Mediation in Palestine

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Abstract: Customary dispute resolution refers to the approaches and procedures common in societies where customary authorities and practices are used to regulate the relationships and disputes that arisen between members of communities. These mechanisms may be used to resolve a wide range of disputes and often utilize various elements of mediation, conciliation and arbitration. The mechanisms of customary conflict in Palestine have historically been through tribal and tribal structures prevailing in Palestine, especially the Beersheba region in Palestine What is now Israel, from which many of the Palestinian refugees currently residing in Gaza have migrated. During the twentieth century, these customary mechanisms continued to evolve and local leaders were active in them. Customary decision, especially the men of al-Mukhtar and Islah, gained prominence. Beginning in 1987 with the first intifada, customary mechanisms became a preferred alternative for many Palestinians in Gaza over the judiciary that Israel controlled at the time. Reform committees affiliated with the Reformation emerged during this period and were recognized and formally organized under the Palestinian Authority after in 1994. Recently, Gaza's local authorities used similar reform committees, called the Rabita Committees, to mediate conflicts in Gaza in accordance with the principles of Islamic law.

Keywords: Dispute. Resolution. Litigation. Negotiation. Mediation.

Introduction

Should customary justice be incorporated into development programmers aimed at guaranteeing human rights and access to justice? This issue is crucial when you consider that today, in developing countries, more than eighty per cent of disputes are resolved outside the framework of formal justice.[1]

In many countries, access to justice is a matter of life or death. The illegal expropriation of Palestine land removes peoples and livelihood forcing them to migrate. Many women find themselves deprived of their belongings by their in-laws upon the death of their husbands, leaving them in total destitution.[2] Extremist groups thrive in some areas because they offer forms of dispute resolution where

[1] Danida, How to Note: Informal Justice Systems, 2010, p. 2.

[2] Hope, K., and Colliou, Y. 'Situating the best interests of the child in community-based arbitration of marriage disputes: Reflections from a pilot intervention of Terre des hommes Foundation in Assiut, Egypt', 2015.

the state is absent {example Hamas}, leaving wide room for arbitrariness. These examples, and many others, demonstrate the need for governance tools and for effective justice systems. Unfortunately, these needs remain unmet.

In Part I, we will explore the customary law of Palestinian society that appear to be encouraging the incorporation of customary law into the PNA. In Part II, 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 III, we will conclude that customary law serves as mediation function in Palestinian society. For the public at large, mediation a legal system fraught with problems. In addition, this mediation maintains social balance between the clans-an important function for neopatrimonial societies and one which Western legal jurisprudence does not fulfill.

Customary law in Palestine

The international community and local authorities have focused on assistance programmers to support official institutions, such as the judiciary, the police, or penitentiary administrations.[3] Customary justice is often seen as incompatible with the "values" of a modern nation state. But despite these massive aid projects and this focus on state systems, it has not been possible to establish justice systems for all: they are often geographically or politically inaccessible; they are considered as being corrupt authority; they do not always have the validation of local religious authorities; they are not free to access in some zones.

As a result, local or community dispute resolution mechanisms remain overall very widely used. Customary institutions govern the lives of a large part of the population in developing countries. But we see that the individual within customary justice systems is not the priority; social peace within the community is the aim. This, therefore, raises questions about respect for the fundamental rights of the person.

Custom is "an oral legal practice, consecrated by time and accepted by the people of a given territory".[4] Custom is a rule of law born of prolonged usage and gradually considered mandatory.

[3] E. Harper, Customary Justice: From Programme Design to Impact Evaluation, 2011, IDLO, Rome.
[4] Le Grand Robert, Dictionnaires le Robert, 1994. Coutume, p.5201.

These two definitions seem particularly relevant as they demonstrate the key[5] elements that define the existence of a custom – namely its acceptance by the majority of a given population, prolonged use and its binding nature. Customary Law, strongly tied to Arab culture and tribal-segmented society, was always important in the Palestinian community. Often treated as an expression of independence and cultural separateness under foreign rules and occupations, it was further developed as a complementary or alternative legal system. Foreign rulers, in their turn, frequently turned a blind eye, if not even supported the local use of customary law because it served their purposes.[6]

Palestine customary law is a remnant of the pre-Islamic legal system[7] Palestine customary law was preserved partly in Islamic religious law and mostly in everyday culture and customs. Palestine customary law is still in use after hundreds of years despite the changes that have occurred in standards of living and the development of more or less stable and efficient state legal systems.[8] In Palestine, customary law still regulates everyday conflicts, including petty crimes, disputes over land and water, family or marital problems and even life-and-death situations such as accidents, murder and bodily-injury cases. This situation is not unique to Arab countries, although, as in the Balkans and Caucasus, similar legal customs are still practiced alongside the official law – the customs practiced there, called kanun or adat, are very similar to those preserved in Arab societies.[9]

According to Virginia Saint James,[10] it is very difficult to study the customary process: classically it is accepted that it takes a long period of time to establish a custom; however it is difficult, if not impossible, to define the temporal origin of most of our customs. Ancient French law had sometimes, for its part, provided a minimum standard of duration with a requirement for a practice to be repeated for a minimum of forty years.

5 Patrick Courbe – Jean-Sylvestre Bergé, Introduction générale au droit, Dalloz, 2013, p. 66.

6 R. Terris, V. Inoue-Terris, A case study of third world jurisprudence – Palestine: Conflict Resolution and Customary law in Neopatrimonial Society, p. 469.

7 L. Walker, Conferencing: Western Application of Indigenous Peoples' Conflict Resolution Practices, p. 3, [www 01]. H. Zehr, A. Gohar The Little Book of Restorative Justice, p. 9. J. Haley, Victim-Offender Mediation: Lessons from the Japanese Experience, p. 236. PJAC New Series 5 1/2017: 31–50 Górska, Klakla.

8 Beginning in the British Mandate period after World War I, the customary law often functioned parallel to, or overlapped with, the civil court system. Similarly, during the Occupation, "judges in the civil courts generally appear to tolerate the competing systems sometimes even consciously accommodating it by delaying actions in a case while awaiting a sulh." GEORGE BISHARAT, PALESTINIAN LAWYERS AND ISRAELI RULE: LAW AND DISORDER IN THE WEST BANK 42 1989.

9 For more see: M. Abu-Nimer, I. Nasser, Forgiveness in The Arab and Islamic Contexts: Between Theology and Practice; C. ten Dam, How to Feud and Rebel: Violence-values among the Chechens and Albanians

10 Maître de conférences de droit public à l'Université de Limoges.

Customary law and settlement

We are mainly interested in the phenomenon of israeliene occupation and its relation to customary law on Palestine. Occupation powers upset traditional political structures. Judicial power was exercised by the occupation power, but faced many difficulties with the coexistence of local law and "imported" law. Particularly in civil matters, the legal system was supposed to take into account local laws and install jurisdictions that demonstrated an understanding of it and willingness to integrate it.

According to Stanislas Melone,[11] the Civil Code system and that of customary law are fundamentally opposed. The differences are tied to notions of family; of the roles of husbands and wives; of the responsibilities of a father to his children; of the rights and responsibilities of these children; of the position of the individual in the social order; and also of the ties between an individual and property, namely land.

The institutions of family and property law have traditionally resisted the invasion of Britain law, preventing the advent of a uniform body of law. Alongside the legal systems in place, complementary jurisdictions developed, namely courts presided over by an officer of the colonial administration, which were in some cases handed over to national actors, while others were gradually removed. The idea of more and more effective participation of indigenous peoples in the management of their communities and the administration of justice became increasingly popular. So-called "Indirect rule" principles were also applied for many years in Palestine under Ottoman period. Customary law was not relegated to the background and threatened with extinction as in other countries. Instead, it fed into both Ottoman law and British law, growing and developing into a harmonious synthesis of both systems. But after upon end of the Great Brittan occupation, Palestine contented themselves with retouching certain details, and opted for the voice of continuity in leaving dual jurisdictions.

Palestine system preferred to integrate traditional courts into the common law jurisdiction, but no one, however, tried to redevelop the judicial systems inherited from colonial rule. They tried to redevelop the old traditional justice, created customary courts of first instance positioned below the ordinary court of the justice of the peace.

This setup allows them to position traditional justice one degree below modern justice; these courts of first instance usually become their court of appeal. While the Palestinians were a lineated by a new legal system that did not reflect

[11] "Les juridictions mixtes de droit écrit et de droit coutumier dans les pays en voie de développement", 1986.

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 ruling civil court system. Under Jordanian rule 1948-1967, the intermingling of the established and customary law intensified. While Palestinians in the West Bank utilized the Jordanian legal system, especially for civil issues, they often used both system. 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.

Colonial heritage and the imposition of systems of justice based on Western models, combined with a lack of resources in Palestine, gradually resulted in avoidance of the formal justice system.

Why customary law is still practiced in Palestine

The lack of confidence in the efficiency of the official judiciary system stems from the cultural values mentioned above, as well as a general distrust towards state institutions. Palestinian statutory law was introduced only after obtaining Autonomy from Israel, following the Oslo Agreements in 1994. However, even in the present day, Israeli law still dominates in the Occupied Palestinian Territories. Even after the establishment of an official Palestinian judiciary, modelled on the European judicial system, many Palestinians remain distrustful of the official law, as they remain distrustful of the Palestinian National Authority in general.

However, the absence of proper legal regulations and overall chaos led to the Palestinian Authority's decision to transform the system by enforcing new laws. With regard to the current status of the judiciary in Palestine, the most important act is the Judicial Authority Act No. 1 of 2002. Prior to its implementation, courts in the West Bank acted on the basis of the pre-1967 Jordanian Act, while the judiciary in Gaza still operated under the laws introduced by the British Mandate before 1948. 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.[12] This was

[12] 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

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.

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. Concurrently, a considerable portion of Palestinian lawyers and judges went on strike to protest against the occupation.

Israeli military officers, entitled to assume all powers formerly vested in the Ministry of Justice, soon controlled the entire civilian judicial system.[13] Israeli military officials staffed the courts and military tribunals superceded the criminal and civil jurisdiction of the Palestinian courts."[14] 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.

The Judicial Authority Act introduced the chief administrative body, called the High Judicial Council, which was tasked with the inspection and administration of the judiciary, appealing decisions, addressing grievances and disciplinary inquiries into judges. The Law of the Formation of Regular Courts of 2001 introduced five levels of judiciary in Palestine.[15] Nevertheless, the new judiciary system has yet to gain the people's trust. And in the meantime, as already mentioned – distrust and deeply held convictions about the lack of efficiency of the state judiciary tend to assert the importance of customary law.

There is a risk that the existing customary dispute mechanisms in Gaza may be unable to ensure the protection of substantive due process, including non-discrimination and human rights principles. The status and protection of basic rights within the customary system may be uncertain since "several forums exist that enforce and apply different standards, many of which may be unwritten and unknown outside the community.

Yasser Arafat, customary law is one of the building blocks augmenting clan politics and empowering clan heads who, because they are also dependent on

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.

13 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.

14 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.

15 W. Lafee, Palestinian Law and the Formation of Regular Courts, Jurist – Dateline, June 19, 2012, http://jurist.org/dateline/2012/06/wael-lafee-palestine-judiciary.php.

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.

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. 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 Shaft former PLC member has said: "Clan culture was decreasing in the past, 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."[16]

Mediation in Palestine

Salha is the main reconciliation and justice mechanism. Palestine has a long history of locally-administered justice, with tribal leaders playing a key role in maintaining security and good relations within and between different tribes. The strength of traditional justice lies in the fact that the local leaders who administer it have the backing of the majority of the community they represent. Disputes are mostly resolved through the mediation of elders, sheikhs or mayors, with no formal paperwork or official records. This is a system known as Sulha. In cases where mediation on its own is not sufficient, customary courts can handle cases such as theft or more minor misdemeanors.[17]

[16] Interview with Dr. Haider Abdel Shafi, former PLC member and Palestinian negotiator, in Gaza June 27, 2000.

[17] 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.

Informal justice institutions play a vital role in peaceful settlement of communal disputes, particularly in rural areas where the formal justice sector is unable to cover the vast Palestine region given the limited resources, limited presence of police, attorneys and judges.

The following sections explore in some detail the Sulha and its elements, including the Wajaha elders, mediators, and the Mutamarat oe Majlus al Sulha reconciliation conference.

Sulha Mediation is Palestine's main customary justice practice. The name of the practice comes from *sulh*, which means peace or reconciliation in Arabic. The Sulha, much like the Sulha, Islam's most ubiquitous customary justice process, is an informal, mixed arbitration-mediation customary justice practice, designed to facilitate "averting or containing violence" and to transition the disputing sides from a desire to avenge to a willingness to forgive, reconcile, and move on with life, through a restoration of their sense of honor and respect.

The origin of the Sulha is traced to a combination of adaptation of traditional Muslim customary justice practices to local approaches at the tribal level and a concurrent adaptation of central rule Turkish, English, and Palestinian formalizations of existing informal practices. It appears that both tribal leaders and formal local representatives of the central government in Jerusalem found the administration of local customary justice a very practical and useful tool in controlling the region.

Almost every new ruler or administration in Palestine since the 19th century has tried to tinker with and modify the Sulha system. The result was the evolution of two distinct types of Sulha: a community-sponsored Sulha and a government-sponsored Sulha.

The Sulha is used to promote reconciliation at five levels of disputes:

- within the family;
- within the village for communities;

Muslah Mediators The practitioners of the Sulha are called Muslah mediators; Muslah is the singular. There is considerable disagreement on the exact spelling of the term; in this article, the spelling will be Muslah. The Muslah are mostly local elders and dignitaries. They are known in the community for their integrity, wisdom, and sincere desire and ability to act constructively in support of conflict mitigation, and usually have decades of experience mediating inter- and intracommunal disputes NRC interview with Abu Nasser Ali Majok, Deputy Director, Department of Tribes and Reform, Ministry of the Interior, Gaza Strip, 24 October 2011. The Muslah position is not permanent, nor is it a formal one. It is also not an inherited position, though some Muslah are the sons of former Muslah, reflecting a sense of quasi-inherited respectability

- within a broader geographic or even identity community spread out over several locations;
- within the tribe; and
- between different tribes.

Old women are occasionally invited to sit as an Sulha, although only on cases where all the disputants are women. This is a rare instance in Muslim customary justice where a woman is allowed to occupy a "formal" position as a mediator.

All current islah men in the Gaza Strip are male, though PCDCR confirmed that approximately 25 women held this position and engaged in sulh conciliation procedures in 2006; this practice was subsequently discontinued by the Hamas authorities. In general, islah men are more likely than mukhtars to be directly affiliated to a political party, though such affiliation is not necessary.[18] Of the islah men currently registered with the Department of Tribes and Reform, most are politically aligned with Hamas.

Although the post of Muslah is informal, legal knowledge civil and/or religious is considered an advantage. The number of Muslah assigned to mediate a conflict is determined by the severity and complexity of the conflict. Some conflicts are mediated by a single Muslah, while others require large teams of Muslahs. The number is determined by the traditional leaders in an internal consultation.

The Muslah are not passive facilitators. Indeed, mediators tend to practice a rather blunt form of evaluation and intervention. They use a variety of tools including persuasion, goading, and even coercion to move the disputants toward an acceptable resolution.

The Muslah do not try to adjudicate in the Western sense of discovering the "right" and "wrong" sides of the dispute equation. Rather, they try to bring about reconciliation between the disputants, to increase the willingness to forgive, and to help move the disputants and the community as a whole on with life.

Since, as we have seen, there are community-sponsored Sulha and government-sponsored Sulha, there are also community-appointed Sulha and government-appointed Salha. One of the differences between these two types of Sulha is that community-appointed Sulha are local dignitaries and elders, while the government usually appoints religious leaders as well as external mediators. The position of islah men in the oPt was significantly elevated and exponentially expanded during the first Intifada, when there was "an increase in the number of people working in the field of customary dispute resolution, and the diversification of their social and political backgrounds."[19] The demographics of islah men

[18] NRC interview with a local NGO worker, Gaza Strip, 16 October 2011.
[19] Birzeit Report, supra note 42, p. 31.

changed during this period as well, as younger, well-educated, and politically-active Palestinians became involved in the customary dispute resolution system.[20] Many youth began to view customary and traditional dispute resolution as part of the Palestinian national identity and the Intifada struggle. Overall, "the people had a very positive image of the representatives of customary dispute resolution during this period".[21]

In 2010, the Department of Tribes and Reform referred 4,417 cases to registered islah men. The Department received these cases either directly from the disputants or through referrals from the formal nizami courts and police stations. By 24 October 2011, 4,012 of these disputes had been completely resolved. For the first quarter of 2011, the Department received an additional 1,226 cases which it referred to its affiliated islah men, of which 1,045 had been fully settled by 24 October 2011.[22]

Islah committees

The term lajnat islah, or islah committee, was coined during the first Intifada and eventually adopted by the PA. During the first Intifada, academics assert that these islah committees became "a practical alternative to the Israeli-governed formal court system" as well as "a socially-acceptable symbol of resistance".[23] In practice, the term has come to generally encompass all factional groups of islah men working through a committee, including the shari'a-based committees affiliated with Hamas known as Rabita committees. Islah committees typically range in size from between five and 10 islah men and are based on geographic area. It is worth noting that the position of islah man, or rajl islah, predates the islah committees and has long since existed to describe the men who serve as conciliators. Prior to the beginning of the first Intifada in 1987, islah men would often work in concert to resolve disputes through the majlis asha'iri tribal council or diwan ai'ili family assembly.

Currently, there are 50 islah committees in the Gaza Strip which report monthly to the Department of Tribes and Reform. NRC interview with Abu Nasser Ali Majok, Deputy Director of Department of Tribes and Reform, Gaza, 24 October 2011. Under the direction of the PA President and PLO Chairman Yasser Arafat,

[20] This demographic shift amongst islah men appears to be confirmed by the findings of the Birzeit Report, which noted that islah men born prior to 1940 were largely illiterate with little fo.

[21] Khalil, "The Coexistence of Formal and Informal Justice in Palestine", supra note 48 confirming that many islah men are "products of the islah committee that were formed during the first intifada.". Birzeit Report, supra note 42, p. 37.

[22] NRC interview with Abu Nasser Ali Majok, Deputy Director, Department of Tribes and Reform, Ministry of the Interior, Gaza Strip, 24 October 2011.

[23] PA Land Disputes Study, supra note 5, p. 35.

the Department of Tribal Affairs under the President's Office attempted to establish a broad network of islah committees in the oPt, known as the Central Sulh Committees.

A number of those involved in the islah committees were PLO members who returned to the oPt following the signing of the Oslo Accords, most of whom "did not belong to the leading families of Palestine; some of them hailed from powerless refugee families." Ze'evi, supra note 18, p. 4. An estimated 25 Fatah-affiliated islah committees were established during this post-Oslo period, each with approximately five members. Most of these islah committees were created "through the direct intervention of the PA, most specifically the executive authority, or even by political factions." Given the official recognition under both the PA and the current local authorities in the Gaza Strip, these islah committees represent a hybrid mechanism of formal and customary dispute resolution.

While the islah committees in Gaza have been mostly usurped and politicized by both Fatah and Hamas, there do appear to be some unaffiliated committees working within the Gaza Strip. For example, the head of the Charitable Association of Mukhtars, a non-governmental organization which classifies itself and its members as politically neutral, confirmed that there are approximately 200 mukhtars in its organization in the Gaza Strip who concurrently serve as islah men and work through neutral islah committees. NRC interview with a representative of the Charitable Association of Mukhtars, Gaza Strip, January 2011.

Rabita Committees Initially established in Jerusalem in 1992, the Rabita committees have recently emerged as a new category of islah committees within the Gaza Strip and have rapidly become a dominant force in the customary dispute resolution sector. The Rabita committees were established through the Palestine Scholars' League, a non-governmental organization with direct links to Hamas and registered with the Ministry of the Interior as a charitable organization.

The Palestine Scholars' League founded the Rabita committees with the aim of mediating and arbitrating disputes in accordance with shari'a law. There are currently 100 members of the Palestine Scholars' League in the Gaza Strip, the majority of whom hold advanced degrees in Islamic law or Islamic studies. Applications for membership are submitted to the organization's Board of Directors, which itself is Hamas-affiliated, and successful applicants receive membership cards to facilitate their work.

There are four departments under the Palestine Scholars' League: the Rabita or conciliation committees department; the preaching and guidance department; the fatwa department; and the shari'a arbitration department. All Rabita committee members are islah men and approximately 100-200 also work as mukhtars. Each individual Rabita committee typically has at least one mukhtar and there are

also 30 registered arbitrators among the Rabita committees. Between 30 and 40 committee members also hold certificates in Islamic science. Half of the 500 Rabita committee members receive monthly lump sum payments of 800 ILS about $210.00 USD directly from the Gaza Ministry of the Interior. All services provided by the Rabita committees are free of charge.

There is strong cooperation between the Rabita committees and the formal nizami courts, which refers a number of cases to the committees. The Rabita committees coordinate as well with the Ministry of the Interior and in complex cases, such as killings, the Ministry of the Interior will follow-up and Ministry representatives may even attend the conciliation proceedings. Nonetheless, local authorities in Gaza consider the Rabita committees to be technically non-governmental and they therefore, remain unregulated and unaccountable.

Community Dispute Resolution

In Palestine a series of interviews described in "Methodology" with dispute brought to light the existence of an alternative, quasi traditional dispute resolution mechanism that was established through a process of trial and error by current community leaders.

The following sections describe the new type of interveners mediators that took over conflict management roles, and the specific stages of practice they devised to attempt to provide a response to conflicts that arise in Palestine.

The Sulha's task is to facilitate transformation of the disputants extended families from a desire for revenge with its potential implication of endless blood revenge cycles to a willingness to forgive, binding all disputants, for all generations, past, present, and future Jabbour, 1993; Farage Khneifes, interview with author, July 21, 2007.

The Sulha is based on a mix of mediation and arbitration applications performed interchangeably by a Sulha committee *Jaha* composed of community dignitaries – men with standing and clout. On the "mediationside", Sulha strives to reconcile differences between the disputants' clans; on the "arbitration side," the decision of the Jaha is final and binding. It is also important to stress that despite similarities between neutrals in Western-style ADR and neutrals in Sulha disputants must perceive the interveners as neutral; all caucuses take place in "location neutral" venues, in the Sulha the mediator/arbitrator can be and usually is aggressive, evaluative, and even coercive

Usually, small, non-violent conflicts are resolved by a single conciliator in direct mediation. In the case of a serious offence, like causing bodily harm, assault, rape or homicide, the mediation is led by a group of conciliators – the jaha. The

work of the reconciliatiors is based on two fundamental rules. The first principle is that "reconciliation is the master of rulings" and the second is that the procedures of customary reconciliation are as flexible to the extent that is necessary to serve its purpose – ending the conflict. Therefore, the conciliators can bypass some of the procedures if it helps to reach their goal.[24]

The following section describes in detail the multitiered, quasi-traditional dispute resolution mechanisms developed by Man of Islah in Palestine to help handle a variety of mostly small oe big disputes

The Stages

The traditional steps involved in a sulh dispute resolution process and are most commonly observed in the context of criminal cases where the risk of revenge, is greatest A detailed exploration of the newly evolved dispute resolution mechanisms employed by the Rabita community revealed the existence of a multistage process, consisting of five stages:

- Stage 1: Prevention through planned placement
- Stage 2: Internal discussion, coordination, and duty scheduling
- Stage 3: Discussion with a community activist
- Stage 4: Mobilization
- Stage 5: Intervention

Stage 1: Prevention through planned placement

The first step in nearly all customary dispute resolution in Palestine is for the interested parties to approach a family or local Mukhtar or for the Mukhtar to initiate the intervention on his own. This also is generally the first involvement of a third party and sometimes non-family member to the dispute. It is estimated that Mukhtars are able to resolve nearly 90 percent of disputes before them through facilitated negotiation and only 10 percent would proceed to Sulh conciliation or the formal courts.[25]

Stage 2: Internal discussion, coordination, and duty scheduling

The leadership encourages and promotes this approach, in an attempt to deal with conflicts fast and as close as possible to their point of origin, with the understanding that there is not a lot of flexibility available in terms of people

[24] Birzeit University Institute of Law, Informal Justice, Rule of Law and Dispute Resolution in Palestine. National Report on Field Research Results, p. 75.
[25] USAID, Alternative Dispute Resolution Practitioners' Guide, supra note 174, p. 5.

moving around, changing residences, and acclimating into another social circle. To minimize conflicts, cohabitants often take preemptive steps. once people find themselves in a cohabitation situation, they often agree on a set of internal house rules designed to promote peaceful cohabitation.

Also, it is important to note that direct negotiations between disputants in community disputes are not always conducive to resolving the disputes, because of the direct emotional involvement of the disputants as they try to act as facilitators in their own disputes.

Stage 3: Introducing a Third Party Intervener – Discussion with a Community Activist

The mitigating steps described in Stage 1 and 2 do not always achieve their goal. Sometimes, a roommate refuses to accommodate his cohabitants. When the situation deteriorates and remains unresolved through internal discussion between roommates, it is time to move to the next stage – bringing in a third party intervener.

This stage seems to be part of the "traditional" tribal conflict management practice, the process rely on customary law, traditional practices, and personal relationships with little or no reference to formal laws and procedures."[26] Before the dispute resolution process Sulha starts formally, the interveners are "Sulha makers"; within the process, they are called Sulha committee, or Jaha. In this article, the terms *Sulha committee, Jaha,* and *Sulha makers* are used interchangeably.

The customary mediation begins when the representative of the offender asks a local member of the reconciliation committee for mediation in the conflict that emerged. Lang states that within 24 hours after the offence was committed, male relatives of the perpetrator ask the local members of the reconciliation committee to convince the aggrieved party to settle the matter. According to the custom, when asking for the help of the conciliators, the offender shall admit to committing the offence and, along with his family, take responsibility for this act, express regret and a desire for conciliation.[27]

In the cases of serious crimes, such as homicide or grievous bodily harm, the first task of the mediation committee is to provide a temporary truce ar. hudna between the two feuding families. The aim is to prevent bloodshed resulting from the injured party taking revenge. It also allows the victim's family to prepare psychologically and emotionally for entering the reconciliation process. During that

[26] PA Land Disputes Study, supra note 5, p. 5.
[27] D. Pely, Resolving..., p. 82

time, the reconciliation committee visits all the parties involved to gather facts and investigate. Direct contact between the representatives of both parties is not recommended in such an emotional time; therefore, conciliators act as intermediaries and transmit information between the parties. They maintain neutrality and confidence to avoid the further escalation of conflict.[28]

The Hudna, or ceasefire, typically lasts for three-and-one-third days and provides an immediate truce amongst conflicting parties and, once declared, prevents immediate retaliation.[29] This ceasefire is secured by the families themselves, though it may be facilitated by a mukhtar or Islah man. The mediator may form a Jaha, or a delegation of respected community men, to confront the victim's family and secure a Hudna. Often, "[i]t 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 circumstances."[30] However, the Hudna is not always enforceable and the victim's family may not always abide by its non-retaliatory restrictions.

Stage 4: "Mobilization" – Atwa

In the next stage of the process, the conciliation committee starts to negotiate the terms of settling the conflict and the conditions of the first temporary agreement between the parties. "In which the perpetrator's clan admits guilt and states that it is ready to pay restitution."[31] All such agreements, before final reconciliation, are called atwa. They are usually made in cases of serious harm, like homicide or causing bodily harm, when the mediations between the two parties are more complicated.[32]

Despite the appearance of a rigidly scripted process, the interveners improvise and modify their application of the various tools, depending on the particulars of each case, the reaction of the disputants, and the progress achieved.

When all else fails, the intervener gathers up the friends and acquaintances of the disputant that can be located in the same area. These are usually people from the same village, possibly the same clan or even family. Having located such people of potential influence, the intervener gathers as many of them as possible

[28] H. Tarabeih, D. Shmueli, R. Khamaisi, op.cit., p. 52

[29] Jamil Salem, "Informal Justice: The Rule of Law and Dispute Resolution in Post-Oslo Palestine", presented to the Justice Sector Working Group, Palestinian Ministry of Planning and Administrative Development, 15 October 2009, p. 7.

[30] Ibid.

[31] Khalil, "The Coexistence of Formal and Informal Justice in Palestine", supra note 48.

[32] Birzeit University Institute of Law, op. cit., p. 77; A. M. Hajjah, Al-Urf al-asha'iri fi-l-islah [Tribal Custom in Reconciliation], pp. 177–188.

in a neutral place, usually a community center. Both disputants are invited to come on a set date and hour.

The interveners invite the disputants – separately – and ask them to describe their side of the dispute. The perceived victim – the person who lodged the initial complaint – is invited to present his side of the situation first. This is in step with many reported and recorded Muslim/ Arab customary justice practices, such as the Sulha settlement, where the victims side is traditionally invited to be the first to make their case – a ritual designed to help the victim's side restore the perceived damage to his sense of honor.

Having listened to the perceived victim, the interveners invite the perceived off ender and listen to his side of the argument. They can ask questions, but at this point they don't voice opinions.

After listening to both disputants, the interveners have an internal discussion among themselves to evaluate all the arguments and try to determine both the facts of the disputes and the extent of culpability of each side in the eruption or continuation of the dispute. The interveners then perform a ritual that called "making a report." "Making a report" is actually a ritual where the interveners declare their verdict to the disputants and the participating friends. The verdict includes a description of the conflict, the sources of its eruption, relevant events in its evolution, and a determination of culpability, along with a list of sanctions or fines. The disputants "must obey that verdict." When challenged to explain what can compel a disputant to obey such a verdict, why disputants chose to obey verdicts that he was involved with:

Stage 5: "Intervention" – Direct Communal Pressure

Following the truce and funeral ceremonies, the reconciliation committee gathers to make the agreement. A portion of this restitution may be paid at this point and an 'atwa formally limits the other party's ability to seek revenge. An 'Atwa lasts between six months and one year and may be renewed up to three times

The process is linear in its progression, and the interveners conduct internal consultations among themselves to coordinate the process and their roles within it. Despite the appearance of a rigidly scripted process, the interveners improvise and modify their application of the various tools, depending on the particulars of each case, the reaction of the disputants, and the progress achieved.

The offender and his family then organize a ceremony marking the final signing of the reconciliation agreement, called sulha. The closing ceremony is deeply ritualized, with gestures varying from area to area, but usually symbolizing forgiveness and the restoration of honor. The organizers invite the inhabitants of the

area as well as respected personalities and dignitaries e.g. politicians, important officials, high-ranking police officers etc. who are supposed to add state legitimacy to the proceedings. The ceremony preferably, takes place outdoors – in a public building or in front of it, in the city square or, at times, in the victim's family home.[33]

The final agreement is sealed with a handshake between the parties. Humbly and respectfully, the perpetrator's relatives offer compensation and the victim's family grants forgiveness. The public handshake is a sign for the community that the conflict is finished and the peace between the families will be restored.[34]

One of the last elements of the reconciliation ceremony is both families sharing a meal. This should take place publicly and is to be organized by the family of the perpetrator.

The reconciliation ceremony ends with the public reading and signing of the formal reconciliation agreement waraqat as-sulh between the parties, by their representatives, several members of the reconciliation committee and some notables. Generally, in the case of murder, the document contains information about who was guilty and to what extent, the nature of the offence, who has paid compensation and to whom, the sum total of the compensation, when it was it paid and in what currency. All conciliatory agreements atwa and sulha are also published in an official newspaper at the expense of the offender's family.

Costs and fees

The Sulh process generally requirement the offenders family to pay symbolic cash advance called an Atwa to victim`s family in an amount determined by the Jaha. The Atwa is addition to any payment mad by the offender family to secure its agreement to abide by the Jaha final decision. For example, in the context of registration of land titles, it is often necessary to pay one percent of the total value of the land to the PLA and chain of ownership must be proven if more than two months have lapsed since the initial transfer. Depending on the complexity of cases, "lawyer's fees may range from 1,000-10,000 Jordanian dinars[35]

The role judicial and police

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

[33] S. Lang, op. cit., p. 58; A. M. Hajjah, op. cit., pp. 190–191
[34] H. Tarabeih, D. Shmueli, R. Khamaisi, op. cit., p. 52.
[35] NRC interview with a local NGO worker, Gaza Strip, 16 October 2011.

the crime, the more likely the police will become involved. For instance, in typical murder or manslaughter cases, defendants are tried by civil courts in conjunction with customary proceedings.[36]

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. 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.

Conclusions

The role of customary justice in Palestine cannot be separated from the current state of the formal judiciary, which remains largely non-functional and ill-equipped to handle the existing caseloads.

The formal courts are still reeling from the impact of the Hamas takeover of the Gaza Strip in 2007 and the resulting replacement of nearly all existing judicial personnel with relatively untrained successors. There continues to be a boycott of the formal judiciary by most local and international NGOs and public confidence and trust in the formal courts remains low.

Women face a nearly absolute exclusion from any position of authority as mediators or negotiators within the customary system and may also be prevented from bringing a case before the customary law system without the consent and support of their families. In the Gaza Strip, customary dispute resolution represents a mixture of negotiations, conciliation and arbitration and the lines between these procedures and the actors who conduct them are frequently blurred in practice.

Similarly, the binding nature of these proceedings is often difficult to ascertain as family influences may pressure a party to accept a particular agreement and the formal judiciary regularly upholds and enforces the decisions reached by

[36] 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 mufti religious leader of Gaza, who issues a ruling based on sharia law. Frisch, supra note 30, at 350.

non-state customary actors. Any distinctions are further complicated by increasing "unofficial" arbitration and hybrid customary and formal mechanisms

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