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The Future of Palestinian Women’s Rights: Lessons from a Half-Century of Tunisian Progress

Adrien Katherine Wing*
Hisham Kassim**

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I. Introduction

As this piece goes to print, the Gaza Strip and West Bank Palestinian Territories are currently under the authority of two different Palestinian

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governments. Gaza is under the control of the Islamist group Hamas, i.e. *Harakat al-Muqawama al-Islamiya* (Islamic Resistance Movement),¹ which unexpectedly won the majority of seats for the Palestinian Legislative Council (PLC) in January 2006.² The West Bank is under the jurisdiction of Palestinian Authority (PA) President Mahmoud Abbas, head of the mainstream Fatah party, who has appointed an alternative cabinet and receives support from the international community.³ Palestinian internecine political conflict and ongoing problems in the peace process with Israel prevent any focus by either Hamas or Fatah on the internal legal regime.⁴ At some point the situation may stabilize, and Palestine may be able to consider extensive legal reform. One area ripe for consideration is women's rights. As we have discussed in a prior article on Palestinian constitutionalism,⁵ if the government is Islamist in nature, women's rights are likely to become more based on traditionalist Islamic *Shari'a* principles.

This Article speculates on the future of Palestinian women's rights if the government in Palestine one day decides to take a more secular direction. If that possibility comes to fruition, we recommend that Palestinians explore the approach adopted by another Muslim country, Tunisia. Why Tunisia? Along with Turkey, Tunisia has taken the most secularized approach to women's rights in majority-Muslim countries.⁶ Additionally, many Palestinians are somewhat familiar with the Tunisian experience since the Palestinian Liberation Organization (PLO) was based there from 1982 to 1994, just prior to moving to the West Bank and Gaza to start the PA.⁷ Moreover, Palestinians

1. E.g., Tim Butcher, *Hamas Threatens to Relaunch Suicide Bombing Attacks on Israel*, DAILY TELEGRAPH (London), May 18, 2007, at 18; Scott Wilson, *Hamas, Fatah Launch Separate Governments*, WASH. POST, June 16, 2007, at A1.

2. See Khaled Abu Toameh, *One Year After Its Election Triumph a Defiant Hamas is Still Riding High*, JERUSALEM POST, Jan. 26, 2007, at 3 (explaining that Fatah leaders were shocked and unprepared for Hamas's landslide victory).

3. Wilson, *supra* note 1, at A1.

4. See Adrien Katherine Wing & Hisham Kassim, *Hamas, Constitutionalism, and Palestinian Women*, 50 HOW. L.J. 479, 513 (2007) ("Unfortunately, the current political situation makes it unlikely that Palestinian women or men will be able to focus on constitutional questions or mundane legislative issues in the near future.").

5. See *id.* at 488–90 (stating that Islamist ideology involves *Shari'a* principles). Dean Adrien Katherine Wing was an advisor to the PLC on drafting the Palestinian Basic Law in 1996.

6. See Adrien Katherine Wing & Ozan Varol, *Is Secularism Possible in a Majority-Muslim Country?: The Turkish Example*, 42 TEX. INT'L L.J. 1, 53 (2007) (explaining that in Turkey, one of two secular countries in the Middle East, women stand on equal footing with men).

7. See Palestine Facts, *What Did the PLO do in Tunisia After Leaving Lebanon*, http://www.palestinefacts.org/pf_1967to1991_plo_tunisia.php (detailing the PLO's activities in

have also been considered one of the more secular groups in the Middle East, and might be amenable to secular approaches in the future.⁸ Dean Adrien Katherine Wing visited Tunisia several times to explore the implementation of women's rights over the fifty-year period since its independence.⁹

Part II of this Article will provide some background on the Palestinian legal system with respect to women's rights.¹⁰ Subpart III.A will first provide an overview of the Tunisian legal system with respect to women's rights. Subpart III.B will then compare the Tunisian legal system on selected women's rights issues to the Palestinian system with suggestions to future Palestinian policymakers, including legislators and women's rights advocates.

II. The Palestinian Legal System

Like many societies, Palestine has customary practices and religious law which endorse disparate treatment on the basis of gender.¹¹ Customary law may be followed across class and geographic lines, and affects women in several areas.¹² For example, in family law, women are clearly subordinate to male heads of households.¹³ In the educational sphere, sisters are less likely to

Tunisia from 1982 to 1994) (last visited Oct. 21, 2007) (on file with the Washington and Lee Law Review).

8. See Wing & Kassim, *supra* note 4, at 511 (asserting that Palestinians have been considered one of the more secular groups in the Middle East, making the possibility of secular change more likely there than elsewhere in the region); see generally, ADRIEN KATHERINE WING, DEMOCRACY, CONSTITUTIONALISM AND THE FUTURE STATE OF PALESTINE (1994) [hereinafter DEMOCRACY] (evaluating the political and constitutional status of Palestine); Adrien Katherine Wing, *Constitutionalism, Legal Reform, and the Economic Development of Palestinian Women*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 656, 658 (2006) [hereinafter *Constitutionalism*] (describing women's reform in Palestine); Adrien Katherine Wing, *Custom, Religion and Rights: The Future Legal Status of Palestinian Women*, 35 HARV. INT'L L.J. 149 (1994) [hereinafter *Custom*] (describing the legal rights of women in light of custom and religion in Palestine).

9. Dean Wing visited Tunisia in June 2006, December 2006 to January 2007, and June to August 2007 and would like to thank a number of Tunisian lawyers and professors, as well as other men and women, for their insights and their assistance during these trips.

10. See Wing & Kassim, *supra* note 4, at 482 (detailing Palestinian women's legal status and rights).

11. See *Custom*, *supra* note 8, at 150 (describing the legal status of women's rights in Palestine).

12. See *Constitutionalism*, *supra* note 8, at 658 ("Customary law may be followed in rural areas or in less educated families, as well as in highly educated families.").

13. See *id.* at 658–59 (explaining that customary family law dictates adult women cannot live independently and must live subserviently either with their husbands or their father's family).

get as much education as their brothers.¹⁴ Conceptions of family honor endorse honor killings in some circles, i.e. the murder of women who shame the family in perceived interactions with unrelated men.¹⁵ Domestic violence may not violate criminal law because it can be considered part of male prerogatives for control of female behavior.¹⁶

The Islamic *Shari'a* law that applies to 90% of Palestinians¹⁷ has certain benefits to women over customary practices.¹⁸ As will be shown in the next part of this Article, it still discriminates on the basis of gender.¹⁹ *Shari'a*, which is found in the *Qu'ran* and other sources, has intertwined itself with custom over the centuries.²⁰ Palestinians follow the *Hanafi* jurisprudential school,²¹ one of the more liberal.²²

If reformers pass legislation on women's rights, they will not only have to take into account the customary and religious law, but the existing constitutional framework as well. Even though the political turmoil has limited its effectiveness, there is a Basic Law²³ that has theoretically been in effect since 2002,²⁴ which has an equality clause including gender.²⁵ Article 9 of the

14. See *id.* at 660 (stating that if a family cannot educate all children, brothers will be educated rather than sisters because the brothers ultimately will be head of a household).

15. See Wing & Kassim, *supra* note 4, at 484–85 (describing the prevalence of honor killings in Palestinian custom).

16. See Adrien Katherine Wing, *A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 ALB. L. REV. 943, 963 (1997) ("[U]nder *Shari'a* law men violently and physically chastise their wives.").

17. See GIHANE TABET, *WOMEN IN PERSONAL STATUS LAWS: IRAQ, JORDAN, LEBANON, PALESTINE, SYRIA* 24 (2005) (stating that 90% of Palestinians are Sunni Muslims).

18. See *Custom*, *supra* note 8, at 158 ("Under *Shari'a*, women are given independent legal personality rather than being regarded as mere chattel of their husbands, and are allowed to own and inherit property. . . . The *Shari'a* also restricts polygamy to four wives, permits women to obtain divorces on certain grounds, and provides for financial maintenance of wives.").

19. See *DEMOCRACY*, *supra* note 8, at 38–39 (describing the many ways in which the *Shari'a* discriminates on the basis of gender).

20. See *id.* at 14–15 (asserting that ancient custom has been incorporated into Islamic laws).

21. See Wing & Kassim, *supra* note 4, at 482 (explaining that *Majallah*, the main source of Palestinian civil law, represents an attempt by the Ottoman government to codify the *Hanafi* jurisprudential school).

22. See *Custom*, *supra* note 8, at 157–58 ("Most Palestinians follow the *Hanafi* school, which is often considered the most liberal.").

23. Amended Basic Law (Muharram 16, 1424 H) [Mar. 19, 2003] (Palestine), translated in U.S. Agency for Int'l Dev., *Amended Basic Law*, http://www.usaid.gov/wbg/misc/Amended_Basic_Law.pdf (last visited Nov. 8, 2007) (on file with the Washington and Lee Law Review).

24. Wing & Kassim, *supra* note 4, at 488.

25. For further discussion of this clause, see *Constitutionalism*, *supra* note 8, at 677.

Basic Law declares, "[a]ll Palestinians are equal under the law and judiciary, without discrimination because of race, sex, color, religion, political views or disability."²⁶

The Basic Law potentially restricts the positive effects of the foregoing equality provision in several ways. It states that *Shari'a* will be "a major source" for legislation.²⁷ It also says that "*Shari'a* affairs and personal status shall be assumed by *Shari'a* and religious courts in accordance with law."²⁸ Furthermore, the Basic Law states that Islam is the official religion in Palestine.²⁹ The meaning and effects of this latter clause are unclear.³⁰ Most Arab countries have such a provision in their constitutions, and the implications depend on each country's cultural context.³¹

Several drafts of a Palestinian constitution have been completed,³² and a final version would presumably take effect after the independent state comes into being. Those seeking improvement of women's rights at that time would have to take the provisions of the final constitution into account as well as any international conventions that the new state becomes party to after independence.³³

26. Amended Basic Law art. 9, *translated in* U.S. Agency for Int'l Dev., *supra* note 23, at 6.

27. See Wing & Kassim, *supra* note 4, at 488 (explaining why the Amended Basic Law of Palestine Article 4(2) should be interpreted as "a major source" in contrast to the U.S. Agency for International Development interpretation of "the major source").

28. Amended Basic Law art. 101(1), *translated in* U.S. Agency for Int'l Dev., *supra* note 23, at 45.

29. *Id.*

30. See Adrien Katherine Wing, *Healing Spirit Injuries: Human Rights in the Palestinian Basic Law*, 54 RUTGERS L. REV. 1087, 1096 (2002) ("The tension between clauses promoting an official religion yet allowing freedom to practice one's own religion are manifested in the fact that this freedom of religion is not absolute, and there exists one condition that it does not interfere with public order or public morals.").

31. See *id.* (stating that Arabic countries have a freedom of religion clause in their constitutions, but each interprets its grant of rights differently based on their cultural context). Lebanon does not have such a clause. LEB. CONST., <http://www.servat.unibe.ch/law/icl/le00000.html> (Paul E. Salem trans., 1990) (last visited Nov. 11, 2007) (on file with the Washington and Lee Law Review).

32. NUSHKA MIN AL DUSTOOR [THIRD DRAFT OF THE PALESTINIAN CONSTITUTION] (Palestine), *translated in* Nathan J. Brown, *Third Draft Constitution for a Palestinian State: Translation and Commentary* (2003), <http://www.pcpsr.org/domestic/2003/nbrowne.pdf> (last visited Nov. 8, 2007) (on file with the Washington and Lee Law Review).

33. For example, the Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW) may create increased obligations, although many countries make reservations that limit their responsibilities to that of existing national laws. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

III. The Tunisian Legal System

A. Tunisia Overview

This subpart examines Tunisia's experience in enhancing women's rights. "Tunisia has been at the forefront of the Arab Islamic world with respect to family law."³⁴ In 1956, Tunisia gained independence from France and deviated from the Islamic *Maliki* jurisprudential school³⁵ when it adopted the Code of Personal Status (CPS), also known as the *Majalla*.³⁶ The adoption of the CPS was part of a larger governmental reform program to build a modern centralized state and marginalize tribal communities, rather than a part of a feminist movement.³⁷

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.³⁸ Unlike Ataturk, who abolished Ottoman Empire *Shari'a* based on purely secular principles, Tunisia regards its reforms as permissible Islamic reinterpretation known as *ijtihad*.³⁹

Tunisia's deeply rooted Arabic and Islamic traditions in no way lessened its desire "to live in close communion with the modern world . . . [and] to open windows on other cultures, particularly Western culture, in order to come to

34. Mounira M. Charrad, *Repudiation Versus Divorce: Responses to State Policy in Tunisia*, in *WOMEN, THE FAMILY AND POLICY: A GLOBAL PERSPECTIVE* 51, 52 (Esther Ngan-ling Chow & Catherine White Berheide eds., 1994).

35. See Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 *VAND. J. TRANSNAT'L L.* 1043, 1114–15 (2004) (detailing ways in which the Tunisian government through the CPS aimed to deviate from the *Maliki* legal system).

36. See MOUNIRA M. CHARRAD, *STATES AND WOMEN'S RIGHTS: THE MAKING OF POSTCOLONIAL TUNISIA, ALGERIA AND MOROCCO* 224 (2001) (describing various ways in which the CPS, also known as the *Majalla* in Arabic, changed Tunisian law beginning in 1956). The day the CPS was passed, August 13, 1956, was only five months after March 20, Independence Day. That day is now National Women's Day in Tunisia. Embassy of the United States—Tunis, Tunisia, American and Tunisian Holidays, <http://tunisia.usembassy.gov/holidays.html> (last visited Oct. 23, 2007) (on file with the Washington and Lee Law Review).

37. See CHARRAD, *supra* note 36, at 224 (explaining that legal reform in Tunisia was part "of a larger project to build a modern nation-state by dismantling the foundation of kin-based solidarities" and not part of a feminist movement).

38. See JENNIFER NOYON, *ISLAM, POLITICS AND PLURALISM: THEORY AND PRACTICE IN TURKEY, JORDAN, TUNISIA, AND ALGERIA* 96 (2003) (describing President Bourguiba's admiration for modernist Attaturk and desire to westernize Tunisia, as evidenced in his thirty-one year reign).

39. See CHARRAD, *supra* note 36, at 221 (stating that in contrast to Turkey's abandonment of Islamic law altogether, law-makers in Tunisia emphasize reforms as continuing evolution and interpretation, *ijtihad*, of Islamic thought).

grips with reality. In this way, our country can remain faithful to its cultural past while forging the instruments for its future."⁴⁰

In addition to adopting the CPS, the Tunisian government eliminated religious courts and endowments as well as restricted the influence of the religious university, Zitouna.⁴¹ To further control the religious sector, the Religious Affairs Ministry supervised religious education, appointed imams, paid their salaries, and oversaw the building of mosques.⁴² Additionally, women received the right to vote in 1959, before other women in the region.⁴³

The government also banned headscarves in classrooms, an issue that has been prominent more recently in countries like France and Turkey.⁴⁴ Bourguiba believed traditional clothing encouraged traditional thinking and even called the headscarf "an odious rag," not required by Islam.⁴⁵ More recently, a 1981 decree forbids women to wear headscarves at educational institutions and when working in government service.⁴⁶

The CPS has continued to be modified under the leadership of current President Zine El Abidine Ben Ali, most notably in 1993.⁴⁷ The changes have

40. KENNETH PERKINS, *A HISTORY OF MODERN TUNISIA* 137 (2004) (quoting Driss Abassi, *La Conception de l'Histoire selon Bourguiba*, in HABIB BOURGUIBA ET L'ÉTABLISSEMENT DE L'ÉTAT NATIONAL: APPROCHES SCIENTIFIQUES DE BOURGUIBISME 22 (2000)).

41. See NOYON, *supra* note 38, at 96 (stating that Tunisia eliminated *Shari'a* courts and religious endowments and restricted the influence of Zitouna).

42. See *id.* ("The Ministry of Religious Affairs oversaw mosque-building, supervised religious instruction, appointed imams and paid their salaries.").

43. FAREED M.A. HASSAN, WORLD BANK OPERATIONS EVALUATION DEPARTMENT, *TUNISIA: UNDERSTANDING SUCCESSFUL SOCIOECONOMIC DEVELOPMENT: A JOINT WORLD BANK-ISLAMIC DEVELOPMENT BANK EVALUATION OF ASSISTANCE 5* (2005) [hereinafter WORLD BANK].

44. See Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifting the Veil?: Muslim Women, France and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 745 (2006) ("In 2004, France passed a law that forbids the wearing of 'ostentatious' religious symbols in public schools. . . . [I]ts main effect was to ban the wearing of headscarves, or *hijabs*, by young Muslim girls."); Wing & Varol, *supra* note 6, at 31 (discussing Turkey's ban of headscarves in educational institutions).

45. See PERKINS, *supra* note 40, at 137 ("Bourguiba believed that old fashioned clothing encouraged old-fashion modes of thinking and acting. . . . [H]e condemned the veil as an 'odious rag' that demeaned women . . . and was not obligatory in order to conform to Islamic standards of modesty.").

46. See Heba Saleh, *Tunisia Moves Against Headscarves*, BBC NEWS, Oct. 15, 2006, available at <http://news.bbc.co.uk/2/hi/africa/6053380.stm> (last visited Oct. 23, 2007) (on file with the Washington and Lee Law Review).

47. See CTR. FOR RESEARCH, STUDIES, DOCUMENTATION & INFO. FOR WOMEN (CREDIF), *TUNISIAN WOMEN'S LEGAL GAINS IN THE NEW ERA 5* (2004) [hereinafter CREDIF] (detailing numerous significant changes made to the CPS in 1993).

continued up to the present with input from women and women's rights groups.⁴⁸

Other Tunisian laws have been modified as well. Whereas Article 1 of the Constitution does say Islam is the national religion,⁴⁹ Article 6 provides for equality before the law.⁵⁰ The Constitution was amended in 1997 to explicitly declare the inadmissibility of gender discrimination in certain respects.⁵¹ Among other modifications, the labor law was amended in 1993 to refer to nondiscrimination, and the law provides some maternal protection as well.⁵²

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.⁵³ The gap between male and female educational levels is lessening in the younger population, and more than one half the university students are female.⁵⁴ Women are 32% of the labor force.⁵⁵ Women have made great gains in a number of professions and are now 34% of magistrates, 40% of university professors, and 22.7% of Chamber of Deputies.⁵⁶ At a conference attended by international experts held at the

48. See Mounira M. Charrad, *Becoming a Citizen: Lineage Versus Individual in Tunisia and Morocco*, in GENDER AND CITIZENSHIP IN THE MIDDLE EAST 70, 81 (Suad Joseph ed., 2000) (explaining that the reforms of 1993 in Tunisia incorporated demands from women's rights groups).

49. See TUNISIA CONST. art. 1 ("Tunisia is a free, independent and sovereign state. Its religion is Islam.").

50. See *id.* art. 6 ("All citizens have the same rights and obligations. All are equal before the law.").

51. See V.M. Moghadam, *Tunisia*, in WOMEN'S RIGHTS IN THE MIDDLE EAST AND NORTH AFRICA: CITIZENSHIP AND JUSTICE 295, 297 (Sameena Nazir & Leigh Tomppart eds., 2005) ("Following the amendments introduced pursuant to Constitutional Act No. 97-65 of October 27, 1997, the constitution strengthens the principle of equality of citizens by explicitly decreeing through an amendment to Article 8 and 21, the admissibility of discrimination between genders."); see also Act of Oct. 27, 1997, No. 97-65, art. 8 (Tunis.) ("[A] political party may not fundamentally base its principles, objectives, activities or programmes on any religion, language, race, sex or region"); *id.* art. 21 ("[A]ny voter of a Tunisian father or a Tunisian mother and having attained 23 years of age shall be eligible for the Chamber of Deputies.").

52. See Moghadam, *supra* note 51, at 297 ("The labor law was also amended in 1993 to refer explicitly to the principle of nondiscrimination. Additionally, some gender-specific benefits exist for women in the labor force, particularly in the form of maternal protections.").

53. See WORLD BANK, *supra* note 43, at 4-5 ("Tunisia leads the MNA [Middle East and North Africa Region] with regard to gender equity.").

54. See Moghadam, *supra* note 51, at 302 (explaining that although the overall female literacy rate is 63.1% and the male rate is 83.1%, the literacy rate has improved to 90.6% for females ages 15-24 with women comprising 56.4% of those at the university level).

55. WORLD BANK, *supra* note 43, at 5.

56. *International Conference in the Hague Pays Tribute to Tunisia's Code of Personal Status*, TUNIS. ONLINE NEWS, July 19, 2006, <http://www.tunisiaonlinenews.com/jul06/190706->

International Court of Justice (ICJ) to commemorate fifty years of the CPS, ICJ President Rosalyn Higgins noted that in Tunisia, "women's rights are now embedded as national values."⁵⁷ After Tunisia became identified with women-friendly legislation, as compared to other countries in the Arab-Islamic world, Tunisia took national pride in the international recognition.⁵⁸ 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.⁵⁹ The only area where Tunisia scores relatively low is in the political rights and civic voice area.⁶⁰

Professor Charrad has compared Tunisia to other North African societies such as Morocco and Algeria, and found that Tunisian women have made major advances in part because male dominated patrilineages that emphasize traditional communitarian norms no longer hold sway, and there has been more emphasis on individual rights norms that benefit women's status.⁶¹ In the view of the authors, it seems quite evident that both Presidents Ataturk and Bourguiba, as highly popular founding Presidents, had considerable elite and grassroots support to engage in clearly revolutionary reforms from the top down. Such reforms probably would not be possible or acceptable coming from later leaders or in the current political climate of increasing Islamist trends globally. According to Noyon, two Tunisian societies have developed. Lower classes are more likely to have retained many traditional Islamic practices, whereas a more secularized western elite has absorbed the new changes.⁶² Like many other

1.html (last visited Oct. 21, 2007) (on file with the Washington and Lee Law Review).

57. *Id.*

58. See Mounira M. Charrad, *Tunisia at the Forefront of the Arab World: Two Waves of Gender Legislation*, 64 WASH. & LEE L. REV. 1513, 1527 (2007) ("Once Tunisia became identified with woman friendly legislation, early on compared to other countries in the Arab-Islamic world, it became a matter of national pride and international recognition to continue on that path.").

59. See Moghadam, *supra* note 51, at 295 (indicating on a scale of 5, Tunisia earned a 3.6 for nondiscrimination and access to justice; 3.4 for autonomy, security and freedom of the person; 3.1 for economic rights and equal opportunity; and 3.3 for social and cultural rights).

60. See *id.* at 295-96 (indicating that on a scale of 5, Tunisia earned a 2.8 for political rights and civil rights). The reasons for the low score in the last category affect both men and women, and they are beyond the scope of this Article.

61. See Charrad, *supra* note 48, at 72 (arguing that because Tunisia's "kin-based formations" exert far less social and political influence, women have gained substantial individual rights). For why and how Tunisia has continued to make changes in the women's rights area, see generally Charrad, *supra* note 58.

62. See NOYON, *supra* note 38, at 97 (discussing how "the degree of Westernization increasingly became a socio-economic marker that divided society").

Muslim countries, there is also an Islamist tendency to reject western secularism, but the government has highly suppressed this segment of the population, which includes some of the highly educated.⁶³

° *B. Suggestions for Palestine*

This subpart discusses selected Tunisian rights that Palestine might consider in the future, and compares those rights to the Palestinian Personal Status Code (PPS), which is essentially the Personal Status Code Jordan promulgated in 1976.⁶⁴ The discussion and comparison of the CPS and PPS will be largely limited to a few main areas concerning marriage, divorce, and child custody: parental consent before marriage; spousal maintenance; spousal discipline; polygamy; divorce; alimony; and child custody.⁶⁵ This Article will also compare the treatment of domestic violence under the respective penal codes.

Regarding parental consent for marriage, under Article 3 of the CPS, the father's consent is not required for a woman who attains the age of majority to

63. *See id.* at 99–100 (explaining how the Tunisian Islamist movement was widely repressed and imprisoned after achieving measured success in the parliamentary election of 1989); *see also* Moghadam, *supra* note 51, at 306–07 (describing how the Ben Ali government of Tunisia suppressed and banned the Islamist an-Nahda movement in the late 1980s).

64. In Gaza, a personal status code based on Egyptian law is followed because this area was under Egyptian control prior to the 1967 Israeli Occupation. Moghadam, *supra* note 51, at 225. This Article will not discuss the Gaza code.

65. There are a number of areas that will not be included in this Article because both societies continue to restrict women. For example, both grant a female only half the inheritance share of a man related to the same degree. CHARRAD, *supra* note 36, at 230. Dean Wing asked many Tunisians about this governmental failure to change and could not get a satisfactory answer. Some Tunisians said that such a change is now impossible due to heightened pressure from Islamist forces, even though illegal. For an explanation of inheritance in Palestine, see Heather Jacobson, *The Marriage Dower: Essential Guarantor of Women's Rights in the West Bank and Gaza Strip*, 10 MICH. J. GENDER & L. 143, 155–56 (2003). A woman's ability to pass her nationality to a child or spouse is problematic in both societies as well. *See generally* Charrad, *supra* note 48 (explaining the qualifications of citizenship). Both societies still require dowries. *See* CARIN BENNINGER-BUDEL & JOANNA BOURKE-MARTIGNONI, VIOLENCE AGAINST WOMEN IN TUNISIA: REPORT PREPARED FOR THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN 14 (2002) (discussing CPS Art. 3) (on file with the Washington and Lee Law Review). It should be noted that Tunisia permits civil marriage. CHARRAD, *supra* note 36, at 224. We have suggested Palestine do the same, instead of only permitting religious marriage. *See* Wing & Kassim, *supra* note 4, at 511 (proposing the creation of a dual legal system for personal status matters in which a person could choose between *Shari'a* and civil law). One area ripe for comparison is that Tunisia now has a law on sexual harassment, but Palestine does not. *See* CREDIF, *supra* note 47, at 23 (stating the laws of sexual harassment in both countries).

marry.⁶⁶ 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.⁶⁷ 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.⁶⁸

In 2007, Article 5 of the CPS was modified to create a uniform age of eighteen to marry unless a judge intervenes.⁶⁹ Tunisian law before the promulgation of the CPS had set the marriage age for the woman at fifteen and the man at eighteen,⁷⁰ and later increased the age to seventeen for women and twenty for men.⁷¹ 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.⁷² The government believed that couples who married later had fewer children and were generally more stable.⁷³ 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.⁷⁴ The birth rate in Palestine remains at a very high 6.1.⁷⁵ The PPS only requires that the husband be sixteen and the wife be fifteen to

66. Abu-Odeh, *supra* note 35, at 1102–03.

67. *See id.* (explaining that under the Jordanian Personal Status Code, the father's consent is required for the daughter to marry, even if the daughter has reached the age of majority).

68. *See id.* at 1103 (describing the exception to the age of majority found in Article 13 of the Jordanian Personal Status Code); *see also* PERSONAL STATUS CODE [PPS] No. 61, art.13 (1976) (Palestine) (Hisham Kassim trans.) (stating the exception to the age of majority law). Due to the unavailability of foreign sources, the Washington and Lee Law Review was unable to verify this citation.

69. La Loi No. [Law No.] 2007-32, 14 mai 2007 (Tunis.).

70. CHARRAD, *supra* note 36, at 225.

71. CREDIF, *supra* note 47, at 5–6.

72. CHARRAD, *supra* note 36, at 225.

73. *Id.*; For a discussion of the problems associated with high fertility in Palestine, see *Constitutionalism*, *supra* note 8, at 699.

74. WORLD BANK, *supra* note 43, at 4.

75. For further discussion of fertility in Palestine, see *Constitutionalism*, *supra* note 8, at 699.

marry.⁷⁶ Palestine would benefit from following the Tunisian example of increasing the marriage age to eighteen.⁷⁷

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."⁷⁸ 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.⁷⁹ 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.⁸⁰ Article 36 then mandates that the husband must provide the wife with a dwelling according to his financial abilities.⁸¹ However, under Article 68 a wife loses her right of maintenance if she works outside the home without her husband's permission.⁸² 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.⁸³ According to the PPS, the wife is to obey her husband, and the husband is to treat his wife with respect.⁸⁴

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.⁸⁵ Unfortunately, the spouse can withdraw the complaint, lessening the impact of the law.⁸⁶ He can be imprisoned for two to three years and given a fine of

76. PPS No. 61, art. 5 (1976) (Palestine) (Hisham Kassim trans.). Due to the unavailability of foreign sources, the Washington and Lee Law Review was unable to verify this citation.

77. *Constitutionalism*, *supra* note 8, at 710 (explaining how the young marriage age in Palestine limits women's opportunities for a good education and financial success, as well as contributes to Palestine's high fertility rate).

78. Abu-Odeh, *supra* note 35, at 1104.

79. *Id.*

80. PPS, No. 61, art. 35.

81. *Id.* art. 36.

82. *Id.* art. 68.

83. BENNINGER-BUDEL & BOURKE-MARTIGNONI, *supra* note 65, at 13.

84. PPS No. 61, art. 39 (1976) (Palestine) (Hisham Kassim trans.). Due to the unavailability of foreign sources, the Washington and Lee Law Review was unable to verify this citation.

85. Moghadam, *supra* note 51, at 298.

86. *See id.* (explaining the ability of the spouse to withdraw the complaint).

23,000 dinars.⁸⁷ Unfortunately, the law does not recognize marital rape;⁸⁸ 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.⁸⁹ Manslaughter can result in life imprisonment.⁹⁰

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.⁹¹ The same exemption or reduced punishment is not afforded to a woman who murders her husband after seeing him commit adultery.⁹²

The Jordanian Penal Code provides reduced punishments for sexual abuse, including rape, of females.⁹³ 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.⁹⁴ Likewise, perpetrators of domestic violence can go unpunished since there is a custom of noninterference in domestic disputes.⁹⁵

One of the most notable advancements of the CPS was outlawing polygamy under Article 18.⁹⁶ A violation is punishable by imprisonment and/or fines of up to 240,000 francs.⁹⁷ Many sources interviewed by Dean Wing indicated the practice has been eliminated, but de facto mistresses remain

87. BENNINGER-BUDEL & BOURKE-MARTIGNONI, *supra* note 65, at 22.

88. See Moghadam, *supra* note 51, at 298 (stating that marital rape is not crime).

89. *Id.* at 297.

90. See BENNINGER-BUDEL & BOURKE-MARTIGNONI, *supra* note 65, at 13 (stating that the maximum punishment for manslaughter is life imprisonment).

91. 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).

92. *Id.*

93. *Id.* at 592.

94. *Id.*

95. See Wing, *supra* note 16, at 964 (explaining how the custom of noninterference contributes to spousal abuse).

96. For further explanation of Tunisian abolition of polygamy based upon Islamic justification of being unable to treat all wives equally as required, see DEMOCRACY, *supra* note 8, at 48 and *Constitutionalism*, *supra* note 8, at 667. For further explanation of polygamy in other contexts, see Adrien Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-First Century*, 11 J. CONTEMP. LEGAL ISSUES 811 (2001) and Adrien Katherine Wing, *Polygamy in Black America*, in CRITICAL RACE FEMINISM: A READER 186 (2d ed. 2003).

97. Article 18 states the amount in francs, even though francs are no longer in use. Abu-Odeh, *supra* note 35, at 1105.

as in most countries.⁹⁸ Tunisian law 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.⁹⁹ 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.¹⁰⁰ However, under PPS Article 19(1) a wife may limit the number of wives her husband may marry in the marriage contract.¹⁰¹ The PPS 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 their consent first.¹⁰² Even though polygamy is not heavily practiced in Palestine,¹⁰³ following the Tunisian example might face heavy societal opposition and the authors would not recommend abolishing it as a first line of action under current circumstances.

Concerning marital breakdown under Tunisian law, both spouses have the right to divorce.¹⁰⁴ They may divorce by mutual consent or at the request of one.¹⁰⁵ Because both may file, both may be held liable to compensate the other.¹⁰⁶ The CPS also requires that a divorce may only be effectuated judicially.¹⁰⁷ 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, to the public sphere regulated by the government.¹⁰⁸ The policy reason was to make marriages more stable and divorce a less impulsive

98. Interview by Dean Adrien Katherine Wing in Tunisia (Dec. 2006). Such mistresses cannot be held out as a wife and do not have the legal rights that would come with being a wife. Having children out of wedlock is severely frowned upon in Tunisia, thus such mistresses would not be likely to produce children as they would if they were a legal wife.

99. See CREDIF, *supra* note 47, at 25 (describing Article 46 of the Tunisian Code of private international law).

100. *Custom*, *supra* note 8, at 159.

101. PPS No. 61, art. 19(1) (1976) (Palestine) (Hisham Kassim trans.). Due to the unavailability of foreign sources, the Washington and Lee Law Review was unable to verify this citation.

102. *Id.* art. 40.

103. The polygamy rate may be as low as 4%. *Constitutionalism*, *supra* note 8, at 659 n.23.

104. CHARRAD, *supra* note 36, at 225.

105. Abu-Odeh, *supra* note 35, at 1106.

106. CHARRAD, *supra* note 36, at 225.

107. *Id.*

108. *Id.* at 226.

decision.¹⁰⁹ Charrad reports that Tunisian reforms "have increased women's ability to terminate marriages in practice."¹¹⁰

Regarding adultery as a ground for divorce, Tunisian men and women have equal rights.¹¹¹ 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.¹¹² In a law passed in 1968, adultery committed by either spouse is an offense that can be punished by fine or imprisonment.¹¹³

Under Palestinian law, the general rule is that the wife does not have the right to divorce her husband.¹¹⁴ 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.¹¹⁵ A wife may request a court to dissolve their marriage if the husband has an incurable disease¹¹⁶ or becomes mentally challenged or insane.¹¹⁷ Other examples include if the husband has been sentenced to imprisonment for a minimum of three years.¹¹⁸ A wife may request a judicial dissolution of their marriage only after the husband has spent one year serving his sentence.¹¹⁹ A wife may also request a divorce if the husband is absent and his whereabouts are unknown or if he abandons her without cause,¹²⁰ if he fails to maintain her,¹²¹ or if he harms her.¹²² Unlike the CPS, a husband under the PPS has the ability to effectuate the divorce orally or in writing.¹²³

109. *Id.*

110. Charrad, *supra* note 48, at 82.

111. See CHARRAD, *supra* note 36, at 226 (explaining how the CPS "gave men and women equal rights and responsibilities in regard to divorce").

112. *Id.*

113. *Id.*

114. *Constitutionalism*, *supra* note 8, at 448 (describing the very limited circumstances in which women may divorce).

115. PPS No. 61, art. 19(1) (1976) (Palestine) (Hisham Kassim trans.). Due to the unavailability of foreign sources, the Washington and Lee Law Review was unable to verify this citation.

116. *Id.* art. 115.

117. *Id.* art. 120.

118. *Id.* art. 130.

119. *Id.*

120. *Id.* art. 123.

121. *Id.* art. 127.

122. *Id.* art. 132.

123. *Id.* art. 86.

It is quite clear that Palestinian women would benefit greatly if Palestine adopted some of the Tunisian reforms, and if Palestinian women would have more ability to terminate bad marriages. The husband's threat of a quick divorce with the woman 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.¹²⁴ 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.¹²⁵ Under Palestinian law, if a wife was divorced by her husband for no legitimate reason, then she is entitled to compensation for a period of one year.¹²⁶ 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.¹²⁷

Concerning control over children after divorce, there is a distinction among Muslims between custody and guardianship, much like the distinction in the United States between physical and legal custody. Whereas Muslim women may have custody for a certain period of time, ultimate guardianship rests with the father. In terms of custody rights, Palestinian law follows the traditional approach that grants guardianship to the father,¹²⁸ 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.¹²⁹ However, 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.¹³⁰ This

124. Abu-Odeh, *supra* note 35, at 1109.

125. Moghadam, *supra* note 51, at 299–300.

126. PPS No. 61, art. 134 (1976) (Palestine) (Hisham Kassim trans.). Due to the unavailability of foreign sources, the Washington and Lee Law Review was unable to verify this citation.

127. *See Custom*, *supra* note 8, at 155 (explaining that a divorced woman was required to return to her father's care in disgrace).

128. PPS No. 61, art. 154.

129. *Id.* art. 161.

130. *Id.* art. 162.

custody is terminated, regardless of the age of the children, if the mother remarries a non-relative of the child.¹³¹

Palestinian women would benefit from guardianship of their children, and Tunisian law takes a step toward that direction. Under the CPS, mothers can gain actual guardianship if the father is deceased.¹³² 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.¹³³ A court decides which parent should have custody based on the best interest of the child.¹³⁴ Charrad found that approximately 90% of the custody cases in Tunisia awarded custody to the mother.¹³⁵ Under CPS Article 67, if the mother is awarded custody, she is also actively involved in making guardianship decisions pertaining to the child's education, travel, and finances.¹³⁶ 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.¹³⁷ As in Palestine, the Tunisian mother faces the horrific option of losing custody of her child if she remarries¹³⁸ although, a judge has the ability to order otherwise.¹³⁹ Both societies clearly need to eliminate this provision.

IV. Conclusion

The political and legal situation in Palestine remains in turmoil, and the future looks bleak in many respects. At some point, the area may stabilize such that Palestine can focus on its internal legal regime. In that case, this Article has offered some suggestions for potential reforms in the area of women's rights by Palestinian policymakers. These proposals are only useful if the legal system takes a more secular approach in the future, rather than an Islamist direction that might be favored by Hamas or a similarly oriented regime.

131. *Id.* art. 156.

132. *See* Abu-Odeh, *supra* note 35, at 1111–12 (describing Article 154 of the CPS).

133. *See id.* at 1109 (describing Article 67 of the CPS).

134. *Id.*

135. *See* Charrad, *supra* note 34, at 60 ("[S]everal of the lawyers whom I interviewed estimate that, in nine cases out of ten, the mother now gets custody of the children after divorce.").

136. Abu-Odeh, *supra* note 35, at 1109.

137. *See* CREDIF, *supra* note 47, at 7 (describing Article 67 of the CPS).

138. *See* Abu-Odeh, *supra* note 35, at 1109 (describing Article 58 of the CPS).

139. *Id.*

The fiftieth anniversary of revolutionary Tunisian legislative reforms provides a suitable occasion for Palestine to explore those efforts in depth for any potential suitability in the Palestinian context. Following the Tunisian example and basing reform upon Islamic reinterpretation, rather than purely secular norms, may enhance the possibility of acceptance in some Palestinian quarters. While not uniformly progressive in all respects, Tunisia has gone further than any other Arab Muslim country in creating a foundation for women's progress on paper, and then implementing it in practice on the ground over a half century. Perhaps one day, Palestine will join Tunisia in the forefront of advancing women's rights in the Muslim world in the twenty-first century.

NOTES
