AL-QUDS, Jan. 19, 2001. According to the announcement, the Zamari family waived its "legal and tribal" rights against the driver, Akif Nubhaan. *Id.* ["Tribal rights" meaning the right to exact blood revenge— "a life for a life."] The announcement states that the aggrieved family also conditionally returned the *diya* (or blood money, paid to redeem the life of their dead relative) with which it was compensated, provided that Akif Nubhaan submit all the necessary documents to the insurance company so that the Zamaris could recover their loss. *Id.* However, according to the agreement, if the insurance company decided not to reimburse the Zamaris, the family would require the driver, Akif Nubhaan, to return the \$1,250 *diya* to the mourning family. *Id.*

153. This is evident in the tribal reconciliation agreement reached between the Sawafta family (whose three-year-old daughter was killed in a car accident) and the Daraghma family, where the Sawaftas agreed to the driver's release on bail. In this particular case, however, they did not waive their right to pursue further legal recourse. AL-QUDS, Nov. 8, 2000.

a *suluh*]. We said: “Yes” and each of us had to pay 100 shekels to the court and 20 shekels each to the police station for having been arrested.<sup>154</sup>

There are many interesting aspects to the above anecdote. The first is that the police were willing to let the two antagonists out of jail after receiving the *suluh* paper, demonstrating how the police have, in a semi-official manner, recognized the status of the traditional document. Ibrahim Shehada (director of the Gaza Center for Rights and Law) reports that police officers have the formal discretion to release someone within forty-eight hours if a reconciliation agreement is brought to them.<sup>155</sup> After this period, the case goes to the courts. According to Shehada, the accused benefits from this reconciliation agreement once the case goes to the courts, because judges see it as a mitigating circumstance for lessening the sentence.<sup>156</sup> Attorney Jonathan Kuttab concurs with Shehada on this point, noting “the regular courts always ask if the tribal responsibility has taken place first, especially in every case of blood and honor (*damm* and *aradd*).”<sup>157</sup>

The degree of judicial and police intervention in the customary law dynamic seems to be in proportion to the severity of the crime at hand. The more serious the crime, the more likely the police will become involved.<sup>158</sup> For instance, in typical murder or manslaughter cases, defendants are tried by civil courts (in conjunction with customary proceedings).<sup>159</sup> While a clan delegation intermediates in the traditional process, which is meant to lead up to reconciliation, the police hold the killer for a preliminary twenty-four hours. The prosecutor remands it automatically for another fifteen days, after which the prosecution starts to determine whether the murder was committed with or without intent. A case could take months or years to prosecute, and a defendant convicted of murdering with intent usually receives a twenty-five year sentence.<sup>160</sup> While the reconciliation process may not affect the sentence, it does maintain social balance and prevent the aggrieved relatives from exacting revenge on the murderer’s extended family.

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154. Interview with Ashraf El-Masri (twenty-seven years of age), in Gaza (June 26, 2000).

155. Shehada, *supra* note 9.

156. This might reflect a retributive principle that punishing the accused is for the satisfaction of the aggrieved party or family, and less for the benefit or satisfaction of society-at-large. See KENNETT, *supra* note 12, at 30.

157. Kuttab, *supra* note 146.

158. According to Ibrahim Shehada, however, probably 95% of rape cases do *not* reach the courts. These cases are very sensitive socially and it is shameful for a family to make them known to the public. The raped victim, as well, will be afraid to make such a case public, for she would most likely be killed for dishonoring the family. There are a few cases which reach the courts, but these proceedings are then always held behind closed doors. Shehada, *supra* note 9.

159. However, it is important to remember that the Palestinian legal mosaic is not relegated to the interplay between the civil courts and the traditional tribal dynamic. Religious authority is very prominent in Palestine, evidenced by the fact that much of family law (marriage, divorce, etc.) is still under the jurisdiction of the *sharia* courts. In his article, Hillel Frisch cites an example in which Arafat even allowed a homicide (normally under the jurisdiction of the state courts) to be adjudicated by an arbitration committee headed by the *mufii* (religious leader) of Gaza, who issues a ruling based on *sharia* law. Frisch, *supra* note 30, at 350.

160. Shehada, *supra* note 9.

However, in cases where there is no intent to kill, the reconciliation paper can play a focal part in the sentencing, as a judge will often lessen sentences when a reconciliation has been reached.<sup>161</sup> Unfortunately, like clan judges, civil judges, whether consciously or not, have difficulty separating the notion of reconciliation with the parties or clans who need to be reconciled. Because all of this occurs in a fiercely tribal culture, the civil judges must contend not only with the social value of conciliation but also with the social players who wield various levels of influence.<sup>162</sup> Judges are thus susceptible to influence and to the danger of trying to appease certain clans. This leaves the system open to the vagaries and injustices of tribal politics, evident in the early release of Taher's assailant as well as in numerous other anecdotes.<sup>163</sup>

According to Ibrahim Shehada, when lesser offenses have been committed (non-capital crimes and civil disputes, such as accidents, fights, etcetera) about sixty percent of the antagonists will try to settle their differences out of court, in accord with traditional tribal intervention.<sup>164</sup> However, *urf* or tribal law has difficulty enforcing decisions regarding cases relating to money, loans, land issues, etcetera. Often, to remedy this, the aggrieved party will approach the police directly and ask them to arrest the individual who is behind in payments. According to the Director of the Palestinian Association for Legal Sciences, Abu Musa, the police are in the habit of apprehending the perpetrator without a court order and holding him for a day or two in jail, thereby putting pressure on the incarcerated individual, or his clan, to pay back the debt.<sup>165</sup> Alternatively, the police do not serve as intermediaries but only act as advocates for tribal solutions. For instance, when citizens approach the station with small claim grievances, the police often encourage them to solve their own problems through customary law before bringing their case to court.<sup>166</sup>

The Palestinian executive and judiciary branches are also making an active effort to incorporate the practice of customary law into their bureaucratic fold.

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161. *Id.*

162. *Id.*

163. Taher, *supra* note 1. For example, Lieutenant Hassona was killed by a barrage of bullets on his way home. It turned out that his killers were three neighbors from a rival clan (the Bheissis) and relatives of a young man killed by Lieutenant Hassona a few years earlier during the Intifada (on suspicion of being a spy). Hassona's murder alarmed his comrades in the Fatah party who had also killed collaborators during the Intifada and were now officers in the Palestinian Preventive Security forces. Two hundred of them, armed, went to the scene of the crime and threatened to wipe out the whole Bheissi clan. Police intervened and averted the massacre, whereupon a military court was convened and, within three days, the killers were sentenced to death and twelve others to various prison sentences. PALESTINE REPORT, 5-13, Sept. 11, 1998, at 10-11.

This article bemoans the fact that "the military judge defended the speedy trial and the sentences as important elements in appeasing the burning rage of the security forces and showing that the Authority can protect its own" and is worried by the fact that "the Palestinian Authority has chosen to rule through tribal politics. A person has to be from a big family or belong to Fatah, the ruling party, to get anywhere . . . in such an environment, people can only rely on their families for protection. The danger is compounded by the fact that thousands of soldiers, whose loyalty is tribal, are heavily armed . . ." *Id.*

164. Shehada, *supra* note 9.

165. Interview with Adnan Abu Musa, Director of Palestinian Association for Legal Sciences, in Gaza (Feb. 6, 2001).

166. *Id.*

For instance, the magistrates in the courts have been directed by the executive branch to encourage mediation and arbitration.<sup>167</sup> And in the wake of the PNC passing the Arbitration Law in January 2000 (*qawnawn el-tahkeem*), approving the formal development of Alternative Dispute Resolution Centers, the Palestinian judiciary can avail itself of institutional arbitration. These centers are modeled on modern, Western legal arbitration, but are a mixture of civil jurisprudence and local notions of conflict resolution. Because it retains traditional elements, and because there is a backlog of cases in the court system, ADR has become a popular alternative.

During a typical court hearing, the judge will review the complaint and ask the parties whether they wish to arbitrate or mediate their disputes (mediation defined as a traditional *sulha*). If the parties wish to arbitrate, they must sign an arbitration agreement to be affirmed by the court. Arbitration sessions are carried out locally and, when a decision is reached, the court is approached to confirm the arbitral awards and deliver an order of execution to the police.<sup>168</sup>

The PNA's efforts to incorporate traditional forms of mediation are also evident in bureaucratic moves, such as the 1995 establishment of the Office of the President for Tribal Affairs (headed by Dr. Gheith Abu Gheith), created to adjudicate problems between families.<sup>169</sup> Consequently, there are over 200 reconciliation offices throughout Palestine. Volunteers run most of these offices, but the main office in Gaza is fully funded by the PNA. By creating such an office, the executive branch has instituted a paid position for regulating and overseeing tribal disputes and decisions.<sup>170</sup> This simultaneously gives legitimacy to the tribal framework and provides the executive with leverage in regard to tribal affairs.<sup>171</sup>

The official facilitation of customary law, however, is most prominently evidenced by the participation of PNA dignitaries in *sulha* mediation and cere-

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167. The decision to sanction extra-judicial, conflict resolution alternatives was also encouraged by many studies of the Palestinian legal situation, as a solution to relieve the judiciary's tremendous backlog. See Chodosh, *supra* note 46, at 408.

168. *Id.* at 403.

169. Frisch, *supra* note 30, at 349.

170. *Id.*

171. The state has also organized the tribes in their specific geographic regions. For instance, in the Beersheva region, the Association of the Confederation of the Sons of the Tribes of Beersheva (*Jam'iyyat Abna' Wa-Qaba'il Bir Al-Sab'*) was founded by the Palestinian Ministry of Interior to regulate the tribes in that area. The ministry granted official bureaucratic status to the clan heads, reflected in the formation of an executive committee and the publication of the participants various positions and telephone numbers. In many ways, this official recognition replicates the formal alliances forged during Ottoman rule, when the clan heads were used as intermediaries between the local people and the authorities.

The official legitimacy of their rule does not go unappreciated or unacknowledged by the clan heads, and helps to foster the type of loyalty to Arafat discussed in the section on neopatrimonialism. In regard to the newly founded Beersheva association, the members responded to their incorporation into the state building efforts with a public letter in which they thanked "President Yasir Arafat for placing precious trust [in the association] that enables [it] to take a role in the service of the Palestinian people so that it may be forever a constructive organ in building our Palestinian state." *Id.* (quoting AL-QUDS, Nov. 7, 1995).

monies.<sup>172</sup> Official authorities are often included in the final, ceremonial stages of these legal proceedings, invited by the family members to lend more weight and authority to the public display of the traditional framework's legal outcome. The authorities, for their part, are interested in participating in the ceremony so as to have a measure of influence over a dynamic which is so focal to public life.

## V.

### CONCLUSION

While the Palestinian judiciary is beset by many problems inherent in the chaos and bureaucratic shortcomings inevitable to any new state, the country's legal culture is primarily a symptom of its socio-political culture. The blurring of lines between the civil and traditional judiciary is characteristic of societies that fall under the sociological rubric of neopatrimonies. While Palestinians may be on their way to realizing full independence and enjoying all of the manifestations of modern statehood, their political and economic situations are precarious and still enmeshed in the patterns of the past.

Nonetheless, one might ask why Arafat does not at least try to subordinate customary law and tribal politics to his regime. What does Arafat have to gain by this blurring of jurisdictional boundaries? It appears that this legal pluralism facilitates Arafat's solidification of his personal power. The absence of formal jurisdiction in neopatrimonies creates competition between individuals and organizations. Perpetuating clientelism, while coming at the expense of democracy, nurtures the patron-client relationship and fosters loyalty to his rule.<sup>173</sup> Strengthening the judiciary would strengthen the rights and position of the individual and, in turn, empower civil society as a whole. But by not allowing the judiciary to clearly demarcate its jurisdiction and enforce its rulings, Arafat strengthens the role of tribal politics and empowers the clan heads, who in turn are dependent on him for employment, finances, and political power. As Haider Abdel Shafi (former PLC member) has said: "Clan culture was decreasing in the past,

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172. For instance, the *Al-Quds* newspaper reported:

"[a]fter Friday prayers, an honorable procession composed of notables from the Bethlehem district and notables from the Hebron district proceeded to the *Diwan of Ahl al'Hadaïqa* in the village of Shuyukh in order to complete the rites of tribal conciliation (*sulh ashairi*) in the wake of a sad car accident." Among the important dignitaries in the procession, invited by the family of the bereaved, was Colonel Abu Khalid al-Lahham, a former officer in the Palestinian Army and currently an adviser to President Yasir Arafat.

*Id.* at 341 (quoting AL-QUDS, Sept. 29, 1995). Another example:

On September 30, 1995, customary-law reconciliation took place in the headquarters of "Quwwat al-17 [Force 17]," one of the five security agencies of the PA, in the presence of leading security personnel and personalities. At the end of the meeting, two Jericho families, the Qaysiyya and the Nisan, concluded the *sulha* "with the blessing of the Authority and the Quwwat al-17."

*Id.* (quoting AL-QUDS, Oct. 24, 1995). See also AL-QUDS, Nov. 2, 1995.

173. In this regard, Iyad Saraj, a prominent human rights activist in Gaza, in one of his treatment proposals for building a Palestinian democratic society that has regard for the rule of law, advocates "overthrowing the tribal symbols that have for so long manipulated leadership and politics. This should be replaced by a unified Arab symbol." See Saraj, *supra* note 142, at 25.

but now it is being encouraged again, at the expense of the legal system of course . . . Arafat is encouraging clan culture because it is to his advantage to favor the group over the individual.”<sup>174</sup>

Rather than resist customary practice, Arafat wants to take advantage of and contain the strong forces of tribalism. He prefers that tribal practices remain under his auspices. By encouraging clan heads to work within the PNA system, he allows the tribal dynamic to continue unimpeded (which it might do for some time regardless) and gains power and influence in the community. He co-opts the clan heads into the PA and thus avoids any potential rivals for power. The coupling of the PNA with tribalism works well for both sides: Arafat gains power and control by patronizing the clan heads, and the clan heads benefit from receiving access to the formal channels of power and having the security establishment “officially” backing them in carrying out tribal resolutions.

As far as local communities are concerned, customary law has remained an abiding conflict resolution mechanism through volatile periods in Palestinian when partially implemented civil institutions left a legal vacuum. At present, sociological factors are not ripe for the Palestinians to relinquish their customary law practices. Not only is the PNA judiciary rife with problems, but customary law safeguards family honor and maintains the social balance between the clans. Western legal traditions do not serve these functions still so deeply rooted in Palestinian culture.

#### AFTERWORD

What lies in store for Palestine society is unclear. Neopatrimonialism may succumb to the tides of change when populations grow, political bases expand, and the material resources at the disposal of the political hegemony dwindle. Moreover, when non-elite sectors of society become more educated and politically aware, increasingly disgruntled, and exposed to other democratic cultures, they may pose a threat to the ruling hierarchy and its power base structure.

In addition, if and when economic conditions improve within the PNA, we can assume that the weakening of clanship ties will accelerate. Palestinians, on the whole, are no longer tied to the village farming life of half a century ago. There are signs of a slow move toward a more nuclear-oriented family, especially in the larger Palestinian cities where married children sometimes opt to move away from their family home. The Israeli-Arab sector already shows prevalent signs of such a dynamic.<sup>175</sup> If peace develops, economic conditions improve, and the middle class grows, nepotism and patron-client relations may give way to meritocracy and competition and the bonds of the tribal clan may slowly unravel.

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174. Interview with Dr. Haider Abdel Shafi, former PLC member and Palestinian negotiator, in Gaza (June 27, 2000).

175. See Soen, *supra* note 13, at 261-263, for a discussion of the historical process of the demise of the traditional clan regime within Arab villages in Israel as a result of the infiltration of Western customs and rapid modernization since 1967.

Conversely, a more radical scenario is also possible. The very nature of clientelism, with its propensity for favoritism, nepotism, and corruption, may fall prey to mass cynicism and distrust towards the elite class.<sup>176</sup> Militant, religious Islamists (such as Hamas in the West Bank and Gaza) may gain even wider support than they enjoy now and develop into a political counterculture. Such forces are already evident.

However, at present, with the Al-Aqsa Intifada now in full force, a significant rise in neopatrimonialism can be expected. Once again, Palestinian areas are fraught with havoc and chaos; law and order are secondary to maintaining the semblance of normality in a war-like atmosphere. The police and law-enforcing bodies have been conscripted to the “national struggle,” which has been dubbed the “Palestinian war of independence.” With the police dealing with national priorities, we can expect that Palestinians will fill the legal void with an accelerated use of customary law.<sup>177</sup>

176. This would particularly be the case with individuals who are not well-connected to powerful families.

177. Substantiating the above, recent tribal reconciliation announcements have appeared in the newspapers with references to the “need for unity and concordance” during the current Intifada. Palestinians think it a national priority to reconcile with each other in order to withstand the “siege and subjugation” of the Israelis. For example, see the announcements below from the May 5, 2001, edition of *Al-Quds*, (Vera Inoue-Terris, trans.) [italics added]:

*Tribal Reconciliation Between the Uncles of the Doudeen Family*

Karza—Dura—Hebron—Yesterday afternoon, a big [reconciliation] committee. . . headed to Karza village to reach a tribal truce in the wake of a family fight that occurred between two uncles from the Doudeen family a couple of days ago. This incident led to the death of Wasfī Ali Doudeen and the injury of a number of family members. When the committee reached the Karza schoolyard, they were greeted by hundreds of members from the Darabee and Doudeen tribes, as well as notables from the magistrate. After being welcomed by Ahmed Shaker Doudeen, Haj Zuheir Marqa spoke, during which he sent condolences to the Doudeen family and wished for speedy recoveries for all those who were injured. *He called for unity and the removal of disagreements amongst ourselves, especially during these difficult times that the Palestinian peoples are living through. He stressed the readiness of the [reconciliation] committee members to work for whoever needs them.* Immediately after, the deceased’s brother, Khalaf Ali Doudeen, stood up and welcomed the committee and thanked them for their good efforts to remove the bad and bring in reconciliation between the people. He then gave the committee a tribal truce agreement valid for a year after the sum of 1,025 [Jordanian] dinars was paid as compensation. This truce was shown to the guarantor, Hamzeh Abu A’lan [etc.]. And so Arabic coffee was drunk by the [reconciliation] committee notables.

The Doudeen Family

*Tribal Reconciliation and Genuine Arab Honor Between the Al-Haymouni Family and the Al-Tarwa Tribe*

Hebron—Sa’ayer—Yesterday was a historic date in establishing genuine Arab honor. Notables from the tribal reconciliation committee in the Hebron district, headed by the Haj Zuheir Marqa. . . and many more notables from Hebron, went to the town of Sa’ayer to carry out tribal reconciliation activities in the aftermath of the tragic traffic accident that occurred five years ago in which the driver, Fallah Abdul Fattah Al-Haymouni, caused the death of Raid Khalil Al-Tarwa. The arriving notables were received by Sa’ayer notables and notables from the Al-Tarwa tribe . . . and many people from the town and from the tribes.

*After the greeting, the Al-Tarwa family requested that the [reconciliation] committee announce their intent to forgo all legal and tribal rights for the honor of Allah the Almighty and for the respected notables, to be done in appreciation of the situation*

The authors suggest the following topics for further research:

- What is the role that *honor* plays in the tribal dynamic, both in regard to social balance and the Palestinian concept of justice?
- To what extent do the stronger clans receive preferential treatment in customary law procedures?
- Are there meaningful differences in the ways various types of crimes (such as criminal vs. civil, violent vs. monetary, domestic vs. urban) are handled through modern customary law channels?
- How do demographic and socioeconomic factors (such as West Bank vs. Gaza, rural vs. urban, poor vs. rich) influence the character and prevalence of tribal and customary law practices?
- To what degree have tribal and customary law remained entrenched in other Arab nations' legal systems? If these countries' judicial systems have weeded out such influences, what are the social and political factors that have characterized the transition?
- Is there an innovative judicial model that can guarantee civil rights, individual liberties, and due process and yet still be culturally sensitive to Third World, tribal dynamics? Are customary law and a Western-style judiciary mutually exclusive, or can a model be developed that incorporates the best of both systems?

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*that our Palestinian people are living under—subjugation and siege.* The Al-Tarwa family then proceeded to return the tribal compensation monies that were previously paid to them. Haj Zuheir Marqa spoke persuasively when the [reconciliation] notables first reached the town of Sa'ayer. In his speech, he emphasized the honor due the Al-Tarwa tribe and the town of Al-Sa'ayer. He spoke about unity and concordance and doing away with disagreements that exist between our people. Omar Al-Zugheiyer spoke and thanked Al-Tarwa tribe and the Sa'ayer notables for their noble stand towards the [reconciliation committee] elders and the Al-Haymouni family. The Haymouni family embraced Al-Tarwa tribe members and Arabic coffee was drunk. This was the beginning of the truce whereupon good took place of bad, and the white flags were raised. With this event, the Al-Haymouni family wants to warmly thank their brothers from the Al-Tarwa tribe for the honor and genuine forgiveness and also thank the tribal reconciliation committee members for all their efforts.

May God Bless All Who Have Goodness and Forgiveness  
The Al-Haymouni Family—Hebron