INFORMAL JUSTICE IN THE PALESTINIAN LEGAL SYSTEM

CONFLICT OR COEXISTENCE BETWEEN LEGAL ORDERS?

Jamil Salem / Ilona-Margarita Stettner

The Palestinian Legal System is often characterised as complex, since it consists of different layers of colonial codes and rules: Ottoman, British, Jordanian, and Egyptian laws, Israeli military orders and Palestinian legislation. Complicating matters further, there are at least two segments of legal and judicial life that coexist in Palestine:[1] Codified laws and regulations, which include the religious laws (i.e. Sharia), and an informal system of conflict resolution based on customs (*urf*).

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In recent years, both the Palestinian Authority and the International Community have put effort into building and strengthening the formal justice system in the Palestinian Territory. Today, there are 20 Magistrates courts (14 in the West Bank and six in Gaza), eleven Courts of first instance (eight in the West Bank and three in Gaza), three Courts of Appeal (in Ramallah, Jerusalem and the Gaza Strip), the Higher Courts (Courts of Appeal and Cassation, High Court of Justice), as well as religious family courts (i.e. Sharia and Ecclesiastical courts). Yet, if a crime has been committed or a civil dispute needs to be settled, the state courts are not the only means of dispute resolution that come into play: In most of the criminal and civil cases, alternative dispute resolution mechanisms work hand in hand with, or parallel to, the formal justice system.

1 | The term "Palestine" if used in this article refers to the historic Palestine before the creation of the State of Israel. If today's situation is discussed, the authors will use the term Palestinian Territory or West Bank and Gaza Strip.

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According to a survey conducted by the Palestinian Center for the Independence of Judiciary and Legal Profession (MUSAWA), half of the public does not trust the formal judicial system (for reasons such as ineffectiveness, corruption and a lack of fair trial), while they still believe in tribal law. More than 60 per cent of Palestinians say they would seek alternative dispute resolution mechanisms if it became necessary.

Should the coexistence of two legal segments in today's Palestinian society be described as impracticable under political objectives of the Palestinian Authority (PA) since the Oslo Accords? Although the two systems are considered to be "conflicting", that neither creates a necessity for a complete separation between two legal orders nor implies an incapability to integrate both orders in the same centralised political system.

INFORMAL JUSTICE IN PALESTINE

Informal justice refers to the social phenomenon widespread throughout the West Bank and Gaza Strip (similar to a number of Arab and non-Arab countries) of settling disputes between litigants outside the framework of state courts and the formal justice system. The methods used to settle disputes in the informal justice system are often referred to as "tribal" or "customary" laws. The principles of informal justice stem from various sources: general Arab and in particular Palestinian historical, social and cultural heritage.[2]

Tribal Justice refers in this context to an ancient judicial system with Bedouin roots. It includes tribal *sulh* (reconciliation) and tribal law. Tribal *sulh* is a method of dispute resolution through conciliation, based on the accommodation of custom, religion and tribal traditions. It has gone through different stages of development throughout history. As for tribal law, the rules are drawn from the dominant tribal traditions in the area where it is practised.[3]

2 | Institute of Law, Birzeit University, *Informal Justice: Rule of Law and Dispute Resolution in Palestine,* 2006, 14, http://lawcenter.birzeit.edu/iol/en/project/outputfile/5/a391785614.pdf (accessed 21 Aug 2013).

3 | Ibid.

The difference between *sulh* and tribal law can best be explained by looking at their respective representatives: A tribal judge, representing tribal law, is a person who specialises in solving disputes presented to him, through issuing a final verdict to both parties that is based on tribal *urf,* and through the accreditation of proofs and conjectures presented to him by the parties to the disputes. An *islah* man, representing the tribal *sulh*, is a person who seeks to solve conflicts between two parties through bridging the gap between their points of view, utilising his personal qualities such as the ability to convince, eloquence and good reputation in order to achieve a conciliatory outcome to the demands of the parties to the disputes, relying on a number of sources, mostly *urf*. The term *islah* stems from the *sulha* (reconciliation). The final settlement of the case is then called *Saq Al-Sulh*.

Bedouin woman herding goats: The inhabitants of the Gaza Strip were influenced by the informal justice widely practiced by the Bedouins of the Northern Sinai. | Source: monika.monika, flickr ⓒⓘ.

Today tribal judges are still active only in the Gaza Strip and in the rural area around Hebron. This is explained by the mass forced movement of Palestinian people from the Beersheba area (whose residents were mostly Bedouins) to the Gaza strip and Hebron in the aftermath of the 1948 war taking with them their social and cultural heritage. The inhabitants of the Gaza Strip were additionally influenced by the informal justice widely practiced by the Bedouins of

the Northern Sinai. Tribal *sulh* on the other hand is widespread throughout the Palestinian Territory.[4] *Islah* men are often appointed by the President.

The societal need for and the acceptance of an informal justice system next to the state laws is often described as the result of the shortcomings of the formal justice system due to external factors, and also the consistency of pre-modern patriarchal structures that are based on clans and tribes rather than on the individual. Tribal law implies a tribal world order, in which the tribe or the clan plays the central role, and not, like in modern justice systems or in religious laws, the individual. If a member of one group violates the property, physical integrity or the honor of a member of another group, a case will erupt between the two tribes to which perpetrator and victim belong, and not between the two individuals themselves.[5]

To say that a particular society is a tribal society means that tribalism is a main or significant regulator of social relations in that society, or that it is a basic determinator for the life opportunities in that society.

No doubt tribal law still plays a role in the Palestinian society, but Palestinian society at large can no longer be considered tribal. To say that a particular society is a tribal society means that tribalism is a main or significant regulator of social relations in that society, or that it is a basic determinator for the life opportunities in that society. In tribal societies, the tribe determines opportunities for education, work, income, medical treatment, location and type of housing, migration, marriage and social and legal rights, as well as other aspects. In Palestinian society, kinship structures based on families are still important, but their role is contained. They are not in control of economic resources, political authorities, or social and educational activities and positions and institutions.[6]

Why, then, does the informal justice system still play such a significant role in Palestinian society? The weakness of the overall state system, particularly the judiciary, which may be partly explained by external factors, such as a history of changing alien authorities and the still ongoing

4 | Ibid., 63.
5 | Thomas Frankenfeld, "Die Macht der Familien-Clans in Palästina", *Hamburger Abendblatt,* 21 Jun 2007, http://abendblatt.de/politik/ausland/article865411 (accessed 21 Aug 2013).
6 | Birzeit University, n. 2, 140.

Israeli occupation, has certainly had an influence on the significance of alternative dispute resolutions in the Palestinian Territory.

The perceived advantages of the informal system over the formal system are often explained as: lower cost of services, speedier, more efficient proceedings, and easy access in all regions of the Palestinian Territories.[7] With regard to cost, however, the widely held perception that the informal system is less costly in the long run is not as clear cut. Although the informal system is supposed to be free of cost to the parties involved, as regards the work of the mediators, it was confirmed by many respondents that some mediators do ask for compensation for their work. This is despite the fact that all the mediators interviewed frowned upon such practices and denied their own culpability.[8] In addition there is a general misunderstanding about costs incurred by bringing a case to the courts. While civil cases, such as land and property issues, incur certain administrative expenses and require both parties to hire lawyers, this is not so in criminal cases. Here the state prosecutor is responsible for representing the public right of the state, and the defendant has the right to legal representation provided by the state.

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However, the expedience of informal mediation becomes more evident when one considers the current inefficiency of the courts. It is widely known that backlog in the courts results in cases being held up for months if not years. Mediation, on the other hand, is initiated as soon as a conflict occurs, and measures are taken to secure a truce directly with the parties involved and thus prevent retaliation by the victim's family for the crime committed. It is this immediate and personalised response that the state authorities, whether it be the police, the state prosecutor or the courts, are unable to provide, especially in the current

7 | The Palestinian Center for the Independence of Judiciary and Legal Profession (MUSAWA), *The Second Legal Monitor for the Situation of Justice in Palestine*, Apr 2012, http://musawa.ps/publication/annual/20120621081113.pdf (accessed 21 Aug 2013).

8 | We refer here to a report drafted by the Institute of Law at Birzeit University entitled *Informal Justice: Rule of Law and Dispute Resolution in Palestine* from 2006. Cf. n. 2.

circumstances. On the other hand, the formal court system is inherently more time-consuming for reasons relating to procedural requirements, such as investigation of a crime and the collection of sufficient evidence to prosecute an individual. However, these procedures are ultimately necessary to ensure the highest degree of justice, guarantee a fair trail and safeguard basic procedural rights. The speediness of the informal system is therefore often at the expense of these fundamental rights and principles.[9]

THE PAST AND THE PRESENT: LEGISLATIVE DEVELOPMENTS IN PALESTINE

To understand the legal basis of informal justice in Palestine, one has to examine the legislative developments and the chronology of several legislative authorities which created the Palestinian legal system under the different regimes that have ruled Palestine over the past five centuries. From the Ottoman rule in Palestine (1516-1918) onward, successive political authorities have sought to control informal justice, i.e. to organise and limit its expressions. The process of law codification (*taqnîn*) has been at work since the Ottoman Reform and was variously modified thereafter. Informal justice progressively – and partly – flowed back towards the south of Palestine. The British Mandate that followed the Ottoman rule practically maintained all of the informal judicial structures and practices inherited from past periods. Still, the British attempted to regulate it by issuing laws which formed the legal basis of tribal courts and limited their application to customs that did not violate natural justice or morality such as a 1935 law aimed at weakening the *târ*-system, the vengeance codes.

In 1948, following the end of the British Mandate, Palestine was fragmented and the state of Israel was created. The West Bank (including East Jerusalem) fell under Jordanian rule, while the Gaza Strip was under Egyptian control. Both authorities maintained most of the inherited informal justice structures in their respective territories.

9 | Jamil Salem, "Informal Justice: The Rule of Law and Dispute Resolution in Post-Oslo Palestine", 15 Oct 2009, http://lacs.ps/documentsShow.aspx?ATT_ID=2044 (accessed 21 Aug 2013).

In 1967, the West Bank and the Gaza Strip came under Israeli occupation. A multiplicity of military declarations and orders were issued, and the Palestinian formal court system was further weakened by the creation of separate Israeli military courts.[10] After 1967, the distinction between the state courts and the informal justice became crucial for Palestinians. The "official" justice system was controlled by the occupation forces and seen as suspicious by the people. Where possible, Palestinians therefore resorted to informal dispute mechanisms and only criminal cases, where the accused was detained by Israeli security forces, were brought to trial in front of Israeli controlled courts, The Palestinian informal justice (West Bank and Gaza) therefore became a growing alternative to the judiciary.

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Since the Oslo Accords and the establishment of the Palestinian Authority (PA) in 1994 the Palestinian Government has initiated a process of legal unification. Even though legally speaking the PA itself is not a state, it began producing laws and bylaws and reorganised the court system which was similiar to that of a state court system. A High Constitutional Court was established by law,[11] Sharia and ecclesiastical family courts kept their independence.[12] At the same time the PA encouraged informal justice, both through the whole system of government as well as specifically by backing their actors. It tolerated existing tribal judges and *islah* men and encouraged their work. Its executive body established official conciliation committees and paid salaries. PA officials took part in the conciliation and contributed financially by compensating the parties to the conflict. Governors, police and security forces often facilitated the work of conciliation committees.[13]

Fittingly, the first legislative elections held in 1996 were carried out by districts and encouraged voting according to tribal and kinship lines, as it gave better chances to

10 | Asem Khalil, "Formal and Informal justice in Palestine: Dealing with the Legacy of Tribal Law. La tribu à l'heure de la globalisation", *Revue Etudes Rurales*, No. 184, 2010, 8.
11 | The law was issued in 2006 but the court is not yet established. The High Court is supposed to function as a constitutional court, until the Constitutional Court is established.
12 | Khalil, n. 10, 9.
13 | Ibid., 16.

candidates who relied on their personal reputation, family relations or tribal connections, rather than on political programs or party affiliation.

One of the reasons for the PA to encourage tribal justice might have been to enhance their local standing and to influence and strengthen their power and social control. But it is also important to examine the structure, authority and jurisdiction that form the reality of the PA: It has no sovereign jurisdiction over a majority of its territories, like Area C (around 60 per cent of the West Bank) and East Jerusalem, to which its security and administrative apparatus does not even have access. Therefore some might argue that customary law and informal justice served the PA as an informal space through which it could extend its authority, given the impossibility of controlling the formal or state system which is still largely under Israeli control in these territories.[14]

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As for the Gaza Strip, Hamas promotes the creation of an Islamic state and the application of Sharia law. According to Hamas, disputes should be resolved by way of Sharia rulings only, and not by informal justice mechanisms. But in light of the absence of an Islamic state for the time being, they resort to an informal judiciary to resolve disputes, as the concept of *sulh* is also one of the principles that Sharia calls for and encourages.[15]

Against the backdrop of the historical and political situation of Palestine and a still ongoing absence of reliable state structures, tribal and customary laws continue to play a significant role in the West Bank and the Gaza Strip, even though in some areas, especially in Hebron, the number of people availing themselves of official courts has increased.[16]

14 | Ibid., 17.
15 | Birzeit University, n. 2, 104.
16 | "The south of Hebron area faces a decrease in tribal dispute solutions and is moving more towards regular courts." Maannews.net, http://maannews.net/arb/ViewDetails.aspx?ID=598538 (in Arabic) (accessed 21 Aug 2013).

LEGAL PLURALISM – CONFLICTING LEGAL SYSTEMS OR INTERACTIVE LEGAL PRACTICES?

The existence of *urf* and the growing field of informal justice in Palestine since the Oslo Accords have been quoted in several studies as relevant and crucial for the development and evolution of the Palestinian legal system. On a strict legal level of the analysis, it is a key issue because it provides opportunity to raise the question of legal pluralism. This discussion is all the more profitable as professional jurists rarely take the time to envisage the sociological history of law and the coexistence of several legal orders inside a centralised system which leads to a singular and monolithic interpretation of law. A pluralistic approach is all the more legitimate and indispensable when the legal system needs to be strengthened. This is especially the case in Palestine, where a permanent military occupation has damaged the legal and judicial institutions inaugurated under the Oslo Accords.

In any given historical period and spatial location, it is important to go beyond the legal text in order to understand how law is shaped and centralised. Such a centralised legal system has existed at different times in Palestinian history. When launching the *Tanzîmât*, the process of reform, in the middle of the 19th century, the Ottoman Empire opened a vast field of social, political, legal and judicial reform. A renewal of administrative practices and institutions was expected from the process in the Arab societies of the Middle East. As for law and the judiciary, the reformers aimed at homogenising courts and law schools, believing that the process could help the Sultan to strengthen his sovereignty over the various provinces of the Empire. Some decades later, the British Mandate for all Palestine, and after the 1948 war and the division of Palestine into three parts, Jordanian rule in the West Bank as well as the Egyptian administration over the Gaza strip took various forms of legal centralisation. However, despite the reform, the Palestinian people seem to have been often suspicious of administrative centralisation in part because of the alien origin of the political authorities in charge of these new institutions.

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Tomb of Yasser Arafat in Ramallah: The recurrent interventions of Arafat and his successors have in some ways undermined the "official" court system. | Source: amerune, flickr CC BY.

From this point of view, it can be noted that local customs and *urf* are authentically native, and it has been universally considered in Palestine as a significant part of the national identity. It is probably because of the strong historical legitimacy of the Palestinian system of dispute resolution that since the Oslo Accords, former President Yasser Arafat and the current PA government have invested their hopes in the informal justice which they believed to be a main – if not the first – judicial authority able to maintain public order when violent conflicts arise between Palestinian families and groups. It can be observed in the daily lives of Palestinian people that informal, socially-sanctioned methods of resolving disputes are integral to Palestinian notions of justice and play a vital role in easing societal tensions resulting from disputes between individuals.

At the same time, it is agreed among Palestinian political and social representatives, as well as among lawyers and legal representatives, that the customary style of dispute resolution can also be seen as problematic from the three perspectives of equity, equality and freedom. There exists a serious contradiction between customary style of dispute resolution and the basic principles on which modern states and their laws are built. Principles such as the individual nature of punishment, the presumption of innocence (which is undermined by the weight of accusation in informal justice, where the issue of responsibility is left to be determined not by evidence but by the capacity of

each party to convince the other of its position) as well as the principle of equality before the law are undermined, as parties are not equal as far as informal justice is concerned. Economic and social status, political affiliation and gender matter for the determination of the outcome of the conciliation procedure.

Yet it is quite impossible to assess the weight of informal justice without considering the efficiency of the "state courts" or at least of the PA's judicial system organised in the framework of the Oslo Accords. The recurrent interventions of Yasser Arafat and his successors, the participation of security organs as well as deputies of the Palestinian Legislative Council (PLC) in informal justice have in some ways undermined the "official" courts system. Viewed from this angle, the independence of the judiciary is threatened, and the rule of law is subject to false interpretation. Nevertheless this observation should not lead us to conclude that both systems are absolutely conflicting or even incompatible, socially and politically speaking; instead let us focus on the complementary aspects of both systems rather than on points of disagreement.

The Palestinian legal sphere is not so much confronted with two separate systems coexisting within the same society as it is with a situation of perpetual compromise between different ways of dispute resolution. It can be observed that informal justice has a tangible impact on formal judiciary. This is possible because of the space left in the legal system for the discretion of judges that allow for informal justice to influence formal justice. According to the penal laws in force in both the West Bank and Gaza Strip, the judge has discretionary authority in mitigating the penalty as stipulated by the law, according to the circumstances of the crime and the social context of which the judge considers it to be a part.[17] Also, according to articles 52 and 53 of the 1960 penal code adopted under the Jordanian rule, the pardon given to the aggressor by the victimised group puts an end to the public action. The same code allowed the judge of a state court to award extenuating circumstances to the defendant in honour crime cases, when a *sulh* (conciliation) had intervened.

17 | Khalil, n. 10, 18.

Such examples can help us to understand that even if two antagonistic legal systems coexist, they are not necessarily in permanent conflict. Practically, the judiciary cannot gain people's confidence if it does not take into account long-standing social values and norms. In that sense, the coexistence of two separate legal orders is perhaps less a question of political conflict than of historical inheritance.

CONCLUSION

In the Palestinian Territory, one cannot deny the existence of a very strong legal pluralism. The work of informal justice is as widespread as the work of the formal justice system in terms of both prevalence and the size of the disputes it resolves.

There exists an urgent need to harmonise the system and draft new laws that take into account the needs of the population. The state is not and cannot be indifferent to non-state law.

The specific issue in Palestine is that of the inheritance of different laws from past colonial periods which create complexities and disharmony within the legal system. There is an urgent need to harmonise the system and draft new laws that take into account the needs of the population. The state is not and cannot be indifferent to non-state law. The coexistence of two prominent legal systems is even positively assessed by stakeholders, *urf* being praised as the expression of positive social values. Nevertheless, it cannot be denied that there is a strong contradiction between customary style of dispute resolution and the rule of law, personified by the state courts.

The Palestinian legislature has so far not developed a clear legislative policy in dealing with informal justice. It has not demonstrated a policy towards codifying, controlling or containing the work of informal justice. There is a need to rehabilitate and increase the impact of the formal judiciary, restructure it and reorganise it, and to strengthen the rule of law. At the same time the current social and cultural reality must be incorporated in the states legal apparatus, as long as it does not contradict the rule of law.

The reform of the system is contingent on many factors. Firstly, there is a need for a clear political will to reform the system, which is currently lacking. In order for judicial reform to take place, a reform of the executive is necessary,

and the legislature must likewise be willing to undertake a reform of certain laws. Nevertheless, whatever willingness for reform there is within Palestinian society, it will be meaningless with the ongoing Israeli occupation of the West Bank and the Gaza Strip and without the existence of an independent, sovereign and viable Palestinian state.