

1999

# The Palestinian Basic Law: Embryonic Constitutionalism

Adrien Katherine Wing

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# THE PALESTINIAN BASIC LAW: EMBRYONIC CONSTITUTIONALISM\*

Adrien Katherine Wing\*\*

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\* This article was the basis of a presentation delivered by Professor Wing as part of a discontinuous symposium entitled, *The Legal Foundations for Peace and Prosperity in the Middle East*, sponsored by the *Case Western Reserve Journal of International Law* and the Frederick K. Cox International Law Center. Professor Wing delivered this presentation at the Case Western Reserve University School of Law on February 9, 1999.

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## I. INTRODUCTION

During the five-year autonomy period negotiated as part of the Oslo Peace Accords,<sup>1</sup> the Palestinian Legislative Council (PLC) drafted and finalized the Basic Law<sup>2</sup> which was supposed to serve as an interim constitution.<sup>3</sup> This document, finished in October 1997, was an attempt by

<sup>1</sup> Between September 13, 1993 and September 27, 1995, five agreements were signed by the State of Israel and the Palestine Liberation Organization (PLO). The two main agreements are: the Declaration of Principles on Interim Self-Government Arrangements (DOP) of 13 September 1993 (also referred to as the Oslo I Agreement) and the Interim Agreement on the West Bank and the Gaza Strip (Interim Agreement) of 28 September 1995 (also referred to as the Oslo II Agreement). See RAJA SHEHADEH, FROM OCCUPATION TO INTERIM ACCORDS: ISRAEL AND THE PALESTINIAN TERRITORIES 11 (1997)[hereinafter SHEHADEH, FROM OCCUPATION]. For an analysis of the legal status of Palestine during the interim period, see Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DENV. J. INT'L L. & POL'Y 27 (1997). For an analysis of the issues that need to be addressed if and when the final status negotiations with Israel get underway, see generally John Quigley, *The Role of Law in a Palestinian-Israeli Accommodation*, 31 CASE W. RES. J. INT'L L. 351 (1999).

<sup>2</sup> See THE PALESTINIAN BASIC LAW (Third Reading) (1998) (Palestine), translated by Saladin Al-Jurf [hereinafter BASIC LAW]. The text of the PALESTINIAN BASIC LAW is reprinted in the Appendix to this issue of the *Case Western Reserve Journal of International Law*. 31 CASE W. RES. J. INT'L L. 495 (1999). Under the Oslo Accords, the PLC is authorized to make a Basic Law. Oslo II, Art. III (7), reprinted in SHEHADEH, FROM OCCUPATION, *supra* note 1, at 211.

<sup>3</sup> See generally Adrien Wing, *The New South African Constitution: An Example for Palestinian Consideration*, 7 PAL. Y.B. INT'L L. 105 (1992-94) (discussing the 1993 interim South African constitution); ADRIEN KATHERINE WING, DEMOCRACY, CONSTITUTIONALISM AND THE FUTURE STATE OF PALESTINE (1994) (discussing the 1994, or third draft of the Palestinian Basic Law); *From Liberation to State Building in South Africa: Some Constitutional Considerations for Palestine*, in LIBERATION, DEMOCRATIZATION, AND TRANSITIONS TO STATEHOOD IN THE THIRD WORLD 91 (May Jayyusi ed., 1998)[hereinafter *From Liberation*].

the democratically elected parliamentarians of autonomous Palestine, representing the Palestinian people living in the West Bank, Gaza, and East Jerusalem,<sup>4</sup> to join the community of nations possessing democratic constitutions. Unfortunately, the Basic Law remains unsigned by Palestinian National Authority (PNA) President Yasser Arafat,<sup>5</sup> and he continues to govern in a constitutional vacuum. The autonomy period itself has expired, and Arafat had threatened to unilaterally declare the existence of the Palestinian state on May 4, 1999.<sup>6</sup> Thus, the Basic Law was not put into effect during its intended time period. It is my view, however, that the Basic Law can serve an important legal function in the future. It can be used as the basis for creating the constitution of any future independent state of Palestine. I base this conclusion upon my seventeen-year expertise in the region, which includes serving as an independent consultant to the PLC on the drafting of the Basic Law in 1996. Although Palestine was not an independent state at the time of the drafting of the Basic Law, it was evident to many of the drafters that the document would hopefully

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<sup>4</sup> Pursuant to the Oslo Accords, elections were held in January 1996, and Palestinians living in the West Bank, Gaza, and East Jerusalem were permitted to vote for a President and for members of the PLC. It is interesting to note that East Jerusalemites were permitted to vote, even though the status of Jerusalem was an issue to be left to final status negotiations, and none of the Israeli government land proposals contemplate permitting East Jerusalem to return to Arab control, i.e. the pre-1967 war situation. I will use the term "autonomous Palestine" to refer to the areas of the West Bank and Gaza that are under control of the Palestine National Authority (PNA). Palestinians living outside of the West Bank, Gaza and East Jerusalem are left in legal limbo as a result of the Accords. For arguments that such Palestinians are entitled to a right to return to Palestine, see John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARV. INT'L L.J. 171 (1998); DONNA E. ARZT, *REFUGEES INTO CITIZENS: PALESTINIANS AND THE END OF THE ARAB-ISRAELI CONFLICT* (1997) (setting forth four negotiation principles which could form the framework for resolving the Palestinian refugee crisis). Compare Justus R. Weiner, *The Palestinian Refugees' "Right to Return" and the Peace Process*, 20 B.C. INT'L & COMP. L. REV. 1, 45-52 (1997) (calling for the creation of an arbitration tribunal to hear the political and financial claims of the displaced Palestinians as a final resolution to the problem).

<sup>5</sup> Arafat's failure to sign will be discussed *infra* at note 63 and accompanying text.

<sup>6</sup> Western and Arab nations have urged Arafat to hold off, worrying that a declaration of statehood would worsen peace prospects with Israel. At the time, Israeli Prime Minister Netanyahu had warned that a unilateral declaration of statehood could bring the peace process to collapse. See *Arafat Ready to Discuss Statehood*, Associated Press, Feb. 22, 1999, available in 1999 WL 12932378. Israel held elections on May 17, 1999, in which Netanyahu was not re-elected as Prime Minister.

be used as a basis for creating an independence constitution, if not constituting that new document itself.<sup>7</sup>

The purpose of this symposium Article is to examine selected strengths and weaknesses of this would-be embryonic constitution and make some preliminary assessments about the democratic nature of the text and its prospects for having any real life impact in Palestine upon implementation.

A constitution manifests a state's experiences and aspirations. Constitution-making remains the preeminent (and institutionalized) *constituting* act of a country. It serves as a marker and rewriting of where the state has been and expresses where it would like to be going . . . . The conflicts between the limiting/legitimizing and the self-defining/reuniting/aspiring aspects of a constitutional text create discontinuities and contradictions noticeable to any reader . . . . Careful analysis of the text uncovers tensions and contradictions that are hidden within the text, as well as gaps left by conflicts so great that they could not be hidden and therefore have been omitted.<sup>8</sup>

An examination of the Basic Law will reveal the current strains and conflicts extant in autonomous Palestine and any future independent Palestine. Its struggle for survival occurs within the context of an unipolar world order with the United States as the sole superpower, and an ongoing Israeli occupation in the Palestinian Territories. The tension is exacerbated by a region lacking true democratic role models and by incidents of Islamic fundamentalist terrorism coupled with terrorism by Jewish settlers as well. Such incidents by Islamic forces have led to increasing pressure by the United States and Israel on Arafat to round up and imprison all those dissenting from the peace process.

Can democracy be born in such harsh conditions? What role does law, and in particular the constitution, play? To answer such existential questions, the Basic Law cannot be examined in isolation. It must be explored within the context of the potential for constitutionalism as well. Democracy is in part constitutionalism, which "has to do with making a state into a *rechtstaat* or an *état de droit* – a state that is governed by its own public law. This kind of state is accountable; it has elements of legislative control or a monitoring supervision of the executive. The admini-

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<sup>7</sup> Interviews with various members of the PLC (June, July, Aug. 1996 and Nov. 1997) [hereinafter Interviews].

<sup>8</sup> Christopher P. Barton, *The Paradox of a Revolutionary Constitution: A Reading of the Nicaraguan Constitution*, 12 HASTINGS INT'L & COMP. L. REV. 49, 53-54 (1988).

stration of justice is automatized through the judicial system."<sup>9</sup> In future scholarship, I hope to further explore the issues raised in this Article and examine the development of Palestinian constitutionalism by reviewing the implementation of the Basic Law or its successor in its first few years of operation.<sup>10</sup>

While the actual implementation of the Basic Law cannot be explored yet, Part II of this Article will detail structural and cultural factors influencing the future democratization and constitutionalism process in Palestine. The factors discussed include the unipolar world order, national economy, education, political pluralization, communitarian/hierarchical society, distrust of authority, and the multilayered legal regime.

Part III of this Article highlights certain textual features of the Palestinian Basic Law. In this part, I will make reference to choices made by another society, South Africa, in its constitution-making process. While the historical, political, and legal differences are numerous, certain similarities between the two societies are undeniable. Over the years, many comparisons have been made between the liberation struggles of South Africa and Palestine. Many considered the African National Congress (ANC) and the Palestine Liberation Organization (PLO), both accredited United Nations General Assembly Permanent Observers, to be fighting variants of minority settler regimes. Military connections and strategic alliances between the enemies of the liberation movements, Israel and apartheid South Africa were well-documented.<sup>11</sup> In both societies, groups who felt oppressed waged both nonviolent and violent warfare against their oppressors. In both countries, the oppressed were not allowed to govern themselves and were subject to military or emergency rule, with well-documented international human rights violations.<sup>12</sup> In both instances, liberation movements formerly branded as terrorist ultimately sat down to negotiate the transition of power. Both societies have experi-

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<sup>9</sup> Crawford Young, *The Debate on Constitutionalism in Africa*, in *THE U.S. CONSTITUTION AND CONSTITUTIONALISM IN AFRICA* 125, 127 (Kevin W. Thompson ed., 1990).

<sup>10</sup> This research will result in a book tentatively entitled *PALESTINIAN DEMOCRACY?: A COMPARATIVE CONSTITUTIONAL LAW PERSPECTIVE*.

<sup>11</sup> See, e.g., JAMES ADAMS, *THE UNNATURAL ALLIANCE* (1984) (discussing the connections between South Africa and Palestine); JANE HUNTER, *ISRAEL'S FOREIGN POLICY: SOUTH AFRICA AND CENTRAL AMERICA* (1987). Needless to say, many supporters of Israel deeply resented any comparisons to the *apartheid* regime.

<sup>12</sup> With respect to Palestine, see, for example, Richard Falk & Burns Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza*, 32 *HARV. INT'L L. J.* 129 (1991).

enced the fear articulated by South African Constitutional Court Justice Albie Sachs:

[T]he elimination of [outside oppression] does not . . . guarantee freedom even for the formerly oppressed. History unfortunately records many examples of freedom-fighters of one generation becoming oppressors of the next. Sometimes the very qualities of determination and sense of being involved in a historic endeavour which give freedom-fighters the courage to raise the banner of liberty in the face of barbarous repression, transmute themselves into sources of authoritarianism and historical forced-marches later on. On other occasions, the habits of clandestinity and mistrust, of tight discipline and centralized control, without which the freedom fighting nucleus would have been wiped out, continue with dire results into the new society.<sup>13</sup>

South Africa appears to be avoiding this fate.<sup>14</sup> After the first five years of democratic government in South Africa, the result is majority rule in a fledgling independent democracy. In Palestine, the end result is still unclear. I hope that my comparative insights will be enhanced by my having served as an advisor in both societies. In addition to the previously mentioned service in Palestine, I acted as an advisor to the African National Congress Constitutional Committee in the years leading up to the adoption of the 1993 interim constitution. Interestingly, the only constitution that the PLC asked that I translate from English into Arabic was the 1996 South African document.

Part IV of the Article is a very brief case study of women's rights since the tension between an inegalitarian past and the potential for constitutionally mandated equality in the future is most evident for this sector of society. Part V concludes that the Basic Law constitutes an embryonic attempt at creating a democratic foundation in whatever part of Palestine the PNA will be allowed to govern as an independent state. The likelihood of a healthy birth and productive childhood for independent

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<sup>13</sup> ALBIE SACHS, THE FUTURE CONSTITUTIONAL POSITION OF WHITE SOUTH AFRICA (1990), cited in Patrick Fitzgerald, *Democracy and Civil Society in South Africa: A Response to Daryl Glaser*, 49 REV. AFRICAN POL. ECON. 94, 108-09 (1990). For a recent article comparing the negotiation process in each society, see Daniel Lieberfeld, *Post-Handshake Politics: Israel/Palestine and South Africa Compared*, 6 MIDDLE E. POL'Y. 131 (1999).

<sup>14</sup> A detailed legal history of the South African struggle to end apartheid is beyond the scope of this Article. For the author's views on this process, see, for example, *From Liberation, supra* note 1; *Communitarianism vs. Individualism: Constitutionalism in Namibia and South Africa*, 11 WISC. INT'L L. J. 296 (1993), and citations therein.

Palestine depends very much on the will of both the Palestinian people and the international community.

## II. INFLUENCES ON DEMOCRATIC STATE BUILDING

While there are many factors that might influence democratization and constitutionalism in Palestine, this Article will mention seven: the unipolar world order; economy; education; political pluralization; communitarian/hierarchical society; distrust of authority; and the multilayered legal regime. These elements provide a backdrop for the discussion of the constitutional aspects of state building in Parts III and IV.

### A. Unipolar World Order

Some Palestinians, including prominent Palestinian-American professor Edward Said, have serious complaints about the peace process<sup>15</sup> or are even completely opposed to negotiating with Israel at all. Many feel the small discontinuous patches of land that some have called “bantustans”<sup>16</sup> or “arabstans” that are being offered in negotiations with Israel are not worth accepting. Others, such as those in Hamas, call for an Islamic state in all of Biblical Palestine, including present-day Israel. Some Palestinians desire to get at least the original land grant proposed in U.N. Security Council Resolution 181 of 1948 for the Palestinian state.<sup>17</sup> This original land grant is larger than the land transfers being discussed now. Regardless of one’s political perspective, it is important to note that democracy and constitutionalism in Palestine cannot be viewed in a vacuum. Autonomous Palestine has come into existence at a particular historical point in the midst of an existing unipolar world order. The Soviet Union and its allies are no longer available to assist the Palestinian national movement militarily, economically, or diplomatically. Absolutist

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<sup>15</sup> See, e.g., EDWARD SAID, *A Cold and Ungenerous Peace*, in PEACE AND ITS DISCONTENTS: ESSAYS ON PALESTINE IN THE MIDDLE EAST PEACE PROCESS 100, 100-06 (1996).

<sup>16</sup> See Trudy Rubin, *Netanyahu’s Leopard-Skin Solution Won’t Work*, BALTIMORE SUN, Mar. 21, 1997, at 17A, available in 1997 WL 5503280.

<sup>17</sup> See Samira Shah, *On the Road to Apartheid: the Bypass Road Network in the West Bank*, 29 COLUM. HUM. RTS. L. REV. 221, 229 (1997).

On November 29, 1947, the United Nations issued Resolution 181, recommending the partition of Palestine into a Jewish and an Arab state with Jerusalem and Bethlehem as a separate entity under a special international regime. The partition plan granted the Jewish population in Palestine just over 56% of the area at a time when they owned 6.2% of the land and constituted one-third of the total population.

*Id.* For the original text of Resolution 181, see G.A. Res. 181, U.N. GAOR, 2d Sess., at 131, U.N. Doc. A/519 (1947).



political positions that might have theoretically been implementable at previous points in history are not possible in the post-Cold War era. Additionally, ever since the Gulf War, when the PLO sided with Iraq, Palestinians have not been able to rely on their Arab brother nations for economic support as in the past.<sup>18</sup> The United States government, a long-time ally of Israel over the years, is now the only international political actor of significance. Any major economic aid for the fledgling Palestine has to come from the United States, American and other multinational corporations and banks, or those of European allies.<sup>19</sup> Moreover, the IMF and the World Bank, both U.S.-dominated, are major players in any redevelopment schemes. While the December 1998 visit of American President Bill Clinton to Palestine was a major diplomatic coup, much of that mutual goodwill was lost when the bombing of Iraq resumed.<sup>20</sup> President Arafat's efforts to hinder public demonstrations of support for the Iraqi people could not conceal the rage and frustration of the Palestinian people at a perceived American double standard. For example, Israel has nuclear and chemical weapons and no one is bombing it.<sup>21</sup> Thus the existence of a unipolar world order has greatly limited the political and constitutional options that autonomous or independent Palestine could undertake in a wide variety of areas.

### *B. National Economy*

Autonomous Palestine has severe economic problems that affect democratization efforts as well. The PNA does not control the economic resources of Palestine. The economy remains dependent on Israel. The

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<sup>18</sup> For discussion of the Palestinian position since the Gulf War, see Adrien Katherine Wing, *Legal Decision-Making During the Palestinian Intifada: Embryonic Self-rule*, 18 YALE J. INT'L L. 95 (1993).

<sup>19</sup> For example, the United States pledged \$500 million to the West Bank and Gaza dating from the 1993 Oslo Accords. See HUMAN RIGHTS WATCH, PALESTINIAN SELF RULE AREAS: HUMAN RIGHTS UNDER THE PALESTINIAN AUTHORITY 41 (Sept. 1997).

<sup>20</sup> Two days after President Clinton was cheered during a visit to the West Bank and Gaza Strip, thousands of Palestinians chanted "Death to Clinton!" and burned U.S. flags to protest U.S. air strikes against Iraq. See Mohammed Daraghme, *Palestinian Authority Caught in a Dilemma After U.S. Attack on Iraq*, Associated Press, Dec. 17, 1998, available in 1998 WL 7472513.

<sup>21</sup> Most Palestinians strongly identify with the Iraqis as fellow Arabs and fellow Muslims, though their support does not necessarily extend to Iraqi leader Saddam Hussein. Arafat has been careful not to hurt his growing ties with the United States, which are considered an important asset in the quest for Palestinian statehood. However, Arafat also cannot afford to be seen as opposing the widespread support for Iraq that exists among his people. *Id.*

massive harm and chaos engendered by frequent Israeli border closures is a deliberate tactic to hurt the Palestinian economy, as is the refusal to allow the operation of the Gaza airport, to designate bypass roads between Gaza and the West Bank, and to transfer tax moneys, etc.<sup>22</sup> Moreover, alleged corruption in the PNA hinders the transfer of promised international aid.<sup>23</sup> Of course, the continued confiscation of Palestinian land and building of Israeli settlements has profound implications for the Palestinian economy. These factors, combined, help insure that any future Palestinian state will be very constrained financially.

### C. Education

Fortunately, many Palestinians have actively sought out higher education and, because of this, they constitute the most highly educated people in the Middle East.<sup>24</sup> This impressive level of accomplishment will be an important contributor in the struggle to achieve democracy. The advanced skill level means that individuals already exist who can staff the new Palestinian-controlled governmental sector and the various components of civil society, such as NGOs, corporations, and schools. Returning exiles have been able to supplement the talents of "insiders," who may not have had the opportunity to utilize their professional credentials to the utmost due to the Occupation.

On the negative side, there are large pockets of the Palestinian population who have not had sufficient access to education. Since the Israelis kept the schools closed throughout most of the *intifada* (1987-94), many children and young people lost several years of schooling.<sup>25</sup> The college population has, of course, been equally affected by their inability to

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<sup>22</sup> For more information on the current state of the economy, see Oussama Kanaan, *The Peace Process, Uncertainty and Private Investment in the West Bank and Gaza Strip*, MIDDLE E. POL'Y, Oct. 1998, at 67; World Bank et al., *Palestinian Autonomous Areas - State of Siege*, 9 PALESTINE Y. B. INT'L L. 299 (1996-97) (describing the effect of the Israeli closure policy on the Palestinian economy).

<sup>23</sup> An internal audit revealed that PNA corruption and mismanagement wasted approximately U.S. \$326 million, or 40% of the PNA's annual budget. See David P. Fidler, *Foreign Private Investment in Palestine Revisited: An Analysis of the Revised Palestinian Investment Law*, 31 CASE W. RES. J. INT'L L. 293, 304 (1999).

<sup>24</sup> Peter Passell, *The Palestinians May Now Have A Chance to Spur Their Economy*, N.Y. TIMES, Sept. 23, 1998, at D2.

<sup>25</sup> See, e.g., ANDREW RIGBY, LIVING THE INTIFADA 100, 110 (1991) (discussing the closure of schools during the *intifada* years of 1987-90 and the accompanying struggle of the Palestinian people to compensate, in part, for the education deficiency).

complete courses of study in a timely manner. This backlog will take years to rectify.<sup>26</sup>

Some of the more highly educated have governmental service and private sector ambitions that cannot be met in the new dispensation. The creation and training for all the various positions will take some years. Resentment of the former exiles or perceived favorites of President Arafat can be considerable.<sup>27</sup>

To address some of these problems, the PA Ministries of Education and Higher Education must have the resources to tackle adult and childhood illiteracy and vocational and higher-education curricular reform. Initial training for those newly hired and those continuing professional training is essential as well. None of this will matter, however, if the economy does not grow sufficiently to create new jobs.

#### D. *Political Pluralization*

Palestinian political pluralization exists to a degree unequalled in the Arab world. Rather than the Monarch/Dictator/one-party state model, a full panoply of political factions has existed ranging from Islamic fundamentalists to Communists. Like the liberation movements of South Africa, these Palestinian groups were illegal in the Occupied Territories prior to the Oslo agreements, and had no time to develop open democratic structures. There are various PLO factions, including the majority party Fatah, as well as the People's Front for the Liberation of Palestine (PFLP), Democratic Front for the Liberation of Palestine (DFLP), and the People's Party (former Communist Party).<sup>28</sup> During the *intifada*, an underground leadership known as the Underground National Leadership of the Uprising (UNLU) developed.<sup>29</sup> The Palestine National Council (PNC) served as a parliament-in-exile for the PLO, containing various political parties, NGOs, etc. In the future, these entities might have some impact on democratization in Palestine.

The year 1996 brought with it the first democratic and internationally monitored elections in which a vast majority of the Palestinians chose among 676 candidates for the PLC and two presidential contenders.<sup>30</sup> Unfortunately, it appears the PNA has been unable or unwilling to

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<sup>26</sup> See generally *id.*

<sup>27</sup> See Interviews, *supra* note 7.

<sup>28</sup> See Wing, *supra* note 18, at 117.

<sup>29</sup> See *id.* at 116.

<sup>30</sup> See HUMAN RIGHTS WATCH, *supra* note 19, at 35. "On January 20, 1996, an estimated 75 percent of the electorate turned out to elect, pursuant to the Oslo Accords, a resident and an eighty-eight member Legislative Council . . . . Local and international

draw upon this heritage. The PLC has accused the PNA and many others of corruption and brutality against its opponents.<sup>31</sup> While PLC members have boldly criticized the PNA, they have not had the resources to carry on the democratization process outside of PNA structures. According to PLC member Professor Ziad Abu Amr, the PLC has been unable to exercise sufficient oversight of the Executive Branch or to enact legislation, including the Basic Law.<sup>32</sup> American and Israeli pressure on the PA to control Hamas terrorism has resulted in the jailing of many members of Hamas as well as other parties. The detention of prominent critics like Dr. Iyad Serraj, human rights attorney Raji Sourani, and prominent journalist Daoud Kuttab has brought international disapproval and indicates an intolerance for democratic disagreement.<sup>33</sup> If security improves and the peace process moves forward, it will be interesting to see if the PNA will be more tolerant of dissident political parties and individuals.

### E. Communitarian/Hierarchical Society

Palestine is a communitarian society in which clan and family ties are central. This communitarian emphasis which is found throughout the

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election monitors characterized the election as generally free and fair, with some reservations." *Id.*

<sup>31</sup> See *id.* at 28 (reporting accusations of brutality).

<sup>32</sup> Ziad Abu-Amr, *The Palestinian Legislative Council: A Critical Assessment*, 26 J. PALESTINE STUD. 90 (1997).

<sup>33</sup> See HUMAN RIGHTS WATCH, *supra* note 19, at 31.

In February 1995, the PA twice detained Raji Sourani, then-head of the Gaza Center for Rights and Law and a prominent lawyer and critic of the PA's human rights practices. On February 15, Sourani was detained and questioned for about sixteen hours, after the center published a statement condemning the decree establishing the state security courts as 'the most serious violation of human rights' since the inception of self-rule in May 1994.

*Id.* In another case, Dr. Iyad Sarraj, a medical doctor and former commissioner-general of the Palestinian Independent Commission on Citizen's Rights, was detained briefly in December 1995, and accused of "defaming" the Palestinian Authority. He was again arrested in May 1996, after being quoted in a *New York Times* editorial as describing the Palestinian Authority as "corrupt, dictatorial, oppressive," again for "slandering the Palestinian Authority," and detained for eight days. He was re-arrested on June 10, 1996, this time, purportedly not for his human rights activities. While he was in custody, his clinic office was searched, and police claimed to have found hashish there. He was charged with drug possession. After seventeen days in custody, Sarraj was released on bail after signing a document committing him to "abide by the law when it comes to publishing anything to do with the authorities." George E. Bisharat, *Peace and the Political Imperative of Legal Reform in Palestine*, 31 CASE W. RES. J. INT'L L. 253, 281 (1999).

developing world, should not be confused with a communal society where everyone is equal. This dynamic is also hierarchical, where status (often inherited) is quite critical.

This communitarian/hierarchical configuration can be an asset for democratic state building. It may translate into a willingness to adhere to group party norms rather than merely focusing on individual needs. The existing party leaders who have acquired or inherited status to some degree, may be obeyed or listened to with a greater degree of loyalty, at least initially, than is seen in the West. In the Palestinian context, if the factional and public leaders endorse democratic norms, programs, and candidates, the populace may follow.

On the other hand, the communitarian/hierarchical factor can be a major impediment if political leaders endorse or tolerate nondemocratic or corrupt candidates and programs. There are numerous African examples where this factor caused friction as ethnic group members blindly clung to obviously corrupt leaders who engaged in outrageous activities. An historical lack of emphasis on individual rights may lead people to suffer in relative silence, punctuated by homicidal outbursts and military coups to rid the country of one corrupt clique, only to replace it with another.

Palestinian decision makers can build upon the strength of the communitarian heritage by following South Africa's example, designing governing structures and programs that emphasize this heritage through the provision of group rights such as respect for language, culture, and education. Protecting the individually oriented civil and political rights, such as freedom of speech, freedom of the press, and freedom of assembly, is provided for in the Basic Law as well. Sufficient enforcement mechanisms are essential to provide the foundation for potentially avoiding the fate of so many dictatorial communitarian societies. Constitutional text provisions will be discussed in Part III of this Article.

#### *F. Distrust of Authority*

Palestinian society has a distrust for governmental authority that has implications for democratic state building and constitutionalism. The thirty-year Occupation has naturally made Palestinians distrustful of authority. The *intifada* was the ultimate attempt to "shake off" an illegitimate regime.<sup>34</sup> This distrust of the former authority can be an asset in the democratization process since some Palestinians have been overjoyed to finally embrace a legal, democratically elected Palestinian government. This passion to be governed finally by one's own people may create a

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<sup>34</sup> See Wing, *supra* note 18, at 96.

level of tolerance with a high enough portion of the population to ensure political stability in these turbulent transition years.

The negative side is that the distrust of foreign authority has transferred over to a distrust in any authority. The dynamic of distrust that is imbedded for one's whole lifetime may be difficult, if not impossible, to dispel. Children who grew up during the *intifada*, sometimes called the Children of the Stones, may constitute a lost generation that is not answerable to anyone. The formation of gangs and religious fundamentalism may prove increasingly popular options for this group, with many unable to transition into "normality." It may be hard for warriors, even young ones, to lay down their weapons, especially in a struggle as old as that of the Palestinians.

Palestine will have to engage in a variety of educational and governmental programs to build a sense of trust and legitimacy in the young and old. The conduct of political officials should be above reproach, and corruption should be rooted out and prosecuted. The lost generation must be specially targeted to build self-esteem, seek education, and create job opportunities so that the gang and crime problem does not escalate, as it has in the United States. There have been piecemeal efforts in the United States to attempt to reclaim these gang youths. The Amer-I-Can Program is one such program, founded by former football player, actor, and activist Jim Brown. It attempts to inculcate specific life skills and values to assist youth with their future educational or vocational plans. Among the skills taught are goal setting, problem solving, emotional control, financial management, effective communication, and family relations.<sup>35</sup> Such a program may have relevance for Palestine.

### G. Multilayered Legal Regime

Any efforts at democratization and constitutionalism will be affected by the extremely convoluted Palestinian legal regime. It is one of the most complex in the world, partially as a result of numerous occupations. The legal layers include custom (*urf*), Islam (*shari'a*), Ottoman land law, British Mandate emergency regulations, Israeli civil law for East Jerusalem and Jewish settlers, Jordanian civil law in the West Bank, Egyptian civil law in Gaza, Israeli military law, changes wrought in all of the above by the *intifada*,<sup>36</sup> and legislation and executive edicts passed by the PNA.

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<sup>35</sup> I am a national consultant for the Amer-I-Can program.

<sup>36</sup> For a more detailed discussion of these legal levels, see Wing, *supra* note 18; see also SHEHADEH, FROM OCCUPATION, *supra* note 1, at 74-79.

Custom and customary law occupy a powerful place within Palestinian society.<sup>37</sup> The most ancient legal tradition in Palestine today is the customary law known as *urf* (that which is known). *Urf* handles disputes outside the official civil or religious courts<sup>38</sup> on the basis of traditional oral customs and norms that stress conciliation, mediation, and family and group honor.<sup>39</sup> Respected elders or reconciliation committees (*ludjnat el-islam*)<sup>40</sup> or other individuals may mediate disputes until a binding settlement (*sulha*) is reached.<sup>41</sup> These individuals are always powerful, and they are always men.<sup>42</sup> The parties involved in the dispute may be an individual claimant, or an entire family or clan (*hamula*). Offenses against individuals are also seen as offenses against the family or clan. The types of disputes include contract issues between businessmen, interfamilial feuds, trespass and other land matters, and personal injury.<sup>43</sup> Settlements

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<sup>37</sup> See generally Bisharat, *supra* note 33.

<sup>38</sup> Beginning in the British Mandate period after World War I, the customary law often functioned parallel to, or overlapped with, the civil court system. Similarly, during the Occupation, "judges in the civil courts generally appear to tolerate the competing systems sometimes even consciously accommodating it by delaying actions in a case while awaiting a *sulh*." GEORGE BISHARAT, PALESTINIAN LAWYERS AND ISRAELI RULE: LAW AND DISORDER IN THE WEST BANK 42 (1989).

<sup>39</sup> See *id.* at 37.

<sup>40</sup> See *id.* at 32, 187 n.5 (citing "a plethora of anthropological studies that document the venerated status of mediators in . . . Middle Eastern societies"); see also ABNER COHEN, ARAB BORDER-VILLAGES IN ISRAEL: A STUDY OF CONTINUITY AND CHANGE IN SOCIAL ORGANIZATION 82 (1965). If a committee was used instead, it had to be neutral and agreed to by both sides. Its judgment then became binding. The committee members had to be powerful men in order for their judgments to be obeyed in the community. They were often supported physically by the *hamula* or clan. This enabled the disputants to accept the judgment without losing honor, since it was considered unwise not to accept the will of powerful men. See *id.* at 142; see also Ifrah Zilberman, *Palestinian Customary Law in the Jerusalem Area*, 45 CATH. U. L. REV. 795 (1996). There are four social categories of arbitrators; "*Manshad*"; "*Shadad al-Uja*"; "*Manhi al-Dam*"; and "*Qadi*." This system of social categories of customary law arbitrators is related to the degree of risk to the social order that arises from a given dispute. Disputes concerning family honor are considered the most dangerous. See *id.* at 801-02.

<sup>41</sup> See Bisharat, *supra* note 33, at 41. *Sulh* meetings are also described in Subhi Abu-Ghosh, *The Politics of an Arab Village in Israel* 130-31 (1965) (unpublished Ph.D. dissertation, Princeton University) (on file with the Ohio State University Library). This process of resolving a dispute is known as mediation, even though it might be classified as arbitration in the Western sense due to its binding nature.

<sup>42</sup> See generally Bisharat, *supra* note 33, at 40 (discussing informal modes of dispute processing that coexist with the formal system).

<sup>43</sup> See generally *id.* at 39-42 (discussing tribal adjudications and the types of disputes settled in this form of dispute settlement). Murder occasions a period of vengeance by

include business closure, exile of family members from the village, and *diya* or blood money, which is an amount paid to the victim's family by the perpetrator's family.<sup>44</sup> *Diya* is a pre-Islamic custom that has also been incorporated into Islamic law<sup>45</sup> and is awarded by Palestinian religious courts as well, indicating another area where custom and religion are interlinked.<sup>46</sup> The settlements are sometimes published in newspapers.<sup>47</sup>

During the autonomy period, the PNA has expanded its attempts at control of customary law, regarding it as a major contributor to the future vitality of Palestinian society.<sup>48</sup> Custom could be utilized as an asset to democratization by building upon such principles as respect for authority and tradition. The polity might obey those in authoritative positions, particularly if from traditional sources of power or if ruling based upon traditional principles of justice. Customary law stresses conciliation and mediation, both of which are processes that may assist the peaceful resolution of disputes within a democratic framework. Thus, customary law mediation might enhance an overburdened civil law court system. Even today, "judges in the civil courts generally appear to tolerate the competing systems, sometimes even consciously accommodating [customary law] by delaying actions in a case while awaiting a *sulh* [settlement]."<sup>49</sup>

The negative aspect of this factor is that blind reliance on traditional authority is anti-democratic. There needs to be respect for new voices from nontraditional sources, whether they are women, youth, or others. Palestinian decision makers must make careful analyses of the role of custom, decide how to reinforce it where appropriate, and when to obvi-

the victim's family. *See id.* at 37. Thus, temporary mediators immediately intervene to obtain a three-and-one-third-day truce called an *atweh*, prior to the formation of a formal committee or the selection of a mediator. The truce can be periodically renewed. *See id.* at 41.

<sup>44</sup> *See id.* at 40-41; PHILIP J. BALDENSPERGER, *THE IMMOVABLE EAST: STUDIES OF THE PEOPLE AND CUSTOMS OF PALESTINE* 117-18 (1913) (providing an early account of blood dispute); *see also* Joseph Ginat, *Blood Revenge in Bedouin Society*, in *THE CHANGING BEDOUIN* 59, 68 (Emanuel Marx & Avshalom Shmuely eds., 1984); EMANUEL MARX, *BEDOUIN OF THE NEGEV* 237 (1967) (describing examples of demands for blood money to settle).

<sup>45</sup> *See* MOHAMMAD HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 285 (1991).

<sup>46</sup> *See* ROBERT H. EISENMAN, *ISLAMIC LAW IN PALESTINE AND ISRAEL: A HISTORY OF THE SURVIVAL OF TANZIMAT AND SHARIA IN THE BRITISH MANDATE AND THE JEWISH STATE* 16 (1978).

<sup>47</sup> *See* BISHARAT, *supra* note 38, at 42.

<sup>48</sup> Zilberman, *supra* note 40, at 810.

<sup>49</sup> BISHARAT, *supra* note 38, at 42.



ate it. Programs will have to be developed to encourage and train nontraditional actors to participate. For example, secondary school girls and boys need exposure to civics. Many women will need to have child care assistance to allow them to participate in activities outside the private sphere. The new customary law mediators might include younger people and women, in a deviation from traditional practice.

Religion, like custom, is an important component of identity in the Palestinian community. For Muslims, the *shari'a*, which is the Islamic law found in the Koran and other sources, provides rules that govern daily life.<sup>50</sup> In Palestine, Islamic law is administered by *shari'a* courts, which have decided disputes on matters of personal status (marriage, divorce, child custody, alimony) and inheritance, since the eighteenth century.<sup>51</sup> Courts may award *diya* as well, which is less for injury to a woman than a man.<sup>52</sup> Additionally, *waf*, as long as it does not contradict the *shari'a* is valid for interpreting the Koran. For example, the Koran

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<sup>50</sup> See Farhat J. Ziadeh, *Permanence and Change in Arab Legal Systems*, 9 ARAB STUD. Q. 20 (1987) (describing the influence of the *shari'a* on daily life and analyzing changes in law). For discussion of Islamic law, see generally J.N.D. ANDERSON, *ISLAMIC LAW IN THE MODERN WORLD* 1-16 (1959); MATTHEW LIPPMAN ET AL., *ISLAMIC CRIMINAL LAW AND PROCEDURE: AN INTRODUCTION* (1988); Hassan Afchar, *The Muslim Conception of Law*, in 2 INT'L ENCYCLOPEDIA COMP. L. 84 (1975); Chafik Chehata, *Islamic Law*, 2 INT'L ENCYCLOPEDIA COMP. L. 1975, at 138; Ann Elizabeth Mayer, *Law and Religion in the Muslim Middle East*, 35 AM. J. COMP. L. 127 (1987); ISLAM IN TRANSITION: MUSLIM PERSPECTIVES (John J. Donohue & John L. Esposito eds., 1982). For a description of Jordanian religious law, applicable in the West Bank, see Fouad B. Attala, *Jordan*, in INT'L ENCYCLOPEDIA COMP. L. J-28-J.29 (Victor Knapp ed., 1973); see generally S.H. AMIN, *MIDDLE EAST LEGAL SYSTEMS* 244 (1985) (surveying the role of the *shari'a* in various Islamic countries).

<sup>51</sup> See BISHARAT, *supra* note 38, at 20. For a concise history of the *shari'a* courts, see Lynn Welchman, *Family Law Under Occupation: Islamic Law and the Shari'a Courts in the West Bank*, in ISLAMIC FAMILY LAW 93, 93-115 (Chibli Mallat & Jane Connors eds., 1990). Prior to the nineteenth century, the only formal courts in Ottoman Palestine were *shari'a* courts, located in larger cities and towns, with a chief judge (*qadi*) in Jerusalem. In the mid-nineteenth century, reforms known as the Tanzimat, centralized political authority and modernized the state bureaucracy. See BISHARAT, *supra* note 38, at 19. Civil courts were established in 1871 to deal with civil and commercial matters while *shari'a* courts retained limited jurisdiction. See Anis Kassim, *Legal Systems and Developments in Palestine*, 1 PALESTINE Y.B. INT'L L. 19, 21 (1984). This gradually led to a diminution of power to the *shari'a* courts.

<sup>52</sup> See Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 HARV. HUM. RTS. J. 13, 39 (1990).

says a man must maintain his wife, but does not specify the amount for which he is responsible. This is determined by custom.<sup>53</sup>

Non-fundamentalist religious elements can be a major asset for democratization. Palestinian Christian and Muslim leaders and adherents can all become involved in the secular democratic processes and encourage religious and/or moral positions in the legislative process and with respect to certain programs.

The rise of fundamentalism in the region, as exemplified by the growth of Hamas in Palestine, presents major challenges for democratization. Religious law itself can be a hindrance to democratization since it sanctions the differential treatment of women on the basis of gender. This difference can immediately come into conflict with constitutional norms that stress the equality of men and women.

The Ottoman Land Code of 1858 is also a major hindrance to democratization. These ancient, convoluted policies make it difficult to sort out who actually owns property, and have been utilized by the Israelis to confiscate Palestinian land.<sup>54</sup> How will the dispossessed be compensated for the loss of their land? Adopting a new land law cannot involve merely placing certain people back on certain lands, since this may over-compensate the more well-to-do families who previously owned such land. Similar questions arise when considering the 1948 refugees with claims to land in Israel and those who have spent decades in refugee camps.

The Jordanian and Egyptian civil laws pose similar problems to the Ottoman Land Code. Those rules still in use constitute a hodge podge of old standards that are outdated and superseded in their countries of origin. During the Occupation, the civil courts that implemented these rules lost whatever legitimacy they once may have had due to inefficiency and corruption.<sup>55</sup> A respected independent court system is a vital component of democracy. Creating vital institutions out of the current rules, institutions, and processes will be a major challenge to be faced.

The British Mandate Emergency Regulations of 1945<sup>56</sup> and the Israeli military<sup>57</sup> laws constitute a special impediment to democratization.

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<sup>53</sup> See KAMALI, *supra* note 45, at 284; cf. JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* 126-29 (1982) (explaining the use of custom as a source of Islamic law and providing examples of the role of custom in Islamic law).

<sup>54</sup> See the discussion of the *Elon Moreh* case, in RAJA SHEHADEH, *OCCUPIER'S LAW* 28 (1985) [hereinafter SHEHADEH, *OCCUPIER'S LAW*].

<sup>55</sup> See generally BISHARAT, *supra* note 38, at 211, n.3 (discussing the deterioration of the formal court system).

<sup>56</sup> See generally *id.* at 21-26 (discussing British Mandate Law); Kassim, *supra* note 51, at 23-24; Ylana Miller, *Administrative Policy in Rural Palestine: The Impact of British*

Palestinians have been subjected to curfews, expulsions, house demolitions, and a wide variety of other violations of international law.<sup>58</sup> Due to the Occupation, the Palestinian people have been denied their basic international human rights. In numerous books, articles, and international resolutions, the desire to achieve those rights has been expressed. These aspirations are an asset to the democratization process because there is a great desire to create a system in which universal human rights can be fully implemented. This burning desire has created a certain amount of good will for the fledgling government.

Unfortunately, some of this good will has dissipated because the PNA has used undemocratic rules against the populace. As mentioned previously, many critics of Arafat's actions or the entire peace process have been rounded up and subjected to torture, imprisonment, etc.<sup>59</sup>

Another layer of the complex legal regime of Palestine concerns changes wrought by the *intifada*, which had some influence on Palestinian society. The occurrence of the *intifada* could be an asset in the democratization process due to the shake-up of traditional structures. Changes have occurred in terms of the legal decision makers, rules, and processes involved. The *intifada* represented an embryonic attempt to gain control over Palestinian society in a broader way than during any previous period of the Occupation. The skills utilized in this gestational attempt at self-rule may help in the upcoming period. For example, people involved in popular committees, underground leadership, or other roles may now be able to use their talents in an above-ground manner as they have become part of the PLC, civil service, or private sector.

The newest legal layer are the laws and edicts of the PNA. President Arafat has signed fifteen laws in areas such as civil service and foreign investment. Additionally, he has issued several presidential edicts. There are a number of laws that remain sitting on his desk, awaiting his signature, including the Basic Law itself<sup>60</sup>

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*Norms on Arab Community Life 1920-1948*, in PALESTINIAN SOCIETY AND POLITICS 124 (Joel S. Migdal ed., 1980). While these laws only apply in legally declared states of emergency, Israel has been in such a state since its 1948 independence. ZE'EV SEGAL, DEMOKRATIA ISRAELI 152, 158 (1990).

<sup>57</sup> See SHEHADAH, OCCUPIER'S LAW, *supra* note 54, at 28; see generally Bisharat, *Peace*, *supra* note 33, at 47-69 (discussing military law).

<sup>58</sup> There is voluminous literature on human rights violations. See, e.g., Falk & Weston, *supra* note 12, at 133-37 (see citations therein as well).

<sup>59</sup> See Bisharat, *supra* note 33.

<sup>60</sup> President Arafat has endorsed the Civil Service Law No. 96/3 and the Encouragement of Investment Law No. 97/20, and a few other laws in areas such as monetary authority and prisons. Other legislation, such as the Basic Law, Law No. 96/1, and the

Having concluded a brief survey of the Palestinian multi-layered legal regime, it is evident that any democratizing efforts must take into account the pre-existing legal system. This task has been simplified since Birzeit Law Center recently organized a compilation of all the laws in effect.

It must be noted that there is no existing body of constitutional law for the West Bank and Gaza, since Palestine has no pre-existing national constitution. The last constitution for the entire area would be the Palestine Order-in-Council issued in 1922 during the British Mandate period, which covered what is now Israel as well as what is now Palestine.<sup>61</sup> After the creation of the State of Israel, Egypt came to administer the Gaza Strip, but continued to regard the territory as part of Palestine. The Prime Minister of Egypt issued a Basic Law in 1957, which was superseded when the President of Egypt issued a new constitution in 1962.<sup>62</sup> In the West Bank, the Jordanian constitution of 1952 governed until the Israeli Occupation began in 1967.<sup>63</sup> This lack of a national constitution could be an asset in the democratization process since the PLC does not have to take into account the impact of a prior national constitution. The downside is that the drafters of new legislation will still have to determine the impact of the existing complicated legal regime on any new constitutional principles. For example, the Basic Law says there can be no discrimination on the basis of gender.<sup>64</sup> What impact will this have on the aspects of *wrf*, *shari'a*, family law, and inheritance law that sanction the differential treatment of women? These issues will be further discussed in Part IV of this Article.

The PLC can address these hindrances for democratization in part through the ongoing use of international experts familiar with the constitutive problems of new nations. For example, the National Democratic Institute and U.S. Agency for International Development have brought in foreign experts, as has the PLC itself. In addition to my service for the PLC, I served as a legal advisor for several years for the African National Congress Constitutional Committee as it developed a variety of documents examining its own evolving principles on constitutional issues.

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Regulation of Foreign Land Ownership in Palestine, Law No. 97/7, passed by the PLC, await Presidential endorsement. See *Palestinian Legislative Council* (visited Apr. 4, 1999) <<http://www.pal-plc.org/english/laws/laws.html>>.

<sup>61</sup> The Order-in-Council had eight parts. Part Two dealt with the Executive Branch, Part Three with the Legislature, and Part Five with the Judiciary. See SHEHADEH, FROM OCCUPATION, *supra* note 1, at 76.

<sup>62</sup> See *id.* at 77.

<sup>63</sup> See *id.* at 78-79.

<sup>64</sup> BASIC LAW art. 9.

They produced several versions of a draft bill of rights and documents for public consumption such as *What is a Constitution?* The ANC had the advantage of several law schools from which to draw expertise and base its operations. South African constitutional scholars such as Constitutional Court Judge Albie Sachs, Minister of Water Kader Asmal, and Minister of Justice Dullar Omar have personally informed me that they are willing to assist the Palestinians, along with U.S.-based scholars such as John Quigley and Francis Boyle. As noted elsewhere in this issue of the *Journal*, Palestinian-American scholar George Bisharat has been assisting with judicial reform as has Case Western Reserve University School of Law Professor Hiram Chodosh.<sup>65</sup> There should be a variety of efforts to increase input from the general public as well.

Studies must be undertaken by the PLC and others to determine which laws need to be revoked or amended and which new laws, including constitutional ones, need to be implemented, in order to unify the legal system in a democratic fashion. The potential impact of all these changes needs to be carefully assessed. Many have called for the publication of a Palestinian Official Gazette to disseminate all laws and regulations.<sup>66</sup>

Now that all seven influences on democratic state building have been preliminarily discussed, it is possible to center the analysis on the constitutional process and the actual strengths and weaknesses of the textual provisions of the Basic Law.

### III. CONSTITUTIONAL TEXTUAL PROVISIONS

#### *A. Constitutional Process*

Before discussing selected strengths and weaknesses of the Basic Law, I will briefly focus on the process leading up to its finalization by the PLC. I detail this process here because I have not seen it accurately described in the literature. Moreover, I was involved to such an extent that I have personal knowledge of the accuracy discussed here. Additionally, the process gives insight into the embryonic democratic potential in Palestine.

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<sup>65</sup> Professor Hiram Chodosh was a principal participant in a comprehensive 1995-97 study recommending recodification and harmonization of all the pre-existing legal layers in Palestine. See generally Hiram E. Chodosh & Stephen A. Mayo, *The Palestinian Legal Study: Consensus and Assessment of the New Palestinian Legal System*, 38 HARV. INT'L L. J. 375 (1997).

<sup>66</sup> See Interviews, *supra* note 7.

In December 1993, the PLO published a draft of a Basic Law, proposed by Dr. Anis Kassim as head of the four-member Higher Legal Commission appointed by PLO Chairman Arafat. With input from some Palestinian jurists and scholars, as well as women's activists and others, a third version was published in April 1994.<sup>67</sup> This document was superseded by a fourth draft, which was submitted to the newly elected PLC in May 1996. The PLC turned the fourth draft over to the new PLC Legal Committee, which considered it along with a fifth draft that had been produced by the Birzeit Law Center. The fifth draft contained a heavy emphasis on international legal norms. The committee drafters were very concerned with developing a highly democratic document, one that would benefit from the experiences of other countries, including South Africa, all the Arab countries, and the United States.<sup>68</sup> They wanted a document that would be more fully detailed than the American constitution, but not as detailed as the one-hundred-page South African document. They wanted to take account of international law norms, but produce a document that would have meaning and effect within the Palestinian context. The Legal Committee thus produced a sixth draft that was published and circulated in Palestine and abroad for comment. While the sixth draft was being prepared for circulation, the Executive Branch submitted a seventh draft produced independently to the PLC as well. After a period of public commentary, The Legal Committee produced an eighth draft for initial consideration by the full PLC.

The PLC deliberated during the months of August and September 1996, and produced a ninth draft, also known as the First Reading. This version was sent over to the Executive branch for its consideration. After months without a response, the PLC completed a revision known as the Second Reading, followed by a final round of revisions resulting in the Third Reading in October 1997. This final version remains on President Arafat's desk.

The Basic Law represents several years of input from a wide variety of constituencies. It was not dictated by any individual or small cadre of individuals. I have consulted with numerous prominent Palestinians, including members of the PLC, about the likelihood of the President's signature to the Basic Law. One person indicated that President Arafat had told him that he will never sign the Basic Law, "even after I am dead."<sup>69</sup> I

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<sup>67</sup> See Naseer H. Aruri & John J. Carroll, *A New Palestine Charter*, J. PALESTINE STUD., Summer 1994, at 5.

<sup>68</sup> The author was involved at this point in the process.

<sup>69</sup> This person needs to remain anonymous since critics of the PNA and Arafat have ended up in prison or worse. According to Professor Fidler, Arafat's failure to sign the Basic Law may also be related to the lack of progress in the peace process and the anom-

was told the principal reason for his refusal to sign is that the Basic Law establishes checks and balances that would fill the constitutional vacuum and end the legal possibility of governance by executive fiat supported by the British Emergency Laws.

The remainder of this section focuses on textual provisions, both those present and those lacking in the Basic Law. I will refer to the South African constitutional process throughout this part.

### *B. Textual Provisions*

#### 1. Parliament as Constitutional Assembly

One of the most important outcomes of the South African constitutional process was the decision to create a popularly elected parliament that would also serve as a constitutional assembly to draft a permanent constitution by the third year of the interim period.<sup>70</sup> The Palestinian Basic Law should likewise provide that the PLC serve as a constitutional assembly to write the permanent governing document. Since the Basic Law has not yet been adopted, and the interim period is nearly over, the PLC could use the Basic Law as a base line in redrafting a constitution of independence. Sufficient time should also be allocated for comments by the public, expert scholars, and the like.

#### 2. Supremacy of the Constitution

The South African constitution specifically states that it is the supreme law of the land, and that any law or conduct which is inconsistent with its provisions is invalid.<sup>71</sup> This supremacy clause was considered essential for a society in which statutes wielded by evil men had been the reality of the abuse of power. It also was important due to the tension between the new democratic norms and the inegalitarian structures existent in all the previous legal layers, especially in customary law.

Palestine faces a similar situation in terms of the need to validate democratic state building and constitutionalism. The Basic Law, however, has no supremacy clause. Article 6 states that all authorities are subject to the law. It does not, however, make it clear that all law should

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ally of enacting a constitution when the PNA does not even control its own borders. *See* Fidler, *supra* note 23, at 306.

<sup>70</sup> *See* S. AFR. CONST. (Interim Constitution, Act 200 of 1993) §§ 68, 73, *reprinted in* BIRTH OF A CONSTITUTION 329, 343-45 (Bertus de Villiers ed., 1994) [hereinafter 1993 Interim Constitution].

<sup>71</sup> *See* S. AFR. CONST. (Act 108 of 1996) § 2.

be subject to the constitution.<sup>72</sup> This is critical for the same reasons as it was in South Africa. The existing legal layers were inegalitarian and there was no history of democratic leadership.

### 3. Separation of Powers

The South African constitution has an elaborate system of checks and balances to help ensure that the rule of law will eventually supplant the rule of men. For instance, the South African President can be impeached by a two-thirds majority of the National Assembly for serious misconduct, or he can be removed by a vote of no confidence by a majority of the Assembly.<sup>73</sup>

The Basic Law does not provide for a method to remove the President. He remains in office for the interim period, no matter how long that is. While this was understandable in the autonomy period with its nebulous dimensions and dependence upon the personality of Yasser Arafat, this must be changed in the independence constitution. Since the President is popularly elected in Palestine, he should probably be removable by some supermajority of the legislature as is the case in the United States. The President should also be restricted in the number of terms he may serve, perhaps limiting them to two four or five-year terms. There are too many examples in the Middle East of presidents for life, *de jure* or *de facto*.

### 4. Judicial Review and a Constitutional Court

Article 98 of the South African interim constitution established for the first time a constitutional court appointed by the President having the power of judicial review.<sup>74</sup> The creation of this court, separate from the

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<sup>72</sup> See BASIC LAW art. 6.

<sup>73</sup> See S. AFR. CONST. (Act 108 of 1993) §§ 89, 102.

<sup>74</sup> For a discussion of these options, see Adrien Wing et al., *Judicial Review for Palestine* (visited Mar. 5, 1999) <<http://lawcenter.birzeit.edu/lawc98d/Publications/WING2b.html>>; see generally Ziyad Motala, *Independence of the Judiciary, Prospects and Limitations of Judicial Review in Terms of the United States Model in a South African Order: Towards an Alternative Judicial Structure*, 55 ALB. L. REV. 367, 397 (1991) (noting South Africa's institution of the United States' model of judicial review into its legal ecosystem). For a review of the shortcomings of judicial review, see Penuell M. Maduna, *Judicial Review and Protection of Human Rights Under a New Constitutional Order in South Africa*, 21 COLUM. HUM. RTS. L. REV. 73, 78-81, (1989).

Nelson Mandela has stated: "For South Africa, the idea of a Constitutional Court is quite revolutionary . . . . The issue of whether we need 'or want' a constitutional court . . . presupposes the acceptance of constitutionalism. Without constitutionalism, we will not need a constitutional court." See generally Nicholas Haysom, *Democracy, Con-*



predominantly white regular judiciary,<sup>75</sup> was a priority of the ANC. A broad-based judicial services commission was also created to recommend appointees to the bench.<sup>76</sup> These bodies can play an important role in preventing judicial abuse.

Palestine should strongly consider establishing similar bodies, especially given its regional context. In most Middle Eastern countries, the judiciary is subservient to the regime in power. Although the laws on the books may appear liberal, the effectiveness of the judiciary tends to be a function of the political style of the ruling party, regardless of whether they are based on the *shari'a* or on secular principles. The judiciary is rarely able to contradict the policies of the executive branch or to transcend the limited role assigned to it by the political authorities. Palestinians will need to adopt safeguards to avoid reproducing these problems.

Like the apartheid-era judiciary, the Israeli-appointed judiciary that served in the Palestinian civil courts lost whatever legitimacy it may once have had.<sup>77</sup> The PNA, like the new South African government, faces the task of restoring the legitimacy of the judiciary. Judges need to be regarded as impartial and competent, rather than as political cronies loyal to the ruling faction. To this end, the Basic Law provides for an appointed judiciary with guarantees of independence and tenure.<sup>78</sup> A High Constitutional Court will also be formed.<sup>79</sup> These measures will do much to enhance the credibility of the judiciary. Currently, the Executive branch dismisses judges who disagree with it.<sup>80</sup>

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*stitutionalism and the ANC's Bill of Rights for a New South Africa*, 18 Soc. JUST. 47 (Spring-Summer 1991).

<sup>75</sup> The regular judiciary contained only one Indian and no black judges. At the time the interim constitution was drafted, only three black senior advocates were even qualified for the bench. See Johann van der Vyver, *Constitutional Options for Post-Apartheid South Africa*, 40 EMORY L. J. 745, 802 (1991).

<sup>76</sup> See 1993 Interim Constitution, *supra* note 70, § 105.

<sup>77</sup> For more on the Palestinian judiciary, see Bisharat, *supra* note 33. For more about the impact of the Israeli occupation on judicial autonomy in Palestine, see John Quigley, *Judicial Autonomy in Palestine: Problems and Prospects*, 21 U. DAYTON L. REV. 697, 706-07 (1996).

<sup>78</sup> BASIC LAW arts. 88, 89, 90.

<sup>79</sup> See *id.* art. 94.

<sup>80</sup> President Arafat "retired" the Chief Judge Amin Abd al-Salam. He presided over the release of Birzeit University students, whom the High Court ruled were illegally detained in March 1996. See Amnesty International, *Human Rights in the Autonomous Areas*, in 9 PALESTINE Y.B. INT'L L. 327, 348 (1996/97).

### 5. A Competent Civil Service

South Africa inherited a civil service that had assisted in the implementation of apartheid for forty years and had incorporated blacks in only the most menial positions. The interim constitution provided for a Public Service Commission to ensure the development of an efficient, non-partisan bureaucracy that makes services and job opportunities available to all citizens regardless of race.<sup>81</sup> The Basic Law should adopt a similar approach in order to avoid the civil service becoming filled with party loyalists lacking appropriate qualifications. The Palestinian situation is complicated by the fact that there is an abundance of qualified individuals for the relatively few skilled positions in the civil service. Only an absolute meritocracy in the hiring, retention, and promotion of civil service employees can dampen the frustrations of those denied jobs in the bureaucracy. A constitutional mandate for egalitarianism in the civil service would be a useful measure to this end. The current provision in the Basic Law merely states that "matters of the civil service shall be regulated by law."<sup>82</sup> This wording is entirely too vague to prevent possible future cronyism and corruption.

### 6. Protecting the Public

South Africa under apartheid, like the rest of Africa, was not immune to governmental abuses of power which threatened the safety of the public. Chapter Nine of the South African constitution, therefore, established several government agencies to safeguard the public interest.<sup>83</sup> The Public Protector is a type of ombudsman whose duty it is to investigate government corruption.<sup>84</sup> This appointed official can act with or without a complaint. The Human Rights Commission is empowered to investigate complaints of human rights violations and issue recommendations to the government.<sup>85</sup> Recognizing the special conditions confronting women, the constitution-drafters included a Commission for Gender Equality which can make recommendations concerning legislation.<sup>86</sup> A Commission on Restitution of Land Rights was established to address the legacy of the forcible dispossession of blacks from their lands.<sup>87</sup> This body can

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<sup>81</sup> See 1993 Interim Constitution, *supra* note 70, ch. 13.

<sup>82</sup> BASIC LAW art. 78.

<sup>83</sup> See S. AFR. CONST. (Act 108 of 1996) ch. 9.

<sup>84</sup> See *id.* § 182.

<sup>85</sup> See *id.* § 184.

<sup>86</sup> See *id.* § 187.

<sup>87</sup> See 1993 Interim Constitution, *supra* note 70, §§ 121, 122.

investigate claims, draw up court reports, and mediate disputes. There is also a Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities which addresses the interests of these groups.<sup>88</sup>

Since Palestine also has a history of government corruption, human rights violations, gender discrimination, and land confiscation, the PLC would do well to constitutionally empower agencies to address these issues. If such problems are ignored or if responsibility for them is assigned to existing PLO bureaucracies, the status quo is likely to continue. The appointive nature of such commissions must be carefully scrutinized to ensure that they are not controlled by supporters of the status quo.

### 7. Enshrining Constitutional Principles

Fear and distrust among the South African parties led them to agree upon a set of preliminary principles as a first step in the process of negotiating the transfer of power. These principles could not be changed by the interim parliament or derogated from in the permanent constitution. The Constitutional Court had the power to reject any proposed legislation that was inconsistent with them. Among the principles agreed upon were a multiparty system, equality of opportunity, and a trilateral separation of powers.<sup>89</sup>

There is similar distrust between Palestinians and Israelis as well as among the various Palestinian factions. A set of constitutional principles would be a useful instrument in building consensus at an early stage in the permanent constitutional process. Agreement on the concept of secular multiparty democracy would, for example, assuage certain doubts. Islamic fundamentalists, however, might not accept the idea without guarantees of minority-party protections. The constitutional principles could then bind the Constitutional Assembly/PLC as it redrafts the Basic Law and transforms it into the independence constitution.

### 8. Repealing Laws

Schedule seven of both the interim and permanent South African constitutions list a number of laws that were repealed simultaneous to the passage of the constitution. These provisions in the interim constitution abolished most of the *de jure* legacy of apartheid.

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<sup>88</sup> See S. AFR. CONST. (Act 108 of 1996) § 185.

<sup>89</sup> A full list of the principles is found in the 1993 Interim Constitution, *supra* note 70, sched. 4.

Moreover, the South African constitution only permits a State of Emergency to be called under very limited circumstances.<sup>90</sup> The Basic Law also contains provisions about the declaration of a State of Emergency. The President can decree such a state "during the existence of a threat to national security as a result of war, invasion, armed revolt, or the occurrence of a natural disaster."<sup>91</sup> He can initially declare a State of Emergency for thirty days, with the possibility of an additional thirty-day extension, if approved by a two-thirds vote in the PLC.<sup>92</sup> The PLC feared that it might be suspended during such an emergency, so it provided that it could not be removed or impeded during the period.<sup>93</sup> Most importantly, the Basic Law abolishes all provisions regulating states of emergency, including the British regulations.<sup>94</sup> Another advantage of such a repeal is that it requires a comprehensive review of the multilayered legal regime in force in Palestine. These laws must be systematically evaluated and replaced over a period of many years, but repeal of some of the most egregious laws in the constitution would signal the centrality of this task.

## 9. Protecting Human Rights

The South African constitution provides basic civil and political rights to all South Africans. It guarantees such rights as freedom and security of the person,<sup>95</sup> freedom of religion, belief, and opinion,<sup>96</sup> expression,<sup>97</sup> assembly, demonstration and petition,<sup>98</sup> association,<sup>99</sup> movement and residence,<sup>100</sup> political rights to form parties,<sup>101</sup> and criminal procedural rights.<sup>102</sup> There are also specific rights to life<sup>103</sup> and human dig-

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<sup>90</sup> See S. AFR. CONST. (Act 108 of 1998) § 37 (limiting declaration of a State of Emergency to when the "life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency [where] the declaration is necessary to restore peace and order").

<sup>91</sup> BASIC LAW art. 101.

<sup>92</sup> See *id.*

<sup>93</sup> See *id.* art. 104.

<sup>94</sup> See *id.* art. 105.

<sup>95</sup> See generally S. AFR. CONST. (Act 108 of 1996) § 12.

<sup>96</sup> See *id.* § 15.

<sup>97</sup> See *id.* § 16.

<sup>98</sup> See *id.* § 17.

<sup>99</sup> See *id.* § 18.

<sup>100</sup> See S. AFR. CONST. (Act 108 of 1996) § 21.

<sup>101</sup> See *id.* § 19.

<sup>102</sup> See *id.* § 35.

nity,<sup>104</sup> while servitude and forced labor are banned.<sup>105</sup> To allay white fears of socialism, there are specific guarantees concerning private property.<sup>106</sup>

The constitution also provides for some economic, social, and cultural rights, including the right to a healthy environment,<sup>107</sup> housing,<sup>108</sup> a language and culture,<sup>109</sup> education,<sup>110</sup> and the right to basic nutrition, health, and social services.<sup>111</sup> Children's rights are specifically delineated as well.<sup>112</sup> Economic, social, and cultural rights are not absolute. The ANC realized that the new government would not have the resources to guarantee these costly entitlements. With respect to the rights to housing, health care, food, water, and social security, the government's responsibility is limited. "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation [sp] of each of these rights."<sup>113</sup>

The equality clause deserves special mention because its protections are much broader than those found in the U.S. Constitution. The clause prohibits discrimination on the grounds of "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."<sup>114</sup> It also permits affirmative-action initiatives based on these categories.<sup>115</sup>

Most of the rights can be limited if a five-part test is met which includes an analysis of numerous factors such as the nature of the right, importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and the less-restrictive means to achieve the purpose.<sup>116</sup> Certain rights can not be derogated from, even in a State of Emergency, and a table is provided

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<sup>103</sup> See *id.* § 11.

<sup>104</sup> See *id.* § 10.

<sup>105</sup> See S. AFR. CONST. (Act 108 of 1996) § 13.

<sup>106</sup> See *id.* § 25.

<sup>107</sup> See *id.* § 24.

<sup>108</sup> See *id.* § 26.

<sup>109</sup> See *id.* §§ 30, 31.

<sup>110</sup> See S. AFR. CONST. (Act 108 of 1996) § 29.

<sup>111</sup> See *id.* § 27.

<sup>112</sup> See *id.* § 28.

<sup>113</sup> See *id.* § 27(2).

<sup>114</sup> See *id.* § 9(3).

<sup>115</sup> See S. AFR. CONST. (Act 108 of 1996) § 9(2).

<sup>116</sup> See *id.* § 36.

listing those norms.<sup>117</sup> The Bill of Rights must be interpreted taking into account international law, and the judges may consider foreign law as well.<sup>118</sup>

The attentiveness of the South African constitution to human rights concerns makes it an apt model for Palestine where human rights have long been an issue. The South African experience also demonstrates that it is possible to approve a constitution that is more progressive in its legal provisions than prevailing cultural norms. For example, none of the traditional cultures of South Africa, whether they are Black, Coloured, or White, approve of homosexuality, yet the equality clause covers homosexuals, lesbians, bisexuals, and transgendered individuals. Of course, protection for homosexuals is not likely to be granted in the Palestinian Basic Law at this time.

The Basic Law also provides for these various human rights. Article 10 makes clear that "human rights and basic freedoms are necessary and an obligation of respect."<sup>119</sup> It goes even further by proclaiming that the PNA "works without delay to incorporate international and national declarations and agreements which protect human rights."<sup>120</sup> Therefore, even though Palestine is not a state and may not become a state, the PLC was agreeable to binding itself to international law. Some earlier versions of the Basic Law listed all the relevant conventions, but these were eliminated due to the unwieldy size.<sup>121</sup> The Basic Law calls for an independent human rights body that reports to the President and the PLC. In September 1993, Chairman Arafat created the Palestinian Independent Commission for Citizen's Rights to serve this purpose. It has already produced reports for the PLC critical of the PNA.<sup>122</sup>

With respect to civil and political rights, one of the most progressive clauses is the equality clause, the first one in the section on human rights, states that "Palestinians are equal before the law and the judiciary. There is no discrimination between them because of descent, gender, color, re-

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<sup>117</sup> See *id.* § 37(5)(c).

<sup>118</sup> See *id.* § 39.

<sup>119</sup> BASIC LAW art 10.

<sup>120</sup> *Id.* art. 10.

<sup>121</sup> The Author participated in these discussions.

<sup>122</sup> See BASIC LAW art. 31. The Palestinian Independent Commission on Citizens' Rights, established by Decree, is a quasi-governmental board charged with monitoring the performance of the Palestinian Authority, and particularly with ensuring the compliance of public institutions with human rights principles. Bisharat, *supra* note 33, at 262 (referring to Decree Number 59 of 1993). The Decree was published in the Official Gazette and became effective only in 1995. *Id.* at n. 37.

ligion, political opinion or disability."<sup>123</sup> I will discuss the gender implications of Article 9 in the next section of this Article.

One of the significant tensions in the Basic Law involves criminal procedural rights. The framers did not want to be so detailed as to effectively draft a new criminal procedure code. On the other hand, they did not want to create a vacuum in which the Executive branch could easily trample on citizens' rights. Such a concern was particularly justified for Palestinians, who lived under Occupation for thirty years subject to laws which denied criminal due process rights. Unfortunately, the drafting in these provisions is sufficiently vague as to permit future executive violations. For example, Article 11 states "[i]t is not permitted to arrest someone, search him, imprison him, restrict his freedom through any restriction or forbid his movement except through judicial order in accordance with the provisions of the law. The law limits the period of precautionary imprisonment."<sup>124</sup> Recent (albeit well-meaning) practice by the Executive indicates that, emergency laws (or no laws) can result in many people being arrested and detained in violation of normal due process provisions. It might be better to follow the South African example and delimit all the fundamental rights that cannot be abrogated even in a state of emergency.<sup>125</sup>

The Basic Law does provide for personal freedom,<sup>126</sup> and that all those arrested shall be informed of the reasons. "They may contact a lawyer and apply to trial without delay."<sup>127</sup> Unfortunately, this does not mean that a state-appointed lawyer will be provided. In a society where so many are poor or unemployed, this type of provision must be included. Another section confirms that "everyone accused of a crime must have a lawyer to defend him."<sup>128</sup> Once again, it does not say the state will pay. Another important criminal right is that "[n]o one may be subject to any compulsion or torture . . . any statement or confession procured in contradiction with the first subsection of this article shall be deemed void."<sup>129</sup> This provision is especially important since so many Palestinians have been tortured in Israeli prisons and the Israeli High Court has

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<sup>123</sup> BASIC LAW art. 9.

<sup>124</sup> *Id.* art. 11.

<sup>125</sup> *See* S. AFR. CONST. (Act 108 of 1996) § 37(5)(c).

<sup>126</sup> BASIC LAW art. 11.

<sup>127</sup> *Id.* art. 12.

<sup>128</sup> *Id.* art. 14.

<sup>129</sup> *Id.* art. 13.

even confirmed that torture is acceptable.<sup>130</sup> Unfortunately, it appears that the PNA is replicating its Israeli predecessors by continuing to subject many Palestinians to torture.<sup>131</sup> Article 14 reaffirms the principle that the "accused is innocent until proven guilty in a legal trial which guarantees him all assurances to defend himself."<sup>132</sup> The problem, however, is that the PNA has created state security courts that hold their sessions in the darkness, constituting a form of kangaroo court. In one case, two members of the security forces who were found guilty of homicide, were tried, and executed in just two days.<sup>133</sup>

The provision that collective punishment is forbidden is quite important given the use of this illegal technique by the Israelis during the Oc-

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<sup>130</sup> On Sunday January 11, 1999, in an exceptional hearing with a panel of nine judges, the Israeli High Court again postponed its decision to ban the use of torture in Israeli prisons. The nine-judge panel, in a 5-4 vote refused to give a temporary injunction against the use of torture during the ongoing interrogation of two Palestinian suspects and decided to rule later on the general use of torture. In the dissent, Chief Justice Barak wanted to issue a temporary injunction against the use of torture. See THE PALESTINIAN SOCIETY FOR THE PROTECTION OF HUMAN RIGHTS AND THE ENVIRONMENT, ANNUAL HUMAN RIGHTS REPORT (1998).

<sup>131</sup> See Amnesty International, *supra* note 80, at 340.

Amnesty International . . . has received substantive and . . . consistent testimonies alleging torture by most branches of the Palestinian security forces. Torture appears now to be most widespread in Gaza. Mahmud Jumayel, who died on 31 July 1996 after being tortured in Jneid Prison, Nablus, on 27 July, was tortured by the use of electric elements, whilst being suspended and beaten.

*Id.* On August 16, 1998, two citizens, Abdallah al-Jabarine, 41, and Wassef Ayayda, 31, were detained at the Hebron detention centre by Preventive Security and Force 17 agents. During their interrogation, they were made to suffer various forms of torture including skull-hair removal, severe beating, sleep deprivation, and hooding. A video tape of al-Jabarine after his release showed bruising all over his body. See THE PALESTINIAN SOCIETY FOR THE PROTECTION OF HUMAN RIGHTS AND THE ENVIRONMENT, *supra* note 130.

<sup>132</sup> BASIC LAW art. 14.

<sup>133</sup> In a court case set up with unprecedented haste, the Palestinian Authority issued death sentences against the two brothers, Fares and Raed Abu Sultan. Two days later, President Arafat approved the sentence and the two brothers were executed. On August 30, 1998, President Yasser Arafat approved and signed a military court order for the execution of three brothers from Gaza; Mohammad, Fares, and Raed Abu Sultan. The three had been charged with the first degree murder of the two Al Khalidi brothers. The execution took place on the same day. Fares Abu Sultan's death sentence was reduced to life imprisonment. See generally PALESTINIAN SOCIETY FOR THE PROTECTION OF HUMAN RIGHTS AND THE ENVIRONMENT, *supra* note 130.



cupation.<sup>134</sup> For example: if a boy throws a stone at a soldier, the response may be to blow up the boy's house, or place a curfew on the entire village. Homes cannot be searched without a warrant.<sup>135</sup> This is a significant right for a people used to having Israeli soldiers break down their doors and haul away family members, while destroying the house in the meantime.

The Palestinians are a people with a Muslim majority, a Christian minority, and even a few Jewish Samaritans. The Basic Law guarantees freedom of belief and worship.<sup>136</sup> A potential source of conflict exists, however, in the text. Article 4 indicates that "Islam is the official religion of Palestine."<sup>137</sup> What does this clause mean? Apparently, most Arab countries have included it in their constitutions; I was present when it was added to the text, even though previous versions said nothing on the subject. Each country has determined its meaning in their specific cultural context. At the same time, Article 4 guarantees the practice of monotheistic religions.<sup>138</sup> Freedom of religion is not absolute and exists on the condition that "they do not interfere with public order or public morals."<sup>139</sup> Currently, this may not be problematic since the PNA is secular in character. If, however, a more fundamentalist faction came to power, this clause might be used to force women to veil, as occurred during the 1989 *hijab* campaign in Gaza during the *intifada*.<sup>140</sup>

Article 19 states "there shall be no interference with freedom of opinion. Every person has the right to express his opinion and spread it through speech, writing or through other methods of expression or art, with the supervision of the provisions of the law."<sup>141</sup> The caveat in the second sentence can clearly undermine the grant of freedom in the first sentence. Many Palestinians went to prison during the Occupation for expressing views favorable to the PLO. Now, many Palestinians have been arrested for disagreeing with the PNA, much less openly siding with Hamas. Draconian laws such as the British Emergency laws, if passed in the future, will undermine the fledgling democracy – presuming the fur-

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<sup>134</sup> See BASIC LAW art. 15.

<sup>135</sup> See *id.* art. 17.

<sup>136</sup> See *id.* art. 18.

<sup>137</sup> *Id.* art. 4.

<sup>138</sup> *Id.*

<sup>139</sup> See BASIC LAW art. 18.

<sup>140</sup> See Rema Hammami, *Women, the Hijab and the Intifada*, MIDDLE E. REP., May-Aug. 1990, at 24; Adrien Katherine Wing, *Custom, Religion and Rights: The Future Legal Status of Palestinian Women*, 35 HARV. INT'L L. J. 149, 190 (1994).

<sup>141</sup> BASIC LAW art. 19.

therance of democracy is indeed the goal. What can freedom of opinion mean under such conditions at all? Clearly such a right has no meaning in conditions of violence and fear. It can only have meaning in conditions of peace.

The Basic Law also guarantees freedom of residency and movement "in the limits of the law."<sup>142</sup> All of these provisos limiting the rights could be looked at as stating the obvious – any right exists only as guaranteed by law. On the other hand, such specific language may be viewed as an opportunity to lay down limits in future legislation. Freedom of movement was denied to Palestinians during the Occupation, and it is understandable why they would want it. The bifurcated nature of their territory with Israel in the middle, controlling all entry and exit points, such freedom has no meaning. The safe passage called for in the Oslo Accords still does not exist between the West Bank and Gaza.<sup>143</sup> Israel frequently closes the Gaza Crossing into Israel, making Gaza a virtual prison. The new Gaza Airport, opened with great fanfare, has already been shut down by the Israelis. People living in the West Bank and Gaza cannot go to East Jerusalem, not even to pray at the Al-Aqsa Mosque, the third most holy shrine in Islam. At certain times, Israel has even shut down passage between towns within the West Bank.<sup>144</sup> Thus this right can have no meaning without the international cooperation of Israel. Moreover, Article 28 states that Palestinians cannot be exiled from their land.<sup>145</sup> This right also has special significance since several thousand Palestinians were deported during the Occupation and many Palestinians living in the diaspora are not permitted to visit.<sup>146</sup> Israel, not the PNA, controls the borders.

The Basic Law also delineates certain political rights, including the right to form political parties, unions, etc.<sup>147</sup> Freedom of the press and other means of communication is guaranteed "in accordance with this Basic Law and other related laws."<sup>148</sup> Once again, however, the language can permit massive intrusion into press freedoms. This right is particu-

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<sup>142</sup> *Id.* art. 20.

<sup>143</sup> Oslo II, art. 29 governs safe passage. SHEHADEH, FROM OCCUPATION, *supra* note 1, at 227.

<sup>144</sup> For examples of the closures, see Human Rights Watch, *Israeli Closure of the West Bank and Gaza Strip*, reprinted in 9 PALESTINE Y.B. INT'L L. 305 (1996-97).

<sup>145</sup> BASIC LAW art. 28.

<sup>146</sup> Numerous Palestinian Americans have confided in the Author that they were unable to enter Israel, despite a valid American passport.

<sup>147</sup> BASIC LAW art. 26.

<sup>148</sup> *Id.* art. 27.

larly important given the history of denial during the Occupation. The arrests of journalists by the PNA have resulted in self-censure by most of the Palestinian press. The editor of one paper was arrested for failing to put a story on page one instead of page eight. Another journalist was arrested for broadcasting the public sessions of the PLC.<sup>149</sup> This is a right that, practically speaking, has not been implemented, and it must be.

One interesting right from an American perspective is the right to litigation as found in Article 30 of the Basic Law. This right ensures that people can use the courts and seek compensation.<sup>150</sup> During the Occupation, Palestinians could not use the law to seek justice, so this new right emerges as significant.

Like South Africans, Palestinians are very concerned with private property rights. Israel confiscated large areas of the West Bank and Gaza, depriving many Palestinians of property that had been in their family for generations.<sup>151</sup> Article 21 of the Basic Law makes clear that "private property is protected. Expropriation or acquisition of real or moveable property shall not be completed except for public benefit in accordance with the law and with the presentation of just compensation or mandated by judicial ruling."<sup>152</sup> This article also makes it clear that the economic system is a free market, and that "freedom of economic activity is guaranteed."<sup>153</sup> Once again, during the Occupation, farms were confiscated or disrupted and businesses were shut down or closed. During the autonomy period, frequent Israeli border closures have had a severe impact on the Palestinian economy.<sup>154</sup>

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<sup>149</sup> HUMAN RIGHTS WATCH, *supra* note 19, at 25.

[O]n December 24, 1995, Maher Alameh, an editor of the newspaper *al-Quds*, received a phone call at midnight, telling him to move an article about Chairman Arafat's meeting with the Greek Orthodox Patriarch from page eight to page one of the Christmas day issue. Alameh refused and was subsequently detained in Jericho for five days by the PSS.

*Id.*

<sup>150</sup> See BASIC LAW art. 30.

<sup>151</sup> See generally SHEHADEH, OCCUPIER'S LAW, *supra* note 54, at 28.

<sup>152</sup> BASIC LAW art. 21.

<sup>153</sup> *Id.*

<sup>154</sup> The Office of the United Nations Special Coordinator in the Occupied Territories (UNSCO) reported that Palestinian real gross national product (GNP) has declined by 18.4% between end-1992 and end-1996, which is mainly attributable to the loss of employment in Israel and the decline in trade flows due to the Israeli closure policy. UNSCO also reports that the Israeli closure policy, combined with significant population growth, has caused real per capita GNP to fall 36.1% between 1992 and 1996. In addition, UNSCO calculates that closures have cost the Palestinian economy approximately

The PLC might consider following some of the South African examples regarding economic, social, and cultural rights. Article 23 of the Basic Law states that "convenient housing is a right for every citizen. The National Authority shall endeavor to insure housing to whomever does not have a dwelling."<sup>155</sup> While the "shall endeavor" language is potentially limiting, the "progressive realisation" language in the South African constitution is more precise. Similarly, Article 25 of the Basic Law states "work is a right for every citizen." Going far beyond Article 23, Article 25 then goes on to state, "[i]t is an obligation and honor and the National Authority endeavors to provide it for all those who are able."<sup>156</sup> The PNA does not have the resources to undertake this type of well-meaning obligation at this time.

Article 22 regarding social security is much more limited. It does not promise a right to social security. "The law shall regulate social security and health insurance services for citizens and provisions for incapacity and old age."<sup>157</sup> The only people guaranteed social security, health insurance, and educational services are "the families of martyrs, prisoners, . . . wounded, injured, and disabled."<sup>158</sup>

The language of obligation is much more precise with respect to education. "Education is a right of every citizen and compulsory at least until the end of the formative stages."<sup>159</sup> Of course, it is deliberately unclear what the end of the formative stages means --kindergarten, elementary, junior high school, or high school? Another aspect of this article is quite important as it guarantees independence of universities. This right could be very important since the PNA has sent troops onto campuses, arrested students for protesting, and even arrested a professor who included comments critical of the PNA in his exam.<sup>160</sup>

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\$6.5 billion for the 1993-1996 period, or a \$4.4 million loss per day. See David P. Fidler, *Peace Through Trade? Developments in Palestinian Trade Law During The Peace Process*, 38 VA. J. INT'L L. 155, 163, 164 (1998).

<sup>155</sup> BASIC LAW art. 23.

<sup>156</sup> *Id.* art. 25.

<sup>157</sup> *Id.* art. 22.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* art 24.

<sup>160</sup> See Charles Robert Davidson, *The Challenge to Democratization: Arafat and the New Elite*, 23 FLETCHER F. WORLD AFF. 171, 181 (1999) (citations omitted).

In March 1996, Palestinian police raided and dispersed an opposition rally at al-Najah University in Nablus, arresting several students in the process. The following month, thousands of university students attempted to hold a rally at Bir Zeit University, but were impeded by security services who ordered the buses not to

There is even a provision relating to motherhood and children's rights. Article 29 makes clear that children must be protected from harm or cruel treatment, and that they must be imprisoned separately from adults.<sup>161</sup> This right has critical significance since children have not been immune from maltreatment by the police or military.

The PLC should also consider following the example of the South Africans with respect to environmental rights. Article 33 of the Basic Law restores a section that had been deleted from the First Reading. The current provision is too brief, however, stating "[a] balanced, clean environment is one of the human rights. Preservation and protection of the Palestinian environment for present and future generations is a national responsibility."<sup>162</sup> According to Article 24 of the South African constitution:

everyone has the right -

to an environment that is not harmful to their health and well-being;  
and

to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-

prevent pollution and ecological degradation;

promote conservation; and

secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.<sup>163</sup>

The South African government has limited its obligation through the use of the term "reasonable," and Palestine could do the same.

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transport the students to the university. When the students marched to police headquarters, police shot into the air in an attempt to disperse the gathered crowd.

*Id.*

<sup>161</sup> BASIC LAW art. 29.

<sup>162</sup> *Id.* art. 33.

<sup>163</sup> S. AFR. CONST. § 24. For a more elaborate proposal on environmental rights for the Basic Law, see Kevin C. Papp, *Environmental Constitutional Protection, Human Rights and the Eighth Draft of the Temporary Constitution for the Palestinian National Authority in the Transitional Period*, 7 IOWA J. TRANSNAT'L L. & CONTEMP. PROBS. 529, 561-75 (1997).

## IV. CASE STUDY: WOMEN'S RIGHTS AND CONSTITUTIONAL REFORM

Women's rights is one area in which the provision of human rights for all will be difficult to implement. Since women have historically suffered unequal treatment under civil law and custom, constitutional attempts to improve their position face special challenges. The South African constitution's stated commitment to gender equality is definitely worth considering for Palestine.

A. *Women's Rights in South Africa*<sup>164</sup>

Black women in South Africa still face a double burden of discrimination: as a black person under the apartheid legacy and as a woman in a patriarchal society.<sup>165</sup> Constituting more than thirty-six percent of the population,<sup>166</sup> they remain the most oppressed group in the country.<sup>167</sup> Black women are subject to male domination under the law in marriage, guardianship, succession, contract, and property. Under various customary laws still in effect, women are perpetual minors, and cannot engage in contracts, acquire property, inherit, or marry without permission.<sup>168</sup> Usually, men still pay a bride price known as *lobolo*, which some view as the sale of the woman, and others view as insurance in the case of divorce, or just as a symbol of agreement between families.<sup>169</sup> Some women

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<sup>164</sup> This subsection draws from Adrien Wing & Eunice de Carvalho, *Black South African Women: Towards Equal Rights*, 8 HARV. HUM. RTS. J. 57 (1995); Adrien Wing, *A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 ALBANY L. REV. 943 (1997)[hereinafter Wing, *Violence*].

<sup>165</sup> See HILDA BERNSTEIN, FOR THEIR TRIUMPHS AND FOR THEIR TEARS 7 (1985).

<sup>166</sup> See Sharon Fonn, *Working Women's Health*, in WOMEN'S HEALTH AND APARTHEID: THE HEALTH OF WOMEN AND CHILDREN AND THE FUTURE OF PROGRESSIVE PRIMARY HEALTH CARE IN SOUTHERN AFRICA 20, 29 (Marica Wright et al. eds., 1988). White women make up roughly eight percent of the population, Coloured women five percent, and Indian women two percent of the population. See *id.*

<sup>167</sup> See Celina Romany, *Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender*, 21 BROOK. J. INT'L L. 857, 857 (1996).

<sup>168</sup> See Wing & De Carvalho, *supra* note 164, at 64.

<sup>169</sup> *Lobolo* is the payment of money from the man to the father of the bride. See J.C. BEKKER, SEYMOUR'S CUSTOMARY LAW IN SOUTHERN AFRICA 150-71 (1989) (discussing the origin, purpose, and importance of lobolo). See generally Ian Currie, *The Future of Customary Law: Lessons from the Lobolo Debate*, in GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER 146, 155 (Christina Murray ed., 1994); cf. Sandra Burman, *Capitalizing on African Strengths: Women, Welfare and the Law*, in PUTTING WOMEN ON THE AGENDA 103, 107-08 (Susan Bazilli ed., 1991) (arguing that South Africa should update the lobolo practice in order to conform to its original purpose of providing a safety net

view *lobolo* as a measure of their worth, a legitimization of their status in the community, and not as a practice that oppresses them.<sup>170</sup> Under custom, polygamy is legal to the extent that a man may have an unlimited number of wives. While the civil law only recognizes monogamous marriages, many blacks still marry under customary law.<sup>171</sup>

Black women suffer disproportionately from the poverty and political exclusion experienced by the black population, since they bear the brunt of the frustration and aggression that their husbands are powerless to express elsewhere.<sup>172</sup> This often manifests itself in the form of rape or physical abuse.<sup>173</sup> The legal definition of rape excluded spousal rape until the enactment of the Prevention of Family Violence Act in 1993.<sup>174</sup>

White males still constitute the majority of employers or potential employers and service providers for black women.<sup>175</sup> Many white women, despite their own disadvantaged position in relation to white men, supported apartheid because it gave them privileges at the expense of the black majority.<sup>176</sup> White women are also employers, especially of domestics – a profession almost exclusively employing black females.<sup>177</sup> Coloureds, Asians, and now even more blacks increasingly employ black women in menial positions.

Nelson Mandela set the tone for equality in 1991 when he called for the creation of a non-sexist state.<sup>178</sup> The permanent constitution makes it

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for women and children); DIGBY SQHELO KOYANA, CUSTOMARY LAW IN A CHANGING SOCIETY 4-5 (1980) (characterizing *lobolo* as a symbolic and traditional marriage custom).

<sup>170</sup> See T.W. BENNETT, A SOURCEBOOK OF AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA 195, 198 (1991).

<sup>171</sup> See Wing & De Carvalho, *supra* note 164, at 87.

<sup>172</sup> See BERNSTEIN, *supra* note 165, at 23.

<sup>173</sup> See Wing, *Violence*, *supra* note 164, at 954-59 (providing details concerning violence against black women in South Africa).

<sup>174</sup> See PREVENTION OF FAMILY VIOLENCE ACT 133 OF 1993 (JSRSA) § 5. For a brief discussion of this Act, see Vivienne Goldberg, *South Africa: Private Law in Transition/The Effect of the New Constitution*, 33 J. FAM. L. 495, 499-500 (1995).

<sup>175</sup> Cf. Romany, *supra* note 167, at 865 (noting that black women fill the ranks of the unskilled and lowest paid jobs).

<sup>176</sup> See BERNSTEIN, *supra* note 165, at 11.

<sup>177</sup> See Wing & De Carvalho, *supra* note 164, at 68 (noting that black women make up 86% of domestic workers, an occupation not subject to minimum wage); Romany, *supra* note 167, at 865.

<sup>178</sup> See *Fighting Another Good Fight*, L.A. TIMES, Dec. 9, 1991, at B4.

clear that the Bill of Rights binds all natural and juristic persons.<sup>179</sup> The equality clause has been broadened to make it clear that neither the state nor any natural or juristic person may discriminate on the grounds of not only sex or gender, which were in the interim constitution, but also pregnancy, marital status, or birth, all characteristics which disproportionately affect women.<sup>180</sup>

The equality clause makes it clear that affirmative action measures may be undertaken; “[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”<sup>181</sup> This provision ensures that disgruntled white men will not sue for reverse discrimination. The Commission for Gender Equality was established under Article 187, and is just now getting under way. It has the power to promote respect for gender equality, and to monitor, investigate, research, educate, lobby, advise, and report on issues concerning gender equality. These provisions are somewhat limited.<sup>182</sup> The equality provision has a new subsection that states discrimination on one of the above grounds is unfair unless it is established that the discrimination is fair.<sup>183</sup>

The article on freedom of belief does permit for recognition of traditional marriages, as long as they are consistent with other provisions of the Constitution.<sup>184</sup> While everyone has the right to practice and enjoy the cultural life of their choice, this right must be consistent with the rest of the constitution.<sup>185</sup> A new law now allows the wife in a customary marriage to own property and gives her half of the marital assets in case of divorce. Husbands married only under customary law can continue to be polygamous as long as the earlier wife agrees. It is highly likely, however, that the new law will remain unenforced in rural areas far from the reach of the formal legal system.<sup>186</sup>

Additionally, Article 12, the revised article on freedom and security of the person, now makes it clear that everyone has a right “to be free from all forms of violence from either public or private sources,” as well

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<sup>179</sup> See S. AFR. CONST. (Act 108 of 1996) § 8(2).

<sup>180</sup> See *id.* § 9(3); 1993 Interim Constitution, *supra* note 70, § 8(2).

<sup>181</sup> See *id.* § 9(2).

<sup>182</sup> See *id.* §§ 7(3), 36.

<sup>183</sup> See *id.* § 9(5).

<sup>184</sup> See S. AFR. CONST. (Act 108 of 1996) § 15(3).

<sup>185</sup> See *id.* §§ 30, 31.

<sup>186</sup> See Suzanne Daley, *In South Africa's Varied Rites, Equal Rights*, N. Y. TIMES, Jan. 5, 1999, at A1.



as the right not to be tortured in any way.<sup>187</sup> The legislature has legalized abortion in the early stages, and the gender jurisprudence of the Constitutional Court includes an opinion in which it ruled that President Mandela did not discriminate unfairly against fathers when he pardoned all female prisoners with young children under twelve.<sup>188</sup>

### *B. Women's Rights in Palestine*<sup>189</sup>

As with other aspects of Palestinian society during the autonomy period, gender politics are in flux as well.<sup>190</sup> Replicating the South African constitution's textual commitment to gender equality will be difficult in the Palestinian case because both Palestinian custom and Islamic tradition sanction differential treatment on the basis of gender. Under custom, women are the repositories of family honor and the property of their menfolk. If female chastity and purity is not maintained, it is a disgrace for the family,<sup>191</sup> and her male relatives may be justified in killing the offending party or even the woman herself if she is considered blameworthy.<sup>192</sup> Like South Africa, a bride price or *mahr* is required to be paid. It, however, is paid to the woman for her own use, rather than to her family.

Under the Islamic heritage, as articulated in the Jordanian Personal Status Law, women's legal status is improved over customary law. Instead of an unlimited number, men can only have four wives.<sup>193</sup> Women can receive a divorce and maintenance if she has the necessary grounds.<sup>194</sup> Women can inherit a one-half share compared with no inheri-

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<sup>187</sup> See S. AFR. CONST. (Act 108 of 1996) § 12.

<sup>188</sup> See *President of the Republic of South Africa, Minister of Correctional Services v. John Philip Peter Hugo*, CCT 11/96.

<sup>189</sup> For further discussion of the same, see generally Wing, *supra* note 140.

<sup>190</sup> See Lisa Taraki, *Palestine: From National Liberation to Feminism*, 5(3) MIDDLE E. POL'Y. 173 (1997).

<sup>191</sup> See PHILIPPA STRUM, *THE WOMEN ARE MARCHING: THE SECOND SEX AND THE PALESTINIAN REVOLUTION* 27 (1992).

<sup>192</sup> See ANGELA BENDT & JAMES DOWNING, *WE SHALL RETURN: WOMEN OF PALESTINE* 89 (Ann Henning trans., 1980).

<sup>193</sup> See KORAN 4:3 (addressing polygamy). It is estimated that polygamy rates may be 5-10% in some villages. See STRUM, *supra* note 191, at 234.

<sup>194</sup> The grounds for divorce are: impiety; incurable skin or sexual disease; mental illness; desertion of more than one year; inability to pay bride price; inability to provide maintenance; or inability of wife to live with the husband. See JORDANIAN PERSONAL STATUS LAW, Temporary Law no. 61/1976, Official Gazette no. 2668 of 1 Dec. 1976, arts. 113-16, 120, 123, 126, 127, 132.

tance rights under custom.<sup>195</sup> On the negative side, a woman can only have one husband, cannot divorce easily, only gets half her male sibling's share, and can be beaten by her husband.<sup>196</sup> She can only marry a Muslim, while a male can marry a Christian or Jewish woman and can divorce easily.<sup>197</sup> The alimony amount awarded is very minimal.<sup>198</sup> Custody of children is awarded to the mother only if the children are very young.<sup>199</sup> While women do have the theoretical right in their marriage contracts to specify divorce without judicial process if polygamy occurs, or if she wants to work, such stipulations are rarely made.<sup>200</sup>

Custom and Islam have become intertwined over the centuries and have been psychological refuges for many Palestinians during the various Occupations, reinforcing the subservience of women. One of the few areas that subordinated men controlled was their women. As one man said when asked why he would not let women have more freedom, "What is left for us? We don't have land, homes or identity - at least let's have our honour."<sup>201</sup> Nevertheless, the 1988 Palestine National Council Declaration of Independence<sup>202</sup> expresses the desire to improve the legal status of women.

The women's movement made some progress during the *intifada*, as women were able to become more involved in the public sphere.<sup>203</sup> Independent women's centers opened, including the Women's Studies Center in Nablus and the Women's Center for Legal Aid and Counseling in Gaza. In 1998, this latter organization spearheaded a three-day Model

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<sup>195</sup> See KORAN 4:11, 4:176 (addressing inheritance).

<sup>196</sup> See KORAN 4:34 (discussing chastisement of a wife). The Jordanian Personal Status Law does provide for divorce if a woman is beaten. JORDANIAN PERSONAL STATUS LAW, *supra* note 194, art. 69; *see also* Wing, *Violence*, *supra* note 164, at 959-65 (detailing domestic violence against Palestinian women).

<sup>197</sup> See KORAN 2:237 (permitting easy divorce); Jordanian Personal Status Law, *supra* note 194, art. 85.

<sup>198</sup> See JORDANIAN PERSONAL STATUS LAW, *supra* note 194, art. 36.

<sup>199</sup> See Mayer, *supra* note 50, at 141; Jordanian Personal Status Law, *supra* note 194, arts. 162, 156.

<sup>200</sup> A review of 8500 marriage contracts registered in the *shari'a* courts in the West Bank over twenty years discovered only 1.5% contained any stipulations. *See* Lynn Welchman, *The Development of Islamic Family Law in the Legal System of Jordan*, 37 INT'L & COMP. L. Q. 868 (1988).

<sup>201</sup> PAUL COSSALI & CLIVE ROBSON, STATELESS IN GAZA 38 (1986).

<sup>202</sup> See Second Declaration of Independence of the State of Palestine, *reprinted in* 4 PAL. Y.B. INT'L L. 301 (1987/88).

<sup>203</sup> See Wing, *supra* note 140 (elaborating on women's roles).

Parliament on women's status and family law.<sup>204</sup> This parliament stirred up a national debate that ended up necessitating a special conciliation meeting where members of the parliament met with *shari'a* judges, intellectuals, legislators, and members of political parties. The participants agreed to work toward a unified Personal Status Code that would grant women better legal protections, as well as "defend them from all forms of violence; [and] reinforce the role and legitimacy of [the] *shari'a* courts."<sup>205</sup>

Since the PNA has taken over, there have been some changes in the legal regime. In 1996, the Women's Affairs Technical Committee was successful in lobbying the Interior Ministry to rescind the laws that required women to have the approval of their husbands or male guardians to obtain travel documents.<sup>206</sup>

Article 9 of the Basic Law contains an article stating that there can be no discrimination between Palestinians because of gender.<sup>207</sup> On the other hand, Article 4 states that Islam is the official religion, and Islamic *shari'a* is a primary source of legislation.<sup>208</sup> This clause was added in the sixth draft and is present in all Arab constitutions. Since Islam sanctions the differential treatment of women, there is an inherent tension between these two clauses.

The issue of improving women's constitutional status is a profound one. Deeply rooted customary and religious attitudes are difficult to eradicate through the passage of new laws, even if such laws are imposed by newly elected popular regimes. Efforts to grant women a legal status different from their social and cultural status often fail due to lack of legitimacy in the community. While some sectors of society will favor equalizing women's status, other sectors may vehemently oppose it. In Palestine, sizable communities of Islamic fundamentalists and other traditionalists fall into this latter category.

In addition to the equality and anti-discrimination clauses already present in the Basic Law, the PLC should adopt additional reforms following the South African model. There should be a clause that discusses the need for affirmative action programs or other positive measures to improve the status of women. A Gender Commission should be considered as well. The Basic Law does not contain a provision concerning pri-

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<sup>204</sup> See Nahlo Abdo, *Gender and Politics Under the Palestinian Authority*, 28 (2) J. PALESTINE STUD. 38, 45 (1999).

<sup>205</sup> *Id.* at 46.

<sup>206</sup> *See id.* at 44.

<sup>207</sup> BASIC LAW art. 9.

<sup>208</sup> *Id.* art. 4.

vate violence as the South African constitution does. Article 13 makes it clear that no person shall be subjected to coercion or torture.<sup>209</sup> This article, however, is located in a series of provisions pertaining to criminal due process rights, so it may ultimately be found inapplicable in the domestic violence context.

In 1994, the General Union of Palestinian Women published a Declaration of Principles on Palestinian Women's Rights, which goes beyond anything proposed in the Basic Law. Its general provision on civil rights states that "the law should stand next to the women to protect her family from violence and practices that infringe on any of her guaranteed rights, . . . by guaranteeing her right to go to a court as a citizen with full rights."<sup>210</sup> Could this be interpreted to protect her from domestic violence? The provision on economic, social and cultural rights "affirms the importance of equality in social welfare . . . and the guarantee of her full equality regarding issues pertaining to personal status."<sup>211</sup>

All these proposals may generate substantial resistance, but should be countered with arguments for the legitimacy of gender equality. Elsewhere, I propose three types of justifications for legal reform in this area: reinterpretation of the *shari'a*, compliance with international human rights norms, and the changes wrought in Palestinian society by the *intifada* and the current period.<sup>212</sup>

After the adoption of the Basic Law, the PNA should take steps to implement Article 10 of the Basic Law requiring the incorporation of international declarations that protect human rights. An important treaty to ratify is the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention).<sup>213</sup> This document is critically important since it covers the private sphere, where most women spend the majority of their time and where a large amount of discrimination takes place. The Convention contains fifteen articles describing the areas in which states must employ "appropriate means" to safeguard women's rights, including the areas of education, health care, nationality,

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<sup>209</sup> *Id.* art. 13.

<sup>210</sup> See Declaration of Principles on Palestinian Women's Rights, reprinted in 24 J. PALESTINE STUD. 137 (1994)[hereinafter Declaration]. For an analysis of the Declaration, see also Suha Sabbagh, *The Declaration of Principles on Palestinian Women's Rights: An Analysis*, in PALESTINIAN WOMEN: GAZA AND THE WEST BANK 245 (Suha Sabbagh ed., 1998).

<sup>211</sup> See Declaration, *supra* note 210, at para. 4.

<sup>212</sup> See generally Wing, *supra* note 140.

<sup>213</sup> *Convention on the Elimination of all Forms of Discrimination Against Women*, G.A. Res. 34/180, 34 U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/180 (1979) (adopted Dec. 18, 1979).

culture, family and personal status, legal and political activity, employment, recreation, and mortgages and other forms of credit. Affirmative action is permitted, but "shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."<sup>214</sup> The PLC should consider adopting these provisions, especially those affecting the private sphere.

## V. CONCLUSION

The Palestinians clearly face difficult diplomatic, political, economic, and legal conditions as the Oslo Accord-mandated five-year autonomy period ends. It remains uncertain whether the Palestinian people living in the West Bank, Gaza, and East Jerusalem will obtain the viable independent state they so clearly want as the end result of the peace process. Despite these severe difficulties, my preliminary analysis indicates that the Basic Law constitutes an embryonic attempt at creating a democratic foundation in whatever part of Palestine the PNA will govern as an independent state. To support this conclusion, this Article first explored the cultural and structural factors influencing democratization and the constitutional process, with particular attention to the unipolar world order, national economy, education, political pluralization, communitarian/hierarchical society, distrust of authority, and the multilayered legal regime. The Article then highlighted certain strengths and weaknesses of various textual features of the Basic Law, referring to lessons that might be drawn from the new South African constitution. The features discussed included: parliament as a constituent assembly, supremacy of the constitution, judicial review and a Constitutional Court, a competent civil service, protection of public safety, enshrining of constitutional principles, repeal of unjust laws, and the protection of human rights. The thumb nail sketch of the specific case study of women's rights suggested that Palestine should follow South Africa's lead and overcome the legacy of sexism by adopting a more detailed equal rights provision in the constitution and other reforms. I leave to later scholarship a further discussion of the issues introduced in this Symposium Article. That elaboration will hopefully include an analysis of the first few operating years of the Basic Law of an independent state of Palestine.

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<sup>214</sup> *Id.* pt. I, art. 4. Special measures protecting pregnancy are allowed. As broad as the Convention is, it does not cover abortion, pornography, domestic violence, or marital rape.