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par Asem Khalil

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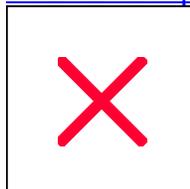
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1

AFIGHT TOOK PLACE between cousins, in which they disputed the borders of their respective landholdings. Many were injured, including a young man who happened to be passing by [1] The author wishes to thank all those who commented... [1]. He was shot in his spinal column, causing permanent and complete paralysis (Case 1). Following a dramatic car accident, two girls died. The police held one of the drivers responsible for the accident (Case 2). A driver ran over a mother and her child. Both were badly injured. Both needed surgery in private hospitals, incurring great expenses (Case 3). A dead body of a pastor was found. After initial investigation, the suspect confessed to killing the pastor. He explained that he did so because the later saw him engaging in a homosexual relationship and threatened to tell everybody about it (Case 4). One person was killed in error by shots fire from a gun of his colleague, a member of the security forces (Case 5). A person was killed by gunshot during a fight (Case 6). A man killed his wife with the help of his mother; it emerged later on that a dispute has arisen about the wife's gold (Case 7). A girl accused a young man of trying to rape her; her family attacked the property of the young man's family, burning houses and shops (Case 8). Two persons were injured after a fight between relatives (Case 9). [2] For more details about case studies, see Institute... [2]

2

The above incidents involved different persons, from different backgrounds, families, ages and sex. They caused different levels of tension between individuals and communities. All occurred in various parts of the West Bank (WB), including East Jerusalem, and the Gaza Strip (GS), [3] The title of the paper uses the term 'Palestine', as... [3] in the years that followed the establishment of the Palestinian Authority (PA), in 1994.

3

Similar incidents are serious enough to merit the state's attention and intervention, in order to enforce state law. In the WBGS, however, the PA justice system was not the only mechanism of conflict resolution that was put in motion. In all the above cases, in fact, a conciliation process, which was referred to as 'tribal', went hand in hand with, and sometimes worked even independently from, the formal justice system. This conciliation process thought to apply binding rules, which do not originate in the state nor are enforced by it i.e. a system of tribal or customary law. [4] Unless specified differently, I will use both words... [4]

4

Informal justice refers to the social phenomenon consisting of settling disputes between litigants outside state courts, the formal justice system. 'Tribal judges' are the main actors of tribal justice. In recent years, though, conciliation committees were established, [5] For more about the difference between tribal judges... [5] sometimes spontaneously, but most of the time, through the direct intervention of the PA, most specifically the executive authority, [6] For more about the role of PA

executive authority and... [6] or even by political factions. [7] Institute of Law... 2006, pp. 123-126. [7] 'Tribal conciliation' is used to describe both the process and the outcome of the conflict resolution carried out by tribal judges or by conciliation committees. [8] In this paper, actors or representatives of informal... [8]

5

This paper considers legal pluralism in the WBS as a way to understand legal phenomena, and the state's [9] The 'state' here refers to the political organization... [9] attitude towards non-state normative orderings. It describes the advantages and inconveniences of the coexistence of formal and informal justice in the territories under the PA control, as well as the influence of each system on the other. The aim of this paper, nevertheless, is not to establish boundaries between state-law and customary law. Rather, it aims at showing that both categories of law are in evidence, and hence that a multitude of normative fields can coexist within a society.

6

It should be noted, though, that despite my use of data and cases collected during field research conducted by researchers with sociological and legal backgrounds, [10] The field research and interviews were conducted by... [10] my approach to the issues raised in this paper remains largely theoretical. It is not my objective to reproduce cases, arguments and conclusions considered in the field research; [11] One can see the report published by the Institute of... [11] rather, my objective is to continue the debate and reflect on the questions raised in the field research in my capacity as an outside observer and a jurist, not as a sociologist or anthropologist.

State Law vs. Customary Law

7

Regardless of the attitudes one may have towards the origins, content and nature of both state and non-state law, and towards legal pluralism as a theory whose credo is that there are various kinds of normative orders not dependent on the state but that nonetheless can be considered as law [Tamanaha 1993: 193], there can be no doubt that there is more than one 'set of rules' that coexist and often overlap in the WBS. Pluralism is the characteristic of both state and non-state law in Palestine.

LEGAL PLURALISM IN PALESTINE

8

The set of rules applicable in the tribal conciliation process is often referred to as 'tribal law'. However, 'customary law' which comprises, but not limited to, tribal traditions, seems more appropriate. As I will show later on, contemporary Palestinian society, in which the above incidents took place, cannot be considered tribal. Customs are also developed by settled and town communities. What is at stake, then, are kinship groups, composed of extended families, that have only formal and sporadic influence, often conceived as a way to meet contingencies.

9

In negative form, customary law may be described as non-state produced law. It will appear throughout this paper that this term is not appropriate for describing customary law in the Palestinian case. A positive description of customary law, however, may consider it as set of rules that have originated from a social field or space, that is not completely autonomous from the state, but which is also not completely dominated by it, i.e. a ‘semi-autonomous social field’, in the way described by Sally Falk Moore [1973].

[10](#)

Using the term ‘law’ when referring to customs, however, is problematic, since, as pointed out by Simon Roberts [1998: 95] it enlarges the concept in a way that extends it to various sets of norms. The concept of ‘legal pluralism’, as a way to describe a situation, in which two or more legal systems coexist in the same social field [Merry 1988: 870], [12] For more about legal pluralism, see L. Pospisil [1971],... [\[12\]](#) is an adequate tool to understand the nature of those norms applicable by tribal judges and conciliation committees, and for speculation over the reasons behind individuals’ compliance.

[11](#)

One of the consequences of the acceptance of legal pluralism is the shift from legal centralism – a predisposition to accept all legal ordering as rooted in state law [Merry 1988: 889]. In such a context, the dialectic between various normative orderings determines the way law is produced, enforced, and accepted. Understanding the dynamic interactions among these separate systems of ordering is a central problem for law and society research [Merry 2004: 570], a field of research to which this paper seeks to contribute.

THE PALESTINIAN LEGAL SYSTEM

[12](#)

The legal system of the WBGS under the PA is a mixture of Ottoman, British, Jordanian, Egyptian, Israeli, and finally PA laws. Each regime supersedes the previous one without completely abolishing its legal system. The succession of states that governed Palestine was always accompanied by changes in the legislation and in the court system [Khalil 2003: 5-54 and 2006: 210-216].

[13](#)

Personal status issues were regulated by religious communities themselves. A partial process of codification of personal status took place (such as marriage and divorce and hereditary rules), largely influenced by the Hanafi Islamic Law School [Welchman 1988 and 2003]. During Jordanian and Egyptian control of the WBGS respectively, personal status laws were endorsed by state authorities. [13] Family Rights Law no. 92 of 1951, replaced by Personal... [\[13\]](#) Those codes, however, apply only to Muslims. Palestinians who were Jewish or Christian continued to be ruled by their respective personal status laws, adopted by religious or ecclesiastic authorities. Nowadays, there are more than thirteen Christian communities and one Jewish community (Samaritans), with different personal status laws and different court systems. [14] Some of the personal status laws and regulations of... [\[14\]](#)

14

Most importantly, the separation between the WB and the GS between 1948 and 1967 polarized the differences even in the legal cultures. The WB legal system can be qualified as a civil law or continental European law system, while GS, with most of British Mandate law intact, was much closer to a common law system.

15

In 1967, both parts of the WBGS fell under Israeli occupation. Israel did not only maintain the differences in the legal systems of both WBGS, it enhanced and institutionalized them. Thousands of military declarations and orders are issued separately for WBGS, and the court system was further weakened by the creation of separate (Israeli) military courts [Shehadeh 1982 and 1988].

16

This is the historical legacy on which the PA started its establishment. The PA started immediately a process of law-changing, with at least one clear legislative policy: legal unification. [15] See Decree no. 1 from Tunisia in 1994. [15] Legally speaking, however, the PA itself is not a state but started to produce laws and bylaws, much as states do. The court system it reorganized is similar to a state's courts system. Religious/Shari'a courts kept their independence and a High Constitutional Court was established by the law. [16] The PA Basic Law of 2003 provided for the establishment... [16] Military courts, responsible of adjudicating military-related crimes, continued to apply the Revolutionary Penal Code and the Revolutionary Penal Procedural Law, endorsed by PLO in 1979.

17

A regular court system is empowered to judge both civil and criminal affairs. The first instance of adjudication is done by Magistrate Courts or the Courts of First Instance, depending on the issue at stake or its value. The second instance is judged by the Court of Appeal or by the Court of First Instance (depending on the court that ruled in the first instance). The High Court consists of the Court of Cassation which is the final level of adjudication and of the High Court of Justice which is the only instance and level to decide administrative disputes (unless otherwise provided by the law). [17] See article 6 of (PA) Judicial Authority Law no. 1... [17]

TRIBALISM IN PALESTINE

18

One can hardly deny the fact that tribal law is relevant in Palestine. Local newspapers continue to publish on a regular basis, deeds of *sòulhò 'asha'irā* (tribal conciliation) or *'atwa*, [18] *'atwa* is the public admission of guilt by the perpetrator... [18] which are, respectively, the final act of the conciliation process, or a step towards it. Different narratives may explain this fact. Some believe that it is the consequence of external factors, such as the Israeli occupation, or the control of alien authorities in general, which has been the case for Palestine for decades. The promotion of state apparatus and officials, the PA included, is believed to be another external factor, especially if accompanied by the weakness of the overall state system, particularly the judiciary. Others give a

totally different account. They believe tribal conciliation is relevant in Palestine because Palestinian society is 'tribal'. Tribal law, according to this account, can be described as the genuine expression of the society itself rather than an artificial tool of the state. [19] Institute of Law... 2006, p. 146. [19]

[19] One finds it difficult to negate the impact of external factors on the development of alternative dispute settlements. The second argument is less convincing, though. Indeed, it is one thing to say that tribal law exists in Palestine or is relevant in the daily lives of Palestinians; but it is quite another to say that Palestinian society is tribal. But, what does 'tribal' mean? To say that a particular society is tribal means that tribalism is a main or significant regulator of social relations in that society, or that it is a determining factor for opportunities open to members of that society. [20] Institute of Law... 2006, p. 166. [20] *Ashariyya* (tribalism) is derived from *ashīra* (tribe), which is often used indistinguishably to refer to existing or assumed kinship structures in a society. What is referred to as an *ashīra* in contemporary Palestine has rarely kept the historical connotations of tribes in the remote areas of Palestine. [21] It could be argued that there are exceptions in the... [21]

[20] *Ashīra*, as much as *hòamūla*, often refers, more or less, to extended families. Accordingly, *ashariyya* in Palestine is no longer, or at least is not, in control of economic resources, political authorities, or social and educational activities and positions and institutions. This is not to deny, however, that kinship structures, based on families, conceived of in terms of unity of blood or roots, are still important in Palestinian society; on the contrary. However, the role of the family is contained. It is confined mainly to certain angles of social relations, particularly on religious and social occasions such as birth, death and marriage. [22] Institute of Law... 2006, pp. 166-171. [22]

The Interaction between State Law and Tribal Law

[21] In this section I will show how states (or the like), that took control of Palestine, or parts of it, from the time of the British Mandate until now, coexisted with tribal law. Despite the variety in the approaches and techniques, I argue, the attitude of states towards non-state law reflects a will of containment rather than acceptance of norms produced by society. It is possible that the means of 'domestication' of non-state law might include 'recognition' and 'enforcement', adopted with the objective of bringing about some changes in their normative content [Woodman 1989: 19]. By doing so, the state formulates its understanding of what is customary and of what is law, exclusively from the state's point of view. [23] Even the words that one uses to distinguish the two... [23]

[22] This attitude reflects the complete opposite, the negation, it might be said, of the assumption on which legal pluralism is based. 'Containment' of all social forces is the objective that may provide a logical explanation of states' apparently contradictory attitudes towards tribal law, when at the same time the effort to build a comprehensive judicial and legal system, although in

different degrees, levels and objectives, is evident. The PA's attitude is not different from previous regimes.

THE HISTORICAL LEGACY OF TRIBAL LAW

[23](#)

The weakness of the Ottoman state's power, at least in the last decades of its rule, limited the role of central administration in remote regions [Al-Majali 1998: 40]. One may speculate that the weakness of state power contributed to the consolidation of the tribal structure in Palestine but there is no data available to assess whether the Ottoman state regulated customary law and informal justice, and how. Besides, the absence of central state authority contributed indirectly to the empowerment of tribes and families, rendering their elders or heads, the only moral authority to settle conflicts between members of families and tribes, by relying on customs and traditions as a base for adjudication [Al-'Aref 1933: 12].

[24](#)

Tribal law continued to be applied during the British Mandate. Nevertheless, it did not leave tribal justice unregulated. A number of laws were issued, [24] These included the enactment of Palestine Order in... [\[24\]](#) forming the legal basis for the establishment of tribal courts. Although limited in their jurisdiction to the Beersheba district, tribal courts under the British Mandate were part of the state's system of courts. The tribal courts applied customs as the basis for their rulings. Not any custom, though. Article 45 of the Palestine Order in Council of 1922, indeed, permits the application of tribal custom by tribal courts established by the High Commissioner, as long as it did not run counter to natural justice or morality.

[25](#)

Following the end of the British Mandate in 1948, Palestine was fragmented. The state of Israel was created, the GS fell under Egyptian control, and the WB (including East Jerusalem) under Jordanian control. Egyptian authorities left most British laws intact, including those related to the informal judiciary. Jordan, on the contrary, adopted a different strategy. It replaced most British law, including, the Penal Code (first in 1951, then in 1960). This 1960 Penal Code did not repeal tribal laws in force in Jordan, which applied to Bedouin tribes. [25] These were later repealed by the Law no. 34 of 1976... [\[25\]](#)

[26](#)

Following Israeli occupation, thousands of military declarations and orders were issued placing the authority to rule, legislate and appoint in the public administration in the hands of the Area Commander (the military commander of the Israeli army in the WB). [26] The most important orders were Proclamation no. 2 of... [\[26\]](#) Similarly, penalties were implemented by the Israeli police. This was resented by the people, particularly in regard to criminal cases, causing increasing distrust of the local population for the judicial system. During the field research, representatives of the informal justice system confirmed that their role expanded under Israeli occupation. [27] Institute of Law... 2006, pp. 45-47. Some even pointed... [\[27\]](#)

[27](#)

The first intifada (1987-1994) is considered as the ‘golden age’ of informal justice. The Unified National Leadership of the Uprising (UNLU) called on Palestinians to boycott the institutions of the occupying power. In Circular no. 9, the UNLU demanded state employees and police officers to resign. Recourse to these institutions was considered illegitimate by the intifada while recourse to conciliation committees was considered as part of the struggle against occupation. Conciliation committees were strengthened further thanks to the UNLU backing of their rulings, which they implemented through the so-called ‘strike forces’. [28] Institute of Law... 2006, p. 46. [28]

THE ATTITUDE OF THE PALESTINIAN AUTHORITY

[28]

There are serious grounds to believe that the PA had encouraged tribal law, not only by backing the actors of informal justice, but also through the whole system of government. The first legislative elections, held in 1996, were carried out by districts rather than on a national basis, and encouraged voting along tribal and kinship lines; the majority system, as pointed out by Robert Terris and Vera Inoue-Terris [2002: 477], gave better chances to candidates who relied on their personal reputation, family relations, or tribal connections rather than on political programs or party affiliations. [29] The second legislative elections (2006) were carried... [29]

[29]

Besides, the PA tolerated the existing tribal judges and encouraged their work; it even encouraged and established official conciliation committees, set up a department to keep track of their affairs, [30] On November 9th 1994, the late president Yasser Arafat... [30] and paid salaries, [31] It is worth noting that there was a consensus among... [31] while PA officials took part in almost all final *sòulhò*. Several *sòulhò* were under the patronage of the late Yaser Arafat, and the President’s Office contributed by financially compensating the parties and by paying the *‘atwa*. The governor, police and other security forces often facilitated the work of conciliation committees. One can suspect that this was done by PA officials in order to strengthen their power and social control, by enhancing their local standing and influence. Robert Terris and Vera Inoue-Terris [2002: 492] even suggest linking this kind of government with Arab culture.

[30]

While not underestimating the role of culture and power relations, I suggest paying more attention to the reality of the PA, its structure, authority and jurisdiction in the interim period. The PA, in fact, has no sovereign jurisdiction in the WBGS. Its security forces and administrative apparatus do not even have access to all the Occupied Palestinian Territory, especially in East Jerusalem. I may even go further and argue that customary law and informal justice served the PA as an informal space through which it extended its authority over Palestinian people and land, given the impossibility of controlling the formal or state system, still largely under Israeli control. [32] In Case 6, for example, President Arafat himself intervened... [32]

THE IMPACT OF INFORMAL JUSTICE

[31](#)

Based on the analysis of the case studies, we notice that rulings issued or decisions taken through informal justice have a tangible impact on the formal judiciary, although the extent of the impact varied according to area. [33] Institute of Law... 2006, pp. 102-104. [\[33\]](#) Influencing courts' rulings was possible because of the space left in the legal system for the discretion of judges that makes it possible for informal justice to influence formal justice. In other words, it is not a question of culture or society; rather, it is a comprehensive legal system that is at issue here.

[32](#)

In fact, according to penal laws in force in both the WB and the GS, [34] Law no. 16 of 1960 in force in the WB (articles 99-... [\[34\]](#) the judge has discretionary authority in mitigating the penalty as stipulated by the law, according to the circumstances of the crime and the social context of which the judge considers it to be a part. If the victim forgives the perpetrator, this is also considered a reason to stop the case in its tracks and to suspend the punishment imposed if a final ruling has not been reached, and if the case was based on a personal claim. [35] Articles 52 and 53 of Law no. 16 of 1960. [\[35\]](#) Besides, under judicial practice, it is common for Palestinian courts to mitigate the sentence to the minimum prescribed penalty following *sòulhò* procedures. [36] In Decision no. 828/73 of February 5th 1974, the Court... [\[36\]](#)

[33](#)

The *sòulhò* deed, treated as equivalent to the waiving of personal rights, after its approval by the judge, 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 right. The Criminal Procedure Law no. 3 of 2001 (articles 130-133) allows the judge to release the accused on bail either before he is sent to court or after he is convicted (providing he has appealed the ruling) according to the discretionary power of the judge.

[34](#)

On the contrary, informal justice is not affected at all by rulings issued by the formal judiciary. In some cases (such as Case 3 and Case 6), it was found that although the accused was not judicially convicted, the informal justice system dealt with the accused as if he had committed the crime. The delays of courts' decisions (compared with the relatively fast decisions of conciliation committees) meant inevitably that informal justice could not be affected by courts' decisions.

[35](#)

This is not to argue, however, that the state and state law are not relevant for the work of informal justice; on the contrary. Its impact is of a different nature, though. First, the central state bureaucracy, officials and security forces play a determinant role for representatives of informal justice, as facilitators. The intervention of the governor (as in Case 1) or members of security forces or armed brigades (as in Case 3) was a factor that determined the outcome of the agreement. Second, state law, formal justice processes, and official documents provide elements useful for parties to bargain over their rights and duties in an informal justice setting. [37] In Case 2 for example, the police report was used to... [\[37\]](#)

The Role of Informal Justice: Uncovering some Misconceptions

36

Some might see the possibility of a consensus on the positive impact of informal justice as a tool for realizing social peace. [38] 'Consensus' may not be the right word but it is the... [38] There seems to be no such agreement, though, over justice. For the concerned parties in the dispute, as much as for formal justice actors and civil society personalities, [39] 'Consensus' may not be the right word but it is the... [39] the results of tribal justice were viewed to be unjust. [40] A relatively high minority of PA executive authority... [40] My suggestion is to assess and evaluate informal justice in Palestine, not from the perspective of individuals' rights, but rather in the context of this balance between social peace and justice, the two most invoked values in the informal justice process. [41] Individuals' rights, it seems to me, form a totally... [41]

THE NEED FOR SOCIAL PEACE

37

The field research reveals that the majority of the interviewed persons believed that informal justice has a positive impact and is, indeed, needed in the Palestinian context. [42] Actually, 54% of the 37 interviewed parties in the... [42] The case studies showed indeed that informal justice helped stop retaliations. [43] As in Cases 1, 3, 5, 8, and 9 but not in Case 7 for... [43] This is not always the case, though. Tribal conciliation often failed to stop the violence, for good. The launching of a conciliation process or even the agreement over final tribal conciliation did not (always) prevent parties to the conflict from retaliating and taking revenge in the future. [44] It should be noted that acts of violence, vandalism,... [44] In Case 5, for example, the family of the victim, despite the launch of the conciliation process, set fire to houses and many cars belonging to members of the family of the person who, by error, caused the death of the victim. After many years, and despite the end of conciliation process, the victim's son, surprised to see the killer of his father in the center of the city – where he was not supposed to be – killed him, and a second conciliation process started. In Case 7, the conciliation commission decided to banish the husband (who killed his wife, in collaboration with his mother) along with the whole family. When the brother of the aggressor showed up in the village, brothers of the victim cut off his hand and caused further complication in the conciliation process. In the same case, the family of the victim took revenge by killing their former brother-in-law despite the final conciliation reached eleven years earlier.

ACHIEVING JUSTICE

38

The second form of intervention of informal justice, nevertheless, goes beyond the role described above (complementary to the formal justice system). Tribal judges and conciliation committees in most cases issued rulings and decisions, dealt with facts, distributed rights and imposed obligations. Although mostly taking the form of monetary fines, sanctions may go beyond that.

[45] Such as the exile of the perpetrator, his family and... [45] On the victims' side, the price is to waive personal rights in front of state courts and authorities, and for the family, not to retaliate. In most cases, most parties confirmed that conciliation did not achieve justice. [46] In Case 1 for example, both parties to the dispute... [46]

[39]

Given the clear injustice (or at least, the perceived injustice) of informal justice, why then do parties to disputes continue to have recourse to its proceedings? And, most importantly, why do concerned parties continue to abide by their rulings? I believe it is not possible to give exhaustive answers based on the available data. It is possible, nevertheless, to exclude two potential explanations: from the analysis of the case studies it is possible to conclude that, first, the recourse to informal justice and the acceptance of tribal solutions is not always genuine and free of pressure, and second, that the parties do not always comply with its rulings.

[40]

In Case 1, for example, the intervention of a powerful PA official in his capacity of conciliation man, and his relationship with the governor, was a determinant factor for both families to accept the solution. [47] The conciliation man indeed obtained from the governor... [47] In Case 2, the family of the second victim of the accident felt the social pressure to accept tribal conciliation because the family of the first victim reached an agreement. In Case 3, the family of the driver accepted to pay part of the costs of the treatment in private hospitals only after the kidnapping of the perpetrator's brother by the family of the victim and the intervention of a local leader of 'Martyrs of Al-Aqsa' brigades.

[41]

On the other hand, the case studies showed different degrees of compliance of individuals with informal justice rulings. However, the binding effect of the decision, in my view, does not derive from the decision of the conciliation committee but from the endorsement and acceptance of the *jaha* 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. Inclusion means protection, exclusion means fragility and no one wants to be left out. In the absence of coercive powers similar to the state, families ensure the compliance of their members through the inclusion/exclusion mechanisms. [48] The kind of description I make here of families and... [48]

THE NEUTRALITY OF INFORMAL JUSTICE

[42]

An examination of the results of case studies in the WBSG shows that the social status of the parties to the dispute influences the outcome. The size of the *hòamūla*, 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. In other words, tribal solutions are often formulated in accordance with the balance of power. [49] Institute of Law... 2006, pp. 171-174. [49]

43

This is not to suggest, however, that customary law is not predictable. Tribal conciliation, indeed, shows a relatively high degree of internal conformity [Fares and Khalidi 2006]. However, case studies suggest very clearly that there is always a margin for bargaining. The outcome of the process depends on the capability of each party to make his position prevail, to limit the damage, and to increase the gains (moral and/or financial).

Conclusion

44

Legal pluralism is a matter of fact in the WBGS. This is the case for both state and non-state law. Admitting that the state is not the only producer of norms, does not lead to legal immobility. The state is not, and cannot be, indifferent to non-state law. The examination of the case studies, in fact, shows a blatant contradiction between on the one hand non-state law, and on the other hand state law and the basic principles on which modern states are constructed. The principles of the individual nature of punishment and the banning of collective punishment are undermined by the practice in informal justice of imposing collective exile from the place of residence. The principle of the presumption of innocence, which is the basis of modern criminal law, is also undermined by the weight of accusations in informal justice, where the issue of responsibility is left to be determined not by evidence but by the capacity of each party to convince the other of its position.

45

The principle of equality before the law is also undermined, since parties are indeed not equal as far as informal justice is concerned. The issue here is not only justice but also fairness. This applies for both victims and perpetrators. A negligent driver that causes the death of an innocent victim may end up being released without any punishment. At the same time, an innocent person, presumed perpetrator of a certain action, may suffer penalties, even if deemed not guilty by state courts. As stated above, economic and social status, political affiliation and sex matter for the determination of the outcome.

46

Those and other realities could not maintain their legitimacy and survive if the given objective were the construction of a democratic state. The development of a Palestinian civic consciousness based on human rights and individual freedom makes it impossible for certain non-state norms, applied by informal justice, to retain their legitimacy. This is not only true of non-state produced norms, but also of the state, which therefore needs to be revised and reformed continuously in order to accommodate the tenets of democratic governance that incorporate basic human rights and freedom; gender inequality can be cited as an example. [50] Sex matters in informal justice in two ways. First,...

47

Accepting legal pluralism and advocating for its use as a tool for the understanding of normative orders in contemporary Palestine means simply that measures of reform, including legal reform,

are likely to achieve their aims only by careful calculation that takes into consideration the content and functions of existing non-state laws [Woodman 1989: 9]. Ignoring the legal mosaic or legal map would give only an obscure idea of the legal reality in the WBS. Legal reform aiming at building democratic institutions and at enhancing the rule of law in the WBS that does not consider non-state law would hence be insufficient and would necessarily fail.

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Notes

[1]

The author wishes to thank all those who commented on initial drafts of this paper, especially Jamil Hilal, Lisa Taraki, Bernard Botiveau and Moussa Abu Ramadan. All remaining errors are mine alone.

[2]

For more details about case studies, see Institute of Law, Birzeit University, ‘Al-Kada’ Gayrel Nethamee: Seyadat al-Kanun wa-Hal al-Niza’at Fee Falasteen’ (Informal Justice: Rule of Law and Dispute Resolution in Palestine. National Report on Field Research Results), 2006, pp. 192-209.

[3]

The title of the paper uses the term ‘Palestine’, as it is concerned with historical experiences and traditions that were applied in historical Palestine, part of the Ottoman Empire and under the British Mandate, before the 1948 partition. However, to distinguish historical Palestine from the one that forms the territorial space in which the practice of tribal procedures are studied and

analyzed in this paper, the author will use the term ‘WBGs’ which refers largely to what is also called ‘Occupied Palestinian Territory’ or the ‘State (to be) of Palestine’.

[4]

Unless specified differently, I will use both words (‘tribal’ and ‘customary’) to refer to the same thing, i.e. the set of rules applied by tribal judges and conciliation committees.

[5]

For more about the difference between tribal judges and members of conciliation committees, see Institute of Law... 2006, pp. 76-80.

[6]

For more about the role of PA executive authority and security apparatus on the work of conciliation committees, see Institute of Law... 2006, pp. 107-120.

[7]

Institute of Law... 2006, pp. 123-126.

[8]

In this paper, actors or representatives of informal justice refer to both tribal judges and members of conciliation committees, while actors or representatives of formal justice refer mostly to lawyers and judges. Both actors from the formal and informal justice systems formed part of the persons interviewed during field research.

[9]

The ‘state’ here refers to the political organization in control of Palestine or of parts of it. Here, it is used in the wider sense of the word rather than exclusively in its strict legal sense; it can thus equally refer to the rule of foreign states, from the Ottoman period until today. It also covers the PA, although the latter is legally not (yet) a state.

[10]

The field research and interviews were conducted by a team of researchers in the Law and Society Department at Birzeit University. Two versions (Arabic and English) are available at <http://lawcenter.birzeit.edu>.

[11]

One can see the report published by the Institute of Law... 2006.

[12]

For more about legal pluralism, see L. Pospisil [1971], J. Griffiths [1986], and S.F. Moore [1986]. For a survey of earlier theorists who made important contribution to the emergence of legal pluralism, see J. Griffiths [1986] and G.R. Woodman [1998]. The latter discussed the contributions of three jurists (neither anthropologists nor sociologists): J. Gilissen ed. [1971], and J. Vanderlinden [1971], who contributed to the volume edited by J. Gilissen [1971] and B.M. Hooker [1975].

[13]

Family Rights Law no. 92 of 1951, replaced by Personal Status Law no. 61 of 1976, applicable nowadays in the WB, and Family Rights Law (order 303 of 1954), applicable in GS.

[14]

Some of the personal status laws and regulations of those communities are collected by the Institute of Law and are available at <http://muqtafi2.birzeit.edu/>.

[15]

See Decree no. 1 from Tunisia in 1994.

[16]

The PA Basic Law of 2003 provided for the establishment of a High Constitutional Court but left the issue to be determined by a law (article 103). Law no. 3 which establishes that Court was adopted in 2006. The law decided on a centralized ‘judicial’ body, independent from the judiciary, with the duty to control, inter alia, the constitutionality of laws and bylaws. However, judges are not yet nominated and the Court is not yet functioning.

[17]

See article 6 of (PA) Judicial Authority Law no. 1 of 2002.

[18]

‘Atwa is the public admission of guilt by the perpetrator of the aggression, and of that party’s readiness to pay all costs arising; *‘atwa* can also be renewed. Through *‘atwa* the freedom of the victim to retaliate through a similar assault is restricted. *‘Atwa* is considered a prelude to *sòulhò* and the amounts paid in *‘atwas* are considered part of the final *diya*. In murder cases it might be renewed. When this happens, the payment is equal to half the amount paid in the first *‘atwa*. The third *catwa* does not occasion any further payment. For more about the process of conciliation, see Institute of Law... 2006 and S. Fares and D. Khalidi [2006].

[19]

Institute of Law... 2006, p. 146.

[20]

Institute of Law... 2006, p. 166.

[21]

It could be argued that there are exceptions in the south of the WB and in GS, i.e. near the areas where the Bedouin of Beersheba and the Sinai live respectively.

[22]

Institute of Law... 2006, pp. 166-171.

[23]

Even the words that one uses to distinguish the two sets of laws (‘state law’ and ‘non-state law’) are not neutral. They reflect the centrality of the state in all debates related to legal phenomena in general and to legal pluralism in particular.

[24]

These included the enactment of Palestine Order in Council of 1922, and the Law of Procedure for Tribal Courts 1937, as well as various other laws that dealt with informal justice such as the Law on the Prohibition of Crimes between *‘ashīra* and *hòamūla* no. 47 of 1935, and the Law of Civil Contraventions no. 36 of 1944 which dealt with the jurisdiction of tribal courts in rulings on blood money (*diya*).

[25]

These were later repealed by the Law no. 34 of 1976 (not enforced in the WB, under Israeli occupation since 1967).

[26]

The most important orders were Proclamation no. 2 of 1967 regulating the authority and the judiciary, and Military Order no. 412 of 1970 concerning local courts in the WB.

[27]

Institute of Law... 2006, pp. 45-47. Some even pointed out that in the early 1980s 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. During the same period, the authorities also set up Village Leagues, hoping that they would play a social and political role. Other interviewees mentioned that in the early 1980s, the PLO formed an *islah* committee in the central WB.

[28]

Institute of Law... 2006, p. 46.

[29]

The second legislative elections (2006) were carried out both by districts (half of the seats) and on a national basis (lists competing for the other half of the seats).

[30]

On November 9th 1994, the late president Yasser Arafat issued presidential Decree no. 161 of 1994. The decree established a Department of Tribal Affairs as part of the President's Office. This department proceeded to draw up internal directives regulating its activities and to prepare internal directives determining the administrative status of its employees and specifying a number of conditions and requirements for *islah* men and tribal judges working in the Palestinian governorates. In 2004, the Department of Tribal Affairs succeeded in establishing central *sulh* committees in several Palestinian governorates.

[31]

It is worth noting that there was a consensus among representatives of informal justice in the central and northern WB that it is not permitted for an *islah* man to take financial remuneration for his work. Tribal judges, on the other hand, are paid a fee for their work, called the *rizqa*. See Institute of Law... 2006, p. 79.

[32]

In Case 6, for example, President Arafat himself intervened, authorizing the governor of Jerusalem and a member of the Palestinian Legislative Council to preside and form part of the *jaha* (delegation) to resolve the conflict between the families. President Arafat even contributed with half of the total amount of *atwa* decided by the conciliation committee.

[33]

Institute of Law... 2006, pp. 102-104.

[34]

Law no. 16 of 1960 in force in the WB (articles 99- 100 of this law) and Penal Law no. 74 of 1936 in force in the GS (article 46).

[35]

Articles 52 and 53 of Law no. 16 of 1960.

[36]

In Decision no. 828/73 of February 5th 1974, the Court of Criminal Appeal held that ‘a personal waiver by the plaintiff constitutes a mitigating reason which requires the reduction of the sentence in accordance with article 100 of the Penal Code of 1960’. In Decision no. 200/76 of the Court of Criminal Appeal included the following: ‘It is up to the discretion of the Court in the case to state that there is a mitigating excuse, although this is naturally constrained by the need for something on which the Court can rely in stating that this exists, based on something that can be concluded from it rationally and logically.’ See Institute of Law... 2006, pp. 64-65.

[37]

In Case 2 for example, the police report was used to determine the responsibility of the perpetrator, and his accident history, provided unofficially by the police director, was used by both parties to enhance their bargaining position. In Case 1, the imprisonment of family members of both parties to the conflict was used by the chairman of the conciliation committee to pressure both parties to accept a solution and to limit their expectations. The waiver of personal right and the release from prison was used to pressure the driver to accept the payment of money despite his initial resistance.

[38]

‘Consensus’ may not be the right word but it is the best to describe the majority in each of the groups of people that were interviewed, which included parties to the dispute, informal justice actors, PA executive authority and lawyers and other jurists. 39Respectively 70% of the 37 interviewed, 83% of the 24 interviewed, and 88,5% of the 26 interviewed.

[39]

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[40]

A relatively high minority of PA executive authority (46% of the 13 interviewed) and formal justice actors (31% of the 39 interviewed) concurred with the same conclusion.

[41]

Individuals’ rights, it seems to me, form a totally different language than the one spoken during tribal conciliation. Informal justice is a process that involves the community as a whole and not the concerned individuals alone, it concerns common interest and not the selfish concerns of the parties to the dispute. The only assumption that may be individualized here is the priority of the community over the individual, of peace and peaceful coexistence over justice.

[42]

Actually, 54% of the 37 interviewed parties in the disputed considered as case studies, 54% of the 24 interviewed lawyers, 92% of the 13 PA executive authority officials, and 100% of the 39 members of conciliation committees’ members believed that informal justice has a positive impact: a majority of similar proportions believes that informal justice is important and needed.

[43]

As in Cases 1, 3, 5, 8, and 9 but not in Case 7 for example, where the start of the conciliation process and the reaching an agreement did not prevent the family of the victim from retaliation and even seeking vengeance.

[44]

It should be noted that acts of violence, vandalism, or even vengeance complicate the tribal conciliation process, and may change the bargaining position of the parties in the initial conflict. In other words, successive and related acts of violence are regrouped and treated as a whole. By doing so, crimes lose their individuality, applying the same logic of vengeance, although in the opposite direction. In Case 7 described above for example, the amount of money requested for the death of the woman (by her husband and her mother-in-law) is reduced by half, due to the perpetrator's brother's hand that was amputated by the family of the victim.

[45]

Such as the exile of the perpetrator, his family and his relatives, as Cases 4, 5, and 7.

[46]

In Case 1 for example, both parties to the dispute believed that social peace was achieved. The price, however, for them was to sacrifice justice. Each party felt indeed that the solution was imposed (by the powerful conciliation committee's chairman) and did not satisfy the needs and requests of both parties in the dispute. In Case 2, the family of the second victim believed that the driver ought to be convicted by the court and that tribal justice in the end was totally based on the narrative of destiny (*kada' wa kadar*). In Case 3, the family of the driver accepted to pay the money, despite the injustice and the fact that the conciliation committee was biased to the family of the victims, because of their political affiliation. In Case 8, the family of the young man accused of raping the girl, had suffered the retaliation actions of the girl's family (houses and properties vandalized and burned) but they were considered to be the aggressors. It is striking how it was left for the young man to prove his innocence from the accusations of rape, and not the opposite. The whole family of the young man was obliged to leave the village.

[47]

The conciliation man indeed obtained from the governor the right to see the police investigation dossier. The governor, on the request of the conciliation man, even forbade family visits for the men from both parties, held in custody, as a way of exerting pressure on the concerned parties to accept the solution.

[48]

The kind of description I make here of families and the place of individuals therein is intentionally harsh and needs to be softened. The solidarity between individuals justifies such a role for their families. This is expressed positively by family support in times of social and religious events (such as in the case of marriage or death) but it is also expressed, most importantly, by the burden that the family often supports when something is wrong with one individual. All members of the wider family suffer by implication from the retaliation and acts of vandalism carried out against the family of the victim, and any member of the family is a

possible target for acts of vengeance. In cases where the payment of an amount of money is imposed, all may be concerned with its payment in order to rescue a fellow member of family.

[49]

Institute of Law... 2006, pp. 171-174.

[50]

Sex matters in informal justice in two ways. First, informal justice is largely patriarchal. Elderly people and the heads of families occupy a prominent place in formal justice. In this sense, informal justice is absolutely masculine. Women are always represented and never present. The analysis of Case 8, however, may give the impression that informal justice is biased in favor of the woman in that it takes issues of honor very seriously. This perception is misleading for three reasons: first, such an attitude is unfair towards the presumed perpetrator, who is accused (maybe falsely) and did not even have the possibility to defend himself while the woman did not have to prove her accusations. Second, this attitude reflects, not a recognition of women's right but rather a paternalistic approach, where the woman is deemed inferior and in need of protection, even at the price of injustice and unfairness. Third, it is not the woman's integrity which is at stake, but the honor, her honor, for sure, but, most importantly, the family's honor. Things are no different for state law, as for example with regards to the way rape is regulated.

Résumé

Français

Cet article voit dans le pluralisme juridique en Cisjordanie et dans la bande de Gaza un moyen de comprendre les phénomènes légaux et l'attitude de l'État vis-à-vis des normativités non étatiques. L'auteur présente les avantages et inconvénients de la coexistence d'une justice formelle et d'une justice informelle dans les territoires contrôlés par l'Autorité palestinienne, et montre comment les deux systèmes s'influencent l'un l'autre. Il ne s'agit pas ici de tracer des limites entre le droit étatique et le droit tribal et coutumier, mais de souligner que ces deux ensembles sont manifestes et que, de ce fait, une multitude de champs normatifs peuvent coexister au sein d'une même société.

Mots-clés

- Autorité palestinienne
- Cisjordanie et bande de Gaza
- justice informelle
- droit tribal, pluralisme juridique
- système juridique palestinien
- victimes
- Palestinian Authority
- the West Bank and the Gaza Strip
- informal justice
- tribal law
- legal pluralism
- Palestinian legal system

English

This paper considers legal pluralism in the West Bank and Gaza Strip as a way to understand legal phenomena, and the state's attitude towards non-state normative orderings. It describes the advantages and inconveniences of the coexistence of formal and informal justice in the territories under the Palestinian Authority control, as well as the influence of each system on the other. The objective of this study is not to establish boundaries between state-law and tribal-customary law, but rather to show that both sets of law are in evidence, and hence that a multitude of normative fields can coexist within a society.

English abstract on Cairn International Edition

Plan de l'article

1. State Law vs. Customary Law
2. LEGAL PLURALISM IN PALESTINE
3. THE PALESTINIAN LEGAL SYSTEM
4. TRIBALISM IN PALESTINE
5. The Interaction between State Law and Tribal Law
6. THE HISTORICAL LEGACY OF TRIBAL LAW
7. THE ATTITUDE OF THE PALESTINIAN AUTHORITY
8. THE IMPACT OF INFORMAL JUSTICE
9. The Role of Informal Justice: Uncovering some Misconceptions
10. THE NEED FOR SOCIAL PEACE
11. ACHIEVING JUSTICE
12. THE NEUTRALITY OF INFORMAL JUSTICE
13. Conclusion

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