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# Customary Dispute Resolution Mechanisms in the Gaza Strip

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## Executive Summary

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 arise between members of communities. These mechanisms may be used to resolve a wide range of disputes and often utilise various elements of mediation, conciliation and arbitration.[1] In the Gaza Strip, it is estimated that between 70 and 90 percent of disputes never reach the formal justice system and are resolved through recourse to existing customary dispute resolution mechanisms, [2] which in Gaza typically consist of *sulh* conciliation procedures mediated by established community leaders and on the basis of traditions and customary law. These procedures are often more accessible to poor and marginalised communities than formal justice systems and frequently provide quicker and more affordable remedies than formal mechanisms though they may also be ill-equipped in guaranteeing rule of law or due process.[3]

The formal legal system in the Gaza Strip reflects a mixture of Ottoman, British, Egyptian, Israeli and Palestinian influences. A legacy of occupation and conflict in the Gaza Strip, combined with the absence of a stable central authority and the continuing power of clans and families, has meant that the formal judiciary currently plays a lesser role and often enjoys less credibility in dispute resolution.[4] Historically weak central authorities combined with political rivalries and increased security instability have only increased the legitimacy of customary dispute resolution at present in Gaza. The challenges faced by authorities in creating a unified and official legal system are, therefore, significant.

Customary dispute mechanisms in the Gaza Strip historically arose through the clan-based and tribal social structures dominant both in Gaza and elsewhere in Palestine, particularly the Beersheba area in what is now Israel, from which many Palestinian refugees currently resident in Gaza emigrated. During the 20th century, these customary mechanisms continued to evolve and local leaders active in customary resolution, particularly *mukhtars* and *islah* men, gained prominence. Beginning in 1987 with the first Intifada, customary mechanisms became a preferred alternative for many Palestinians in Gaza over the then Israeli-controlled judiciary. *Islah* conciliation committees emerged during this period and were formally recognised and regulated under the Palestinian Authority (PA) following its creation in 1994. More recently, the local authorities in Gaza have employed similar *islah* committees, termed the *Rabita* committees, to mediate disputes in Gaza in accordance with *shari'a* principles.

At present, the formal court system in the Gaza Strip, also known as the *nizami* courts, is plagued by an extensive backlog of cases and widespread public mistrust. In April 2007, the PA estimated that there were 20,360 cases pending before the *nizami* courts in Gaza.[5] This backlog has only been "exacerbated by a shortage of judges, lack of accountability and professionalism, inadequate buildings

[1] The study of customary dispute resolution is marked by a panoply of terms such as, *inter alia*, "traditional," "customary," "indigenous," "informal," "non-state," "local," "community," "popular," "participatory," and "tribal," often conflated in both discourse and practice. In some instances, they seek to capture the same social phenomenon, while in others their meanings are quite different. Throughout this report, the term "customary dispute resolution" has been used to avoid any negative connotation associated with other terminology and to maintain consistency with the NRC Collaborative Dispute Resolution (CDR) handbook. *See* NRC, *Housing, Land and Property: Handbook on Design and Implementation of Collaborative Dispute Resolution*, [YEAR].

[2] NRC interview with a local NGO worker, Gaza Strip, 16 October 2011; NRC interview with a UN worker, Gaza Strip, 16 October 2011. *See generally,* Ewa Woikowska, United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme, *Doing Justice: How Informal Justice Systems Can Contribute*, December 2006, p. 5 [estimating that, in many countries, collaborative dispute resolution (CDR) mechanisms resolved between 80 and 90 percent of all disputes and are often crucial to restoring some degree of rule of law in post-conflict settings].

[3] UNDP, *Access to Justice: Practice Note*, 9 March 2004, p. 4.

[4] Hallie Ludsin, "Putting the Cart Before the Horse: The Palestinian Constitutional Drafting Process", *UCLA Journal of International Law & Foreign Affairs*, *443*, 447 (2005).

[5] Palestinian Authority, Ministry of Planning, *Land Disputes Study: Part I – Palestinian Authority Land Administration Project*, prepared by Land Equity International, June 2007 [PA Land Disputes Study], p. 33.

and facilities, and shortages of support staff."[6] According to the PA, between 25 and 40 percent of this backlog are land dispute cases, with the average land dispute case before the *nizami* courts taking three years for resolution.[7]

Customary dispute resolution in Gaza has, in many ways, attempted to fill this gap. According to UNDP, between 2005 and 2007, approximately 70 percent of disputes were resolved through customary mechanisms; since then, local legal practitioners estimate that the percentage has increased to nearly 90 percent.[8] In the absence of a functional formal court system, recourse to customary mechanisms may become less a voluntary choice and more the only available option.

There is a growing concern that customary dispute resolution is no longer complementing the formal judiciary, but is actively replacing it. As the customary system is designed to enforce the rule of equity as opposed to the rule of law, decisions are frequently inconsistent with human rights, gender equality, and due process. Among the difficulties with customary judicial procedures in the Gaza Strip is their lack of standardisation and failure to incorporate a gender perspective. 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 non-state customary actors. Any distinctions are further complicated by increasing "unofficial" arbitration and hybrid customary and formal mechanisms.

Based on NRC interviews and focus groups, community perceptions of customary dispute resolution procedures in Gaza are largely favourable, particularly in comparison to the formal *nizami* judiciary. In terms of cost and timeliness, the customary mechanisms are much more accessible to Palestinians in Gaza and most focus group participants believed the customary system was adequately fair, impartial, voluntary and confidential. There remain considerable concerns amongst those regarding the lack of transparency in and accountability for customary mechanisms as well as questions regarding their compliance with established due process and human rights standards. Further, there are significant areas for capacity building and training for actors within the customary judicial system.

From a practical perspective, the influence of customary dispute resolution procedures in the Gaza Strip can no longer be ignored. Customary dispute resolution mechanisms in Gaza may fill gaps in legal protection, serve a complementary function with the formal courts and prevent recourse to self-help or revenge. Faced with lengthy proceedings and a significant backlog of cases, judges and police within the formal judiciary actively encourage disputants to pursue customary remedies. Where parties reach an agreement through mediation or conciliation, the formal courts generally support the unofficial resolution and dismiss any pending legal proceedings.

The objective in this report is to provide a better overall understanding and framework to the present role of customary dispute resolution in Gaza and to outline potential advantages and risks to programmatic intervention with this customary system. The intention is not to suggest a normative structure as to how the formal and customary systems should function, but to present a positive study as to how these mechanisms currently operate and the potential for engagement by legal aid providers.

[6] *Ibid.*, p. 6.
[7] *Ibid.*, p. 9.
[8] NRC interview with a UN worker, Gaza Strip, 16 October 2011.

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## Acronyms

| | |
|---|---|
| **CDR** | Collaborative Dispute Resolution |
| **HLP** | Housing, Land and Property |
| **ILS** | Israeli New Shekel |
| **NGO** | Non-governmental organisation |
| **NRC** | Norwegian Refugee Council |
| **OCHA** | United Nations Office for the Coordination of Humanitarian Affairs |
| **oPt** | occupied Palestinian territory |
| **PA** | Palestinian Authority |
| **PBA** | Palestinian Bar Association |
| **PCDCR** | Palestinian Center for Democracy and Conflict Resolution |
| **PLA** | Palestinian Land Authority |
| **PLC** | Palestinian Legislative Council |
| **PLO** | Palestine Liberation Organisation |
| **UNDP** | United Nations Development Programme |
| **UNLU** | Unified National Leadership of the Uprising (*al-Qiyada al Muwhhada*) |
| **UNRWA** | United Nations Relief and Works Agency for Palestine Refugees in the Near East |

## Glossary of Arabic Terms

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|---|---|
| ***Al qada'al 'asha'iri*** | A system of justice for resolving disputes between members of a clan or tribe. Under this system, the ruling of the tribal judge is considered binding. The tribal justice system was historically active within the Bedouin communities in the Gaza Strip, though is no longer prevalent. |
| ***Ashira*** | A Bedouin tribe. |
| ***'Atwa*** | A public admission of guilt by the perpetrator and a readiness to pay compensation to the victim's family; one of the first steps in the *sulh* conciliation process. Such an admission limits the victim's ability to seek revenge against the alleged perpetrator. |
| ***Badawi*** | The semi-nomadic tribal population of Bedouins in the oPt. |
| ***Bait al mulim*** | In a tribal dispute, the *bait al mulim* is the *islah* man initially approached by the parties. The *bait al mulim* will initially attempt to resolve the dispute through *sulh* conciliation and will refer to a tribal judge if unsuccessful. |
| ***Bish'a*** | Traditional means of proof previously employed in the tribal judiciary that consisted of putting a coffee bean roster near an individual's tongue to determine whether or not he/she is telling the truth. |
| ***Diwan*** | An assembly or meeting of the male elders of a family or clan. |
| ***Diya*** | "Blood money" paid by a perpetrator's family as compensation to the victim's family. |
| ***Hadari*** | Urban and rural inhabitants in the Gaza Strip with sedentary roots. |
| ***Hamula*** | A patrilineal extended family, typically referred to as a clan. |
| ***Hudna*** | A ceasefire period secured by both the perpetrator and victim's families or facilitated by a *mukhtar* or *islah* man. The *hudna* lasts three and one-third days, though it may be extended. During this period, the perpetrator of an offense expresses his or her desire to explore mediation through the conciliation process, though the victim's family is not obligated to refrain from revenge. |
| ***Islah* Committee** | A committee of *islah* men who resolve disputes in concert. Initially created during the first Intifada, these committees were formalised as Central *Sulh* Committees under the Department of Tribal Affairs established by President Yasser Arafat in 1994. Currently, the most influential and largest *Islah* Committees in the Gaza Strip are the Hamas-affiliated *Rabita* Committees. |
| ***Islah* men** | Literally, "man of conciliation"; refers to the adjudicators within the conciliation process in Gaza. While local *mukhtars* constitute a significant portion of this group, not all *islah* men are *mukhtars*. There is no formal system for the appointment of *islah* men and most are approached due to their knowledge of *'urf* (customary law) and experience in conciliation procedures. Also known as "*rajl islah*". |
| ***Jaha*** | Delegation of respected community men who help secure the *hudna*, or ceasefire, at the beginning of a *sulh* conciliation. |
| ***Jalwa*** | Forced expulsion of a perpetrator and his or her family from the community as punishment for the perpetrator's offense. |

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|---|---|
| ***Lajiyun*** | Refugees. |
| ***M'adhuf*** | A tribal judge. |
| ***Majlis asha'iri*** | A tribal council. |
| ***Matrud*** | A defendant in a tribal court proceeding. |
| ***Mithaw al-sharaf*** | A code of honour. |
| ***Mukhtar*** | A clan elder or male head of the family. The *mukhtar* traditionally connected villages to formal government and often plays an integral role in customary dispute resolution and the application of *'urf* (customary law). |
| ***Mulk* land** | Private land. |
| ***Mush'a* land** | Shared lands historically cultivated by clans in the oPt until the Ottoman Land Code of 1858 effectively eliminated these common lands. |
| ***Muwatinun*** | Literally, "citizens". In the context of Gaza, this term refers to the "host" or native, non-refugee population. |
| ***Nizami*** | The formal civil judicial system in the Gaza Strip. |
| ***Rabita* Committee** | An *Islah* Committee in the Gaza Strip affiliated with Hamas which resolves disputes in accordance with *shari'a* law. Founded initially in 1992, these committees are now the most prominent customary dispute resolution actors in Gaza and frequently issue binding arbitration decisions in all types of disputes, including criminal matters. |
| ***Rajl islah*** | See *islah* men. |
| ***Rizqa*** | The fee paid to the tribal judge by the parties in a tribal dispute resolution. |
| ***Saff*** | A Bedouin tribal confederation. In Gaza, the Bedouin tribes are divided into six *saffs*, each containing a least a dozen individual tribes. The six *saffs* in Gaza include the Hayawat, Tarabeen, Tayaha, Ijbara, Azazma and Jahalin. |
| ***Shari'a*** | Religious law and practical ordinances derived from the *Qur'an*. |
| ***Sulh*** | Literally, "conciliation". Refers both to the method of customary dispute resolution in which male elders mediate in accordance with customary law and a final reconciliation agreement between the parties (also known as the *kifala*). |
| ***Tahkeem*** | Arbitration. |
| ***Tarid*** | The petitioner in a tribal court proceeding. |
| ***Tha'ir*** | Literally, "revenge". Typically initiated by the victim's family and prohibited during the *sulh* conciliation process. |
| ***'Urf*** | Customary law. |

# Map of the Gaza Strip

## Development of the ICLA Programme in the Gaza Strip

In April 2009, the Norwegian Refugee Council (NRC) established an Information, Counselling and Legal Assistance (ICLA) programme in the occupied Palestinian territory (oPt), initially working in the West Bank, including East Jerusalem. In August 2009, NRC undertook an ICLA needs assessment of the Gaza Strip, which identified several areas for legal intervention, particularly among persons whose houses were demolished or damaged during the December 2008 – January 2009 Israeli military operation in Gaza codenamed "Cast Lead". As a result of this assessment, NRC initiated a Legal Aid Centre in Gaza to provide legal assistance on housing, land, and property (HLP) matters to persons affected by the conflict.

The ICLA needs assessment additionally identified the need for current information on the scope of customary dispute resolution in the Gaza Strip and the extent of its relationship to the formal judiciary, with a specific focus on HLP disputes.[9] In particular, the primary objectives were identified as follows:

- Provide a background on the customary dispute resolution system in the Gaza Strip;
- Describe the structure and function of customary legal system and collaborative dispute resolution (CDR) mechanisms in the Gaza Strip;
- Identify the current challenges facing customary dispute resolution mechanisms in the Gaza Strip, in particular with regards to land disputes and access to justice; and,
- Provide recommendations for future interventions by the NRC ICLA programme in the Gaza Strip.

Since the establishment of the Legal Aid Centre in Gaza, NRC has provided legal information on HLP rights and procedures to 3,142 persons all over the Gaza Strip.[10] In addition, it has provided individual legal counselling to 2,072 persons requiring land registration or proof of ownership documentation and 1,151 cases were successfully completed whereby the required documents were obtained.

On 31 August 2011, NRC entered into a partnership agreement with the Palestinian Centre for Democracy and Conflict Resolution (PCDCR) to develop a legal aid project focusing on HLP and women's rights and working with traditional community leaders, or *mukhtars*, in customary dispute resolution and mediation. PCDCR has extensive experience in working with HLP disputes and in engaging with the customary dispute resolution sector in Gaza.

Through this partnership, NRC hopes to utilize its global expertise on HLP rights as well as its own global set of collaborative dispute resolution methods to complement and develop the work of PCDCR and ultimately improve legal information and assistance provided in HLP disputes in the Gaza Strip.

The purpose of this report is to better understand the current state of customary dispute resolution in the Gaza Strip. Given the limited number of publications and research on this issue available, the objective in preparing this report is to help fill that void, expand dialogue regarding customary justice amongst practitioners in Gaza, and recommend programmatic responses for potential ICLA interventions and engagement.

[9] *See, e.g.*, UNDP, *Access to Justice in the occupied Palestinian territory: Mapping the Perceptions and Contributions of Non-State Actors*, April 2009, p. 12: "There is little published material on the state of the justice system in Gaza."
[10] These figures cover the period from 1 November 2009 to 31 January 2012.

## Methodology

This report is based primarily on field research conducted by NRC in the Gaza Strip, including focus group discussions and interviews, from 16 January 2011 to 13 February 2011. Additional field research was undertaken from 3-27 October 2011. This report additionally draws upon the limited primary and secondary source materials relevant to customary dispute resolution in the Gaza Strip.

During the initial field research period, NRC conducted five focus group discussions throughout the Gaza Strip, segregated by gender and involving 18 male and 31 female participants.[11]

In addition, NRC conducted more than 40 interviews in the Gaza Strip with actors involved in or expert on the customary dispute resolution system in Gaza, including:

- Representatives from four United Nations agencies
- Representatives from three Palestinian non-governmental organisations (NGOs)
- Eight practicing lawyers and one non-practicing lawyer
- Three Palestinian Supreme Court Judges who ceased working in the Gaza Strip in 2007
- Three judges currently working in the Gaza Strip, including a Reconciliation Court Judge, a Court of First Instance Judge, and a Supreme Court Judge
- A representative from the Palestinian Land Authority (PLA) in the Gaza Strip
- Two representatives from the Palestine Scholars' League
- Eight *Islah* men, three of whom also serve as local *mukhtars*
- A tribal judge
- A legal academic from the Gaza Strip
- A representative from the Institute of Law at Birzeit University
- Two senior officials from the Department of Tribes and Reform within the Ministry of Interior in the Gaza Strip

On occasions where it was possible and appeared beneficial, several meetings were arranged with the same individual or organisation. An introductory meeting with the High Judicial Council was also held. NRC agreed with many interviewees to the principle of confidentiality and, as such, the names and any identifying information of the interviewees have been withheld in this report as a protective measure for all parties.[12]

All information presented in this report has been updated as of January 2012.

NRC would like to thank all those who agreed to be interviewed in the preparation of this report. In particular, NRC would like to thank PCDCR for its assistance, legal advice and facilitation of numerous meetings and focus groups.

[11] An additional planned focus group with male participants was cancelled due to security concerns. Details of each focus group, including composition and location, are on file with NRC.
[12] A complete list of interviews conducted is on file with NRC.

# Introduction

The Gaza Strip, with a population of more than 1.6 million people in an area of only 360 square kilometres, represents one of the most densely populated areas in the world. Administratively, the Gaza Strip is divided into five districts or governorates: North Gaza, Gaza, Middle Area, Khan Younis, and Rafah.

The legal system in the Gaza Strip remains a mixture of Ottoman, British, Egyptian, Israeli, and Palestinian laws with each new system augmenting the previous without fully overriding or superseding it. At various times, the customary system has been reinforced indirectly through the absence of a central authority or the role of an occupying power; more recently, it has been directly fostered through the Palestinian Authority (PA) and the current local authorities.

Thus, the legal system at present in the Gaza Strip can best be viewed as three overlapping systems:

1. **The *nizami* court system**, the formal courts with jurisdiction over all matters relating to contracts, criminal proceedings, and commercial transactions;
2. **The *shari'a* court system**, a semi-autonomous formal legal system with jurisdiction over all personal status matters, including all disputes related to marriage, divorce, custody, maintenance payments, and inheritance;[13] and,
3. **Customary dispute resolution mechanisms**, which encompasses all dispute resolution outside the framework of the *nizami* and *shari'a* courts and primarily consists of facilitated negotiations and *sulh* conciliation procedures mediated by community leaders and in accordance with *'urf* customary law and traditions.

In terms of governing law, the Palestinian legal system is governed by three normative frameworks: statutory laws and regulations, Islamic *shari'a* law, and *'urf*, or customary law. These bodies of law "have never been completely independent of one another, nor are they internally homogenous or undifferentiated."[14]

Both the *nizami* and the *shari'a* court systems are structured in three-tiers, divided into courts of first instance, appellate courts, and supreme courts.[15]

For purposes of this report, "formal justice" will refer to the *nizami* and *shari'a* judiciaries as both systems are regulated and governed by statute. The term "customary dispute resolution" encompasses those customary clan-based mechanisms that have developed in the Gaza Strip and which today represent the predominant means by which Palestinians in Gaza resolve disputes. This report tracks the historical developments of informal justice in the Gaza Strip along with the primary mechanisms and key actors. Drawing on conclusions and observations from NRC interviews and focus groups, this report further analyses community perceptions toward customary dispute resolution as well as the benefits and disadvantages of engaging with the customary system.

[13] For additional information on the historical development of the *shari'a* courts in the Gaza Strip, see Norwegian Refugee Council, *The Shari'a Courts and Personal Status Laws in the Gaza Strip*, January 2011.
[14] Lynn Welchman, "The Bedouin Judge, the Mufti, and the Chief Islamic Justice: Competing Legal Regimes in the Occupied Palestinian Territories", *Journal of Palestine Studies*, Vol. XXXVIII, No. 1, Fall 2008, p. 7.
[15] UNDP, *Access to Justice in the oPt*, *supra* note 9, p. 11.

# Chapter 1: Overview of Clan-Like Structures in the Gaza Strip

Before examining the historical development and practices of customary dispute resolution in the Gaza Strip, it is first necessary to understand the prevailing clan and tribal structures in the territory, which form the basis for most of the customary legal traditions. This section provides a basic outline of the primary clan-like structures in the Gaza Strip, though the historic distinctions between the groups are no longer as prominent or clear as they used to be.

The Palestinian population in the Gaza Strip is divided into urban and rural inhabitants with sedentary roots, or *hadari*, and the semi-nomadic tribal populations of Bedouins, or *Badawi*. *Hadari* account for roughly 75 percent of the population in Gaza while *Badawi* represent the remaining 25 percent.[16]

A further distinction should be made between those inhabitants with historic roots in the Gaza Strip, or *muwatinun* (literally, "citizens"), and refugees displaced to Gaza starting in 1948, or *lajiyun*.[17] More than 75 percent of the population in Gaza is registered as refugees with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and would fall within this latter category of *lajiyun*. There are *muwatinun* and *lajiyun* among both the Bedouins and *hadari* population and there is no direct correlation between the two classifications.

The three historic clan-like structures in the Gaza Strip may be divided into clans, notable families, and tribes. Clans and notable families, which share many tribal attributes, enjoy a level of modern political influence that present-day tribes appear to lack.[18]

## 1.1 Clans

Throughout the oPt, the *hadari*, or settled population, are organised into individual households, or *beit*, which are part of extended clans, or *hamula*. Such clans range in size from several dozen members to a few hundred, though some of the largest may include thousands.[19] Each clan is typically headed by a *mukhtar*, or male elder, and "[i]n rural districts, the usual practice has been that the *mukhtar* of the largest and most powerful *hamula* is also the *mukhtar* of the whole village."[20] When a woman marries, she formally joins her husband's *hamula*.

Clans were historically essential for the cultivation of shared, or *mush'a*, lands, though the adoption of the Ottoman Land Code in 1858 effectively eliminated these common lands.[21] Clan structure also plays a significant role in protection and security; all male clan members are bound by *mithaw al-sharaf*, or a code of honour, and an attack on one member could compel revenge, or *tha'ir*.[22] Clans additionally provide a necessary social network and source for spouses, particularly in the Gaza Strip where nearly half of all marriages are between cousins.[23]

More recently, many clans in Gaza have established foundations and other institutions to care for the financial well-being of its members. Such shared financial security has been particularly prominent

[16] Landinfo – Country of Origin Information Centre, *Clan conflicts in the Palestinian Territory*, 28 July 2008 [Landinfo Study], p. 6, n. 1.
[17] *Ibid.*, n. 3.
[18] Dror Ze'evi, "Clans and Militias in Palestinian Politics", Brandeis University, Crown Centre for Middle East Studies, Middle East Brief, No. 26, February 2008, p. 1.
[19] Landinfo Study, *supra* note 16, p. 6.
[20] *Ibid.*
[21] Glenn E. Robinson, "Palestinian Tribes, Clans, and Notable Families", Strategic Insights, Volume VII, Issue 4, September 2008.
[22] *Ibid.*
[23] *Ibid.*

and necessary in Gaza, where employment is scarce and members may be dependent on remittances from those living in the Palestinian global diaspora for contributions.[24]

Amongst refugees living in camps in Gaza, these clan connections may be re-created and academics have argued that "refugees from certain villages [in what is now Israel] have settled together in particular areas within the [Gaza] refugee camps."[25] The common blood ties are sometimes more imagined than real, particularly given the geographic distribution of Palestinian families.[26] While *a'ila*, or the extended families within each *hamula*, assert a shared patrilineal heritage, there is criticism that this common ancestry is "often a fictitious instrument intended to shore up political partnerships between unrelated groups of people."[27]

Generally speaking, clans are strongest when the central governments are weak and by their nature do not have strong political or ideological affiliations. In contemporary Gaza Strip society, the *hamula* structure is "far more consequential than the Bedouin tribes, and has become even more important since the breakdown of the Palestinian Authority structures during the second uprising."[28]

## 1.2 Notable Families

Notable families in the Palestinian context are the urban elite families, "a social formation typical through the Arab lands of the Ottoman Empire." Historically, these families aligned themselves to the various governing authorities in the Gaza Strip and exerted political influence through the patronage they received. Today, these families remain prominent in the Gaza Strip.

While every new occupier of the Gaza Strip sought to exploit this notable family structure, each appointed different families. For example, the British singled out the Shaw'wa family in Gaza City in the 1920s and transformed their family leader into a "big *mukhtar* as a reward for his role in leading British forces around Turkish defences during the battle for Gaza City during World War I."[29]

The power of notable families in the Gaza Strip has weakened since the collapse of the PA's control in the area in 2007 and they were not able to take advantage of the power vacuum that arose to the same extent as the major clans. While clans are typically strengthened by a weak state, notable families benefit most from a strong central government which can provide patronage and allow them access to power.[30]

## 1.3 Tribes

Approximately 25 percent of the population in the Gaza Strip are "descendents of nomadic and semi-nomadic Bedouin populations", or tribes.[31] The Bedouin tribes in Gaza are divided into six confederations, or *saffs*, with each confederation containing at least a dozen individual tribes. In the Gaza Strip, these confederations include the Hayawat, Tarabeen, Tayaha, Ijbara, Azazma, and the Jahalin.[32]

[24] *Ibid.*
[25] Landinfo Study, *supra* note 16, p. 6.
[26] Robinson, *supra* note 21.
[27] Ze'evi, *supra* note 18, p. 2.
[28] Robinson, *supra* note 21.
[29] International Crisis Group, "Inside Gaza: The Challenge of Clans and Families", *Middle East Report No. 71*, 20 December 2007, p.1, n. 4.
[30] Robinson, *supra* note 21.
[31] *Ibid.*
[32] *Ibid.*

Bedouin tribes lack significant political influence in contemporary Palestinian society, largely due to the decline of their traditional semi-nomadic lifestyle, the loss of their original tribal lands, livelihoods, access to markets and repeated displacements. The detribalisation of Palestinians is "both the normal product of modernization and a result of the hyperconcern over property, property rights, and property lines that has characterized the Israeli-Palestinian conflict."[33] As the tribes have become increasingly sedentary, their tribal affiliation has become less significant. Moreover, the "Palestinian Bedouin population are among the economically most deprived groups in the region, further diminishing their political clout."[34]

[33] *Ibid.*
[34] *Ibid.*

# Chapter 2: Historical Development of Customary Dispute Resolution in the Gaza Strip

The current prevalence and dominance of customary dispute resolution mechanisms in the Gaza Strip are, in large part, the result of historically weak central governments, decades of Israeli occupation, and, more recently, the support provided by the PA and the current local authorities in Gaza.[35] It is therefore important to understand the historical context of the Gaza Strip to correctly understand the development of the customary dispute resolution system and to fully appreciate its significance and continuing relevance in the daily lives of people in the Gaza Strip.

## 2.1 Ottoman Empire (1516-1917)

For nearly 400 years, the Gaza Strip was part of the Ottoman Empire. In terms of legal development, the Ottoman rule over Palestine and elsewhere can be divided into two eras. The first period, which lasted until 1839, was marked by a reliance on Islamic jurisprudence and customary law.[36] The second period, or *Tanzimat* era, represented an attempt to modernise and secularise the rule of law across the empire and witnessed the enactment of the Ottoman Land Law of 1858 and the 1877 Ottoman Civil Code (*Majalla*).[37]

In general, the Ottoman state was administratively decentralised and relied on prominent families and clans to serve as intermediaries and enforce policies.[38] Clan leaders were treated as "semi-formal legal agents accountable for taxation, for administering justice, and for keeping an eye on public order" while notable families "bought their way into government-based positions—as, for example, court officials and tax farmers."[39] Leaders of notable families and clans served as prominent tax collectors and, with the land reforms instituted in 1858, became significant Palestinian landowners.[40] While the Ottoman authorities never formally regulated the customary or tribal systems of justice, "the absence of central state authority contributed indirectly to the empowerment of tribes and families, rendering their elders or head, the only moral authority to settle conflicts between members of families and tribes, by relying on customs and traditions as a base for adjudication."[41]

*'Urf*, or customary law, played an important role in the development of the nascent justice system in the oPt during the Ottoman Empire. Heads of tribes and families were effectively authorised to settle disputes through reliance on *urf*, primarily as a consequence of a weak centralised authority that was mainly concentrated in urban areas. Tribal law likewise flourished during this period, though it was geographically restricted to the Bedouin-dominated regions surrounding Beersheba.[42] For example, in Beersheba District, a management council was formed composed of a team of tribal judges.[43]

[35] UNDP workshop report, *Supporting the Rule of Law and Access to Justice in the Occupied Palestinian Territory*, Jericho, 9-10 March 2010, p. 10.
[36] Birzeit University, "Legal Status in Palestine: Palestinian Judicial system: Historical Evolution of the Palestinian Legal System", available at: http://lawcenter.birzeit.edu/iol/en/index.php?action_id=210 [last accessed January 2012].
[37] *Ibid.*
[38] Robinson, *supra* note 21.
[39] Ze'evi, *supra* note 18, p. 3.
[40] Robinson, *supra* note 23.
[41] Asem Khalil, "Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law", *La tribu à l'heure de la globalisation, Revue Etudes Rurales*, No. 184, 2010, p.13.
[42] Birzeit University, Institute of Law, "Informal Justice: Rule of Law and Dispute Resolution in Palestine – National Report on Field Research Results", 2006 [Birzeit Report], p. 31.
[43] *Ibid.*, citing Aref al-Aref, *Jurisprudence Amongst the Bedouin*, Jerusalem: Maktba' at Beit al Maqdes, 1933, p. 12.

During the late-Ottoman period, the position of *mukhtar*, or clan elder, was created in order "to represent village communities and urban neighbourhoods in their dealings with the state, [and] these functionaries were chosen, as a rule, from among the leaders of powerful clans."[44]

## 2.2 British Mandate (1917-1948)

The Gaza Strip came under British occupation on 9 December 1917 and the British Mandate for Palestine, issued by the Council of the League of Nations on 24 July 1922, formally recognised British administration over the region. Gaza remained under British Mandate control until the war in 1948 between the newly-created state of Israel and five Arab states, including Egypt, Jordan, Lebanon, Syria, and Iraq.

As the Ottomans before them, the British relied on notable families and clan structures to facilitate their rule. Leaders from notable families were frequently granted administrative powers. Tribal judges were granted official status as a means of controlling tribes and the *mukhtars'* positions were strengthened in exchange for political loyalty and influence.[45]

However, British rule also exploited rivalries between key notable families and academics have argued that the British "were able to play the game of divide and conquer, weakening Palestinian society, and giving a clear advantage to the emerging Zionist foothold in Palestine in the 1920s and 1930s."[46]

Attempts were made during the British Mandate period to regulate the customary justice system in the oPt, including through the introduction of formally-sanctioned tribal courts in the Beersheba District. Article 45 of the Palestine Order-in-Council of 1922 provided that:

> The High Commissioner may by order establish such separate Courts for the district of Beersheba and for such other tribal areas as he may think fit. Such courts may apply tribal custom, so far as it is not repugnant to natural justice or morality.[47]

These tribal courts applied *'urf* and were included within the jurisdiction of the more formalised civil courts of what was then Palestine. Judges on these courts represented the major tribes of southern Palestine and "were appointed with British approval based on their status within their tribes and their knowledge of the customs of the society."[48] Other laws during this period include the Law of Procedure for Tribal Courts 1937 and the Law of Civil Contraventions no. 36 of 1944, which dealt with the jurisdiction of tribal courts in matters involving *diya* (blood money).[49]

## 2.3 Egyptian Administration (1948-1967)

As a result of the war in 1948, which formally ended with a series of armistice agreements

[44] Ze'evi, *supra* note 18, p. 3.
[45] International Crisis Group, *supra* note 29, p. 1. Several *mukhtars* interviewed traced their current position to an initial appointment made to their ancestors during the British Mandate.
[46] Robinson, *supra* note 21.
[47] The Palestine Order-in-Council, 10 August 1922, available at: http://unispal.un.org/UNISPAL.NSF/0/C7AAE196F41AA055052565F50054E656 [last accessed January 2011]. Significantly, the Palestine Order in Council "was a *law* issued by the British Crown, while the British High Commissioner for Palestine issued *ordinances*, under which authority subsidiary enactments issued by the head of a governmental department under the name of *regulations*. In this sense, the Palestine order-in-council can be considered the constitution for Palestine, which was issued to conform to the international framework of the mandatory text." Asem Khalil, "Which Constitution for the Palestinian Legal System?" Pontificia Universita' Laternanense, Roma, 2003, p. 15.
[48] Asem Khalil, "The Coexistence of Formal and Informal Justice in Palestine," *La tribu à l'heure de la globalisation, Revue Etudes Rurales*, No. 184, 2010.
[49] Khalil, "Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law", *supra* note 41, p. 13, n. 25; Birzeit Report, *supra* note 42, p. 32.

culminating in July 1949, the Gaza Strip became subject to Egyptian administration and the West Bank fell under Jordanian authority. While the West Bank was formally annexed by Jordan in this period and regulated by Jordanian law, the Gaza Strip was never fully incorporated into the Egyptian national system.

By this point, the demographics of the Gaza Strip were dramatically altered. The native population of approximately 80,000 residents was suddenly forced to absorb nearly 200,000 refugees who had been displaced from throughout Palestine.[50] This included a significant number of "Bedouins who migrated from the Beersheba area...to the Gaza Strip, taking with them their customs and *'urf*."[51] Particularly in the southern districts of the Gaza Strip, tribal justice remained dominant during this period.

The Egyptian administration largely left British Mandate laws intact. On 1 June 1948, Order No. 6 issued by the Egyptian Administrative Governor "established that Courts continue to apply laws, order and regulation that were in force before May 15, 1948, to the extent that they did not contradict what was issued or to be issued by competent authorities in these areas."[52]

Notable families remained a key to the Egyptian Administration in Gaza, with most of the town mayors, city councilmen, and prominent local officials arising from these families during this period.[53] The administrative governor for the Gaza Strip was charged "with meeting regularly with tribal judges and *mukhtars* in order to support them and to liaise with them regarding the effectiveness of the executive authority's agencies during that period."[54]

## 2.4 Israeli Occupation (1967-present)

Following the war in 1967 between Israel and neighbouring states Egypt, Jordan and Syria, Israel occupied the Gaza Strip and established a military administration in the area.[55] More than 1,100 military orders were issued by Israeli forces in the Gaza Strip during the subsequent four decades, the most relevant for the present topic being Proclamation No. 2 of 1967, which regulated the judiciary.[56] However, for the first 20 years of the Israeli occupation, the applicable laws in the Gaza Strip during the Egyptian Administration remained generally unchanged and enforced.

Under the Israeli occupation, the role of customary dispute resolution in Gaza expanded as an alternative to the formal courts which, though staffed by Palestinians, were under the authority and control of the Israeli military authorities.[57] While Israeli intervention in the daily workings of the formal *nizami* courts was relatively minimal, court decisions were enforced through the Israeli security police and those using the formal courts and seeking enforcement of its decisions therefore risked being perceived as collaborators with Israel. One lawyer interviewed in Gaza estimated that nearly 75 percent of disputes were resolved through the customary system during this period, a figure that would soon increase to nearly 100 percent with the onset of the first Intifada.[58]

In the late 1970s, Israel implemented the "Village Leagues" programme throughout the oPt, which utilised local rural councils staffed and managed by Palestinians but funded and directed by Israel.

[50] International Crisis Group, *supra* note 29, p. 1.
[51] Birzeit Report, *supra* note 42, p. 52.
[52] Khalil, "Which Constitution for the Palestinian Legal System?" *supra* note 47, p. 21.
[53] Robinson, *supra* note 21.
[54] Birzeit Report, *supra* note 42, p. 34.
[55] Ludsin, *supra* note 4, p. 447.
[56] Khalil, "Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law", *supra* note 41, p. 14, n. 25; Feras Milhem and Jamil Salem, "Building the Rule of Law in Palestine: Rule of Law Without Freedom", *International Law and the Israeli-Palestinian Conflict: A Rights-Based Approach to Middle East Peace*, Routledge, 2010, p. 26.
[57] Birzeit Report, *supra* note 42, p. 35-36.
[58] NRC interview with a practicing Gaza lawyer, Gaza Strip, January 2011.

The plan was originally designed by Ariel Sharon, the Israeli Minister of Defence at the time.[59] Under a number of military orders, the Village Leagues were empowered to arrest and detain political activists, establish militias, and issue all documentation ranging from drivers' licenses to work permits and family unification applications.[60] However, Palestinians received these Village Leagues with demonstrations and strikes and, by 1983, the Leagues had begun to disintegrate.

Both notable families and clans in Gaza were paradoxically both strengthened and weakened as a result of the Israeli occupation. Mass confiscation of land in the Gaza Strip by Israeli authorities most acutely hurt the landowning notable families.[61] The short-lived Village Leagues programme similarly undermined notable families by shifting resources and power to rural elites.[62] Further, the ability of Palestinian refugees to work and earn money in Israel challenged the financial authority of the clans and notable families; by the early 1980s, 40 percent of the Palestinian labour force, including both West Bank and the Gaza Strip, were working in the Israeli economy.[63]

At the same time, Israel sought to facilitate its occupation through the existing clan structures, as the Ottomans, British, and Egyptians had done before. Israel also sought to foster connections with leading Palestinian families, often handpicking the *mukhtars* and paying their salaries.[64] During this period, "the occupation authority formed *islah* committees which consisted of *islah* men willing to collaborate with them, providing them with the necessary documents to facilitate their movement."[65] Such *islah* committees would become an essential component of the customary dispute resolution sector and remain so to this day, though their level of influence and political affiliation has changed repeatedly and significantly.

## 2.5 First Intifada (1987-1993)

With the outbreak of the First Intifada in December 1987, Palestinians in the Gaza Strip turned to the customary dispute resolution system in unprecedented numbers. The Unified National Leadership of the Uprising (UNLU) (*al-Qiyada al Muwhhada*), an underground coalition of leading Palestinian political factions,[66] formally called for a boycott of all agencies and institutions of the Israeli occupation, including the *nizami* court system and the police. In Circular No. 9, the UNLU formally called on all state employees and police officers in the oPt to resign.[67]

A number of *mukhtars* who had previously received case referrals from the *nizami* courts ceased working since they did not want to risk being seen as collaborating. At least 10 *mukhtars* suspected of collaborating with Israel were killed by Palestinian militants during this period.[68]

*Islah* conciliation committees, or *lijan islah*, were established at this time by the UNLU "to usurp the power of customary law and mediate conflicts in a more centralized manner."[69] The widespread expansion of *islah* committees affiliated with the UNLU was coupled with the enforcement of

[59] Robert Terris and Vera Inoue-Terris, "A Case Study of Third World Jurisprudence—Palestine: Conflict Resolution and Customary Law in a Neopatrimonial Society", *Berkeley Journal of International Law*, Vol. 20, 2002, p. 477.
[60] Arjan El Fassed, "Abbas' Village League", *Electronic Intifada*, 9 September 2007.
[61] Robinson, *supra* note 21.
[62] *Ibid.*
[63] Tobias Kelly, "Access to Justice: The Palestinian Legal System and the Fragmentation of Coercive Power", LSE Crisis States Programme – Development Research Centre, Working Paper No. 41, March 2004, p. 6.
[64] International Crisis Group, *supra* note 29, p. 2.
[65] Khalil, "Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law", *supra* note 41, p. 15, n. 26.
[66] Including Fatah, the Popular Front for the Liberation of Palestine, the Democratic Front for the Liberation of Palestine and the Palestinian People's Party.
[67] Khalil, "Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law", *supra* note 41, p. 15.
[68] International Crisis Group, *supra* note 29, p. 2.
[69] Terris and Inoue-Terris, *supra* note 59, p. 471; Landinfo Study, *supra* note 18, p. 9.

decisions of the *islah* committees through physical force if necessary, by "strike forces" (*al-mulaththamin wa 'l-mutaridin*).[70]

The demographics of those active in the customary system changed during this period. Family background and succession were no longer the determinant factors and "[n]ew social groups became involved in the committees and the importance of family and inheritance decreased at the expense of affiliation to the resistance struggle."[71] The ascension of this new elite emphasised non-familial civil society and Palestinian nationalism and further weakened the influence of notable families and clans.[72]

## 2.6 The Oslo Accords and the Creation of the Palestinian Authority (1994-2005)

On 28 September 1995, Israeli Prime Minister Yitzhak Rabin and Palestine Liberation Organisation (PLO) Chairman Yasser Arafat signed the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (also known as the "Interim Agreement" or "Oslo II").[73] The PA was established under the Interim Agreement, giving Palestinians a limited measure of self-government in the West Bank and the Gaza Strip.[74] At that time, "the PA inherited a barely functioning, disjointed judicial system neglected during almost 30 years of Israeli occupation."[75] Palestinian Presidential Decree No. 1 of 1994 provided that the laws, regulations, and orders in force in the oPt prior to 5 June 1967 would remain in effect.[76]

Given the separate administration of the Gaza Strip and the West Bank under Egyptian and Jordanian authorities, respectively, from 1948 to 1967, there was a lack of any unified Palestinian legislation when the PA was created. The PA made concerted efforts to unify the Palestinian legal system and nearly 95 percent of the legislation in Gaza and the West Bank was successfully linked during this period.[77] However, following the political division between the Hamas and Fatah parties, which culminated in internal armed conflict in Gaza in 2007, continued efforts at unifying the Palestinian legal system have since frozen altogether.

According to the Palestinian Basic Law, which was passed by the Palestinian Legislative Council (PLC) in 1997 and ratified by then PA President Yasser Arafat in 2002, the formal *nizami* and *shari'a* judiciaries represented an independent branch of the PA government. Following years of Israeli occupation, the Palestinian judicial sector was completely reformed and was largely dominated by members of the Fatah political party. While actors within the formal judiciary were no longer seen as potential Israeli collaborators, the early years of development of the PA were still "beset by charges of patronage, nepotism, and corruption."[78] In a 1995 poll of Gaza residents conducted by one academic, 90 percent of respondents felt that positions within the PA were filled unfairly and 69 percent complained of a lack of democracy. Fifty-seven percent of respondents were generally dissatisfied with the functioning of the PA.[79]

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[70] Literally, "those who are masked and those who are on the run". Khalil, "Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law", *supra* note 41, p. 15; Birzeit Report, *supra* note 42, pp. 36-37.
[71] Landinfo Study, *supra* note 16, p. 9.
[72] Robinson, *supra* note 21.
[73] *See also* Agreement on the Gaza Strip and the Jericho Area, 4 May 1994.
[74] *See* Declaration of Principles on Interim Self-Government Arrangements (the "Declaration of Principles" or "Oslo I"), 13 September 1993; Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (the "Interim Agreement" or "Oslo II"), 28 September 1995.
[75] Human Rights Watch, *A Question of Security: Violence against Palestinian Women and Girls*, 11 November 2006, p. 19.
[76] Birzeit Report, *supra* note 42, p. 37-38.
[77] Dr. Hani Albaroos, *The Role of Hamas in Gaza: Facing the Challenge of Isolation*, 11 February 2010, p. 11.
[78] Rex Brynen, "The Neopatrimonial Dimension of Palestinian Politics", *Journal of Palestine Studies*, Vol. 25, No. 1, Autumn 1995, pp. 23-36 at p. 23.
[79] *Ibid.*

Under the direction of then-PA President Yasser Arafat, the PA and Fatah embarked on a return to the "tribalisation" of politics. Some scholars have argued that local clans and notable family members were strengthened under this initiative in order to weaken the Intifada elite, who challenged the authority of the PLO after it returned to the oPt following years in exile.[80] They argue that the aim of this tribalisation process was "to undermine the new elite and the political parties and factions they represented....Fatah transformed itself into a large and fragmented party that added any social and political element that wanted to enjoy the flows of patronage. While tribes and clans are not ideologically inclined by nature, they were happy to hop on the Fatah bandwagon after 1994. Arafat's political agenda matched up nicely with the interests of Palestinian tribes and clans."[81] Notable families largely aligned with Fatah during the creation of the PA.[82]

On 9 November 1994, Presidential Decree No. 161 established the Department of Tribal Affairs within the President's Office.[83] The Department of Tribal Affairs sought to facilitate the work of customary dispute resolution through the creation of new *Islah* Committees, branded as Central *Sulh* Committees, which it attempted to establish in all governorates throughout the oPt.[84] One of the purported goals of these Central *Sulh* Committees was to establish certain minimum guidelines for *Islah* men and tribal judges.[85] The PA additionally "established specialized departments in *'urf* (customary law) and *islah* (customary conflict resolution)" within the legal departments of most governorates.[86]

The Central *Sulh* Committees "were given official papers to make their work easier and the new police forces helped enforce the committees' decisions."[87] These committees paid salaries directly to *mukhtars*, police, and security forces in their governorate and PA officials actively participated in these committees and with the *sulh* conciliation procedures themselves.[88] The jurisdiction of the Central *Sulh* Committees included:

> [G]eneral jurisdiction in all criminal and civil disputes, with the exception of drug cases, illegal arms dealing, sodomy, embezzlement of public funds, bribery, illegally commission and security cases.[89]

The Central *Sulh* Committees were met with local resistance and some governorates refused to cooperate with them or the Department of Tribal Affairs. The sheer number of *Sulh* committees which arose during this period likewise frustrated any attempts at centralising the role of customary dispute resolution. In the Gaza Strip alone, Central *Sulh* Committees arose under the Ministry of *Awqaf* and Religious Affairs, the Ministry of Social Affairs, and the Ministry of the Interior; each major political faction in Gaza, including Fatah, Hamas, and Islamic Jihad, established its own Central *Sulh* Committee in addition to local neighbourhood *Sulh* committees established in several urban centres.[90]

The 1996 Palestinian general elections for the PA presidency and the PLC served to bolster the tribal and clan structures since these first legislative elections "were carried out by districts rather than on a national basis, and encourage[d] voting along tribal and kinship line."[91] For these elections, the West

[80] *Ibid.*
[81] Robinson, *supra* note 21.
[82] *Ibid.*
[83] Birzeit Report, *supra* note 42, p. 59.
[84] *Ibid.*
[85] Khalil, "Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law," *supra* note 41, p. 16, n. 28.
[86] Robinson, *supra* note 21.
[87] Landinfo Study, *supra* note 16, p. 9.
[88] Khalil, "Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law," *supra* note 41, pp. 16-17; Terris and Inoue-Terris, *supra* note 59, p. 491.
[89] Birzeit Report, *supra* note 42, p. 59 [citing internal memorandum issued by the Department of Tribal Affairs on 28 October 2003 (no. 230)].
[90] Birzeit Report, *supra* note 42, p. 59.
[91] Khalil, "Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law", *supra* note 41, p. 16; *see also* Danny Rubinstein, "The clans are coming back", *Ha'aretz*, 1 December 1995: "[I]nstead of voting for a party, the public at large in the West Bank and Gaza will vote for family members, the clan, the tribe, and the village."

Bank and the Gaza Strip were divided into 16 electoral districts and representatives were chosen from each district, which strengthened local sheikhs, patriarchs, clan elders, and notables.[92] The result was a parliament of clan leaders with few independent national leaders. The second national Palestinian elections held in January 2006 maintained this system to a lesser extent, with half of the positions elected on a national basis and half based on specific districts.

Following the creation of the PA, there was criticism that even the recruitment of Palestinian security forces became connected to specific clans and "security forces became an extension of clan politics and interests, and rivalries amongst clans then got reflected in rivalries among security forces."[93] The new security services "started to contact the *hamula* more often when planning to make arrests in order to make their work easier."[94] Security commanders also frequently recruited kinsmen and whole families became associated with particular security agencies.[95] The death of then-PA President Yasser Arafat in 2004 did a great deal to weaken this clan control; following his death, the PA lacked "anyone...able to substantially replace Arafat in his ability to shape and manipulate clan politics and behaviour."[96]

Robinson has argued that the flow of international donor money to the PA, initially pledged at $2.4 billion in October 1993, was the only factor to weaken the clan dynamics in the oPt in the years immediately following the Oslo Accords. This international financing helped in "accelerating refugee relocation to wealthier neighbourhoods and further blurring longstanding geographical and social divide. The expanding PA bureaucracy gave Gazans an additional escape from the old socio-economic order and new source of allegiance beyond the clan and its leaders."[97]

## 2.7 Second Intifada (2000-2005)

The outbreak of the second Intifada, also known as the Al-Aqsa Intifada, in September 2000 resulted in the destruction of many Palestinian institutions and much of its infrastructure by the Israeli military. The ongoing violence "seriously weakened the Palestinian central authority and limited the reach of its legal organs."[98] The formal *nizami* courts throughout the oPt essentially became non-functional during this period. The customary sector served to fill the void left by the judiciary and Palestinians increasingly turned to the *Islah* Committees for assistance. The chaotic and unstable environment during the Intifada period served to "promote recourse to 'self-help' measures in resolving disputes and seeking remedy for wrongs" and resort to *tha'ir*, or private vengeance, increased significantly.[99]

Meanwhile, the power of clans and notable families expanded during this period, as did their control over the customary Palestinian economy. Clans in the Gaza Strip set up roadblocks, charged for safe passage, smuggled goods from Egypt via the Rafah tunnels, and carried out kidnappings for ransom during this period.[100] During the Israeli dismantlement of settlements in the Gaza Strip in 2005, there were allegations that established clans had quickly claimed most of the abandoned settlement lands along the beach.[101]

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[92] Robinson, *supra* note 21.
[93] *Ibid.*
[94] Landinfo Study, *supra* note 16, p. 10.
[95] International Crisis Group, *supra* note 29, p. 3.
[96] Robinson, *supra* note 21.
[97] *Ibid.*, p. 2.
[98] Welchman, *supra* note 14, p. 7.
[99] *Ibid.*, p. 8.
[100] Robinson, *supra* note 21 ("Reportedly, the powerful Samhadana clan controls many of these smuggling tunnels, and charges fees for their use.").
[101] *Ibid.*

Families and clans in the Gaza Strip were increasingly weaponised and "[v]irtually overnight, families became repositories of significant arsenals, dramatically augmenting their firepower and ultimately transforming some clans into substantial militias."[102] Clan structures soon became the primary source of security for their members.[103] After several Palestinian police stations were destroyed during Israeli incursions in Gaza, many security officers "were ordered to take their service weapon home," which furthered the arming of powerful clans and created "family-run militias."[104]

Violence in the Gaza Strip became more widespread as a result of the weaponisation of Gaza society; where previously "kinsmen had resolved disputes over a cup of coffee or at most with sticks and knives, they were now fielding automatic weapons and rocket-propelled grenades."[105] While more people turned during this period to customary *sulh* conciliation for assistance, "various militia groups started to interfere in the work of the mediation committees in an attempt to influence the outcome of the mediation."[106]

## 2.8 Palestinian Parliamentary Elections and Hamas Takeover of Gaza (2006-present)

In January 2006, Hamas won the civil Palestinian parliamentary elections, winning 74 of the 132 seats, and formed a new majority government within the PLC.[107] During these elections, there was a perception that political parties within the Gaza Strip "included candidates from the big clans on their lists in order to secure the clans' votes. The clan members' political persuasions were not necessarily the same as the *mukhtar's*, but many still felt a moral duty to vote for their own clan leader."[108]

Tensions erupted between Hamas and Fatah following the elections and, despite an attempt to establish a unified government in March 2007, culminated in armed conflict between the parties and the Hamas military takeover of the Gaza Strip on 14 June 2007. Since then, Hamas has exercised control and functioned as the local government in Gaza. Following the takeover, Israel and Egypt imposed a full land and sea blockade on the Gaza Strip, largely preventing the export of any goods, crippling the local economy, and restricting imports to a limited amount of basic humanitarian aid. The blockade has also severely restricted freedom of movement in Gaza, disrupting, among other things, family life for residents with relatives in the West Bank and Israel.

As a result of the Hamas takeover, nearly all PA employees in Gaza immediately went on strike and, at least initially, the judiciary in Gaza ceased functioning. Beginning in November 2007, the local authorities in Gaza began appointing new judges and officials to replace those on strike. The majority of these newly-appointed judges had little or no experience as judges or adjudicators and many were simply recent law graduates. In January 2008, the Palestinian Bar Association (PBA), fearing that its members in Gaza would lose their jobs or simply be replaced, formally suspended its strike.[109]

Given the designation of Hamas as a terrorist organisation by a number of countries, the majority of local human rights organisations and international organisations have refused or been unable to recognise the legitimacy of the Hamas-appointed judiciaries.[110] Nearly all direct international funding to the local government in Gaza ceased. This effectively crippled the economy in Gaza, particularly

[102] International Crisis Group, *supra* note 29, p. 3.
[103] Robinson, *supra* note 21.
[104] *Ibid.*
[105] International Crisis Group, *supra* note 29, p. 4.
[106] Landinfo Study, *supra* note 16, p. 10.
[107] Human Rights Watch, *A Question of Security*, *supra* note 75, p. 14. In the 2006 elections, Hamas received 44 percent of the popular vote and 56 percent of the PLC seats, or 74 of the total 132 seats.
[108] Landinfo Study, *supra* note 16, p. 11.
[109] Albaroos, *supra* note 77, p. 11.
[110] One exception to this wide-scale boycott with the Hamas-appointed judiciaries has been the willingness of women's organisations to continue working with the *shari'a* courts in the adjudication of personal status laws.

considering that foreign aid to international organisations working in Gaza and to the PA subsidised nearly half of the workforce in Gaza at the time of the 2006 Hamas electoral victory.[111]

Upon seizing control of Gaza, "Hamas immediately concentrated on putting a stop to the innumerable blood feuds among the clans."[112] Hamas did a good deal to decrease the lawlessness and intra-family violence and the murder rate dropped 50 percent from 2005 to 2006.[113] Hamas banned clan roadblocks as well as the public display of guns or gunfire at weddings, though Hamas did relent in 2008 and allowed clan militias to maintain their weapons. This marked the first time "Gaza was being run by local forces that did not have to support or favour certain local clans in order to hold on to power."[114]

Hamas has also embraced customary dispute resolution mechanisms and, through the Hamas-affiliated Palestine Scholars' League, established its own *islah* committees, known as *Rabita* committees. As discussed more fully below, while these *Rabita* committees are presented as the successor to earlier *islah* committees under the UNLU and PA, the function and influence of the *Rabita* committees are markedly different in several areas. *Rabita* committees rely exclusively on *shari'a* principles as a legal basis for their interventions and their decisions are frequently a result of adjudication and arbitration rather than mediation and conciliation. In total, between 2004 and 2010, more than 41,000 cases were resolved by the *Rabita* committees.[115] During this same period, and particularly following the Hamas takeover of Gaza in 2007, there was an estimated 20 to 25 percent increase of cases heard before the customary system as opposed to the formal *nizami* judiciary.

Practically speaking, the *Rabita* committees have allowed Hamas to essentially form a parallel judiciary by co-opting the traditional *sulh* conciliation mechanisms in order to broadly implement *shari'a* law, including in cases involving murder and rape.[116] It is estimated that up to 90 percent of disputes in the Gaza Strip are now resolved primarily through customary dispute resolution mechanisms, the majority through these newly-established *Rabita* committees.[117]

[111] International Crisis Group, *supra* note 29, p. 5.
[112] Landinfo Study, *supra* note 16, p. 13.
[113] Robinson, *supra* note 21.
[114] Landinfo Study, *supra* note 16, p. 13.
[115] NRC interview with Dr. Nasem Yassin, Secretary of the Palestine Scholars' League, Gaza Strip, 25 October 2011.
[116] UNDP, *Access to Justice in the occupied Palestinian territory: Mapping the Perceptions and Contributions of Non-State Actors*, *supra* note 9, p. 12.
[117] NRC interview with a UN worker, Gaza Strip, 16 October 2011.

# Chapter 3: Main Customary Dispute Resolution Actors in the Gaza Strip

Before fully analysing the various mechanisms for customary dispute resolution in the Gaza Strip, this section outlines the multiplicity of actors within this system and defines their roles and functions. However, it is important to note that there are significant overlaps between these actors and the distinctions described below are, in practice, often unclear.

Field research in the Gaza Strip revealed that customary justice actors include *mukhtars*, *islah* men, *islah* committees, *Rabita* committees, tribal judges and registered arbitrators. There are striking similarities in the work of all these actors. Most employ *sulh* conciliation practices and a hybrid of formal and informal arbitration principles to address an array of criminal and civil disputes and nearly all rely primarily on *urf* and *shari'a* rather than formal law to inform their decisions. The various actors within the customary dispute resolution system in Gaza appear generally to cooperate with one another.

## 3.1 *Mukhtars*

*Mukhtars* are traditional family leaders and clan elders.[119] Their position originated during the late-Ottoman era and they continue to occupy an important role in Palestinian society. *Mukhtars* are typically the first actors approached for assistance in dispute resolution and their approval and signature are often required as witnesses on official legal documents. All *mukhtars* in the Gaza Strip are male and many *mukhtars* serve as *islah* men in the resolution of disputes through *sulh* conciliation procedures, though not all do so.

**Table 1: Type and Number of *Mukhtars* in the Gaza Strip, February 2011**

| Types of *Mukhtar* | Number of *Mukhtars* |
|---|---|
| Family *Mukhtar* | 173 |
| Tribal *Mukhtar* | 61 |
| Area *Mukhtar* | 49 |
| Neighbourhood *Mukhtar* | 21 |
| Camp *Mukhtar* | 7 |
| City *Mukhtar* | 6 |
| *Mukhtar* within an Area | 3 |
| **Total** | **320**[118] |

In most situations, the parties to a dispute or their families directly approach and request a *mukhtar*'s services. *Mukhtars* intervene in nearly all types of disputes and aim to achieve resolution through mediation and consensual agreement. There are no enforcement mechanisms to implement the decisions of the *mukhtar*, though typically the social status of the *mukhtars* and the influence of families are adequate to ensure compliance.

All *mukhtars* in the Gaza Strip must be appointed by and registered with the Department of Tribes and Reform within the Ministry of Interior. *Mukhtars* are assigned to and represent a family, neighbourhood, camp, area, tribe, or city. As of February 2011, there are approximately 320 registered *mukhtars* in the Gaza Strip.[120]

The Department of Tribes and Reform within the Ministry of the Interior in Gaza, which is separate from the Ministry of Tribal Affairs established under PA President Yasser Arafat, appoints *mukhtars* to their position after an application and vetting process. In practice, *mukhtars* in Gaza may also receive their position through succession.[121] The initial nomination process requires the signatures of at least 300-400 of the *mukhtar's* family members. The Department of Tribes and Reform then

[118] NRC interview with Abu Nasser Ali Majok, Deputy Director, Department of Tribes and Reform, Ministry of the Interior, Gaza Strip, 24 October 2011.
[119] A direct translation from Arabic of the term *mukhtar* is "chosen one" or "preferred one". Landinfo Study, *supra* note 16, p. 6, n. 2.
[120] NRC interview with Abu Nasser Ali Majok, Deputy Director, Department of Tribes and Reform, Ministry of the Interior, Gaza Strip, 24 October 2011.
[121] NRC interview with a *mukhtar* in the Gaza Strip whose father had served as the local *mukhtar* before him and who had been registered as a *mukhtar* in the Gaza Strip since 1997, Gaza Strip, February 2012.

reviews the application and a final decision on an individual application is issued by the Deputy Director General of the Department of Tribes and Reform, who serves as an advisor to the Hamas Prime Minister in the Gaza Strip.[122]

Once appointed, *mukhtars* receive an official seal and an identity card from the Department of Tribes and Reform to facilitate their work. There is no required training or written guidelines for *mukhtars* to follow in carrying out their duties. The Department of Tribes and Reform also does not provide *mukhtars* with any payment for their work nor do they receive payment from the parties to a dispute.[123]

In 2007, the PA Ministry of Planning conducted a survey of *mukhtars* throughout the oPt regarding their experiences in mediating land disputes. Of the *mukhtars* surveyed from the Gaza Strip, all were men over the age of 50; 69.2 percent of the *mukhtar* respondents in Gaza were older than 60. Nearly 85 percent had less than a secondary education, while the remaining 15.4 percent held a Bachelor's degree. More than 50 percent of *mukhtars* surveyed in the Gaza Strip had worked as a *mukhtar* for more than 15 years and only 7.7 percent had less than five years of experience.[124]

Because the position of *mukhtar* is aligned primarily to the families and clans rather than political parties, *mukhtars* tend to be less politically affiliated than *islah* men and *islah* committees.[125] However, several interviewees did note that the appointment of *mukhtars* became increasingly politicised following the signing of the Oslo Accords.[126]

## 3.2 *Islah* Men

The term *islah* man, literally "man of conciliation", refers to the traditional mediators within the customary *sulh* conciliation process. It is unclear when *islah* men first came into prominence, though it appears to have originated among the Bedouin tribes in the Beersheba region during the Ottoman era. Traditional practices of mediation and conciliation were passed down through the generations and eventually spread to the non-Bedouin population in the Gaza Strip.[127]

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."[128] The demographics of *islah* men changed during this period as well, as younger, well-educated, and politically-active Palestinians became involved in the customary dispute resolution system.[129] Many youth began to view customary and traditional dispute resolution as part of the Palestinian national identity and the Intifada struggle.[130] Overall, "the people had a very positive image of the representatives of customary dispute resolution during this period."[131]

Unlike *mukhtars*, there historically was no prerequisite that *islah* men be formally appointed or registered nor do they receive any official seal. Given this lack of formal registration, which continued

[122] NRC interview with Abu Nasser Ali Majok, Deputy Director, Department of Tribes and Reform, Ministry of the Interior, Gaza Strip, 24 October 2011.
[123] *Ibid.*
[124] PA Land Disputes Study, *supra* note 5, p. 53.
[125] NRC interview with a local NGO worker, Gaza Strip, 16 October 2011.
[126] NRC interview with a group of *mukhtars* and *islah* men, Gaza Strip, January 2011.
[127] Birzeit Report, *supra* note 42, p. 31.
[128] *Ibid.*, p. 27.
[129] 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 formal education while those born post-1940 were typically university graduates. *See* Birzeit Report, *supra* note 42, p. 67.
[130] 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.").
[131] Birzeit Report, *supra* note 42, p. 37.

until recently, it is difficult to know precisely how many *islah* men worked in the Gaza Strip in past years.

More recently, the Department of Tribes and Reform in the Gaza Strip has begun registering *islah* men through an application and vetting process similar to that required of *mukhtars*, though not all *islah* men in Gaza have yet been registered. There are currently 500 *islah* men registered with the Department of Tribes and Reform and there are likely a significant number of unregistered and unaffiliated *islah* men as well. For those *islah* men registered with the Department, most are typically first recommended by an *islah* committee, as discussed in the following section.

Once registered, *islah* men receive an identity card to facilitate their work or use at police stations and which contains the following direction:

> All competent authorities must facilitate the mission of the holder of this card. If this card is found it should be given to the nearest police station and it should not be given to others.[132]

Although *islah* men are not permitted to receive financial remuneration from the parties to a dispute, *islah* men formally registered with the Department of Tribes and Reform may be entitled to a monthly allowance of 800 ILS (about $210.00 USD) if they have no other source of income.[133] Roughly 300 of the 500 registered *islah* men in Gaza are currently receiving this stipend.[134]

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.[135]

Most *islah* men are chosen and approached by community members due to their knowledge of *'urf*, or customary law, and their experience in *sulh* conciliation procedures. The work of an *islah* man "depends on the extent of the trust he enjoys from the public generated by his qualities which lead them to approach him to resolve disputes."[136] According to *islah* men and *mukhtars* interviewed in the preparation of this report, desirable criteria include:

- Strong personality, influential, eloquent, and persuasive;
- Stable financial position;
- Knowledge of tribal *'urf* as well as *shari'a* law;
- Broad social network and good relationships with official ministries; and,
- From well-established and respected *hamula*, or clan.

Though the role of an *islah* man is to serve as a mediator and to seek mutually agreeable solutions to a conflict before them, it is not uncommon for an *islah* man to serve in practice as an arbitrator and adjudicator if a consensual resolution is not possible.

While local *mukhtars* constitute a significant percentage of *islah* men, not all *mukhtars* serve as *islah* men and vice versa. According to one estimate, roughly two-thirds of *islah* men are also *mukhtars*,

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[132] Information recorded from the card issued to the interviewee and provided during NRC interview with Abu Nasser Ali Majok, Deputy Director, Department of Tribes and Reform, Ministry of the Interior, Gaza Strip, 24 October 2011.
[133] Birzeit Report, *supra* note 42, p. 64; NRC interview with group of *mukhtars* and *islah* men, Gaza Strip, January 2011.
[134] NRC interview with Abu Nasser Ali Majok, Deputy Director, Department of Tribes and Reform, Ministry of the Interior, Gaza Strip, 24 October 2011.
[135] *Ibid.*
[136] Birzeit Report, *supra* note 42, p. 63.

while the rest typically are community leaders and members of notable families.[137] 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.[138]

In general, *islah* men are more likely than *mukhtars* to be directly affiliated to a political party, though such affiliation is not necessary.[139] Of the *islah* men currently registered with the Department of Tribes and Reform, most are politically aligned with Hamas.

### 3.3 *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."[140] 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.[141]

*Islah* committees typically range in size from between five and 10 *islah* men and are based on geographic area.[142] 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.[143] Prior to the beginning of the first Intifada in1987, *islah* men would often work in concert to resolve disputes through the *majlis asha'iri* (tribal council) or *diwan ai'ili* (family assembly).[144] Currently, there are 50 *islah* committees in the Gaza Strip which report monthly to the Department of Tribes and Reform.[145]

Under the direction of the PA President and PLO Chairman Yasser Arafat, 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."[146] 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."[147] 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.

Since the political division between Fatah and Hamas, these Fatah-affiliated *islah* committees have largely disbanded in the Gaza Strip.[148] To the extent such Fatah-aligned committees remain, they are relatively inactive and are no longer a significant actor in the Gaza Strip. As discussed below, the

[137] NRC interview with a local NGO worker, Gaza Strip, 16 October 2011.
[138] *Ibid.*
[139] *Ibid.*
[140] PA Land Disputes Study, *supra* note 5, p. 35.
[141] International Crisis Group, *supra* note 29, p. 8 n. 68.
[142] NRC interview with Abu Nasser Ali Majok, Deputy Director, Department of Tribes and Reform, Ministry of the Interior, Gaza Strip, 24 October 2011.
[143] International Crisis Group, *supra* note 29, p. 8, n. 68.
[144] *Ibid.*
[145] NRC interview with Abu Nasser Ali Majok, Deputy Director of Department of Tribes and Reform, Gaza, 24 October 2011.
[146] Ze'evi, *supra* note 18, p. 4.
[147] Khalil, "Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law," *supra* note 41, p. 3.
[148] NRC interview with a local NGO worker, Gaza Strip, 16 October 2011.

*islah* committees in the Gaza Strip have been largely replaced and are currently dominated by the Hamas-affiliated *Rabita* committees.

While the *islah* committees in Gaza have been mostly usurped and politicised 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 organisation which classifies itself and its members as politically neutral, confirmed that there are approximately 200 *mukhtars* in its organisation in the Gaza Strip who concurrently serve as *islah* men and work through neutral *islah* committees.[149]

### 3.4 *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 organisation with direct links to Hamas and registered with the Ministry of the Interior as a charitable organisation.[150] 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 organisation's Board of Directors, which itself is Hamas-affiliated, and successful applicants receive membership cards to facilitate their work.[151] 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.[152] All services provided by the *Rabita* committees are free of charge.

The work of the *Rabita* committees has exponentially expanded in recent years, both in terms of membership and caseload. In 2004, there were three or four *Rabita* committees with a total of 20 members; today, there are more than 40 *Rabita* committees with 500 members.[153] The *Rabita* committees processed fewer than 1,000 disputes in 2004. By 2010, the annual number of cases processed had risen to more than 13,000. As recently as 2006, the *Rabita* committees processed a comparable number of cases to the Department of Tribes and Reform and its registered *islah* men. In 2010, three times as many disputes were being heard before the *Rabita* committees than the Department of Tribes and Reform. In total, between 2004 and 2010, the *Rabita* committees processed more than 41,000 cases.

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[149] *Ibid.*; NRC interview with a representative of the Charitable Association of Mukhtars, Gaza Strip, January 2011.
[150] "Rabita" literally translates from Arabic as "League". According to Dr. Nasem Yassin, Secretary of the Palestine Scholars' League, the League was initially founded in Jerusalem in 1992 by Hamed Al Bitawi from Nablus and the first branch in the Gaza Strip opened in 1993 under Salem Salameh. Additional branches were established at that time in Sudan, Lebanon, and Yemen. Many of the founding members were subsequently arrested and Salem Salameh was soon deported from Gaza. Salameh returned in 2002 and began reactivating the organisation. NRC interview with Dr. Nasem Yassin, Secretary of the Palestine Scholars' League, Gaza Strip, 25 October 2011.
[151] *Ibid.*
[152] *Ibid.*
[153] *Ibid.*

**Table 2: Cases Before *Islah* Men Registered with Department of Tribes and Reform by Type of Case, 2006-2010[154]**

| Year | Types of cases | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Assaults | Financial | Accidents | Family (including Inheritance) | Land | Theft | Honour | Killing | Other | Total |
| **2006** | 1143 | 1203 | 759 | 395 | 372 | 104 | 15 | 25 | 172 | **4178** |
| **2007** | 550 | 1327 | 607 | 508 | 829 | 42 | 8 | 11 | 277 | **4159** |
| **2008** | 847 | 849 | 626 | 553 | 640 | 48 | 8 | 10 | 210 | **3719** |
| **2009** | 1053 | 973 | 426 | 290 | 279 | 46 | 14 | 44 | 100 | **3225** |
| **2010** | 1659 | 892 | 588 | 499 | 445 | 87 | 45 | 48 | 154 | **4417** |
| ***Total*** | ***5252*** | ***5244*** | ***3006*** | ***2245*** | ***2565*** | ***327*** | ***90*** | ***138*** | ***913*** | ***19,698*** |

**Table 3: Cases before Rabita Committees by Type of Case, 2004-2010[155]**

| Year | Types of cases | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Assaults | Financial | Accidents | Family | Land | Inheritance | Housing | Theft | Honour | Killing | Other | Total |
| 2004 | 300 | 30 | 250 | 217 | 20 | 27 | 22 | 59 | 32 | 15 | 20 | **992** |
| 2005 | 370 | 38 | 279 | 97 | 60 | 39 | 44 | 17 | 45 | 32 | 79 | **1100** |
| 2006 | 1000 | 320 | 480 | 600 | 700 | 200 | 473 | 132 | 130 | 30 | 135 | **4200** |
| 2007 | 1250 | 330 | 500 | 560 | 750 | 170 | 500 | 150 | 80 | 50 | 660 | **5000** |
| 2008 | 2300 | 350 | 960 | 580 | 950 | 180 | 630 | 90 | 40 | 68 | 52 | **6200** |
| 2009 | 4132 | 1325 | 1500 | 1440 | 708 | 320 | 230 | 190 | 70 | 90 | 395 | **10,400** |
| 2010 | 4597 | 2322 | 1418 | 1654 | 806 | 481 | 437 | 235 | 100 | 117 | 1241 | **13,408** |
| ***Total*** | ***13,949*** | ***4715*** | ***5387*** | ***5148*** | ***3994*** | ***1417*** | ***2336*** | ***873*** | ***497*** | ***402*** | ***2582*** | ***41,300*** |

[154] NRC interview with Abu Nasser Ali Majok, Deputy Director, Department of Tribes and Reform, Ministry of the Interior, Gaza Strip, 24 October 2011.
[155] NRC interview with Dr. Nasem Yassin, Secretary of the Palestine Scholars' League, Gaza Strip, 25 October 2011.

Initially, the *Rabita* committees arose to fill the void created by the non-functioning formal courts and were intended as "a temporary solution to stimulate [the] judiciary."[156] However, the *Rabita* committees have not only replaced the earlier PA-affiliated *islah* committees, they are increasingly serving as a substitute for the formal judiciary itself. In a relatively short period of time, the *Rabita* committees have become the most influential and powerful actors in the customary dispute resolution sector in Gaza.

The *Rabita* committees must be distinguished from other *islah* committees and their work, in significant respects, represents a marked departure. Rather than reliance on *'urf* (customary law), the *Rabita* committees base their decisions almost exclusively on *shari'a* principles.[157] In essence, "Hamas has sought the substantive application of Islamic law while adapting processes of customary dispute resolution in order to present the result as a *sulh* (conciliation) before the formal legal authorities."[158] In the Gaza Strip, the jurisdiction of the *shari'a* courts is limited to personal status, or family law, matters. By presenting their work as traditional *sulh* conciliation, the *Rabita* committees provide an indirect means for the application *shari'a* to a broad range of civil and criminal disputes as well, including murder and rape.[159]

The *Rabita* committees receive cases either directly from the claimants or through police referrals; *Rabita* committees maintain offices at present in many police stations in Gaza. Faced with a dispute, police officers frequently refer claimants to the *Rabita* committees for resolution. There is some concern that police in Gaza may be actively pressuring individuals to use the *Rabita* committees rather than following formal procedures or filing an official police report. Given the growing influence of the *Rabita* committees and their strong Hamas affiliations, individuals may be reluctant to refuse such referrals and may be turning to the *Rabita* committees out of intimidation and fear rather than personal choice.[160]

The *Rabita* committees first attempt resolution of matters through conciliation and, if these efforts fail, disputes are referred to a second stage for binding arbitration. An estimated 90 percent of disputes before the *Rabita* committees are resolved through traditional *sulh* conciliation while eight percent are forwarded for *shari'a*-based arbitration and only two percent proceed to the formal *nizami* courts.[161] The Palestine Scholars' League itself conceded that *Rabita* committee members may pressure one party to the dispute "if it appears that he is being unreasonable."[162]

Decisions reached by the *Rabita* committees are enforced by the police in the same manner as formal judicial rulings.

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.

### *Hybrid Customary and Formal Mechanisms*

[156] Albaroos, *supra* note 77, p. 15. In July 2007, a police spokesperson even declared that the District Attorney's office in the Gaza Strip would temporarily be replaced by the *Rabita* committees.
[157] In an interview with NRC, it was confirmed that disputes are primarily conducted in accordance with *shari'a* law. NRC interview with Dr. Nasem Yassin, Secretary of the Palestine Scholars' League, Gaza Strip, 25 October 2011.
[158] Welchman, *supra* note 14, p. 17.
[159] *Ibid.* (noting that, in one murder dispute resolved by the *Rabita* committees, "it was in the political and 'customary' processes that the '*shari'a* ruling' was embedded and legitimized.").
[160] NRC interview with a UN worker, Gaza Strip, 16 October 2011.
[161] NRC interview with Dr. Nasem Yassin, Secretary of the Palestine Scholars' League, Gaza Strip, 25 October 2011.
[162] *Ibid.*

The creation of the *islah* committees during the first Intifada and the subsequent formalisation and legitimisation of these groups under the PA and current local authorities in the Gaza Strip represents a hybrid between the formal and customary systems. In protest to the Israeli control of the formal courts, "political factions developed a parallel system of dispute resolution. Drawing on the conciliatory structures of the *sulh* process, groups created *islah* committees that heard the disputes of the constituents....and provided the population with a practical alternative to the Israeli-governed formal court system."[163]

Over time, these committees, "which were designed to fill gaps in accessible systems of formal justice during the occupation, subsequently metamorphized in part into the role served by the legal departments of governors' offices."[164] This hybrid process follows the traditional *sulh* process of mediation under the imprimatur of government authority. These *islah* committees, which include both the now-defunct Central *Sulh* Committees under Fatah and the current *Rabita* committees, are so connected and entrenched with the formal system that it is difficult to consider them non-state actors at this point. Through these *islah* committees, the customary system has been formalised and rulings of *islah* committees are treated on par with formal court decisions. Through the *Rabita* committees, the local authorities in the Gaza Strip have indirectly expanded the application of *shari'a* law to an ever-increasing list of disputes and offences.

## 3.5 Tribal Judges

Within the Bedouin population in the Gaza Strip, tribal judges may resolve disputes through tribal *'urf*, a process largely comparable to *sulh* conciliation, or tribal law. According to NRC interviews and field research conducted in the Gaza Strip, although they once were important and dominant in the customary dispute resolution sector in Gaza, tribal judges are no longer prominent actors. Generally speaking, "a distinction should be made between the terms 'tribal judge' and '*islah* man', as the usage of these terms is often confused. 'Tribal justice' refers to an ancient judicial system with Bedouin roots, recourse to which has decreased over time as a result of the diminished role of the tribe in Palestine and a reduction in its political, social and economic status."[165] The role of tribal law peaked during the British Mandate period, when the "tribal law system was formally structured and regulated by the Mandatory government through tribal law courts in the Bedouin areas of Palestine."[166]

Today, tribal judges in Gaza appear to be few in number and do not adjudicate many cases. Those remaining tribal judges typically "specialise in a particular legal area, such as land disputes, debts, or litigation concerning dowries."[167] Many of those who traditionally held the title of tribal judge have now been absorbed into the non-Bedouin traditional systems and may serve as *mukhtars* for their tribe. Tribal judges inherit their positions through succession and receive a fee for their work, called the *rizqa*, which is paid by the relatives of the disputants.[168]

One tribal judge in Gaza interviewed by NRC confirmed that he had been appointed to his position by succession and both his father and grandfather had served as tribal judges before him. He is one of three tribal judges in the Gaza Strip who specialises in land disputes. His family originally migrated to Gaza from Beersheba; the other two tribal judges focusing on land issues were likewise from the Beersheba District. Before commencing customary judicial work in 1978, he underwent a 15 year apprenticeship with other tribal judges. He also works as a registered arbitrator and his decisions

[163] PA Land Disputes Study, *supra* note 5, p.10.
[164] *Ibid.*, p. 7.
[165] Birzeit Report, *supra* note 42, p. 14.
[166] *Ibid.*, p. 14.
[167] Terris and Inoue-Terris, *supra* note 59, p. 468.
[168] Birzeit Report, *supra* note 42, p. 64. However, one tribal judge interviewed by NRC stated that he did not charge a *rizqa* and was critical of the number of tribal judges who did "care for money" and sometimes "tout" for cases. NRC interview with a Gaza tribal judge, Gaza Strip, February 2011.

generally reflect *'urf* and *shari'a* law rather than formalised land regulations. In 2010, he resolved 20 cases, two of which had been directly referred to him through the *nizami* courts.

Tribal judges solve disputes presented to them "through issuing a final verdict to both parties that is based on customs and tribal *urf* and through the accreditation of proofs and conjunctions/connections presented to him by the parties to the disputes such as *bish'a*—in former times—oath, and statements."[169]

## 3.6 Registered Arbitrators

A final category of relevant actors in the Gaza Strip, though not necessarily falling squarely within the customary system, are arbitrators registered in accordance with Arbitration Law No. 3 (2000). Although current statistics on the number of registered arbitrators in Gaza are unavailable, in 2005, there were 112 registered arbitrators in Gaza, 27 of whom were working with PCDCR. To obtain formal status, arbitrators must register with the Ministry of Justice and receive an official stamp to carry out their work. Roughly 20 *mukhtars* in Gaza are also certified as arbitrators, though most arbitrators typically work as accountants, lawyers or judges.[170]

After the division between Fatah and Hamas in 2007, the process of registering arbitrators in Gaza was halted for a period. One interviewee confirmed that the Ministry of Justice in Gaza has refused to renew his arbitrator's license and he is aware of other arbitrators who registered under the PA in Gaza facing a similar situation.[171]

[169] Birzeit Report, *supra* note 42, p. 61.
[170] NRC interview with a local NGO worker, Gaza Strip, 16 October 2011.
[171] NRC interview with a local NGO worker, Gaza Strip, 16 October 2011.

# Chapter 4: Mechanisms for Customary Dispute Resolution in the Gaza Strip

Before analysing the actual mechanisms for customary dispute resolution within the Gaza Strip, a brief discussion and definition of the typologies of collaborative dispute resolution (CDR) may provide guidance. CDR is "an all-encompassing term that includes a range of approaches and procedures that foster and utilize cooperation between disputing parties."[172] While the term "alternative dispute resolution" (ADR) is used in many contexts, "this term has limited utility in countries where customary procedures and mediation may be the most common form of dispute resolution and the alternative—and often much less used—is going to a government court."[173] This is particularly the case throughout the Gaza Strip where recourse to formal courts is the exception rather than the norm.

One of the primary distinctions to differentiate between different CDR processes, though one which is often blurred within customary dispute resolution mechanisms currently used in Gaza, is whether the process is binding or non-binding on participants. Another relevant distinction is whether the process is community-based, court-based, or court-adjunct. Thus, the primary forms of CDR can be categorised as follows:

- ***Negotiation*** **–** The most common form of CDR, "negotiation is the process by which the parties voluntarily seek a mutually acceptable agreement to resolve their common dispute. Compared with processes involving third parties, generally negotiation allows the disputants themselves to control the process and the solution."[174] While negotiations do not necessarily involve third parties, facilitated negotiation "involves two or more people and is facilitated by a member of a team, ally or advocate of one of the parties in dispute."[175]
- ***Conciliation*** – Often used interchangeably with mediation, "[c]onciliation with a relationship emphasis generally focuses more on relationship building and communications strategies needed to open or encourage productive talks."[176] Conciliation may be initiated by one or more of the disputants or an intermediary. The third-party conciliators "are generally individuals or small groups of people whom parties in dispute respect, trust and are willing to listen to. They do not have to be totally neutral or impartial regarding their relationship to involved parties or issues in dispute but do have to have personal characteristics and views that make parties open to their assistance and hearing their views."[177] Conciliators typically begin by meeting with the parties separately to increase understanding of the dispute and the parties' views and convey messages between the parties.[178]
- ***Arbitration*** **–** The only of these processes that may (where these mechanisms are regulated) result in a binding decision, arbitration is "a dispute resolution process in which people in conflict submit their differences to a mutually acceptable and trusted third party to make either a non-binding recommendation on how to settle their dispute or a binding decision."[179] Individuals providing arbitration need to be trained.[180] Arbitrator decisions are "generally based on their assessment of the merits of each of the parties' cases and/or application of some widely accepted standard, such as statutory or customary law or terms in a contract or agreement."[181]

[172] NRC, *Housing, Land and Property: Handbook on Design and Implementation of Collaborative Dispute Resolution*, p. 38.
[173] *Ibid.*
[174] USAID, Center for Democracy and Governance, *Alternative Dispute Resolution Practitioners' Guide*, Technical Publication Series, Document No. PN-ACP-335, March 1998, pp. 60-61.
[175] NRC, *Housing, Land and Property: Handbook on Design and Implementation of Collaborative Dispute Resolution*, p. 57.
[176] *Ibid.*, p. 41.
[177] *Ibid.*, pp. 41-42.
[178] *Ibid.*, p. 42.
[179] *Ibid.*, p. 53.
[180] *Ibid.*
[181] *Ibid.*, p. 67.

Negotiation encourages direct communication and discussions between the parties to a dispute, with or without a third party or facilitator.[182] Conciliation focuses more on the relationship between the disputants than the specific substantive issue they are seeking to resolve. In negotiation and conciliation, the agreements reached are non-binding and the process in and of itself has no legal standing.

The role of an arbitrator therefore differs significantly from that of a conciliator. Whereas a conciliator tries to facilitate the parties in reaching an agreement and does not make any binding decision, an arbitrator may seek evidence or call witnesses and will reach a decision that is binding and enforceable against the parties. Arbitration awards may be binding or non-binding, depending on the agreement of the parties.

In the Gaza Strip, the lines between these various forms of CDR are extensively blurred and there is a high level of overlap. The above definitions are intended primarily as a framework and to provide illustrative examples. Even by actors within the customary dispute resolution system in Gaza, the terms mediation, arbitration, and negotiation are frequently used interchangeably without an adequate understanding of their different definitions.

In the life cycle of a typical customary dispute resolution process in Gaza, therefore, the actors involved and CDR forms applied do not necessarily follow strict guidelines or a linear process. However, customary dispute resolution procedures in Gaza often do follow certain, if inconsistent and scattered, patterns. In addition, many of these customary processes may be used in combination with one another or as part of a broader process.

## 4.1 Facilitated Negotiation with Local *Mukhtars*

The first step in nearly all customary dispute resolution in Gaza 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.[183]

At this level, the process "tend[s] to rely on customary law, traditional practices, and personal relationships with little (or no) reference to formal laws and procedures."[184] *Mukhtar*-led negotiations can begin almost as soon as the conflict occurs. The *mukhtar* may attempt to separately approach the parties to determine whether a mutually agreeable solution is possible and may agree to facilitate a meeting between the parties.

If the *mukhtar* represents the family or clan of only one party to the dispute, he may not be a neutral or impartial facilitator and may instead be representing the interests of one side. However, if both parties are from the same family, the *mukhtar* may seek a solution that best maintains the interests of the family rather than the individual needs of the disputants. Women in particular may be acutely affected by this particular dynamic, as one of the most common intra-family disputes in Gaza involves domestic violence and other forms of gender-based violence.[185] The property rights of women may also be impacted as husbands may attempt to take possession or sell part of a woman's *mahr*, the brideswealth paid upon marriage which fully belongs to the wife.[186]

[182] USAID, *Alternative Dispute Resolution Practitioners' Guide*, *supra* note 174, p. 5.
[183] NRC interview with a local NGO worker, Gaza Strip, 16 October 2011.
[184] PA Land Disputes Study, *supra* note 5, p. 5.
[185] NRC interview with a local NGO worker, Gaza Strip, 16 October 2011.
[186] NRC interview with a local NGO worker, Gaza Strip, 16 October 2011.

*Mukhtars* may work in concert or consult with each other at this point to facilitate negotiations.[187] For example, in an inter-family dispute, a *mukhtar* representing one family may seek the assistance of the other family's *mukhtar* if there is difficulty in engaging with both parties. PCDCR has also organised local committees of *mukhtars*, with groups in Khan Younis, Rafah, and Gaza. There are ten *mukhtars* per committee and weekly committee meetings allow these *mukhtars* to discuss and refer cases that have been brought to their attention.[188]

## 4.2 *Sulh* Conciliation

Where a negotiated settlement to a dispute through *mukhtars* is not possible, the parties may pursue *sulh* conciliation, "a method of dispute resolution through conciliation, based on the accommodation of custom, religion and tribal traditions."[189] The term *sulh* refers both to the entire conciliation process as well as the final written agreement between the parties. The actual *sulh* process itself is largely the same in urban and rural areas in Gaza and the tribal *sulh* practiced among the Bedouin population, as distinct from tribal law, is likewise comparable.[190]

The customs involved in *sulh* conciliation pre-date the establishment of Islam, although they now incorporate principles of *shari'a* law.[191] *Sulh* proceedings are based on a number of different legal sources, most importantly "pre-Islamic traditions, Bedouin traditions or Bedouin tribal law and *Sharia*, i.e. Islamic law, in addition to existing formal legislation."[192] In practice, most *sulh* ceremonies will make little or no reference to formal law and instead draw mainly from *'urf* customary law which is unrecorded and may be highly regionalised.[193] Yet, while the governing law and many of the agreements are unrecorded, the majority of Palestinians in the Gaza Strip are generally familiar with the basic standards and proceedings.

The primary conciliators for *sulh* dispute resolution are the *islah* men, who mainly work either individually or through an organised *islah* committee. The work of the *islah* man "comprises narrowing the gap between the positions of the disputing parties, in order to bring them to common ground in a resolution of the dispute."[194] The *sulh* process relies heavily on the social standing and personality of the conciliators. Most disputes involve only one *islah* man as facilitator, though more complex disputes may involve upwards of five.[195] All customary dispute resolution actors follow similar steps in *sulh* conciliation, with the exception that *Rabita* committee members will rely primarily on *shari'a* law rather than *'urf*.[196]

The actual steps of *sulh* conciliation follows a process "which over time has acquired the authority of a ritual."[197] When an inter-family dispute arises, the parties will select an *islah* man who is independent of the two families. Because "traditionally Palestinians view an offense against an individual as an offense against the entire family of *hamula* (clan)," the entire family becomes a party to the dispute and will seek an immediate solution.[198] *Sulh* conciliation is carried out through multiple

[187] NRC interview with a group of *mukhtars* and *islah* men, Gaza Strip, January 2012.
[188] NRC interview with a local NGO worker, Gaza Strip, 16 October 2011.
[189] Birzeit Report, *supra* note 42, p. 14.
[190] *Ibid.*, p. 63.
[191] PA Land Disputes Study, *supra* note 5, p. 5.
[192] Landinfo Study, *supra* note 16, p. 8.
[193] Human Rights Watch, *A Question of Security*, *supra* note 75, p. 70.
[194] Birzeit Report, *supra* note 42, p. 64.
[195] International Crisis Group, *supra* note 29, p. 8.
[196] NRC interview with a local NGO worker, Gaza Strip, 16 October 2011.
[197] International Crisis Group, *supra* note 29, p. 8.
[198] Adrien Katherine Wing, "Custom, Religion, and Rights: The Future Legal Status of Palestinian Women," 35 Harvard International Law Journal, Vol. 35, 1994, p. 153, n.23.

meetings with the parties, the number of which may vary depending on the case. One *islah* man told NRC that anywhere between two and 20 meetings may be necessary.[199]

Though the process itself is known as a conciliation (or mediation) "it might be classified as arbitration in the western sense due to its binding nature."[200] The binding status of *sulh* proceedings derive not only from intense social pressures to abide by the decisions, but increasingly actual legal enforcement of *sulh* agreements by the police and formal judiciary.

In 2007, the *mukhtars* surveyed by the PA Ministry of Planning were asked about their experiences with *sulh* conciliation in the context of land disputes. The *mukhtars* from the Gaza Strip confirmed that most land disputes are resolved by less than three *islah* men and women typically played a minor role in the *sulh* process. According to the *mukhtars* surveyed, in more than 75 percent of *sulh* conciliations, there were no women present in attendance at the public *sulh* proceedings. By contrast, in 46.2 percent of *sulh* proceedings, there were more than 20 men present.[201]

**Table 4: Average Number of Men in Attendance at *Sulh* Conciliation Proceedings in Gaza[202]**

| Number of Men Present | Percentage |
|---|---|
| Less than 10 | 46.2 % |
| 10 – 19 | 7.7 % |
| 20 or more | 46.2 % |

**Table 5: Average Number of Women in Attendance at *Sulh* Conciliation Proceedings in Gaza[203]**

| Number of Women Present | Percentage |
|---|---|
| 0 | 76.9 % |
| 1 – 3 | 23.1 % |
| 4 – 6 | 0.0 % |

**Table 6: Average Number of *Islah* Men Involved in Each *Sulh* Conciliation Proceeding in Gaza[204]**

| Number of *Islah* Men | Percentage |
|---|---|
| 1 – 3 | 53.8 % |
| 4 – 6 | 46.2 % |
| > 6 | 0.0 % |

The most common *sulh* conciliation cases in the Gaza Strip involve violent fights and assaults, while the second most common type of *sulh* conciliation case involves financial disputes. Generally speaking, cases before *sulh* dispute resolution throughout the oPt range "from tort and child custody to 50 cases of murder."[205] Most disputes that are resolved through *sulh* conciliation arise between family members and neighbours and are typically resolved within one week to a few months. One *mukhtar* interviewed estimated that he had successfully resolved between 70 and 80 cases through *sulh* conciliation in 2010.[206]

[199] NRC interview with a Gaza *islah* man, Gaza Strip, February 2011.
[200] Wing, supra note 198, p. 153, n.23.
[201] PA Land Disputes Study, *supra* note 5, pp. 65-66.
[202] *Ibid.*
[203] *Ibid.*
[204] *Ibid.*
[205] International Crisis Group, *supra* note 29, p. 9.
[206] NRC interview with a *mukhtar* who is also an *islah* man and a registered arbitrator, Gaza Strip, February 2011.

The following stages are 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 *tha'ir,* or revenge, is greatest:

- ***Hudna* –** 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.[207] 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."[208] However, the *hudna* is not always enforceable and the victim's family may not always abide by its non-retaliatory restrictions.[209]
- ***'Atwa* –** The *hudna* is then followed by the *'atwa*, "in which the perpetrator's clan admits guilt and states that it is ready to pay restitution."[210] 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.[211]
- ***Sulh* –** The final step in resolving the conflict is the *sulh* resolution, which is "concluded with a final agreement (*kifala*) being written, signed and distributed to the parties who then swear to uphold the agreement."[212] The *sulh* marks the final resolution and is often a public ceremony.[213] Most attendees are men between the ages of 15 and 45 and few women participate. A *sulh* agreement may be formally recorded in a civil or criminal court, though there is no requirement that it be. A decision in the *sulh* process may at times result in the dismissal of pending parallel formal proceedings. This *sulh* deed is further evidenced by two guarantors, one for each party and usually male relatives, who are responsible for ensuring the agreement is honoured and payment is made. The use of guarantors helps strengthen the *sulh* agreement and the "signatures of the notables give the accord a weight it would not have if only the two families signed it. To break such an agreement is not only to go back on one's publicly given pledge, it is also a direct insult to the important men who mediated the *sulha* [sic] and signed the agreement."[214]

Once the *sulh* deed has been signed by the parties, the formal *nizami* courts in Gaza are likely to uphold the terms of the agreement. One High Court judge in Gaza interviewed by NRC stated that he would be reluctant to set aside a signed agreement, even if one of the parties no longer agreed to the terms, unless it could be shown that the process was not voluntary or the party was coerced into signing the document.[215] Where a *sulh* agreement is formally affirmed by the *nizami* courts, it "becomes an official document that is attached to the case file, after the judge confirms that the victim or his guardian have waived their personal rights."[216]

*Sulh* agreements may be presented to the police in criminal cases in order to dismiss the pending case and release the accused.[217] Local newspapers regularly publish the terms of the *'atwa* and the *sulh* and

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[207] 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.
[208] *Ibid.*
[209] Khalil, "The Coexistence of Formal and Informal Justice in Palestine", *supra* note 48.
[210] Landinfo Study, *supra* note 16, p. 8.
[211] Khalil, "The Coexistence of Formal and Informal Justice in Palestine," *supra* note 48.
[212] Landinfo Study, *supra* note 16, p. 8.
[213] International Crisis Group, *supra* note 29, p. 8, n. 72 During one *sulh* process observed by NRC, the *sulh* deed was sealed with a Qur'anic recitation from both parties and there was a concluding admonition from the *islah* man "not to keep hatred in your hearts".
[214] Several people interviewed by NRC in Gaza expressly cited the existence of guarantors as evidence that the customary system is stronger and has more enforcement capabilities than the formal courts.
[215] NRC interview with a current Gaza High Court Judge, Gaza Strip, February 2012.
[216] Khalil, "Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law," *supra* note 41, p. 19.
[217] Terris and Inoue-Terris, *supra* note 59, p. 464.

"[e]ven the most prominent newspapers, such as *Al-Quds*, are filled with announcements publishing the successful conclusion of reconciliation between families."[218]

The penalties imposed through the *sulh* process are most often financial and may include payments of *diya*, or blood money, and *jalwa*, or expulsion from the neighbourhood.[219] Other common punishments include imprisonment in the jails in Gaza or house arrest and "[c]orporal punishment may also be administered, although this is rarely officially sanctioned by the mediation committees."[220] In the context of land disputes, those *mukhtars* in the Gaza Strip surveyed by the PA Ministry of Planning confirmed that three-quarters of *sulh* conciliations are resolved without any payments by the disputed parties.

**Table 7: "During the *Sulh* Conciliation Process in Land Disputes, is Any Money Paid as Restitution or Compensation?"[221]**

| | |
|---|---|
| **Yes** | 23.1 % |
| **No** | 76.9 % |

Even where financial restitution is agreed, it is often simply a mark of respect and it is not uncommon for the victim's family to return the payment as a gesture; what the "family forfeited in cash, it subsequently gained in social prestige."[222] Moreover, the actual penalty agreed upon may be influenced by "the financial situation of the parties to the conflict, their political and partisan affiliations, the size of their families or tribes, whether they are refugees or indigenous, the power and status of the particular tribal judge, and the degree of respect he engenders."[223]

## 4.3 Arbitration of Disputes by Local Actors

To supplement other forms of customary dispute resolution, as described above, recourse is also had by local actors to arbitration procedures, which are formally set out in Arbitration Law No. 3 (2000). It is important to be aware of the arbitration procedures set out in the law for a number of reasons. Firstly, a number of customary dispute resolution actors in Gaza are also registered arbitrators; secondly, many of the procedures set out in the law are used by these actors in their resolution of disputes, whether informally or formally. However, most arbitration actually conducted in Gaza can at most be considered "unofficial" arbitration, as it is conducted outside the parameters for formal arbitration proceedings, by unlicensed actors, and/or on subject matter outside the jurisdiction of arbitration altogether.

There is thus considerable overlap, and confusion, between the perceived roles and responsibilities of local actors as mediators, negotiators, conciliators and arbitrators. The blurring of formal and informal arbitration and the 'hybridisation' of customary and formal mechanisms are features of the Gaza dispute resolution context which must be understood.

### *Procedures under Arbitration Law No. 3 (2000)*

Enacted by the Palestinian Authority, Arbitration Law No. 3 (2000) governs all matters related to arbitration of disputes and replaced Arbitration Ordinance 1926, which was previously introduced

[218] *Ibid.*, p. 487.
[219] International Crisis Group, *supra* note 29, p. 9. In the Gaza Strip, *diya* are as high as $30,000 for manslaughter, $60,000 for manslaughter without *jalwa*, and $90,000 for murder.
[220] Landinfo Study, *supra* note 16, p. 8.
[221] PA Land Disputes Study, *supra* note 5, p. 66.
[222] Terris and Inoue-Terris, *supra* note 59, p. 464, n. 8.
[223] Milhem and Salem, *supra* note 56, p. 24.

during the British Mandate period.[224] Arbitration decisions made in accordance with the provisions of these laws are binding and enforceable.[225] Arbitration Law No. 3 (2000) is largely based on the international standards articulated under the 1985 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration and the 1976 UNCITRAL Arbitration Rules.[226]

Legally speaking, for an arbitration to be binding and enforceable in the oPt, it must be issued in compliance with Arbitration Law No. 3 (2000), which requires:

- **Subject-Matter Jurisdiction –** Arbitration is not available "where there is involvement of public order, disputes related to personal status [family law], or issues where conciliation is not legally allowed."[227] Therefore, the overwhelming majority of criminal disputes or any matters involving inheritance and family law can never be legally arbitrated, regardless of whether the arbitrators are formally registered or the proceedings are conducted in compliance with Arbitration Law No. 3 (2000).
- **Authorised Arbitrators –** Those seeking inclusion on the Ministry of Justice's approved list of arbitrators must submit an application; have no criminal convictions; belong to "one of the free professions and hold the proper practical and scientific experience"; pass an examination administered by the Ministry of Justice; be domiciled in Palestine; and pay the required legal fees.[228] These fees include 10 Jordanian dinars for the initial application and 50 Jordanian dinars for the official arbitrator certificate.[229] In a given dispute, arbitrators "should not have any interest, whether in appearance or in fact, in the subject of arbitration, or with any of the parties."[230] An arbitrator is required to disclose "any circumstances or facts that might place his or her independence or impartiality in question."[231] Inclusion on the list of arbitrators is valid for three years, renewable if the individual arbitrator has adjudicated at least five cases in that period.[232]
- **Arbitration Panel –** Upon agreement of the parties, "the arbitration panel may comprise one arbitrator or more. If the parties do not come to an agreement, each party is entitled to nominate one arbitrator." Each disputant typically chooses one arbitrator and together these two arbitrators sit on the panel with a third neutral arbitrator, or "umpire". If more than one arbitrator is selected, the total number must always be odd; if the parties cannot agree upon an umpire, "the competent court shall nominate an umpire from the Ministry's list of accredited arbitrators. The court's decision in this regard is final." [233]
- **Written Agreement –** The agreement to enter into arbitration "shall be in written form signed by the parties, and shall specify the disputed subject." This agreement may be through the parties' mutual consent or in the form of a contractual arbitration clause executed prior to the dispute. Any arbitration agreement not in writing "will be deemed null."[234] The

[224] Draft Bylaw for Arbitration Law Number (3) of 2000, Palestinian National Authority, Ministry of Justice [Arbitration Law No. 3 (2000)]; Copy of Arbitration Ordinance 1926 on file with NRC.
[225] *See* Arbitration Ordinance 1926, Section 3 ("A submission, unless a contrary intention is expressed therein, shall be deemed irrevocable except by leave of the Court or agreement of the parties, and shall have the same effect in all respects as if it had been made an order of court.").
[226] Essam Al Tamimi, *Practitioner's Guide to Arbitration in the Middle East & North Africa*, Emirates Printing Press LLC, 1 February 2009; William E. Davis, Lubna Katbeh, and Shahla Maghzi-Ali, "Creating a Commercial Dispute Resolution Center in the Palestinian Territories", *Dispute Resolution Journal*, May-July 2005.
[227] Arbitration Law No. 3 (2000), Article 2.
[228] *Ibid.*, Article 7.
[229] *Ibid.*, Article 13.
[230] *Ibid.*, Article 4.
[231] *Ibid.*, Article 25.
[232] *Ibid.*, Article 12.
[233] *Ibid.*, Article 21.
[234] *Ibid.*, Article 14.

arbitration agreement is binding, though a competent court "upon either party's request may decide to terminate the agreement if the court is not convinced of its validity."[235]

- **Arbitration Procedures –** The arbitration "shall be conducted in accordance with the Law and the procedures provided for in this bylaw" and the sessions "shall be open to the public, unless the arbitration tribunal decides otherwise."[236] The arbitrators must "respect litigation rules, in which parties are treated with equality, given access to each other's documents, and provided opportunity to submit their pleas and arguments, either in writing or orally, during the hearings."[237] At any point, the parties may "request the court to attempt reconciliation between them. The arbitration tribunal may also offer a peaceful settlement to the dispute."[238]
- **Arbitration Award** – The arbitration panel closes the pleadings and allows the parties closing statements after all evidence is presented.[239] Deliberations of the arbitration panel are held in secrecy. The award "shall be made in the presence of the tribunal members and parties."[240] The award shall be made unanimously or by the majority of the arbitration panel and the award must be signed by all members of the panel.[241] The written award shall include, *inter alia*, the disputed subject, the applicable law, the parties' pleas and defences, the rationale upon which the award was made, the arbitration panel's decision, and the allocation of costs and fees.[242]
- **Enforcement of Arbitration** – Parties must file a signed copy of the arbitration award to be ratified by the appropriate court and arbitration awards are enforced as court orders. After "the competent court approves the award, it shall be final and binding. All related authorities shall enforce the award in all legal means including the use of force if needed."[243]
- **Governing Law –** In terms of applicable procedural law, the Law of Evidence No. 4 of 2001 governs all scene investigations and challenges regarding falsification of documentation. The Civil and Criminal Procedures Law No. 2 of 2001 regulates rules of attendance and absence and notification. There is no provision under Arbitration Law No. 3 (2000) that stipulates the applicable substantive law to an arbitration dispute and presumably the parties may determine the governing law under the arbitration agreement. Therefore, there is no requirement that recourse be made to formal civil law and, if the parties willingly consent, there is no legal impediment to the application of *shari'a* principles to an arbitration dispute.[244]

Several of the *mukhtars* interviewed by NRC in Gaza along with a tribal judge and two lawyers all indicated that they are registered arbitrators. One *mukhtar* stated that he received arbitration cases referred to him from the *nizami* courts; he estimated there were 10 such referrals in 2010.[245] Two current judges estimated that 80 percent of civil cases filed before the *nizami* courts in Gaza are ultimately resolved through arbitration with the parties selecting the arbitrators, some of whom may be formally registered with the Ministry of Justice, others of whom are not. Most arbitrations in Gaza are completed within a couple months.[246]

Following the signing of the Oslo Accords and based on priorities identified in 1996 by the PA Ministry of Justice, the World Bank implemented a rule of law project throughout the oPt with nearly

[235] *Ibid.*, Article 15.
[236] *Ibid.*, Article 34.
[237] *Ibid.*, Article 33
[238] *Ibid.*, Article 43.
[239] *Ibid.*, Article 50.
[240] *Ibid.*, Article 51.
[241] *Ibid.*, Article 52.
[242] *Ibid.*, Article 53.
[243] *Ibid.*, Article 56.
[244] *Ibid.*
[245] NRC interview with a *mukhtar* who is also an *islah* man and a registered arbitrator, Gaza Strip, February 2011.
[246] NRC interview with Gaza judges from a court of first instance and the High Court, Gaza Strip, February 2011.

$750,000 earmarked towards the development of ADR.[247] One objective of this project, which extended from November 1997 through June 2004, aimed at "training instructors in mediation and arbitration" and "establish[ing] a programme for alternative solutions as a court-adjunct programme to help reduce the backlog of cases and improve the efficacy and quality of legal services."[248] Two arbitration and mediation centres were established through this project, one in Gaza City and one in Ramallah.[249]

These *Tahkeem*, or "arbitration", centres opened in 2002 and marked the first commercial arbitration centres in the oPt.[250] The Palestinian Ministry of Justice "approved the registration of the *Tahkeem* Center, which joined the International Federation for Commercial Arbitration Institutions in the spring of 2003. In January 2004, the *Tahkeem* centres became a member of the Arab Federation of Arbitration Institutions.[251] Through the training unit in these centres, 60 individuals were trained and registered as arbitrators. Despite the extensive regulations detailed under the Arbitration Law No. 3 (2000) and efforts to establish a formalised, court-adjunct arbitration programme, "several members of the Bar...and at least one study suggests that that Act has not necessarily been enforced: all arbitrators practicing are not required to have legal training, and arbitral awards may not be respected, resulting in *de novo* trials."[252]

PCDCR confirmed that it had also been involved with the *Tahkeem* centre in the Gaza Strip between 2005 and 2007. Cases were referred both by the Palestinian Bar Association as well as individual Palestinian lawyers and, during that period, PCDCR intervened in 197 arbitration cases. PCDCR even helped to certify 12 *mukhtars* as arbitrators.[253] The *Tahkeem* centres themselves "lacked support from judges, lawyers and the Ministry of Justice and only very few cases were ever handled." The World Bank programme was cancelled prematurely, with only one-third of the funds spent.[254] The Ministry of Justice itself described the programme as "unfeasible and inconsistent with the Palestinian legal and social system."[255] There was an additional "lack of public information regarding the nature and practice of ADR."[256]

Since 2007, with the replacement of nearly all Ministry of Justice personnel in Gaza and the breakdown of the formal judiciary, the *Tahkeem* centres have suffered further isolation. The *Tahkeem* centre in the Gaza Strip is still technically open, though currently non-functional and unrecognised by the local authorities.[257] Today, there is no formal court-adjunct arbitration supported by the Ministry of Justice and any international efforts at developing the arbitration centres in the Gaza Strip have been suspended.

### *Unofficial Arbitration*

The present status and enforcement of Arbitration Law No. 3 (2000) in the Gaza Strip is likewise unclear, as is the status of arbitrator applications forwarded to the Ministry of Justice. There appears to be some confusion amongst relevant customary dispute resolution actors in Gaza regarding the

[247] Douglas Ierley, "Law and Judicial Reform in Post-Conflict Situations: A Case Study of West Bank Gaza", World Bank Conference, Session VI, Saint Petersburg, Russia, 8-12 July 2001, p.10; World Bank, *Implementation Completion Report (TF-26063 TF-23757)*, Report NO. 29066, 9 June 2004, p. 6. This amount was subsequently reduced to $330,000 under a revised project budget.
[248] World Bank, *Implementation Completion Report (TF-26063 TF-23757)*, *supra* note 247, p. 18.
[249] *Ibid.* p. 6.
[250] Davis, Katbeh, and Maghzi-Ali, "Creating a Commercial Dispute Resolution Center in the Palestinian Territories", *supra* note 226. *See also* www.tahkeem.com.
[251] Davis, Katbeh, and Maghzi-Ali, "Creating a Commercial Dispute Resolution Center in the Palestinian Territories", *supra* note 226.
[252] PA Land Disputes Study, *supra* note 5, p. 34.
[253] NRC interview with a local NGO worker, Gaza Strip, 16 October 2011.
[254] World Bank, *Implementation Completion Report (TF-26063 TF-23757)*, *supra* note 247, pp. 5-6.
[255] Quoted in World Bank, *Implementation Completion Report (TF-26063 TF-23757)*, *supra* note 247, p. 4.
[256] Davis, Katbeh, and Maghzi-Ali, "Creating a Commercial Dispute Resolution Center in the Palestinian Territories", *supra* note 226.
[257] NRC interview with a local NGO worker, Gaza Strip, 16 October 2011.

distinctions between mediation and arbitration; several of the *islah* men interviewed clearly interpret their role as more of an arbitrator than a mediator, frequently issuing binding decisions. Often, the *islah* man will issue a binding ruling without adequately understanding the requirements of arbitration law. Where the arbitrator is not formally registered or the provisions under Arbitration Law No. 3 (2000) are not followed, the decision is not legally valid or enforceable. One judge even noted that there have been problems with the arbitration decisions of the *Rabita* committees and that these rulings cannot be ratified by the court.[258]

Lynn Welchman has termed such dispute resolution "unofficial" arbitration.[259] In one case study, she outlined a 2005 case in which a *Rabita* committee arbitrated the murder of a young woman in Gaza City. Even on its face, a murder criminal case is beyond the subject-matter jurisdiction open to arbitration. Within one week after the murder, "the families of the victims and those of the perpetrators reached an agreement on '*shari'a* adjudication.'" The appointed *Rabita* committee was headed by the *mufti* of Gaza, the highest Islamic scholar in Gaza, a fact which itself revealed the importance and high-profile nature of the case.[260] The actual process itself followed the traditional *sulh* conciliation steps and culminated in the signing of the *sulh* deed by the male relatives in a public ceremony. The difference here was that the decision was presented as the result of arbitration and the process was procedurally connected to the formal system.[261] The *Rabita* committee had been "empowered by the parties to arbitrate in accordance with Islamic law and issue a ruling, rather than simply to assist reconciliation efforts. Such a committee has no formal standing to conduct criminal investigations and issue 'rulings' that directly challenge the state's monopoly over criminal justice."[262] No individual was ever held personally accountable for the young woman's death and the dispute was resolved between the families.

For cases requiring arbitration, disputes may be referred to the *shari'a* arbitration department of the Palestine Scholars' League, which includes four to six members of the League who are trained arbitrators. The actual arbitration agreement reached may then be forwarded to the formal *nizami* courts, where it will be automatically verified and formalised if there is no objection within 30 days. If any party raises an objection, the *nizami* court may then decide whether to hear the dispute *de novo* or to uphold the arbitration.

Many decisions reached by the *Rabita* committees and the League's *shari'a* arbitration department, however, may not actually comply with the Palestinian arbitration laws and, therefore, might not be deemed legally binding under applicable Palestinian law. International standards and Palestinian Arbitration Law No. 3 (2000) provide that where there is any element of coercion or pressure, the parties' consent to abide by the terms of the arbitration should not be legally enforced. Moreover, areas such as criminal disputes and family law are beyond the subject-matter jurisdiction approved under existing arbitration legislation. These *shari'a* arbitrations also do not appear to provide any opportunity for appeal.[263]

## 4.4 Tribal Justice

Tribal adjudication, or *al-qada' al-'asha'iri*, historically played a role in customary dispute resolution in the Gaza Strip and was reinforced during the British Mandate period, though is relatively limited and minor today. Tribal courts were officially abolished in the oPt in 1976, though practices of tribal mediation and arbitration continue at present.[264] For the most part, most traditional tribal leaders have been incorporated into the *mukhtar* system and now participate in the *sulh* procedures.

[258] NRC interview with a Reconciliation Judge, Gaza Strip, DATE.
[259] Welchman, *supra* note 14, p. 6.
[260] *Ibid.* p. 17.
[261] *Ibid.* p. 17.
[262] *Ibid.* p. 17.
[263] NRC interview with a UN worker, Gaza Strip, 16 October 2011.
[264] *Ibid.*, p. 30.

Nonetheless, tribal law can still be found in Gaza and maintains its own particular characteristics and terminology.[265] Tribal law is "drawn from the dominant tribal traditions in the area where it is practised."[266]

In most cases where tribal law is still applied, the parties would first attempt consensual resolution through the *sulh* procedures before formally engaging a tribal judge. Those cases that do proceed before a tribal judge only involve other tribal members and typically follow these steps:

- **Intervention by *Bait al-Mulim* and Selection of Tribal Judges** – The *bait al-mulim* is the *islah* man initially approached to resolve the tribal dispute. If negotiation or mediation fails, the *bait al-mulim* will refer the dispute to a judge with the appropriate specialisation. Three judges are typically chosen, one who specialises in the particular field and two chosen by the parties themselves. The tribal judge chosen by each party is referred to as that party's *m'adhuf*.[267]
- **Litigation and Tribal Court Proceedings** – In tribal litigation, the petitioner is deemed the *tarid* and the defendant is the *matrud*. The *bait al-mulim* will present the details of the dispute to the tribal judge, who will then set his fees, or *rizqa*. Each party pays his own share and ultimately, the losing party is obliged to reimburse the other party. Guarantors play a role here in enforcing and ensuring payments. The tribal judge then hears the statements of the parties. The *tarid* makes an opening statement followed by the response from the *matrud* and a rebuttal from the *tarid*. The tribal judge may seek expert witnesses or employ methods of evidence. In the past, these may have entailed *bish'a*, or the placing of a coffee bean roaster near an individual's tongue; if his/her tongue burns, it is believed he/she is not telling the truth.[268]
- **Binding Ruling of Tribal Judge** – After considering the parties' statements and evidence, the tribal judge issues a binding ruling, enforced with the assistance of the guarantors. The penalties are generally financial though may also involve exile of the guilty individual along with his close relatives.
- **Appeal Procedures** – An individual seeking appeal may approach the *bait al-mulim* to ask that the dispute be transferred to his designated tribal judge, or *m'adhuf*. The same litigation procedure is undertaken, only before the *m'adhuf* of the appellant, who then is unable to challenge the ruling. If the opposing party accepts the decision of the second ruling, then the proceeding ends. However, that party may seek to appeal and transfer the case to his *m'adhuf* who issues a third ruling. If the first appellant does not accept this ruling, the *bait al-mulim* will consider all three rulings and issue a decision in accordance with the majority.[269]

As mentioned, these tribal judicial proceedings are no longer prominent within the Gaza Strip and, even within the Bedouin community, the vast majority of disputes are now resolved only through facilitated mediation on the part of tribal *mukhtars* or conciliation through the *sulh* procedures.

[265] Birzeit Report, *supra* note 42, p. 14.
[266] *Ibid.*, p. 14.
[267] *Ibid.*, pp. 72-73.
[268] *Ibid.*, pp. 73-74.
[269] *Ibid.*, pp. 74-75.

# Chapter 5: Community Perceptions of Customary Dispute Resolution in the Gaza Strip

To determine the community perception of customary dispute resolution mechanisms, NRC conducted five separate focus groups with 49 participants: 31 women and 18 men throughout the Gaza Strip between 16 January 2011 and 13 February 2011. Participants were asked for their views regarding, *inter alia*, the mechanisms and actors within the customary dispute resolution system; their assessments in terms of independence, impartiality, and neutrality of the customary system; the voluntariness and confidentiality of the customary processes; and the fairness of the outcome. The general reactions of the participants are summarised in a table in Annex I of this report.

## 5.1 Choice of Forum

In each focus group, participants confirmed that they would likely seek resolutions of disputes through customary mechanisms prior to the formal justice system. Before approaching any customary dispute resolution actors, most participants would first seek to privately resolve the matter within their own families or with the families involved. The next step would be to approach a local *mukhtar* for facilitated negotiation.

If resolution is not possible at the *mukhtar* level, most participants indicated a willingness to next engage an *islah* man or *Rabita* committee in formal conciliation. Only if that procedure failed would they approach the police, with the formal courts in Gaza viewed as a last resort. It should be noted that most participants did not perceive a distinction between the *islah* men and the *Rabita* committees, indicating how prominent the *Rabita* committees have become in just a short period of time. In one group, the participants had no direct experience with the *Rabita* committees, but believed they had a good reputation in the community.

As to why the customary system was preferential, participants cited the length of time for a case to be resolved at the formal level; the cost involved in litigation; the complicated procedures; and the fact that it is against custom and tradition to immediately resort to the formal system.

## 5.2 Costs and Fees

Focus group participants cited the affordability of the customary dispute mechanisms as one of the main reasons for opting not to pursue the formal courts. 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.[270] Depending on the complexity of cases, "lawyer's fees may range from 1,000-10,000 Jordanian dinars."[271]

By contrast, resolution of land disputes through customary mechanisms entails few fees and provides most for cost-efficient results. The difficulty, however, is that land titles resolved through *sulh* procedures may be unrecognised by the PLA and, therefore, the transfer and disposition of the property may not be legally valid undermining any legal security of tenure.

[270] NRC interview with a local NGO worker, Gaza Strip, 16 October 2011.
[271] PA Land Disputes Study, *supra* note 5, p. 6.

## 5.3 Duration and Timeliness

Customary mechanisms have an additional advantage in terms of speed of resolution. In terms of land disputes, the average land registration case filed before a Court of First Instance "may require three years for an initial decision."[272]

Few disputes brought before the *mukhtars* in the Gaza Strip have been pending for more than a few months and the overwhelming majority of *sulh* procedures are resolved within a couple months.

**Table 8: How Long Has the Land Dispute Been Going On?[273]**

| | |
|---|---|
| **Less than one month** | 7.7 % |
| **1 – 3 months** | 61.5 % |
| **4 – 6 months** | 23.1 % |
| **More than 6 months** | 7.7 % |

**Table 9: Average Length of Time for *Sulh* Procedures in Land Disputes**

| | |
|---|---|
| **Less than one month** | 15.4 % |
| **1 – 2 months** | 61.5 % |
| **3 – 4 months** | 7.7 % |
| **More than four months** | 15.4 % |

## 5.4 Independence and Impartiality

Overall, the focus group participants felt that the actors within the customary dispute resolution system in Gaza were independent, impartial, and neutral. In three of the focus groups, the participants stated that the *Rabita* committees and *islah* men may be more independent than the *mukhtars* given that they are more removed from the family and clan structure.

## 5.5 Voluntariness of the Process

The focus groups largely found the *sulh* mechanisms and customary dispute resolution procedures to be voluntary, though some participants estimated that women might face pressure from their families in a small percentage of cases. Participants in one group expressed concern that the *Rabita* committees may pressure the weaker party to a dispute to reach an agreement to avoid the matter being taken to the police. The police themselves may detain parties to a dispute to compel compliance or acceptance of the *Rabita* committee ruling.

One *islah* man interviewed by NRC confirmed this level of coercion and explained that "sometimes they [the *Rabita* committee members] go to the police and inform them that a party to the dispute is intransigent and does not wish for a solution. Upon this, the police proceeds to bring the party in and pressure him to implement the decision of the *islah* men."[274]

## 5.6 Confidentiality

Three of the focus groups expressed no concerns about the ability of the customary dispute resolution system in Gaza to maintain adequate levels of confidentiality. Another focus group noted that it is

[272] *Ibid.*, p. 6.
[273] *Ibid.*, p. 65.
[274] Birzeit Report, *supra* note 44, p. 96.

generally difficult to keep details confidential within their small community, particularly if a dispute arose and was referred to *sulh* conciliation.

The final focus group indicated that matters may be maintained in confidentiality at the *mukhtar* level, but that confidentiality was more difficult if the parties embarked on a *sulh* conciliation process. It was generally believed that *islah* men will respect confidentiality in particularly sensitive cases, such as those involving honour. The *Rabita* committees were perceived as the least likely to maintain confidentiality as they do not know the disputing parties and would need to inquire within their respective communities.

## 5.7 Fairness of Outcomes

Participants varied in their beliefs as to the fairness of the outcomes. In two focus groups, one male and one female, participants had no concerns regarding the fairness of the customary dispute resolution mechanisms while another focus group estimated that outcomes are fair in 80 percent of disputes. Two focus groups expressed concern with the fairness of procedures if the police or *Rabita* committees attempted to pressure the parties to accept an agreement.

A separate field survey conducted by the PA found the majority of respondents viewed the *sulh* procedures as "unfair".[275]

## 5.8 Accessibility and Protection for Women

Gender dynamics are a significant concern in the customary dispute resolution sector. The system itself is highly patriarchal and "women are almost completely excluded from acting as mediators and as negotiators. Customary *sulh* procedures may fail to recognise a woman's legal right to inheritance, which under *shari'a* law is half the amount as her comparable male relatives. Instead, "under *urf* the adjudicators award it to their brother."[276]

One focus group discussed the issue of inheritance rights and the economic situation that has made it more necessary for women to claim their shares, often with husbands urging wives to fight for their share. For the women in that group, less than 30 percent would have claimed their inheritance rights before Operation "Cast Lead" whereas 50 percent said they would now be willing to do so.

[275] PA Land Disputes Study, *supra* note 5, p. 5.
[276] International Crisis Group, *supra* note 29, p. 8 n. 76.

# Chapter 6: Considerations for Engaging with Customary Dispute Resolution in the Gaza Strip

In determining whether and to what extent to engage with the customary dispute resolution mechanisms in the Gaza Strip, it is necessary to outline the opportunities and risks of such actions in light of the current context of the formal judiciary and the limited legal recourse available to most Palestinians in Gaza.

## 6.1 Opportunities and Benefits in Engaging with Customary Dispute Resolution

*Accessibility and General Legal Awareness of Standards and Procedures*

The process of legal awareness "relates to people's knowledge of the possibility of seeking redress through the justice system, who to demand it from, and how to start a formal or traditional justice process"[277] Based on NRC interviews and focus groups in the Gaza Strip, it appears that most Palestinians in Gaza are well aware of the *sulh* mechanisms and the various actors within the customary dispute resolution system.[278] *Mukhtars* and *islah* men are found in every community throughout the Gaza Strip and customary dispute mechanisms are readily accessible and available. The lower costs and timeliness of proceedings before the customary dispute resolution mechanisms likewise increase the accessibility of these procedures.

*Non-Functioning Formal Judiciary and International Boycott of Formal Courts*

Following the Hamas military takeover of the Gaza Strip in June 2007, the local authorities in Gaza established a parallel justice system. For example, at this time, the local authorities established a Supreme Justice Council to counter the High Judicial Council under the PA which is operational in the West Bank.[279] Most existing judges and lawyers in Gaza, who boycotted following the takeover, were replaced by Hamas appointees, many of whom had limited judicial background or training. As a result, the Palestinian Bar Association initially boycotted these new Hamas-appointed courts and many Palestinian NGOs continue to boycott the formal *nizami* courts.[280] International NGOs and donors present in Gaza likewise continue not to engage with the current formal court system.

Thus, the formal judiciary has yet to recover and public trust and confidence in the formal system remains deeply affected.[281] Given this context, the customary dispute mechanisms fill a gap created by the absence of a well-functioning formal court system.

*Training and Capacity Building of Customary Decision Makers*

Within the customary dispute resolution system in the Gaza Strip, there have been concerted efforts in recent years to provide training and capacity-building for many *mukhtars* and *islah* men. Among local organisations active within the Gaza Strip, PCDCR has one of the most established customary dispute resolution programmes and regularly works with local *mukhtars*. PCDCR has provided 10-day trainings in mediation and arbitration, and currently works with 120 *mukhtars* in providing ongoing mentoring and advice.[282] PCDCR has also conducted 22 training courses for police in the Gaza Strip

[277] UNDP, *Access to Justice in the occupied Palestinian territory: Mapping the Perceptions and Contributions of Non-State Actors*, *supra* note 9, p. 10.
[278] PA Land Disputes Study, *supra* note 5, p. 5.
[279] UNDP, *Access to Justice in the occupied Palestinian territory: Mapping the Perceptions and Contributions of Non-State Actors*, *supra* note 9, p. 23.
[280] *Ibid.* PCHR, however, does engage with the *shari'a* court system in the legal assistance it provides to women.
[281] UNDP, *Access to Justice in the occupied Palestinian territory: Mapping the Perceptions and Contributions of Non-State Actors*, *supra* note 9, p. 23.
[282] NRC interview with a local NGO worker, Gaza Strip, 16 October 2011.

and has worked on referring cases from police stations to mediation. In addition, PCDCR has been approached by *Rabita* committee members to provide trainings in mediation and arbitration.

International organisations have also engaged in trainings with customary dispute resolution actors. In October 2011, UNDP concluded its training course on "bridging the gap" between formal and customary dispute resolution systems. Sixty-four *mukhtars* from throughout the Gaza Strip attended the three-day training, which included sessions on mediation, arbitration, the Palestinian judicial system, and criminal procedure.[283] The goal is to develop a programme to transfer legal knowledge and better distinguish between arbitration, mediation, and negotiation. Recent publications by UNDP include training packets on arbitration, legal aid and empowerment for vulnerable groups in the Gaza Strip, criminal and civil procedures, and the jurisdiction of Palestinian judicial system.[284] To date, UNDP has not reached out to the Hamas-affiliated *Rabita* committees with regards to training programmes, largely due to its policy of restricted contact with the local authorities in the Gaza Strip.[285]

*Enforcement and Willingness of Disputants to Comply*

Enforcement represents the "key to ensuring accountability and minimising impunity, thus preventing further injustices."[286] While decisions before the customary system have no legal standing *per se*, "the law does give weight to out-of-court procedures and settlements, including agreement and reconciliation (*sulh*) between parties to disputes involving offenses against the person (e.g., wounding or killing), countenancing a limited reduction in penalties imposed on perpetrators."[287]

Even aside from formal legal effect, community pressure plays a significant role and parties frequently "accept the results because they believe they are bound to do so by social convention and by the status of the *sulh* members or mediator."[288] The binding effect and enforceability of the customary system "does not derive from the decision of the conciliation committee but from the endorsement and acceptance of the *jaha* (a delegation of respected men from the community) representing the party in the dispute. The family, not the members of the conciliation committee itself, is what counts for the party to the dispute. No individual needs to risk the exclusion of his own family if the decisions are not respected."[289] Moreover, many clans themselves have their own militias with which to enforce rulings.

*Coordination and Complementarity with the Formal Judiciary*

The customary system is "generally accommodated by the state-run court system. If the parties reach an agreement, they can inform the court and drop any legal proceeding that may exist; in criminal cases, the courts may choose to dismiss a case if a mediation settlement is reached."[290] For example, a formal judge may mitigate a criminal penalty based on the *sulh* settlement between the parties. However, there is a potential risk that legal rights under the formal judiciary may be impacted by parallel proceedings in the customary dispute resolution system and "[i]n some cases, undertaking customary dispute resolution procedures obviates the intervention of the police and the state prosecutor, and consequently the judiciary, from hearing the case."[291]

[283] "Bridging the gap between formal and informal justice – conclusion of training course for 64 *mukhtars*", 12 October 2011, available at http://www.aswarpress.com/ar/news.php?maa=View&id=31779 [Arabic] [last accessed January 2012].
[284] NRC interview with a UN worker, Gaza Strip, 16 October 2011.
[285] *Ibid.*
[286] UNDP, *Access to Justice in the occupied Palestinian territory: Mapping the Perceptions and Contributions of Non-State Actors*, *supra* note 9, p. 10.
[287] Welchman, *supra* note 14, p. 16.
[288] PA Land Disputes Study, *supra* note 5, p. 5.
[289] Khalil, "Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law", *supra* note 41, p. 25.
[290] Ludsin, *supra* note 4, p. 455.
[291] Salem, *supra* note 207, p. 8.

Formal *nizami* courts may formally validate *sulh* settlement agreements and the customary decision then carries the same authority as a court ruling.[292] One judge stated that, where a *sulh* deed had been signed by the parties, the court would be reluctant to set aside the agreement.[293] It is also not uncommon for the court and police to consider an *'atwa* agreement in determining prosecution and punishment and judges may "mitigate the sentence to the minimum prescribed penalty during *sulh* procedures."[294] While formal court judges will generally recognise and uphold such customary agreements, there is no obligation that they do so.[295]

## 6.2 Risks and Disadvantages in Engaging with Customary Dispute Resolution

*Inconsistent and Contradictory Application of Legal Principles*

Even where Palestinians are generally aware of the customary procedures, there are no written standards or consistent practices. One lawyer identified this as one of the main drawbacks to the customary dispute resolution system, namely that the actors do not know and do not apply the law. Decisions based on '*urf* are often simply decisions based on "what I perceive".[296] As a 2006 Birzeit University study on the customary dispute resolution system in the oPt noted: "[T]he interpretation of ['*urf*] principles differs from place to place and from one person to another. This is certainly in contradiction with the rule of law which requires a legal text that is clear, established and defined, in order that legal text not be subject to different interpretations. The publication of the law – meaning its publicity and making it available to the people, which is a condition to guarantee the rule of law – is not met by the informal justice system".[297]

*Unsuitability for Complex Legal Disputes*

An additional problem is that even determining the applicable law in Gaza is difficult given the complicated historical background and current political environment. Customary methods of dispute resolution, "while suitable for social and family disputes, are not ideal for complex, commercial and international disputes."[298] Land law is particularly complex and even legal practitioners may have difficulty understanding the applicable provisions.

*Non-Compliance with Due Process and International Human Rights Standards*

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."[299] With regard to the *Rabita* committees, two lawyers interviewed by NRC stated that they had initially referred clients to these committees, but stopped doing so in 2008 after they were convinced that binding arbitration decisions were being issued without compliance to Arbitration Law No. 3 and therefore did not afford the parties adequate legal protection.[300]

*Sulh* conciliation is designed and intended as an instrument "for the application of equity, rather than the rule of law, and as such cannot be expected to establish legal precedent or implement changes in

[292] NRC interview with a local NGO worker, Gaza Strip, 16 October 2011.
[293] NRC interview with a Gaza High Court Judge, Gaza Strip, February 2011.
[294] Khalil, "Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law", *supra* note 41, pp. 18-19.
[295] NRC interview with a local NGO worker, Gaza Strip, 16 October 2011.
[296] NRC interview with a practicing Gaza lawyer, Gaza Strip, January 2011.
[297] Birzeit Report, *supra* note 42, p. 137.
[298] Davis, Katbeh, and Maghzi-Ali, "Creating a Commercial Dispute Resolution Center in the Palestinian Territories", *supra* note 226.
[299] PA Land Disputes Study, *supra* note 5, p. 5.
[300] NRC interview with two practicing Gaza lawyers, Gaza Strip, January 2011.

legal and social norms."[301] The admissibility of evidence in customary dispute resolution generally falls short of accepted standards and "the use of legally unrecognized mechanisms as evidence undermines the right to due process, the presumption of innocence and the right to legal representation."[302] For example, one *islah* man interviewed by Human Rights Watch stated: "I have the ability to determine if a woman is lying or telling the truth. My experience has shown me that I can tell the truth by looking in her eye. In the absolute majority of cases involving women, the woman's deviant behaviour is the reason for her death. A man does not punish or kill a woman without a reason."[303]

*Discrimination Against Women and Vulnerable Members of Society*

In situations of gender-based violence, the customary system may also be ill-equipped to protect women's interests and *islah* men "rarely get involved in cases within families, but focus instead on conflicts between families or clans. The traditional conflict mediation system does not, therefore, lend itself to protecting woman [sic] from violence within families."[304] However, in so-called "honour cases", there are cases where "the conflict mediators will attempt to negotiate a solution whereby the family guarantees the woman's safety, or they find a relative who will take the woman in and protect her."[305]

The priority in many disputes is the protection of the family's reputation and honour, often at the expense of women's individual rights.[306] Women "who report abuse to the authorities find themselves confronting a system that prioritizes the reputations of their families in the community over their own well-being and lives."[307] Police officers may directly refer domestic violence cases to clan leaders for mediation and "[a]s this system is nonjudicial and non-regulated, there is no way to ensure that a woman's legal rights will be upheld."[308]

*Lack of Oversight and Accountability*

Oversight judicial mechanisms include "watchdog and monitoring functions that civil society actors or parliamentary bodies perform with regard to the justice system"[309] The reality is that, in the Gaza Strip, there is little oversight to either the formal or customary judiciaries. There is some concern that the already-struggling formal system is being undermined and substituted with customary mechanisms, for example, through direct police referrals of criminal cases to the *Rabita* committees with no procedural guarantees, no due process rights, and no right of appeal.

*Political Affiliations*

Many customary dispute resolution actors have direct government connections and enforcement of their decisions through the local security services, though, as discussed, they ultimately remain largely unaccountable to the Palestinian population. *Islah* committees are often grounded in the offices of a particular political party and lack independence.[310] Often, it is the formal backing of the state actors, who may not directly intervene, that ensures the activities of the *Rabita* committees are respected and powerful, rendering them essentially quasi-state actors.

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[301] USAID, *Alternative Dispute Resolution Practitioners' Guide*, *supra* note 174, p. 3.
[302] Salem, *supra* note 207, p. 7.
[303] Human Rights Watch, *A Question of Security*, *supra* note 75, pp. 71-72.
[304] Landinfo Study, *supra* note 16, p. 17.
[305] *Ibid.*
[306] Khalil, "Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law," *supra* note 43, p. 28 n. 46.
[307] Human Rights Watch, *A Question of Security*, *supra* note 75, p. 5-6.
[308] *Ibid.*, p. 72.
[309] UNDP, *Access to Justice in the occupied Palestinian territory: Mapping the Perceptions and Contributions of Non-State Actors*, *supra* note 9, p. 10.
[310] *Ibid.*, p. 10.

*Compromising Individual Rights*

One final issue is that the *sulh* conciliation does not recognise individual rights and "does not view the individual as an autonomous agent; suspects or individuals in disputes are dealt with through the agency of their immediate kin, and in some cases, a wider circle of relatives."[311] To some extent, this collective perspective is justified given that vengeance may be directed at an entire family and "[a]ll members of the wider family suffer by implication from the retaliation...and any member of the family is a possible target for acts of vengeance."[312] Dispute resolution system may have "helped stop retaliations."[313] The sacrifice of the individual voice to the collective may act as a protective measure, but may conversely affect the rights, freedoms and responsibilities of the individual in a negative and disproportionate way.

*Family and Clan Influence*

The informal justice system frequently reinforces existing social hierarchies and power structures. The social standing of parties has an impact on outcomes and "[t]he size of the *hamula*, its economic position, and the nature of its relationship with political factions and PA institutions all constituted important elements in influencing the formula and content of decisions in informal justice."[314] The *islah* men themselves typically come "from relatively wealthy, large families or clans, and...had extensive networks of social and political relationships."[315]

*Mukhtars* and *islah* men may feel obliged "to appease the stronger party in a conflict, the party whose family has more social clout and is apt to wreak havoc on the weaker party until it receives satisfaction. Judges want to prevent such disorders and, therefore, often feel compelled to side with the party that has brought the most pronounced delegation, both in terms of numbers and in terms of the prestige attributed to the different notables."[316] One field study found that often "people did not want mediation, as they would be forced to take less than they wanted. Mediation would have favoured the status quo and the stronger party in the dispute."[317]

One human rights activist in Gaza stated, "If you're from the Dughmush, you have more rights than a refugee. So the principle of equality is absent."[318] Another study found that the majority of respondents doubted the ability of clan-based informal systems to deliver justice, with one participant pointing "to the fact that many people go to the formal justice system to cancel rulings made by clan-based judges."[319]

[311] Lisa Taraki, "Palestinian Society: Contemporary Realities and Trends", *Palestinian Women: A Status Report*, 1997, pp. 17-18.
[312] Khalil, "Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law", *supra* note 41, p. 26, n. 45.
[313] *Ibid.*, p. 22.
[314] Khalil, "Formal and Informal justice in Palestine: Dealing with the Legacy of Tribal Law," *supra* note 43, p. 26.
[315] Salem, *supra* note 207, p. 10.
[316] Terris and Inoue-Terris, *supra* note 59, p. 487, n. 149.
[317] Kelly, *supra* note 63, p. 13.
[318] International Crisis Group, *supra* note 29, p. 8 n. 76.
[319] UNDP, *Access to Justice in the occupied Palestinian territory: Mapping the Perceptions and Contributions of Non-State Actors*, *supra* note 9, p. 24.

## Conclusion

Today, the role and influence of customary dispute resolution in the Gaza Strip has never been stronger. Though precise statistics are unavailable, several practitioners estimated that 90 percent of disputes are currently resolved through customary mechanisms. The historic fostering of clan structure through the Ottoman, British, and Israeli authorities has only been increased under the PA and since the second Intifada.

*Sulh* conciliation serves an essential role in the absence of a functioning judiciary. However, this customary dispute resolution system is, in many respects, a double-edged sword. It does provide stability in situations of state breakdown, all too common in the Gaza Strip, yet it may prove discriminatory towards women and those from less well-known clans. However, inequality pervades the formal courts system as well and women in Gaza do not necessarily feel their rights would be better protected under the formal judiciary.

The role of customary justice in Gaza 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. For many in Gaza, the current formal judiciary is seen as something temporary and subject to drastic change depending on the larger political situation.

The recent prominence of the *Rabita* committees in Gaza has likewise elevated the role of customary dispute resolution and raises significant rule of law concerns as well as protection concerns for women and marginalised populations. Rather than traditional mediation and decisions reached by consensus amongst the parties, the *Rabita* committees increasingly operate as binding arbitrators with enforcement mechanisms through the local authorities. Through these *Rabita* committees, the customary dispute resolution system has become increasingly recognised by the authorities and is becoming more directly and formally linked to the existing formal judiciary system.

Customary dispute resolution has historically incorporated both religious and customary traditions in its practices. However, under the *Rabita* committees and the related *shari'a*-based arbitration, both headed by the Palestine Scholar's League, the shift has been increasingly towards reliance on Islamic legal principles.

Practically speaking, the overwhelming majority of disputes in the Gaza Strip are resolved through customary mechanisms and the influence of customary dispute resolution in Gaza therefore cannot be ignored. The Gaza customary system does provide cost-effective and relatively quick resolutions to disputes that the formal judiciary is unable to offer. The customary system may also be better suited to serve geographically dispersed and rural populations as well as provide access to justice for the poor and illiterate.

Despite its flaws, the customary dispute resolution sector has "protected Palestinians during the absence of a functioning judicial system." [320] Customary mechanisms are able to function even in the absence of a centralised authority, "[w]hereas the performance of the courts is predicated on a minimum degree of political stability."[321] Following the division between Fatah and Hamas in 2007, one legal expert candidly stated that "the regular courts and prosecutors' office were almost entirely

[320] UNDP workshop report, *Supporting the Rule of Law and Access to Justice in the Occupied Palestinian Territory*, supra note 35, p. 11.
[321] Salem, *supra* note 207, p. 9.

moribund. Cases went either to a clerk's drawer or the *lijan al-islah* [islah committees]."[322] These traditional mechanisms have limited recourse to vengeance and self-help, though there remains a risk that these customary procedures have simply become a replacement or substitute to a formal judiciary.

While it is important to engage with the customary dispute resolution system in undertaking any legal programme in the Gaza Strip, it should be done so in a manner which complements court reform of the formal judiciary and does not undermine the formal system. The goal should be to better prepare and educate these existing community leaders, which includes the local *mukhtars*, *islah* men, *islah* committees, and even *Rabita* committees, and increase civic engagement.

Moreover, any engagement with the customary system must be clear to distinguish between the types of cases which would be appropriate subject-matter before a *mukhtar* or *islah* man. Customary dispute mechanisms are increasingly called on to resolve criminal matters, including murders, assaults and rape, which for reasons of due process and the fundamental role of the state in prosecuting crimes should fall outside the ambit of customary resolution mechanisms. At present, customary mechanisms utilise elements of negotiation, conciliation and arbitration, but there is often little clear division between the actors involved or the mechanisms employed. To effectively engage with customary mechanisms, these distinctions should be clarified and any binding arbitration should only be facilitated through the assistance of a trained and qualified arbitrator.

For agencies and individuals engaging with customary mechanisms it will be critical to have a clear understanding of the advantages and disadvantages of the various mechanisms. This is particularly the case for vulnerable groups or individuals, including women, persons from less powerful families or tribes and other marginalised persons. Whilst individuals may feel they have little choice but to engage with a particular mechanism in some situations, an information and empowerment strategy will allow them to maximise the possibility of the most favourable outcome. Full and informed consent is a key objective. A second key objective is to ensure that basic standards of fairness, including due process, equality of participation, gender perspectives, right to use and enjoyment of property and anti-discrimination protections are incorporated to the extent possible.

[322] Quoted in International Crisis Group, *supra* note 29, p. 9.

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# Appendix 1: Perceptions of Focus Group Participants Regarding Customary Dispute Resolution Mechanisms in the Gaza Strip

| Focus Group | Impartiality | Voluntariness | Confidentiality | Fairness of Outcome |
|---|---|---|---|---|
| **10 Women 1 February 2011** | Between 40 and 80 percent of *mukhtars* are independent, impartial, and neutral. The participants stated that the *islah* men in their community worked from the *Rabita* committee office and there was general agreement that *Rabita* committee members are more independent and neutral than *mukhtars*. | Only 5 percent of disputes proceed to the customary dispute resolution. The process and results are voluntary and there is no pressure exerted on the parties. | The mechanisms are confidential. | Eighty percent of cases reach a fair decision. In their impression, *Rabita* committee members try to secure the rights of women. |
| **8 February 2011**<br><br>**12 Women** | The participants had no personal experience with *Rabita* committees, but stated that they generally have a good reputation within their communities. Most *mukhtars* are perceived as impartial and independent, though there is some level of corruption. In general, *islah* men tend to be more neutral as they are not always direct relatives or family members. | The process is completely voluntary and there is no pressure exerted on the parties. | The participants noted that it is generally difficult to keep any matters confidential in their small community, particularly when disputes arise. | Consensus was that the decisions reached were fair to both parties. |
| **8 February 2011**<br>**8 Men** | *Mukhtars* are not necessarily independent or impartial and many have their own vision of how to resolve a given dispute. *Islah* men and *Rabita* committee members may be more independent and neutral as they are not always family members. | All customary dispute resolution mechanisms are considered to be voluntary. | Matters are more likely to be kept confidential with the mukhtars, who already know the families. *Islah* men will work to maintain confidentiality in particularly sensitive matters, e.g. cases involving honour. *Rabita* committees are least likely to maintain confidentiality as they do not know the disputants and need to ask community members for information. | It was felt that outcomes in cases involving *mukhtars* are less fair than outcomes involving *Islah* men and *Rabeta* committees. |
| **10 Feb 2011**<br>**9 women** | The participants perceived both *mukhtars* and the *islah* men to be independent, neutral and impartial. The participants were unfamiliar with the *Rabita* committees and, to their knowledge, had no experience with these committees. | Participation is generally voluntary and no pressure is exerted on parties. However, if a matter is referred to the police, the parties could be forced to accept a solution against their will and consent. | The customary dispute resolution mechanisms maintain confidentiality. | Outcomes are generally fair, unless the matter involves the police, in which case it may not always be a fair result. |
| **10 Feb 2011**<br>**10 men** | The customary dispute resolution actors are perceived as independent, impartial and neutral. The *islah* men in their community are believed to be *Rabita* committee members. | The weaker party may be pressured to reach an agreement by the *Rabita* committees, who exert more pressure that the *mukhtars* in their community. Police may exert pressure to resolve disputes by detaining the parties until an agreement is reached. *Mukhtars* would be less likely to approach the police and 90 percent of disputes are resolved through the *mukhtars.* | It was felt that the mechanisms are confidential. | The outcomes are perceived as fair, even though there may be some pressure exerted in resolutions before the *Rabita* committees. |

## Appendix 2: Case Study

*The following case study is based on interviews conducted in the PCDCR offices in Gaza City on 24 October 2011. Though the legal issues focused on inheritance and common ownership, the case raises concerns regarding violence against women, the independence of police and security services, and adequate protection for vulnerable populations.*

In a conference room in PCDCR's Gaza City office, SH sat with her brother and four *islah* men. In a separate room down the hall, SH's brother-in-law, AB, waited. The two parties refused to sit in the same room with one another, but had come to PCDCR in hopes of resolving a five-year long housing dispute.

The residential property in dispute consisted of a two-story house in Beit Hanoun, in the northern Gaza Strip, the ground floor of which was rented to an unrelated tenant. The upstairs level included two apartments: a front apartment, which was occupied by AB and his family, and a back apartment, in which SH and her family lived.

In 2006, SH's husband, M, died, leaving her with six children: four daughters and two sons. Prior to his death, SH and her husband had purchased their apartment and she obtained full legal title. The rest of the property belonged to her mother-in-law, who has since died.

Following the death of her husband SH contended that her brother-in-law AB pressured her to move out, claiming that he built the house and was the true owner. At some point, SH claimed she offered to purchase AB's apartment from him, but he refused. Over time, the tensions escalated. AB prevented SH's children from playing outside on the ground floor or using the front entrance. SH was prevented from receiving any guests in her home since entry through her front door required visitors to walk past AB's apartment.

According to SH, the dispute eventually turned violent. One night, AB and her other brothers-in-law entered her apartment without permission and began cursing and physically threatening her. After this incident, she approached a family *mukhtar* to meet with AB. The *mukhtar* blamed SH and told her to control her children and prevent them from running around. This *mukhtar* also told her that even though she was the legal owner of her apartment, she had no legal claim to any of the moveable property within the apartment. SH told the *mukhtar* that she should be entitled to shared ownership of the entire building since she inherited on behalf of her husband and her children when her mother-in-law died. This *mukhtar*, however, did not recognise her right to any amount of the inheritance.

SH next approached the police station to report that her brothers-in-law had forcibly entered her apartment without permission and threatened her. The police arrested AB and at this point, AB's wife approached SH to start *sulh* conciliation and request forgiveness so AB could be released from jail. Before *sulh* conciliation could begin, AB was released from police custody. SH believes that his release was only secured because he had a relative working at the police station.

Following his release, AB broke into SH's apartment with his brothers and carrying a gun. SH and her brothers were in the apartment at that time as AB broke the door down, cursing SH and threatening her brothers and children. The police were called to the house and arranged safe escort for SH and her family.

AB and his brothers were arrested and taken to the police station. Two family *mukhtars* were called at this time and the brothers-in-law agreed to pursue *sulh* conciliation with SH. A third *mukhtar*, married to SH's sister-in-law, directly intervened at this time without being requested to do so by either party. This third *mukhtar* physically blocked the main entrance to SH's apartment, which was the door AB had broken down. The *mukhtar* claimed this was to avoid any additional violence between the parties

and refused to reopen this door despite SH's repeated requests. For the past three years, SH has been unable to use this front door to her apartment and has been forced to access the home through the back entrance.

During the past three years, AB would continually pressure SH to leave by cutting off her electricity and water and she regularly needed to contact a *mukhtar* to intervene and re-connect her utilities. If her children went outside to play or were near AB's front apartment, they would be shouted at by their uncles and cousins.

She went to the police station several times regarding the electricity and her front entrance and was told to attempt conciliation with AB. She also pursued recourse through the formal courts to assert her rights to inheritance as well as to a portion of the rental income from the ground floor apartment. AB kept the full amount of the rent and SH felt she should be entitled to some fraction of the income. The formal courts also just suggested that SH attempt a conciliation and mediation.

It was at the courthouse where SH first learned of PCDCR and the dispute resolution services it provides when she met a lawyer there who referred her to PCDCR for resolution. SH was concerned that the formal courts might take years to bring any results and so she agreed to meet with PCDCR. Social workers and lawyers from PCDCR met with SH twice to determine what she wanted from an agreement as well as what she was and was not willing to accept.

An *islah* committee was contacted at this time, all four of whom sat with SH in the PCDCR conference room on the day of the meeting. This was the first face-to-face meeting of the *islah* men with SH. All four *islah* men were also *mukhtars* and had received training in arbitration and mediation. Before meeting with SH, the *islah* committee went to the Beit Hanoun community where she and AB lived to learn more about each party. Community members advised the *islah* men not to directly meet with AB or go to his home. Instead, this *islah* committee approached several *mukhtars* from the Beit Hanoun area and asked them to intervene with AB on their behalf. AB was contacted and he stated a willingness to come to PCDCR's office to resolve the longstanding dispute.

During the meeting with SH, the PCDCR social worker asked SH whether she had the financial ability to purchase the apartment from AB and whether she would be willing to do so. If she agreed to purchase his apartment, the PCDCR social worker proposed that an appraisal of the fair market value of the property be conducted. Three separate appraisal teams would assess the value and the agreed price would be the average of these assessments.

From this accepted appraisal, SH would be entitled to two separate shares. The first was the apartment she purchased with her husband that was hers alone and for which she enjoyed full and exclusive ownership. The second was her share of the building which she was entitled to receive as inheritance upon her mother-in-law's death. PCDCR would deduct the value of these two shares from the total building appraisal and SH would pay the remainder of the property value to AB and purchase his shares. If SH agreed to these terms, PCDCR would execute an arbitration agreement binding her and AB and both parties would agree to abide by the decision.

The question of the electricity was raised as a concern by SH. No payments had been made on electricity for this property since 2000 and there were estimated accrued costs of 10,000 Jordanian dinars (about $14,050.00 USD). Issues related to utilities have become relatively common in land disputes in the Gaza Strip and many Palestinians have made no electricity payments for years. Utility workers had recently begun threatening to disconnect the electricity if full payment was not made. SH stated that she was not willing to accept full payment for all electricity charges and it was agreed that these costs would also be divided according to each party's share. Electricity costs would be divided according to family size and usage.

SH agreed to pursue the arbitration. When the *mukhtars* asked whether she would be willing to sign the forms in the presence of AB, however, she stated that she still did not want to be in the same room

as him. The *mukhtars* assured her that they were on her side and that it would be for her benefit to formalise the process with AB and resolve the dispute as quickly as possible. Eventually, it was agreed that the parties would separately sign the arbitration agreement that day and the next step would be working towards a face-to-face meeting and conciliation.

In the room across the hall, AB sat with his family *mukhtar*. PCDCR informed him of the arbitration terms to which SH had agreed. He became upset at the issue of electricity and felt there was no way the appraisal could adequately assess how much electricity each household used or could take into account different types of usage. His *mukhtar* and two PCDCR employees attempted to calm him down and AB eventually agreed to the proposed arbitration, including his share of electricity. If SH was able to purchase his share of the property value, AB and his family would leave the building. AB had purchased vacant private land outside the town and he would build a new home there.

According to AB, PCDCR contacted him a week earlier. He was familiar with the organisation and was willing to meet with them. This was his first time in their offices. He claimed that the dispute began five years ago when his brother died and that he wanted to finally resolve the matter. At the time, he offered to allow SH to purchase his apartment from him, but she refused. She likewise refused his offers to purchase her apartment. AB claimed that the problems emanated from the people who surround SH and that she became a "strange" person after her husband's death. At one point, SH received an offer of marriage and she claimed that AB was preventing her from accepting the opportunity. AB said this was never the case and the question of whether she remarried was for her and her own family to decide, not him.

In his opinion, SH believes "everyone is against her" and no one is on her side. When asked his view on the agreement reached through PCDCR, AB stated he was happy to be moving to a new home and also glad that his brother's children would have a peaceful home in which to live. The conflict had been difficult for his family and it is particularly hard for his children to not be able to play or even speak with their cousins.

The arbitration agreement, a copy of which is on file with NRC, was read aloud by the PCDCR lawyer and explained to the parties. Each party separately signed the arbitration agreement in the presence of their respective *mukhtars* and the PCDCR lawyer. Under the terms of the arbitration, a decision will be issued in three weeks after the appraisals were undertaken. The arbitration would be conducted in PCDCR offices and would be solved by *sulh* conciliation. All arbitrator fees and expert witness costs would be split evenly by the parties. Any issues not specifically addressed by the arbitration agreement would be conducted in accordance with Arbitration Law No. 3 (2000). The agreement would be final and enforceable.

Thereafter, a contractor accompanied by a PCDCR lawyer appraised the price of the land and the home at issue and prepared a report that was submitted to PCDCR in December 2011. PCDCR also sent an engineer, also accompanied by one of their lawyers, to prepare an appraisal report that was submitted to the organisation in January 2012.

PCDCR lawyers then proceeded with finalising the resolution of this dispute according to arbitration procedures. They asked SH to prepare a claim of all her legal rights (shares) to the land and property, which she submitted to the arbitration committee. The committee then sent a copy of this claim to AB for his review and reply, which was due in late February 2012. Further sessions between SH and AB before the committee will then be held as needed in order to finalise all issues and procedures.