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NORWEGIAN  
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## **The Shari'a Courts and Personal Status Laws in the Gaza Strip**

**January 2011**



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The **Norwegian Refugee Council (NRC)** is an independent, international humanitarian non-governmental organisation that provides assistance, protection and durable solutions to refugees and internally displaced persons worldwide.

In 2009, NRC re-established its presence in the occupied Palestinian territory, with programs in Gaza in shelter and education and a legal aid programme (Information, Counselling and Legal Assistance, or ICLA) in the West Bank, including East Jerusalem, and the Gaza Strip.

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## **Acronyms**

<b>CBO</b>	Community Based Organisation
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination Against Women
<b>CFTA</b>	The Culture and Free Thought Association
<b>CWLRC</b>	Center for Women’s Legal Research & Consulting
<b>DWRC</b>	The Democracy and Workers’ Rights Center
<b>IDF</b>	Israel Defense Forces
<b>IHL</b>	International Humanitarian Law
<b>OCHA</b>	United Nations Office for the Coordination of Humanitarian Affairs
<b>oPt</b>	occupied Palestinian territory
<b>PA</b>	Palestinian Authority
<b>PCDCR</b>	The Palestinian Center for Democracy and Conflict Resolution
<b>PCHR</b>	Palestinian Centre for Human Rights
<b>PLC</b>	Palestinian Legislative Council
<b>UNDP</b>	United Nations Development Programme
<b>UNRWA</b>	United Nations Relief Works Agency for Palestinian Refugees in the Near East
<b>WAC</b>	Women’s Affairs Center
<b>WATC</b>	Women’s Affairs Technical Committee

## Glossary of Arabic Terms

<i>Fiqh</i>	Islamic jurisprudence and interpretation of the <i>shari'a</i> by Islamic jurists based on the <i>Qur'an</i> and <i>Sunnah</i> . Of the four main Sunni schools of <i>fiqh</i> , the personal status laws in Gaza primarily follow the <i>Hanafi</i> school.
<i>Hadana</i>	Rights to child custody that generally belong to the mother. Under personal status laws in Gaza, a woman's rights to <i>hadana</i> extends only until male children are 9 and female children are 11. A divorced woman typically loses her <i>hadana</i> rights upon remarriage.
<i>Hanafi</i>	One of the four main Sunni schools of jurisprudence and the one primarily applicable under the personal status laws in Gaza. Established by the jurist Imam Abu Hanifah Nu'man ibn Thabit (d. 767).
<i>'Idda</i>	Waiting period following a woman's divorce or the death of her husband and during which a woman may not remarry. The specific time may vary, but for divorced women this period typically lasts three menstrual cycles. If a woman is pregnant, the period will extend until the birth of her child. During the <i>'idda</i> period, a husband must continue to provide maintenance payments ( <i>nafaqa</i> ) and a divorce is considered revocable for the duration of the <i>'idda</i> period. For widows, the <i>'idda</i> lasts four months and ten days. There is no <i>'idda</i> period if the divorced woman is still a virgin.
<i>Ijma</i>	Under Islamic jurisprudence ( <i>fiqh</i> ), this refers to the consensus amongst Islamic scholars and may be used as a tool in interpreting the <i>shari'a</i> where there is no clear answer under the <i>Qur'an</i> or <i>Sunnah</i> .
<i>Khul'</i>	A form of divorce initiated by women before the <i>shari'a</i> courts and under the personal status laws. A <i>khul'</i> divorce generally requires a woman to forfeit her rights to some or all of her <i>mahr</i> (brideswealth) in exchange for being granted a divorce.
<i>Madh'hab</i>	School of Islamic jurisprudence ( <i>fiqh</i> ). Under Sunni Islam, there are four primary <i>madh'habs</i> : <i>Hanafi</i> , <i>Maliki</i> , <i>Shafi'i</i> , and <i>Hanbali</i> .
<i>Mahr</i>	Brideswealth, either cash or goods (often jewellery), paid by the groom to the bride upon marriage. <i>Mahr</i> may either be prompt, in which the full amount would be paid at the time of marriage, or it may be deferred, in which case it would be paid either in installments or at a later date. Regardless of whether it is prompt or deferred, the entirety of the <i>mahr</i> must be paid to the wife upon divorce.
<i>Mukhtar</i>	Clan elder or male head of the family. The <i>mukhtar</i> traditionally connected villages to formal government and often plays an integral role in informal dispute resolution and the application of <i>urf</i> (customary law).
<i>Nafaqa</i>	Maintenance payments that a husband is obligated to pay to his wife under the marriage contract and in exchange for her obedience. Upon divorce, a husband is required to continue making <i>nafaqa</i> payments during the <i>'idda</i> period before a divorce becomes irrevocable.
<i>Nikah</i>	An Islamic marriage contract which designates the amount of <i>mahr</i> (brideswealth) and which must be filed before the <i>shari'a</i> courts.
<i>Qadi</i>	<i>Shari'a</i> court judge. Under the Palestinian Authority, the ministerial position of chief judge ( <i>Qadi al Qudah</i> ) of the <i>shari'a</i> courts was created.

<i>Shari'a</i>	Religious law and practical ordinances derived from the <i>Qur'an</i> .
<i>Sunduq</i>	Family fund or treasury. <i>Sunduqs</i> have been established and administered throughout the Gaza Strip by prominent clans. There has been a five-year initiative to establish an analogous <i>sunduq al nafaqa</i> to provide aid through the <i>shari'a</i> judiciary to men who are unable to meet their <i>nafaqa</i> (maintenance) obligations to their wives and children. To date, the <i>sunduq al nafaqa</i> in Gaza is not fully functional.
<i>Sunnah</i>	The sayings, practices, and deeds of the Prophet Muhammad. After the <i>Qur'an</i> , this is the other primary source for interpretation of <i>shari'a</i> law.
<i>Tafriq</i>	Judicial divorce that is granted in limited circumstances and generally relates to one party's failure to fulfil marriage responsibilities. Such grounds include, for example, absence or imprisonment without reason for over a year, impotence, severe mental or physical disability, or failure to provide maintenance payments.
<i>Talaq</i>	Unilateral divorce by the husband.
<i>Tafwid al-Talaq</i>	Delegation of the husband's rights to <i>talaq</i> to either his wife or a third party. This delegation may occur at the time of the marriage and as part of the marriage contract or at a later date. It also may be conditional or unconditional.
<i>Wali</i>	The marriage guardian, generally the father or paternal grandfather of the bride, who has authority to contract marriage on the woman's behalf.

# Map of the Gaza Strip



# Introduction

## Development of the ICLA Programme in Gaza

In 2009, the Norwegian Refugee Council (NRC) established an Information, Counselling and Legal Assistance (ICLA) programme in the Gaza Strip to provide free legal services to persons who have been displaced or were facing displacement. An independent assessment of the ICLA programme undertaken in September 2009 identified the need for additional research in English on the structure and functions of the *shari'a* courts and personal status laws in Gaza from a women's rights perspective. In particular, the primary objectives for the evaluation were identified as follows:

- Provide a background to the use and application of *shari'a* law in Gaza
- Describe the structure and function of *shari'a* courts in Gaza
- Summarise the personal status laws in Gaza, with a focus on women's rights
- Identify the current challenges facing the *shari'a* courts in Gaza

## Background Information on the Gaza Strip

The Gaza Strip, with a population of approximately 1.5 million people in an area of only 360 square kilometres, represents one of the most densely populated areas in the world. More than 75 percent of the population in Gaza is registered as refugees with the United Nations Relief Works Agency for Palestinian Refugees in the Near East (UNRWA). Administratively, the Gaza Strip is divided into five governorates: Northern Gaza, Gaza, Middle Area, Khan Younis, and Rafah.

The demographics in Gaza, particularly in relation to women, are unique and at times paradoxical. Women in Gaza are among the best educated in the world, yet their participation in the labour force is unusually low at only eight percent.<sup>1</sup> Their high level of education has not been matched by any corresponding level of occupational opportunities. In Gaza, more than 40 percent of women marry at the age of 18 or younger and more than half the population is under 15 years old.<sup>2</sup> The fertility rate of women in Gaza is likewise one of the highest in the world, with an average 7.8 children per woman in 1992; at any given time, roughly one-quarter of Palestinian women in Gaza are pregnant.<sup>3</sup>

The *shari'a* court system in the Gaza Strip functions as a semi-autonomous legal system and adjudicates matters related to family law, also known as personal status law.<sup>4</sup> Family or personal status law includes all laws regulating marriage, divorce, custody, maintenance payments and inheritance.<sup>5</sup>

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<sup>1</sup> Nahda Shehada, *Between Change and Continuity: Age and Marriage Trends in Gaza*, JOURNAL OF WOMEN OF THE MIDDLE EAST AND ISLAMIC WORLD 6 (2008), 315-350.

<sup>2</sup> *Id.* at 315.

<sup>3</sup> *Id.* at 315-16; Fadwa Labadi, Penny Johnson, Rema Hammami, and Lynn Welchman, *Islamic Family Law and the Transition to Palestinian Statehood*, in ISLAMIC FAMILY LAW IN COMPARATIVE PERSPECTIVES, Lynn Welchman, ed. (London: Zed Books, Spring 2002).

<sup>4</sup> In the context of the Gaza Strip, the terms "family law" and "personal status laws" are often used interchangeably and both encompass the Islamic legal codes related to marriage, divorce, custody, and inheritance. The majority of primary and secondary source materials refer to "personal status laws", and, therefore, that is the term that is primarily used in this document.

<sup>5</sup> It is important to note that the personal status laws applied by the *shari'a* courts are only applicable to the Muslim population in Gaza and that separate ecclesiastical courts exist for the minority Christian population in Gaza. However, 99.3 percent of the approximately 1.6 million people living in Gaza are Muslim (predominantly Sunni) and any analysis of the function or structure of the ecclesiastical court system is outside the scope of this research.

## Methodology

The methodology employed in drafting this report attempts to identify and distinguish the ways in which the personal status laws are codified, implemented, and actually affect the realities of women's lives and experiences in Gaza. While significant research has been undertaken with regards to the *shari'a* court systems in the West Bank and other Muslim countries, there has been limited analysis of the *shari'a* legal structures in the Gaza Strip.<sup>6</sup> In many cases, the *shari'a* courts in the Gaza Strip are treated as simply an extension of those in the West Bank, a simplified comparison when considering the distinct historical background and development of personal status laws in Gaza.

The existing publications that have analysed the *shari'a* courts in Gaza either assume an anthropological and sociological perspective or adopt a normative legal approach focusing on how the laws ought to be.<sup>7</sup> Little research has been conducted that details the actual legal function and application of personal status laws in the Gaza *shari'a* courts; in particular, there have been no studies addressing how the significant social, economic, and political changes in Gaza in recent years have impacted the *shari'a* court system. The initial goal of this research, therefore, was to draw upon primary and secondary source materials relevant to the personal status laws in Gaza and to identify any gaps.

This report is also based on interviews and field visits in the Gaza Strip conducted from the 1st to the 25th of November 2010. NRC conducted interviews with several non-governmental local organisations and other key legal actors.<sup>8</sup> Field visits to the *shari'a* courtrooms in Gaza City and Rafah were carried out to observe the actual daily proceedings before the courts. NRC conducted interviews with *shari'a* court personnel, including judges, lawyers, and members of the Family Counselling Unit.

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<sup>6</sup> See, e.g., Lynn Welchman, *WOMEN AND MUSLIM FAMILY LAWS IN ARAB STATES: A COMPARATIVE OVERVIEW OF TEXTUAL DEVELOPMENT AND ADVOCACY* (Amsterdam University Press: 2007).

<sup>7</sup> See, e.g., Nahda Shehada, *Justice without Drama: Observations from the Gaza City Sharia Court*, in *GENDER, RELIGION AND CHANGE IN THE MIDDLE EAST: TWO HUNDRED YEARS OF HISTORY*, Inger Marie Okkenhaug and Ingvild Flaskerud, eds. (2005).

<sup>8</sup> A list of the interviews conducted is on file with NRC.

# Historical Background on Personal Status Laws in Gaza

## Ottoman Empire and British Mandate (-1948)

The Gaza Strip was part of the Ottoman Empire until 1920. By the early twentieth century, the legal jurisdiction of *shari'a* courts in the Ottoman Empire was gradually stripped as significant areas of penal and commercial law were transferred to the civil judiciary. What remained under the legal sphere of the *shari'a* courts was largely the management of personal status issues. To this day, the personal status laws remain the principle area in which codified law remains connected to *shari'a* courts in the majority of Muslim countries.<sup>9</sup>

The Ottoman Civil Code of 1871 was the primary codification of law during this period and the Ottoman Law of Family Rights of 1917 (OLFR) represented the first modern codification of personal status law. The OLFR drew on principles from the four major Sunni schools of law (*madh'hab*), though primarily based its interpretations on the Hanafi school. Nearly half of the provisions under these Ottoman codes remain applicable in the Gaza Strip today.<sup>10</sup>

The Gaza Strip came under the authority of the British Mandate in 1920 following the fall of the Ottoman Empire and remained under British control until the war in 1948 between the newly created state of Israel and five Arab states, including Egypt, Jordan, Lebanon, Syria and Iraq. During the British Mandate period, two formal *shari'a* courts were established in the Gaza Strip: a court of first instance and a court of appeal.<sup>11</sup>

## Egyptian Governor General (1948-1967)

As a result of the war in 1948, which formally ended with a series of armistice agreements culminating in July 1949, the demographics of the Gaza Strip were dramatically altered. The native population of approximately 80,000 was suddenly forced to absorb nearly 200,000 refugees who had been displaced from throughout Palestine.<sup>12</sup> As a result of the armistice agreements between the state parties to the conflict, from 1948 to 1967, the Gaza Strip was subject to Egyptian control while the West Bank fell under Jordanian authority. This separate administration of the Gaza Strip and the West Bank by Egypt and Jordan, respectively, resulted in the development of separate *shari'a* judiciaries and the lack of any unified personal status laws.

While the West Bank was formally annexed by Jordan in this period and regulated by Jordanian law, the Gaza Strip was never fully incorporated into the Egyptian national system. Instead, the Gaza Strip was simply supervised and administered by the Egyptian governor general. Thus, when the *shari'a* courts in Egypt were abolished in 1956 and their jurisdiction was transferred to the civil judiciary, the *shari'a* courts in the Gaza Strip remained unaffected.<sup>13</sup>

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<sup>9</sup> Asma M. Abdel Halim, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy*, 9/22/08 MIDDLE E. J. 728 (2008).

<sup>10</sup> Welchman, Lynn, *The development of Islamic family law in the legal system of Jordan*, I.C.L.Q. 1988, 37(4), 868-886, 869-70 (1988).

<sup>11</sup> Shiekh Salah Odah Hashish, *The Legal System of Islamic Courts*, from Palestinian National Authority, Judicial Authority, Legal Justice Courts website, available online at [http://www.ljc.gov.ps/index.php?option=com\\_content&view=frontpage&Itemid=52#Scene\\_1](http://www.ljc.gov.ps/index.php?option=com_content&view=frontpage&Itemid=52#Scene_1) (last visited 5 December 2010).

<sup>12</sup> *Inside Gaza: The Challenge of Clans and Families*, INTERNATIONAL CRISIS GROUP, Middle East Report No. 71 (20 December 2007) at 1.

<sup>13</sup> Lynn Welchman, *Palestine: Pre-State Positioning on Family Law*, in THE INTERNATIONAL SURVEY OF FAMILY LAW, Andrew Bainham (ed.) (2000 ed.) at 5.

However, the 1954 Egyptian Law on Family Rights was made applicable to the Gaza Strip and remains to the present day the primary source for codified personal status law in Gaza. This 1954 law itself bears a much stronger resemblance to the 1917 OLFK than to even the existing personal status laws in Egypt in 1954. During this period under Egyptian administration, an additional *shari'a* court of first instance was established in the Khan Younis governorate of Gaza.<sup>14</sup>

### **Israeli Occupation (1967- )**

Following the war in 1967 between Israel and neighbouring states Egypt, Jordan and Syria, Israel occupied the Gaza Strip and established a military administration in the area.<sup>15</sup> The Israeli occupation effectively froze the development of personal status law in Gaza in its pre-1967 state. As a result, the personal status law reforms and progressive benefits to women's rights adopted in other Arab states, including Egypt and Jordan, were never implemented in the Gaza Strip.<sup>16</sup> During this period under Israeli occupation, additional *shari'a* courts of first instance were established in Jabalia and Rafah.<sup>17</sup>

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

The Palestinian Authority (PA) was established in 1995 following the signing of the Oslo Agreements, giving Palestinians a limited measure of self-governance in the West Bank and the Gaza Strip. The PA greatly expanded the responsibilities and financial independence of *shari'a* courts and created the ministerial position of chief judge (*Qadi al-Qudah*) of the *shari'a* courts, who was only answerable to the president of the PA.<sup>18</sup> The *shari'a* court system in Gaza was significantly expanded at this time, with the establishment of an additional *shari'a* six courts of first instance along with a second *shari'a* court of appeal in Khan Younis on 1 August 2003 and the creation of the *Shari'a* Supreme Court established in Gaza City on 29 June 2003.<sup>19</sup>

In addition to the expansion of the court system in Gaza, attempts were made during the Oslo years to unify all personal status laws throughout the oPt. Consequently, nearly 95 percent of the legal systems in Gaza and the West Bank were successfully linked during this period.<sup>20</sup> However, following the division between Hamas and Fatah in 2007, efforts to promulgate unified personal status laws for the entire oPt floundered and the disparate family law systems between the Gaza Strip and the West Bank remained.

In 2005, Israel withdrew its military personnel and dismantled all settlements within the Gaza Strip. While the Israeli government contended that this amounted to a cessation of its occupation, Israel still retained complete control of the airspace, all maritime access and the non-Egyptian land crossings and has rigorously enforced a closure of all border crossings into Gaza.

### *Palestinian Basic Law*

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<sup>14</sup> Sheikh Salah Odah Hashish, *supra* note 11.

<sup>15</sup> Hallie Ludsin, *Putting the Cart Before the Horse: The Palestinian Constitutional Drafting Process*, UCLA J. INT'L L. & FOREIGN AFF. 443, 447 (2005).

<sup>16</sup> *Id.* at 453;

<sup>17</sup> Sheikh Salah Odah Hashish, *The Legal System of Islamic Courts*, *supra* note 11.

<sup>18</sup> Nahda Shehada, *Flexibility versus Rigidity in the Practice of Islamic Family Law*, 32 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 28, 33 (2009); Sheikh Salah Odah Hashish, "The Legal System of Islamic Courts." Initially, the PA had established the position of *wakil* (custodian) to head the *shari'a* judiciary within the general Ministry of Justice. However, in October 1994, Yasser Arafat agreed to the creation of the ministerial *Qadi al-Qudah* to head a ministry completely apart from the Ministry of Justice. Welchman, *Palestine: Pre-State Positioning on Family Law*, *supra* note 13 at 10.

<sup>19</sup> Sheikh Salah Odah Hashish, *The Legal System of Islamic Courts*, *supra* note 11

<sup>20</sup> Dr. Hani Albaroos, *Chapter 7: The Judicial Sector*, in THE ROLE OF HAMAS IN GAZA: FACING THE CHALLENGE OF ISOLATION at 11.

The Palestinian Basic Law, essentially intended as a temporary constitution for the PA, was ratified by the Palestinian Legislative Council (PLC) in 1997 and signed into law by Yasser Arafat in 2002. Article 4 of the Basic Law expressly provides that “[t]he principles of Islamic *Shari’a* shall be the main source of legislation” while Article 92 affirms that “*Shari’a* affairs and personal status shall be assumed by *Shari’a* and religious courts in accordance with law.”<sup>21</sup> Under the Palestinian Basic Law, the judiciary constituted one of the three independent branches of the government, along with the PLC and the Executive office, headed by the President.

### *Model Parliament*

In 1997, the Palestinian Parliament for Women and Legislation, or Model Parliament, was established “with the aim of proposing Palestinian laws and legislation based on equality and human rights....[and] correcting the discriminatory nature of family law.”<sup>22</sup> The Model Parliament began initially as a networking project between women’s non-governmental organisations, with the West Bank-based Women’s Centre for Legal Aid and Counselling (WCLAC) acting as the implementing organisation, and was active in both the West Bank and the Gaza Strip.<sup>23</sup>

In the Gaza Strip, the Model Parliament focused exclusively on the personal status laws and sought “ways to amend them in a spirit of equality, non-discrimination and respect for women’s human rights.”<sup>24</sup> The women’s organisations conducted surveys, presented a comprehensive review of existing laws affecting the status of women in Gaza, and ultimately proposed amendments to the existing personal status laws more in line with gender equality.<sup>25</sup>

However, this campaign produced a profound backlash in Gaza and eventually erupted into a public debate with sharp criticisms from Islamist movements. In a conference at the Islamic University in Gaza, women participants were accused of heresy, being servants of Western imperialism, and “degrading Islam”.<sup>26</sup>

For its part, the PA and its leading party, Fatah, maintained a cautious approach to the Model Parliament and “endorsed the women’s movement as long as this policy helped to contain Hamas, but frustrated its demands in order not to alienate conservative religious sentiments and not to strengthen the Islamic opposition”.<sup>27</sup> Ultimately, the PA adopted an ambivalent approach to the MP to avoid any further criticism.

The experiences of the Model Parliament revealed that any attempts to reform personal status laws in the oPt would face intense resistance if they were perceived as a threat to *shari’a* and that any proposal to adopt an entirely secular, civil code for family law would be unrealistic.<sup>28</sup>

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

In 2006, Hamas won the civil parliamentary elections in the PA and formed a majority government within the Palestinian Legislative Council (PLC). Tensions erupted between Hamas and Fatah and, despite an attempt to establish a unified government in March 2007, culminated in the Hamas military takeover of the Gaza Strip on 14 June 2007. Since then, Hamas has exercised control and functioned as the *de facto*

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<sup>21</sup> Palestinian Basic Law, available online at <http://www.palestinianbasiclaw.org/2002-basic-law> (last visited 5 December 2010); Amal Jamal, *Engendering State-Building: The Women’s Movement and Gender-Regime in Palestine*, 3/22/01 MIDDLE E. J. 256 (2001) at 8.

<sup>22</sup> Nahda Shehada, *Gender and Politics in Palestine: Discourse Analysis of the Palestinian Authority & Islamists*, 11 U. MIAMI INT’L & COMP. L. REV. 3, 3-4 (2003).

<sup>23</sup> *Id.* at 39-40.

<sup>24</sup> *Id.* at 42.

<sup>25</sup> Jamal, *supra* note 21 at 7.

<sup>26</sup> *Id.* at 10.

<sup>27</sup> *Id.* at 9.

<sup>28</sup> *Id.*

government in Gaza, effectively causing the cessation of any efforts at a unified personal status law for the entire oPt. In 2007, following Hamas's seizing of control in Gaza, Israel imposed a full blockade, largely preventing the export of any goods, crippling the local economy, and restricting imports to a limited amount of basic humanitarian aid. The blockade has also severely restricted freedom of movement in Gaza, disrupting, among other things, family life for residents with relatives in the West Bank and Israel.

As a result of the Hamas military takeover, nearly all employees of the PA immediately went on strike and, at least initially, the judiciary in Gaza ceased functioning. Beginning in November 2007, the *de facto* authorities began appointing new judges and officials to replace those on strike. In January 2008, the Palestinian Bar Association, fearing that its members in Gaza would lose their jobs or simply be replaced, formally suspended its strike.<sup>29</sup>

Given the designation of Hamas as a terrorist organisation by a number of States internationally, the vast majority of local human rights organisations and international organisations have refused or been unable to recognise the legitimacy of the Hamas-appointed judiciaries and nearly all direct aid funding from these countries to the *de facto* government ceased. This effectively crippled the economy in Gaza, particularly considering that foreign aid to international organisations working in Gaza and to the PA subsidised nearly half of the workforce in Gaza at the time of the 2006 Hamas victory.<sup>30</sup>

The one exception to the wide scale disengagement with the *de facto* authorities in Gaza, however, was the willingness of women's organisations to continue working with the *shari'a* courts in the adjudication of personal status laws. As with the civil judiciary, the vast majority of *shari'a* judges had refused to cooperate with the *de facto* authorities in Gaza following the takeover in June 2007 and were subsequently replaced by those more sympathetic to Hamas.<sup>31</sup> Nonetheless, in terms of actual practices and operations of *shari'a* courts, Hamas authorities appear to have instituted relatively few substantive changes. For example, Pursuant to a High Justice Council of Gaza ruling handed down after the Hamas takeover in 2007, all female lawyers practicing before the *shari'a* courts Gaza are now required to wear the traditional *hijab*.<sup>32</sup> Hamas authorities also repealed a change in the child custody laws instituted by the PA that expanded a divorced woman's custodial rights.<sup>33</sup>

### *Israeli Military Offensive in Gaza, December 2008 – January 2009*

The 23-day Israeli military campaign against Gaza codenamed "Operation Cast Lead", which lasted from 27 December 2008 through 18 January 2009, resulted in significant loss of life, damage to infrastructure and homes, and further economic deterioration in Gaza. At least 1,414 Palestinians in Gaza were killed in "Cast Lead", including 118 women and 355 children, and an estimated 107,330 individuals were displaced.<sup>34</sup> Eighty-three percent of these fatalities were civilians.<sup>35</sup> A joint UNRWA and UNDP survey in August 2009

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<sup>29</sup> Albaroos, *supra* note 20 at 7.

<sup>30</sup> *Inside Gaza: The Challenge of Clans and Families*, *supra* note 12 at 5.

<sup>31</sup> Albaroos, *supra* note 20 at 5 (noting that, of the 20 *shari'a* court judges in Gaza, only one cooperated with the *de facto* authorities and the other 19 remained on strike and continued to receive their salaries from the Ramallah-based PA government).

<sup>32</sup> NRC interview with the Palestinian Centre for Human Rights (PCHR), 10 November 2010. However, it appears that the High Judiciary Council has not fully implemented the ruling and that women are still allowed to enter courtrooms without wearing the *hijab*. Albaroos, *supra* note 20 at 21.

<sup>33</sup> Though even on this issue of the headscarf, it appears that the High Judiciary Council has not fully implemented the ruling and that women are still allowed to enter courtrooms without wearing the *hijab*. Albaroos, *supra* note 20 at 21.

<sup>34</sup> *Priority Issues of Women in Gaza Strip*, WOMEN'S AFFAIRS CENTER – GAZA, September 2009.

<sup>35</sup> *Through Women's Eyes: A PCHR Report on the Gender-Specific Impact and Consequences of Operation Cast Lead*, PALESTINIAN CENTRE FOR HUMAN RIGHTS (PCHR) (2009) at 9.

found that 3,540 homes were completely destroyed during the offensive, 2,870 sustained major damage, and 52,900 sustained minor damage.<sup>36</sup>

The vast majority of female victims of the conflict were in the Northern Gaza Strip and Gaza City, where the heaviest fighting and bombing occurred.<sup>37</sup> Nearly 800 women were widowed, many of whom then faced one or more personal status legal issues as a result. For example, widows in Gaza often find it difficult to live on their own, either due to financial or social constraints, and may be pressured to return to their family homes or remarry.<sup>38</sup> Widows may also face manipulation and intimidation from their husband's families, including threats to their custody of the children; this may be particularly so in the wake of the military offensive where widows and orphans may receive (or may be perceived as receiving) increased international aid and martyr's payments from the *de facto* authorities.<sup>39</sup>

Another indirect consequence of "Cast Lead" were increased rates of gender-based violence (GBV) observed in Gaza.<sup>40</sup> In a UNIFEM survey undertaken in March 2009, 70 percent of respondents in Rafah and 61 percent in Khan Younis noted increases in domestic violence in the months since the conflict.<sup>41</sup>

Both statistical review and interviews conducted by NRC also attest to an increase in child custody disputes in Gaza since 2008. In the wake of the conflict, the primary access to justice issues cited by women in Gaza were domestic violence (26 percent), divorce (26 percent), and legal custody (18 percent).<sup>42</sup> For female heads of household, the access to justice concerns with regard to child custody were even higher, at 29 percent.<sup>43</sup>

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<sup>36</sup> *Locked In: The Humanitarian Impact of Two Years of Blockade on the Gaza Strip*, UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (OCHA), SPECIAL FOCUS, August 2009 at 14; *Through Women's Eyes*, *supra* note 34 at 5.

<sup>37</sup> *Through Women's Eyes*, *supra* note 34 at 9. 104 of the 118 women killed during *Operation Cast Lead* were in the northernmost governorates of Northern Gaza and Gaza City.

<sup>38</sup> *Id.* at 5.

<sup>39</sup> *Towards gender equality in humanitarian response: Addressing the needs of women & men in Gaza*, UNITED NATIONS DEVELOPMENT FUND FOR WOMEN (UNIFEM) (now known as UN Women), 2009 at 54-55.

<sup>40</sup> *Between the Fence and a Hard Place: The Humanitarian Impact of Israeli-Imposed Restrictions on Access to Land and Sea in the Gaza Strip*, UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMAN AFFAIRS (OCHA), WORLD FOOD PROGRAMME, SPECIAL FOCUS, August 2010.

<sup>41</sup> *Voicing the needs of Women and Men in Gaza: Beyond the aftermath of the 23 day Israeli military operations*, UNITED NATIONS DEVELOPMENT FUND FOR WOMEN (UNIFEM), 2009 at 53-54.

<sup>42</sup> *Id.* at 63.

<sup>43</sup> *Id.*

## Applicable International Human Rights Law<sup>44</sup>

The Palestinian Authority (PA) lacks the status of an internationally-recognised sovereign state and, as such, has been unable to formally ratify any of the United Nations human rights conventions. However, the draft Palestinian Constitution of 2003 does expressly provide that “[t]he state of Palestine shall abide by the Universal Declaration of Human Rights and shall seek to join other international covenants and charters that safeguard human rights.”<sup>45</sup> Likewise, in the context of the Israeli occupation of Palestinian territory, including the Gaza Strip, and international armed conflict, all civilians are further considered protected persons under international humanitarian law, including customary international humanitarian law and the Fourth Geneva Convention of 1949.<sup>46</sup> Moreover, on 8 March 2009, the President of the Palestinian Authority signed the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as a symbolic gesture towards improving greater gender equality in the Palestinian territory.

CEDAW first came into force in 1979 and has been ratified by 185 countries. Article 2 of CEDAW guarantees “the principle of the equality of men and women in [the States Parties’] constitutions or other appropriate legislation” and provides that States Parties will “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.” Similarly, Article 5(a) provides that States Parties shall “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped role for men and women.”<sup>47</sup>

Even for those Muslim-majority countries that have ratified CEDAW, most have entered reservations specifically intended to preserve *shari’a* with regard to issues of personal status. These reservations vary significantly by country in terms of the scope and specificity.<sup>48</sup> To the extent that early marriage and child

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<sup>44</sup> International humanitarian law is also applicable in the Gaza Strip in relation to Israel’s ongoing belligerent occupation of the territory. Both Israeli and Palestinian actors are bound by these laws as well as international human rights laws. However, Israel’s obligations are not addressed given the scope of this paper.

<sup>45</sup> Palestinian Constitution of 2003 (3d draft), §para. 18. Moreover, the International Court of Justice (ICJ) has found that Israel’s human rights obligations under ICCPR, ICESCR, CEDAW, and CRC extend extraterritorially to the oPt. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9) §§ 111-13.

<sup>46</sup> *Through Women’s Eyes*, *supra* note 34 at 13.

<sup>47</sup> Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW); see also International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), Article 10(a) (“The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit in society [...]. Marriage must be entered into with the free consent of the intending spouses.”); International Covenant on Civil and Political Rights (1966) (ICCPR), Article 23(4) (“States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”); Universal Declaration of Human Rights (1948) (UDHR), Article 16 (“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. Marriage shall be entered into only with the free and full consent of the intending spouses.”).

<sup>48</sup> Lisa Hajjar, *Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis*, LAW & SOC. INQUIRY 1, 17-18 (2004). Most countries did not elaborate on their reasons for such reservations, though Egypt, Iraq, Jordan, and Morocco did expressly explain that women are frequently “advantaged” by *shari’a* through the provision of *mahr* (brideswealth) and the husband’s financial maintenance obligations. See Yakare-Oule Jansen, *Muslim Brides and the Ghost of the Shari’a: Have the Recent Law Reforms in Egypt, Tunisia, and Morocco Improved Women’s Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make It Stick*, 5 NW. U. J. INT’L HUM. RTS. 181 (2007) at 7-8 (“[I]t has been stated that of all UN human rights treaties, CEDAW “has attracted the greatest number of substantive reservations with the potential to modify or exclude most, if not all, of the terms of the treaty.”).

custody issues are raised, the Convention on the Rights of the Child (CRC), which came into force in September 1990 and has been ratified by 194 countries, will also apply.

## Personal Status Laws in Gaza

By the twentieth-century, nearly all laws in Gaza related to contracts, criminal proceedings, and commercial transactions had been removed from the *shari'a* courts and incorporated into a secular civil law. The sole exception was the personal status laws, which remained governed by Islamic *shari'a*. The primary domestic codification of personal status laws in Gaza is the 1954 Law of Family Rights as proclaimed by the Egyptian governor general. Administrative decisions issued by the *Qadi al-Qudah*, the chief judge of the *shari'a* courts, likewise have a binding effect on all *shari'a* judges.

Of the four leading Sunni schools of law, or *madhabs*, the *shari'a* courts in Gaza primarily apply the *Hanafi* school. The primary sources for *shari'a* under the *Hanafi* school of law, in descending order of importance, are:<sup>49</sup>

- (1) *Qur'an*
- (2) *Sunnah* (acts, sayings, and traditions of the Prophet Muhammad)
- (3) *Ijma* (consensus)
- (4) *Qiyas* (analogical reasoning)
- (5) *Urf* (customary law)
- (6) *Ijtihad* (personal reasoning)

Personal status laws encompass nearly all legal areas that most acutely affect women, including marriage, divorce, child custody, maintenance, and inheritance. The following section outlines each of these legal areas under personal status laws and describes the application of the laws by the *shari'a* courts in Gaza.

For all cases involving the dissolution of marriage, it is important to note that a litigant will often bring multiple claims and the resolution of her several claims may be related and interconnected. For example, a custody dispute may be connected to the question of *nafaqa*, or alimony payments and a *nafaqa* claim could, in practice, be an attempt to attain a husband's consent to divorce.

### Marriage

The most common claims brought before the *shari'a* courts involve marriage and the marriage contract (*nikah*), which is considered a binding contractual offer.<sup>50</sup> Women traditionally cannot enter into marriage without the consent of a *wali*, or marriage guardian, who is typically the bride's father or other male relative. While polygamy is permissible under personal status laws in Gaza, the overall polygamy rate in Gaza is estimated at only 4.4 percent.<sup>51</sup>

Personal status laws stipulate that the bride must be at least 17 years old and the groom must be at least 18 years old in order to marry. Despite these formal requirements, early marriage continues to be an endemic

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<sup>49</sup> Christie S. Warren, *Lifting the Veil: Women and Islamic Law*, 15 CARDOZO J. L. & GENDER 33, 36-38 (2008); Jansen, *supra* note 47 at \*7 n. 31; Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah*, 2 BUFF. J. INT'L L. 1 (1995) at 9-10; Moussa Abou Ramadan, *The Transition from Tradition to Reform: The Shari'a Appeals Court Rulings on Child Custody (1992-2001)*, 26 FORDHAM INT'L L. J. 595, 595 (2003) ("Islamic law, like any system of law, is dynamic rather than static. Islamic law cannot be thought of as law disconnected from history and society. Like any other legal system it is influence by political, economic and social factors.")

<sup>50</sup> Heather Jacobson, *The Marriage Dower: Essential Guarantor of Women's Rights in the West Bank and Gaza Strip*, 10 MICH. J. GENDER & L. 143, 145 (2003).

<sup>51</sup> *Id.* at 161.

issue in Gaza.<sup>52</sup> In the wake of displacement, long-term school closures, and high unemployment, daughters may be seen as an economic weight upon the family and there is evidence that early marriages increase in such situations.<sup>53</sup> While there has been no quantitative study to determine whether early marriages have increased since the Israeli military attack on Gaza in December 2008-January 2009, such correlation has been analysed and observed in the wake of the Second *Intifada* (2000-2005).<sup>54</sup> In one study, the decrease in value of the *mahr* (brideswealth) and *tawabi* (household equipment) along with the ban on wedding parties by *Intifada* leadership increased the number of young men and women who were able and willing to marry early.<sup>55</sup>

One issue raised by the prevalence of early marriage is the practice of document falsification, whereby families produce documentation stating that the bride is of age for marriage in order to overcome financial burdens and economic difficulties. Thus, formal documentation and marriage court records may be unreliable regarding the bride's actual age and *shari'a* court judges may be in a position of having to investigate the bride's age and appropriateness for marriage.<sup>56</sup>

Perhaps the most important element of the marriage contract is the *mahr*, or brideswealth, which the husband agrees to pay to the wife. The *mahr* typically consists of money or goods (often jewellery) and may either be prompt (*mahr mu'ajjal*), which must be paid in full at the time of marriage, or it may be deferred (*mahr m'akhhkar*), which would be paid either in instalments or at a later date. Regardless of whether it is prompt or deferred, the entirety of the *mahr* must be paid to the wife upon divorce. For many women, it represents their only access to property ownership and may be their primary means of financial stability.<sup>57</sup>

The *mahr* may also be seen as an arms-length bargaining tool for women since families may negotiate the amount or terms of the *mahr* in exchange for stipulations in the *nice* regarding a wife's right to work, limitations on polygamy, or the type of house that will be provided.<sup>58</sup> In practice, however, there is a strong social stigma against formally including such stipulations in the marriage contract and most families instead orally agree to such negotiations.<sup>59</sup>

As there are few cases involving disputes about the amount of *mahr*, it is difficult to assess what amount is considered appropriate given a woman's social or educational background. Moreover, there is a prevalence of "secret dowers", in which families announce a large dower to the public and put that public dower in the marriage contract, but secretly agree that the actual dower paid will be lower".<sup>60</sup> Therefore, the registered *mahr* amounts in the marriage contract may frequently be inaccurate and it would be difficult to assess whether the amount of *mahr* a wife received under a divorce settlement significantly departs from the agreed *mahr* under the *nikah*.

The marriage contract will often require that the husband provide his wife with suitable and separate living space. However, physical constraints and high unemployment in Gaza have forced many unemployed, married sons to continue living in their family homes. One result of this practice has been the development of

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<sup>52</sup> Interview with Islah Hassanya, *Shari'a* Lawyer, Center for Women's Legal Research and Consulting (CWLRC), 9 November 2010.

<sup>53</sup> Shehada, *Between Change and Continuity*, *supra* note 1 at 332. One economist assessed the dependency ratio of breadwinners to dependents as increasing since the June 2007 takeover from 1:8 to 1:12. Albaroos, *supra* note 20 at 20.

<sup>54</sup> Shehada, *Between Change and Continuity*, *supra* note 1 at 332.

<sup>55</sup> *Id.* at 333.

<sup>56</sup> *Id.* at 346.

<sup>57</sup> Jacobson, *supra* note 49 at 144 ("[D]ower is the only significant source of income available to women outside of the maintenance-obedience relationship of marriage."). One obvious problem with the *mahr* is that the father or grandfather of the bride may be authorised to receive the amount on her behalf, thus inviting abuse and denial of rights.<sup>57</sup>

<sup>58</sup> *Id.* at 157-58.

<sup>59</sup> *Id.* at 158-59. For example, research undertaken by the Women's Center for Legal Aid and Counselling (WCLAC) in the West Bank uncovered such stipulations in less than 2 percent of all marriage contracts.

<sup>60</sup> *Id.* at 147.

a “transitional mode” of housing where extended family members live in the same house with the parents sleeping on the ground floor and the sons building separate apartments on the upper levels.<sup>61</sup> Combined with pressure from the bride’s family that she live in a separate apartment, this “has led the majority of families in Gaza to pretend they are providing a separate apartment while, in reality, there is no more than a separate bedroom on an upper floor, which is used only at night.”<sup>62</sup> In one case before the Rafah *shari’a* court, a woman filed a complaint that she was being forced to stay in her husband’s home and that the house was not suitable. The judge stated that he would send an investigator to the house to determine whether or not it was well-suited.<sup>63</sup>

In addition, as a result of the Israeli military operation codenamed ‘Cast Lead’ in December 2008-January 2009, which caused the destruction of many homes in the Gaza Strip, and the continuation of the Israeli and Egyptian blockaded on Gaza, which prevents the import of materials needed for reconstruction, many families had to move in with relatives. This often resulted in the loss of physical and private space for women, many of whom were forced to live with male relatives of their husband. These living conditions meant that the women had to wear the *hijab* and cover themselves at all times in the home as they would in public. These conditions also resulted in increased tensions within the family and feelings of powerlessness for many women in Gaza.

**Number of Marriage Contracts by Year in the Gaza Strip *Shari’a* Courts, 2000-2010<sup>64</sup>**

Courts	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Gaza City	3430	3820	3782	2696	1652	1161	1561	1649	2080	2208	1642
Ash Sheikh Radwan	-	-	-	632	1160	1234	1145	1291	1551	1752	1289
Jabalia	-	-	-	-	213	1118	1050	1149	1444	1671	1192
North Gaza	1782	1762	1880	2031	1815	1096	1020	1218	1575	1719	1196
Ash Shuja’iyeh	-	-	-	993	1805	1824	1803	1901	2237	2534	1922
Middle Area	-	-	-	434	816	784	805	846	1171	1219	796
Deir al Balah	1217	1327	1370	1170	821	824	806	812	1188	1160	794
Khan Younis	1149	1586	1491	1491	1694	1635	1719	1921	2468	2920	1940
Bani Suheila	646	629	565	664	726	716	640	724	930	1062	592
Rafah	1159	1200	1258	1305	1389	1409	1367	1574	2185	2326	1476
<b>Total</b>	<b>9683</b>	<b>10,324</b>	<b>10,266</b>	<b>11,412</b>	<b>12,091</b>	<b>11,801</b>	<b>11,871</b>	<b>13,148</b>	<b>16,829</b>	<b>18,571</b>	<b>12,839</b>

## Divorce

The social and political instability in Gaza has contributed to recent sharp increases in divorce rates, particularly among newly married couples.<sup>65</sup> From 2007 to 2008, the divorce rate increased a staggering 46 percent, a rise that significantly outpaced the marriage increase of 28 percent for the same period. The highest rates of increase in divorces were in the Middle Area, where divorces increased in Ban Suheila and Deir al Balah by 78 and 79 percent, respectively.

<sup>61</sup> Shehada, *Between Change and Continuity*, *supra* note 1 at 344.

<sup>62</sup> *Id.*

<sup>63</sup> Observation of *Shari’a* court proceedings before Sheikh Maher Jameel Al-Lahaam, Rafah, 24 November 2010.

<sup>64</sup> Statistical information for 2008 through 2010 provided upon request from Higher *Shari’a* Judiciary Council.

Statistical information from 2000 through 2008 available “Palestinian Women in the Gaza Strip between Fact and Law,” Center for Women’s Legal Research and Consulting (CWLRC) (2009) (translated from Arabic) at 73. Data for 2010 only through 1 November 2010.

<sup>65</sup> Shehada, *Between Change and Continuity*, *supra* note 1 at 344.

**Number of Divorces by Year in the Gaza Strip *Shari'a* Courts, 2000-2010<sup>66</sup>**

Court	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Gaza City	525	570	588	490	350	350	291	262	369	346	327
Ash Sheikh Radwan	-	-	-	61	155	172	155	172	233	309	227
Jabalia	-	-	-	-	23	154	132	122	209	245	221
North Gaza	266	283	272	273	291	148	131	152	221	237	214
Ash Shuja'iyeh	-	-	-	77	177	173	158	171	234	288	256
Middle Area	-	-	-	60	110	124	122	93	149	180	143
Deir al Balah	191	199	178	154	111	116	128	81	145	152	176
Khan Younis	201	196	187	216	200	211	209	207	300	363	296
Bani Suheila	183	144	149	131	75	210	64	59	105	146	112
Rafah	61	93	58	90	168	75	179	198	251	327	291
<b>Total</b>	<b>1427</b>	<b>1,485</b>	<b>1,432</b>	<b>1,552</b>	<b>1,660</b>	<b>1,738</b>	<b>1,569</b>	<b>1,518</b>	<b>2,216</b>	<b>2,593</b>	<b>2,263</b>

Divorced women in the Gaza Strip are particularly vulnerable and often face social stigmatisation, financial instability, and risk losing custody of their children. Upon divorce, a woman is typically expected to return to her father's home until she is able to remarry.<sup>67</sup> Since a woman is expected to rely financially either on her husband or her father, divorce mechanisms do little in ways of providing women with financial assistance.

### *Talaq*

The personal status laws in Gaza provide the husband with a unilateral right to no-fault divorce known as *talaq*. There are very few limitations on the husband's right to *talaq*, though a high-deferred *mahr* may act as a deterrent to *talaq* in that, upon a divorce, a husband is required to pay his wife the full amount of the *mahr*, regardless of whether it was initially prompt or deferred.<sup>68</sup>

Invoking *talaq* simply requires the husband to verbally state his intention to divorce. His wife does not even need to be present at the pronouncement and must only be informed within one week.<sup>69</sup> The *talaq* is further distinguished by whether it is considered revocable or irrevocable. To become irrevocable, a husband must invoke the *talaq* on three separate occasions and the *'idda* waiting period must have fully lapsed.<sup>70</sup> The divorce remains revocable for the duration of the *'idda* period. The purpose of this *'idda* period is to allow the parties to reconcile as well as to determine whether the wife is pregnant. In most situations, the *'idda* period lasts for three menstrual cycles and, if the wife is pregnant, this *'idda* period continues until she gives

<sup>66</sup> Statistical information for 2008 through 2010 provided upon request from Higher *Shari'a* Judiciary Council, 22 November 2010. Statistical information from 2000 through 2008 available "Palestinian Women in the Gaza Strip between Fact and Law," Center for Women's Legal Research and Consulting (CWLRC) (2009) (translated from Arabic) at 73. Data for 2010 only through 1 November 2010. No data was provided regarding the forms of divorce proceedings before the *shari'a* courts, though one study of the *shari'a* courts in both the West Bank and Gaza for the years 1989 and 1992-94 revealed that *khul'* divorces were by far the most common (67 percent), followed by unilateral *talaq* (26 percent) and then judicial divorce, or *tafriq* (7 percent). Welchman, *Palestine: Pre-State Positioning on Family Law*, *supra* note 13 at 7 n. 26.

<sup>67</sup> Jacobson, *supra* note 49 at 158.

<sup>68</sup> Jacobson, *supra* note 49 at 163.

<sup>69</sup> *Id.*

<sup>70</sup> Jansen, *supra* note 47 at 4.

birth.<sup>71</sup> If a marriage has not been consummated, then the *'idda* period does not apply. During this *'idda* period, a wife is entitled to maintenance payments (*nafaqa*) from her husband.<sup>72</sup>

### *Khul'*

For many women in Gaza, divorce is only possible under the personal status laws through the *khul'* process. Generally, a *khul'* divorce involves a wife forfeiting either all or part of her *mahr* as well as her right to *nafaqa* (maintenance) payments in exchange for her husband's consent to the divorce.<sup>73</sup> As such, a woman's freedom from an abusive marriage may require her to abandon all claims to financial security. Some men may even antagonise and abuse their wives in the hopes that the wife will seek a *khul'* divorce and forfeit her financial rights.<sup>74</sup>

For example, in a case before the Rafah *shari'a* court, a 17-year-old girl was seeking a divorce after two months of marriage. Both the wife and husband appeared without legal representation and the judge finalised the divorce after confirming that both parties consented to the terms of the divorce agreement. In that case, the original *mahr* was 2000 JD (about \$2,820 USD), but the wife and her father agreed to a settlement of 1,000 JD (about \$1,410 USD).<sup>75</sup> While women may seek divorce through this *khul'* process, it is important to note that such a divorce remains contingent on the husband's consent; if the husband refuses to grant his consent, the only other option available to women would be a judicial divorce, or *tafriq*.

### *Tafriq*

*Tafriq* provides for judicial divorce granted by the *shari'a* court judge and upon petition by the wife.<sup>76</sup>

A judicial divorce may be granted for a limited number of reasons, including:

- Absence for more than one year;
- Imprisonment for more than three years;
- Inability to provide adequate maintenance (*nafaqa*);
- Impotence or inability to consummate the marriage; and/or,
- Insanity or other serious physical or mental disease.

Domestic violence is typically not adequate grounds in itself to seek divorce. Generally speaking, judicial divorce in Gaza is rare and most women attempt to gain their husbands' consent to a *khul'* divorce by forfeiting their rights to *mahr* and *nafaqa*.

### *Tafwid al-Talaq*

The only other option for divorce is *tafwid al-talaq*, in which the husband delegates his powers to divorce either to his wife or to a third party. Such delegation may be done as a stipulation to the marriage contract or may be granted at a later date. While *tafwid al-talaq* under the marriage contract could essentially provide

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<sup>71</sup> *Id.*

<sup>72</sup> Ludsins, *supra* note 15 at 463.

<sup>73</sup> While a woman may forego her rights to maintenance (*nafaqa*) during the *'idda* period in order to attain a *khul'* divorce, this does not constitute a waiver of the *'idda* period entirely. For example, in one case before the Gaza City *shari'a* court, a woman appeared with her father to seek a *khul'* divorce from her husband. The woman and her father affirmed that they did not want any money from the husband. The judge granted the divorce but, after learning that the woman was pregnant, stipulated that the divorce would remain revocable until the birth of the child.

<sup>74</sup> Ludsins, *supra* note 15 at 463.

<sup>75</sup> The judge also verified that the girl was still a virgin by asking the husband whether he had ever been alone with his wife behind closed doors. Because the wife was still a virgin, the *'idda* period did not apply and the divorce became immediately irrevocable.

<sup>76</sup> Welchman, *supra* note 10 at 872-73.

the wife with equal rights to seek no-fault divorce, in actual practice such stipulations are extremely rare. In a study by Lynn Welchman of nearly 8,500 marriage contracts in the West Bank over the course of 20 years, only 129 contained any form of *tafwid al-talaq* stipulation, a mere 1.5 percent.<sup>77</sup>

### **Child Custody (*Hadana*)**

In terms of rights to custody of minor children upon divorce, the personal status laws in Gaza draw a distinction between custody and guardianship. Guardianship (*wilaya*), or, essentially, decision-making power over the children, includes the right to determine a child's education or marriage and is typically granted to the father regardless of the child's age. However, rights to physical custody (*hadana*) of the children will depend on the age of the children. Under the current personal status laws in Gaza, mothers are granted custody to male children under age 9 and female children under age 11.<sup>78</sup> Upon the expiration of *hadana*, custody is transferred to the father or the paternal family.<sup>79</sup> If a woman remarries, she will generally lose her custodianship of the children.

The previous *Qadi al-Qudah* (chief judge of the Gaza shari'a courts), Tayseer Tamimi, who served when the PA retained control of Gaza, extended the *hadana* period until the age of 15 for both male and female children. In 2007, the *de facto* authorities repealed this extension.<sup>80</sup> However, following the Israeli military assault in Gaza in December 2008-January 2009, the age of custody for the children of widows was extended; at present, widows in Gaza are legally entitled to retain custody of their children until they remarry.<sup>81</sup>

During interviews NRC conducted with women and legal advocates, the custody age law was raised most frequently as one of the personal status laws to be reformed. The Center for Women's Legal Research & Consulting (CWLRC) in Gaza has instituted the *Voice of Justice* project with the express goal of raising the age of custody for the children of divorced women.<sup>82</sup> According to the Palestinian Center for Democracy and Conflict Resolution (PCDCR), the current *Qadi al-Qudah*, Dr. Hasan al-Juju, has expressed a willingness to discuss a new draft of the custody bill and has specifically asked local organisations to help collaborate.<sup>83</sup>

Another CWLRC study found through focus groups that significant numbers of women were forced to abandon their custodial rights in order for their husbands to consent to divorce.<sup>84</sup> Custody disputes may often become a means of leverage by which husbands may attempt to coerce women into forfeiting their rights to *mahr* and *nafaqa*.<sup>85</sup>

One of the biggest issues related to custody involves determining the location for the non-custodial parent to visit the child or children. In instances documented in Gaza, typically where the husband retains custody but does not agree to a designated place for visitations from the wife, women have been forced to conduct their visitations at the nearest police station. In response to this situation, PCDCR founded Family Forum centres to provide a neutral location for child visitations. The previous *Qadi al-Qudah*, Tayseer Tamimi, had

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<sup>77</sup> *Id.* at 874 n. 10.

<sup>78</sup> *Id.* at 877; Jansen, *supra* note 47 at 5.

<sup>79</sup> Ramadan, *supra* note 48 at 601-02.

<sup>80</sup> Zeinab Al Ghoneime, *Women's Family Rights*, CENTER FOR WOMEN'S LEGAL RESEARCH AND CONSULTING (CWLRC) (2009) (translated from Arabic).

<sup>81</sup> The law was modified with regard to widow's custody by the *de facto* authorities on 7 June 2009 and came into effect on 7 July 2009. *Through Women's Eyes*, *supra* note 34 at 6 n.2.

<sup>82</sup> *Voice of Justice Project*, CENTER FOR WOMEN'S LEGAL RESEARCH AND CONSULTING (CWLRC) (2009) (pamphlet) (translated from Arabic).

<sup>83</sup> NRC interview with the Palestinian Center for Democracy and Conflict Resolution (PCDCR), 14 November 2010.

<sup>84</sup> *Study on the Reality and the Needs of Divorced Women in the Gaza Strip*, CENTER FOR WOMEN'S LEGAL RESEARCH AND CONSULTING (CWLRC), December 2009 (translated from Arabic).

<sup>85</sup> *Towards gender equality in humanitarian response: Addressing the needs of women & men in Gaza*, UNITED NATIONS DEVELOPMENT FUND FOR WOMEN (UNIFEM) (2009) at 54.

embraced this programme and formally issued a Memorandum of Understanding authorising the *shari'a* courts to transfer cases to the PCDCR Family Forum centres. This programme has been continued under the current *Qadi al-Qudah*, Dr. Hasan al-Juju. During NRC's observation of the *shari'a* court in Gaza City, the judge stated in one case that he preferred that visitations be conducted in agreement between the parties and not at the police stations, and ordered the visitations to take place at the PCDCR Family Forum centres.

### **Maintenance (*Nafaqa*)**

During the *'idda* period in which a divorce remains revocable, a woman is not allowed to remarry and her husband must continue making maintenance payments, or *nafaqa*, to support her. However, because a divorced woman is generally expected to return to her family's home upon divorce and become their financial responsibility, these *nafaqa* payments are often quite minimal and not sufficient for a woman to independently support herself or her family.<sup>86</sup>

In a case before the Gaza City *shari'a* court, the judge ordered a monthly *nafaqa* payment of 8 JD (about \$11 USD); the judge framed the husband's obligation to pay *nafaqa* not in legal terms, but as a moral duty and stressed that these payments were directly providing food and clothing to his daughter.

Moreover, given the extremely high rates of unemployment throughout the Gaza Strip, many divorced women are not receiving their rights to *nafaqa* because their husbands simply lack the resources to pay. For example, in a case before the Gaza City *shari'a* court, the judge initially ordered *nafaqa* payments of 20 JD (about \$28 USD) per month, but the husband asserted that he was unemployed and had no means to pay even that amount. The judge conceded that this was a reality for many men in Gaza and ultimately reduced his order to 8 JD (about \$11 USD) per month. There are plans to institute a public *sundug al nafaqa*, or family fund, within the *shari'a* court system in Gaza that would directly provide women with their *nafaqa* payments and deem such payments as a loan to the husbands. Although the *sundug al nafaqa* has been in the planning stages for more than five years, it has not yet become operational.<sup>87</sup>

### **Inheritance**

*Shari'a* rules regarding inheritance generally provide that women receive half the amount given to a comparable male relative. In practice in Gaza, women often do not even receive this amount of inheritance and may be pressured or even threatened by male relatives not to file a claim for the inheritance to which they are entitled at all. A 1999 survey by the Gender Unit of the Palestinian Central Bureau of Statistics confirmed that only 16 percent of women living in Gaza had any right to inheritance and, of those women, 48 percent did not obtain their full share.<sup>88</sup> A survey carried out by the Women's Affairs Center in Gaza in 2009 found that 23.8 percent of women were being denied their right to inheritance, and that 62.5 percent of women surveyed did not receive any type of external legal advice.<sup>89</sup>

As a result of these discriminatory inheritance practices, the financial resources available to a woman are even more limited in an environment where female employment is already at significantly low levels.<sup>90</sup>

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<sup>86</sup> Ludsins, *supra* note 15 at 463.

<sup>87</sup> NRC interview with the Palestinian Centre for Human Rights (PCHR), 10 November 2010. The *sundug al nafaqa* itself appears to be modelled on the existing and functioning *sunduqs*, or funds, managed by various prominent clans through the Gaza Strip. *Inside Gaza: The Challenge of Clans and Families*, *supra* note 12 at 6.

<sup>88</sup> Labadi, *supra* note 3 at 36.

<sup>89</sup> Women's Affairs Center, *Women and Inheritance: Causes and Effects*, 2009.

<sup>90</sup> Jacobson, *supra* note 49 at 155-56.

## Structure of the *Shari'a* Courts in Gaza

The *shari'a* court system in Gaza is structured similarly to the civil judiciary and is divided into a three-tiered system that includes 10 courts of first instance, two courts of appeal, and one Supreme Court. The two main courts of appeal are in Gaza's main cities of Gaza City and Khan Younis; the Supreme Court sits in Gaza City.

In addition to the *shari'a* courts, the *shari'a* system in Gaza includes a number of support departments for Research and Legal Studies, the Family Counselling Units, and an office to administer the yet-unrealised *sundug il nafaqa*, or family fund. The entire *shari'a* system falls under the oversight of the Higher *Shari'a* Court Council.<sup>91</sup> With exceptions identified below related to enforcement, the *shari'a* court system is largely separate and autonomous from the civil judiciary.

**Number and Type of *Shari'a* Courts in the Gaza Strip<sup>92</sup>**

Type of Court	Number
Supreme Court	1
Courts of Appeal	2
Courts of First Instance	10

Filing a case before the *shari'a* courts requires a filing fee of approximately 20 NIS (about \$6 USD), a fee that many women cannot afford. In terms of processing times, cases are generally heard within two to three months of filing, though divorce and child custody proceedings tend to be the most complicated and can take longer periods of time.<sup>93</sup> Although backlogs or lengthy processing times in hearing a case do not appear to be issues, complaints about the *shari'a* system from those interviewed included the willingness of some judges to repeatedly delay proceedings in order to pressure compromise and out-of-court agreements through delay tactics.

The majority of litigants appear before the *shari'a* courts *pro se*, or without formal legal representation. Costs for legal representation in Gaza can be very high. A divorce case in the Gaza *shari'a* courts could cost an estimated \$500 USD whereas a *nafaqa* case may be about \$100 to \$200 USD and child custody suits are typically between \$200 and \$300 USD.<sup>94</sup>

Where a case poses difficult questions of law and cannot be resolved between the parties, the *shari'a* judge may refer an unrepresented litigant directly to another *shari'a* lawyer or local legal organisation. According to the Palestinian Centre for Human Rights (PCHR), nearly half of their *shari'a* court cases come as direct referrals from the courts.<sup>95</sup> Official figures from the *shari'a* courts regarding the number of cases referred to local legal aid organisations were requested, but were unavailable.

Instead, the procedures for referrals from the courts appear to be far more informal. In one case before the Gaza City *shari'a* court, the parties could not come to a resolution regarding the husband's *nafaqa* payments. The wife was represented by PCHR, but the husband did not have legal counsel. The judge asked the court usher to speak with five *shari'a* lawyers and see if any of them would be available to take on the husband's case in the event that there was no mutually agreed resolution.

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<sup>91</sup> Statistical information provided upon request from Higher *Shari'a* Judiciary Council, 22 November 2010.

<sup>92</sup> *Id.*

<sup>93</sup> NRC interview with the Center for Women's Legal Research and Consulting (CWLRC), 9 November 2010.

<sup>94</sup> NRC interview with the Palestinian Centre for Human Rights (PCHR), 10 November 2010.

<sup>95</sup> NRC interview with the Palestinian Centre for Human Rights (PCHR), Khan Younis Branch, 24 November 2010.

*Shari'a* court judges in Gaza typically rely heavily on their clerks and the court ushers for support in expediting hearing procedures. To this end, clerks will often swear in witnesses in the hallways outside the courtroom. Judges may also order independent investigations in an attempt to resolve a disputed issue. For example, in a case before the Rafah *shari'a* court, the judge ordered an investigation to determine the conditions of a home that the wife alleged constituted inadequate living conditions and fell below the husband's basic duty of providing maintenance.

In terms of issuing a decision, the *shari'a* judges typically rule from the bench on the day of the hearing and dictate the decision to the court clerk. The written record of the proceeding contains only the terms of the parties' mutual agreement or the judge's decision and generally does not provide the legal grounds or bases for the decision.

A litigant dissatisfied with the judge's ruling may appeal the case to one of two *shari'a* courts of appeal in Gaza City or Khan Younis. The appellate courts then consider the appeal without additional pleading and will, if necessary, correct any error and send the case back to the court of first instance.<sup>96</sup> In practice, however, such appeals are relatively rare.

**Number of Cases Appealed from the Gaza Strip *Shari'a* Courts of First Instance by Year, 2008-2010<sup>97</sup>**

Courts	2008	2009	2010
Gaza City	27	42	36
Ash Sheikh Radwan	6	17	32
Jabalia	6	22	34
North Gaza	10	24	41
Ash Shuja'iyeh	6	7	7
Middle Area	6	12	15
Deir al Balah	20	17	16
Khan Younis	14	21	8
Bani Suheila	10	15	7
Rafah	12	22	21
<b>Total</b>	<b>117</b>	<b>199</b>	<b>217</b>

The decision from the *shari'a* judge itself is self-executing and is generally respected. However, when there is difficulty in compliance, the parties may be forced to seek an implementation order. These orders are not available through the *shari'a* courts and must instead be issued by a civil court judge. The *shari'a* courts have no independent implementation power and no independent enforcement mechanism.<sup>98</sup> The refusal of many international and domestic organisations to engage with the Hamas-appointed civil judiciary, therefore, complicates matters related to the execution and implementation of *shari'a* court rulings.

<sup>96</sup> Shiekh Salah Odah Hashish, *The Legal System of Islamic Courts*, supra note 11.

<sup>97</sup> Statistical information provided upon request from Higher *Shari'a* Judiciary Council, 22 November 2010.

<sup>98</sup> NRC interviews with the Palestinian Center for Democracy and Conflict Resolution (PCDCR), 14 November 2010, and the Palestinian Centre for Human Rights (PCHR), 10 November 2010. In practice, the boundaries between the civil and *shari'a* judiciaries are far more blurred. When a witness in a case before the Gaza City *shari'a* court repeatedly interrupted the proceedings, the judge ordered him held in contempt and he was arrested by the police officers who worked as guards in the courtroom.

## Key Legal Actors in the Gaza *Shari'a* Court System

### Judges

Nearly all of the *shari'a* court system judges in Gaza, who boycotted the courts when Hamas took power in 2007, were subsequently replaced with justices more sympathetic to the *de facto* authorities. However, at present this broad upheaval does not seem to have had any noticeable impact on the functioning of the *shari'a* courts. For the most part, local legal aid organisation interviewed by NRC did not identify any major differences between the current judges and those in place prior to 2007. In fact, many actually expressed some preference for the current judges and found them to be more accommodating.

Continuing education and training programmes for the sitting *shari'a* judges in Gaza have proven difficult to instate given the lack of continuity following the boycott and subsequent replacement of the previous judges under the PA and restrictions from the ongoing blockade of the Gaza Strip by Israeli and Egypt largely preventing the judges' travel abroad for rule of law training.

The blockade has also imposed severe financial burdens on the judges in the *shari'a* court system. Salaries for judges have been reduced by an estimated 50 percent since the imposition of the blockade in 2007. Meanwhile, many of the previous *shari'a* court judges and officials who served under the PA have continued to receive their regular salaries from the Ramallah-based PA government while continuing their strike.<sup>99</sup> While specific details are not available, it is unlikely that the *shari'a* court fees and taxes are sufficient on their own to guarantee the budget for the *shari'a* judiciary and it is likely that what funds are collected are supplemented through external sources and Islamic charities.

In terms of educational and training background, although the current slate of *shari'a* judges in Gaza vary significantly, most have studied Islamic jurisprudence (*fiqh*) in *shari'a* schools or have trained at law faculties with a focus on *shari'a*.<sup>100</sup> *Shari'a* judges in Gaza often begin their training as clerks (*kuttab*, *katib*) in the *shari'a* courts, where they can acquire knowledge of court administration, including registration of marriage contracts and drafting of documents.<sup>101</sup>

**The Number of Judges in the Gaza Strip *Shari'a* Courts<sup>102</sup>**

Level Of Judge	Number
Chief Judge of the Supreme Court	1
Associate Judges of the Supreme Court	2
Chief Judges of the Courts of Appeal	2
Associate Judges of the Courts of Appeal	4
Judges of the Courts of First Instance	11
<b>Total</b>	<b>20</b>

All of the judges in the Gaza *shari'a* courts are men and, while they may make active efforts to protect vulnerable female litigants, observation of court proceedings indicates that their approach is generally not one based in women's rights or gender mainstreaming. There is a general lack of female representation among the employees of the Gaza *shari'a* court system, though some women are employed in the *shari'a* system's Family Counselling Units.

<sup>99</sup> Albaroos, *supra* note 20 at 12-13.

<sup>100</sup> Shehada, *Flexibility versus Rigidity*, *supra* note 18 at 31-32.

<sup>101</sup> *Id.*

<sup>102</sup> Statistical information provided upon request from Higher *Shari'a* Judiciary Council, 22 November 2010.

Unlike the *shari'a* judges during the Ottoman era, who were transferred each year to attempt to preclude involvement in local affairs, *shari'a* court judges in Gaza at present are fully integrated members of the communities in which they sit.<sup>103</sup> As Nahda Shehada noted in her comprehensive study of the Gaza City *shari'a* courts in 2002, the *shari'a* judges are far more flexible, pragmatic, and dynamic than previously assumed. The judges perceive themselves “as members of their community rather than as mere implementers of the law” and, as such, their decisions reflect “their understanding of the *shari'a* not just as a body of texts, but rather as a set of ethical principles that aim at, on the one hand, protecting the weaker members of the community and, on the other, preserving the social order.”<sup>104</sup>

In an interview in 2003, then Gaza Deputy Chief Judge Mahmud Salama described the expectations for potential *shari'a* judges:

“Judges are not expected to sit behind the bench and only follow the book; that qualification is tested by the written exam. They are expected to be active in people’s daily life and deliver the message of Islam. Another important issue is the fact that the *shari'a* court is mostly used by poor people, particularly women. Judges should be empathetic and able to convey the ethical message of Islam when communicating with them. The economic background of our judges and their studies should enable them to fulfil such a task.”<sup>105</sup>

However, the “adherence to the notice of ‘protecting the weak’ is not informed by a desire to compensate for gender asymmetry or hierarchies based on age”.<sup>106</sup> This also means that judges are fully cognizant of the underlying power dynamics of clans and families in their communities and may fear the consequences of any ruling that could be perceived as threatening those existing structures.<sup>107</sup>

## Lawyers

*Shari'a* lawyers in Gaza typically attain qualifications similar to civil lawyers, including a four-year Bachelor’s degree in law followed by a two-year apprenticeship under a practicing attorney, generally referred to as the “stage”. To practice as a lawyer before the Gaza *shari'a* courts, students must also successfully complete an additional examination.

The primary law faculties in the Gaza Strip are available at Al Azhar University, the Islamic University and the Palestine University, all in Gaza City. While recent law school graduates have the option to become either civil or *shari'a* lawyers, in practice, most lawyers in Gaza either choose to practice solely before the civil courts or to combine a *shari'a* certification with their existing civil law qualifications given the limited jurisdiction of the *shari'a* courts.

The *shari'a* license is the only field requiring legal specialisation for lawyers in Gaza; all other lawyers practice as generalists. Lawyers practicing before the civil and criminal judiciaries must register with the Palestinian Bar Association, which covers both Gaza and the West Bank. There are approximately 1,700 lawyers registered with the Gaza Branch of the Palestinian Bar Association. However, there is no separate bar association or members’ organisation applicable to *shari'a* lawyers.

### Number of *Shari'a*-Certified Lawyers in the Gaza Strip<sup>108</sup>

Male <i>Shari'a</i> Lawyers	146
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<sup>103</sup> Shehada, *Flexibility versus Rigidity*, *supra* note 18 at 30-31..

<sup>104</sup> Shehada, *Justice without Drama*, *supra* note 7 at 14.

<sup>105</sup> *Id.* at 32-33.

<sup>106</sup> Shehada, “*Flexibility versus Rigidity*, *supra* note 18” at 39.9.

<sup>107</sup> *Inside Gaza: The Challenge of Clans and Families*, *supra* note 12 at 9.

<sup>108</sup> Statistical information provided upon request from Higher *Shari'a* Judiciary Council, 22 November 2010.

<b>Female <i>Shari'a</i> Lawyers</b>	<b>44</b>
<b>Total</b>	<b>190</b>

**Number of Lawyers in the Gaza Strip Who Have Taken the *Shari'a* Certification Exam in 2009-2010<sup>109</sup>**

	<b>Passed</b>	<b>Failed</b>	<b>Re-Exam</b>	<b>Total</b>
<b>2009</b>	27	2	6	<b>35</b>
<b>2010</b>	23	0	6	<b>29</b>

### **Informal and Customary Dispute Resolution**

As a consequence of the long history of occupation and conflict in the Gaza Strip, the absence of a stable central authority, and the powerful role of clans and families, the formal judiciary frequently plays a lesser role in the lives of Palestinians in Gaza than the informal mediation and customary law mechanisms.<sup>110</sup> The customary legal mechanisms often enjoy greater credibility in that the *mukhtars* who regulate these mechanisms are established community leaders. Under the PA, President Yasser Arafat even issued a presidential decree establishing the Department of Tribal Affairs as an oversight body for the informal legal mechanisms.<sup>111</sup> On a practical level as well, customary law procedures may help reduce the caseload and expedite proceedings before the formal *shari'a* court system. Police have been known to appeal to local leaders to help facilitate a peaceful surrender or enable enforcement of orders from the formal judiciary.<sup>112</sup>

In practice, the customary dispute resolution mechanisms have frequently filled gaps in legal protection and serve a complementary function with the formal judiciary. *Shari'a* judges have been known to ask litigants to see their local *mukhtar* to attempt some form of agreed solution.<sup>113</sup> If the parties are able to reach an agreement through mediation or informal mechanism, then the *shari'a* judge will generally consent and any legal proceeding will simply be dismissed

The difficulty with the customary law procedures is their lack of standardisation and their failure to incorporate a gender perspective.<sup>114</sup> The system of *mukhtars* and informal mediation must also be approached with caution given the nearly absolute exclusion of women from any authority roles as mediators or negotiators. Women also may face difficulty or be prevented from bringing a case before the customary law system without the consent and support of her family.<sup>115</sup>

### **Local Women's and other Legal Organisations**

Local legal organisations in the Gaza Strip, particularly those focusing on women's and family issues, likewise play an unofficial but key role in the administration of the *shari'a* courts. According to those interviewed, the *shari'a* judges, including the current *Qadi al-Qudah*, Dr. Hasan al-Juju, are responsive and willing to engage in discussions with local organisations regarding advocacy efforts and potential reforms.<sup>116</sup>

Of the main local organisations in Gaza, the Palestinian Center for Democracy and Conflict Resolution (PCDCR) has perhaps the most established arbitration, mediation, and informal conflict resolution programme and regularly works with local *mukhtars*. PCDCR has trained 100 *mukhtars* in conflict resolution

<sup>109</sup> *Id.*

<sup>110</sup> Ludsin, *supra* note 15 at 450.

<sup>111</sup> *Inside Gaza: The Challenge of Clans and Families*, *supra* note 12 at 2.

<sup>112</sup> *Id.* at 3.

<sup>113</sup> Shehada, *Flexibility versus Rigidity*, *supra* note 18 at 38.

<sup>114</sup> Ludsin, *supra* note 15 at 453.

<sup>115</sup> *Id.* at 456.

<sup>116</sup> NRC interview the Palestinian Centre for Human Rights (PCHR), 10 November 2010.

to work with divorced women whose children have been returned to their fathers and who are frequently obliged to see their children in police stations.<sup>117</sup> PCDCR also seems to be among the most willing to interact and engage with the government ministries.

Nearly all the main women's organisations appear to conduct some form of trainings for both practicing lawyers and community members. For example, PCHR offers trainings and meetings with the *shari'a* lawyers and judges. CWLRC likewise provides trainings for legal practitioners and PCDCR does legal literacy workshops. PCDCR is one of the few organisations in Gaza to conduct workshops just for men and to address domestic violence with men.

With regard to legal representation before the *shari'a* courts, PCHR appears to represent the most clients, with four established *shari'a* lawyers in its Women's Unit. To a lesser extent CWLRC also provides legal representation, though its strength lies more in the realm of training and advocacy. As an advocacy programme, CWLRC has been extremely proactive. The *Voice of Justice* project sets forth to raise the age of custody to 18 and has conducted trainings and mock trials.<sup>118</sup>

In terms of advocacy, most interviewees acknowledged that the existing *shari'a* and personal status laws are imperfect, but that they can be used as a tool to empower women and that there are identified areas in which the law could be incrementally changed to better women's lives. As far as necessary and immediate reforms, those interviewed most frequently mentioned the effect on both women and their children when custody is arbitrarily transferred to the father and his family at the expiration of the *hadana* period. The impact of this custody transfer is even harsher when considering that siblings themselves may be divided between different homes.

While there are a number of local organisations working with women and the *shari'a* courts in various capacities, there does appear to be a lack of coordination and referrals between these organisations. The approaches of the different organisations in their work with the *shari'a* courts are quite distinct and could serve to complement one another more than they currently do.

Local community-based organisations (CBOs) likewise play a significant role in the dissemination of information and in providing outreach to the largest number of women, particularly those in the most vulnerable and neglected areas. However, one difficulty in working with various CBOs is that they are at risk of takeover by the *de facto* authorities at any point. For example, in July 2008, following a bombing attributed to Fatah, Hamas forces raided and closed 210 CBOs allegedly connected to Fatah.<sup>119</sup> These closures affected nearly 50,000 beneficiaries, though most organisations were gradually allowed to reopen. The degree to which CBOs may be monitored or subject to closure greatly impacts their ability to provide services, operate independently and will almost certainly affect aid funding they might receive.<sup>120</sup>

## International Organisations

To a lesser extent, international organisations play an indirect role in the *shari'a* court system and the administration of the personal status law. There are currently no international organisations that directly work with the *shari'a* courts. Part of the limitation in this area is the refusal of most international organisations to formally engage the *de facto* Hamas government, interacting with the authorities only indirectly through local partners.

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<sup>117</sup> NRC interview with the Palestinian Center for Democracy and Conflict Resolution (PCDCR), 14 November 2010.

<sup>118</sup> *Voice of Justice Project*, CENTER FOR WOMEN'S LEGAL RESEARCH AND CONSULTING (CWLRC) (2009) (pamphlet) (translated from Arabic).

<sup>119</sup> *Locked In: The Humanitarian Impact of Two Years of Blockade on the Gaza Strip*, UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (OCHA), SPECIAL FOCUS, August 2009 at 13.

<sup>120</sup> NRC interview with the Gender Initiative, United Nations Relief Works Agency (UNRWA), Gaza Field Office, 25 November 2010.

Within the constraints of these indirect efforts, UN Women is perhaps most active in this area given the impact of the *shari'a* courts upon women. In collaboration with UNIFEM, PCDCR runs a helpline for women to call anonymously to discuss any problems they might be having. In addition, one of the largest UNIFEM projects in development at present is a women's domestic violence shelter in Gaza City, the first of its kind, set up in collaboration with CWLRC. The shelter's mission is multi-faceted and it aims to provide *ad hoc* legal support, psychosocial support, and outsourcing of legal representation to other parties.<sup>121</sup> Despite several start-up delays, the shelter is expected to be fully operational in the spring of 2011. UNIFEM also functions as the chair of the UN Gender Task Force; at present, participation in the UN Gender Task Force is limited to United Nations organisations and is not open to international or local NGOs. There is presently no gender-based violence (GBV) working group in Gaza.

The United Nations Relief Works Agency for Palestine Refugees (UNRWA) also has a significant role in the protection of women in the Gaza Strip, given that three-fourths of the population of Gaza are registered refugees with the Agency. UNRWA participates in the UN Gender Task Force, has established a gender initiative, and also has a Women's Committee. Both UNIFEM and UNRWA run centres that provide legal aid and counselling, but do not provide legal representation. UNIFEM also runs three community centres in the Middle Area (Al Maghazi), Beit Hanoun, and Rafah, each with a legal support function. These UNIFEM community-based centres provide group and individual awareness on women's rights (including CEDAW).

The Amal Coalition was established by UNIFEM in late-2008 as a networking platform also works to combat violence against women in Gaza and currently consists of six organisations and steering committee members:

- The Culture and Free Thought Association (CFTA)
- Center for Women's Legal Research & Consulting (CWLRC)
- Palestinian Center for Democracy and Conflict Resolution (PCDCR)
- Palestinian Centre for Human Rights (PCHR)
- Women's Affairs Center (WAC)
- Women's Affairs Technical Committee (WATC)

The Amal Coalition is hosted by WATC and the members meet monthly and set a collective agenda. Its first year of operations involved internal capacity building and national strategy development in cooperation with UNIFEM. As it enters its second year, the Coalition's goals include greater advocacy and growth, with the potential addition of five new organisations in 2011.

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<sup>121</sup> NRC interview with the United Nations Development Fund for Women (UNIFEM) (now known as UN Women), 22 November 2010.

## Courtroom Practices and Observations

### Family Counselling Unit

Each of the 10 *shari'a* courts of first instance in the Gaza Strip includes a Family Counselling Unit. Cases before the *shari'a* system are first registered in the Family Counselling Unit where the goal is to reach a compromise before the case proceeds to the formal hearing stage. The Unit's officers will typically first contact the party who filed the lawsuit to request a meeting for the purposes of negotiation, and will then contact the other party. Often the first time a spouse will hear about a divorce proceeding is when he or she is contacted by the Family Counselling Unit. Most cases in the Gaza *shari'a* court system are resolved in this manner before the judge ever hears the dispute.

If an agreement is reached, the judge must sign off on the terms of agreement before the entire case is dismissed. In the event there is no agreement between the parties, the Family Counselling Unit forwards the case to the judge with notes and recommendations. Unit staff meet with the judge on a monthly basis.

Parties may also seek advice and dispute resolution assistance from the Family Counselling Unit without formally filing a complaint before the courts.

### Courtroom Proceedings

*Shari'a* court proceedings in Gaza are open to the public, unless the judge determines that the sensitivities of a given case necessitate private or *in camera* hearings.<sup>122</sup> The most common courtroom visitors are probably other *shari'a* trainee lawyers who are required to undergo a certain number of observation hours. The courtroom itself is often simply a small room furnished with a conference table with lawyers on either side and the judge sitting at the head of the table along with his clerk. Observers may sit on benches along the sides of the room. All records before the *shari'a* courts are handwritten. The parties to the case wait in the hallways outside the room until their names are called; typically the clerk or usher will call a client's name three times before moving to the next case.<sup>123</sup> Extended families may also play a larger role in *shari'a* court proceedings as witnesses and observers, frequently in divorce disputes or child custody battles.

Often, when the parties are represented by counsel, the litigants will not appear themselves in court. For example, in one custody case before the Gaza City *shari'a* court of first instance, both parties had retained counsel and were not present in the courtroom. After the lawyers were unable to reach a decision, the judge ordered the clerk to call both litigants and request their appearance before the court. The parties, along with their lawyers, were then seen by the judge that same afternoon. The primary issue in that case was the specifics of visitation and where the wife would see the children since it would be inappropriate for her, as a divorced woman, to appear at her ex-husband's home. After some protracted discussions, the judge helped fashion a resolution whereby the wife's older brother would be responsible for retrieving the children from their father's home.

### Consensual and Mutual Resolution

The *shari'a* judges, both in their courtroom behaviours and interviews, displayed an interest in finding a mutually agreeable solution in most cases and the procedures are often far more akin to negotiations than legal proceedings. Different tactics used by the judges may entail in-court mediations, customary law

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<sup>122</sup> Shehada, *Flexibility versus Rigidity*, *supra* note 18 at 38-39.

<sup>123</sup> Observation of *Shari'a* court proceedings before Sheikh Zakari Ramadan Al Nadeem, Gaza City, 23 November 2010.

application, or out-of-court negotiation. Frequently, resolution is attained through compromise between the parties' stated objectives or by simply delaying the case for a week to allow the parties additional time to reach an agreement.<sup>124</sup> During observation of the *shari'a* court in Gaza City, the judge seemed inclined to simply keep postponing the case to allow the parties to reach some form of consensual decision or even to formally refer the parties to mediation.

The *shari'a* judge in Gaza City stated that he had actually worked as a mediator before becoming a judge and that it was his duty to attempt to mediate both sides. That judge stressed the importance of consensus and flexibility and stated that mutually agreed decisions were most often in the best interest of the children.

One concern about this emphasis on mediation and common resolution is that it does not prioritise or even consider gendered family dynamics or women's rights. The primary objectives for most *shari'a* judges are often to protect vulnerable members of society while also preserving the existing social order.<sup>125</sup> A judge may, therefore, have a general aversion to divorce since it is seen as a threat to traditional social norms. In one divorce case observed before the Gaza *shari'a* court, despite the wife's clear indication that she wanted to divorce her abusive husband, the judge repeatedly asked the parties whether there was any chance for reconciliation or any way the wife could return to the family home.<sup>126</sup>

Even when a common solution is reached and the case is dismissed, all cases are operating under the umbrella of courts and the shadow of litigation and the threat of airing one's private business in public has its own power. For many women, even where they never formally file a case, the *shari'a* courts may serve a more practical function in exerting pressure on their husbands and providing leverage in asserting their rights under the personal status laws.

### **Flexibility and Sensitivity to Social Norms**

One impediment to legal reform of the existing personal status laws in Gaza through judicial activism or a better understanding the judges' reasoning through a study of relevant jurisprudence is that almost no judicial reasoning exists in the public records. In most cases, the *shari'a* judge simply dictates the terms of the decision to the clerk and most of the negotiations and compromises are excluded from this public record.

In addition, the *shari'a* court judges also do not always perceive or frame their decisions directly in legal terms. The judges may often be "more interested in cleaning up the 'social mess' than in focusing strictly on the judicial aspects of this conflict. ....In this regard they can decide cases not only through legal conclusions, but also through tactics that show the degree to their discretion."<sup>127</sup> For example, in a *nafaqa* case before the Gaza City *shari'a* court, the judge applied moral language and stressed the husband's obligation and honourable duty to make payments that would directly go towards his daughter's clothing and food, instead of stressing the husband's legal obligations in this regard.<sup>128</sup> As Nahda Shehada noted, "Instead of taking a

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<sup>124</sup> See *Towards gender equality in humanitarian response: Addressing the needs of women & men in Gaza*, UNITED NATIONS DEVELOPMENT FUND FOR WOMEN (UNIFEM), 2009 at 54. "Towards gender equality in humanitarian response: Addressing the needs of women & men in Gaza," United Nations Development Fund for Women (UNIFEM), 2009 at 54. ("Though prevailing family law in Gaza does offer divorced women some minimal guarantees and rights, Shari'a judges are often loathe to get involved in divorce cases since judges run the risk of incurring problems for themselves with the extended family of whichever spouse he has judged against. Instead, judges prefer to throw negotiating a final settlement back on the families of the two spouses and rubber stamp the resulting agreement. Given that women's rights in divorce cases are already an extreme minimum, they are often further weakened when negotiated between contending families, with the more powerful family usually defining the outcome.")

<sup>125</sup> Shehada, *Flexibility versus Rigidity*, *supra* note 18 at 35.

<sup>126</sup> Observation of *Shari'a* court proceedings before Sheikh Zakari Ramadan Al Nadeem, Gaza City, 23 November 2010.

<sup>127</sup> *Id.* at 37.

<sup>128</sup> Observation of *Shari'a* court proceedings before Sheikh Zakari Ramadan Al Nadeem, Gaza City, 23 November 2010.

legalistic approach, the judges remind those who come before them of the norms of Palestinian society. For example, a husband has to provide maintenance to his family by both law and custom; when he fails to do so, the judge does not merely regard it as a violation of the law, he also invokes principles related to what the society and religion consider normal and acceptable behavior.”<sup>129</sup>

*Shari'a* court judges in Gaza may often see their role as one of navigating the different social and economic backgrounds of the litigants and attempting to get a better sense of the power balance in the cases before them. In her extensive fieldwork and observations of the *shari'a* courts in Gaza City, Shehada argued that “the judges (*qudah, qadi*) as legal and social actors, are aware of the discrepancy between codified law and social reality and attempt to bridge the gap.”<sup>130</sup> One tactic in doing so is to rely on the court clerks and the ushers to provide them with a context of the dynamics taking place outside the courtroom. An usher will often become “familiar with the proceedings of the *shari'a* courts and sometimes intervenes in cases before they reach the judge. He listens to and advises litigants, offers to persuade lawyers to represent poor women without a fee, and gives advice to any woman who asks for it.”<sup>131</sup>

In a case before the Gaza City *shari'a* court, a noticeably pregnant woman came to see the judge without having filed a claim and after his regular cases had adjourned. She stated that she had been forced to leave her home by her husband and had been unable to gather even the most basic personal items, including her identification card. In response, the judge ordered the police to go to the husband’s home to retrieve her identification and asked the woman if there were any other belongings such as clothing or other personal items that she wanted the police to bring. After she requested the washing machine and other furniture, however, the judge stated that she would need to formally file a lawsuit to retrieve those items.

## Rule of Law Considerations

This willingness and flexibility of the judges often best protects those most vulnerable or threatened in a given case, but may at times also raise concerns about professionalism, legitimacy, and the rule of law. In part, this may reflect that the *shari'a* judges see themselves not simply as being assigned to uphold the law, but also as being assigned to uphold the traditions and customs of the society in Gaza.

In one case before the Gaza *shari'a* courts, an unmarried girl had discovered she was pregnant and contacted a local organisation for assistance. Through mediation efforts by the organisation, the girl’s father was contacted and he reluctantly consented to his daughter’s marriage. The organisation then contacted a *shari'a* judge whom it knew would be sympathetic and discreet in that matter. The *shari'a* judge agreed to marry the couple and even backdated the marriage contract in order to protect her reputation. Such a move served to best protect the young woman in that situation and possibly saved her life, yet still presents concerns about professional ethics and the professionalism of the judiciary.<sup>132</sup>

As members of the communities in which they sit, *shari'a* judges are also acutely aware of the role that reputation and honour plays in society in Gaza. A common expression in Gaza is “If I cough in the north, those in the south will hear me,” reflecting the high-density concentration and impact of historical occupation.<sup>133</sup> In communities with staggeringly high unemployment and few concrete assets, individual and family reputations are often the primary asset for many people in Gaza. In a case detailed by Nahda Shehada, a judge was willing to allow a 21-year-old virgin woman to marry without her father’s consent where the father had a substance abuse problem and allegedly used his daughter’s monthly earnings to purchase narcotics. This judge also appealed to the importance of reputation, stating that “It would not be good for her

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<sup>129</sup> *Id.* at 38.

<sup>130</sup> *Id.* at 28-29.

<sup>131</sup> *Id.* at 37.

<sup>132</sup> NRC interview with the Palestinian Center for Democracy and Conflict Resolution (PCDCR), 14 November 2010.

<sup>133</sup> Shehada, *Flexibility versus Rigidity*, *supra* note 18 at 35.

to marry without your consent. That would be bad for both of you. It would also ruin your daughter's image in the eyes of her in-laws."<sup>134</sup>

Similarly, a child custody dispute arose in which the eldest daughter, age 14, was living with her father and complained to her mother about being sexually abused by her father. The mother approached the *shari'a* judge and the judge determined that custody could not be taken away unless the case against the father was proven. Moreover, the reputation of the daughter would have been irretrievably damaged by a public hearing on such a private matter. However, using the importance of reputation to the mother and daughter's advantage, the judge directly contacted the father and threatened to jail him for sexual abuse. When the father denied the accusation, the judge stated that even an accusation of sexual misconduct would sully his reputation. To avoid any tarnish to his own honour, the father sent the daughter and their other children to live with their mother.<sup>135</sup> As Shehada described:

“Thus, in order to protect the children, the judge ignored the rule of law regarding punishment of an offense, as well as the father's legal custody rights. The flexibility here does not relate so much to the room given to the judge in the [personal status laws], as to his individual judgment that provided the best solution for the specific case at hand.”<sup>136</sup>

The larger issue in such situations is not the willingness of the *shari'a* judges to consider the best interests of the women or the children, but the failure to abide by the rule of law and professional ethics.

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<sup>134</sup> *Id.* at 36 (author's interview with Judge al-Karmi of Gaza City *Shari'a* Court of First Instance)

<sup>135</sup> *Id.* at 35-36 (author's interview with Judge Anis Abu Salman, Khan Younis *Shari'a* Court of First Instance, 2 March 2002).

<sup>136</sup> *Id.* at 35.

## Attitudes of Women in Gaza Towards the *Shari'a* Courts

Assessing the attitudes of women in Gaza towards the *shari'a* courts and the personal status laws can best be divided into four categories: (1) actual knowledge of their existing legal rights; (2) level of confidence in the competency and legitimacy of the *shari'a* courts; (3) willingness to utilise the *shari'a* courts to assert individual rights; (4) attitude towards potential reforms of the personal status laws.

### Knowledge of Legal Rights

For the most part, people in Gaza have a general awareness of the rules and regulations governing personal status, though they are less familiar with the specific scope of their rights under such laws. Likewise, while there is a knowledge that the personal status laws arise from *shari'a*, they are typically not couched in religious terms or seen necessarily as religious.

A recent survey conducted by CWLRC in Gaza addressed the reality and needs of divorced women.<sup>137</sup> The organisation conducted focus groups with 50 divorced women to discuss their knowledge of their rights. When asked whether the women felt they were knowledgeable about the applicable divorce laws, 29 percent felt they had inadequate knowledge and 17 percent felt they had no knowledge of the law. Twenty-five percent did believe they had full knowledge and 29 percent felt they had adequate knowledge.<sup>138</sup> When asked whether they had received any legal support in their divorce, 54 percent stated that they had received no support and 16 percent stated that they had received simple legal advice, but not representation.<sup>139</sup>

In one case example, a woman attending a PCDCR legal literacy workshop was astonished to learn that she had legal rights to custody to her young child. In that case, the woman had been forced to surrender custody of her newborn baby years previously to her ex-husband's family and had not seen the child since. Following the workshop, she approached PCDCR, which attempted to work out a peaceful solution with the ex-husband's family since the woman still did not want to formally go to court. Ultimately, the husband agreed to weekly visitations at the Family Forum centre and the mother was able to meet her daughter for the first time after the divorce when she was seven-years-old.

### Willingness to Use the *Shari'a* Court System

Even where women are fully aware of their formal legal rights, they may be reluctant to assert such rights and risk losing family or social network support. For most people, particularly those facing acute external forms of violence as in the context of the ongoing belligerent occupation of the Gaza Strip, the family is the only resort for protection.<sup>140</sup> For example, one woman widowed in the recent conflict interviewed by UNIFEM was well aware of her custody rights, yet was afraid to bring a case since it could bring shame on her children and one of the few assets the children had left was their kinship and connection to their father's family.<sup>141</sup> Despite significant problems with their in-laws, none of the war widows surveyed by UNIFEM had even considered bringing a legal case.

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<sup>137</sup> *Study on the Reality and the Needs of Divorced Women in the Gaza Strip*, CENTER FOR WOMEN'S LEGAL RESEARCH AND CONSULTING (CWLRC), December 2009 (translated from Arabic).

<sup>138</sup> *Id.* at 14.

<sup>139</sup> *Id.* at 16.

<sup>140</sup> *Voicing the needs of Women and Men in Gaza: Beyond the aftermath of the 23 day Israeli military operations*, UNITED NATIONS DEVELOPMENT FUND FOR WOMEN (UNIFEM), 2009 at 60 "Voicing the needs of Women and Men in Gaza: Beyond the aftermath of the 23 day Israeli military operations," United Nations Development Fund for Women (UNIFEM), 2009 at 60.

<sup>141</sup> *Towards gender equality in humanitarian response: Addressing the needs of women & men in Gaza*, UNITED NATIONS DEVELOPMENT FUND FOR WOMEN (UNIFEM), 2009 at 54-55. "Towards gender equality in humanitarian

The larger complaint and hurdle for women in dealing with the *shari'a* courts is the stigma against bringing private matters into a public forum. The historic influence of families and clans in the Gaza Strip has only been bolstered by six decades of instability, occupation, and conflict. In a society faced with very high unemployment rates, kinship and social networking ties are frequently the only means to attain a job. This is particularly clear when considering that close to 95 percent of businesses in the Gaza Strip are family-run.<sup>142</sup> The extremely high physical density of Gaza itself only intensifies the existing bonds of clans and kinship and reputation is often the only asset many people actually have.<sup>143</sup>

Given these considerations, combined with a deep-seated distrust of authority evidenced by many residents in Gaza, most women would never consider seeking formal redress for their private family matters. For example, only about one percent of women surveyed would go to the police as a victim of domestic violence.<sup>144</sup> While transparency in law is clearly a goal, it is clear that programmes will be unable to reach women in Gaza unless there is a high sensitivity to the need to keep matters private.

Moreover, it is rare that a woman would bring a case before the *shari'a* courts without family support and often the decision to file a legal case is a collective one. A woman cannot actually be married on her own without her marriage guardian, or *wali's*, consent and it would be extremely rare for a woman to seek divorce on her own without family support.<sup>145</sup> Thus, regardless of how the *shari'a* courts are functioning, they are likely to remain the last resort for women.

Nonetheless, although discussion of private matters in public fora remains taboo and best addressed by other family members or, if necessary, customary figures such as *mukhtars*, a well-functioning *shari'a* court does serve a purpose as a shadow under which all other negotiations exist. While the fear of damaging her reputation or honour may prevent some women from actively using the *shari'a* court system, the importance of social reputation in Gaza is not limited to women.<sup>146</sup> The very public nature of the proceedings may become a double-edged sword and can be used to a woman's advantage as men, too, rely on their reputation and can be challenged on these same grounds through the *shari'a* court system. While no doubt the public nature of the legal system can be a deterrent to women who might otherwise assert their rights under personal status laws, it can equally become a tool to embarrass men and their reputation by chastising their inability to provide for their families or their shortcomings.

### **Attitudes Regarding *Shari'a* Courts and Reform of Personal Status Laws**

In general, there is a sense of trust among the women surveyed in the *shari'a* court system and it does not seem to be tainted by the same legacy of corruption and inefficiency as the civil and criminal judiciaries. Moreover, since the most common encounter women have with the *shari'a* courts involves marriage, the courts also do not necessarily have a negative connotation.

With regard to necessary reforms of the existing personal status law, there are typically two separate strands of argument within the organised women's movement. One promotes a completely secular approach to

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response: Addressing the needs of women & men in Gaza," United Nations Development Fund for Women (UNIFEM), 2009, at 54-55.

<sup>142</sup> *Inside Gaza: The Challenge of Clans and Families*, *supra* note 12 at 7.

<sup>143</sup> Shehada, *Between Change and Continuity*, *supra* note 1 Shehada, "Between Change and Continuity" at 344.

<sup>144</sup> NRC interview with the United Nations Development Fund for Women (UNIFEM), 22 November 2010. For example, women's organisations reported "honour killings" of 29 women in 2006, 19 in the West Bank and 11 in the Gaza Strip, yet there was no record of such "honour killings" from the police records or the Ministry of Women's Affairs. Dr. Ayesha Al-Rafai, *Political Instability and Nation-Building: Sexual Violence against Female Teenagers in the Occupied Palestinian Territories*, in GENDER-BASED SEXUAL VIOLENCE AGAINST TEENAGE GIRLS IN THE MIDDLE EAST, Pernilla Ouis and Tove Myhrman (eds.), Save the Children (2007) at 73.

<sup>145</sup> NRC interview with the Palestinian Centre for Human Rights (PCHR), 10 November 2010.

<sup>146</sup> Shehada, "*Flexibility versus Rigidity*, *supra* note 18" at 38-39.8.

personal status laws with international human rights and CEDAW serving as the primary sources and principles. This approach was perhaps most prominent under the Model Parliament initiative in 1998 and the backlash encountered by the Model Parliament also reveals the difficulties and unlikelihood of success inherent in such proposals.

The other strand, and the more common perspective in the Gaza Strip, is to embrace the religious and Islamic elements of society in Gaza while working within the existing framework of the *shari'a* courts to expand women's rights.<sup>147</sup> According to a March 1999 public opinion poll conducted by the Jerusalem Media and Communication Center (JMCC), 68.7 percent of Palestinians in Gaza stated that the implementation of Islamic law would increase their support for the PA.<sup>148</sup>

**If the PA Implements Islamic Law, How Will This Affect Your Position Regarding the Authority?<sup>149</sup>**

Response	West Bank	Gaza	Total
<b>Increase my support</b>	61.1%	68.7%	<b>63.9%</b>
<b>Decrease my support</b>	2.5%	2.2%	<b>2.4%</b>
<b>Will not affect</b>	28.8%	24.0%	<b>27.0%</b>

A survey of Palestinian women likewise revealed that 85 percent of women wanted personal status law to be based on *shari'a*.<sup>150</sup> Despite this overwhelming support, 66 percent of those same respondents felt that the current personal status laws did not ensure gender equality and 79 percent had a negative view of the legal systems.<sup>151</sup> This paradox may be seen as a *doxa*, or “aspects of tradition and culture which are so internalised as to become common sense unquestioned dispositions. Clearly, the notion of *shari'a* has become a *doxa* in this case assumed to be an unquestionable good that everyday negative experiences of the law and courts does not undermine.”<sup>152</sup>

On the question of early marriage, the overwhelming majority of men and women in Gaza (at 90 and 94 percent, respectively) felt that women under the age of 17 were not mature enough to choose their own spouse.

**Are Women Under the Age Of 17 Years Old Mature Enough to Choose Their Spouse?<sup>153</sup>**

Response	Men in Gaza	Women in Gaza
<b>YES</b>	10%	6%
<b>NO</b>	90%	94%

<sup>147</sup> Rema Hammami, *Attitudes Towards Legal Reform of Personal Status Law in Palestine*, in ISLAMIC FAMILY LAW IN COMPARATIVE PERSPECTIVE, Lynn Welchman (ed.), Institute of Women's Studies, Zed Press (2003) at 2.

<sup>148</sup> Amal Jamal, *Engendering State-Building: The Women's Movement and Gender-Regime in Palestine*, 3/22/01 MIDDLE E. J. 256 (2001) at 9.

<sup>149</sup> Information collected through Jerusalem Media and Communication Center (JMCC) poll conducted in March 1999, cited in Nahda Shehada., *Gender and Politics in Palestine: Discourse Analysis of the Palestinian Authority & Islamists*, 11 U. MIAMI INT'L & COMP. L. REV. 3 (2003) at 60.

<sup>150</sup> Statistical information from Palestinian Working Women's Society (PWWS) and Jerusalem Media and Communication Center (JMCC) poll conducted in March 1999, cited in Labadi, *supra* note 3 at 24-25.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Statistical information from March 2000 survey and interviews of 1,200 randomly selected men and women over the age of 18 in the West Bank and the Gaza Strip (hereinafter “March 2000 Survey”), results cited in Hammami, *supra* note 158 at 7. Of the respondents in this March 2000 Survey, approximately 54 percent were female, and 34 percent were from Gaza. Additionally, 65 percent of respondents were married, 29 percent were single, 4 percent were widowed, and one percent was divorced. Of those surveyed, only 18 percent had used the *shari'a* courts in the previous year and nearly half of those cases involved marriage, followed by inheritance.

### Are Men Under The Age Of 18 Years Old Mature Enough To Choose Their Spouse?<sup>154</sup>

Response	Men in Gaza	Women in Gaza
YES	19%	15%
NO	81%	85%

When asked whether individuals should be granted rights to marry under civil law even if this did not affect the rights of others to marry under *shari'a*, only 26 percent of men and 21 percent of women agreed.<sup>155</sup>

With regard to a woman's right to seek no-fault divorce, public support is typically lower than compared to other women's rights, with 57 percent of men and 72 percent of women supporting such rights.<sup>156</sup> However, another survey found that only four percent of men and women were opposed to a woman's right to divorce under any circumstance, with the husband being a political collaborator as the most justifiable reason (69 percent), followed by husband's mental illness (66 percent), spousal abuse (55 percent), and polygamy (20 percent).<sup>157</sup>

### Do You Think Family Law Should Respond to Changes and New Needs in Palestinian Society?<sup>158</sup>

Response	West Bank		Gaza		East Jerusalem	
	Men	Women	Men	Women	Men	Women
YES	81%	90%	88%	86%	89%	84%
NO	19%	10%	12%	14%	11%	16%

There remains substantial public support in Gaza for reform of personal status laws as long as it remains within the *shari'a* framework. In 2000, 88 percent of men in Gaza and 86 percent of women in Gaza surveyed supported changes to the personal status laws to respond to new needs in Palestinian society.<sup>159</sup> This represents a marked change when compared to a separate survey from 1995 in which only 61 percent of men and 57 percent of women support that statement that "the existing Islamic laws (those that relate to social aspects) require reinterpretation in order to become more appropriate to contemporary life."<sup>160</sup> It is possible that part of the shift between the 1995 and 2000 surveys was the result of larger political changes during that period as well as the fallout and public awareness of the need for reform from the failed 1998 Model Parliament campaign.

The disparity between the 1995 and 2000 survey results, however, may have less to do with the timing than the phrasing. The 2000 survey simply refers to "family law" and removes any association with *shari'a* or Islam, thus avoiding the very sharp reactions the Model Parliament drew.

### Do You Favour More, Fewer, or the Same Level of Rights Given to Women in the Family Law Currently Existing in Your Place of Residence?<sup>161</sup>

Response	West Bank		Gaza		East Jerusalem	
	Men	Women	Men	Women	Men	Women
MORE	46%	67%	35%	57%	24%	55%
LESS	6%	2%	11%	5%	6%	2%
SAME	48%	31%	54%	38%	71%	43%

<sup>154</sup> *Id.*

<sup>155</sup> Labadi, *supra* note 3 at 27.

<sup>156</sup> Center for Palestine Research and Studies (CPRS) Survey Results from 1995, cited in Labadi, *supra* note 3 at 24-25.

<sup>157</sup> *Id.* at 26.

<sup>158</sup> March 2000 Survey, results cited in Hammami, *supra* note 158 at 7.

<sup>159</sup> Labadi, *supra* note 3 at 27.

<sup>160</sup> Hammami, *supra* note 158 at 9-10.

<sup>161</sup> March 2000 Survey, results cited in Hammami, *supra* note 158 at 7.

**Recently a Law Was Passed in Egypt Enabling Women to Ask for a Divorce if They Waived Their Financial Rights. Would You Like to See a Similar Law Enacted in Palestine?<sup>162</sup>**

Response	West Bank		Gaza		East Jerusalem	
	Men	Women	Men	Women	Men	Women
<b>YES</b>	34%	41%	25%	30%	50%	48%
<b>NO</b>	66%	59%	75%	70%	50%	52%

Respondents in the 2000 survey were additionally asked which parties actually possessed the authority to reform the personal status laws. Thirty-three percent of respondents felt that society should vote democratically in order to reform the personal status laws, with the second highest number of respondents (26 percent) supporting the *shari'a* court judges right to reform. Another 17 percent felt the PLC should be responsible for implementing any reforms and only 12 percent felt this power rested with the PA president.<sup>163</sup>

These survey results reveal the extent to which Palestinians in the Gaza Strip are emotionally committed to *shari'a* as the framework for personal status laws, but also suggest that there is a significant willingness to adapt the current personal status laws to better accommodate women's rights.

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

<sup>163</sup> *Id.* at 12.

## Conclusion

For women in the Gaza Strip, personal status laws and the *shari'a* court system provide an imperfect framework for asserting certain family and women's rights. Moreover, given the political instability of the Gaza Strip and the refusal of most international and local human rights organisations to recognize or engage with the civil judiciary operated by the *de facto* authorities, the *shari'a* courts offer the most stable means to seek recognition and enforcement of such rights.

The deep connection between the personal status laws in Gaza with *shari'a* judicial principles indicates that any attempt to sever the personal status laws from the *shari'a* courts or to institute a wholly secular family law is unrealistic and will face widespread and harsh opposition.<sup>164</sup> This was seen most evidently with the response to the Model Parliament in 1998, which itself didn't go so far as to expressly state support for a secularised family law.

Any analysis regarding the barriers for women in accessing justice in the Gaza Strip must separately consider the lack of normative rights under existing personal status laws, a lack of knowledge of women's rights, and a lack of protection and unwillingness to assert those rights. That said, there is significant room to reform the personal status laws and to enhance women's rights under the existing framework so long as such changes are not perceived as threatening or diminishing the *shari'a* courts. Further, the non-functioning status of the legislative branch at the present time means that the greatest possibility for reform is by directly engaging the *shari'a* courts. For their part, the *shari'a* judges appear open to dialogue and efforts could be made to incorporate greater gender mainstreaming into the *shari'a* judiciary.

This approach of advocacy with the *shari'a* courts has, in fact, been successful in a few regards, most notably through a number of binding administrative orders issued by the chief judge (*Qadi al-Qudah*). However, it should be noted that even while such orders from the *Qadi al-Qudah* would be binding upon the *shari'a* judiciary, these would not in and of themselves substantively change the existing legal texts or invalidate the written law.

Finally, actual legal reform could ultimately end up delivering very little if larger issues of power relations and cultural practices are not considered and addressed. While the *shari'a* courts may be a mechanism for protecting women's rights, they should not be confused as an institution that prioritises women's rights. *Shari'a* judges are far more likely to see their role as designed to protect social functions and vulnerable members of society rather than specifically to protect women.

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<sup>164</sup> Asma M. Abdel Halim, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy*, 9/22/08 MIDDLE E. J. 728 (2008) at 1-2.

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## **Relevant Legal Texts and Conventions**

### **National Texts**

Ottoman Civil Code of 1871

Egyptian Law of Family Rights 1954, Order No. 303 (15 July 1954)

Law no. 12/1962 on the Obligatory Bequest

Law of *Shari'a* Court Procedure no.12.1965

Administrative decision No. 78/1995 of the *Qadi al-Quda* (setting minimum marriage age as 15 for girls and 16 for boys)

Palestinian Basic Law of 2002

Draft Palestinian Constitution of 2003

### **International Conventions and Declarations**

Universal Declaration of Human Rights (1948) (UDHR)

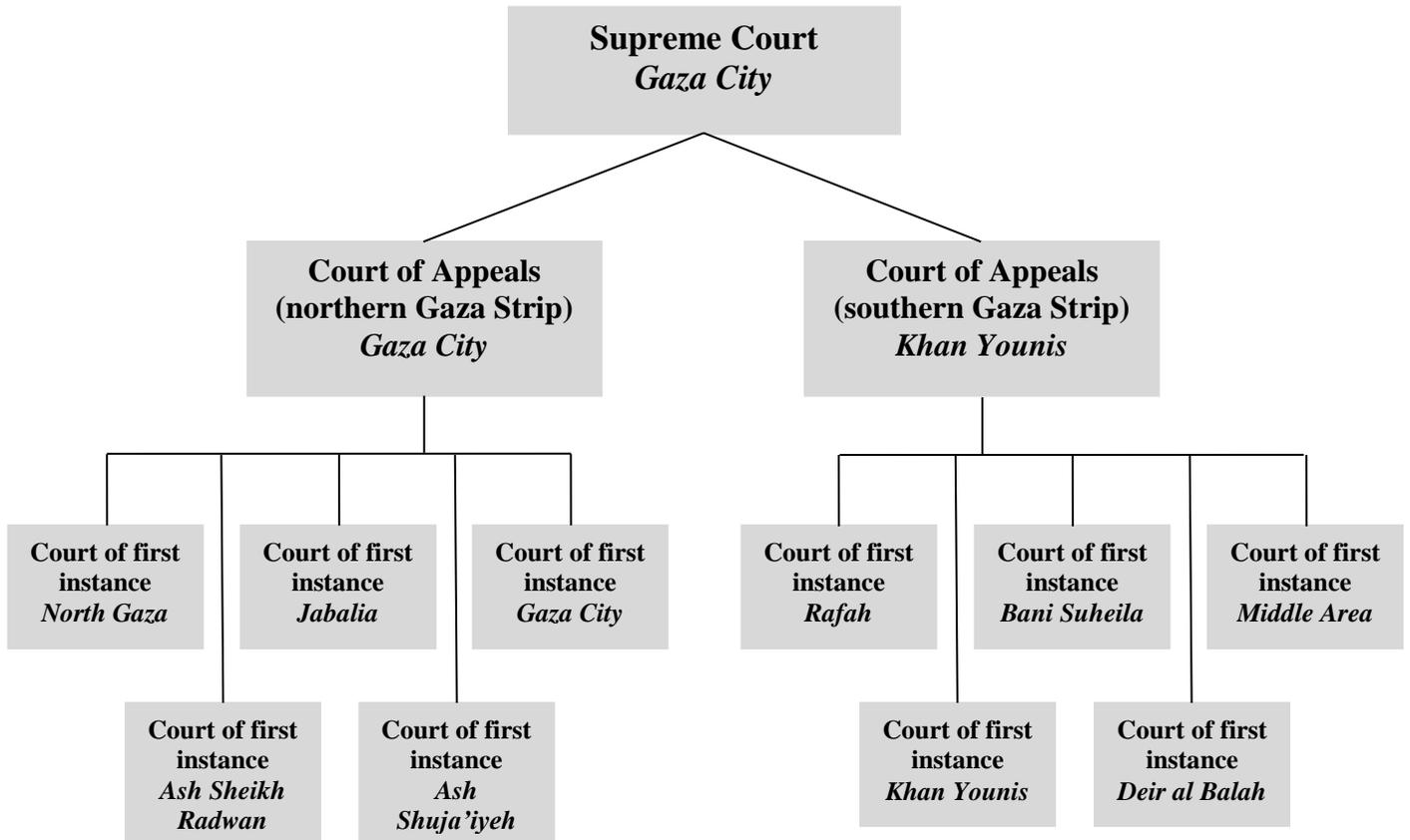
International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), entered into force 1976

International Covenant on Civil and Political Rights (1966) (ICCPR), entered into force 1976

Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW), entered into force 1981

Convention on the Rights of the Child (1989) (CRC), entered into force on 2 September 1990

## Appendix I: Structure of the *Shari'a* Court System in the Gaza Strip



## Appendix II: Names and Locations of *Shari'a* Courts in the Gaza Strip

COURT	GOVERNORATE	JURISDICTION	TELEPHONE
<b><i>Shari'a</i> Supreme Court</b>			
Supreme Court	Gaza	All Gaza Strip	282.0240 283.0250
<b><i>Shari'a</i> Courts of Appeal</b>			
Court of Appeal – Gaza City	Gaza	Oversees the following courts of first instance: North Gaza, Jabalia, Ash Sheikh Radwan, Gaza City, Ash Shuja'iyeh	282.0240 283.0250
Court of Appeal – Khan Younis	Khan Younis	Oversees the following courts of first instance: Rafah, Khan Younis, Bani Suheila, Deir al Balah, Middle Area	206.8599
<b><i>Shari'a</i> Courts of First Instance</b>			
Court of First Instance – North Gaza	North Gaza	Serving: Beit Lahiya, Beit Hanoun, Abed Raboo	247.6181
Court of First Instance – Jabalia	North Gaza	Serving: Jabalia (city, camp, Al Nazlah), El- Saftawi, Ebad Al Rahman	248.5290
Court of First Instance – Ash Sheikh Radwan	Gaza	Serving: Ash Sheikh Radwan, Al Nasir, Ash Shati' Camp	287.4455
Court of First Instance – Gaza City	Gaza	Serving: Al Remal, As Sabra, Tal El Hawa, Ash Sheikh 'Ijleen	286.3609
Court of First Instance – Ash Shuja'iyeh	Gaza	Serving: Ash Shuja'iyeh, At Tuffah, Az Zaitoun	282.9196
Court of First Instance – Middle Area	Middle Area	Serving: An Nuseirat Camp, Al Bureij camp, Al- Zahra city	255.3270
Court of First Instance – Deir al Balah	Middle Area	Serving: Deir al Balah, Al Maghazi	253.0122
Court of First Instance – Khan Younis	Khan Younis	Serving: Khan Younis (city, Camp), Al-Amal neighborhood, East Satar, West Satar, Al Fukkhari, Qizan An Najjar, Qizan Abu Rashwan, Al Batn Al Sameen, Beir Aayiah	205.1067
Court of First Instance – Bani Suheila	Khan Younis	Serving: Bani Suheila, 'Abasaan al Kabira, Abasaan As Saghir, Khuza'a, Qa'al Karaba, Maan, Qa'al Qurein, El Sheikh Naser	207.1244
Court of First Instance – Rafah	Rafah	Rafah (city, Camp), Mosabeh Area, Um Al-Nasser village, Al Shawka village, Khirbet Al-Adas	213.5093

