



THE BEDOUIN JUDGE, THE MUFTI, AND THE CHIEF ISLAMIC JUSTICE: COMPETING LEGAL REGIMES IN THE OCCUPIED PALESTINIAN TERRITORIES

LYNN WELCHMAN

This article examines competing legal frameworks in dispute resolution in the occupied territories, against the background of weakening central authority, bitter political rivalries, and increasing insecurity on the ground. Two case studies from 2005 are presented—a killing in Gaza and an attempted sexual assault in the West Bank—where the involved parties had recourse to three distinct but overlapping bodies of law, not all of which were part of the formal Palestinian legal system: statutory law, Islamic law, and customary (or tribal) law. The resolution of these cases, while shedding light on the intersection of local politics and alternative legal systems, underscores the challenges of forging a united legal system in a situation of occupation, weak government, and heterogeneous legal heritage.

SINCE THE ESTABLISHMENT of the Palestinian Authority (PA), one result of the political uncertainties and inadequate security in the West Bank and Gaza Strip has been an increasing recourse to “unofficial” arbitration and the adjudication of disputes in the context of contests over political power. Three main bodies of “law” appear most frequently as overlapping normative frameworks in dispute resolution processes: statutory legislation (the law “on the books” in the areas under the PA’s jurisdiction), Islamic law, and various forms of customary law—specifically, in the case examined here, “tribal adjudication” (*al-qada’ al-`asha’iri*).

This article examines the intersection of these normative frameworks in the resolution of two cases in mid-2005, one in the Gaza Strip and the other in the West Bank. Both disputes arose from criminal acts, one a shooting death and the other an attempted sexual assault; both were clearly within the criminal jurisdiction of the formal courts. Yet, in both cases, the application of statutory law was avoided or contested and penalties were assessed according to norms drawing, respectively, upon Islamic law and tribal (or customary)

LYNN WELCHMAN is Professor of Law at the School of Oriental and African Studies in the University of London. For their help, variously, in locating sources for this article and discussing the material, she would like to thank Salwa Du’yabis, Shaykh Riyad Issawi, Stephanie Koury, Amneh Ma’bad, Ellen Saliba, Issam Younis, Susan Rockwell, and Nahed Samour. She is particularly grateful to lawyer and Bedouin judge Daif Allah Abu Dahuk.

law. Specifically, contesting norms were advanced in these cases by three men with different institutional positions: a Bedouin judge, whose ruling relied on tribal law; the mufti of Gaza, who headed an arbitration committee that issued a ruling based on Islamic criminal law; and the chief Islamic justice, who upheld in a commentary on the former case the primacy and authority of statutory law and the formal judiciary, as well as the norms of Islamic jurisprudence.

These three normative frameworks have never been completely independent of one another, nor are they internally homogenous or undifferentiated. Each has overlapping and mutually constructive influences on the others, both institutionally and informally. In the cases discussed here, however, the distinctiveness of each body of law is socially constructed by being publicly asserted. Although the official legal system was not ignored in either case, adjudicators self-consciously invoked and acted upon norms derived from Islamic law and customary or tribal law as “alternative” (or parallel) bodies of law to the nascent central legal system, both doctrinally and institutionally.

“Unofficial” arbitration and adjudication of disputes in the West Bank and Gaza Strip in the context of contests over political power has been examined by a number of scholars in recent years. Glenn Robinson, writing in *JPS* in 1997, discussed the challenges facing the Palestinian legal community as “a metaphor for the larger process of power consolidation of the Palestinian Authority.”¹ Addressing the emerging field of Palestinian legal studies in 1999, Bernard Botiveau urged analysts to draw upon “legal anthropology, which considers the political dimension to play a decisive role in the dynamic process of law creation and the normalization of social practices.”² In the current, distressed Palestinian governance context, it is not just the *normalization* of practices but also the *formalization* of practices as law that is being contested.

SOCIAL AND LEGAL CONTEXTS: “THE BREAKDOWN OF PUBLIC SECURITY”

By mid-2005, the events of the second intifada and the ongoing violence of the Israeli occupation had seriously weakened the Palestinian central authority and limited the reach of its legal organs.³ Public anxiety was mounting over *al-falatan al-amni*, “the breakdown of public security,” manifested by assassinations and armed confrontations between different agencies of the security forces and armed wings of political factions (or individuals claiming such affiliations). Armed clashes and invocations of the concept of *tha'r*, or private vengeance, had increased alarmingly.⁴ Adding to political stakes at the time, Israel’s “unilateral withdrawal” from the Gaza Strip was on the horizon, municipal elections were ongoing, and the participation of Hamas in the Palestinian Legislative Council (PLC) elections slated for the following January was seen as a real possibility.

Chaotic circumstances often promote recourse to “self-help” measures in resolving disputes and seeking remedy for wrongs. Thus, recourse to normative

systems other than those legitimated by the central authority is not necessarily an index of simple preference for one among an array of equally available options; competition for power also shapes processes of forum selection. For instance, in the first case presented below, Hamas had a political interest in promoting a particular normative system at the expense of the centralized administrative power of the PA. Advocates of unofficial modalities of dispute resolution tend to cite familiarity, speed of resolution, lower cost, and “efficacy” (i.e., sensitivity to the social position and feelings of the wronged party) among its advantages.⁵ Political convenience may also influence the choice of a particular dispute forum.

In the first case examined here, an arbitration committee headed by the mufti applied the rulings of Islamic criminal law to a homicide in Gaza, and subsequently the parties requested the official (statutory) legal system to drop its own proceedings against the accused. In the second case, which took place in the West Bank, the parties turned to a Bedouin judge, who imposed deliberately extraordinary sanctions unknown in either the official criminal law system or in Islamic law. It was in reaction to this astonishing ruling that the chief Islamic justice weighed in with his commentary.

FIRST CASE: THE KILLING OF YUSRA JAMAL AL-`AZAMI

Late in the evening of 8 April 2005, Yusra al-`Azami, a young woman returning home from an outing in Gaza City in an automobile with her sister and two young men from another family, was shot dead by hooded gunmen pursuing them in another vehicle. The sisters were formally engaged to the young men, and wedding celebrations were imminent.⁶ `Azami’s companions were beaten by the assailants, who made off with the car; two were arrested later that night and gave up the names of three co-offenders. The next day, the “Association of the People of Jaffa” issued a statement denouncing the murder of the “bride of Palestine” and reported that the prosecutor’s office had declared that “the criminals were claiming they belonged to Hamas and had done their ugly crime as a result of being charged [with this function] by their Hamas leader.”⁷ The statement gave the names of the five persons allegedly involved, and also the name of the Hamas official alleged to be responsible for them. The association demanded a full investigation, the political disavowal of those involved, the “clarification of the position of the families of the criminals,” and the perpetrators’ “clarification of the truth and retaliation [*qisas*].”⁸ Failing this, the statement said, the family of the victim would themselves be obliged to exact vengeance.

Hamas initially denied any connection with the shooting, but later acknowledged that “individuals affiliated with Hamas” had perpetrated the crime as an “irresponsible, individual deed.” The movement called for adjudication of the case “by God’s law.”⁹ Local press reports covered various political groups’ demands for the PA to enforce law and order and provide security.¹⁰ Ten political factions (including Fatah) signed a statement calling for the killers to

be handed over to the security forces and “for the law to be applied.”¹¹ A week after the killing, however, the families of the victims and those of the perpetrators reached an agreement on “*shar`i* adjudication,” following which a “*shar`i* arbitration committee” was established. On 30 April 2005, the committee issued a *shar`i* ruling (*bukm shar`i*), the translation of which follows.

***Shar`i* Ruling**

Issued in the matter of the grievous incident that took the life of the chaste and virtuous martyr, Yusra Jamal al-`Azami, of Bayt Lahiya
Saturday 21 Rabi` al-Awwal 1426/30 April 2005

Parties to the case:

First party: the honorable family of the chaste and virtuous martyr Yusra Jamal al-`Azami (“al-Dada”) and the honorable Zarnda family.

Second party: the honorable Daghmash, al-Li, al-Daya, and al-Barniya families.

Arbitration committee: Shaykh `Abd al-Karim Khalil al-Kahlut, Dr. Ahmad Diyab Shwaydah, Dr. Mazin Isma`il Haniya, Dr. Yusuf `Awad al-Sharafi, Shaykh Sa`id `Abd al-Malak Abu al-Jabin.

Based on the grievous incident which led to the killing of the chaste and virtuous young woman Yusra, daughter of Jamal al-`Azami; and the agreement of all the above-mentioned parties to be ruled by the Islamic *shari`a* out of commitment to the command of God Almighty: “By your Lord, they will not be true believers until they let you decide between them in all matters of dispute, and find no resistance in their souls to your decisions, accepting them totally”¹²; and the agreement of all parties upon the above-mentioned *shar`i* committee of arbitration to rule between them: The committee undertook the investigation and took all necessary measures to arrive at justice and nullify falsehood. Finally, the committee met in full at the house of Shaykh `Abd al-Karim al-Kahlut on Saturday 21 Rabi` al-Awwal 1426/30 April 2005 and issued by consensus a decision drafted by the head of the committee, Shaykh `Abd al-Karim Kahlut, as follows:

1. Censure [*ta`zir*] of the persons who followed over a long distance the car of the martyr and her companions, these persons not being directed by any person or faction or *tanzim* but rather doing what they did of their own accord.
2. Detailed and reliable investigation established that the shooting was done by [only] one individual with no one else participating.
3. The shooting was not intended to kill . . . The shots occurred randomly to different places, far apart from each other. Thus the killing was accidental, and the perpetrator must pay the heavy [*mughballaz*]

financial compensation [*diyya*] . . . because he did something unworthy of him and was not charged by anyone to do it, but was rash and reckless.

4. Accordingly, the heavy *diyya* of 25,000 Jordanian dinars shall be paid to the person lawfully [*sbar`an*] entitled; the owner of the car shall be compensated for the damage sustained by the vehicle in the amount of 1,000 American dollars, and the remainder are censured by paying 1,000 Jordanian dinars as compensation to the three persons accompanying the victim for the fear, injury, and offense they sustained.
5. Those persons who committed this deed explicitly affirmed that they were not directed by any party whatsoever, and that the Movement of Islamic Resistance— Hamas— had nothing to do with what happened.
6. Also, the committee thanks Hamas for [its] efforts to bring out the truth and arrive at justice.

The day after this *sbar`i* ruling appeared, male representatives of the families signed a “deed of final and absolute reconciliation” citing the *sbar`i* arbitration and announced that they had reconciled “of our free will and our complete consent, acknowledged in law and *sbari`a*, and without any pressure or coercion from anyone.” The parties declared “complete acceptance” of the arbitration decision, considering it to supersede “all other rights unspecified in the arbitration decision,” and called upon “the concerned official and unofficial parties to take the arbitration decision and the deed of reconciliation into account, and to release those detained in relation to this case, and not to pursue the others.” Two days after the families signed this deed, the public reconciliation ceremony (*farbat al-musaliba*) was held at the house of “a well-known mediator [*rajul al-sulb*] in Gaza City.”¹³

The *sbar`i* ruling was published in *al-Quds* and *al-Risala* in early May 2005.¹⁴ Both newspapers reported that the public reconciliation rituals between the families took place “in the presence of a large number of senior Hamas leaders, notables, scholars, and men of conciliation.” The reports noted that the event included interventions from a number of the notables present, in praise particularly of the victim’s family, the reading of the ruling, the celebration of the “exchange of peace” between the families, and the further celebration (*mabrajan*) Hamas held to mark the resolution of the dispute. The only indication that Yusra al-`Azami’s killing had ever generated controversy came in an observation in *al-Quds* that “[t]he case had seen wide and angry reactions, especially an attempt to abuse it during the election campaign in . . . Bayt Lahiya . . . and [other] Gaza Strip areas, and even in the West Bank.”

Meanwhile, the foreign press had been covering the incident in detail almost from the start, including various reports about the political affiliation of Yusra al-`Azami and that of her fiancé, hinting at possible interfamilial conflicts. The story that predominated in the English- and French-language press was that Yusra had been executed by a Hamas “vice and virtue unit” acting on the erroneous assumption that the parties in the car had been involved in

“immoral conduct” during their trip to Gaza City.¹⁵ Locally, reports that the killers were on some kind of “formal” Hamas morality enforcement business—which would have rendered the movement institutionally and politically responsible for the death—stoked tensions just before municipal elections. Hamas reportedly “mounted a desperate damage-limitation exercise,”¹⁶ while other parties decried the perceived exploitation of the incident in the lead-up to the elections. Some observers suggested that Hamas was seeking to reassure Western (especially European) observers about its social agenda, particularly in light of its electoral ambitions.

The case disappeared from the local press until the arbitration committee published its findings, which entirely exculpated Hamas. A French-language article published a month later reported that senior Hamas officials had visited the victim’s family and proposed payment of *diyya* and that, while the family had not agreed, they had “accepted, at Hamas’s insistence, to put the issue to *shar`i* judgment.”¹⁷

SECOND CASE: AN EXTRAORDINARY RULING

Just as in the case of Yusra al-`Azami’s killing in Gaza, the victim in the second case—an attempted sexual assault in the West Bank—was female, while all those who were actively involved in the resolution process were male. In contrast to the Gaza case, however, there was no immediate publicity concerning the incident itself, which only came to light with the publication of a long article in *al-Quds* that focused not on the crime but rather on the very unusual ruling rendered by Daif Allah Abu Dahuk, a tribal judge in the Ramallah area who is also a practicing lawyer and who was standing in the upcoming municipal elections.¹⁸ The names of the perpetrator, the victim, and the victim’s father (who represented her) are not mentioned. The anonymity of the actors appears to be the result of the journalist’s agreement not to publish identifying details.

The text of the ruling presents significant challenges to interpretation because it risks being read as “exoticizing” or “scandalizing” customary or tribal law (and wider Palestinian society) in the Orientalist trope.¹⁹ A closer reading, however, will allow us to locate this deliberately shocking ruling in the political context of competing normative discourses at the time. The following is a translation of the press report about Abu Dahuk’s ruling:

100,000 Jordanian Dinars’ Financial Reparation Paid on the Spot; Tribal Judge²⁰ Issues Deterrent Ruling against Youth for Attempted Assault on Girl’s Honor

In an incident demonstrating the power and capacity of the tribal justice system to restore right to those entitled and to see that the wronged receive justice, elite elders of al-Jahilin, al-Ka`abna, and Abu Dahuk vindicated the honor²¹ of a girl after a young man from the Ramallah district made an attempt on her honor. She managed to escape after seeking help from good people.

... [S]aid young man saw a girl walking in an area close to an Israeli military checkpoint ... stopped his car, and asked her to get in with him. When she refused, he got out of his vehicle—a Ford Transit—and pursued her.

When she realized his bad intentions, she turned and fled. The young man persisted in his folly and followed her, thinking he could catch her, but the girl used the only weapon she had: her voice. She screamed for help with all her might and two youths from the [Bedouin] Arabs of al-Jahilin and Abu Dahuk heard her. They ran after the youth, caught and tackled him.

... The story of “the chase” ends here, but after this painful incident the family of the girl resolved to obtain their due through the tribal justice system in what is known as the “*mansbad*.”²²

... [A] large customary *jaba* [delegation], including notables from Jerusalem and Ramallah, went to the home of the girl’s father, where they were met by a large gathering of the elders of [the clans of] al-Jahilin, al-Ka`abna, and Abu Dahuk.

The leader of the *jaba*, Ahmad Najib al-Hizmawi, condemned the incident, calling it wicked and unprovoked, and announced that he was prepared to pay the due demanded of the offender.

Then the girl’s father took all the tribal requisites for guarantee [*kafil*], and asked the offender’s family to swear an oath ... before all the people, that their son had not been provoked by any person [to commit this act] and had not planned his deed, which had come suddenly from him as devil-like conduct, and thus their honor had ... suffered no stain.

... After hearing the oath, the girl’s father asked Attorney Shaykh Daif Allah Abu Dahuk to be judge of the *mansbad* and settle the case. He then presented the details of the incident before the judge.

The *qadi* asked the offender’s family whether they acknowledged their son’s offense, and they avowed that they did. He asked them to pay what is known as “*rizqat al-mansbad*,”²³ while he consulted Abu Dahuk elders and then began presenting the factual findings.

... [T]he judge said that this was an event with no justification, and that “this *mansbad* is a *mansbad* of the ‘*sa’ibat al-dubin*’²⁴—she who screams in the forenoon—as the incident took place between ten in the morning and twelve midday; and after hearing the oath, I hereby commence presentation of the *mansbad* from the first moment that the incident began.”

... The judge ruled, with regard to the youth who committed the deed, that his right eye be plucked out, the eye with

which he looked at the girl . . . and that his tongue be cut out, the tongue with which he called to her . . . Her deed in not responding to him and in running away is valued at ten white camels, while his in returning moments later in his vehicle to the same place to watch the girl is set at ten black camels. For going in the other direction and stopping his vehicle to catch her, his right foot shall be severed from his shin and his other eye shall be gouged out by reason of his surveillance of her . . . As for his chasing after her for a distance of 1,500 meters, the distance is valued as follows: For the first hundred meters, every meter at a hundred dinars; for the second hundred meters, every meter at 200 dinars; for the third hundred meters, every meter at 500 dinars, and the rest of the distance is set at 1,000 dinars for every meter, by reason of his persistence in what he was doing, without thought and without hesitation, despite the length of the distance.

The judge further ruled that 100,000 dinars be paid by the family of the youth for the girl running and her sandals falling off and she being unable to pick them up; and another 100,000 dinars for her shawl falling from her head and she being unable at the time to retrieve it; and a third 100,000 for her fear and the fear of her sisters, and for her screaming until her cousins rescued her.

As for the whole distance of 1,500 meters, a white cloth, one meter wide, shall be spread upon it. At the start of the cloth there shall be a man of black [skin] color, not more than one meter tall, with a black coffee-pot (“*dalla*”) full of bitter coffee. In the middle of the distance there shall be a “*banti*” [olive-skinned] man, likewise not more than a meter tall with a copper jug of water for those who ask for water. At the end of the cloth there shall be a white[-skinned] man not more than a meter tall carrying a silver tray of sweets in felicitation of the girl’s innocence of the heedless youth.²⁵

As for the two youths who rescued her, each of them shall be given two white purebred horses with white saddles upon them, and two white purebred camels. The distress caused to the people, who were mourning a death, is set at 50,000 dinars. As for the perpetrator, he is forbidden for the rest of his life to wear white upon his head . . . And the vehicle which the perpetrator drove shall be burned in the same place, to be a warning for those who do not heed.

After that, judge Abu Dahuk asked for the calculation of the sum and for the evaluation of the cost of the body parts by the *jaba*.²⁶ Then he waived a third of the “*mansbad*” out of respect for the *jaba* and the admission of guilt by the

perpetrator's family, and left the other two thirds to be dealt with by the father and the family of the girl and those present. The *qadi* waived the "*rizqat al-mansbad*" and returned it to the head of the *jaba*.

After negotiations and intervention by the *jaba* seeking leniency, each member of the *jaba* was assigned a part in paying the "*mansbad*"—whether financial or in-kind.

After the *jaba* had paid the 100,000 dinars, the girl's father rose and said: "My daughter's deliverance from this criminal cannot be assessed in money," and he donated the sum to the Fatah *tanzim* in Jalazun camp, asking them to use it for the benefit of prisoners, the families of martyrs, and the needy, and declaring that he did not want money but honor [*karama*].

The unnamed journalist who wrote this report clearly found some parts as unfamiliar as he or she expected readers would: Words specific to Bedouin law were presented within quotation marks in the original

The Bedouin judge's ruling blended elements of tribal law—the guarantees, the horses and camels, the elaborate symbolic elements of the ruling—with features of contemporary Palestinian life—a military checkpoint, a refugee camp, and the ubiquitous Ford Transit.

text. The ruling was very different from the routine press reports publicizing customary "truces" and reconciliation agreements involving large delegations that may include not only clan leaders and local notables but also PA officials and senior figures from political parties as well. The entire process, from the ruling until the agreement on the final arrangements, apparently took one month.²⁷

Abu Dahuk's ruling illustrates the integration of features common to contemporary West Bank Palestinian life with the mechanics and assumptions of the tribal law process. Thus, the distinctive proceedings of the *mansbad*—the guarantees, the horses and camels, the elaborate symbolic elements of the ruling, and the negotiation of the final penalty—are blended into a story involving an Israeli military checkpoint, the al-Aqsa Brigades, Fatah *tanzim*, a refugee camp, and the ubiquitous Ford Transit. The traditional collective oath included a denial that any outside involvement had "pushed" the man into doing what he had done, thus ruling out the involvement of Israeli agents looking to manipulate local families through issues of "honor." The donation of the final sum to a worthy cause, a common although not universal practice, invoked the national struggle. Moreover, there are suggestions that, in the end, the amount was returned to the perpetrator's family.²⁸

In interviews with the author, Abu Dahuk stated that he based this extraordinary ruling on an early twentieth-century Jordanian precedent. The ruling itself makes clear that the physical punishments enumerated were never intended to be carried out,²⁹ and they would, of course, have been considered criminal acts. Nevertheless, even as mechanisms for calculating the

financial penalty due, they evoked a normative framework so far removed from dominant social and legal discourses that readers were shocked in ways perhaps unintended by Abu Dahuk. Noting both positive and negative reactions to the ruling, Abu Dahuk reported that it had been “discussed in Saudi Arabia and in Jordan” as well as in Palestine, where he had answered questions about the case on local television. Acknowledging that his precedents were drawn “from older times, not from current practice,” he related that he frequently heard comments to the effect that “we don’t do this sort of thing.”³⁰

As in the case of the murder of Yusra al-`Azami, the aggrieved parties’ motivation is not immediately apparent from the public narrative. Why did the victim’s family choose this resolution method? Who influenced their decision? Who participated in the decision? What were their parameters of “choice”? Abu Dahuk observed that had the family chosen to take this case to court, they might have expected the perpetrator to receive a prison sentence of six months had he been found guilty. Some observers speculated that the case’s focus on vindicating a woman’s honor would have provided strong incentive for choosing the *`asha’iri* system over the civil courts.

The title of the *al-Quds* report about the case, which characterized the ruling as a “deterrent,” indicates the judge’s motivation: its deliberate severity aimed at preventing the victim’s family from pursuing physical retaliation. The extraordinary statement underlined their rights and entitlements while placing the ruling firmly in the context of increasing acts of private revenge in disputes between families. Thus, the perpetrator was afforded a level of personal security that might not have been provided by a court process.³¹ The extraordinary nature of the ruling is therefore not an index of exoticism but rather represents a strategy of containment. The secondary target of deterrence was anyone else who might have been tempted to behave like the perpetrator in the social context of the vulnerability of young women in the Ramallah area to predatory male behavior.

The most in-depth doctrinal response to this ruling came from the chief Islamic justice. In his regular column on the “religious affairs” page of *al-Quds* a couple of weeks later, Shaykh Taysir al-Tamimi published an opinion piece that began with the Quranic phrase “judgement is God’s alone.”³² Positioning himself as a “legal, *sbar`i*, and judicial party,” Tamimi asserted his authority to contest the normative discourse of Abu Dahuk’s ruling through three referential frameworks: “state” law, Islamic law, and the institution of the judiciary. Tamimi’s column emphasized the theoretical underpinnings of the office of judge in Islamic *fiqh*, supported with references to a set of *hadith* and a reminder that the ruler appoints the judge (thus, implementation of the judge’s rulings is the prerogative of the political ruler). In the fourth paragraph, Tamimi addressed the role of tribal judges:

We value the positive positions offered by the tribal judges to our Palestinian community in calming matters between disputing parties through the *`atwa* and the *budna*, which . . .

prevent the occurrence of evil things. But . . . [these] rulings must not violate the *shari`a*. Rather, they should accord with . . . its bases and established principles, and the penalty must issue from a judicial authority. Otherwise, people will take it merely as speculation and accusation, and injustice or tyranny could result. So it must accord with the texts and principles of the Islamic *shari`a*, and if it violates these, then it is of the *jabiliyya* [pre-Islamic era]: “Do they want judgment according to the time of pagan ignorance? Is there any better judge than God for those of firm faith?”³³

Pinpointing violations of the *shari`a* that he discerned in Abu Dahuk’s ruling, Tamimi also alluded indirectly to criticisms of partiality made of the tribal law system: “The *shar`* deals with everyone with equality, does not distinguish between one person and another, does not give weight to people’s superiority in wealth, status (*basab*), or lineage (*nasab*); nor does it back the strong and empowered against the victimized citizen.”

THE POLITICS OF INTERSECTING NORMATIVE FRAMEWORKS

The emerging Palestinian legal system in the West Bank and Gaza demonstrates various levels and degrees of legal pluralism:³⁴ different laws apply statutorily to different sectors of the population; the nascent central authority formally recognizes as “law” norms of which it is not the originator; and parallel systems of “social ordering”—as demonstrated by the cases examined here—function in quasi-judicial fashion, potentially conflicting with the central legal system’s requirements. On the formal level, the Basic Law recognizes “principles of *shari`a*” as “a basic source of law”; “*shari`a*-based law” is applied in the *shari`a* courts enjoying jurisdiction over specified areas of law. These courts—and those serving different Christian communities—are constituted and administered separately from the regular (*nizami*) court system.

Along with Muslim family law, *waqf*, and certain other matters, the *shari`a* courts are also empowered to assess the amount of *diya* due in cases of bodily injury and killing—but only on application from the injured parties, and only *after* the regular court system has completed its ruling. Beyond this, the *shari`a* courts have no jurisdiction over criminal matters, which fall under the exclusive jurisdiction of the *nizami* courts. As for “customary” or “tribal law” processes, although there is no statutory recognition of them *per se*, the law does give weight to out-of-court procedures and settlements, including agreement and reconciliation (*sulb*) between parties to disputes involving offenses against the person (e.g., wounding or killing), countenancing a limited reduction in penalties imposed on perpetrators.

The mufti of Gaza, who headed the *shar`i* arbitration committee in the case of Yusra al-`Azami’s murder, is a member of the Office of Fatwa and Islamic Research, headed by the Supreme Mufti of Jerusalem and the Palestinian Lands.

Formally appointed in towns across the West Bank and Gaza, muftis currently have no formal adjudication role, although they do invest considerable effort in mediation and conciliation activities.³⁵ In this particular case, however, the mufti headed a committee 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. Furthermore, concerning the awarding of *diyya*, the committee’s ruling also challenged the substance of “Islamic law” on which *shari`a* courts (headed by the chief Islamic justice) are empowered to rule. The *diyya* awarded, albeit increased in view of aggravating circumstances, was apparently assessed at half the full *diyya* because the deceased was female.³⁶ The halving of *diyya* for the life of a female derives from some interpretations of traditional law, but it is no longer applied in the *shari`a* courts. The chief Islamic justice states that no distinction is made on the basis of the victim’s gender.³⁷ The ruling on this matter also differentiated the position of the mufti and his committee from the political processes. The article in the French daily *Liberation* reported that Hamas officials who visited the `Azami family in the aftermath of the killing offered what would appear to have been a full *diyya* of \$ 80,000 to the family.³⁸

As for central legal processes, the fact that the mufti of Gaza headed the arbitration committee reveals the case’s importance. The ruling was pitched to a normative level presumably aimed at competing effectively with the formal judicial system.³⁹ Nor was this simply a case of a prominent local individual taking on a difficult task in a personal capacity: the original text of the arbitration committee’s ruling was not only signed by the four other members of the committee, but also stamped with the mufti’s official insignia. The ruling did not cite any system of law except the “Islamic *shari`a*,” although the committee issued the “ruling” in the form of an arbitration between families, leaving the guilty unnamed. So, while attributing *individual* responsibility for particular deeds, the actual perpetrators “disappeared,” since the ruling was issued between (and subsequently accepted by) the respective families as the “parties to the case.”

The process and trajectories of this ruling conformed to Hamas’s insistence that their members be held accountable “under God’s law” rather than under the criminal law system, through which the PA could assert its presumed state-like authority over manifestations of “security chaos.” Hamas sought the substantive application of Islamic law while adapting processes of informal customary dispute resolution in order to present the result as a *sulb* (reconciliation) before the formal legal authorities. Press coverage of the public reconciliation ceremony elucidated the meshing of Islamic law rulings with reconciliation rituals derived from customary law processes, as well as Hamas’s role in the case.

Ultimately, it was in the political and “customary” processes that the “*shari`i* ruling” was embedded and legitimized. Here, the central legal system

The shar`i ruling was ultimately legitimized by both political and customary processes: the central legal system and statutory law were engaged, while the victims' families' privacy was protected by a reconciliation that did not hold any one individual accountable.

was engaged: statutory law was procedurally evident in the formal textual declarations of the deed of final reconciliation and was also a critical part of the agreement between the families. The deputy public prosecutor appears to have responded to the families' call, rather than to the issuing of the *shar`i* ruling, stressing that the reconciliation concerned the "private rights" of the victims' families rather than the prosecutor's right to take necessary legal measures on behalf of the public authority. In the end, the formal legal system failed to hold anyone personally accountable for `Azami's killing. The two suspects who had been apprehended were subsequently released, and there did not appear to have been further follow-up.⁴⁰ Hamas as a party (as distinct from individual Hamas party members) was publicly vindicated of any allegations of involvement and thus "rehabilitated."

By comparison, the West Bank case is presented entirely within the framework of "customary law" (specifically "tribal law") and lacks any apparent engagement with the formal legal system. Nor does it provide any references, in the extracts of the ruling reproduced in the press report, to "classical" Islamic law. Given the reciprocal influences of Islamic law and customary law, a key focus for those seeking to control or "rehabilitate" customary institutions is the extent to which certain procedures and sanctions in the latter violate the rulings of the former.⁴¹ The broad and amorphous realm of "clan-based 'customary' law" has arguably been strengthened during the period of PA rule.⁴²

The literature on adaptations of customary dispute resolution processes makes clear the multiple and overlapping institutional/political/kinship roles played by different actors in emerging processes of "social ordering," and the intertwining and entanglement of different elements of the legal system and legal culture.⁴³ In the Palestinian context, political groupings' adaptations of customary law to self-help processes can be traced to the first intifada.⁴⁴ In the post-Oslo period, the emergence of Palestinian statutory law casts new analytical light on legal pluralism: the West Bank case highlights the very specific framework of Bedouin law while simultaneously illustrating the contestations of different legal cultures and communities. The victim of the offense was Bedouin, while the perpetrator was not; the judge, a Bedouin, notes that his ruling would have had additional features had it been an entirely intra-Bedouin case. Whereas Hamas's involvement in the first case dictated the application of classical Islamic law within an adapted customary law framework, the involvement of individuals affiliated with Fatah in the second case only becomes clear in the press account at the very end, in the distribution of the financial award by the victim's father to the Fatah *tanzim* in Jalazun camp; the impression given is that all parties submitted to the specific framework and substantive norms of "tribal law."

For his part, the chief Islamic justice explicitly denounced those parts of the “*manshad*” ruling he found to contradict the requirements of the Islamic *shari`a*, acting as an authoritative voice on substantive Islamic criminal law, although this falls outside his juridical institutional remit. He was addressing the *norms*. At the same time, his intervention clearly asserted the authority of the official judiciary, of which he is a senior member, over adjudicators imposing penalties from outside the formal system. Thus, he pointedly recognized the contribution made by the procedural aspects of truce integral to the management of tribal disputes, while insisting that the imposition of penalties is the prerogative solely of the “official” judiciary. He buttressed his argument with appeals to public interest as well as to Islamic jurisprudence. No comparable official commentaries on Abu Dahuk’s ruling appeared in the press. The chief Islamic justice thus emerges as the foremost institutional defender of the formal legal system and, by implication, of Palestinian statutory law.

Another part of the public discourse that informs a reading of Abu Dahuk’s ruling (and the press report thereof) is the fact that, against the plethora of dispute process frameworks drawing on and adapting customary law practices and personalities, there are complaints that individuals lacking sufficient knowledge have exercised functions for which they were not qualified.⁴⁵ Such complaints can be interpreted in a variety of ways: as expressing a desire to maintain the integrity of a system; as an effort to control access to the politically (and economically) powerful position of conciliation; and as a response to negative connotations associated with the idea of “tribalism” in some sectors of the local community. In mid-2005, a number of press articles referred disparagingly to “tribalism” as being behind the rise in violence between and within families.⁴⁶ The chief Islamic justice invoked “the force of tribalism and jahili zeal” in a commentary on increasing incidents of revenge murders and “honor” killings.⁴⁷ Two weeks prior to the publication of the West Bank ruling, the Abu Dahuk clan had felt obliged to clarify publicly their role in events preceding the “honor” killing of Fatin Habash, a young Ramallah woman who, at an earlier point, had sought refuge with them. She was later killed, apparently by her father, who gave himself up to the police.⁴⁸

It is possible that the wider publicity given to Abu Dahuk’s ruling in the attempted assault case aimed at redeeming “Bedouin values” and traditions as understood by a Bedouin judge in the specific case of the protection of a young woman’s honor, while also demonstrating the Abu Dahuk clan’s ability to contain a potentially escalating dispute. Indeed, the *al-Quds* report’s introductory sentence—“In an incident demonstrating the power and capacity of the tribal justice system to restore right to those entitled and to see that the wronged receive justice” (apparently the reporter’s only commentary on the case)—frames the ruling as an illustration of the efficacy of tribal law. In the broader context of public concern over access to justice within the formal legal system, Abu Dahuk’s ruling asserted the normative values of tribal law in a highly formalized—even ritualized—albeit unofficial process of dispute resolution.

Tamimi's response integrated the state legal system with the normative values of Islamic *shari`a* in an explicit contestation of the authority of the tribal law system. Although neither he nor his office had publicly responded to the "*shar`i* ruling" issued in the Gazan case, his insistence that formally appointed judges are the only parties empowered to issue rulings and impose sanctions arguably applies equally to the role played by the mufti and his fellow members of the *shar`i* Arbitration Committee in Gaza.

CONCLUSION

The hybrid legal heritage of the West Bank and Gaza Strip cannot but challenge the unification, centralization, and institutional empowerment of the central Palestinian legal system—and not only because institution building is taking place in a context of hostile and predatory military occupation, ongoing dispossession, and politically powerful donor-driven agendas. The combination of the central authority's weakness with an embryonic "national" legislation and prospective statehood stimulates competition between different, though overlapping, normative frameworks. June Starr observes that "law is a process . . . that . . . is shaped by rules and cultural logic, and . . . it is also a *discourse* fought over by very real agents with different political agendas."⁴⁹ The two cases discussed here illuminate this dynamic. This is true whether the actors were competing for "control" over norm-making in a particular space, with a view to future legislation, or (more specifically) with a view to establishing norms in the framework of particular disputes. Hamas's 2006 victory in the Legislative Council elections does not signal the triumph of a single normative repertoire in Palestinian legislative processes, either doctrinally or practically. How different discourses of "the law" develop, and how other normative discourses continue to be asserted in the public sphere and applied in unofficial (as well as official) dispute processes, will doubtless remain open to interpretation as metaphors for contests well beyond the sphere of "law."

NOTES

1. Glenn E. Robinson, "The Politics of Legal Reform in Palestine," *Journal of Palestine Studies* 27, no. 1 (Fall 1997), p. 57.

2. Bernard Botiveau, "Palestinian Law: Social Segmentation Versus Centralization," in Baudouin Dupret, Maurits Berger, and Laïla al-Zwaini, eds., *Legal Pluralism in the Arab World* (The Hague: Kluwer Law, 1999), p. 73.

3. For an overview of the situation in different parts of the West Bank from the previous summer, see *Who Governs the West Bank? Palestinian Administration under Israeli Occupation*, ICG Middle East

Report no. 32 (Amman/Brussels: International Crisis Group, 2004).

4. In May 2005, Palestinian human rights organizations in Gaza, along with a range of political factions, registered their concern over the "continuation of the state of security disorder" and the numbers of casualties from "internal violence." *Al-Quds*, 11 April 2005 and 1 May 2005. Earlier, in September 2004, the International Crisis Group reported that "law and order—more accurately its absence—is today the key domestic preoccupation among Palestinians." *Who Governs the West Bank?* p. 18.

5. Tobias Kelly has examined both academic and practitioner approaches to unofficial dispute resolution in the context of West Bank labor disputes, with a focus on donor policies on governance and the rule of law; see Kelly, "Law, Culture and Access to Justice under the Palestinian National Authority," *Development and Change* 36, no. 5 (September 2005), pp. 865–86. An extensive study by Birzeit University's Institute of Law considers the practice of "informal justice" in the West Bank and Gaza Strip from the perspective of individuals whose cases were dealt with through processes of "conciliation" (*islab*) and customary law; see *Informal Justice: Rule of Law and Dispute Resolution in Palestine—National Report on Field Research Results* (Birzeit: Birzeit University Institute of Law, 2006). I am using the term "tribal law/adjudication"—despite certain problems with it—to translate *al-qada' al-`asha'iri* in this article, rather than "clan-based customary law," to reflect the position of the judge who issued the ruling under examination in the second case. On the differences between "customary *subb*" procedures and *al-qada' al-`asha'iri*, see Nadera Shalhoub-Kevorkian and Mustafa `Abd al-Baqi, *al-Qada' wa'l-subb al-`asha'iri wa atbarbuma `ala al-qada' al-nizami fi filastin* (Birzeit: Birzeit University Institute of Law, 2003), pp. 11–12. Shalhoub-Kevorkian and `Abd al-Baqi note an increased recourse to the latter in view of the circumstances of closures since the Israeli incursions of 2002.

6. They had apparently signed the marriage contracts (*katibin al-kitab*) and were thus formally married under the law but had not yet held the public wedding celebration.

7. Association of the People of Jaffa [Gaza], "Bayan li'l-Haqiqa," 9 April 2005.

8. *Qisas* is the Islamic law term for exact retaliation, distinguished from the term *tha'r*, or vengeance, attributed to pre-Islamic practice.

9. Hamas statements of 9 April 2005 and 10 April 2005.

10. Local and international coverage placed the name of the victim and the story of her death in the public domain. An academic treatment such as this must formally emphasize the personal tragedy involved for the victim and her family.

11. Statement of 12 April 2005; press reports in, for example, *al-Ayyam*, 10 April 2005, and *al-Quds*, 11 April 2005. Other statements included those issued by Fatah Northern Command on 8 and 11 April 2005.

12. Qur'an 4:65; Abdel Haleem, M.A.S., *The Qur'an: A New Translation* (Oxford: Oxford University Press, 2004).

13. *Al-Quds*, 4 May 2005.

14. *Al-Quds*, 4 May 2005; *al-Risala*, 5 May 2005. The news report in the latter was by Rami Khrais; in the former, by a "special correspondent."

15. Donald Macintyre reported in the *Independent* on 13 April 2005 that a Hamas spokesperson told the press that Yusra had been shot because of a "mistaken suspicion of immoral behavior," and that "the gunmen had not known the couples were betrothed."

16. Macintyre, "Hamas Admits Its Gunmen Shot Betrothed Woman in 'Honour Killing,'" *Independent*, 13 April 2005.

17. *Liberation*, 11 May 2005.

18. *Al-Quds*, 24 May 2005.

19. I am grateful to the judge, Daif Allah Abu Dahuk, for interviews on 29 June 2005 and 20 November 2005 during which he explained a number of terms mentioned in the report and offered his perspective on the case.

20. Daif Allah Abu Dahuk explains that although he would describe himself as a Bedouin judge (*qadi badawi*), he did not object to the newspaper title of "tribal judge" (*qadi `asha'iri*) in this case because it involved non-Bedouin parties (i.e., the perpetrator and his delegation). An intra-Bedouin ruling, he explained, would have featured additional social sanctions. Daif Allah Abu Dahak, author interview, 29 June 2005.

21. On the significance of *tabyid al-`ird* (literally, "whitening the honor") in cases of assaults on "honor"—including the swearing of the oath—see for example Muhammad al-Sawahira, *Al-Mujaz fi al-qada' al-`asha'iri* (Jerusalem: n.p., 2003), pp. 53–54. I will not examine the concept of "honor" in this article.

22. Muhammad Abu Hasan explains the *mansbad* as "the judge who examines cases of honor (*`ird*) and the dishonoring of obligations." Abu Hasan, *Turath al-badu al-qada'i* [English title page translated as *Bedouin Customary Law*] (Amman:

Da'irat al-thiqafa wa'l-fanun, 1987), p. 564; see also pp. 96–104, 341 for differences between tribes. Abu Dahuk (author interview, 20 November 2005) described the *mansbad* as the text of the qualified judge's ruling, a ruling which stands as a precedent that others may follow; he compared its standing to "legislation" (*tasbri`*).

23. Here this signifies the judge's fee; Abu Dahuk (author interview, 20 November 2005) stated that normally this is ten percent of what has been demanded, but that he had waived the fee (see below) to "ease the way" in the *mansbad*. On other meanings of the *rizqa*, see Sawahira, *Al-Mujaz fi al-qada' al-`asba'iri*, pp. 36–37.

24. See Abu Hasan, *Turath al-badu al-qada'i*, pp. 240–43, on this classification and on cases from Jordanian tribal law involving "she who screams in the forenoon." As explained by Abu Dahuk (author interview, 29 June 2005), this category of offense entails the severest punishment, since it is perpetrated in broad daylight, when, within this tradition, the Bedouin woman is expected to be able to be safely out and about tasks such as gathering wood, drawing water, or herding. The classification refers to the way in which—according to this tradition—the attacked woman establishes her innocence through screaming.

25. Ahmad al-`Abbadi states that generally in Bedouin law an attempted rape or assault is considered a crime in and of itself and gives rise to demands for the same penalty as would apply to the commission of the crime. Ahmad al-`Abbadi, *Jara'im al-jinayat al-kubra `ind al-`asba'ir al-urduniyya* (Amman: Dar al-`Arabiyya li'l-nashr wa'l-tawzi`, 1985), p. 240. He also describes penalties as including the different stages passed through by the offender in his attempt (going to the place, talking to the person, and so on), as is the case in the elaboration of the different elements of this ruling. Abu Dahuk (author interview, 29 June 2005) explained this particular part of the ruling as intended to mirror the feelings of the young woman as she fled from her would-be attacker, from despair to hope and then to safety.

26. Compare `Abbadi, *Jara'im al-jinayat al-kubra*, p. 233, on the "buying back" of body parts included in the penalty.

27. Abu Dahuk, author interview, 20 November 2005.

28. Compare to practices in Egypt: Sara Ben Nafissa "Haqq al-Arab and Customary Dispute Settlement in Egypt," in Baudouin Dupret and Francois Burgat, eds., *Le shaykh et le procureur: Systèmes coutumiers et pratiques juridiques au Yémen et en Égypte* (Cairo: CEDEJ, 2005), pp. 150–51; see also Mohammed Abu-Nimer, *Nonviolence and Peace Building in Islam: Theory and Practice* (Gainesville: University of Florida Press, 2003), pp. 95, 98.

29. Abu Dahuk (author interview, 29 June 2005) explained that "the point is the perpetrator's indebtedness to those [of the *jaba*] who delivered him."

30. Abu Dahuk, author interview, 20 November 2005.

31. Abu Dahuk, author interview, 29 June 2005. Compare Barbara Drieskens, "What Happened? Stories, Judgments, and Reconciliations," in Dupret and Burgat, eds., *Le shaykh et le procureur*, pp. 145–57.

32. *Al-Quds*, 3 June 2005.

33. Qur'an 5:50.

34. Sally Engle Merry, "Legal Pluralism," *Law and Society Review* 22, no. 5 (1988), p. 879. Much of the academic debate on "legal pluralism" depends on definitions of "law" or "legal system" and non-state forms of social ordering. See Baudouin Dupret, "What Is Plural in the Law? A Praxiological Answer," in Dupret and Burgat, eds., *Le shaykh et le procureur*, pp. 159–83.

35. See Muhammad al-Kufrdani, ed., *Al-ifta' fi filastin fi zhill al-sulta al-wataniyya, 1994–2004* (Jenin: Dar al-fatwa wa al-buhuth al-islamiyya, 2005), p. 45.

36. See Palestinian Supreme Fatwa Council, Decision no. 2 (1996) in Kufrdani, *Al-ifta' fi filastin*, p. 118, where the full *diyya* is given as the classical value of a thousand gold dinars or 4.25 kilograms of 24-carat gold, worth just under 50,000 Jordanian dinars at 2005 prices.

37. Fadwa al-Labadi discusses the significance of this in regard to "lives at half value" in al-Labadi, "Case History: *Diya* between *Sbari`a* and Customary Law," in Lynn Welchman, ed., *Women's Rights and Islamic Family Law: Perspectives on Reform* (London: Zed Books, 2004), pp. 164–71.

38. *Liberation*, 11 May 2005.

39. Compare the 1995 case discussed by Hillel Frisch, where the mufti of Gaza headed an arbitration committee “under the sponsorship of the honorable President” in a murder case of particular political gravity; Frisch notes here also that the process “was nevertheless closely linked to customary law practice.” Frisch, “Modern Absolutist or Neopatriarchal State Building? Customary Law, Extended Families, and the Palestinian Authority,” *International Journal of Middle East Studies* 29, no. 3 (August 1997), pp. 341–59.

40. Information from al-Mezan human rights organization as of 2005. See Shalhoub-Kevorkian and Abd al-Baqi, *Al-Qada' wa'l-sulb*, pp. 45–46, 71–80, for examples from the court records regarding the impact of customary reconciliation agreements on judgments; see Palestinian Criminal Procedure Code 2001 article 149(1) for circumstances where the prosecution may recommend to the attorney general that a case be dropped.

41. See generally Sawahira, *Al-Mujaz fi al-qada' al-`asba'iri*.

42. Ifrah Zilberman, “Palestinian Customary Law in the Jerusalem Area,” *Catholic University Law Review* 45 (1996), pp. 795–810; Frisch, “Modern Absolutist or Neopatriarchal State Building”; and 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* 20, no. 2 (2002), pp. 462–95. See also the December 2007

International Crisis Group report, *Inside Gaza: The Challenge of Clans and Families*, excerpted in the International Documents section of *JPS* 147, no. 3 (Spring 2008) pp. 191–202.

43. The second intifada has also witnessed increasing “enforcement actions” by members of politically affiliated groups such as the al-Aqsa Brigades and also clan-based factions (see *Inside Gaza*).

44. In addition to the sources cited above, see Adrien Katherine Wing, “Legal Decision-Making during the Palestinian Intifada: Embryonic Self-Rule,” *Yale Journal of International Law* 18, no. 1 (Winter 1993), pp. 95–153; and Abu-Nimer, *Nonviolence and Peace Building in Islam*, pp. 128–80. The context of one “trial” by a popular committee, and the impact of “both ‘traditional’ and intifada mechanisms of conflict resolution” on women are examined in Rema Hammami, “Women, the Hijab, and the Intifada,” *Middle East Report* nos. 164–65 (May–August 1990), pp. 25–26.

45. Sawahira, *Al-Mujaz fi al-qada' al-`asba'iri*, pp. 82–89.

46. See, for example, *al-Quds*, 13 May 2005 and 16 May 2005.

47. Shaykh Taysir al-Tamimi, “Hukm al-qatl tha'ran aw difa`an `al-sharaf,” *al-Quds*, 1 April 2005.

48. *Al-Quds*, 13 May 2005 and 16 May 2005.

49. June Starr, *Law as Metaphor: From Islamic Courts to the Palace of Justice* (Albany: State University of New York Press, 1992), p. xviii.