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After achieving independence, most Arab states founded their legal systems on Western constitutional concepts. Arab societies, however, continued to practice traditional customary law. The more a state tried to force society to use its own law, the more society depended on customary law to regulate its internal affairs. Thus, the advent of modernity in Arab states paradoxically strengthened conservative trends in society. Palestinian society, being under the rule of another state, retained the use of customary law even more than other Arab societies.

Several studies discussed the phenomenon of customary law in Palestinian society.[1] Others have documented the use of customary law in other Arabic-speaking societies in the Middle East.[2] The past few years have witnessed growing research interest in customary law as part of the mechanisms by which states seek to exert control over their "traditional" societal norms, and the internal use of customary law by these societies.[3]

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1. *See* JOSEPH GINAT, BLOOD DISPUTES AMONG BEDOUIN AND RURAL ARABS IN ISRAEL (U. of Pittsburgh Press 1987); G. KERSEL, BLOOD FEUDS AMONG URBAN BEDOUINS (Jerusalem: Magnes Press Heb. 1982); A. Layish & A. Shmueli, *Custom and Shari'a in the Bedouin Family according to Legal Documents from the Judean Desert*, 42 BSOAS 21-45 (1979); *see also* G. SALAHUT, THE CUSTOMARY LAW (Acer, Dar al-Aswar. Arb. 1987); G. Salahut, *The Customary Law of the Tribes*, *in* 21 AL-KATEB. 65-88 (Arb. 1981).

2. *See* F.H. Stewart, *Tribal law in the Arab World, A Review of the Literature*, 17 IJMES 474-480 (1987); J.W. CATHIE, MEDIATION AND SOCIETY—CONFLICT MANAGEMENT IN LEBANON (Academic Press 1980); A. Layish, *Customary Khul as Reflected in the Sijjil of the Libyan Shari'a Courts*, LI BSOAS pt. 3, 428-434 (1988).

3. *See* SALLY F. MOORE, SOCIAL FACTS AND FABRICATIONS: "CUSTOMARY" LAW ON KILIMANJARO, 1880-1980, at 9-10 (Cambridge: Cambridge U. Press 1986) (reviewing the anthropological theory of customary law); *see also* A.'A AL-'ABADI, CUSTOMARY LAW AMONG THE JORDANIAN TRIBES (Amman: Dar al-Bashir. Arb. 1988); JOHN DAVIS, LIBYAN POLITICS — TRIBE AND REVOLUTION: AN ACCOUNT OF THE ZUWAYA AND THEIR GOVERNMENT (London: Tauris 1987); A. Oweidi, Bedouin Justice in Jordan (1982) (unpublished Ph.D. thesis, Cambridge University).

Customary law is perceived not only as a traditional element or a relic of the past, but also as a dynamic social system that is being adapted constantly to the changing needs of societies in the process of modernization. In this context, Moore developed a paradigm that emphasizes the importance of historical metamorphoses of social institutions, and notes their integration into economic, religious, and political contexts.[4] This Article uses Moore's paradigm to analyze the Palestinian institution of customary law. This institution is part of the cultural bricolage that characterizes a society trapped between tradition and modernity.

This Article presents an analysis of Palestinian customary law in the Jerusalem area. It may appear that circumstances in a modern city such as Jerusalem leave no room for customary law, which could be perceived exclusively as an aspect of rural society and culture. However, customary law is of prime importance in Palestinian society, and has demonstrated a unique ability to adapt itself to the circumstances of a modern city. For example, most traffic accidents involving Palestinians of East Jerusalem trigger customary law arbitration.[5]

Following the outbreak of the Intifada in December 1987, the use of customary law in Palestinian society was intensified by radical Islamic movements such as the Hamas, as well as by the Intifada's secular-national leadership, the Unified National Command. The signing of the Oslo agreements after the decline of the Intifada and the founding of the Palestinian National Authority has not given rise to the establishment of state law. Customary law has become both a resource of the Palestinian Authority in creating national institutions, especially in the Jerusalem area, and a contested issue between the Palestinian Authority and the Islamic movements. It is viewed as an intermediate stage on the road to statehood—a means of linking the mostly traditional society to the embryonic semi-state structure.

PALESTINIAN CUSTOMARY LAW IN A SOCIO-HISTORIC PERSPECTIVE

During the Ottoman Period (1517-1917), the state recognized customary law as a legitimate source of jurisprudence. The Ottoman judges in Jerusalem incorporated local customary law ('Urf) into imperial law (Canon) and Islamic law (Shari'a).[6] The Ottoman use of customary law re-

4. MOORE, *supra* note 3, at 1-13 (1986).

5. *See, e.g.*, AL-QUDS, July 13, 1989; *see also* V. ABU SHAMSIYYA, CUSTOMARY LAW IN THE AREA OF HEBRON 16-17 (Hebron: Matba'at al-E'itisam, Arb. 1989) (noting that traffic accidents trigger most cases of customary law in the Hebron area).

6. *See* URIEL HEYD, STUDIES IN OLD OTTOMAN CRIMINAL LAW 167-71 (Oxford: Clarendon Press 1973); JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 90-91 (Oxford: Clarendon Press 1966).

flected its military weakness in the area of Jerusalem: it served as a means of compromise with local rural forces, and also demonstrated the relative autonomy of the social groups dwelling in the mountains surrounding Jerusalem. Customary law became a cultural component which has characterized Palestinian society at least since the sixteenth century.[7]

In Hebron, south of Jerusalem, customary law developed in a different way. Since the Ottoman state was unable to control the rural and tribal societies surrounding the town, Hebronite merchants were obliged to rely on customary law as the sole means for mediating conflicts and were forced to adapt to the structure of society accordingly. To achieve this adaptation, the Hebronite kin-groups had to maximize cohesion and co-liability. This co-liability led to the protection of members of a clan, which, when necessary, would respond to or exact revenge for any insult to a member's honor.[8]

The early twentieth century was a time of socio-economic crisis in the area to the south of Jerusalem, aggravated by massive population growth.[9] The economic base of Hebron was too weak to support the livelihood of its inhabitants, who were forced to migrate to Jerusalem. By the 1990s, Hebron migrants accounted for more than fifty percent of the population of East Jerusalem. The fierce competition for resources in Hebron triggered further changes in the social structure of the city in the 1930s, and hence the institution of customary law in Jerusalem.[10] Due to co-liability and group cohesion, disputes between individuals immediately evolved into disputes between their clans. The dynamic equilibrium between social segments led to a balance of power between warring factions and greatly reduced the probability of blood feuds.

This use of customary law as a mechanism of equilibrium and conciliation within Palestinian and neighboring societies is described by Gran-

7. *See* O. Salame, Shari'a, State Law and Customary Law in Jerusalem by the Beginning of the Ottoman Times 13-14 (1982) (unpublished manuscript, Heb.).

8. *See* AMNON COHEN & BERNARD LEWIS, POPULATION AND REVENUE IN THE TOWNS OF PALESTINE IN THE SIXTEENTH CENTURY 107 (Princeton: Princeton U. Press 1978). For an analysis of customary law in the Jerusalem area in the eighteenth and nineteenth centuries, see A. Mana'a, Sanjac Jerusalem Between Two Invasions—Administration and Society 182-83, 283, 322, 328-29 (1986) (unpublished Ph.D. thesis, Hebrew University).

9. For a discussion of the demographic development of Hebron, see I. KARMON & A. SHMUELI, HEBRON: THE PROFILE OF A MOUNTAIN TOWN 75-76 (Tel Aviv: Gome (Heb. 1970)).

10. For analysis of the social structure in Hebron and its relation to the segmentary model, see Ifrah Zilberman, Change and Continuity amongst Muslim Migrants to Jerusalem 165-67 (1988) (unpublished Ph.D. thesis, Cambridge University).

quist,[11] Marx,[12] Cathie,[13] Antoun,[14] and Lutfiyya.[15] However, customary law is not only a mechanism of equilibrium and conciliation within a society, but also a vehicle of inter-clan rivalry and struggle for domination. Cohen[16] and Kersel[17] cite examples of such application of customary law in Palestinian society. The rival social groups they describe intensified and expanded certain disputes, and mitigated others, in a calculated and controlled manner.

Indeed, among Hebronites and other groups in the Jerusalem area, customary law serves as a mechanism of equilibrium and conciliation in certain cases, and in others, as a mechanism of rivalry and domination. However, it also acts against the backdrop of processes of inter-clan fusion.[18] In such a process, some clans combine to form a large coalition sharing a common "name," a genealogy that is largely artificial, and a myth concerning the new group's origins. The fusion of several small groups into one large unit unfolds as a chain reaction, and invests this unit with a wider co-liability. Therefore, such composite units impose their authority on smaller groups, and claim a larger share of resources in the Jerusalem area. The smaller, dominated groups, form or join other coalitions. Thus, several dominant social blocks emerge and, indeed, become dominant in the arena of customary law.

The ability of Hebronites to relate to their community as a single co-liability group played an important role in the process of their migration to Jerusalem. From the 1930s, Hebronites who had migrated to Jerusalem began to use co-liability and customary law as tools for the attainment of economic and political objectives and the consolidation of their status in the City. The migrant Hebronites lacked prestige, political con-

11. HILMA GRANQUIST, MUSLIM DEATH AND BURIAL 111-120 (1963), *reprinted in* COMMENTATIONES HUMANARUM LITTERARUM XXXIV (1965).

12. E. MARX, THE BEDOUIN SOCIETY OF THE NEGEV 193-94 (Tel Aviv: Reshafim. Heb. 1974).

13. J.W. CATHIE, MEDIATION AND SOCIETY—CONFLICT MANAGEMENT IN LEBANON 49-73 (Academic Press 1980).

14. RICHARD T. ANTOUN, ARAB VILLAGE: A SOCIAL STRUCTURAL STUDY OF TRANS-JORDANIAN PEASANT COMMUNITY 40-43 (Bloomington: Indiana U. Press 1972).

15. ABDULLA M. LUTFIYYA, BAYTIN, A JORDANIAN VILLAGE 92-100 (The Hague: Mouton 1966).

16. ABNER COHEN, ARAB BORDER VILLAGES IN ISRAEL 58-71 (Manchester: Manchester U. Press 1965).

17. KERSEL, *supra* note 1.

18. On the debate about the segmentary system, fusion, and fission mechanisms, see DALE F. EICKELMAN, THE MIDDLE EAST: AN ANTHROPOLOGICAL APPROACH 98-104 (New Jersey: Prentice Hall 1981); E.E. EVANS-PRITCHARD, THE SANUSI OF CYRENAICA (Oxford: Clarendon Press 1949); ERNEST GELLNER, SAINTS OF THE ATLAS 35-69 (London: Weidenfeld & Nicholson 1969); E. Peters, *Some Structural Aspects of the Feuds among the Camel Herding Bedouins of Cyrenica*, 37 AFRICA 262-82 (1967).

tacts, and possessions. To offset this, they made use of their cohesion for several purposes: (a) to create a common denominator among the Hebronite migrants who stemmed from the more than one hundred Hebronite clans; (b) for political empowerment which enabled the migrants to establish an economic base in Jerusalem, especially by utilizing Islamic Endowments (Awqaf); and (c) to regulate their own economic activity in Jerusalem through customary law, as they had done in Hebron.

The Hebronite migrants also aspired to impose their customary law on the City's established population. By 1948, they had efficiently applied customary law to fashion a position of dominance and power in society. Such a system of customary law which is practiced in order to dominate may be termed "predatory."

Under Jordanian rule (1947-1967), the Hebronites formed a political alliance with the Hashemite regime, and reaped its rewards.[19] The Jordanians had codified their customary law and thus regarded it as a legitimate part of their jurisprudence.[20] Therefore, Hebron customary law gained the support of the Jordanian regime in Jerusalem. During the 1950s, Hebron customary law became the dominant informal legal system, and served as a means of regulating the economy.

The annexation of East Jerusalem by Israel in June 1967 presented the resident Palestinians with an identity problem. The Israelis imposed their law and civil identity, while allowing the Palestinians to keep their Jordanian citizenship and maintain their link to Jordanian law.[21] Palestinians preserved religious autonomy in Jerusalem through the use of Islamic courts, under the Jordanian Department of Islamic Endowments. Obviously, the population of East Jerusalem needed an internal system to mediate and resolve disputes without recourse to the Israeli courts. Hebronite customary law was the only system that could perform this function after 1967.

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19. N. Dana, Religious Personages in the Islamic Establishment of the West Bank under the Jordanian Rule (Heb. 1974) (unpublished manuscript, on file with author). Dana notes that Hebronites were conspicuously represented in the Council of Islamic Scholars (Hayat al-'Ulama) appointed by the Jordanian government. One, for example, became the Qadi of Jerusalem. *See also* NORMAN H. GOSENFELD, THE SPATIAL DIVISION OF JERUSALEM 298-301 (1973) (stating that the proportion of Hebronites among business owners in Jerusalem increased from 33.2% in 1950 to 39.8% in 1956 and 42% in 1960).

20. A. Oweidi, Bedouin Justice in Jordan 322 (1982) (unpublished Ph.D. thesis, Cambridge University); 'A AL-'ABADI, *supra* note 3, at 187-91.

21. The Jordanian government only legally disengaged from the West Bank in August 1988. However, the Jordanians maintained their attachment to Jerusalem and its Islamic Endowments Department, and even in 1995 did not agree to relinquish it to the Palestinian Authority's control.

Hebronite customary law in Jerusalem has evolved into a system whose main importance lies in the regulation of economic activity and the resolution of economic disputes. It also has become a vehicle for maintaining local autonomy vis-à-vis the Israeli government and judicial system, and has served to mediate internal political processes. Despite the many problems arising from its application and enforcement, as well as doubts about the integrity of some of its arbitrators, the Palestinians adopted customary jurisprudence since they had no other reasonable means of conducting their economic life under the constraints imposed by Israel, Jordan, and the PLO.

THE STRUCTURE OF CUSTOMARY LAW IN THE JERUSALEM AREA

Those who practiced customary law in Jerusalem presented it as "traditional," without regard to its place in the political and economic domains. This was true not only of the Hebronites, but also of the Jordanian authorities before 1967 and the post-1967 Israeli authorities that accepted the "traditional" facet of customary law. Likewise, important elements within the PLO, wishing to use local culture as a basis for national identity, preferred to view customary law as being "traditional." In fact, customary law was far from traditional: it evolved according to changing conditions in the city.

Customary law is not a rigid corpus of rules; it leaves considerable room for negotiation.[22] Those who are familiar with Hebronite customary law tend to represent it as a complex hierarchy of mediators, each an expert in his own field. Nevertheless, it is more accurate to present the specialization patterns in customary law as social categories, affiliated with the power centers in society.[23] Arbitration decisions are socially constructed, and are influenced by the social background of the arbitrators.[24] Therefore, customary law is integrated into all areas of social life, and is not a "neutral and inherently just" legal system. Thus, Palestinian society understands that the key to successful customary jurisprudence is the power of its mediators, which flows from the support and cohesiveness of their clans.

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22. *See* LAWRENCE ROSEN, THE ANTHROPOLOGY OF JUSTICE II, 29-31 (Cambridge: C.P.U. 1989).

23. These categories exist, with minor differences throughout the southern West Bank. *See* SALAHUT, *supra* note 1, at 100-01 (discussing the existence of these categories in the southern West Bank); 'A AL-'ABADI, *supra* note 3, at 264-65 (discussing these existence of these categories among the Transjordanian tribes).

24. *See* CLIFFORD GEERTZ, LOCAL KNOWLEDGE 172-75 (Basic Books 1983) (discussing various factors that influence legal outcomes).

The first category of arbitrators, known as "Manshad," hear all problems concerning family honor. The Manshad is a person with experience and prestige and commands the support of a large, powerful clan. Rather than acting as a local arbitrator, he may call upon other, sometimes lesser, arbitrators to deal with the case before him.

The second category is the "Shadad al-Uja." The Shadad is a powerful figure who administers sentences and enforces punishment in the process of customary law in cases involving the failure to honor co-liability and guarantees. The ability to impose a decision is more important for a Shadad than a thorough command of the minutiae of customary law. The Qafil, or provider of guarantees, is related to the Shadad.

The third category is the Manhi al-Dam, who directly arbitrates problems of blood feuds, family honor, land, and occasionally (informal) appeals against judgment. Blood, Honor, and Land represent the basic values of traditional society; hence the importance of the Manhi al-Dam as the upholder of these values. The ideal Manhi al-Dam is a member of a large, powerful clan, a wealthy and esteemed man, a devoted Muslim, moderate in his demeanor, experienced, and charismatic. Frequently, a father bequeaths the role of Manhi al-Dam to his son in families (Buyut Islah) renowned in the Hebron hills for their power and influence, such as the Abu 'Aram family of Yatta.[25]

The fourth category is the Qadi, who deals with disputes concerning money, property, and various lesser matters not resolved by the Manshad and the Manhi al-Dam. The Qadi also hears cases in which the culprit is not clearly identified.[26]

This system of social categories of customary law arbitrators is related to the degree of risk to the social order that arises from a given dispute. Disputes concerning family honor are considered the most dangerous, since the preservation of family honor is paramount to the preservation of the kin-group, the very cornerstone of Palestinian society. An individual earns recognition as a Manshad, Manhi al-Dam, or Qadi through consensus rather than appointment. Success in a complicated case of arbitration leads to recognition of the arbitrator's charisma, and inspires litigants to bring before him more complicated disputes for adjudication. The choice of arbitrator is made either by both litigants or by the plaintiff

25. *See, e.g.*, ABU-SHAMSYIA, *supra* note 5, at 42; AL-NAHAR, Feb. 27, 1989.

26. There is a tendency to idealize customary jurisprudence and attribute to it "natural" social justice, emanating from a primordial source or covenant. However, Hebronite customary law is no more or less "just" than Western justice. For criticism of Hebronite customary law, see AL-NAHAR, May 18, 1989.

alone. There is a procedure for selecting an arbitrator, but the ultimate reason for his selection is often his ability to impose his authority.

The whole system of these categories of arbitrators is a social institution known as Tahkim. The Islah constitutes an alternative institution of mediation, which may account for the majority of conflict-resolutions in Palestinian society. The Islah mediator may be anyone invited to resolve a conflict. Whereas Tahkim entails coercion and is often paid for in cash, Islah is an expression of social control and conventional values, and is not necessarily part of society's power system.

The institution of Tahkim, and especially the category of Qadi, have been criticized in Palestinian society. In contrast to the ideal arbitrator who administers justice on the basis of his authority and family affiliation, some arbitrators of Hebronite origin (almost the only ones active in the Jerusalem area) are aligned with opposing political factions. When such an individual is chosen as arbitrator in a conflict, his rivals in some cases refuse to participate in the conciliation process. Thus, it is not easy to create a proper balance between the various arbitrators and guarantors who seek to solve a certain conflict or to ensure impartiality. Some Tahkim arbitrators who deal in economic conciliation command large fees and thus, allegedly, distort justice. Moreover, Hebronite customary law tends to dispense justice primarily to members of cohesive clans, and may at times dispense injustice to those who lack the backing of such a clan.[27]

Despite the criticism leveled against customary law, it has no substitute, and indeed has helped society to maintain internal social order. However, the changes which have taken place within Palestinian society, including the Islamic revival and the Intifada, have provoked further criticism of customary law as well as efforts to adapt it to society's new needs.

Reforming Customary Law

The strengthening of Islamic tendencies in Palestinian society since the mid-1970s has intensified criticism leveled at customary law, and prompted efforts to replace it with the Islamic Law (Sharia). However, customary law is not only a system of arbitration, but also has served as the linchpin holding society together and maintaining internal order. Under Israeli hegemony in the Jerusalem area, the fine points of Islamic and national discourse were overshadowed by the practical needs of the Palestinian population. Customary law needed reform, but not replacement. The Hebronites in Jerusalem as well as in Hebron had more affin-

27. *See, e.g.*, M.H. Gith, Customary Law in the District of Hebron (Hebron: Matba'at al-Amal. Arb. 1988); al-Nahar, Mar. 7, 1989.

ity to the growing Islamic movements than any other social group. Therefore, they felt the contradiction of being members of a Muslim society which practiced customary law rather than the Islamic law. Radicals among Hebronite Islamic activists therefore demanded reform of customary law according to the "proper Islamic way."

By the mid-1980s, representatives of the Hebronite clans expressed their willingness to reconcile Islamic law with customary law. In August, 1985, they convened a congress on this issue in Jerusalem. Three major groups engaged in jurisprudence were represented: Islamic scholars ('ulama), customary law arbitrators, and attorneys with Western legal training. The agenda of this comprehensive congress included lectures, debates, and arguments, some quite fierce, by radical Islamic activists and practitioners of customary law.[28] Even after the congress, the internal debate about customary law continued within Palestinian society, and has spilled over into its journalism.[29]

With the outbreak of the Intifada in December 1987, the radical Islamic organization, Hamas, emerged from the Palestinian Muslim Brotherhood. It gained strength in Palestinian society and became a rival to the Palestinian national-secular organizations affiliated with the PLO.[30] Hamas opposed the use of customary law in society, in accordance with the pre-Intifada position of radical Islam. The natural allies of Hamas in the southern West Bank and in East Jerusalem were the conservative social groups relying on customary law, led by the Hebronites. These groups were compelled to continue using customary law, as the local court system virtually collapsed during the Intifada, and Jordan renounced in August 1988 its claim to sovereignty over the West Bank. Moreover, no legitimate Palestinian legal system replaced the Israeli-controlled local court system. Consequently, customary law continued to prevail and even gained strength.[31] Islamic criticism, however, forced its modification. For example, the style of debate in the course of arbitration became closer to that prescribed by Islam, and Islamic traditions (Hadith) and Quranic verses were cited more frequently in the written verdicts.

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28. For the processes leading to the congress and the events there, see GITH, *supra* note 27.

29. *See, e.g.*, ABU-SHAMSYIA, *supra* note 5; GITH, *supra* note 27; SALAHUT, *supra* note 1. During the Intifada, a series of articles about customary law also appeared in AL-NAHAR and AL-USBU'A AL-JADID.

30. *See* Hamas Covenant (August 1988) (on file with author).

31. The rituals of conflict resolution (Hudna, 'Atwa, and Sulha) that are important for society in the Jerusalem area are similar to those conventionally used throughout Palestinian society. *See* CATHIE, *supra* note 2; GINAT, *supra* note 1; KERSEL, *supra* note 1.

The activists of radical Islamic organizations were aware of the importance of customary law during the Intifada as an autonomous system which promoted social law and order, and helped disengage from the Israeli authorities while the local system was paralyzed. The radical Islamic activists were prepared to ignore the ideological conflict surrounding customary law, on condition that it would be overlaid by a facade of Islamic symbols. This contrast between Islamic and customary law troubles radical Islamic activists, but does not deter many of them from supporting it as a social system for regulation and control.[32]

Nevertheless, customary law has come under more social criticism. Allegedly, some customary law judges are illiterate; there are different local versions of customary law and no "true" unified one, and some arbitrators demand emoluments verging on bribery. The imposition of Hebronite customary law in East Jerusalem and the southern West Bank, as well as its ties with the social power-structure, have evoked social protest, often under the guise of Islamic rhetoric.

Reform of Customary Law in the Jerusalem Area during the Intifada

The co-liability and protection that the clan grants the individual, his dignity, family, and possessions, is the main motif underlying the institution of customary law and justifying its existence. This co-liability purports to be absolute, except for cases in which the clan officially withdraws its protection from a member who repeatedly commits crimes that prejudice its own social position. Co-liability also is essential for local leaders who rely on their kin support, which is a stable source of power in the changing political environment of Palestinian society. The eruption of the Intifada triggered a clash between the traditional leadership (based on kinship) and the new leadership (the PLO and the ideological movements upholding the causes of Islam) which aspired to reform customary law.

Reform by Pro-PLO Organizations

The Unified National Command of the Intifada was created from the pro-PLO political organizations during the Intifada. The intensity of events during the Intifada, at least from 1988 to 1990, led to both the coalescence of a national solidarity which partly overcame kin solidarity, and an attempt to disengage from customary jurisprudence. The princi-

32. *See, e.g.*, Islamic Jihad leaflet of July 20, 1989, circulated in Jerusalem (manuscript on file with author).

ple of co-liability within the kin-group lost some of its potency. For example, the killing of alleged Israel-collaborators led neither to blood-revenge nor to arbitration and reconciliation (Sulha) proceedings. Nevertheless, the scale of activity of customary law increased during the Intifada. The political and socio-economic tensions caused significant friction and dispute for which no other avenue of resolution was available, due to the collapse of the Israeli-managed local courts.

The pro-PLO Intifada leadership tried to channel the resolution of disputes to political bodies known as the Popular Committees and the Mediation Committees.[33] A Mediation Committee was established in the Jerusalem area in late 1988, subject to pro-PLO leadership and excluding conservative and pro-Jordanian arbitrators. In April 1989, one publication asserted: "Lately . . . the local national forces have played a major mediation role, especially in the more serious and complicated cases."[34] It describes mediation in a blood feud case in Qattana (a village near to Jerusalem), in which two youths were killed.[35] The Popular Committees involvement in resolving local disputes was not confined to mediation and conflict resolution between groups and bodies involved in the Intifada, or to areas in which pro-PLO forces prevailed. In resolving conflicts, procedures of customary law were applied usually without modification. Beit Sahur (a town near Jerusalem) was unique in its drive to adapt customary law to the social and political needs of the pro-PLO forces. "Conciliation Committees" and "Judicial Popular Committees" were established there to replace traditional arbitration completely.[36]

The decline of the Popular Committees in the West Bank since 1989[37] necessitated the creation of a center of arbitration in East Jerusalem, linked to the leadership of the Orient House, which continued to assist in dispute-mediation in the Jerusalem area. Lists of politically-reliable, traditional mediators were distributed to local activists.

Far from accepting the Popular Committees as surrogates, however, most of the Palestinian public continued to cling to its traditional customary law, and resolved disputes using family networks rather than political bodies. Although the Intifada created unity among Palestinians, tensions in society and the deteriorating economic and political situation contrib-

33. *See, e.g.*, Unified National Command leaflets Nos. 8, 9, 13, 15 (on file with author).

34. *See* SPECIAL NEWS—FAMILY FEUDS (Jerusalem), Apr. 1989.

35. *Id.*

36. G. Robinson, Creating Space: Organization, Ideology and Leadership in the Palestinian Intifada 184-89, 212-18 (1992) (unpublished Ph.D. dissertation, University of California (Berkeley)).

37. *See, e.g.*, Unified National Command leaflets Nos. 6, 11 (on file with author); D. Kuttab, *Discipline Becoming a Problem* (Mar. 22, 1989).

uted to a state of anomie. Rather than undermining the social order, these events led to a drive to uphold its basic values. In the early 1990s, the pro-PLO Intifada leaders realized that they could not yet reform the fundamental patterns of Palestinian society, and therefore would do best to preserve the institution of customary law. They construed it as a necessary evil which regulated social life and facilitated the disengagement from Israel; and as a part of Palestinian cultural heritage to cultivate. Thus, paradoxically, an institution that represented the traditional social order was now exploited for the construction of a new national, political, and social order.

Reform by the Islamic Movements

During the Intifada, Hebronite customary law continued to serve the Hebronites in Jerusalem as a mechanism for economic regulation and conflict resolution. Their social cohesion enabled them, more than any other Palestinian group, to pursue commercial and artisan activities without the constraints (such as strikes) thrust upon the public by the Intifada. Their power system, hiding behind the "traditional" facade of customary law, successfully adjusted to the changing conditions of the Intifada. At the same time, the remarkable cohesion of their traditional leadership protected them from the upheavals of the Intifada. Yet, damage to the social fabric and deterioration of public security induced Hebronite society to seek ways to tighten social control. To achieve this, society had to modify the institution of customary law.

Like the previous attempt to reconcile customary law with Islamic law, this modification process took place in the context of co-liability. The dispersion of Hebronite power between Jerusalem and Hebron and evenly among large clans fostered egalitarianism and consensus. Beginning in early 1989, the links between the Hebronites and Hamas gained strength, and it thus became possible to couple traditional and legitimate Islamic values. Mediation (Islah) was now considered Islamic, even as arbitration by customary law (Tahkim) was construed as un-Islamic.

The culmination of the Islamic reform of customary law in the Jerusalem area was embodied in the "Hebron Covenant." In early 1989, a series of crimes in Hebron and East Jerusalem stunned Hebronite society. In the aftermath of these crimes, the city leaders, practitioners of customary law, and a large audience convened on March 4, 1989 in a meeting hall (diwan) of a clan. Sheik Bayud al-Tamimi, a Qadi in the Islamic court whose brother is the leader of an Islamic Jihad organization, was selected as chairman of this assembly, which was then charged with the reformation of customary law. On March 6, 1989, this assembly convened

again in the presence of a large audience, including many Islamic activists. Finally, a ten-point Hebron Covenant (mithak) was drafted and circulated. It integrates Islamic forms with principles of customary law: its style conforms with the conventions of radical Islamic groups, while its tone is that of a social covenant.[38]

The Hebron Covenant marked an attempt to adjust society to the Intifada era on two levels: (a) mandating social reform by defining customary law as "mediation" (Islah), thus lending to the Hebron Covenant an Islamic legitimacy, while invoking community authority, both of which were needed to prevent criticism from Islamic radical activists; and (b) reform of customary law by strengthening co-liability and thereby social control. For example, under customary law a kin-group can cast out a delinquent member, who then may be killed in revenge by his victims without fear of a blood feud. However, in paragraph 5 the Hebron Covenant departs from custom by stating that the delinquent can be proclaimed an outlaw even without receiving permission from his relatives, and the entire forum of Hebron clan representatives can declare this collective outlawing. Its power lies in depriving the offender's kin of the right to exact his blood revenge.

Paragraph 6 of the Covenant intends to prevent the evasion of collective responsibility by a clan when one of its members is proven to have engaged in crime. Paragraph 8 seeks to deny a criminal the protection of customary law by refusing him the right of asking arbitrators to serve as his guarantors. Paragraph 10 attempts to protect customary jurisprudence from the abuse of its power by a large clan. The Hebron Covenant placed offenders in the Jerusalem area under strong social pressure, and established a new, communal level of involvement in the field of customary law.

CHANGES IN THE PATTERNS OF CUSTOMARY LAW DURING THE 1990S

By the early 1990s, the patterns of customary law in Palestinian society had changed still further. The struggle between the national pro-PLO and Hamas-Islamic factions of Palestinian society had increased. Between 1991 and 1993, the power base of the PLO was still abroad, while Hamas's power was located inside the occupied areas. While the PLO's flow of money and chain of command during the Intifada transferred from the level of the National Command down to the streets, the Hamas leadership was based directly on the streets. As a result, Hamas became more entrenched among the pauperized Palestinians. Customary law was

38. *See* AL-NAHAR, Feb. 28, 1989; AL-NAHAR, Mar. 5, 1989; AL-FAJR, Mar. 26, 1989.

conceived by the pro-PLO camp as a means of keeping its roots among the masses. The two contesting bodies were forced to try and shape customary law to their own image of society. Both wished to institutionalize customary law, and make it more like a regular corpus of law. They hoped that it would replace the redundant courts, and become the core of their own future Palestinian political entity. This hope was reflected in public debate. An article in a Palestinian newspaper published in Jerusalem called for a formal codification of customary law by "creating institutes and national bodies . . . that will use the practitioners of customary law."[39]

During this struggle, several types of customary law activity crystallized in the Jerusalem area. One was the important pre-Intifada traditional type, which still accounted for more than fifty percent of customary law activity. The second, traditional-Islamic type evolved from the first, overlaying customary law with an Islamic facade. This constituted an adaptation of traditional customary law to the new and more legitimate Islamic radical discourse. The third was the traditional-national type, carried and used by the national, pro-PLO political block. The fourth type was developed by the Islamic radical movements, and more closely resembled Islamic law than any other category. The fifth type, termed the National-Islamic, was formed by an Islamic group with a national orientation, located in the Jerusalem area; al-Lagna al-Mohammadia al-Sufia.

The political vacuum created in the West Bank after the decline of the Intifada, and especially after the Oslo agreements, weakened the ability of traditional arbitrators of the first type to impose their decisions in difficult disputes such as blood feud cases. The Palestinian National Authority could not yet compile its own secular code of law,[40] mainly due to opposition from the Islamic movements, who wish to impose Islamic law over Palestinian society. Therefore, it became important both to traditional arbitrators and society at large that political bodies linked to the National Authority impose arbitration. In order to reap the political advantages and popular legitimacy deriving from customary law, prominent leaders in the Fatah were appointed directly by Yasir Arafat to supervise customary law, and to insert into its process the power structure of the National Authority. The traditional-national type of customary law was also linked to efforts by the national camp to create legitimacy for its drive towards nationhood and, at the same time, to bolster its struggle

39. AL-QUDS, Sept. 10, 1992.

40. *See* Draft of the Basic Law for the Palestinian National Authority in the Transition Period, Jerusalem Media and Communication Centre, 1994.

against the growing influence of Hamas among the conservative Islamic social strata.

On July 2, 1992, wishing to establish their hegemony as leaders of the Palestinian Muslims as well as sole representatives of Islamic law, supporters of Hamas established the Association of the Islamic Clergy ('Ulama) of Palestine in al-Aqsa mosque in Jerusalem.[41] This organization challenged the political ascendancy of the pro-PLO block and its hold over customary law. Moreover, the organization could announce that negotiations between the PLO and Israel violated Islamic law. The pro-PLO bodies had to counter this bid in order to control the Islamic clergy's right to pronounce religious and legal verdicts. Supporters of the national block therefore created their own Association of Palestinian Islamic Clergy which also included a Committee of Islah.[42]

After the signing of the Oslo agreements, the struggle for control of customary law and its adaptations to Islam in the Jerusalem area became even more acute. Hamas encouraged the creation of Islamic organizations dedicated to arbitration. In January 1994, for example, a committee of mediation (Islah) was created as part of the Young Muslim Association in the affluent al-Ram, the large Palestinian suburb of Jerusalem. Hebronite merchants formed the majority of this committee.[43] The Palestinian National Movement was supported in arbitration cases by the al-Lagna al-Mohammadia al-Sufia. This organization was unique in the sense that its Islamic ethos emerged from Sufi traditions. Its endowment on the National Block of Islamic legitimacy during arbitration, and as an enforcer of arbitration decisions was critical.[44]

After its establishment, the Palestinian National Authority continued its efforts to limit the ability of Hamas to present itself as the sole legitimate representative of Islamic law and thus to shape for itself an independent role in a future Palestinian political entity. The Palestinian National Authority wished to control the assets of the Islamic establishment and the Islamic Endowments, and thereby to reject Jordanian claims to have a role in managing Islamic affairs in Jerusalem. During 1995, it established its own Department of Islamic Endowments in an effort to control Islamic courts in the Jerusalem area.

Yet, the Palestinian National Authority did not neglect the field of customary law. It became directly involved with the practice of customary

41. AL-QUDS, July 17, 1992.
42. AL-QUDS, May 5, 1993.
43. AL-QUDS, Jan. 4, 1994.
44. *See* AL-RAZEM, ABDAL-BALIL, (Jerusalem. al-Lagna al-Mohammdia al-Sufria. Arb. 1992). This organization was also involved in social activity, such as the rehabilitation of drug users. Its members used violence in several cases.

law, in an effort to preempt Hamas in this area. During 1995, the Palestinian National Authority regarded customary law as a resource to be cultivated, a means to enhance its influence. It therefore used its organs of security and members of the Fatah movement as guarantors and arbitrators in conflicts, and intensified its struggle against Hamas in the customary law arena. Both sides wished to control public discourse and symbols of legitimacy in society through control of its regulatory system of customary law. As a consequence, customary law became a prelude to Palestinian state law.

Conclusion

Customary law is a central pillar in the social structure of Palestinian society, as well as a major component of culture and a mechanism of social control. This institution has been in continuous use since the sixteenth century, if not earlier. In Ottoman Jerusalem, it reflected the complexity of relations between the state and its subjects; and in Hebron, it embodied the economic constraints of trade with the inhabitants of the desert, and reflected a limited amount of regional autonomy and the need for co-liability among clan members. The Hebronite migrants to Jerusalem in the 1930s exploited their power as a co-liability group to obtain economic resources in the City. The customary law system that developed at that time was predatory in nature.

A metamorphosis in Hebronite customary law took place under Jordanian rule. The dispersion of the Hebronite community, the complexity of its commercial and artisan life, and the constraints of political connections with the Hashemite regime, led to the institutionalization of Hebronite co-liability, which then provided leaders with a political power base. Israeli rule catalyzed another metamorphosis in Hebronite customary law. It now also became a vehicle of Palestinian autonomy, and a regulating mechanism of important economic processes. Under Jordanian and Israeli rule, the Hebronites represented customary law as "traditional" even as they modified it in several important ways.

The Intifada triggered further changes in customary law. The contradiction between Islamic and customary law, and the need to strengthen social control, have generated additional adjustment processes in customary law characterized by debate, consensus-building, and reform. Islamic organizations became prominent in the regulation of customary law. The Palestinian National Authority, established after the Olso agreements, fought a power struggle with Hamas. Both sides considered customary law as a crucial asset in the construction of a future state. Recently, the Palestinian National Authority has expanded its control of customary law

and limited Hamas's role. Thus, the institution of customary law today is not a relic of the past, but rather a part of future Palestinian society and a major contributor to its vitality.