Birzeit University

Institute of Law

Informal Justice:

Rule of Law and Dispute Resolution in Palestine

National Report on Field Research Results

2006

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Translator's Note

The translation into English of the Arabic text of this report involved a number of particular challenges, due *inter alia* to the unique nature of the study and the well-known difficulties of giving appropriate rendering to the highly specific Arabic terms in use in customary or tribal systems of law. The English text transliterates a number of Arabic terms and phrases in customary usage in the area under study (informal law and legal systems). The English meaning is given in the text the first time the word or phrase is used, but thereafter the English text uses the transliterated Arabic term. The Glossary at the end of the English text explains these terms in full for further reference. Where laws quoted in the study have an official English-language translation (such as in much British Mandate legislation), every effort has been made to use that translation; in the case of the 1932 Ordinance on the Formation of the Courts, this was not possible and the text has been translated from the Arabic. It should be noted that references to Annexes 1-6 in the body of the text refer to the original Arabic study; these annexes are not translated in the English version. It should further be noted that academic and professional titles of those involved in the study have not been reproduced in the English version. Firstly, the Arabic text is to be regarded as the original, and in the event of any overlooked discrepancies between the two, reference should be made to the Arabic.

Introduction

The Institute of Law – Birzeit University established its Law and Society Unit as part of its work on modernising the Palestinian legal framework, building the capacities of academics and (legal) professionals and making available in-depth research on methods for legal modernisation of the homeland in preparation for the establishment of a state. The Law and Society Unit was founded to address the mutual relationship between legislative activities and legal practices on the one hand and social progress (including political and economic aspects) on the other. The Institute considers this field to be a vital element in seeking to ensure the development of the rule of law in Palestine in a permanent and organic way without imposing it upon society.

The Institute's research team started work on the project **'Informal justice: The Rule of Law and Dispute Settlement in Palestine'** in 2004 with the aim of reaching a deeper understanding of the limits, mechanisms and the constitutuent elements of the work of informal (tribal) justice in order to determine the role of this justice in the current and future Palestinian legal system. The subject of study required the methodological approaches of legal anthropology, a field that combines law and sociology with the aim of studying the practical interaction of the role that law plays in the social economic and political context. The project is complementary to the study published in the Institute's series on criminal justice in Palestine under the title 'Tribal Judiciary and *Sulh* and Their Effect on Informal Justice in Palestine' (2003).

The main aim of the project is to generate recommendations and suggestions in order to modernise *nizami* justice in Palestine with regard to criminal cases. Although there is a historically high degree of interaction between formal and informal justice, there are many outstanding questions about this interaction and the nature of the relationship that binds the systems together.

In order to achieve the aims of the project in extrapolating realistic political recommendations, the task of collecting information was given to four field research teams distributed among the various West Bank regions (including Jerusalem) and the Gaza Strip. The research teams studied twelve criminal cases (murder, injury, rape) which were resolved through informal justice in order to understand the mechanisms of the work of informal justice. Nearly 160 interviews were conducted with persons knowledgeable about the topic under examination; these included interviews with tribal judges, *islah* men, *nizami* judges, governorates officials, officials in NGOs, officials in political parties, officials in security forces and members of the Legislative Council. A team of legal researchers and social science specialists supervised the field research team and provided them with observations and feed-back for the duration of the research and the preparation of the reports through the three stages up to the writing of the national report which sets out the results of the field research.

Two workshops were held while the project was underway, attended by a number of representatives of informal justice, *nizami* judges, lawyers and representatives from civil society organisations. The workshops were held to present and discuss the findings reached during the field research stages.

Finally, I would like to thank everyone who contributed towards the completion of this pioneering work: main researchers, field researchers, interviewers, and the participants in the two workshops. We would also like to thank Sami al Kilani who proof-read the manuscript and the Centre of International Development Studies (Canada) who funded this project. My thanks also go to Asem Khalil for his efforts in following up on and checking the manuscript; Jamil Salem for his work in supporting the research period and for his contributions towards background comparative research. It is not possible in this introduction to thank by name everyone who contributed to the success of this work, but they have a special mention in the section 'Notes on the field research' which follows this introduction; I hope this will be taken as a special thank you to each of them.

It should be pointed out that the Law and Society Unit at the Institute will continue its work in this field by conducting other studies. For the coming two years, it will concentrate on the subject of legal reform and its relationship with the ending of the consequences of colonisation and the process of state building.

Mudar Kassis

Director

Institute of Law, Birzeit University

Notes on the field research

Notes regarding interviews and interviewees.

The Institute of Law agreed with the interviewees on the principle of confidentiality, and undertook not to publish anything that might reveal the identity of those who made various statements. Accordingly, the information is presented without a citation of the source. In some cases however it was necessary to give certain information about the source of particular information, in terms of the interviewee's status and the area of his residence or work, for the purpose of analysing and differentiating the nature of the work of informal justice and the extent of its reach, according to differences in the social and economic situation of the various regions. Below, we list in alphabetical order the names of the interviewees and those who participated in the workshops, excluding those interviewees who were parties to the disputes examined in the course of the study.

Representatives of informal justice interviewed

Ibrahim al Zein, Ibrahim Sa'adeh, Ibrahim 'Awad-Allah, Ahmad Safi, Ihmedan Sha'ath, Badie' Duwaikat, Jamal Shalash, Hamed Musa, Hassan 'Umr, Hamdallah il Hamdallah, Khader al-Rishq, Daoud Wazwaz, Dar'an a-Wahidi, Rateb al-Hatabeh, Rafiq al-Haddad, Zuhair Maraqa, Sabe' Joudeh, Salman Abu Shammas, Suhail Abu Zant, Sabri al-Sufi, Salah Sabri, Taher Hijaz, Abdul Rahman Albarbarawi, Abdul Rahman Hijja, Aziz al-Hanini, Ali Abu Mohsen, Omar Halilo, Ghaith Abu Ghaith, Fakhri al-Turkman, Mohammead Abu Jaber, Mohammed Abu 'Aram, Mohammed Ghannam, Mohammed al Qatawi, Mohammed Bishtawi, Mohammed Rojoub, Mahmoud Qondos, Marzeeq Abu Maghseeb, Musa Tayyem, Musa Hmaidat, Musa Siam, Musa al-Manasra, Musa al-Wahidi, Nadi Sbaih, Nafez Abu 'Asab, and Yousef al-Manasra.

Representatives of political organisations interviewed

Ahmad al Taraireh, Bassam al-Salhi, Amjed al Masri, Yasser Mansur, Yousef Harb.

Lawyers interviewed

Bashar al-Damanhouri, Shukri al-Nashshibi, Ali Muhana, Fouad Shehadeh, Mohammead Abu Ghosh, Mohammed Dahleh and Yousef Rab'i.

Participants in workshops

Ahmad al-Khalidi, Ahmad Assayad, Areij Odeh, Amal Khreisheh, Badie' Dwaikat, Hanan al-Bakri, Khalida Jarrar, Ruba al-Shu'eibi, Riyad Barghouti, Zuhair Maraqa, Samar Abdo, Suhail Abu Zant, Abdullah Abu Eid, Fayez Bkairat, Fathi Nasser, Latifa Suhwail, Lynn Welchman, Lina Abdul Hadi, Mohammed al Qitawi, Musa Tayyem, Musa al-Wahidi

Introduction

The concept of informal justice.

The term 'informal justice' refers to a social phenomenon widespread throughout the West Bank and Gaza Strip, comprising the settlement of disputes between citizens outside the framework of the regular or formal (*nizami)* courts. It is a phenomenon which exists in a number of Arab and non-Arab countries. According to *`urf*, *sulh* is one of the methods used to settle disputes. This phenomenon is referred to by different terms, such as customary law, tribal law, tribal *sulh*, and conciliation among people. Informal justice is practised throughout Palestine by individuals belonging to different families and *hamula*s and from varying social backgrounds. The principles of informal justice stem from various sources: in general Arab and in particular Palestinian historical, social and cultural heritage. It is a system with a relatively high degree of internal conformity despite the multiplicity of the sources of customary rules that are used. In this study, the term informal justice is used to differentiate it from the *nizami* justice system based on the application of state legislation.

Informal justice includes tribal *sulh* and tribal law. Tribal *sulh* is a method of dispute resolution through conciliation, based on the accommodation of custom, religion and tribal traditions. It has gone through stages of development throughout history. As for tribal law, the rules are drawn from the dominant tribal traditions in the area where it is practised. The recourse to informal justice does not necessarily indicate an absence of other means of extra-judicial dispute resolution, such as taking the law into one's hand, the elimination of Israeli informants, vendetta etc) or the imposition of a solution through armed groups.

Here, a distinction should be made between the terms 'tribal judge' and *islah* man'. The usage of these terms is often confused. Tribal justice refers to an ancient judicial system with bedouin roots, recourse to which has decreased over time as a result of the diminished role of the tribe in Palestine and a reduction in its political, social and economic status. As set out in the relevant section of this study, during the British Mandate period the tribal law system was formally structured and regulated by the Mandatory government through tribal law courts in the Bedouin areas of Palestine. Tribal law thus has its own particular characteristics, while *sulh* between people is derived from the understandings, procedures and principles of tribal law as well as tribal '*urf*.

The Scope of the study:

Research was restricted to the phenomenon of informal justice in the field of criminal law, particularly crimes against the person, without touching on its work in civil cases; thus, the term 'informal justice' used in this study takes its meaning from these bases.

The researchers of this study chose to restrict the scope to criminal cases only because these cases are sensitive and serious, and the attempts of the representatives of informal justice to settle them is a blatant violation of the state's right to enforce punishment. On the other hand, this is not of such importance with regard to civil disputes, because as these are concerned the personal/civil rights of the parties to the dispute.

The significance of the study:

This study is somewhat unique, being a socio-legal investigation which places legal and tribal practices in the general social context. It also strives to understand the social logic and general principles that govern informal justice and to explain the reasons for continued use of the system. It therefore does not start off from a position that simply emphasises the need for an official unified legal system that guarantees the rule of law, however imperative this is; rather, it is based on the principle that positions and recommendations must be based on a detailed understanding of the way informal justice works in real life, through the actions and positions of real social actors (ordinary people, *islah men* and formal judges). These people often find themselves in a position of having to choose the most appropriate solutions for solving a particular conflict or remedying a particular crime. Recommendations in regard to these areas will be simplistic and detached from real life if not based on a deep knowledge of the way informal justice interacts and works with *nizami* justice. The study aimed for the recommendations to be on the one hand based on political and social realities and on the other on the general principles of justice and the rule of law.

Aim of the study:

The aim of this study is to understand informal justice in Palestine on the one hand and its relationship with formal justice on the other, in order to generate suggestions and recommendations with regard to the role of informal justice within the current and future framework of the justice system in Palestine. The authors of the study found that the most appropriate methodology would be field research. Through field work the authors could highlight the mechanisms and procedures of informal justice and explore the relationship between this system and the codified legal system on the ground, allowing us to approach informal justice in the light of Palestinian social and political realities through the observation of the activities of the main actors involved in dispute resolution in criminal cases in Palestine.

Questions raised by the study:

Although the principles and procedures of informal justice are generally known, and despite the widely held belief that formal and informal justice coexist to a certain extent in the West Bank and the Gaza strip, there are important outstanding questions with

regard to the way informal justice works, its limitations, and the nature of interactions between the two systems. Thus, this study aims to answer the main following questions:

What is the social background of the representatives of informal justice in Palestine (Tribal judges, *islah* men)? And what is the difference, if there is one, between a tribal judge and an *islah* man?

What are the mechanisms used by tribal judges and *islah* men with regard to the cases put before them? What are the procedures used for criminal cases in particular? What are the jurisdictions of the representatives of informal justice in handling the cases before them? What are the sources of legitimacy they draw upon to examine disputes? What types of decisions and rulings are issued by tribal judges and *islah* men? And to what extent do the mechanisms of informal justice differ in one part of Palestine to another?

To what extent do informal justice procedures affect the procedure of cases in the formal courts? And on what legal bases do *nizami* judges deal with the decisions and rulings of tribal judges and *islah* men?

What is the relationship between informal justice, institutions, societal and political frameworks? What is the nature of the relationship with the institutions of the Palestine National Authority (PNA) (the governorate, security forces, President's Office and Palestine Legislative Council (PLC))? What is the nature of the relationship with political parties and civil society?

To what extent do the social status, political position and affiliations of the parties to the dispute affect the content, shape and decisions of informal justice? How do the parties of the dispute evaluate decisions reached by the tribal judges? What is the most important consideration which determines the behaviour of informal justice: achieving justice or preserving general peace and order? What rate of success does informal justice have in calming and maintaining general and social peace?

How do representatives of the various sectors concerned (the legal profession, *islah* men, officials in the Palestinian authority, members of political parties, and workers in civil society) view the role and the future of informal justice?

Methodology:

The study used field research to disclose the extent of the relationship and interaction between informal justice and the various social sectors and their institutions. This was included in–depth interviews with actors connected to informal justice; it also included collecting relevant documents from *islah* men, official sources and local papers. Field

research was conducted between May and October 2004, under social and political conditions that will be referred to later.

Interviews:

A large number of interviews were held with relevant actors who included:

- Representatives of informal justice – tribal judges and *islah* men;
- Senior Palestinian authority officials - governors and legal consultants;
- *Nizami* justice representatives – lawyers, judges and prosecutors;
- Civil society activists (human rights, advocacy and women's organisations);
- Political parties and movements, mayors, senior security and police officers;
- Members of the Palestinian Legislative Council;
- Parties to disputes resolved through the informal judiciary.

Scope of field work

The task of collecting information on the relationship between formal and informal justice and official and non-official institutions and personalities was given to four research teams who covered various parts of the West Bank and Gaza. One of the teams covered the north of the West Bank (Nablus, Jenin, Qalqilia and Tulkarem governorates); the second covered the central West Bank (Jerusalem and Ramallah & al-Bireh governorates); the third team covered areas in the south of the West Bank (Hebron and Bethlehem governorates), and the fourth team covered the Gaza Strip. The teams consisted of two individuals, one male and one female to ensure gender representation, one with a legal background, the other with a background in sociology. Field researchers were chosen according to their field research experience, academic discipline and area of residency - in the case of the latter, ease of movement and local knowledge of institutions and individuals for interviews were taken into consideration.

Stages of field research

Field research consisted of three stages; each stage determined the type of people to be interviewed depending on the desired outcome of the interview. The field research teams were provided with specific instructions which were prepared by the team over-seeing the research. Documentation was accurate; interviews were taped (audio cassettes) as well as detailed notes taken. After an interview was concluded, it was transcribed and given to the research team with commentary and conclusions prepared by the field research team.

First stage

The first stage aimed at acquiring a detailed picture of informal justice in the four regions (northern, central and southern West Bank and the Gaza strip), its mechanisms and the cases it deals with, and at exploring its relationship with formal justice. Information was acquired through interviews with a number of tribal judges, formal judges, *islah* men, prosecutors, and senior officials in the governorates. Also, primary information on different cases dealt with by informal justice was collected so that in-depth study could be made of some of them at the second stage of the study. Thus, a list of cases dealt with by tribal judges and *islah* men was compiled that contained a brief description of every case, particularly criminal cases.

This stage aimed at identifying the mechanisms of informal justice, the personalities that practise it and the transformations that it has gone through.

Second stage

After the interviews and the writing of the reports were completed, certain cases from the four regions were studied in depth. Several criminal cases were chosen which included murder, serious assault resulting in physical disability, crime of 'honour', theft or traffic accident. The aim was to obtain a clear idea about the dispute resolution mechanisms and their similarities from one region to another; similarities between crimes; background of people involved in these cases; the form of the relationship between *nizami* justice and informal justice; relations with security agencies, governorates and political parties and the extent of influence these different actors have on the solution of these cases. A further aim was to identify the impact of the social status of the parties to the dispute on seeking *islah* between them.

Therefore, for every case, the research team was requested to conduct interviews with the following:

- *Islah* men and notables representing parties to the dispute;
- Formal judge (if a judge dealt with the case);
- Lawyers representing the two parties (in cases where legal representation occurred);
- Persons connected to parties to the dispute or persons familiar with the case (with at least one woman who is a party to the dispute to be interviewed);
- General prosecutor (if involved in the case);
- Members of the police and security agencies (if involved in the case).

Field research at this stage included collecting details about cases from the people mentioned above. Documents regarding the cases were obtained, such as deeds of *islah* and *'atwa*, files from the courts, police, prosecutors or lawyers. Information about public reaction to the cases was also collected through referring to the media, whenever possible, and through interviewing individuals such as witnesses, friends or relatives of disputing parties.

It proved difficult to obtain such information particularly from judges, security forces and lawyers as a result of the sensitivity and the confidentiality of such information. However, a number of people cooperated with the research team, in particular, parties to the dispute and the *islah* men involved in the cases. The rest of the interviewees talked about informal justice in general terms and did not go into details. The field work was carried out over two and a half month period at an average of three cases per team.

Third Stage

During this one-month stage, a number of interviews were conducted with public figures in every region. The aim of the interviews was to record the opinion of these public figures on the role and nature of informal justice; its advantages and disadvantages; its connection to formal justice; its effects on different sections of Palestinian society and the possibilities of changing and developing the reality of informal justice in the future.

The team supervising the study, in consultation with the research team, chose a number of personalities that included representatives of the following institutions and bodies:

- Palestinian Legislative Council (some members of which were involved in informal justice and some not);
- The governorates' legal department or a senior official;
- Ministry of Justice (Ramallah and Gaza only), and the Supreme Judicial Council (Gaza);
- Ministry of Interior (Ramallah);
- Security forces (police, preventative security - excluding people who were interviewed in the second stage of the research);
- Law and human rights institutions;
- Women's, advocacy, social and legal services institutions;
- Trade unions and professional associations;
- Political parties;
- Municipalities or local councils.

Duties of the field researchers

At the start of every stage, the researchers were asked to suggest a list of names of prominent personalities in each research area. A number of personalities were selected through consultation between the researchers and the supervisors in every area to ensure the inclusion of the broadest range of opinions. Part of the responsibilities of the researchers was to send transcripts of interviews to the team leader for revision and comment.

Throughout the three stages of field work a high degree of accuracy in documenting interviews was required, as well as clarity in implementing procedures of recording information and opinions. Thus, field researchers were requested to take the following into consideration:

- Members of the field research team, upon conducting interviews, introduced themselves and showed the formal letter that the team had from the Institute of Law (Birzeit University), explained the purpose of the research and answered questions put by the interviewees.

- Interviews were audio taped after consent was given; if any of the interviewees objected to being taped then only detailed notes were taken.

- Field researchers' duties included preparing a report after each stage of the research summarising the work and information that were collected; the report also contained opinions and conclusions of the researchers according to a particular structure for each stage (see further below).

Duties of research supervisors

The field research was supervised by four supervisors, one for every field research team. Their duties included follow-up on the team's work, reading and commenting on the interviews, consulting with other research supervisors in order to choose interviewees, preparing instructions for each stage of research and report writing. Liaison between field researchers and supervisors was carried out by email and telephone calls due to the difficulty in movement in the field as a result of the Israeli occupation practices. Despite these difficulties, two meetings were held in Ramallah between the field researchers in the three areas of the West Bank; the first was held before the start of the field research

and the second was held before the end of the work, just before the completion of the final report. Also, a supervisor made personal visits to the areas of the research at each stage of the research to ensure that the work was being properly carried out. It was not possible to visit the Gaza Strip however, as a result of the difficult security situation that the Strip was going through.

Interviews held

In six months of field research, 165 interviews were held. The first stage included 40 interviews at an average of ten interviews per region. For the second stage 80 interviews were held at a rate of 18-23 interviews per research team. The third stage included 45 interviews at a rate of 7-15 interviews per team as assigned to them.

Preparing the reports

Each team prepared three reports after the completion of each stage of research. The first two reports included a summary of what was completed in the first and second stages as well as the most important information and conclusions reached. The third report was comprehensive and detailed, and it covered all stages of the research, with the field research team recording the final conclusions and observations of the results of the field work.

1. The political and social context of informal justice in West Bank and Gaza

1-1 The undermining of the PNA by Israeli measures:

When studying informal justice (*'urfi* or tribal) in any society and its relationship with formal justice (the formal or *nizami* judiciary) it is important, even in general, to be aware of the reality and the circumstances of the society during the research stage. Unlike the surrounding society, Palestine does not have its own state. When a national authority was formed in the West Bank and the Gaza Strip it lacked even the minimum mandatory powers and authority of a sovereign state. Also, Palestinian society (if the term society can be used to describe areas separated from each other as is the case in the West Bank, Gaza Strip and East Jerusalem) has been, since 1967, under a military, settler, expansionist occupation that is based on policies of racial separation (apartheid) that the world witnessed in South Africa. In 1947 and 1948 (*nakba*) (or catastrophe) Israel carried out a policy of ethnic cleansing. Prior to 1967 the West Bank was subject to Jordanian rule while the Gaza Strip was under Egyptian administration. Before the *nakba* in 1948, both areas – as part of Palestine – were subject to the colonial British Mandate government which encouraged Zionist settlement on the land of Palestine and oversaw the project of the Zionist state. Thus, in this type of study, it is necessary to be aware of the effect of the absence of a national sovereign state on the reality of the judicial systems in the West Bank and Gaza Strip, and to take note of the circumstances through which the Palestinian Authority has passed since its establishment in 1994 and up to the time that the field work was conducted in 2004.

The field research on informal justice was conducted in 2004, nearly four years into the second intifada. The second intifada began after the political process between the PNA and Israel had reached a deadlock following the negotiations at Camp David in the summer of 2000 over the shape of the final settlement. Israel's 'national unity' government, and then the Likud government, took advantage of certain forms of Palestinian resistance, claiming that it is terrorism, to take a number of measures which aimed to demolish the civil and security infrastructure of the PNA, cripple the Palestinian economy and stop development projects. These measures included fragmenting and isolating areas under PNA rule from each other, imposing severe constraints on movement to and from these areas, and pursuing a policy of assassination and detention of the cadres and command of the Palestinian national movement factions. The escalation of Israeli hostilities culminated in incursions into West Bank towns, villages and refugee camps by the Israeli army and the siege of the President of the PNA in his headquarters in Ramallah after destroying the larger part of the compound (the *Muqata`a*) and the effective abrogation of Israeli commitments under the Oslo agreement, with the re-taking of control over areas 'A' and repeated incursions into the Gaza Strip, closing its entry/exit points and destroying hundreds of houses and the stripping of agricultural land. Sharon's right wing government built the separation wall which snatched new large swathes of land in the West Bank; isolated thousands of Palestinians from each other and annexed the greater part of colonies to Israel, particularly large ones. These policies

resulted in the weakening of central institutions of the PNA, first among them the security, judicial and correctional institutions (prisons), the fragmentation of PNA territory and obstruction of movement therein, and a rise in the rates of unemployment and poverty.

The occupation severely exposed and threatened the Palestinian society in the West Bank and Gaza Strip, and created deep concern over its national fate. It can be said that the aim of the Israeli government was to sabotage any possibility of establishing a viable and sovereign Palestinian state by weakening the Authority's institutions as much as possible - without entirely destroying it, so that the Authority could still be accused of promoting violence and so-called 'terrorism' and of not being qualified to be a negotiating partner – and through the usurping of both society and the land. Thus, the period during which the field research was conducted witnessed the paralysis of most PNA institutions (particularly judicial and security institutions) and a series of assassinations, detentions, house demolitions, the stripping of land, settlements expansion and the construction of the annexation and separation wall.

1-2 Society in the West Bank and Gaza Strip during the second intifada

In 2002, the population of West Bank and Gaza was estimated at 3.5 million with a population growth of 3.2% per annum for the same year. The distribution of the urban population in the West Bank and the Gaza Strip (with some disparity between the two regions) for 1997 was as follows: 53% living in urban areas, 16% in refugee camps and 31% in rural areas. The percentage of population of refugee origins (living inside or outside refugee camps) was 41%.

The majority of the Palestinian population are under the age of eighteen. In 2002 the population of children (under fourteen years old) in the West Bank and Gaza Strip was 46% (45% in the West Bank and 50% in the Gaza Strip).[1]

Statistics show a low percentage of women in paid employment; the yearly average participation of women in the labour market for the year 2003 was approximately 11% (12% in the West Bank and 9% in the Gaza Strip).[2] Rates of poverty in 2002 witnessed an increase by three folds on pre-intifada levels (Increase from 21% in 1999 to 60% in 2002 according to the World Bank's definition of poverty which is less than two US dollars per day per person).[3]

[1] See Palestinian Economic Policy Research Institute (MAS) Social Monitor, issue 7 April 2004, Table no. 2-2.
[2] See Palestinian Economic Policy Research Institute (MAS) Economic Monitor, issue no. 10, December 2003, see table 'Main economic indicators in the West Bank and Gaza Strip', 1999-2003
[3] Ibid

Levels of unemployment rose three-fold between 1999-2003 resulting in a third of the labour force being unemployed as a result of closures, economic paralysis, and control of natural resources by the Israeli authorities (land, water resources etc).[4]. In 2002 public sector workers made up quarter of the total labour force. Workers in Israel proper and the settlements were about a tenth of the labour force, having been about a quarter of the labour force in 1999 (before the second intifada).[5] In other words, Palestinian dependence on the PNA as a source of income increased, at a time when the PNA was in its weakest state since its establishment. The number of workers in the production sector (industry and agriculture) formed a quarter of the labour force.[6] Production in the West Bank and Gaza is dominated by small scale production as the number of workers in most institutions does not exceed four workers and they are mostly family businesses. This means that number of self-employed was very high, making a quarter of the total labour force in year 2002 (an indication that the black economy was inflated). Waged (or salaried) labour formed about two-thirds of the labour force for the same year (compared to over 70% for the year 1999). For the same period, the percentage of non-waged family workers exceeded tenth of the labour force in the year 2003. [7]

The great majority of the population who are over the age of fifteen are literate. [8] Most households have utilities and the majority of the families own television sets.

1-3 The Rise of the Islamist Movement

Since the establishment of the PNA in 1994, it was dominated by one political party, Fateh, which also dominates the institutions of the Palestine Liberation Organisation (PLO). This domination was re-consolidated after the general elections of 1996, when Fateh took the majority of seats in the Palestinian Legislative Council (PLC) after the opposition boycotted the elections as an expression of their rejection of the Oslo accord. Thus, the Fateh movement controlled both the legislative and the executive powers, and the judicial authority remained weak and incapable of maintaining its independence from the executive despite the fact that the Basic Law guarantees the independence of the judiciary.

What distinguished the Palestinian political system before the second intifada in 2000 was a centralisation of authority in the hand of president of the authority, which included him personally controlling the various security services. The political system was also marked by pluralist politics and ideologies and by a decline of the left-wing opposition movement to the advantage of the Islamist political current (Hamas and Islamic Jihad).

[4] MAS, Economic Monitor, ibid
[5] MAS, Social Monitor, ibid
[6] Palestine Central Bureau of Statistics, Labour force census, third quarter for 2004, press conference on the results of labour force census, 6/11/2004, Ramallah.
[7] Ibid
[8] See Social Monitor, ibid, table entitled ' West Bank and Gaza Strip: Selected Social Indicators', 1996-2002

Popular support for Islamist current grew rapidly as the confrontation with the Israeli army escalated, and the deterioration of security and living conditions of the Palestinians during the intifada. Also, during the intifada some forms of field relationship emerged between the political factions.

The situation in the West Bank and the Gaza Strip was also unique as a result of the wide and tangible presence of the non-governmental organisational sector (in comparison with the neighbouring Arab countries) including a new and active 'development' sector (such as education, health and agriculture), as well as research, awareness-raising and legal issues. The call for institutionalisation, democratisation and reform was met by a wide interest from influential circles in civil society and political society; the issue of resisting occupation issue received the same amount of interest as reform and voices were raised calling for a review of forms of resistance, and widening its popular base.

1-4 Disparity in living conditions

Areas in the West Bank and the Gaza Strip vary in social, human and financial status and conditions, which is reflected in different aspects of life. We will refer briefly to the most prominent aspects of disparity that might shed some light on the practices of informal justice.

Governorates in the Gaza strip are distinguished from those in the West Bank in having a high proportion of refugee camp dwellers. In the Gaza Strip, the largest refugee population is in Deir al-Balah governorate where two-thirds of the population live in refugee camps, followed by Rafah governorate with half of the population living in refugee camps, followed by North Gaza with one third of the population living in refugee camps. In Gaza and Khan Younis some sixth of the population live in refugee camps. The highest percentage of refugees in the West Bank live in Jericho governorate where they constitute about a fifth of the total population; Tul Karem governorate is second at an eighth of the population, followed by the governorates of Toubas, Nablus, Bethlehem Ramallah & Al Bireh and Jerusalem (excluding the part annexed by Israel in 1967) where the refugees comprise between 5% to 10% of the population. The refugee population in Jenin and Hebron governorates is less than 5%. There are no refugee camps in Salfit and Qalqilya governorates.

On the other hand, by comparison with the governorates of the Gaza Strip, West Bank governorates have a large rural population. In 1997, those living in villages constituted 47% of the total population of the West Bank compared to Gaza's 5%. The rural population of the West Bank, as a percentage of the total population, varies from one governorate to another: 30% in Hebron and 74% in Salfit. In the Gaza Strip, the highest is in Khan Younis governorate (13%); in Gaza governorate, the largest in terms of population, the rural population is no more than 2%.

The disparity highlights many other important aspects which include family size in different governorates of the West Bank, the largest being in Hebron and the lowest in Tul Karem, Nablus and Bethlehem. The lowest population density is in the urban areas of the West Bank at 5.2 per family; while refugee camps and villages were at 6.0 and 6.3 respectively.

In the Gaza Strip, the North Gaza governorate has the largest family average at 7.2 members per family, while the smallest is in Khan Younis at 6.8; but unlike the West Bank, the smallest family in Gaza Strip is in villages followed by refugee camps then urban areas, which have the largest families.

Palestinian society is comprised largely of nuclear families,[9] which make up three-quarters of families in the occupied Palestinian territory. Extended families[10] make up less than a quarter of the total families. Single families form a small proportion of families, while compound [11] families make up less than half a percent.

Statistics show further disparities between governorates and built-up areas; the most prominent are:

Disparity in the rate of illiteracy among the population (10 years and older) between males and females: males having a higher rate of illiteracy.[12]

Disparities in the number of returnees (returned exiles). The numbers vary according to governorate and type of built-up area. This is applicable in the case of migration.[13] The percentage of returnees (the largest proportion of whom returned after the first Gulf war and the Oslo agreement between the PLO and Israel) as a total of the whole population was 11.1% in the West Bank and 9.4% in the Gaza Strip. The highest percentage of returnees in the West Bank lives in towns and villages, while a smaller percentage lives in refugee camps; in Gaza, returnees live in cities and refugee camps.

[9] According to the definition by the Palestine Central Bureau of Statistics, a nuclear family is: spouses or parents or a single parent family with a son or a daughter or more.
[10] Palestine Central Bureau of Statistics defines an extended family as: one or more nuclear families plus one or more persons who are relatives of the head of the family
[11] Compound families are an extended or a nuclear family plus at least one person who is not a blood relative or two or more persons with no marriage relations.
[12] In the West Bank illiteracy was at 6.3 % for males and 17.5% for females. In the Gaza Strip it was 7.4% males and 15.3% females.
[13] See, Majdi Al Malki and Yaser Shalabi, Migration and the returnees, MAS, December 2000. Also, Rita Giacaman, and Penny Johnson, eds., Inside Palestinian Households: Initial Analysis of a Community-Based Household Survey, Birzeit: Institute of Women's Studies and Institute for Community and Public Health, Birzeit university, 2002.

There were wide disparities in different governorates regarding family ownership of durable goods such as computers, private cars and telephone-lines. Disparities in home ownership were smaller by comparison to durable goods.

The highest average of number of people living in one room was in refugee camps and rural areas. Hebron and Jericho had the highest average number of people in one room in the West Bank, while Ramallah & Al Bireh, Bethlehem and Nablus had the lowest number. The governorates in the Gaza Strip had small disparities.

There were large disparities in poverty rates in the various governorates, as shown in the last documented study about the increase of poverty in Palestine[14]. In 1998, poverty levels were 14.5% in the West Bank and 33.0% in the Gaza Strip. Generally speaking, poverty rates (including abject poverty) increased in the north and the south of the West Bank. In the Gaza Strip it increased in the south. Jenin and Hebron governorates recorded the highest percentage of families living under the poverty line (relative and abject), three times higher than that of Ramallah & Al Bireh and six times higher than Jerusalem governorate.

Israeli measures against the second intifada during 2001 and 2002 resulted in a severe deterioration of living conditions and an increase in the poverty rate (number of people who live on less than two US dollars a day); according to estimates by the World Bank, by the end of 2002, this increased to half of the population of the West Bank and the Gaza Strip, to reach 60% by the year 2003[15]. In other words, Palestinian society became more pauperised, peaking in 2003.

1-5 Society exposed and at risk

Locally and internationally documented indicators show that the Palestinian economy has entered a deep recession over the last few years. As mentioned above, these indicators also show that the three-fold increase in unemployment is affecting one third of the Palestinian labour force[16]. Real income also decreased by 30% from levels of the late

[14] Palestine Central Bureau of Statistics, Poverty in the occupied Palestinian territories (oPt) (January – December 1998), Ramallah, 2000.
[15] See: The World Bank, Fifteen Months-Intifada, Closures and Palestinian Economic Crisis- An Assessment, Washington: the World Bank, March 2002.
The World Bank, Poverty in the West Bank and Gaza. Washington: the World Bank, February 2001.
[16] According to series of reports and surveys of the labour force issued by the Palestine Bureau of Statistics, unemployment (broad definition) in the first quarter of 2002 reached 38.7 % of the labour force in the WBGS (35% in the West Bank and 46% in the Gaza Strip). The same census shows a decrease in the number of West Bank Palestinian workers in Israel from 25.3% of the labour force in the last quarter of 1999 to 11.3% in the last quarter of 2000. In Gaza for the same period the decrease was from 16.5% to 2.7%.

1980s. Opinion polls show that 42% of the families consider their standard of living as bad or very bad.[17]

Israeli economic, military, administrative and security measures resulted in transforming Palestinian areas into Bantustans that are under siege economically and militarily as well as being surrounded by settlements which continued to expand after the signing of the Oslo accord and the 'road map'. The phenomena of socio-economic fragmentation, geographic isolation and the policy of racial discrimination are the gravest dangers facing Palestinian society as a whole. These elements coincided with a wide deterioration in standards of living as a result of the worsening income levels of most families and the decrease in their access to basic services such as health and education. Losses due to closures, siege and military offensive affected most sectors in the Palestinian economy; closure and military operations by the Israelis had a particular effect on women and children.[18]

Israel succeeded in weakening and constraining the PNA to the extent that after the reoccupation of the West Bank in spring of 2002, it was incapable of providing its citizens with subsistence and minimum security from the dangers threatening their sources of income and destroying their properties. Many see the PNA as having failed in its duties and responsibilities in establishing a democratic life for its citizens. They also see this failure as being capitalised on, particularly after the events of September 2001, by Israel and the United States' administration to weaken the PNA and question its legitimacy with the aim of lowering the ceiling of its political demands and of marginalising and paralysing the Palestinian national movement.

The financial situation of the PNA[19] after the start of the second intifada led to increased dependence on foreign financial aid in paying for the growing budget deficit. The deficit resulted in reduced capacities on the part of the ministries to meet their current and future obligations in education[20], health[21] and other matters.

[17] Survey held in October 2004 ; of those questioned, 42% (41% in the West Bank and 21% in the Gaza Strip) considered their families' living conditions as either bad or very bad; whilst 17% (14% in the West Bank and 21% in Gaza Strip) considered their families' living conditions as good or very good. See: Study no. 19 Development Studies Programme, Birzeit University, 5/10/2004

[18] See field survey by the Palestine Central Bureau of Statistics between the period 11 April and 15 May 2001; random sample which showed that 10% of Palestinian families were assaulted by the Israeli army. Children made up approximately a third of this number (PCBS Survey of Effects of Israeli Measures on the conditions of women, children and Palestinian families, Ramallah, July 2001).

[19] The value of the PA's public deficit increased as a result of continuing Israeli freezing of income tax revenues owed to the PA, decrease in local revenues for the PA by more than a half as a result of economic recession, and delays in the arrival of international and Arab aid (See statements by General Director of the Ministry of Finance to *Al Ayam* newspaper on 29/4/2002. page 10).

[20] Ministry of Education, The Five-Year Education Development Plan 2000/2001-2004-2005, Ramallah, 1999.

[21] Independent Group for Citizens Rights, Palestinian Medical Readiness for Emergencies, Series of Special Reports (4), Ramallah, November 2000.

Problems within civil and political society will not be addressed here; although they are related to this research, they are not perhaps as important as the role of the central authority's institutions, nor as important as the growing dangers facing the people. Suffice to say that the experience of the Palestinian NGOs has become diversified and deep rooted over the last two decades and has included cooperating and coordinating with the PNA's institutions and managing relationships with donors. Some NGOs still have problems with their long term-planning for financial sustainability (particularly from local sources) through diversifying their income base and in modernising their internal infrastructure. This problem is partly connected to the type of relationship the NGOs have with their donors and partly to their relationships with their public. As for the existing political parties and organisations, although their role represents something very important, they are suffering from structural stagnation, more rhetoric and slogans that do not reflect the actual programmes, weak internal democracy and an undemocratic relationship with the public. Pluralism does not guarantee the establishment of political democracy, although it is a prerequisite. Democracy requires a system based on the separation of powers which would disallow authoritarianism by the executive over other authorities; it also requires the political parties to abide by the rules which guarantee peaceful and orderly transfer of power according to the results of fair, free, and regular elections. Also, for democracy to become deep-rooted, it requires the presence of active trade unions and professional associations which are independent from the executive. These perquisites are currently in a poor state in the West Bank and the Gaza Strip.

The problems facing voluntary organisations (those with a horizontal national dimension such as political parties, federations and unions) and the weakness of the central authority create feelings of citizenship and equality before the law. It may be this that is behind the emergence of local and inherited solidarities that provide the appropriate and perhaps necessary environment for tribal *sulh* which we are witnessing in the West Bank and the Gaza Strip, albeit with differences from one area to another as noted above. We return to this discussion later in this study.

2. Historical Development of informal justice in Palestine

To understand why Palestinian citizens have recourse to alternative methods of solving disputes outside official PNA institutions (*nizami* justice), it is important to study the historical development of informal justice in Palestine. Historical elements that are in essence products of social and political realities have played a role in the emergence and the shaping of informal justice in Palestine. These same reasons push a cultured society that enjoys high levels of education to have recourse to informal justice with all the advantages and disadvantages that it entails. In the present section, we examine the historical development of informal justice era by era since Ottoman rule.

2-1 Ottoman Rule in Palestine (1517-1917)

Local *'urf* had important standing in the Ottoman Empire and was a principal source for many laws issued by the Ottoman Sultans, particularly regarding land laws and penal codes. The Ottoman courts implemented '*urf* even where it might have been in contradiction with *Shari'a* law. An example is the codification of criminal penalties in a law that was included in collections distributed throughout the empire; it was called *qanoun nameh* and contained several penalties taken from local Ottoman *'urf*. Similarly, land laws issued before the era of *tanzimat*[22] (which began with the promulgation of the *Khatt-il Gulhane* in 1839) were a form of codification of Ottoman *'urf*.

The above shows the power of '*urf* in societies subjected to Ottoman rule and is sufficient proof that informal justice existed particularly in areas remote from the main city centres in the areas that now form modern Turkey. As for other areas in the Ottoman Empire, informal justice developed as a result of the administrative decentralisation that was characteristic of Ottoman rule. During the rule of the Ottoman Empire, Palestine was part of the *vilayat* of either Beirut or Damascus and was divided into three *sanajeq*. The relationship between parts of Palestine, particularly in the mountains of Nablus and Hebron, and the Ottoman authority which was based in the *sanajeq* centres and the *vilayat* were characterised by tension and rebellion against the central authority. This relationship led to a weakening of the authority of Ottoman institutions in the areas where there was tension. This made its inhabitants have recourse to informal justice in order to impose general and public peace in the absence of official Ottoman agencies, particularly in the mountains of Hebron.

Through the nationwide interviews which were conducted with a large number of workers in informal justice, relatively speaking, there were not many statements relating

[22] The *Tanzimat* refers to legal, administrative and judicial reforms during the rule of the Ottoman Empire that were initiated with the promulgation of the *Khatt-i Gulhane* in 1839- also known as the Edict of the Rose Chamber.

to the late Ottoman era. The reason for this is of course is that not many of the interviewees lived during that era. Certain statements given by some of the interviewees were passed orally from people who lived through the Ottoman era, such as their fathers and grandfathers. A tribal judge in the south of the Gaza Strip said that that era saw the formation of what is known as the *biyut al mulam* (see annex 7)[23] in the south of Palestine, and that every Bedouin tribe specialised in a particular one of these *biyut* and passed it down one generation to another. In later stages, non–Bedouins began working with these *biyut* and had recourse to them to solve their disputes. In an interview, tribal judges in the Hebron area pointed out that *tribal justice houses* were formed during Ottoman rule and that they were restricted to certain families which passed them down, these houses remaining in their hands to this day. In another interview, the oldest and most prominent *islah* man in the northern West Bank area stated that he had inherited the position of *islah man* from his father and uncle who lived during the period of Ottoman rule and were *islah* men during that era. Despite the scarcity of testimonies concerning the end of Ottoman era and the lack of verification of sources, it is possible to conclude with a profile of that era with regard to informal justice in Palestine.

Tribal law existed in that period, largely restricted to the regions south of Palestine amongst Bedouin tribes and particularly the tribes of Beersheba who passed it from one generation to the next until the present time. The most eminent tribal judges that we interviewed were from Bedouin roots of the Beersheba tribes who inherited their work from their fathers and grandfathers.

It is unclear how much the Ottoman state influenced the work of informal justice. Some sources say that towards the end of Ottoman rule, the power and authority of the state was weak and restricted in many regions.[24] It is possible that the weakness of the state's authority contributed to the consolidation of the tribal structure. It is also possible that this situation gave heads of tribes and families the authority to settle conflicts between members of families and tribes through relying on *'urf* and tradition as a base for passing judgements.

There is no proof that any law was issued by the Ottoman state that legalised and organised the practice of informal justice. Also, during the era of the Ottoman state there were no formal courts for tribes; rather, a management council existed which comprised a team of employees and another of tribal chiefs. The council specialised in examining conflicts within the Beersheba district only[25].

[23] The *islah* man whom both parties to the dispute approach with a request that he refer their dispute to the specialised tribal judge. *Beit al mulim* initially attempts to resolve the dispute through reconciling both parties but if he fails in the *sulh* then he refers them to the tribal judge specialised in this type of dispute.
[24] Nizam al- Majali, *Explanation of the Penal Code – General Section* (Amman: Maktabet Dar al-thaqafeh li'-nashr wa'l-tawzi` 1998) first edition, page 40.
[25] 'Aref al-'Aref, *Jurisprudence Amongst the Bedouin* (Jerusalem: Maktba'at Beit Al Maqdes, 1933), page 12.

The first Ottoman Penal Code was issued in 1840, subsequently replaced by the second Ottoman Penal Code of 1858 which was based on the French law of 1810[26]. Subsequently, Arab countries that were under Ottoman rule ceased to rely on Islamic *Shari'a* as the only source for legislation. The Ottoman penal law was implemented in Palestine until the end of Ottoman rule and during British rule thereafter.

2-2 British Mandate rule over Palestine 1917-1948

After the British were given a Mandate over Palestine, informal justice continued particularly in Beersheba district. The British Mandate did not leave informal justice unregulated; a number of laws were issued during the Mandate period, including The Enactment of Palestine Order–in-Council of 1922 Article 45 and the Law of Procedure for Tribal Courts 1937 Article 2, as well as certain other laws that dealt with informal justice such as the law on the prohibition of crimes between '*ashiras* and *hamulas* no. 47 of 1935[27] and the Law of Civil Contraventions no. 36 of 1944 which dealt with the jurisdiction of tribal courts in ruling on blood money[28] (*diya)* (for more information see chapter 2: Legal Basis for informal justice in Palestine). These laws provided a legal basis for the establishment of tribal courts. The tribal courts applied `*urf* known amongst the tribes as the reference for their rulings; the formation of tribal courts was restricted to Beersheba and the Beersheba district. However, in most Palestinian cities and areas, the Palestinian Criminal Code no. 74 of 1936 – together with its amendments - was applied as well as the Ottoman Penal Code of 1247 *hijra* (1840 CE). In an interview, an *islah* man in the Hebron area noted that a tribal council was established during the British mandate period, along with what are known as *manahi al domum* (see annex seven). Despite the scarcity of testimonies regarding the period of the British mandate, we still have a clear observation about this period, which is that it witnessed the British Mandate authority promulgating a series of laws regulating the work of the informal judiciary. It is worth pointing out that the fact that the British mandate authority did this may not have been a matter simply of responding to the distinctiveness of this social reality, but rather in order to realise other aims through the implementation of different laws. The most significant of these aims was the facilitation of British colonial rule over the people though indirect rule.

2-3 Jordanian Rule of the West Bank 1948 - 1967

Following the end of the British mandate and the Palestinian *nakba*, and in particular immediately after the Jericho conference which resulted in the annexation of the West Bank to the Hashemite Kingdom of Jordan, the Jordanian Penal Code no. 85 of 1951[29] was passed. This law was implemented in the West Bank as a part of the Kingdom of Jordan. It should be noted that when the 1951 law was applied to the West Bank, the laws

[26] 'Aref Ramadan, *Aref Ramadan's Collection- Ottoman Rule* (No publication references), Page1.
[27] *Palestine Gazette*, British Mandate, issue 557, published on 18/12/1935.
[28] *Palestine Gazette*, British Mandate, issue 1380, published on 28/12/1944.
[29] Jordanian *Official Gazette*: issue 1077.

in force were the Ottoman criminal law of 1274 AH and the Palestinian Criminal Code 1936. These two laws were not repealed by the 1951 law, ad none of the tribal laws were implemented anywhere in the West Bank. On the other hand, when the 1951 law was applied in the East Bank of Jordan (currently Jordan), the existing laws prior to that were tribal laws, that is, the Law of Supervision of the Bedouin 1929 as amended 1936, which applied only to Bedouin tribes. The 1951 law remained in force in the East and the West Banks of Jordan except for the tribes who remained under the Law of Supervision of Bedouins of 1936[30]. When Law no. 16 of 1960[31] was promulgated, it replaced the 1951 law and also repealed the Ottoman penal law, the Palestinian Criminal Code of 1936 together with the laws amending it, and all Palestinian and Jordanian legislation passed before the 1960 law, to the extent that such legislation contradicted its rulings. It should b noted that Law no. 16 of 1960 did not include any repeal of tribal laws, which remained applicable to Bedouin tribes and were applied until Law no. 34 of 1976, which repealed the Tribal Courts Law 1936, the Law of Establishment of a Tribal Appeal Court 1936, and the Law of Supervision of the Bedouin 1936. In other words, as of 1976, there remained no legal codification of informal justice in Jordan.

With regard to the existence and the extent of the reach of informal justice in the West Bank during Jordanian rule, there is a consensus among the representatives of informal justice that informal justice existed during that period, although there are some discrepancies in the evaluation of its role in resolving disputes and the extent of its role. Representatives of informal justice who were interviewed in the Jenin, Tulkarem, Hebron and Nablus areas stated that the formal system of justice maintained the rule of law and in charge of settling disputes; that the *nizami* courts and the executive were active; that the Jordanian government used an 'iron fist' to rule and as a result informal justice was limited and merely complemented the work of *nizami* justice. The view of majority of the representatives of informal justice may not be in contradiction to what has been mentioned; however, the assessment of their presence and their role during that period was that it was strong, effective, supported by and connected to the authorities. In other interviews conducted in Nablus, Ramallah, Jerusalem and Hebron, *islah* men stated that informal justice worked well and that its decisions were supported by the government. They also observed that the Jordanian authorities were more sympathetic with tribalism and that the commissioner (or the governor) was cooperative with the *islah* men, facilitating their work and providing them with support; and that sometimes the governor would, on request of the *islah* men order the arrest of a party to the dispute that had rejected a solution. One *islah* man also noted that he and other *islah* men went to the royal court in Amman, Jordan and met with King Hussein in order to support and pledge allegiance to the King. In another interview, an *islah* man from Jerusalem pointed out that during that period there was a Jordanian government department existed called the Department of 'Tribal Affairs' which reported directly to the royal palace.

Further, there was a consensus among the *islah* men who witnessed the Jordanian period that they were fewer in number then compared to the present, and that there were no *islah*

[30] Mohammad Aljabour, Crimes Committed Against Individuals (Amman: National Library. 2000), Page 8.
[31] Jordanian *Official Gazette*: issue 1487.

men or tribal judges who were appointed or took wages from the Jordanian government. Also, it wasn't easy for just anyone to become a tribal judge or an *islah* man because the basis for acquiring this position was succession, and it was restricted to certain families.

It becomes clear from the above that informal justice had a role during Jordanian rule of the West Bank but it was not an alternative to the official government institutions because of the effectiveness of the executive's institutions, the authority of the state and the rapid resolution of cases. Also, that period did not witness –relatively speaking - a wide diffusion of informal justice within the community, as can be seen from by the small number of representatives of informal justice at that time. Therefore, it can be said that informal justice existed and was somewhat backed by the authorities, and further that it was characterised by the small number of people involved in it, with the work moving between them by succession to the post.

2-4 Egyptian Administration of the Gaza Strip 1948-1967

After the end of the British mandate of Palestine on 15 May 1948, followed by the Palestinian *nakba*, Egypt took over the Gaza Strip after the signing of the Egyptian–Israeli armistice in Rhodes in February 1949. The Egyptian government was formally requested by the Arab League to administer the Palestinian areas that were under Egyptian military control, which became known as the Gaza Strip[32]. Egyptian rule in Gaza began with confirmation that all laws in force at the time of the British Mandate would remain in force, including those related to the informal judiciary. In an interview, a tribal judge in Gaza stated that the Egyptian administration supported their work and that the courts used to transfer certain cases to them and would confirm a ruling made by the informal judiciary in the event it had issued from three of them. The tribal judge added that the Egyptian Governor General charged the administrative governor with meeting regularly with tribal judges and *mukhtars* in order to support them and to liaise with them regarding the effectiveness of the executive authority's agencies during that period. The tribal judge described the situation in the following words: 'one police car used to enforce order in the two governorates of Khan Younis and Rafah, and fear used to deter everybody and entrench the law.' In conclusion, it can be said that informal justice work continued during the Egyptian administration of the Gaza Strip, and that the ruling authorities had dealings with it. However, it was not very common a result of the Egyptian state having a strong executive and because law and order existed in the community. Worsening economic conditions during that period were among the factors that helped the operation of informal justice to operate, as it was less costly and quicker in its decisions (for more information see chapter 3). A tribal judge from the south of the Gaza Strip described the period as one of poverty, rationing, low income and widespread deprivation among a large section of the community, which resulted in them becoming dependent on either meagre crops or on assistance from the United Nations Relief and Works Agency for Palestinian refugees (UNRWA).

[32] Fathi Alwahidi, Constitutional Development in Palestine (Gaza: Alsalam Press, 1989), page 363

2-5 Israeli Occupation 1967-

2-5-1 Pre- first intifada (1967-1987)

The majority of the representatives of informal justice in the West Bank and the Gaza Strip confirmed that their role witnessed an expansion and enlargement during this period. They attributed this to the fact that people were loath to go to the *nizami* courts which were under the authority of the occupying authorities. A number of Israeli military orders were issued placing in the hands of the Area Commander (the military commander of the Israeli army in the West Bank) the authority to rule, legislate and appoint in the public administration. The most important orders were Proclamation no.2 of 1967[33] regulating the authority and the judiciary, and Military Order no. 412 of 1970[34] concerning local courts in the West Bank. These orders retained formal justice under the authority of the military governor, and as a result Palestinians lost faith in *nizami* justice throughout this period of the occupation. This was verified by representatives of informal justice: 'their role was considered to be a national alternative for the *nizami* courts which were under occupation'. They also added that they bore the brunt of resolving disputes among the citizens particularly in regard to criminal cases. Against this consensus, an *islah* man in the northern West Bank region said that informal justice did not have a big role during this period, citing as reasons the strength of the occupation's executive power and the effectiveness of formal courts. Also, there was no relationship or liaison between the occupation authorities and the representatives of informal justice. Some representatives of informal justice said that they were harassed by the occupation authorities, arguing that the latter were not interested in settling discord in Palestinian community and preferred that cases and conflicts be dealt with directly by them rather than by the informal judiciary, since they viewed *islah* men and tribal judges as a nationalist 'police' which was not under their control.

Some *islah* men stated that the occupation authorities interfered with a view to ruining their work particularly if one of the parties to the dispute was a collaborator. A number of *islah* men in the West Bank pointed out that in the early 1980s the occupation authority formed *islah* committees which consisted of certain *islah* men who collaborated with them, furnishing them with papers to facilitate their movement. During the same period the authorities also set up the Village Leagues in an attempt to give these Leagues social and political roles. An *islah* man from the north of the West Bank spoke of a collaborator who was involved in the Village Leagues to whom it was proposed that he open up a *sulh* office, but he refused. Most representatives of informal justice said that they avoided *islah* men and tribal judges who had any dealings with the occupation authorities and that

[33] Publication no. 2 of 1967 regarding rules of authority and judiciary, issued by the commander of the Israeli occupation forces in the West Bank; *Collected military proclamations, orders and appointments*, issue 1, dated 11/8/1967, p. 3.

[34] Order no. 412 of 1970 concerning local courts issued by the commander of the Israeli occupation forces in the West Bank , *Collected military declarations, orders and appointments*, issue 25, dated 1/3/1971, p. 954.

they held them in contempt. They also said that members of the community dealt with only representatives of informal justice who had good nationalist credentials. Another islah man pointed out that the PLO in the early 1980s formed an *Islah* Committee in the central West Bank. An *islah* man in the northern West Bank also observed that Fateh's western sector charged *islah* men with intervening in and resolving disputes, particularly major ones. In conclusion, what distinguishes this period of the occupation with regard to informal justice is that by comparison to other eras, people started to have recourse to it and considered it as an alternative to *nizami* courts. Although the prosecutors and the *nizami* judges were Palestinians, the control and administration were in the hands of the occupation authorities. Similarly, the implementation of penalties was carried out through the Israeli police which was resented and relatively rejected by the people, particularly in regard to criminal cases.

2-5-2 The first intifada (1987-1994)

Representatives of informal justice were unanimous in their view that the first intifada was the best time for their work. Many of them described it as the 'golden age' for their work, and as the spark that lit their flame. Representatives of informal justice noted that their role was consolidated as a result of the weakness or the absence of the occupation's executive authority, and the calls by the Unified National Leadership of the Uprising (UNLU) in their regular circulars for Palestinians to boycott the agencies and institutions of the occupation. In circular no. 9 the UNLU called on workers and police officers who worked in these institutions to resign. This created a need to find an alternative mechanism to replace recourse to the agencies of the civil administration, the courts and the police which were administered by the occupation. Recourse to these institutions was considered to be outside the legitimacy of the intifada. From here began the effective and widespread emergence of the informal judiciary represented by the *islah* committees. Through numerous statements it became taken for granted that the UNLU considered these committees to be part of the implementation of their project of struggle through civil disobedience. This led people to have recourse to these committees as a national institution to which people could turn in order to resolve their disputes, and this was what the UNLU wanted at the time. This view is consolidated through the direct backing that the UNLU gave these committees in implementing their rulings through what were called the strike forces during the first intifada. The majority of the representatives of informal justice pointed out that their decisions were implemented through the *shabab* of the *tanzim*, or what was known at that time as 'those who are masked and those who are on the run' (*al-mulaththamin wa'l-mutaridin).* Some of the representatives of informal justice described the situation as follows: 'Youth from the *tanzim* and those who were on the run used to help us, and those who didn't obey (didn't comply with their opinion) were made to comply through the force of the baton'.

The majority of the interviewees pointed out that Fatah played the prominent role in this. Some *islah* men referred to Orient House (a Palestinian institution belonging to the PLO, based in East Jerusalem) commissioning them to intervene in resolving disputes between people through a committee supervised by Orient House. Hence, through the consistency

and congruity of statements about this period, it can be said that compared to other period, the first intifada was the period where the work of the representatives of informal justice was the most active. It also saw the spreading out of an organisational structure for informal justice known as *islah* committees. This coincided with an increase in the number of people working in the field of informal justice, and the diversification of their social and political backgrounds. A new generation of individuals became part of the field, without being bound by the traditional characteristics of informal justice representatives such passed it on from one generation to the next, social status and economic position. Rather, many of those who worked as *islah* men in this period were chosen as a result of their successful relations with the citizens or their position in the political structure (for details see chapter 3: informal justice Representatives). In this period, the practice of conciliation was considered to be part of the struggle against occupation and a nationalist alternative to which people turned. Thus, the people had a very positive image of the representatives of informal justice during this period.

2-6 Rule of the Palestinian Authority (1994 – 2000)

2-6-1 Period up to the start of the second intifada (Al Aqsa intifada)

This spans the period from when the PNA was established until the outbreak in the year 2000 of the second intifada, known as Al Aqsa intifada. When the Palestinian Authority was established in 1994, *islah* committees existed and were active within Palestinian society. Most of the representatives of informal justice mentioned the fact that the PNA welcomed and encouraged their work, and that they met with the Authority through the governors. In most regions, the governorates issued them with official papers to facilitate their work and access to official departments and institutions. There was a consensus among the representatives of informal justice that they were relieved when the PNA was established because it helped them in fulfilling their role, and that the various institutions of the executive helped *islah* committees by implementing their decisions. Evidence of the reconsolidation of the role of informal justice can be seen in the establishment of the Tribal Affairs Department through Presidential Decree no. 161 for the year 1994[35]. In an interview, an *islah* man in an area in the south of the West Bank considered that the Authority supported their work because they did not have control over the entire occupied Palestinian territories, and that the division of the territories into Areas A, B and C made the PNA dependent on representatives of informal justice because they could move around freely and quickly in areas which were not under the PNA's security authority, such as Jerusalem for example. However, some pointed out that reliance on them declined after the PNA was established, citing the role of the Palestinian security forces and the *nizami* courts in implementing the law. Some *islah* men spoke of negative aspects arising from the establishment of the PNA and its effect on their work, citing nepotism, cronyism and interference by the security forces in forcing their solutions on the *islah* men. Also, some *islah* men mentioned new faces entering the field of informal

[35] *Palestine Gazette*, Palestine National Authority, Issue 3, dated 20/2/1995, p. 24.

justice without having the required experience, but rather relying only on their position in the security services and the institutions of the PNA.

From what was mentioned above we can conclude that the Palestinian Authority dealt with informal justice at the highest administrative level starting with the governor, through the leaders of security forces, and even the office of the President, that to a certain extent it succeeded in establishing contacts with the representatives of informal justice, and that it facilitated and tried to regulate their profession. The PNA also constructed organisational phraseology for the work of informal justice under many names such as Central *Sulh* Committees, charitable committees and other names. The Palestinian Authority also gave these committees the veneer of officialdom on many occasions and supported their decisions, even though during this period there was relative stability in the security situation. This indicates inaccuracy in the claims of some of the officials in the executive authority who stated that the instability of the security situation was behind the PNA encouraging the role and the work of informal justice (see Annex 5). Hence, informal justice during this period received formal patronage from the PNA which pushed for its modernisation in an admission of its vital role in the Palestinian system. The biggest proof can be seen in the role played by former President Yasser Arafat in his patronage of informal justice though various measures such as: his office making payments as financial compensations for the holding of the rites of *sulhs* and *ʿatwas* (see Annex 6: case nos. 6, 8).

2-6-2 Second Intifada (2000-2005).

This period spans the start of the second intifada in the year 2000 up to the time the report was written on which this study is based (spring 2005). The majority of representatives of informal justice pointed out in their interviews that the security closure and siege of Palestinian cities and the measures of the occupation disrupted the work of the *nizami* judiciary and resulted in a backlog of cases. Also, the destruction of Palestinian institutions and Palestinian infrastructure by the occupation forces resulted in a total absence or severe weakness of these institutions, particularly the security forces. The weakness of the security agencies led to a situation of security instability in society, and this was worsened as a result of the large numbers of weapons in the hands of the people. Most of those interviewed who were not representatives of informal justice pointed to the spread of negative phenomena, such as the intervention of armed groups in dispute resolution among people. A political leader held that the PNA bore a large part of the responsibility for the worsening state of *nizami* justice, which in turn resulted in wide scale reliance on the informal judiciary. He added that the Palestinian Authority did nothing to modernise *nizami* justice and ensure its independence and effectiveness; rather, the PNA protected the informal judiciary, be it by supporting them directly through passing laws legitimising their status or through helping representatives of informal justice in implementing their decisions.

On the other hand, most of the interviewees, from the range of groups and sectors studied in the West Bank and Gaza, said that the current situation of instability and an absence of law and order that currently dominates Palestinian society brought informal justice and its role to the fore, and that the activities of the *islah* committees was reconsolidated during the second intifada as a result of a desperate need for it. Interviews revealed that the PNA depended on these to maintain the general peace, whether by officially commissioning representatives of informal justice to intervene and resolve disputes among citizens or by representatives of informal justice themselves intervening directly. Therefore, in the absence of alternatives to which Palestinians might have recourse in order to resolve their disputes and litigations, they are obliged to have recourse to the informal judiciary.

3. Legal Basis for informal justice in the Palestinian Legal System

Studying the legal basis of informal justice in Palestine requires an examination of relevant legislative developments, particularly since the Palestinian legal system is distinctive in that it was the work of several legislative authorities which created this system under different regimes ruling Palestine over the last five centuries. Given that different states have different legal systems according to their different social, economic and political systems, then the legal turmoil that the Palestinian society went through over this period is perfectly natural. It is also inevitable that Palestinian legislation would be affected by the Palestinian people's changing social conditions as a result of the mass population displacements it suffered. Thus, the way that successive authorities respected local traditions and customs and dealt with local '*urf* was carried out through different frameworks. Some authorities included it in the general framework of the constitution and in the laws related to the establishment of courts, without reaching the stage of codifying or amending these '*urfs*, as was the case with the British Mandate Authority. At the same time, other authorities were careful not to codify these customs or to stipulate the formation of courts particular to them, fearing that it might be an alternative to the formal judicial authority or might lead to the existence of plural legislative authorities in the state; at the same time, although it required the legislative authority to respect tribal customs and *'urfs* and be influenced by the rulings thereof, as this study will show at a later stage.

In order to set out the legal basis for informal justice in the Palestinian legal system, we must examine these bases according to each period at a time.

3-1 Rule of British Mandate of Palestine

In order to address the legal basis of informal justice in Palestine during the British Mandate period (1917-1947), the related mandate laws should be reviewed, starting with the Palestine Order–in-Council of 1922 and finishing with the laws and ordinances that codified the work of the informal judiciary through the establishment of tribal courts and

the specification of procedure therein. This section will address firstly the legal basis for informal justice during that period and secondly the procedural law of tribal courts.

3-1-1 Legal Basis of informal justice during the British Mandate of Palestine

3-1-1-1 Palestine Order-in-Council 1922

Chapter Five of the Palestine Order-in-Council 1922 dealt with the legislative authority, with article 38 providing as follows: 'The Civil Courts hereinafter described shall subject to the provisions of this part of the Order exercise jurisdiction in all matters and over all persons in Palestine, bearing in mind the provisions of this Chapter of the Order.'

The text of article 38 referred to the jurisdiction of *nizami* courts, set out in subsequent provisions of the same chapter, in examining all disputes and in regard to all people in Palestine, in accordance with the territorial judicial jurisdiction specified in regard to each court.

A tribal court was established by virtue of Article 45 of the Palestine Order-in-Council which provided: 'The High Commissioner may by order establish such separate courts for the district of Beersheba and for such other tribal areas as he may think fit. Such courts may apply tribal custom, so far as it is not repugnant to natural justice or morality.' Putting this together with the text of Article 38 of the same chapter, we can conclude that British legislator included tribal courts within *nizami* courts, with their jurisdiction, formation, procedure of trials before it, and place of convening are determined by the law. Similarly, tribal courts were considered special courts, which the High Commissioner alone had the right to establish by ordinance, without being obliged to do so, and without being established by law. The jurisdiction of place for tribal courts was specified as the district of Beersheba or any other area in which the High Commissioner saw fit to establish a tribal court. Also, implementation of '*urf* and customs in these courts was authorised and given priority, providing it did not contradict the discipline and the morality of natural justice (these principles are considered one of the sources of residual law affirmed by the authority of the British Mandate government in Palestine as is the case in the English legal system).

According to interviews held with a number of representatives of informal justice who lived during that period, after the Palestine Order-in-Council came into force there were two types of tribal judges: judges who were appointed by the British Mandate according to the text of the law, which will be mentioned later, and unappointed judges to whom people had recourse because the parties to the dispute trusted them and trusted their social standing. Thus, tribal justice was practised either in a regulated way through tribal courts, rendering decisions issued by them binding for the British Mandate government, or in an uncodified way through the independent and individual work of tribal judges. In this situation, what rendered the decisions binding were tribal customs and *'urfs*.

Tribal courts were established by the British Mandate government in 1918, prior to the Palestine Order-in-Council, in accordance with the Law of Procedure for Tribal Courts 1918. Their work was characterised by chaos from the outset, and everyone who claimed to be a tribal chief became involved.[36] Also, the tribal *sheikhs* appointed to those courts were not paid for their work nor were they given letters of appointment by the British government, and they were not obliged to take the usual oath. Thus, there was a procedural shortcoming in the appointment of those judges as well as professional differences in their work from *nizami* judges; this led to the poor functioning of these courts and loss of trust in them by the general public, who turned instead to unappointed tribal *sheikhs*.

In 1920, once the British mandate government started to change the legal system in Palestine, the organisation of these courts was implemented through the appointment as judges at these courts of individuals who were experts in customs and *ʿurf*. At that time sixteen members were chosen out of all of the southern tribes (*al-Turabeen*, *al-Tayaha*, *al-ʿAzazmeh*, *al-Hanajira* and *al-Jibayrat*) except for *al-Saʿidien* clan which was the smallest[37].

Despite the organisation of these courts, and their establishment in the Palestine Order-in-Council 1922, procedural shortcomings persisted in the judges not being furnished a letter of appointment in accordance with procedure, and not taking the oath before the relevant authorities.

3-1-1-2 Law of the Courts 1924

In 1924 a special law was promulgated on the composition of certain courts in Palestine and the delineation of their jurisdiction, based on chapter five of the Palestine Order-in-Council 1922. This law regulated the composition of *nizami* courts in Palestine and specified the jurisdiction thereof; as for tribal courts, Article 21 provided that 'The Chief Justice (*Qadi al-Qudah*) may, in consultation with the Governor of the Southern District, set procedure for tribal courts.'

Further, Article 22/1 of the same law stipulated that it was within the authority of the Chief Justice, with the approval of the High Commissioner, to issue an order specifying the fees to be levied by the above mentioned *nizami* courts in an appendix to the law (tribal courts were included in the text within these courts), or the fees to be collected by employees or by judges.

From the text of these two articles we can conclude that the Law of the Courts 1924 determined a special procedure for tribal courts that is different from the other courts, represented in granting full authority to the Chief Justice, in consultation with the

[36] 'Aref Al 'Aref, supra, p. 62.
[37] Ibid, p. 64.

Governor of the Southern District, in setting the procedure for tribal courts according to what they considered appropriate, and this for the following reasons:

- The British Mandate government worked on implementing a large number of legal regulations used in England and in English colonies in Palestine, but since tribal courts were unknown in England, the English legislator had no legal familiarity with the workings of these courts.
- The good social status enjoyed by the Chief Justice (who was of Palestinian origin and nationality) made him one of the overseers of procedural law for these courts; judges for tribal courts were chosen on the basis of knowledge, astuteness and social status that they had, and thus hereditary factors played a large part in the selection of judges in that period, as the judge was better placed to know these tribal matters than the British High Commissioner.
- Reliance on *'urf* and customs as the legal base for the work of these tribal courts meant that these customs had to be treated with some form of flexibility, so the Chief Justice was obliged to consult with the tribal *shaykh*s in order to determine the procedural law to be followed in these courts.
- Oversight by the Mandatory government of procedural laws of these courts was realised through providing that the Chief Justice could consult the Governor of the Southern District when laying the procedural law for these courts.

Therefore, since the promulgation of this law on 1/9/1924, membership in the tribal courts was dependent on a decision of the Chief Justice; letters of appointment were given to judges appointed in 1920 by the British High Commissioner Sir Herbert Samuel who went to Beersheba especially for the occasion, and the judges took the following oath before him: 'I swear by Almighty God that I will hold the balance of justice honestly and truly between the people without fear, love or bad intention'. A fee was set of twenty piasters per judge for every session, rising to fifty piasters by 1930[38].

3-1-1-3 Ordinance on the Formation of Courts 1932

The Ordinance on the Formation of Courts 1932 was a further step in the legal organisation of tribal justice during the British Mandate period. Article 5 provided as follows:

'One or more court(s) to be formed in the Beersheba district, and this court will constituted of three tribal *sheikhs* or more from Beersheba district, to view cases transferred to him by the head of the Central Court in Jerusalem or the district officer of the judiciary.
Tribal sheikhs are appointed through a clearance for appointment, which is issued by the Governor of the Southern District, by permission of the President of the Central Court. It is permissible for the Governor of the District to withdraw a clearance of appointment at

[38] 'Aref Al'aref, Supra, p. 68.

all time providing a sufficient reason and with permission of the President of the Central Court mentioned above.
If the Governor of the District withdrew the clearance of appointment from any sheikh he must report the matter to the High Commissioner mentioning the reasons which made him withdraw it.
A Tribal Appeal Court will be formed to view cases appealed through tribal courts in the district and will be formed with the district officer as chair and two sheikhs as members who will be appointed by the district officer providing they did not sit in courts which viewed the appealed cases.'

The purpose of this Ordinance was to organise the work of tribal courts in greater detail than the Courts Law of 1924. The above article 5 referred to the formation of one or more tribal courts in the Beersheba district to hear cases transferred by the Head of the Central Court in Jerusalem or district officer of the judiciary, as the Beersheba district court was under the jurisdiction of the Jerusalem Central Court (Article 2(a) of the same ordinance); cases of a tribal nature coming under Beersheba's jurisdiction would be transferred to these courts, so that their work became dependent upon transferral of cases to them by the head of the Jerusalem court, without Jerusalem being under their jurisdiction.
One of the most important changes brought about by the 1932 Ordinance was the introduction of a tribal court of appeal, due to the different legal nature of tribal courts from formal courts and the different legal referential framework of the work. A tribal Court of Appeal was constituted to examine cases appealed from tribal courts (the role of Tribal Court of Appeal will be discussed in detail later in this chapter during the discussion of procedure in courts).

Article 2(2) deals with the procedure of appointing tribal judges, an authority entrusted to the Governor of the Southern District with the approval of the head of Central Court; this brought to an end the Chief Justice's role in appointing tribal judges. The clause also gave the Governor of the Southern District the right to withdraw the letters of appointment from tribal judges, as long as he informed the High Commissioner of the reasons.

3-1-1-4 Tribal Courts Procedural Law 1937

Although Article 21 of the Courts Law 1924 had charged the Chief Justice, in consultation with the Governor of the Southern District, with setting procedural law for tribal courts, these procedures were not put in place until 1937. The procedural law regulated the work of the tribal courts in terms of place of convening, jurisdiction, appeal of rulings issued by them, and the manner in which cases were brought before them (these procedures are addressed in detail in the following sections due to their legal significance). These procedures applied until the end of the British Mandate.

3-1-1-5 Courts Law 1940

By virtue of Courts Law no. 31 of 1940, Courts Law of 1924 was explicitly repealed; Article 27 of the Law provided that: 'Laws set out in the second appendix to this Law are repealed'.

Equally, Article 24 of Courts Laws of 1940 stated that: 'It is permitted for the Chief Justice to consult with the Governor of the Gaza district to lay the procedural law for tribal courts and the tariff to be collected for taken procedures'.

The question that should be asked in this regard is whether the repeal of the Courts Law of 1924 resulted in the repeal of the Law of Procedure for Tribal Courts 1937, since the previous law was the legal basis for the subsequent law. The legislator's wont was to continue using the 1937 procedural law until the Chief Justice laid down new procedural laws replacing those issued in 1937. The legislator pushed for continuing to work with rulings issued in accordance with the repealed law. There are a number of reasons for this conclusion:

- The desire by the legislator not to bring about a legislative vacuum by repealing the 1937 procedural law without having a new law to replace it.
- The fact that the procedural law was not included among the laws that were explicitly repealed.
- The fact that the Chief Justice did not draw up a new procedural law repealing the 1937 law.

As well as the 1924 Courts Law, the 1918 Law of Procedure used in Beersheba and the 1918 regulation on tribal law were explicitly repealed in Article 16 of the Courts Law 1940.

3-1-2 Procedure in Tribal Courts

The foregoing shows the extent to which the work of the tribal courts in Palestine underwent legislative development from the start of the British Mandate until the Courts Law 1940. The Tribal Courts Procedural Law of 1937 holds a special place in this development as the law that laid down clear and defined procedural laws for tribal courts, following legal foundations required to clarify the formation and jurisdiction of tribal courts, the appeal of their rulings, and other details that are discussed in the following sections of this study.

3-1-2-1 Jurisdiction of Tribal Courts

Articles 3, 5, and 6 of the Tribal Courts Procedural Law 1937 define the jurisdiction of tribal courts. The basis of their authority was referral, that is, the transfer of cases to the tribal courts by the head of the Central Court or by the district officer. This meant that parties to a conflict could not have recourse to the tribal court on their own initiative, but had to go to the formal courts or to the district officer, who in turn would refer the dispute to the tribal courts should they see fit. Although Article 3 set out the basis of judicial jurisdiction for the tribal courts, it included certain exceptions which were to be borne mind when the article was applied, stipulating that a dispute could not be referred to the tribal courts in the following cases:

1. If the two parties or one party to the dispute was a resident of or originally from the town of Beersheba. Here we find the exception encompassed the people of the town of Beersheba, not the district of Beersheba, thus specifying the territorial jurisdiction of tribal courts to be over disputes where the individuals involved belonged to the people of Beersheba district (where the Bedouins live). They also had jurisdiction in cases where the disputed property was physically in Beersheba district, on the grounds that the court with jurisdiction is that of the place where the immoveable property is. This is confirmed by the unequivocal text on the 'town of Beersheba.' It is also confirmed by a ruling issued by the High Court of Justice (no. 89/929) in regard to disputed jurisdiction as between the tribal court and the land court: 'in light of the absence of deeds of land ownership in the Beersheba area, and in view of the necessity of producing a deed of ownership according to Article 24 of the Magistrates Law, it appears that a case such as this is among the claims intended for application of tribal custom according to Article 45 of Palestine Order-In-Council. The ruling of the land court is accordingly abrogated.' Similarly, it is confirmed by Article 2 which made the district of Beersheba the place that tribal courts would be convened.
2. If the accused was charged with murder, whether intentional or unintentional.
3. If the minimum specified punishment was more than 25 pounds or a prison term of more than three months.

Article 3 authorised any police officer of a rank not less than Deputy Inspector, or any person who stood to be harmed as a consequence of the dispute being referred to the tribal court, to appeal the decision of referral to the Central Court; the tribal court was forbidden from hearing the case until the appeal had been settled. The same article also constrained the tribal court from issuing rulings in criminal cases imposing a fine of more than 50 pounds, or imprisonment for more than three months.

A consideration of articles 5 and 6 shows that they also placed two exceptions on the work of tribal courts. The first, in article 5, concerned criminal cases, and the text was a word for word repetition of the provision regarding the last exception of article 3 referred to above. The second, in article 6, concerned civil cases and provided that 'the tribal court shall not rule on cases of ownership of immovable property, but it may issue the decision it considers just with regard to taking possession of such property.'

As for the territorial jurisdiction of the tribal courts, article 8 provided that they had jurisdiction over claims occurring in the Beersheba district, other than those coming under the jurisdiction of the *shari'a* courts and the magistrates courts.

The same Article explained that 'a claim occurring in the Beersheba district' meant claims where the petitioner was resident in the Beersheba district or the disputed property was in the district, provided this did not conflict with the terms of article 3 of the law (that is, the exceptions referred to above).

3-1-2-2 Appealing decisions issued by the tribal court

The Tribal Courts Procedural Law 1937 indicated two types of appeals in relation to the work of these courts:

1. Appealing a decision to refer the dispute to the tribal court: this form of appeal would include an objection from the person referred to in article 4 (a police officer of a rank not less than deputy inspector, or anyone who stood to be harmed as a consequence of the dispute being referred to the tribal court). The objection was heard before the Beersheba Central Court, with the tribal court forbidden from examining the case or dealing with its content for a three month period from the date of the appeal. An appeal here does not respond to a decision or ruling issued by a tribal court, but rather to the decision to refer.

An examination of the terms of articles 3 and 4 of this law reveals is a repetition in the text regarding appealing the referral; article 3 states that the tribal court was not allowed to examine the case until after the appeal had been resolved, while article tribal court was not allowed to examine the case until after the appeal had been resolved, while article 4 provides for a three month period during which the tribal court could not hear it. A close look at the texts of the two articles allows us to conclude that the tribal court was not allowed to examine the case until there had been a decision on the appeal, provided that this process lasted no longer than three months.

2. Appeal of decisions issued by tribal courts: according to Article 7, appeals against decisions issued by tribal courts were heard by the Tribal Court of Appeal. In criminal cases it was permitted to appeal decisions issued by a Tribal Court if the sentence included a fine of more than five pounds or imprisonment for more than

seven days. In civil cases it was permitted to appeal decisions issued by a tribal court if the value of the subject of the claim was ten pounds or more. In all cases it was permitted to appeal decisions issued by tribal courts in civil and criminal cases, whatever the value of the subject of the claim or the sentence imposed by the court, if permission to appeal was obtained from the tribal court. In cases where appeal was permitted against their decisions, the tribal courts were obliged, when issuing their ruling, to inform the affected party of the right to appeal. The reason for this is that, unusually, lawyers were prohibited from pleading on behalf of parties before the tribal court or the Tribal Court of Appeal (Article 9); hence, the law assumed that both sides of the dispute were unaware of their rights.

3-2 Jordanian Rule of the West Bank

Because of the different legal systems prevailing in the East and West Banks (the Continental system in the former and the Anglo-Saxon system in the latter), and in implementation of the 1952 Jordanian Constitution, the Jordanian legislator set out to unify the legal system in the two Banks, by way of repealing most British Mandate regulations and laws in force in the West Bank and applying Trans-Jordanian laws to it instead.

In Trans-Jordan, tribal law had been dealt with in legal fashion, codified through special courts that used tribal *'urf* drawn from the distinctive Bedouin tradition of that region, which could not be easily ignored when considering the administration of these areas. The work of these courts was restricted to a particular territorial area, and is not going to be discussed in this study, since the West Bank was not included.

Social change followed the mass refugee movement of the Palestinian people after the 1948 *nakba*, with many of the residents of southern Palestine moving to parts of the West Bank, particularly the south of the West Bank, taking with them their '*urf*, social and cultural heritage. In addition, the geographical proximity of the south (Beersheba) to the Hebron area meant that work with tribal justice transferred to the Hebron area in particular.

When researching the legal system during the Jordanian rule of the West Bank, the researchers found no legislation regarding the work of informal justice. Does this mean that the legal system during the Jordanian rule of the West Bank did not recognise the existing social reality as embodied in the prevalent work of informal justice?

To answer this question we must touch upon Penal Law no. 16 of 1960 as well as certain judicial applications related to this on the criminal law level. To begin with, it must be pointed out that the legislative policy of the Jordanian legislator was not directed at codification of informal justice work in the West Bank, even indirectly; the proof for this is the Jordanian legislator's explicit direction in codifying tribal justice in certain areas of

Trans-Jordan. The policy was to grant the *nizami* judge a wide discretionary authority in assessing criminal rulings, with a margin of movement in the penalty set in the text between the maximum and minimum limits. It was here that the work of informal justice came in, through the interpretation of formal judges in assessing criminal penalties and through their being influenced by the social and security realities prevailing in the West Bank. This will be seen clearly when we address judicial precedents acknowledging the work of informal justice.

3-2-1 Penal Code no. 16 1960

Upon examining this law nothing could be found which pointed to the codification of informal justice. Nevertheless, as noted above, Jordanian legislators could not ignore the social reality of the people of the West Bank. Hence the Jordanian legislator was influenced by the work of informal justice when they prepared legislative policies, knowing that during this period the dominant mode of the work of tribal justice was confined to *islah* men, who contributed greatly to the preservation of general security and public order (representatives of informal justice in the West Bank concurred on this point). Thus the executive authority gave them support and consolidated their social role, as well as judicial contribution to their work. Great reliance was placed on the solutions they reached, which were taken into consideration when penalties were imposed on perpetrators. Thus, in the Penal Code we find indications of the Jordanian legislators being influenced by the work of i*slah men,* as in the following texts:

Article 52: Pardon from the side of the victim gives rise to suspension of the action and the implementation of penalties that have been ruled for but have not reached the level of a final ruling, where the raising of the action depends on it taking the nature of a personal claim.

Article 53: Pardon is irrevocable and unconditional.

Pardon of one sentenced person includes the others.

Pardon is not considered if there is a plurality of claimants for personal rights, unless it issues from all of them

Article 99: If there are mitigating reasons in the case the court shall rule:

Instead of the death penalty, hard labour for life or temporary hard labour for 10-20 years.

Instead of life hard labour, temporary hard labour for not less than eight years, and instead of life imprisonment, imprisonment for a period of not less than eight years.

The court may reduce every other felony sentence to half.

Apart from in cases of repeat offences, the court may reduce any penalty the minimum of which is three years to imprisonment for one year minimum.

Article 100: If the court accepts mitigating reasons to the benefit of the person who committed a misdemeanour, it may reduce the penalty to the minimum as set out in articles 21 and 22 at the least.

The court may commute a prison sentence to a fine or, apart from in cases of repeat offences, commute the misdemeanour penalty to a contravention penalty.

The decision allowing mitigating reasons shall be thoroughly explained, whether in felonies or misdemeanours.

It is noticeable that these articles come under the headings 'lapse of criminal rulings' (articles 52 and 53) and 'reasons mitigating the penalty' (articles 99 and 100). These are the two effects that the legislator wanted to include for several reasons "into which comes the work of the informal judiciary." As is known, criminal cases include two rights – the public and the personal. The personal right is the right initiated by the victim or his representative; hence he has to right to waive it. However, the public right is initiated by the prosecution on behalf of the state and may not be waived.

Pardon by the injured party and lapse of the criminal action

By looking at the text in Articles 52 and 53 mentioned above, it becomes apparent that the Jordanian legislator acknowledged that pardon by the injured party leads to termination of the State's right to pursue the accused, and means that measures necessary to move the case are not taken, as well as vitiating the states' right to execute the sentence ruled for. This was however acknowledged for specified crimes[39]; this includes halting pursuit and interrogation of the accused, halting procedures of judicial claims, and halting the implementation of penalties that have been ruled for but have not acquired the status of final rulings, where the laying of the claim is dependent on taking the form of personal claims. This is an exception from the basic rule that gives the right to the state's appropriate agencies to undertake measures of pursuit, investigation, initiation of the case and implementation.

In this context, the pardon is a sort of an entry-point through which informal justice can operate as law. Representatives of informal justice play a fundamental role in bringing together the different points of view of the parties in dispute, obliging the perpetrator or his family to pay the tribal remuneration owed by him, which contributes to a large extent in reaching the stage of pardon.

Pardon by the injured party gives rise to a number of effects:

[39] This is provided for disparately in the Penal Code; as identified in this study, relevant provisions are to be found in the texts of articles 42, 235, 284, 286, 308, 334, 347, 348, 354, 364, 415, 416, 422, 424, 425, and 426.

- Halting claim proceedings, that is stopping the initiation and pursuit of the claim and other measures of pursuit and investigation related to this.
- Suspension of execution of a sentence that has not reached the stage of a final ruling (that is where not all avenues of appeal have been exhausted and a challenge is still permitted) if raising the claim depends on taking the form of a personal claim.
- Pardon of one sentenced person includes the others.

  Pardon is not considered unless it issues from all claimants for personal rights
- Pardon is irrevocable and unconditional.
- Pardon has no effect once the final ruling has been issued and implementation of the sentence has commenced, except in narrow exceptional circumstances.

Further, it should be noted that other sentences outside those mentioned above also lapse by conciliation between the parties to the dispute providing it is accompanied by a medical report certifying that the medical injury and incapacity resulting from the assault do not exceed ten days; this is because of the lack of severity of the crime committed.

3-2-2 Circumstances mitigating punishment

Mitigating reasons are the mitigating judicial circumstances the evaluation of which the legislator left to the discretion of the judge, to allow for the reduction of the legally stipulated sentence in accordance with the facts of the case. The judge enjoys wide discretionary authority in setting out the reasons and circumstances that lead to mitigation.

Article 99 and 100 of Penal Code (Law no. 16 of 1960) refer to an explanation of the scope of the mitigating reasons, and give the judge wide discretionary authority to evaluate the circumstances of the crime and the financial effects arising from it. Mitigating reasons are confined to felonies and misdemeanours.

The legislators correctly did not set out the mitigating reasons, in order to give the judge the widest margin for manoeuvre in dealing with social and legal circumstances of the action perpetrated. Research into the decision and rulings of the Court of Cassation will show the impact of reconciliation between the parties to the dispute in reducing the set penalties, within the scope defined by the law. As a nizami judge put it, the judge 'is affected by the social reality that he lives in, without deviating from the terms of the law, as the purpose of penalty is not revenge on the perpetrator by the realisation of an element of deterrence and protection of the public order. Hence what is wrong with reducing the penalty by reconciliation, especially as this might achieve the desired objective' (*nizami* judge in a central West Bank governorate). Judicial practice has settled on mitigating the penalty through reconciliation to the limit determined by the law. Also,

if the judge insists on adhering to the letter of the law and is severe in his punishment, this might lead to grave risks, as tribal *urf* and customs require the family of the perpetrator to go directly through representatives of informal justice to appease the family of the victim by acknowledging the tribal right that arises against them and paying for it, in order to achieve two objectives:

1. to avoid reactions of revenge from the other party and thus preventing the bloodshed that might occur as a result of the anger felt by the victim's family at that stage.
2. to try to achieve a reason mitigating the stipulated sentence before the regular courts.

3-2-3 Crimes of assault on honour

The first section of the seventh chapter of the Penal Code 1960 determines the legal penalties for crimes of assault on honour. At the end of this section, article 308 provides an indirect legal basis for the work of informal justice with regard to these particular cases in Palestinian society. The article provides that: 'if a valid marriage is contracted between the perpetrator of one of the crimes mentioned in this section and the female victim then the prosecution is halted, and if a ruling on the case has been made then implementation of the penalty imposed is suspended.' It is known however that honour cases are dealt with great particularity by representatives of informal justice; mostly this type of crime is contained through the efforts of the *islah* men to conclude a marriage between the accused and the victim. This comprises a clear prejudice against a young woman who has been assaulted twice, firstly through the accused's sexual assault and secondly by being married off to her assailant even if this is not acceptable to her, on the pretext of preserving the family honour. Although many representatives of informal justice deny that they make use of such solutions, they persist in such tendencies.

3-2-4 Judicial rulings

In studying many rulings from the Jordanian Court of Cassation and the Court of Criminal Appeal in the West Bank[40] during the course of this study, the researchers noted the significant legal impact of conciliation and the waiving of personal rights in the lapsing or reduction of the penalty, as set out in the Penal Code.

In decision no. 828/73 of 5th February 1974, the Court of Criminal Appeal held that 'a personal waiver by the complainant constitutes a mitigating reason which requires the reduction of the sentence in accordance with article 100 Penal [Code] 1960.'

[40] See Court of Cassation rulings nos. 43/73, 69/77, 22/70, 6/66, 25/58, 86/75, 77/75, 60/75, 60/57, 169/80, 69/82 and decisions of the Court of Criminal Appeal 13/77, 1003/77, 200/76, 828/73, 98/74, 57/73, 133/74.

This decision employs the word 'requires', meaning that the judge is obliged to mitigate the sentence based on *sulh*. This conflict with the text of article 100 which employs the phrase 'may' – that is, the judge is free to allow mitigation. However, we don't find a contradiction in this context, since the practical reality of judicial decisions has settled on the mitigation of penalty based on tribal *sulh* between the parties to the dispute.

Decision no. 200/76 of the Court of Criminal Appeal included the following:

'It is up to the discretion of the court in the case to state that there is a mitigating excuse, although this is naturally constrained by the need for something on which the court can rely in stating that this exists, based on something that can be concluded from it rationally and logically.'

From the foregoing we can conclude the following:

- waiving the personal right is considered a reason mitigating the penalty, but the evaluation of this is at the discretion of the court; it is deduced through logical and rational processes of the judge.
- If the waiving of the personal right is considered by the court to be a mitigating reason, the court is obliged to reduce the penalty without exceeding the limits set by the law.

3-3 Period of Egyptian Administration of the Gaza Strip

The situation in the Gaza Strip was not very different from that in the West Bank in regard to informal justice, with the following particularities that distinguish Gaza:

- Historically, Gaza had close connections with the population of the northern Sinai and el-Arish, where there are large numbers of nomadic Bedouins, and this led to the spread of tribal justice practices.
- Most of the Bedouins who migrated from Beersheba area went to the Gaza Strip, taking with them their customs and '*urf*; many of the tribal shaykhs continued working in tribal justice in the Gaza Strip, particularly in the southern parts.
- The administrative nature of Egyptian rule in the Gaza Strip meant that they continued to use all the pre-existing laws and regulations and that the laws and customs prevailing in the Gaza Strip were respected.

The uncodified tribal justice that was practised widely in Gaza during this period, particularly in the southern areas, must be distinguished from the impact on the formal legal system of tribal solutions that proceeded on the social level.

On the tribal level the research shows that there were two classes of tribal justice during that period, in the sense that it was practised by two clans: the Qla'iya, who are the original inhabitants of the Rafah/Khan Younis area, and the Turabin, Bedouins who migrated in the aftermath of 1948 *nakba* and are known as *blood qassasis* (tribal judge from Gaza Strip).

As to the legal system and the extent to which it was influenced by tribal solutions, the research did not show a large difference from what has already been noted in regard to the West Bank during Jordanian rule. A brief reference should be made to the Penal Code no.74 of 1936, article 42 (1) of which provides that: 'If a criminal was convicted of a felony incurring the death penalty, he may not be sentenced to a different punishment'. Thus, we find that the law deals with crimes warranting the death penalty without being influenced by any tribal *sulh* that may have taken place, or by the waiving of personal right for a reduction in sentence. This was the sentence set for the crime of intentional murder according to the article 215 of this law.

Article 42 (2) allowed the court to call on prevailing tribal customs and *'urf* when assessing a fine for the crime committed, where this is not determined in the law; the same clause gives further details on this, referring to the court's wish to replace a physical punishment stipulated by law with a financial penalty that is not explicitly determined in the law: 'Once the accused has been sentenced to the punishment determined in this law or any other legislation, it [the court] may replace it with the punishment familiar in tribal *'urf*, providing that such does not contradict the principles of natural justice or public morality.'

Thus, the judge who wishes to replace a physical punishment with a financial penalty in accordance with the terms of this article has to observe two things:

- Investigate tribal '*urf* in order to know the value of this penalty;
- Not to contradict the principles of natural justice and public morality when assessing the fine; this means that the *nizami* judge is given the discretionary authority to select this penalty through his investigation of the extent to which it conforms with the requirements of natural justice.

Article 43 (2) allows the court to rule for compensation for the victim for the harm that has been inflicted, providing that such ruling would not affect the victim's right to obtain *diya* or compensation in place of *diya*. Thus it becomes apparent that the terms of this article do not take into consideration, when assessing the amount of compensation for personal harm, the value of the *diya* that the victim obtains from the perpetrator. In practice, *diya* is obtained through the work of *islah* men at the termination of the dispute between the parties.

Article 46 (1) explicitly refers to mitigating circumstances and their effect on the release of the perpetrator, through commuting a prison sentence into release on bail.

An examination of legal precedents shows that they concurred on considering *sulh* to be one reason for the reduction of penalty and took it into account when assessing the sentence. In its decision no. 22/51 (1952), the High Court of Appeal held as follows: 'After hearing the pleading of both sides and examining the papers of the case, having regard to the circumstances of the case, the family circumstances of the accused, and the achieving of reconciliation between the rival parties, and given that the medical report notes that future improvement is expected in regard to the incapacity that afflicted the victim as a result of the blow which caused an estimated 10% paralysis in his hand, the court found for a reduction in sentence'.

3-4 Period of Israeli Occupation of the West Bank and Gaza Strip

During this period there was continued application of the above-mentioned laws related to the work of informal justice used under Jordanian rule of the West Bank and Egyptian administration of the Gaza Strip. There was thus no legal change on the structure of informal justice work.

3-5 Period of Palestinian Authority Rule

On 13th September 1993, the Palestine Liberation Organisation and the Government of Israel signed the Declaration of Principles which became known as the Oslo Agreement. The Agreement constituted the legal basis for subsequent agreements signed between the two sides, with the aim of establishing a Palestinian Authority (Palestinian self rule) in the West Bank and the Gaza Strip for a period of five years, during which final status negotiations would be held between the two sides. This was followed by the Cairo Agreement by virtue of which the Israeli occupation army was redeployed in limited areas of the West Bank and Gaza Strip. The Palestinian National Authority was established to exercise its executive, legislative and judicial authority within its territorial limits.

This enabled the Palestinian people to exercise certain of their rights of sovereignty through its sole legitimate representative (the PLO). The differing legal heritages of the West Bank and Gaza Strip made it a difficult task for the Palestinian National Authority to organise its administration of the two areas. This obliged the PNA to deal with the existing legal situation and to proceed with incremental legal unification of the West Bank and the Gaza Strip. Presidential decree no. 1 of 1994 thus provided that laws, regulations and orders in force before 5 June 1967 in the West Bank and Gaza Strip would continue to apply until unified in one legal framework.

During this period informal justice was practised widely in the West Bank and Gaza Strip. The question that is raised here is how the PNA dealt with informal justice, and whether it took a different route in dealing with it from that taken during Jordanian rule of the West Bank and Egyptian administration of the Gaza Strip.

In order to answer this question we must examine the Code of Criminal Procedure (law no. 13 of 2001), the draft Palestinian Penal Code, the body of rules, regulations and decisions issued by the PNA and the PNA's administrative bodies, insofar as these related to informal justice work. We will not go into the civil laws related to this subject as the scope of the study is confined to the criminal law aspects of informal justice.

Before going into the details of these laws, it should be noted that many fundamental legal principles were incorporated in the amended Basic Law 2003 as the basis of the legal regime in Palestine, and any law, legislation or procedure that contradicts the provisions of the Basic Law is void. Article 11 of provides for the respect of personal freedom, stipulating in its second paragraph that: 'It is unlawful to arrest, search, imprison, restrict the freedom, or prevent the movement of any person, except by judicial order in accordance with the provisions of the law. The law shall specify the period of pre-arrest detention. Imprisonment or detention shall only be permitted in places that are subject to laws related to the organization of prisons.'

Article 15 of the law provides that: 'Punishment shall be personal. Collective punishment is prohibited. Crime and punishment shall only be determined by the law. Punishment shall be imposed only by judicial order and shall apply only to actions committed after the entry into force of the law.'

The two above-mentioned articles lay down two very important principles. The first is that the restriction of any individual's freedom or prohibition of an individual's movement is allowed only if based on judicial order. From the cases that were the subject of this study (see annex 6) it was clear to us that the penalties of exile and prohibited presence specified in the deeds of *'atwa* or *sulh* were determined in informal justice work, with no recourse being had in this to the formal courts. The second principle is the prohibition of collective penalties and the confining of penalty to the person of the perpetrator alone. Nevertheless, the study showed that the distinctive character of penalties determined in the work of informal justice is their collective nature. The penalty of exile extends to the clan-based 'five' of the perpetrator (relatives to the fifth degree), while the reactions of the victim's family (the 'boiling of the blood') target the property of the perpetrator and of his family on an equal level, not to mention the financial penalties which the sons of one family will usually contribute to paying. It should be noted that many representatives of the executive authority and certain members of the legislative authority support the enforcement of these types of penalties, through their participation in the work of informal justice or their formal attendance at s*ulh* sessions held to add the standing of the governing authority to the decisions that are reached.

It is also worth noting that the Elections Law (law no. 13 of 1995) contributed to the election of many Palestine Legislative Council (PLC) members on a family and tribal basis, at the expense of the political and professional side required for election. The areas included in the elections were divided into sixteen constituencies for the election of 88 members to the PLC. The electoral system of separate constituencies was used rather than that of one single constituency, opening the way for the emergence of tribalism (article 5 of Elections Law no. 13 1995). It was enough for the candidate to have a numerical clan majority in his constituency without being concerned about the demands of political and legislative work; this turned him from being a representative of all sectors of society into being a representative of the members of the constituency who nominated him. Further, an alliance between two or more clans in one electoral constituency would guarantee the election of whomever the clans agreed on. The experience from the legislative election showed that the candidates' election campaign headquarters were in family *diwan*s or associations that represented the members of one tribe or one town, something that greatly added to the tribal character of these elections.

The 1995 Elections Law used the principle of simple majority and not that of proportional representation under the guise of providing broad opportunity for independent candidates to enter the field of political and legislative work, away from the dominance of large political parties. This is shown in the fact that many members of the political leadership of the Palestine Liberation Organisation chose to stand in electoral constituencies where their clan and family were from and where they made up large numbers, in order to guarantee their success in the elections to the PLC, relying on the clan support afforded them rather than on their history of politics and struggle.

The Palestinian Elections Law no. 9 of 2005 did not deviate much from this tribal dimension; it increased the number of PLC members to 132, half of whom were to be chosen on the basis of separate constituencies (simple majority) and the other half on the basis of the single-constituency system i.e. proportional representation.

A discussion of the legal basis for the work of informal justice during the PNA period calls for examination of the following laws:

3-5-1 Code of Criminal Procedure no. 31 of 2001

The Code of Criminal Procedure 2001 lays down the rules and procedures to be followed in criminal trials. The law has contains various provisions that provide the ground for informal justice work, comprising the impact on procedures in criminal courts by reconciliation between the parties to the dispute and by the waiving of personal rights by the victim or his guardian. Article 1 of this law provides for monopoly by the prosecution over raising and processing criminal actions, with the exception of certain situations specified by the law. These are situations where the right to bring the criminal action depends on the laying of complaint by the victim or his guardian, consistent with the

situations referred to previously in the discussion of pardon by the injured party and the lapsing of the criminal action during the period of Jordanian rule in the West Bank.

Thus, it is not possible for informal justice to intervene in the public right procedures followed in situations where the criminal action is initiated and undertaken by the prosecution. Article 16 of the Criminal Procedure Code obliges officers of the judicial police to propose s*ulh* to parties to the dispute in cases of contraventions and misdemeanours that incur only fines. According to article 21, this includes the Chief of Police, his deputies and assistants, the governorate and general administration chiefs of police, ranking police officers, and all employees granted the authorities of judicial police officers by virtue of the law. In practice, the s*ulh* procedure takes place before officers of the judicial police through the activity of representatives of informal justice on the grounds of containing and controlling the dispute.

Chapter 8 of the law regulates release of the accused on bail in articles 130–148. The specific conditions of release on bail are not given, indicating the extent of discretionary power given by the legislator to the court in initiating and using this right. The results of field research for this study reveal clearly the importance of ongoing procedures of tribal s*ulh* on the release of the accused on bail; it was noted that *sulh* procedures were inevitably underway when a request was made for release of an accused on bail. Articles 195, 196 and 197 deal with the right of the victim to bring an action for the civil right accompanying the criminal action. By virtue of such an action, the victim or his guardian can seek material compensation for incapacity and harm inflicted as a result of the crime. Article 197 allows the person bringing a personal right action to waive his claim in any case that the claim is founded upon, without this affecting the ongoing proceedings of the criminal case. In practice, when a tribal *Sulh* decides upon a cash compensation for the victim or his guardian, this is considered equivalent to waiving the personal right before the formal courts, and consequently as a dropping of the civil action for the civil claim accompanying the criminal action, as it is considered that the accused or his guardian has obtained the financial compensation for incapacity and harm resulting from the crime.

3-5-2 The Draft Palestinian Penal Code

In the Draft Palestinian Penal Code, the legislative policy of the Palestinian legislator tends towards allowing the work and decisions of the *nizami* courts to be affected by decisions issuing from the informal judiciary. A comparison of the text of the Draft Penal Code with Penal Code no. 16 of 1960 and law no. 74 of 1936 shows that, without a shadow of a doubt, the Palestinian legislator is no different in the matter of taking into account informal justice decisions. Articles 51 and 33 of the draft Palestinian Code provide as follows:

Article 15: In felonies, when the circumstances of the crime so require, the court may show mercy to the accused by commuting the penalty as follows:

A- Instead of the death penalty, life imprisonment or imprisonment for a fixed term of not less than five years

B- Instead of life imprisonment, a fixed term of imprisonment

C- Instead of a fixed term of imprisonment, a prison term of not less than one year.

Article 33: When the court rules for a fine or for a prison term of not more than one year, it may order in the sentencing decision that the penalty be suspended in accordance with the terms and conditions set out in the following articles, if it finds that the morals of the accused, his past, his age or the circumstances in which he committed the crime induce the belief that he will not break the law again. The ruling shall set out the reasons for the suspension of the sentence. The suspension may be made inclusive of any secondary penalty and all effects arising from the sentence, bearing in mind the terms of article 38 of this law.

It appears to us that the texts of these two articles show no substantive differences from articles 99 and 100 of the 1960 Jordanian Penal Code discussed above. To clarify this, we need to examine what is meant by the 'circumstances of the crime' according to general criminal law principles. The term 'circumstances of the crime' is defined as 'elements that may or may not attach to the crime; the absence of these elements do not affect the fact that the crime has been committed, but in the event that they are present, the result is a modification of the sentence, whether by increase or reduction.'[41]. There are two types of circumstances of the crime; the first type comprise circumstances that change the description of the crime while the second comprises circumstances that change the sentence determined for the crime by either reducing or decreasing it. In this context, this study is concerned with the second type, which does not go into the constitutive elements of the crime. These circumstances may be related to the criminal past or criminal capacity of the accused, or circumstances where the community's best interest is served by not imposing the penalty or by reducing it. Undoubtedly, the community's best interest might require the work of informal justice to preserve public peace and order; this might lead the formal judiciary to reduce the sentence stipulated in the law in accordance with circumstances that change the sentence, including tribal *sulh*.

From the above, it is clear that the draft Palestinian Penal Code gives the judge discretionary authority to reduce the sentence stipulated in the law, based on decisions issued by the representatives of informal justice, and within the limits of the minimum stipulated penalty, without changing the legal description of the crime.

[41] Majali, Nizam, supra, p. 56.

3-5-3 Establishment of the Tribal Affairs Department

In an unprecedented step on 9 November 1994, the late president Yasser Arafat issued Presidential Decree no.161 of 1994[42]. The decree established a Department of Tribal Affairs within the President's Office. This Department proceeded to draw up internal directives regulating its work and to prepare internal structures determining the administrative status of its workers and specifying a number of conditions and requirements for *islah* men and tribal judges working throughout the Palestinian governorates. From its inception, this Department strove to be an administrative centre for all those involved in informal justice throughout the governorates of the West Bank and Gaza Strip. It sought to address them through central *sulh* Committees, which it initially tried to set up in all the governorates in an attempt to contain and regulate the work of informal justice. However, it failed in this due to the lack of response in various of the governorates, especially those in the West Bank, and also due to the multiplicity and variety of *sulh* committees working in the West Bank and Gaza Strip. Thus, in Gaza there were *Sulh* Committees under the Ministry of Awqaf and Religious Affairs, *sulh* Committees under the Ministry of Social Affairs, others under the Ministry of Interior, and Central *Sulh* Committees under Fateh, Hamas and Islamic Jihad. There were also *sulh* committees in certain urban centres (local neighbourhood committees) in the Gaza Strip. Furthermore, many of the governorates in the West Bank and Gaza Strip did not cooperate with the Department of Tribal Affairs when the governorates organised the work of their central *Sulh* committees. This in turn resulted in the absence of legal and administrative organisation that is needed to regulate and contain the work of informal justice, for which the Department of Tribal Affairs was established.

In 2004, the Department of Tribal Affairs succeeded in establishing Central *Sulh* Committees in the governorates of Nablus, Jenin and Salfit, on the basis that the headquarters of the West Bank Central *Sulh* Committees would be in Jenin governorate. However, these committees did not reach the stage of centralised administrative work in the West Bank, the reason being the lack of legal administrative structure governing the work of the *sulh* committees in the West Bank as is the case in the Gaza Strip, where the Department worked on issuing a number of rules and regulations which contributed substantively to organising the work of some representatives of informal justice.

In sum, the presidential decree provided a direct legal basis for the work of informal justice, and it did not specify the powers or scope of the Department's work. This meant that it gave the Department greater flexibility and freedom of movement in regard to the specificities of its work; the Department itself specified the type of disputes that it would examine. An internal memorandum issued by the Department on 28 October 2003 (no. 230) gives the central *sulh* committee general jurisdiction in all criminal and civil disputes, with the exception of drug cases, illegal arms dealing, sodomy, embezzlement of public funds, bribery, illegal commission and security cases.

[42] Official Gazette no. 3, 20 February 1995, p.24.

The question that might be asked here is: does the PNA have a clear legislative policy with regard to the work of informal justice?

This study has arrived at the conclusion that the work of informal justice is as widespread as the work of the formal justice system in terms of both prevalence and the size of the disputes that it resolves. However, the Palestinian legislator has not followed specific legislative policies in dealing with informal justice. The study has found a small number of legal texts in the draft Palestinian Penal Code and the Code of Criminal Procedure that give the judge discretionary powers in reducing set penalties, and usually this is the framework in which deeds of *`atwa* and *sulh* are dealt with. Apart from that, the Palestinian legislator has not developed a clear policy to deal directly or indirectly with the work of informal justice, and has not taken into account the social and legal reality of Palestinian society as represented in the un-ignorable prevalence of the work of informal justice. The Palestinian legislation has not demonstrated a clear policy towards codifying, controlling, or containing the work of informal justice, or even abrogating it, in disregard of the requirements and the needs of Palestinian society in this regard.

As is known, the legal rule on the one hand reflects a social reality and a fulfilment of society's needs, and on the other, through influencing this reality, raises the organisational and social level for this society to the benefit of the individual and the group in the short and long term. On the contrary, the Palestinian legal system is clearly contradictory insofar as the above-mentioned legal texts related to the work of informal justice are concerned. Thus, article 9 of the Basic law as amended 2003 provides that: 'Palestinians are equal before the law and the judiciary, with no discrimination between them on grounds of face, sex, colour, religion, political opinion or disability.' Article 11(2) provides that: 'It is unlawful to arrest, search, imprison, restrict the freedom, or prevent the movement of any person, except by judicial order in accordance with the provisions of the law. The law shall specify the period of pre-arrest detention. Imprisonment or detention shall only be permitted in places that are subject to laws related to the organization of prisons.' Article 15 provides that 'Punishment shall be personal. Collective punishment is prohibited. Crime and punishment shall only be determined by the law. Punishment shall be imposed only by judicial order and shall apply only to actions committed after the entry into force of the law.' Furthermore, one should not ignore the principle of the separation of powers which is considered one of the most important basic pillars on which a rule of law state is based. The above mentioned texts clearly contradict the Presidential Decree no.161 of 1994, by virtue of which the Department of Tribal Affairs was established as a reference for the work of informal justice in Palestine, without specifying its brief, as if we had an undefined judicial structure with a legal dimension added to suit the more important social dimension.

4. Representatives of Informal Justice

This side of the study addresses the social background of the representatives of informal justice, in as much as their economic situation, level of education, size of their tribes and legal affiliations, in a way which considers the geographic, historic and economic distinctiveness they come from in the West Bank and the Gaza Strip. This will become clear later on in the study.

4-1 Definition of Representatives of Informal justice

Tribal Judge: the person who specialises in solving disputes presented to him, through issuing a final verdict to both parties that is based on customs and tribal *ʿurf* and through the accreditation of proofs and conjunctions / connections presented to him by the parties to the disputes such as *bashʾa*– in former times- oath, and statements (for more details see annex no. 7)

***Islah* Man:** the person who seeks to solve conflicts between two parties through bridging the gap between their points of view, utilising his personal qualities such as the ability to convince, eloquence and good reputation, in order to come out with a formula for a conciliatory outcome to their demands, relying on a number of sources the most prominent being *ʿurf* and customs.

4-1-1 Assumed and actual characteristics of tribal judge

Assumed characteristics: An active tribal judge in the Gaza Strip defined the tribal judge as the person who has 'A pin, standing, and money; he has knowledge, strong and good support' (see annex 7). A tribal judge is assumed to have a number of characteristics which qualifies him to work in this field, such as inheriting the position, be a member of a strong and large clan that supports him and implement his orders when necessary; having a respected standing which will qualify him to be obeyed; good financial position and to be knowledgeable in tribal *ʿurf* and customs. A tribal judge who has these characteristics is qualified to resolve disputes among people, through issuing final and binding verdicts.

Actual characteristics: through the interviews that were conducted with a number of tribal judges, it became clear that the actual characteristics of the tribal judges can be summarised in having a good financial position; four of those interviewed - in the Gaza Strip and south of Hebron - have an excellent financial position, two had a good financial position and three had an average financial position. This led to the conclusion that poor people can not afford to work as tribal judges, because such work has financial burdens such as transport costs and hospitality which poor people cannot afford.

Apart from a good financial position, all of the tribal judges that were interviewed are well known for their ability to solve disputes that are put before them. They also have a good standing in their tribe and in the areas that they are active in. All of them have a total knowledge of tribal customs and '*urf* which was passed on from one generation to another, and through mixing with tribal judges.

4-1-2 Assumed and actual characteristics of islah man

4-1-2-1 Actual characteristics

An active *islah* man in one of the governorates in the centre of the West Bank defined an *islah* man as having clean hands, clean mouth and tongue. Interviews showed that there are a number of characteristics that should be available in an *islah* man which would qualify him to work in this field. An *islah* man should have a good financial position; be a member of a strong family or tribe that would support him and stand behind him; to have good relations with official institution in the governorate and security forces (one of the heads of security forces in southern West Bank), providing his relationship with the security forces doesn't produce a feeling among people that his work is part of the security forces (*islah* man in northern West Bank). *Islah* men should have a strong personality, presence and a strong ability of persuasion and also have a wide social network. One of the examined *islah* men who belonged to the Islamic current added that an *islah* man requires knowledge and morals and should be aware of the demands of religion and its teachings so he would fear God (Allah) when doing his work and consider the interest of society.

4-1-2-2 Actual characteristics

It became clear during the field work that the above mentioned assumed characteristics are not absolute standards that have to met for someone to work in this field and therefore have to exist in an *islah* man; they could be considered as guidelines to be qualified for working in this field, and can be summarised as having a strong personality, eloquence and ability to convince and wide social relations, good financial position, knowledge of tribal urf and customs, as well as knowledge of the rules of the Islamic *shari'a* in relation to the *hudud* and punishments in Islam. An *islah* man has other characteristics, such as belonging to a large and strong *hamula* that backs and supports him, and good relationships with official agencies. Any additional distinctive qualities facilitates the *islah* man's work in examining and resolving the dispute through bridging the gap between the parties' respective positions.

4-1-3 The difference between a tribal judge and an *islah* man

During the interviews it was noted that there was a consensus among interviewees as to the difference between a tribal judge and an *islah* man. These differences can be summarised as follows:

4-1-3-1 Areas of activity of tribal judges

Tribal judges are active in the Gaza Strip and Hebron. This is due to the distinctive features in the history and geography of the two areas. In the Gaza Strip this includes the mass forced movement of Palestinian people in the aftermath of the 1948 *nakba*, during which many of the residents of the Beersheba area moved to live in the Gaza Strip, taking with them their social and cultural heritage. This was the period during which the Gaza Strip was administered by the Egyptian authorities, and the authorities did not attempt legislative change in the Gaza Strip (tribal judge in the Gaza Strip). The distinctive geographic element comprises the proximity of the Gaza Strip to the Northern Sinai, which resulted in the inhabitants of the Strip being influenced by the informal justice widely practised in that area by the Bedouins.

The same applies to Hebron. The geographical proximity of the southern area to Beersheba contributed to its being affected by informal justice. One of the active tribal judges in Hebron stated that work in informal justice was transferred to Hebron by Bedouin who lived in the neighbouring villages.

As for work in tribal *sulh*, it is widespread throughout Palestine, due to the geographical factor of the proximity of north Sinai and Jordan, where work in informal justice is very active. It was noted that the political element - represented in the extent of stability witnessed by the Palestinian areas - is the biggest factor limiting the prevalence of this phenomenon. The political factor affects the extent of executive and legislative power, which is in inverse proportion to the prevalence of informal justice.

4-1-3-2 Succession

A tribal judge is assumed to succeed to the work in this sphere. The tribal judge is normally chosen by his tribe. The tribal judiciary – as transpired from the results of the field work – is a monopoly held by certain families because it is passed on by succession. This is contrary to the *islah* man, who does not have to succeed to the post although it might constitute an additional distinction through giving him knowledge and experience. The *islah* man in his work depends on the extent of trust he enjoys from the public generated by his qualities which lead them to approach him to resolve disputes.

4-1-3-3 Referential framework in dispute resolution

The referential framework within which the tribal judge resolves disputes is confined to tribal *`urf*, while the *islah* man relies on customs and traditions as well as positive law and the Islamic *shari'a*; sometimes his solutions will come in the form of texts bringing together more than one source. The type of reference on which the *islah* man relies in solving a case is determined by the extent to which it realises the goal, that is, *islah*. *Islah* men normally draw on all *`urf* and legal and religious texts with the aim of reconciling the disputing parties and convincing them of the solution (*islah* man - northern West Bank). The tribal judge issues his ruling by relying on tribal *`urf* known in the area where he is active, while the *islah* man relies on tribal *`urf* known in the area of the dispute that is, *al-jusur al-mabniya*, to formulate the text of the solution.

4-1-3-4 Type of work

The tribal judge's work is of a judicial nature, in the sense that the dispute is presented to him by the parties; he hears evidence and statements from both, and may employ other means of proof during his investigation of the facts of the dispute, such as *bish`a* – in former times – and the oath, with the objective of reaching a decision in which he indicts one party and obliges this party to accept the penalties imposed, such as exile or fines, while the other party is cleared. As for the *islah* man, his work is mostly of a conciliatory nature, in the sense that *islah* men representing the parties to the dispute negotiate the generation of a formula for a solution acceptable to both parties. However, it is the nature of the case that determines how the *islah* man deals with it, so *islah* men may issue rulings of a judicial nature such as exile and fines fixed without negotiation between the parties, depending on the case.

4-1-3-5 Financial remuneration

The tribal judge is paid a fee for his work, called the *rizqa*, while the *islah* man does not receive a financial reward for his work. There was a consensus among the informal justice interviewees in the central and northern West Bank that it is not permitted for an *islah* man to take financial remuneration for his work in *islah*. A representative of the executive authority in a central West Bank governorate stated that there is a very distinguished *islah* man working in the area, whose only flaw is that he takes a fee for his work.

An active *islah* man in the Gaza Strip, who is a senior person in the office of tribal affairs, stated in an interview that it is not permitted for an *islah* man to receive any financial remuneration for his work from any of the parties. There is a quasi-consensus on the description of *islah* men who take financial sums for their work as bribes takers.

4-1-3-6 Dealing with cases

With regard to the tribal judge, the parties to the dispute come to him through the *bait al-mulim* since the tribal judge is considered neutral in the dispute before him, and therefore considered not representing interest of one party against the other, and his main aim is to issue a final ruling to the dispute. For his part, the *islah* man intervenes to break up the dispute having been charged by one of the parties to be his representative and to achieve what this party is seeking to the extent that it can be reconciled with the demands of the other party, trying to generate a conciliatory formula for resolution of the dispute (which may include imposing financial or other penalties).

4-1-3-7 How the ruling authorities deal with the tribal judges

The ruling authorities in Palestine have not previously intervened to strengthen the stature of tribal judges, as the judges emerged through their tribes and their positions were handed down through succession.[43] In the case of *islah* men, it is possible for the ruling authority to intervene in their support and give them executive

assistance. As the ruling party, Fateh promoted a number of personalities to work as *islah* men before the arrival of the PNA and during its existence (commander in the security forces in a governorate in the north of the West Bank).

If an *islah* man fails in mediating a dispute, he transfers it to a tribal judge to deal with (*islah* man –central West Bank). In the event that there are no tribal judges in the area of the dispute, *islah* men have to resolve the dispute either by reconciling the parties or transferring it to a tribal judge in a neighbouring area (see annex 6, case 12). The *islah* man can also withdraw from the *sulh* procedures for whatever reasons that he relies on. It is possible to replace an *islah* man with another in order to carry on with the *sulh* procedures (see annex 6, case 2). As for the tribal judge, he is obliged to rule in the dispute presented to him, in the same way that a formal judge is obliged to rule in disputes.

4-1-4 Social background of representatives of informal justice

4-1-4-1 Financial Situation

The fieldwork shows that the financial situation of tribal judges and *islah* men varies from average to excellent (see table 1 showing the financial situation of representatives of informal justice). This is due to the fact that a poor financial situation results in a person being unable to meet the commitments of the work in informal justice, such as moving

[43] Al-Aref, Aref, *supra*, p.69.

between towns to pursue the procedures and tribal ceremonies. Men of *islah* also have to have good social connections, which require a high degree of interaction with others through sharing their social occasions; this constitutes a critical factor in his success and entails increased financial burdens. Furthermore, it is assumed that representatives of informal justice will maintain open house for anyone who approaches them seeking dispute resolution; this also constitutes a financial burden (tribal judge, southern West Bank).

During the fieldwork it was noted that the financial level of representatives of informal justice differs according to area. The wealthiest representatives of informal justice are in the southern West Bank, due to the fact that those active in that area are elderly men who inherited the work from their large and wealthy families such as Amer and al-Manasira. A tribal judge in one of the southern West Bank governorates stated that wealth and belonging to large families are fundamental conditions for working in the field of *islah* in the southern West Bank. This does not mean that there are no exceptions; the research showed that one tribal judge active in that area is wealthy despite the fact that he does not belong to a large family. However, his family has considerable social weight in the governorate by virtue of his work and standing. This confirms that an *islah* man can add considerable name and weight to his family or tribe.

As for the Gaza Strip, it was noted that there was a similarity in the financial position of the representatives of informal justice (see table 1). The reason here is that the work of informal justice is carried out by two groups: one of the original inhabitants of Gaza, who are distinguished in wealth and own large areas of land, and the second of refugees who came to live in the Gaza Strip after being forced out of the Palestinian areas in 1948. Although this group has an average financial position by comparison to the first group, this group proved itself on a tribal level through knowledge of tribal *`urf* passed down from one generation to another (tribal judge – Gaza Strip). The general population census of 1997 observed in a report on the demographics of the population in Palestine for 1997 that the percentage of refugee camp dwellers in the area of Rafah is 50% of the total population; this percentage includes a large number of Bedouins forced out in 1948, and this contributed to the concentration of tribal work among these refugees. In addition, a prosecutor in the Gaza Strip stated that the extent of intervention by tribal men differs from one area to another; it is greater in the southern areas such as Khan Younis and Rafah (areas where there is a large number of Bedouin who moved in 1948, and which lie next to the Beersheba area).

In the central governorates of the West Bank it was noted that the financial position of the majority of *islah* men varies from good to excellent. This is due to the good standard of living of the area in which they are active by comparison to other areas. It was also noted that a number of *islah* men were distinguished among people for their good financial position, which gave more social weight to their families. The situation in Jerusalem is largely similar to that in the governorates of the central West Bank, in that most of the *islah* men working in the Jerusalem area are originally sons of the southern governorates

of the West Bank who preserved the social and cultural heritage despite now living in Jerusalem.

Table 1

Financial position of representatives of informal justice

Region / Position	Excellent	Good	Average	Poor	Not Known	Total
Central Region	6	1	3	0	2	12
Northern Region	5	6	2	0	1	14
Southern Region	9	0	2	0	0	11
The Gaza Strip	2	3	2	0	0	7
Grand Total	22	10	9	0	3	44

- Individuals with excellent financial position: owners of real estate.
- Those with average financial position: individuals with steady income such as public employees / professional employees or green grocers.
- Those who are in a good financial position: with income between good and excellent

4-1-4-2 Educational level

Table 2 shows the educational level of the representatives of informal justice, and table 3 shows their educational disciplines. The highest percentage of the representatives completed elementary education; this is followed by those who completed university education. By correlating educational level with average age, we find that the representatives of informal justice are elderly (born before 1940), and are either illiterate or completed only their elementary education. This is because of the poor educational situation at that time. However, despite their low educational level, they managed to fulfil the requirements for working in informal justice as they relied on inheriting the position from their fathers and grandfathers (tribal judge, the Gaza Strip). The people in this group are considered pillars in the field. As for the second group of the representatives of informal justice, the majority of whom are born after 1940, these are university graduates. This is due to them becoming prominent in the 1980s (more precisely the period of the first intifada) (*islah* man - central West Bank). The majority of these studied law, Islamic law, sociology and philosophy (see table 3). None of the representatives of informal

justice with university degrees in law worked in the legal field; some worked in education, some in commerce and some in politics. As for those who majored in Islamic law and the Arabic language, some (as shown in table 3) worked in education. The field work showed that there is a correlation between academic discipline and educational level and the success of the representative of informal justice in the second group. The first group (those born before 1940) qualified to work in informal justice through succeeding to the position as used to be the practice in earlier times. On the other hand, the second group who are new arrivals to the work (those born after 1940) came to it through their personal distinction and qualities, one of which is a high educational level.

The field work showed that the educational level is not the sole determinator for a person to work in informal justice, although it is an advantage: the majority of the representatives of informal justice with the most influence have only elementary education, and all were born in the 1920s and 1930s.

Table 2

Level of education of the representatives of informal justice

Education level/ Area	Post Graduate	Graduate	Diploma	*Tawjihi*	Secondary	Elementary	Illiterate	Not known	Total
Central Region	0	4	0	1	0	7	0	0	12
Northern Region	0	6	2	1	0	0	2	3	14
Southern Region	0	1	1	2	2	4	1	0	11
The Gaza Strip	1	1	0	0	2	3	0	0	7
Grand Total	1	12	3	4	4	14	3	3	44

Table 3

Disciplines of representatives of informal justice

Discipline	Number
Law	4
Theology and *fiqh/shari'a*	4
Business Administration	1
Sociology	1
Engineering	2
Arabic	1
Education	4

4-1-4-3 Size of *Hamula*

The field work shows that there is a high proportion of representatives of informal justice who belong to large families. However, it also showed development in this regard in the conditions of work in informal justice. While belonging to a large and well known family used to be a basic requirement for the first generation of representatives of informal justice (born before 1940), this condition was no longer a measure for the work of the second generation (born after 1940). Financial standing and educational level have become factors more determining of work in this field, especially in the northern and central governorates of the West Bank. The field work shows that there are four representatives of informal justice in one of the central West Bank governorates who do not belong to large families. However, the requirement of belonging to a large family did not change in the southern governorates of the West Bank due to the strength of clan and tribal stands in these governorates compared with other areas.

4-1-4-4 Political affiliation

Although many of the representatives of informal justice who were interviewed denied any political or party affiliation, the data about them gathered during the field work shows that the majority of them have known party affiliations. It may be that the reason for their denial is their desire to reinforce the idea that their standing is a social phenomenon which should not be accredited to their political and party affiliation. Political and party affiliation is considered an important factor in the work of representatives of informal justice at the current time, as it enable them to intervene to

solve family disputes which may arise for party political reasons (see further chapter 6 of this study).

It was noted that a large majority of *islah* men are affiliated to Fateh. This is because *Fateh* was careful to choose personalities belonging to the movement to be recommended to the PLO leadership in Tunis to work as *islah* men (legal advisor a central West Bank; *islah* man, northern West Bank). Fateh is also considered the biggest political organisation in the West Bank and Gaza Strip, which added a kind of standing and influence to the work of the *islah* men (*islah* man - northern West Bank). Fateh also established a central committee for *islah* in the Gaza Strip after the PNA was formed, which added an organisational form to the work of *islah* men and gave them the privilege of benefiting from the executive power for decisions issued by its members (consensus of representatives of informal justice in Gaza Strip).

4-1-4-5 Professional status of representatives of informal justice

Table 4 shows the professions of representatives of informal justice, demonstrating that the largest proportion work as public sector employees and merchants. The reason that there is a high proportion of public sector employees is because the PNA absorbed a large number of representatives of informal justice in its institutions in the Gaza Strip. The PNA established 'central *islah* committees' the members of which are employees on the payroll of the PNA. This is because the PNA wanted on the one hand to gain favour with them and on the other to organise and contain their work (civil society institution worker – Gaza Strip; formal judge, Gaza Strip). One tribal judge in the Gaza Strip stated that he works in as head of the central *islah* committee belonging to the General Security Service and receives a salary at the rank of *munadil*, which is equivalent to the rank of lieutenant colonel, conferred on him by the late president Yasser Arafat.

It is somewhat different in the West Bank, where the percentage of the representatives of informal justice working as PNA employees is very low. There are two *islah* men working in the Palestinian military establishment in one of the northern governorates, and a third who is a senior employee in the executive establishment and works as an *islah* man in Jerusalem. He justified this through the special situation of Jerusalem and the PNA's desire to control the security situation in the city.

Most of the *islah* men who work in commerce live in the central and southern West Bank governorates, due to the robustness of the economic and commercial situation in these governorates compared to elsewhere. Also, most of those who work in informal justice in the southern West Bank own land and estate and consequently are able to devote their time to this field (tribal judge, southern West Bank; commander in the security forces, southern West Bank). This is because most of those working in informal justice in this area inherited their positions from their large families who monopolise work in informal justice, which is not the case in the northern and central governorates of the West Bank.

Table 4

Professional status of representatives of informal justice

Region/ professional status	Merchant	Employees#	Land owner	Without*	Total
Central region	8	2	0	2	12
Northern Region	5	8	1	0	14
Southern Region	3	1	1	6	11
The Gaza Strip	0	7	0	0	7
Total	16	18	2	8	44

Employees includes all workers in PNA's agencies or council's members, mayors, and workers in ministries.

* Without: Meaning unemployed or working in *islah* full-time.

5. Mechanisms of work utilised by representatives of informal justice

This part of the study sheds light on the mechanisms utilised by representatives of informal justice in their work through researching the procedures they follow in dealing with disputes brought before them. Due to the fact that the work of *islah* men and tribal judges differs (see further Chapter 3 regarding the nature of the work of representatives of informal justice) the mechanisms utilised also differ, and are therefore dealt with separately in this section.[44]

5-1 Mechanisms of work utilised by tribal judges

The work of tribal judges in dealing with disputes mostly shows a unified procedure, meaning that the procedures are largely unified and that none of them may be by-passed. This is because the tribal judges consider their work not to differ hugely from that of the formal judges, so they bind the parties to the dispute to these procedures by way of maintaining the social standing of the tribal judge. The appointment of guarantors *(kafil al-wafa'* and *kafil al-dafa)* by both sides (the perpetrator and the victim) is an extra method of obligation to guarantee that they fulfil the solution set out by the representatives of informal justice.

The case goes before the tribal judge in several stages: *bait al-mulim*, litigation of the two parties to the dispute before the tribal judge, issuing of a ruling in the dispute by the tribal judge, and appeal of the ruling issued by the tribal judge.

5-1-1 Bait al-mulim

At this stage, the parties to the dispute approach an *islah* man, which is called *bait al-mulim*, to argue before him and try to reach a solution that satisfies both parties. If *bait al-mulim* manages to resolve the dispute through reconciliation, then there is no need for the parties to have recourse to a tribal judge. However, if *bail al-mulim* fails then he refers the parties to the tribal judge with the specialisation to hear the case, according to what type of case it is, as some tribal judges specialise in cases of blood and honour, others in assault and harm, and others in land cases…. etc. They way a specialised tribal judge is chosen to resolve the dispute does not depend on the choice *of bait al-mulim* alone; the parties to the dispute are also involved in the selection, which proceeds after they consent to transfer of the dispute to a tribal judge to rule between them. Each party to the dispute identifies the nature of the dispute and the specialised judge to hear it (*qadi manshad*, tax judge, land judge etc). The judge is chosen through the involvement of *bait*

[44] In order to understand this section of the study, it is necessary to understand the terminology used in describing the mechanisms of the work of representatives of informal justice and hence to refer to the Glossary in this study (annex 7).

al-mulim depending on the nature of the dispute and the rank of the tribal judge. After a specialised judge has been identified to consider the dispute, *bait al-mulim* undertakes the task the nominating three tribal judges, one of whom is chosen to examine the dispute. The selection process is done through each party to the dispute choosing one of the three judges, who is referred to thereafter as the *ma`dhuf* of so-and-so (see annex 7). The third judge who is not chosen by either becomes the specialised judge to consider the dispute. The *ma`dhuf* judge is the appeal judge for the party that chose him (that is, if the petitioner chooses Judge X as his *ma`dhuf*, then he can appeal the decision issued by the specialised judge before Judge X).

The function of the *bait al-mulim* thus consists initially of 'burying the pebble' (burying a pebble in the ground) which indicates his success in determining the nature of the dispute before him, then identifying the specialised judge who will examine it, and finally in asking each party to the dispute to bring a guarantor to guarantee the implementation of the decision issued by the tribal judge.

In the event that the accused refuses to appear before the judge for the procedures of tribal justice, tribal *`urf* requires the petitioner to send a '*bidwa'* consisting of a number of men who call on the accused to present himself for the procedures of tribal justice. If the accused does not appear then the petitioner sends a second and a third '*bidwa'* but through persons other than the first 'bidwa'. Thus a large number of people witness his failure to appear before tribal law. If the accused refuses to appear before the tribal judge after the third *'bidwa'*, then the petitioner is entitled ('tribally') to take his right by force with no tribal consequences for such action.

5-1-2 Litigation of the two parties before the tribal judge

When the parties to the dispute go to litigate before the tribal judge, the petitioner is referred to as 'the *tarid'* and the accused 'the *matrud*.' They approach the tribal judge in the presence of the *bait al-mulim*, who proceeds to set out the details of the dispute to the tribal judge, so that the latter can specify his fee (*rizqa*) due from the two parties, provided that this does not exceed the price of a sheep. After specifying his fee, he asks each party to pay their share of the fee (half the total fee specified by the tribal judge), on condition that whichever party loses has to reimburse the winning party. The importance of each party's guarantors becomes clear here; it will come back to them in the event that either party reneges on his financial commitment. After the tribal judge has collected his fee from the two parties, he begins hearing the statements of each. The petitioner (*tarid*) begins, followed by the accused (*matrud*). After this, the tribal judge allows the *tarid* to respond to the defence of the *matrud*. This is very similar to procedures in the formal justice system, where the petitioner is allowed two statements and the accused just one, because the accused may benefit from the initial statement of the petitioner. Then if need by the tribal judge draws on many evidential methods to help him come to his decision. Evidential methods are unspecified and flexible; the *qadi* seeks any means that will enable him to get to the truth (such as *bish`a* previously, oaths, witness statements etc).

Fundamentally, the tribal judge relies on tribal *`urf* and *al-jusur al-mabniya* in deciding his ruling. Here, the tribal judge's experience and acuity come to the fore in ruling on the dispute before him. He may call on an expert to help him produce the tribal ruling. The statement given by the expert is not binding on the tribal judge, but is taken into consideration. Thus for example if the subject of the dispute involves a commercial or financial issue, the judge could seek the help of an appropriate expert. This resembles to a certain extent the help sought by formal judges from experts during the examination of the subject matter of the claim.

5-1-3 Issuing of the ruling by the tribal judge

When the tribal judge issues his ruling, it is said that he 'legislates the right'. This is done by the tribal judge issuing a tribal ruling binding on both parties; its binding nature arises from the parties having guarantors to ensure the implementation of the ruling. The person who has the entitlement can have recourse to the guarantor to implement on the one hand and on the other to bind the tribe of each party by the ruling. Thus it is possible for one of the parties to go to the tribe of the other party seeking their implementation of the ruling. When the judge 'legislates the right', he asks the person ruled against to reimburse the other party for his share of the fee. The tribal judge is also entitled, after 'legislating the right', to ask the person ruled for to take off the so-called '*sharha*' for the judge (an amount equivalent to a third of what the tribal judge has ruled for), as a means of easing the burden tribally on the person ruled against. Normally, rulings issued by tribal judges are financial, and may extend to the exile of the person ruled against along with his *khumsa* (that is, everyone who carries the family name, especially close relatives such as brothers, father, mother, grandfather and paternal cousins), depending on the type and circumstances of the crime.

5-1-4 Appealing the ruling issued by the tribal judge

The procedures of tribal justice guarantee both parties to the dispute the right to appeal the decision issued by the tribal judge. This appeal process has its set tribal procedures which are binding on the appellant. The appeal procedure starts with the party who wants to appeal going to the *bait al-mulim* asking him to transfer the dispute to his *m`adhuf*, saying to him ' support me to my *ma`dhuf'*. In this event the *bait al-mulim* is bound by the demand of the personal appealing the tribal ruling. The procedures for appearing before the *ma`dhuf* commence as in the first time before the tribal judge, and is concluded with the *ma`dhuf* issuing his ruling. The *ma`dhuf's* ruling is binding and cannot be challenged by the person who sought it. Thus if the first party seeks the transfer of the dispute to his *ma`dhuf*, he is bound by the *ma`dhuf* judge's ruling and may not challenge it. In the event that both parties to the dispute accept the ruling issued by the *ma`dhuf*, it is implemented and the ruling of the first tribal judge is annulled. However, if the *ma`dhuf's* ruling came contrary to the ruling of the first judge, and the second party to the dispute does not accept it, having accepted the ruling of the first judge, then the second

party goes back to the *bait al-mulim* asking him to transfer the dispute to his *ma`dhuf* (that is, the ma`dhuf of the second party). The *bait al-mulim* is obliged to fulfil the demand of the second party. The *ma`dhuf* of the second party begins consideration the dispute from its beginning and issues a ruling. In the event that both parties accept the ruling of the second *ma`dhuf*, then the dispute ends there. In any case, the second *ma`dhuf* is binding for the party who chose him (second party). However, if the first party rejects the ruling of the second *ma`dhuf*, in this case we have three tribal rulings in one dispute issued by three judges, and *bait al-mulim* taking on the 'legislation of the right' by considering the ruling that the judges agreed upon. If the three rulings are different, then *bait al-mulim* undertake the task of reconciling the rulings in accordance with the ruling issued by the majority. He issues a final ruling that binds both parties to the dispute which may not be challenged.

5-2 Mechanisms utilised in the work of the *islah* man

The *islah* men who were interviewed agreed that the have a general and comprehensive jurisdiction in considering cases. They examine all types of legal cases, whether torts or crimes, irrespective of where the crime takes place. They strive to resolve disputes as soon as they are brought before them, without examining the nature of the conflict (*islah* man, central West Bank). The exception here is cases of spying (collaboration with Israel); they refuse to review any case where one of the parties is collaborating with the Israeli army, whether this person was a killer or killed in the particular case (*islah* man, central West Bank). The same applies to cases involving drugs, bribery and public property.

The reason for the generality of the *islah* men's jurisdiction goes to the fundamentals of the work in this field, which forbid *islah* men ever to close their doors in the face of those coming to them to have their case considered. This even goes for cases of honour, which the *islah* men generally complain about examining as they reveal secrets that people normally do not like to be discussed. *Islah* men are obliged to intervene in such cases, particularly in cases where events could develop into outcomes even worse than murder, arson and vandalism. Their interventions however are restricted in order to ensure a certain level of confidentiality and secrecy (*islah* man, northern West Bank).

Fundamentally the work of the *islah* men comprises narrowing the gap between the positions of the disputing parties, in order to bring them to common ground in a resolution of the dispute. The work of the *islah* man thus stems from two main principles. The first is reliance on the principle that '*sulh* is the master of rulings', and the second is the flexibility of tribal *sulh* procedures which serves the main aim of the work. It is therefore possible for the *islah* man to by-pass some of these procedures if necessary or if the reason behind the particular procedure is negated (see annex 6 cases 1 and 3). In what follows we will discuss the mechanisms utilised by *islah* men in serious criminal cases (murder, grievous harm etc) and set out any differences in any cases where this is necessary.

The work of the *islah* men is set out under the following procedures: *hudna*, *`atwa* and final *sulh*.

5-2-1 Hudna

Hudna occurs only in cases of killing and grievous harm, and aims at psychologically preparing the family of the victim to enter the processes of tribal *sulh*, as they are taken up with various matters such as the commemoration rites, or getting treatment for their injured son (in the fourth case in the case summaries, no *hudna* was taken up because the accused was identified after the commemoration rites had taken place). In cases of murder, *hudna* is normally 'taken at the grave'. A public figure in the community comes forward and asks the family of the victim to agree a *hudna*. The *hudna* is taken from 'a passer-by', meaning that it could be at the initiative of a local notable (*wajh*). There are no negotiations or discussions about the dispute and its details or about a resolution. The *hudna* takes place without financial remuneration; thus it holds no tribal obligation on the family of the victim not to attack the perpetrator or his family or their property; there are no financial undertakings nor guarantors for the two parties to the dispute, as is the case in *`atwa* and *sulh* (see annex 6 case 5).

In cases of murder, the hudna lasts three and a third days, which is the period of commemoration rites. During the *hudna*, *islah* men move away from a public role to carry out negotiations with the family of the victim with a view to securing the requirements for the first tribal *`atwa*. Refusal of this request by the family of the victim is considered by *islah* men to be a dangerous indication of the intention of the victim's family to seek revenge and vengeance. This means that the *islah* men exert the utmost efforts to broker the *hudna*. Different notables may intervene to secure a *hudna* until the family of the victim agree to grant it.

5-2-2 `Atwa

The *atwa* is considered to be an admission and a confession of the crime tribally attributed to them by the family of the perpetrator. The *`atwa* usually takes place directly after the end of the *hudna*. In the event that the perpetrator's family denies the crime attributed to him, they request an ``atwa* of search' through which they take it upon themselves to search for the actual perpetrator within a certain period of time, preferably not too long (normally only one week). Here we find the burden of proof in informal justice falls on effect on the family of the accused. The victim's family may do this, contrary to the system in formal justice where the burden of proof falls on the public prosecution. This is considered a general rule in the procedures of tribal *sulh* (see annex 6 case 6), with the accused being asked to indicate the actual perpetrator and provide evidence for this; otherwise, his denial of having committed the crime is not counted.

This too is contrary to the rulings of the Islamic *Shari`a* which affirms that proof is on he who claims and the oath for he who denies.

The actual intervention by the designated *islah* men starts when they enter the negotiations over the details of the *'atwa*, normally at the request of the family of the perpetrator; in some cases the governorate may empower certain locally well known *islah* men to resolve the dispute particularly in big cases such as murder. In any case, many *islah* men participate in the first tribal *'atwa*. At this stage, an *islah* man similar to a *wakeel* called (*lisan al hal*) speaks on the behalf of the family of the accused. Before he intervenes in the dispute he informs them of the amount of money of the *'atwa* that he can reach with the other side; if the family of the accused agree the amount then he intervenes, but if he feels that they are not serious in paying the amount, then he doesn't bother himself with the burden of intervention and talking on their behalf and asks them to approach another *islah* man.

In the first *'atwa*, negotiations are held over the amount of a financial compensation. 1,025 Jordanian dinars are subtracted as a *'atwa mus-hooqa* in the cases of intentional murder. The crushed '*atwa* is justified on the grounds that it is a compensation to the family of the victim for the cost of the funeral and the condolences ceremonies. The *'atwa* is limited in time, normally for one year in the cases of murder. Predominantly, an agreement is reached as well on exiling the immediate family of the accused to areas that is far from where the family of the victim are and the family of the accused are prohibited from entering the area where the family of the victim frequent. This exile is temporary and fundamentally it aims at avoiding friction between the parties of the dispute.

Negotiation at this stage between representatives of the parties to the dispute must end with an agreement over all of the details and requirements of the *'atwa*. This stage takes place with a small number of *islah* men who were prepared to represent the side of the perpetrator. This stage is characterised by intense, and often very heated, debates and negotiations, which requires the *islah* man to be patient and tolerant with an ability to engage and convince, drawing on *'urf* ,tribal customs, Islamic *shari'a* laws and build bridges to consolidate his demands. If the *islah* man fails in reaching a solution accepted by both parties, they work on involving personalities with more social weight in order to influence the family of the victim to accept what was offered, and mostly they talk about rules of waiving the right, amnesty and mitigation as stipulated in Islamic *shari'a* law.

Once an agreement between the representatives of parties to the dispute on the conditions and requirements of the first *'atwa* has been reached, they agree on making the *'atwa* public. This is done through, almost unified, ceremonies where the family of the victim prepare a public space near the area of their residence (large house court yard, school, municipality building etc) that can hold a large number of people. The family of the victim welcomes the *jaha* of the family of the accused. The *jaha* mostly includes the *islah* men who negotiated the terms of the *'atwa*, most of the *islah* men in the city, a number of representatives from the executive authority (the Governor or his representative, the chief

of police or his representative, and representatives from the security forces etc) a number of the city's notables and members of the public. At any rate, it is prohibited for the perpetrator or any member of his *hamula* to attend the '*atwa*. It is also prohibited for women to attend these sessions even if a woman was a pivotal character -whether a victim or a perpetrator.

The ceremonies of the first *'atwa* are arranged as follows: *lisan il hal* of the family of the accused start by denouncing the crime committed; admitting to all the tribal rights that it entails and using quotes from the *Qur'an* and *hadith* which calls for repentance , leniency and reconciliation between people in order to influence the family of the victim. In turn, the representative of the family of the victim points out to the severity of the act and the extent of financial and psychological damage inflicted on the family of the victim. The procedure could occasionally include some talk to the effect of showing a hardened position of the family of the victim and insisting on their terms and conditions, but in the end the two parties reach an agreement over the solution that was agreed upon already in the preparatory negotiations to '*atwa*. Subsequently the ceremonies of the '*atwa* are considered to be just for show in order to inform the public of what was reached in terms of requirements and conditions of the *'atwa*.

After informing the entire attendants of the reached agreement, the requirements and conditions are drafted and is signed by the representatives of the parties to the dispute, the financial guarantors and no-retaliation guarantors of the parties (chosen by the parties to the dispute based on their prominent social position, and it is essential that they are unrelated to either party). Generally, the deed of the *'atwa* is published in the daily papers especially criminal cases (for more details see annex no. 8).

After the signing, the family of the accused use the deed through a formal court to release on bail their accused son in case he was gaoled. There is an understanding that judicial *'urf* is to secure the release of the accused on bail in this case (for more information see chapter 5 with regard the relationship between formal and informal justice. See also annex no. 6).

As mentioned above, the first tribal *'atwa* is normally limited to one year for criminal cases. *Islah* men can seek to renew it several months before its expiry date under two pretexts. The first is that the family of the victim are not in psychologically state which allows them to be ready for a *sulh* , and the second is to give the family more time in order to raise the money and pay the instalments. If none of these apply, then there is not to proceed with the arrangements for the final *sulh* as there is no need for the renewal. Negotiations for renewals are normally easier for *islah* men to broker than the first *'atwa*. During it, the *islah* men request from the family of the victim to agree on the return of the exiled members of the perpetrator's family back to their homes / houses who generally agree. In most cases, renewal is granted and normally it is for financial reward which according to tribal *'urf* is half the amount of the first *'atwa* (in case number 5 it was noticed that renewal was not in exchange of money: see annex 6). Renewal is concluded

through a new ʻatwa deed and is signed by the financial guarantors and no-retaliation guarantor and it includes the conditions and the amount for the renewal. At this stage, another *islah* man may intervene who is different to the one that brokered the first *ʻatwa* (see annex 6: case 4) in order to complete the procedure of the tribal *sulh* although tribal *ʻurf* requires a reason to justify it.

All the payments are considered part of the final amount for the *diya*, with the exception of the amount for the *ʻatwa mus-hooqa*. Once expired, the ʻ*atwa* could be renewed more than once. In the first and second renewals, financial commitment which is equivalent to half of the amount paid in the first and second ʻ*atwas* is reiterated; for the third renewal the amount is half of that in the second renewal; there are no payments made for renewals thereafter. Field research showed that renewal is done twice only (three *ʻatwas*). After the ʻatwa, final *sulh* takes place as the family of the victim would be psychological ready for a tribal *sulh* with the other party. The last ʻ*atwa* which precedes the final *sulh* is called an *iqbal ʻatwa* (see annex 7) which during the ceremonies the *islah* man candidly requests of the family of the victim that the ʻ*atwa* must be an *iqbal ʻatwa*, and if they agree then the family of the perpetrator prepare themselves and get ready for the final *sulh*.

5-2-3 Final sulh stage

This stage signals the end of the procedure of the tribal *sulh* between parties to the dispute. And in some cases *sulh* is held (particularly in murder cases) between the families of the victim and the perpetrator without the *sulh* for the perpetrator becoming comprehensive, which means that it is an indirect declaration by the family of the victim that they would can avenge their victim without having any tribal commitments as a consequence. If the family of the victim kills the perpetrator later on then this is tribally know and ʻ*joera muqabel joera'* (*islah* man, northern West Bank) according to which the case is concluded with the full reimbursement of the first financial amount that the family of the victim was awarded by the family of the perpetrator according to the *sulh* rites mentioned above.

Tribal *sulh* has many follow-throughs; it litigates waiving personal rights by the custodians / parents of the victim before formal courts. It is also considered a waiving of tribal rights that is the entitlement of the family of the victim once they receive the final *diya* from the family of the accused. It is also considered a commitment from the family of the victim that there would be no hostility and vendetta against the family of the perpetrator.

In practice, the procedure of the final *sulh* starts months before the end of the duration of the *iqbal ʻatwa*. *Islah* men intensify their work and start visiting the family of the victim and negotiate the sum of the final payment. *Islah* men rely on *jusur mabniya* in estimating the financial amount, which is set according to the economic situation in the

areas that the parties to the dispute live in; sometimes they rely on the laws of Islamic *shari'a* in determining the amount of the *diya*.

The effect of the economic situation in the areas that the parties live in on the agreed upon amounts of money for the final *sulh* in criminal cases must be highlighted, if we look at the average amounts imposed in *sulh* over murder cases in the areas of the south of the West Bank we might reveal that the amount may be as much as 70 thousand Jordanian dinars, particularly in cities; it might be as high as 40 thousand Jordanian dinars in the central governorates of the West Bank and 15 thousand in the northern governorates of the West Bank. Therefore, it can be said that the standards in setting out the amounts for the final *sulh* are variable (for more details regarding the set financial amounts as penalties in the work of *islah* men, see annex 6).

Generally, *islah* men work hard to reach an agreement by the family of the victim on the conditions and requirements of the final *sulh*. It requires a large effort and high level of experience from the *islah* man to finally determine the *diya* amount that he might feel is fair, because usually *islah* men are faced with hard bargaining by the family of the victim in the course of determining the amount. Normally *islah* men normally seek the help of personalities who have influence on the family of the victim to agree on a suitable amount. This highlights the clear impact that an *islah* man has on the estimation of the *diya*, his patience and credibility with the parties to the dispute. The foundation of *islah* is based on the extent to which the parties trust the personalities involved in the solution.

The ceremonies of the final *sulh* only differ from the ceremonies of the '*atwa* in two aspects. The first is that the family of the victim can demand from the family of the accused to provide all the requirements of *sulh*, whether be it catering for lunches (meat, rice etc) and the second is represented in the entire members of the family of the accused attending the ceremony of *sulh*, standing in a distance from the place where the *sulh* ceremony is held (on the outskirts of the town or city). Once the *sulh* deed is signed, the *lisan il hal* of the relatives asks the attendance to permit the family of the accused to come in and greet them and in return, the attendants at the family of the victim's stand in line on either side; the family of the victim come in and greet everyone. Mostly, the family of the victim demand that the family of the accused pay for publishing the *sulh* deed in the daily newspapers.

6. The relationship between formal and informal judiciary

This aspect of the study will highlight what is the connection that links formal justice with informal justice. Field research covered a number of criminal cases that informal justice looked into throughout the governorates of the West Bank and the Gaza Strip. This means knowing the legal influence of *sulh* and tribal justice procedures on the procedures of formal justice and the verdicts ruled by formal justice and vice-versa.

6-1 The reality of the relationship between formal and informal judiciary

Unveiling the extent of the relationship that connects / formal judiciary with informal justice can be done by examining the extent to which formal justice is affected by the rulings of representatives of informal judiciary, the extent of which informal judges are affected by rules issued by formal courts, also, through measuring the extent of interference of the representatives of formal system of justice in the work of informal judges and vice versa (such as interference of lawyers and representatives of informal justice in tribal solutions; informal judges in the work of formal courts). Here it can be said that the relationship between the two systems does not exceed three probabilities: firstly, the absence of a direct relationship between informal and formal judiciary; meaning that formal judiciary is not affected by rulings issued by tribal judges or *islah* men and formal judges not being influenced by rulings issued by formal courts. Secondly, rulings issued by the formal judiciary that are influenced by the procedures of informal judiciary by mitigating sentences and shelving the case. Therefore in this case informal judiciary complements the work of formal judiciary. As for the third probability it is represented in the absence of reviewing the case by the formal judiciary and pursuing the criminal case by the general prosecution as a result of tribally dismissing the case through a final *sulh* deed between the parties 'completing the procedures of informal justice'.

Before going into studying these side-effects, several legal givens that rule the relationship between formal and informal judiciary must be pointed out; and can be summarised as follows:

According to Penal Law no. 16 of 1960 in force in the West Bank, the judge of the subject (the formal judge that is viewing the subject of the dispute before the formal court) had a discretionary authority in mitigating the penalty as stipulated by the law (Article 99-100 of this law). This was also included in the text of Article 46 of Penal Law no. 74 of 1937 in force in the Gaza Strip. Therefore the judge has a discretionary power to mitigate the penalty as stipulated by the law according to the conditions of the crime and its aspects and the social reality that dominates society which the judge is considered to be part of. Articles 52 and 53 of the same law allowed for forgiveness by the victim to be considered as a reason to stop the case in its tracks and to suspend the punishment imposed if it has not reached the stage of a final ruling in the event the case was based on the form of personal claim.

Under judicial practice, it is common for Palestinian courts to mitigate the sentence to the minimum by virtue of the law as a result of the procedure of tribal *sulh* (formal judge, central West Bank). Some formal judges consider that the penalty can be mitigated to less than the minimum as stipulated by the law (formal judge – one of the northern governorates of the West Bank). Articles 130, 131, 132, and 133 of the Criminal Procedure Law no. 3 of 2001 allow the judge to release the accused on bail either before he is sent to court or after he is convicted (providing he had requested a challenge over

the ruling) according to the discretionary power of the judge (for more details see chapter 2).

One important fact should be noted: that is, that tribal *sulh* is considered a waiving of personal rights before the formal courts, through the dropping of the civil compensation claim that accompanies the criminal claim at the formal courts. Thus the *sulh* deed, after its approval by the judge, becomes an official document that attaches to the case file, after the judge confirms that the victim or his guardian have waived the personal right (prosecutor, one of the central West Bank governorates, formal judge in a central West Bank Governorate; formal judge in the Gaza Strip).

Before going into details of the cases under examination, it should be pointed out the Penal Code in form in the West Bank establishes the penalty of temporary hard labour for a period of not less than seven years for whosoever intentionally sets fire to buildings, factories or any personal properties, in accordance with Article 368 of the Penal Code no.16 1960. As to the Gaza Strip, the set penalty for this crime is prison for a period of 14 years, in accordance with article 239 of Penal Code no.74 of 1936 in force in the Gaza Strip. It was noticed that from the 12 cases under examination, no charges were made for arson and attacking property that followed the perpetration of the crime, with the exception of one in the Gaza Strip. In this case, the penalty set in the law was reduced to a fine, as detailed below. The formal judiciary bases reduction of penalty on the prevailing *`urf* in society and the circumstances and aspects of the situation. It appears that to a certain extent, this goes along with the informal judiciary, in that these deeds come under circumstances of 'the rage of the blood' in which the perpetrator is not punished.

Annex 2 shows the legal description of these crimes, the areas where they were committed, stage reached in measures of tribal *sulh*, and the extent to which the ruling issued by the formal judiciary was affected by tribal solutions in these cases (for more details see annex 6: case summaries).

An examination of the relationship between the informal and formal judiciary in the cases under examination shows the clear impact of tribal *sulh* proceedings on the release of the accused on bail. Thus, we find in the first three cases in the northern West Bank – referred to in annex 6 – that their release was delayed until after the first tribal *`atwa* was completed. In the first case there an *islah* man and the formal judiciary coordinated their efforts in order to pressurise the accused, forbidding his family from visiting him until he agreed to start proceedings of tribal *sulh*. And indeed, the accused was released on bail on the basis of the undertaking by the *islah* man to proceed with tribal *sulh* measures between the parties to the conflict in coordination with the Governor of the city. In the second case, the accused was detained for 45 days by the formal courts, and was released only after his family concluded a first tribal *`atwa* in accordance with recommendations from the formal judge regarding the necessity of proceeding with measures of tribal *sulh*

so that the accused could be released on bail. In the third case the accused was also released on bail the day after the first tribal *`atwa* was concluded.

In these three first cases (see annex 2), the relationship is confined to the release on bail of the accused as a result of tribal *sulh* procedures. As for reduction of penalty, by the time this report was written, the formal courts had not issued rulings in these cases, despite the fact that some of them had occurred some time ago (before the second intifada). It is as if the formal courts had been reassured that public order would not be disturbed by the disputing families as a result of the proceeding with tribal *sulh*, and implicitly held that these procedures were sufficient. Consequently, an unequivocal judgement cannot be made as to the extent of impact on the legally stipulated penalty from the work of the informal judiciary.

In the fourth case (see annex 2) the relationship between the informal and formal judiciary is determined through the release of the accused on bail following the completion of tribal *sulh* proceedings (that is, not after the *`atwa*). Here, the family of the accused did not ask for their son to be released on bail after the first tribal `atwa was concluded, out of fear that the victim's family would take revenge on the accused. The formal judiciary detained the accused for three years until the tribal *sulh* procedures had been completed and the family of the victim waived their personal right. Despite the passing of a long period after perpetration of the crime (before the second intifada), it had not been ruled on by the time this report was written, and thus it is not possible to determine the impact of tribal *sulh* procedures on the legally stipulated penalty. Noticeable in this case is the fact that the family of the accused denied that their son had committed the crime, although they agreed to be bound by the procedures of tribal *sulh* (meaning a tribal confession to the crime). With regard to this contradiction, the family of the accused stated that they were obliged to go ahead with the procedures of tribal *sulh* out of fear of the reaction of the victim's family, and also because were they to deny that their son committed the crime in front of the informal judiciary, this denial would give rise to them having to identify the actual perpetrator and prove it.

In the fifth case (see annex 2) in the central West Bank area, the perpetrator appeared before the State Security Court, and sentenced within just one month to 15 years imprisonment, reduced to 12 years in consideration of his advanced age and poor health. After the stage of tribal *sulh* was reached between the parties to the dispute three years after the crime was committed, the family of the perpetrator appealed to the State Security Court for a reduction in the sentence, which halved (to six years). The perpetrator was effectively released before then end of this period, as a result of security circumstances prevailing in the Palestinian areas following the start of the Al-Aqsa intifada, and the destruction of the prisons that followed. The second part of this case involved an act of revenge on the perpetrator carried out by the son of the victim, after the parties to the dispute had reached *sulh*. The formal court had not passed a judgement by the time this study was completed; the family of the victim did not request the perpetrator's release on bail, although they had completed a first tribal *`atwa*, for fear of revenge by the other party. Here we can conclude that the formal judiciary reduced the

sentence by half as a result of the signing of the deed of *sulh* between the two parties to the dispute.

In the sixth case (see annex 2), in the central West Bank area, an accused was cleared by the formal courts for insufficient evidence. This however did not stop the informal judiciary from convicting him. The accused was obliged to follow the procedures of informal justice because he had caused the dispute and consequently being acquitted tribally would require him to identify the actual perpetrator.

In the seventh, eighth and ninth cases (see annex 2), in the southern West Bank, there was a complete absence of formal justice. Despite their gravity (murder, sexual harassment, grievous assault), a large number of cases were not brought were not brought to the formal justice system. There was an intervention from the executive authority – represented by the civil police - only in the eighth case, to protect the accused from being attacked by the other party to the dispute, without the dispute being transferred to the formal justice system; the claim in this case was suspended (*hafdh*).

The tenth case (see annex 2) involved a number of crimes. For the crimes of arson and vandalising of commercial property, a ruling was issued for three months imprisonment or a fine of a thousand Israeli shekels along with a one year suspended prison sentence. These penalties are substantially light when compared to the penalties stipulated in the law; the penalty was reduced to below the minimum tariff, and was commuted from imprisonment to a fine. There was a significant impact here of the rulings of tribal *sulh*. As for the part of the case concerning the crime of infanticide, no ruling had been issued by the time this report was written and the accused was released on bail as a result of the completion of tribal *sulh* procedures.

In the eleventh case, the accused were released without the parties to the dispute having reached the stage of tribal *sulh* or even *`atwa*; nor had the stage of investigation been completed. The release came about through the intervention of the security agencies to which the accused belonged; this reflects the extent of interference by the security agencies in the work of the formal judiciary and in the proceedings of the regular courts.

The twelfth case showed the judiciary's role to be absent, with the case file retained at the police station and not examined at the regular courts; the fact that the stage of tribal *sulh* had been reached was considered sufficient, based on instructions from high authorities in the PNA.

6-1-1 Impact of formal justice rulings on the informal judiciary

From the above it can be said that informal justice is not affected at all by rulings issued by the formal judiciary. In many cases it was found that although the accused was not

judicially convicted, the informal justice system did not hesitate on conviction, and dealt with the accused as having been convicted of committing the crime (see annex 6, cases 4 and 6).

Similarly, years-long delays in dealing with disputes on the part of the formal judiciary does not leave room for informal justice to be affected by the rulings issued by the formal justice system, as the informal judiciary is characterised by the speed with which it resolves disputes while the formal judiciary' work in dealing with cases is extremely slow. Thus, in light of the flows in the work of the judiciary, it is logical that the informal judiciary will have completed its work before the regular judiciary has ruled in the same dispute. This agree to some extent with the consensus expressed in interviews with regard to the reasons for the spread of informal justice work, to the effect that the poor work of formal justice and the length of the procedures encourages the public to have recourse to those who can resolve their disputes quickly and effectively – although it should be noted that the role of informal justice in criminal cases is *sulh* and not dispute resolution.

6-1-2 Impact of informal justice rulings on the formal judiciary

Rulings issued through informal justice have a tangible impact on the formal judiciary, although the extent of the impact varies according to area. A sizeable impact was found in the northern West Bank and the Gaza Strip, as shown by the reduction of penalties to less than the minimum stipulated in the law in the cases examined. This accords with the statements of formal judges working in those areas (formal judge in a northern West Bank Governorate; formal judge, Gaza Strip). In the central West Bank area, sentences may reduced to half or to the minimum legally stipulated penalty, as formal judges working in those areas observed (two formal judges, central West Bank). In the southern West Bank, we find that the formal judiciary is all but absent in examining these cases, and the work of the informal judiciary substituted most of the time. All this leads to the conclusion that the impact of informal justice rulings on the formal judiciary is varied in so far as concerns the effect of tribal solutions on judicial penalty. As to the spread of the work of informal justice, this also varies in different areas. Informal justice is more widespread in the southern areas than in the north and more in the northern West Bank areas than in the central West Bank. In this regard we cannot ignore the different security situations in these areas. The PNA's security control in the central West Bank area is greater than elsewhere in the West Bank, and the work of the formal justice system in the central West Bank area is better than in the north and south, particularly during the circumstances of al-Aqsa intifada.

6-2 Legal basis for the formal judiciary in dealing with decisions of the informal judiciary

Judges in the regular courts base their decisions in dealing with the rulings and decisions of representatives of informal justice on the above-mentioned texts of articles 46, 99 and 100 of the Penal Code. The Palestinian Criminal Procedure Law does not specify cases of release of the accused on bail, but leaves this matter to the discretion of the judge as noted above. The formal judge is regarded as part of society, influenced by prevailing political, social and economic circumstances, which means that he inevitably takes these circumstances into consideration when examining a claim raised before him (formal judge, Gaza Strip). A formal judge referred to the fact that the purposes of the penalty decided by the judge is not punishment in and of itself but to prevent the spread of the crime and the preserve peace and order in society, and that consequently it is fitting for the judge to be influenced by *sulh* and peace that exist between the parties to the dispute, and should encourage reconciliation generally, something that is accomplished only by reducing the sentence (formal judge, central West Bank). There is a consensus among formally judges that a judge is not bound to reduce the sentence as a result of tribal *sulh*, because the judge considers the circumstances accompanying the crime and the reactions of both parties, and according to this he decides on the penalty within the limits allowed by the law.

As for detention, this is not considered a penalty according to the law, but rather a preventative measure that is imposed on the accused until such time as the inquiry is completed and the accused is either transferred to the relevant court or released. Hence, the investigating judge has full authority to release the accused on bail or continuing his detention, according to the requirements of the procedures of investigation which serve the progress of his work (two prosecutors, northern West Bank, and the Gaza Strip). This can be clarified by a consideration of the following two aspects.

6-2-1 Decisions of informal justice and their impact on determination of judicial penalty

Some formal judges held that the proceedings of tribal *sulh* should not be taken into consideration when assessing the penalty. One of them held that tribal *sulh* is reached between the families of the disputing parties and the judge should not be influenced by it when he assesses the penalty due. When asked about a particular case of murder in which reconciliation had been reached between the parties to the dispute, he replied that if he had been the judge handling the case, he would have sentenced the accused to the maximum penalty stipulated in law (*nizami* judge, central West Bank). This was the only view recorded regarding the lack of impact on the formal judiciary by decisions issued by the informal judiciary. Equally, many formal judges expressed the opinion judicial practice is settled on reduction of sentence in the event that tribal reconciliation between the parties to the dispute (three *nizami* judges in the central and southern West Bank and the Gaza Strip). Some formal judges said that the regular courts always require the parties

to the dispute to complete the procedures of tribal *sulh* in order that the accused can be released (*nizami* judge, central West Bank). This is because the reason for substantial reduction in penalty is that the *nizami* judge is influenced by prevailing circumstances in society on the one hand, and the desire to reduce the burden on the regular courts on the other, particularly given the severe shortage of human resources in the Palestinian judicial system (*nizami* judge, Gaza Strip). This plurality of views goes back to the fact that as mentioned above, the Law of Criminal Procedure and the Penal Code set out the provisions in a general manner without specifying cases in which it is permitted to grant release on bail or to reduce the penalty. Thus the intention of the legislator here is to leave the judge free in determining such cases according to the circumstances of the crime, allowing the judge scope to take into consideration prevailing economic and social circumstances. This is shown by the legal texts that give the formal judge the right to consider reduction, rather than obliging him to reduce the sentence. First among these circumstances are those related to security and peace in society. Thus, every *nizami* judge has the right to apply mitigating texts according to what he considers appropriate, and has the right to apply or refuse mitigation. In the event that he applies mitigation, he should be constrained by the minimum as stipulated by law, as one formal judge stated (*nizami* judge, central West Bank). However, one of the formal judges held that it is allowed to go below the minimum, indeed even to commute a prison sentence into a fine (*nizami* judge, northern West Bank). A sole opinion recorded from a prosecutor held that the regular courts do not take tribal solutions into consideration in major criminal cases, but only in minor cases (prosecutor, Gaza Strip). This opinion does not match the cases that were examined in this study where sentences had been issued. In general, it can be said that judicial precedents have settled on taking reconciliation between the disputing parties as a reason for mitigating the stipulated penalty.

6-2-2 Relationship of informal judiciary with the work of the prosecution

The new Law of Criminal Procedure reduces the jurisdiction of the prosecution to the benefit of an expansion in jurisdiction of the judge. Consequently, the interaction and impact of the work of tribal *sulh* is limited in regard to the prosecution; mostly, matters are dealt with before the judge. However, this does not cancel out the fact that the judge draws in his decisions on recommendations from the prosecution, without being bound thereby. In an interview with a prosecutor in the central West Bank, he stated that currently the prosecution has no legal basis on which to deal with deeds of *`atwa* and *sulh*; the legal basis is before the judge alone. The Chief Prosecutor in a northern West Bank governorate states that in the event there is a deed of tribal *sulh* or *`atwa* then the prosecution recommends the release of the accused on bail and does not insist on keeping him in detention.

This indicates that the relationship between informal justice representatives and the prosecution is limited. Nevertheless, there are those who say that this relationship continues and that members of the prosecution look positively on the work of *islah* men and appreciate their role in preventing the exacerbation of the problem. At the same time however, they reiterate the need for *islah* men not to exceed their limits, and note that

some of them occasionally obstruct the work of the prosecution and that in some cases their decisions are in conflict with those of the prosecution (prosecutor, northern West Bank).

Similarly, some prosecutors observed that tribal *sulh* procedures speed up the progress of claims before the regular courts, through providing the appropriate security climate for the work of prosecutors and judges during their examination of judicial claims (two prosecutors, southern West Bank and the Gaza Strip).

7. Relationship between informal judiciary, the executive and legislative authorities, political organisations and civil society institutions

The fact that informal justice is active in Palestinian society means that it is open to influencing and being influenced by society's institutions and various political frameworks. In order to identify the level and extent of this mutual relationship, we will examine the details of the relationship between the informal judiciary and the executive and legislative authorities, Palestinian political organisations and civil society institutions.

7-1 Relationship between informal judiciary and the executive

7-1-1 Relationship with the governorate

The relationship between informal justice representatives and the governorate is active, continuous, almost daily and somewhat structured, and involves forms of mutual support, facilitation, subordination and reliance. The form and substance of the relationship depends on the nature of the case in dispute, the parties thereto, the circumstances of time and place, and the identity and character of the *islah* man or the tribal judge and the personal in charge at the governorate. It should be noted that the strength of the relationship with the governorate various from one *islah* man or tribal judge to another. Also, there is a slight difference in the relationship between one governorate and another.

Equally, the governorates view the work and the role of the informal justice representatives positively and consider them to be a vital tool in maintaining public peace. At different levels and administrative departments, the governorates have provided – and continue to provide – plenty of support and facilitation for *islah* men and tribal judges. In an interview with a Governor in the southern West Bank, he stated that he personally intervenes with *islah* men to resolve disputes between the citizens in his governorate, because of the experience and know-how that *islah* men have in resolving problems and disputes in the tribal manner.

In another interview, a governor in the central West Bank insisted on introducing himself as first and foremost an *islah* man. In the case of an incident that occurred in a southern Gaza Strip governorate, the Governor was leading the *islah* men himself, and went with them to negotiate with the parties to the dispute in order to reach with them a resolution and resolution of the case. In another interview, a governor in the northern West Bank gave a description of the relationship with the men of *islah* to the effect that the governorate instructs the *islah* men to solve specific cases, and it facilitates their work, and deals with the difficulties that might confront them in resolving the case, because of their important and positive role in solving disputes and problems among the people.

7-1-1-1 Legal basis for the relationship between the governorate and informal justice

The position of governor is an important one within the administrative structure of the state. It is position that is both administrative and political at the same time. The governor enjoys wide powers and discretionary authority. He relies in this on administrative law, in particular the Jordanian Regulation of Administrative Structures no.1 of 1965[45] and the Jordanian Law on the Prevention of Crime no.7 of 1954,[46] along with Presidential Decision no.74 of 2003 issued by the late President Yasser Arafat.[47] The Regulation and the Crime Prevention law give the Governor broad administrative and disciplinary authorities, the basic aim of which is to ensure the maintenance of public order, as this is considered the primary responsibility of the Governor. The central and core role of the governorate lies in the realisation of social peace through working to achieve the elements of public order. This does not mean that judicial powers are legislated to the Governor empowering him to rule on citizens' different cases. The Jordanian Regulation on Administrative Structures constrained and standardised the jurisdiction and powers of the Governor and the legal departments under him to strictly administrative functions based on preserving public order. Furthermore, the said Regulation employed clear expressions and terminology to avoid overlap in authority between the governorates and their legal departments and the jurisdiction of other authorities, particularly the judiciary, prohibiting any act that would conflict with its sovereignty (article 12 of the Regulation). Article 12 (b), in setting out the tasks of the governors, stipulates 'preserving public morals, general security and public health…within the limits of the independence of the judiciary.' In fact, the said powers of the governors have nothing to do with the judiciary and cannot be used to justify the governorates' work in regard to dispute settlement. Maintaining public order in this regard means administrative – not judicial – discipline. Without going into too much detail about the extent of the powers and authorities of the governors, it can be said that there is an overwhelming number of cases that are resolved and concluded within the legal departments of the governorates. This was confirmed by interviews with legal advisors in the governorates, indicating that the governorate, which is part of the executive authority, is usurping certain powers of the formal judiciary, whether this is done directly or through charging the informal judiciary with intervening and solving disputes. Furthermore, the governorate uses certain means of pressure on

[45] Jordanian *Official Gazette*, Jordanian rule, no. 1894 of 1st January 1966, p.2.
[46] Jordanian *Official Gazette*: Jordanian rule, no.1173, 1st March 1954, p.141.
[47] Palestinian *Official Gazette*: PA, no.46, p.43.

parties to the dispute and threatens them with administrative detention in the event that they do not abide by the decisions of the informal judiciary on the pretext of maintaining public order and general security.

From all that has been discussed above with regard to the relationship between the governorates and informal justice, it can be assumed that this relationship constitutes the widest dimension in the relationship of the informal judiciary with the other institutions of the Palestinian executive authority.

7-1-1-2 Governorate organisation of informal justice work and mechanisms of organisational intervention

There was a consensus among the informal justice representatives interviewed for this study, that with the start of the PNA the governorates contacted them, met them and built confidence between them and the governorates. In an interview, an *islah* man from the northern West Bank noted that an *islah* committee through which he worked existed before the establishment of the PNA, and said that after the advent of the PNA, the Governor met with him and other *islah* men and lauded their work and positive role, and approved of the work of this committee on condition that there would be coordination between it and the governorate.

7-1-1-2-1 Establishment of the islah committees

The *islah* man mentioned above explained that the *islah* committee in which he worked in along with other *islah* men before the establishment of the PNA subsequently turned into the Central Committee of *Islah* and Khair under the auspices of the governorate, although not completely under its auspices. In an interview, a tribal judge from the south of the Gaza Strip who heads the High *Islah* Committee of the governorate in his area observed that governors throughout the Gaza Strip have set up *Islah* Committees under their governorates with the objective of these committees intervening to settle disputes among citizens through and under the supervision of the governorate. He noted that despite this affiliation, they as an *islah* committee undertook the resolution of disputes and cases according to their knowledge and experience.

There were many statements by informal justice representatives as to the governorates throughout the West Bank and Gaza Strip establishing or relying on *islah* committees, and as far as possible making these committees come under the governors in their work; there was only exception in a governorate in the south of the West Bank. He added that the reason for this went back to the presence of a large number of *islah* men in that governorate, rending it impossible to absorb them all in one *islah* committee. In addition, forming such an *islah* committee might lead to shutting the door in the face of those who wish to undertake reconciliation between people. In summary, most of those working in informal justice agreed on the existence of an effective and cooperative relationship

between them and the governorates, while a few observed the opposite. One *islah* man interviewed in the northern West Bank noted that after the creation of the PNA, the governorates tried to regulate the work of the *islah* men with the aim of subjecting the rulings and decisions of the *islah* committees to what the Palestinian Authority – as represented by the governorate - wanted and found appropriate. The above-mentioned *islah* man added that the governorate was successful with some for a period but failed with others, and that it had failed with him.

Equally, a legal advisor in a central West Bank governorate said in an interview that immediately after the establishment of the PNA and the creation of the governorate and its legal department, the first thing they did was to invite *islah* committees that existed during the time of the first intifada to meet with them. He added that these committees started to work under the umbrella, instruction and patronage of the governorate. As a governorate they were not content with the *islah* men who were already present, but added many new names, and formed a central *islah* committee under the governorate, as well as sub-committees. Similarly they created mechanisms and programmes for cooperation and coordination with these committees, such as specialised departments in the governorate to follow up the work of the *islah* men; they provided training courses for them, with the aim of familiarising them with arbitration techniques. In another interview, the legal advisor of one of the northern West Bank governorates noted that when the PNA was established, the governorate cooperated with *islah* committees that were already in existence. He added that the governorate cooperated with well known *islah* men respected in their family and clan and in exchange, the *islah* men assisted the governorate in resolving many disputes. With regard to the *islah* men coming under the governorate, the advisor stated: 'All *islah* men consider coming under the governorate in their work, and the governorate considers itself responsible for the work of all *islah* men.' Perhaps the last part of the advisor's opinion is more a reflection of his wishes than it is a reflection of reality, as this view assumes the absence of any independence for *islah* men, meaning also that an *islah* man makes not move without informing the governorate. This was not borne out by the study; rather, there was wide agreement among informal justice representatives throughout the governorates of the West Bank and Gaza Strip that they have substantial freedom in action, following up on dispute resolution and *sulh* procedures without referring to the governorates, particularly regarding the cases and disputes that come to them directly rather than going through the governorate.

7-1-1-2-2 Governorate regulation mechanisms for informal justice

From the above it is clear that there is a side of the relationship between informal justice representatives and the governorates that is to a large extent organisational in form. This form focuses on the following mechanisms:

- Establishment of *islah* committees in the vast majority of West Bank and Gazan governorates. Normally these committees are named to indicate that they are formal committees and that they work comes under the governorate. These

designations may be 'Central *Islah* Committee' or 'High *Islah* Committee' etc; these committees come under the governorates where they are established, but they have no central unified administration.

- Employment of governorate headed paper by certain of the above mentioned *islah* committees, as well as of seals bearing the names of the committees, giving the general impression that the committees' decisions have a formal nature (see annex 8).
- The existence of special departments in the governorates following up and supervising the work of the *islah* committees, the most important being the legal department. The legal department of the governorate is basically considered the relevant address for the activity and work of informal justice. This department makes contact with the informal justice representatives and cooperates with them, also supervises other departments in the governorate with regard to the work of *islah* committees, although one governorate will differ from another in the nature and title of these departments. In one central West Bank governorate the name 'tribal affairs section' is given to a department that deals with the *islah* committees and that is supervised by the legal department. In another northern West Bank governorate the name 'department of citizens' follow-up' is given to a department whose work relates to following up and supervising the activity of the *islah* committees. In sum, the head department that follows up on the work of *islah* men in the governorates is the legal department, and whatever is done through other departments remains under this department's supervision. It should be pointed out that the governor in person intervenes and participates with informal justice representatives in their activities, working with them in the settlement of cases and disputes between citizens. In many cases, governors in both the West Bank and Gaza Strip head notables' delegations in *sulh* and *`atwa* (see annex 8).
- On occasion, the direct and formal commissioning by the governorate of *islah* men to intervene and resolve cases and disputes. Mostly these commissions issue from the governorate's legal department. They include the commissioning of an *islah* committee or *islah* man in person to intervene in a particular case or dispute. Besides this being done through formal letter of charge, the commission maybe made by way of telephone call or a personal communication from the governorate with a representative of informal justice. For their part, the informal justice representatives stress that the governorate charges them with intervention in cases and disputes, and note that they send a copy of their decision in regard to the dispute to the governorate. However, most of the informal justice representatives noted that cases reach them directly from parties to the dispute, without commission from the governorate.

Mostly, the appointments of informal justice representatives do not feature on the organisational charts of the governorates, meaning that they are not bound by formal time keeping and are unsalaried. However, mention was made of a case in the northern West Bank where a particular *islah* man is present in the governorate, keeps formal hours and

receives a salary for his work, but his employee designation indicates that he works in the office of the governor rather than as an *islah* man. In this context, a tribal judge who works in an *islah* committee in a Gazan governorate noted that there is a decision issued by the late President Yasser Arafat requiring the payment of the sum of 300 dollars as a monthly salary of an *islah* man, adding that the finance minister obstructs the implementation of this decision.

Sometimes the governorate intervenes in formulating and setting rulings and decisions of informal justice. This happens when the legal department amends decisions either by way of additions or deletions in order to achieve the maximum level of harmony between these decisions and the statutory law, ensuring that the decisions do not contradict statutory law, as in the case of decisions that include the exile of the perpetrator's family (*al-jalwa*) from their homes, even where the perpetrator's family agrees to this decision. This is because the governorate is against the principle of exiling people from their homes. The legal department considers its work as a form of supervision over the decisions and rulings of informal justice. Here it should be noted that most informal justice representatives said that the governorate does not participate in the decisions issued by them, observing that they consult and coordinate with the governorate but not to the extent that the governorate issues rulings and decisions on cases in which they intervene. This contradiction is summarised in statements made by officials in the governorates on the one hand and ifrs on the other; most of the cases where informal justice representatives intervene come to them directly, without passing through the governorate, meaning that the governorate basically has no knowledge of the details of the case or of the decisions issued by the *islah* men.

From the above, it would appear that there is a certain level of subordination from the informal judiciary to the governorate. This varies from one *islah* committee to another and from one *islah* man or tribal judge to another and from one governorate to another. However, it is clear that there is not absolute subordination of the informal judiciary to the governorate.

In summation, from the time the PNA was established, the governorates had an interest in establishing contact with the informal justice representatives and in building good relations with them. They also worked on finding an administrative formula for this relationship in such as way as to ensure supervision of the work of the informal judiciary by the governorate. The governorate succeeded (albeit partially) in this field in consolidating the organisational structure of the informal judiciary.

7-1-1-2-3 Support and facilitation provided by the governorate to the work of informal justice

Most informal justice representatives state that they seek the assistance of governorates to facilitate their work in solving disputes. This assistance comes either through facilitating their function with other official agencies and institutions, or through seeking the intervention of the governorate with one of the parties to the dispute to bind them to accept the solution or the implementation of the decisions of the *islah* committee. A legal advisor in a northern West Bank governorate said in an interview that in the event that an *`atwa* or *sulh* deed was obstructed by a party to the dispute, the *islah* committee would inform the governorate. In its turn the governorate, fearing trouble and public disorder, proceeds to summon the party who does not want *sulh* or who is violating his commitments, and informs this party that he must implement the decision of the *islah* committee. The legal advisor added that if the party persists in rejection, 'then we try to convince him, and if he is not convinced and we feel that this will have an impact on public order, then we can take administrative measures against him, such as administrative detention.' On the other hand, the personal participation of governors along with other officials from the governorates in the rites of tribal *sulh*, as notables in the final *sulh* and *`atwas*, and in the negotiations between the disputing parties, is an important and direct support for the work of *islah* men. Suffice it to look at the daily papers for confirmation of this; many deeds of *sulh* and *`atwa* that are published in the daily newspapers include the names of governors and governorate officials, their names heading the lists of the members of *sulh* delegations (see annex 8). Most informal justice representatives who were interviewed for this study across the West Bank and Gaza Strip stated that governorates are one of the official bodies that support their work; they constitute a source of strength on which they rely in implementing their decisions. Similarly, they agreed that the governorates provide them with channels of communication and coordination with other official agencies and departments of the PNA, at different levels, for the purpose of giving the support and facilitation necessary for their work. In a case that occurred in a village in the north of the West Bank, an *islah* man charged with resolving the dispute described the role of the governorate in supporting the *islah* men by saying that the governor himself provided him with the necessary facilitation and authorities, through contacting the governorate's chief of police and asking him to facilitate the task that the *islah* man was carrying out and to give him what he needed (see annex 6, case 4).

7-1-1-2-4 Impact of personality and position of the governor or official on the way that informal justice is dealt with

The perception of the governor or the official in the governorate with regard to informal justice and its work plays a role in determining the level of the relationship between the two parties. Naturally this relationship is strengthened and developed if the personal convictions of the governor or the official serve this. However, the position of the official is not the decisive factor for the existence or non-existence of the relationship, because of opinions against informal justice on the part of certain officials. Nevertheless, the extent and nature of the relationship between the governorate and the informal judiciary indicates the existence of a relatively general and established policy imposed by need, most probably, in the interaction and relationship between the two parties. This

interaction will not cease merely because of the personal conviction of one employee or official here or there.

7-1-2 Relationship with the security services

7-1-2-1 Relationship with the police

There was a consensus among the informal justice representatives and the directors and officials of the security services who were interviewed for the purposes of this study that there is a relationship and a connection between the two parties. On the one hand, the informal justice representatives seek help and facilities from the security services, particularly the police, while on the other the security services support the efforts and work of the informal judiciary to the extent that it does not conflict with the vision of these services. In Addition, there are *islah* committees formed by the security services and coming under these services in their work, particularly in the Gaza Strip. In an interview, the most prominent tribal judge in the Gaza Strip stated that he himself was a member of the Central High *Islah* Committee belonging to the Palestinian national security command. The dominant characteristic of the relationship between informal justice and the security services is the realisation of shared interests and objectives of the two parties. On the one hand, the informal justice representatives need the support and facilitation of the security services in a variety of matters, such as helping them to contain large disputes and facilitating their visits and meetings with the disputing parties in detention centres and prisons. On the other, the security services consider the activities of informal justice to be a factor that helps in the maintenance of public order. The following gives some detail of the manner in which this interaction occurs between the two parties.

As regards intervention by the security services in organising and regulating the work of informal justice, the General Directorate of the Palestinian police issued a circular directed at members of the *islah* committees in a northern West Bank governorate that in its preamble lauded the substantial role played by *islah* men and their positive work in calming, conciliating and achieving *islah* between citizens. The circular then proceeded to set out what could be considered a regulation for the work of *islah* men, requiring them not to carry out the procedures of *sulh* unless the involved parties had signed the deed, and that the *sulh* be approved by the chief of police in the governorate, in order to see whether the case should be brought before the regular judiciary for the necessary legal process to occur. The *sulh* would thus be considered as a mitigating reason before the formal judiciary, but without the cancellation of the public right (see annex 8). Thus the organisational formula contained in the circular sought to bind the informal justice representatives in their work, and included a threat in the event that they did not abide by the directives set out in the circular – that is, that whoever exceeds this rule is liable to a penalty.

The measures of facilitation offered by the policy to the work of informal justice are various. There is a consensus among the informal justice representatives on the importance of the support afforded to them by the security services, particularly the police. One of the most prominent *islah* men in the northern West Bank said in an interview that as *islah* men, they sometimes go to the police and inform them that a party to the dispute is instransigent and does not wish for a solution. Upon this, the police proceeds to bring this party in and pressure him to implement the decision of the *islah* men. Many informal justice representatives noted that the police give them a grace period to solve the dispute before the case is transferred to the prosecution, and that this period is normally extended for a month or more. This action is not legal, as grace periods and the extension thereof are not allowed in criminal matters, which are not dependent on complaints of a lack of reconciliation in order to be taken up in the courts. The informal justice representatives say that when major disputes occur, such as those involving the use of firearms, the call on the security services for help because of the difficulties of their own intervention in such cases. In one case that happened in the Gaza Strip, informal justice representatives could not intervene between the two parties due to ongoing confrontation and armed clashes which required the help of the security services. The latter intervened and put an end to the clashes between the parties, giving the informal justice representatives the opportunity to intervene and solve the dispute at a later stage (see annex 6 case 10).

The informal justice representatives also noted that the security services provide them with protection in the event that a party to the dispute threatens or insults them. Sometimes the police guards the place where the *sulh* is taking place; in other cases, they allow informal justice representatives to examine the files on the investigations related to the case. The police also allow informal justice representatives to visit parties to the dispute detained in prison so that they can negotiate with them to find a way of resolving the matter in dispute (see annex 6 case 1).

From the above, it is clear that the security services intervene in the work of *islah* committees and cooperate with them as if they are a judicial authority. This is to be considered unlawful conduct, not to mention the incidents of intimidation and violence that sometimes accompany it. In this way, the security services in general, and the police in particular, become an implementing tool for the informal justice representatives. This is reinforced by a statement from a director in the security services, who observed that they support the work of the informal judiciary and that they sometimes intervene to convince the disputing parties to accept the solution; he added however that their intervention is of a friendly nature.

This view is affirmed by the rest of those who were interviewed besides the informal justice representatives and security service officials, to the effect that there is a relationship between the security services and *islah* committees. They held that there are many forms of facilitation and support provided to informal justice by the security services, noting that this support sometimes came in the form of participation by the commanders of these services in the rites of *`atwa* and tribal *sulh*, and sometimes their

active participation as members of *islah* committees 9see annex 6 case 1). This is clear from the deeds of *sulh* and *`atwa* published in the newspapers, which include many names of commanders in the security services listed in the *sulh* delegations (see annex 8).

It is noticeable that the interplay between the work of informal justice and the security services takes place with the police force in particular. There is a special relationship between the police and informal justice in the Gaza Strip, where one of the security services formed *islah* committees answerable to the service in its work. This does not exclude relationships with other security services, particularly with preventative security in the West Bank, which will be considered next.

7-1-2-2 Relationship with Preventative Security

There is a distinctive relationship between informal justice and Preventative Security in the West Bank. The reason for this is that the Preventative Security Service is made up mostly of members of the Fateh movement in Palestine, who had experience in dealings with citizens and solving disputes among them. Some of them even worked as *islah* men before the establishment of the PNA.

A Preventative Security commander in the West Bank who was interviewed for this study noted that after the establishment of the PNA, members of the service continued to intervene to solve disputes between citizens, and contributed to the resolution of many problems through the Preventative Security Service. The commander added that *islah* committees were sometimes formed to solve disputes, particular major ones, with committee members being from those elements of the Preventative Security with experience in solving disputes, in addition to ordinary *islah* men. He also stated that there are Preventative Security elements dedicated to work in certain *islah* committees in the West Bank, while taking their salaries from the Service. He emphasised however that the intervention of these individuals was under the name of the *islah* committee not that of the Service.

On the participation of the Preventative Security Service (PSS) in its capacity as a security service, in the rites and procedures of informal justice, the same officer noted that sometimes they intervene as the Service and in a direct manner in these rites and procedures, adding that in the event that if he could not participate himself in these rites, he would send a public relations officer to participate therein.

Preventative Security officers in the West Bank have special offices to receive complaints, follow up on disputes, solve cases and problems between citizens; these offices are directed by a PSS officer.

In conclusion, there is interplay between the work of informal justice and the security services, although it varies in levels of coordination from one service to another according to the nature of the work of each security service. So for example the interaction between the police and informal judiciary is extensive, by reason of the nature of police work. Similarly, the way in which the PSS was formed – as explained above- makes the relationship existing with the informal justice representatives also very strong.; There is also a strong relationship between informal justice and other security services such as the intelligence services, national security, Force 17, special forces, and other services. The relationship reaches a distinctive stage in Gaza where certain security services have established their own *islah* committees.

7-1-2-3 Forms of intervention by the security services in informal justice work

The participation of security services in the work of informal justice sometimes takes the form of facilitating the work, without attempting to impose directions or orders on the informal justice representatives. However, this intervention transforms into design and formulating the solution when a member of the security services participates in an *islah* committee following up a particular case (see annex 8).

Among other forms of intervention by the security services is when they intervene in the interests of one of their members who is a party to a case being considered by the informal judiciary. A number of informal justice representatives noted that the security service intervenes to protect its members from the tribal liabilities arising in such cases. In an interview, an *islah* man from the northern West Bank noted that if a member of a security service for example killed someone, then the security service concerned will take him, and will tell the parties and the men of *islah* that he has been put in the service's prison. The *islah* man added that mostly the murderer remains at large; and that even if he was actually put in prison, then he would be released after a short period of time.

7-1-2-4 The effect of Al Aqsa intifada on the shaping of the relationship between the security services and informal judiciary

There was a consensus among the informal justice representatives who were interviewed for this study that their reliance on the help; of the security services decreased and weakened during the current intifada. They observed that the reason for this was that the security services were going through a period of severe weakness as a result of the ongoing situation and the practices of the occupation. On the other hand, most of the commanders and members of the security services who were interviewed said that the current situation had resulted in a paralysis in the work of the security services; the serves were now without weapons, and could not fulfil their duties even in the matter of arrests, and was totally important at this stage as a result of the measures taken by the occupation. In an interview, a commander of the security services in the central West Bank observed

that as security services, they commissioned *islah* committees to address part of the security gaps that had befallen the Palestinian street.

It is clear that currently the security services suffer from a paralysis in their work, and are sometimes totally incapable of breaking up disturbances or clashes between two families. In a case that took place in the southern Gaza Strip, armed confrontations between two families lasted for three days without the security services being able to break it up. Eventually, the personal relationship between a member of the security services and a party to the dispute played a fundamental role in calming things down and securing the arrest of the perpetrators (see annex 6 case 11).

It is also clear that the current situation has led to the security services conceding many of their responsibilities to the advantage of informal justice, which in turn has resulted in the widespread consolidation of its role. In periods of stability, and at their full strength, the security services allowed the work of informal justice and facilitated its functions, but did not concede a significant part of its own role as is now the case. Furthermore, the conceding of these roles by the security services is an indication of impotence and not a result of a voluntary act by the services. From here, we see that in the event the security services regains its strength, this will lead to a change in the way they deal with informal justice, meaning that they will try to reduce the role of the latter and limit its authorities, albeit without a complete break in the relationship between the two parties.

The above suggests that there is reason to assume that the form and details of this relationship reflects a major gap in the methods and policies of these services, going beyond the question of the weakness or strength of these services to also affect informal justice. When security services resolve conflicts in cases of dispute through special units at their headquarters, or through their members, and close criminal claim files without transferring them to the prosecution, this constitutes usurpation of the authority of the formal judiciary. One of the reasons is the absence of an applicable law regulating the powers of the security services. Also, the security services contribute, through certain set practices of 'facilitation' provided to informal justice, to the consolidation of legal violations, such as allowing informal justice representatives to view investigation files, providing them with free access to detention centres, forbidding visits of parties to the dispute, and pressuring them –albeit in a friendly manner, as some claim – in order to gain their agreement to tribal solutions.

7-1-3 Relationship with the office of the President

The informal justice representatives who were interviewed state that the late President Yasser Arafat was a strong force in Palestinian society, adding that they need a strong party continuously supporting their work. They also agreed that direct contact between them and the President is lacking, and that the relationship is mostly brokered through the governors. If they wish for something from the President's office, they send him a formal

letter through the governor; they consider that the governor's support for their work comes within the framework of directives and authorities granted to the governor by the President.

Perhaps the clearest example of the support that informal justice received from the former President was the establishment of a department under his office entitled the Department of Tribal Affairs and the appointment of a Director for this department by way of Presidential Directive no.161/1994.[48] The head of the department was titled 'presidential advisor on tribal affairs.' There are also offices for follow-up on tribal affairs in certain parts of the West Bank, although the main activity of this department is focussed in the Gaza Strip, and the main members are mostly representatives of informal justice in the Gaza Strip.

Similarly, the late president issued orders for financial payments to be made, such as *`atwa* payments (*firash `atwat*) and compensation in many cases. In more than one of the cases we studied, the president, through his representatives, paid sums of money to the families of victims or those injured in disputes (see annex 6 cases 6,8,10). Hence, there is certainly a relationship between the president and the informal justice representatives, indicating the reliance of the political system under the leadership of the late President Arafat on relationships based on family and local loyalty.

7-2 Relationship with the PLC

The informal justice representatives who were interviewed agreed that there is no relationship of consultation or communication between them and the PLC in regard to their work. A number of them mentioned that after the elections for the PLC in 1996, they were not invited to any meeting with PLC members, adding that PLC members used to meet with them during their election campaigns and before they were elected. For their part, members of the PLC who were interviewed (six members, some of whom work as *islah* men) said that there is no relationship or consultation between them and informal justice representatives regarding the codification of the work of informal justice or anything of that kind. An *islah* man who is a member of the PLC stated that consultation sometimes takes place between him and his colleagues at the PLC, and that this occurs in order to reach a resolution of a particular dispute through informal justice.

Thus it can be said that there is no tangible consultation between the PLC, as a legislature and a formal body, and the informal justice representatives, whether in the West Bank or Gaza Strip.

[48] Palestinian Official Gazette: PA, year 2, 1995, issue 3, 20th February 1995, p.24.

7-2-1 Participation of PLC members in the rites and procedures of informal justice

Most of the PLC members who were interviewed participated at various levels in the rites and procedures of formal justice. Some of them have more the stamp of *islah* men than of PLC members, in the sense that a member usually participates in a personal capacity and from individual motivation, and not in a formal capacity as a member of parliament. In some of the cases studied where PLC members had a central in reaching a solution shows that PLC members appeared in delegations and *sulh* and `atwas as the principal *islah* men and were the spokesmen for the delegations (*jahat*). In one case in a central West Bank governorate, a PLC member who intervened was the guarantor and 'robe-wearer' (*labis thob*) for the perpetrator (see annex 6 case 6). In another case, in the southern West Bank, a PLC member had the principal role in bringing the case to resolution, and also financially compensated the injured parties based on instructions from the late President Arafat (see annex 6 case 8). In a case in a northern West Bank governorate, PLC members' roles became clear through the coordination between the PLC members before the arrival of the *sulh* delegation to take the `atwa; one PLC member was at the head of the delegation representing the perpetrator, and the other was at the head of the delegation that received them and represented the family of the victim (see annex 6 case 2).

The intervention of PLC members in disputes has an impact on the solution, as they have influence over citizens and people usually listen to them as a result of their considerable status in society as elected officials. This speeds up the process of reaching resolution and calming people down; however, this does not stop one PLC member in the Gaza Strip from claiming that there are PLC members who intervene in a stealthy and behind-the-scenes manner, urging their relatives to have recourse to informal justice in order to avoid the imprisonment of these relatives. Irrespective of the aim and direction of the PLC members' interventions, there is often a substantial impact on the success of the solution. This is due to the social status enjoyed by these PLC members in their areas. In a case in the southern Gaza Strip, the intervention of the PLC member representing the area had a large role and effect in calming things down between the disputing parties (annex 6 case 10).

As for the rest of the PLC members who were interviewed, there was one who said that he intervenes in dispute resolution through informal justice and participates in the rites and procedures of *sulh* and *`atwa*, but also pointed out that this participation saddens him and that he is forced to do it because of the current situation. Another PLC member said that he intervenes in solving many disputes through the informal justice system but does not consider himself an *islah* man or affiliated to those who work in informal justice.

As a result of these entanglements, it is not possible to consider all PLC members who intervene in disputes as workers in informal justice, as some of them intervene in order to resolve a particular dispute out of feelings of responsibility towards society's interests and security, and from the point of view of a need arising from the current situation,

rather than as a result of working in a permanent fashion as an *islah* man. Others on the other hand can be considered first and foremost *islah* men, and secondly PLC members.

7-2-2 Obstacles preventing PLC members from discussing the subject of informal justice

PLC members who were interviewed agree that the fact that the PLC's has not discussed informal justice goes back to the fact that there is no need for it to do so. They believe that informal justice is part of customs, traditions, and social `*urf* historically present in society, and that the need for it increases in exceptional circumstances. These PLC members add that the PLC is not the right place for this discussion, and agree that the PLC should not draft any laws for the codification of informal justice, because the PLC in their opinion should be concerned with drafting *nizami* laws only. The field research suggests that there are other reasons preventing the PLC from embarking on an investigation and discussion of the subject of informal justice, given the extent to which members participate in the rites and procedures of informal justice. Many of them achieved their positions through electoral bases that rely on 'families' and other kinship relations and thus will try to avoid any 'clash' with their electoral bases, seeking rather to use this to reinforce their image.

Most PLC members who were interviewed, and others, held that the reason for absence of PLC discussion of the matter was that PLC members were unwilling to do so, whether for lack of expertise, or because they are themselves a part of this phenomenon, or are benefiting from it, or because they fear classing with it.

7-2-3 Future scope and anticipated role of the PLC

As noted above, PLC members who were interviewed do not consider that the PLC has a role with regard to the codification or regulation of the work of informal justice, holding that the task of the PLC is to set *nizami* laws and to follow up their application. They add that if the PLC was to do that, then it would be in the case where there was no urgent need for informal justice and that its role would diminish but not come to an end. Some of the informal justice representatives who were interviewed believed otherwise. Certain of them called on the PLC to promulgate laws to regulate the work of informal justice. One suggested that this might begin with a study of tribal `*urf*, trying to locate it within legal texts, because this, in his opinion, would reduce the burden on the formal judiciary. Here we must mention an important point made by a PLC member, who said that the role of the PLC should be part of a complete process attempting to re-educate society in a culture appropriate to the age. The PLC is one of the bodies charged with a part of this task, but not all of it, as this work is a collective responsibility that starts from the home, the school, the university and so on. He added that promulgating laws to address informal justice is beyond the pale, because the drafting and legislating of laws should be come as a result, after the creation of a new societal culture. It is worth noting that the person who

expressed this opinion sometimes participates in the rites and procedures of informal justice.

7-3 Relationship with political organisations

In the first chapter of this study, it was mentioned that Palestinian political organisations and informal justice have a historical relationship that has spanned many years and gone through many different stages.

The informal justice representatives who were interviewed for this study agreed that their work is not influenced by the political affiliation of the parties to the dispute and that they deal with everyone in the same manner and by the same standards, whether the are members of political factions or individuals; they do not involve politics in their work, and an *islah* committee should not have a political direction. In their opinion, however, this does not prevent an *islah* committee from cooperating with a particular political faction in order to find a solution to a problem, particularly if a member of this faction is a party to the dispute, or in the event that the families who are parties to the dispute are members or affiliates of political factions – in such cases, there is intervention. This means that if a particular political faction holds the key to the solution of the problem, then an *islah* committee might approach a personality in that organisation asking him to help in reaching a resolution of the dispute.

Equally, many members, leaders and officials in political factions who were interviewed confirmed that there was a relationship between their organisations and informal justice, even though there were different positions in regard to the nature of their dealings with the informal judiciary, according to the political faction to which they belonged.

7-4 Relationships between political factions and representatives of informal justice

Three political attitudes emerged in so far as concerns the relationship of political factions with informal justice, as follows.

First attitude: This represents the position of the main faction (Fateh). A Fateh representative in the northern West Bank observed that they (in the Fateh movement) deal with informal justice, because it is indispensable, and because it is a tangible fact on the ground, and that disputing parties accept solutions coming from informal justice more than they do from formal justice. He considered that the informal judiciary was more accepted in Palestinian society than the formal judiciary, being as it is part of Palestinian *`urf*, adding that the political factions have no problem with and do not object to the work of informal justice, and that the informal justice representatives could not have had their current substantial role were it not for the agreement on this role by the political

organisation, because in his opinion the political organisation is the force on the ground, and can have a great impact on the way life goes on in society. The Fateh representative observed that Fateh plays the largest role in this support and impact, as it is the largest force and has a bigger influence than others, although he held that those sections of society that have recourse to informal justice are normally 'backward.'

Second attitude: This represents the position of the left. A member of the Central Committee of one of the leftist Palestinian factions said in an interview that they reject informal justice but find themselves as a faction obliged to deal with it in certain cases. She considers that this behaviour does not constitute a doctrine or a referential framework in their faction, but rather is a result of lived reality, and that as a faction; they consider that they should not give in to this reality.

Third attitude: This represents the position of the Islamist tendency. A representative of Hamas in the West Bank says that his movement's position is that disputes should be solved by way of *shari`a* ruling, and that in light of the absence of an Islamic state, they have no problem with the informal judiciary solving disputes amongst the people, as *sulh* is one of the things that the Islamic *shari`a* calls for and encourages. However, ultimately they call, as Hamas, for the application of the Islamic *shari`a* and the creation of an Islamic state; this is the general slogan for the Islamist movement.

It is clear that the position of the religious tendency can be summarised as not aspiring to the application of either informal or formal justice; rather their goal is the establishment of an Islamic state. It should be noted however that they are currently more inclined towards the informal judiciary than to the formal judiciary, as they are sometimes able to direct the rulings and decisions issued by *islah* committees and make them accord with the Islamic *shari`a*. They are able to do this when individuals affiliated with the Islamic tendency are inside the *islah* committees, or when the *islah* men and the parties to the dispute are influenced by the directions and advice given by members of this tendency outside the committees.

Looking at the three directions here, a clear fact emerges: that all the political factions deal with informal justice and have a relationship with it, irrespective of whether this relationship is welcomed and accepted as is the case with Fateh, or comes by way of forced interaction in order to address reality without attempting to change it as is the case with the left, or from the perspective of dealing with the phenomenon temporarily until such time as an Islamic state is established as is the case with the Islamic tendency.

7-4-1 Mechanisms of intervention by members of political factions in the work of informal judiciary

This intervention takes many and varied shapes that differ from one area to another, particularly between the West Bank and Gaza Strip, and also between one political faction and another and one case to another. The following exposes the forms and shapes of political factions' interventions in the work of informal justice as shown in the field research.

- The creation by the Fateh movement in the Gaza Strip of its own *islah* committees. These committees have a centre in the city of Gaza and sections in several Gazan governorates. In their work these committees come under the Central *Islah* Commission of Fateh's high movement committee. As for the other political factions in the Gaza Strip, they did not work on establishing *islah* committee affiliated to them, but this does not mean that there is no cooperative relationship between them and informal justice representatives in the Gaza Strip. Many informal justice representatives in the Gaza Strip stressed the existence of such cooperation, although they noted that the broader relationship and bigger role in regard to their work is with the Fateh movement.
- In the West Bank, no political faction has been noted as having directly set up an *islah* committee; what happens is that individuals are sponsored to become members of *islah* committees, or else there are members of the political faction inside the *islah* committees for a long time. The faction with the greatest presence and activity in this field is the Fateh movement. As for Hamas, there are personal affiliated to Hamas working in *islah* committees, although a Hamas representative from the West Bank considers these members to be in the committees in their personal capacities and not in their capacities as organisational affiliates. No presence was noted of leftist political factions in the *islah* committees.

- The participation of the factions in the rites and procedures of informal justice in their organisational capacity, in the sense that the factions intervene directly from the start to the end of the case, and representatives of the factions sign the deeds of `atwa and final *sulh*. In a case in the northern West Bank, a representative of the factional liaison committee which includes all the political factions signed a final *sulh* deed in the name of the liaison committee; the reason, it was said, was that both families in the dispute were both affiliated to a faction. Equally, political organisations commission informal justice representatives to intervene in cases and disputes, benefiting the political organisation, since normally one of the parties to the dispute is a member in this faction (see annex 6 case 2). As to the impact of political affiliation on informal justice representatives in relation to the formula of the resolution that they set for the case in hand, views are mixed. Some say that informal justice representatives separate from their political affiliations when drawing up the final solutions – that is, that political affiliation does not interfere in the solution. This view was supported by most of those interviewed, whether they were informal justice

representatives or others. Meanwhile, others consider that it is not possible to separate the personality of the one who intervenes in informal justice from his factional reality.

- The intervention by factions in the intricacies of the dispute as an executive power, having effective power and presence in society. This intervention takes many forms. It might be an intervention to break up clashes between disputing parties, resulting in commissioning informal justice representatives with intervening and ending the dispute (see annex 6 cases 9, 10, 11). Intervention could be in the form of pressuring one of the parties to the dispute to guarantee agreement on the solution formulated by informal justice representatives, or intervening to overcome certain obstacles standing in the way of an agreement being reached (annex 6, cases 3-9).

In regard to political disputes among the factions themselves, the dominant view holds that the informal justice representatives take a distance from these disputes and do not intervene to solve them. This is of course if the dispute remains political and does not come under the framework of a family dispute. A leader in a political organisation notes that these political disputes take place inside the faction or inside the factions' liaison framework.

Equally, it was noticed among those researched outside the informal justice representatives and officials in political factions that they held very negative opinions regarding the intervention of political factions in solving disputes among people. Some said that the intervention of these organisations in and of itself represents a problem; others said that it does not accord with their role, as it is impossible to talk in the same breath of democratic parties and of the law, on the one hand, and of informal justice on the other. In this context, a member of the Executive Committee of the PLC says that parties intervening in solving disputes within society is a result of the impotence and shortcomings of these organisations in leading the nation, and that it does not accord with the role of these parties which is built on the development of society and helping it advance and progress. The Executive Committee member mentioned that these political factions went back to using tribalism and informal justice and tried to endorse this phenomenon to serve their own interests.

7-5 Relationship with civil society organisations

It is important to point out at the start the large gap between one institution and another in civil society with regard to their dealing with and position taken on the work of informal justice. In reality, we cannot set clear limits between these organisations and divide them into groups based on the social sectors that they serve. Even the institutions that one would expect to have relatively similar positions – such as women's organisations – do not have a unified position on informal justice or on dealings with it. In interviews with certain women leaders in civil society institutions in the West Bank and Gaza Strip, the women noted that they rejected the idea of working with informal justice, and completing

rejected its work. Other women leaders stated in interviews that they welcome the work of informal justice and consider it to be the idea and only method that can help to solve cases and disputes with which people approach these institutions. Between these two positions we find a position of other women leaders that refuses the work of informal justice on principle, but works with it out of necessity and as a matter of reality. In women's organisations close to the Islamist tendency, the leaders observed that they see informal justice as a good thing, provided that it follows Islamic law. The difference in the positions of women's organisations applies also to other institutions of civil society in terms of their view and the nature of their dealings with informal judiciary.

Excepted from this is the position of legal organisations run by jurists, which consider informal justice as a phenomenon related to – as they put it - 'social backwardness, poor economic situation and the dissipation of central authority; it is a system based on balance of powers that does not realise justice'.

Despite these differences, there is still a relationship between civil society institutions and informal justice, normally coming through the victim who has recourse to these organisations. Once approached, the institutions – particularly women's organisations – work with the victim in order to empower them emotionally and sometimes materially, so that they can reach a stage of independent decision-making. In the meantime, they deal with the informal judiciary to resolve the case, whether directly with informal justice representatives or indirectly through transferring the victim to another party that deals with the informal judiciary such as the governorates. A woman who heads a women's association said that there is direct contact between her and informal justice representatives, and that the organisation goes to them to solve most problems that reach the association, as well as going to the governorate or large families or any influential personalities with weight in society. She also mentioned that the activists in the association want at the end of the day to resolve the dispute, irrespective of the party that undertakes its resolution, stressing that *islah* men provide substantial assistance in solving cases that are brought to the association; through this the association is able to perform excellent work especially during the current situation. This woman adds that most of the cases in which they approach informal justice are those involving rape and family honour, and the aim of the *islah* men's intervention in such cases, along with certain influential personalities in the local community, is to protect the victim. She also adds that in certain cases the parties involved do not want to go to the police, and this is why informal justice representatives are brought in to the case. On the other hand, the director of a women's organisation in the Gaza Strip observed that her organisation arranged meetings and dialogues with informal justice representatives during which many subjects were discussed, such as women's position in informal justice and the extent to which her rights a realised if she approaches the informal judiciary, as well as the extent to which it is possible for women to actively participate in the work of informal justice.

As for how these organisations view the future role of informal justice, views were mixed. Some called for it to be abrogated to the benefit of the formal judiciary as the only form of judiciary, while others called for a social role to remain for informal justice

representatives in *islah* procedures between parties to a dispute, but without issuing rulings and decisions, and that their work would be voluntary and supervised by the state, which would define their authorities. Yet others suggested placing informal justice under the authority of formal justice in order to control it as a first step towards its abolition.

From the above, it can be said that the nature of cooperation between civil society organisations and informal justice stems primarily from these organisations' need for an address inside society that can resolve disputes the parties to which approach these organisations. Acceptance by these organisations of the work of informal justice reflects, to a certain extent, the background of the personalities running these organisations, which in turn reflects the manner in which they describe dealing with informal justice ranging from rejection to forced acceptance to welcome.

8. Outcomes of *sulh* proceedings in the cases examined

8-1 Impact of social status of parties to the dispute on outcomes of informal justice proceedings

An examination of the results of 12 cases distributed throughout the West Bank and Gaza Strip showed that the social status of the disputing parties has an impact on the outcome. The size of the *hamula*, its economic position, and the nature of its relationship with political factions and PNA institutions all constituted important elements in influencing the formula and content of decisions in informal justice (see annex 6 case 3). Similarly, the *hamula* of one the parties (perpetrator or victim) could be of local origin or refugees to the area, which can affect the decision, albeit, that this differs according to location of the case (city, village, camp). A convergence of these elements, or some of them being present in one party to the dispute and not the other can constitute an advantage to that party.

In a case that occurred in the northern West Bank (see annex 6 case 3) the fact that certain individuals of the victim's family belonged to the Fateh movement had a substantial effect in forcing the perpetrator's side to accept all the conditions as set by the victim's families. The *islah* committee handling the case agreed to these conditions and turned a blind eye to a number of violations by the victim's family, most importantly the armed kidnapping of the perpetrator's brother which took place after the conclusion of the deed of *`atwa*.

The financial capabilities on the part of one party to the dispute does not constitute a standard on which the value of compensation due to victim's party is based; the assessment is made according to the type and nature of case. However, the perpetrator's financial capabilities make it easier to fulfil the financial obligations tribally imposed on him toward the victim's party. Also, if the perpetrator has a good financial position, this makes it easier for *islah* men to find a solution to the dispute, since it gives them a margin

for manoeuvre as the majority of penalties set by *islah* men are at base financial (prosecutor, a central West Bank governorate). In a case in the central West Bank, the financial capabilities of the perpetrator's family played a role in facilitating fulfilment of the financial obligations that were incurred as a result of the solution drawn up by the *islah* men (see annex 6 case 4).

In another case, in a town in the southern West Bank, the small size of the perpetrator's family, alongside the fact that they were refugees, played a part in the events that took place during the build-up to the case. The townspeople got together and burned and looted the properties of the perpetrator's family, forcing them to leave town under police protection (see annex 6 case 8).

As for PNA intervention in disputes, this is mostly a result of personal knowledge of one of the disputing parties, or else as a result of a personal plea from certain informal justice representatives involved. Such an intervention normally takes the form of arresting parties to the dispute to stop acts of retribution between them, to prepare the way for informal justice representatives to intervene. In case in the southern Gaza Strip, the personal relationship connecting certain individuals working in the PNA with the perpetrator's family played a part in convincing the perpetrators to give themselves up to the security forces as they latter sought to control the situation and stop the ongoing attacks between the parties (see annex 6 case 11). An intervention by certain individuals from the executive authority in the ceremonies of `atwa and *sulh* may lend a binding quality to the formula of the solution set by the informal justice representatives (see further chapter 6).

Furthermore, the fact that certain informal justice representatives work in the security services plays a part in facilitating tribal procedures in solving cases in which they intervene, as their decisions take on a more binding character for the disputing parties. In a case in the northern West Bank, the *islah* man handling the case belonged to the security services (as a colonel in the Department of Political and Personal Guidance in the PNA) and this played a role in the imposition of the form of solution that he considered appropriate on the disputing parties, although a number of well known *islah* men in the governorate had intervened before him and failed to solve the case (see annex 6 case 1).

As for the disputing parties' social status, in the cases examined no impact was observed on the decisions issued by informal justice. A tribal decision is not influenced in the event that the offending party or the victim is a man or a woman. The factor that has the most influence in such cases is the extent of convergence of the elements of power of the *hamula* of the woman. In three cases studied in the West Bank where the victims were women, it was noted that the result of the tribal *sulh* was to their advantage (meaning that the decisions by the informal justice representatives inclined more to their side than to the other party). In these three cases, the families of the victims enjoyed attributes of power such as a large number of family members and belonging to the largest political faction,

Fateh. The other disputing party on the other hand (the perpetrators) belonged to families that did not have the same power, being smaller and not having the same relationship with the authority. Despite the positive discrimination to the benefit of the woman in these cases, the woman did not represent herself in any of the three cases; normally, the woman was represented in the rites and procedures followed in informal justice by a senior member of her *`ashira* or a relative such as her husband, father or brother (see annex 6 cases 2, 4 and 8).

From the above it can be concluded that it is not possible to separate the outcomes of tribal solutions from social status and political affiliation of the disputing parties. To a certain extent this reinforces the idea that tribal solutions are often formulated in accordance with the balance of power. This of course exposes the weaker sectors in society to oppression in many cases as a result of their recourse to informal justice or being obliged to have recourse thereto. However, this should not be taken as the overall situation in Palestinian society. The poor for example do not always represent the weaker party in the case, as a poor person who is a party in a case against a party with greater material capabilities may possess sources of power that render him more able to impose a formula that he considers appropriate for resolution of the case. He may belong to a political faction or have lots of young men in his *`ashira* or a large family, or have the backing of the family notables in his area (town, village, camp), which may enable him to impose conditions and demands on the other party.

8-2 Extent to which justice is realised

From the cases studied, it emerges that the position of most disputing parties who were interviewed (37) was that justice was not realised through the solution set by the informal justice representatives in the case. Most disputing parties observed that solutions imposed by *islah* men and tribal judges were unfair, and that they did not have freedom of choice or even of objection. They also considered that the informal justice representatives exercised many forms of pressure to get agreement on the solution. In a case in the central West Bank, *islah* men imposed a solution and fines on the party accused in the case, without going back to him or even consulting him, despite the fact that the accused and his family had not authorised informal justice representatives to resolve the case. The accused and his family found themselves required to discharge the obligations imposed on them by the *islah* men despite their insistence that their son was innocent of the charge made against him. Although they objected to the interventions of the informal justice representatives in the case, they thought that their contribution to the solution did work to stop the dispute between the families from escalating (see annex 6 case 6).

In another case in the southern Gaza Strip, the father of the victim said that the informal justice representatives pressured the *mukhtar* of his *`ashira*, and took advantage of his generosity, to reduce the amount of compensation to which they were entitled, added that *islah* men succeeded in reducing these amounts by half. He considered that they were biased towards the *hamula* of the other party, because they were afraid of them – as she

put it – as they have a reputation in the area as a belligerent family (see annex 6 case 10). Other members of parties to the disputes in other cases stated that informal justice representatives exerted pressure on them to accept conditions for *sulh* that meant they had to waive their rights; because the informal justice representatives were influenced by the social status of the disputing parties (see annex 6 cases 2 and 9).

In a case in a village in the southern West Bank, the family of the perpetrator felt that they had been wrongfully treated in the tribal resolution formula set by informal justice representatives. The charge against their son was attempted rape and on the basis of this they were expelled from their home, but the charge was false. The informal justice representatives took the decision for their expulsion and prevented them from seeking compensation for the material losses they incurred, without clarifying the truth of what had really happened (see annex 6 case 8).

In another case, some of the parties to the dispute held that the solution set by informal justice representatives responded to a large extent to the conditions and demands of the victim's family; this leniency pushed them – as they put it - to subsequently kill the perpetrator (see annex 6 case 5). In another case, the perpetrator's side said that he accepted the formulation of the solution by the informal justice representatives because he was afraid of the victim's family and their reaction. He also stated that if he had found other *ashira*s to back him, he would have rejected the decisions made by the informal justice representatives (see annex 6 case 10).

Parties to the disputes in other cases considered that informal justice was unjust, in that it bases its work only on material penalties. One of them observed that blood cannot be compensation for by money (see annex 6 cases 8, 9). As for women who were interviewed as relatives of parties to the disputes, they did not voice their opinion as to the extent to which the informal system achieves justice; they knew nothing, they said, about the work of informal justice, and they don't interfere in it.

There was a quasi-consensus among the parties to disputes in the cases examined to the effect that the reason they approached the informal judiciary, or accepted the formulations of resolutions set by its representatives, was the lack of a formal legal alternative that is effective and able to resolve disputes with the desired speed and efficiency. In addition, there was a sense of obligation to general customs and `urf in going ahead with the procedures of informal justice. In one of the cases, the victim held that he had been forced to proceed with informal justice out of custom and tradition, and respect for what senior `ashira members do (see annex 6 case 12). At the same time, other individuals in the same case said that they had accepted the solution set by informal justice representatives because of the importance of protecting the two disputing parties from mutual retribution, explaining that the informal judiciary always takes this matter (the prevention of retribution) into consideration in their work, in contrast to the formal judiciary. Parties in other cases described the importance of informal justice – despite the

fact that it did not realise justice, in their opinion – as lying in its contribution to their release from prison on bail (see annex 6 cases 1 and 2).

For their part, the informal justice representatives held that justice was achieved through their solutions in the cases under examination. In one case in the northern West Bank, and *islah* man who intervened stated that the solution he imposed was an ideal solution that achieved justice for all parties. This position by the *islah* man contradicts what the parties to the dispute said; the consensus among the latter was that they had been unjustly dealt with in the formulation of the resolution (see annex 6 case 1). Most of the other cases studied showed a similar picture. The view held about the justice of the case's resolution is divided in two: parties to the dispute consider that informal justice did not bring them justice, while *islah* men hold that justice was achieved, as '*sulh* is the master of rulings'. An explanation may lie in statements by some of the informal justice representatives to the effect that their primary objective is ending the dispute and preventing its escalation through finding a settlement on which both parties agree or are forced to agree. This settlement of course does not assume that justice is realised in most cases, as it is based on the parties waiving some of their rights.

It is worth noting that for informal justice representatives, the concept of realising justice has a special meaning that differs from the normally understood. In their opinion, justice is based on the acceptance by parties to the dispute of the formula of the resolution, regardless of whether this acceptance comes through conviction or through coercion. On the most prominent *islah* men in the central West Bank said in an interview that 'right' doesn't satisfy both parties, while *sulh* satisfies everyone, as the dispute does not end until the parties are satisfied. This view goes for most of the informal justice representatives who were interviewed; they consider that justice in their solutions is represented in the parties being satisfied by the formula of the resolution, because justice is known only to God, and *sulh* is the maters of rulings (*islah* man, Ramallah). *Islah* men believe that the parties to the dispute being satisfied is evidence for them that justice has been realised, and that the understandings of forgiveness and pardon that prevail between the parties to the dispute guarantee the bridging of any gaps that arise from the fact that justice has not fully been achieved.

8-3 Extent to which social peace is realised

Most of the parties to the disputes in the cases examined agreed that the main reason for their acceptance of the solution set by informal justice representatives – despite this solution being unjust from their point of view – was to prevent the problems escalating. One party to a dispute in a case in the northern West Bank stated that he knowingly accepted to be unjustly treated rather than seeing the problem escalating into killing between the parties (see annex 6 case 1). A governor in the northern West Bank stated in an interview that the fundamental desire behind the governorates dealing with *islah* committee is to achieve social peace so that disputes do not explode within society. Equally, the informal justice representatives agreed that their work maintains public order

and protects society, because stoops bloodshed between parties to the dispute and prevents escalation of problems, as well as protecting the family of the perpetrator from retribution by the family of the victim.

Most informal justice representatives consider that their work leads to atmosphere of calm in society. Despite this consensus on the ability of informal justice to achieve social peace, there are opinions that hold that social peace, and the clam atmosphere that goes with it, is temporary, and that the calm lasts for years and then sometimes the disputes erupt again. In a case in the southern West Bank, the family of the victim killed the perpetrator 11 years after the first crime, despite the existence of a *sulh* deed between the two families (see annex 6 case 7). In another case, in the southern Gaza Strip, the parties to the dispute engaged in armed clashes and set fire to each others' houses, although there was a deed of `atwa between the parties which lasted only a day (see annex 6 case 10). In five of the twelve cases examined in detail, there were violations of some of the decisions made by *islah* men, whether through the murder of the perpetrator or attacking his property and that of his family, despite the conclusion of procedures and ceremonies *sulh* between the parties to the dispute. This could be considered as an indication that resolutions set by informal justice representatives sometimes achieve social peace for a limited period for time, only for the disputes to break out again sooner or later depending on the nature of the case. On the other hand, in other cases, the solutions set by informal justice representatives held and there had been no reactions from the parties to the dispute or developments in the dispute, although there aren't any guarantees that the problem will not re-emerge in the future. In a case in a central West Bank village, *islah* men concluded a *sulh* between the parties to the dispute and there was no violation of the *sulh* deed, no attacks or vendettas; indeed, social relations between the two *`ashiras* returned to normal with the exception of the family of the perpetrator and the victim (see annex 6 case 4).[49]

From the above it is clear that justice has a particular meaning for informal justice representatives, stemming from the principles and foundations on which the system is based. Solutions issued by informal justice representatives are based on the principle of settlement and concessions by the two parties in order to reach a formula of a resolution that ends their dispute. Here, the social status of the disputing parties and the *islah* men comes into play in determining the amount of pressure that the *islah* men can exert on the two parties so that they offer concessions on the way to reaching a solution. *Islah* men for example cannot exert pressure on a party that has the kind of sources of power set out above, except in cases where the *islah* man is confident of his own personal power sources and personal connections that make it possible for him to impose the formula of resolution to the case that he considers appropriate for the two parties.

Despite the fact that informal justice sometimes failed to maintain social harmony in the long term, with the re-emergence of the dispute by way of revenge, even if this comes after many years as noted above, it did however in many cases prevent reactions leading

[49] For further details see annex 5, setting out the opinions of parties to the dispute and *islah* men of the extent to which justice and social peace are realised through tribal solutions.

to escalation of the dispute through prompt initiation of the proceedings of *`atwa* and *sulh*. A number of officials in the PNA services and the governorates stated that the informal justice representatives stated that this was the case and that this led to the preservation of public order, even if for a short period. This explains the trust that the executive agencies of the PNA have in the informal judiciary. In a case in the northern West Bank, after the victim's party kidnapped the brother of the perpetrator, the governor went to the head of the governorate's *islah* committee who was handling the case, asking him to intervene to secure the release of the person kidnapped and to resolve the crisis, which is what happened (see annex 6 case 3).

9. Attitudes to and evaluations of informal justice

Opinions were varied among the interviewees in regard to informal justice. This became clear from the opinions the expressed during their interviews, and their observations regarding the nature of this system, and their knowledge of the its function and effect and their evaluation of its performance. The difference in opinions goes back to differences between the dominant characteristic of the interviewee. Despite the difference in opinion even between members interviewed from the same group, it is possible to talk of each group included in the field research, to attempt to distinguish between the views of the different groups, and to cast last on the details of the views within each particular group.

It should be noted to start with that personal considerations of each interviewee play a large role in the opinion they expressed, in the sense that the interviewee expressed an opinion on informal justice from a personal perspective. For example, a suspect in a dispute that was tribally solved in the northern West Bank stated that the role of informal justice in this dispute was positive, because he was detailed by the prosecution and released as a result of the tribal *sulh* procedures, while the victim of a dispute that was tribally solved in the southern West Bank considered the role of informal justice to be negative, having not received adequate material compensation for the crime committed against him. A member of the executive authority in the central West Bank emphasised the fact that the work of informal justice was positive and just, because the system contributes to the preservation of public order and security, which in turn facilitates the work of the executive.

Though the interviews conducted by the research teams in the West Bank and Gaza Strip, different and even contradictory views were obtained regarding the justice of the informal judiciary, and the extent to which it is positive and necessary in Palestinian society. Annex 5 sets out these views. It is worth noting that not all of these opinions were voiced directly; a fair proportion of them were concluded from the answers given by the interviewee with regard to an evaluation of the work of informal justice, his view of the reality of its work in Palestine, and suggestions for the codification, development or abolition of the work of informal justice. For example, some praised the justice of the work of *islah* men and tribal judges and their impartiality, and considered their role to be a positive contribution in maintaining security and public order in society, which led to

the view of this interviewee being categorised as considering informal justice fair, positive and necessary. Others on the other hand referred to the partiality of *islah* men in their work, recommended that this work should be abolished and the formal system should suffice, and held that their interventions in dispute resolution was negative; this led to these views being categorised as holding the work of informal justice to be unjust, negative and unnecessary. There were also those who responded directly to questions related to the justice of the informal judiciary and the extent to which it was positive and necessary.

Annex 5 details all of these views according to the field interviews that were carried out with societal groups with a connection and an interest in the work of informal justice. From this annex, we can draw out the opinions according to the classification of the groups whose views were obtained, in the manner set out below.

9-1 Interviewee evaluation of the work of informal justice

9-1-1 Parties to disputes resolved tribally

The evaluation of this group depends on the vision held by the party to the dispute of the capacity of informal justice to treat him equitably from his point of view. The section related to the outcomes of *sulh* proceedings in Chapter 7 of this study clarifies these opinions.

9-1-2 Legalists

This group comprises members of the formal judiciary, lawyers and legal researchers who were interviewed, with the exception of those working in the executive authority; the group numbered 24 interviewees. The interviewees were asked about their views in informal justice, in particular about its relationship with formal justice. Only one interviewee voiced his inability to evaluate informal justice (a lawyer in the northern West Bank). Another considered that such an evaluation basically depends on the aim of the *islah* man in intervening in the dispute (material benefits, desire for fame and fortune, or working without personal interest) and therefore he did not want to generalise (chief prosecutor in the Gaza Strip).

Among the legalists who were interviewed there was a consensus that the existence of the phenomenon of informal justice basically goes back to historical reasons stemming from public refusal to deal judicially with the regimes and authorities that ruled Palestine, particularly the Israeli occupation authorities (see further Chapter 1: Historical evolution of the work of informal justice). There was also a consensus that the weakness of the executive authority was a significant factor in the current spread of this phenomenon. A further consensus was found to the effect that the role of informal justice is applicable in

dealing with personal right (with the two parties to the dispute reconciling and waiving personal rights) but that the question of public right is a matter for the judicial authority, although this right however is influenced by the sentence mitigation or by release on bail as a result of the waiving of personal rights.[50] There was also consensus that the procedures of tribal *sulh* are distinguished by their speed in ending disputes, and that its work has a preventative nature with a good role in maintaining peace and order in society through preventing escalation of the dispute and containing it through reconciliation. Further, there was also consensus that the work of informal justice does not affect the principle of the rule of law because the law deals with the public right while tribal justice deals only with private right.

Certain members of the judicial authority prefer to deal with *islah* men when asking for guarantees for the release of accused, because they have considerable weight in society, and it is safe to deal with and rely on their guarantees (prosecutor, southern West Bank). Also, procedures of tribal *sulh* help speed up criminal proceedings by providing a situation of security and calm for the regular judiciary to work in and through the charging of certain *islah* men with bringing in witnesses should the need arise (prosecutor, southern West Bank). The same interviewee pointed out that one characteristic of informal justice is that it does not seek justice in its work as it relies 'shaming' both parties into reaching a solution. Other legalists considered informal justice to be materialistic, since most of the penalties imposed are confined to financial compensation to the family of the victim, and consequently deter only the poor. This is a licence for crime, encouraging the spread of crime by those who are able to pay the financial exchange set as the penalty (two prosecutors in the northern and southern West Bank). Others considered the work of informal justice to complement the work of the prosecution, provided that it did not interfere with the latter's work (prosecutor, northern West Bank). Here, 'complementary' means preserving security and social harmony which furnish the appropriate atmosphere for the prosecution to do its work. Some pointed out that the speed of tribal justice procedures and their low financial cost propels the public towards it in resolving their disputes (two prosecutors in the Gaza Strip). Others found the work of *islah* men positive in terms of delivering accused and witnesses to the formal judiciary (prosecutor, Gaza Strip). One prosecutor pointed out that *islah* men often come to the prosecution seeking the release of the accused on bail in order to consolidate a *sulh* between the parties to the dispute (prosecutor in the northern West Bank). One nizami judge stated that they always ask the parties to the dispute to resolve the dispute tribally so they can release the accused (*nizami* judge, northern West Bank). Another considered that the overwhelming majority of criminal cases are solved tribally without even reaching the formal judiciary (*nizami* judge in the central West Bank). Another judge considered formal justice in its current state to be incapable of meeting society's needs, hence informal justice intervenes; the number of cases in the regular courts for the year 2004 was 67,000, indicating that there should be 500 *nizami* judges in work while in fact there were only 120 (formal judge in the Gaza Strip). However, one formal judge expressed his absolute rejection of cooperating with tribal judges and their

[50] A sole interview was outside this generalisation and related the issue of mitigation to the discretionary power of the judge, who may take the waiving or otherwise of personal right into consideration when assessing the penalty (*nizami* judge in Ramallah).

decisions from the first day he took up his post. He stated that he does not take into consideration tribal deeds that are brought to him, not does he allow the informal judiciary scope to interfere in his work (*nizami* judge, central West Bank). Meanwhile, another *nizami* l judge lauded the justice of the work of *islah* men, stating that he attended all their tribal sessions in a case that he was examining, and that this does not conflict with his role as a formal judge (*nizami* judge in the Gaza Strip). This judge justified the need for the work of informal justice, particularly in criminal disputes, because of the length of proceedings before the *nizami* courts, as the informal judiciary work to maintain public peace and order while the formal courts are doing their job.

One nizami judge considered the work of the informal judiciary to be positive through helping to seep up the resolution of claims before the formal courts, clarifying that a claim that takes several years to examine could be resolved within a few days as a result of the intervention of *islah* men (*nizami* judge, northern West Bank). A prosecutor clarified that intervention by *islah* men at the start of the dispute is wrong, as they would affect the process of investigation, but their work is acceptable if they intervened after the completion of the investigation process (prosecutor, Gaza Strip). He also pointed out that *`urf* is for the public to approach the informal judiciary in the first instance to resolve the dispute, and if the *islah* men are unable to do this, then the parties to the dispute will go to the formal judiciary. Some of the formal judges observed that formal justice also fulfils the function of *islah*, as the magistrate (*qadi sulh*) pursues *sulh* from the parties to the dispute from the outset – and hence he is called the '*qadi sulh'* ('justice of the peace') (two *nizami* judges in the central West Bank and Gaza Strip). A senior official in the Palestinian Ministry of Justice declared that he had personally intervened to solve certain tribal disputes in order to preserve security and public order. Looking at the opinions of some of the lawyers, we find that certain of them thought that the work of informal justice will come to an end with the passing of time, that Palestinian society has entered a phase of 'urbanisation', and that the work of tribal justice will not last long (lawyer, central West Bank). Another lawyer stressed that the Israeli law applied in occupied Jerusalem is influenced by tribal *sulh* and reduces the penalty by half as a result of tribal *sulh* procedures (lawyer, central West Bank). Another held that the work of informal justice might be more just than that of formal justice, as the speed of dispute resolution gets people their rights, even if only partially, in a short time, while waiting years for a resolution before the regular courts may get people their rights but after years, so the financial compensation awarded doesn't match the extent of the injury (lawyer, central West Bank).

Noticeable from these views is that the legalists constituted the largest proportion of interviewees who considered the work of informal justice to be unjust; however, there was a large proportion among them who held it to be necessary and positive. The reason for this contradiction is the acknowledgement by a group of legalists of the poor situation of the judicial and executive authorities in the current circumstances, and held that despite the lack of justice in the informal system, it is still necessary given the absence of executive authority and the incapacity in the work of the judiciary. This became clear in interviews carried out with top officials in the judicial authority in Palestine, who held

that the intervention of informal justice was necessary in the current stage as it reduces the workload of the formal courts (*nizami* judge, Gaza Strip).

9-1-3 Representatives of the executive authority

This group comprises those working in the civil police, the security service and the governorates; there were 13 interviewees in this group, a large proportion of whom supported the work of informal justice. This is due to the assistance that informal justice provides to the executive authority in maintaining security and social harmony and peace. Thus, it is considered assistance to the executive authority in arriving at this state of security and social peace which is among the functions of the executive authority.

Although a fair proportion of this group did not find justice to be realised in the work of the informal judiciary, they viewed it as extremely positive and necessary. This transpired in an interview with a member of the executive authority in the Gaza Strip, who considered the work of the informal judiciary as necessary and positive, although in one of the disputes that they dealt with they did not succeed in preserving security or in controlling the dispute (see annex 6 case 11). Certain members of the executive authority in the West Bank referred to support for the work of informal justice, and recommended that it be codified and contained in accordance with the law. There were also six representatives of the authority in the West Bank and Gaza Strip who spoke of informal justice as positive and necessary despite its work contradicting the rule of law. This is due to the incapacity of the formal judiciary in light of the weakness from which it suffers in discharging the requirements of judicial work; this might give rise to a situation of chaos and lawlessness if informal justice did not intervene to fill the vacuum. They expressed a desire for the abolition of the work of informal justice through the activation of formal justice to fulfil the needs of society, and for formal justice to become the only judicial authority authorised to examine and resolve all civil and criminal disputes. This contradiction can be explained as arising from the practical reality of the executive and the (formal) judiciary in Palestine. On the one hand these interviewees saw the need for the work of informal justice, despite its conflict with the rule of law, during the period when the executive and judicial authorities do not meet society's needs, and on the other they recommend the activation of the executive and judicial authorities towards the abolition of the work of informal justice.

Someone who works in a central West Bank governorate noted that the executive authority, as represented by the governorate, had organised and supervised the work of informal justice, putting in place a mechanism to oversee its work and helping to increasing the profile of its work through involving a number of *islah* men in training courses with a number of legalists in the field of arbitration. The *islah* men demonstrated that they were more capable than the legalists in so far as the work of mediation and arbitration was concerned and turned into teachers rather than trainees because of their experience and knowledge of *sulh* through intuition and instinct. A person deputising for the executive authority in the city of Jerusalem observed that the situation in the city in

particular necessitates the work of informal justice in order to control the security of society there, as there is no presence for the PNA apart from through the work of *islah* men; he noted that he works primarily in the field of *islah* despite his considerable position in the PNA.

9-1-4 Representatives of civil society and local bodies

This group comprises representatives of civil organisations and those working in local Palestinian bodies (municipalities), totalling 26 interviewees. Although a large proportion of them considered the work of informal justice to be unjust, a fair proportion held it to be positive and necessary. Representatives of civil society saw the absence of the rule of formal justice and the executive as being at the bottom of this positive perception because society is in urgent need of a body to control the public order and general peace; they felt that this is the primary function of the *islah* men and that they were successful in carrying it out to a large extent. There is a consensus among representatives of civil society that the reason behind the spread of informal justice is due to the poor performance of the formal judiciary that citizens are in need of a body to find solutions to their dispute, and that is what informal justice manages to do in the absence of formal judiciary.

Generally, the view of the representatives of civil society in the West Bank and the Gaza Strip is that revitalising the formal justice system will definitely result in informal justice work coming to a halt. Three representatives of civil society associations in the West Bank and the Gaza Strip believe that justice fundamentally is about two parties to a dispute accepting a solution even though it may be unfair. Two representatives on the other hand thought that pressurising two disputing parties to accept a solution is contrary to justice and therefore informal justice work lacks justice. Another two representatives of civil society associations who belong to the Islamist tendency believed that the measure of justice in the work of *islah* men depends on the extent to which their work relies on the Islamic *shari'a*.

Ten representatives of civil society associations in the West Bank and the Gaza Strip expressed a belief that informal justice contradicts the principle of rule of law because of non-*nizami* judicial parties taking over dispute resolution. A lone case in the Gaza Strip held the view that there is no conflict between the work of informal judiciary and the rule of law on the basis that informal judiciary deals with personal claims while the formal judiciary deals with public claims. Some representatives of women's institutions in the West Bank pointed out that the work of informal judiciary is in conflict with human rights particularly with regard to its dealing with women; some other women's institutions however, held that the work of the informal judiciary was good and did not discriminate against women.

9-1-5 Political organisations

There were fifty interviewees in this category, representing the main political organisations in Palestine. Some of them held that the most important thing that an *islah* man seeks to do is to protect security in society and to stop vendettas, rather than seeking the prerequisites of justice. There are some who view the relationship between society and the informal judiciary as the old relationship between society and popular / natural medicine which was shunned by society once professional medicine was consolidated. Some individuals belonging to the Islamist tendency recommended that in order for justice to prevail *islah* should be conducted according to Islamic *shari'a*, with no differentiations between the *'urfi* judiciary and *nizami* judiciary; as they put it, we should seek the establishment of a just Islamic system.

9-1-6 Members of the PLC

Six members of the PLC were interviewed; one member worked as an *islah* man on a full time basis while the level of intervention by the rest of the interviewees varied. The general inclination of the members who were interviewed was to consolidate the work of the judiciary in order to dispense with the informal judiciary phenomena. A view emerged which suggests that the PNA backed the informal judiciary at the expense of the formal judiciary and that the PNA had consolidated the concept of tribalism in Palestinian society (PLC member, central West Bank). Some members claimed that many members of the PLC were elected as a consequence of their work in the informal judiciary (PLC member, central West Bank).

9-1-7 *Islah* men and tribal judges

The number of interviewees from this category was 39, and they were unanimous on the necessity of informal judiciary because of the function of *islah* men in contributing to the maintenance of social and general peace in society. An *islah* man observed that his house had been turned into a police station as a result of people flocking to it in order to solve their disputes (*islah* man, central West Bank). They were also unanimous in their view that the work of informal judiciary is positive due to its success in averting sedition (*fitna*) and solving disputes in society.

What is interesting, however, is the part concerning the extent to which the informal judiciary realises justice. Most of the *islah* men and tribal judges interviewed believe in the justness of the work of the informal judiciary, while the rest held the view that the work of the informal judiciary, although they practiced it, is unjust. The interviews revealed that there was a different understanding of the concept of justice among tribal judges; five of them who worked in central and southern West Bank saw justice as a means to deter injustice and guarantee rights, and therefore, they could see the injustice of the informal judiciary. Others considered justice as deterring the perpetrator through

penalty, something that is not exercised by the *islah* men and tribal judges (two *islah* men, southern and southern West Bank). Also, some of them felt that the informal judiciary is interested only in *islah* even if they had to conceal the truth (*Islah* man, southern West Bank). Some of the *islah* men stated that in some of the cases that they handled, they pressurised parties to the disputes to accept their solutions but despite that, they believed in the justice of the informal system (*islah* man, northern West Bank). Another *islah* man, on the other hand, talking about a particular case, said that the informal judiciary provided justice in solving one of the cases although he added that the relatives of the perpetrator were unjustly treated in the case as it was decided that they should be exiled (*islah* man southern West Bank). An *islah* man said that he always pressurised the stronger party to accept the solution (*islah* man, central West Bank).

It is noticeable that there is a general tendency by *islah* men to view *sulh* as the basis for justice. There is a consensus among them that a ruling satisfies one party only but that *sulh* satisfies both parties. They said that the solutions they provided were just because both parties were satisfied by them and therefore they accept them. However, there is a clear contradiction between the concept of 'satisfaction' that they mentioned and the pressure exerted on the parties to the dispute to accept the solutions. Some considered *islah* to be an end in its own right which must be reached even if at the expense of justice (*islah* man, Gaza Strip). Others considered justice to lie in forgiveness and voluntary concession (tribal judge, Gaza Strip).

There is a common expression in the work of *islah* that, effectively, means: '*Al Haq* (the justice) is of the same stature as those involved'. This means that the strong can impose his decisions and reach the solution he desires through power (*islah* man, central West Bank). Some considered tribal justice to be contrary to justice and religion (two *islah* men, central and southern West Bank). Also, others said that even if the work of the formal judiciary improved, irrespective of the extent, it will not affect the work of informal justice (tribal judge, Gaza Strip; *islah* man, central West Bank). As for the position of women with regard to the informal judiciary, an *islah* man in northern West Bank held the view that informal justice pays special attention to women and exaggerates the financial compensations awarded to them.

Another *islah* man from the northern West Bank said that he wished for the formal judiciary to fulfil its role under the umbrella of the PNA but that the role of *islah* men has increased during the period of the PNA. Some *islah* men believed that people should accommodate each other (meaning they should be forgiving and respect the wishes of those who intervene in the *sulh*), and that 'God's forgiveness makes it a duty for people to be forgiving, and that being merciful means to forgive and to waive some of their *Haq* (their right or entitlement)' (*islah* man, central West Bank).

9-2 Recommendations by the interviewees regarding the work of informal justice

The interviewees voiced many and varied recommendations regarding informal judiciary, which may be summarised as follows.

1. It is imperative to preserve the informal judiciary and not to interfere in its work;
2. It is imperative for the informal judiciary to be contained and controlled by the ruling authority in Palestine;
3. It is imperative for the work of the informal judiciary to be abolished and for the formal judiciary to be re-empowered.

These main recommendations should be viewed according to the dominant character of those who made them and as an expression of their view of the type of society in which they wish to live. The legalists and the workers in civil society associations, for example, believe in the rule of law and believe that nothing else should be used in its place. *Islah* men, however, held the view that their work does not affect the work of formal courts; that they deal only with personal claims and not public claims and that formal courts can not perform the work that they do: *islah* (conciliation) of discord and averting acts of revenge through brokering *islah* among families in dispute. As for disputing parties, their position stems from their need for someone to solve their disputes without too much concern for the rule of law being undermined, which is what happens due to such solutions.

In order to shed more light on these opinions, it is important to examine these views held by different groups.

Those who believe that it is necessary to maintain and not to oppose informal judiciary

This group is particular represented in those who oversee the work of informal judiciary: *Islah* men and tribal judges. Their view is that '*urfs* and customs regulate our daily life to a large extent, rejecting the views of those who call for the need to re-empower the work of formal judiciary in order to cancel informal judiciary by claiming that there is no conflict between the formal and informal judiciary citing that formal judiciary was in a good state during the Jordanian rule and it did not affect the work of informal judiciary, rather, it was its golden age and that period was the best in terms of citizens respecting the law, with solid cooperation between the executive and the judiciary on the one hand and between the informal judiciary on the other (representatives of informal justice in the West Bank unanimously agreed on this). Some *islah* men held the view that the essence of the work of informal justice is for people to be generous in their dealings among themselves and therefore it is difficult to abolish it since it stems from the social and cultural basis of Palestinian citizens, although at the same time they expected that there

would be a contradiction between the work of formal and informal judiciary in the future as a result of the increasing number of specialist in legal work in Palestine and their feeling that there is a conflict between their work and that of the formal judiciary (*islah* man, central West Bank). As a result of this, *islah* men see the increased number of workers in the legal field in Palestine will result in containing the work of informal judiciary without necessarily abolishing it. Others believed that the reasons behind informal justice being widespread is not only a result of the executive and the judiciary being weak, but also due to the dominant customs and '*urfs* in Palestinian society which played a large part in the spreading of this work, therefore, we should raise the level of social and cultural awareness in Palestinian society in order to ultimately reach a stage where this phenomenon is limited but not abolished (*islah* man, southern West Bank). There is also a clear consensus among the practitioners of informal judiciary that there is a strong connection between a weak ruling authority and the popularity of informal justice. Subsequently, we can concluded that there is a general tendency for that group to believe in the considerable need to separate between the existence of informal judiciary and the level of its spread, because in their opinion its existence is due, fundamentally, to the tribal nature of Palestinian society but its widespread is due to the weakness of the ruling authority in Palestine.

Some *islah* men find it necessary to codify and control informal judiciary (*islah* man, central West Bank). His desire to codify the law is not driven by his fear of rationing the work of informal judiciary to the extent that it might cause its oblivion; rather, he fears that dealing with informal judiciary might be prohibitive as a result of the high financial recourses that are being imposed. Meaning that he wants an informal judiciary that determines penalties and *diya* in order to limit exaggerated amounts. Some went as far as saying that it is impossible to do without informal judiciary as it is woven into the fabric of Palestinian society and character (tribal judge, Gaza Strip). Others saw the impossibility of abolishing informal judiciary being limited to the areas in southern West Bank as a result of these areas adhere most to tribal customs and '*urf* as a result of living next to the bedouins of the Beersheba district (tribal judge, southern West Bank). This view considers informal judiciary to be more just than the formal judiciary, and therefore there is no room for abolishing it. Also, some held the view that strength of informal judiciary is based on the fact that is more binding than formal judiciary as unlike formal judiciary it binds the family and not just the individual and therefore it is impossible to abolish it (*islah* man, central West Bank). While others held the view that it doesn't matter how much the formal judiciary was re-empowered it will not affect the work of the informal judiciary (*islah* man, central West Bank). Some others went as far as saying that informal judiciary is complementary to formal judiciary as the latter can not fulfil the role of informal judiciary and therefore informal justice should be codified for the fear of deviation from it and of its abolition (tribal judge, Gaza Strip). An employee in the executive who also works in informal judiciary pointed out that there should be no interference in the work of informal judiciary adding that ' leave them to their work as they know it very well'. While a party to a dispute that was solved tribally stated that he was obliged to carry on with the tribal *sulh* rites because of customs and '*urf* which is impossible to abandon, and therefore there is no chance of abolishing the work of informal justice (see annex 6 case 10).

Those who believe in the necessity of the PNA to contain and control informal judiciary

This tendency was mainly represented by the people who are in charge of the executive and political parties that belong to the ruling party (Fateh) [need an update] in Palestine; their view is based on the assistance that they obtain from informal judiciary in maintaining the general peace in society. They consider the existence of the informal judiciary to be an integral part of society, which is totally attached to it through customs and '*urf* that make it indispensable and irreplaceable; and therefore, there is no alternative but to contain it and control it with a view to limiting its negative side and guaranteeing the integrity of its work. Others held the view that it is necessary to control and contain the informal judiciary through codification with the aim of limiting its activity (governor, southern West Bank). Some pointed out that there is a need to contain and control the work of informal justice but without codifying it, so that it would not be an alternative to formal judiciary (legalist, central West Bank).

There are those who believe that the work of the informal judiciary became widespread as a result of the occupation and the absence of national institutions, and that therefore it must be contained and dealt with although it does not achieve justice. This view is influenced by the current political and security situation in Palestine. A senior official in the executive in the southern West Bank said that he has to cooperate with *islah* men in order to carry out his duties as necessary. Responding to those who call for the informal judiciary to be abolished, he said that 'it's easy to talk if they're in a position to shun the informal judiciary' (he who has a hand in the fire is in a different situation from he whose hand is in water). Also, some said that the nature of their work obliged them to deal with the informal judiciary, citing an example that he had to provide protection to members of the informal judiciary during *sulh* meetings which required cooperation and liaison between the executive and informal judiciary to ensure that their work is operating efficiently in the shadow of the weak formal justice system (See annex 6, case 10).

Some recommended codification of informal justice on the Jordanian model which existed in the West Bank before 1967. One stated that he wished that the rule of law would be upheld and the informal judiciary abolished, but that under the current security situation this would be impossible, and hence there was no alternative but to contain and codify the work of the informal judiciary in order to ensure its integrity in work and direction (legalist, central West Bank). A PLC member for the central West Bank said that it is a must to establish a Higher Tribal Judicial Council that would ensure that the informal judiciary works and is dealt with according to the law. This suggestion is influenced by the idea of finding a mechanism for the formal and informal judiciaries to co-exist; nevertheless, this interviewee conceded that the revitalisation of the formal judiciary might be possible through the abolition of the informal judiciary.

Others pointed to the need for the informal judiciary to be contained through tying its work to Islamic *shari'a* rules to ensure its integrity and justness. This view is religion-based and is advocated by some who observe that the Islamic *shari'a* ordered the practice of *islah*, and that this means it cannot be abolished (recommendations made by three individuals who work in civil society institutions and are affiliated to the Islamist current). Others stressed the need for the executive to support the work of the informal judiciary to ensure its integrity. The informal judiciary, according to this view, takes the pressure off the work of the formal courts and contributes to maintaining general peace and order in society (legalist, northern West Bank). Opinions voiced by workers in the judiciary in the Gaza Strip maintained that there is a need to codify and work with the informal judiciary because of its positive role. These interviewees hold that the informal judiciary has positive aspects in dealing with the prosecution by handing over certain wanted people, meaning that it would be useful to codify and contain it (prosecutor, the Gaza Strip). Also, some held the view that it is important to contain the work of informal judges because their work helps to maintain social and general peace, and that because the formal judicial authority takes so long to issue legal rulings, there must be something available to solve disputes between families (*nizami* judge, Gaza Strip).

The group which holds the view that it is necessary to abolish the informal judiciary and re-empower the work of formal justice

This group of interviewees is represented by most of the legalists who work in formal judiciary (except for those who work with the executive authority), a small percentage of PLC members, representatives of civil society institutions, political parties (with the exception of Fateh and the Islamist current to a certain extent) and parties to disputes that were tribally solved, and who held they had been treated unjustly by tribal solutions.

There was a consensus among this group that the spread of the work of the informal judiciary is due to the weakness of both the executive and the judiciary resulting in the citizens losing confidence in them. The group's suggestions were based on this logic. They hold the view that it is necessary to re-empower the executive and the judiciary so citizens can have trust in them; it is not feasible to abolish the work of informal judiciary without finding a legal alternative to replace it. Some held the view that it is only a matter of appealing to the public not to deal with informal judiciary, something that they will respond to immediately (prominent personality in civil society, central West Bank). Others advised that it was necessary to move to gradual abolition through re-empowering the formal judiciary incrementally and raising the cultural awareness of the public (prominent personality in civil society, central West Bank).

9-3 Initiatives taken to regulate and codify the work of informal justice

These initiatives come under two main headings:

1. Initiatives by the executive and the political party of the Authority, reflecting what has been done by the governorates, the office of the President and Fateh. These initiatives are by way of regulating, liaising with and controlling the informal judiciary (for further information see Chapter 6, The Relationship of Informal Justice with the Executive and the Office of the President).

2. Personal initiatives by senior figures in the informal judiciary, aimed in principle at regulating and seeking to codify the work of informal justice. These initiatives were prominent in the northern West Bank. After the PNA took up its functions in the West Bank (1996), a number of prominent *islah* men in this area met through the central *islah* committee in the northern district and came out with a code of conduct regulating the work of *islah* men (an attempt to record informal justice). This document included tribal principles such as not allowing the exile of the family of the perpetrator, not allowing attacks on the perpetrator's property through arson and physical damage, and the setting of *hudud* and *diyya*s according to the rulings of the Islamic *shari`a*. It should be noted that these documents are not binding. As for the area of Ramallah and Jerusalem, a conference was held in Jerusalem in 1985 in an attempt to set down and define the work of informal justice.[51] Furthermore, there was an effort by a group of *islah* men known for their integrity and good repute in Ramallah governorate, who prepared a code of conduct to codify the *hudud* and *diyya*s set in informal justice to comply with the rulings of the Islamic *shari`a*, out of a concern at the excesses in the setting of *diyya*s and *hudud*. This document however is still pending (*islah* man, central West Bank). In the southern West Bank some efforts by *islah* men to organise meetings to regulate and codify the work of informal judiciary but these efforts failed as a result of internal divisions between some figures in the informal judiciary there. In early October 2004, discussions and workshops were held in the Faculty of Islamic Law at Hebron University with the participation of representatives of informal justice and academics in Islamic *shari'a* in an attempt to codify the informal judiciary and regulating its work so it would comply with the rulings of the Islamic *shari'a*. No recommendations emerging out of these discussions were produced by the time this report was written.

[51] For further details on this conference see Ghayth, Muhammad, *Tribal justice in the light of Islamic law* Amal Press, Jerusalem 1987, first edition.

10. Consolidation of practical recommendations

10-1 Analytical reading of some aspects of the relationship between formal and informal judiciary

This study has shed light on many aspects of the work of informal justice in Palestine and provided some answers to questions about the conditions surrounding its work, through painting a holistic picture of the activity of the informal judiciary and its interaction with society. The aim of this study was to come up with suggestions and recommendations regarding the role of the informal judiciary within the context of the Palestinian legal system; the accomplishment of this aim required obtaining good knowledge of the nature of the relationship between the formal and informal judiciary and the nature of their interactions. Since the rules that govern the work of the two systems are different, although the environment that they thrive in is the same, this essentially creates differences in the procedures and methods of work in each system. Success or failure in either system in dealing with a certain societal case or a dispute is one of the factors that influence the spread of the work of one system over the other, because people in society – in general – will rely on one system rather than the other, or will increase their reliance thereon, because they want to have recourse to a party that is able to end their dispute and deal with their cases. Practicality and reality might dictate this, not forgetting other important elements such as the characteristics of society, stability and the presence of active government institutions.

In order to explore the distinctions of both formal and informal judiciary a comparative study must be carried out that should include an analytical reading of the following aspects: the effectiveness of procedures and methods of work for both systems; differences in their positive and negative attributes; the nature of relationship between formal and informal justice; a determination as to whether the work of informal judiciary complements the work of formal judiciary or replaces it; the main and most important differences in both systems particularly with regard to time and cost that each system requires in order to examine and rule in cases and disputes put before them. These aspects will be discussed in the second part of the study.

10-2 A question of time

Field research revealed that the informal judiciary has the edge, in most cases and most of the time, regarding prompt intervention in solving and finishing cases and disputes between people. This is regarded as one of the main reasons that people call on the informal judiciary particularly since the formal judiciary usually takes years to examine the cases before them. This has led to people stereotyping the formal judiciary as taking a long time, which has contributed to people often avoiding going to the formal justice system. A saying in circulation amongst the people suggests that if you want to 'kill' a case or a dispute, then all you have to do is to approach the *nizami* courts. Equally, some

people said that they had a good experience with informal justice regarding the amount of time it takes them to intervene and solve cases and disputes. In practical terms, representatives of informal justice carry on with their work under any circumstances, at any time of day and at all times until the dispute is solved: they don't adjourn cases or disputes; furthermore, they boast of their speed in solving cases and disputes and compare their speed with the slowness of the formal judiciary.

The speed of the informal judiciary in intervening in disputes and reaching solutions in relatively short periods of time is a positive characteristic of this type of justice. This becomes apparent in practical reality when representatives of informal justice prevent criminal disputes from spreading and from worsening, because the nature of some of the cases or disputes requires the making of quick decisions, such as dispersing a conflict between the disputing parties, determining the amount of money to be paid as compensation or the cost of medical treatment for those injured as a result of the dispute; this helps to calm the dispute and prepare the parties to accept on these solutions. Although this is an advantage it also can be at the expense of important issues such as achieving justice for the victim and guaranteeing his rights. The procedure of formal judiciary is slow, this has multiplied during the worsening security situation that prevailed after the second intifada, although it can be said that minimum amount of time required by the formal judiciary in implementing the procedures and the rulings of the law under normal circumstances is sometimes necessary to ensure the sound implementation of the procedure of justice. Therefore the slowness of the formal judiciary is often to the advantage of achieving justice and safeguarding rights providing that the delay is similar to the period of time needed by procedures and ruling to be implemented correctly as well as it is not due to other reasons such as the situation that the formal judiciary is currently going through and circumstances that surround it. The field research showed that there are many criminal cases that have been before the formal judiciary for many years are still pending and no rules have been issued in their regard. This of course has negative social and financial effects on the parties to the dispute particularly the party of the victim, and it also results in reinforcing the feeling by Palestinian citizens that formal judiciary is ineffective and that approaching it is a waste of time and effort, which contributes to the lose of trust in the judiciary and leads to seeking other alternative ways that are active and capable of solving disputes such as informal judiciary.

10-3 The question of cost

The formal judiciary undertakes the task of ruling in criminal and civil cases by applying a variety of legal procedures and rulings. The latter involves a special administrative process for the fees of civil and criminal cases. The process determines the cost of proceeding with the case which is based on a number of standards, such as the value of the case and its type. Also, proceeding with the case before the formal judiciary requires the parties of the case to appoint lawyers for a fee which increases their financial burden.

Equally, the procedures of informal justice do not involve a specific process for costs incurred; that is, unlike the formal justice system, informal justice does not involve predetermined fees, expenses or stamp duties. This gives the public a general impression that the cost of recourse to the informal judiciary is low if not non-existent, while at the same time the cost of formal justice is high. As a result of this impression people often chose to have recourse to the informal judiciary in order to avoid the costs of formal justice and lawyers' fees.

However, the result of the field research revealed that in practice, the claim that informal justice does not involve any expenses if compared with the formal judiciary is untrue. The claim that the costs of informal justice are low or nearly non-existent might appear to be correct when civil cases are involved – that is, when the informal judiciary intervenes in a dispute between two parties over land ownership or distribution of inheritance or any other financial dispute. In such cases, parties to the dispute do not pay any financial sums to begin with, whereas the formal judiciary have a special procedure which sets the fees for cases. For example, if two parties have a dispute over the ownership of a piece of real estate, then the claimant party would appoint a lawyer to file a claim at the relevant court, and there would be costs payable calculated according to the value of the disputed real estate, as well as the lawyer's fees and any other expenses relating to the case if there was a need to consult specialists and so on. As for the second party, the defendant, he appoints a paid lawyer to represent him in the case. However, when the judge issues his ruling, whether it is to the advantage of the claimant or the defendant, the ruling includes assignation of the costs, expenses and lawyers' fees to the party who lost the claim thereby guaranteeing that the winner of the claim does not end up with any financial expenses. Here, it is true that poor people initially do not have the money to pay the costs associated with filing the civil complaint before the formal judiciary, even though they have a good chance of recovering these expenses. Going back to informal justice and its cost, as mentioned above, no costs, expenses or lawyers' fees are pre-paid when representatives of informal justice are approached to intervene in a civil dispute. If the dispute requires the opinion of specialists, surveyors or engineers then parties to the dispute would bear the costs of their fees and it is mostly the claimant party or that party that approached the representatives of informal justice who bears these costs. Once the informal judiciary settles the dispute, irrespective of the faults in the solution as a result of the lack of legal basis and procedures, the solution or the decisions taken by the representatives of informal justice do not involve the losing party bearing the costs. In other words the person entitled, mostly, will bear all of the expenses; this of course would never happen if the case was before the formal judiciary.

On the other hand, with regard to the research – which concerns criminal cases, particularly murder, assault and harm - in most of the cases it is the family of the perpetrator that approaches the representatives of informal justice to intervene in order to solve the dispute. For their part, the family of the victim do not pay any money to the representatives of informal justice when they approach them for solving the case. However, the true cost of informal justice become apparent when the representatives of informal justice intervene in the dispute and start issuing their decisions and rulings which set the obligations and the amount of the usually high financial penalty which is

paid during the rites of '*atwa* or *sulh* and is the responsibility of the family of the perpetrator. In a case that occurred in the central West Bank, a tribal judge overseeing the case issued rulings that included imposing huge financial sums on a young man and his family after he was accused of attempted sexual harassment of a young woman (see annex 6, case 8). The research also showed that some representatives of informal justice in different areas of the West Bank and Gaza Strip take financial remuneration for their adjudicatory work. Furthermore, the informal judiciary possesses a mechanism to guarantee that parties to the dispute are bound to pay the fines awarded against them through the guarantor of the perpetrator and his family, and naturally the *islah* men follow up his proper implementation of this. There are also other means of obligation that have been previously mentioned in this study.

As for the costs of informal justice in examining criminal cases, no expenses or court fees are imposed on the case because the criminal case, quite simply, is a means for the state to fulfil the public right, The state, represented by the prosecution and as a delegate of society, is the one with the right to move criminal claims except where the law stipulates otherwise. An example would be that if a person was beaten, injured or murdered, then it is the duty of the judicial officers represented by the prosecution and the police to proceed immediately in investigating the circumstances and the scene of the crime, to take statements from the victim and the witnesses, to apprehend the perpetrator and proceed with presenting the case before formal judiciary. In their work, the judicial officers do not levy any fees on the victim or his family; the prosecutor is the one in charge of the claim and it is he who seeks - after proving his claim – the imposition on the perpetrator of the penalty provided for in law. The victim retains the right to lay a civil claim for compensation for the prejudice and damage occasioned by the crime, and here the concerned party bears the costs of the civil claim and must await a ruling for compensation.

The foregoing indicates a lack of precision in statements about the low cost – or absence of costs – of informal justice by comparison with the expenses of the *nizami* judiciary, and reflects citizens' lack of knowledge about the rights provided by the formal justice system.

There remain the assertions by certain informal justice representatives and others to the effect that informal justice guarantees the victim or his family appropriate material compensation that cannot be guaranteed by the formal judiciary. However, a ruling against the perpetrator made by the formal judiciary in a criminal claim does not prevent civil pursuit through a compensation claim and consequently holding him accountable for the injury he caused the victim. The criminal court may examine the civil claim connected to the criminal claim, or it may separately laid to the civil court. The victim or the interested party can lay a civil action for compensation demanding that the person responsible for inflicting the injury pay all costs of treatment and due compensation whether material or psychological. The judge determines the value of compensation though his discretion, based on the extent of the injury and the circumstances of the incident; usually it is not less than the compensation set by informal justice. However, it

is claimed, to the advantage of informal justice, that compensation by the family of the perpetrator is paid quickly, sometimes within days. It is worth noting here that there are certain crimes in which movement of the public interest's action depends on a complaint by the complainant and the costs are negligible, such as the crimes of insult, slander and minor harm where the recovery period is not more than 10 days, cheque crimes and others; and the fees, as criminal complaint in these cases is symbolic.

10-4 Is informal justice complementary to the *nizami* system or an alternative?

The field work for this study gave a picture of the practical reality of the relationship between informal and formal justice. Although most of those working in both systems provided a description and definition of this relationship as complementary, based on mutual cooperation, this view cannot be taken entirely at face value, as it is impossible to give a single description of this relationship. The set of criminal cases studied showed that the relationship between the two judiciaries takes two main forms, the first when informal justice complements the work of formal justice, and the second when the work of informal justice replaces the work of formal justice.

The first form occurs when representatives of informal justice intervene between two parties to a criminal dispute, and proceed to prevent the escalation of the dispute and calm down the parties without this going as far as rulings and decisions. That is, their role in the dispute is restricted to containing the situation and limiting reactions. Here it is possible to consider the work of informal justice as complementary to the work of the formal judiciary.

It is worth pointing out that most *nizami* judges who were interviewed mentioned that the work of *islah* men complements and aids their work in felonies and misdemeanours, and reduces the burden of criminal case files, in the event that the representatives of informal justice do not exceed their limits. In fact, what the *nizami* judges said raises the following question: will the criminal case file be ready for resolution after *sulh* between the parties? This is without belittling the importance of *sulh* as a social regulator preventing escalation of the dispute. But the precise question is about the procedural necessity of the deed of tribal *sulh* allowing it to be a condition for speeding up resolution of the criminal action. It may be that this assertion by certain *nizami* judges reflects the poor situation of the formal judiciary in Palestine rather than anything else.

The second form is when representatives of informal justice intervene in the criminal dispute through issuing rulings and decisions dealing with the results of the crime, imposing a penalty on the perpetrator and his family, such as fines and exile and so on, and also obliging them to waive their personal rights before the formal judiciary, where the case has been taken before the formal system. It is worth pointing out here that some *sulh* deeds put conditions on the victim and his family requiring them to waive all their legal rights, and that deeds with such conditions may be voided. However, this indicates

that the role of informal justice in such a case has replaced the work of formal justice. Also, the taking and promulgation of rulings by the informal judiciary can be considered another indication of this alternative role.

In addition, the issuing of rulings and decisions including punishment of the perpetrator means that he is punished twice; the first through informal justice and the second before the *nizami* judges. This contradicts the principle prohibiting double jeopardy.

10-5 Advantages and disadvantages of the two judiciaries

When it is said that informal justice has an advantage in the speed of its procedures, generally speaking, as compared with the slowness of formal justice, this means that the work of informal justice is distinguished by its speed, and that the work of the formal judiciary is characterised by the disadvantage of the slowness of its procedures. Also, maintaining public order and social harmony is a task to the realisation of which informal justice contributes. It is thus distinguished by being a social control device for public order in the light of the weakness of the security agencies and especially the police. This angle was mentioned previously. Are there then any other advantages and disadvantages than can be observed in the work of the two judiciaries within the current Palestinian situation?

The practical operation of the informal judiciary shows that informal justice can do its work in an unstable situation, and this is a positive point in its favour. Representatives of informal justice can move between different parts of the Palestinian areas and intervene in and resolve disputes, despite the military checkpoints that dissect these areas, and despite the daily confrontation with the Israeli occupation. The representatives of informal justice have no need of buildings and offices from which to carry out their work.

On the other hand, the *nizami* judiciary is directly impacted by an unstable situation. The repeated Israeli army incursions into the PNA areas have caused paralysis in the machinery of the work of the formal judiciary, and the failure of mechanisms of enforcement of the rulings they issue. In reality, it must be said that the dominant characteristic of the Palestinian situation is instability, and this imposes, in particular stages and situations, the presence of alternatives for the work of official authority institutions.

Furthermore, the flexibility with which informal justice representatives deal with the requirements of resolving criminal disputes is mostly a factor in ending disputes rapidly and practically. Despite the existence of a number of procedures and mechanisms followed in their work and relatively established, they deal with every case on its own merit and have no objection to the setting or suggesting of more than one formulation to resolve the criminal dispute, eventually choosing the formulation that most closely fits the requirements of the dispute, the nature of the parties and other contextual elements. In

the same context, representatives of informal justice moistly know the parties to the dispute in person, and can thus deal with them in accordance with this knowledge, which makes easier the drafting of solutions which might lack 'justice' but at a minimum satisfy the parties. Thus flexibility is at the same time a positive and a negative characteristic. It often provides practical solutions to disputes but at the same time does not realise justice for the parties.

Such flexibility can certainly not be imagined in the work of the formal judiciary: in principle it should not be sought or imagined. The legal rule requires that the *nizami* judge shall not rule according to his personal knowledge but according to the evidence and statements contained in the case file. When the *nizami* judge considers and rules in a criminal case, he follows a set of established legal procedures and measures, and this is what guarantees to a large extent the realisation of justice for and equal treatment of the parties to the action.

10-6 The principle of the rule of law – the future and prospects for change

From the field research it was clear that the aspiration of most individuals in Palestinian society, and their view of the future, comprise the establishment of a state of institutions based on respect for human rights and public freedoms and the separation of power. It is of course impossible for these aspirations to be realised in isolation from the guarantee of the principle of the rule of law, which is one of the most important principles that any democratic system is based on. In recent times, the concept of rule of law has been repeatedly discussed; calls for it to be respected and entrenched are repeated on a daily basis, and in the Palestinian situation it has both popular and official reach.

10-6-1 What is meant by rule of law?

The principle of the rule of law stems from the assumption that the rule of law can be achieved only in a democratic system, where the three powers (executive, legislative and judicial) function in independent, effective and complementary fashion. This understanding of the concept is concerned with the essence of the law, and is thus distanced from the form-based understanding of the rule of law which says that this principle is not tied to a particular type of political rule, but rather with the application of the law without regard to its substance and content.

The core understanding of the principle of the rule of law is concerned with mechanisms for the application of the law and the standards this achieves. It is worth noting here that the international community has adopted a set of covenants that guarantee the basic principles (standards) to guarantee toe principle of the rule of law. The Palestinian Basic law took these standards into account and holds that the principle of the rule of law is the basis of governance in Palestine: article 6 affirms that 'The principle of the rule of law

shall be the basis of government in Palestine. All governmental powers, agencies, institutions and individuals shall be subject to the law.'

These standards are set out and discussed below within the framework stipulated by the Palestinian Basic Law, as follows:

1. That the law is clear and precise, so that legal texts are not subject to different interpretations and leave no confusion in the mind of those who read and deal with them.

This principle gains particular importance in regard to criminal law, since criminal law relies on an important basic principle, that of 'nor crime and no punishment except by provision of the law'. This is what is known as the doctrine of the legality of criminal law or the legality of crime and punishment. This principle assumes that the sources of texts on crime and punishment are contained in the written law issued by the legislature, in accordance with the Basic Law. This requires the specification of the sources of criminal doctrine and the scope for its interpretation, and hence no deed can be considered a crime if it is not stipulated as such in the law, even if such a deed contradicts custom, morality or religion, or constitutes some kind of danger to society.

This principle means that if there is no written text setting out the criminal deed and determining a set penalty for it, the criminal judge must rule for the innocence of the accused.

The doctrine of the legality of crime and punishment constitutes a fundamental guarantee of individual freedom in the field of crime and punishment; departing from it is an assault on individual freedom. The Palestinian Basic Law reaffirms the principle of the lawfulness of criminal doctrine: the text of article 15 provides that: 'Punishment shall be personal. Collective punishment is prohibited. Crime and punishment shall only be determined by the law. Punishment shall be imposed only by judicial order and shall apply only to actions committed after the entry into force of the law.'

2. Publicity of the law. This principle assumes the existence of mechanisms for dissemination of the law which guarantees that it reaches the individuals of society, so that they are able to conduct themselves in accordance with it. Certain legislatures have considered the publication of the law as a condition for its coming into force on those addressed by it, and this is what the Palestinian Basic Law has adopted, as provided in article 116: 'Laws shall be promulgated in the name of the Palestinian Arab people and shall be published immediately in the *Official Gazette*. These laws shall come into force thirty (30) days from the date of their publication, unless the law states otherwise.'
3. Equality between all citizens before the law, without discrimination. This principle requires the application of the law to citizens in total equality, and considers all people equal in their right of enjoyment of the protection of the law. The Palestinian

Basic Law reaffirms this principle: article 9 provides that 'Palestinians shall be equal before the law and the judiciary, without distinction based upon race, sex, color, religion, political views or disability.' It is worth noting here that this principle has two main parts: the first is equality and the second non-discrimination. Although these two parts are mutually binding and fused, the principle of non-discrimination, in modern understanding, is very much connected with the subject of women's rights, as this principle rejects and prohibits discrimination on the basis of sex, and requires the ignoring of natural differences between men and women. Accordingly, the legal principle must address men and women in a general and detached manner. The Palestinian Basic Law in adopting this principle requires that Palestinian laws accord with it. For this to be activated, the Legislative Council may not pass any law that contains a text discriminating between men and women. This has enormous significance at the current time, since the draft Palestinian Penal Code has been submitted to the PLC and is in the process of being passed. Civil society and its institutions have to mobilise and put pressure on the Council not to pass any texts discriminating against women, as is the case in articles 98, 308 and 340 of the Jordanian Penal Code no.16 of 1960 applied in the West Bank.

4. Citizens electing their representatives in periodic elections, regulated by a modern and developed law that includes secret ballot and non-discrimination between citizens in nomination and voting. This principle guarantees that the legislature draws its strength and legitimacy from the people as the source of authorities. That is, the legislative authority exercises its role and responsibilities in defence of the rights of society's individuals, their freedoms and interests, through overseeing the deeds of and holding accountable the executive authority, without the legislative authority being subjected to meddling by the executive. The Palestinian basic Law affirms this principle; article 5 provides that: 'The governing system in Palestine shall be a democratic parliamentary system, based upon political and party pluralism. The President of the National Authority shall be directly elected by the people. The government shall be accountable to the President and to the Palestinian Legislative Council.' Furthermore, article 2 provides that: 'The people are the source of power, which shall be exercised through the legislative, executive and judicial authorities, based upon the principle of separation of powers and in the manner set forth in this Basic Law.'

5. An effective, independent and impartial judiciary that can rule in disputes and that constitutes an oversight mechanism on the acts of the executive and legislative authorities. The realisation of this requires the activation of the principle of separation of powers. The Palestinian Basic Law confirms that the judiciary is independent in its work, with article 97 providing that: 'The judicial authority shall be independent and shall be exercised by the courts at different types and levels. The law shall determine the way they are constituted and their jurisdiction. They shall issue their rulings in accordance with the law. Judicial rulings shall be announced and executed in the name of the Palestinian Arab people.' Furthermore, article 98 provides that: 'Judges shall be independent and shall not be subject to any

authority other than the authority of the law while exercising their duties. No other authority may interfere in the judiciary or in judicial affairs.'

In the light of these standards, it is obvious that the rule of law cannot be guaranteed in a situation where any of these standards are either exceeded or fallen short of, because the principle of the rule of law is comprehensive and cannot be realised in one aspect while overlooking another. The task of consolidating the principle of the rule of law is in the first degree that of society, shared by the various frameworks and institutions of society, with the three powers at the fore.

As noted above, it seems that the aspirations of the majority of Palestinian society are represented in building a state based on institutions and the rule of law. This is supported by all the stands and views of those who were interviewed, and who reflect to a large extent the aspirations of wide and varied sections of society. On the other hand, despite the harsh conditions that Palestinian society lives under, it made strides in the democratic experience, exercising it recently in a civilised manner in the selection of the President of the PNA. This reflects the characteristics of modern civilization enjoyed by this society. Even though there are certain groups who take advantage of the absence of the rule of law, they would not dare to actually voice this position, nor to say that they stand against the realisation of the rule of law in society.

Because informal justice fulfils a function within society through a set of rules and procedures, then a fundamental question should be asked with regard to the extent to which it accords with or departs from the principle of the rule of law.

10-6-2 Extent to which the rules of informal justice contradict the principle of the rule of law

The study has detailed how informal justice takes up criminal disputes. An examination of the means and procedures used by the informal judiciary, from first getting involved to the reaching of a resolution to the dispute shows that the methods of intervention and of proof, the issuing of rulings and penalties and the ways in which these are implemented are subject to a set of understandings and basic principles. If these principles are set in the balance against the standards on which the principle of the rule of law is based, the following becomes clear:

- The basis of criminalisation and punishment in informal justice is drawn in the first degree from *`urf*. This is in total contradiction with the principle of the rule of law. According to the principle of criminal legality, there can be no crime and no punishment except by virtue of a written legal text issued by the relevant authority as determined by the Basic Law. Thus, *`urf* cannot constitute a basis for criminalisation and punishment. It might serve to reduce a penalty, but it cannot create it. Here, there

may be a debate for the future in regard to the positive bases of *`urf* that could be included in the formal law.

Furthermore, the type and nature of punishment ruled for by the informal judiciary in criminal disputes differs from those determined by criminal legislation. Punishments curtailing freedom (imprisonment) for example do not exist in informal justice.

In addition, the punishment imposed on the convicted perpetrator by virtue of the law is a personal punishment which fits his crime. As for the informal judiciary, the rulings and decisions that they issue are imposed on the perpetrator and his family; in certain cases and crimes, the perpetrator's family is exiled from the place of residence by virtue of a procedure used in informal justice, *al-jalwa* (see annex 7). Also, the fines imposed by the informal judiciary in most cases exceed the financial capabilities of the perpetrator, which means that his *`ashira*, family or *hamula* has to bear this burden with him. Although the fact that members of the family, *hamula* or *`ashira* share these burdens is considered a form of social solidarity (albeit sometimes taking the form of compulsory duties), these punishments have the characteristics of collective penalty, which is against the principle of individual responsibility that requires that the punishment be personal and at the same time prohibits collective penalty.

Furthermore, the interpretation of *`urfi* principles usually differs from place to place and from one person to another. This is certainly in contradiction with the principle of the rule of law which requires a legal text that is clear, established and defined, in order that legal text not be subject to different interpretations. The publication of the law – meaning its publicity and making it available to people, which is a condition to guarantee the rule of law – is not met by the informal justice system.

- The informal judiciary end disputes through settlements between the parties, with the final formula of the settlement, as we saw in the course of this study, being influenced by many factors. These factors comprise the material situation of the parties to the dispute, their political and party affiliations, the size of their families and `ashira, along with whether they are local or refugees, the status and power of the *islah* man intervening in the dispute and the extent to which the parties accept him, as well as the means of pressure available to him. These and other factors pull together and apart in contributing to the final formulation for settlement of the dispute, which does not require the achievement of justice. This of course contradicts one of the fundamental bases of the principle of the rule of law, which is equality between citizens before the law and non-discrimination. Among the most important requirements of this is that all citizens are subject to a legal rule that addresses them impartially and generally, without the slightest discrimination between them on the basis of race, religion, sex, political opinion or other factors. This aspect is extremely important because it clearly refers to the constantly renewed possibility of marginalised or weaker groups in society being exposed to discrimination and

unequal treatment, when they are parties in disputes where the informal judiciary intervenes.

- When the informal judiciary indicts someone for having committed a deed rendering him liable to punishment, they employ various means of proof, such as the testimony of people who were present at the incident, the oath, and not so long ago *'al-bish`a'* and other forms of proof. These methods are in large part illegal and unscientific. What is important here is that they mostly do not guarantee the right of the person accused of the crime to a proper defence of himself. This contradicts the principle of the rule of law, which requires that no person be punished without a sound and just legal procedure that assumes the accused to be innocent, enables him to exercise his right of defence, and provides him with all the guarantees for the exercise of this right such as the appointment of a lawyer, public trial, and disclosure of all charges being laid and the evidence for the accused's responsibility for the crime. The evidence and proof gathered and examined by experts and specialists in the criminal sciences are what guarantees to a large extent the soundness and justice of the procedures. These procedures also guarantee the freedom of choice for individuals. In the course of this research, certain cases emerged where freedom of choice was taken away from individuals who were parties to disputes resolved by the informal judiciary.

Here we have to go back to a definition of informal justice with regards to the authority that the informal judiciary constitutes inside society: is it a legislative, executive or judicial authority? It was mentioned in this research that the informal judiciary is a social phenomenon concerned with intervening and resolving disputes between citizens, through relying on *`urf* as a fundamental basis for the issuing of rulings and decisions. Without going back to the historical societal context for this aspect, which has already been treated in this study, suffice it to say that the informal judiciary is an arm of the executive authority. This is confirmed by the relationship between the informal judiciary and the agencies of the executive authority, particularly the governorates, the security services and the Office of the President, in addition to certain systems and formalities that have to a certain extent regulated the work of the informal judiciary and that were issued by the executive authority. Here there is a question as to the extent of the legality of the informal judiciary's interventions and resolution of disputes, particularly in criminal cases: is the authority of the informal judiciary in issuing rulings and punishments a legitimate authority?

The principle of the rule of law assumes that source of governance is the will of the people, which it mandates to the legislative, executive and judicial authorities. In this conception, the judicial authority exercises an oversight role in regard to the executive and the legislative authorities, as well as having a fundamental role in preserving the rule of law and the rights of individuals. This guarantee stems in essence from the establishment of the right of individuals to have recourse to the courts, and also from the guarantee of the monopoly of judicial authority, whereby the judicial authority has the jurisdiction, sovereignty and authority to rule in all cases of a judicial nature; hence, it is not allowed to create judicial bodies that do not apply the legally established procedures.

Thus, when the informal judiciary intervenes in criminal disputes and proceeds to issue rulings and decisions in their regard, it infringes on the fundamental authorities of the judicial power. The informal judiciary being closer to being an arm of the executive authority, this means that the executive authority is encroaching on the powers of the judicial authority. This will result in violation of the right of individuals to have recourse to the courts and on the basic principle requiring that no punishment is imposed on any individual in society except by judicial ruling.

10-7 'Tribalism' and Palestinian society in the West Bank

During the fieldwork for this study, Palestinian society was repeatedly described as a 'tribal' society. This came by way of explanation, or justification, for the continued phenomenon of tribal justice or *sulh* (informal justice). Sometimes this description was used to say that there is no alternative for this system, because Palestinian society has a 'tribal' nature, and that it will remain that way for a long time, and thus there is no escaping recourse to tribal justice or *sulh* as proponents of this view put it. Other justifications were proposed for the continuation or increase in the phenomenon of informal justice over recent years, tracing the reason to the military and settler occupation tightening its grip on Palestinian society after the start of the second intifada, particularly after the Israeli incursion in the spring of 2002. The phenomenon is thus considered to be the result, not of some characteristic of Palestinian society, but rather of oppressive external circumstances imposed upon it. Israeli measures against the intifada weakened the PNA including its security, judicial and executive agencies.

We also find those who attribute the phenomenon to PNA policies that are said to promote tribalism, as evidenced by the establishment of the Department for Tribal Affairs directly under the President of the PNA. The PNA also encouraged informal (*`urfi*) *sulh* procedures through establishing specialised departments in the governorates, also evidenced by the participation of PNA men, including members of the PLA, in the procedures of informal justice. Some explain this role of the PNA by two factors: the first the 'tribal nature' of Palestinian society, which obliges any political force to have dealings with it, and the second the weakness of the formal justice system, the length of time needed for litigation in the *nizami* courts and the cost thereof. In other words, the explanation most frequently voiced for the phenomenon of informal (*`urfi*) justice combines an assumed characteristic of Palestinian society which spontaneously responds to tribal justice or *sulh*, and the weakness of the formal legal system. There is no disagreement on the second statement here, as different indicators and proofs reinforce the weakness of the formal judiciary and its urgent need for development. Also, Israeli colonial violence left its marks on the PNA's security, policy and correctional agencies and institutions (prisons).

10-7-1 What is meant by 'tribal'?

What can the expression 'tribal society' mean? Is Palestinian society really a tribal society?

To say that a particular society is a tribal society means that tribalism is a main or significant regulator of social relations in that society, or that it is a basic determinator for the life opportunities in that society. To say that tribalism is a main determinator means that it determines opportunities for education, work, income, medical treatment, location and type of housing, migration, marriage and social and legal rights, and other aspects. Social class, for example, determines life opportunities to a tangible degree, in regard to education (opportunity to complete a university education for example), accessing a particular profession and income, and to a certain extent the social group of the spouse and age of marriage, number of individuals in the family (even if this is also related to other factors), opportunities for accessing necessary health care and its quality. Undoubtedly gender similarly impacts on life opportunities and on likely spheres of public activity. There are certainly general indicators for the lives of individuals, although these differ according to social class, area, gender, age group and so on. Among these are the effects of the Israeli occupation which – as noted above – have put Palestinian society at grave risk, as it has raised to high levels the probabilities of a person being killed, wounded, arrested, made unemployed, pauperised, have his house demolished or suffer from psychological problems as a result of worrying about the future, and so on.

Here, it is necessary to distinguish between the *`ashira* (which may include hundreds of households), or the *hamula* (which is made up of tens of households), or 'the family' (which comprises a number of households), and the household which is grouped around one budget, one kitchen and one entrance. The household may take the form of the extended family or nuclear (conjugal) family. The nuclear family is the most common in Palestinian society. Both types of families are connected to class, through property and its inheritance, and are also connected to the nature of work of the male or female breadwinner (or both). The household makes common cause in the daily life concerns of its heads. The discussion here of course is not about the impact of the household, as a given, on the life of the individual and his life opportunities, but rather about the extent to which belonging to the 'tribe' has an impact of an individuals' life opportunities.

Thus the question can be summarised as follows: are an individual's life opportunities in Palestinian society determined by the *`ashira*, the *hamula* or the family to which he belongs and the name of which he bears, or though other affiliations or positions such as class, gender, origins or other positions that have no direct relationship with tribal affiliation (such as political affiliation and educational level)? It is clear that the *`ashira* or *hamula* as such (that is, not as a household belonging or attributed to this or that *`ashira* or *hamula*) no longer controls economic resources (common land, factories, farms), nor political authority (through membership of parties or political organisations, positions in ministries, PLC municipalities), nor sites of social influence (unions,

federations, pressure groups, NGOs), nor educational positions (universities, schools), nor other institutions (hospitals, clinics, clubs, charitable organisations, military or security agencies).

There is a wide variation between families that belong to the same *hamula* or *`ashira* in regard to wealth or poverty (that is, the number of wealthy or poor persons belonging to it or in terms of land ownership or lack thereof). We also find differences in size between *hamulas*, *`ashiras* and 'families' with regard to the number of individuals or the number of families. We also find variation in what the individuals making up the *hamula* or *`ashira* own, by comparison with others. We also find that certain 'families' previously (in Ottoman times, during the British Mandate and during Jordanian and Egyptian rule) occupied administrative positions that afforded them social or even economic status that distinguished them from others. Also, the term *`ashira* is used by journalists and writers in a very loose manner to refer to kinship structure (or assumed kinship). These terms have lost their historical connotations; it may be that certain of them are retained in particular areas mentioned above such as the southern West Bank and the Gaza Strip.

The important thing here is the fact that families that belonged to those 'families' or *hamulas* vary in matters of the class and educational level of their individuals and the nature of their work. Nevertheless, we find that certain 'families' or '*hamulas*' or '*`ashiras'* maintain *'diwans'* for their members, some of them elect a committee to look after the affairs their members in terms of providing assistance to 'family' members in need (education, treatment, assistance in looking for work, etc). The local elections showed that '*diwans'* (of 'families' and *hamulas*) were widely used for electoral canvassing, and that this interfered with party or organisational campaigning.

These arrangements indicate that there is wide variation in the position of families of one *hamula* (or one 'family') in relation to income, property, profession and educational level. Also, members of the same *hamula* have different political affiliation. What '*hamulas*' do is to organise assistance from rich families to poor families, that is, they fulfil the function of support and relief, but not the function of bridging or closing the gaps between the families. This role can be seen as a form of political investment that the rich or well-off play in consolidating their social standing, or achieving or sustaining a political position (here, assistance might include members from outside the *hamula*). Investment of kinship relations (and class status) is usually made in order to achieve membership in municipal or local councils or the PLC or some other position, and this is what in fact has happened.

10-7-2 Investment in the *hamula* or the *`ashira*

As for assertions of a 'tribal' society, promoted as a particular characteristic of Palestinian society, the following summary points can be made:

- In the important spheres of life (work, education, income) the effect of the *hamula* or the *`ashira* is very limited, and varies from one *hamula* to another and one area to another according to the capacities and needs of their members that constitute social capital that serves in the obtaining of political, social or governmental position.

Recourse is made to the *hamula* in certain circumstances, by certain individuals (the affluent, the political, the party members) as it constitutes a an asset (among other assets) in their competition with others over public positions or offices, or in the improvement of their negotiating position in accessing resources, positions or general rights. From here we find that there are two fields in which the *hamula* or *`ashira* is most put to use. The first is in local or general elections, with the mobilisation of votes in favour of members of the *hamula*. It is obvious that members of the *hamula* or *`ashira* who give their vote to fellow members of the *hamula* or *`ashira* do so in accordance with an implicit understanding that the latter's success will result in benefiting them in one way or another. That is, giving the vote is not done for free or for dogma, but rather for the return it may provide in the future, or in order to avoid likely marginalisation (in the event that a candidate from another *hamula* wins). Secondly, recourse is had to the hamula in cases of *sulh* or informal justice, where the relationship is between hamulas and `ashiras and 'families', not between individuals. This is because it provides the seniors in the hamula with social and political clout. Undoubtedly, the weakness of the law and of the central authority and institutions (including an independent judiciary) that assures it citizen of rights and protection and guarantees minimal social guarantees for him and his family, pushes some individuals in time of need to firstly approach the extended family and then wider kinship or local structures (often these are intertwined). That is, the hamula (or the actual or presumed kinship structure) is given moral authority over its members, albeit for a passing moment, despite the fact that it has lost its material basis of authority, represented in common ownership and in providing a system for complete protection.

- Extended family relations play a tangible role in regulating certain angles of social relations, particularly on religious and social occasions (birth, death, marriage). Presents and visits are exchanged, and kinship and neighbour relations are renewed, and local community relationships are born. However, the more binding side of these relationships remains between individuals of the extended family, that is, those who belong to one grandfather (maternal or paternal, and this is shown through the high rate of marriage between relatives, which is related to low professional, geographical and residential mobility).

The above indicates that the impact of so-called 'tribalism' or 'familialism' in Palestinian society is confined to certain spheres and periods. Some of these spheres relate to informal justice. There is a variation in the type of population centre, as it appears that its effect is limited in cities and more present in villages, and according to area, as it is more widespread in Hebron and southern Gaza than in other areas. Here, a historical, political and social explanation should be sought; perhaps the most important factor in the Palestinian situation is to be found in the absence of a national state that fuses society binds individuals together horizontally through voluntary solidarity that transcends local community and inherited relationships. This kind of solidarity is most prominent in political parties and social movements that are based on horizontal ties (on the basis of class, professional sector, gender, age group), and that limit the impact of local affiliations and horizontal ties, in particular solidarity that is based on actual or assumed kinship. There is no doubt that the length of the occupation has played a fundamental role both directly, in consolidating the role of the informal judiciary (weakening horizontal affiliations), and indirectly through the national movement's adoption of this means in dispute resolution between members of society in order to avoid recourse to the courts of the occupation and its security services, and through the significance of the informal judiciary in establishing local harmony quickly and at low cost. In this context it can be said that the PNA gave a role to tribalism through trying to mobilise it in the process of consolidating its power, and through failing to invest in adequate resources in the development of the formal judiciary that would speed up its measures and consolidate its standing in society. The measures taken by the occupation against the PNA and its various institutions rendered recourse to the informal judiciary the only option in many situations, once proceeding in the formal courts became difficult or very complicated.

It is also worth noting that political parties deal with the informal judiciary from a position of neutrality, or one of encouragement, for a number of reasons. Perhaps the most prominent is the fear of the parties that were they to ignore or refuse to cooperate with the informal judiciary; this might lead to the entrenchment of social conflict at a time when the occupation was still there. Thus we find that the parties, as parties, including opposition parties, rely on the procedures of informal justice (see Hamas proclamation on its responsibility for the killing of a person and reliance on tribal *sulh* in resolving the case, in *al-Ayyam* newspaper 31st December 2005). We have seen how the ruling party is involved in the operations of tribal *sulh*. It is noteworthy that this is happening in a society with a high rate of education and of civilization, with most of its members in waged labour, and with a long history of experience in political pluralism and social movements.

There do not appear to be any exit strategies from the effect of informal (*`urfi*) justice, even incrementally, apart from the strategy of strengthening the formal judiciary and its independence, and reducing the role of the *`urfi* judiciary in criminal matters, restricting it to questions under civil arbitration. This must be done within the context of an understanding of building a modern state (independent and sovereign) based on the understanding of citizenship and the consolidation of the rule of law. All of this is linked to the end of occupation. Without a state that is sovereign, it is difficult to have an effective strategy to control and confine the role of tribal justice or *sulh* in areas that do

not undermine the role of the individual and his individual responsibility or rights, and that distinguish between *sulh* (undoubtedly a very important matter) and justice and the rule of law.

10-8 Informal judiciary and the restructuring of the balance of power

Different parts of this study have reiterated that one of the most important achievements of the informal judiciary is in ensuring the 'social peace' or 'public peace' or preserving peace, security and stability in society. This was repeated by the overwhelming majority of the active elements in informal justice, be it tribal judges, *islah* men or some of the people who had recourse with informal justice during periods of unexpected distress and danger. Further support for this positive role was forthcoming from a considerable number of workers in the judicial agencies, lawyers and civil society representatives.

How does the relationship between the informal judiciary and social peace appear? To start with, it is elementary to say that the known and familiar procedures of informal judiciary begin when there is a crisis, meaning in a time when it is feared that serious escalation in the dispute will occur, or after an incident of some kind. All of those interviewed during the field research stressed that the 'rapid intervention' of the representatives of informal justice prevents violent and immediate retribution, particularly in cases of murder, sexual assault or in the event of psychological or physical injury. From what was mentioned above, it is clear that the high social regard and the wide social and political connections that representatives of informal justice enjoy enable them to calm matters down and reach interim agreements while they prepare for the final formula that will result in ending the disagreement or the dispute.

It is worth pointing out that effective and positive intervention by *islah* men comes within the wider social context of recreating the social order in its entirety which includes restructuring relationships of dominance and influence in society. It also comes within the framework of institutionalising and supporting the existing social arrangements which are based on class, age, gender and other hierarchal relationships. Thus, the rites and procedures of 'tribal *sulh'* can be viewed as social activities that contribute in the first instance to the perpetuation of prevailing social arrangements and relationships and the active centres of power in society.

This analysis can be supported in the first place by the information regarding the social status of the representatives of informal justice and their relationship with the official institutions in society which the field research revealed. It illustrated that most of the representatives of informal justice are affluent and belong to families or large '*hamulas'* with authority in the area where they work. Thus, the support and the facilities that the governorates and some of the security agencies give to their work contributes to the strengthening of their social status by making them a 'reference' and adding the legitimacy of the central authority to their role in solving disputes. Other effects are

consolidating the general belief which says that there is no quick and practical solution without 'tribal' intervention and that it is natural to have recourse to personalities who possess the required authority and influence to reach a solution that is binding on all parties. This wide confirmation that there is a lack of legal alternatives to achieve justice and resolve disputes is a fundamental base in maintaining the status quo and continuing working outside the formal judiciary under the supervision and the patronage of people with influence in local communities.

One might assume that the direct and official support given to representatives of informal justice undermines the contemporary international system, and that it is not in the interest of the young Palestinian authority to provide the personalities and the rites of such a system that lies outside the framework of the official institutions. However, the rationale of the executives of the PNA is not necessarily to strengthen the state's institutions at any cost because they are fully aware of the limitations on the PNA's capabilities in providing an effective alternative as a consequence of all the obstacles mentioned earlier in this study. Thus, recourse is normally had to individuals who possess the necessary legitimacy and influence in their areas so they can achieve what the PNA can not provide – i.e., the PNA's official institutions doing what is necessary to handle crimes and disputes successfully and in a short time. Also, there is another reason which might make some of the officials in the PNA has recourse to *islah* men and the notables: that is, to consolidate their own standing inside the system through the construction of a social and political network with the influential people in different positions. Through the benefits with which the PNA officials and the representatives of informal justice provide each other, the latter gain more clout and influence in their areas while the local PNA men, on a national level, aim to expand their political base through these relations.

A number of practices and behavioural codes are available in support of this analysis with regard to the informal judiciary's contribution to the consolidation of the existing social status quo. An example of this would be the rites of publicising (*ish-har*) the '*atwa* before the public concerned with the matter (local members of the public) which include, along with the *islah* men and the *jaha*, a large number of men from the area where the incident took place. The is also high-profile participation of *islah* men, representatives from the governorate, security agencies, and the notables of the area in this public procedure, on order to emphasise their legitimate and respected social and political status and as an endorsement of their active role in public life. In other words, each time these social ceremonies are held, the local community through that participation of its members is 'acknowledging' the 'legitimacy' of the 'tribal *sulh*' system and those who work in it.

Also, there are also known rules that control the behaviour of the representatives of informal justice, and, in fact, contribute to adding more 'legitimacy' to their role in *islah* and supporting their social status. It is also known that an *islah* man does not fulfil his role as an *islah* man for a fee, nor is he allowed to. As pointed out in the study, there are actual financial burdens – travel expenses, hospitality and so on which a normal person cannot afford; therefore, a financially affluent *islah* man volunteering his time and money

for the 'public service' will definitely enhance his social standing and add legitimacy to the social order that provides the solutions / perks of the informal judiciary.

It is worth highlighting a different point in this context: *islah* men using methods that include a mixture of persuasion and pressure in order to come up with a solution for the parties to the dispute. Also, one of the results shown by the research is that most of the parties to the disputes that were included in the research stated that the resolutions put forward by or imposed by *islah* men did not guarantee them justice and that they had no choice in accepting or contesting the resolution. This raises an important question which is: how can informal justice carry on with its work while there are such feelings among the individuals affected by these resolutions? According to our analysis, the secret behind the continuity of such a system does not only lie in the fact that it is relatively inexpensive or that it is quick in resolving problems or because it is the viable only option available in the light of the weak executive and formal judiciary, but because it is also run by people with the necessary social and political standing to guarantee the success of their resolutions. The absence of serious 'resistance' to this system is an indication of the continuity of the local structure. This structure is presided over by men of authority in ''*ashiras*', '*hamulas'*, families, and some of the politicians and the higher echelons of the PNA.

Another characteristic of the informal judiciary is its function as a mechanism for social discipline. This is not necessarily a reference to the role of its procedures and it decisions that act as a 'deterrent', although this is important in forming precedents in known punishment such as exile and the various financial penalties. Rather, the importance of the informal judiciary's contribution lies also in terms of renewing the authority of the 'custodians' as the reference in public affairs, and authority (*satwa*) that can not be challenged by individuals. This seems to reflect itself in the simplest of incidents such as normal traffic accidents, quarrels or fights which may occur on a daily basis. When such incidents take place, then the concept of *satwa* (which is patriarchal in essence) is evoked through the intervention of whomever who has the largest and widest influence in imposing resolutions and reaching the appropriate settlements. The individual in these cases is subject to the will of his 'representative' which in most cases constitutes firstly the family, '*hamula'* and '*ashira'* if the dispute escalates and became dangerous, and then by the *islah* men called on by the family or the relatives of the party to solve the dispute. In such cases, all concerned are subjected to the concept of the group and the authority of the group which is represented by the 'family's elder' or some other person who can take decisions, and who is considered the authorised person in the matter. Thus, individuals and the will of individuals are marginalised, and it is difficult to rebel against the loss of will for a person who might think of representing himself, for example, or solving his problem by some other means.

The analysis mentioned here does not mean that there are no challenges or opposition to the informal judiciary in Palestinian society. Modernisation, for example, weakens local solidarity and equally strengthens broader affiliations. In the case of city migrants (although migration from the country-side to the city is limited in Palestine), they don't

have a ready social 'tribal' framework that can be activated in the event of a dispute or a crime taking place. Although most people are forced to ask for support from their families, this support could sometimes be impossible to grant or it may not be available, particularly in the light of the circumstances through which the PNA areas have been living for the last few years.

11. Recommendations

This study has shed light on most of the characteristics of the informal judiciary in the criminal field. The recommendations produced by this study stem from studying and analysing the results of the intensive field research with the parties and the individuals concerned. The recommendations agree with the calls from various sources calling for the need to rehabilitate and increase the impact of the formal judiciary, restructure it and reorganise it; strengthen the executive and its security forces, enforce the rule of law etc.

These recommendations are also meant to support the aim of building a modern state based on democracy and the rule of law and the respect of individuals and their liberties, without overlooking the current social and cultural reality, as far as it does not come into conflict with the rule of law.

The recommendations are the following:

- When laws concerned with the judiciary, in particular laws on crime and procedures, are drafted, it is important that whoever draws up these instruments be familiar and aware of the informal judiciary and its procedures. This knowledge may contribute towards the codification of the positive aspects of this judiciary and eliminate many of its negative aspects through the *nizami* judiciary.
- The study has also shown that representatives of informal justice issue rulings and decisions that contradict the Basic Law and its general provisions such as the law concerned with collective penalty, such as exile or imposing financial penalties that go against the nature of the law. Thus, it is important to recommend that the issuing of such decisions should cease, and that they should not be accommodated on paid of legal liability; and to recommend the inclusion of a text in the Palestinian Penal Code that would punish people responsible for issuing these decisions and put an end to such phenomena.
- The study showed that the offices of the governorates decided many cases and disputes on the pretext of maintaining public order, knowing that this exceeds the governor's jurisdiction. The study thus recommends the drafting of a modern Palestinian law that would exhaustively determine the jurisdiction of the governorates, in accordance with the independence of the judiciary and the principle of the rule of law.
- It also transpired that one of the elements that makes parties to a dispute have recourse to the informal judiciary is the slowness of the formal judiciary. This study thus recommends **the imperative of putting in place appropriate mechanisms to ensure speed in solving disputes between litigants,** such as reinvigorating the principle of judicial inspection and the adoption of administrative methods – like the administration of courts in certain countries – for the management of court files that reconcile the number of cases resolved with the number of cases that are registered in the general register.

- Also, the study showed that the *sulh* deed constitutes a guarantee for lasting social/communal peace, and prevents the escalation of the dispute. The study thus considers that it would be useful to review the draft Palestinian Penal Code and to stipulate therein that the *sulh* deed that does not include an infringement on the free will and choice of the parties, and that does not contain oppressive decisions such as collective punishment such as exile (*al*-jalwa), may be codified as being considered a mitigating circumstance. This would be after such deed has been reviewed by the judiciary, and provided that this should not reduce the penalty to below the minimum provided in the law, and without affecting the civil right of the injured party, which the *nizami* judiciary remains empowered to consider. It is imperative to limit the role of the representatives of informal justice to personal initiatives that preserve communal peace without deciding on the matter of the dispute.
- It also transpired during the course of the study that there are certain texts in the Penal Code in force in the West Bank that permit the mitigation of legal punishment in crimes that follow the incident when in a state of rage (the 'boiling of the blood'). In order to prevent these crimes it is imperative to increase the penalty on all such crimes because they are committed, effectively, for revenge, and this represents a violation to the authority of the *nizami* judiciary and a lack of respect for its standing. It also constitutes an attack on the right of the state to punish, and on the state's authority in maintaining public order. It entrenches the phenomenon of taking the law into one's own hands. It is also appropriate to increase the penalty for crimes committed against the background of so-called 'family honour.'
- The research revealed that some PLC members practice the role of *islah* men, thus the study see that they should no act in this role in order to consolidate the idea of a state based on the rule of law.
- It also became clear that financial cost of litigation before the *nizami* judiciary is one of the factors pushing parties to the dispute to have recourse to the informal judiciary. Thus the study holds the view that in would be useful if the Bar Association and human rights organisations intervened by offering legal aid to those who do not have the necessary financial means, and that the PNA needs to bear its responsibility towards this issue in an appropriate manner.
- Further, the study revealed that there are tribal judges in the Gaza Strip. It is imperative that their role should be abolished on pain of legal liability, as this role of theirs is in conflict with the principle of the rule of law, and creates a parallel judiciary.

12. Annex no. 7: Glossary of terms used in informal justice in the West Bank and the Gaza Strip

This part of the study looks at the terms used in informal justice in the West Bank and Gaza Strip with a view to helping the reader understand the language used by representatives of informal justice and various subjects treated in this study, which employs these terms particularly when discussing the mechanisms of the work of the *islah* men and examining the criminal cases under examination.

Before going commencing the glossary it should be noted that there is a distinction between terms used in the work of tribal judiciary and those used in the work of *islah* men; the terms used in the work of tribal judiciary exist only in the areas where tribal justice is practiced (the Gaza Strip and southern West Bank), while the terms used in the work of *islah* men are found throughout the West Bank and the Gaza Strip where the work of *islah* men is widespread. Accordingly, at the end of every entry, the area where the term is used is mentioned; if a term is used in all areas then this will not be mentioned.

'Atwat al-iqbal: the final '*atwa* that precedes the *sulh;* no *'atwa* is allowed after it.

'Atwat inkkar: is taken for the accused until he can be referred to tribal justice to prove or disprove the crime.

'Atwat kamm wa lamm: the '*atwa* taken by the disputing parties in order to give every party their right in the case of a stalemate in the dispute. This expression was only used in the Hebron and Nablus areas.

'Atwat tafteesh: this is mostly taken on the second day of the *hudna* (truce) during which the family of the accused requests from the family of the victim a sufficient period of time – normally not more than one week - to prove that their son is not implicated in the crime that he is accused of by identifying the real perpetrator, i.e. it does not entail any admission until the truth is revealed. No financial sums are paid.

1) Munshed al-munashada: the root of this is the verb '*nashada'* meaning asked / sought. When the case is transferred from the *mulam* to *qadi al munshada* he asked whether the case can be solved by him or whether it should be transferred to the '*munshd qat' al haq' '* or '*munshed al ra's'.*

2) Munshed qat' al haq *(munshed al ra's)****:*** the main judge to whom cases of assault on women (cases of honour) are referred so he can rule in them.

Ad-daghma: mutilation of the corpse after murder. This gives rise to the same as a *diya*. If the family of the victim revenge their loss through killing a relative of the murderer, they do not have the right to mutilate the body. In other words, if the family of the victim

want to take revenge on the family of the perpetrator then they do not have the right to deform the face of the person they kill when taking revenge for the murder of their son (this term was used in interviews in the southern West Bank).

Ad-dans: cases of dispute related to slander, involving charges such as theft or (in recent times) collaboration or a violation of honour. This term was used only in the southern West Bank.

Ad-daribi: tribal judges specialised in examining all disputes outside the jurisdiction of the judge of the *manshad* and *munqi` ad-dam* (that is, with the exception of cases of blood and honour). *Ad-daribi* is from *ad-darb*, and the term is used only in the Gaza Strip among al-Sawarkeh, al-Tarabin and ar-Rmailat (originally inhabitants of Beersheba and migrated to the Gaza Strip on the 1948 Nakba).

***Ad-dleekha*:** a murder that is carried out by way of deception (the murdered person is deceived so he can be killed) and the body of the murdered person is moved from the place of the murder to somewhere else. In this case the amount of both the '*atwa* and the *diya* increase four-fold; the term 'killing in safety' means that the victim trusted the perpetrator and so did not doubt the latter's intentions, while the perpetrator exploited this situation to commit his crime. This means that the *diya* is increased, but if the relatives of the victim want to take revenge (*th'ar*, 'getting even') then this can be carried out against only one person of the perpetrator's family (this term was only used in the southern West Bank).

Ahl addiyar: judges who specialise in land disputes and all that is related to the buying, selling, pawning, boundaries and inheritance of land; they are mostly property owners. This term is only used in the Gaza Strip.

Al 'athf ('atwat al fattash): the judge who is chosen by a party to the dispute while at the *beit al mulim* to be an alternative judge to adjudicate the dispute, as a result of that party not accepting the rule of the tribal judge that is resolving the dispute; each party to the dispute has the right to chose a *ma'thouf*. This definition was only mentioned in the Gaza Strip, it was mentioned in the West Bank under the name of *'atwat al fattash* which can be explained as follows: When the disputing parties arrive at the beit al mulim they are offered three names of judges to resolve the dispute; each party chooses a judge as a *ma'thouf* (this choice is based on the trust that the parties to the dispute have in the judge whom they have chosen as *ma'thouf*), and subsequently only one judge is left. The *beit al mulim* then transfers them to the judge that was not chosen by either party to rule between them; if both parties agree on the solution then there is no room for disagreement because there are no objections; if however one of the parties to the dispute is not convinced by the decision that the tribal judge gives, then they return to the *beit al mulim* and say 'back me up with my *ma'thuf'* (meaning 'I request that the dispute be referred to the judge I chose as a *ma'thouf* at the beginning when you gave us the names of the three judges'). If

the original *ma'thouf's* ruling satisfies both parties, and they do not object to it then the ruling is implemented; however, if the other party to the dispute objects to the *ma'thouf's* ruling then the objector goes back to the *beit al mulim* and requests referral to the *ma'thouf* that he initially chose. If the second *ma'thouf* issues a decision to which both parties agree, then there is no possibility for a disagreement as there are no objections, but if the other party objects to the ruling of his opponent's *ma'thouf*, then the final ruling is declared by the *beit al mulim* according to the majority view of the three judges who participated in the resolution of the dispute.

Al 'atwa al-madfuneh: **(**or ***'Al makhfiya'*****)** taken when there is an assault on honour and the disputing parties do not wish to reveal it in public. The discussion of the case by the parties is restricted to one or two *islah* men in great secrecy because people normally avoid getting involved in such cases.

Al 'atwa al-mus-hooqa (morooq al 'atwa): taken only for murder cases; the amount is 1025 Jordanian Dinars which is not included in the final amount of the *diya*. This amount is used in all areas.

Al 'atwa: a public admission by the party of the perpetrator of the aggression, and their readiness to pay for all that is required to satisfy the rights arising; *'atwa* can also be renewed. Through the *'atwa* the freedom of the victim to retaliate through similar assault is restricted. *'Atwa* is considered a prelude to *sulh* and the amounts paid in '*atwas* are considered part of the final *diya*. In murder cases it might be renewed and when this happens the payment is equal to half the amount paid in the first *'atwa* except in the third '*atwa* when renewal is without payment.

Al bidwa: *al bidwa* occurs in the case when the party who is in the wrong does not admit or denies their mistake or delays payment of the tribal rights owed by him. This entails the holder of the right sending two or three men who deliver the communication in precise detail; one of the men will say that so-and-so sent us to you seeking such-and-such, and either he is answered or he asks the [liable party to the dispute] to meet him at [house of the] '*ra'i il beit'*, i.e. at the [house of the] informal judge to separate between them. If the liable party does not listen to him then the holder of the right may send him '*bidwa'* a second and a third time, each time using different people and having them witnessed. After the third time the holder of the right is entitled to take his right by force without being criminally liable. This term is only used in the Gaza Strip.

Al bish'a: a means of proof previously employed by tribal judges, whereby a coffee bean roaster being brought close to the tongue of the person who is denying the act and if his tongue is burned then what he states is a lie. This is used in a town called '*Sarab Yom*' west of Ismailia in Egypt. The *bash'a* takes place in three situations: denying blood (in the case of a murder and denial of murder); a land with no neighbours (when there is a

dispute between two people over a piece of land with unknown ownership and the neighbours do not wish to interfere); and in cases of honour.

Al dakhaleh: when the relatives of the perpetrator pay an unspecified amount of money to the family of the victim in order to submit to the known and followed tribal customs. This term was used only in the southern West Bank. It can be explained as follows: *al dakhaleh* takes place only in cases of sexual assault and of shaming (*taqtee' wajh)* the guarantor, and is done through the family of the aggressor paying a financial sum that is normally in the region of 500 Jordanian dinars to the family of the victim, as an initiation of tribal *sulh* rites before the first *'atwa*. This sum is normally calculated to be part of the final *sulh*.

Al diya al muhammadiya: the sum agreed upon in reconciliation or compensation paid by the perpetrating party's family to the victim's party; in tribal *`urf* it is equal to 4850 grams of gold in cases of intentional killing.[52]

***Al diya al murabba`a***: exacerbation or increase in the amount of *`atwa* and *diya* when there is more than one criminal involved in one crime, or in a case of murder by deception or mutilation or concealment of the victim's body.

Al haq al mudakhar: a moral right ruled against the perpetrator with suspended implementation.

Al hudna ('atwat dafn): [burial 'atwa] - a procedure by the perpetrator whereby he declares [what is right?] the right, his desire for conducting a tribal *sulh* and receptiveness for the good people to mitigate; its duration is three and a third days. This represents the period of condolences; it can be extended but should not go beyond one week; no sums of money are paid and normally it is taken by the grave which anyone can take [the '*atwa]* even a passer by. There are no guarantors, which means that the family of the victim are not bound to non-retaliation.

Al jalwa: forced migration, displacement or exile of the perpetrator's family from the area they live in. This includes, in the Northern West Bank area, the root and branches of the perpetrator's family, that is the father, brothers and sons and with them the women of the family who follow their husbands and fathers. Exile normally happens when the families of the perpetrator and the victim live close to each other (village, refugee camp, or town if they are living close to each other). In the old days, it used to include the perpetrator's 'five' (that is, those related up to the fifth grandfather).

[52] For further information on *diya* in the Islamic *shari`a* see Falih Bin Muhammad Falih al-Saghir, *Ahkam al-diya fi 'l-shari`a al-islamiyya wa tatbiqatha fi al mamlaka al-`arabiyya al-sa`udiyya* (Al-markaz al-`arabi li'l-dirasat al-'amniyya wa'l-tadrib) Riyad: 1412 AH p. 177.

Al jira: when a large gathering of notables and *islah* men go to the family of a person who has been assaulted to ask them to renew the bonds of friendship and neighbourliness between the family of the victim and the family of the perpetrator, once the outstanding tribal entitlements required from the family of the perpetrator have been paid, on the understanding that there are no negotiations over the sums demanded by the family of the victim in cases of honour. *Al jira* occurs only in cases of murder and honour. (This term was used in the Gaza Strip and southern West Bank).

Al Kabira takol as-saghira: **('the greater eats the lesser') -** if there was a fist fight between two parties, then the bigger injury merits an '*atwa* and rights and the lesser injury is ignored. For example, if for the purpose of burglary someone enters a house and the owner kills him, then this merits a *diya*. In other words, the murder annuls the burglary or the attempted burglary and so the deceased is not held to account over burglary and entering.

Al Kibar: 'the seniors' - senior judges (there are three of them) who can deal with all cases. They can solve any dispute although they may refer certain cases to specialists in pursuit of justice. *Al kibar* are people of knowledge and are given the title of *kawakeb* (planets) because of their prominence; they modernise the '*urf* rules to suit the modern age, determine the value of the *diya*, length of the period of 'blood rage' (*fawrat ad-dam)*; they form a strong fence around the *'urf* procedure and handle all cases whether mistakes, theft, slander, assault, or fights. They are similar to a magistrate court of and a criminal court in the *nizami* judiciary. *Al Kibar* may refer certain cases to specialists such as *al munshid*, *ahl ad-diyar* or to *al bish'a* (this term was only used in the Gaza Strip).

Al mokiya: when parties to the dispute agree on referring the dispute to a tribal judge it is said 'dafana hasahmon 'end beit al mulim' (they buried their pebble at the *Islah* man house)

Al munshed: the judge specialising in honour cases (this term was used in the Gaza Strip and southern West Bank).

Al qada' al 'asha'iri: 'tribal' justice, a mean of solving disputes between members of the public where parties to a dispute willingly approach a tribal judge to rule between them, relying on his wisdom and experience in this field; his ruling is usually binding. Tribal justice is currently used only in the southern West Bank and in the Gaza Strip.

Al tafweel: this occurs when the head of the family breaches a judgment or an agreement made by one of his relatives without him knowing. This is connected up to the fifth grandfather (this term was only used in south of the West Bank).

Al taltheem fi al wajh: is an assault without consideration for the 'face' (*wajh)* or the guarantee of the guarantor who gave his bond for the first '*atwa* (this term was used in the Gaza Strip and southern West Bank).

Al tawara: in the '*urf* of old the holder of the right would arrange a camel ride for the guarantor to collect the right from an adversary refusing to render him his right, along with everything for the journey (drink, food, tobacco), this constituting the *tawara* of the guarantor. Currently they either take an amount of money in place of the ride or a car is made available, constituting *tawara* of the *'urfi* judge. This term was mentioned in the Gaza Strip and the southern West Bank.

Al wajh: the first step in tribal justice; it occurs when a group of the society's notables go to the parties to the dispute and use their status to pressurise the parties to the dispute to accept the solution; normally their will is respected.

***Al-`aqila***: the family; saying 'the *`aqila* of the perpetrator' means the perpetrator's family and 'the *'aqila* of the victim' means the victim's family, and 'so-and-so's *`aqila'* means his family.

Al-Falajeh: an overwhelming and powerful reason that might lead the *jaha* to be late; in such a case, it is said that the *jaha* have a *falajeh*, i.e. a strong excuse for being late.

As concerns the definition of *mulim*, an *islah* man defined it as an *islah* man (meaning the islah man who tries to resolve the dispute through the conciliation between both parties) and not a tribal judge. A tribal judge from the Gaza Strip indicated that it is a tribal judge who is sought by parties to the dispute to resolve it and who in turn refers them to one of the tribal judges for a resolution if *beit al mulim* could not resolve it. This term was not used in the Nablus and Hebron areas, although it was referred to briefly in interviews in the Hebron area when the definition of '*atwa al fattash* was discussed.

As-sulha (`atwat at-tayyib): the rites of signing the final *sulh* between the disputing parties, giving comfort to the feelings of the family of the victim and bringing to a close the *sulh* procedures between the sides.

At-tanib*:* taking sanctuary and refuge with another person; the person providing the protection is obliged to ensure the protection of the person taking sanctuary and to defend him with his money and his life.

At-tarid wa l-matrud: the claimant and the respondent in tribal justice.

Beit al mulim: the *islah* man whom both parties to the dispute approach with a request that he refer their dispute to the specialised tribal judge. *Beit al mulim* initially attempts to resolve the dispute through reconciling both parties but if he fails in the *sulh* then he refers them to the tribal judge specialised in this type of dispute.

Dabbous: the baton i.e. the power of the guarantor, an important characteristic in a tribal judge (term used only in the Gaza Strip).

Dafn hasa: agreeing on the specialised judges who will be approached to hear the case. *Dafan al-hasa* is considered the beginning, not the end, and through this the case is contained among the disputing parties; a pebble is buried in the ground and the petitioner asks the judge to transfer his case to specialised judges so that he can obtain his right from them (this term was used in the Gaza Strip and the southern West Bank).

Fawrat ad-dam: ('raging of the Blood') - the period immediately after the crime is committed which lasts until the taking of the first '*atwa*, during which the family of the victim may attack the property of the family of the perpetrator up to the fifth grandfather. This does not always happen but if it does, then it is said that it occurred in *fawrat ad-dam*; during which, the family of the perpetrator are exiled from their homes. Damages to properties are not calculated in the final *diya*.

Firash al-'atwa al-baida: *'atwa* concluded without any money being paid. Normally in an *'atwa* a sum of money is paid that is calculated into the amount paid upon *sulh;* if the party of the victim agree on taking a *'atwa* without the party paying any sums of money for the *'atwa*, then it is called *al-'atwa al baida*.

Firash il 'atwa: the amount paid by the family of the perpetrator to the family of the victim. The amount is determined in the *'atwa* deed depending on the type of the case and the extent of the damage inflicted upon the victim.

Had il sayeh: **this** indicates forgiveness and good will among the parties (this term was only used in the southern West Bank).

In summation, *beit al mul*im is an '*islah man* who cannot resolve a dispute through reconciling both parties and therefore refers them to a specialised tribal judge'.

***Islah*:** a method of settling disputes between people through the intervention of *islah* men to bridge the gap between the different points of view of two disputing parties in order to reach a common ground for a solution, the decisions of which are mostly based on financial compensation for the victim; sometimes the penalty includes exile of the family of the perpetrator.

It is preferred that the *jaha* comprise *islah* men and not tribal judges because tribal judges do not attend *sulh* procedures and '*atwas.*

***Ityah al wajh*:** (causing loss of face, hiding the face*);* this occurs where there is a '*atwa* and a guarantor, and one party to the dispute assaults the other party. Here, the guarantor who gave the guarantee loses face i.e. the guarantor is no longer respected. According to this, it is possible to pardon blood, while '*ityah al wajh*' is considered more dangerous than the blood itself.

Kafeel a-daf' (al-wafa gharem): the person who guarantees the perpetrator and pays all the rights and obligations entailed after the *'atwa*.

Kafeel al jam' (kafeel hudori): the person who pledges to bring the disputing or conflicting parties to the house of the 'judge'.

Kafeel al-kafl: the person who consolidates the guarantee of the first guarantor whether he is a *kafeel dafa* or *kafeel wafa (a 'guarantor of payment' or a 'guarantor of fulfilment)*

Kafeel al-man' (ad-dafa - al-kafa): the person who guarantees the party of the victim not to retaliate in kind and assault the party of the perpetrator after the *'atwa* i.e. they guarantee implementation of the contents of the '*atwa*.

Kursi al-munshid: there are three types of *munshid* judges who deal with two types of cases. The first e cases of honour (meaning if someone assaulted a peaceful / non-belligerent woman either by beating or sexual harassment) and the second is *al–wajh* (meaning if someone assaults someone who is in the *wajh* -i.e. under the protection- of a guarantor) which occurs when someone guarantees one of the parties of the dispute providing they are not assaulted. This term is only related to the work of tribal justice and therefore it is only used in the Gaza Strip and southern West Bank.

Labes al-thoab: the person who deputises for the parties of the dispute in the procedures of tribal *sulh*.

Lisan il-hal: a party who talks on behalf one of the parties to the dispute.

Manahi ad-domoum: are the houses (families) specialised in cases of blood (murder).

Manaqi' ad-damm: the specialised judges of solutions and punishments in the cases of murder or severed ligaments i. e. in the cases of 'ad-*damm al naqi' wa al 'aqab al qatee'* '; they determine the fine which is imposed as well as estimating *diyas* and separating between people. This term was used in interviews throughout the region in response to questions about the tribal judiciary, although it only exists in the Gaza Strip and south of the West Bank where the work of the tribal judiciary is.

Namous: **the presence of** a large number of men in the family of the guarantor, which is one of the required characteristics for a tribal judge (this term was only used in the Gaza Strip).

NB: *al manashid* are referred to in the cases of '*sarkhat ad-doha'* and '*al taltheem fi al wajh'* and they are two types:

Neighbourliness is the neighbour's right, and so is requesting the renewal of the bonds of neighbourliness and friendship between the parties to the dispute. The term can be defined as follows: *al-jira* is similar to '*atwa* but it only exists in the cases of murder and honour crimes; when it occurs, the representatives of informal justice head in person to the family of the victim and ask them for forgiveness and pardon and for renewal of neighbourliness and affection between the family of the perpetrator and the family of the victim, asking for a new page to be turned in the relationship between them based on admission of fault by the family of the perpetrator and their payment of the tribal right demanded by the family of the victim. In cases of crimes of honour, the demands of the victim's family will be met fully without discussion or reduction by the *jaha* (it is understood to be exactly like a '*atwa* with the one difference in that in crimes of honour there is no negotiation or discussion).

Rafa` al raya: raising a white flag seeking *sulh* and forgiveness between the disputing parties (this term was used only in the southern West Bank).

Rizqat al mafluj: where the tribal judge takes half his fee from each of the parties to the dispute, and upon one party being found to be in the wrong, he pays back what the other party paid to the tribal judge.

Rizqat al qadi: the fee received by the tribal judge and determined at his request.

***Sakk `atwa***: the document in which the representative of the parties to the dispute, that is *islah* men and guarantors, sign to what was agreed upon in the *`atwa*.

Sakk as-sulh: the document in which the final conciliation is signed between the two parties; it contains what has been agreed upon and is signed by the representatives of the two disputing parties and the guarantors.

Sarkhat ad-doha: the scream of a woman subjected to an attempt at sexual harassment or assault. When a young woman is harassed she is said to have 'lit her fire and summoned her neighbour' by screaming when someone tries to touch her.

Sharhat al-qadi: when the judge rules for a specified sum, he is entitled to deduct a third, in a long-recognised custom; the amount deducted is referred to as *sharhat al-qadi,* i.e. 'for the sake of the judge', although the judge does not take it, but rather waives it to the benefit of the perpetrator's family.

Siwa jariya: (built bridges – customs): customs and traditions.

Tashri` al haq: this occurs when a tribal judge sets out *al haq* ('truth', or what is right, what is due) ***through*** the judgment he produces.

There is no basis for *al bash'a* in Islam; the interviewees were unanimous in denouncing *al bash'a* and denying its usage in their work.

Tisa`at an nawm: payment by the relatives of the perpetrator who were exiled from their homes of a sum equivalent to the price of a camel to the family of the victim, in exchange for them returning to their homes; this amount is not included in amount of the final *sulh* (this term was mentioned only in the southern West Bank).

Wagheef: opposite of innocent i.e. a person proven to have committed a despicable act (this term was only used in the southern West Bank).

Wajh 'adam: the intervention by a senior notable to impose on the parties to the dispute not to assault each other and to start the procedure of tribal *sulh* in earnest; if one of the parties does not commit, this is considered as a tribal aggression against the senior notable (this term was only used in the Gaza Strip). The meaning is an intervention by one of the heavyweights in town to impose himself as a guarantor for the commencement of the tribal *sulh* procedures between the two disputing parties

What is meant here is the making of a payment to the family of the victim for the return of some of the relatives of the perpetrator to their homes. When a murder is committed by someone, the custom is to exile his relatives from their homes; in such a case, if the relatives of the perpetrator, with the exception of brothers and paternal first cousins, want to go back to their homes then they have to pay an amount equal to a price of a camel (1000 Jordanian dinars) to the family of the victim. The relatives of the victim are then obliged not to attack those who made the payment, ensuring their safety at home.