Women and the Draft Constitution of Palestine

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The views expressed in this publication do not necessarily represent the views of WCLAC.

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Preface

I am pleased to present *Women and the Draft Constitution of Palestine*, a study that critically analyses the Palestinian Draft Constitution to assess both its potential and shortcomings for ensuring women's rights in a future Palestinian state.

A core of work of the Women's Centre for Legal Aid and Counselling (WCLAC) is dealing with issues of women through various legal and legislative processes and reform of institutional policies. The Basic Law, which effectively serves as a temporary constitution until Palestine gains its statehood,[1] and a national constitution would be the legal foundation on which the future Palestinian state would organize itself. We generated the idea for this study at a time when many of us still hoped that our people would eventually be living in an independent Palestine. The hope was partially reinforced by the work of a committee drafting a possible constitution for the State.[2] In this scenario, the State would be constitutionally and otherwise legally accountable to its own people; there would be both the momentum and a legal basis for meaningful discussions about gender issues and equality. But by 2004 these hopes were shattered as we experienced Israel systematically undermining Palestinian nation-building through military incursions and other tactics to force demographic engineering of the Palestinian people into set population clusters that could easily be controlled and manipulated.

Our determination to shape our own destinies rather than simply submitting to defeat, however, propelled us to pursue the work represented by this study. WCLAC commissioned legal researcher Ms Hallie Ludsin in January 2004 to conduct a critical feminist review and analysis of the Draft Palestinian Constitution. Her methodology included reviewing extensive body of scholarly legal literature and various UN conventions and declarations like CEDAW, the Convention on the Rights of the Child, and the International Convention on Civil and Political Rights, and comparing and analyzing constitutions of a diverse array of countries including Egypt, South Africa, Syria, Colombia, Rwanda, Albania, and Afghanistan. She also interviewed legal scholars, drafters of constitutions, experts in constitutional law, and most of the WCLAC staff.

The confluence of several factors, including shifting Centre priorities and

1 The Basic Law was approved by Palestinian Legislative Council in October 1997 and signed into law by President Yasser Arafat in May 2002. For more information see, for example, http://www.thejerusalemfund.org/ www.thejerusalemfund.org/carryover/pubs/20020730ib.html

2 President Arafat established an 8-member Constitution Committee to draft the Constitution and appointed Nabil Sha'ath, then Minister of Planning and International Cooperation, as its chairperson.

dramatically changed political landscape in the aftermath of Hamas victory in 2006 national elections, the entire project was postponed. It was revived again in mid-2007 but the document was not updated to include the impacts and implications of Hamas control of Palestinian Legislative Council after the election and resulting internal political changes. After Ms Ludsin had finalized the document, we reviewed it to make sure it reflects Palestinian context and Palestinian political and cultural sensitivities. As we observed the fast-changing, sometimes volatile, political climate, we held out on finalizing this document until the right political moment. Given the protracted nature of the Palestine/ Israel conflict, and the related internal struggles, we determined that there would never be a perfect moment for us. Rather than wait, we decided that it is most prudent to release the study as a way to catalyze hopeful discussions, a way to resist colonialist and patriarchal domination, which is an essential part in the struggle for liberation.

Our hope is that, through the discussions of this study and the Draft Constitution itself, a space will be created to amplify the diverse voices and perspectives of Palestinian women. We envisage that these voices and perspectives will help both Palestinian women and men to understand more fully the various meanings and implications of concepts like nation, state, citizenship, accountability, power limitation, and issues of social and gender justice, not only in relation to a new Palestinian state but also to the struggle against Israeli occupation and colonialism as we seek liberation. By opening spaces for thoughtful discussions among women, and men of all segments of Palestinian society, it will be possible to acknowledge fully and build on the struggles and resistance particularly of people in towns, villages, and refugee camps in occupied Palestine, those from various socio-economic classes, and those from a multitude of life circumstances including Palestinians in exile. By focusing specifically on women's roles and issues, it will be possible to illuminate the particular ways in which women are both victimized and play the roles of liberation fighter, protector and keeper of family and community. We hope that these discussions will amply demonstrate our belief that a constitution that is not based on the experiences of the nation's people and does not address their needs, concerns and aspirations will remain only a paper document.

In closing, we would like to thank all those who have contributed to bringing this document to its final form. Particular appreciation goes to Dr. Gwyn Kirk, feminist thinker, for her substantial editorial work on the main document and for preparing the condensed discussion summary. Also, we thank Dr. Adrien Wing, Bessie Dutton Murray Professor of Law at the University of Iowa, for the Introduction and to Adv. Rajah Shehadeh and her for their critical review of the paper.[3]

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3 The English version of the discussion summary was translated into Arabic by Dr. Malek Qutteineh.

Introduction: Towards Gender Equality in Palestine

Adrien Katherine Wing[4*]

The Women's Centre for Legal Aid and Counselling (WCLAC) has provided an important service for the international community by publishing *Women and the Draft Constitution of Palestine*. The third draft of the constitution [hereinafter Draft Constitution] discussed in the report may one day form the basis for developing the ultimate constitution for the independent Palestinian state. Although current political conditions prohibit accurately forecasting a date when the new country will come into existence, it is important that thorough legal analysis not wait for that time. Similarly, in South Africa, the African National Congress started developing constitutional principles years before Nelson Mandela was released from prison to lead negotiations freely with the apartheid regime. The forty–plus year old Israeli occupation, breakdown of the peace processes, and internecine battles among the Palestinians themselves, make the desired end result in the Holy Land unlikely in the near future. Nonetheless, whenever the constitutive process moves forward again, the WCLAC report will provide a starting point for a critical assessment by those interested in achieving equality for Palestinian women.

This introduction will first discuss the "spirit injuries" that afflict Palestinian women and men, and what role a constitution can play in healing those injuries. Then, it will highlight some background information concerning the document that is theoretically governing Palestine now – the Basic Law of 1997, promulgated by former Palestinian President Yasser Arafat in 2002. The introduction will compare the Basic Law to the Draft Constitution in a few selected aspects. Then, the introduction will speculate briefly about future potential scenarios. It should be noted that this WCLAC report was written before the June 2007 rupture that resulted in Hamas governing Gaza and Fatah governing the West Bank, and this schism had not been bridged at the time of writing this introduction. Right now, it is impossible to predict the outcome of this divide and what kind of regime will govern Palestine at the time of independence. Thus, the first scenario assumes a future led by an Islamist-leaning government. The second assumes a more secular regime. With respect to the secular option, the introduction will close with some possibilities for women's rights drawn from the example of another Arab country – Tunisia.

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4 * Dean Adrien Katherine Wing is Associate Dean for Faculty Development and the Bessie Dutton Murray Professor of Law at the University of Iowa College of Law. Author of over 100 publications, she has been involved with Palestinian issues since 1982. She was a consultant to the Palestinian Legislative Council during the drafting of the Basic Law. She would like to thank her research assistants Saba Baig, Kevin Dawson, Atanna Essama, Meredith Friedman, Elizabeth He, Peter Nadimi and Samuel Nielson for their help with this introduction.

Healing Sprit Injuries

All Palestinians suffer from "spirit injury"[5] – the combination of physical, emotional and spiritual harms that confront them – ranging from occupation, underdevelopment, exile, land dispossession, family dissolution, death, torture, imprisonment, neocolonialism, and imperialism. On a personal level, spirit injury can lead to the "slow death of the psyche, the soul and the persona."[6] On the group level, these collective injuries can result in the "devaluation and destruction of a way of life or of an entire culture."[7] Spirit injuries can result from violence with Israel, violence between Palestinian factions such as the current impasse between Hamas and Fatah, as well as domestic violence between men and women.[8]

The complex spirit injuries sustained by Palestinians may never be truly healed in many cases. For some, a mixture of non-legal and legal options pursued by the independent state or by individual Palestinians can treat the wounds.

Among the non-legal solutions, governmental apologies have been procured in some contexts, but can be very hard to give and equally difficult to accept. Memorials and commemoration days can be part of national healing. Individual, family and group therapy can provide some solace. Education for both children and adults can be structured so that the past is never forgotten, but also not used as a basis for destructive behaviours.

When Palestine becomes a member state of the United Nations, its legal options might include seeking a binding or advisory opinion before the International Court of Justice or the International Criminal Court. There could be a request for an *ad hoc* tribunal along the lines of the former Yugoslavia and Rwanda courts. Additionally, legal actions might be brought in various countries, especially any which recognize universal jurisdiction, such as France, Spain, the Netherlands, the United Kingdom and Belgium. It could also try disinvestment by corporations or shareholder proxy suits. Palestine could also try another option that was used in South Africa and other countries to heal spirit injuries – a truth and reconciliation commission.[9] A further approach could be the crafting of an international settlement involving reparations to the Palestinian people as a nation or as individuals.

5 See Adrien Wing, 'Healing Spirit Injuries: Human Rights in the Palestinian Basic Law' 54 rutgers l. Rev. 1087 (2002). This section derives from Adrien Wing & Hisham Kassim, 'Spirit Injury, Exile, and the State of Palestine' in Landscapes of Exile 249 (Anna Haebich & Baden Offord eds., 2008) and Adrien Katherine Wing 'Custom Religion and Rights: the Future Legal Status of Palestinian Women' 35 Harv J. Int'l L. 149, 183-94 (1994).

6 Wing, note 4 above at 1.

7 Ibid.

8 See Adrien Wing, 'A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women' 60 Albany L. Rev. 943 (1997).

9 See Adrien Wing, 'A Truth and Reconciliation Commission for Palestine/Israel: Healing Spirit Injuries, 17 Transnat'l L. & Contemp. Prob. 140 (2008).

One part of a legal solution to group spirit injury can be a constitution. In spite of the mass trauma, the birth of the constitution will proclaim that Palestine does exist and can take its rightful place in the world community, not as an observer or quasi-entity, but as a sovereign nation. It will say that the right of self-determination finally has some legal effect, at least for those Palestinians under the jurisdiction of the new state. The birth of the constitution can illustrate that Palestine has broken from the past constitutive void and has drawn principles culled from best practices around the world. The content of the document can show that Palestinians will not copy the abuses found in the many legal layers from its past or those of other countries and that Palestine will stand for justice instead of injustice and transparency instead of obfuscation.

The constitution can be a beginning step in treating both individual and collective spirit injuries. It can be a salve that provides a context for healing. It can establish how power must be wielded by the three branches of government in ways that hasten the creation of healthy new citizens. It can be a supportive structure to bind injured groups, much like broken bones that knit together, so that all can play their part in the working of the whole. The constitution can establish the strong framework for subsequent legislation that provides implementation of lofty principles.

As vital citizens representing half the population, Palestinian women in particular can benefit from a document that challenges deeply held patriarchal customs and religious practices that restrict their full citizenship, and provides a framework for acknowledgement of their rights based upon international principles. Women have been involved in the Palestinian national movement since the British Mandate period early after World War I up until the present. Despite managing large families often under horrific conditions, they have made their presence felt and their voices heard, whether by doing traditional charitable projects or by demonstrating against oppression. After the PLO was formed, they joined the various political factions as well as women's groups such as the General Union of Palestinian Women. They were actively involved early in the first intifada starting in 1987 and have played some roles in the Palestinian Authority as well.

It must be acknowledged that despite these valuable contributions, women have been underrepresented in all phases of the struggle to create Palestine. In order for women to gain their well-deserved benefits from the constitution, they must be involved in the drafting or redrafting process to a greater degree than happened with either the creation of the Basic Law or the drafts of the constitution up until now. There must be assistance from civil society individuals, academics, and NGOs like WCLAC, as well as elected parliamentarians. Anything less than

significant involvement of women will probably result in a final document that is not sufficiently attentive to women's actual needs. It may result in a triumph for practices that have confined them too often mainly to the private sphere no matter their extremely valuable contributions in the public sphere.

The Basic Law versus the Draft Constitution[10]

The WCLAC report will give a detailed exegesis on each section of the Draft Constitution. Any further changes to the Draft Constitution should take into account the Basic Law provisions and how successful they have been in any period of relative tranquillity.

In addition to the general human rights provisions applicable to both genders, the Basic Law and the Draft Constitution contain various provisions affording certain rights and freedoms to Palestinian women that attempt to assist them in their struggle to gain a more equal footing with men in Palestinian society. I will briefly highlight a few here. Article 9 of the Basic Law, the Equality Clause, declares, "All Palestinians are equal under the law and judiciary, without discrimination because of race, sex, colour, religion, political views or disability." Draft Constitution Article 19 contains a similar provision, which states that "Palestinians are equal before the law" and that "the term 'Palestinian' or 'Citizen'...refers to both, male and female."

Additionally, the Draft Constitution contains several provisions that specifically address the rights afforded to women. Such rights are not present in the Basic Law. Article 22 of the Draft Constitution states: "Women shall have their own legal personality and independent financial assets. They shall have the same rights, liberties and duties as men." Furthermore, Article 23 states: "Women shall have the right to participate actively in the social, political, cultural and economic aspects of life. The Law shall strive to abolish restraints that prevent women from contributing to the building of family and society."
On their face, the above provisions seem to give Palestinian women equal status to men, both in the private and public spheres. Nevertheless, another provision that appears in both the Basic Law and the Draft Constitution severely restricts the potential positive effects of the foregoing equality provisions. The Basic Law and the Draft Constitution state that *Shari'a* will be "a major source" for legislation. The Draft Constitution also places all personal status matters, including women's rights, under the control of one of the religious institutions in Palestine; and for the majority of Palestinians, personal status matters will be governed by the *Shari'a*. Furthermore, Basic Law Article 92 states, "*Shari'a* affairs and personal

10 This section derives from Adrien Wing & Hisham Kassim, 'Hamas, Constitutionalism, and Palestinian Women' 50 Howard L. J. 480 (2007).

status shall be assumed by *Shari'a* and religious courts in accordance with law." Conversely, Article 162 of the Draft Constitution does not specifically create religious courts; however, it states that the "law shall define the institutions of the judicial branch and regulate their structure and the types of courts." It is uncertain how the Draft Constitution will affect *Shari'a* courts, which are already established institutions in Palestine.

Since *Shari'a* endorses disparate treatment of women, the provisions designating *Shari'a* as a source of legislation are in an inherent contradiction with the equality provisions. Further, both Article 4 of the Basic Law and Article 5 of the Draft Constitution state that Islam is the official religion in Palestine. The meaning and effects of this clause are unclear. Most Arab countries have such a provision in their constitutions and the meaning of the clause depends on each country's cultural context. The clause has the potential to provide the authority to enforce Islamic law on all Palestinians, which may lead to discriminatory treatment of women and non-Muslims. Thus, this clause could also conflict with the equality provisions and restrict the rights afforded to Palestinian women.

The Draft Constitution specifically addresses Palestinian women's rights to participate in political life. Article 8 states: "The rights and liberties of all citizens shall be respected, including the right to form political parties and engage in political activity without discrimination on the basis of political opinions, sex or religion." In Article 53, the Draft Constitution further states: "Citizens shall have the right to assume public office, on the basis of competence, merit and equal opportunity in accordance with the requirements of the law." Thus, the Draft Constitution, on its face, seems to provide equal political rights to men and women.

In contrast, Article 26 of the Basic Law, which lists certain political rights, including the right to establish political parties, does not specifically include a non-discrimination provision. Moreover, the language allows for the restriction of the rights listed in that article, since many of the provisions state that the rights are afforded "in accordance with the requirements of the law." Thus, the political rights listed in the Basic Law are subject to limitations imposed by legislation.

There are additional articles in the Draft Constitution that could be applied to situations of domestic violence. Article 61 of the Draft Constitution states that "the state shall assume responsibility for the safety of persons and property." Protection of the "safety of persons" may apply to domestic violence. Further, Article 23 declares that the "constitutional and legal rights of women shall be safeguarded; and any violation of those rights shall be punishable by law." Freedom from

domestic violence may be a legal or constitutional right of Palestinian women and thus protected by Article 23. Additionally, Article 28 states: "Every person has the right to freedom and personal safety. Such right may not be violated, except in cases and in accordance with procedures stipulated by law." Consequently, "personal safety" may encompass freedom from domestic violence.

Even though the foregoing articles in the Draft Constitution may potentially be applicable to domestic violence, they are ambiguous and subject to different interpretations. Moreover, *Shari'a*, which specifically allows the beating of women, is a "major source of legislation" in the Draft Constitution and may prevent the intrusion of these ambiguous sections into the private sphere. The scope of Article 28 is further limited by the provision that allows the right to personal safety to be violated "in accordance with procedures stipulated by law." Legislation or *Shari'a* can be "law" within the meaning of this provision, allowing the suspension of the right to personal safety of Palestinian women.

Islamist

How might an Islamist-controlled or dominated regime move to institute an Islamist agenda in the constitutional realm? One might speculate that Hamas would move to change the Draft Constitution provision to indicate Islamic law is *the* main source of law, rather than *a* main source. Language might be inserted in various places limiting certain rights to make them consistent with Islamic law. For example, Basic Law Equality Clause could be amended to say, "Palestinians are equal without discrimination... according to the Law," and define "Law" elsewhere as Islamic law. A number of other Arab countries have limited their bills of rights in this way, often gutting constitutional protections for women and minorities.

With respect to women's rights, the implications are clear. Since an Islamist type of regime might retain fairly traditional notions of women's participation, it would likely move to implement these ideas in the Constitution. A further notion would be to move to restrict the granting of citizenship to the traditional Islamic principle of citizenship passing only through the father or husband. For instance, a Palestinian woman could not pass citizenship to her non-Palestinian husband or her children.

Enforcement of the final Constitution would ultimately or ideally be left to the courts. Islamist-appointed judges might be very likely to interpret the language to uphold the government's approach to these questions. Due to the Israeli occupation, Palestinian Authority (PA) government corruption, and interference, the judiciary has not been highly regarded and has not been permitted to retain any independence. It is unlikely that this situation will change in the near future.

The Legislative Council would be tasked with passing laws consistent with the constitution. An Islamist leaning parliament would likely produce statutes or amendments to statutes that would further restrict women. The practices of more conservative Islamic countries might be followed. Women might be banned from being judges, or forced to wear *hijabs*. Criminal punishments for committing "honour crimes" could be eliminated. The regime could also remove minimum marriage ages that could foster young child marriages.

Secular

If the future government is more secular in orientation, there are several possibilities with respect to constitutional options. First, Palestinian decision-makers should consider adding an affirmative action clause to the Draft Constitution. This clause would enable the legislature to pass laws specifically designed to enhance women's status. Article 47(4) of the Iraqi constitution provides an example of gender affirmative action, stating: "The Elections Law aims to achieve a percentage of women's representation not less than one-quarter of the Council of Representatives' members." The Palestinians already have some experience with affirmative action for women. There were quotas for women on the party lists in the 2006 Palestinian elections, and the Hamas group of seventy-four legislators includes six women. A total of seventeen women are in the 132-member Parliament, more than twice the number in the 1996 parliament.

If an affirmative action clause in the Constitution is too sweeping of a reform due to the cultural norms inherent in Palestinian society, lawmakers can implement affirmative action through legislation pursuant to the various equality provisions in the Draft Constitution. In that case, affirmative action would merely be a piece of legislation, which a simple majority of the legislature could change. In the absence of affirmative action legislation, government ministries could choose to use affirmative action as part of their programmes.

Next, Draft Constitution Article 23 is in need of revision. I recommend changing the wording so that the phrase reads "Women shall have the right to participate *equally* in the social, political, cultural and economic aspects of life." The article uses the word "actively" rather than "equally," which could suggest that it falls short of guaranteeing full equality.

Article 7 of the Draft Constitution places all personal status matters under one of the monotheistic religions in Palestine. As is recommended in this paper, a final proposed solution is to revise or modify this provision by moving all personal status matters outside of religious control and creating a dual personal status legal system; one based on the *Shari'a* and one based on civil law. Such a system allows the individual the freedom to choose under which regime to be governed. The primary drawback to this alternative is that family and societal coercion could pressure couples not to select the civil law choice. South Africa is an example once again. Its constitution creates a civil personal status law and couples can opt to be governed by tribal personal status law.

South Africa can also serve as an example in terms of handling domestic violence on a constitutional level. Article 12 of the South African constitution forbids violence from public or private sources. This provision was added in to make clear that domestic violence would be covered. Thus men could not claim that domestic violence was within the private sphere and the constitution only covered the public sphere.

Post-constitution: The Tunisian Example

If the government in Palestine one day decides to take a more secular direction, it will have to follow up the constitutional provisions with legislation that will help women as well. While there are many countries that Palestine will be able to reference, I recommend that Palestinians explore the approach adopted by another Muslim country, Tunisia.[11] Why Tunisia? It has taken the most secularized approach to women's rights of any Arab country. Additionally, many Palestinians are somewhat familiar with the Tunisian experience since the PLO was based there from 1982 to 1994, just prior to moving to the West Bank and Gaza to start the PA. Moreover, Palestinians have also been considered one of the more secular groups in the Middle East, and might be amenable to secular approaches in the future. I have visited Tunisia several times to explore the implementation of women's rights over the fifty-year period since its independence.

Whereas Article 1 of the Tunisian Constitution does state that Islam is the national religion, Article 6 provides for equality before the law. The Constitution was amended in 1997 to explicitly declare the inadmissibility of gender discrimination in certain respects.

Tunisia has been at the forefront of the Arab world with respect to family issues. In 1956, Tunisia gained independence from France and deviated from the Islamic Maliki jurisprudential school when it adopted the Code of Personal Status (CPS). The adoption of the CPS was part of a larger governmental reform program to build a modern state, not due to feminism.

The then highly popular founding President Habib Bourguiba, who would rule thirty-one years, admired the modernist perspective of founding Turkish President Kemal Ataturk from the 1920s, and felt that Tunisia must also reform its laws. Unlike Ataturk, who abolished Ottoman Empire *Shari'a* based on purely secular principles, Tunisia regards its reforms as permissible Islamic reinterpretation known as *ijtihad*.

11 See Adrien Wing & Hisham Kassim, 'The Future of Palestinian Women›s Rights: Lessons from a Half-Century of Tunisian Progress' 64 WASH. & LEE L. REV. 1661 (2007).

The CPS has continued to be modified under the leadership of current President Zine El Abidine Ben Ali, most notably in 1993. The changes have continued up to the present with input from women and women's rights groups.

What has been the result of the reforms? Have they made a difference over fifty years? According to the World Bank, Tunisia leads the Middle East/North African region in gender equity.[12] The gap between male and female educational levels is lessening in the younger population, and more than one half the university students are female.[13] Women are 32% of the labor force.[14] Women have made great gains in a number of professions and are now 34% of magistrates, 40% of university professors, and 22.7% of the Chamber of Deputies.[15] According to a Freedom House publication, Tunisia scores very high in the region on indicators such as nondiscrimination and access to justice; autonomy, security and freedom of the person; economic rights and equal opportunity; and social and cultural rights.[16]

I will now briefly discuss some areas where the Palestinian Personal Status Code (PPS), which is essentially the Personal Status Code Jordan promulgated in 1976, might be amended based upon the Tunisian CPS: marriage, divorce, and child custody; parental consent before marriage; spousal maintenance; spousal discipline; polygamy; divorce; alimony; and child custody.

Regarding parental consent for marriage, under CPS Article 3, the father's consent is not required for a woman who attains the age of majority to marry. However, Article 6 does stipulate that if the woman is a minor, the consent of both the father and mother is necessary. Adopting this policy would enhance Palestinian practices because under the PPS, the consent of the father is required in all cases even if the daughter is a legal adult. Article 13 of the PPS provides an exception to the general rule. The consent of the father is not required if the woman has attained the age of majority and has been married previously.

In 2007, Article 5 of the CPS was modified to create a uniform age of eighteen to marry unless a judge intervenes. Tunisian law before the promulgation of the CPS had set the marriage age for the woman at fifteen and the man at eighteen,[17]

12 See Fareed M.A. Hassan, World Bank Operations Evaluation Department, 'Tunisia: Understanding Successful Socioeconomic Development: A Joint World Bank-Islamic Development Bank Evaluation of Assistance' 4-5 (2005).

13 See V.M. Moghadam, 'Tunisia' in Women's Rights in the Middle East and North Africa: Citizenship and Justice 295, 302 (Sameena Nazir & Leigh Tomppart eds., 2005).

14 Hassan, note 11 above at 5.

15 See Tunisia Online News, 'International Conference in the Hague Pays Tribute to Tunisia›s Code of Personal Status' July 19, 2006, http://www.tunisiaonlinenews.com/jul06/190706- 1.html.

16 See Moghadam, note 12 above at 295.

17 Mounira Charrad, States and Women's Rights: The Making of Postcolonial Tunisia, Algeria and Morocco

and later increased the age to seventeen for women and twenty for men.[18] By increasing the minimum age, the Tunisian government was trying to decrease the birth rate, produce more stable marriages, and reduce the amount of familial intervention in the marriage process. The government believed that couples who married later had fewer children and were generally more stable.[19] Increasing the minimum age of legal marriage may have caused the birth rate to decline. In the early 1970s the birth rate in Tunisia was approximately five births per woman and by 2001 the birth rate had dropped to two births per woman.[20] The birth rate in Palestine remains at a very high 6.1.[21] PPS Article 5 only requires that the husband be age 16 and the wife 15 to marry. Palestine would benefit from following the Tunisian example of increasing the marriage age to 18.

Concerning spousal maintenance, Tunisian law deviates from its overall reformist character by adopting a traditional view under CPS Article 23, which stipulates that the husband is the head of the household and therefore "is responsible for the maintenance of his wife and children." Article 23 contains some reformist notions in that it also stipulates that the wife is also partly responsible for the upkeep of the household, if she can afford to do so. Under Palestinian law, the wife has no such obligations, remaining solely under her husband's authority. PPS Article 35 states that if the marriage contract is valid, the husband has to support the wife. Article 36 then mandates that the husband must provide the wife with a dwelling according to his financial abilities. However, under Article 68 a wife loses her right of maintenance if she works outside the home without her husband's permission. If Palestine adopts more rights for women, it should also consider granting women some obligation to care for the household, if they are able, and dropping the spousal permission requirement as well. Tunisia has eliminated the traditional wifely duty to obey her husband.[22] According to PPS Article 39, the wife is to obey her husband, and the husband is to treat his wife with respect.

Duties of obedience may be interlinked with domestic violence as well. In Tunisia, 1993 amendments to the Penal Code provide that a man accused of domestic violence faces a heavier punishment if the victim is his wife. Unfortunately,

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225 (2001).

18 CREDIF, Tunisian Women's Legal Gains in the New Era 5-6 (2004).

19 Charrad, note 16 above at 225.

20 Hassan, note 11 above at 4.

21 See Adrien Wing, 'Constitutionalism, Legal Reform, and the Economic Development of Palestinian Women' 15 Transnat'l L. & Contemp. Prob. 656, 699 (2006).

22 See Carin Benninger-Budel & Joanna Bourke-Martignoni, 'Violence Against Women in Tunisia: Report prepared for the Committee on the Elimination of Discrimination Against Women' 13 (2002).

the spouse can withdraw the complaint, lessening the impact of the law.[23] He can be imprisoned for two to three years and given a fine of 23,000 dinars.[24] Unfortunately, the law does not recognize marital rape; however, the law holds men who kill their wives after seeing them in the act of adultery responsible for manslaughter, rather than a simple misdemeanor.[25]

Palestinian women in the West Bank face a much bleaker picture, and would greatly benefit from some of the Tunisian reforms. Complete exemption from murder is afforded under the Jordanian Penal Code if a man kills his wife after he sees her committing adultery. The same exemption or reduced punishment is not afforded to a woman who murders her husband after seeing him commit adultery.[26]

The Jordanian Penal Code provides reduced punishments for sexual abuse, including rape, of females. In fact, under the Jordanian Penal Code, the law follows the ancient customary practice, and a court has the authority to suspend a criminal proceeding if the offender agrees to marry the victim of a rape.[27] Likewise, perpetrators of domestic violence can go unpunished since there is a custom of noninterference in domestic disputes.[28]

One of the most notable advancements of the CPS was outlawing polygamy under Article 18. A violation is punishable by imprisonment and/or fines of up to 240,000 francs. Many sources I interviewed during my several trips there indicated that the practice has been eliminated, but *de facto* mistresses remain as in most countries. CPS Article 46 forbids a Tunisian woman from marrying a foreigner from a country where polygamy is allowed, unless there is a certificate stating that the man is free from all conjugal ties. Palestinian men follow traditional *Shari'a* and still have the right to marry up to four women who can be Muslim, Christian, or Jewish, while Palestinian women can only marry one Muslim man. However, under PPS Article 19(1) a wife may limit the number of wives her husband may marry in the marriage contract. PPS Article 40 also stipulates that if the husband has more than one wife, he is to treat them equally and may not house them in the same dwelling without securing consent first. Even though polygamy is not heavily practiced in Palestine,[29] following the Tunisian example might face heavy societal opposition and I would not recommend abolishing it as a first line of action under current circumstances.

23 See Moghadam, note 12 above at 298.
24 Benninger-Budel & Bourke-Martignoni, note 21 above at 22.
25 See Moghadam, note 12 above at 297.
26 Nadera Shaloub-Kevorkian, Femicide and the Palestinian Criminal Justice System: Seeds of Change in the Context of State Building?, 36 Law & Soc'y Rev. 577, 580 (2002).
27 Ibid. at 592.
28 Wing, note 7 above at 964.
29 Wing, note 20 above at 659 n.23.

Concerning marital breakdown under Tunisian law, both spouses have the right to divorce. They may divorce by mutual consent or at the request of one of the spouses.[30] Because both may file, both may be held liable to compensate the other. The CPS also requires that a divorce may only be effectuated judicially.[31] In doing so, the Tunisian government removed the divorce process from the private sphere, where a man under *Shari'a* norms could normally effectuate a divorce simply by stating his intent to divorce his wife three times. The policy reason was to make marriages more stable and divorce a less impulsive decision.[32] Charrad reports that Tunisian reforms "have increased women's ability to terminate marriages in practice."[33]

Regarding adultery as a ground for divorce, Tunisian men and women have equal rights. Previously, only adultery committed by the wife was an offense, and a woman could not use the husband's adultery as a ground for divorce. In a law passed in 1968, adultery committed by either spouse is an offense that can be punished by fine or imprisonment.[34]

Under Palestinian law, the general rule is that the wife does not have the right to divorce her husband.[35] The PPS has carved out a few exceptions, however, in which the wife may request a divorce from her husband. First, under Article 19(1), the spouses may stipulate in their marriage contract that the wife has a right to divorce her husband without his consent. Under Article 115, a wife may request a court to dissolve their marriage if the husband has an incurable disease. Under Article 120, she can divorce him if he becomes mentally challenged or insane. Other examples include if the husband has been sentenced to imprisonment for a minimum of three years. Under Article 130, a wife may request a judicial dissolution of their marriage only after the husband has spent one year serving his sentence. According to Article 123, a wife may also request a divorce if the husband is absent and his whereabouts are unknown or if he abandons her without cause. If he fails to maintain her, she can divorce him pursuant to Article 127. Article 132 permits divorce if he harms her. Unlike the CPS, a husband under PPS Article 86 has the ability to effectuate the divorce orally or in writing.

It is quite clear that Palestinian women would benefit greatly if Palestine adopted some of the Tunisian reforms, and if Palestinian women had greater ability to terminate bad marriages. The husband's threat of a quick divorce with the woman

30 See Lama Abu-Odeh, 'Modernizing Muslim Family Law: The Case of Egypt' 27 Vanderbilt J. Transnat'l L. 1043, 1106 (2004).
31 Charrad, note 16 above at 225.
32 Ibid. at 226.
33 See Mounira Charrad, 'Becoming a Citizen: Lineage versus Individual in Tunisia and Morocco' in Suad Joseph (ed.) Gender and Citizenship in the Middle East 70, 82 (2000).
34 Charrad, note 16 above at 226.
35 Wing, note 20 above at 448.

having no similar right, the existence of the obedience norm, and the possibility of the husband taking additional wives puts substantial pressure on many wives to submit to horrific conditions.

The CPS and PPS differ greatly regarding alimony as well. Under the CPS, a woman is generally entitled to more support from her ex-husband. Article 31 of Tunisian law states that if the husband has harmed his wife, then she is entitled to compensation as well as a residence. A 1981 amendment grants women lifelong alimony instead of a lump sum, and there is now a fund for the guarantee of alimony to provide support if what the ex-husband provides is inadequate.[36] Under PPS Article 134, if a wife is divorced by her husband for no legitimate reason, then she is entitled to compensation for a period of one year. Clearly, Palestinian women would be better served by receiving enhanced support from ex-husbands. In the modern era, it is no longer possible to assume that the ex-wife's natal family will reassume financial or physical custody as was the practice in the past.

Concerning control over children after divorce, there is a distinction between custody and guardianship. Whereas Muslim women may have custody for a certain period of time, ultimate guardianship rests with the father. In terms of custody rights, PPS Article 154 follows the traditional approach that grants guardianship to the father, but delineates custody between mother and father based on the gender of the child and the child's age. Article 161 of the PPS stipulates that the mother maintains custody of the daughters until the age of eleven and the sons until the age of nine. However, under Article 162, it is possible for the mother to maintain custody of the son or daughter until they reach the age of majority if she does not remarry. Under Article 156, this custody is terminated, regardless of the age of the children, if the mother remarries a non-relative of the child.

Palestinian women would benefit from guardianship of their children, and Tunisian law takes a step toward that direction. Under CPS Article 154, mothers can gain actual guardianship if the father is deceased. In addition, custody of the children is awarded to the most suitable parent. Neither the mother nor father has priority based on the gender or age of the child. Under Article 67, a court decides which parent should have custody based on the best interest of the child. If the mother is awarded custody, she is also actively involved in making guardianship decisions pertaining to the child's education, travel and finances. If the guardian, *i.e.* the father, is prevented from exercising authority, has vanished or is irresponsible, the judge may give the mother all guardianship responsibilities. As in Palestine, the Tunisian mother faces the horrific option of losing custody of her child if she

36 Moghadam, note 12 above at 299-300.

remarries, although, a judge has the ability to order otherwise under Article 58. Both societies clearly need to eliminate this provision.

Conclusion

The WCLAC report that follows will become an important part of Palestine's pre-independence legal history. I hope that it will generate a lively discussion across the political spectrum, both inside and outside Palestine and serve as an educational tool for everyone on gender issues. When work on the constitution starts again, I pray that the report will be dusted off and its value recognized even more. I look forward to the day when WCLAC will do an analysis of the first five years of implementation of the permanent constitution of the State of Palestine. Even if the ultimate text is satisfactory in many dimensions for women, the true test of success will be whether Palestinian society will be able to use the text to make fundamental changes in society. Will Palestinian women be able to use the text and subsequent legislation to help overcome their spirit injuries or will they suffer the fate of Algerian women who helped liberate the country from France, but were then relegated back to the private sphere? Will Palestinian women be able to play a major role in ensuring the implementation of the constitution serves as a role model for constitutionalism in its region and the world? Only time will tell.

Acknowledgments

The Women's Centre for Legal Aid and Counselling would like to thank the numerous people who helped us with our research. Participants included constitution-drafters, members of the Palestinian Authority, local attorneys, university professors and members of civil society organizations. Although we cannot identify the participants by name for the sake of confidentiality, each person's contribution proved invaluable to the success of our work and deserves acknowledgment and our gratitude. We would also like to thank Professor Adrien K. Wing and Raja Shehada for their insightful comments.

Who we are

Established in 1991, the Women's Centre for Legal Aid and Counselling (WCLAC) is a Jerusalem-based Palestinian NGO working to promote the legal and social status of Palestinian women. As a leading defender of women's rights in Palestine, WCLAC has built its reputation on its uncompromising commitment to providing a legal and social network of protection for women. In the current militarised environment, where human rights abuses are rampant, the plight of women is often overlooked. WCLAC attempts to deal with women's rights within the context of the broader human rights struggle for the liberation of Palestine.

Goals of the Discussion Document[37]

As part of our goal of promoting women's status and rights through the law, WCLAC undertook an extensive review of the Revised Third Draft of the Constitution of Palestine, May 2004. Looking at the Draft Constitution as a framework for governance and the basis for rights and duties, WCLAC analysed it from a women's perspective focusing on the provisions most relevant to women's concerns. In so doing, WCLAC examined the provisions of the Draft Constitution within the context of Palestinian women's lives.

Although much of the impact of a Palestinian constitution will depend on its interpretation, WCLAC seeks to ensure that women are provided with the best possible starting point. The first step is to ensure that Palestinian women are not overlooked when setting the social, political, legal and governmental framework for the future state of Palestine. Women's needs and concerns must be addressed directly by the constitution.

37 Portions of the Discussion Document were published in 11 U.C.L.A. J. Int'l. L. & For. Aff. 443 (2006).

The drafters and the wider society must consider the effects, intended or otherwise, these specific provisions could have on women.

Executive Summary

The primary goal of this discussion document is to ensure that Palestinian women are not overlooked when setting the social, political, legal and governmental framework contained in a constitution for the future state of Palestine. This means working to ensure that any draft constitution directly addresses women's needs and concerns as well as to ensure that the drafters and the wider society consider the effect, intended or otherwise, specific constitutional provisions could have on women. To achieve this goal, WCLAC analyzed the Revised Third Draft of the Constitution of Palestine, May 2004 from a women's perspective, focusing on the provisions most relevant to women.

Understanding the meaning and significance of the provisions of the Revised Third Draft of the Constitution of Palestine (Draft Constitution) requires a general understanding of the social, economic, political and cultural context of the area it is intended to cover. **Chapters I through III** of **Part I** set out to provide a general overview of what will be referred to as "the Palestinian Context." **Chapter I** explains the current state of the law in the Occupied Palestinian Territory (OPT). It examines the legal system, which is made up of state-run courts, religious courts and customary mediation, its jurisdiction and the Basic Law, which serves as an interim constitution. The chapter considers the impediments to justice in the OPT that have weakened the judiciary. **Chapter II** describes the social context, mainly focusing on women's lives. The chapter explains that women are not a homogenous group and their circumstances depend on diverse factors such as religion and marital status, as well as life under occupation and militarization. **Chapter III** discusses the Palestinian women's movement, detailing the challenges the movement confronts in achieving women's rights. The challenges addressed arise from the divergent strands and discourses of the women's movement and pressure from the nationalist movement and other political actors.

Part II examines the Third Revised Draft of the Constitution of Palestine. **Chapters 4, 5** and **6** set out preliminary matters. **Chapter 4** looks at the process of developing a constitution for the future state of Palestine. It begins by explaining why Palestinians should want a constitution, before describing the actual process. Much of Chapter 4 considers whether the Occupied Palestinian Territory is in the midst of a "constitutional moment" that could result in meaningful change in the lives of Palestinians.

Chapter 5 Part A discusses the meaning of women's citizenship, which provides a framework for analyzing the Draft Constitution. Part B examines the concept of a public-private divide that is used to define the areas of an individual's life in which the state will intervene. This helps explain many of the concerns WCLAC raises in this document. The last two sections consider practical aspects of drafting a constitution: whether the constitution should be highly detailed and whether it should contain a preamble. **Chapter 6** then discusses issues and concepts directly related to the meaning and types of human rights that may appear or should appear in the Draft Constitution.

Chapters 7 through 9 examine the individual provisions of the Draft Constitution:provisions related to the foundation of the state (**Chapter 7)**; human rights provisions (**Chapter 8)**; and governmental structures (**Chapter 9**). These chapters analyze the provisions most relevant to ensuring women's equal citizenship, as well as some general human rights issues the provisions raise.

Conclusions

This discussion document reaches many conclusions that separately and combined challenge the process and substance of the Draft Constitution. The following summarizes our main conclusions.

On its face, the Third Revised Draft of the Constitution of Palestine appears to create a strong framework for women's rights through four provisions protecting women's equality.

- Article 19 provides all Palestinians with equal protection under the law without discrimination on the basis of sex (but not gender or marital status); in addition, "Palestinian" and "citizen" explicitly include both men and women, protecting against any narrow interpretation of these words.
- Article 20 states that all citizens will have rights guaranteed on the basis of equality and equal opportunity.
- Article 22 recognizes every woman as a person before the law and states that men and women will have the same rights, freedoms and duties. This provision also protects women's independent financial assets.
- Article 23 gives women the right to "participate actively," but not necessarily equally, in "social, political, cultural and economic aspects of life." It states that the law will work to abolish restraints that stop women "from contributing to the building of family and society," Article 23 concludes that the constitutional and Shari'a rights of women, including the right of inheritance, will be protected. These are the only provisions of their kind in the Arab world.

Article 7, however, places personal status law under the authority of religion, which governs marriage, divorce, custody and maintenance and is highly discriminatory in its treatment of women. In addition, Article 23 protects Shari'a rights. These provisions may severely undercut the four equality provisions listed above.

Whether the four equality provisions can be used to tackle this discrimination will depend on whether interpreters of the constitution treat religious law as "private" and outside the control of government. Two other family-related provisions suggest that the public-private divide will remain, regardless of the equality provisions.

- Article 35 prohibits government interference in family matters with a few limitations. Separately, this provision raises the concern that domestic violence will be ignored as a "family matter" protected by privacy.
- Article 48 protects maternal and family rights. It seems likely that with the constitutional foundation of Islam in Palestine and the authority of religion over family law, the concept of family rights and care and of maternal rights and care will only further entrench women's gender roles as caretakers of their families and children to the detriment of their rights to equality as individuals.
- Taken together with Article 7, this supports our concern that the drafters intend family matters, including personal status law, to be protected from government intervention.

In the current Palestinian context, many women's rights are relational and their enforcement is dependent on their personal relationships rather than on the state, largely because of religious-based personal status law and conservative social practices. The right to work and the right to education for women, for example, depend on whether families will allow women to exercise these rights. The Draft Constitution does not appear to transform these relational rights into individual rights enforceable against the state because it does not provide explicitly for their application of human rights to non-governmental individuals, groups, or institutions. Without such application of human rights to non-governmental bodies and actors, the Palestinian government may be able to hide behind the public-private divide to avoid its responsibility to protect women from violence.
In terms of equal citizenship, the Draft Constitution fails to address the inequalities, disadvantages and discrimination women face in accessing rights, particularly in relation to the family. It also fails to provide for equal citizenship in terms of economic and political power. Article 16 establishes a free market economy, without promising to adopt measures to ensure that groups disadvantaged in the market are given equal access to it or other support.

Unlike various other post-colonial and post-conflict constitutions, the Draft Constitution contains no guarantees to ensure women's equal representation in government.

Drafting a constitution in the current political climate defeats the purpose of constitutionalism. Instead of expressing a strategic vision for the future of Palestine, the constitution reflects the current social and political climate of insecurity, instability and danger created by the Israeli occupation. This climate results from: detention and imprisonment of Palestinians, killing and injuring of Palestinians, destruction of property, restrictions on movement, confiscation of land, limited economic opportunity; and lack of access to and control over natural resources. In such turbulent times, societies tend to grow more conservative, taking comfort and security in tradition, culture and religion. They are more willing to sacrifice rights for a sense of security, which is not appropriate for a future-oriented constitution.

Although inadequate in the long term, the Basic Law can serve as an interim constitution until an appropriate and inclusive constitutional process can be undertaken. An ill-timed and ill-devised process is likely to weaken constitutionalism in Palestine and the legitimacy of the constitution. The Basic Law establishes a democracy based on the separation of powers of executive, judicial and legislative branches of government, and promises to implement the rule of law; it guarantees a free market economy and states that the "principles of Islamic Shari'a" will be a main source of legislation.

The idea that a "constitutional moment" still exists and can provide the impetus for reaching a political consensus as a basis for completing the constitutional process is highly problematic. Continuing the constitutional process when there is no independent state and without meaningful public participation is unnecessary.
Overall, the Draft Constitution seems to protect women's rights to the extent that they do not conflict with religious-based family law or threaten patriarchal power. However, it stops far short of providing women with equal citizenship.

PART I: THE PALESTINIAN CONTEXT

By themselves, the written provisions of constitutions have very little meaning. Understanding the meaning and significance of the provisions of the Revised Third Draft of the Constitution of Palestine (Draft Constitution)[38] requires a general understanding of the social, economic, political and cultural context of the area it is intended to cover.[39] Chapters I through III provide a general overview of what will be referred to as "the Palestinian Context." Chapter I explains the current state of the law in the Occupied Palestinian Territory (OPT). It examines the legal system, which is made up of state-run courts, religious courts and customary mediation, and their jurisdiction. The chapter considers the impediments to justice in the OPT that have weakened the judiciary.

Chapter II provides a brief overview of the issues Palestinians face in their daily lives. The chapter focuses specifically on women's lives and notes that women are not a homogenous group; their circumstances depend on diverse factors such as religion and marital status, as well as life under Israeli occupation and militarization.

Chapter III discusses the Palestinian women's movement and examines the challenges the movement confronts in achieving women's rights. The groups that make up the movement also have diverse discourses that reflect differences among women. Different discourses are important to women's self-expression but sometimes weaken their ability to bargain in the political arena. This chapter examines the political challenges to the women's movement that arise from nationalist discourse and from other political actors in Palestinian society.

38 Where we discuss the "Draft Constitution" we are referring to the Third Revised Draft of the Constitution of Palestine May 2004; where we discuss the "constitution" we refer to a constitution as eventually adopted for Palestine.

39 Noah Feldman, 'Book Review: Constitutions in a Non-Constitutional World: Arab Basic Laws and the Prospects for Accountable Government' 1 Int'l J. Const. L. 390, 402 (2003).

Chapter 1: Law in Palestine

Chapter I begins the process of contextualizing the provisions of the Draft Constitution by explaining law and the legal system in the Occupied Palestinian Territory. Part A explains what falls under the jurisdictional control of the Palestinian Authority according to the various agreements with Israel. Part B examines the status of the OPT under international law. Part C describes the legal system currently in place and the problems it faces.

The OPT has a long and complex history that has affected its social, economic, political, cultural and legal development. For much of its recent history, Palestine/OPT has been occupied by foreign powers that have hindered its development and struggle for self-determination. Colonialism and the Israeli occupation largely explain the OPT's outdated laws and problem-infested legal system.

1.A. Jurisdiction under Oslo and Other Agreements

In 1995, following the signing of the Oslo Accords and various other agreements between Israel and the Palestine Liberation Organization (PLO), Palestinians were given a limited measure of self-governance in the form of the Palestinian Authority (PA).[40] The PA derives its power and jurisdiction directly from these agreements, which means from the negotiations between the PLO and Israel.[41] At times the PA has managed to stretch its authority beyond the boundaries created by the agreements, but its jurisdiction remains far too restricted to meet the needs of its citizens.[42] Understanding the PA's jurisdiction to create and enforce law and social order helps explain many of the current problems Palestinians face under the PA and the Israeli occupation.

The Interim Agreement on the West Bank and the Gaza Strip or "Oslo II" agreement establishes the jurisdiction of the Palestinian Authority. Oslo II divides the OPT into areas A, B and C to correspond with levels of PA jurisdiction, but specifically excludes Jerusalem from such jurisdiction. Area A includes the Gaza Strip and the major cities of the West Bank; Area B covers small towns and villages in the West Bank; Area C consists of Israeli settlements, military installations and lands immediately surrounding these areas.

40 For purposes of this Discussion Document, institutions run by Palestinian Authority will be termed "state-run", although the PA is only semi-autonomous.

41 Given the imbalance of power between Israel and the PLO, some argue that in reality the PA derives its authority from Israel.

42 Fabio Forgione, 'The Chaos of Corruption: Challenges for the Improvement of the Palestinian Society' Palestinian Human Rights Monitoring Group (2004).

The Palestinian Authority has different types of jurisdiction for each of these three areas, which can be divided into the categories of territorial, functional and personal jurisdiction. Territorial jurisdiction is intended to give the PA physical and administrative control over territory, including over internal security and civil affairs.[43] "Territory" includes land, subsoil, and territorial waters, but not "electromagnetic space", air space or borders.[44] Territorial jurisdiction encompasses functional and personal jurisdiction;[45] it does not include control over external security and only provides limited control over infrastructure. The PA holds territorial, functional, and personal jurisdiction over Area A.[46]

Oslo II provides the Palestinian Authority with functional jurisdiction over Area B,[47] which gives the PA administrative control over civil and personal matters, but not foreign affairs or internal security matters.[48] The PA's functional jurisdiction includes health, education, land registration, local governments and parks – basically any issues considered "internal" to Palestinians and not of interest to Israel.[49] Most other powers remain in Israel's hands, such as territorial security, or are shared between Israel and the PA, such as with infrastructure issues and internal security matters.

The Palestinian Authority maintains little real power in Area C where it has only personal jurisdiction over Palestinians living there. Personal jurisdiction refers to the power of the PA over the civil matters of Palestinians. Israel holds territorial and functional jurisdiction in Area C, as well as full jurisdiction over Israeli settlements, military bases and citizens.[50] The PA has no personal jurisdiction over Israelis anywhere in the OPT, even if they commit criminal acts within Areas A and B that are under its territorial and/or functional jurisdiction.[51]

With the exception of the settlements, military installations and Jerusalem, which are to be the subject of a separate negotiated agreement, Oslo II set the course for the turnover of full territorial jurisdiction over all other land to the PA. So

43 Palestine Facts, 'Israel 1991 to Present Oslo II Agreement' www.palestinefacts.org/pf_1991to_now_oslo_accords_2.php.

44 The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (1995) Articles XVII(2)(a) and (5).

45 Palestine Facts, note 44 above.

46 Hiba I. Husseini, 'Challenges and Reforms in the Palestinian Authority' 26 Fordham Int'l L. J. 500, 508 (2003).

47 Ibid.

48 Omar M. Dajani, 'Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period' 26 Denv. J. Int'l L. & Pol'y 27, 67 (1997).

49 Ibid. at 65; Asem Khalil, 'Which Constitution for the Palestinian Legal System?' Institutum Utriusque Iuris, Chapter 1, http://it.geocities.com/frofpito/which2.html.

50 Husseini, note 45 above at 508.

51 It should be noted that this is true even for Israelis living permanently with the OPT in illegal Israeli settlements.

far this has not happened, meaning that "the Palestinian Authority governs a population, rather than a territory."52 Because the PA does not have control over the borders or a contiguous landmass, "it cannot effectively control the external or internal movement of its people, goods, services, and trade, or its scarce and limited natural resources."53 Israel's dismantling of Jewish settlements in and disengagement from the Gaza Strip has not changed the occupied status of the Gaza Strip, but has merely given the PA the same freedoms and rights it has in Area A but over a more contiguous space.

Among a variety of problems, the confused nature of this jurisdictional arrangement and the noncontiguous nature of PA territorial jurisdiction under Oslo II and other agreements weakens law enforcement in the OPT. For example, if a Palestinian receives a court order against another Palestinian living in Area C, how can the Palestinian Authority enforce the order where it has no control over internal security? Another important example for women is what happens if a woman receives a maintenance order from a Christian ecclesiastical court located in Jerusalem (there are no Christian ecclesiastical courts in the West Bank or Gaza Strip) and her husband, who lives in Area B, refuses to comply. Who has the authority to enforce that order? Limited jurisdiction over the OPT makes it extremely difficult for the Palestinian Authority to enforce social order.

These problems have been exacerbated since 2001 when the Israeli military deployed again into Areas A and B, revoking much of the security jurisdiction of the PA. While the PA security forces continue to work in these areas, Israel takes control over internal security powers at will. Israel's disengagement from the Gaza Strip has done little more than increase the space for Palestinians. Israel continues to conduct incursions into the area, has fought a war in the territory and regularly isolates the Gaza Strip.[54]

1.B. Status of the OPT under International Law

As a people, Palestinians first received status under international law in 1974 when the United Nations granted observer status to the Palestine Liberation Organization. The PLO has maintained a mission to the UN and can participate in international conferences organized by the General Assembly. At various times, the Permanent Observer Mission of Palestine to the United Nations has been invited by the UN Security Council to participate in debates related to the OPT and in the proceedings for the advisory opinion by the International Court of Justice on the *Jidar* (the Wall) Israel is building in the West Bank. Although

52 Dajani, note 47 above at 69.

53 Husseini, note 45 above at 505-506.

54 Indeed, in December 2008/January 2009 Israel waged all-out war against the population of Gaza.

Palestinians increasingly have been given rights and privileges as observers to the UN, the OPT is not yet a state and therefore does not qualify for full membership in the UN.[55] Instead, it is placed somewhere between a non-member state and regional bodies in the UN hierarchy.[56] As a result, it cannot be a signatory to international treaties, although the PA has proclaimed repeatedly its intention to abide by international law and human rights treaties.[57]

1.C. The Basic Law

Following the creation of the Palestinian Authority, the Palestinian Legislative Council (PLC) drafted the Basic Law to serve as a temporary constitution for the interim period until Palestine gains status as a state and can draft a permanent constitution.[58] The Oslo Accords and the PLC's election law provided the basis for its adoption.[59] The document was approved by the PLC in 1997 but was signed into law by President Yassir Arafat only in 2002. The initial Basic Law gave the President significant powers. As a result of international pressure, [60] the Basic Law was amended to weaken those powers and to create a Prime Minister position.[61] The Basic Law was amended again in 2005 to address the terms and elections of the President and the PLC.[62]

The Palestinian Basic Law establishes a democracy in the OPT based on the concept of separation of powers of executive, judicial and legislative branches of government and it promises to implement the rule of law.63 Each branch of government has defined competencies, with an executive branch controlled in part by a Prime Minister and his cabinet and in part by a president.64 The Basic

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55 'Justice Undermined: Balancing Security and Human Rights in the Palestinian Justice System', Human Rights Watch 14 (2001).

56 Because of the agreement between Israel and the PLO that the PA would not undertake international relations, the Palestinian Authority cannot directly participate in the workings of the UN, only through the PLO. Dajani, note 47 above at 79-80.

57 Palestinian Basic Law as Amended Article 10(2) (2003). See also 'Justice Undermined' note 54 above at 14.

58 The Middle East Media Research Institute, 'About the Palestinian Constitution' INQUIRY AND ANALYSIS SERIES - NO. 126(2003)

59 Nathan J. Brown, 'The Palestinian Reform Agenda' United States Institute of Peace PEACEWORKS No. 48 (2002) at http://www.usip.org/pubs/peaceworks/pwks48.pdf (last visited May 1, 2007.)

60 The Middle East Media Research Institute, note 57 above.

61 Larry Garber 'Palestinian Reform and International Assistance' Arab Reform BULLETIN Vol. 3, Issue 1 (2005); 'Palestinian Reform - Part 1: Palestinian Reform' USAID (2003) at http://www.usaid.gov/wbg/focus_5.htm (last visited May 25, 2007).

62 The Basic Law of 2005 A.D. Concerning the Amendment some of the Provisions of the Amended Basic Law of 2003 at http://www.elections.ps/pdf/The_amended_Basic_Law_of_2005_EN.pdf (last visited May 25, 2007).

63 Basic Law, note 56 above at Articles 2, 5 and 6.

64 Ibid. at Article 63.

Law guarantees a free market economy within the OPT,65 which is a significant break from many Arab constitutions that promise socialism.66 It also guarantees that the "principles of Islamic Shari'a" will be a main source of legislation,67 which is part of a growing trend within Arab constitutions, meaning that aspects of Islam will serve as a source of legislation.68

The Basic Law protects a variety of human rights, although the degree of protection differs greatly. It guarantees the rights to equality,[69] to freedom of belief and expression,[70] the freedom of movement,[71] along with other rights, including numerous socio-economic rights.[72] Women are specifically protected and their welfare during maternity is considered a public duty.[73]

The Basic Law permits "the law" to limit many of these rights, including the right to freedom of expression,[74] to form and join political parties[75] and the right to privacy, which suggests that they may not be fully guaranteed.[76] Other rights contain internal limitations, such as the right to freedom of belief, which allows for individuals to follow their beliefs as long as they do not violate public order and morals.[77] The Basic Law's protection for socio-economic rights appears weak at best, for example stating that the government will regulate disability and health insurance, as well as other social benefits, but without guaranteeing social welfare for the population.[78] Overall, as a framework for democratic governance and the protection of human rights, the Basic Law has several significant limitations.

1.D. The Palestinian Legal System

The Palestinian legal system is made up of the formal, state-run court system, religious courts and the informal system of customary law mediation, each based on separate sources of law. For our purposes, the PA-run legal system will be referred to as a state-run system although the PA is not a state and does not maintain full jurisdictional control over the OPT. Because the OPT has been

65 Ibid. at Article 21.
66 See e.g. the Constitution of Egypt (1971) Article 1; The Constitution of Syria (1973) Article 1; The Constitution of Libya (1969) Article 6.
67 Basic Law, note 56 above at Article 4(2).
68 See discussion in Chapter 7 (Part A-6-a).
69 Basic Law, note 56 above at Article 9.
70 Ibid. at Articles 18 and 19.
71 Ibid. at Article 20.
72 Ibid. at Articles 23, 24, and 25.
73 Ibid. at Articles 9 and 29. The meaning of the latter protection is unclear.
74 Ibid. at Article 18.
75 Ibid. at Article 26.
76 Ibid. at Article 17.
77 Ibid. at Article 19.
78 Ibid. at Article 22.

occupied for many decades, the state-run court system plays a far smaller role in the lives of Palestinians than the customary law mediation system or the religious courts.[79] The strength of these latter systems remains relatively unchallenged despite the creation of the PA.

1.D.1. The State-Run Legal System

The state-run legal system uses legislation that reflects the fact that the OPT has been occupied for over a century. Palestinians were unable to exercise self-determination and self-government until the 1996 election of the Palestinian Authority, and as a result have seen minimal development in the laws that govern them. Even when the occupiers reformed the law, they did so for their own interests rather than the interests of the local population.

What remains as law in the West Bank, Gaza Strip and East Jerusalem is a hodgepodge mixture of law from various periods in the history of the OPT.[80] Portions of law promulgated during the Ottoman Empire, the British Mandate, the occupation of the Gaza Strip, West Bank and East Jerusalem by Egypt and Jordan respectively, and the subsequent occupation by Israel still remain in force, in addition to newer legislation enacted by the PA.[81] There is little unity and coherence to the legislation, particularly since the West Bank continues to be governed by some Jordanian legislation and the Gaza Strip by some Egyptian legislation. Furthermore, much of the legislation is outdated. Since the advent of the PA, there has been little progress toward correcting these problems because of the short time in which it has been in power, coupled with the current political situation. However, as described above, the PA has adopted a Basic Law that applies to all Palestinians under its jurisdiction and is intended as an interim constitution until the OPT achieves sovereignty and a final constitution can be drafted.

The Palestinian Authority runs two types of courts as permitted in the Basic Law: ordinary courts and military courts. The ordinary courts hear civil and criminal matters. The military courts are responsible for trying cases involving state security and crimes related to the state security forces.[82] The military court procedure has been described as "summary, deficient, and unfair, especially in those cases

79 Who the state is depends on what period of history is being discussed.

80 Adrien Katherine Wing, 'The Palestinian Basic Law: Embryonic Constitutionalism' 31 Case W. Res. J. Int'l L. 383, 399 (1999).

81 Ibid.

82 'Judiciary: Palestine', United Nations Development Programme: Programme on Governance in the Arab Region, http://www.pogar.org/countries/judiciary.asp?cid=14 (last visited May 15, 2005); 'Military or Revolutionary Tribunals' Palestinian National Information Centre, http://www.pnic.gov.ps/english/gover/gover35.html (last visited May 1, 2007); George E. Bisharat, 'Peace and the Political Imperative of Legal Reform in Palestine' 31 Case W. Res. J. Int'l L. 253, 272 (1999).

that have imposed the death penalty."[83] For an 8-year period (1995-2003), the Palestinian Authority also ran security courts outside the civil and military system and without the foundation of the Basic Law. The late President Arafat ordered their creation by decree.[84] The security courts heard matters involving "crimes which infringe on internal and external state security and . . . felonies and misdemeanours mentioned in Order 555 of 1957."[85] They were a source of a large number of human rights violations and have since been abolished.

The state-run legal system has largely been de-legitimized in the eyes of Palestinian society; people have lost faith in a formal justice system that continued to run under Israeli occupation prior to the creation of the PA.[86] The courts had little independence and suffered from corruption.[87] Further, they had little real jurisdiction, as most political and security cases were handled by the Israeli administration.[88] To the extent the Palestinian courts remained operative, they were deprived of the resources necessary to hear cases efficiently, which resulted in fewer court personnel and a higher risk of corruption. Moreover, the courts lacked enforcement capability.

Since the advent of limited self-governance, the Palestinian Authority has not been able to regain people's confidence in the state-run system. Part of the reason lies in inherited problems: "(1) the absence of legal unity between the two regions; (2) confused and antiquated bodies of substantive and procedural law; (3) weak and vastly under-resourced judiciaries; and (4) a fragmented, demoralized, and poorly trained legal profession."[89] The government system also suffers from allegations of corruption and lack of independence.[90]
The Palestinian Human Rights Monitoring Group paints a bleak picture: "The judiciary is not strong enough to hold the executive accountable. This has created a situation in which ordinary Palestinians have neither the means to redress injustice, nor any protection against their abusers."[91]

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83 Bisharat, note 81 above 272.
84 'Palestinian Self-Rule Areas: The State Security Courts' Human Rights Watch Report Vol. 9, No. 10(e) 1997. http://www.hrw.org/reports/1997/palestina/Israel-04.htm#P253_49607
85 Ibid.
86 'Justice Undermined', note 54 above at 4.
87 Ibid.; Wing, note 79 above at 399; Bisharat, note 81 above at 266.
88 'Justice Undermined', note 54 above at 4.
89 Bisharat, note 81 above 262.
90 '2005 Annual Narrative Report', Palestinian Human Rights Monitor, Palestinian Human Rights Monitoring Group 18 (2006)("The PA president, ministers, and the police and security forces have systematically disempowered and undermined the authority and independence of the judiciary and legal systems."); J. Norman, 'Human Rights and Democracy: Conceptualization and Application in Palestine,' Palestinian Human Rights Monitoring Group (2005).
91 '2005 Annual Narrative Report', note 89 above at 18

The creation of the military and security courts exacerbated the weakness of the ordinary court system: "[t]he message conveyed by the existence and practices of the security and military courts is that the regular civil courts are simply not the locus of real power."[92] For example, the Palestinian High Court has declined hearing challenges to detentions by the military courts, claiming it does not have jurisdiction.[93] As a result, some Palestinians turn to the security forces to settle disputes,[94] while the majority turns to customary dispute mechanisms.

1.D.2. Religious Courts

Based on the system set up by the Ottoman Empire, members of each of the monotheistic religions represented in the OPT have matters of personal status governed by religious law.[95] Personal status law covers the areas of marriage, divorce, custody and maintenance. Shari'a law governs inheritance regardless of the religion of the deceased.

Currently, religious law in the Occupied Palestinian Territory means Shari'a law for Muslims and any of four different types of Christian laws corresponding to the main Christian denominations represented and recognized in the OPT: Orthodox, Catholic, Assyrian and Protestant. Although there have been discussions in the PA about unifying personal status law, no legislation has been passed. Any efforts at unification of the law will face stiff opposition, as religious leaders have been able to link recognition of religious law with nationalism. For example, because personal status law is one of the only areas of law to survive secularization and colonialism, some Muslims view it as "a symbol of Muslim identity, the hard irreducible core of what it means to be a Muslim today."[96]

For Muslims, the substantive law derives in part from legislation enacted by Egypt for Gaza, and Jordan for the West Bank,[97] which highlights the disunity of Palestinian law. Due to over 30 years of Israeli occupation, reforms of personal status law that have improved women's status in other Arab nations, including Egypt and Jordan, have not yet been adopted in the OPT. Christian personal status laws depend on the Christian denomination to which a person belongs.

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92 Bisharat, note 81 above at 272.
93 Ibid.
94 Husseini, note 45 above at 533.
95 Sh'hada, 'Gender and Politics in Palestine: Discourse Analysis of the Palestinian Authority & Islamists' 11 U. Miami Int'l & Comp. L. Rev. 3, 45 (2003).
96 Lynn Welchman, 'Islamic Family Law Text and Practice in Palestine' Women's Centre for Legal Aid and Counselling, 12 (1999).
97 Ibid. at 18.

The main criticisms of the religious laws are that they fail to address the current needs of Palestinian women and often discriminate against them. In the past several decades the personal status law under each religion has developed little to accommodate new human rights standards. Many of the laws were codified well before international acceptance of human rights norms; none of the laws were adopted since the time of the acknowledgment of the importance of women's human rights. There have been few successful efforts to reform personal status law even though such reforms are occurring in other Arab and Muslim countries. As a result, the personal status laws that govern Palestinians fail to reflect changes in norms within Palestinian society and the wider world.

Religious courts applying religious law discriminate against women.
In some instances the religious courts hear personal injury disputes and award compensation. Compensation for injuries to a woman is less than for injuries to a man.[98] Furthermore, women's testimony before Shari'a courts is given only half the weight these courts give to men's testimony. Another criticism is that the leadership is not representative of the community, particularly of women.

With regard to Christian churches, all four of the main ecclesiastical courts are located in Jerusalem. Access to them depends on Israeli authorities who regularly deny Palestinians permission to enter Jerusalem. Although some religious leaders travel to areas of the West Bank, most cases filed by attorneys are postponed indefinitely because the litigants cannot reach the courts, which means that the cases have no final outcome.[99]

1.D.3. Customary Law Mediation

Customary law mediation is an informal system of dispute resolution in the Occupied Palestinian Territory. It is a clan or family based system in which individuals with complaints work through their families or clans to achieve resolution of disputes, justice and social order. Customary law derives from a combination of cultural practices that originated prior to Shari'a law, as well as newer cultural practices and current law. It falls outside the civil and religious legal systems, and consists of "traditional oral customs and norms that stress conciliation, mediation, and family and group honour."[100] There are no rigid rules under customary law and outcomes depend greatly on negotiations between the clans or families who serve as negotiators for the individuals.[101]

98 Wing, note 79 above at 396.

99 Interview with Nabil Mushahwar, Advocate, Ramallah, West Bank (February 17, 2005).

100 Wing, note 79 above at 396.

101 Ifrah Zilberman, 'Palestinian Customary Law in the Jerusalem Area' 45 Cath. U. L. Rev. 795, 800 (1996).

Importantly, injuries to an individual are considered an injury to the family or clan, and families and clans share liability with the individual.[102]

Customary law as practiced today covers areas of law such as contract, labour, land, trespass, and personal injury.[103] This traditional law is even used to deal with crimes, including murder and rape.[104] Importantly, customary law has a variety of offences that relate to the conduct of women: "Women are considered 'repositories of family honour,' and therefore female chastity and purity must be maintained to avoid disgrace to the family and clan."[105] Customary law mediators view violations related to sexual purity to be among the most serious they confront.[106] In this respect, customary law works hand in hand with religious rules.[107]

If the families of both parties to the dispute agree to settle it through customary law, they seek a mediator to start the process.[108] Mediators typically are notable members of the community: "these individuals are always powerful, and they are always men."[109] With the agreement of the senior males representing the families,[110] the mediators have the power to reach a binding settlement or *sulha*.[111]

The customary law process is generally accommodated by the state-run court system.[112] If the parties reach a *sulha*, they can inform the court and any legal proceeding brought to the court may be dropped. If the matter involves a crime, the court will continue proceedings if all issues were not resolved during the mediation.[113] Members of the formal legal system view the customary system as complementary. It maintains social harmony, reduces the burden on the state-run courts and deals with disputes that the formal system is currently unable or unwilling to handle.[114]

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102 Wing, note 79 above at 396; Zilberman, note 100 above at 804.

103 Wing, note 79 above at 396-97; Hillel Frisch, 'Modern Absolutist of Neopatriarchal State Building? Customary Law, Extended Families, and the Palestinian Authority' 29(3) Int'l J. of Middle East Stud. 341, 347 (1997).

104 Interview with Dima Khalidi, Birzeit University Institute of Law (April 14, 2005).

105 Adrien Katherine Wing, 'Custom, Religion, and Rights: The Future Legal Status of Palestinian Women' 35 Harv. Int'l L. J. 149, 154 (1994).

106 Nadera Shalhoub-Kevorkian, 'Mapping and Analyzing The Landscape of Femicide in Palestinian Society' Women's Centre for Legal Aid and Counselling 50 (2004).

107 Wing, note 104 above at 154.

108 Zilberman, note 100 above at 802; Khalidi, note 103 above.

109 Wing, note 104 above at 396; See also, Shalhoub-Kevorkian, note 105 above at 48.

110 Lisa Taraki, 'Palestinian Society: Contemporary Realities and Trends' in Palestinian Women: A Status Report, Birzeit University Women's Studies Program 17-18 (1997).

111 Wing, note 79 above at 396.

112 Ibid.

113 Khalidi, note 103 above.

114 Ibid.

While the customary law system gained strength, the Palestinian-run court system deteriorated and lost much of its credibility. Customary law mediation is the most prevalent form of dispute resolution in the OPT.[115] The reasons for this reflect the history of the occupation of Palestine. Since 1967, Israel usurped much of the jurisdiction of the Palestinian courts, which meant that Palestinians seeking justice would need to turn to the occupier for help – something they were reluctant to do.[116] For Jerusalemites, the customary law system provides an alternative dispute resolution system to using Israeli courts.[117]

Customary law proponents also have successfully linked the customary law process with nationalism, highlighting that this system is indigenous and therefore authentic.[118] Because of this, customary law decisions are generally more respected than the decisions of the state-run courts. The credibility of the customary law system has been further enhanced by the fact that mediators come from the participant's community, which aids concessions between the parties.[119] On a more practical level, financial constraints and insufficient numbers of Palestinian courts and court personnel creates a backlog of cases, whereas customary law mediation generally is completed within three months.[120] The customary law system has been credited as "the linchpin holding society together and maintaining internal order."[121]

The strength of the customary law system highlights the weakness of the Palestinian Authority, which has been unable to gain control of the dispute resolution process. To some extent, the customary law system has been able to co-opt the Palestinian Authority into accepting its power. Recognizing its own weakness, the PA actively participates in the customary law mediation process. PA officials may act as mediators or refer matters to this system.[122] For women's issues, this is particularly true. Members of the PA's security forces often refer disputes related to 'honour' to the customary law system.[123] Police officers and other government officials explain that the "ineptness and marginalization of the formal judicial system" and the security service's inexperience and discomfort with issues involving women's sexuality result in this outcome.[124]

115 Shalhoub-Kevorkian, note 105 above at 49.
116 Taraki, note 109 above at 17-18.
117 Zilberman, note 100 above at 800.
118 Frisch, note 102 above at 346-47.
119 Sh'hada, note 94 above at 5.
120 Khalidi, note 103 above.
121 Zilberman, note 100 above at 802.
122 Fadwa al-Labadi, 'Appendix Case History: Diya Between Shari'a and Customary Law' 168 in Lynn Welchman (ed.) Women's Rights in Islamic Family Law: Perspectives on Reform 168 (2004); Frisch, note 102 above at 350.
123 Shalhoub-Kevorkian, note 105 above at 49.
124 Ibid. at 50.

Criticisms of the customary law system abound. First, women are almost completely excluded from acting as mediators and negotiators. They cannot bring a complaint through the system without the support of their family. This means that women's disputes may never be addressed; or, if addressed, women will not be heard by their peers. Further, the customary law system has been accused of not only failing to serve women's interests but of shoving them aside in favour of the interests of the family.

Women are particularly at risk for unfair outcomes in disputes related to 'honour'.[125] Because customary law depends so heavily on social and religious practices, the outcomes tend to favour men and family interests. Research highlights a bias against women in disputes arising out of women's alleged sexual transgressions. For example, one customary law mediator noted: "whenever a woman is suspected of anything, it is a sign that she has done something grievous."[126] Turning to the customary law system often results in violations of women's procedural and substantive rights typically to protect the interests of her family.

Critics further argue that families and clans use the system as a "vehicle of inter-clan rivalry and struggle for domination."[127] The power of the clan or family will determine the result of the negotiations.[128] These critics conclude that the family or clan's economic and social position in the community inappropriately influences the outcome of the dispute resolution process.[129]

1.E. Conclusion

The Palestinian legal system is riddled with problems. Because Palestine has been occupied over the last 100 years, the West Bank, including East Jerusalem and Gaza Strip not only are governed by a variety of outdated sources of law but also have separate laws applicable to each area. While law reform in other Arab and Muslim nations has begun to advance human rights and women's rights, the OPT has seen few benefits from those reforms. Exacerbating these problems is the weakness of a formal legal system, distorted through occupation and discredited by corruption, and the resulting increase in power of the informal customary law system and religious courts. So far, the Palestinian Authority has been unable to regain control over dispute resolution, which places determination of justice and social harmony in the hands of customary law mediators and religious leaders. This defeats the purpose of the rule of law, which is to apply the same law to all persons equally.

125 Ibid. at 49.
126 Ibid. at 53.
127 Zilberman, note 100 above at 798.
128 Ibid.
129 Shalhoub-Kevorkian, note 105 above at 49.

Chapter 2: The Context of Palestinian Women's Lives

Chapter 2 describes the context of Palestinian women's lives to provide a basis for understanding the meaning and effects of the provisions of the Draft Constitution. Palestinian society as a whole faces enormous difficulties, including violations of human rights committed by Israel, the indignities of occupation and poverty, and uncertainty under the new Palestinian leadership. However, women experience these difficulties differently from men. It is important for the drafters of a Palestinian constitution and for a society that will vote (hopefully) on its adoption to understand the likely differential impact of the constitutional provisions on women.

2.A. Demographics of the OPT

The Occupied Palestinian Territory is made up of the West Bank, Gaza Strip and East Jerusalem. It is hard to establish the total population of these areas accurately because of the number of Israelis who have moved into East Jerusalem. It is estimated that approximately 3.7 million Palestinians live in the West Bank and the Gaza Strip, and about 210,000 Palestinians in East Jerusalem.[130] A large percentage of Palestinians living in the West Bank and the Gaza Strip are refugees displaced from areas that were part of Palestine before the creation of the state of Israel in 1948.[131] Women make up 49% of the Palestinian population.[132] Approximately 98% of Palestinians living in the OPT are Muslim, though estimates vary on what percentage of the population is Christian.[133] The mean age of Palestinians, as of 1999, was 16.4 years old, making the OPT a country of young people.[134]

2.B. Current Situation inside the OPT

Palestinians living in the Gaza Strip and West Bank, including East Jerusalem, share a social, political, economic and legal context, despite the fact that these areas were divided between Egypt, Jordan and Israel, respectively. Though physically separated, these areas form one political entity. This new entity, currently represented by the Palestinian Authority, is working hard to develop a sovereign state and establish peace and self-determination for its constituents. Unfortunately, the PA has inherited a variety of problems.

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130 Palestinian Central Bureau of Statistics at http://www.pcbs.org/; U.S. Department of State, Annual Report on International Religious Freedom (2004).

131 Maha Abu-Dayyeh Shamas, 'Women In situations of Organized Violence A Case of Double Jeopardy: The Palestinians' (2003) 7.

132 Ibid.

133 U.S. Department of State, note 129 above.

134 Abu-Dayyeh Shamas, note 130 above at 7.

For the past century or more, the OPT has been exploited economically by various occupiers less concerned with the economic, social, and development needs of the Palestinian population and more with how to use Palestinian people and resources to achieve their own goals. These occupiers did little to build up public services and infrastructure, leaving the PA with insufficient resources to accomplish its development.[135]

Palestinians living in the West Bank and Gaza Strip experience high rates of unemployment and poverty. In the 4th quarter of 2004, the Palestinian Central Bureau of Statistics (PCBS) put the unemployment rate at 25.7%.[136] The World Bank estimates the percentage of Palestinian people living below the poverty line in PA controlled areas at between 38% and 51%; while the PCBS estimates it at between 61% and 72%.[137] As a consequence of poverty and unemployment, social welfare is particularly important to Palestinians. For example, many households require some food aid assistance to survive.[138] The government has insufficient funds to address the nation's economic problems, which forces Palestinians to rely more and more on their families. Meagre family resources are being stretched to the breaking point.

Equally problematic is the state of the healthcare system. The PA inherited "severe deficiencies in the areas of infrastructure, services and human resources due to minimal investment and years of neglect."[139] These deficiencies cause long waits and overcrowding in clinics and hospitals, most of which are located in urban areas.[140] While healthcare for children under 3 is fully covered by the government, there is at least some cost to Palestinians for medical treatment at state-run facilities.[141] The PA has been unable to meet the health needs of a growing population, despite allocating "a major share of the national resources" to healthcare.[142]

135 Penny Johnson, 'Social Support, Gender and Social Policy in Palestine' in Palestinian Women: A Status Report, Birzeit University Women's Studies Program (1997) 5.

136 'Press Release on Labour Force Survey Results (October-December, 2004)', Palestine Central Bureau of Statistics 3 (2005). The PCBS used International Labour Organisation standards for determining the rate.

137 'Deep Palestinian Poverty in the Midst of an Economic Crisis', The World Bank and The Palestinian Central Bureau of Statistics 11 (2004).

138 'The Impact of the Conflict in the Occupied Palestinian Territory on Women', UNIFEM, http://www.womenwarpeace.org/opt/opt.htm#impact (last visited May 2006).

139 'Social and Economic Situation of Palestinian Women, 1990-2003', United Nations Economic and Social Commission for Western Asia, 20, http://www.escwa.org.lb/ecw/editors/pubs/wom-04-1.pdf (last visited May 2005.)

140 Motasem Hamdan, Mia DeFever, and Ziad Abdeen, 'Organizing Health Care Within Political Turmoil: the Palestinian Case,' 19 Int'l J. Health Planning and Mgmt. 63, 69 (2003).

141 Ibid.

142 Ibid. at 74.

Another serious problem the PA faces results from the non-contiguous nature of the territory it governs.[143] Administering areas that government leaders cannot access because of Israeli-imposed restrictions on Palestinian people's mobility means that some areas may be neglected or may not fall under centralized oversight.

Despite some trappings of democracy, the late President Arafat ran the PA more like an authoritarian government in which he controlled all branches. As part of its control apparatus, the executive branch of the Palestinian Authority developed an extensive network of security forces that have been responsible for human rights violations against Palestinians—that is, those not caused by the Israeli occupation forces.[144]

The Israeli occupation causes separate problems that enhance the powerlessness of the Palestinian Authority to meet the needs of its constituents. These problems include: the detention and imprisonment of Palestinians, the killing and injuring of Palestinians, destruction of property, restrictions on movement, confiscation of land, limited economic opportunity; and lack of access to and control over natural resources. The list of abuses under occupation seems endless.

One of the most pressing human rights issues affecting Palestinians is freedom of movement. Since 2002, Palestinian mobility within and between the Gaza Strip, the West Bank and East Jerusalem has been much more restricted. Israeli authorities have placed more and more checkpoints to inhibit movement, which is further aggravated by the building of the *Jidar* (the Wall).[145] At the checkpoints Israeli soldiers delay and harass Palestinian people who have to pass through the checkpoints to get to work or to hospital—all the errands and visits that are part of daily life. Additionally, Israel has subjected the West Bank and Gaza Strip to a strategy of repeated closures and curfews. Palestinians have been cut off from jobs, education, families and healthcare, exacerbating poverty and hardship in the OPT.

The creation of Jewish settlements, military bases and the *Jidar* (the Wall) through land confiscation has resulted in untold hardship to Palestinian farmers. Israeli authorities have destroyed productive agricultural land, fruit trees, and olive groves, which served as an income source for their Palestinian owners.[146] Israeli settlers have killed, shot at and beaten up Palestinians, as well as destroyed

143 John Strawson, 'Palestine's Basic Law: Constituting New Identities Through Liberating Legal Culture' 20 Loy. L. A. Int'l & Comp. L. J. 411, 413 (1998).

144 Bisharat, note 81 above 272. See also, "Palestinian Self-Rule,' note 83 above. Forgione, note 41 above.

145 On WCLAC's use of the term the jidar refer to the Glossary.

146 'The Impact of Armed Conflict on Palestinian Women', UNIFEM/UNDP-PAPP, 18 (2002).

property, acts which generally go unpunished by the Israeli government.[147] Many Palestinian families find themselves essentially imprisoned by the encroaching settlements, settler violence, and the *Jidar* (the Wall).

Israeli military incursions also have a profound affect on Palestinian life. Many people have died, become disabled, suffered serious injuries, or had property destroyed by Israeli troops. Additionally, Palestinians find themselves arbitrarily arrested and detained by the Israeli military, often for long periods of time and extra-judicially. The ongoing violence further affects the psychological well being of many Palestinians.

Access to natural resources is a major concern in the West Bank and Gaza Strip, particularly water, which is necessary for physical and economic survival. Israel maintains control over water sources in these areas to the detriment of Palestinians.[148] Israel has restricted Palestinian water use while increasing the proportion the Israeli settlers receive.[149] Systematic restrictions on movement make it difficult for tankers to bring in water[150] and the *Jidar* (the Wall) is cutting off Palestinians from well water.[151]

The impact of the daily humiliations and the gross violations of human rights by Israel cannot be underestimated or overstated. In the space available here we can only sketch the effects of the Israeli occupation on Palestinians.

2.C. Women in the OPT

This section describes Palestinian women's situations and the specific impact of Israeli occupation and militarization on women. Palestinian women are not a monolithic group. Instead, their roles, problems, needs, and benefits depend on such diverse factors as age, marital status, religion, class, whether they have children or are employed. In combination, the impact of these factors is more complicated. Exacerbating these complexities is the occupation and militarization of the OPT, which affect women's everyday physical, economic, and emotional security. This includes the militarization of Palestinian communities as well as Israeli militarism and occupation.

147 ‹Settler Violence: The Nature of the Violence›, B›Tselem, http://www.btselem.org/english/Settler_Violence/Nature_of_the_Violence.asp (last visited May 2005).

148 'Water – a Dehydrating Predicament', The Palestinian Initiative for the Promotion of Global Dialogue and Democracy (2004).

149 Ibid.

150 UNIFEM, note 137 above.

151 The Palestinian Initiative, note 148 above.

Palestinian society is patriarchal, placing nearly all power – familial, political, and financial – in men's hands. This is also translated into law: men are expected to be breadwinners and to support their families; women are not expected to work outside the home. Men control the vast majority of financial resources in Palestinian society.[152] Women's access to financial resources is through their fathers when they are unmarried and through their husbands when married.[153] Women have important roles within their families but men are presumed to hold the decision-making power, in part because of their financial power.[154] Insufficient government assistance, combined with increasing rates of poverty and unemployment, increases everyone's dependence on the family, maintaining a strong patriarchal system.[155]

Within the family, women are wives, mothers and caregivers. They are responsible for reproduction, nurturing and "preserv[ing] tradition, national heritage, and culture, and its symbols."[156] These roles are crucially important to Palestinian society, particularly in the midst of a protracted struggle that attacks its national and cultural identity. Women create the nation by bearing and rearing children. They are respected for this as long as they remain within a patriarchal power structure. The honour of the family and the nation is located in the female body; invoking a patriarchal concept of family and national honour is a powerful instrument of control over women.[157]

Finally, men also hold political power in the OPT, a point we develop below in Part C(7) of this chapter. Women are underrepresented in national and local government, and have inadequate political power to ensure that their needs and concerns are addressed.

152 Taraki, note 109 above at 18.

153 Cheryl A. Rubenberg, 'Palestinian Women: Patriarchy and Resistance in the West Bank' (2001) 151.

154 Ibid.

155 Rita Giacaman, Islah Jad and Penny Johnson, 'For the Common Good? Gender and Social Citizenship in Palestine' Middle East Report No. 198 (1996) 13.

156 Amrita Basu (ed.) The Challenge of Local Feminisms: Women's Movements in Global Perspective (1995) 229.

157 Shalhoub-Kevorkian, note 105 above at 9 (quoting AM Baker & N Shalhoub-Kevorkian, 'The Effects of Political and Military Trauma on Children: The Palestinian Case' 19 Clinical Psychology Review 935 (1999)). See also, Abu-Dayyeh Shamas, note 130 above at 12.

2.C.1. Girls and Young Women

Discrimination against girls starts at birth.158 Societal preferences are for male children, meaning that scarce resources may be saved for boys. For example, boys are likely to be taken to a doctor or clinic sooner than girl children.

Girls also suffer from discrimination in education. Although Palestinian boys and girls attend secondary school at similar rates, their reasons for dropping out are gender-based.[159] Girls drop out because (1) they marry at a young age and are discouraged from returning to school;[160] (2) parents are reluctant to send their daughters to school through checkpoints or past Israeli soldiers, particularly since the start of the Second Intifada in September 2000;[161] (3) they are needed at home to help the family, and (4) if families cannot afford for all their children to attend school, they favour boys' education as "an investment in the family's future."[162] Boy children tend to drop out for financial reasons – they need to work to help support the family.

Girls and young women who continue their studies are pressed into educational fields considered suitable for women. As a result, they tend to study social sciences or nursing, rather than physical sciences, business or engineering.[163] Training courses also are geared towards separate roles for men and women.[164] Gender segmentation in education and training greatly affects women's employment opportunities, typically pushing them into lower-income and lower-status jobs.[165]

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158 Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women defines discrimination against women as:

For the purposes of the present Convention, the term «discrimination against women» shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Temporary measures intended to correct historical and current discrimination are not considered discriminatory. G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1981) Article 4.

159 'Implementation of the International Conference on Population and Development, Program of Action (PoA) 1994-2004' National Report of the Occupied Territories 59

160 Welchman, note 95 above at 36.

161 Mono Ghali, 'Education, A Gender Profile of the Determinants and Outcomes of Schooling in the West Bank and Gaza Strip' in Palestinian Women: A Status Report, Birzeit University Women's Studies Program (1997) 30; Abu-Dayyeh Shamas, note 130 above at 12; UNIFEM, note 137 above.

162 Rubenberg, note 152 above at 124.

163 Ghali, note 160 above at 30. See also Economic and Social Commission for Western Asia, note 138 above at18.

164 Maha Abu-Dayyeh Shamas and Sama Aweidah, 'Towards Gender and Development (GAD) in Palestinian Society: An Approach for Development Cooperation' prepared for the Italian Development Cooperation (2002) 16.

165 With respect to pressure on young married girls and education, see Ghali note 160 above at 30.

Finally, Palestinian society places many restrictions on adolescent girls. Some are forbidden to go out for fear that they will ruin their family's honour. Others face forced modesty and veiling before their parents will let them leave the house. Adolescent girls, along with women of reproductive age, are at great risk of being killed (femicide) if accused of violating family honour. This can include sexual violence committed against them.[166]

2.C.2. Women of Reproductive Age

Societal attitudes toward women differ greatly based on their marital status, with married women accorded the most respect. Unmarried and divorced women often find that they face disadvantages that married women do not.

2.C.2.a. Unmarried Women

The norms of Palestinian society pressure single women to marry. Society places great value on women's roles as mothers and wives and expects women to focus on that goal. Factors such as poverty and the violence and insecurity caused by the Israeli occupation only increase this pressure. A number of parents push for early marriages so their daughters will become someone else's financial burden;[167] other parents feel that it is safer for their daughters if they are married; while still others fear that unless their daughters are married young, they will betray their family "honour" in pre-marital relationships. Those who marry young tend to have less choice about their husbands and less access to further education.[168]

Unmarried women face discrimination on a number of issues. Single women report that healthcare providers assume that any unmarried woman seeking gynaecological care must have had pre-marital sex. Consequently, unmarried women may be forced to submit to pregnancy tests and virginity tests against their will. In fact, such examinations are "standard procedure approved and regulated by the Attorney General" and are part of police procedure in cases of suspected sexual abuse.[169] Single women are deprived of their rights to control their healthcare and bodily integrity.

The social welfare system offers little help to single women. It currently provides assistance to women as widows or wives, including wives of workers, men with disabilities, or prisoners, expecting most other needy Palestinian women (and men) to turn to their families for support. Because of migration of Palestinians

166 Abu-Dayyeh Shamas, note 130 above at 12. See also, Shalhoub-Kevorkian, note 105 above at 9.
167 Giacaman, Jad and Johnson, note 154 above at 14.
168 See Ghali, note 160 above at 30.
169 Shalhoub-Kevorkian, note 105 above at 76.

out of the OPT, women have fewer family resources on which to rely. Single women without families suffer from the highest rates of poverty.[170]

2.C.2.b. Married Women

The first problem married women face is that they may not have a choice about whom they marry. While both Christianity and Islam require that women give their consent before marriage, in practice, many women find they are effectively denied this right. In some instances, heavy family and societal pressure push women into marriage against their will, although they may never complain about it.[171] In other instances, women are denied their right to choose their spouses when they try to marry men without their families' or guardians' approval. Religious leaders sometimes refuse to marry a couple without family consent.[172]

Equally important for Muslim women is the legal right of their husbands in the West Bank and the Gaza Strip to marry additional wives.[173] Muslim law permits polygamy, providing men the right to marry up to four wives at one time on condition that they treat each wife equally and provide each of them with their maintenance rights.[174] These conditions are considered binding on the man's conscience rather than legally enforceable.[175] Nothing in the laws governing the West Bank or the Gaza Strip requires the man to inform his wife (or wives) of his intention to marry additional wives.[176]

Another issue concerns the effect of early marriages on women's health. Having children at a young age puts women's bodies at risk, and statistics show an increase in the mortality rate of and pregnancy complications for women who have children while teenagers.177 Additionally, raising children and running a household is physically taxing work, especially under the violence and upheaval of occupation. At times it is too much for young women. Early marriages deny young women their childhoods, in addition to risking their education. For all these reasons, many women's groups are lobbying the Palestinian Legislative

170 UNIFEM, note 137 above.

171 Rubenberg, note 152 above at 151

172 Welchman, note 95 above at 39.

173 East Jerusalem is under the jurisdictional control of Israel, which prohibits polygamy.

174 Welchman, note 95 above at 81, 92 and 93.

175 Ibid. at 81.

176 Ibid. at 95. Women may be able to limit the husband's polygamous rights by placing the restriction within their marriage contract that the husband may not take additional wives. The stipulation does not actually stop the man from taking additional wives but makes it more likely that a court will grant the woman a divorce based on the husband's breach of contract.

177 'Technical Areas: Adolescent Maternal Health' United States Agency for International Development, http://www.usaid.gov/our_work/global_health/mch/mh/techareas/adolescent.html

Council to increase the age of marriage for boys and girls to 18, and only allowing boys and girls between the ages of 16 and 18 to marry with the approval of a court. According to Jordanian Personal Status Law, which applies in the West Bank, the current marriage age is 15 Hijri (lunar) years for a girl and 16 for a boy, or 14 and a half, and 15 and a half on the Western calendar. In East Jerusalem, where the Jordanian Personal Status Law (reformed in 2001) applies, the age for both is 18 years.

Another issue for married women, although not always problematic, is the high rate of fertility in the Occupied Palestinian Territory. The OPT has one of the highest fertility rates in the world.[178] Many women complain that they have little control over family size. Women with daughters are pressured by their husbands and family to have boy children, regardless of the number of children they already have. Although the fertility rate is declining, it continues to strain women's health as well as family life and government resources. In the Palestinian context, high birth rates are partly due to the severe disruption of war, the many war-related deaths of Palestinian children and youth, as well as high levels of imprisonment and emigration of mostly male youth, making women desire large families to provide them with a measure of security especially in their old age.

For women who are unable to have children, infertility leaves deep wounds, including the fact that they are treated with less respect than other women. While the Palestinian healthcare system caters to pregnant women, it provides little treatment for infertile women unless they can afford to pay for it. Infertile Muslim women further risk being subjected to polygamous marriages as their husbands marry additional wives in order to father children.

Muslim married women face distinct problems not experienced by Christian women. Under Shari'a law, which governs personal status matters, women owe their husbands a duty of obedience and in return receive a right to maintenance.[179] Obedience typically means that the wife lives with her husband, provides sexual relations and only works or travels with his permission.[180] This concept of obedience has allowed men to restrict their wives' movement and to stop them from working; if the women refuse to comply, they relinquish their financial entitlements from their husbands. While Shari'a courts are increasingly reluctant to force women to stop working, the concept of obedience subjugates women to men.

178 United Nations Economic and Social Commission for Western Asia, note 138 above at 9-10.

179 Welchman, note 95 above at 101.

180 Ibid. at 102-3 and 121. In practice, men rarely restrict their wives from working because of the economic and political situation in Palestine.

Another issue for married women results from their roles as caretakers. Women are responsible for the emotional and physical health of their families and are increasingly pressed to contribute financially while maintaining the role of primary caretaker.[181] The demands of caretaking have grown as a result of the occupation, including the need to care for an increasing number of people with injuries and disabilities.[182] Confronted with the psychological and often physical trauma of children, husbands and family members, married women face daily challenges in fulfilling their roles and responsibilities.[183]

Married women in unhappy marriages face societal pressure to keep their families intact. Palestinian society frowns on divorce, even for those whose religions grant it, which pressures women to put up with unhappy marriages and maintain family harmony. Added to that, under religious-based personal status law, divorces typically result in unfavourable maintenance and custody orders for women, discussed below.[184]

Women in violent relationships confront great pressure to stay in their marriages. Rates of violence against women in the OPT are high,185 and are aggravated by the occupation, as men take out their rage and frustration on their wives.186 To some extent, society accepts a husband's right to chastise his wife, which seems to mean a "light" beating.187 Palestinian law does little to deal with the issue,188 and the police often refuse to come to the aid of women, treating domestic violence as a problem to be dealt with by the family. As one Palestinian police officer explained, "issues related to women are usually very complicated, and it is difficult for us as police officers to start wheeling and dealing with fathers and brothers. It is difficult because we are basically men and it is not acceptable that male police personnel interfere in the family affairs of another man."189 Women can turn to the religious courts hoping for a solution to domestic violence, many Muslim women fear that if they do so their husbands will divorce them, which is not necessarily the result they are seeking.190

181 Abu-Dayyeh Shamas, note 130 above at 11.
182 UNIFEM, note 137 above.
183 Randa Siniora, 'In the Shadow of Occupation', Al Haq submission to Sanabel Committee in Support of Palestinian Women and Children (2003); UNIFEM, note 137 above.
184 Rubenberg, note 152 above at 145.
185 Program of Action, note 158 above at 63.
186 Siniora, note 182 above; UNIFEM, note 137 above.
187 Rubenberg, note 152 above at 140. See also, Isha Khan, 'Islamic Human Rights: Islamic Law and International Human Rights Standards' 5 Appeal 74, ¶18 (1999).
188 'Strategies for Post-Beijing Palestinian Governmental Plan of Action Through the Year 2000' submitted by the Palestinian Observer Mission to the United Nations Committee on the Elimination of Discrimination Against Women.
189 Shalhoub-Kevorkian, note 105 above at 76.
190 Rubenberg, note 152 above at 142.

Married women, like unmarried women, remain subject to notions of "family honour" that limit their behaviour. The main threat for married women is that they will be suspected of adultery, which could result in "honour killing" – which WCLAC refers to as femicide.

Finally, the severe disruption of war and high rates of male emigration impose additional burdens on married women who care for large families, including those injured through war, and the elderly. This is a clear example of the way militarization affects women's daily lives.

2.C.2.c. Divorced Women

Religious-based personal status law governs divorce. As a result, Palestinian women do not have equal rights to divorce. Moreover, Muslim women's rights to divorce are very different from those of Muslim men. Under Shari'a law there are separate divorce procedures for men and women. A man has the right to divorce his wife unilaterally, which in the Gaza Strip may be done without the woman's knowledge. Throughout the OPT, a husband can exercise his right to divorce outside of court.[191] Muslim women cannot receive a divorce without the permission of their husbands, a *khul'* divorce, unless they reserved that right in their marital contract. To gain permission for a *khul'* divorce, women often renounce their financial rights[192] and sometimes give up custody of their children. Some men deliberately antagonize and mistreat their wives until they agree to a *khul'* divorce so that the men will be released from their financial obligations.[193] The vast majority of divorces are *khul'* divorces, which means in most cases women have had to relinquish their financial rights.[194]

Muslim women also may apply for legal dissolution or judicial separation.[195] A court will order a divorce if the marriage is irregular, such as when the parties marry under duress, coercion or under the minimum marriageable age. Grounds for judicial divorce include: (1) absence of the husband for a year or more resulting in injury; (2) non-payment of maintenance by the husband; (3) discord and strife; (4) imprisonment of the husband for 3 or more years; (5) insanity of the husband; (6) if a spouse has a dangerous, contagious disease; (7) if a spouse suffers from a disease or disability that prevents the consummation of the marriage, including impotence; (8) non-payment of dowry; and (9) the disappearance of the husband.[196]

191 Welchman, note 95 above at 136-137.
192 Ibid. at 137.
193 Ibid. at 143.
194 Ibid. at 142.
195 Ibid. at 135.
196 Ibid. at 175.

Christian women also find the issue of divorce extremely difficult.[197] Catholic and Protestant church-followers cannot divorce. At best, and only under extremely limited circumstances can such women receive an annulment. This will be granted only if spouse "A" discovers a material fact about spouse "B" which spouse "B" knew at the time of the marriage but spouse A only learned of afterwards. Examples of this include mental illness, infertility or a chronic disease. If granted an annulment, the spouses may remarry. Catholic and Protestant churches also will order an annulment if there is proof that the woman was forced into marriage. For most Catholic and Protestant women, their only real hope of ending an unhappy or violent marriage is that the religious leader will grant them a separation as a partial, although not legal, end to the marriage.

Women married in the Assyrian and Orthodox churches may receive divorces, but only at the discretion of religious leaders. Spouses may receive a divorce if they can prove they are unable to continue the marriage. This is a difficult standard to prove as the ecclesiastical courts are looking for something like mental illness or disease that makes continuation of the marriage impossible, not whether the married couple is unhappy. The Assyrian and Orthodox churches also provide for legal separation. A woman in a violent marriage may be able to get a divorce in either ecclesiastical court, but also may be limited to separation or may find no remedy at all.

As this overview of religious-based personal status laws shows, many women are forced to remain in miserable situations with little or no recourse to law. Even when they are able to obtain an annulment, divorce or separation, they may find their situation equally difficult because of custody and maintenance rulings by the Shari'a and ecclesiastical courts.

Under Shari'a law, divorced women are entitled to maintenance payments during the '*idda* period. '*Idda* is the period after a divorce during which a woman may not marry; it typically lasts about three months unless the woman is pregnant at the time of the divorce. If the husband unilaterally and arbitrarily divorces the woman, she may qualify for one year of maintenance. Maintenance orders are decided based on the man's circumstances rather than the woman's, and the payments ordered are typically very low.[198] The assumption is that a divorced woman will return to her family and become their financial responsibility.[199] Also, the payments are set without consideration of a woman's contributions to the

197 The description of Christian personal status law is based on an interview with Nabil Mushahwar. See note 98 above. Mr. Mushahwar specializes in representing women before the ecclesiastic courts.

198 Welchman, note 95 above at 102.

199 Ibid. at 107.

financial and emotional wellbeing of her marital family.[200] Muslim women are entitled to payment of any outstanding money owed to them as part of the dowry they received on marriage. For this reason, some women view the dowry system as a form of social security in case of a divorce.[201]

A woman may lose her right to maintenance under Shari'a law in three ways. The first is if the Shari'a court concludes that the woman's disobedience caused the divorce. If the woman leaves her husband because of violence or a strong dislike, the Shari'a court may find that she was disobedient and therefore undeserving of maintenance.[202] A woman also may lose her maintenance rights if she agrees to relinquish them in exchange for her husband's consent to divorce. In practice, many divorced women renounce these rights and their rights to unpaid dowry in exchange for the husband's consent, as mentioned above. Finally, in the Gaza Strip, a woman may lose her financial entitlement if she does not know she has been divorced until after the '*idda* period expires. The Shari'a law applied in the Gaza Strip does not require a husband to inform his wife that he has exercised his right to a unilateral divorce.

For all four Christian churches, ecclesiastical courts have complete discretion to determine maintenance.[203] If the woman is considered to be "at fault" for the divorce or separation, she will not receive any maintenance. The courts will not "reward" her "bad" behaviour, regardless of her financial circumstances. If the "fault" lies with her husband, she will receive maintenance, although the amount typically is insufficient to meet her needs and generally follows the practice of the Shari'a courts.

Under both Shari'a and Christian law and practices, religious courts assign marital property to men under the assumption that they are the ones who earned it.[204] This ignores women's financial contribution to the family and the fact that men would be unable to earn their income if women did not maintain the household and assume responsibility as primary caretaker for the children. It also devalues women's roles in society. Under Shari'a law, assigning marital property to men is justified because women are entitled to keep their earnings for themselves and, unlike men, are not forced to spend it on the maintenance of the family.[205]

200 Ibid. at 101-102.
201 Ibid. at 312.
202 Ibid. at 131.
203 Mushahwar, note 98 above.
204 Ibid.
205 Leila P. Sayeh and Adriaen M. Morse, Jr., 'Islam and the Treatment of Women: An Incomplete Understanding of Gradualism' 30 Tex. Int'l L. J. 311, 327 (1995).

The last issue governed by religious law is custody and maintenance of children. Under Shari'a law, Muslim women typically retain custody of their children until they reach puberty, at which point the fathers regain custody. During their childhood, regardless of who has physical custody, men retain legal guardianship, which means the decision-making power over their children.[206] Shari'a courts will order men to pay maintenance for children unless a woman has declined those rights as part of the divorce agreement. Maintenance ordered in these courts is too little to allow a woman to support herself and children independently of assistance from her family or the government.[207]

Shari'a courts find a variety of reasons to deprive women of their custody rights. They sometimes grant custody to the Muslim father if the mother is not Muslim for fear the child will not be raised Muslim.[208] A woman may lose custody rights if she remarries someone not in a close familial relationship with the child.[209] A man may be able to challenge a woman's right to custody if she is working, on the grounds that she is not caring for their child properly.[210] Additionally, foreign women formerly married to Palestinian men may not be allowed to return to their home countries with their children.[211] This is particularly harsh since they are entitled to maintenance for a very limited period of time after a divorce and may not have family in the country to support them. Foreign women may not be able to retain custody because they have no financial resources.

In the ecclesiastical courts, women are granted custody of girl children until the age of 9 and boy children until the age of 7.[212] After that, the father regains custody of the children. The ecclesiastical courts will order maintenance for children on separation or divorce of the parents.

206 Welchman, note 58 above at 38 and 201.
207 Ibid. at 142.
208 Ibid. at 205.
209 Ibid. at 206. Shari'a law permits cousins to marry. The requirement that women remarry a cousin or other close family member to her children is believed to protect the interests of the child. Ibid.
210 Ibid. at 207.
211 Ibid. at 209 .
212 Mushahwar, note 98 above.

The consequences of religious-based family law on Palestinian women are severe, particularly:

> In a society where (like many other societies worldwide) women do not have the same access to, or freedom of movement within, the waged labour force as men, and where, as yet, no state provision is made for the support of single, unwaged and unpropertied women who are then – under the law – dependent upon male relatives for financial support.[213]

2.C.3. Older Women

The Palestinian population is young, with 45.4% under 15 years old. Life expectancy at birth is 73.3 years for females and 71.8 for males.[214] People over 65 years of age made up 3.1% of the population in 2005, much lower than in many countries.[215] Older people suffer from hypertension, diabetes, and rheumatic conditions, but there is no gender-stratified data on this. More elderly males than females are suffering from disabilities. More elderly females are illiterate (83.2%) compared to elderly males (37.9%).[216]

Consistent with the societal focus on women's roles as wives and mothers, older women of menopausal age face many difficulties, especially in the areas of healthcare and social security. The health system generally neglects the care of women in menopause. It is inadequate in dealing with conditions such as osteoporosis and arthritis that affect many women in this age group. Furthermore, like most women, older women find it difficult to access social welfare assistance.

In general, the social welfare system is weak: it does not satisfy basic needs and is based on a charitable approach, rather than a human development approach that treats elders with dignity and respect. For families without financial resources, caring for the elderly is difficult.

Traditionally, older women were respected and could count on their families to take care of them. Even unmarried women had this security. The disruption of families and communities caused by emigration, war and occupation has led to increasing abandonment of elderly people. This is one reason why women want to have many children, as mentioned above, to alleviate the fear that no-one will take care of them in their old age. In this context, women prefer daughters, as

213 Welchman, note 95 above at 142.

214 Palestinian Central Bureau of Statistics, note 129 above.

215 'Elderly People in the Palestinian Territory: Facts and figures' Palestinian Central Bureau of Statistics, 2004.

216 'Labour Force Survey (Data Base)' Palestinian Central Bureau of Statistics, 2004. Published in The Palestinian Central Bureau of Statistics, 'Elderly People in the Palestinian Territory; facts and figures' 2004.

they can be expected to stay and care for their parents. Sons are more likely to emigrate or to be imprisoned or killed as a result of the occupation.

2.C.4. Women-Headed Households

Women-headed households constitute a vulnerable segment of Palestinian society that deserves separate attention. Many of these women become household heads after the death, injury or imprisonment of their husbands or because of male migration for employment. Traditionally, women are less educated and hold lower-paying jobs, which for women-headed households results in increased risk of poverty.217 Women are the heads of roughly 9% of Palestinian households; 30% of which live in poverty.218 The statistics are even more startling for women-headed households in refugee camps: women head 13.6% of refugee households and these households account for almost 45% of the "special hardship" families.219 Not enough of these women qualify for private social security or for state-sponsored social security and many are forced to rely on their families for financial support.

2.C.5. Refugee Women

Refugee camps were created as a result of the United Nations decision to create the state of Israel. According to the United Nations Relief and Works Agency (UNRWA) a refugee is a person whose "normal place of residence was Palestine between June 1946 and May 1948, who lost both their home and means of livelihood" as a result of the 1948 creation of Israel. Refugees are registered with UNRWA and receive services such as food, education and healthcare. UNRWA statistics show that the number of registered Palestine refugees has grown from 914,000 in 1950 to more than 4.4 million in 2005, and continues to rise due to natural population growth.220

One-third of registered Palestine refugees – about 1.3 million – live in 58 recognized refugee camps in Jordan, Lebanon, the Syrian Arab Republic, the West Bank and Gaza Strip. The plots of land on which camps were set up are either state land or, in most cases, land leased by the host government from local landowners. This means that the refugees do not "own" the land on which their shelters are built, but have the right to "use" the land for a residence. Ten camps

217 UNIFEM, note 137 above; see also, CEDAW, note 157 above at Preamble.

218 'Main Indicators in Gender Statistics' Palestinian Central Statistics Bureau http://www.pcbs.org/gender/indicator_04.aspx.

219 UNIFEM, note 137 above.

220 Website of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, http://www.un.org/unrwa/refugees/index.html

were established in the aftermath of the June 1967 war and the Israeli occupation of the West Bank and the Gaza Strip, to accommodate a new wave of displaced persons, both refugees and non-refugees.221

The other two-thirds of the registered refugees live in and around the cities and towns of the host countries, and in the West Bank and the Gaza Strip. The camps in the West Bank are al-Amari', Jalazoon, Balata, Arroub, Jenin, Tulkarem, Nur Shams, Askar, Fawwar, Diheisheh, Aida, Aqbat-Jaber, Shuufat, Ein Sultan, Deir Ammar, and Fara'a. Camps in Gaza are Rafah, Khan Yunis, Deil al-Balah, Maghazi, Bureij, Nusseitat, Jabalyiah. Conditions in the camps are generally poor with high population densities, cramped living conditions and inadequate basic infrastructure such as roads and sewers.

Refugee women experience life differently than other women and men, including refugee men. As a result of "a combination of factors, including economic difficulties, overcrowding, social frustration and moral degradation among camp residents," refugee women face increased rates of physical, sexual and psychological abuse.[222] As mentioned above, the number of women-headed households among refugees is greater than in other Palestinian households, which tends to correlate with higher rates of poverty.[223] And, refugee women face more restrictions on their movement, on their access to the labour force and on educational resources.[224]

Government-like services, including education, healthcare and social assistance are provided to refugees by the United Nations Relief Works Agency for Palestine Refugees in the Near East (UNRWA). Refugee women married to non-refugee men and their children face severe discrimination under UNRWA policies. Refugee women married to non-refugee men do not qualify for a variety of benefits and programs, including educational, healthcare and social assistance programs and human rights protections, whereas families of refugee men married to non-refugee women retain their access to UNRWA services.[225] This exclusion is essentially permanent because UNRWA maintains it even if the woman divorces her non-refugee husband.[226] Furthermore, women cannot pass on their refugee status to their children, only the father can.[227] Children of Palestinian refugee

221 Ibid.

222 Nahla Abdo, 'Engendering Compensation: Making Refugee Women Count!' Expert and Advisory Services Fund International Development Research Centre (2000).

223 UNIFEM, note 137 above; Abdo, note 221 above.

224 Abdo, note 221 above.

225 Christine M Cervenak, 'Promoting Inequality: Gender-Based Discrimination in UNRWA›s Approach to Palestine Refugee Status' 16 HR Quarterly 300, 302 (1994).

226 Ibid. at 314.

227 Harish Parvathaneni, 'Who Are the Refugees: Social, Economic and Legal Conditions'

women and non-refugee fathers are unfairly deprived of protection and services provided by UNRWA.

The potential ramifications of UNRWA's discrimination are enormous. Host countries may determine refugee status based on UNRWA's guidelines, which means many Palestinian women and children who otherwise could be considered refugees are summarily excluded. Secondly, refugee status may affect the rights of women and children to return to the future state of Palestine and to claim compensation from Israel. Palestinian refugee women and children who are excluded from refugee status by UNRWA's policies may fall through the cracks if the host country does not grant them another status that entitles them to social assistance, education, healthcare and other benefits.

2.C.6. Women as Paid Workers

Women employed or seeking employment in the labour market face multiple forms of discrimination and disadvantage. The first problem is societal attitudes that women should not work outside their homes.[228] High fertility rates make it difficult for some women to work for wages, as they are needed at home to care for their children.[229] Pressure on women to remain outside the labour market increases with male unemployment; women are expected to 'return to the kitchen' to increase the opportunities of male workers.[230] Societal attitudes further discount the work women carry out in the home although studies show that the majority of women spend more than 50 hours a week on "housework and income-generating activities in the home."[231] Many rural women spend much of their day working on the farm, but their work is unpaid.[232]

Because of the high rate of poverty in the OPT, many women seek employment despite social attitudes. Research shows that women spend as much as four times the amount of time searching for jobs as men.[233] Married women find it particularly difficult to find employment because of employers' assumptions that

Stocktaking Conference on Palestinian Refugee Research (2003) 2-3.

228 Rema Hammami, 'Labor and Economy, Gender Segmentation in Palestinian Economic Life' in Palestinian Women: A Status Report, Birzeit University Women's Studies Program (1997) 5.

229 Ibid.

230 Welchman, note 95 above at 116.

231 Hammami, note 227 above at 5.

232 United Nations Economic and Social Commission for Western Asia, note 138 above at 15-16. In fact, women perform between 60 and 70% of all of the agricultural work in rural areas. 'Plan of Action' note 187 above.

233 United Nations Economic and Social Commission for Western Asia, note 138 above at 17.

they will leave shortly to have children. Further, the Palestinian labour market is marked by gender segmentation; women are expected to work in certain jobs, such as secretarial work and service provision, while other jobs, such as in the sciences and business positions, seem to be reserved for men.[234] "Male" jobs tend to carry higher status and pay more. As described below, women and girls are less likely to receive the education and training necessary for higher paying employment. Even in areas of employment with large numbers of women there is a pay differential.[235] The prospects for women in the formal labour market are narrowing, as more and more men are unemployed and competing with women even for typically "female" jobs.[236]

Overall, women's employment prospects in the formal job sector are limited. Approximately 10% of Palestinian women participate in this sector, as compared to 25% of women in the region and 39% in developing countries.[237] Instead, most employed women work in the informal sector, often as domestic workers, seamstresses or unregistered factory employees. Many women find that due to their limited education, they cannot find employment elsewhere. Others find that the formal labour market does not offer sufficient flexibility to accommodate their responsibilities for children and families, such as allowing women to work part-time.[238] However, women in the informal sector are more likely to be exploited, subjected to poor working conditions, and suffer from job insecurity.

Labour laws inadequately protect women's needs or deal with discrimination. They fail to address the income disparity between men and women, which employers justify on the grounds that men are responsible for supporting their families financially.[239] The laws do not provide sufficient pregnancy benefits for women or adequate maternity leave, which is only 10 weeks.[240] Women who need to take time off from work because of pregnancy needs, such as to attend doctor's appointments or because of complications, find that the law does not protect them. Labour laws also "do not adequately cover domestic, agricultural and informal labour, including work in family enterprises, which represent areas of work with comparatively higher proportions of women."[241] Nor do they

234 Hammami, note 227 above at 40. See also, Susan Rockwell, 'Palestinian Women Workers in the Israeli-Occupied Gaza Strip' 14(2) Journal of Palestine Studies 114 (1985).

235 United Nations Economic and Social Commission for Western Asia, note 138 above at 15.

236 Hammami, note 227 above at 40.

237 Ibid. at 5.

238 Ibid. at 41.

239 Ibid.

240 Palestinian Labour Law no. 7 (2000), Published in 'Palestinian Facts' No. 39 (2001) 7. of November 25 2001 / page no. 7

241 United Nations Economic and Social Commission for Western Asia, note 138 above at 19.

adequately address hazardous working conditions, such as in the manufacturing sector.[242] Overall, women find themselves subject to discrimination and severely disadvantaged in the labour market.

2.C.7. Women in Government

Women are underrepresented in the national and local governments and have been excluded to a large extent from the negotiation process with Israel. Within the legislative branch, the introduction of a quota system in the elections law for the PLC gave women much greater levels of representation than ever before in the PA.[243] Women now hold 13% of the seats in the PLC.[244] Women's groups lobbied strongly for increased women's representation in the PLC through a quota system. Despite this achievement, the quota system falls far short of providing women with equal representation in government. Following the 2006 national elections, only one woman filled a cabinet post, and even that was consistent with her social role.[245]

In the executive branch, the Palestinian Authority under the late President Arafat created the Directorate of Gender Planning and Development, which was responsible for training women working in the ministries and for creating women's departments within different ministries.[246] In 2004, the Directorate developed into the Ministry of Women's Affairs, which is responsible for monitoring government policies and draft legislation on behalf of women and for working toward women's development. Under the late President Arafat, only 13% of those appointed/employed in the national ministries were women.[247]

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242 Hammami, note 227 above at 41.

243 The Elections Law for the PLC creates a quota for women for the seats elected by proportional representation through party lists, which comprises half of the seats of the PLC. The quota system requires that party lists contain one woman in the top three of slots on the list, one in the next four slots and one in the next five slots. 'Palestinian Legislative Council Elections' Canadian International Development Agency (2006) Part 10.

244 Ibid. The quota system more than doubled the number of women in the PLC from previous elections.

245 That cabinet minister was Dr. Mariam Mahmoud Hasan Saleh as Minister for Women's Affairs. In 2003, Prime Minister Ahmed Qurei appointed only two women to serve in his cabinet, and both positions were consistent with society's roles for women. One woman served as the Minister of Social Affairs, while the other served as Minister of Women's Affairs. Despite this, the government relied on the number of women in cabinet as sufficient to respond to women's advocacy for equality in the government.

246 United Nations Economic and Social Commission for Western Asia, note 138 above at 14.

247 'Towards a More Secure Future: UN Agencies Operating in the Occupied Palestinian Territory Call for Action in Improving the Situation of Palestinian Women' United Nations Press Release (2005) 1.

Often, political appointments are made because of family or clan alliances, which typically exclude women.[248]

Within the judicial branch, only 9% of judges are women.[249] Under the late President Arafat, judges were appointed based on cronyism and family alliances. Customary law mediation, the predominant legal system, is controlled by men and also depends on cronyism and clan and family alliances for appointments as mediators.[250] As a result, women's needs and interests receive government or "legal" protection at the will of men and typically only with respect to their family roles.[251]

At the local level, the existing election law requires a quota of two women representatives in each local council, but only if women choose to run as candidates. There is no penalty for failure to meet the quota and many women are pressured not to run for election. Statistics show that women are only 1% of employees in local government institutions.252 Finally, Palestinian women rarely participate in the negotiations for peace with Israel, although signatories to CEDAW are "[c]onvinced that . . . the cause of peace require[s] the maximum participation of women on equal terms with men in all fields."253

The Palestinian Authority acknowledges that women are underrepresented in government. It stated: "Women's participation in reviewing the current policies in ministries and other governmental entities and in adopting new policies is still in its inception, and has not yet expanded to include all areas and ministries which can influence women's status and the instruments of their advancement."[254] Even this statement is highly problematic as the PA limits women's participation to the areas it thinks are most relevant to them, rather than recognizing that women should be participating in all areas of government.

One of the main barriers to women's participation in government is the current practice of making political appointments on the basis of clan and family alliances, in addition to political alliances. Amal Jamal explains how this reinforces male control:

> With the establishment of the PA, families began establishing political coalitions to obtain access to public resources or to

248 Giacaman, Jad and Johnson, note 154 above at 11-12.
249 United Nations, note 246 above at 1.
250 See Chapter 1 (Part D-3).
251 Nahla Abdo, 'Gender and Politics Under the Palestinian Authority' 28(2) Journal of Palestine Studies, 38, 43 (1999).
252 United Nations, note 246 above at 1.
253 CEDAW, note 157 above at Preamble
254 'Plan of Action' note 187 above.

> be part of the policy-making process. . . . Since men's position is dominant in the Palestinian family, the system of patronage copied the traditional social structure into the institutions of the PA. This process has led to a new form of patriarchy, where PA institutions become extensions to the prevalent family structure.[255]

For this reason, women have insufficient input into policy-making and have little decision-making power within the government.

2.C.8. Women and the Criminal Justice System

The criminal justice system in the Occupied Palestinian Territory is characterized by patriarchal and discriminatory system regarding crimes committed against women and by women. The Jordanian Penal Code (law no. 16 of 1960), applicable in the West Bank, leaves women defenceless in the face of crimes by men. The crime of femicide is excused, rape is narrowly defined, and men and women are treated differently in the definition of crimes. The reluctance of the police and courts to deal with crimes against women often leaves women at the mercy of the customary law mediation system, which is less concerned with women's interests than the interests of their families.

Throughout Chapter 2, we describe the possibility that women will be killed by male relatives for perceived "crimes against honour," such as premarital sex and adultery. The Jordanian Penal Code (Article 340) allows men to escape punishment or to receive a lighter sentence for the premeditated murder of their female relatives if they "surprise" the women in bed with men who are not their husbands. Article 98 mitigates a sentence for murder if it is committed in anger. Men who killed women because they suspected "honour" violations have used this law successfully although there is nothing in the provision that directly applies to these situations.[256] Studies show that many women killed had been raped or subject to incest and sexual abuse, which punishes the victim not the perpetrator.[257] Women do not benefit from mitigation of sentences if they kill male relatives regardless of whether they catch them having premarital or adulterous sex.[258]

The issue of rape in the OPT is equally problematic. Marital rape is not a crime, and the crime of rape is defined narrowly to cover vaginal intercourse only.

255 Amal Jamal, 'Engendering State-Building: The Women's Movement and Gender-Regime in Palestine' 55 (2) The Middle East Journal 256 (2001).
256 Shalhoub-Kevorkian, note 105 above at 64.
257 Ibid. at 76.
258 'Towards Equality: An Examination of the Status of Palestinian Women in Existing Law' The Women's Centre for Legal Aid and Counselling (1995) Preface.

Families downplay incidents of rape, hoping to avoid any scandal that could harm "family honour."[259] Police are reluctant to get involved. They will turn cases over to the Attorney General only if the rapist refuses to marry the victim.[260] In some instances the family of the victim forces her to marry the rapist to avoid scandal.

Another major problem for women and girls is the official procedure that requires the police to determine whether a woman or girl is pregnant, a virgin or sexually active, even when a police officer or medical practitioner suspects sexual abuse.[261] Along with the obvious violation of the woman's right to autonomy, these tests could lead outraged family members to kill the woman or girl, regardless of whether she was a victim of sexual violence.

Women also receive little relief from domestic violence through the criminal justice system. Currently, there is no specific legislation criminalizing domestic violence. Women may be able to file charges against their husbands or families for assault, but these cases rarely, if ever, reach the courts. Assault provisions also do not cover psychological abuse. Women are reluctant to file charges because of societal pressure to maintain family privacy. Even when they do contact the police, their actions fall far short of protecting women. Many police are reluctant to intervene in domestic abuse situations because they do not want to interfere in private family matters, as mentioned above.[262] Additionally, when they do respond to abuse complaints, they may beat the perpetrator, who then further abuses the woman.

Many cases of rape, domestic violence and femicide are handled through the customary mediation process rather than the courts. In some instances, the police refuse to submit these cases to the courts because they fear a close examination of "family honour"; also the courts are reluctant to hear these cases.[263] Customary law mediators discourage these claims too, because they are considered private matters. The mediators are far more likely to sympathize with the men committing the crimes, particularly the killing of women, because: "if the family respects itself and honour, it will not hesitate to kill a female member who is suspected of violating the sexual code of behaviour acceptable for females."[264] Mediators in the customary law system typically pressure women and girls who have been

259 Shalhoub-Kevorkian, note 105 above at 44.
260 In the past, marriage of the rapist to his victim for a period of no less than 3 years absolved the rapist of his crime.
261 Shalhoub-Kevorkian, note 105 above at 9.
262 Shalhoub-Kevorkian, note 105 above; Women's Centre for Legal Aid and Counselling, note 257 above at 41.
263 See e.g. Shalhoub-Kevorkian, note 105 above at 76.
264 Ibid. at 53.

raped to marry the perpetrator.[265] If the families accept this settlement, the victims are forced to marry their rapist or abuser. If the women refuse, they are likely to be coerced into marrying older men or men with disabilities who will accept them as "damaged goods."[266]

In customary law mediation settlements, families typically pledge that they will not pursue criminal or civil cases in the regular courts. Shalhoub-Kevorkian concludes: "the victim is regarded entirely as the property of her male guardians. The 'owner' (father, husband) conveys a clear message to society when he drops his personal rights: the crime is forgiven as if nothing occurred."[267]

The criminal law process, whether under the Jordanian Penal Code or through the customary law mediation process, frequently negates women's experiences with violence. Large portions of Palestinian society accept violence against women as do state institutions given the task of protecting women. Palestinian women typically find themselves completely alienated from the criminal justice system and subjected to crimes based on "cultural and political rules that are not written but powerfully and savagely enforced."[268]

Women also suffer from discrimination in the Jordanian Penal Code when it comes to defining crimes and defences. Article 315 criminalizes the actions of women who are prostitutes, but does not criminalize seeking or paying for a prostitute, which would be an offence by men. Unlike men, a woman cannot benefit from mitigation or elimination of a sentence if she kills her husband or male relatives she surprises in the act of adultery or premarital sex. Even in cases of adultery, which is a crime for both men and women, women are more likely to be punished and are the only parties at risk of murder for so-called "honour" violations.

2.C.9. Palestinian Women under Israeli Occupation

The general problems Palestinians confront as a result of Israeli occupation were described earlier in this chapter. However, women are affected by occupation and militarization differently to men, and there are also differences among women. Particularly since the start of the Second Intifada in September 2000, occupation has resulted in increased levels of domestic violence against Palestinian women and children.[269] As the Palestinian economy continues to deteriorate and more

265 Ibid. at 50.
266 Ibid. at 50-51.
267 Ibid. at 61.
268 Women's Centre for Legal Aid and Counselling, note 257 above at 2.
269 'Palestinian Women's Health During the Second Intifada: Some Facts and Figures, April 2005' Women's Centre for Legal Aid and Counselling.

men are unemployed, rates of domestic violence are climbing. This phenomenon can be explained, in part, because unemployed men are angry, frustrated and at home. High unemployment makes them unable to fulfil their responsibilities as providers. Disempowered by these external factors, men may use their power within the family against women and children.

Women's social roles as mothers and caretakers also come under pressure as a result of occupation. Women are responsible for feeding their families and seeking healthcare. Currently the closures, checkpoints and curfews make it difficult for women to access resources and healthcare for their families. One horrific side-effect of the occupation is that a shocking number of women have been forced to give birth at checkpoints while waiting to pass through to the hospitals.[270] Several babies and mothers have died in the process.[271] Numbers of stillbirths in the West Bank and the Gaza Strip have increased since 2000, which corresponds to a significant decrease in the percentage of births attended by physicians.[272]

Women also take on the responsibility for dealing with emotional and physical injuries caused by occupation and conflict.[273] If their homes are demolished or they are forced to leave them, women's burden of locating food, water and other resources for their families increase. As a result women become "almost totally dependent on certain authorities (whether occupation forces, peacekeepers or humanitarian workers) for survival, leaving them acutely vulnerable to sexual and other forms of exploitation."[274]

The Israeli government also uses women's roles as wives and mothers against them. Women have been taken hostage and imprisoned as a tactic "to pressure their 'wanted male relatives' to submit themselves."[275] Other women have been detained for political participation. Women prisoners have suffered torture, sexual abuse and humiliation at the hands of the Israeli military. Many have been denied adequate medical treatment. In addition to the inhumane conditions in which they are held, some women prisoners have given birth while imprisoned and now have children imprisoned with them.[276]
The Israeli occupation also has resulted in increased societal restrictions on women.

270 'Palestinian Civilians Denied Access to Healthcare Facilities' Palestine Monitor, http://www.palestinemonitor.org/new_web/factsheet_health.htm (last visited May 2006).
271 UNIFEM, note 137 above.
272 Ibid.
273 Siniora, note 182 above.
274 'Lives Blown Apart: Crimes Against Women in Times of Conflict' Amnesty International (2004) 17.
275 Siniora, note 182 above.
276 'Palestinian Women Political Prisoners and Detainees in Israeli Jails' The Palestinian Initiative for the Promotion of Global Dialogue and Democracy (MIFTAH) 2001.

As more Palestinians turn to religion to cope with the atrocious violence of the occupation, women are under growing social pressure to conform to traditional roles.[277] As noted, parents restrict their daughters' movements so that they do not need to cross through checkpoints or walk past soldiers. Israeli officials have blackmailed women with threats that they will be exposed for violations of Palestinian society's sexual codes unless they provide information about the men in their lives. As a result of societal pressure and the Israeli government's behaviour, Palestinian women have been withdrawing from 'public life,' including employment and education, and families are pushing women into early marriages.[278]

Another effect of the occupation and conflict with Israel relates to the militarization of Palestinians fighting for self-determination and an independent state. Militarization includes not only the arming of a society or its soldiers but also "the effects of militaristic thinking on an entire society."[279] Militarization directly correlates with higher rates of domestic violence. Men who use violence to solve the problems of occupation often also use violence to solve their problems at home.

Militarization also correlates with sexism as it draws on sexist themes and plays on the social roles of men and women to encourage men to participate in military operations. Military strategists use traditional roles as incentives for men to fight. They argue that men must fight to preserve their culture and their place in society that the enemy threatens to destroy.[280] In most societies, such rhetoric implies that unless men fight, they will lose their manliness. In addition to using patriarchal arguments to rally fighters, militarists also co-opt women's bodies as a nationalist symbol.[281]

2.C.10. Women Caught between OPT and Israeli Laws

One of the more complex problems facing Palestinian women is finding themselves caught between Israeli and Palestinian laws and legal systems. In many instances these multiple jurisdictions favour men. The first set of issues arises when one spouse has Jerusalem identification, which allows him/her to live and work in Israel, and the other does not. The Israeli Nationality and Entry

277 Siniora, note 182 above.
278 Ibid.
279 Rubina Saigol, 'Militarisation, National and Gender: Women's Bodies as Arenas of Violent Conflict' http://www.sacw.net/Wmov/RubinaSaigol.html.
280 Simona Sharoni, 'Homefront as Battlefield: Gender, Military Occupation and Violence Against Women' in Tamar Mayer (ed.) Women and the Israeli Occupation (1994).
281 For further description, see Chapter 3 (Part A-2) below.

into Israel Law prohibits the Israeli Interior Ministry from granting residency or citizenship to spouses of Israeli citizens or residents who originate from the West Bank and Gaza Strip.[282] This discriminatory legislation violates a large number of Palestinian human rights.

The impact on women is severe. Palestinians with Israeli citizenship and Palestinians with Jerusalem identification now have to choose whether to live in their homes without their spouses or relocate to the West Bank or Gaza Strip in order to live with them. Moving to either of these territories for holders of Jerusalem identification could mean giving up their right to live and work in Jerusalem and in Israel. With the *Jidar* (the Wall) closing in around them, families with one spouse holding Jerusalem identification but living in the West Bank or Gaza Strip similarly are being forced to choose between maintaining their right of access to and residence in Jerusalem and living with their families. This law is tearing Palestinian families apart.

One of the insidious side effects of the new law occurs when women choose to live with their husbands inside Israel without the appropriate documentation. These women are afraid to leave their homes for fear of being caught by Israeli police; they sometimes find that they are completely dependent on and under near total control of their husbands. These women risk domestic violence and a form of slavery because they cannot live openly with their husbands. They receive no protection or services from Israel, compounding their vulnerability. If Jerusalem ID holders marry West Bank men and reside in the West Bank their children risk not getting any identification – on the one hand with Israel using West Bank residency as grounds for refusal and, on the other, the PA being mindful that if they were to issue West Bank ID they could be accused of facilitating the transfer of Palestinians out of Jerusalem. Now there is a whole generation of young people who have no identity documentation, as they cannot get either Israeli or Palestinian identification. In any context the implications of living without documentation are immense, and much more so when living under military occupation. Another heart-wrenching problem the new law creates is that divorced parents may have no access to their children. If the parent with Jerusalem identification has custody of the children and lives in Jerusalem or Israel, the other parent cannot visit his/her children. It also appears that soon Israel may restrict Jerusalem identification holders from entering the West Bank or the Gaza Strip, which would deprive them of access to their children living in those areas.

A final problem arises simply from the nature of having residents or citizens who move back and forth between Israeli and Palestinian jurisdiction. In the OPT,

282 Temporary Order 2003.

polygamy, or the practice of a husband marrying multiple wives, is legal, but not in Israel. Palestinian women married to husbands in polygamous relationships and living in Jerusalem discover that unless they are registered as the husband's one legal wife, they receive no legal protection or benefits from Israel. Men use this legal escape mechanism to avoid responsibility for their unregistered wives and children.

2.D. Conclusion

As the Palestinian Authority struggles to build a state out of this legacy of under-development, poverty, occupation and problems it has created, many Palestinians—women and men—struggle just to survive. Women confront additional problems inherent in a patriarchal society, meaning that their lives, their happiness, and their wellbeing depend greatly on their relationships with men as well as the demographically inspired policies of Israeli government and occupation forces. It is crucial to take account of the circumstances and context of Palestinian people's lives to understand the potential impact of the Draft Constitution.

This chapter shows that legal protection in the areas of greatest concern for women – family and freedom from violence – lies almost completely outside the state-run legal system. Personal status law is governed by religious authority; crimes against women are almost completely ignored by the formal legal system and dealt with almost exclusively by the customary law system. Moreover, this chapter underscores the personal implications, in terms of family life, of any peace agreement between Israel and the PLO on almost every Palestinian.

Chapter 3: Challenges to Women's Rights in Palestine/OPT

Working for women's rights in the Occupied Palestinian Territory is difficult as women's full emancipation and self-determination threatens traditional notions of women's roles and position in a patriarchal society. The women's movement has met with varying degrees of success and confronts regular setbacks, including those due to diverse discourses within the movement. Understanding the meaning of the human rights provisions as they pertain to women involves understanding the challenges women's advocates face. The obstacles they confront now are many of the same obstacles they will meet in the future state of Palestine. Militarization and Israeli occupation also affect women's rights in profound ways, as mentioned earlier. The impacts of prolonged occupation that has taken the form of colonization and militarism need to be addressed in the constitution and institutions of the Palestinian state.

3.A. Challenges to the Fight for Women's Rights

Before discussing challenges the women's movement confronts in addressing women's legal, political, cultural, social and economic rights, it is important to define what is meant by Islamist and fundamentalist or conservative Islamist, terms that appear throughout the Discussion Document. Islamist refers to persons whose political ideology rests on the desire to "govern or be governed only by Islamic principles as they define them."[283] Not all Islamists work against women's rights. Some, such as the women (and men) described below (Part A1), argue for human rights and increased opportunities for women through re-interpretation of Islamic texts. Fundamentalist or conservative Islamist groups take a much more traditional approach to women's issues. They define women's rights and duties using classical interpretations of Islamic texts, which are the basis for current gender inequalities in the OPT.

3.A.1. Discourses within the Women's Movement

Again, it is important to remember that Palestinian women are not a homogenous group. While they share one aspect of their identity, other aspects also influence their hopes and needs. Consequently four main discourses have developed within the women's movement: (1) a traditionalist discourse; (2) a nationalist discourse; (3) an Islamist discourse; and (4) a human rights and development discourse. On the one hand, a variety of approaches reflect the diversity of Palestinian society. On the other, it is more difficult for women's groups to achieve their

283 Asma Afsaruddin, 'Hermeneutics and Honor: Negotiating Female "Public" Space in Islamic/ate Societies', Harvard Middle Eastern Monographs XXXII (1999) 5-6.

goals because they are not sufficiently unified and, because of this disunity, are not strong enough to pressure for change. In some instances, the different perspectives directly undermine each other.

The traditionalist discourse focuses on women's needs within the confines of their existing roles in society as wives, mothers and caretakers. Proponents of this discourse are content with the current construction of these roles: "This discourse implicitly adheres to a concept of female inferiority by supporting traditional gender roles that elevate men and disempower women."[284] Rather than reach for gender equality and full partnerships with men, adherents of this approach seek to address women's needs as wives and mothers, whose activities typically consist of organizing charitable groups to provide social services to the needy.[285]

The nationalist discourse derives from the ongoing work of grassroots women's organizations (affiliated with political parties belonging to the PLO) toward ending the occupation and creating a new state. Their "ideology has been shaped by the imperative of national self-determination."[286] In the post-Oslo period, these groups are struggling to balance nationalist goals and women's goals, which are sometimes pitted against each other by nationalist rhetoric that condemns women's groups as undermining the unity necessary for the nationalist fight.[287]

These nationalist groups take one of three different approaches in balancing nationalist goals and women's goals. The first focuses solely on nationalist needs; women groups are unwilling to rock the boat by challenging male roles until a sovereign state is achieved.[288] Proponents of the second approach are willing to confront nationalist leaders on women's issues, but do so within the confines of religion and culture.[289] For example, many women adopt a "progressive Islamic discourse" that seeks equality for women through progressive interpretations of the Koran and other Islamic texts.[290] Proponents of this approach argue that working through culture to achieve change is appropriate and politically more feasible.

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284 Abu-Dayyeh Shamas and Aweidah, note 163 above at 11. See also, Wing note 104 above at 158 ("Like many men, these women found reliance on custom to be both necessary and desirable, one area where their own culture was reaffirmed.")
285 Abu-Dayyeh Shamas and Aweidah, note 163 above at 11.
286 Islah Jad, 'Claiming Feminism, Claiming Nationalism: Women's Activism in the Occupied Territories' 228 in Basu, note 155 above.
287 Abu-Dayyeh Shamas and Aweidah, note 163 above at 12.
288 Ibid.
289 Rema Hammami, 'Attitudes Towards Legal Reform of Personal Status Law in Palestine' 126, in Welchman, note 121 above.
290 Abu-Dayyeh Shamas and Aweidah, note 163 above at 12.

A third approach is taken by groups that strongly support the nationalist movement but want to see a state based on equality and universal human rights principles.[291] These groups directly challenge the Israeli government to end occupation while strategically challenging the Palestinian Authority to address women's rights in the process of state building.[292]

Fundamentalist groups have established women's organizations that mirror the political goals of their movement, creating an Islamist women's discourse. Such fundamentalists characterize as un-Islamic those women's groups which are calling for gender equality.[293] Groups that follow a fundamentalist discourse argue that an Islamic approach does not make women inferior;[294] rather, they have different rights, privileges and roles that are complementary to men's.[295]

This last discourse has emerged strongly within the Palestinian women's movement and is grounded in the discourse of human rights and the right to development. Proponents of this perspective argue that women's rights are human rights that apply universally and do not depend on culture or religion.[296] The Women's Centre for Legal Aid and Counselling argues that women's rights cannot be sacrificed to the nationalist, cultural or religious movements for political convenience, making women's rights and needs their paramount concern.[297]

In this highly complex situation, not surprisingly, Palestinian women's organizations and movements hold different perspectives on needs and issues. This can be a positive force for debate and clarification of values and approaches in a dynamic discourse. However, Palestinian political leaders have exploited the divergences between women's perspectives to justify maintaining the status quo on women's rights. The diversity of opinion within women's movements has given political leaders an excuse to avoid confrontations with more conservative members of Palestinian society, which, as described below, suits their need to maintain their power in an unstable political climate.

291 Hammami, note 288 above at 126.
292 Abu-Dayyeh Shamas and Aweidah, note 163 above at 12.
293 Ibid.
294 Ibid.
295 Researchers report that the concept of complementary rights also appears implicitly in Christian religious law practices. Rubenberg, note 152 above at 121.
296 Abu-Dayyeh Shamas and Aweidah, note 163 above at 12.
297 Ibid. at 11-12.

3.A.2. External Challenges to Women's Efforts for Change

Efforts to increase women's rights and equality in the OPT have met with stiff opposition from the nationalist movement, fundamentalists, the customary leadership that serves in the mediation process, and the Palestinian Authority. Understanding these challenges will lend context to the struggle to ensure women's rights in a constitution for the future state of Palestine.

Although the Palestinian women's movement sprang directly from the nationalist movement, nationalist discourse has proved to be a double-edged sword for women's rights. The nationalist movement has successfully turned women's roles as mothers and wives into symbols of the Palestinian nationalist cause.[298] Women are the repository of the culture, tradition and education that Israel is trying to eradicate.[299] Thus, in nationalist rhetoric the role of women is to reproduce the nation by having children and instilling in them their Palestinian identity:[300]

> The glorification of women's fertility, the recognition of their bodies as the most important part of national resources, and the encouragement to bear more children as part of the national struggle against the Israelis was an explicit expression in the Palestinian national discourse. Yasser Arafat has said, '[t]he wombs of Palestinian women are bombs in the confrontation with the Israelis.'[301]

Essentially, women's bodies have been co-opted into the nationalist struggle and challenges to this rhetoric are seen as anti-nationalist.

Fundamentalist groups use this discourse to maintain patriarchal power.[302] They explain how the progressive women's movement plays into the enemy's strategy; they portray women as both victims of Israeli and Western attacks, and as tools for the oppression of Palestinians. For example, a police officer described it this way to a WCLAC researcher:

> Our enemy is using women to fight us. The fact that women are asking for equal rights is placing the security of Palestinians in jeopardy. Women should help men by adhering to social norms, not by adopting norms offered by the West or the enemy. Do you

298 Jamal, note 254 above.
299 Basu, note 155 above.
300 Julie Peteet 'Women and the Palestinian Movement: No Going Back?' 143, in Suad Joseph and Susan Slymovics (eds.) Women and Power in the Middle East (2001).
301 Sh'hada, note 94 above at 13.
302 Suad Joseph, 'Gender and Citizenship in Middle Eastern States' Middle East Report, No. 198, p. 6 (1996).

realize how many women are used by the Israelis in order to put us down and to ridicule us as a nation?"[303]

The fundamentalist movement labels efforts to work for women's rights or address women's needs as Western and anti-Islamic.[304] Both fundamentalists and nationalists believe that women should sacrifice their own goals of self-determination within Palestinian society. For a long time, women have agreed with the view that women's struggle for self-determination is "'less critical' than the nationalist agenda,"[305] and have found it difficult to press for their needs.[306]

Throughout the struggle for a Palestinian state, women activists have hoped that their loyalty and service to the nationalist cause would translate into increased rights and opportunities for women. Disillusioned with the results so far, women have begun to identify and situate their issues and concerns within the dominant discourse of nationalism and state-building. One strategy women's activists have used to combat conservative nationalist rhetoric is to link "gender equality with the inequalities under the Oslo process and occupation."[307] These activists hope that by making this connection they will be able to retrieve nationalist rhetoric from fundamentalist movements.[308]

The Palestinian Authority's approach to women's issues has been mixed at best. Publicly the PA expresses support for "the advancement of Palestinian women and support for the continuation of their positive and historic role of participation in building the state institutions."[309] Some argue that this support derives from pressure international donors place on the PA to make at least some effort to address women's concerns.[310] Members of civil society report that under the late President Arafat they were able to gain some concessions in the form of Presidential decrees, such as the order to allow women to travel internationally without the permission of their husbands or guardians. Unfortunately, most of these gains were not legislated.

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303 Shalhoub-Kevorkian, note 105 above at 42.
304 Sh'hada, note 94 above at 67.
305 Deborah J. Gerner, 'Mobilizing Women for Nationalist Agendas: Palestinian Women, Civil Society, and the State-Building Process' 2 http://lark.cc.ku.edu/~redbud/Gerner.Fulbright.pdf.
306 Ibid. at 20.
307 Nahda Younis Shehada, 'The Model Parliament for Family Law Reform: A Significant Step Towards Linking Women's Issues with National Concerns' www.whrnet.org/fundamentalisms/ docs/doc-wsf-nahda-model-parl-0311.rtf.
308 Ibid.
309 'Strategies for Post-Beijing Palestinian Governmental Plan of Action', note 187 above at 12.
310 Sh'hada, note 94 above at 59.

On a practical level, the weakness of the PA creates tension between secularist goals and the need for compromise with a strong religious opposition. Under Fatah, the secular nationalist party of the late President Arafat and current President Mahmoud Abbas, the PA recognized that Palestinian society was frustrated with the Israeli occupation and the worsening economic situation. In the absence of a peace deal between the Israelis and the PLO, as well as increasing daily hardships and threats to personal security due to occupation and colonization and the consequent devastation of the economy, many people questioned whether the fundamentalist movement could provide alternative leadership that would lead to sovereignty and better lives.[311] The Fatah-controlled Palestinian Authority faced a real threat to their political power from this movement.

In the course of trying to unify the Palestinian population behind it, the Palestinian Authority under Fatah was more than willing to adopt conservative rhetoric about women:

> It is an irony of Palestine that a secular State is trying its utmost to prove that it can be as religious as the Islamists. The reason for this is simple: the PA has no other choice. Having weakened its legitimacy through corruption and inability to bring economic benefits to the people, knowing the popularity of the Islamic discourse and unable to present an effective counter-discourse, it is forced to appropriate the discourse of its rivals.[312]

The PA took this rhetoric a step further and compromised with fundamentalist groups, often to the detriment and exclusion of women, in order to unify the main political actors behind a secular government. In addition, many within the PA also wanted to maintain male privilege. For example, women's lobbying efforts to reform family law to make it more favourable to women were met with little enthusiasm by the Fatah-run PA.

Following the January 2006 elections, the fundamentalist group Hamas gained control of the Palestinian Legislative Council. Analysis of reasons for voting is debatable, but the findings of voter behaviour analysis, undertaken by the Palestinian Centre for Policy and Survey Research (PSR), identified two notable trends, based on 1694 in-depth exit poll interviews.[313] One finding was of disillusionment with the peace process, which dealt a heavy blow to Fatah as

311 Ibid. at 61.

312 Ibid. at 65.

313 Palestinian Centre for Policy and Survey Research, 'A Crumpling Peace Process and a Greater Public Complaint of Corruption and Chaos Gave Hamas a limited Advantage Over Fateh, but Fragmentation within Fateh Turned that Advantage into an Overwhelming Victory' http://www.pcpsr.org/survey/polls/2006/exitplcfulljan06e.html#mainfindings

a negotiated peace process was the "centerpiece of Fatah's national agenda." The second trend marks a strategic success of Hamas in "elevating the status of corruption and lawlessness to top priorities" and highlighting "voter disillusionment with PA governance particularly in areas of fighting corruption and enforcing law and order". PSR's analysis suggests that voters "lost confidence in the ability of Fatah to lead state building in these two areas." It would seem, therefore, that while Mr. Mahmoud Abbas, a member of Fatah, remains the President of the PA, the influence of fundamentalists is increasing.

Because the strength of the customary law system also challenges the authority of the PA, the PA is working to co-opt traditional leadership into the government process. These efforts resulted with further discrimination against women: "[i] n effect, women's rights become secondary to the objective of securing the allegiance of . . . customary authorities to the state, and are therefore surrendered to the control of traditional authorities."[314] Traditional authorities have much to lose if women gain full rights and equal status in society.[315] Overall, the Palestinian Authority publicly supports advancing women's rights but often without making meaningful efforts to address women's needs.

3.B. Conclusion

The Palestinian women's movement is made up of diverse groups of activists with different and sometimes conflicting goals. These differences undermine a united action on women's development and equality agenda and provide politicians with an excuse to ignore women's demands for their rights. In its desire to maintain control, the Palestinian Authority easily capitulates to the demands of fundamentalist groups and traditional leaders who seek to maintain a patriarchal society within the OPT. Using patriarchal rhetoric tied to nationalism and women's perceived roles as the reproducers of the Palestinian nation, fundamentalist groups, social leaders and the PA have found a convenient tool to maintain the status quo that limits women's rights in the home and the wider society.

314 Anne Marie Goetz, 'Gender and Accountability' 62 in Alexandra Dobrowolsky and Vivien Hart (eds.) Women Making Constitutions: New Politics and Comparative Perspectives (2003).
315 Abu-Dayyeh Shamas, note 130 above at 10.

PART II: THE CONSTITUTION

The remainder of this Discussion Document examines the Third Revised Draft of the Constitution of Palestine. Chapter 4 looks at the process of developing a constitution for the future state of Palestine. Chapter 5 Part A discusses the meaning of women's citizenship, which provides a framework for analyzing the Draft Constitution. Part B examines the concept of a public-private divide, which helps explain many of the concerns WCLAC raises in this document. Chapter 6 examines issues and concepts directly related to human rights. Chapters 7 through 9 analyze individual provisions of the Draft Constitution, especially those most relevant to ensuring women's equal citizenship.

Chapter 4: The Constitutional Process

The first section of this chapter briefly explains what a constitution is and what the goals of constitutionalism are. The chapter critically examines the process behind the drafting of the Palestinian Draft Constitution. The last section raises the question: is Palestine/OPT experiencing a constitutional moment and should it be? It concludes by arguing that finalizing and adopting a constitution is premature without a sovereign Palestinian state.

4.A. What is a Constitution and Why Do We Want It?

On a theoretical level, constitutions explain how the society and government will operate and under what parameters. A constitution may be said to derive its legitimacy from an assumed social contract between the constituents who will be governed and the political actors who will govern.[316] The development of this political consensus is an important step in state building. Unless such consensus is negotiated and established a constitution may reflect the self-interest of the powerful, particularly if it takes shape within a tense political climate.[317]

Constitutions are drafted to express a society's ideals and hopes for its future, which are shaped by its history and experiences. A constitution must reflect the nation's values and historical experiences;[318] otherwise, there is the risk that it will become irrelevant or warped.[319] The process of drafting and adopting a constitution is

316 Richard A. Rosen, 'Constitutional Process, Constitutionalism, and the Eritrean Experience' 24 N.C. J. Int'l L. & Com. Reg. 263, 273 (1999).

317 Nathan J. Brown, 'Constitutions in a Non-Constitutional World' (2002) 101.

318 Rosen, note 315 above at 273. See also, Patricia Hughes, 'Recognizing Substantive Equality as a Foundational Constitutional Principle' 22 Dalhousie L. J. 5 (1999).

319 Ruth Gordon, 'Growing Constitutions' 1 U. Pa. J. Const. L. 528, 530-531 (1999).

"the preeminent (and institutionalized) constituting act of a country. It serves as a marker and rewriting of where the state has been and expresses where it would like to be going."[320]

Constitutions have a variety of functions, including to: (1) establish a framework for governance; (2) limit what actions the government may take against its constituents; and (3) create government accountability to the people. Through these functions, constitutional drafters and the wider society hope to ensure "for their citizens and their state, an optimal chance for survival, growth and renewal of the polity."[321]

The first role of a constitution is to "[d]efine[e] the state and to whom it belongs."[322] It sets out the process for choosing government authorities, allocating powers among government officials, and establishing that the government will be run on the basis of the rule of law.[323] The framework for choosing government officials illustrates whose interests the state is expected to serve. The rule of law is intended to establish that the law is superior to any government authority.[324] The division of powers is expected to inhibit any one political body, organ or person from usurping the powers that belong to others, or from taking authoritarian control.[325]

Citizens also rely on the constitution as a tool to limit government authorities and governmental discretion and to protect themselves from arbitrary use of state power.[326] They do this by including in the constitution human rights provisions that the government is obligated to protect.[327] Human rights provisions insulate the population "from the 'whims' and 'passions' of transient and possibly irresponsible majorities which can form in the legislative branch of the government," which may be known as a tyranny of the majority, as well as from the executive branch.[328] They ensure that long-term societal values and rights, particularly the rights of minority group members, are not violated by the will of the majority working towards their own short-term interests.[329]

320 Wing, note 79 above at 386.
321 Rosen, note 315 above at 272.
322 Aeyal M. Gross, 'The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel' 40 Stan. J. Int'l L. 47, 64 (2004).
323 Richard L. Sklar, 'On the Study of Constitutional Government in Africa' http://democracy.standford.edu/Seminar/Sklar.htm.
324 Sklar, note 282 above.
325 Raja Bahlul, 'Islamic Perspectives on Constitutionalism' Centre for Philosophy of International Law and Global Politics (2000) http://dex1.tsd.unifi.it/juragentium/en/index.htm?surveys/islam/bahlul.htm.
326 Bahlul, note 324 above.
327 Rosen, note 315 above at 272.
328 Bahlul, note 324 above.
329 Khaled Abou El Fadl, 'Constitutionalism and the Islamic Sunni Legacy' 1 U.C.L.A. J.

Equally important, constitutions create the framework for accountability for government authorities. Constitutions usually include accountability mechanisms to make sure government officials and bodies follow the dictates of the constitution and impose penalties if they do not. In theory at least, they hold officials accountable to voters who elect them.[330] An important element of accountability is transparency: "accountability institutions are designed to support the rights of less powerful actors to demand answers of and enforce punishments on more powerful actors."[331] The formal institutions include the electoral system, the judiciary, a body designated to hear administrative disputes, the legislature and an audit office. Advocacy groups and the media may also serve as informal mechanisms for monitoring the government.[332]

Importantly, a system of government is constitutional only if it follows the directives the constitution contains.[333] One of the main problems of constitutionalism today is that while most countries have constitutions, few follow them.[334] A system that violates, suspends or amends its constitution regularly is not constitutional, as the document serves none of the functions for which it was intended.[335] A system also fails to be constitutional if the constitution does not provide the basis for fulfilling its functions.[336]

4.B. The Drafting Process

In addition to creating a written constitution, the drafting process can achieve an important goal for a new government: constitutional legitimacy. Failure to achieve constitutional legitimacy could mean that the government and the wider society will fail to respect the constitution. The primary complaint about post-colonial and post-conflict constitutions is that they are foisted on the citizens by donor countries and the local political elite and do not reflect the values of their societies.[337] One way to avoid these complaints in the future state of Palestine is to ensure an inclusive constitution-drafting process. If handled properly, the process could empower and educate the public, make the constitution accessible

Islamic & Near E. L. 67, 70 (2002).

330 Goetz, note 313 above at 53.

331 Ibid.

332 Ibid.

333 El Fadl, note 328 above at 69.

334 Nathan J. Brown defines constitutionalism as the "ideologies and institutional arrangements that promote the limitation and definition of means of exercising state authority." Brown, note 316 above at 8.

335 El Fadl, note 328 above at 69.

336 Ibid.

337 See e.g. Christina Murray 'A Constitutional Beginning: Making South Africa's Final Constitution' 23 U. Ark. Little Rock L. Rev. 809, 822 (2001).

to the general public, and generate loyalty to it.[338] This section describes the drafting process for a Palestinian constitution, and argues that the current process is unlikely to legitimize the constitution.

In 1999, the Executive Committee of the Palestine Liberation Organization (PLO) established a Constitutional Committee (CC) designated with the task of drafting a constitution,[339] in time for the creation of an independent state.[340] The Basic Law, which the late President Arafat signed in 2002 (although ratified by the PLC in 1997), is limited in duration until Israel and the Palestinians conclude a final status agreement. It is limited in jurisdiction to the areas of the OPT controlled by the Palestinian Authority.[341] A sovereign state of Palestine will need a constitution rather than the Basic Law for the long-term.

In his capacity as Chairman of the PLO, Yasser Arafat appointed Dr. Nabeel Shaath, then the Palestinian Authority (PA) Minister of Foreign Affairs and former Deputy Prime Minister of the PA, as Chairman of the Constitutional Committee. Dr. Shaath chose the remaining members, who were approved by the late President Arafat. At the time of writing, there are no women serving on the CC, although there are women representatives on the local consultative committee to the CC and on the Arab League advisory committee. The creation of a Constitutional Committee by the PLO suggests that it, not the PA, is the official governing body; that the PLO instigated the constitutional process, however, is not conclusive because there is significant overlap between the members of the CC, the PA and the PLO.[342]

In 2000, members of the drafting committee produced several drafts of a constitution, with members working independently of each other.[343] In 2001, the CC distributed the first draft to the Arab League and local consultative committee and presented it at workshops for invited participants.

338 Ibid. at 824.

339 The PLO also had established a constitutional committee at the same time that it released its Declaration of Independence in 1988.

340 Khalil, note 48 above at Chapter 2.

341 Ibid.

342 The significance of the PLO role in instigating the constitutional process is that the PLO has a broader reach than the PA, and can involve all Palestinians in discussion, including those in exile and in the diaspora.

343 Nathan J. Brown, 'Drafting a Palestinian Constitution: Hope for Democratic Governance?' Information Brief No. 70 (2000). The full name of the agreement is: A Performance-Based Roadmap To A Permanent Two-State Solution To The Israeli-Palestinian Conflict.

The Constitutional Committee formulated the Second Draft Constitution and distributed it in February 2003. The drive for the Second Draft appears to have come as a result of pressure exerted by the United Nations and the United States and the push for a constitution in the Roadmap for Peace agreed to between Israel and the PA.[344] The Second Draft went through a consultative process and culminated in several published versions that reflected the comments the drafts received. The CC submitted the drafts to external consultants, the local and Arab League advisory committees, and presented the Second Draft in workshops with invited participants, including three meetings held with women's organizations.

The Third Draft followed shortly on the heels of the Second Draft and also underwent a series of revisions that concluded in the Revised Third Draft Constitution of Palestine (Draft Constitution) published on May 4, 2004. This draft followed the same consultative process as the Second Draft. The Constitutional Committee currently is working on a fourth draft that has not been finalized or published.

The constitution-drafting process raises several questions that strike at the legitimacy of the document. The first is whether the Constitutional Committee established by the PLO is the appropriate mechanism for the drafting process. The PLO is more broadly representative of Palestinians in that it includes the interests of Palestinians in exile, the diaspora and refugees. On the other hand, the Palestinian Authority is the elected body representing Palestinians living within the area that will be the state of Palestine. Political scientists recommend that any constitutional committee be separate from the governing body to ensure sufficient independence from pressure by the government and its donors.[345] Running the process through the PLO could achieve this, except that the CC is headed by a Fatah politician who has held a variety of ministerial positions within the PA and at the time of writing, remains a member of the Palestinian Legislative Council.

The second criticism is aimed at the process of choosing the members of the Constitutional Committee. Political scientists and common sense recommend that a constitutional drafting committee have representatives from most groups in Palestinian society so that the ideals of those groups are reflected in the constitution.[346] Currently, there are no women members of the CC despite women constituting 49% of Palestinians. Although women participate in the advisory councils and in workshops, these positions carry less influence, making it difficult to ensure that

344 Nathan J. Brown, 'The Third Draft Constitution For a Palestinian State: Translation and Commentary' Palestinian Centre for Policy and Survey Research (2003).
345 Mitchell O'Brien, 'Post Conflict Participatory Constitution-Making Processes' Policy Memorandum submitted to Duke University (2004).
346 Gross, note 321 above at 60.

women's concerns are considered during the drafting process. The participation of marginalized groups would serve both to create a better and fairer document and to empower those groups. The failure to include women as members of the CC undermines the legitimacy of the constitution.

Similarly, a lack of public participation in the drafting process weakens the legitimacy of the draft constitution: "there must be sufficient popular participation to allow the constitution to be claimed as a product of popular sovereignty of the people's will rather than an expression of the ruler's interest."[347] Currently, only members of the political, academic and social elites have been consulted.[348] Public participation in drafting serves an additional purpose, which is to educate people about the document, its goals and the details of individual provisions.[349] It also encourages people's ownership of and loyalty to the constitution, so that they will press the government to follow it. By itself, a popular referendum for the adoption of the constitution cannot achieve these benefits.

Drafting a constitution is a delicate task that should be undertaken by experts and the public alike. Both groups need to be provided with adequate time and resources to achieve the best possible document. A large part of the resources should be spent on educating the public about constitutionalism and the contents of the drafts, which makes the constitution accessible to them and helps inform their opinions.[350] Time is needed for this education process and to achieve agreement about aspects of the constitution. Unfortunately, donor countries often push for drafts or changes without apparent concern for public participation or the time it takes.

4.C. The "Palestinians"

This section asks who are "Palestinians" with regard to an assumed social contract and have they been included (or will they be included) in the process? There are five categories of Palestinians who could participate in the constitutional process. These are: (1) Palestinians residing in the OPT, including East Jerusalem, who

347 Rosen, note 315 above at 275.

348 In contrast, the South African constitutional drafting process included an extensive community participation programme, offering all citizens the opportunity to comment on drafts of the constitution and submit ideas and opinions regarding the constitution generally. Ziyad Motala 'Constitution-Making in Divided Societies and Legitimacy: Lessons From The South African Experience' 15 Temp. Pol. & Civ. Rts. L. Rev. 147, 157-158 (2005). Millions of copies of the draft constitution and other constitution-related literature were distributed throughout South Africa and workshops and meetings were held throughout the country to increase public participation. Ibid. at 157. Everyone was encouraged to submit comments, with over 1.7 million submissions received. Ibid.

349 Ibid.

350 Gross, note 321 above at 60-61.

are not refugees; (2) Palestinian refugees residing in the West Bank and Gaza Strip; (3) Palestinian refugees elsewhere in the world; (4) Palestinians with Israeli citizenship; and (5) Palestinians with citizenship in other countries.

To date, workshops on the constitution have been limited mostly to Palestinians with access to the West Bank and Gaza Strip, which means that only the first two groups have been able to participate in deliberations. The legitimacy of the constitutional process could be challenged on the grounds that a large number of Palestinians have been excluded from it. At a minimum, it is questionable whether the exclusion of refugees is acceptable, regardless of where they are residing, since most are fighting for the right of return to a Palestinian state. To exclude from the drafting process those who intend to be governed by the constitution is unfair.

Furthermore, nearly all Palestinians are excluded from the adoption process – regardless of whether they reside in the Occupied Palestinian Territory, are refugees, or have citizenship in other countries. In its current version, Article 185 of the Draft Constitution gives the Palestine National Council or the Central Council of the PLO the power to adopt the constitution prior to statehood. Palestinians vote to adopt the constitution only at the discretion of the Representative Council of the future Palestinian state, which occurs only after: (1) a PLO body adopts the constitution; (2) the constitution comes into effect to create the Representative Council; (3) elections are held to fill it; and (4) the Representative Council decides to institute a referendum. These provisions allow for the political leadership (which has few women members) to put the constitution into effect without guaranteeing at any stage that the public can fully participate in the constitutional process.[351] Essentially, the current process takes the creation and adoption of a social contract and constitution out of the hands of the majority of the members of Palestinian society.

The Constitutional Committee currently is considering whether to change the way in which the constitution will be adopted, skipping the complicated process in Article 185 and jumping straight to a referendum. This does not solve most of the problems. If the referendum occurs prior to statehood, the adoption process could exclude many Palestinians who intend to be governed by the constitution. Only if a referendum includes Palestinian refugees, regardless of where they reside, or if the vote occurs after all Palestinians are given a chance to return to an independent state of Palestine would the adoption process be properly inclusive of "the Palestinians."

351 As of 1996, only 7.5% of the members of the Palestinian National Council and 3% of the members of the Central Council were women. United Nations Economic and Social Commission for Western Asia, note 138 above at 13.

4.D. Is This a Constitutional Moment?

WCLAC believes that even if the constitutional process met all our criteria for success, the Occupied Palestinian Territory is not experiencing a constitutional moment. This has been defined as a period in time that sharply delineates past ordinary politics from the ordinary politics that come after it.[352] The focus during this period is on a change to the polity that is both significant and has "a lasting effect."[353] The concept of a constitutional moment raises a number of issues: (1) whether there is consensus about the type of government people want; (2) whether that consensus could change after statehood; (3) whether the government of Palestine can be transformed in the absence of sovereignty; and (4) whether the political climate will allow for a true constitutional moment.

4.D.1. Is There a Social Contract?

Returning to the concept of a social contract, the first question is whether society, appropriately defined, and the Palestinian political leadership have reached meaningful consensus about what they want and expect from a government. Without consensus, the constitution would be an imposition by those in power.

Unfortunately, it appears that the current Draft Constitution does not reflect a political consensus but the will of political leaders. Various Palestinian political actors have been able to unite behind nationalist goals but this apparent unity masks deep rifts between these groups and within the wider society about ideas of governance.[354] The perspectives expressed in the Draft Constitution resulted from a bargaining process between the secularists who held power in the Palestinian Authority at the time of the drafting and the fundamentalist movement, which formed the main opposition block. This process left out significant sectors of Palestinian society. Although the constitutional process needs to include fundamentalist groups, the weakness of the Fatah-run Palestinian Authority resulted in undue influence by them. To placate fundamentalist groups and maintain its own power, the PA regularly compromised with them.

From a women's perspective, the PA had difficulty in withstanding pressure from conservative groups that seek to maintain patriarchy, which is a common problem in conflict societies. Moghadam comments: "State elites have discovered that promoting male domination contributes to the maintenance of social order in

352 Neil Walker, 'After the Constitutional Moment' http://www.unipr.it/arpa/dsgs/seminariopermanente11%20novembre/neil_walker.htm 2.
353 Ibid. 2-3.
354 Hammami, note 288 above at 125.

a period of state transformation."[355] Under Israeli occupation, women's rights activists find it difficult to challenge the political power of religion without being condemned as Western, anti-nationalist, anti-culture and anti-religion. The compromises between the PA and fundamentalists do not necessarily reflect the views of the wider society but the will of the political leadership, which was trying to survive challenges to its power.

Compromises between the PA and the fundamentalist movement are evident in the Draft Constitution, such as Article 7, which places personal status law under the authority of religion. What this will mean in practice depends on varied interpretations of religious principles. It is unclear which interpretations are intended and who has the power to decide this issue. This will undoubtedly create a big debate and make the situation more difficult for women. This provision preserves the status quo that has a harmful and discriminatory effect on many women's lives, a point that is thoroughly discussed in Chapter 7. When members of the Constitutional Committee and other participants in the drafting process were asked about Article 7, each responded that despite the ill effects on women, they could not reach agreement without it.

Included among the political actors with undue influence are outside forces such as the Israeli government and donor countries. Many Palestinians see the pressure for constitution making as coming from European countries and the United States. In a sense, they view constitutionalism as a trend with which they are being forced to conform, and they believe that the drafters are being pressured to adopt provisions that reflect Western interests rather than Palestinian values.[356] Pressure from the Israeli government has had another effect. Israel's requirement that the PA safeguard Israeli interests discredited the secular Palestinian Authority and weakened its power in negotiating with Palestinian fundamentalist groups.

Any consensus reached to establish a constitution necessarily will reflect a compromise among political actors but should also reflect the will of the constituents of the future Palestinian state. The wider Palestinian society has not yet decided what it wants and expects from a government. Many argue that most Palestinians have not felt the need to discuss the issue of a constitution because they are more concerned with the enforcement of the Basic Law that governs them now rather than the creation of another document which makes promises that may not be kept. This disinterest also stems from a feeling of hopelessness.

355 Valentine M. Moghadam, Gender, National identity and citizenship: Reflections on the Middle East and North Africa (1998) (quoting Sue Ellen M. Charlton, Jana Everett, and Kathleen Staudt (eds.) Women, the State, and Development (1989) 180) .
356 Interview with Nader Sa'id, Director of the Birzeit Development Studies Programme, Ramallah, West Bank, March 24, 2005.

Many Palestinians believe that their dream of an independent state will not be realized in the near future, which makes the constitutional effort seem irrelevant and unnecessary.

Even if a consensus between politicians and the wider society could be said to exist, the next question is whether an agreement reached before statehood is likely to reflect what the consensus would be once Palestinians are no longer living under the instability, insecurity and danger of occupation. In times of tense political conditions, people are more willing to sacrifice their rights in exchange for greater security. Under these circumstances, societies generally grow more conservative as a return to tradition or more conservative practice of culture and religion provide comfort and a sense of security. The current strength of fundamentalist groups results in large part from the conflict with Israel. Their support may wane once the conflict ends. A constitution drafted now is more likely to reflect conservative values of this time of conflict, which does not serve the forward-thinking purpose of a constitution. It also seriously disadvantages women.

Some try to counter this by arguing that if the ideals and values of society change after statehood, they can be incorporated into the constitution by amendment. This ignores the difficulty of achieving an amendment that requires a constitutional majority. Often, societies grow apathetic about their constitutions as their nations grow more stable, which means people stop thinking about the need to change. A constitution gains rhetorical value that is hard to challenge despite its flaws. Why risk entrenching conservative values in a constitution when those values may change after the constitution goes into effect? It seems more appropriate to rely on the Basic Law as an interim constitution until statehood and the completion of a fully inclusive constitution-drafting process.

Proponents of continuing the consensus building stage also argue that public discussion of the main issues affecting Palestinians should happen now because this would allow people to develop a strategic vision for their future. In principle WCLAC agrees, but we have two concerns. The first is that consensus building revolves around developing an ideal structure of governance and the relationship between society and the government. Because the solution to several important issues depends also on agreements with Israel, focusing on the ideal could either lead to major disappointment or could undercut the ability of the Palestinian leadership to negotiate a final status agreement with Israel. Secondly, as this section argues, a strategic vision developed in a tense, insecure, and dangerous political climate is unlikely to reflect what people will want once they no longer live in these conditions. Therefore, WCLAC believes that a draft constitution should

not be finalized until after Palestine achieves statehood and until Palestinians are given a meaningful opportunity to participate in the drafting process free from the long-standing oppression of occupation.

4.D.2. Putting the Cart before the Horse?[357]

This next section looks at when the Constitutional Committee intends the constitution to go into affect. Can a "constitutional moment" be completed if the expected change will not happen until some unknown and perhaps distant time in the future? Or, if implemented prior to the establishment of a sovereign state of Palestine, could it put into effect the meaningful change society expects? WCLAC believes that the answer to these questions is a resounding "no."

According to Draft Constitution Article 185, the "Palestine National Council of the PLO shall adopt this constitution before the establishment of the independent Palestinian state with sovereignty." The argument in favour of adopting the constitution prior to sovereignty is that Palestinian leadership would have the parameters for establishing a government immediately once there is an independent state. This provision raises the question of what the effect of the constitution will be if it is adopted before statehood. Does it become binding on the Palestinian Authority? Already the Draft Constitution is influencing legislation to the extent that members of the PLC consider whether new legislation is consistent with it. The drafters also expect that the constitution will be used as soon as it is adopted; the question for them is when adoption will take place.

The effect of drafting and adopting a constitution without state sovereignty, however, could be highly detrimental to the growth of constitutionalism in the Occupied Palestinian Territory. Actions based on constitutional considerations may give the impression of increased status for Palestinians and the OPT. Although initially this may have a positive impact on Palestinian identity, in the long-run it sets up a 'virtual' state with no real power or infrastructure that over time will weaken the status of the constitution.[358] Because the constitution could be applied only according to the Oslo and successor agreements, it could be perceived to be as limited as the Basic Law and less legitimate than one would expect for a constitution.

357 Nader Sa'id, the Director of the Birzeit Development Studies Programme, used this expression when describing some of the viewpoints he received during workshops the Programme held on the constitutional process. Ibid.
358 Ibid.

Many of the provisions, particularly the human rights protections, cannot be implemented while under Israeli occupation. The Draft Constitution guarantees self-determination yet that right is inherently and continuously violated by occupation. It promises security of the person, but the PA cannot protect its constituents from Israeli military incursions that lead to arrest, injury and death.[359] Already Palestinians perceive the PA as weak because it cannot protect them from the effects of occupation. Perceived failures of a constitution prior to statehood could impede the transition to a constitutional society.[360] If a constitution is adopted and nothing changes because of occupation, Palestinians may lose confidence in it.

Another aspect of occupation by and conflict with Israel that could confuse constitutional development is the lack of a final agreement regarding the borders of the future Palestinian state. Many Palestinians already are caught in a confusing web of jurisdictions, particularly those living in East Jerusalem or caught between the Green Line and the *Jidar* (the Wall). While the Draft Constitution currently declares all of the land captured by Israel in 1967 to be a part of Palestine,[361] the current political situation would exclude East Jerusalem and significant portions of the West Bank from the protections of a Palestinian constitution. Automatically, the provision relating to the borders of Palestine would be "paper law," weakening the credibility of the document.

The point about borders highlights yet another issue with adopting a constitution before statehood. The constitution has the potential of inhibiting final status agreements with Israel. The provisions of a constitution could limit the Palestinian Authority's and/or the PLO's ability to negotiate difficult political issues already decided in the constitution, such as borders and the status of Jerusalem.[362] An agreement reached that does not comply with the constitution could invalidate it or force political leaders to struggle with a constitutional amendment unnecessarily. Changes to the constitution as a result of an agreement with Israel could be viewed as a retreat, which may limit support for an amendment.[363]

The main argument for adopting a constitution prior to attaining sovereignty is that it allows Palestinians a way to organize a government and society upon

359 As one commentator wrote: "any constitution . . . is useless when population are [sic] in daily contacts with the occupants, facing the impotence of their National Authority that was elected to represent and govern them." Khalil, see note 48 above at Preface.

360 Penny Johnson and Lynn Welchman (eds.) 'Islamic Law and the Transition to Palestinian Statehood: Constraints and Opportunities for Legal Reform', 113 in Welchman, note 121 above.

361 Third Revised Draft Constitution of the State of Palestine (May 2003) Article 1.

362 Brown, see note 58 above at 4.

363 Ibid.

achieving statehood or upon adoption of the constitution. This argument is undercut by the existence of the Basic Law, which organizes the government and provides for the protection of human rights.[364] If properly implemented, the Basic Law can address the needs of Palestinians while under occupation. Also, it would serve as the basis for maintaining order in a new state of Palestine until a constitutional process can be completed. Palestine will not dissolve into anarchy simply because it does not have a final constitution.

The Basic Law provides the Palestinian leadership and the wider society with the breathing space to conduct a fully inclusive drafting and adoption process after statehood. Then it would be possible to develop a constitution that more accurately reflects Palestinians' vision for their future and the political consensus at the time. Focusing on constitution-making too early unnecessarily distracts the Palestinian people and their leaders from their primary goal: the creation of an independent and sovereign state of Palestine.

Even if sovereignty is not a prerequisite of constitutionalism, the inability of the Palestinian Authority to enforce a constitution is highly problematic. For example, the PA has yet to wrest control over dispute resolution from religious and customary courts. To regain control over this process, the Palestinian Authority needs to correct any corruption or appearance of corruption as well as take full jurisdiction, including territorial jurisdiction, over its constituents and land, something it cannot do under Israeli occupation. A new or reformed judiciary under occupation will accomplish little toward reinstating the judiciary as the primary legal system and will likely undermine constitutionalism.

4.E. Conclusion

This chapter argues that a constitution should be drafted on the basis of a political consensus between political leaders and those who will be governed. At this stage, the draft constitution does not clearly define who makes up Palestinian society; whether all members of society, including women, will be given a meaningful chance to participate in the drafting process; and whether political actors who do not necessarily represent the wider society have overly-influenced this process.

This Discussion Document also questions the timing of the drafting process and of the adoption of the constitution. Even assuming that Palestinian people have a fair chance to participate and a political consensus is reached, the agreement reflects the current political climate of insecurity, instability and danger created by occupation rather than a strategic vision of a Palestine free from those factors. As a result, a constitution drafted and finalized during this time is likely to be far more

364 See Chapter 1(Part C) above.

conservative than society would want for its future. This ill-timed and ill-devised process particularly disadvantages women. Their role in the process has been limited, as discriminatory and detrimental provisions that greatly impact their lives have been written into the proposed constitution.

On a practical level, if a constitution is adopted now, it could be weakened by the same political climate that created it. Without sovereignty, the Palestinian government cannot fully implement the constitution, which would weaken its value to Palestinian society and may ultimately turn the constitution into a mere "paper law." Further, the adoption of the constitution now could hinder a final status agreement with Israel. Risking these negative outcomes is entirely unnecessary since the OPT has a Basic Law that can serve as an interim constitution until a fully inclusive process is completed after the emergence of an independent Palestinian state.

Chapter 5: A Draft Constitution: Preliminary Issues

Chapter 5 examines two general themes that run through this analysis, as well as two structural concerns within the Draft Constitution. Part A looks at the meaning of women's citizenship. In order to understand the extent to which the Draft Constitution will protect women's rights and interests and how the Draft Constitution will impact women's lives, it is necessary to understand what it means to be a citizen in a democracy. Equally important is whether the Draft Constitution creates a public-private divide in which it protects the rights of and offers privileges to participants of the public sphere, typically men, while ignoring the home as a private matter outside the realm of constitutional and governmental attention. Part B discusses this issue.

Turning to structural issues, Part C considers whether Palestinians would benefit more from a smaller constitution containing general provisions or from a more detailed constitution that attempts to address human rights and the governmental structure more directly. The chapter concludes by discussing a section that is missing from the current Draft Constitution – a preamble. Part D describes the purposes, benefits and drawbacks of a preamble.

5.A. The Meaning of Women's Citizenship

Citizenship describes the relationships between a state and its constituents and among the individuals who form the state.365 Citizenship typically means that an individual is accorded full membership in the state, with complete civil, political and social rights, privileges, and responsibilities.366 The citizen reciprocates with a promise of loyalty to the state, and by undertaking responsibilities owed to it.

In states grounded on the principle of equality, women should have equal citizenship with men, which means that they should have the same rights, privileges and responsibilities and have equal access to power, resources, education and "social and political mobility."[367] If women have unequal power or fewer rights, privileges and benefits, then they are "less free than men . . . [and] less capable of protecting their interests through the democratic process."[368]

365 Christine Chinkin and Kate Paradine, 'Vision and Reality: Democracy and Citizenship of Women in the Dayton Peace Accords' 26 Yale J. Int'l L. 103, 127 (2001).

366 Moghadam, note 365 above; Ayelet Shachar, 'Reshaping the Multicultural Model: Group Accommodation and Individual Rights' Windsor R Legal and Social Issues, Issue 8, 87 (1998).

367 Joseph Eliot Magnet, 'National Minorities and the Multinational State' 26 Queen's L. J. 397, Para. 95 (2001). See also, Tracy E. Higgins, 'Democracy and Feminism' 110 Harv. L. Rev. 1657, 1687 (1997).

368 Ibid. at 1681.

Women are less likely to have full citizenship when the family is placed in a privileged position; and, within the family unit, if males are privileged over women. In some instances, unequal citizenship results "from the entrenching of religious communities and the legal authority of religious leaders over their members."[369] Under these circumstances:

> [W]omen are recognized and addressed as citizens in the context of their positions within patriarchal structures as subordinate mothers, wives, children or siblings. . . . To the extent that women are recognized as valued members of society, their value is often abstracted and depicted in terms of their familial roles and sacrifices, notably as mothers. Given the importance of family in patriarchal structures, women are expected to continue to prioritize their subordinate familial roles even when they achieve public status as individuals.[370]

Women's rights activists have identified markers that indicate the extent of women's citizenship within a state. "Empirically, women's citizenship is reflected in their legal status, in access to employment and income, in the extent of their participation in formal politics and in the formation of women's organization."371 Women's advocates are careful to point out that the concept of equal citizenship also includes access to private power, particularly in the home where government is less likely to intervene.372 Some analysts look at high levels of domestic violence against women as a marker indicating decreased citizenship.[373]

Using these markers, much of Chapter 2 shows that, currently, women do not have equal citizenship with men in the OPT.[374] For example, they have few leadership roles within the government; only a small percentage of women work in the formal employment sector; nearly all women suffer from discrimination in pay; Palestinian women experience high rates of domestic violence; and they inherit only half of what their brothers inherit because the men in the family are expected to care for them.[375] The question now is whether the Draft Constitution is capable of providing women with full membership in a new state.

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369 Joseph, note 301 above at 6.

370 Ibid. at 7.

371 Moghadam, note 354 above at 138.

372 Higgins, note 366 above at 1670-1671.

373 Linda C. McClain, 'Reconstructive Tasks for Liberal Feminist Conception of Privacy' 40 Wm. & Mary L. Rev. 759, 779 (1999).

374 The Discussion Document recognizes that the OPT suffers under occupation and is not yet a sovereign state. The commentary instead is based on what powers the Palestinian Authority has.

375 Kenneth L. Karst, 'Woman's Constitution' 1984 Duke L. J. 447, 465 (1984).

5.B. The Public-Private Divide

A primary mechanism patriarchal societies use to deprive women of equal status and citizenship is the concept of a public-private divide, which determines when a state will act to protect its citizens. This divide results from a belief that the government may only intervene in the public but not private realm.[376] Typically, the family falls within the private realm, which predominantly affects women; while public refers to government and the marketplace, which predominantly affects men.[377] This socially constructed dichotomy between realms allows governments to justify their reluctance to "interfere" in discriminatory and abusive behaviour within the family.

Regulation of "public" aspects of life is not enough to correct sex and gender-based inequalities women face in the home. Ignoring sources of so-called private discrimination entrenches women's inequality.[378] An example of the entrenchment of such discrimination and the government's unwillingness to act in matters deemed 'private' is provided by family law in the OPT. Leaving issues of marriage, divorce, maintenance and custody to religious law gives women few public remedies to protect themselves from arbitrary divorce, violent behaviour by their husbands, and poverty.

Often overlooked is the fact that "private" power affects "public" power to the detriment of the weaker party.[379] Under democratic theory, every citizen has a right to vote and therefore to shape the exercise of governmental power. It assumes that everyone who has a vote has equal power. In reality, social conditioning, lack of education and societal inequalities limit women's power by teaching them that they have no choice but to submit to the will of men.[380] As a result, many women vote against their interests.

The dichotomy between public and private leaves women almost completely unprotected from abusive relationships, discrimination and unequal power relations. Men use the public-private divide to maintain a system of patriarchy. A common theme throughout the analysis of the Draft Constitution will be the extent to which the provisions of the constitution either maintain this socially constructed dichotomy or leave room for it to be asserted.

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376 Susan Moller Okin 'Justice and Gender: An Unfinished Debate' Symposium: Rawls and the Law Panel II: Equal Citizenship: Gender 72 Fordham L. Rev. 1537 1551-1552 (2004).
377 Ibid.
378 Ibid. at 1674-1675.
379 Ibid. at 1669.
380 Ibid. at 1669.

5.C. General Constitution v. Detailed Constitution

The remaining two sections of Chapter 5 examine preliminary structural concerns, the first of which is the construction of the constitution. A major debate in constitutional drafting today is whether constitutions should be smaller and more general or detailed and specific documents. Post-colonial and recent post-conflict constitutions tend to be more detailed and specific. The length and details of these constitutions reflect the desire of the societies to protect themselves from the types of abuses of power that occurred under the predecessor, repressive regimes. They hope to close the loopholes the regimes exploited to carry out violations of human rights and to avoid any challenge to the constitutional authority. One drafter of the Draft Constitution explained that Palestinians want a specific and detailed constitution in order to feel more secure.

Critics of a more detailed constitution argue that drafting the provisions in more general terms, leaving the specifics for the legislature, would allow a government greater flexibility to deal with sensitive issues, as well as allow the constitution to develop as society develops.[381] They fear that if the provision is too detailed and society does not accept it, it will be ignored.[382] Further, "A detailed provision that leaves little room for possible interpretation will limit its effectiveness to those concerns explicitly stated."[383]

The lessons from constitutionalism in the Arab world and the specific context of the OPT suggest that a more specific constitution may be appropriate, despite the drawbacks. Nathan J. Brown argues that Arab constitutions generally leave open a wide variety of loopholes that allow governments, particularly the executives, to abuse their power. He reports:

> Rights are guaranteed but not defined; separation of powers is declared but easily circumvented; and procedures are designed with escape hatches built in for instances in which their implications become politically inconvenient. Arab governments do act unconstitutionally but only rarely; most are able to operate consistently within plausible if illiberal interpretations of the constitutional text.[384]

381 'Making a Bill of Rights for Northern Ireland', The Northern Ireland Human Rights Commission (2001).

382 Kevin C. Papp, 'Environmental Constitutional Protection, Human Rights and the Eight Draft of the Temporary Constitution for the Palestinian National Authority in the Transitional Period' 7 Transnat'l L. & Contemp. Probs. 529, 555 (1997).

383 Ibid.

384 Brown, note 316 above at 143.

Overall, the generality of their constitutions has allowed these governments to evade difficult or restrictive provisions. Within the context of the OPT, a specific and detailed constitution could protect society from the problems other Arab states confront as well as reinforce constitutional institutions that are likely to come under pressure from competing political forces.[385]

From a women's perspective, a detailed and specific constitution is more likely to guarantee women's equality and their right to self-determination. For example, a general equality provision could allow a court to accept that women have complementary duties and rights (as described in Chapter 2), rather than the same ones as men. A more detailed constitution could explain that men and women have the same rights and duties, a provision that is included in the Draft Constitution. This level of specificity makes it far harder for men and religious leaders to argue for separate and unequal rights for women.

5.D. Preamble

Finally, the Draft Constitution of Palestine is missing a preamble. In recent times, drafters have begun incorporating preambles to provide the historical context for the constitution, a description of the fundamental principles by which the government will abide, and a promise to protect human rights. This historical backdrop explains the basis for the fundamental principles of the constitution.[386] The statement of principles, in turn, "define[s] the constitutional framework, influence[s] the interpretation of express provisions and fill[s] in the gaps of the constitutional text."[387] The principles are overarching, which means they do not depend on the particular provisions of the constitution,[388] and may create a political and moral standard by which society and the government must act.[389] The promise of protection of human rights emphasizes their importance to society.

385 Brown, note 343 above at Foreword.
386 Hughes, note 317 above at 8.
387 Ibid. at 6.
388 Ibid. at 15.
389 Catherine Albertyn, 'Towards Substantive Representation: Women and Politics in South Africa' 104 in Dobrowolsky and Hart, note 313 above.

Preambles also have drawbacks. Critics complain that preambles may reflect a particular moment in time rather than the long-term values of the country. Others express concern that preambles promise more than they can give.[390] They fear that placing high aspirations in the preamble could "quickly generate disappointment and cynicism."[391] For Palestinian women and religious minority groups, the main fear of adding a preamble is that it could further entrench the role of Islam in the government.

5.E. Conclusion

Chapter 5 discussed women's citizenship and the concept of a public-private divide that permits the government to intervene in "public" affairs but refuses intervention in the home and family, which are deemed private. This socially constructed dichotomy is used to sustain a system of patriarchy and to deprive women of equal citizenship. Equal citizenship stretches far beyond the right to vote, to equal rights, privileges, duties and equal access to power, resources and education. Markers such as women's participation in politics and the formal labour market, and the incidence of domestic violence, indicate that Palestinian women do not enjoy equal citizenship with Palestinian men.

Chapter 5 also asked whether a constitution should be written in general terms or should be detailed and specific, and whether the Constitution of Palestine should contain a preamble. In the Palestinian context, a detailed constitution is more likely to protect women's rights and to close loopholes that have allowed governments to abuse their powers. A preamble could highlight fundamental social and political principles and may provide the constitution with added legitimacy.

390 Kent Roach, 'The Uses and Audiences of Preambles in Legislation' 47 McGill L.J. 129, Para. 3 (2001).
391 Ibid. at Para. 35.

Chapter 6: Conceiving Human Rights

This chapter explains different rights that exist under international, regional and domestic law; who can enforce these rights; and against whom they may be enforced. Part A looks at the meaning of civil, political, social, economic and cultural rights that are derived from international agreements, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as from applicable regional agreements and the existing Palestinian Basic Law. Chapter 8 applies this discussion to the current Draft Constitution by examining the extent to which it protects each of these types of rights.

Part B considers group rights, individual rights and relational rights. It looks at who are the recipients of rights. Do rights belong to the individual, or can they be exercised by an individual only as a member of a group, or through his/her relationship with family members? Because individual, group and relational rights are often pitted against each other, particularly in multicultural constitutions such as the Draft Constitution, understanding who may exercise or claim rights is crucial in explaining the practical impact of the constitutional provisions on Palestinian women's lives. Part B argues that relational rights deprive women of individual rights. Relational rights exist in large part because of the concept of the public-private divide discussed in Chapter 5.

Part C examines the concepts of negative and positive rights. Whether the rights guaranteed in the Draft Constitution are negative or positive rights determines whether the Palestinian state is merely required to refrain from violating the protected rights or whether it is obligated to take proactive measures to ensure that its citizens receive the full benefit of the rights.

Part D examines another component necessary to determining the depth of the human rights guarantees. It looks at the concepts of horizontal and vertical enforcement of human rights. It explains that some countries protect human rights from violations by the government as well as by individuals, groups and non-governmental institutions and bodies. Whether human rights guarantees are enforceable against non-governmental actors often determines the extent to which women can exercise their human rights.

Part E considers a drafting flaw found in a number of the human rights provisions that leave the boundaries of the protections to be determined by the legislature. Finally, Part F considers the meaning of equality in order to understand what type of protection is needed to ensure women's and minority rights. It argues that a

formalistic approach to equality is likely to maintain patriarchy, and concludes that only the concept of substantive equality allows for transformation of Palestine to a truly egalitarian society that transcends its patriarchal heritage.

6.A. Civil, Political, Social, Economic and Cultural Rights

Often, human rights are divided into three main categories – civil and political rights; socio-economic rights; and cultural rights. Civil and political rights protect the individual from the actions of the state.[392] They include the right to form political parties, to express opinions and beliefs, to vote, to run for government office, and the right to a fair trial. Typically, constitutions limit civil and political rights in the interests of public safety, health and order.[393] These rights are considered the first generation of human rights.

Socio-economic rights consist of the rights necessary for a good quality of life (some would say for survival), including rights to food, water, shelter, education, health, and social security. The meanings of these rights vary in different societies. For example, the right to health could mean the right to healthcare, the right to a clean and healthy environment, the right to shelter, the right to food and water, or any combination of these rights.

Socio-economic rights are important to all members of society, but they particularly impact women. In most of the developing world, and also in the OPT, women are responsible for the emotional and physical care of their families, as well as providing food and healthcare. Achieving socio-economic rights is critical for women. The United Nations Convention on the Elimination of Discrimination against Women (CEDAW) emphasizes that enforcement of socio-economic rights is a necessary component to ensuring women's equality.[394] As the preamble notes, "in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs."[395] Without socio-economic rights that address such access, women will continue to suffer from the effects of discrimination.

Socio-economic rights are hotly contested within many developed countries, but are typically entrenched in the newer constitutions of the developing world.[396]

392 Niamh Reilly, 'Civil and Political Rights' (2003) http://www.whrnet.org/docs/issue-civilpolitical.html.

393 The Northern Ireland Human Rights Commission, note 380 above.

394 CEDAW, note 157 above at Preamble.

395 Ibid.

396 See e.g. Constitution of the Republic of South Africa Act 108 of 1996, (1996) Articles

They are contentious mainly because they require governments to take active and financial steps to ensure that people's basic needs are met. As described in Part C below, states prefer to promise rights that require them to refrain from acting rather than require them to expend time, money and energy to provide the full benefit of specific rights.

One of the main concerns about socio-economic rights is whether they can be enforced. Can a court require the executive and legislative branches to provide housing for all of its homeless or to clean up pollution? Realization of socio-economic rights costs money and decisions about distributing financial resources do not fall within the competence of the courts. Enforcement of socio-economic rights by the courts could re-direct financial resources from other governmental priorities. Judicial enforcement potentially violates the principle of separation of powers between the three branches of the government.

Most countries have limited resources that are insufficient to meet every basic need of every member of society. Newer constitutions attempt to deal with this reality by including an internal limitation to these rights with the expectation that states should enforce these rights within the limits of their resources, and enforcement should increase as the resources increase.[397] Many criticize the concept of progressive realization of rights as providing governments with an easy excuse to avoid implementing rights. Human rights advocates in South Africa, for example, complain that they have had a difficult time forcing the government to live up to the constitutional promise of socio-economic rights because of the broad discretion the concept gives the government.

A final group of substantive rights described here is cultural rights, which developed as part of the developing world's fight for self-determination. Cultural rights are intended to protect individual and group identities. They allow people to practice their cultures, traditions and religions, and require respect for cultural and religious heritage and sites. Cultural rights are often limited to ensure that they do not infringe on other rights, particularly the right to equality and civil and political rights.

24, 26, 27, and 29; Constitution of Namibia (1990) Article 20.
397 The Northern Ireland Human Rights Commission, note 380 above.

6.B. Group, Individual and Relational Rights

One of the predominant debates in state-building and human rights discourse is whether constitutions should include the concept of group rights. Group rights are defined as rights derived from a person's membership in a group rather than his/her status as an individual; these rights can belong to the group or to the individual as part of his/her membership in the group.[398] Any individual benefits members receive from their group rights are ancillary.[399] The purpose of group rights, typically, is to protect groups by ensuring that minority groups have equal citizenship with majority groups or that marginalized groups gain sufficient strength to balance their power in relation to dominant groups. Group rights also may be an expression of majority cultural identity. In many parts of the world, the concept of group rights is controversial; in the Middle East group rights have long been recognized formally.[400]

Within the Draft Constitution, two groups are provided with group rights: monotheistic religious groups and women. The choice of groups to protect is an important aspect of group rights. Religious minority groups deserve protection from total domination by the majority culture, but, as will be described shortly, only if religious group rights are not used to dominate individual members. The decision to provide group rights to monotheistic religions is highly problematic as it excludes a variety of other religions. The choice of women as a group needing additional protection is appropriate in nearly all contexts but particularly in the OPT where issues effecting women are often ignored. Specifically providing them with rights could increase their chances of attaining full and equal citizenship.

Kymlicka provides a strong theoretical framework that critically examines the strengths and weaknesses of the doctrine of group rights. He divides group interests into two categories – internal and external protections, both of which are intended to protect the stability and security of specific groups.[401] Groups seek external protections of rights that can only be enjoyed as a group or that enhance their individual rights, including for example language rights and guaranteed political representation.[402] Kymlicka warns that external protections could result in "unfairness between groups. One group may be marginalized or segregated in the name of preserving another group's distinctiveness."[403]

398 Will Kymlicka, 'Multicultural Citizenship' (1995) 45.
399 J. Angelo Corlett, 'The Problem of Collective Moral Rights' 7 Can. J. L. & Juris. 237, Para. 7 (1994).
400 Joseph, note 201 above at 7.
401 Kymlicka, note 397 above at 35.
402 Will Kymlicka 'Liberal Complacencies' 31-32 in Susan Moller Okin, Is Multiculturalism Bad for Women? (1999).
403 Kymlicka, note 397 above 36.

Internally, groups may seek to protect their traditions or their cultural integrity by regulating their members, which "raises the danger of individual oppression."[404] For example, religious leaders may fight to maintain an image of unity among their group in order to stave off external threats to their culture or power. Pursuit of unity often results in the suppression of individual members who wish to challenge aspects of group doctrine.[405] While the goal of external protections is to promote justice and equality, internal restrictions are likely to violate individual human rights.

Most criticism of the concept of group rights is levelled against the internal restrictions that group leaders hope to enforce. Critics argue that the concept obliterates individual identities, treating members "as the mere carriers of group identities and objectives, rather than as autonomous personalities capable of defining their own identity and goals in life."[406] A country that allows group leadership to enforce internal restrictions is most likely to protect discriminatory and unjust policies against weaker members or non-conformists. Critics also argue that protection of group rights is unnecessary, as individual rights are enough to ensure the well being of minority groups.[407] Proponents of group rights point out, however, that an individual rights framework ignores the fact that most Arab and Muslim societies are communitarian and that individuals derive their security and stability from association with the community.

For our purposes, the predominant problem created by religious group rights is that these rights tend to favour men.[408] Men form the religious leadership and are able to use group rights to consolidate their power over marginalized members of the community.[409] Group rights assume the group is homogenous, which is never the case, and tends to render women invisible.[410] Current leadership often is able to portray themselves as protecting their religious or cultural beliefs, accusing non-conformists and reformers of trying to destroy them.[411] As mentioned throughout this Discussion Document, fundamentalist groups in the OPT have capitalized on such rhetoric.

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404 Ibid.
405 Yael Tamir, 'Siding With the Underdogs' 47 in Moller Okin, note 401 above.
406 Kymlicka, note 397 above 34.
407 Leighton McDonald, 'Can Collective and Individual Rights Coexist?' 22 Melbourne Univ. L. Rev. 310, 312 (1998).
408 Tamir, note 404 above at 47.
409 Ibid. at 48.
410 Ibid. at 47.
411 Ibid. at 48.

WCLAC is also concerned with the extent to which the constitutional entrenchment of group rights makes participation in religion or culture mandatory rather than voluntary, and whether community members can access legal alternatives to religious institutions, and to the formal and informal power of the patriarchal system.[412]

Internal restrictions on group member's rights that violate other provisions of the constitution should not be tolerated, while external protections of minority groups may be appropriate.

The conceptual conflict between group and individual rights is extremely important, particularly with respect to Article 7 of the Draft Constitution, which places personal status matters under religious law. Many women's rights activists complain, however, that the focus on group and individual rights ignores the fact that women in the Middle East, including the OPT, derive their rights from their personal relationships rather than from the state, and certainly not from their membership in a group.[413] Therefore, the key to understanding the gross violations of women's rights, the perpetuation of patriarchy, and the power imbalances within families is to understand the current source of women's rights – their relationships with other family members.

As described throughout Chapters 1 and 2, individuals generally access power through their families. Associations with clans and families often are the basis for political appointments and for dispute resolution. Under a patriarchal power structure, men hold family power.[414] Personal status law and societal attitudes treat men as the primary decision-makers and power-holders. Family members owe each other duties. For men this can be construed as obligations owed to them as a matter of right.

The right to inheritance serves as a useful example of relational rights. Under Shari'a law, which in this case is also applied to Christian Palestinians as well as Muslims, women are entitled to inherit one half of what their brothers inherit from their parents. Whether women claim these rights depends on their degree of dependence on their family. Many women refuse their inheritance in order to ensure their brothers' protection and financial support. As Rubenberg reported about the practice in the West Bank:

> There is then, an important, implicit 'bargain' in a woman's decision to refuse her inheritance. In exchange for what she gives up, she ensures

412 Joseph, note 301 above at 8.

413 Rubenberg, note 152 above at 120-121.

414 Deniz Kandiyoti, 'The Politics of Gender and the Conundrums of Citizenship' 57 in Joseph and Slymovics, note 299 above.

> her brothers' support and protection – a functional and rational choice in the context of West Bank women's economic and social insecurity. This patriarchal bargain is the ultimate meaning of relationality – a woman relinquishes her right to inherit in exchange for her right to her brother's support. Yet, as a consequence of surrendering their right to inheritance, women are not only disinherited, but also increasingly dependent, disenabled, and disempowered.[415]

Based on this understanding of how women access their rights, provision for individual and group rights that does not challenge relational rights will fail to offer any meaningful benefit to women.[416]

6.C. Negative and Positive Rights

Once a state determines which rights it will provide to citizens and residents, and to whom they belong, the next question is what is the extent of the state's obligation to enforce these rights. Is the state merely required to refrain from violating these rights; or must it actively take measures to ensure access to them?

Often these questions are framed in terms of negative or positive rights. Negative rights require "the state, and thereby all its organs and agents, to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom."[417] In contrast, positive rights require state bodies to take proactive measures to provide individuals with the opportunity to exercise their rights.[418] Positive rights are intended to correct social, economic, political and other imbalances that constrain an individual's ability to exercise his/her rights. Most rights are or could be both positive and negative.

Many states are reluctant to provide positive rights because of the cost to the government. Unfortunately, negative rights alone are not enough to guarantee that individuals and groups can exercise their human rights fully. For example, the right to a fair trial is meaningless if the accused cannot afford a lawyer. Unless the state guarantees that it will provide an attorney for indigent defendants, the

415 Rubenberg, note 152 above at 131. Some view this 'bargain' as a sign of women's power as they are able to manoeuvre to ensure their brothers' protection. Ziba Mir-Hosseini, 'Book Review: Women, Property and Islam: Palestinian Experiences, 1920-1990/ Between Marriage and the Market: Intimate Politics and Survival in Cairo' 35 Middle Eastern Studies 198 (1999).

416 For a complete explanation of relational rights, see Hallie Ludsin 'Relational Rights Masquerading as Individual Rights' 15 Duke Journal of Gender Law and Policy 195 (2008).

417 Raj Kumar, 'International Human Rights Perspectives On The Fundamental Right To Education –Integration Of Human Rights And Human Development In The Indian Constitution' 12 Tul. J. Int'l & Comp. L. 237, 261 (2004).

418 Ibid.

poor cannot access this right. Thus, positive rights are needed to level the playing field between advantaged and disadvantaged groups.

6.D. Horizontal and/or Vertical Application of Rights

The next question that arises when looking at the nature and depth of human rights is against whom they can be enforced. Essentially, this question asks whether rights are enforceable only against the state (vertical application/enforcement of rights),[419] or whether they can be enforced against individuals (horizontal application/enforcement).[420] Most people think about rights as applied against the state: the state must not violate a person's rights, and if it does, it must stop the violations.[421] More contentious is whether the government can intervene to prevent an individual, group, non-governmental body or institution from violating another's rights.

The issue of horizontal application of rights illustrates another aspect of the public-private divide. In this case, public means the government and private means individuals and non-governmental bodies and institutions. Horizontal protection of rights is gaining international acceptance. For example, the International Covenant on Economic, Social and Cultural Rights expressly "realiz(es) that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the . . . Covenant."[422]

The question of horizontal application of rights takes on added importance in the Palestinian context. As described above, women derive most of their rights from personal relationships rather than from the state or from membership in a group. In this context, private sources of power – the family – create many inequalities and hardships for women.[423] If the constitution does not allow for horizontal application of rights, many women will have no recourse to law or the constitution when their rights are violated.

An example of this point can be found in Muslim family law. Under Shari'a law and practice, a husband may prohibit his wife from working; if she chooses to work

419 William J. Smith and William F. Foster, 'Equal Opportunity and the School House: Part I – Exploring the Contours of Equality Rights' 13 Educ. & L.J. 1, Ftnt 43 (2003)
420 Francis Raday, 'Privatising Human rights and the Abuse of Power' 13 Can. J. L. & Juris. 103, Para. 1 (2000).
421 Ibid.
422 G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (1976) Preamble.
423 Higgins, note 366 above 1665.

anyway, she loses her right to maintenance from him.[424] The Draft Constitution protects both an individual's right to work as well as religious authority over personal status matters. In reality, the woman's right to work likely will depend on her husband rather than the state. Prohibiting the state from interfering in a person's right to work will do nothing to correct the discrimination created by Shari'a law and practice.[425]

Many proponents of horizontal application of rights argue that there needs to be some limitation placed on the enforcement of human rights against non-governmental actors because horizontal application inherently "limit[s] the autonomy of an individual where exercise of that autonomy would infringe the human rights of another person."[426] They argue that there needs to be some mechanism to weigh the competing rights in order to "protect an individualistic notion of private space and freedom from interference."[427] The need for some limitation mechanism should not be used as an excuse to avoid horizontal enforcement of rights, otherwise women will be severely disadvantaged under the constitution and the law.

The First Draft of the Constitution of Palestine provided for the horizontal application of human rights. Article 15 read: "The provisions of the Constitution and the laws issued in accordance thereof apply to all individuals and governmental institutions." WCLAC recommends the reinsertion of this provision into the Draft Constitution, along with language broadening the list of individuals and governmental institutions to which human rights provisions apply, including all non-governmental bodies and institutions; religious bodies and institutions; quasi-governmental bodies and institutions; and any individuals or non-governmental bodies or religious bodies or institutions that perform functions typically belonging to the government.[428]

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424 See discussion Chapter 8 (Part A-27).

425 Arguably, the application of Shari'a law by religious courts is state action because they act in place of the government.

426 Raday, note 419 above at Para. 1.

427 Ibid. at Para. 27.

428 See e.g. Constitution of Namibia, note 395 above Article 5, which reads: "The fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed."

6.E. "Within the Limit of the Law" or "As Provided by the Law" or "In Accordance with the Law" or "the Law Shall . . ."

Throughout the Draft Constitution, the drafters wrote that a variety of rights would be protected "within the limit of the law," "as provided by the law," "in accordance with the law" or that "the law shall" guarantee, protect, or regulate the rights. There are two serious problems created by this language. The first is that rights have no effect until the legislature passes implementing legislation. Any delay in such legislation could result in the inapplicability of these rights. The second point is that these words could allow the legislature to eviscerate human rights provisions simply by passing legislation.[429] This language gives the legislature the discretion to determine the contours of the rights and their limitations rather than having them defined by the constitution.[430] Courts will find it difficult to strike down legislation on the basis of rights that are defined in the constitution.

In many of the provisions, the purpose of the phrases "as provided by the law," "within the limit of the law," "in accordance with the law" and "the law shall" is to place limits on the rights. Limitations on rights for purposes of public safety, security, health and protecting the rights of others are not uncommon, but the language used by the drafters is far too expansive and general. To the extent it is necessary to draft into the individual provisions certain limitations, these limitations need to be clear and concise and as narrow as possible to ensure the broadest protections of rights. As much as possible, the constitution needs to avoid placing the determination of rights within the discretion of the legislature or the purpose of a constitution and human rights may be undermined.

A better solution is to remove these internal limitations and adopt a provision that expresses the standard the government will use to determine when rights may be limited. South Africa provides a good example of a uniform standard that addresses the government's need to limit rights because of competing rights and interests and society's need for the security and enforcement of the broadest protection of rights. Article 36 of the South African constitution reads:

> 36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

429 'Analysis of the 1998 Draft Constitution for the Republic of Albania' American Bar Association Central and Eastern European Law Initiative (1998).

430 Nathan J. Brown, 'Judicial Review and the Arab World' J. of Democracy 9.4 (1998) 85, 92.

a. the nature of the right;
b. the importance of the purpose of the limitation;
c. the nature and extent of the limitation;
d. the relation between the limitation and its purpose; and
e. less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The South African constitution sets out a clear standard that offers the broadest protection of rights while still allowing the government room to legislate as necessary, even if it violates other provisions of the constitution. The Palestinian Draft Constitution adopts similar language in a few specific provisions, such as in Article 55, which allows the law to restrict the right to association, but limits government discretion to restrictions that are "prescribed by law and which are necessary, in a democratic society, for the protection of rights and liberties in this constitution."

Another key point of concern with these phrases is what the "law" is. Does this mean statutory law only? Or does it include any type of legislation, customary law, religious law or common law? With each additional source of limitation, the value and the meaning of the rights diminish.

6.F. The Meaning of Equality: Substantive or Formal

Societies around the world are debating the meaning of equality. The debate centres on the question of whether equality simply means treating all individuals the same or whether the concept allows for differentiation between individuals to allow them equal access to rights, freedoms or duties. The end point of equality is the same but the means for getting there are different. Which means are the most appropriate?

Equality based on treating people and groups identically is termed "formal equality" and is based on the assumption that society already is fair and just. If this is the case, treating people the same provides them with equality.[431] This underlying assumption, however, is false. Some members of every society, most often women and members of minority groups, suffer from discrimination that cannot be corrected merely by treating people identically.[432] In fact, treating

431 Joanna Birenbaum and Cathi Albertyn, 'Gender and the Working Draft of the New Constitution: What Must Be Changed?' Gender Research Project, Centre for Applied Legal Studies, South Africa, Draft.

432 Patricia Hughes, note 317 above at 12 and ftnt 53; Birenbaum and Albertyn, note 430

people identically is likely to maintain inequality.[433] For example, requiring employers to treat all male and female job applicants the same will not increase women's access to employment as long as they still suffer from the effects of discrimination in their education and training. These women cannot compete with men who have been privileged.

Women's advocates favour the concept of "substantive equality," which requires governments to seek equality in outcomes rather than in process. Substantive equality allows for governments to treat groups and individuals differently in order to place them on an equal footing with historically more privileged groups and individuals.[434] To provide substantive equality, governments must take measures to correct the underlying conditions that lead to inequality, which creates a positive right to equality. For example, it may be necessary to develop a quota for women representatives in government to ensure that women are elected. In a patriarchal society, simply allowing men and women to run for office is likely to result in women remaining outside the political system. Ultimately, substantive equality has the power to transform society by levelling the playing field for all groups and individuals.[435]

6.G. Conclusion

Chapter 6 examined a variety of aspects of human rights that will inform and deepen the analysis of the provisions of the Draft Constitution. Part A of Chapter 6 emphasized that civil, political, social, economic and cultural rights are important to women's equality and quality of life.

The discussion noted the problems of attaching rights solely to individuals while pointing out the dangers of establishing group rights. Part B concluded that group rights should be adopted to ensure the equal citizenship of minority groups, but that they cannot be used to justify oppressing women and weaker members within the group. It also highlighted that in the OPT women receive (or are deprived of) their rights not as individuals or as members of groups, but through their personal relationships, a point a constitution must address.

Part C considered whether the protection of human rights simply requires the state to refrain from violating rights or whether they place a positive duty on the state to adopt measures to ensure access to rights. Unless the state has a duty to

above.

433 See e.g. Dobrowolsky and Hart note 313 above 'Introduction'; Hughes, note 317 above at 14 (1999); Higgins, note 366 above 1701.

434 Hughes, note 317 above at 21.

435 Ibid. at 18.

take proactive measures to protect rights, women will not have meaningful access to them.

Part D asked whether rights are horizontally applicable, meaning that they can be enforced against individuals, groups, and non-governmental institutions and bodies, or whether they are only vertically applicable to or enforceable against the state. We concluded that unless rights are enforceable against non-governmental actors, women will continue to suffer severe rights violations, particularly since they access most of their rights through non-governmental sources.

Part E discussed a major flaw in the human rights provisions that allows the legislature to determine the contours of rights. In certain instances it may be appropriate to limit rights for the benefit of the public interest, but the sweeping language in many human rights provisions that allows the "law" to limit rights, could allow the legislature to eviscerate rights.

Chapter 6 ended by describing the difference between formal and substantive equality in order to advocate for the broadest meaning of the term equality. We pointed out that a purely formal approach to equality, which treats all people and groups the same, is likely to maintain the status quo of patriarchy and discrimination against minority groups. We argue that the Palestinian constitution must adopt the concept of substantive equality, which allows for the government to treat people differently in order to achieve equality in outcomes.

Chapter 7: The Draft Constitution: Foundations of the State

This chapter examines the "General Foundations of the State" contained in Chapter 1 of the Draft Constitution of Palestine. The analysis focuses on women specifically, but where appropriate the Discussion Document comments on human rights generally and anything that could de-legitimize the Draft Constitution or harm the future state of Palestine. The Discussion Document attempts to define the meaning of each provision, to raise important issues, and discuss the extent to which the provisions create or address them. In some instances, the Discussion Document simply asks questions; in others, it provides recommendations. This analysis draws heavily on the contextual information contained in Chapters 1-6.

Importantly, the Discussion Document does not analyze every provision in the Draft Constitution, but only those that relate to the purpose of this document. In addition to the specific provisions, Chapter 7 also addresses two important issues: whether the Draft Constitution will be treated as superior to all other sources of law and authority; and whether it creates a theocratic state. Where we refer to the "Draft Constitution" we are referring to the Third Revised Draft of the Constitution of Palestine; where we discuss the "constitution" we refer generically to a constitution as eventually adopted for Palestine.

7.A. Individual Provisions

The Third Revised Draft Constitution of Palestine establishes Palestine as a sovereign state whose borders are based on the 1967 demarcation between Israel and East Jerusalem, the West Bank and the Gaza Strip.[436] The Draft Constitution places the capital in Jerusalem.[437] It creates a parliamentary representative democracy,[438] with a free market economic system,[439] and promises to abide by principles of human rights, equality, peace and the rule of law.[440] It names Arabic as the official language and Islam as the official religion.[441] It places Palestine within the Arab Homeland.[442]

436 Draft Constitution, note 360 above at Article 1.
437 Ibid. at Article 4.
438 Ibid. at Article 8.
439 Ibid. at Article 16.
440 Ibid. at Articles 3, 5, and 9.
441 Ibid. at Article 5.
442 Ibid. at Article 2.

The Articles contained in Chapter 1: General Foundations of the State also discuss sources of legislation;[443] independence of the judiciary;[444] administrative, judicial and other review;[445] nationality and the right of return;[446] and environmental and historical concerns.[447]

7.A.1. Article 1: An independent, sovereign state

Article 1 of the Draft Constitution launches Palestine as an independent sovereign state and assumes that the constitution will go into affect once Israeli occupation ends and Palestine becomes sovereign. If the Draft Constitution is adopted prior to statehood its provisions, while existing on paper, would have no practical effect.

Article 1 outlines the borders of Palestine to include East Jerusalem, the West Bank and Gaza Strip based on the border that existed in 1967. Again, if a constitution is adopted prior to statehood, what happens if a final status agreement creates a different border from the one described in the Draft Constitution? If Israel and Palestine exchange areas of land to reach an agreement, would the constitution need to be amended?[448] Or, could it limit the ability of the Palestinian leadership to negotiate a final status agreement?

Article 1 also states that residents of Palestine will be "subject to Palestinian jurisdiction exclusively." Nathan J. Brown suggests that the drafters included this sentence to make it clear to Israeli settlers who choose to remain in Palestine after statehood that they will be under Palestinian jurisdiction alone.[449] If the constitution is adopted and implemented before statehood, this provision cannot be enforced, as Israel is the only power able to enforce laws in East Jerusalem and in Israeli settlements.

One way to solve the issues raised here is to adopt and implement a constitution after statehood, at which stage the constitution could define the actual borders of Palestine and its jurisdiction. The Palestinian leadership could negotiate freely without the potential of being forced to seek a constitutional amendment or undergo a treaty referendum in order to finalize borders.

443 Ibid. at Article 7.
444 Ibid. at Article 11.
445 Ibid. at Article 10.
446 Ibid. at Articles 12 and 13.
447 Ibid. at Article 14.
448 Brown, note 343 above at 6.
449 Ibid. at 6.

If this recommendation is rejected, a partial solution to these problems is to adopt the approach of the First Draft of the Constitution, which has a provision that reads: "Palestine is an independent state with complete sovereignty that cannot be conceded . . . its lands are unitary and indivisible."[450] This suggested provision does not correct the problem of claiming sovereignty before it is actually achieved, but it does remove impediments to negotiations for a final status agreement.

7.A.2. Article 2: Arab and Muslim Unity

Article 2 situates Palestine in the world political order as belonging to both Arab and Islamic nations. The Draft Constitution binds Palestine to the Charter of the League of Arab States and lists its goals as achieving Arab unity and participating in an Arab homeland. This provision serves one of the main purposes of post-colonial constitutions – it establishes the identity of the Palestinian people and the state.

Article 2 is the first provision that mentions Islam and raises a concern that will be discussed at length later in this chapter: does the Draft Constitution create a theocratic state? Regardless of the answer, this provision could make Palestinian minorities – either those who are not Arab or those who are not Muslim, feel uncomfortable, less welcome, distant, or even alienated from the State of Palestine. Furthermore, the constitutional guarantee to abide by the Charter of the League of Arab States automatically binds Palestine to any decisions the Arab League makes that are reached unanimously.[451] If a decision in the Arab League is reached by a majority and Palestine voted for it, under the Charter Palestine is bound by the decision. On the one hand, this gives Palestinians constitutional recourse to these regional decisions. On the other, the provision does not discuss what happens if Palestine is bound by an Arab League decision that is otherwise unconstitutional. A way to protect against this latter obstacle is to include a sentence that limits Palestine's obligation to enforce or follow the Charter when the requirements, duties, and obligations conflict with the constitution.

7.A.3. Article 3: A Peaceful Nation

Article 3 describes Palestine as a peaceful nation that promises to promote peaceful means of conflict resolution and to follow the Charter of the United Nations. The United Nations Charter does not create any legally binding obligations between states and their citizens. However, it provides a further basis of support for human rights and equality in Palestine, as the preface describes the signatories' intention "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women."

450 First Draft of the Constitution of the State of Palestine (2001), Article 4.
451 The Charter of the League of Arab States (1945) Article 7.

7.A.4. Article 4: Jerusalem as the Capital

Article 4 locates the capital of Palestine in Jerusalem. Because the borders of Palestine are drawn based on the 1967 border with Israel, the capital is East Jerusalem.[452] The only question that arises from this provision is what happens if the Draft Constitution is adopted and implemented prior to statehood? Until the occupation ends it will be impossible to place the government in Jerusalem.

7.A.5. Article 5: Arabic is the Official Language; Islam is the Official Religion

From a cultural, religious and gender perspective, Article 5 is a controversial provision. It adopts Islam as the official religion of Palestine, while promising to treat all monotheistic religions and their members equally. This type of provision is common among Arab and Muslim states. Some question, however, whether a state can have a religion: "Islam has five recognized duties: *shahadah*, prayer, fast, *zakat* and pilgrimage. As the State does not accomplish any of these duties, it cannot claim to be Muslim."[453] The first issue then is what is the meaning or effect of having a state religion?

The main purposes of adopting an official religion are to establish an identity for the state and to provide special support to the religion, religious leaders and their followers. As described under Article 2, establishing a Muslim identity could result in the feeling of exclusion and separation of religious minority groups from the state and from the majority of society. Having a national religion could undermine the security non-Muslims feel in Palestine and send the message that the state may not belong to all people.[454] For example, the Basic Laws in Israel contain several references to Israel as a Jewish state, which has altered the discourse about religion and state and implied "that Israel belongs to the Jewish people and is not the 'state of all its citizens.'"[455] Insecurity fostered by these provisions, could lessen some people's loyalty to the state unnecessarily.[456]

In practical terms, adopting an official religion is likely to mean additional funding for Islamic education, the adoption of Islamic courses in school curricula, and

452 Brown, note 343 above at 4.

453 Sami Aldeeb, 'Report on the Arabic Version of Third Draft of the Constitution of the State of Palestine Revised April 27, 2003' (2003) http://www.mideastweb.org/palconstitutioncomment.htm. See also, Elias H. Tuma, 'The Draft Constitution for a State of Palestine' Another Viewpoint NS 85 (2003) 1-2.

454 Magnet, note 366 above at Para. 71; Noah Feldman, After Jihad: America and the Struggle for Islamic Democracy (2003) 54-55.

455 Gross, note 321 above at 15.

456 Lisa Hajjar, 'Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis' 29 Law & Soc. Inquiry 1, 21-22 (2004).

possibly the appointment by the government of a Muslim religious leader who would be responsible for interpreting Shari'a law.[457] This latter possibility takes on added significance when reading this provision with Article 7, which treats the principles of Shari'a as a major source of legislation. A state appointed Muslim leader could have significant influence over the legal system of Palestine.

Even without this eventuality, the PA has already created a Ministry of *Waqf* and Religious Affairs that builds and maintains mosques and pays the salaries of Imams in the OPT.[458] If the point of this provision is to require constitutional support for Islamic institutions, then to treat all religions equally means that it must provide support to all of them. If declaring an official religion is intended to provide added benefits to members of the religion or its leadership, then it is hard to see how the government could treat all religions and their participants equally.

Adopting a national religion could prevent arguments for the separation of religion from the government. The government could justify imposing Islamic practices on the whole country on the basis that it is practicing the official religion. The concept of an official religion also could be used as an excuse to curtail the activities or recognition of other religions. Taken to one possible conclusion, the adoption of a national religion could justify the creation of a theocratic state by legislation. Nothing in the Draft Constitution would limit this possible outcome, which would be supported by Article 5.

One of the arguments in favour of a separation of religion from the state is to ensure that no one is coerced into practicing a religion. Already Palestinian religious minority groups complain that it is difficult to maintain their religious autonomy, as Muslim practices become part of Palestinian culture, and become practices expected of non-Muslims. Even within the Muslim community the adoption of an official religion could prove problematic. For example, followers of different schools of thought within Islam could find that other schools are preferred over theirs.

Noah Feldman asserts that there is nothing inherently undemocratic about having an official religion.[459] Whether an official religion undermines democracy depends on what benefits that religion receives – or stated differently, whether it results in the unequal treatment of citizens. To the extent Article 5 could be used to justify additional funding to Islamic education or the promotion of Islam in Palestine, the provision would increase the power of Muslims compared to everyone else. Equal access to power is a requirement of equal citizenship, which would then

457 Brown, note 343 above at 7.
458 U.S. Department of State, note 129 above.
459 Feldman, note 453 above. But see Gross, note 321 above at 15.

be denied to members of religious minorities.[460] Already this is a concern since Article 7 of the Draft Constitution states that the principles of Shari'a will be a major source of legislation. Moreover, any official role of religion will only entrench male power and patriarchy, a point that will be underscored in our discussion of Article 7. Many women fear that adopting an official religion could allow religious leaders to gain increased authority and deprive women of their rights.

Article 5 attempts to deal with some of these concerns by promising to revere and respect other monotheistic religions in an equal manner. The provision creates a group right to equality for all monotheistic religions. However, this discriminates against a variety of other religions. Article 5 also creates an individual right of all citizens to equal rights and duties regardless of their religious beliefs. Whether this promise can be fulfilled depends on the extent to which the Palestinian government favours Islam. Some members of religious minority groups already perceive the PA as intolerant.[461] True equality further depends on whether the Palestinian government will enforce religious practices and rules that discriminate against women, which the PA already does.

Commentators note that the adoption of this provision is in opposition to the long-standing statements and promises of a secular state by the leaders of the nationalist movement.[462] For example, the Declaration of Independence of 1988, while referencing god, nowhere mentions Islam as an official religion. The fundamentalist movement has wrested much of the popular support away from secularist nationalists because of the inability of the secularist movement and PLO leadership to achieve a Palestinian state and because of the corruption in the PA under secular leadership. Fundamentalist leadership is new in the OPT and offers hope to many Palestinians for a better solution to existing problems. Drafting and adopting a constitution in the current political climate makes it unlikely that drafters can return to the concept of a secular state. Insiders within the drafting process agree on this point.

7.A.6. Article 7: Role of Shari'a and Religion in Law and Governance

Like Article 5, Article 7 is a highly controversial provision because it guarantees that the principles of Shari'a will be a major source of legislation, and places personal status matters under religious control with few limitations. The discussion of this

460 See Chapter 5 (Part A).
461 U.S. Department of State, note 129 above.
462 Tuma, note 452 above at 1-2.

provision will be divided between these two substantive elements. It will address their practical effects and put forward alternatives to this provision. Given the crucial importance of this provision for women's rights and equality, we discuss Article 7 at some length.

7.A.6.a. Principles of Shari'a as a Major Source of Legislation

The first sentence of Article 7 reads: "The principles of Islamic Shari'a shall be 'a' major source of legislation." The language of Article 7 mirrors the language contained in Article 4 of the Basic Law,[463] which reflects a compromise between fundamentalists who wanted to make Shari'a 'the' major source of legislation and secularists who wanted no role for religion.[464] Merely reading the provision does not tell constituents its full meaning. On a purely definitional level, the first question to ask is what the drafters mean by "Islamic Shari'a." Does this mean all "aspects of Islam that pertain to rules and commands", as one commentator suggests?[465] Does it mean Shari'a as derived solely from the Koran, or does it include the multitude of religious texts and interpretations?

Article 7 does not indicate what it means by "principles" and this phrasing avoids terms that have technical legal meanings in Islam.[466] Currently, "there is no well-defined set of 'principles' in Islamic law that corresponds to the plain meaning of this term."[467] Commentators suggest that this phrasing is significant because it should mean that only the guiding principles of Islam apply, rather than any specific provisions of the Shari'a. This reading is general enough to allow for flexible interpretations of Article 7.[468]

The next definitional issue concerns what is meant by "a major source" of legislation. Does this provision simply lend moral support to legislators who wish to rely on Shari'a principles when creating laws? Does it bind the legislature to look to the principles of Shari'a when creating legislation? Does it require

463 The English translation of the Basic Law provided by the United States Agency for International Development found at http://www.usaid.gov/wbg/misc/Amended_Basic_Law.pdf (last visited May 2007) translates Shari'a as "the" main source of legislation. WCLAC, however, relying on the original Arabic language reads it as "a" main source of legislation.

464 Johnson and Welchman, note 359 above at 121.

465 Kristen A. Stilt, 'Islamic Law and the Making and Remaking of the Iraqi Legal System' 36 Geo. Wash. Int'l L. Rev. 695, 741 (2004).

466 Ibid. at 723.

467 Ibid.

468 For those who would respond to these points that Egypt has defined "principles" narrowly to make it difficult to challenge legislation on the basis of the provision, there is nothing inevitable about that interpretation. Ibid. at 728.

adopting Shari'a law in national legislation? Or, does it mean that legislation cannot conflict with the principles of Shari'a? Nathan J. Brown argues that this provision "should be read as an injunction on the legislature to take Islamic law seriously rather than an attempt to implement a Shari'a based legal system."[469] He argues that the provision has few teeth. The concept of "principles" has little practical meaning within a legal tradition based on debate and a variety of interpretations, resulting in only a small body of rules that have been universally accepted within the faith. Therefore, proving that a law does not take into consideration Shari'a principles will be difficult in actuality.[470]

A related issue is who is responsible for determining what the principles of Shari'a are and whether the government has complied with the dictates of Article 7. Will this be the job of the judiciary or does Article 7 require a religious tribunal or leader to decide such matters?[471] A religious tribunal or leader could usurp the role of a neutral judiciary.

Regardless of these ambiguities, officially adopting the principles of Shari'a as a major source of legislation has more than symbolic value as it continues to entrench Islam as the dominant doctrine and religion in Palestine. The intention to do so is evidenced by the absence of references to other sources of law, including international law and international human rights standards.[472]
If the courts or the legislature develop a fundamentalist approach to constitutional interpretation, this first sentence could have severe ramifications. Women and members of religious minorities could find themselves the victims of a zealous legislature, executive or court, which defines the "principles" to mean more than agreed-upon norms but, rather, specific rules located in Islamic texts and interpretations. If these texts are a major source of legislation or legal interpretation, then Shari'a rules would be codified into Palestinian law.[473] The provision could serve as the basis of legislating for a theocratic state. Only personal status issues would be constitutionally protected from being wholly dominated by this system.

Even without a more fundamentalist approach to principles of the Shari'a as a major source of legislation, overall the provision benefits Muslims to the detriment of non-Muslims. At a minimum, Muslims will be able to relate to

469 Brown, note 343 above at 8.
470 Ibid.
471 See James CN Paul, 'Islam and the State: The Problems of Establishing Legitimacy and Human Rights' 12 Cardozo L. Rev. 1057 (1991).
472 In the First Draft of the Constitution, Article 20 included principles of customary international law as a source of law as long as they did not conflict with the constitution or any law in force. First Draft Constitution, note 449 above.
473 Stilt, note 464 above at 728.

the laws differently and probably better than religious minority groups.[474] The provision also may create a power imbalance as the "Shari'a backdrop brings Islam and traditional or believing Muslims into a potential alliance with the state."[475] Muslims are likely to have an easier time getting laws passed, placing non-Muslims and secular Muslims "at a distinct disadvantage in the political sphere even if they get to vote and participate in elections."[476] This provision violates Article 5, which promises equality to members of monotheistic religions and equal respect for those religions. Also it contradicts Article 19, which guarantees that all Palestinians are equal before the law, and Article 20, which promises equality regardless of religious affiliation.[477]

Equally problematic, Article 7 raises the question of what happens if the principles of Shari'a conflict with human rights protections of the constitution. Critics of similar provisions in the constitutions of other Arab and Muslim countries fear that "these provisions imply that the Shari'a itself stands prior to the positive legal order - including, potentially and by implication, the constitution itself."[478] Returning to the possibility that the legislature reforming or creating new law or courts reviewing legislation may subscribe to fundamentalism, the teeth that seem to be lacking due to the vagueness of Article 7 could suddenly grow into fangs that shred human rights when they conflict with the dictates of the Shari'a. Use of those fangs, at least to some extent, would be constitutionally protected.

A final question is whether adopting the principles of Shari'a as a major source of legislation is consistent with the concept of democracy. The argument is that predetermining the sources of legislation usurps the role of elected governmental representatives who should choose their sources based on the wishes of the electorate. Others argue that if the majority of the people want to adopt this provision, then the people have chosen how they want to be governed.[479]

The first problem with this defence is that the current procedure for adopting the constitution could effectively exclude the public. Nothing in the Draft Constitution mandates a referendum of the Palestinian people in order to adopt the constitution. The second problem with this argument is that it treats democracy solely as a procedural method for determining how governmental

474 Feldman, note 453 above at 55.
475 Ibid.
476 Ibid.
477 Aldeeb, note 452 above.
478 Nathan J. Brown and Adel Omar Sherif, 'Inscribing the Islamic Shari'a in Arab Constitutional Law' 63 in Yvonne Yazbeck Haddad and Barbara Freyer Stowasser (eds.) Islamic Law and the challenges of Modernity (2004).
479 Feldman, note 453 above at 55.

decisions will be made and who will choose the government.[480] This emphasis on procedure greatly narrows the meaning of democratic citizenship, and negates the substance of it. As a procedure, democracy allows for the tyranny of the majority – or, stated differently, deprives the minority and weaker members of society of their voice in their nation. In the context of Article 7, non-conformists and members of religious minorities will be less than equal before the law and have less opportunity to participate in decision-making at the legislative level if the constitution favours a religious source of law over other sources. Their beliefs will not be able to compete if democracy is nothing more than a procedure that recognizes the beliefs of one group over all others.

For these reasons WCLAC strongly recommends deleting Article 7 from the Draft Constitution. If the drafters choose to keep this provision, the first sentence should make clear that all legislation must conform to the constitution, particularly the human rights provisions, to ensure that Article 7 is not used as a tool to override human rights.

7.A.6.b. Personal Status Matters

The remainder of Article 7 places personal status and religious matters under the authority of the monotheistic religions in Palestine and is no less problematic. As a preliminary matter, the English translation of Article 7 found on the PA Ministry of Foreign Affairs website inaccurately translates the provision so that it reads "civil and religious matters" will be governed according to religion, when a more accurate translation is "**personal status** and religious matters."

The second sentence of Article 7 establishes Palestine as a multicultural country that constitutionally recognizes the religious diversity of its population by adopting legal pluralism – or separate systems of law to govern different religious groups – in the area of personal status law. The purpose of promoting multiculturalism is to ensure that minority groups – in this instance, minority religious groups – receive a fair opportunity to have family law matters guided by their religious beliefs.

Article 7 divides and categorizes Palestinians on the basis of religion.[481] One of the main outcomes of multiculturalism is that it provides different religious groups with certain rights to self-government. Thus, it creates what has been called "differentiated citizenship" under which Palestinians will have different rights, privileges, benefits and obligations from each other based on religious

480 Bahlul, note 324 above.

481 Islah Jad, 'Feminist Reading of the Draft Constitution' Review of Women's Studies (2002) 8 (Arabic).

affiliation rather than their shared identity as Palestinian.[482] Accordingly, there is no universal citizenship for all Palestinians; instead there are individuals with group citizenship.

In effect, the second sentence of Article 7 retains the status quo with respect to personal status law in Palestine. Religious laws of the different monotheistic religions maintain authority over marriage, divorce, maintenance and child custody. The provision contains three internal restrictions to the development of legal pluralism. Only monotheistic religions are entitled to practice a separate faith-based system of family law, and those laws and practices must fit "within the framework of law" and "preserve . . . the unity and independence of the Palestinian people."

Although the protection of religious diversity is a commendable goal, Article 7 accomplishes it at the expense of large segments of the population. Article 7 restricts individual self-determination in favour of group-determination, as it does not offer Palestinians a choice about whether they wish to be governed by religious law but compels them to submit to it. Even those who would choose to have matters of personal status dealt with on the basis of religion may find that one particular version of religion is forced on them. For example, Evangelical Christian churches are not officially recognized by the Palestinian Authority,[483] which means that their members may be forced to marry and divorce under the law and traditions of a different Christian denomination. Article 7 further provides only a limited measure of religious choice because no one is allowed to choose not to observe religious law.

The refusal to allow Palestinians a choice about whether they wish to be governed by religious law derives from an attempt by the religious leadership to maintain their power base, and by men in general, to maintain patriarchal control. Under the Draft Constitution, the only type of Shari'a law that would be enforced is personal status law, although the Shari'a contains rules for other areas of life, such as business and finance:

> It is not suggested that banking laws, for example, are based on what is allowed in Islam. In this case it is recognized that a committed Moslem would make her own choice not to violate in her financial dealings what is prohibited by her religion. The presence of an alternative system is not seen as preventing a religious person from following the dictates of her conscience and religion. Why then is it possible to provide such an alternative in certain areas of life but not in others?[484]

482 Kymlicka, note 397 above at 182.
483 U.S. Department of State, note 129 above.
484 Women's Centre for Legal Aid and Counselling, note 257 above.

Equally disturbing, Article 7 protects the rights and interests of monotheistic religions, ignoring other religions or belief systems that may be represented in the OPT. In addition to the obvious discrimination that results from this limitation, on a practical level it means that atheists, adherents to polytheistic religions or monotheistic religions without comprehensive rules to deal with personal status issues will have no method through which to marry or divorce within Palestine. The provision also assumes that all people belong to a religious denomination and that they will marry someone from the same denomination. The provision does not explain what law will govern a couple that wishes to marry but are not of the same religion.

Although Article 7 does not remove jurisdiction over personal status law from the elected legislature, the problem for women is that a conservative legislature will interpret this article conservatively through the lens of Shari'a. At a minimum, Article 7 makes it nearly impossible to abrogate religious power over personal status matters. Compelling individuals to submit to religious personal status practices and law means that the religious practices and laws are removed from any kind of participatory process in their continuing development. In violation of democratic principles, the religious practices and rules do not need to change in response to the will of the electorate, but are removed from any type of review process by those who will be governed by them. Article 7 thus destroys at least one primary goal of constitutionalism – creating accountability – by allowing authoritarianism in this area of law.[485]

A multicultural system without judicial, legislative, and constitutional oversight is highly detrimental to women and is at its most dangerous when it relates to family law matters. Most religions follow personal status practices, rules and laws that discriminate against women. By favouring the group interests of religion, particularly of the religious leadership, women will suffer under continuing patriarchal power and control. While it may be appropriate to find a way to provide minority religions equality with Islam, which is an external protection of group rights, unmitigated multiculturalism allows each religion to discriminate among and place internal limitations on groups members.[486]

Essentially, the adoption of a religion-based personal status legal system that is not subject to the constitution allows religious communities and leaders to circumvent the equality rights contained in the Draft Constitution, particularly with respect to women. This system hides the flaws in religious laws and practices that violate

485 Amy Bartholomew, 'Group-differentiated Cultural rights, Constitutionalism and Feminism' 219 in Dobrowolsky and Hart, note 313 above.
486 Chapter 6 (Part B) further explained why this should not be allowed.

the individual rights of group members "because it conceptualizes intra-group affairs as completely 'outside' the domain of state law."[487] It entrenches the public-private divide that disadvantages women by ceding control over family law from a public, elected body to religious authority, which is currently treated as private.[488] Article 7 deprives women of equal citizenship as fundamental aspects of their lives are removed from (or remain outside of) the democratic process and are left solely to men, as no women hold decision-making roles within the religious leadership. It effectively reinforces male power and protects male interests.

One drafter of the Draft Constitution asserts that Article 7 does not remove personal status law from the jurisdiction of the legislature. By requiring that personal status and religious matters be handled within the framework of law, legislators have the power to regulate within these areas. Furthermore, personal status and religious matters would be subject to the constitution and to any other legislation that make up the "framework of law," which could limit the power of the religious leadership to discriminate against women.

Whether this suggestion is correct will depend on how the courts interpret Article 7, particularly in the context of a Draft Constitution that entrenches a role for religion within the state. The phrasing that personal status matters governed by religion be organized "within the framework of law" is not particularly clear about what happens if the application of religious-based personal status law conflicts with individual rights contained in the constitution. Whose rights get trumped – the religious communities' or the equality rights of women and men of minority groups?

To the extent that the drafters insist on maintaining constitutional recognition of religious domination over personal status matters, the provision must be reworded to ensure that the application of family law does not violate other provisions of the constitution. Article 7 of the First Draft of the Constitution was much clearer on jurisdictional control.[489] It read: "The legislative branch shall determine personal status law under the authority of monotheistic religions according to their denominations, in keeping with the provisions of the constitution and the preservation of unity, stability, and advancement of the Palestinian people."[490]

487 Shachar, note 365 at 95.

488 Vrinda Narain, 'Women's Rights and the Accommodation of "Difference": Muslim Women in India' 8 S. Cal. Rev. L. & Women's Stud. 43, 64-65 (1998); Chapter 1 (Part D-2). See also, Shachar, note 365 at 86-87.

489 First Draft, note 449 above.

490 Perhaps a better way to phrase Article 7 is to replace "within the framework of law" with "subject to the terms of this Constitution and further subject to the condition that the religious practices, traditions and rules do not infringe upon the rights of others or the national interest." This wording is based on Article 19 of the Constitution of Namibia. Constitution

This provision clarifies what happens in a conflict between individual rights and the right of religious groups to govern matters of personal status. The provision favours individual rights by restricting the application of personal status law when it violates the constitution. If the intention of the drafters is to keep constitutional oversight over matters of religion and personal status, then they should use a form of wording more like the version in the First Draft.

The second potential restriction on the authority of religious leaders to deal with personal status and religious matters is that they must be handled in a manner that "preserves the unity and independence of the Palestinian people." Differentiated citizenship, which means individual rights that depend on one's religious affiliation rather than one's status as a Palestinian citizen, could lead to disunity by harbouring resentment between groups based on their unequal rights. For example, a woman in an abusive relationship who is married under Catholic law is trapped in the relationship and can never remarry, while a Muslim, Assyrian or Greek Orthodox woman may receive a divorce. Another example is that a Christian woman can work freely, while a Muslim woman may be restricted by her husband. These are significant differences in rights and freedoms on the basis of religion that highlight the lack of unity in the current personal status regime and that could sow seeds of discontent under the Draft Constitution.

Another problem with the requirement that personal status and religious matters be handled to preserve unity is that this provision could allow the courts to curb minority religious practices under the guise of maintaining unity. When religious practices are the most dissimilar is when the minority religions are most in need of protection. For that reason, the provision requiring the maintenance of unity could "destroy the basic premise of religious rights."[491]

The final issue the last sentence of Article 7 raises is whether the Draft Constitution protects Shari'a and Ecclesiastical courts. What does it mean to "organize" personal status and religious matters "in accordance with . . . their denominations?" If this provision is read to require that religious courts hear such matters, then religious courts cannot be abolished unless there is a constitutional amendment. The provision then would usurp the role of the judiciary and would conflict with Article 159, which grants the judiciary the jurisdiction "to decide all disputes."

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of Namibia, note 395.

491 S.I. Strong, 'Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and the Potential for Violence' 19 Mich. J. Int'l L. 109, 187 (1997).

7.A.6.c. Practical Effects of Religious Adjudication of Personal Status Matters

Placing matters of marriage, divorce, custody and maintenance under the dominion of religious laws and leaders maintains the patriarchal status quo in Palestine. The fact that men serve as the sole arbiters of personal status disputes leads to greater protection for male interests and continuation of the current power imbalance between men and women.

There are a variety of examples of how personal status law as governed by religion enforces a power imbalance. Because many of them have been discussed in Chapter 2, this section will highlight only a few. Starting with Shari'a practices, which apply to the majority of Palestinians, men and women do not have the same rights and duties because of the belief that: "God made men and women 'essentially different'; that these differences contribute to complementary family roles, rights and duties; and that this complementarity is crucial to the cohesion and stability of the family and society."[492]

Men use the concept of "complementary rights" along with a variety of patriarchal assumptions to justify discrimination against women. For example, under Shari'a law, after a divorce, women are entitled to maintenance payments for three months (or in limited circumstances up to one year) and are entitled to keep only the property they acquired separately from their husbands.[493] The decision over the amount and length of maintenance and the division of property is made without reference to the woman's needs, her ability to support herself, including whether her husband prohibited her from working, and her contribution to the property, care and financial support of her family, husband and home.

Traditional Islamic thought rationalizes the paltry maintenance payment based on the concept of complementary rights. Women have an enforceable right to maintenance from their husbands as long as the women remain obedient to the men; the husbands have a right of obedience enforceable against their wives as long as they maintain them.[494] By definition, a divorced woman is not obedient to a husband she no longer has, and therefore is not entitled to financial support. Religious leaders further justify the paltry maintenance sums and property settlements on the patriarchal assumption that women will return to their families for financial support if they need it, even if it means giving up their independence.[495] It is impossible to see how a system of family law based on religious practices such as these can be allowed to exist within a constitutional state that guarantees equality.

492 Hajjar, note 455 above at 7.
493 See Chapter 2, (Part C-2-c).
494 See Ibid.
495 See Ibid.

Under both Christian and Shari'a law, men and women are forced to relinquish their custody rights based on the ages of their children. As Chapter 2 described, Christian women maintain custody of their boy children until the age of 7 and girl children until the age of 9; while Muslim women are entitled to custody until their children reach puberty.[496] At no stage do these courts decide custody matters based on the best interests of the child, a standard required by the United Nations Convention on the Rights of the Child and the League of Arab Nations Charter of the Rights of the Arab Child. The Draft Constitution adopts both documents,[497] but does not specify whose rights would prevail in a conflict between religious rules and the interests of children. Additionally, Shari'a courts find a variety of excuses to deny women their custody rights, particularly if the woman is not Palestinian by birth or is not the same religion as her husband. Again, women bear the brunt of the disadvantages created by religious-based personal status law, as do children in this example.

These examples highlight fundamental principles, rules and practices of the Palestinian Shari'a and Ecclesiastical courts that greatly disadvantage women. They force the issue of whether it will be possible to take seriously the provisions of the Draft Constitution that demand equality for women and promise to protect children while maintaining religion-based legal pluralism.

7.A.6.d. Alternatives to a Religion-Based Personal Status Legal Regime

The previous discussion highlighted two fundamental problems that the personal status regime of Article 7 creates. First, it compels individuals to submit to the rules and practices of their religions, leaving them without an alternative if they do not want to be governed by religious law, do not believe in religious law, do not belong to a monotheistic religion, or if they wish to marry someone of a different religious faith. Secondly, personal status law as governed by religious authorities discriminates against women and creates severe injustices. A Palestinian constitution needs to ensure that people have the optimal amount of choice about how they wish to live their lives and that all people are treated fairly and equally. There are two different options that provide individuals with more freedom of choice, including the choice to be governed by religious-based personal status law. The first option is to create a unified personal status law system but allow a couple to marry under their religious traditions. What this means is that all people would be governed by the same rules regarding marriage, divorce, custody and maintenance, but would be allowed to marry according to their religious traditions. For example, a Catholic couple could choose to get a divorce

496 See Ibid.

497 Note 360 above Articles 24 and 48 respectively.

that would be recognized by the government but not their church. They could remarry under the unified system, although the marriage would not be recognized by religious law.

At each step spouses would have personal choices – about whether to follow religious personal status rules – that they alone would make, not the government. A unified system would create unified citizenship, as all Palestinians would have the same rights, privileges, benefits and duties. Moreover, it would grant individuals their full right to self-determination. When discussing a unified system, it is important to keep in mind that this system must be secular or it could force minority religious groups to submit to the religious rules of the majority groups.

Fundamentalist groups, in particular, challenge the idea of a unified personal status law on the grounds that it is an imported system that denies the cultural heritage and identity of Palestinians.[498] In response, we argue that a unified system provides the best of both worlds – it allows individuals maximum choice, including following their religion's marital rites and law. People who are not religious, who are not members of monotheistic or recognized religions, or who wish to marry across religions would be able to turn to the state in personal status matters, unlike now when they are either excluded completely or are compelled to submit to a system in which they do not believe.

The second option for personal status law is to have a civil family law system outside the control of religion, alongside the religious personal status system. Individuals would then have to choose which system they want to govern their family relationships. Under this arrangement, individuals would have full self-determination rights in the area of personal status matters and could choose whether they want different rights, privileges, benefits and duties than those given or placed on others who adopt a different system. It would solve the problems of those currently excluded from the personal status regime or who are forced to submit to the practices and laws of a system in which they do not believe. And, this system would open religious practices, rules and laws to scrutiny and criticism, particularly from the less-powerful members of the group; if the religious leaders are unresponsive to the needs of their communities, people can choose the civil system of family law.[499]

There are a few problems with adopting this possible alternative to a solely religion-based family law system. First, societal and familial pressures could force the couple to choose a religious or cultural system of law, effectively removing

498 Johnson and Welchman note 359 above at 100.
499 Bartholomew, note 484 above at 231.

their choice. Conversely, providing a 'right of exit' from religious-based family law could place individuals and particularly women in a cruel dilemma: "either accept all group practices, including those which violate basic individual rights or leave."[500]

South Africa provides an example of a constitutional provision for a civil personal status law with the option of developing a multicultural system that allows citizens to choose whether to be governed by religious and cultural law. Section 15(3)(a) reads:

a. This section does not prevent legislation recognizing:
   i. marriages concluded under any tradition, or a system of religious, personal or family law; or
   ii. systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
b. Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

Importantly, the provision requires religious-based personal status law to conform to the human rights provisions of the constitution. Currently, South Africa recognizes the tribal law of African communities and is in the process of legislating for the recognition of Muslim family law.

If the above recommendations are rejected, there is one other method for handling the problems that arise under Article 7. The drafters could remove all discussion of personal status law from the Draft Constitution, leaving the question of jurisdiction over these matters to the legislature. The legislature would then make the choice about personal status law, a choice they could change when/if the wider society changes its views about a religious system of family law. This would increase the accountability of religious authorities to the people because if people are unhappy with religious rules, they can lobby the legislature for change. It would also force religious leaders to change their rules as society develops. Both benefits are consistent with the goals of democracy.

7.A.6.e. Conclusion

Constitutionally entrenching the "principles of Islamic Shari'a" as a "major source of legislation" at a minimum deprives non-conformists and members of religious minorities of equal citizenship, by creating an alliance between Muslims and the state. At its worst, this could be interpreted to require the wholesale adoption of the Shari'a as codified law, turning Palestine into a theocratic state. Either

500 Shachar, note 365 above at 107.

eventuality defies the purpose of constitutions and the development of democracy and is likely to maintain patriarchy. This provision needs to be removed from the Draft Constitution. Failing that, the first sentence needs to include a stipulation that all legislation must conform to the constitution, particularly its human rights provisions.

With respect to the second sentence of Article 7, regardless of the alternative Palestinians choose for a system of family law, constitutional drafters and legislators must ensure that the personal status rules and laws can be subjected to internal and external review. Multiculturalism left unrestricted could become a mechanism for violating the individual rights otherwise guaranteed in the Draft Constitution. At a minimum, Article 7 needs to make it much clearer that religious and personal status law and practices must comply with the human rights provisions in the constitution. Otherwise, Article 7 could be used to allow religious groups to trample the rights of individuals and allow men to maintain control over women. Again, WCLAC recommends deleting Article 7 from the Draft Constitution.

7.A.7. Article 8: A Parliamentary, Representative Democracy

Article 8 establishes the Palestinian system of government as a parliamentary, representative democracy that guarantees the rights and freedoms of all of its citizens, political pluralism, and the right to participate in political activities. This Article seems intended to correct a problem other Arab states face: the creation of a strong presidential system that has been used to exercise authoritarian control.[501] This article misses a prime opportunity to establish Palestine as a constitutional democracy, which would place the constitution at the apex of the hierarchy of law. Establishing constitutional supremacy would send the message that all governance activities, regardless of who performs them, are subject to the constitution. Instead, it reads as though the parliament is the source of power and limitations over governance in Palestine. WCLAC recommends substituting "constitutional" for "parliamentary" in the first sentence of Article 8 to read: "The Palestinian political system shall be a constitutional representative democracy."
Article 8 provides all Palestinians with the right to participate in political parties and activities without discrimination. Sami Aldeeb argues that this provision needs to be worded more strongly to prevent conservative religious parties from practicing discrimination within political parties.[502] For women, his point is important, as they are the most likely to be excluded from political participation.

501 Brown, note 343 above at 3.

502 Aldeeb, note 452 above. The translation by Nathan J. Brown includes protection from "discrimination on the basis of political opinions, sex or religion." Brown, note 343 above at 9.

Finally, under Article 8 the right to form political parties and participate in political activities must be "in accordance with the law." As Chapter 6 (Part E) argues, this is highly problematic because it does not set boundaries to the limitation of these rights. They are reduced to legal rights, rather than constitutionally protected rights. The legislature could easily legislate them away. WCLAC recommends the adoption of language to narrow the power of the legislature in limiting political rights, as in: "The political rights conferred by this provision shall be exercised subject to the law, in so far as such law imposes reasonable restrictions that are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Palestine, national security, public order or in relation to contempt of court, defamation or incitement to an offence."[503]

7.A.8. Article 9: Govern According to the Rule of Law

Article 9 is an important provision because it requires governing bodies and the entire society to abide by the rule of law. This means that no legal person or governing body is above the law and that the law applies to every person, every institution and every government body. Individuals derive their rights from law rather than rulers. Individuals' rights are protected by courts that are independent of the government.[504]

7.A.9. Article 10: Administrative, Political, Legal and Judicial Review

In conjunction with Article 9, Article 10 makes explicit what is inherent in the concept of the rule of law: all governance matters, actions, rules and laws must be subject to review to ensure their compliance with the law and, presumably but not explicitly, the constitution.[505] Judicial review and oversight is a major facet of democracy, as it "prevent[s] majorities from either implicitly contradicting democratic ideals by oppressing minorities through state action, or by explicitly voting society out of its democratic character."[506] This provision should stop any attempts by the government to remove their actions from the process of judicial review, which some Arab states have tried.[507]

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503 The recommended language is derived in large part from the Constitution of Namibia sec. 1. Constitution of Namibia, note 395 above.

504 Sklar, note 322 above.

505 As a preliminary matter, the translation of the Draft Constitution is not as exact as it could be and should read: «All actions of governmental authorities shall be subject to administrative, political, legal and judicial review and oversight."

506 Barak Cohen, 'Empowering Constitutionalism with Text From an Israeli Perspective' 18 Am. U. Int'l L. Rev. 585, 596-597 (2003).

507 Brown, note 343 above at 3.

The main issues that arise under Article 10 are definitional. What does it mean to place governmental action under "political" review and oversight? While judicial review is a generally accepted concept within democratic theory, political review is a potentially dubious form of review. Does "political review and oversight" mean that if a law, regulation, or administrative action does not comply with the politics of the majority or the executive that the action can be struck down? If yes, this provision could become a dangerous weapon that creates a tyranny of the majority—or even a minority.

Or, does the provision mean that governmental authorities other than the judiciary have the power to determine whether their actions or the actions of others comply with the law? If yes, political review could allow the executive or legislature to usurp the role of the judiciary in violation of the concept of separation of powers contained in Article 64 of the Draft Constitution. This provision needs to ensure that review and oversight occurs within the confines of the constitution.

One drafter of the Draft Constitution explained that political review and oversight allows for the legislature to demand that government personnel explain their actions.If necessary, this could provide the legal basis for a withdrawal of confidence from the government. Such review, however, is unnecessary as other provisions accomplish this goal. Article 82 allows the legislature to have its committees "investigate any matter relative to any governmental institution falling under its observatory mandate. The said committee may ask any question it feels necessary to, and examine documents and seek information from all concerned parties." Articles 84 and 85 specifically allow members of the Representative Council (legislature) to question the Prime Minister or a minister without limitation; Article 86 allows for withdrawal of confidence from the government.

The second definitional question concerns the meaning of "legal" review and how this differs from judicial review? This point is not of major importance since legal review seems to be same as requiring the government to follow the rule of law.

The third issue arising from Article 10 could impact women a great deal. Does Article 10 allow for political, judicial and legal review and oversight of the religious courts or leadership that are responsible for dealing with personal status matters? The Draft Constitution relegates a major area of the law to religious authority. Would these authorities then be considered "governmental authorities" subject to judicial review when currently they are not? Excluding the religious authorities from review and oversight with respect to family law could allow them to violate the constitution with impunity. The same question arises for customary law mediations, which is currently the main form of dispute resolution in the OPT.

Nowhere does the Draft Constitution explain the relationship between religious courts, religious law, customary law and mediators, and the government. Excluding these bodies from review would undermine the force of a Palestinian constitution. The Draft Constitution should make it clear that any individuals or institutions that perform dispute resolution tasks or other governmental functions are subject to review and oversight.

7.A.10. Article 11: Independence of the Judiciary

Article 11 entrenches the principle of independence of the judiciary within Palestine and states that no one, whether an individual, group, institution, body or member of a governmental body or government, is exempt from "the law". This provision takes the next logical step after Article 10 by placing all actions of individuals, groups, and governmental and non-governmental institutions and bodies under review to ensure they comply with "the law".

The provision is imprecise, however, raising the question of what is "the law." Does "the law" include the constitution, legislation, common law, customary law, and/or religious law? While it could include constitutional law, under Article 11 the judiciary has room to manoeuvre. It would be better to use Article 15 of the First Draft of the Constitution, which reads: "The provisions of the Constitution and the laws issued in accordance thereof apply to all individuals, private bodies and institutions, and governmental institutions." The rewording would guarantee the horizontal application of the human rights provisions to non-governmental actors, which, as described in Chapter 6 (Part D) is necessary to ensure the full protection of human rights and women's equal citizenship.

7.A.11. Article 12: Palestinian Nationality

Articles 12 and 13 address the thorny issue of who is a Palestinian. Article 12 states that Palestinian nationality will be determined by law, but limits the discretion of legislators to prevent them from restricting the rights of Palestinians who left Palestine prior to May 15, 1948 and have not been allowed to return. It establishes constitutionally that both mothers and fathers can pass their nationality to their children. Article 12 leaves to the law the issues of how to obtain and renounce citizenship, while constitutionally protecting citizens from deprivation of their citizenship. It also states that the rights and duties of citizens with multiple nationalities shall be governed by law.

Article 12 attempts to protect the nationality rights of Palestinians who resided in what was Palestine prior to the armistice in 1948 that ended the war with

the newly declared state of Israel. The wording of the first sentence may prove problematic because it discusses Palestinians who "legally acquired" nationality before May 15, 1948. Was there a sufficient system of nationality during and prior to the British Mandate period that would allow for the determination of who qualifies as a Palestinian under current conceptions of nationality? The reason we ask this question is that many women were deprived of their nationality in circumstances that would not justify such deprivation now. For example, female Palestinians who married foreigners and their descendants have not always been treated as Palestinian.[508] Can these women and their descendants regain their Palestinian nationality under this provision? This point applies equally to the men who married Palestinian women but were not granted Palestinian citizenship because by law it only passed from husbands to wives. Are they now Palestinian? Article 12 corrects some of the problems identified in the previous paragraph for the future. It allows women to pass on nationality to their children, unlike some Arab and Muslim countries. This is an important gain for women's rights and children's rights. Drafters report that the inclusion of a woman's right to pass on her nationality to her children was strongly contested during the drafting process. Unfortunately, Article 12 remains silent as to whether women can pass their nationality to their husbands, something that is only sometimes allowed in Arab and Muslim countries. This potentially deprives women of equal citizenship, as men are able to pass their citizenship on to their wives with little restriction.

Another important gain for women under Article 12 is the statement that no one can be forced to relinquish their citizenship. In some Arab and Muslim countries, women who marry foreigners are deprived of citizenship. Article 12 specifically protects against such discriminatory legislation.

However, Article 12 opens up another difficulty in stating: "The rights and duties of citizens with multiple nationalities shall be governed by law." In principle, there is no reason why the rights and duties should differ for Palestinians who hold multiple citizenship and all other Palestinians. If the concern is that multiple nationalities could lessen an individual's loyalty to Palestine, then the provision should allow for "the law" to determine under what conditions Palestine will recognize multiple citizenships. As it stands, the provision allows legislators to create unequal citizenship for holders of dual or multiple citizenships.

508 Lisa C Stratton, 'The Right to Have Rights: Gender Discrimination in Nationality Laws' 77 Minn L R 195, 201-203 (1992).

7.A.12. Article 13: A Right of Return

Article 13 provides Palestinians who were forced out of or expelled from historical Palestine in 1948 with a right of return. It is an irrevocable right that cannot lapse by prescription. Article 13 also obligates the Palestinian state to seek a right of return to and compensation for property and land inside Israel that was lost in the 1948-49 war. The main concern for women in this provision is how compensation for loss of land and property as a result of the war will be determined. Since many of the original owners are no longer alive, presumably any compensation will pass to their descendants. Compensation should be applied without discrimination between men and women. Article 13 must address this issue directly by adding the phrase "on the basis of social justice and equality" to read "and to obtain compensation in accordance with the United Nations Resolution 194 and the principles of International law, and on the basis of social justice and equality, through negotiations."

Another concern arises under the second paragraph of Article 13, which requires Palestine to seek the right of Palestinians to return to land now in Israel. This provision is both controversial and open to differing opinions and interpretations because there is no political agreement with Israel; it could even undermine an agreement with Israel on this particular issue.

7.A.13. Article 14: Natural Resources, Antiquities and Historical Sites

Under Article 14, the people are the owners of Palestine's natural resources, antiquities and historical sites, while the state has the power to regulate their use. The main concern for women relates to their access to natural resources. Because of women's lesser economic, social and political power, they often have little access to or control over natural resources, although they are typically responsible for providing food and water for their families and for agricultural work.[509] A Palestinian constitution needs to ensure that women have equal access to and equal decision-making power over natural resources. For this reason, WCLAC recommends adding a sentence to Article 14 to clarify that the state will regulate the use of natural resources based on the principles of equality, social justice and sustainability.

509 See 'Plan of Action' note 187 above.

7.A.14. Article 15: Protection of the Environment

Article 15 is an extremely weak provision for the protection of the environment, particularly when compared to Article 33 of the Palestinian Basic Law. Currently, the Palestinian Authority provides for greater environmental rights and protections than the Draft Constitution. Article 33 of the Basic Law reads: "A balanced and clean environment is one of the human rights. The preservation and protection of the Palestinian environment from pollution, for the sake of present and future generations, is a national duty."

Unlike the Basic Law provision, Article 15 of the Draft Constitution has few teeth. It only requires the Palestinian state to "strive to achieve a clean, balanced environment." It creates no enforceable right to a clean environment. The Palestinian government shares limited environmental responsibilities with the communities and is required to draft legislation to punish tampering with the environment. For Palestinians concerned with the environment, health, pollution, and clean water, this provision provides little constitutional support for environmental improvement and protection.

Expecting the government, individuals, groups and institutions to respect, protect and restore the environment on the basis of a weak statement of environmental policy is highly unrealistic. Each of these groups has conflicting interests concerning the cost of cleaning up the environment, and economic interests typically outweigh environmental concerns. Each of these groups must be forced to restore and protect the environment. One possible explanation for the weakness of the provision is that drafters fear that this could be extremely costly for a Palestinian state. As Chapter 6 (Part A) argued, however, the constitution could address this concern by providing for progressive realization of this right.

Protection of the environment is an important goal in all societies. Contamination and unsafe water, among other environmental problems, cause severe health problems and endanger society. Women in the OPT are traditionally responsible for the health and wellbeing of their families and for caring for the sick. Failure to address the detrimental effects of an unsafe environment impacts women by increasing their burden.[510] Failure to place an obligation on the government to clean up the environment limits women's ability to protect their health and well being, that of their families and the wider society.

510 United Nations Economic and Social Commission for Western Asia, note 138 above at 21.

The drafters should include a constitutional protection of the environment such as Article 23 of the First Draft of the Constitution of Palestine, which reads: "A clean and sustainable environment is a human right. It shall be a societal and official responsibility to preserve and protect the Palestinian environment for present and future generations."511 Another option would read: "Everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected for the benefit of present and future generations."

7.A.17. Article 16: Free Market Economy

Consistent with most Arab constitutions, the Draft Constitution of Palestine describes its economic system.[512] However, the Draft Constitution entrenches a free market economy, unlike many other Arab systems, which entrench socialism. Article 16 also allows the government to establish public companies for the benefit of the public interest. As a preliminary matter, the English translation is inaccurate. It adds the statement "within the context of fair competition" that does not exist in the Arabic.

The predominant question Article 16 raises is why is the political choice of an economic system being made within a constitution? As societies develop and their needs change, this provision could limit the government's ability to respond to those changes. It could inhibit necessary development of the Palestinian economy.

Additionally, this provision lacks foresight with respect to social and economic justice and women's issues. A market economy assumes that all Palestinians have equal access to the economy, which is rarely true. Employed men, in particular, benefit from the market, as they have the political and economic power to utilize the system. Women face obstacles to full market access, particularly in patriarchal OPT where their education and employment options are impeded by gender-defined roles.[513] Equally important, women's unpaid contributions to their families are not recognized in a market economy, which devalues their work and drains their political, economic and social power.[514] The market exploits women's unpaid labour to the extent that it relies on this work to maintain family stability, while also rendering it invisible in economic terms. The question is whether constitutionally entrenching the principle of a free market economy builds obstacles to measures necessary to correct these problems.

511 The translation was provided by the following website: www.pcpsr.org/domestic/2001/conste1.html.

512 Brown, note 343 above at 13.

513 See Chapter 2.

514 Chinkin and Paradine, note 364 above at 123.

Allowing public companies is not enough to correct the deficiencies inherent in a market economy. First, there is nothing that says those public companies will ensure fair and equal access to resources for all Palestinians regardless of gender and economic status. Secondly, Article 16 could inhibit economic measures to ease the suffering of poor people. For example, a constitutional requirement of a free market economy could inhibit price controls and subsidies or other economic measures that may be necessary for the subsistence of the poor and the development of the economy. The point here is not whether a market economy is appropriate for Palestine, but whether Article 16 could inhibit measures needed to ensure social and economic justice, to equalize women's access to the market, and to recognize women's work in sustaining families and communities partly for the benefit of the market. If the provision remains, WCLAC recommends including language from the First Draft of the Constitution of Palestine that allows the law to regulate the market "to preserve the rights of groups in need of care."[515]

7.A.16. Article 17: Social, Economic and Cultural Development

Article 17 sets out a policy statement: the government of Palestine "shall strive to promote social, economic and cultural development and scientific advancement" based on the consideration of social justice and the idea of providing assistance to the "more deserving, especially those who suffered during the national struggle." While the WCLAC commends the policy statement, it does raise concerns for women.

The first is how will the government determine who suffered during the struggle against occupation and for a state? At least one commentator expressed concern about abuse of this provision based on current practices: "In the PNA (Palestinian National Authority), family members of those who had given their careers or lives to the nationalist struggle were routinely given preference, but on an *ad hoc* basis that made it difficult to distinguish from cronyism."[516] Most Palestinians living within the OPT have contributed to the national struggle and suffered under occupation, which makes it extremely difficult to determine who is deserving of benefits under this provision.[517]

Women suffer the greatest risk of having their efforts and suffering ignored during the process of determining who is "more deserving." While women have been extremely active in the national struggle, their activities often have been less visible. Their efforts ranged from public demonstrations and armed struggle, to the less obvious efforts of caring for the injured and the families of prisoners,

515 First Draft Constitution, note 449 above at Article 21.
516 Brown, note 343 above at 13.
517 Ibid.

rebuilding of homes and tending the emotional injuries of men and children, all of which are critical to the security and stability of the Palestinian people.

The second point is that women are more disadvantaged than men when it comes to development. They have less access to education, resources, status and employment, which means their needs must be considered in any development policy. Article 17 adopts the concept of social justice, which in principle includes addressing women's disadvantages, but it would be better to add "with due consideration to **the principles of** social justice and **equality**." Phrasing Article 17 in this way would also address the equality issues of religious minorities in Palestine.

7.A. 17. Article 18: Commitment to International Agreements

Chapter 1 of the Draft Constitution of Palestine ends with Article 18, which promises that Palestine will follow the Universal Declaration of Human Rights and establishes a policy that it will "seek to join" other international human rights agreements. WCLAC welcomes this provision.

Under Article 18, it seems that the Universal Declaration of Human Rights (UDHR) will apply immediately to the state of Palestine once the constitution comes into force, bypassing the constitutional process for adopting international treaties, which is a positive step.[518] Importantly, it sets an example for the entrenchment of human rights agreements in a Palestinian constitution. The constitutional adoption of the UDHR also may fill in gaps in the human rights provisions of the Draft Constitution. For example, as will be seen in the discussion of Article 19 (in Chapter 8 Part A-1), the Draft Constitution protects against discrimination only if it is based on race, colour, religion, gender, political opinion or handicap. The UDHR expands those protections to include language, political or other opinion, national or social origin, property, birth or other status. The expansive grounds on which discrimination may not occur could offer greater human rights protection to vulnerable Palestinians.

Additionally, under the UDHR women could have a greater constitutional basis for challenging discriminatory personal status laws through Article 16, which reads:

> (1) 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.

518 Ibid. at 14.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

The remainder of Article 18 of the Draft Constitution is similar to Article 10 of the Basic Law, which reads: "The Palestinian National Authority shall work without delay to join regional and international declarations and covenants which protect human rights." The drawbacks of the wording of Article 18 are that it does not require the Palestinian government to join international or regional human rights agreements and it does not restrict the government from placing reservations on membership. Many Arab countries condition their membership in international agreements with exclusions from provisions they do not want to enforce, particularly with respect to women's human rights and equality within family law.[519] For this reason, one commentator suggests adding the phrase "without any reservation" to the provision so that it reads: "and shall seek to join other international instruments that safeguard human rights **without any reservation.**"[520]

7.B. Supremacy of the Constitution?

Missing from the provisions of Chapter 1 of the Draft Constitution of Palestine is a declaration of the supremacy of the constitution. The main reason for placing the constitution at the apex of the legal hierarchy is that it protects against "the tyranny of the majority". If every aspect of governance and human rights can change depending on the legislature and the executive, people in minority groups will find that their interests receive little recognition or state protection. Their rights, duties and benefits will be determined by the majority through legislation, without any limitation by the constitution. The only issue would be whether the correct procedure had been followed rather than whether government actions conform to the constitution. Also, the wider society would discover that people could not rely on the law to protect human rights consistently because the law could be changed at any point.[521] Thus, Palestinian society would be "subject to the vagaries of political administrations."[522]

519 Department of Economic and Social Affairs, United Nations, 'Declarations, Reservations, and Objections to CEDAW' http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm. Egypt, Morocco, Lebanon, Algeria, Jordan and Tunisia, for example, each have placed reservations on CEDAW. Ibid.

520 Aldeeb, note 452 above.

521 See e.g. Ronalda Murphy, 'Constitutional Rights Discourse: Canadian and South African Feminist Engagements' 20 in Dobrowolsky and Hart note 313 above.

522 Hughes, note 317 above at ftnt. 13.

When the constitution is supreme, an unelected judiciary typically serves as a neutral body that determines if the government is acting beyond constitutional boundaries. Leaving such disputes to the legislature could allow it to "privilege . . . short-term political goals over long-term interest in compliance with the constitution."[523] A judiciary that is not subject to elections and somewhat neutral in political terms can resist political whims that could violate the constitution. In this way, the judiciary is able to apply the constitution and the law consistently, ensuring stability of the government and the rights of minorities. It should be added that the process of appointing members of the judiciary is highly political, potentially undermining the alleged neutrality of the judiciary mentioned here.
The supremacy of the constitution can be inferred from Article 8, which reads: "It [the Palestinian political system] shall guarantee the rights and liberties to all citizens . . . in accordance with law." Whether "the law" includes the constitution will depend on how the provision is interpreted by the judiciary. Article 10 also may provide for supremacy of the constitution because it removes any option of granting immunity to the government from judicial review. Presumably, the judiciary would review such actions based on the constitution, but this should be stated explicitly. What is unclear, from a close reading of the text and conversations with drafters of the constitution, is why Article 15 of the First Draft of the Constitution of Palestine was removed. Article 15 read: "The provisions of the Constitution and the laws issued in accordance thereof apply to all individuals and governmental institutions. No suspension of these provisions shall be allowed." Article 15 should be revised to include application of the constitution to groups, institutions and anything with "legal personality".

7.C. An Islamic State?

Many people, both in the OPT and abroad, are asking whether the Draft Constitution of Palestine creates an Islamic state. The answer depends on how one defines "Islamic state."[524] Some define an Islamic state by whether the state "maintain[s] and/or [has] consciously adopted at least the public symbols of adherence to traditional Islamic beliefs and practices."[525] These symbols include a declaration of Islam as the state religion or a promise that some aspects of Islam will be a source of law.[526] Others look for a stronger connection between Islam and the government, including whether Shari'a forms the basis of the legal system. Still others avoid rigid definitions, preferring a range that places a wholly secular state at one end and a fundamentalist state whose government is "subject

523 See e.g. Murphy, note 520 at 21.
524 See e.g. Andrew Harding, 'The Keris, the Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia' 6 Sing. J. Int'l & Comp. L. 154 (2002).
525 Afsaruddin, note 282 above at 4.
526 Harding, note 523 above at 156.

to and limited by Shari'ah law" at the other.[527] Whether a country is "Islamic" depends on where it falls on the scale.

Because of the lack of uniformity in defining an Islamic state, this Discussion Document avoids answering the question as posed, preferring to examine the symbolic and legal role of Islam in the Palestinian state under the Draft Constitution. This section pulls together much of the information contained in Part A of this chapter to complete this examination. Through this analysis it becomes evident that from a women's perspective it is irrelevant whether the Draft Constitution creates a truly Islamic state under any generally accepted definition because for the vast majority of Palestine's women the country will feel like one.

On a purely symbolic level, the Draft Constitution deeply entrenches Islam in Palestine. In Article 2, it declares that the Palestinian people are a part of the Islamic nations. Article 5 adopts Islam as the official religion of Palestine. Neither provision places any binding obligations on the government or society to practice Islam. Both establish the identity of the country. For the minority religious population, these two "symbolic" provisions set the tone, such that they may be considered outsiders within their own country. These provisions plant the seeds of insecurity, despite promises of religious equality in Article 5 and later in Chapter 2 of the Draft Constitution.

Article 5 is likely to have substantive effects within Palestine in addition to its symbolic role. At a minimum, Article 5 prevents the separation of religion from the government and supports the further entrenchment of Islam in the government. It justifies a common practice in most countries of the world, which is to recognize certain religious holidays as public holidays during which government offices and services are closed; in Palestine those public holidays mostly will be determined by Muslim practices. It also is likely to justify special funding for Islamic schools, programs and institutions, which already is occurring under the PA. Special funding increases the power of Muslims. They will identify more closely with the state; they will be perceived as preferred by the government; and they will receive scarce resources not available to others.

An even more important concern about the status of Palestine as an Islamic state derives from Article 7, which constitutionally entrenches "the principles of Islamic Shari'a" as a "major source of legislation."[528] By itself, this provision provides the Palestinian government with the power to create a legal framework and system based wholly or in large part on Shari'a law and interpretation. Nothing in the

527 Khaled Abou El Fadl, 'Islam and the Challenge of Democratic Commitment' 27 Fordham Int'l L. J. 4, 28 (2003). See also, Hajjar, note 455 above at 1.

528 English translation provided by the Palestinian Ministry of Foreign Affairs.

Draft Constitution inhibits the government from doing so. Instead, Articles 7, 2, and 5 – read together – could be interpreted as mandating the government to constitute itself as a theocratic state.

Some theorists argue that the creation of a theocratic state is impossible in a country that places sovereignty in the hands of the people rather than god, as the Draft Constitution does in Article 63.[529] This begs the question: if the Draft Constitution is adopted by referendum and if the people vote for representatives who interpret the constitution as creating a fundamentalist state, then strictly speaking, the people will have chosen their government and system of law. Although this is a superficial and incorrect notion of democracy since the Draft Constitution does not require the public to vote for its adoption, nothing limits the Palestinian government from adopting this approach. This is one of the loopholes in the Draft Constitution.

Without knowing how the Draft Constitution will be interpreted, its current language is that of a hybrid constitution, incorporating elements of a theocracy (particularly Article 7), but also adopting features consistent with liberal democracies – mainly the human rights provisions in Chapter 2. Hybrid constitutions usually are the result of political compromise between "diverse and fragmented people . . . unlikely to agree on the constitutional enthronement of any single justice principle" as is the case in Palestine.[530] The result is that the Draft Constitution promises equality, but favours Islam. It allows for pluralism but only in the area of family law and even then only in part, as the right to have personal matters decided by one's religion applies only to monotheistic religions, to the exclusion of secularists, non-conformists and polytheists.

Regardless of whether the Palestinian government will interpret the Draft Constitution as providing for or requiring a theocratic state, the practical effect of these provisions on women is no different than if the Draft Constitution explicitly proclaimed the state of Palestine to be one. As Chapter 6 (Part B) argues, Palestinian women derive their rights not from the state or through their membership in a group but from their family relationships. Under Article 7, family relationships are governed by religion, which for the majority of Palestinians means Islam. For women, their rights, duties and responsibilities are determined by Islam, which will make Palestine an Islamic state for them.

529 See e.g. Brown, note 316 above at 169.
530 Graham Walker, 'The Mixed Constitution after Liberalism' 4 Cardozo J. Int'l & Comp. L. 311, 317 (1996).

7.D. Conclusion

In examining the General Foundations of the State, this Discussion Document pointed out that several provisions may become "paper law" if they are adopted and implemented prior to Palestine gaining full sovereignty. Also some of these provisions may pre-empt attempts at a final status agreement with Israel. Chapter 7 also considered several provisions that entrench Islam in Palestine, which at one extreme could result in the creation of a theocratic state. At a minimum it will create insecurity among religious minorities and perpetuate patriarchy. Although the language of the Draft Constitution creates a hybrid constitution, in effect it creates an Islamic state for women.

Chapter 8: The Draft Constitution: Rights, Freedoms and Duties

Chapter 8 turns to the predominant focus of our analysis of the Third Revised Draft Constitution of Palestine – the human rights, freedoms and duties contained in Chapter 2. Again, the analysis centres on women, although it looks at minority rights and makes general comments and recommendations where appropriate. After consideration of the different provisions, Chapter 8 discusses their limitations and human rights protections missing from the Draft Constitution.

At face value, the Draft Constitution creates a strong human rights framework for the state of Palestine and the first constitution in the Arab world to include specific provisions for women's rights. The meaning of the human rights provisions, however, will depend on their interpretation and on the social and political context.[531] Examined in the context of Palestinian women's lives, the human rights provisions fall far short of fully protecting women's rights. Read together with other provisions of the Draft Constitution, particularly Article 7, the provisions for women's rights may be almost meaningless.

One of the measures this Discussion Document uses to analyze the Draft Constitution from a women's rights and human rights perspective is whether the provisions support, are indifferent to, or in conflict with international human rights treaties. Although most Arab and Muslim countries are signatories to these treaties, many have recorded significant reservations that exempt them from applying the provisions that "conflict" with Shari'a law, particularly in matters relating to women. These countries use conservative cultural and religious practices to justify discrimination against women.[532] WCLAC is very concerned

531 Feldman, 'Book Review' note 38 above at 402.

532 Ann Elizabeth Mayer 'A "Benign" Apartheid: How Gender Apartheid Has Been Rationalized' 5 UCLA J Int'l L & Foreign Aff. 237, 270 (2000-2001).

that the state of Palestine will follow the same path, which would negate women's rights and preserve a system of patriarchy.

8.A. Individual Provisions

8.A.1. Article 19: Equality before the Law

Article 19 states that all Palestinians will be equal before the law; that they "are entitled to enjoy" political and civil rights and duties; and that they cannot be discriminated against on the basis of race, sex, colour, religion, political opinion or disability. The provision states explicitly that the words "Palestinian" and "citizen" include both men and women. Articles 19 and 20 provide the primary protection for equality in the Draft Constitution. Articles 22 and 23 extend additional protection to women.

As a preliminary matter, the translation of the Draft Constitution found on the Ministry of Foreign Affairs (MOFA) website is inaccurate. The translation should read: "without distinction of any kind due to race, sex, colour, religion, political opinion, or disability."

The MOFA translation provides additional grounds that cannot be used as a basis for discrimination, whereas the more accurate translation suggests that these grounds are limited to those listed in the provision. The translation also confuses sex and gender, a point that will be elaborated on shortly.
Overall, Article 19 is an important and necessary provision for human rights protections. With that said, there are a few issues the drafters of the constitution should address. The first is that the grounds that cannot serve as a basis for distinction are not sufficiently inclusive to address all types of discrimination and human rights violations that occur in the OPT, particularly with respect to women. As Chapter 2 explained, women face discrimination not just on the basis of their sex, but also on the grounds of their gender, marital status, age, and social status.

The difference between sex and gender is important. Sex typically refers to biological differences between men and women; an example of discrimination on the basis of sex would be a refusal to hire a pregnant woman. Gender, on the other hand, refers to socially-constructed differences, particularly in relation to the different roles society creates for men and women.[533] An example of gender discrimination is paying women a lower salary than men for equivalent work on the basis that a man is expected to be the breadwinner. Article 19 should protect against both sex and gender discrimination to make "it clear that it is

533 Moghadam, note 354 above at 138.

impermissible to discriminate against men or women whether on the basis of biological features or patterns of behaviour."[534] Arabic speakers will be aware that there is no word for "gender" in Arabic, but this point still deserves explicit attention.

Women also need to be protected against discrimination that occurs because of the intersection of their various identities, one of which is being a woman.[535] Protection against discrimination on the basis of sex may not be enough to counter discrimination that employers justify because of a woman's marital status. For example, single women report that they receive inadequate healthcare compared to married women and that they may be subjected to pregnancy tests and virginity tests without their consent by police who suspect premarital sex or sexual abuse. Married women, on the other hand, report that they have difficulty getting jobs or keeping them once they are married because employers assume that they will not want to work so that they can have children.[536]

This employment example shows that protection against discrimination on the basis of sex may not be enough to protect women. While it is clear that only a woman risks employment problems when she marries, the potential employer could argue that s/he did not hire the applicant (or that s/he fired the employee) not because she is a woman but because she is married. If interpreted narrowly, Article 19 does not necessarily protect against this type of discrimination and could let unfair and unequal treatment continue without constitutional recourse.

There are a variety of other factors that governments and individuals use to justify discrimination that applies to both men and women and these should be made unconstitutional also. The Universal Declaration of Human Rights, which is adopted by the Draft Constitution in Article 18, at a minimum, obligates signatories to protect against discrimination on the basis of "race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status." At one stage, the fourth version of the draft Basic Law for the OPT included this longer list of grounds for protection against discrimination.

South Africa's constitution provides the broadest list of grounds for protection against discrimination and should serve as a model for an equality clause. Under Article 9, South Africa's constitution protects against discrimination on the basis of "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."[537]

534 Birenbaum and Albertyn, note 430 above; Brown, note 343 above at 13.

535 Hughes, note 317 above at 23.

536 CEDAW requires signatories to sanction employers who discriminate on the basis of marital status. CEDAW, note 157 above at Article 11.

537 Constitution of South Africa, note 395 above Article 9(3).

If the Palestinian drafters do not wish to list each of these grounds, they instead could add "or other status" as a ground for protection against discrimination. This could open up equality protection to a wider group of people and allow the government to develop equality law as society's understanding of what constitutes discrimination changes.[538] The Second Draft of the Constitution of Palestine protected against discrimination on the basis of listed reasons and also for "any other reason."[539] This would be sufficient.

The South African constitution also has additional language that should be adopted in a Palestinian constitution. It creates a legal presumption that "[d]iscrimination on one or more of the grounds listed . . . is unfair unless it is established that the discrimination is fair."[540] This provision shifts the burden of proof of discrimination away from the complainant, replacing it with a burden on the defendant to explain why the discrimination was not unfair. This shift recognizes that discrimination cases are extremely difficult to prove, especially since most of the information that would constitute proof is in the hands of the defendant. This shift gives teeth to the provision that makes enforcement more likely.

Next, Article 19 of the Draft Constitution states that Palestinians are entitled to enjoy civil and political rights, but it does not include social, economic and cultural rights. As Chapter 6 (Part A) argued, socio-economic and cultural rights are an integral part of human rights and must be properly addressed in a Palestinian constitution in order to guarantee the broadest protection of and access to rights. In fact, without socio-economic rights, it may be nearly impossible to address issues of equality, as women and poor men often cannot exercise civil and political rights unless their socio-economic needs are met. Article 20, on the other hand, guarantees socio-economic and cultural rights as well as civil and political rights. Why are they excluded from this provision?

A third issue of concern is whether Article 19 creates a positive duty on the government to take proactive measures to protect against discrimination or merely a negative duty that the government must refrain from discrimination. As Chapter 6 (Part C) argues, a negative duty by itself is not enough protection to guarantee equality or other human rights. The government needs to take proactive measures to ensure that each person has equal and meaningful access to their rights – in this instance their right to equality.[541]

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538 The Northern Ireland Human Rights Commission, note 380 above.

539 Second Draft of the Constitution of Palestine, 9 February 2003, Article 19.

540 Constitution of South Africa, note 395 above at Article 9(5).

541 CEDAW specifically requires state signatories to "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise." CEDAW, note 157 above Article 2.

Another purpose for creating a positive right is to correct the effects of discrimination that occurred prior to the adoption of the constitution. In its current version, it is unclear whether Article 19 allows for special provisions to guarantee substantive equality or measures that would allow the government to differentiate between groups or individuals in order to correct historical and current injustices.[542] It is important to ensure that a Palestinian constitution does not foreclose the option of adopting substantive equality measures by allowing the courts or legislature room to interpret this provision as providing formal equality only.

Another important element missing from Article 19 concerns horizontal application of the provision to individuals, groups, and non-governmental institutions and bodies as well as to the government. As Chapter 6 (Part D) argues, the Draft Constitution does not specify that the human rights provisions apply horizontally. Since many Palestinian women's rights derive from their relationships with their family, a situation that Article 7 maintains, horizontal enforcement of rights may be the only way to ensure women's equality and equal citizenship, and ultimately to end patriarchy.[543]

This point needs to be reinforced when considering what constitutes "the law" in the declaration that "all Palestinians are equal under the law." It is not clear whether "the law" includes religious law and customary law and the systems that apply them. Since, currently, most disputes are settled through these systems, if there is no horizontal application and these systems are deemed "private" or outside the scope of government intervention, then women are not guaranteed equality before the only law that is likely to apply to them and, therefore, cannot have equal citizenship with men.

The last sentence of Article 19, which states that the words "Palestinian" and "citizen" include both men and women, is important to ensure that women are included within the meaning of the constitutional provisions. This sentence is the only one of its kind in an Arab constitution.[544] Because many of the provisions use the pronoun "he" it would also be appropriate to note explicitly that the words "he" and "his" also include women.[545]

A final point about Article 19 is that it applies only to Palestinians. As discussed in Part B of this chapter, this limitation allows for discrimination against foreigners, including permanent residents of Palestine. As the Draft Constitution does not guarantee that women can pass on their citizenship to their husbands, Palestinian

542 See Chapter 6 (Part F).
543 See Chapter 6 (Part D) and Chapter 7 (Part A-6).
544 Brown, note 343 above at 14.
545 See Chapter 9 (Part B).

women and their families are likely to feel the effects of this limitation. Does the word "Palestinian" apply only to those with Palestinian citizenship or does it include Palestinians in exile and the diaspora?

WCLAC recommends changing the language of Article 19 to provide the broadest protection for equality possible: (1) by adding additional grounds for protection against discrimination, (2) by embracing the concepts of horizontal application of human rights, substantive equality and positive rights, and (3) by opposing any attempt to maintain the public-private divide that protects male privilege in the OPT.

8.A.2. Article 20: Equal Rights and Liberties

Article 20 guarantees that human rights and freedoms are binding and that the state will protect "religious, civil, political, economic, social and cultural rights and liberties on the basis of equality and equal opportunity." It concludes that no one can be deprived of these rights or their legal competence "for political reasons." Article 20 could be an important source of equality rights for male members of minority groups and for all women, particularly if it is interpreted broadly.

The first sentence of the provision is not particularly clear. Although it states: "human rights and liberties are binding and must be respected," it does not explain on whom those rights and liberties are binding and by whom they must be respected. This issue relates to the question of whether the constitution adopts horizontal application of rights and liberties so that they apply to the behaviour of non-governmental actors. Chapter 6 (Part D) explains that horizontal application is necessary to ensure that human rights operate against actions historically treated as private and against private sources of power. Again, since most Palestinian women derive their rights from their family relationships, many women will be unable to access their rights or benefit from equal citizenship unless their rights apply to the private realm as well.[546]

WCLAC fully supports the second sentence of Article 20 that guarantees all different rights based on equality and equal opportunity. Unlike Article 19, it addresses socio-economic and cultural rights, which are of particular benefit to women. Importantly, the provision does not restrict the sources of these rights only to constitutional provisions, which allows for the inclusion of new rights including those contained in the international and regional treaties Palestine signs. Additionally, it may be possible to interpret "guarantee" and "on the basis of . .

546 See Chapter 5 (Part B) for a description of the public-private divide that leads to governmental refusal to intervene in so-called 'private' matters.

. equal opportunity" as creating a positive obligation on the government to take proactive measures to ensure that all Palestinians have the opportunity to access those rights.[547] "Guarantee" suggests something more than simply refraining from action, particularly when read with the promise of access to those rights on the basis of equal opportunity. The provision also may be wide enough to encompass the concept of substantive equality, which allows the government to differentiate between individuals to reach equality in outcome, rather than just a formalistic appearance of equality by treating everybody identically.[548]

The last sentence of Article 20, which prevents individuals from being "deprived of his legal competence, basic rights and liberties for political reasons," is problematic. This sentence seems to touch on a major issue in constitutional law – how the government, particularly the courts, will determine when rights can be limited. This provision expressly states that rights cannot be limited for political reasons, which is an important protection against authoritarianism, particularly when applied to opposition movements and the media.

Article 20 does not define what is meant by "political" and does not address other grounds that may be used inappropriately to justify the deprivation of rights. It would be much better to state that rights may not be limited or revoked for any reason and then add a limitation clause to explain the circumstances under which the government may limit a person's rights. Rights should only be limited by law, which stops the executive branch from ordering deprivation of rights; and the constitution should set the standard by which the courts will measure whether the limitation of rights can be justified. For a complete description of models for limitations clauses, see Part C (9) of this chapter.

Two other provisions in the Draft Constitution discuss limitations of rights. Article 57 specifically prohibits the suspension of rights but allows their restriction in exceptional circumstances. Articles 128 through 130 provide for limitations of rights in a State of Emergency. The Discussion Document addresses the limitations these articles create under the respective provisions, below.

Article 20 can be improved by stating explicitly that the provision is intended to create positive obligations on the government to ensure equality and equal access to human rights and that the provision does not exclude the possibility of measures that treat groups and individuals differently in order to correct the effects of discrimination. The drafters also need to delete "to all citizens" which limits the guarantee of rights to citizens only. Further, the constitution would benefit greatly from the addition of a limitation clause that provides a uniform standard

547 See Chapter 6 (Part C).
548 See Chapter 6 (Part F).

for determining when the government may limit rights, rather than relying on the statement that rights cannot be abridged for political reasons. Finally, WCLAC recommends adopting specific language stressing that this provision is binding on and must be respected by non-governmental actors.[549]

8.A.3. Article 21: The Right to Vote, Part 1

Article 21 gives every "Palestinian" the right to vote "in accordance with the law" and the right to run for election for president or as a member of the legislature, and to serve as a judge or minister, as long as s/he is of the required age and meets other conditions provided by law. In the first sentence, the right to vote is provided to all Palestinians, which in the current context could apply to people without citizenship in Palestine. The second sentence addresses this concern by stating that the right to run for election applies to "each Palestinian national", making it clear that only citizens may run for office or be appointed to the government.

Secondly, the right to vote appears to be limited by the phrase "in accordance with the law". As Chapter 6 (Part E) explained, this phrase is dangerous as it leaves to the legislature the determination of the boundaries of the right. Without a limitation clause to determine when a right may be restricted, described fully in Part C (9) below, the legislature holds the power to arbitrarily deprive people of their right to vote. The same point can be made with respect to the last sentence of Article 21, which allows the law to regulate age and "other preconditions for assuming" public posts. Article 21 seems to limit the right to run for election or to be appointed to government posts at the local level. To address these concerns, drafters should include a statement that the law cannot discriminate on any basis, including gender, sex, religion, opinion or any other grounds listed in Article 19 and in the Universal Declaration of Human Rights, as adopted by Article 18 of the Draft Constitution.

Ensuring a right to vote and to run for political office without discrimination is not enough. One of the main barriers to women's political participation, aside from societal attitudes, is that they lack resources. This also applies to men who are marginalized through poverty. A constitution intent on transforming society to ensure equal rights and equal access to benefits must require the legislature to address societal and economic barriers to participation in government.

A final concern that arises under this provision is whether there is a way to restrict the current practice in the OPT of government appointments being made on the

549 This recommendation is based on the Constitution of Namibia, Article 23. Constitution of Namibia, note 395 above.

basis of clan and family alliances.[550] This excludes women and less powerful or influential men, including members of minority groups.[551] One possibility would be to add a sentence that all appointments to government positions will be made on a non-discriminatory basis and according to merit such as required by Article 52, which discusses access to public services and employment.

The Draft Constitution contains a second provision that addresses the right to vote. Article 53 provides for the right to practice the right to vote, including in referenda, and gives rights related to nomination of candidates. These two provisions cover the same topic and are similar enough that they should be integrated into one provision.[552]

8.A.4. Article 22: Women's Equality, Part 1

Articles 22 and 23 are progressive provisions in much of the world, but most especially in the Arab world. If these provisions are adopted, Palestine will have the only constitution in the Middle East to have separate provisions expressly guaranteeing women's rights. The constitutional drafters should be praised for including these two provisions that could serve as tools in the fight for women's rights.[553] These provisions also have symbolic value because they send the message that Palestine will be committed to women's equality.[554] Unfortunately, Article 7 of the Draft Constitution almost wholly undermines the positive effect of these provisions.

Article 22 states that women will be recognized as full persons before the law, that they are entitled to their independent financial assets, and that they "have the same rights, liberties and duties as men." As a preliminary matter, the translation of the provision provided by the Palestinian Ministry of Foreign Affairs is not fully accurate. The word "entity" should be replaced with "assets" to read: "Women . . . shall have their independent financial assets."

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550 Rex Byrnen, 'The Neopatrimonial Dimension of Palestinian Politics' 25(1) Journal of Palestine Studies 23, 25 (1995).

551 See Chapter 2 (Part C-7).

552 See Chapter 8 (Part A-29).

553 Some women's advocates criticize these provisions for essentially treating women as a special needs group or a minority group, rather than as a majority of the Palestinian population. They are concerned that in doing so, the provisions will ultimately result in further discrimination. This approach glosses over the fact that women face enormous disadvantages that need to be addressed specifically and specially in order to ensure their rights.

554 The Northern Ireland Human Rights Commission, note 380 above.

Article 22 has the potential to support the transformation of Palestine from a patriarchal system to one that offers women equal citizenship with men. However, taking the wider social context into account, and reading Article 22 together with other articles of the Draft Constitution, it seems unlikely this provision will have any real force once it is implemented. Regardless, it provides a constitutional framework that may be used in the future to liberate women from the shackles of patriarchy.

The first sentence of Article 22 promises Palestinian women that they will be treated as legal persons, or as full adults, under the law. This statement could prohibit any efforts to require women to submit to the will of their parents or spouses at any stage after reaching adulthood. For example, this sentence has the potential of liberating women who wish to marry men of whom their fathers or guardians do not approve. No longer, at least in theory, could religious clergy refuse to marry women because their fathers do not give consent. Similarly, it would be more difficult to limit women to acting as caregivers but not as legal guardians of their children, which currently happens under Shari'a law. The main question is whether Article 22's guarantee of "legal personality" requires religious courts and religious law to recognize women's equality and legal status in personal status matters. Article 7 places personal status matters under the authority of religious denominations, as discussed at length above. If a court allows the power given to religious leaders under Article 7 to be used to trump the legal status of women, then the guarantee of full legal status may have almost no effect at all.

The best way to avoid this possibility is to remove Article 7 from the Draft Constitution, or at least the sentence that protects religious authority over personal status matters. Short of that, the drafters should revise Article 22 to ensure the horizontal application of these provisions to non-governmental actors.[555] At a minimum, a Palestinian constitution, particularly one that contains a provision designating religious authorities with responsibility over personal status matters, must contain a statement that the human rights provisions apply to personal status law.

Another point about the first sentence is that it should be read to allow women to represent themselves or members of their families in disputes. Since much of the dispute resolution process remains under the control of customary mediation practices, a woman must be allowed a voice in the process as part of being assured equal protection at law, which is promised in Article 19. The problem with enforcing women's status as a full person under the law is that customary law mediation may

555 See Chapter 6 (Part D) for a description of horizontal application of human rights provisions.

be deemed "private" or outside the realm of constitutional enforcement of Article 22. Again, this problem calls for the horizontal application of the human rights provisions to ensure that customary law practices are governed by the constitution.

The first sentence of Article 22 also protects women's rights to maintain independent financial assets. As Chapter 2 (Part C) argues, in theory Palestinian women already benefit from some property rights, including inheritance rights. Muslim women have the right to the dowries paid to them on marriage, to hold their own assets received before marriage, and they are not required to use their income and property for the benefit of their families but can maintain them as separate property.[556] Marital property, however, is treated as the property of the head of the household or men's. In reality, women rarely have full access to these "independent" assets. While Palestinian law allows women to inherit from their families one half of what their brothers receive, women often do not demand their share because of family and societal pressure.[557] Under Shari'a law, dowries belong to women, but two practices limit their ownership. First, some families take the dowries and women do not complain because they want to ensure the protection of their families should they need it. Secondly, men rarely pay the full amount of the dowry on marriage, which Shari'a law treats as conferring on the woman the right to full payment on divorce. Men have been able to avoid making these payments by refusing a divorce until the woman agrees to relinquish her financial rights.[558] Since it is very difficult for women to receive a divorce without their husbands' agreement, the vast majority of divorces result in the deprivation of women's independent financial assets.

Article 22 also neglects to protect women's rights to marital assets. Marital assets are given to men on divorce based on the inaccurate and highly unfair assumption that men earn the income that supports the family.[559] First, many Palestinian women work and contribute their income to the family. Secondly, this system does not account for the fact that men are able to work only because women act as the primary caretakers of children. Finally, such distribution of marital property undervalues women's emotional and physical support that keeps families secure, as well as the unpaid labour women provide for the family and household.

Article 22 will do little to change the real limitation on women's access to their independent or marital assets. The provision should focus on religious law, which is the source of deprivation of these assets. Unless the rules change to protect women's financial assets on divorce or, for Muslim women, give them a right to divorce other than by obtaining their husband's consent, this provision offers limited protection. The only benefit likely to arise from it is that it may solidify in women's minds their entitlement to their inheritance.

556 Sayeh and Morse, note 204 above at 327.
557 See Chapter 8 (Part A-5) below.
558 See Chapter 2 (Part C-2-c).
559 See Chapter 2 (Part C-2-c).

The last sentence of Article 22 guarantees women the same rights, freedoms and duties as men. This has the potential to transform women's rights in Palestinian society from relational to individual, but only if the provision is applied to personal status law, in particular applied to abolish the concept of "complementary rights." As a reminder, complementary rights derive from Shari'a law, which prescribes different rights and duties to men and women based on gender roles. For example, the doctrine of obedience gives women the right to maintenance from their husbands as long as they fulfil their "complementary" duty of obedience to them (obedience is a right of the husband). Palestinian researchers report that the concept of complementary rights also pervades the Christian family law system.[560]

Based on the language of Article 22, the concept of complementary rights and duties, as well as relational rights, should be unconstitutional. The provision should require men and women to have identical rights and duties. However Article 7, which gives religious denominations authority over personal status matters, challenges such a simplistic reading. The issue of complementary rights applies almost wholly to personal status matters. What happens if women assert their right to equality, and men argue that their own decision-making powers or financial entitlements are protected by religious-based personal status law? One drafter of the constitution asserts that Article 22 will not change the practice of enforcing complementary rights.

Again, this raises the issue of whether the Draft Constitution is intended to apply to religious leaders acting in what typically is a governmental role: determining and applying family law. If the courts treat the ecclesiastical and Shari'a courts as non-governmental entities, rather than as bodies delegated governmental powers, or personal status matters as private, Article 22 may not apply to family law. For this reason, Sami Aldeeb recommends adding the words "including in the field of family law and the access to public function" to the guarantee that men and women will have the same rights, duties and freedoms.[561] Again, WCLAC recommends that the Draft Constitution be revised to include a provision for the horizontal application of human rights to non-governmental actors, or at a minimum contain a statement that the actions of religious bodies or the application of religious-based personal status law under Article 7 are governed by the human rights provisions of the constitution.

560 Rubenberg, note 152 above at 121.
561 Aldeeb, note 452 above.

8.A.5. Article 23: Women's Equality, Part 2

Article 23 is the second provision that exclusively guarantees women's equality rights and reads:

> Women shall have the right to participate actively in the social, political, cultural and economic aspects of life. The law shall strive to abolish restraints that prevent women from contributing to the building of family and society. The constitutional and legal (Shari'a) rights of women shall be safeguarded. Any violation of such rights shall be punishable by law. The law shall also protect their legal (Shari'a) inheritance.

This provision has the potential to add depth to women's equality rights. The efficacy of the provision, however, will depend on how it is interpreted and whether it applies to personal status matters.

The promise that women will have the right to participate "actively" in political, cultural and economic aspects of life seems needlessly limited. Why does the text use the word "actively" rather than "equally?" This choice of words suggests that the provision stops short of guaranteeing full equality in these areas. Articles 19 and 22 mandate changing the word "actively" to "equally" as both explicitly protect against discrimination on the basis of sex and Article 22 also requires men and women to have equal rights, freedoms and duties.

The second issue is whether "social, political, cultural and economic aspects of life" is sufficiently inclusive of all the areas in which barriers exists to women's equality and equal citizenship. Does the word "social" include family relations, or is this set aside to be governed solely by religious authority as provided for under Article 7? This is of serious concern because Palestinian women derive most of their rights from their family relations, as mentioned earlier.[562]

The second sentence requires the government to "strive to abolish" barriers to women's contributions to the "building of family and society." Although this could benefit women, again it is needlessly limiting and ambiguous. First it states a policy rather than creating a right to equality women can enforce against the government and individuals. Article 23 seems drafted to limit women from claiming that it assures full equality, this time because it sets policy that allows women to contribute, rather than contribute equally, to the building of family and society.

562 See Chapter 6 (Part B).

The provision also sets policy only related to society and the family, rather than also including political, cultural and economic concerns. For this reason, "To the building of family and society" should be broadened to include political, cultural and economic development, activities, and "aspects of life." The statement should be broadened further to allow women to do more than build, but also to maintain and develop these areas.

Although the second sentence of Article 23 stops far short of guaranteeing equality to women in all areas of life, it does seem to require the legislature to take proactive measures to ensure women's contributions to these areas. How far the government must go in this is limited by the phrase "strive to abolish restraints". Rather, the government should be required to remove all restraints; all government and non-governmental actors should be obligated to do so. Also, most women already contribute in all areas of life, but their contributions rarely are treated as equal. If interpreted narrowly, maintaining current contributions may be enough to satisfy the government's obligations.

Also, the second sentence does not address what happens if the restraints that arise in these areas result from the application of religious-based personal status law, which under Article 7 is within the authority of monotheistic religious denominations. Women are likely to use this provision to argue that religious-based personal status law inhibits their contributions to family and society. Religious authorities are likely to defend against these arguments by asserting that none of the human rights provisions were intended to trump their power. The first two sentences of Article 23 stop far too short of supporting women's arguments for equality within the family.

On the positive side, the first two sentences suggest that the government, to the extent not limited by Article 7, may intervene in matters historically considered private or outside the realm of governmental intervention to allow women to participate actively. Based on the language of the provision, the restraints the government will strive to abolish are not limited to ones that arise from government action. As Islah Jad points out, obstacles to women's contributions to family and society arise not only from the law but also from state policy, norms and customs.[563] What remains unclear is whether Article 23 allows women to challenge "private" behaviour or whether they have a horizontal right to enforce the provision.

Any analysis of the third sentence of Article 23 must address a problem in the government translation of the Draft Constitution. According to the Ministry of Foreign Affairs, this sentence reads: "The constitutional and legal rights of women

563 Jad, note 480 above at 8.

shall be safeguarded." Nathan J. Brown and other commentators assert that the government incorrectly translated the word Shari'a from Arabic to mean "legal",[564] which means the provision should read: "The constitutional and Shari'a rights of women shall be safeguarded." Insertion of the word Shari'a into this provision safeguarding women's rights could provide a basis for religious authorities to argue for the continuation of complementary rights or for the exclusion of religious law from the application of the women's rights provisions.[565] For this reason, WCLAC recommends deleting the word Shari'a from the text of Article 23.

Because of all these problems, WCLAC recommends combining the first three sentences of Article 23 to create an enforceable right to equality that could read:

> "Women shall have the right to participate equally in social, political, cultural and economic aspects of life, within the public and private spheres, and within the family. The government shall promote, fulfil and protect women's constitutional rights in all areas of life."

This rewording would ensure that the equality provision eliminates the public-private divide, described in Chapter 5 (Part B) that is used to justify government inaction in family and societal discrimination. In addition, it would create a positive right that requires the government to take proactive measures to guarantee equality. The revised provision also would comport with the requirement of the Convention on the Elimination of Discrimination against Women (CEDAW), which specifically requires signatories to "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise."[566] Draft Constitution Article 18 encourages the Palestinian government to sign the CEDAW treaty.

The fourth sentence of Article 23 allows the government to punish violations of women's rights, but requires the legislature to enact law for such punishment. This means that the sentence is not self-executing but requires legislation to implement it. To avoid the risk that the legislature will fail to adopt such legislation within a reasonable period, Article 23 should specifically mandate the legislation.

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564 Brown, note 343 above at 15.

565 Ibid. at 15-16. Brown counters our concern by arguing that the word Shari'a is ambiguous, which means it will have little real impact on the statement of women's rights. One drafter of the Draft Constitution disagrees, stating that Shari'a encompasses the full system of Shari'a as enacted by laws. However, he hopes to include a explanatory memorandum that would explain that the drafters intended to limit the application of Shari'a to ensure that it conforms with the constitution.

566 CEDAW, note 157 above at Article 2.

The last sentence of Article 23 addresses women's entitlement to their inheritance. Again, there is a problem with the translation provided by the MOFA; in English it translates Shari'a as "legal." Shari'a inheritance allows women to inherit from their fathers one half the share of property their male siblings can inherit. Although this rule originated under Shari'a law, it applies equally to Christians in Palestine.[567]

On the one hand, this sentence addresses the need to protect women's inheritance rights, which they often relinquish because they are ashamed to take their inheritance, feel pressured to relinquish it, or fear that if they claim their rights their brothers will not help them if they need it at some future time.[568] Symbolically, a provision expressly protecting their inheritance rights could encourage women to claim their financial entitlement. On the other hand, the protection of women's inheritance rights in Article 23 does not correct the inherent discrimination in the Shari'a rule that divides property unevenly on the basis of sex/gender, but instead constitutionally protects it. Also, the provision would force non-Muslim women to submit to Shari'a law, a practice that is forbidden. The drafters of the constitution need to delete the word "Shari'a" from the text and replace it with "equal."

Overall, read separately from other provisions of the Draft Constitution, Articles 22 and 23 could be important tools that women could utilize to protect their rights to equality, despite the limitations of the language of the provisions. They fill in some of the gaps that exist for women in the protections of Articles 19 and 20, which provide for general equality rights. Unfortunately, these articles do not address the issue of equality in family relations, despite language suggesting otherwise, which is particularly important once these provisions are read with Article 7. Article 7 could wholly undermine the potential benefits of Articles 22 and 23. The Draft Constitution is silent about whether Article 7 allows the religious law to limit women's rights, as mentioned above. The specific comment in Article 23 that women's Shari'a rights will be safeguarded could be interpreted to allow personal status law to limit women's rights. Unless the Draft Constitution is revised to expressly require that personal status law and decisions comply with the constitution, women's rights remain insecure.

567 Rubenberg, note 152 above at 131.
568 Ibid.

8.A.6. Articles 24 and 48: Children's Rights

Article 24 guarantees children all rights provided in the United Nations Convention on the Rights of the Child (UNCRC).[569] The adoption of this treaty seems to imply it is self-executing, which means it does not need the legislature to enact legislation to implement it.

This provision is an important gain for children as the UNCRC takes a progressive approach towards children's rights and ensures that decisions regarding children are made on the basis of the best interests of the child.[570] It applies this standard to the determination of legal custody, for example. As a reminder, under both Shari'a and Christian law, mothers are given custody of their children until they reach a certain age, at which point custody transfers to the fathers.[571] This provision should benefit children by allowing custody to be determined based on their needs rather than their age. Application of the UNCRC also should restrict courts from limiting women's custody rights solely on the basis of their religion, whether they are foreign-born, and whether they remarry.[572] The only danger to these rights is if Article 7, which places family law under religious authority, is interpreted to trump provisions of the UNCRC that conflict with religious-based personal status law.

Also important, the UNCRC requires the government to implement policies to place "common responsibilities" on both parents for the upbringing of their children.[573] Currently, Palestinian society expects women to be responsible for childcare and educative tasks and men for their children's financial maintenance. The division of labour according to gender roles is used to justify limiting women's participation in the labour market and often creates an unequal burden on women, particularly on working women.

For Palestinian girl children who suffer from discrimination based on sex/gender, Article 2 of the UNCRC guarantees their rights without discrimination and creates a positive right for its enforcement. The UNCRC requires the government to assist all children in accessing their rights, seemingly including through social

569 G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989)

570 Ibid. at Article 3.

571 Under Islamic law, women have custody until their children reach puberty; under Christian laws, girl children remain with their mothers until the age of 9 and boy children until the age of 7. See Chapter 2 (Part C-2-c).

572 Chapter 2 (Part C-2-c) explains that religious courts have used these bases to unfairly discriminate against women and deprive them of their custody rights.

573 Convention on the Rights of the Child, note 568 above at Article 18.

assistance;[574] it requires that children have the right to be heard in judicial matters that affect them;[575] and that government must take active measures to protect children from abuse.[576]

Although Article 24 ultimately covers most of the concerns related to children, it would be advisable to add a sentence stating that all matters related to children will be decided on the basis of the best interests of the child, and that women have the equal right to serve as legal guardians for their children. Such a statement would protect children's rights from an adverse application of Article 7 of the Draft Constitution.

Also, it would be advisable to merge the sentences from Article 48 that relate to the rights of children, with some revision, into Article 24. Article 48 provides for a right to child-care and to care for adolescents and youth. It also states: "the law shall regulate child . . . rights in accordance with the provisions of international agreements and the Charter on the Rights of the Arab Child of the League of Arab States." Article 48 further states that the "state shall seek to protect children from harm, exploitation or work that would endanger their safety, health or education. Because these sentences of Article 48 deal with the rights of the child, the Discussion Document will analyze them here.

Article 48 provides for the right to child-care. This provision is important in that it seemingly obligates the government to provide assistance to needy children and to care for children when their parents cannot. The right to child-care complies with the UNCRC. Article 48 also specifically promises to care for adolescents and youth, which is important because these categories of children are often neglected. An example of this is that the Palestinian Authority provides free healthcare to children under the age of 3, but not to youths and adolescents.

Oddly, Article 48 requires "the law" to regulate children's rights according to international agreements and the Charter on the Rights of Arab Children ("Arab League Children's Charter"), although the Arab League Children's Charter is not mentioned in Article 24 and the UNCRC has already been adopted by the Draft Constitution. Article 48 seems more limiting with respect to the application of international standards than Article 24. It subordinates the role of the Arab League Children's Charter when compared to the UNCRC, which may be appropriate given some problems that arise under the Arab League document. Such problems include the fact that it pursues one concept of what is "right," which is based on religion, and it assumes that women will be responsible for childcare, which

574 Ibid. at Article 24.
575 Ibid. at Article 12.
576 Ibid. at Article 19.

stands in direct contradiction with Article 18 of the UNCRC.[577] The Arab League Children's Charter, however, does create extensive, enforceable socio-economic rights for children that are worded more strongly than its UN counterpart.

Finally, with relation to children, Article 48 establishes a policy to protect children from "harm, harsh treatment, exploitation, and from any work that would endanger their safety, health and education." This last sentence makes an important statement, but would serve children better if it created an enforceable right rather than a policy. Articles 19 and 32 of the UNCRC and Article 5 of the Arab League Children's Charter require that what is stated here as policy must be a child's right in law.

Combined, Articles 24 and 48 provide very broad and important protections for children that surpass existing protections in the Palestinian Basic Law.[578] These provisions should be merged so that children's rights are described in one provision to ensure that children get the fullest protection possible. They also need to be protected from Article 7 to the extent that religious law could be used to avoid responsibilities under these provisions.

8.A.7. Article 25: The Right to Life

A guarantee of the right to life is a standard provision in all constitutions. The Draft Constitution alters the standard language by placing the guarantee in the hands of the legislature. The provision reads: "The right to life is guaranteed by the law."[579] As Chapter 6 (Part E) argued, this wording allows the legislature to determine the contours and meaning of the right, rather than the constitution. It also means that there is no right to life until the legislature legislates it. Inexplicably, this provision was changed from the wording of the First and Second Draft Constitutions, both of which protected the right to life based on the constitution.[580]

Presumably, Article 25 was drafted this way to allow for the death penalty. State sanctioned violence should not be allowed unless absolutely necessary for the

577 League of Arab States Charter on the Rights of Arab Children, 'The Objectives'.
578 See Basic Law, note 56 above at Article 29.
579 The translation of this provision completed by Nathan J. Brown reads: "The right to life is safeguarded and to be protected by the law." Brown, note 343 above at 16. This translation is preferable, but will not be assumed to be correct by the Discussion Document.
580 Article 28 of the First Draft of the Constitution of Palestine provided: "Every person has the right to life and to the protection of his rights, freedoms, and well-being in accordance with the provisions of the constitution, the laws issued in application thereof, and the principles of justice." First Draft Constitution, note 449 above. The Second Draft Constitution of Palestine, Article 25 simply read: "The right to life is guaranteed by the Constitution." Second Draft, note 538 above.

safety of the population. The death penalty should not fit within this limitation. If the death penalty remains, the provision still needs additional language to protect individuals from the arbitrary taking of a life. Article 6 of the United Nations International Covenant on Civil and Political Rights (ICCPR) expressly states that "[n]o one shall be arbitrarily deprived of his life."[581] Also, the ICCPR article contains specific language detailing when the death penalty should be permissible, an important source for determining whether life is being taken arbitrarily. Although the Draft Constitution does not adopt the ICCPR, Article 18 of the Draft Constitution creates policy that pushes the government to join all international instruments that protect human rights. The ICCPR should influence the drafting of the Palestinian constitution.

WCLAC calls for respect for everyone's life. The state or other institution or individual has no right to take any person's life. WCLAC recommends that no death penalty be allowed.

8.A.8. Article 26: Security of the Person; Protection against Torture and Cruel Treatment

Article 26 is the first of three provisions to protect a person's bodily integrity and autonomy. Article 26 guarantees the right to "security of the person"; it protects against physical and psychological torture, and against cruel, inhuman or degrading treatment or punishment. Participation in any of those acts, including the ordering of them, is a punishable crime that cannot lapse by prescription. In addition, confessions extracted through torture or threats of torture cannot prove one's guilt.

The first two sentences under Article 26 are of the utmost concern for women. Women (and children) often find themselves the subject of domestic violence. Domestic violence rates in the OPT are high and have been increasing since the start of the Second Intifada in September 2000. Currently, Palestinian law does almost nothing to counter domestic violence or the killing of women for perceived violations of "honour."[582] There is no law that specifically targets perpetrators of domestic violence. So-called "honour" crimes against women are dealt with outside the criminal system by the customary law system and perpetrators are treated lightly.[583] Palestinian women need to be protected from family violence, which subjugates women to male authority, behaviour and expectations. A right to security of the person could develop part of the framework for that protection

581 G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

582 See Chapter 2 (Part C-8).

583 See Chapter 1 (Part D-3), Chapter 2 (Part C-8).

by giving women a tool to lobby for legislative protections against domestic violence. This would be a significant start in addressing one source of women's inequality.

The second sentence of Article 26 reads: "No one shall be subjected to torture, physical or psychological, or to cruel, inhuman or degrading treatment or punishment." It does not explain whether the provision protects against all sources of such treatment or only when governmental officials such as the police carry out these acts. All people, including women and children, have the right to be free of violence, regardless of the source. If the provision is read to apply only to the conduct of governmental bodies and personnel, it will not cover the major source of violence against women in the OPT, which occurs in the home. For women, treating domestic violence as a private matter essentially transforms the right to security of the person into a relational right that is granted by family members rather than the state. Treating bodily integrity and security rights as relational rights deprives women of meaningful protection from the greatest source of violence against them.

To ensure that women have the broadest protections and the strongest constitutional tools to oppose and ultimately eliminate domestic violence, this sentence needs to state explicitly that it applies to both governmental conduct and the conduct of individuals, groups and non-governmental bodies and institutions.[584] Such a statement would create horizontal application of this right and would transcend the public-private divide that currently justifies treating domestic violence and femicide as private matters in which the government should not interfere. An explicit right to freedom from family violence also could serve to change societal attitudes that currently accept some form of physical "chastisement".[585]

Article 26 would be bolstered further if the right to security of the person and freedom from violence were made an expressly positive right that requires the government to take proactive measures to prevent the occurrence of domestic violence in Palestine.[586] Enforcement of a positive duty to protect against domestic violence could counteract police reluctance to intervene in these matters.

The remainder of Article 26 deals with torture and is important considering the numerous reports of torture and physical abuse of detainees held by the Palestinian

584 See e.g. Constitution of South Africa, note 395 above at Article 12(1)(c) ("Everyone has the right to freedom and security of the person, which includes the right . . . (c) to be free from all forms of violence from either public or private sources.")
585 See Chapter 2 (Part C-2-b).
586 The Northern Ireland Human Rights Commission, note 380 above.

Authority.[587] Of particular importance is the provision that punishes anyone who orders such abuse, closing a potential loophole in the prosecution of such crimes.

8.A.9. Article 27: Consent to Medical Treatment

Article 27 states that all Palestinians have the right to protection against being forced to submit to medical experimentation and it provides a lesser right to physical integrity by prohibiting medical treatment without consent except as provided by the law. Article 27 also states that the law will "govern the transplant of organs, cells and other new scientific developments, consistent with legitimate humanitarian purposes."

The major concern regarding this provision for women is the limited right to bodily integrity as it relates to medical treatment. Currently, the Attorney General of the PA and the police have established a standard procedure whereby a woman or girl thought to have been a victim of sexual abuse must submit to medical tests for pregnancy and virginity.[588] Unmarried women also report that health officials force them to submit to such testing when they seek gynaecological care and then turn the results over to the police or tell their families if they find evidence of premarital sex.[589] Protection against these types of violations takes on urgency in the Palestinian context because the results of the test could lead to so-called "honour" killings of women and girls, which WCLAC refers to as femicide.

Forced medical testing of any kind should not be permitted as a violation of individual autonomy and of a person's physical security, which are protected without limitation in Article 26 and with some limitation under Article 28. Despite the clear language of Article 26 and the strict procedural requirements for limiting autonomy rights in Article 28, Article 27 allows the law to determine the extent of the protection against violations of bodily integrity for medical reasons. While it is necessary to ensure mechanisms to provide medical treatment in situations when a person is unable to provide consent because of incapacity, this provision is written to allow the legislature broad discretion to compel medical treatment and examinations. The constitutional drafters should delete the phrase "except being proponent with the law" from the second sentence of Article 27.

The last sentence of Article 27 also may serve as a basis for denying a full right to bodily integrity. It allows the law to determine issues surrounding organ and cell transplants and new scientific developments on the basis of "humanitarian purposes."

587 Bisharat, note 81 above at 275.
588 Shalhoub-Kevorkian, note 105 above at 76.
589 This practice highlights the need to guarantee privacy as it relates to healthcare.

It could allow the government to force medical treatment or even force a person to donate an organ if the hospital or the recipient of the organ can prove there is a humanitarian need, regardless of whether the procedure would benefit the person whose bodily integrity is being violated. Currently, there is debate in many countries about whether a pregnant woman should be forced to submit to medical treatment for the benefit of her foetus. Article 27 would expressly permit this.

8.A.10. Article 28: Right to Freedom and Personal Safety

Article 28 provides a new right to freedom or autonomy, as well as the right to personal safety that overlaps with Articles 26 and 27. The provision explains that these rights may not be violated except through procedures provided by law and except in cases mentioned in the law, and according to procedures mentioned in the law. Article 28 spells out the rights regarding arrests, searches, detainment and imprisonment, including specific rights regarding procedures for arrest and trial.

Although not clear, the difference between Article 26's right to security of the person and Article 28's right to personal safety seems to be the stage at which the need for these rights arise. Article 26's focus on torture and forced confessions suggests that this protection is to be enforced against the police during the course of investigation. In contrast, Article 28's focus on the arrest, detainment, trial and imprisonment procedures concerns personal safety during the criminal law process. It would seem to make more sense to combine these two provisions and create one comprehensive right to security of the person. Either way, both provisions need to address non-governmental forms of violence.[590]

The second sentence of Article 28, which allows for the limitation of freedom and personal safety, is worded in a way that seems to offer some procedural protections of these rights. It allows these rights to be abridged only by judicial decision. This sentence would benefit greatly from the addition of a substantive test for when violations of autonomy and personal safety may be allowed. For example, South Africa protects against violations that are arbitrary and "without just cause."[591]

590 See discussion in Chapter 8 (Part A-8).
591 Constitution of South Africa, note 395 above at Article 12(1).

8.A.11. Article 31: Freedom of Movement

Article 31 expressly protects the right of "every citizen" to move freely within Palestine and outside of Palestine and protects Palestinians from deportation and from being prevented from returning to Palestine. The right to freedom of movement is particularly important because of the egregious restrictions Israel places on Palestinian movement inside of, between and into the Occupied Palestinian Territory.

Freedom of movement has an additional meaning for Palestinian women. Under the Shari'a law of obedience, a personal status matter, husbands have the right to restrict the movement of their wives as part of the complementary rights and duties entailed in marriage. Women lose their right to maintenance from their husbands if they travel or even leave home without their permission.[592] In fact, current law applicable to the West Bank states:

> [T]he wife shall obey her husband and live in his *shar'i* dwelling, and shall move with him wherever he wishes . . . provided that he can be trusted with her and that there is no stipulation to the contrary in the marriage contract. If she refuses obedience, then her right to maintenance lapses.[593]

Gaza Strip legislation enacted by Egypt also requires a woman to "reside in her husband's house . . . and to travel with him if he desires to travel to another country if there be no obstacle to this."[594]

Although it appears that the PA revoked travel restrictions that required women to obtain permission of their husbands or fathers before they could use their passports,[595] young women report that they still need their father's or brother's permission before travelling.[596] In one case, a woman tried to escape because she wished to marry a man of whom her family did not approve. Her uncle beat her, and she left home to avoid more violence. When she reached the border with Jordan, the authorities refused her exit because her family called seeking her return.[597] Her father subsequently killed her.

While some claim that a court will not enforce these restrictions on movement currently, Article 7 of the Draft Constitution may allow them. Article 7 places

592 Welchman, note 95 above at 121-122.
593 Jordanian Law of Personal Status of 1976, Article 37, in Welchman, note 95 above at 124.
594 Gaza Strip Law of Family Rights of 1954, Article 40, in Welchman, note 95 above at 124.
595 Wing, note 79 above.
596 Rubenberg, note 152 above at 135.
597 Women's Centre for Legal Aid and Counselling, note 95 above.

matters of personal status under religious authority and treats the principles of Shari'a as a major source of legislation. Read conservatively, these provisions may be allowed to inhibit or fully abrogate adult women's rights to freedom of movement.

There are a variety of ways to avoid the potential restriction on women's movement that results from the application of Shari'a family law. The first is to wholly delete Article 7, which confuses the issue of whether religious-based personal status law is allowed to trump human rights. A second option is to require that the application of personal status law conform to human rights and other provisions contained in the constitution. With respect to Article 31, the provision could be revised to state that individuals, groups or governmental and non-governmental bodies or institutions cannot restrict an individual's freedom of movement.[598] This would avoid the potential barrier created by a perceived public-private divide that limits government intervention in the protection of women, and would create a horizontally enforceable right.

As a separate point, Article 31 only protects the freedom of movement of citizens. Again, considering the implication for women, it is important to broaden this protection to include everyone or at least temporary and permanent residents. Women may not be able to pass on citizenship to their husbands, meaning that this provision would allow restrictions on the movement of the husbands of Palestinian women.

8.A.12. Article 32: Protection of Refugees

Article 32 is an extremely limited provision for the protection of refugee rights. It states that political refugees who have asylum rights in Palestine cannot be extradited, and that extradition of foreign defendants who are not refugees will be governed by agreements and international conventions. Article 32 avoids a potentially difficult issue – the question of the status of Palestinian refugees once there is an independent and sovereign state of Palestine. This avoidance seems appropriate since the right to asylum is an individual right recognized under international law that cannot be changed by domestic law or constitutions.

The provision needs to be revised to include a statement protecting the right of people to claim asylum in Palestine and what that status means. The Draft Constitution could simply adopt the international refugee conventions and treaties as it does other human rights instruments to solve this problem. Or, it could state

598 CEDAW requires signatories to provide "men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile." CEDAW, note 157 above at Article 15(4).

that refugee status and the rights, freedoms and duties that inhere in this status will be determined based on international legal instruments and norms.

In addition, the provision must include an important caveat that Palestine will grant asylum where the persecution results from a woman's sex or gender and the government of the country is unwilling or unable to stop the threats or violence against her. The 1951 United Nations Convention Relating to the Status of Refugees defines a refugee as someone who:

> [O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[599]

Women who flee their countries because their governments are unable to or unwilling to stop domestic violence or threats of "honour" crimes find it extremely difficult to claim asylum under this definition of refugee, although it is unsafe for them to remain in their countries. Because they cannot claim refugee status, they may be returned to their country of origin and to the violent situation.

Two problems with this definition of a refugee are whether domestic violence will be interpreted as a form of persecution and, if so, whether the persecution will be treated as resulting from women's membership of a "particular social group." The first definitional problem arises from the public-private divide that assumes that domestic violence and issues of women's "honour" are purely private matters and not subject to state intervention, particularly by a foreign country. Persecution requires evidence of some type of state action, which many countries do not believe exists in situations of domestic violence. This narrow interpretation of persecution ignores the fact that the problem is not just that women are being abused or threatened with violence but also that governments are failing to protect them. This omission by the government should be treated as state action (actively choosing not to intervene), and should meet the standard for persecution required for asylum.

The second definitional problem derives from the reluctance of governments to view women as a separate social group when they constitute roughly half of the world's population. Again, a narrow interpretation of social group results in

599 189 U.N.T.S. 150 (1954) Article 1(2).

extreme unfairness to women and ignores "the specific forms of persecution to which women are often subjected because of their gender status."[600] Article 32 should be revised to state directly that asylum claims are allowed regardless of the source of the persecution, as long as the country of citizenship will not protect the claimant, and that women are a distinct social group that deserves protection.

Another problem regarding refugee rights that should be addressed is the right to equality and equal opportunity for women refugees. Women refugees suffer from a variety of forms of discrimination and abuse due to sex and gender. In refugee camps, refugee women typically are excluded from leadership positions.[601] They have access to scarce resources such as food only through men in the camp, and often are forced to exchange sex for resources.[602] In some refugee camps, the rules discriminate against women directly, for example by reserving better or higher paying jobs for men. Additionally, women's healthcare needs often are ignored.[603]

A clear example of gender discrimination against Palestinian refugee women is the United Nations Relief and Works Agency (UNRWA) rule that does not allow a woman (or her family) to receive UNRWA services and benefits if she is married to a non-refugee.[604] These women also cannot pass on their refugee status to their children. Refugee men who marry non-refugee women maintain their rights to UNRWA services and benefits and to pass that status to their children. Constitutional protections of refugee rights need to address the special vulnerability of refugee women.

8.A.13. Article 33: Right to Litigation

Article 33 guarantees the right of all people to litigation and to have legal recourse for the protection against and compensation for violations of human rights and freedoms. The provision additionally obligates the government to pay compensation if a litigant is hurt by judicial error, and requires the legislature to enact legal procedures to ensure that legal disputes are settled quickly and fairly.

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600 Melanie Randall, 'Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution' 25 Harv. Women's L. J. 281 (2002).

601 Malinda M. Schmiechen, 'Parallel Lives, Uneven Justice: An Analysis of Rights, Protection and Redress for Refugee and Internally Displaced Women in Camps' 22 St. Louis U. Pub. L. Rev. 473, 486 (2003).

602 Ibid. at 489-490. The latter experiences are not typical for Palestinian refugee women; however they may occur within other refugee populations.

603 Ibid. at 486-487.

604 Chapter 2 (Part C-5).

Palestinian women report that they are often unwilling to use the formal court system for dispute resolution because they feel pressured by their families to avoid any appearance of "scandal" and because they believe that they will not receive a good result from a court. Most women turn to customary law mediation instead. What this shows is that it is not enough to promise a right to litigation, but this provision needs to be implemented to ensure women's meaningful access to the courts. While this does not necessitate revision of Article 33, this concern must be raised.

More directly related to the wording of this provision is whether the right to litigation protects an individual's right to bring personal status disputes before government-run courts or whether those disputes are reserved for the sole consideration of religious denominations under Article 7. The translation of Article 33 provided by the Palestinian Ministry of Foreign Affairs reads: "Every person shall have the right to legal recourse to defend his rights and liberties." The Palestinian Centre for Policy and Survey Research translates this provision to read: every person "shall have the right to resort to his natural judge to defend his rights and freedoms."[605] This difference may be substantial. The phrase "legal recourse" suggests that the provision guarantees the right to access the government-run legal system. "Natural judge" could mean any institution that fulfils the role of judge, whether the institution is governmental or non-governmental.

The problem with defining "natural judge" to include customary law mediators or religious courts, or allowing "legal recourse" to refer to these quasi-governmental bodies or individuals is that it is unclear whether they are bound by human rights provisions. Considering that Article 7 places personal status matters under religious authority and that religious rules discriminate against women, interpreting "natural judge" or "legal recourse" to include religious courts would deny women their human rights in the area of family law. Exacerbating this is the fact that under religious law, Shari'a courts give women's testimony only half the weight they give men's. This is patently discriminatory and violates women's rights. The customary law system is no better at protecting women, as it is often willing to overlook women's needs and rights in order to protect family "honour".[606]

To avoid these problems, WCLAC recommends clarifying that every one has the right to recourse from the "legal system" or "judiciary." If this provision includes religious courts and customary law mediators, the human rights provisions must apply to them and women must be able to challenge discriminatory and unfair laws, rules, practices and outcomes that derive from any dispute resolution mechanism.

605 Brown, note 343 above at 18.
606 See Chapter 1 (Part D-3) and Chapter 2 (Part C-8).

Another important issue the right to litigation raises is who is entitled to bring a claim for human rights violations to the courts. Must it be those whose rights have been harmed or could it be a public interest group acting as their representatives? Allowing public interest groups standing to file suits for breaches of human rights provisions would increase the likelihood that marginalized groups, such as women, men of minority groups and poor men will have access to justice.[607] In some instances, providing standing to a public interest group, or even an individual or company that can show sufficient interest to file a legal claim may be the only way to access justice. For example, if standing is limited only to those who are affected by the contested action, it may be difficult to challenge governmental policy that allows companies to spew pollution into the air under lax rules and regulations. It may be hard for an individual to show that s/he is being harmed sufficiently to meet the requirements of standing.

The main concerns with allowing public interest groups to have standing are whether this will result in a flood of lawsuits, whether there will be multiple claims related to the same issue, whether it will result in frivolous suits, and fear of the effects of having groups with little at stake file claims.[608] One solution to these problems is to limit the actions in which these groups can get involved to matters related to the public interest and to ensure that the group or individual filing the suit can provide a sufficient basis to support their interest in the matter. For example, the South African constitution has a provision that reads:

> 38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -
>
> a. anyone acting in their own interest;
> b. anyone acting on behalf of another person who cannot act in their own name;
> c. anyone acting as a member of, or in the interest of, a group or class of persons;
> d. anyone acting in the public interest; and
> e. an association acting in the interest of its members.

WCLAC recommends allowing public interest groups standing to file human rights suits.

607 Standing refers to the right to bring a case before the courts.
608 'Standing in Public Interest Litigation' Australian Law Reform Commission (1985).

8.A.14. Article 34: Crime and Punishment

Article 34 guarantees rights related to criminal prosecution. It provides that there will be no crime or punishment except by law and that all sentences will be executed by judicial order. Punishment will be personal and in proportion to the crime. There will be no collective punishment or punishment for an act that was not a crime at the time of its commission. It also prohibits trying a person again for a crime for which s/he has already been acquitted or convicted under criminal law. Finally, the provision states that retroactivity of laws in non-criminal cases will be regulated by the law.

From a women's perspective, the first major concern with this provision is that it does not necessarily target penal provisions that discriminate against women. The Jordanian Penal Code (JPC), which is still in effect in the West Bank, patently discriminates against women. Under Article 340 of the JPC, a man who kills his wife or any of his female relatives after catching them having premarital sex or committing adultery either can benefit from a reduced sentence or receive no sentence at all, even if the murder was premeditated.[609] This provision does not apply to women who kill their husbands or male relatives in the same circumstances. The Jordanian criminal laws regarding prostitution similarly result in gender discrimination, as the prostitute (typically a woman) is punished but not the client (typically a man) who pays for sexual relations.[610]

These examples highlight the need for Article 34 of the Draft Constitution to attack directly discrimination against women in the penal code. Arguably, the requirement of parity between crime and punishment could be used to challenge reduced or waived sentences for men who murder women, but whether this will be successful is unclear since many members of society believe women who are perceived as violating "honour" deserve to be killed. It is better to have a direct prohibition against discrimination in the penal code. The Convention on the Elimination of Discrimination against Women, which the Palestinian government is encouraged to adopt by Article 18 of the Draft Constitution, specifically requires state parties to "repeal all national penal provisions which constitute discrimination against women."[611]

The second problem with Article 34 is that it does not reserve a monopoly on dispute resolution in criminal matters for the judiciary. The customary law system mediates in criminal law matters and while the judiciary is not required to accept the mediation agreement as ending the court case, in practice it often does.

609 See Chapter 2 (Part C-9).
610 Jordanian Criminal Code (1956) Article 315. See Chapter 2 (Part C-9).
611 CEDAW, note 157 above at Article 2(g)

Of particular concern are murder and rape cases, where the victim's rights and interests are often negated and the mediator searches for a solution that will keep the issue within close family boundaries to avoid public disclosure and maintain family "honour".[612]

Thirdly, WCLAC is concerned about whether violence against women, regardless of the form it takes, will be treated as criminal. Currently, there is no specific legislation dealing with domestic violence, which leaves women vulnerable to police and the court system's reluctance to prosecute these cases.[613] WCLAC argues that there should be clear legislation and policies regarding crimes, as well as dealing with issues of violence against women.

8.A.15. Article 35: Right to Privacy

Article 35 provides a right to privacy by obligating the legislature to enact legislation to protect privacy, including in the areas of "family matters, residences, correspondence and other means of private communication." This right can be infringed only through a court decision and "within the limits of the law," and violations of this right that cause harm entitle the victim to compensation. This raises two major concerns for women: (1) whether the provision maintains the public-private divide described in Chapter 5 (Part B) that deprives women of their human rights and equal citizenship; and (2) how to protect privacy rights without infringing on other rights. These two concerns overlap each other.

One of the most pressing concerns for women today is the concept of a public-private divide that is used to differentiate the matters in which the government will intervene. As Chapter 5 (Part B) argued, family matters – particularly the marital relationship – have been excluded from government intervention because they were deemed private. This divide still exists in the OPT. Because of this exclusion, the government, courts and the police are reluctant to intervene in matters of domestic violence or matters of "honour" that result in crimes against women.[614] This divide maintains women's subjugation to men and the system of patriarchy, as well as perpetuating women's unequal citizenship. Article 35 appears to protect, rather than topple, the public-private barrier. The provision explicitly states that family matters are a "private aspect of life" that will be protected by law.

Common notions of privacy must be challenged to ensure that women's rights and personal security are not ignored. Challenging these notions, however,

612 Chapter 2 (Part C-8).
613 See Chapter (2 Part C-8).
614 See Chapter 1 (Part D-3) and Chapter 8 (Part A-8).

should not be seen as foreclosing the right to privacy. For example, residences, correspondence and communication deserve protection from government actions that are wholly inappropriate, such as searching or wiretapping homes. People are entitled to physical privacy, confidentiality, "data protection and control over personal information," as well as to control over their personal identity.[615] However, unlike these examples, protecting the privacy of family matters serves to insulate men against claims of violence and subjugation by women, rather than protecting the family from the government.

With this distinction in mind, it is also important that the privacy right include the right to privacy regarding matters of health. Unmarried women report that they are forced to submit to medical testing for pregnancy and virginity and that healthcare officials relay the results to their families or to the police depending on the outcome.[616] One woman reported that the hospital staff turned her over to the police to be charged with fornication after she gave birth in the hospital. She was incarcerated, although she was a victim of incest by her brother.[617]

Another area that should be protected under a right to privacy is an individual's private choice. Individuals should be allowed to make personal decisions without the intervention of the government as long as those decisions do not harm another person or violate another person's rights.[618] Protecting private choice also serves to protect an individual's autonomy rights by allowing him/her "to make many . . . of the most important decisions concerning friendship, sex, marriage, reproduction, religion, and political association."[619] Private choice in family matters, for example, would be protected rather than simply privacy in family matters. A constitutional protection for privacy that includes the notion of private choice should eliminate the criminalization of adultery and sex before marriage, returning them to the realm of individual morality rather than public legal concerns. Also this protection should allow women more choice related to reproduction and family planning.

Overall, the right to privacy contained in Article 35 needs to be revised to eliminate the wholesale protection of "family matters" as private, a protection many use to justify ignoring domestic violence and "honour" crimes. Rather, Article 35 should explicitly protect personal choice, including in family matters, to the extent those choices do not harm others or violate the human rights of others.

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615 Anita L. Allen, 'Coercing Privacy' 40 Wm. & Mary L. Rev. 723, 723-724 (1999).
616 See Chapter 2 (Part C-8) and Chapter 8 (Part A-9).
617 Shalhoub-Kevorkian, note 105 above at 41.
618 It is important to note, however, that private choice is only meaningful if individuals have access to information, education, economic resources and full equality.
619 Allen, note 614 above at 724.

8.A.16. Article 36: Freedom of Religion

Article 36 is the third provision to expressly protect religious rights in the Draft Constitution. Article 5 promises that all monotheistic religions will be "equally revered and respected" after adopting Islam as the official religion of Palestine. It also guarantees that all citizens will have equal rights regardless of their religion, which is guaranteed again in Article 19. Article 7 then develops religious rights by placing all personal status and religious matters under the authority of religious denominations, while at the same time carving out the principles of Shari'a as a major source of Palestinian legislation.

Article 36 contains a more conventional statement of religious rights, which is that "freedom of religion and religious practice is guaranteed by this Constitution and the law." It also guarantees access to and protection of the holy shrines of monotheistic religions located in Palestine. Article 36 is a vast improvement over the Basic Law protection of freedom of religion, which only protects religious practices that "do not violate public order or public morals." Such a clause could be used to enforce a subjective or one-sided view of morality and is particularly likely to result in the dominance of Islamic morality in Palestine/OPT.[620]

Most of the concerns regarding religious practice have been discussed earlier under Articles 5 and 7.[621] To reiterate briefly, our three main concerns are the extent to which the Draft Constitution favours Islam despite promises to the contrary, the exclusion of polytheistic religious rights and secular rights, and the extent to which these provisions allow for discrimination against women. With respect to the apparent dominance of Islam, WCLAC advocates strongly the removal of specific references to Islam as the national religion and the principles of Shari'a as a major source of legislation. WCLAC also advocates the removal of language that protects the religious rights only of members of monotheistic religions. Article 36 would benefit from language creating a positive right that the government "promote and protect" the rights of religious minorities, particularly in light of the current preference for Islam.[622]

With respect to women's rights, two things must occur. The first is that personal status matters need to be removed from the authority of religion, at least within the Draft Constitution. The second is that religious practices, particularly enforceable ones such as those under personal status law, must not be allowed to violate the rights, particularly of women. For this reason, the drafters should abolish Article

620 Adrien Katherine Wing, note 4 above.
621 See Chapter 7 (Part A-5 and A-6) respectively.
622 See Obaid Ahmed Il-Obaid & Kwadwo Appiagyei-Atua, 'Human Rights in Africa – A new Perspective on Linking the Past to the Present' 41 McGill L. J. 819, Para. 19 (1996).

7 and add an internal limitation to Article 36 that expressly states that religious rights "may not be exercised in a manner inconsistent with" the constitution.[623]

Shari'a law does not recognize conversions from Islam.[624] Individuals who convert from Islam may be "punished by dissolution of the marriage, deprivation of the inheritance and guardianship, etc."[625] Article 7 seems to permit these restrictions on conversion by providing room for the adoption of Shari'a law into legislation and by the power of the religious denominations to determine the repercussions of conversion in the area of family law. The right to convert also needs to be horizontally enforceable, as often it is the wider society that responds negatively, and sometimes violently, to these changes.

In the other direction, the right to freedom of religion needs to be broadened to protect against religious rules that may place women in the untenable position of being unable to marry the man of their choice or of being forced out of their religion in order to marry a non-Muslim. Classical Islamic law does not permit Muslim women to marry non-Muslim men.[626] Muslim women who choose a non-Muslim spouse either are denied the right to choose their spouse or they must marry under a different religious law, which denies them religious freedom. These recommended changes would be consistent with Article 18 of the Universal Declaration of Human Rights, as adopted in the Draft Constitution in Article 18. Finally, the drafters need to delete the reference to monotheistic in the sentence protecting religious shrines.

8.A.17. Article 37: Freedom of Opinion and Expression

Article 37 guarantees the right to freedom of opinion and expression "within the limits of the law" in order to "safeguard the rights and liberties of others." This provision guarantees a standard democratic right but immediately removes any real protection for freedom of expression and opinion by allowing the legislature to determine its scope. Some restriction on this freedom is acceptable and likely beneficial where it protects the rights and liberties of others, such as in cases of

623 The language was taken from Article 31 of the Constitution of South Africa, which protects cultural rights. Constitution of South Africa, note 395 above. The Namibian constitution offers another alternative; Article 19 reads: "Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this article do not impinge upon the rights of others or the national interests." Constitution of Namibia, note 395 above.

624 Ebrahim Moosa 'The Dilemma Of Islamic Rights Schemes' 15 J.L. & Religion 185, 200-201 (2000-2001).

625 Aldeeb, note 452 above.

626 Adrien Katherine Wing, note 7 above.

hate speech and pornography.[627] The wording of Article 37, however, allows the legislature much greater discretion to restrict freedom of opinion and expression, which could be used for political gain. Freedom of opinion and expression is one of the first rights undemocratic governments limit to silence opposition, a tactic the PA has sometimes employed.[628]

Article 37 should be revised carefully to offer the broadest right to freedom of opinion and expression while still allowing narrowly tailored limitations based on democratic principles in order to protect the rights of others. Essentially, the provision should be redrafted to form two sentences: the first should state that freedom of opinion and expression is guaranteed; the second should state that the right may be limited in order to protect the rights of others, but the limitations must be consistent with the principles of a democratic and equal society.

8.A.18. Article 39: Freedom of the Media

Article 39 protects the freedom of the media to work and to express opinions, but with the caveat that it must do so "within the framework of society's basic values, while preserving rights, liberties and public duties in a way not [sic] contradicts the principle of rule of law." It also protects the media from government interference except when the government receives a judicial ruling in accordance with the law.

The media play an important role in democratic societies by serving as watchdogs sniffing out government activities that are harmful to society and that violate the principles of democracy and the constitution. Because of this watchdog role, democratic principles require the media to operate as freely as possible with some limitations, such as restrictions on publishing current military plans during times of war. Many governments take advantage of any discretion they are given to restrict media activities in order to avoid criticism and opposition.

Article 39 starts off with strong protections for the media, but ultimately allows for limitations on their rights that seem likely to allow the government to restrict media expression to avoid criticism. The provision allows the government to curb media rights based on "society's basic values," which creates a relative standard for determining when these limitations are permissible. Unlike the limitation on media rights to preserve individual rights and liberties, which tests media activity against constitutionally set standards, there is almost no way to determine society's basic values unequivocally. This leaves the limitation on media rights

627 The International Covenant on Civil and Political Rights requires signatories to prohibit "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." Note 580 above at Article 20(2).
628 Wing, note 79 above at 414-415.

open to abuse. The drafters tried to constrain this potential effect of a purely subjective standard by stating that the limitations must not contradict the rule of law. However, this statement is somewhat ineffective because any legislation restricting media rights forms the rule of law. The provision needs to be drafted so as to set an objective standard for determining when the government may limit media rights and activities.

There is one concern related to women that deserves attention here. Often women (and men of minority groups) are inadequately represented in the media. Any statement of media rights should also include the point that the media must ensure fair representation of the interests of women and minority groups.[629]

8.A.19. Article 40: Access to News and Information

Article 40 provides journalists and "other citizens" with the right of access to news and information "in accordance with the law," and promises transparency and responsibility. The goals of this provision are to guarantee that journalists and citizens have access to the information they need in order to fully exercise their rights and to discover reasons for government decisions and actions. Transparency is an important element of democracy as it serves as another mechanism to ensure that the government is acting according to the rule of law. For women, this provision may be the only tool they have to discover whether they were denied a job or other rights and services on the basis of gender discrimination.

The provision as it is written in the Draft Constitution stops short of providing a right to access to information because the right is limited by the law, thus giving the legislature the ability to determine its scope.[630] The Constitution of South Africa offers a better option for the right of access to information and news:

> 32. (1) Everyone has the right of access to any information held by the state; and any information that is held by another person and that is required for the exercise or protection of any rights . . .

The South African provision also includes information held by non-governmental actors that may be necessary for individuals to achieve their rights. The provision applies horizontally, which ensures that the private sector is also held accountable for decisions or actions that harm others.

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629 Birenbaum and Albertyn, note 430 above.

630 See Chapter 6 (Part E) for a full discussion of the impact of the phrase "in accordance with the law."

8.A.20. Article 42: Right to Education

Article 42 promises every citizen a right to education. It makes education compulsory at the "preparatory stage," which presumably means primary education, and guarantees the establishment of public schools and institutions until the end of the secondary stage. It allows the law to regulate government supervision of the education system. The right to education is an important socio-economic right that is decisive to Palestinian development and people's well being.

While this provision is commendable, it needs revision to provide more meaningful access to education and equality. First, education should be made compulsory until a child reaches the age of 16. Currently, girls drop out of school because they marry at a young age or they are needed at home.[631] Further, if the family cannot afford for all of their children to attend school, they favour education for their boy children.[632] Boys drop out of school to work.[633] Dropping out of school hinders personal development and limits a child's future economic possibilities. Unless education is compulsory until a later stage, a child's right to education will depend on his/her family rather than the state. Thus, it would become an unenforceable, relational right after preparatory school.[634] The provision also should guarantee free education through the secondary stage of schooling.

A second concern is that the provision does not promise equality in education. As Chapter 2 (Part C, 1) argued, the Palestinian education system suffers from gender segmentation in which education and training are provided to students based on assumptions about their gender roles. For example, girls and women are pushed to study social sciences or train to be nurses and secretaries, while boys and men are pushed toward physical sciences, business, or training in carpentry and metal work. The areas carved out for men tend to lead to jobs with higher pay and status. The right to education should promise real equality, which in Palestine means breaking down gender segmentation and making it possible for men and women to work in all fields. Equality further requires schools to have special programs that cater to the educational needs of girls who marry and have children at a young age, including information about family care and family planning.[635]

631 See Chapter 2 (Part C-1).
632 Rubenberg, note 152 above at 124.
633 See Chapter 2 (Part C-1).
634 Rubenberg, note 152 above at 127.
635 This is a requirement under the Convention on the Elimination of Discrimination against Women. CEDAW, note 157 above Article 10(f-g).

Another issue regarding the right to education is whether religion will be taught in schools either in separate classes or integrated into other course work.[636] Given the role of Islam in the Draft Constitution and the fact that there is no promise of a separation between religion and state, it seems likely that religious education in public schools will continue and that Islam will be preferred in those courses. The goal then would be to ensure that no one is forced to participate in religious education. Furthermore, religious education should not be founded on one religion only but should include other religions as well. Essentially, religious education should be made a choice for students and their families rather than compulsory and the choice must include the opportunity to study a religion that is not commonly practiced in Palestine.

Finally, Article 42 restricts the right to education to citizens. This is an unfortunate limitation that could harm the development and growth of the children of non-citizen residents and migrant workers. The right to education needs to belong to everyone.

8.A.21. Article 43: Right to Private Education

Article 43 guarantees the freedom and independence of private education. Sami Aldeeb raises the concern that private educational institutions in the Middle East often discriminate against individuals, such as by refusing entrance to non-Muslims and to girls. He suggests adding the following language to Article 43: "Private education must respect the principle of non-discrimination based on religion or gender."[637] WCLAC recommends adding all of the grounds listed for protection against discrimination in Article 2 of the Universal Declaration of Human Rights, as it has been adopted in the Draft Constitution in Article 18. Article 43 should apply the concept of horizontal application of human rights against non-governmental bodies, institutions and individuals to ensure equality rights in education.

8.A.22. Article 45: Right to Social Security

Article 45 sets out the right to social security in Palestine. The provision reads:

The law shall regulate social security, pensions for the disabled and the aged, and support to families of martyrs, detainees, orphans, those injured in the national struggle and those of special needs. The state shall guarantee them, within its capabilities, educational, health and social insurance services, and shall give them priority in employment opportunities, in accordance with the law.

636 Aldeeb, note 452 above.
637 Ibid.

The first sentence of the provision makes no promises to Palestinians. It simply states that the law will regulate these areas. It may be inferred that the constitution intends the government to provide a social welfare safety net, but it stops far short of requiring it to do so. The second sentence does make promises. It guarantees educational, health and social insurance services to specific categories of people, which does not necessarily cover all Palestinians who need social security assistance. Article 45 suggests that the right to social security is limited to members of these groups and is not a universal right that offers special protections for all people in need.[638]

The first question Palestinians should ask is whether there should be a universal right to social security rather than a limited need-based right, or in this case a right belonging to persons who fit certain groups. A universal right would provide every citizen (and hopefully permanent residents) with access to social security. The law would determine at what point need would be considered and how much each person should receive. Why a person needs assistance and whether those in need were ever employed would be irrelevant in considering how much financial assistance the government is required to provide. No one could be excluded from the system, although the amount to which they are entitled would depend on laws and regulations.

To the extent Article 45 creates a limited or need-based right to social security, the second issue this sentence raises is to what extent this provision will entitle women to social welfare and the services they need. As Chapter 2 (Part C) argues, under the current social welfare system women qualify for social security almost exclusively because of their relationships with men.[639] The system assumes that women only need assistance if the male members of their families are injured or dead.[640] Article 45 could result in the same injustice depending on how the government interprets "those of special needs." Will this category include women, or will it be assumed that their families will support them?

Of similar concern is the question of whether the category of "those of special needs" includes the unemployed. Under the current welfare system in the OPT, "[a]ble bodied males are assumed to be capable of supporting families without assistance," an assumption that excludes them from social welfare assistance.[641] Social welfare assistance to a family stops as soon as a son turns 18,[642] and does

638 The ICESCR requires universal coverage. Note 421 at Article 9.
639 Rita Giacaman, Islah Jad and Penny Johnson 'For the Common Good? Gender and Social Citizenship in Palestine' 132 in Joseph and Slymovics note 299 above.
640 Johnson, note 134 above at 8.
641 Ibid.
642 Ibid. at 18.

not necessarily cover unemployed men or women with young children. These gender stereotypes restrict unemployed men and women from social assistance regardless of their needs.

Also, Article 45 only offers social security and other social welfare assistance to children who are orphans, rather than all children whose families do not have enough resources to support them. The same concern applies here as it does to women, does the Draft Constitution assume that because the child has a family, the family will be able to support him/her? Again, this highlights the need for universal social security or at least a broader protection for children in need, a protection that is required by both the United Nations Charter on the Rights of the Child, which is adopted by the Draft Constitution in Article 24, and the Charter of the Rights of the Arab Child, which is adopted in Article 48.

Since Article 45 also prioritizes the listed groups in terms of employment opportunities, it is even more imperative that women be included explicitly within this provision. While not all women will need financial assistance, most women will need help in employment in order to overcome barriers that result from discrimination. Treating women the same as men who do not fit within the listed categories will not address the real inequalities and disadvantages women face in the employment sector. For this reason, Article 45 should include women as a category deserving access to social welfare services, or the drafters should add a new category of recipients of social security rights that includes the historically disadvantaged members of society, which would include women and disadvantaged men.

A third concern is that the provision guarantees "social insurance" rather than social welfare assistance. In everyday use, social insurance refers to a scheme into which working adults pay that promises to provide financial assistance when they become unemployed. Typically social insurance covers people working in the formal labour market. Social welfare assistance, on the other hand, connotes financial assistance to poor people that is not conditional on the recipient having worked in the formal labour market or having paid into the insurance system.

If Article 45 is interpreted as making social welfare payments conditional on participation in the formal labour market, it will exclude a large number of women, since only 10% of Palestinian women have formal employment.[643] Many women are unable to enter the formal labour market due to lack of education or their need to care for children and family members, which limits them to part-time hours that the formal labour market will not accommodate. Furthermore, rural

643 See Chapter 2 (Part C-6).

women typically work on family farms and do not receive compensation for this work. The exclusion of women in the informal labour market and rural women from social insurance would perpetuate inequalities that result from socially constructed gender roles and from sex and gender discrimination. Relying on participation in the formal labour market as a condition of social security rights also ignores the very real value of women's work at home; work that makes it possible for families to function and for men to work in the formal labour market.

If the drafters intended Article 45 to guarantee social welfare assistance, it is important that the government not be allowed the discretion to limit its assistance only to those who paid into the social security system during the course of their employment.

The guarantee of social welfare provided by Article 45 contains two other internal limitations. The first is that it guarantees educational, health and social insurance services based on the capabilities of the government. As Chapter 6 (Part A) argued, this type of limitation allows for the progressive realization of rights. While it would be preferable that there be no limits on socio-economic rights, realistically the Palestinian government cannot afford to fulfil each and every right to the maximum because of financial constraints. Keeping this in mind, it is also important that the government does not use this limitation as an excuse to ignore its promises and that government discretion in determining its capabilities is not so broad as to allow it to undermine the provision. One way to protect against such broad discretion is for Article 45 to include a standard for determining whether the government acted reasonably when it determined its capabilities.

The second internal limitation of Article 45 is that the guarantee of social assistance is limited to application "in accordance with the law." This statement suggests that the legislature will have discretion to determine the scope of social welfare rights, which may allow them to deprive needy Palestinians of a safety net.

In conclusion, social welfare assistance needs to be a right that belongs to all citizens and permanent residents, rather than a charitable benefit bestowed on the needy or a right belonging only to those who can pay into an insurance system. If this recommendation is rejected, then the phrase "social insurance" needs to be changed to reflect a financial assistance program that does not depend on prior employment and the provision needs to include women explicitly in the entitlement for priority in employment.

8.A. 23. Article 46: Right to Health Insurance

Article 46 provides for a right to health insurance for everyone and a right to "basic healthcare" for poor people. The right to health insurance is important in a nation where the majority of the population lives in poverty. Currently, government health insurance covers 39% of the Palestinian population; the main beneficiaries are public sector employees and workers employed in Israel.[644] While some Palestinians benefit from private insurance, a large percentage has no coverage at all. Depending on how poverty is defined, many Palestinians could qualify for basic healthcare.

While commendable, Article 46 stops far short of providing comprehensive health rights, which should encompass more than the provision of medical treatment. The World Health Organization describes health as "a state of complete physical, mental and social well-being that does not consist solely of the absence of disease or infirmity."[645] Protecting health and providing healthcare goes far beyond paying for doctors' visits and medical treatment.

In addition to a right to medical treatment, a right to health should include a right to preventative care, good nutrition, mental health services, clean water, sanitation, a healthy environment, housing, education, and protection from violence. A right to health should include the right to be treated fairly and equitably, and the right to privacy in healthcare matters. It must include autonomy rights, such as the rights to bodily integrity, to choose whether to receive treatment, and to make decisions regarding family planning. A right to health insurance does not promise many of these things, nor does a right to basic healthcare. Article 46 is drafted far too narrowly to cover health related concerns and rights; it should be widened as suggested here.

8.A.24. Article 47: Housing Policy

Article 47 promises government policy to provide housing to every citizen based on collaboration between the public, private and banking sectors. It also promises that during the occurrence of a war or natural disaster that it "shall also seek, within its capabilities, to provide shelter to those who lose their homes." The first point about this policy is that it weakens the existing socio-economic right to housing contained in the Basic Law Article 23, which reads: "Proper housing is a right for every citizen. The Palestinian National Authority shall secure housing

644 United Nations Economic and Social Commission for Western Asia, note 138 above at 20.

645 'Women's Rights in a Bill of Rights for Northern Ireland', Queen's University Belfast & Northern Ireland Human Rights Commission (2001).

for those without shelter." The first question to ask is why should Palestinians accept lesser rights in their constitution than those they are guaranteed currently under the Basic Law?

Palestinians suffer from high rates of poverty. Women-headed households are at greater risk of poverty than other segments of the population, which means they are the most likely to become homeless. Women also are disproportionately at risk for homelessness because of their insecure inheritance rights, the treatment of the marital home as property belonging to the husband on divorce, and the societal expectation that their families will support them should they become homeless. Article 47 needs to be revised from a policy statement regarding homelessness to an enforceable right to adequate housing. The language of the Basic Law Article 23 is appropriate for this purpose.

8.A.25. Article 48: Family, Maternal and Child Rights

Article 48 guarantees family, maternal and child care, including care for children of all ages. It requires the law to regulate child, mother and family rights based on international agreements and the Charter on the Rights of the Arab Child. It also states that it will protect children from "harm, harsh treatment or exploitation, and from any work that would endanger their safety, health or education." The rights and policy statements related to children contained in this provision are discussed fully under Article 24, above.[646] This section only considers the family and maternal rights and policies guaranteed under Article 48.

The main issues with this provision are definitional. What do family care and maternal care mean? What are maternal rights and family rights? These ambiguous phrases could be advantageous or detrimental for women.

This provision recognizes one of women's important roles—as mothers. If the interpreters of the constitution adopt a progressive approach that promotes shared decision-making within the family, and do not use the concept of family to interfere with women's autonomy, then family rights and family care will benefit women.[647] Rights to such care could address very real concerns of Palestinian women, including how to ensure the basic needs of their families and to protect them. This provision could provide women with reproductive rights and choices that are not yet secure under Palestinian law, particularly a right to make decisions regarding family planning. It could protect women from pregnancy discrimination.[648]

646 See Chapter 8 (Part A-6).

647 See e.g. Penny Johnson, 'Agents for Reform: The Women's Movement, Social Politics and Family Law Reform' 170 in Welchman, note 121 above.

648 Reproductive rights should be broad and include the right to decide the number of

Also, this provision could allow women to challenge their husbands for custody despite religious laws, and to advocate for social assistance for their families. Interpreted progressively, Article 48 could allow women to demand government support for their families, while also protecting their own individual rights as women.

As good as this seems for women, phrases such as family care and rights, and maternal care and rights may work to benefit men. The definitional ambiguity of family rights raises the questions of who are the recipients of those rights? Will it be assumed that men are the recipients as "heads of household?" Will these rights assure men of their decision-making power on behalf of the family? If the interpreters of the constitution conceive of family in patriarchal terms, then the current uneven power relationship between men and women will be perpetuated and women could find themselves under even greater control of their husbands. Maternal rights and care are unlikely to counter current conservative interpretations of "family," but instead are likely to be used to reinforce hierarchical gender roles.[649]

Since the meaning of these terms is unclear, it is important to consider them alongside the other provisions of the Draft Constitution. A variety of provisions protect women's equality rights, including two specific provisions related to women (Articles 22 and 23) and another that protects against sex discrimination (Article 19). These protections seem strong except when it comes to the area of family law and personal status, which under Article 7 is governed by religious authorities.

As argued above, religious-based personal status law currently protects patriarchal practices and ensures men have more power in family relationships than women. For example, under Shari'a law, men can divorce their wives unilaterally, while women need the permission of their husbands or the court to receive a divorce. All women can inherit only half of what their brothers inherit because it is assumed that men need the estate to care for their families, including their sisters if necessary. It seems likely that with the constitutional foundation of Islam in Palestine and the authority of religion over family law, the concept of family rights and care and of maternal rights and care will only further entrench women's gender roles as caretakers of their families and children to the detriment of their rights to equality as individuals. Equally problematic, the law is allowed to regulate mother, child and family care and rights. This gives the legislature the power to decide what these rights mean, which means those rights are not secure even when they benefit women.[650]

children, when they want to have children, and when they wish to stop having children. These rights must include access to information and the means to ensure their choices.

649 Strong, note 490 above at 183; Schmiechen, note 600 above at 485.

650 See Chapter 6 (Part E).

The best way to ensure that Article 48 does not become another tool to perpetuate patriarchy is to add language that guarantees equality within the family. For example, the Constitution of Colombia provides the following: "Family relations are based on the equality of rights and duties of the couple and on the mutual respect of all its members."[651] By providing for equality in the family, the Draft Constitution would ensure that women benefit from the rights contained in this provision without risking other rights or having them maintained as complementary rights based on traditional gender roles. Unless such a statement is added this provision should be deleted, except for the language that protects children's rights, which should be added to Article 24 together with the revisions suggested in the discussion of that provision.

8.A.26. Article 50: Private Property Rights

Article 50 provides private property rights to protect owners from unfair confiscation of their property, and to protect the right to compensation in cases where private property is taken by the government. Under this provision, the government may confiscate or seize private property only if it is done in accordance with the law and if it serves the public interest. Article 50 prohibits "general confiscation," which suggests that the government cannot nationalize all private property or grab land in the way that Israel does. Ultimately, the law regulates whether and when land can be confiscated, as well as whether and how foreigners may own land.

From a women's perspective, our concern regarding private property is women's access to it. As argued throughout this document, although many women inherit from their families, most decline to take their share because of social pressure.[652] Families sometimes force women to relinquish their inheritance rights even though, legally, these belong to women. Equally problematic is the fact that under religious divorce law, which Article 7 of the Draft Constitution will continue to apply, marital property is assumed to belong to the husband. When a couple divorces, the woman loses all rights to marital property regardless of her contributions to it.[653] For women, access to property should be addressed by social welfare provisions and through changes in personal status law so that marital property does not belong solely to men. This would ameliorate the conditions that create the need for women to bargain with their families for financial protection. Another concern that the Draft Constitution does not address is the right to private

651 Article 42 (1991) (as translated on http://confinder.richmond.edu/admin/docs/colombia_const2.pdf (last visited June 22, 2007)).

652 See Chapter 2 (Part C) and Chapter 6 (Part B) for a discussion of Palestinian inheritance rights.

653 Mir-Hosseini, note 414 above.

property in relation to land taken by Israel from the OPT. A Palestinian constitution should guarantee the re-distribution of or compensation for this confiscated land based on principles of social justice and equality. The constitution must ensure that the rights of women are not overlooked during this process and that the redistribution and compensation policy does not discriminate against women. A constitutional protection for private property "must not be structured to entrench existing land and wealth distribution schemes, but should instead ensure egalitarian mechanisms to undo past injustice."[654]

Regarding regulation of foreign ownership of real estate, the provision makes sense in the context of the history of Palestine/OPT as the Zionist movement purchased land to entrench its claim to land that belonged to Palestine before 1948, as well as to land in the OPT. On the other hand, limitations on foreign ownership could prove problematic both for foreign investment purposes and also if Palestinian women cannot pass on their nationality to their husbands. Foreign men married to Palestinian women would be greatly disadvantaged if the law does not give them an entitlement to citizenship and the regulations do not allow them to own land or protect their property interests.

8.A.27. Article 51: Right to Work

Article 51 guarantees all citizens the right to work. This does not promise a right to employment, but rather a right to pursue employment free from discrimination.[655] According to the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR), this right is fulfilled by governments when they provide "technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual."[656] Article 51 of the Palestinian Draft Constitution promises a development plan, with private sector support, to increase employment opportunities. It states that the law will regulate work relations in accordance with principles of justice and the security and protection of workers. The law also will regulate forced labour during emergency circumstances. Article 51 gives workers the right to establish unions and professional associations subject to the rules of the organizations; workers will have the right to protest and strike within the limits of the law.

654 Gross, note 321 above at 83.

655 Birenbaum and Albertyn, note 430 above. See also, ICESCR, which defines the right to work as: "include[ing] the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right." Note 421 above Article 16(1).

656 Note 360 above Article 6(2).

The first point about this right is that it may be meaningless for women unless the Draft Constitution is revised to include the horizontal application of rights against non-governmental actors. Article 7 places personal status matters under the authority of religion. Under Shari'a law, a husband may be able to deprive his wife of the right to work without any legal consequences; in fact the Shari'a courts may legally enforce the deprivation of this right. Men owe their wives a duty of maintenance as long as their wives are obedient. One element of obedience requires women not to leave the home without the permission of their husbands, which means husbands have to give their wives permission to work outside the home. While the Shari'a courts are unlikely to force a woman to stop working,[657] they could allow her husband to avoid any duty of maintenance owed to her. If the wife does not earn enough money to support herself, she will have to give up her work to keep her right to her husband's maintenance.

This example again highlights the fact that women derive rights from personal relationships rather than the government, and unless human rights provisions address family relationships women will continue to suffer from sexist and gender-based discrimination. For this reason, WCLAC recommends adding language guaranteeing a right to work on the basis of equality, as well as adding a statement, either here or preferably in a separate provision applying to all of Chapter 2, that this right (and all human rights) is enforceable against all individuals, groups, and governmental and non-governmental bodies and institutions.

In addition to the problems created by religious-based family law, women confront a multitude of discriminatory practices in the workplace that are not addressed directly by Article 51. First, women often are paid less than men for the same work, which is justified on patriarchal notions that men need more money to care for their families while women are cared for by their husbands.[658] Women are given inadequate maternity leave – a mere 10 weeks – and have almost no access to leave for pregnancy-related doctor's appointments or complications unless they use time from those 10 weeks.[659] Further, married women find it difficult to locate employment because employers fear they will become pregnant.[660] Article 51 promises the law will "regulate work relations in a manner that guarantees justice for all parties" but does not specifically require that the regulations address discrimination in pay and other benefits, discrimination in employment generally, or fair maternity leave.

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657 Welchman, note 95 above at 115.

658 See Chapter 2 (Part C-6).

659 Palestinian Labour Law, note 239 above at 7.

660 See Chapter 2 (Part C-6) for a fuller description of the problems employed women confront.

The Universal Declaration of Human Rights, which is adopted in Article 18 of the Draft Constitution, requires states to protect the right to equal pay for equal work, without discrimination.[661] The Convention on the Elimination of Discrimination against Women (CEDAW) supplements the UDHR by requiring its signatories to develop special protections for pregnant and married women. While Palestine is not a signatory, Article 18 of the Draft Constitution enjoins the government to "seek to join other international instruments that safeguard human rights." Article 11(2) of CEDAW reads:

> 2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:
>
> (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
>
> (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
>
> (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child care facilities;
>
> (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

Many Palestinian women work in the informal sector or perform unpaid work on family farms; another concern about Article 51 is that it also does not address this explicitly. Labour law must regulate domestic workers and unregistered sweatshops and factories. The promise of justice and measures for safety for workers may be meaningless to many women, as well as many Palestinian men, unless the regulations cover the informal labour market and family farms.

CEDAW includes a provision regarding rights and policies related to women working in agriculture, recognizing that labour laws rarely include provisions protecting the unpaid work of rural women. Instructive to the constitution drafters, Article 14 reads:

> 1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural

661 See also, United Nations International Covenant on Economic, Social and Cultural Rights, note 421 Article 7.

women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.
2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

(a) To participate in the elaboration and implementation of development planning at all levels;
(b) To have access to adequate healthcare facilities, including information, counselling and services in family planning;
(c) To benefit directly from social security programs;
(d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as . . . the benefit of all community and extension services, in order to increase their technical proficiency;
(e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self- employment;
(f) To participate in all community activities;
(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Article 51 does not promise to address gender segmentation in the labour market and other forms of gender discrimination. As argued in Chapter 2 (Part C-6), gender segmentation places many men in higher status, higher paying jobs that lead to promotion, while women are relegated mostly to dead-end jobs, such as in the informal labour sector, in part because of expectations that they will be the primary caretakers of their children.[662] Many women accept grossly underpaid employment that allows them part-time hours so they can be home when school lets out. Article 51 should require the government to take measures to address

662 Georgina Ashworth, 'Gendered Governance: An Agenda for Change' (1996) http://www.sdnp.undp.org/gender/resources/mono3.html.

the conditions that lead to gender segmentation, as well as to fight discrimination in the labour market. The provision should guarantee that the law will regulate employment relations based on principles of social justice and equality and should require legislation targeting "pay equity, promotion policies, maternity leave and child-care provision."[663]

The policy statement that the government will work towards creating more employment in Palestine does not address inequities in the current labour market or the need to ensure that women are included in and beneficiaries of the development process:

The great demographic imbalance in Palestinian society between the ratio of producers of income to consumers of income does not bode well for the society's ability to invest in long term sustainable development. The marginalization of women from wage work is one of the critical causes of this imbalance.[664]

Women need to be expressly included in development plans to correct the historical imbalance in the labour market and discrimination against them.[665]

Finally, WCLAC expresses grave concern that this provision permits any kind of forced labour. Article 51 should be revised to read: "No person shall be required to perform forced labour."[666]

8.A.28. Article 52: Access to Public Service

Article 52 provides for a right to "have access to public service, to serve society, on the basis of competence, merit and equal opportunity in accordance with the requirements of the law." This provision goes a long way toward promising fair access to public service and jobs based on merit rather than cronyism. The Palestinian Authority has been criticized repeatedly for appointing individuals to government positions based on family and clan relationships rather than competence. The provision does not go far enough, however, to provide the

663 Hammami, note 288 above at 42.

664 Ibid.

665 The United Nations International Covenant on Economic, Social, and Cultural Rights, which the Palestinian government is encouraged to adopt under the general directive of Article 18 of the Draft Constitution, requires governments to take positive steps to encourage individual development. Note 421 above at Article 6. The measures Article 6 of the ICESCR requires to achieve the right to work include: "technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual." Ibid.

666 See United Nations International Covenant on Civil and Political Rights, note 580 above at Article 8(3).

foundation for women's access to and participation in public institutions and positions.

Under the late President Arafat's government, women filled only 13% of the appointments or employment positions in Palestinian Authority ministries.[667] Promising equal opportunity is not enough to correct this obvious imbalance. For example, equal treatment in hiring may mean simply that women must be considered as candidates for positions. It does not address the fact that women have been given limited educational opportunities or have been excluded from jobs or promotions they need to qualify them for new positions. Article 52 should address the concept of substantive equality. As Chapter 6 (Part F) argues, substantive equality means that the government must use appropriate means to ensure equality, even if it means treating different people differently.

The best way to guarantee substantive equality is to create a positive duty on the government to ensure equality. This could include adopting affirmative action measures stating that if both a man and a woman are qualified for a position, the woman should be appointed, and also adopting measures to train women to qualify them for public service positions. To address both substantive equality and positive rights, WCLAC recommends adding language to the provision that guarantees equality as well as equal opportunity, and that the government must adopt policies and legislation to promote and fulfil equal enjoyment of this right. The Constitution of Colombia provides an example of such language in Article 40: "The authorities will guarantee the adequate and effective participation of women in the decision making ranks of the public administration."[668]

8.A.29. Article 53: Right to Vote, Part 2

Article 52 guarantees the right of every citizen to "practice his right to vote in referenda and election", to run as a candidate for election or nominate another person who qualifies for election. This right is slightly broader than the right to vote promised in Article 21. Because it is so similar to Article 21, it should be incorporated into that provision.

8.A.30. Article 54: Participation in Political Activities

Article 54 protects the right of citizens to participate in political activities, as individuals or members of groups. This provision protects the right to form, belong to or withdraw from political parties and trade unions or other trade-related

667 See Chapter 2 (Part C-7).

668 See also the recommendations made under Article 66 in Chapter 9 (Part C-4).

groups "in accordance with the law." Also, it states that the law will regulate how such organizations will achieve "legal personality." It expands on Article 8, which provides for the right to political participation and to form political parties, and on Article 51 which provides for a right to form trade unions.

With respect to women, the main concern is whether women can participate equally and fairly in political activities. Currently women are underrepresented in the leadership positions of political parties and trade unions, meaning that their concerns are less likely to be addressed through political efforts. Also, political appointments are often made from the leadership ranks of political parties. Since women are barely represented in these ranks, they are less likely to be appointed to government posts.

Women's individual participation in political activities in the OPT is often restricted by societal attitudes that relegate women's interests to the home. Others argue that women's rights should be subordinated to the broader nationalist struggle, or that activism on behalf of women is a Western "import" that seeks to eradicate Palestinian culture. Additionally, educational barriers limit women's access to participation in political and work activities, as well as gender segmentation of the labour force that leads women to informal employment where they are unlikely to be represented by trade unions. This means that many employed women will have little access to the social resources necessary to lobby for their employment rights. For this reason, WCLAC recommends adding that everyone has the right to participation on the basis of equality and revising the provision to create a positive duty on the government to ensure women's full and equal participation in political activities.

Finally, Article 54 restricts the right to form political parties and trade unions and associations "in accordance with the law." As the discussion of Article 8 of the Draft Constitution explains,[669] although it may be necessary to curb political participation rights to ensure public safety, the legislature's discretion in this should be defined more narrowly to ensure that it is not allowed to obliterate the purpose and meaning of this right. For example, this provision could allow the government to require permission before forming a political party or trade group, which would enable the government to choose which groups it wants to recognize.[670] This loophole could be exploited for political purposes.

669 See Chapter 7 (Part A-7).
670 See Aldeeb, note 452 above.

One solution to this problem is to delete "in accordance with the law" and add the following language: "The political rights conferred by this provision shall be exercised subject to the law, in so far as such law imposes reasonable restrictions that are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Palestine, national security, public order, or in relation to contempt of court, defamation or incitement to an offence."[671]

8.A.31. Article 57: Suspension of Rights and Liberties

Article 57 guarantees that rights and liberties will not be suspended. It then qualifies this protection by stating that the law may temporarily restrict rights and liberties in times of exceptional circumstances related to public safety and national security. The provision requires that any arbitrary restrictions be penalized by law.

The first problem with Article 57 is definitional. It states that "basic" rights and liberties may not be suspended. It does not explain what it means by basic, which leaves open the possibility that many rights may be suspended or none at all. Because of this ambiguity, the word "basic" needs to be removed from the provision.

The second issue is whether there is a qualitative difference between suspending and restricting rights. Could the legislature create a law that restricts rights to the point that it essentially suspends them, such that in times of war, for example, people may be subject to invasions of their privacy or tried in court on the basis of evidence obtained illegally?[672] Does this provision allow for misuse of power, despite the promise of penalties for such behaviour? One commentator tried to read the provision to create consistency so that Article 57 only allows restrictions on rights that are not considered basic.[673] He concludes, however, that the ambiguity in the language creates an unnecessary loophole open to exploitation.[674]

The discretion of the legislature to restrict rights needs to be curbed beyond a threat of penalty for arbitrary use of power. There should be some rights that

671 The recommended language is derived in large part from the Constitution of Namibia, sec. 1. Constitution of Namibia, note 395 above.

672 This example comes from the United States Patriot Act that allows for such behaviour to fight terrorism, but applies it only to non-citizens. See 'Surveillance Under the USA PATRIOT Act' American Civil Liberties Union (April 3, 2003). The full title of the Patriot Act is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Public Law 107-56 (2001)).

673 Brown, note 343 above at 25.

674 Ibid.

cannot be limited – for example, the rights to life and equality – and a stricter standard for determining whether restrictions are permissible and what circumstances are deemed exceptional, e.g. only if fair and just in an open and democratic country and during a state of emergency. Given what is at stake for Palestinians, this is a provision that should be highly detailed and restrictive.

The United Nations International Covenant on Civil and Political Rights (ICCPR), which a Palestinian government is likely to ratify under the policy injunction contained in Article 18 of the Draft Constitution, contains specific provisions detailing when a country may limit its protection of human rights. ICCPR Article 4 allows for limitation of the rights it protects only in times of a "public emergency which threatens the life of the nation." This is much narrower than what is permitted under Article 57 of the Draft Constitution, which allows for restrictions on rights for protection "in matters related to public safety and national security." Given that "national security" is a slippery concept open to political interpretation, the Draft Constitution offers far greater opportunity for allowable limitations to human rights.

The ICCPR also creates rights that cannot be restricted or suspended regardless of the circumstances, including the right to life, the right to be free of torture or cruel, inhuman or degrading treatment, the right to protection against slavery and servitude, the right not to be charged for a crime that was not a criminal offence when committed, the right to recognition as a person, the right to protection from unlawful interference in privacy, and the right to be free of discrimination solely on the ground of race, colour, sex, language, religion or social origin.[675] These types of limitations on the government's power to restrict rights are necessary to ensure rights.

8.A.32. Article 58: Criminalizing Human Rights Violations

Article 58 states that "any" violation of "fundamental" rights and liberties, whether granted under the constitution or by law, is a crime, and that legal claims for such violations, whether civil or criminal, will not be subject to prescription. It also guarantees just compensation for anyone whose rights have been harmed. Article 58 reads as though it is self-executing.

This provision may serve as an important tool to protect rights and liberties. It does not define which rights are "fundamental", which could remove some or all of its effectiveness. It also seems far too sweeping in what it criminalizes. For example, taken to an extreme, if the legislature enacts legislation that women can inherit only half of what their brothers inherit, which would be permissible under

675 Note 580 above at Article 4.

Article 7 but likely to violate equality rights, could the legislature – or at least the members who voted for the provision – be prosecuted for violating women's rights?[676] While such legislation should not be permitted, criminal punishment seems extreme.

Similarly, does Article 58 apply only to state actions or also to the behaviour of non-governmental actors? The provision criminalizes "any" violation, which suggests that it covers all violations, regardless of who perpetrates them. On the other hand, since it refers to rights granted in the constitution, it may be more of a question of whether the constitution applies horizontally. If the provision is intended also to target so-called "private" behaviour, then it is far too sweeping. For example, if a houseguest wishes to express an unpopular view and the host quiets him, the houseguest may be able to claim that the host violated his right to freedom of expression and push for criminal prosecution.

Article 58 also provides no protection for individuals, both those working in the government and those in the private sector, who may be unaware of which actions will be considered a violation of human rights protections. They will have no notice of what will be considered criminal, which makes it harder to avoid the behaviour and seems likely to lead to unfair punishment. Also, if the judiciary ultimately interprets the human rights provisions, its interpretations may create non-textual rights, exacerbating the problem of notice of what is criminal. This would also lead to a change in the balance of power between branches of government, as the judiciary will be defining crimes.

The limitation that civil and criminal suits based on human rights violations are not subject to prescription could be problematic also. Would ordinary statutory crimes no longer be subject to prescription since nearly all crimes violate someone's rights and liberties? Even if the provision is not taken that far, removing prescription for crimes that are not well defined could eliminate any chance at a real defence for the accused. The purpose of prescription is to protect the accused person who may not be able to locate the evidence or witnesses for his/her defence, particularly if a long period of time has elapsed, thus placing the accused at a serious disadvantage.

Lastly, Article 58 guarantees compensation for harm resulting from human rights violations, which suggests that the constitution is either not horizontally enforceable or places an enormous burden on the government. The state should

676 According to Articles 102 and 103 of the Draft Constitution, the Representative Council is immune from criminal prosecution for actions taken while acting in the role of the legislative body. Despite this, the point the example is trying to make is how sweeping Article 58 is.

expect to be held responsible for compensation for any of its violations of rights (although perhaps not for actions done in good faith).[677] Either this provision formalizes the expectation, or the drafters decided to make the state the financial guarantor of all rights, regardless of who violates them. WCLAC recommends that the state should be held responsible and accountable, and should compensate for violations.

8.A.33. Article 59: Independent Public Commission for Citizen's Rights

Article 59 requires the establishment of a Palestinian Independent Commission for Citizen's Rights (PICCR)[678] that will monitor the "state of the rights and liberties of the citizens" and report to the Representative Council, the President and the Prime Minister.

Legislation will prescribe the duties, competence and structure of the Commission. This provision creates an important body accountable for the implementation and protection of human rights as long as its members are truly independent of the government. Its role, however, should not be limited to monitoring the rights of citizens, but should include the rights of all residents, temporary or permanent, of Palestine.

Another possibility for strengthening the role of the PICCR is to give it the power to prosecute violations of human rights and standing to commence civil actions on behalf of Palestinian citizens and residents. The Draft Constitution only gives it research and reporting duties, which, while important, may not be enough to allow the PICCR to act as an effective watchdog for human rights. The current Palestinian Independent Commission for Citizen's Rights has enforcement powers, but nothing in the text of the Draft Constitution would stop the legislature from removing them from the PICCR. Also, the job of the PICCR could be aided greatly if it had the power to compel individuals, groups and governmental and non-governmental institutions and bodies to provide it with necessary information for the completion of its reports.

One issue that arises when creating accountability institutions such as the PICCR is whether they can address violations of women's rights effectively, or whether it would be better to create a separate body to monitor such violations. Proponents of a separate women's rights oversight institution are afraid that a generalized body will overlook the subtle forms of bias, such as, for example, differential access to

677 American Bar Association note 428 above at 12.

678 Subsequent to the time of writing, the name of the PICCR was changed to the Independent Commission for Human Rights (ICHR).

the political process because of education, a problem that may be difficult to detect if the oversight body is unschooled in gender politics. Or phrased differently, a generalized body may be focused more on "procedural correctness rather than the achievement of positive outcomes for women."[679] Women may find it difficult to access the generalized body or feel less comfortable doing so,[680] and may find themselves in competition with other groups for attention.[681] WCLAC is very concerned that women's issues may be placed in separate bodies without adequate powers. A women's unit within the PICCR could be more effective.

Another issue is whether the PICCR should have the power to monitor human rights violations and abuses by non-governmental actors. Currently, the Palestinian Commission can review claims of abuses only by governmental actors. This means that the reports to the Prime Minister, President and Representative Council may not reflect the real state of human rights in Palestine.

Finally, from the experience of the current Commission, it also seems important to establish that the government is required to fund the activities of the PICCR and cannot arbitrarily revoke funding or revise funding, such as for political reasons. The current Commission is wholly funded by outside donors.[682]

8.A.34. Article 60: State Responsibility for Security of the Person and Property

Article 60 places the responsibility for security of the person and property with the state. The Palestinian state promises to protect every citizen in its territory and abroad. Because Article 61 places a positive duty on the government to protect people and property, it could prove to be an important article for women, particularly if the rights to security and safety of the person under Articles 26 and 28 are read to apply horizontally. The two articles could be used by women to force the government to deal with domestic violence.

The second sentence of Article 60 may be overreaching. While it promises to protect the rights of Palestinian citizens abroad, the government may not be able

679 Goetz, note 313 above at 55.
680 Ibid.
681 Colin Harvey,' The Politics of Human Rights and Gender Equality in Northern Ireland' 140 in Dobrowolsky and Hart note 313 above ("The establishment of a new single Equality Commission in Northern Ireland was not universally welcomed. There were fears that it might lead to a 'hierarchy of discrimination' with gender equality losing out to issues of fair employment.") But see also Judith Squires, 'Reviewing the UK Equality Agenda in the Context of Constitutional Change' in Dobrowolsky and Hart note 313 above.
682 United Nations Office of the Special Coordinator in the Occupied Territories, 'Rule of Law Development in the West Bank and Gaza Strip' (1999).

to fulfil those rights since it will lack jurisdiction to do so. To the extent it fails, the government may be held responsible because of this provision. It would be better to state as policy that the government will take reasonable measures to ensure the rights of Palestinians abroad.

8.A.35. Article 61: Military Service

Article 61 creates a duty to serve in the military for Palestinian citizens. The primary concern with this provision is that it does not set a minimum age limit for conscription as required under the United Nation Convention on the Rights of the Child, which is adopted in Article 24 of the Draft Constitution. Under Article 38 of the UNCRC, children under the age of 15 should not be allowed to serve in the military. Being such a small state surrounded by powerful militaries, WCLAC does not see the need to have compulsory military service in addition to an effective civilian police force. Resources allocated to a Palestinian military could be better spent on services needed to provide for family and community security in daily life.

8.B. Application of Rights, Freedoms and Duties to Citizens or All Palestinians

The human rights provisions of the Draft Constitution distinguish somewhat arbitrarily between human rights, which are rights that "inhere in all people simply by virtue of their being human," and citizen's rights, which "belong to and can be exercised by an individual by virtue of the constitution, basic law or legal culture of the state to which he or she claims citizenship."[683] In some instances, the limitation of rights to citizens is appropriate, in others it is likely to lead to injustice against temporary and permanent residents. Provisions restricted to citizens are as follows:

- Article 5 – Islam is the Official Religion; all citizens are equal regardless of religion;
- Article 19 – All Palestinians are equal before the law;
- Article 20 – Guarantee of basic rights and liberties to citizens;
- Article 21 – All Palestinians have a right to vote;
- Article 31 – Every citizen has the right to freedom of movement and residence;
- Article 40 – Journalists and other citizens have the right to access to information and news;
- Article 41 – Citizens have the right to protect intellectual property rights;

683 Papp, note 381 at 7.

- Article 42 – Every citizen has the right to education;
- Article 47 – Policy to provide adequate housing to every citizen;
- Article 51 – All citizens shall have the right to work;
- Article 52 – All citizens have the right to access public service;
- Article 53 – Every citizen has the right to practice the right to vote;
- Article 54 – All citizens have the right to participate in political activities;
- Article 56 – Every citizen has the right to address the public authorities;
- Article 60 – The state will protect the rights of every citizen within its territory and abroad.

This limitation is reasonable in only a few of these 15 provisions. For example, it is wholly appropriate to limit the right to vote to citizens. In other instances, the restriction is not reasonable. For example, Article 60 promises to protect the rights of its citizens within its territory. Palestine should be concerned with the rights of all people within its jurisdiction, without distinction. The limitation on the right to education also seems grossly unfair. Children of foreigners deserve an education; to limit such a right to citizens could harm these children and should not be allowed. The Universal Declaration of Human Rights, which the Draft Constitution adopts in Article 18, does not divide rights between citizens and all others.[684] WCLAC recommends that the drafters of the constitution review the human rights provisions and consider whether the limitations to citizens is justifiable in a democratic country founded on human rights, equality and freedom.

8.C. Suggested Additional Provisions

There are a few obvious protections missing from the human rights provisions in Chapter 2 of the Draft Constitution. These protections would enhance the rights of citizens and residents of Palestine and may be necessary to ensure equality and equal enjoyment of life.

8.C.1. Right to Dignity

The right to dignity should be a fundamental right provided in every constitution.[685]

684 The International Covenant on Economic, Social and Cultural Rights limits the obligation of developing countries to provide socio-economic rights only to citizens because of economic underdevelopment. ICESCR, note 421 above Article 2(3). The International Covenant on Civil and Political Rights limits the right to vote and the right to enter a country to citizens only. Asbjorn Eide, 'Citizenship and International Human Rights Law' 105 in Nils A. Butenschon, Uri Davis and Manuel Hassassian (eds.) Citizenship and the State in the Middle East: Approaches and Applications (2000).

685 See e.g. Constitution of Namibia, note 395 above Article 8; Constitution of South Africa, note 395 above Article 10 (1996)

A right to dignity reflects every individual's inherent worth on an equal basis with all other members of society. It could be used to support protections against family violence, sexual harassment and against other violations that diminish an individual's dignity and that occur in what is often deemed the private sphere. The PLO Declaration of Independence of 1988 expressly declared that a state of Palestine would safeguard human dignity. The First Draft of the Constitution of Palestine also expressed its belief in the principle of dignity.[686]

8.C.2. Right to Culture

For our purposes, culture refers to a "system of shared beliefs, values, customs, behaviours, and artefacts that the members of society use to cope with their world and with one another, and that are transmitted from generation to generation through learning."[687] Culture is distinctly different from religion whose belief system relates to the supernatural, sacred or divine. Nowhere does the Draft Constitution expressly protect the right to practice one's culture, although it refers to "cultural development,"[688] "cultural rights" as a category of rights protected by the constitution[689] and "cultural aspects of life."[690] Cultural rights are an integral part of human rights protections intended to encourage personal development and growth. The Universal Declaration of Human Rights, as adopted by Draft Constitution Article 18, expressly requires state signatories to guarantee that: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."[691]

Cultural rights should be limited, however, when they conflict with other human rights provisions. The Constitution of Namibia provides an example of a cogent cultural rights provision. Article 19 reads:

> "Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interests."[692]

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686 First Draft, note 449 above Article 2.
687 Robert Aunger, 'Cultural Transmission and Diffusion' http://www.cus.cam.ac.uk/~rva20/EncyclCogSci.pdf
688 Third Revised Draft, note 360 above Article 17.
689 Ibid. Article 20.
690 Ibid. Article 22.
691 First Draft, note 449 above Article 27. See also, ICCPR, note 580 above Article 27; ICESCR, note 421 above Articles 1 and 15.
692 Constitution of Namibia, note 395 above.

8.C.3. Right to Language

The right to language is closely linked to the right to culture. A common language often is a manifestation of a common culture. Arabic is the language of the majority, however there are minorities like Armenians, Assyrians, *etc*. Our recommendation is to ensure respect for the language and culture of those minorities through clear legislation and policy.

8.C.4. Minority Rights

The First Draft of the Constitution of Palestine specifically protected minority rights. Article 11 read: "The Palestinian political system . . . shall guarantee the rights and freedoms of minorities without discrimination in their rights and obligations. It shall guarantee their protection and their respect for legitimacy in that which insures the supreme interest of the Palestinian people and their national unity."[693] While WCLAC does not advocate the adoption of the exact language of this provision, creating enforceable rights for minorities may be a necessary step to ensure equality.

8.C.5. Right to Reproductive Choice

Throughout Chapter 8, WCLAC recommended the adoption of rights that would explicitly guarantee women the right to make decisions regarding family planning, including whether and when to have children.[694] Palestinian women complain that they are given little choice about the spacing and number of children due to societal and family pressure, and the way this is reflected in medical practice. They also complain that it is illegal to have an abortion, which deprives them of some control over reproduction. Women need to be able to take control of their bodies in order to exercise their rights fully, including the rights to equality and autonomy.

693 The translation was taken from www.pcpsr.org/domestic/2001/conste1.html.

694 See e.g. Constitution of South Africa, note 395 above Article 12(2)(a): " Everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction."

8.C.6. Rights of Secular Persons and Adherents to Polytheistic Religions

In three separate sections the Draft Constitution provides for a variety of religious rights and protections but limits them to adherents of monotheistic religions.[695] This places believers in polytheistic religions at a severe disadvantage and must be corrected. Secular Palestinians and all other non-Muslims also could find themselves at a disadvantage because Article 5 establishes Islam as the official religion, which suggests Palestinians who are secular or adherents to other faiths will be outsiders in society. Article 7 further places personal status matters under the authority of monotheistic religions, which would have the effect of excluding atheists and members of polytheistic religions from the application of personal status law unless they conform to beliefs different from their own.[696] The Draft Constitution should address the exclusion of these Palestinian groups.

8.C.7. Right to Protection from Slavery and Involuntary Servitude

Nowhere does the Draft Constitution of Palestine protect all people within the territory of Palestine from slavery.[697] Article 51 limits compulsory labour to times of emergency but does not take it the next step to prohibit slavery. WCLAC recommends that this protection against slavery be translated into clear procedures for punishment of anyone practicing slavery and compulsory labour, including family members; also that "time of emergency" be clearly limited.

8.C.8. Right to Administrative Reasons

A right to administrative reasons would give all persons a right to demand that the government explain its decisions. It gives individuals power to protect themselves from arbitrary and/or discriminatory decision-making. This is an important accountability mechanism that ensures transparency, which is one goal of a democratic government. An example of such a provision comes from the South African constitution, which guarantees as part of a right to just administrative action that: "Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons."[698]

695 See Draft Constitution, note 360 above at Articles 5, 7 and Article 36.
696 The Discussion under Articles 5, 7 and 36 explain these points in great detail. See Chapter 6 (Parts A-5 and A-6) and Chapter 8 (Part A-16) respectively.
697 See e.g. Constitution of South Africa, note 395 above Article 13.
698 Ibid. Article 33(2).

8.C.9. Limitation Clause

Throughout this Discussion Document, it is apparent that a constitution of Palestine needs to address directly when and how human rights may be limited. In this chapter and in Chapter 6 (Part E), WCLAC advocates a uniform standard for determining when human rights may be limited that balances the government's need to limit rights because of competing rights and interests and society's need for the security and enforcement of the broadest form of rights. Leaving the standard of how and when to limit rights to the different branches of government could result in arbitrary decisions that will damage the credibility of the constitution. Any standard should weigh the importance of the right, the reasons for the restriction, and whether the limitation is justifiable in a democratic, human rights-based country, among other things.

South Africa provides a strong model of a limitation clause. Article 36 of its constitution reads:

> 36. Limitation of rights:
> 1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
>   a. the nature of the right;
>   b. the importance of the purpose of the limitation;
>   c. the nature and extent of the limitation;
>   d. the relation between the limitation and its purpose; and
>   e. less restrictive means to achieve the purpose.
> 2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The Canadian Charter of Rights and Freedoms also contains a limitation clause that "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[699]

8.C.10. Horizontal Application of Human Rights

699 Canadian Charter of Rights and Freedoms, Constitution Act 1982 Article 1.

As argued in Chapter 6 (Part D) and throughout this chapter, it is important that the Palestinian constitution provide for the horizontal application of human rights to all individuals, groups and non-governmental bodies and institutions to ensure the broadest protection of human rights. The First Draft of the Constitution of Palestine contained such a provision. Article 15 read: "The provisions of the Constitution and the laws issued in accordance thereof apply to all individuals and governmental institutions. No suspension of these provisions shall be allowed." Arguably Article 11 creates horizontal application of rights, but the language is too ambiguous to guarantee enforcement against so-called private actors.

8.C.11. A Positive Duty to Ensure Rights

Throughout this chapter and in Chapter 6 (Part C) WCLAC advocates the adoption of language in a Palestinian constitution that would place a duty on the government to take positive measures to enforce constitutional rights. Following the example set by the South African constitution in Article 7(2), the drafters should add a provision to Chapter 2 of the Draft Constitution that states: "The state must respect, protect, promote and fulfil the rights in this Constitution."

8.C.12. Marital Rights and Duties

One of the main areas of concern for Palestinian women is their rights and duties in relation to forming, maintaining and dissolving marriages. The Draft Constitution touches on the subject of marital and family issues seemingly to ensure the maintenance of the status quo over the administration of family relationships. Article 7 places personal status law under religious administration. The Draft Constitution avoids discussing rights within family relationships other than to set policy that the Palestinian government will seek to abolish restraints that keep women from contributing to the building of the family and to say that the law will protect family rights.[700] None of the Draft Constitution provisions address unequal family power relationships; instead the provisions could perpetuate them, which would deprive women of equal citizenship and access to human rights.[701]

To change this situation, a Palestinian constitution needs to have a specific provision addressing marital rights. The areas of greatest concern are: (1) setting a minimum age for marriage; (2) requiring the consent of both parties to the marriage; (3) creating identical and reciprocal rights and duties between spouses

700 Draft Constitution, note 360 above Articles 23 and 48.

701 Chapter 5 (Parts A and B); Chapter 6 (Parts A and B); Chapter 7 (Parts A-5 and A-6); Chapter 8 (Parts A-1, A-2, A-4 and A-5).

and equal power in family relationships, (4) ensuring equality in the formation, maintenance and dissolution of a family; (5) banning polygamy; and (6) protecting against discrimination on the basis of marital status.

One question this issue raises is whether to require that all persons in Palestine have the right to divorce, which is not the current state of the law. Protestant and Catholic churches do not allow for divorce. Compelling people to remain in their marriages seems antithetical to the goals of self-determination and autonomy. For that reason, it is advisable to add to any provision addressing marriage and family that "everyone who is married has the right to have the marriage terminated in accordance with the law."[702]

The Convention on the Elimination of Discrimination against Women provides guidance for a marital rights provision. What is missing is protection against discrimination on the basis of marital status: married, unmarried, widowed or divorced. Article 16 of CEDAW reads:

> 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
>
> (a) The same right to enter into marriage;
>
> (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
>
> (c) The same rights and responsibilities during marriage and at its dissolution;
>
> (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
>
> (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
>
> (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
>
> (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

702 The Northern Ireland Human Rights Commission, note 380 above.

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

8.D. Conclusion

Chapter 8 of the Discussion Document analyzed the human rights provisions in the Draft Constitution. It examined the provisions most relevant to women's lives to see whether those provisions offer real protection for women, whether there are loopholes that could be exploited to women's detriment, and whether there are ways to strengthen the provisions to provide women with the best possible framework for rights.

Many of the human rights provisions are weakened (1) by language that allows the government to determine the boundary of rights, (2) by statements of policy rather than rights, and (3) by the interaction of Article 7 with the human rights protections. Overall, Chapter 8 showed that unless human rights provisions apply horizontally to non-governmental actors and unless Article 7 is removed from the Draft Constitution, women risk being excluded from the real benefits of the human rights protections and are likely to continue to suffer from unequal citizenship.

Chapter 9: The Draft Constitution: The Structure of Government

This chapter analyzes state institutions created by Chapter 3 of the Draft Constitution. It looks at the framework for governance, focusing on the provisions that most affect women. Part A explains the meaning of women's representation in government to add context to the review of individual provisions. Part B looks at the importance of the masculine language in these provisions to raise the concern that the Draft Constitution imagines only male leaders. Part C discusses the legislative bodies of the Representative Council and the Advisory Council. Part D examines the framework for the Executive Authorities. The Discussion Document then explores the provisions related to the judiciary (Part E) and ends with an analysis of the concluding provisions (Chapter 4 of the Draft Constitution).

Because this Discussion Document focuses on women, only the provisions most relevant to them will be considered unless there is something outstanding about a particular provision that is of general concern.

9.A. Representation of Women in Government

The primary concern for women in the framework for governance is the extent to which they are represented in government. Equal citizenship requires that women have equal representation in government decision-making. Representation has two aspects. The first is numerical representation, the number of women working in all levels of government.[703] The second is whether the government is addressing the issues that most affect women.[704]

The numerical representation of women in government is important for a variety of reasons. The first is that it increases the likelihood that the government will address women's issues, potentially countering bias in current government practices that favour men's interests.[705] Research in the United States shows that "consistent with feminist theory, women legislators are more likely to champion measures concerning women, children and families."[706] Women parliamentarians in Scotland assert that their presence allowed them to make a difference in the agenda of their Parliament.[707] Scottish research found that as "a result some traditionally gendered policy areas, such as childcare or domestic violence, were becoming re-framed as mainstream issues."

703 Fiona Mackay, Fiona Myers, and Alice Brown, 'Towards a New Politics? Women and the Constitutional Change in Scotland' 85 in Dobrowolsky and Hart note 313 above.
704 Ibid.
705 Ibid. 89.
706 Kay Lehman Schlozman, Nancy Burns, Sidney Verba, and Jesse Donahue, 'Gender and Citizen Participation: Is There a Different Voice?' 39(2) Am. J. Pol. Sci. 267, 271 (1995).
707 Mackay, Myers, and Brown, note 702 above at 94.

Opponents of the need for numerical equality in governmental representation use mainstream political theory to argue that governments are "gender neutral" (and race neutral, etc.) and that elected representatives can ensure that the concerns of all their constituents will be addressed.[708] Mainstream theory ignores that fact that men and women, and majority and minority groups, sometimes have different and competing needs and interests.[709] Representatives are likely to favour their own interests, which typically coincide with dominant interests and the interests of men – negating the underlying assumptions of the theory.[710] Mainstream theory also ignores signs of "deep flaws" within most political systems. Consider that in the OPT women constitute roughly half of the population but serve as only a small percentage of the government.[711] In a society that allows men and women equal opportunity to run for office, this shows that Palestinian women are a long way from achieving equality in representation, as well as more generally.

Numerical representation also enables women to bring to government important skills, knowledge and resources that would otherwise be lacking.712 Another purpose of numerical representation is to create legitimacy for the government. Women "may or may not act differently or in women's interests, but their presence lends legitimacy to democratic institutions as a signifier of justice, inclusion and recognition."713 On a purely symbolic level, women may "stand for" women,714 though not all women who achieve government office do this, as we argue below.

For these reasons, a Palestinian constitution must address how to ensure women's numerical representation in all branches of government, at all levels, and in all areas of the bureaucracy. It is not enough to prohibit discrimination against women in government appointments and employment; there must be an obligation on the government to take positive measures to ensure women's representation. The Palestinian Authority has recognized the importance of women's role in government and the need for positive measures in its Plan of Action submitted to the CEDAW Committee when it listed as an objective:

"[t]aking action to secure commitment of the highest decision-making authority to adopt mechanisms and institutional structures which call for the advancement

708 Ashworth, note 661 above.
709 See Kymlicka, note 397 above at 139.
710 Helena Catt, 'How Can Women MPs Make a Difference? Reconsidering Group Representation and the Responsible Party Model' Centre for the Advancement of Women in Politics, Occasional Paper No. 6 (2003)
711 Jennifer Smookler, 'Feminism, Liberal Democracy and the Politics of Inclusion and Exclusion' Political Studies Association UK – 50th Annual Conference (2000).
712 Mackay, Myers, and Brown, note 702 above at 89-90.
713 Ibid. at 89.
714 Ibid.

of women as an integral part of the fundamental success of political, economic, social and cultural development."[715]

However, numerical representation alone is not enough to guarantee that the government will address the issues of greatest concern to women. Women do not always speak for each other and, because they are not a monolithic group, there are differences among them that result in different needs and concerns.[716] Furthermore, numerical representation does not necessarily overcome institutional barriers to the admission of women's concerns to the government agenda.[717] Mechanisms should be added to any government framework to accomplish gender representation in substance.[718] These mechanisms need to ensure that decision-makers hear a variety of women's voices. Currently, the Ministry of Women's Affairs, established in November 2004, is one such mechanism for monitoring government actions as they relate to women. One ministry, however, is not enough to accomplish the enormous task of ensuring women's representation. The provisions of the Draft Constitution should add other mechanisms throughout the government to address women's needs and concerns.

9.B. Gender Bias in the Language of the Constitution

Another issue for women that is most apparent in the later chapters of the Draft Constitution derives simply from the language of the provisions – the reliance on person, not women and men, and the use of male pronouns. As Georgina Ashworth argues:

> Language is more than a superficial issue, for the use of masculine terminology either to infer leadership or to subsume the rights and personhood of women, has had the effect of alienating women, literally and making them politically and juridically invisible in the past . . . Changes to terminology . . . are not merely fashion or 'political correctness'; they are intrinsic to the strengthening of capacity for gender analysis and action by governance officials, from legal drafters to economists to prime ministers.[719]

Article 19 attempts to deal with this issue in the Public Rights section, explaining that "[t]he term 'Palestinian' or 'citizen' wherever it appears in the constitution refers to male and female." The statement is necessary to ensure that everyone understands that the provisions of the constitution apply to both men and women.

715 'Plan of Action' note 187 above.
716 Chinkin and Paradine, note 364 above at 132-133.
717 Goetz, note 313 above at 52.
718 Mackay, Myers, and Brown, note 702 above at 89.
719 Ashworth, note 661 above.

However, it does not go far enough. In many of the provisions of the Draft Constitution there is more subtle gender bias in the choice of language. For example, Article 66 talks about "his election" when discussing the criteria for becoming a member of the Representative Council. It sends the message that government representatives are men. Wherever "his" is used, "her" should be included as "recognition of women's role as governors and leaders."[720] Taking this point one step further, the language could emphasize that women also have an equal role in leadership by "referring to 'women and men elected members' rather than just 'members' or to an 'appropriately qualified man or woman' as opposed to an appropriately qualified 'person.'"[721]

9.C. Public Authorities: Introductory Provisions and the Legislative Council

Chapter 3 of the Draft Constitution is one of three chapters that establish the framework of the Palestinian government. It guarantees fundamental principles of democratic governance: that sovereignty belongs to the people and that the three branches of government – the executive, legislative and judicial – are separate and independent. It then creates two representative bodies. The first is the Representative Council, which will be made up of 150 representatives who serve 5-year terms.[722] It is responsible for passing laws, approving treaties in certain circumstances, and for approving the government's budget, among other things. The second representative body is the Advisory Council. It also will be made up of 150 members and will include members from the Palestinian diaspora. It will be responsible for advising the Palestinian government on "strategic issues," matters related to "national rights" and the integrity of Palestine and Palestinians abroad, among other concerns.

Our analysis of these introductory provisions is limited to the areas that most affect women, democracy and human rights.

9.C.1. Article 63: Sovereignty of the People

Article 63 states that national sovereignty belongs to the Palestinian people and that they are the source of power. It explains that the people will exercise their authority through elections, elected representatives and referenda. It provides for three branches of government that are constitutional institutions whose powers cannot be usurped by any individuals or groups.

720 Birenbaum and Albertyn, note 430 above.
721 Ibid.
722 The translation on the Ministry of Foreign Affairs website refers to this body as the House of Representatives.

This provision places governmental power with the people, which is a fundamental principle of democratic governance.[723] Sovereignty with the people attempts to ensure that Palestine will not become a theocratic state in which only god is sovereign. However, Article 7 of the Draft Constitution places what is typically an area of governmental competence – personal status and family relations – under religious authority and establishes the principles of Shari'a as a major source of legislation. Article 7 appears to contradict Article 63. As this Discussion Document has argued repeatedly, the transfer of power from the government to religious authority results in a theocratic system over the areas that most affect women.[724] Furthermore, relying on religious law or its principles as a major source of law sets religion above the legislature.

9.C.2. Article 66: Elections for the Representative Council

Article 66 states that the Representative Council will consist of 150 members elected by the people according to the constitution and the election law. It limits membership in the Representative Council to exclude persons with dual nationality.

From a women's perspective, the main concern is whether they will be represented in the Representative Council. As Part A of this chapter argued, one aspect of women's representation is whether women will serve as members of the Representative Council, particularly since they are underrepresented in the current Palestinian Legislative Council. In an ideal world, the solution to the under-representation of all women and minority-group men in the government is to provide full equality and citizenship to these groups. Such equality requires addressing gender and ethnic discrimination that inhibits their participation in government. Until such time as women and minority-group men achieve true and meaningful equality, systems need to be established to ensure their participation in government. For this reason, WCLAC recommends inserting additional language in a Palestinian constitution to guarantee measures to ensure fair representation of all women and minority groups.

The primary option for ensuring women's and minority group representation in the Representative Council is the adoption of a quota system, which would reserve seats for them in the legislature. It would guarantee that some women and minority group members would serve as members of the legislative body. It should also penalize any political party that does not support women candidates to counter the current societal pressure on women not to run for public office. The existing PLC Election Law (no. 15 of 1995) reserves seats for women, which

723 El Fadl, note 526 above.

724 See Chapter 7 (Parts A-6-b and A-6-c).

after the 2006 election equalled roughly 10-13% of the seats. The Local Election Law (no. 5 of 1996) has a quota requirement of 2 women representatives in each local council when they run for election. Nothing in the language of Article 66 guarantees that the government will take positive measures to ensure women's participation in governance, although the PLC currently chooses to do so.

The main criticism of a quota system is that it advantages specific groups and is therefore said to be undemocratic. On the theory that democracy simply requires procedural equality in elections, a quota system would seem to give preferential treatment. The counterargument is that true democracy requires the full participation and representation of all members of society. The procedural theory also ignores real barriers to the equal participation of women and men of minority groups, including prejudice and limited access to the media and financial resources, that make it very difficult for members of these groups to get elected.[725] A quota system poses some risks for these disadvantaged groups. The first is that a quota will be seen as a "ceiling" for their recruitment or election.[726] For example, if the law or constitution requires two women from each district to serve as representatives, political parties may be inclined to submit the names of only two women as candidates and no more. A second concern is whether these women and members of minority groups will suffer from the perception that they lack merit or are less legitimate because they needed help to get elected.[727]

A look at other states' constitutions shows increasing acceptance of entrenching quotas for the legislative branch. For example, the Uganda constitution stipulates that there must be one woman representative in each district.[728] The constitution of Afghanistan also places quotas on women's representation in its two legislative bodies.[729] According to the International Institute for Democracy and Electoral Assistance, as many as 14 constitutions around the world either allow for or set quotas for women in national parliaments.[730]

725 Kymlicka, note 397 above at 141("The point here is not that the legislature should mirror society, but rather that the historical domination of some groups by other groups has left a rail of barriers and prejudices that makes it difficult for historically disadvantaged groups to participate effectively in the political process.")

726 Rwanda's experience with a constitutionally required quota counters this argument. The constitution requires 30%representation of women in decision making positions and guarantees 30% representation of women in the Senate, which is the one of two Parliamentary bodies. Constitution of Rwanda (2003) Article 9(4) and 82. In the 2003 elections, 48.8% of persons elected to Parliament were women, which included 15 women more than required by the constitution's quota. Gumisai Mutume 'Women break into African politics' Africa Recovery, Vol.18 No. 1 (2004) 4.

727 Goetz, note 313 above at 63.

728 Constitution of the Republic of Uganda (1995) Article 78(1)

729 Constitution of the Islamic Republic of Afghanistan (2004) Articles 83 and 84.

730 'Constitutional Quota for National Parliaments' Global Database of Quotas for

If the drafters of a Palestinian constitution wish to avoid adopting a specific election system that would guarantee the participation of women and minority group members, they could adopt language that states: "The state shall take all appropriate measures to promote the right of all women and men of minority groups to fair, full and equal participation in public life, including participation in decision-making processes and access to power."[731] The appropriate place for this addition would be Article 52, which provides the right to access to public service. Such a provision would create a positive duty on the government to develop measures for participation of women and minority group men in governance, extending the obligation beyond just elections to the Representative Council. Such a provision also could be interpreted to require the government to address some of the underlying causes of women's under-representation, including that they have childcare responsibilities that make it difficult to run for office.[732]

This discussion applies equally to elections at the local government level. India, for example, amended its constitution to include a quota that 30% of the local government representatives must be women.[733]

9.C.3. Article 67: Term of Membership in the Representative Council

Article 67 states that members of the Representative Council will be elected for 5-year terms that cannot be extended except by a law passed by two-thirds of the members "when necessary." This provision raises a major issue: can the Representative Council extend its term indefinitely and with little difficulty? This provision is far too broad. "When necessary" could be interpreted to include any signs of instability or insecurity, rather than limiting the grounds for extending members' terms to extraordinary times such as during a war or a natural disaster. Thus, this provision could be turned into a tool to severely limit or to end democracy. In light of the likely continuation of tension between Palestine and Israel, Palestinian governments will have an easy time justifying such an extension. Even if Article 67 narrows the circumstances under which membership terms could be extended, it places no limitation on the length of such an extension. Essentially, this provision allows the Representative Council members to determine the length of their terms. This provision needs to be revised to close all loopholes to abuse of power.

Women, http://www.quotaproject.org/system.cfm#constnational.

731 See The Northern Ireland Human Rights Commission, note 380 above. See also, Constitution of Colombia, note 650 above Article 40, which reads in part: "The authorities will guarantee the adequate and effective participation of women in the decision making ranks of the public administration."

732 Smookler, note 712 above.

733 Goetz, note 313 above at 57.

9.C.4. Article 69: Oath for Members of the Representative Council

Article 69 requires all candidates elected to the Representative Council to take an oath of allegiance to Palestine before they become members. The required oath reads: "I swear by Almighty God to be faithful to the Homeland, to safeguard the rights of the People, the Nation and their interest, to respect the Constitution and the law, and to fulfil my duties rightfully. May God be my witness." This Discussion Document is concerned with the reference to god in the oath. The oath assumes that all persons subscribe to monotheistic religions. As Sami Aldeeb explains, "This oath is contrary to articles 5, 19, and 20 of the Constitution. As we accept the freedom of religion and the guarantee of equality without religious discrimination, how can we ask a Buddhist or an atheist to swear in the name of God?"[734] The text needs to provide for an alternative oath for those who do not believe in god or in one god.

9.C.5. Article 82: Legislative Committees

Article 82 establishes the right of the Representative Council to form special *ad hoc* committees in addition to its standing committees. This is the only place that the Draft Constitution discusses legislative committees.

In order to ensure that women are consulted and their needs and concerns addressed by the legislative body, a Palestinian constitution should create a specialized women's legislative committee charged with the task of analyzing the effect of legislation and other Representative Council decision-making on women.[735] The committee would report to the Council, ensuring debate surrounding women's issues and concerns. This would safeguard women's substantive representation and could serve as a tool through which constituents could determine whether representatives are addressing women and gender in their decision-making.

9.C.6. Article 92: The Annual Budget

Article 92 describes the procedure by which the government will refer a budget to the Representative Council for approval; once approved, the President is responsible for promulgating the budget. The main concern with the budget process for women is whether the budget is gender-sensitive in both its accounting and disbursements. Budget allocations often have a differential impact on men and women. For example, the Palestinian Authority passed legislation creating a

734 Aldeeb, note 452 above.
735 Goetz, note 313 above at 60.

government fund for the payment of maintenance to a spouse when they receive a court order against the other spouse. Based on the OPT's patriarchal system, usually it is the wife who receives the order against her husband. Under the new law, women will receive their maintenance payments through the government, but if the government does not allocate sufficient money to the fund for the necessary infrastructure, women will not be able to receive the maintenance due to them. Failure to allocate funds in the budget to support this law is unlikely to have a major effect on men.

Another factor in considering women in the budget requires looking for subtle bias in spending. For example, a government may commit itself to spending toward the development of the Palestinian economy. The question then is whether funding is provided for women as well as men. If the budget allocates money toward scientific development, an area where gender segmentation leads to the exclusion of women currently, women will see almost no benefit from the spending program.

Because of potential differential impact, Article 92 should be revised to include a requirement that the government consider the potential impact of the budget on women and that it address women's needs and concerns.

9.D. Public Authorities: Executive Authority, Public Administration, and Local Authority

Section II of Chapter 3 of the Draft Constitution provides for the framework of the executive branch of the Palestinian government. It divides executive power between the President and the Prime Minister. The President is elected by direct vote for no more than two, five-year terms. S/he will act as commander of the Security Forces and as head of state. The President is responsible for appointing the Prime Minister based on the recommendation of the political party that receives the majority of the popular national vote. The President is given the power to direct the Council of Ministers on policy; propose laws to the Representative Council; authorize laws; issue decrees; and declare a state of emergency, among other things.

The Prime Minister is charged with representing the government. S/he is responsible for negotiating treaties; composing the Council of Ministers; implementing policies and law; signing executive decrees; overseeing the functioning of the public authorities; and proposing draft legislation. The distribution of power between the President and the Prime Minister falls between a purely presidential or purely parliamentary system.[736]

736 Khalil, note 48 above.

The remainder of Section II of Chapter 3 of the Draft Constitution discusses the tasks of the Council of Ministers and of the ministers, the role of the security forces, the process of government appointments, and the establishment of the Audit Bureau and local government.
Our analysis of the individual provisions is limited to the areas that most affect women, democracy and human rights.

9.D.1. Article 115: Oath of the President

Article 115 provides the following oath that the President of Palestine must make on his/her inauguration: "I swear by the Almighty God to be faithful to the nation and its shrines, to the people and their national heritage, to respect the Constitution and the law, and to fully preserve the interests of the Palestinian people. May God be my witness." The issue here is identical to the one described under Article 69 above (Part C-4), and under Article 136 (Part D-3): the text should provide an alternative oath for those who do not believe in god or in one god.

9.D.2. Article 130: Restriction of Rights and Liberties during a State of Emergency

Article 130 describes the circumstances under which the Council of Ministers may restrict "basic" rights and liberties during a state of emergency.[737] The restrictions must be necessary to "preserve the integrity of the Nation" and must be "strictly required." The decision to restrict rights and liberties will be subject to judicial review and heard by the courts in no more than three days after a grievance is made.

Article 130 places limitations on the government's right to restrict rights and liberties; they must be considered alongside Article 57, which prohibits suspension of rights and liberties but allows their restriction by law "in exceptional circumstances in matters related to public safety and national security protections." Unlike Article 130, which only allows rights to be restricted as "strictly required," Article 57 does not provide a standard for determining to what extent rights may be abridged.

Article 130 is a vast improvement over Article 57, but several of our concerns remain. The first is definitional – what do the drafters mean by "basic rights and liberties." Are basic rights and liberties something less than all those provided for in Chapter 2 of the Draft Constitution? The second concern is that Article 130 does not protect some of the most important rights and liberties from restriction,

737 Restrictions by the legislature of human rights are governed by Article 57.

such as the right to life and the right to equality. A final concern is whether the provision allows the Council of Ministers to restrict rights and liberties to the point where they are suspended, negating the promise in Article 57. Chapter 8 (Part A-31) discusses Article 57 and covers these concerns more fully.

9.D.3. Article 136: Oath by Ministers

Article 136 requires the Prime Minister and all other Ministers to take the following oath prior to beginning their duties: "I swear by Almighty God to be faithful to the country, to uphold the rights of the people, and its interests, and to respect the Constitution and the Law, and to fully carry out my duties. May God be my witness." As mentioned with respect to Articles 69 and 115, the requirement that all ministers swear before god potentially violates their religious rights.[738]

9.D.4. Article 155: Appointment of Civil Servants and Government Employees

Article 155 simply states that the appointment of civil servants and government employees and the conditions of their employment will be in accordance with the law. The provision does not state that the decisions regarding appointments and employment must be made based on merit, equality and equal opportunity. Nor does it require the government to take positive measures to ensure that all women and minority groups have full access to these positions. As Chapter 2 (Part C-7) argued, women are grossly underrepresented in the Palestinian Authority, despite the Basic Law's guarantee of equality. Part A of this chapter argued the importance of guaranteeing women's equal representation in government in all levels and all branches.

The Constitution of Bangladesh provides one possible model for ensuring the inclusion of women in all governmental institutions. It creates a 15% quota for women in the government bureaucracy.[739] The percentage is too low for Palestine, since women are already nearly 13% of ministry employees, but it shows that constitutions can entrench quotas in all areas of governance.

9.D.5. Article 158: Local Government

Article 158 states that there will be local government and that the law will regulate the relationship between local and national governments. Our main concern with the provision is that it does not address women's representation at the local

738 See Chapter 9 (Parts C-4 and D-1).
739 Goetz, note 313 above at 63.

government level. Consistent with many of the recommendations in Chapter 9 of this Discussion Document, it is imperative that women be included in local government institutions. Currently, the Local Election Law (no.5 of 1996) creates a quota requiring that 2 women serve in local government wherever women run for office. Nothing in the Draft Constitution would stop the legislature from eliminating this quota. To avoid this possibility, Article 158 must guarantee women's representation at this level of government. Part A and Part C-2 of this chapter provide a fuller explanation of the importance of such measures.

9.E. Public Authorities: The Judiciary

Chapter 3, Section 3 of the Draft Constitution establishes the judiciary as the third branch of government. This section guarantees the independence of the judiciary and states that the courts are responsible for deciding all legal disputes and criminal matters. The law will determine the structure and jurisdiction of the court system. However, the Draft Constitution creates a Court of Cassation to hear appeals in civil and criminal cases and possibly overturn previous rulings made by lower courts; a Supreme Court of Justice to hear administrative and disciplinary cases; a Military Court to hear matters related to the security forces; and a Constitutional Court that is the highest court on constitutional matters. A High Council of the Judiciary will be responsible for organizing the "affairs" of the judiciary. Court sessions will be public and judges are to be independent and irremovable. The Draft Constitution also creates a Bureau of Public Prosecutor, as part of the executive branch's Ministry of Justice, to try crimes.

The judicial process is the primary tool to enforce the human rights guarantees in the Draft Constitution. These provisions can make a difference only if enforced, which means individuals must have access to the courts to guarantee their rights. Meaningful access to the courts requires the judiciary to be independent and free of discrimination. For this reason, our analysis of the judiciary will focus on the extent to which the Draft Constitution provides access to justice and true accountability. It also is concerned with whether the Draft Constitution creates mechanisms to ensure women's representation in the judiciary.

9.E.1. Article 159: Role of the Judicial Authority

Article 159 establishes the judiciary as independent with the competence to decide "all legal disputes and crimes." The law will establish the institutions of the judiciary and its organization, including the classification of the courts and their jurisdictions. Article 159 restricts the establishment of "exceptional courts."

The main concern for women with respect to this provision is Article 159's guarantee that the judiciary will decide all legal disputes and crimes. As Chapter

1 (Part C-2) argued, personal status matters are heard by religious courts that are not part of the formal court system, and the majority of disputes are decided through customary law mediation. The vast majority of crimes against women, including rape and femicide, are dealt with at the customary law level.[740]
Under both the religious court system and the customary law system, women face discriminatory rules and practices. Considering that these are the primary systems of dispute resolution, these systems limit women's equal citizenship. For example, under Shari'a law, women can be prohibited from working or risk losing the financial support of their husbands. In the customary system, men who rape women are encouraged to marry their victims. The Palestinian judiciary generally accepts the settlements of customary law mediators, legitimizing their decisions. Religious authorities have full jurisdiction over personal status matters. Women do not serve as mediators, which further highlights the discriminatory nature of both systems.[741]

The state-run court system needs to regain a monopoly over dispute resolution and criminal matters to ensure that justice is reached and the process and outcome comply with a Palestinian constitution and laws. In theory, Article 159 provides the basis for this with respect to customary law disputes. In practice it may be difficult for the regular courts to usurp the role of the predominant source of justice in Palestine/OPT, the customary law system. WCLAC does not advocate eliminating the customary law system. Rather, we wish to ensure that certain disputes, particularly criminal matters, are heard by the state-run court system and that the constitution applies to these mechanisms in order to protect women's rights and interests and the interests of other victims of crimes. The Draft Constitution does not necessarily apply to the customary law system, although it should.

It is not clear whether Article 159 could be used to eliminate the jurisdiction of the religious courts. Article 7 states that personal status matters will be decided in accordance with an individual's religious denomination. It does not specifically guarantee that religious courts will hear these matters, only that they will be decided according to religious law. In theory, nothing in Article 7 or in the remainder of Section III of Chapter 3 of the Draft Constitution requires the maintenance of religious courts.

In reality, it will be hard to shift jurisdiction over personal status matters based on religious law to what are supposed to be secular courts. If personal status matters are turned over to the state-run court system, religious law could stagnate as the court system would have little power to develop religious rules. This would halt

740 Chapter 2 (Part C-7).
741 On March 1, 2009, Palestine appointed the first female religious court judges in the Arab world: Khulood Al-Faqeeh (a former WCLAC lawyer) and Asmahan El-Wheidi.

the development of religious law at the point when personal status jurisdiction is handed over to the government-run courts. This stagnation would be detrimental to women, freezing current discriminatory rules and practices. On the other hand, maintaining religious courts is equally likely to perpetuate patriarchy and discrimination against women unless the religious courts and law are made subject to the constitution.

The Draft Constitution does not directly confront the issue of religious courts. Nowhere does it mention them, including in Article 159. Furthermore, there is no mention of whether religious-court decisions can be appealed through the state-court system.[742] There should be a system to deal with religious law and courts to ensure that both are held accountable to the constitution and to the people. As Chapter 7 (Part A-6-b) argued, it is unclear whether religious courts are subject to the constitution or whether Article 7 will insulate religion from the democratic process.

At a minimum, all mechanisms of dispute resolution, whether state-run, religious, or customary, need to be subject to the constitution and to judicial review. Two ways to do this would be: (1) to treat religious courts and customary mediators as governmental or quasi-governmental bodies because their functions are governmental, or (2) to provide for the horizontal application of the Draft Constitution, which would bind religious courts and the customary law system to human rights guarantees.

One final question that arises under Article 159 is what the drafters mean by "exceptional courts." According to Nathan J. Brown, these are courts "established for special reasons or on a temporary basis."[743] Exceptional courts have been used at times as a tool of authoritarian governments to avoid the rules and limitations of prosecutions in ordinary courts. WCLAC welcomes this provision. However, a crucial concern for women is that the ban on exceptional courts must not prohibit the formation of family law courts or domestic violence courts in the future.

9.E.2. Article 162: Appointment of Judges

Article 162 states that the High Council of the Judiciary will determine its own rules and orders governing the appointment, assignment, or transfer of judges. Article 162 does not explicitly state that the High Council will be responsible for appointments, although it suggests it.

742 This seems intentional since the Basic Law protects the jurisdiction of religious courts in Article 101. Basic Law, note 19 above Article 101.
743 Brown, note 343 above at 64.

To the extent that this provision covers judicial appointments, it needs to ensure that judges are appointed based on principles of equality and equal opportunity and that there are mechanisms to ensure that women and members of minority groups have a fair opportunity to be appointed as judges. Prohibiting sex and religious discrimination alone is not enough to ensure equal opportunity. Currently, the Basic Law prohibits sex discrimination but the number of women judges does not come close to the number of male judges (only 9% of judges are women).[744] A Palestinian constitution needs to obligate the body responsible for judicial appointments to take proactive measures to ensure that women and members of minority groups are appointed to the judiciary.

9.E.3. Article 168: Independence of Judges

Article 168 guarantees the independence of judges, "subject only to the law and their conscience." Under this provision, judges cannot be removed from their positions and the law will determine their terms of office. Article 168 prohibits obstruction of the judicial process.

The only concern with this provision that we raise here is the statement that judges are "subject only to the law and their conscience." Judges need to be accountable to the Palestinian constitution as well, in order to bind them to the guarantees made for the protection of human rights. Unless justice is guaranteed on an equal basis, free of discrimination, marginalized groups will lack equal citizenship. For this reason, WCLAC recommends adding "to the Constitution" to this sentence so that it reads: "subject only to the law, **the Constitution** and their conscience."

9.E.4. Article 178: Constitutional Court

Article 178 establishes a Constitutional Court to "preserve the legitimacy of the work of the institutions of the State." It will be made up of nine judges who will serve a term of nine years that cannot be extended or renewed. The Council of Ministers is responsible for nominating the candidates, the President then appoints them and the Representative Council approves the appointment.[745]

Our first concern with this provision is whether the courts have the power to review non-governmental actions for constitutionality. The statement that the Constitutional Court will be responsible for preserving the legitimacy of state institutions may imply that the constitution is only vertically enforceable against the government and not also horizontally enforceable against non-governmental

744 See Chapter 2 (Part C-7).

745 There are many criticisms regarding this method of appointment that are beyond the scope of this Discussion Document.

actors. As we argued earlier, horizontal application of the human rights provisions may be the only way to ensure that women's rights are protected.[746]

The second concern is that the process for appointing Constitutional Court judges does not guarantee equality or equal opportunity and does not contain the promise of measures to ensure that women and members of minority groups have the opportunity to serve in such capacity.

9.E.5. Article 182: Jurisdiction of the Constitutional Court

Article 182 is a complex provision that sets out the jurisdiction of the Constitutional Court. It states that the court must hear constitutional matters brought to it by:

- the President,
- the Prime Minister,
- the Speaker of the Representative Council,
- ten members of the Representative Council,
- the Court of Appeal,
- the Court of Cassation,
- the Supreme Court of Justice, or
- the Chief Public Prosecutor.

The language of the provision suggests that the Constitutional Court cannot refuse to hear any matter referred to it. The Constitutional Court, upon request by any of these individuals or bodies, must review for consistency with the constitution:

- laws and draft laws,
- ordinances, regulations, measures and decisions taken by the President or the Council of Ministers that have the force of law,
- interpretation of constitutional text in matters related to rights, duties or the competency of the three branches of government, as well as disputes between the Prime Minister and the President,
- treaties signed, procedures for their implementation, and whether their provisions require the repeal of legislation or conflict with other treaties or the constitution.

The Constitutional Court has the power to decide disputes regarding the programs and activities of political parties and associations, their dissolution and suspension procedures, and any other powers assigned to it by the constitution. The Constitutional Court also has the power to nullify law or parts of the law and international treaties that it rules violate the constitution.

746 See Chapter 6 (Part D).

A constitutional court is an important institution to ensure that all government, and ideally non-governmental, actions conform to the constitution. Article 182 allows members of the government to challenge the constitutionality of legislation before it is passed, which increases protection for human rights. It also allows for the review of cases referred to the Constitutional Court by the Court of Cassation, the Supreme Court of Justice and the Court of Appeal. Oddly, the Draft Constitution does not specifically establish a Court of Appeal.

The first concern with this provision is the list of individuals and institutions that can refer matters to the Constitutional Court. Currently, referrals may be made only by the highest-ranking members of the government or by the appeals courts, which excludes individuals and lower courts in the judiciary from direct access to the Constitutional Court. This means that individuals and non-governmental actors can be heard by the Constitutional Court only if: (1) they are in the midst of a "case or controversy," which requires specific harm to the individual or non-governmental actor, and (2) the appeals court refers their case to the Constitutional Court, which means they must move through the appeals process.

Individuals must undertake a long and probably expensive process before they can be heard by the Constitutional Court and, even if they undergo appellate review, there is no guarantee that the appeals court will refer their matter to the Constitutional Court. WCLAC recommends that individuals be allowed direct access to the Constitutional Court. Article 201 of the First Draft and the Second Draft of the Constitution of Palestine allowed such access.

This provision implies the creation of a system of decentralized review in which all courts are competent to hear constitutional matters, but does not guarantee it. If jurisdiction to hear constitutional matters is decentralized, then individuals can challenge the constitutionality of legislation, laws, ordinances, regulations and other governmental (and hopefully non-governmental) actions in any court. If constitutional review is limited to the Constitutional Court then individuals will have no guaranteed mechanism to challenge any laws or actions as unconstitutional. Individuals with constitutional complaints would be subject to the discretion of the appeals courts as to whether the Constitutional Court will hear their claims. Since Article 33 grants individuals the right to litigate to protect their human rights, the only reasonable interpretation of this provision is that the lower courts will have the jurisdiction to hear constitutional matters.

Despite the implied decentralized constitutional jurisdiction, the drafters should include an explicit statement that at least some courts as well as the Constitutional Court will have the power to hear constitutional matters. Article 159 would be the

appropriate place for such a statement. If the drafters follow this recommendation or if the provision is read to imply decentralized jurisdiction, the Draft Constitution should require the Constitutional Court to review lower court decisions that invalidate legislation as unconstitutional. It seems logical that the Constitutional Court should be required to review any decisions invalidating legislation to ensure consistent application of the constitution throughout Palestine.

Finally, the list of matters the Constitutional Court may consider implies the establishment of the supremacy of the constitution by allowing the court to evaluate all laws, regulations, ordinances and other measures that have the force of law for their conformity with the constitution. Although, it would be far better to state such supremacy directly, this provision is an important tool for enforcing the rule of law.

9.E.6. Article 183: Constitutional Court Power to Void Law

Article 183 allows the Constitutional Court to "void or end the effectiveness of the law, regulation, ordinance or measure" that does not conform to the Constitution "in accordance with the law governing its operation." This provision raises two questions. The first is why is the Constitutional Court's power to void a law limited by the clause "in accordance with the law governing its operation"? There may be a legitimate reason, but it could create a loophole for the legislature to restrict the Constitutional Court. The second concern is whether the Constitutional Court can void religious rules and their application by religious authorities if they violate the constitution. Article 7 permits religious denominations authority over personal status matters, typically a governmental function subject to judicial review. The provision does not address whether the religious courts are governmental actors and, if not, whether the judiciary can review their actions. Because religious-based personal status laws and rules often discriminate against women and deprive them of human rights, such laws should be governed by the constitution and subject to review.[747]

9.F. Concluding Provisions

The Concluding Provisions of the Draft Constitution explain how the constitution will be adopted in Palestine, relying on the PLO in the first instance to adopt the document. Only after there is an independent state of Palestine will the public have an opportunity to vote to adopt the constitution, and then only if the Representative Council chooses to submit it for a public referendum. Chapter 4 describes the process for amending the constitution; it covers transitional

747 See Chapter 7 (Part A-6) for a description of the effects of Article 7.

matters such as the continuation of public institutions and laws until appropriate changes can be made or are deemed repealed as being contrary to the constitution. Chapter 4 sets a 6-month deadline for the legislature to draft and approve the laws necessary to establish the legal and administrative structures required by the Draft Constitution.

9.F.1. Article 185: Adoption of the Constitution

Article 185 requires an elaborate process for the adoption of the Palestinian Constitution because of the Israeli occupation. Until a state can be established, the Palestine National Council of the PLO will be responsible for approving the constitution. If it is unable to meet, the Palestine Central Council of the PLO will approve it. Once Palestine becomes an independent state and elections are held for a Representative Council, the Representative Council must vote to approve the constitution by a two-thirds majority. The Representative Council also has the discretion to submit the constitution to a public vote; if it passes by a majority it will be considered adopted. Nothing in the provision requires a referendum.

As Chapter 4 (Parts B and D) argued, the process of adopting the constitution has major flaws. The first problem is that it allows for the adoption of the constitution by PLO institutions prior to statehood. From a procedural standpoint, this does not ensure that the people who will be governed by the constitution will have the opportunity to approve it. It is irrelevant whether it is the PLO or the PA that initially adopts the constitution, either way the people are not guaranteed a direct say in its adoption and so far have not participated in its drafting.

From a substantive perspective, adopting the constitution prior to statehood could mean that the consensus on which it is based will be inoperable and outdated by the time there is an independent Palestine. There is no way of knowing when the occupation will end and Palestine is finally recognized as an independent state; this could happen long after the constitution is adopted. By the time the constitution becomes fully operational, the wishes and desires of Palestinians reflected in it may have changed. The likelihood that the current consensus will change is increased by the conditions of the occupation. During insecure and unstable times, societies become more conservative. By the time Palestine gains independence the violent and insecure conditions that prevail currently should be ameliorated. If adopted sooner, Palestinians may find themselves saddled with a constitution more conservative than they might otherwise prefer.
Furthermore, if the adopted constitution takes effect prior to statehood, many of the provisions will have no real affect. For example, the Draft Constitution guarantees security of the person in Articles 26 and 28 but the Palestinian Authority

cannot enforce these provisions against the state of Israel. Similarly, Articles 1 and 4, which define the boundaries of Palestine and name Jerusalem as its capital cannot go into force while Palestine remains occupied. These provisions highlight another problem, which is that adoption of the Draft Constitution may affect final status negotiations with Israel. To the extent that an agreement deviates from the state boundaries as defined in Article 1, the negotiating team either would be restricted from accepting the agreement or the agreement would violate the constitution. Either outcome could prove detrimental.

Article 185 should be revised to require a more inclusive process that will guarantee that the public will have an opportunity and the tools to comment on and revise the draft constitution, as well as adopt it. Further, the adoption of the constitution should be put off until after Palestine achieves statehood in order to ensure that the constitution reflects a political consensus for the future and to protect against creating "paper law" with provisions that cannot be enforced while under occupation.[748] The Basic Law could serve as a constitution in the interim.

9.G. Conclusion

Chapter 9 of this Discussion Document examined the structure of the government provided for in Chapter 3 of the Draft Constitution. It examined the provisions most relevant to ensuring women's representation in the government, concluding they are inadequate. It also raised concerns regarding human rights and democracy, particularly the loopholes that could allow a government to avoid human rights obligations and take authoritarian control of Palestine.

748 For additional criticisms of Article 185, see Brown, note 343 above.

PART III: CONCLUSION

Before discussing the substance of the constitution with respect to women, it is important to comment on the constitutional process. One of the main concerns with this is whether a consensus exists in Palestinian society regarding the constitution. As Chapter 3 of this Discussion Document makes clear, few people have had the opportunity to participate in the drafting process. Certainly women have been mostly excluded from it. The Draft Constitution appears to be a political compromise between the secular nationalist movement in control of the government at the time of drafting and the fundamentalist religious movement. It is not based on a consensus of the wider society.

Equally problematic, drafting a constitution in the current political climate defeats the purpose of constitutionalism. Instead of expressing a strategic vision for the future of Palestine, the constitution reflects the current social and political climate of insecurity, instability and danger created by the Israeli occupation. In such times, societies tend to grow more conservative, taking comfort and security in tradition, culture and religion. They are more willing to sacrifice rights for a sense of security, which is not appropriate for a future-oriented constitution. So far, women's rights have been sacrificed, despite language in the Draft Constitution to the contrary.

The adoption process provided for in Article 185 causes additional problems. There is no guarantee that the public will be given the opportunity to adopt the constitution, leaving open the possibility that it will be imposed from above. Secondly, the constitution allows for adoption prior to Palestinians achieving an independent, sovereign state. This could reduce many of the constitutional provisions to the status of "paper law" rather than law in practice, weakening the legitimacy and efficacy of the constitution. It is impossible to know when Palestine will throw off the shackles of occupation and establish itself as an independent state. It could be many years before it needs a constitution to replace the Basic Law, which means that this draft constitution could be outdated by the time it can be fully implemented. Adopting a constitution now could inhibit final negotiations to end Israeli occupation.

The attempt to sustain the idea that a "constitutional moment" still exists and can provide the impetus for completing the constitutional process is highly problematic both procedurally and substantively. Continuing the constitutional process when there is no independent state and without meaningful public participation is unnecessary. The Basic Law can serve as an interim constitution until an appropriate and inclusive constitutional process can be undertaken. An

ill-timed and ill-devised process is likely to weaken constitutionalism in Palestine and the legitimacy of the constitution.

Turning to substantive issues, the Third Revised Draft of the Constitution of Palestine appears to create a strong framework for women's rights. It contains four provisions directly establishing the right of equality in Palestine, three of which specifically focus on women. Article 19 provides all Palestinians with equal protection of the law without discrimination on the basis of sex (but not gender or marital status); in addition, "Palestinian" and "citizen" explicitly include both men and women, protecting against any narrow interpretation of these words. Further, Article 20 states that all citizens will have their rights guaranteed on the basis of equality and equal opportunity, providing additional support for women's rights.

Article 22 recognizes every woman as a person before the law and states that men and women will have the same rights, freedoms and duties; both guarantees are necessary to safeguard women's full and equal citizenship. This provision also protects women's independent financial assets. Article 23 is weaker, giving women the right to "participate actively," but not necessarily equally, in "social, political, cultural and economic aspects of life." It states that the law will work to abolish restraints that stop women "from contributing to the building of family and society," rather than requiring the government to remove all restraints that inhibit women's equal citizenship. It does suggest, however, that the government must take proactive measures toward addressing barriers to women's equality in these areas. Article 23 concludes that the constitutional and Shari'a rights of women, including the right of inheritance, will be protected. These are the only provisions of their kind in the Arab world.

However, when these four provisions are read alongside other articles of the Draft Constitution and in the context of Palestinian women's lives, the equality framework begins to crumble. One of our first concerns is whether these four provisions tackle the current public-private divide that the Palestinian Authority uses to justify non-intervention in the area of women's lives with the greatest negative impact on their rights – the family. Three provisions deal with the family, each entrenching this divide. Article 7 places personal status law under the authority of religion, which governs marriage, divorce, custody and maintenance and is highly discriminatory in its treatment of women. In addition, Article 23 protects Shari'a rights. Whether the four equality provisions can be used to tackle this discrimination will depend on whether interpreters of the constitution treat religious law as "private" and outside the control of government.

Two other family-related provisions suggest that the public-private divide will remain regardless of the four equality provisions. Article 35 prohibits interference in family matters with a few limitations. Separately, this provision raises the concern that domestic violence will be ignored as a "family matter" protected by privacy. Taken together with Article 7, this supports our concern that the drafters intend family matters, including personal status law, to be protected from government intervention. The current patriarchal context in the OPT lends further support to this contention as personal status law and rulings by religious courts are treated as private, and members of the PA and the police are extremely reluctant to intervene in family relationships.

Article 48 guarantees care for children, mothers, and families, and that the law will regulate child, maternal and family rights. Although it is possible to interpret this provision progressively, in the context of Palestine/OPT and a religious-based family law system, it seems more likely that this provision will be used against women and will subjugate their needs to the needs of their families. The concept of "family rights" should raise concern that the family unit will be protected from government interference, regardless of what happens within it, and that men, as the perceived heads of households, will see the benefits of this protection. Read critically, it seems likely that the Draft Constitution will protect the current public-private divide rather than transform Palestine into a nation where women have full and equal citizenship.

To change the status quo, the constitution needs to remove family law and many family matters from their insulated "bubble," allowing the government to intervene to protect the rights of individuals. One way to do this is to ensure the horizontal application of human rights provisions to individuals, groups, non-governmental bodies and institutions, as well as to religious law and the institutions that apply it. Article 11 states that "[n]o public or private person shall be immune from the law." This could provide for the horizontal application of rights if "the law" is interpreted to include the constitution. The First Draft stated explicitly that the constitution applied to these non-governmental groups and actors. The fact that this provision was weakened in the Third Draft creates a loophole that could be easily exploited to shield family law and family matters from the application of the constitution.

Furthermore, in the Palestinian context, many women's rights are dependent on personal relationships rather than on the state, largely because of religious-based personal status law and conservative social practices. The right to work and the right to education for women depend on whether families will allow women to exercise these rights. The Draft Constitution does not appear to transform

these relational rights into individual rights enforceable by the state because it does not provide explicitly for the horizontal application of human rights to non-governmental individuals, groups or institutions.

Horizontal enforcement of rights also is necessary to implement the right to bodily integrity in a meaningful and effective way. Articles 26 and 28 protect the security and safety of individuals, but do not clarify whether they require the government to protect women from domestic violence and murder. Without horizontal application of human rights to non-governmental bodies and actors, the Palestinian government may be able to hide behind the public-private divide to avoid its responsibility to protect women from violence.

Two further guarantees are missing from the protection of women's equality rights. The first is a statement that men and women will have equal rights and duties within the family. A clear statement of equality should replace the concept of complementary rights that is used currently to justify separate and unequal rights for Muslim women and men, such as the view that marital assets belong solely to men. Also, this would provide women with equal access to power within the family or at least open it up to them.

Also missing is a positive requirement on the government to take proactive measures to address inequality and ameliorate the effects of discrimination on women. For example, Article 45, which provides for social security, offers access to opportunities for education, health, social insurance, and priority in employment to various disadvantaged groups. Women may access these benefits as wives or daughters of men who were killed, detained or injured during the struggle for Palestine, or if they are disabled or elderly, but this provision does not specifically address women as women -- a group that has suffered great disadvantage in a patriarchal system, and living under conditions of prolonged occupation and military conflict. There is little in the Draft Constitution that requires the government to do more than simply refrain from discriminating against women, which is insufficient to address women's inequality.

In terms of equal citizenship, the Draft Constitution fails to address the inequalities, disadvantages and discrimination women face in accessing their rights, particularly in relation to the family. It also fails to provide for equal citizenship in terms of access to economic and political power. Article 16 establishes a free market economy, without promising to adopt measures to ensure that groups disadvantaged in the market are given equal access to it or other support. Furthermore, the Draft Constitution's development policy does not promise to address issues of inequality or social justice, all of which are necessary to open women's access to the market.

With respect to political power, unlike various other post-colonial and post-conflict constitutions, the Draft Constitution contains no guarantees to ensure women's equal representation in government. It does not restate the constitutional guarantee of non-discrimination in civil service appointments and employment, although Articles 19, 20 and 23 apply to them. Nor does the Draft Constitution guarantee proactive measures to ensure women's numerical representation in all government bodies and institutions, or provide mechanisms to ensure that these bodies and institutions address women's issues and concerns.

Overall, the equality provisions of the Third Revised Draft of the Constitution of Palestine appear to provide a strong framework for women's equality. This diminishes substantially when the equality provisions are read together with other provisions of the Draft Constitution and within the current context of Palestinian women's lives. The Draft Constitution seems to protect women's rights only to the extent that they do not conflict with religious-based family law or threaten patriarchal power. It stops far short of providing women with equal citizenship.

GLOSSARY OF TERMS AND CONCEPTS

***Al-Jidar*:** The wall built by Israel to separate and isolate Palestinians. Different people use different terms for this barricade depending on their perspective. Some use the term "apartheid wall" although South Africa did not have a wall dividing communities or a system of separate roads. Some say "annexation and expansion wall" but annexation of Palestinian land happened years ago. WCLAC prefers the term *al-jidar*, the Arabic expression commonly used to refer to this barrier, as the others do not reflect Palestinian reality or the total political debate around it.

Citizen's rights: Enforceable rights that inhere because of a person's status as a citizen.

Civil and political rights: Rights related to the protection of the individual from the state, including the right to form political parties, to express one's opinions and beliefs, the right to vote, to run for governmental position, and the right to a fair trial.

Complementary rights: A system of rights that establishes different rights and duties for men and women based on the belief that men and women are different. The determination of rights and duties is made on the basis of gender roles.

Constitutional moment: A period of transformation in a state that sharply delineates past ordinary politics from ordinary politics that come after it through

some form of change beyond what is typical in every day political life.

Constitutionalism: The belief in a system of government and governance based on a constitution.

Cultural rights: Rights that protect individual and group identities and enable people to express their identities through the practice of their cultures, traditions and/or religions. These rights also require respect for cultural and religious heritage and sites.

Culture: A system of shared beliefs, values, customs and behaviours that members of a society use to determine and establish relationships with each other and with the rest of the world, usually passed down through generations.

Differentiated citizenship: A system of citizenship under which individuals will have different rights, privileges, benefits and obligations based on identities, characteristics or affiliations other than their shared identity as citizens of the state.

Equal citizenship: Occurs when an individual is accorded full membership in the nation-state, with full and equal civil, political and social rights, privileges and responsibilities, including equal access to power, resources, education, and social and political mobility.

Femicide: The practice of killing women, including the murder of women for perceived breaches of honour.

Formal equality: This concept requires equality in procedure; it assumes that societies are fair and just and that equality will result if people and groups are treated identically.

Theocratic State: a country whose government is subject to and limited by religious law.

Gender: Socially constructed differences between men and women typically based on different roles society, culture, the economy and politics assign to them.

Group rights: Rights that derive from a person's membership in a group rather than his/her status as an individual; these rights can belong to the group or to the individual as part of his/her membership in the group and are enforceable against the state.

Horizontal application of rights: The ability to enforce one's rights against all non-governmental actors, including individuals, groups, bodies and institutions.

Human rights: Enforceable rights to which all people are entitled simply because they are human.

'Idda: The period after a divorce during which a woman may not marry; it typically lasts about three months unless the woman is pregnant at the time of the divorce.

Individual rights: Rights that inhere in an individual and are enforceable against the state.

Islamist: Persons or groups whose political ideology rests on the desire to be governed solely by Islam. Fundamentalist or conservative Islamists seek to be governed by traditional Islamic practices and interpretations of Islamic law.

***Khul'* divorce**: A divorce agreement between spouses under Islamic law; typically a man grants the divorce in exchange for the woman relinquishing her financial rights and entitlements.

Legal pluralism: – A legal framework that allows separate systems of law to govern members of different religions, cultures or groups.

Negative rights: This concept requires governments to abstain from taking any action that would violate a protected right.

Occupied Palestinian Territory (OPT): All Palestinian territory occupied by Israel since 1967. This covers the West Bank including East Jerusalem and the Gaza Strip.

Polygamy: The practice of a husband marrying multiple spouses at the same time.

Positive rights: This concept requires the government to take proactive measures to ensure that people have meaningful access to their rights by dismantling barriers to them.

Public-private divide: A socially constructed dichotomy used to determine when

a state will intervene to protect its citizens. Under this dichotomy, the government will only intervene in what is considered public, such as governmental actions and the economic marketplace, but will refuse to intervene in areas it considers private, which usually means the family and home.

Relational rights: Rights that are granted by or derived from family and personal relations rather than the state.

Social and economic rights or socio-economic rights: Rights considered necessary for a good qualify of life, including rights to health, food, water, shelter, education and social security.

Social contract: An implied agreement to a system of governance between the constituents who will be governed and those who will govern. It may serve as the basis for a constitution.

Substantive equality: This concept requires equality in outcome and assumes that treating people identically will not always achieve equality; at times treating people differently is necessary and justified to achieve equality in outcome.

Sulha: A binding settlement under customary law.

Vertical application of rights: The ability to enforce one's rights against the government and governmental actors.

Women's representation: This concept has two aspects. The first is numerical and refers to women's participation in the government, body or institution under consideration. The second is substantive and requires that the issues that most affect or concern women are taken into account by a government, institution or body.

LIST OF ABBREVIATIONS

CC	Constitutional Committee
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHR	Independent Commission for Human Rights (referred to at the time of writing as PICCR)
MOFA	Ministry of Foreign Affairs
OPT	Occupied Palestinian Territory
PA	Palestinian Authority
PICCR	Palestinian Independent Commission for Citizens Rights (later changed to ICHR)
PLC	Palestinian Legislative Council
PLO	Palestine Liberation Organization
PNA	Palestinian National Authority
UDHR	Universal Declaration of Human Rights
UNCRC	United Nations Charter On Children's Rights
UNRWA	United Nations Relief and Works Agency for Palestine Refugees
WCLAC	Women's Centre for Legal Aid and Counselling