

# Palestinian Women and Security: A Legal Analysis

Zeina Jallad



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## **The Geneva Centre for the Democratic Control of Armed Forces (DCAF)**

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## **Palestinian Women and Security: A Legal Analysis (2012)**

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## Introduction

For women and girls, gender-sensitive legislation is one of the greatest gateways to security and improved status within society. Outdated legal frameworks, discriminatory legislation, and inaccessible justice systems are just some of the issues women and girls contend with the world over. In the case of the occupied Palestinian territory (oPt), the legal framework has yet to adapt to contemporary developments. The history of the region can be read in the current

legislation, which is a patchwork of laws from various current and historical administrations. Indeed, the current legal framework in the oPt is a mixture of Jordanian, Egyptian, Palestinian, Ottoman and British laws, as well as Israeli military orders, many of which were inherited from the colonial period. Yet, in the past decade, attempts at legal reform have encountered a series of barriers. Efforts on the ground persist, but change is slow to come.

Many international documents are committed to ensuring that gender-sensitive legislation is enacted so that women's security is prioritised. For example, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979), the Declaration on the Elimination of Violence Against Women (DEVAW, 1993), and Platform D of the Beijing Platform for Action (1995), as well as United Nations Security Council Resolution 1325 on women, peace and security (2000) among others, call for governments to enact gender-sensitive legislation that take serious account of the security of women and girls. These international frameworks can be a useful tool for the Palestinian authorities in their attempt to improve the status and security of women and girls through gender-sensitive legal reform.

Recent efforts of the Palestinian authorities in this field include the endorsement of CEDAW by Presidential Decree No. 19 of 2009, as well as Presidential Decree No. 7 of 2011, issued on 15 May 2011, which suspended some highly problematic articles with respect to women's rights, namely Article 340 of the Jordanian Penal Code of 1960 (applicable in the West Bank), and Article 18 of the Penal Code of 1936 (applicable in the Gaza Strip). The two suspended articles stipulate that perpetrators of crimes against close female relatives in so-called "honour" crimes can be exempted from punishment or can benefit from a mitigation of their sentence. This paper aims to provide an analysis of specific articles within the main legal texts that directly impact the status and security of Palestinian women

and girls, which primarily includes the prevailing penal codes and personal status laws<sup>1</sup>. This paper sheds light on the most problematic aspects of these laws in relation to women's and girls' human rights. The first section addresses the protection of women and girls under the penal codes in place in the West Bank and the Gaza Strip. This includes an examination of articles pertaining to rape, sexual assault, harassment, and domestic violence. The paper goes on to discuss the status of women in the court system through the court's consideration of cases and case dismissal. Finally, so-called "honour"-related crimes and abortion are examined. In the second section of the paper, the status of women and girls under the family laws is reviewed. This includes crucial articles related to the age of marriage, guardianship and marriage, polygamy, divorce and custody. The section concludes with a discussion of women as witnesses in family court. The conclusion of the paper outlines the necessary steps to amend existing legal texts in order to ensure greater gender equality within Palestinian legislation.

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<sup>1</sup> For recommendations on laws to be amended for improving the security of Palestinian women and girls, see: DCAF-Women's Centre for Legal Aid and Counselling (WCLAC). 2012. *Working Paper - Palestinian Women and Security: Promoting the Rights of Palestinian Women and Girls through Legislation*. Available at: <http://www.dcaf.ch/Publications/Working-Paper-Palestinian-Women-and-Security-Promoting-the-Rights-of-Palestinian-Women-and-Girls-through-Legislation>. Also see the three related DCAF-WCLAC Policy Briefs (2012): *Palestinian Women and Penal Law*, *Palestinian Women and Personal Status Law*, and *Palestinian Women and Economic Security*.

Since 2008, the Geneva Centre for the Democratic Control of Armed Forces (DCAF) has been actively supporting the promotion of gender awareness within the Palestinian security sector through training activities, conferences, and focus groups, as well as the publication of studies and compilations of reference texts. The present paper is a companion to DCAF's collection of laws pertinent to the security of Palestinian women.<sup>2</sup>

## Protection of Women and Girls under the Penal Code

In the oPt, two penal codes prevail to combat crimes and criminal offences: the Jordanian Penal Code of 1960 in the West Bank, and the Penal Code of 1936 in the Gaza Strip<sup>3</sup>. Over the past decade, Palestinians have strived to tailor a modern penal code that reflects the current situation in the oPt. Myriad drafts have been prepared, yet none has been endorsed by the Palestinian Legislative Council (PLC). Reasons for the delay certainly include the detention of PLC members in Israeli prisons, on-going political paralysis of the PLC, and the presumably low priority afforded to issues affecting women and girls in the context of occupation and the struggle for national liberation.

In 2003, a Draft Penal Code was submitted to the PLC by the Ministry of Justice. After a review, the council members could not come to a consensus concerning the text; it has remained untouched ever since. Despite it being a new document, the Draft Penal Code of 2003 was criticised by legal experts and activists as not amending some of the more problematic gender-based discriminatory features of the current penal codes, as well as not being fully in line with international standards<sup>4</sup>. Other drafts have since been put forth and are pending a response from the executive branch.

<sup>2</sup> For more information, see: DCAF. 2011. *Palestinian Women and Security: A Legal Collection*. Geneva: DCAF. (English forthcoming). Available at: <http://www.dcaf.ch/Publications/Palestinian-Women-and-Security-A-Legal-Collection>

<sup>3</sup> This study only covers areas where the Palestinian National Authority has jurisdiction.

<sup>4</sup> Human Rights Watch. 2006. *A Question of Security: Violence against Palestinian Women and Girls*. New York: Human Rights Watch, p. 25.

Both current penal codes contain problematic articles that greatly affect the status and security of women and girls, especially articles that deal with sexual crimes. The Jordanian Penal Code of 1960 differentiates between three sexual crimes: rape, sexual assault and sexual harassment, while the Penal Code of 1936 addresses only rape and sexual assault. The following section provides a brief analysis of the most challenging articles in the Jordanian Penal Code of 1960 and the Penal Code of 1936 concerning the protection of women and girls under the law, including a brief analysis of the existing legal framework for sexual crimes.

### Legal framework in the oPt

- Penal Code of 1936
- Egyptian Family Law No. 303 of 1954
- Egyptian Penal Code and Criminal Procedure Code Including Crimes of Adultery (Issue No. 260) of 1953
- Jordanian Penal Code of 1960
- Jordanian Personal Status Law No. 61 of 1976
- Draft Penal Code of 2003
- Amended Basic Law of 2003
- Palestinian Child Law of 2004
- Presidential Decree No. 19 of 2009 Concerning the Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Presidential Decree No. 7 of 2011

### International Instruments

- Universal Declaration of Human Rights (UDHR, 1948)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979)
- Convention on the Rights of the Child (CRC, 1989)
- Declaration on the Elimination of Violence Against Women (DEVAW, 1993)
- Vienna Declaration (1993)
- Beijing Platform for Action, Platform D (1995)
- United Nations Security Council Resolution 1325 (UNSCR 1325, 2000)
- Millennium Development Goals (MDGs, 2000)



## Defining and Penalising Rape

While there is no internationally agreed upon definition of rape, Article 1 of DEVAW declares violence against women as any act “that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life,” which includes rape. Article 2 includes sexual abuse of female children in the household, marital rape, rape, sexual abuse, and sexual harassment, among others, as fitting within the definition of sexual harm. Article 2 of CEDAW<sup>5</sup>, while not specifically addressing rape, calls for the elimination of all discriminatory practices against women, specifically in Articles 2(f) and 2(g) where the document calls for a modification of laws that discriminate against women. Other international frameworks, such as Article 18 of the Vienna Declaration (1993) and Platform D of the Beijing Platform for Action, call for states to respect the innate human rights of women and girls while also calling for legislation that criminalises gender-based violence in all its forms.

Regarding the definition of rape currently applicable in the West Bank, a reading of Article 292(1) of the Jordanian Penal Code of 1960 raises three pivotal observations. Firstly, the Article clearly states that rape is the non-consensual vaginal penetration of non-wife females. As such, the law limits the scope of protection and does not recognise marital rape. By not recognising marital sexual assault, the law fails to meet international standards. This includes the anti-discriminatory principles laid out by CEDAW, specifically General Recommendation No. 19 (1992), which addresses violence against women. Secondly, Article 292(1) of the 1960 Penal Code only acknowledges vaginal penetration as constituting rape. Therefore, any other form of sexual aggression (including non-vaginal

penetration), no matter how severe, is not considered rape. Such acts are classified as sexual assault meriting a lesser punishment. Thirdly, the article does not provide for adequate protection of minors. While it provides for aggravated sanctions in case of an assault on a girl under 15 years of age, the same approach has not been adopted for the rape of minor girls between 15 and 18 years of age. This is in contradiction with the Palestinian Child Law (2004), which considers those below 18 years of age as minors (Article 1), and could potentially open the door for other forms of abuse against minors in this age group.

In the Gaza Strip, Article 152 of the Penal Code of 1936 sets forth a definition of rape that includes “unlawful sexual intercourse with a female against her will”, sodomy with any person (male or female) under threat, and unlawful sexual intercourse or sodomy with a youth (male or female) under 16 years of age. All acts are defined as felonies. However, a lighter sentence may prevail if the perpetrator is able to convince the court that, in the case of a female youth, she was perceived as being older than 16 years of age. Similarly, it is explained that in Article 156(1), anyone who is married to a girl less than 15 years of age and has intercourse with her is guilty of a misdemeanour and shall be jailed for two years. This can be overcome, according to Article 156(2), if the perpetrator argues that the girl has reached puberty or a medical practitioner deems her fit for consummation of the marriage.

In this context, it is worth noting that the Jordanian Penal Code of 1960, unlike the 1936 Penal Code, imposes a harsher punishment if the female rape victim is a virgin than a non-virgin. Article 257 of the Draft Penal Law of 2003 follows the approach of the Jordanian Penal Code of 1960 in its definition and penalisation of rape. It is discriminatory, as it does not include the rape of men or boys, through penetration or the insertion of objects.

## Defining and Penalising Sexual Assault

Rather than being based on an internationally accepted or survivor-centred definition, the term “sexual assault” in Article 296(1) of the Jordanian Penal Code of 1960 draws on social and conceptual understandings of ‘honour’. Both Articles 292(1) and 296(1) classify unwanted sexual contact other than vaginal penetration as sexual assault, irrespective of its gravity or

<sup>5</sup> Although President Mahmoud Abbas symbolically endorsed CEDAW in 2009, the non-state status of the oPt prevents the Palestinian National Authority (PNA) from ratifying international agreements. In this context, the President’s endorsement of CEDAW is used as an internal tool to lobby for change and harmonise the existing legal framework. For more information, see: *National Situation Analysis Report: Women’s Human Rights and Gender Equality Occupied Palestinian Territory, Enhancing Equality between Men and Women in the Euromed Region (2008-2011)*, Euromed Gender Equality Programme, p.6.

harm. Similarly to Article 292, Article 296(2) only prescribes a greater punishment for sexual assault when the victim is a minor below 15 years of age. Many of the same concerns voiced over the Penal Code's response to rape exist with its response to sexual assault. It is worth noting that the terminology used in Article 296 provides that sexual assault is committed against persons, which means men and women. Although the narrow definition and wording used to define rape excludes men, the article on sexual assault does not.

As for the Penal Code of 1936, sexual assault is not explicitly defined. Rather, sexual assault appears to be labelled as an "indecent act" in Articles 157, 158, and 159, leaving a vague, and potentially harmful, interpretation of the offences. Article 157 addresses indecent acts through force whereas Article 158 addresses indecent acts without force. In both cases, there is no specific designation of the victim's sex. When force is used, the law implies that anyone may potentially be a victim; such a crime is considered a felony with fourteen years of imprisonment. Yet, when perpetrated without force, the indecent act is considered a misdemeanour and subjected to a lesser penalty. Article 159 responds to indecent acts committed against a minor less than 16 years of age by considering these acts a misdemeanour subject to three years of imprisonment.

Similarly to the 1960 Penal Code, Article 263 of the Draft Penal Law of 2003 defines sexual assault as a sexual act that is committed against another person without his/her consent. The law does not specify whether the victim of these acts is male or female.

## Defining and Penalising Sexual Harassment

Article 305 of the Jordanian Penal Code of 1960 prohibits "immoral advances" (sexual harassment) against both females and males. However, the law does not use the term harassment. This concept of "immoral advances" as mentioned in the law is vague and rooted in a culture of honour, rather than administering non-discriminatory justice. Such ambiguity could potentially lead to sidelining women's rights, as well as the rights of male victims of sexual harassment.

## Defining and Penalising Domestic Violence

Both the 1960 and 1936 penal codes are silent on the issue of domestic violence. According to the 2003 Draft Penal Law (Article 242), domestic violence<sup>6</sup> is a crime punishable by a two-year prison sentence. However, paragraph 3 of the Draft Penal Law mentions that legal action against the perpetrator can only be taken if the victim herself, or a relative to the fourth degree for minors under 15 years of age, files a complaint. That means that these crimes will remain unpunished if the victim gives in to family pressure and does not file a complaint. As of this writing, the newly proposed Family Protection Law, which would bridge the current protection gap in the applicable penal codes, is pending a response from the executive branch. This situation is not in line with international frameworks, including CEDAW, which call for the elimination of violence against women, including violence in the home. These frameworks also call for legislation that criminalises such violence.

Related to the penal codes' handling of violence against women and girls is the ability of a female victim to file a complaint against a perpetrator with the police. The penal codes do not address this issue, but the personal status laws do<sup>7</sup>, requiring a male relative (wali) to file a complaint on behalf of the victim if she is under 18 years of age. This becomes especially difficult when a family member is the perpetrator. Social workers, shelters and government institutions do not have the legal capacity to accompany a minor to file a complaint.

## Considerations from the Court

In cases of adultery, the court does not consider any case without a prior complaint from the "victim", as is stipulated in Articles 284 of the Jordanian Penal Code of 1960. For incest, the law considers that there is no victim, and a relative (up to the fourth degree) of one of the persons involved has to file a complaint in order for

<sup>6</sup> The law only uses feminine pronouns to refer to the victims of domestic violence, except when it comes to children, in which case both boys and girls are included. This implicitly denies the existence of cases involving adult male victims of domestic violence.

<sup>7</sup> Article 183 of the Jordanian Personal Status Law of 1976 stipulates that for cases not explicitly mentioned in the law, the principles of the Hanafi School apply. This is one of the four Schools of Islam, which offers a specific interpretation of the Quran and the Shari'a.

the court to consider a case (Article 286 of the Jordanian Penal Code). The 1936 Penal Code does not criminalise adultery. However, the Egyptian Order No. 260 of 1953, which is applied in Gaza, criminalises adultery and refers to the Egyptian Penal Code. Article 3 of that Order states that adultery can only be prosecuted if the “victim” files a complaint. Article 155 of the 1936 Penal Code criminalises incest, but this law does not mention any procedure for court consideration.

### Sexual Crimes and Case Dismissal

Article 308 of the Jordanian Penal Code of 1960 permits the dismissal of a case or, if a judgment is issued, the suspension of its implementation if the perpetrator of rape, sexual assault or sexual harassment marries his victim. In such cases, the court will most likely dismiss the case. Conversely, a female victim of rape might be under pressure to marry her aggressor in order to preserve her family’s “honour”. This arrangement neglects the status of the woman or girl as the victim of a brutal assault and rewards the perpetrator. When the victim of a sexual crime is pressured to marry her attacker to wash away a “sin” for which she bears no responsibility, this constitutes a double punishment. In practice, the police and other actors sometimes use this article as a means for allowing perpetrators to evade punishment for sexual crimes against women.

The same also applies in case of “seduction” or when a man promises to marry a woman in order to obtain sexual favours. Article 304 of the Jordanian Penal Code of 1960 punishes any man who deflowers a virgin who is 15 years of age after promising to marry her. It also requires him to “guarantee her virginity”, which means to marry her. The law is silent regarding the victim’s right to file a civil suit and request financial compensation. However, due to social and traditional values that relate to “honour” and shame, such cases are practically never brought to court<sup>8</sup>.

### Defining and Penalising So-Called “Honour”-Related Crimes

The concept of “honour” is central to many articles in the Jordanian Penal Code of 1960. Articles 62, 98 and 340 implicitly legitimise the

<sup>8</sup> Based on interviews with lawyers and research conducted at the Ramallah Courthouse.

killing of a female on the basis of her “improper conduct” as a way to “restore the honour of the family.”

According to the 1960 Jordanian Penal Code, so-called “honour”-related crimes are justifiable by a “crime of passion” defence. The law indeed provides mitigating circumstances and reduced sanctions for this type of crime. In some cases, the perpetrators of murder are completely exempt from punishment. This is evident in Article 340(a) of the Jordanian Penal Code of 1960<sup>9</sup> that reads, “Whoever catches his wife or one of his close female relatives in the act of adultery with another person and murders, injures or harms both or any of the adulterers shall be exempt from punishment”<sup>10</sup>. Paragraph (b) of the same Article adds, “Whoever catches his spouse or any of his or her ascendants, descendants or sisters in the course of a sexual act that is not tantamount to adultery with another person and murders, injures or harms both or any of them shall benefit from mitigating circumstances”. Furthermore, Article 98 of the same law reads, “The perpetrator of a crime shall benefit from mitigating circumstances if he commits the crime in a fit of fury caused by an unlawful and dangerous act committed by the victim”.

Examining these laws, it is evident that none stipulates what constitutes an illegitimate act. However, all three articles put men in a protected position. This is clear in the language of the law that addresses the “male perpetrator” by using masculine pronouns in Arabic (e.g. ‘yastafeed’, meaning he benefits). Furthermore, the articles discussed above reduce punishments for men for so called “honour” crimes against women, while a female perpetrator does not benefit from the same mitigating factors. These articles contradict Articles 9 and 10 of the Amended Basic Law (2003) that state, “Palestinians shall be equal before the law and the judiciary” and “Basic human rights and liberties shall be protected and respected”, respectively. Furthermore, they contravene international human rights norms, such as Articles 3 and 7 of the Universal

<sup>9</sup> In 2011, a Presidential Decree suspended this Article as well as Article 18 of the Penal Code of 1936, which also provides mitigating circumstances to a man who kills his wife or another female relative if they are caught committing adultery.

<sup>10</sup> Jordanian Penal Code, Number 16, 1960 (Arabic). English translation of quotes by the author for the purpose of this paper.

Declaration of Human Rights (UDHR, 1948) ensuring every person's right to life, liberty, security and equality before the law, Articles 2 and 15 of CEDAW ensuring that women and men are equal before the law, as well as Article 3(a) of DEVAW, which reaffirms a woman's right to a life free of all forms of violence.

In addition, some judges misinterpret Article 62(2a) of the Jordanian Penal Code of 1960 in favour of male perpetrators of so called "honour" crimes. Article 62 allows parents to "discipline" their children as they see fit as long as their actions follow "general customs". However, the law does not determine the extent of such disciplinary acts. In practice, judges treat daughters who are living with their families as children, regardless of their age<sup>11</sup>. They thus often consider so-called "honour"-related murder of daughters by their parents as a means of disciplining children allowed by "general customs".

### The Criminalisation of Abortion

Abortion is criminalised under Articles 321, 322, 323, 324 and 325 of the Jordanian Penal Code of 1960. Penalties are extended not only to the pregnant woman, but also to all individuals and (medical) staff who assist her in performing the abortion. This intimidating legal approach makes it difficult for a woman to secure a safe abortion if a pregnancy has occurred as a result of a sexual crime and forces her, instead, to resort to the risky method of inducing a miscarriage. Abortion is also of concern in the Penal Code of 1936. Articles 175, 176, and 177 offer similar arguments for criminalisation as the Jordanian Penal Code of 1960.

Furthermore, Article 321, et al. of the Jordanian Penal Code of 1960 and Article 175, et al. of the Penal Code of 1936 do not fully engage with the United Nations Millennium Declaration, in particular Millennium Development Goal 5 (MDG5), which seeks to reduce unsafe pregnancy rates, and improve maternal health and access to reproductive health services. MDG5 calls upon the international community to amend laws that create barriers to safe abortion, and

<sup>11</sup> In penal and family cases, laws refer to general customs. As long as a woman is living under the patronage of her family, then she is expected to adhere to disciplinary customary rules. Women need a legal guardian, "wali", who could be their husband, father, son or as stated by the law.

the Treaty Monitoring Committees continuously call on governments to ensure women's ability to access safe abortion in their existing legal frameworks and also to review legal restrictions on abortion<sup>12</sup>. The Palestinian Authority is actively seeking to meet these goals and has monitored progress accordingly<sup>13</sup>. Interestingly, Article 324 of the Jordanian Penal Code of 1960 affords a mitigating excuse for a woman (and family members up to the third degree) who obtains an abortion for "honour"-related reasons. In cases of extra-marital pregnancies, law provides for a more lenient punishment for abortion if the motive is to cover the woman's perceived "dishonourable" conduct and to protect her and her family's reputation. Therefore, the reduced penalty is not about female reproductive health, but rather about the culture of honour and shame.

## The Status of Women under Family Law

The current state of personal status laws in the oPt is no different from the other types of laws that were inherited from former eras; however, the situation for personal status laws is even more complex. Muslims and Christians have their own personal status laws, but both Christian and Muslim women are discriminated against in matters of personal status<sup>14</sup>. Palestinians living in Jerusalem are subject to Israeli civil regulations and Jordanian family law. For Muslims in the West Bank and Gaza Strip, currently two different sets of laws predominantly derived from the Hanafi School of Islamic jurisprudence (fiqh) are applicable.

<sup>12</sup> Ensuring Women's Access to Safe Abortion; A Key Strategy for Achieving Millennium Development Goals, Ipas, Protecting Women's Health, Advancing Women's Reproductive Rights, 2011. According to this report, "98 percent of unsafe abortions occur in developing countries with restrictive abortion laws." For more information see: <http://www.ipas.org/~media/Files/lpas%20Publications/MDGFLY3E11.ashx>

<sup>13</sup> For more information, see: MIFTAH. 2009. The MDG - ICPD Palestine Report In Preparation for ICPD @ 15. Ramallah: MIFTAH; PNA & PCBS. 2009. *Millennium Development Goals (MDGs) Statistical Report*. Ramallah: PCBS; PNA & PCBS. 2008. *The Millennium Development Goals in Palestine According to the Data of the Palestinian Family Health Survey 2006*. Ramallah: PCBS.

<sup>14</sup> Personal status laws established by their respective churches govern the lives of Palestinian Christian women.



The analysis that follows limits itself to the legal framework applicable only to the Muslim community. This section of the paper will focus on the two laws applicable to Muslims in the West Bank and the Gaza Strip and highlight the most problematic aspects of both the prevailing Jordanian Personal Status Law No. 61 of 1976 and the Egyptian Family Law No. 303 of 1954. This complicated context directly impacts the security of women and girls.

## Clarifying the Age of Marriage

Both prevailing family laws for the Muslim community in the oPt differentiate in stipulating the age of marriage between males and females. According to the Jordanian Personal Status Law, the age of marriage for males is 16 hijri<sup>15</sup> years of age and 15 hijri years of age for females. Meanwhile, Article 5 of the Egyptian Family Law sets the age of marriage at 18 years of age for males and 17 years of age for females<sup>16</sup>. Yet, the Palestinian Child Law of 2004 sets the age of majority as eighteen years old. The age of marriage as it stands today clearly contradicts the Palestinian Child Law and permits the marriage of children<sup>17</sup>. The current Draft Personal Status Law under consideration of the executive branch is seeking to raise the age of marriage to 18 years of age for both males and females<sup>18</sup>.

Currently, a judge (qadi) has the authority to permit a minor to marry if he considers marriage to be in the minor's best interest; this is more likely to happen with female minors than with male minors. It has been noted that female children as young as nine years and male children as young as 12 years of age may be wed with the consent of a judge<sup>19</sup>. Articles 7 and 8 of the

<sup>15</sup> According to the lunar calendar rather than the Gregorian calendar.

<sup>16</sup> However, this law also specifies that a judge is allowed to make an exception and marry a female under the age of 17 if she has reached puberty. Some cases of exceptions are discussed below.

<sup>17</sup> The Law of the Palestinian Child No. 7 of 2004, Article (1) defines the child as every human being who has not reached 18 years of age.

<sup>18</sup> Until recently, different institutions have prepared different draft Personal Status Laws. This paper refers to the draft that was prepared by the Shari'a Supreme Council.

<sup>19</sup> For more information, see: Labadi, Fadwa. 2004. The Making of a Fatwa: Muftis, Early Marriage and Islamic Law. *Review of Women's Studies*, Birzeit University, 2: 72-84. [http://home.birzeit.edu/wsi/images/stories/The\\_review/2nd\\_issue/E\\_5th\\_article.pdf](http://home.birzeit.edu/wsi/images/stories/The_review/2nd_issue/E_5th_article.pdf)

Egyptian Family Law allow the judge to conduct a marriage contract for a minor if he assumes it is "suitable" for a girl. This decision is made without much deliberation, where a mix of factors is allowed to play an influential role in what is considered the best interest of the child. Article 279 of the Jordanian Penal Law of 1960 penalises conducting or facilitating a marriage contract for girls below 15 years of age. It also punishes anyone who facilitates the marriage of a girl who is under 18 years of age without the consent of her guardian. Article 182 of the Penal Code of 1936 has a similar stipulation.

By using general terms such as a "girl's interest" and by not specifying which restrictions might apply, the law leaves a lot to the judges' discretionary powers. This contradicts the Convention on the Rights of the Child (CRC, 1989), Article 16 of CEDAW on the elimination of discrimination in relation to marriage, and Article 16(2) of the UDHR, which states, "[Marriage] shall be entered into only with the free and full consent of the intending spouses"<sup>20</sup>. Minors do not enjoy complete legal capacity, as they are unable to provide their full consent. To note, the law also does not enforce penalties on those who allow or facilitate the marriage of a minor.

## Addressing Issues of Guardianship and Marriage

The concept of qawama (literally "the right of the man upon the woman", but generally understood as "guardianship and authority") in shari'a law dictates that a male family member (wali) should act on behalf of a female family member, including when contracting a marriage. This concept is in contradiction of Articles 9 and 10 of the Amended Basic Law, which state that all Palestinians are equal.

Both the Egyptian Family Law (Article 9) and the Jordanian Personal Status Law (Article 11) stipulate a female's need for the guardianship of a male relative in order to conclude a marriage contract; the female's consent alone does not suffice. When a male guardian is not available, the judge is permitted to act as a guardian. Women, regardless of their age, abilities, educational background or social and mental capabilities, need a male guardian to permit them to marry for the first time. A woman

<sup>20</sup> For more information, see: <http://www.un.org/en/documents/udhr/index.shtml#a16>

can be a judge, a representative in the PLC, a businesswoman, or assume other high-level decision-making positions, but she cannot stand for herself when it comes to the right to enter into marriage. Furthermore, the Jordanian Personal Status Law differentiates between a female virgin who has never married and one who has been previously married. Accordingly, a woman who is 18 years of age and divorced can agree to a marriage by herself, while the marriage of a female virgin who is 40 or 50 years of age is conditioned on the approval of her male guardian. Males are not under a similar condition; they can marry and remarry without legal contractual constraint. These specific articles reinforce perceptions of females as incapable of assuming responsibility for their lives, while defining unmarried as children. The articles also contradict the notion of equality enshrined in the Amended Basic Law, as stated above.

Issues of guardianship continue beyond marriage and influence a woman's life in the long term. For example, Article 165 of the Jordanian Personal Status Law entitles a mahram<sup>21</sup> to decide that the female virgin of whom he is a guardian should live with him if she is under 40 years of age or a previously married woman who is not considered to be "safe" on her own. The law does not specify if the woman has a say in that decision.

### Limiting Polygamy

In the oPt, a woman does not have a say in her husband's decision to take another wife<sup>22</sup>. Such a decision is normally considered the sole discretion of the husband. Article 14 of the Egyptian Family Law and Article 28 of the Jordanian Personal Status Law are mute on the issue of requiring the husband to notify his first wife about his intent to marry another woman. Undoubtedly, polygamy has an impact not only on the first wife, but also on the entire family.

In April 2011, the Head of the Shari'a Supreme Council issued a decision stating that a man has to inform his wife about his interest in taking another wife. Two observations could be made

<sup>21</sup> According to Islamic law, a mahram is a male relative who cannot legally marry a female relative (e.g. her uncle, grandfather, brother, nephew).

<sup>22</sup> Although the Family Law and the Personal Status Law allow women to include conditions in their marriage contract such as restrictions to polygamy, in practice, judges in the West Bank often refuse such a window of opportunity to women.

on this decision. Firstly, such an administrative decision could be easily changed or cancelled. As it stands, it is a regulatory decision that is not incorporated in the law or by-laws. Secondly, the decision requires informing the wife, but does not require her consent.

### Addressing Rights within Divorce

Unilateral repudiation (talaq) is a controversial feature of divorce proceedings in the oPt. According to the existing shari'a legal framework, divorce is most commonly the husband's unilateral repudiation of a marriage. Muslim husbands have the absolute right to dissolve a marriage without restriction<sup>23</sup>. The wife's consent is not necessary for the divorce to be effective, as outlined in Article 67 of the Egyptian Family Law and Article 38 of the Jordanian Personal Status Law. A divorce can actually take place in the wife's absence. In practice, this means that a man can divorce his wife and send her back to her family without her consent, and even without informing her of his decision. As it stands today, a husband's unrestricted right to divorce is a cause of great insecurity (both emotional and economic) for women, who do not even have a say in decisions regarding their own life.

Muslim women in the oPt may seek divorce within very restricted conditions. As listed in both laws, there are eight particular scenarios under which wives may seek divorce through the court. Mukhala'a divorce is the first case (Article 102 of the Jordanian Personal Status Law). This type of divorce requires the wife to pay the husband compensation for initiating divorce, to return the dowry (mahr) she received from the husband, as well as to forgo her right to alimony during her "waiting period"<sup>24</sup>. Once the wife meets these requirements, the husband has the choice to declare the divorce effective or not. It is worth noting that this rule only applies to West Bank residents.

The second way for a woman to seek divorce is based on her husband's failure to provide alimony (nafaqah), as specified in Article 92 of the Egyptian Family Law and Article 127 of the

<sup>23</sup> Christian women are subject to the laws of their specific denomination.

<sup>24</sup> According to Islamic law, alimony is the financial support that the husband owes his wife as long as they are married, as well as during the waiting period ("iddah"), which is the period after divorce and during which the wife is not allowed to remarry.

Jordanian Personal Status Law. A woman can also ask for divorce based on her husband's prolonged and unjustified absence (for a year or more), if she has been "harmed" by this absence, as stated in Article 94 of the Egyptian Family Law and 123 of the Jordanian Personal Status Law. Another justification women can use when seeking divorce is discord and strife, which is a reason that both men and women can invoke (Article 97 of the Egyptian Family Law and 132 of the Jordanian Personal Status Law). Women can also seek divorce when any condition of the marriage contract was breached. Divorce can also be granted to women on the basis of their husband's long imprisonment<sup>25</sup>. In addition, women may seek divorce if their husband is unable to consummate the marriage, as specified in Articles 84 of the Egyptian Family Law and 113 of the Jordanian Personal Status Law. Finally, women may seek divorce if their husband has a mental illness (Article 88 of the Egyptian Family Law and Article 120 of the Jordanian Personal Status Law.)

The existing system in the oPt does not grant women the right to seek *kholu'*, which can be defined as a "woman's right to unilateral divorce"<sup>26</sup>. Currently, the Shari'a Supreme Council is considering issuing an administrative decision to permit *kholu'* for women in one case only; that is when the marriage has not been consummated (in the case of "*katb el kitab*", i.e. a contract without consummation)<sup>27</sup>.

## Addressing Discrepancies in Custody

According to the existing legal framework, divorced mothers are entitled to custody over their children. However, this right is a tightly restricted one. In the Jordanian Personal Status

<sup>25</sup> Article 130 of the Jordanian Personal Status Law gives a woman the right to seek divorce in case of a final court decision sentencing her husband to over three years imprisonment. In case of her husband's disappearance, Article 131 allows a woman to seek divorce after four years due to a lack of information about the existence of the husband, whether he is dead or alive.

<sup>26</sup> The difference between *Mukhala'a* divorce and *Kholu'* is the husband's consent. In the *Mukhala'a*, the consent of the husband is mandatory for the divorce to be pronounced. However, in the *Kholu'*, the divorce may be effective without the consent of the husband, based on court procedures and a decision from the judge.

<sup>27</sup> It is common for couples to sign a marriage contract without actually consummating the marriage. Traditionally, this is known as an engagement, although the couple is legally married.

Law (Article 162), women may only have physical but not legal custody of their children. Custody is granted to the mother until her children (whether a son or daughter) reach the age of puberty (but this age is not specified by the law). Article 161 of the Jordanian Personal Status Law specifies that if custody is granted to a female relative who is not the mother, then she can keep the children until the girls are eleven years of age and the boys nine years of age. The Egyptian Family Law (Article 118) grants women the right to custody until the male children are seven years of age and females nine years of age, but this period could be extend to nine and eleven years of age respectively, if it is in the children's interest. Under certain conditions, custody may be granted to a woman other than the natural mother, such as a grandmother or an aunt.

The Jordanian Personal Status Law stipulates a different arrangement for the mother's right to custody in cases that involve Christian women who have married a Muslim man. Christian mothers are not treated in the same way as Muslim mothers. Rather, they only enjoy a time-limited right to custody over their children, as they are only granted a status similar to that of a Muslim grandmother or aunt. This rule violates Christian mothers' right to equal protection before the law.

The existing family laws do not give primary consideration to a child's best interest, which clearly contradicts the Palestinian Child Law of 2004. In particular, Article 4 of the law sets a child's best interest as a standard to be applied "in all cases that affect children". The current application and interpretation of the Jordanian Personal Status Law and Egyptian Family Law also contradict international standards, such as Article 3 of the CRC, which states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"<sup>28</sup>.

Article 156 of the Jordanian Personal Status Law deprives divorced women and widows of their right to custody over their minor children in case of remarriage. In practice, this article forces a woman to choose between remarriage and the right to raise her children.

<sup>28</sup> See Convention on the Rights of the Child: <http://www2.ohchr.org/english/law/crc.htm#art3>

In addition, according to Article 155 of the Jordanian Personal Status Law, the shari'a court can void a mother's right to custody for failing to safeguard her children or to raise them in accordance with religious principles<sup>29</sup>.

Generally, when fathers have custody of their children, the prevailing laws continue to grant mothers the right to visit their children. Therefore, even in cases where mothers are denied the right to raise their children, the law still guarantees their right to maintain relationships and contact with them.

### **Full Legal Personality and Women as Witnesses**

In providing testimony, female witnesses do not enjoy full legal personality before shari'a courts<sup>30</sup>. This is not explicitly mentioned in either personal status law as a general principle. However, Article 16 of the Jordanian Personal Status Law mentions that a man's testimony is equivalent to that of two women in marriage contracts. In addition, Article 183 of the Jordanian Personal Status Law refers to the Hanafi School for any principles not covered by the law. According to the Hanafi School, a woman's testimony is worth half that of a man. Two women's testimonies are thus considered equivalent to that of a single man in shari'a courts. This is an example of gender-based discrimination, which denies women's equality before the law. It is worth stressing that while women can be lawyers and judges within the shari'a court, their testimonies are still only worth half those of men.

## **Conclusion**

It is difficult for a society to be democratic if its legal framework perpetuates discrimination and inequality, particularly for women and girls. Without a legal system that grants equal rights to female and male citizens, women and girls will continue to feel marginalized and insecure.

<sup>29</sup> There are also other conditions for a woman to be granted custody of her own children or of minor relatives. For instance, if a woman remarries with someone who is not a "mahram" for the children (i.e. someone who is legally not allowed to marry the children because he is considered a close relative), she automatically loses custody of her children.

<sup>30</sup> This is not the case for the secular criminal courts where men and women are considered equals as witnesses.

The status of gender equality has been examined in the prevailing penal and family status laws, many of which have not been updated in decades. Each section has highlighted the most outstanding discriminatory issues in the legislation. There are other issues in the family laws and penal codes that continue to challenge women's status and security in Palestinian society. This paper only highlights the most problematic articles, while recognising that other shortcomings exist. Myriad legal provisions still need to be introduced to assure that gender-sensitive reform has occurred.

As a result of a multitude of historical, social, cultural, political and economic factors, the Palestinian legal system does not form a coherent and consistent structure; thus, it does not appropriately reflect the contemporary Palestinian situation. Accordingly, many of the applicable laws contradict the principle of equality between men and women enshrined in the Palestinian Basic Law. Over the last decade, different efforts have been made to modify some pieces of legislation, aiming to provide better protection for women and girls. However, without comprehensive efforts that correspond not only to women's rights but to societal needs in general, the legal system will continue to founder. What is needed is a clear vision for mainstreaming gender equality into the current Palestinian legal system. Efforts on the ground, spearheaded by local women's and human rights organisations, legal experts, academics, and concerned government officials indicate that reform is pending. As mentioned, there are draft laws seeking to ensure the security of women and girls while acknowledging the crucial role they play in the development of Palestinian society.









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