

Research Paper

Women's Participation
within Religious Courts in Palestine,
and the Importance of Their Participation
as Decision Makers

November 2021

ACKNOWLEDGMENTS

This is to extend our sincere appreciation to all of those who contributed to this paper. This study paper would not have been achieved without the valuable contributions of Judge Scarlet Bishara and Judge Sumoud Dmairi, the Women's Center for Legal Aid, and all of those who participated in our interviews who were committed to participate in this study. We highly appreciate the exceptional support of the ELCJHL team for their outstanding cooperation.

Thank you all,

Fadi Abbas and Rasha Salah Eddin- Hdaib

TABLE OF CONTENTS

Executive Summary	4
Introduction: Contextual Analysis	6
Methodology	10
Religious Courts: Legal and Religious Background	11
Religious Courts: Women's Participation	15
Recommendations	20

EXECUTIVE SUMMARY

This research is part of the efforts of the Evangelical Lutheran Church in Jordan and the Holy Land (ELCJHL) to compile evidence-based advocacy material to further promote gender justice in Palestine, specifically through reforms with faith-based organizations that are inclusive and just for all community members, with focus on women. To that end, the objectives of this research include understanding women's participation in religious courts in Palestine from legal and religious perspectives, and also from the perspectives of women who are participating in religious courts as decision makers, lawyers, and litigants.

This research was conducted through a mixed approach that included legal analysis, a literature review, and a participatory approach to provide evidence from participating women in religious courts and other relevant organizations through interviews as a primary technique. Limitations of this research include limits in the number of participating litigants, many of whom were not comfortable discussing their experiences in religious courts for the purposes of the study, as well as limitations related to available previous literature, especially on ecclesiastical courts in Palestine; as a result, the research is mainly focused on religious courts in the West Bank and Jerusalem. Other challenges included limited responses from male participants in religious courts invited to participate in interviews and primary data collection, which influenced our capacity to collect statistical data. This was mitigated by collecting relevant data from women's experiences in religious courts as well as from a very limited number of male respondents.

The contextual analysis in section two describes the political and social contexts that affect Palestinian women from an intersectional gender lens, including sex, religion, social status, economic status and geography. This contextual analysis introduces factors of the marginalization of women in Palestine, including structural and cultural factors. Structural factors include the Israeli occupation, as well as outdated laws and legislations that have failed to protect Palestinian women and ensure equitable participation in decision-making. Cultural factors include, but are not limited to, gender-based violence in private and public spheres, misinterpretation of religion based on domination interests, and victimization of women, among others.

The legal analysis was based on a review of relevant Palestinian laws in a colonized context and the phases of their development to govern the justice sector and the formulation of the Islamic Sharia laws, and to provide independence for churches to formulate ecclesiastical courts based on church laws. Additionally, the review includes previously-conducted legal analyses of church laws that influenced the formulation of the ecclesiastical courts in the West Bank and Jerusalem. The main observations of this analysis are focused on the conditionality of masculinity in decision-making in religious courts, whereas in Sharia courts, there were no legal conditions related to the masculinity of decision makers or in the judiciary, especially Palestinian legislations that follow the Hanafi School.

For ecclesiastical courts, with the exception of the Lutheran church, the condition of masculinity is not directly linked to the formulation of court committees. However, the condition of masculinity does apply to higher church positions, including bishops and priests, who are permitted to exercise their judicial power either directly, or through others at the local level, by appointing one

or more judges from among certain positions within the church to the ecclesiastical court, which also influences various organizational/ institutional structures in the church.

Additional observations are related to the qualifications for judiciary positions, which also influence women's participation in religious laws. Whereas in Sharia courts and in the ELCJHL, a combination of religious and legal educational background and experience is among the requirements for court members, legal education is not mandatory in other churches, which in itself poses a challenge to women who participate in courts in the capacity of lawyers and/or to women who litigate within these courts.

Section five documents available statistical data on women's participation in religious courts. In Palestine, women's current participation in religious courts includes their participation within the internal setting and environment of the religious court, for example by holding judicial seats in Sharia courts including first instance and appellate courts, and in the Lutheran Evangelical Ecclesiastical Courts in first instance and appellate courts. The number of women who currently occupy religious judiciary seats is very low, representing fewer than 1% (4/43) in Islamic Sharia courts, 33% (2/6) in the Lutheran Evangelical Ecclesiastical Courts, and 0% in other denominations' ecclesiastical courts. Other positions held by women within the Sharia courts include religious family prosecution, social and family workers/advisors, administrative positions and court reporting positions. This participation inside the court not only promotes equal opportunities but also contributes to creating an inclusive environment for women, as in other public spaces where women and men practice their daily life. This is seen as necessary by most interviewees in order to create a welcoming environment for women to access these courts seeking justice.

The achievements of women in decision-making positions in religious courts, including increased accessibility and independence from traditional and stereotype-driven mindsets and discourse, was challenging to quantify and document as evidence. However, interviewees including judges, lawyers, and litigants proposed that these achievements in Sharia courts are linked to 1. improvements in matters of parental custody and visitation through the invocation of correct legal procedures in situations in which religious interpretations differ, 2. the introduction of new positions and functions within the court system that are necessary to promote effectiveness in processing cases and in creating a gender-inclusive environment within the court system, 3. active participation in several coalitions that bring together the public sector and civil society, bridging a dialogue gap between religious courts and civil society, and 4. greater decorum in speech and discourse in internal discussions facilitated by the participation of women in decision-making committees and processes alongside male judges.

For the Evangelical Lutheran Ecclesiastical Courts, women's achievements in decision-making areas are linked to 1. the introduction of concepts of equality and equity from a woman's perspective, as gender policies and practices developed by the Lutheran World Federation are promoted and used as a road map in preaching, awareness-raising for gender quality, and equality principles for the church community, 2. revisions to family law and the introduction of gender-responsive revisions in the areas of custody, alimony, visitation, divorce, and others, as well as revision to inheritance laws toward equal inheritance rights for women and men, 3. revisions to litigation costs, which presented challenges to accessibility to justice, 4. the introduction of practices that

promote women's access to information, and 5. developments in male judges' sensitivity towards women's issues from a gender perspective.

The last section of this paper introduces some recommendations based on challenges that still persist in women's participation in and access to religious courts. The recommendations include: 1. disseminating the achievements so far gained in Sharia Courts and Evangelical Lutheran Ecclesiastical Courts relevant to women's participation in decision making, 2. working with lawyers in religious courts on increased gender sensitivity, 3. advocating for court formulation laws that promote a relevant legal background for judicial committee members in addition to religious qualifications, 4. advocating for women's participation in the supreme Sharia court based on qualifications rather than seniority, and 5. revising policies and practices related to arbitration in order to provide greater oversight of the recruitment of arbitrators, the environment they conduct the meetings in, and the processes used to reach decisions.

INTRODUCTION- CONTEXTUAL ANALYSIS

Working toward the goal of improving gender justice, the Evangelical Lutheran Church in Jordan and the Holy Land (ELCJHL) is the only religious institution in Palestine that has integrated gender equality and women's rights into their internal Family Law. The ELCJHL reformed its Family Law and established its own ecclesiastical court in 2015, the Lutheran Evangelical Ecclesiastical Courts. This was a historic decision that came after a long process of deliberations which started in 2013. The deliberations resulted in the adoption of a revised Family Law that is aimed at gender justice, and particularly at enhancing access to justice by women.

With the overall objective of the intervention "challenging gender-discriminatory laws that undermine women's rights and gender equality in Palestine," faith-based organizations and women's rights champions needed to gather evidence to inform their policy advocacy interventions related to the reform of gender discriminatory laws which impact the ability of women to claim and enjoy their human rights. To that end the ELCJHL, in collaboration with ACT Alliance, determined to develop a research paper on women's participation within religious courts in Palestine, which could elaborate on the importance of women's participation as decision makers and leaders.

It is worth noting that this research paper came to fruition as part of the advocacy efforts of the ELCJHL, who are pioneering gender justice through church reforms that promote gender equality from the religious belief that God created us equal: "So in Christ you are all children of God through faith, for all of you who were baptized into Christ have clothed yourselves with Christ. There is neither Jew nor Gentile, neither slave nor free, nor is there male and female, for you are all one in Christ Jesus" (Galatians 3:26-27).

By mid-2021, the total Palestinian population reached 5.23 million, of which 2.66 million are men and 2.57 million are women.¹ Women represent 49.2% of the Palestinian population. The average number of household members decreased to 5.1 people per household in 2021, compared to 6.¹

1. Women and men in Palestine, 2021, PCBS

in the year 2000.² According to a study of population and education from a gender perspective published in 2020 by the Palestinian Bureau of Statistics, 10.9% of Palestinian households were headed by women.

Since the interim Oslo accords, the West Bank, which represents 21% of Palestine's historical land, was divided into three political areas: Area A, representing 17.7% of the West Bank, which falls under the administrative control of the Palestinian Authority (PA); Area B, representing 18.3% of the West Bank, with partial administrative control by the PA; and Area C, representing 60.9% (as well as 3% of natural reserves), under full Israeli military and administrative control. The apartheid wall is constructed mostly on Palestinian lands, and is about 1,200 km long, dividing Palestinian cities and governorates and separating the city of Jerusalem from all other cities, with military checkpoints in different entry points.

Data from 2019-2020 showed that about 21.7% of women aged 20-49 in Palestine were first married before their 18th birthday, a statistic that likely affects women's participation in leadership and decision-making, as well as in the workforce in general. Participation in the workforce among individuals 15 years old and above reached 40.9% in 2020; within this group, the participation rate was 65.1% among men and 16.1% among women. A similar gap in unemployment rates between women and men is also increasing; the unemployment rate reached 40.1% for women and 22.5% for men in 2020. Poverty percentages among individuals in households headed by a woman was higher in the Gaza Strip compared to the West Bank: 54.0% and 18.6%, respectively. Also, the poverty percentage among individuals in households headed by a woman was higher than those individuals in households headed by a man, in both the West bank and Gaza Strip.³

Women's participation in public life is very low compared to men in Palestine. This fact is reflected in women's participation in the judicial system, where female lawyers represent 30.1% of registered lawyers in the West Bank, and women make up just 20.3% of the total number of judges in the West Bank and 21.1% of public prosecution staff in the West Bank.

Christians in Palestine, and especially in Jerusalem, are decreasing in number due to a variety of factors, precipitated by the flight of many Christians from the country after the 1948 Nakba (the establishment of a Jewish state in Palestine), when 50% of Christians lost their homes in the western parts of Jerusalem. This event was followed by a series of wars, including in 1967, when the West Bank and East Jerusalem fell under Israeli occupation and 30% of land owned by Christians in East Jerusalem was confiscated by Israeli authorities. This has been the main factor reducing the percentage of the Christian population of Palestine from about 19% in 1947 to 1.7% in 2017,⁴ taking into account that this percentage was also affected by higher birth rates among the Palestinian Muslim community.

2. Women and men in Palestine, 2021, PCBS

3. Women and men in Palestine, 2021, PCBS

4. A population census carried out by the Palestinian Central Bureau of Statistics in 2017 concluded that 47,000 Palestinian Christians are living in Palestine – with reference to the Occupied West Bank, East Jerusalem and the Gaza Strip. Ninety-eight percent of Palestine's Christians live in the West Bank – concentrated mostly in the cities of Ramallah, Bethlehem and Jerusalem – while the remainder, a tiny Christian community of merely 1,100 people, live in the besieged Gaza Strip.

Challenges that face Christian women in Palestine are part of a broader Palestinian struggle where the intersections of gender, religion, and conflict dominate.⁵

Women in general, like all Palestinians, are subject to a set of laws and judicial regulations emanating from a colonized context; but Palestinian women in particular encounter a context in which the traditions and social norms of a patriarchal society discriminate systematically against women in practice.

Discrimination against women takes different forms in both private and public spheres. That said, it is worth noting that, according to the results of the 2019 Violence Survey in Palestinian Society, the prevalence of violence against women in Palestinian society has actually decreased since 2011 by 16% in the Gaza Strip (from 51% to 35%) and by 8% in the West Bank (from 30%-22%).⁶

Among the factors that influence women's poverty in Palestine is the issue of inheritance. Palestinian Muslim women are subject to the Jordanian Personal Status Law of 1976, which is derived from the 1917 and 1951 laws of the same name, and from the Egyptian Family law of 1954 in Gaza. Both codes are based on the Hanafi school of Islamic jurisprudence, which grants males double inheritance rights.⁷ The laws of their respective denominations govern Christian Palestinians. The Greek Orthodox Church, for example, applies its laws, based on Byzantine Family Law and the Patriarchate Law, to its followers. The Roman Catholic Church applies the law of the Jerusalem Latin Patriarchate to its own followers, while the Orthodox Coptic Church applies a personal status law of its own which was ratified by the General Coptic Council in 1938; however, the Islamic system of inheritance is applied for Christian women. The right of women to inherit in Palestine is usually restricted by societal norms and constraints posed by customs and traditions. According to national statistics, only 5% of Palestinian women own (or share ownership of) a piece of land, and fewer than 10% of owned houses in Palestine are owned (or co-owned) by women⁸. Daycare services for children are entirely controlled by the private sector, which creates an issue of absorptive capacity, service quality, and cost. The Ministry of Social Development, which is mainly responsible for this sector, does not provide any supervision of childcare facilities, nor does it provide alternative services.

The rule of law is the cornerstone of organizing democratic societies. Access to justice through formal systems is one of the core components of this principle, as a right proclaimed by international laws and human rights charters such as the Universal Declaration of Human Rights, which affirmed the major principle of equality before the law. This is reflected in the Palestinian Basic Law, which states in its sixth article that the principle of the rule of law is the basis of governance in Palestine, and all authorities, agencies, bodies, institutions, and persons are subject to the law. Article 9 also affirms that Palestinians are equal before the law and the judiciary, without discrimination based on race, gender, color, religion, political opinion, or disability. Article 30 also guarantees the right to litigation for all people.

5. <https://christiansforsocialaction.org/resource/women-behind-wall/>

6. Results of violence survey in the Palestinian society, 2019, PCBS

7. Baseline study «Women inheritance rights in Palestine», 2013 Asala

8. Preliminary Results of the Population, Housing and Establishments census, 2017, PCBS

Access to justice for all is a key element in the promotion of peaceful and inclusive societies (SDGs, agenda 2030). Access to justice includes various elements leading to appropriate redress against the violation of a human right.⁹ Challenges to women's access to justice are usually related to a variety of factors, such as stereotyping, discriminatory laws, procedural and evidentiary requirements and practices, and a failure to systematically ensure that judicial mechanisms are accessible.

Women's participation in the judiciary in and of itself demonstrates the equal right of men and women to participate in all aspects of life. It is also assumed that women's participation can contribute to increased gender equality in accessibility to the formal justice system, and to the increased independence of the judicial system, where women and men are treated equally and where gender roles are considered in judicial institutions. As also noted by Gabriela Knaul, the former Special Rapporteur on the independence of judges and lawyers, achieving gender equality and empowering women "requires an independent judiciary able to exercise its role to uphold the rule of law and make all persons, institutions and entities, public and private, accountable to gender-sensitive laws."¹⁰

Religious courts are no exception. Moreover, the accessibility and independence of religious courts is specifically important for women in Palestine given the nature of these courts' specialization in family-related cases such as marriage, divorce, separation, child custody, and alimony, among others. Hence, gender-sensitive religious courts are a necessary partner in promoting gender equality and combating gender-based discrimination and violence.

9. Promoting freedom of religion or belief and gender equality in the context of sustainable development goals, a focus on access to justice, education and health, The Danish institute for Human Rights, 2019.

10. Women in the Judiciary in the Arab States Removing Barriers, Increasing Numbers, Economic and Social Committee for Western Asia, E/ESCWA/ECW/2019/2

METHODOLOGY

The goals of this study included the identification of a feasible and relevant research method to collect pertinent data and information from relevant informants and documents, to analyze and elaborate on the importance of women's participation in religious courts, to draft the research paper, and to discuss and present its context to partners.

In response, the methodology of this research paper was developed, building on a participatory and strength-based approach that supports learning from the different experiences of women in religious courts as participants, judges and lawyers, and litigants.

The methodological tools applied include reviews of literature on the justice sector as a whole, on the formulation of religious courts according to legal and religious background, and on women's participation in decision making in the justice sector. Taking into account gaps in literature on women's participation in religious courts, the paper's detailed questions were developed based on these literature reviews and on interviews with relevant stakeholders. Several revisions were made to accommodate limitations related to available data and informants.

There was very limited literature available on women's participation in religious courts in Palestine; and this study also assumed, based on examples from other countries, that many religious leaders are not in favor of discussing and/or interpreting patriarchal religious traditions. Despite these challenges, this study came to document the potential influence that women in religious courts in Palestine could have, highlighting the cases of women in Sharia courts and in Lutheran Evangelical courts. Secondly, this study sought to provide an analysis on women's participation in religious courts in Palestine from a legal and religious perspective, but also from the perspective of women's needs and concerns. Therefore, the personal experiences of women in religious courts as judges, staff members, lawyers, and litigants were analyzed to provide an overview of strengths and weaknesses of the current reality of women's participation that influence accessibility, independence and equality.

Primary data collection was conducted through semi-structured interviews with three judges in religious courts, two female and one male; interviews with lawyers in religious courts, three female and one male, including lawyers from the Women's Center for Legal Aid (WCLAC); and an interview with one male court-designated lawyer.

Significant challenges were encountered in identifying litigating women who were willing to participate in focus group discussions. Therefore, two women were interviewed individually; interviewers noted that these interviewees displayed a degree of self-censorship in discussing their private cases with the researcher.

Other challenges faced included the lack of response on the part of religious leaders approached to participate in the study. Official letters were sent to request their participation through an interview; however, all were ignored.

RELIGIOUS COURTS: LEGAL AND RELIGIOUS BACKGROUND

Rule of law is acknowledged by the Palestinian basic/constitutional law amended in the year 2005 under article 6: "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."¹¹ The law is composed of constitutional rules and principles that address public and personal rights and liberties aiming at achieving justice and equality for all, without discrimination. Article 30 of the same law provides that the right to litigation is a protected and guaranteed right for all people, where every Palestinian has the right to resort to his natural judge.

The judicial system in Palestine developed in a colonial setting, starting with Ottoman rule and followed by the British Mandate over Palestine, Egyptian rule over the Gaza Strip, Jordanian rule over the West Bank (including Jerusalem), and Israeli control over the remaining parts of Palestine since 1948, ending with the Israeli occupation of the West Bank and Gaza in 1967 and the Palestinian Authority established by the Palestinian Liberation organization in 1994, based on the Oslo interim agreement of 1993.¹² Since then, the judicial inheritance from three main sources of legislation (Jordanian laws, Egyptian laws, and military Israeli laws) has continued to fragment the judicial system in Palestine until today, despite several developments and revisions that took place during the Palestinian legislative council era. During the years 1995-2006, the Palestinian Legislative Council issued a package of laws on the Palestinian judicial system, most importantly the Supreme Judicial Council Law of the year 2002 (amended in 2006), the Arbitration Law of the year 2000, and Law No. (5) of 2000 on establishing regular courts (amended in 2005).

THE FORMATION OF RELIGIOUS COURTS IN PALESTINE: LEGAL BACKGROUND

Before 1948: The British Mandate issued several laws based on some of the prior Ottoman laws influencing the judicial system in Palestine, including the Constitutional Decree of 1922, the Principles of Human Rights Courts (1938), the Principles of the Supreme Court (1937), the Principles of Forming Courts (1940), and the Principles of the Magistrate's Courts (1940). Prominent features of this era included the structural construction of multiple types of courts, including regular courts to consider criminal, legal, land, and administrative issues; and irregular courts for sharia and the religious matters of various sects, noting that matters of personal status for foreigners may be considered before regular courts (central court), or Sharia or religious courts, as circumstances require. In addition were tribal courts for clan affairs, and the Special Courts, consisting of two British judges from the Supreme Court, along with the head of the highest religious court in Palestine for the sect representing one of the litigating parties and claiming to have the sole authority to hear the case, or from any judge appointed in his place by the aforementioned president. The Special Courts are temporary courts that rule in disputes between more than one party or sect, and issues related to personal status.

The Constitutional Decree dealt with the formation of Sharia courts to legislate and organize matters of personal status for Muslims, whether Palestinians or foreigners, in accordance with

11. Palestine's Constitution law, 2005,

12. Historical development of the Palestinian litigation system, Palestinian National Information Center

Articles 51 or 52 thereof. It exercises its authority in two degrees. A higher Sharia Council was formed to exercise full authority in endowment cases and everything related to this among Muslims, in accordance with Article 52 of the Constitutional Decree. This Council is headed by the Sharia judge appointed by the British High Commissioner. Article 53 of the Constitutional Decree dealt with granting independent jurisdiction to the Jewish rabbinical courts in all matters relating to personal status. Christian religious courts were also established in accordance with Article 54 of the Constitutional Decree, and they exercise full and independent power to consider matters of personal status. Foreign Jews and Christians may sue before these courts with the consent of both parties, each according to his/her religion.¹³

It is worth noting that Article 51:1 of the Constitutional Decree defines personal status issues for Muslims, Jews and Christians, and stipulates: "Personal status issues are concerned with cases related to marriage, divorce, alimony, maintenance, and guardianship; the legality of filiation, the adoption of minors, and the confiscation of persons without legal capacity from disposing of their money; inheritances, wills and endowments, and management of absentee funds." Prior to this, the Ottoman Empire had recognized the autonomy of the Christian community in Palestine to regulate the affairs of their members in personal or family matters, under the authority of the spiritual superiors.¹⁴

After the Nakba of 1948, Palestine was divided into three parts. The largest part was apportioned by the British Mandate for the establishment of a Jewish state (Israel). The West Bank was annexed to Jordan, and later became an integral part of the Hashemite Kingdom of Jordan. The Gaza Strip was subject to the supervision of the Egyptian Arab administration, which preserved its Palestinian identity. This resulted in changes in laws and regulations that were then in force in Palestine, including judicial organization, based on Jordanian Law No. 26 on the Formation of Regular Courts in the West Bank (1952) and Resolution No. 95 (1949) establishing the regular and Sharia courts in Gaza. Egyptian judges were appointed to lead these courts, including Sharia courts. In 1956, Israel occupied Gaza; and in 1967, it occupied the West Bank, cutting off relations with Egyptian and Jordanian judiciaries. The Supreme Court of Israel has replaced the Jordanian Court of Cassation to oversee courts in the West Bank; this court also exercises its power to supervise the litigation system in the Gaza Strip.

It is worth noting that Tribal/Clan Judiciary in Palestine was solidified through the issuance of relevant laws of the Courts Formation Decree (1939), the Courts Law No. 31 (1940), the Tribal Courts Principles Law (1937), the Law on the Prevention of Crimes between tribes and clans No. 47 (1935), and Civil Violations Law No. 36 (1944).¹⁵ During the Jordanian and Egyptian administration periods, tribal courts were also active, albeit with a lower number of judges.

After the Israeli occupation of the West Bank and Gaza Strip in 1967, the tribal judiciary became more active, especially because Palestinians often boycotted the regular courts run by the occupation. In 1979, a decision was issued by the Palestinian National Council in Amman on January 22, bearing the name No. 924/m/912, according to which the Palestinian National Council decided to establish the General Administration for Tribal/Clan Affairs and Reform.

13. Palestine Constitution Decree of 1922

14. The sharia and ecclesiastical judiciary in Palestine, Birzeit University, 2012

15. Tribal Courts Principles Law of 1937

In September 1994, the Tribal/Clan Affairs Department was reconstituted by a presidential decree to be affiliated with the President's office. While in 2005 the Department of Tribal Affairs and Reform was attached to the Ministry of the Interior, this unit was dissolved during the last decade. Post-establishment of the Palestinian Authority: The first Palestinian law related to religious courts that developed after Oslo was issued through a presidential decree in 2011, establishing the Supreme Transitional Council for the Sharia Judiciary, comprising 7 judges appointed by the president.¹⁶ This law was amended in 2012 to describe the composition of the Supreme council of the Sharia Judiciary, where the head of the council, also called the chief justice, is appointed by the president. The remaining 6 members of this council were to be appointed based on their seniority (years of service) in Sharia and the Appellate court courts in both the West Bank and Gaza, as well as the head of the Judicial Inspection Authority.¹⁷ For regulation of the execution of Sharia court decisions, a presidential decree was issued in 2016.¹⁸ In 2021, a presidential decree was also issued providing the president and the chief justice additional powers on sharia judiciary, by the establishment of a new body (office of chief justice).¹⁹ The recent law provides that the rules of appointing Sharia judges are based on the judge's educational background in Islamic Sharia studies rather than on legal education and expertise.

CONSTITUENCIES OF RELIGIOUS COURTS IN PALESTINE: THE LEGAL BACKGROUND

The Sharia Courts Law no. 41 (1951) clarified the constitution of the two courts, the Court of First Instance and the Court of Appeals, both led by a judicial council who is responsible for appointing, promoting, transferring, and removing Sharia judges, and when necessary taking disciplinary action against them: "The decisions of the Council, with the approval of the Chief Justice, shall be submitted to the position of His Majesty the King. They shall not take effect unless accepted by His Majesty the King and accompanied by his signature."²⁰

A Sharia Judicial Council is composed of the Sharia Director as a chairperson and from two senior Sharia judges chosen by the judge. First instance courts are composed of one individual judge, while appeal courts are composed of a president and a number of judges; three should participate in appeals, including the president. The law also links the monitoring of the courts to the chief justice. Sharia employees within the courts are appointed according to the Jordanian Hashemite Government's employee system. The law amendments including Law No. 19 (1972) on the Formation of Sharia Courts, clarified the qualification of Sharia judges to include:

a. He must be a Jordanian with full legal and civil capacity. b. He must have completed at least the twenty-second year of his life. c. He must have obtained a law degree from a Sharia college in one of the recognized Arab or Islamic countries, or he must have held the post of Sharia judiciary in the Hashemite Kingdom of Jordan and was not dismissed for a dishonorable reason, or he must hold a law degree from a university in the Arab countries. If there is no one who meets these conditions, the council will conduct an examination for the applicants in Sharia and legal affairs related to the

16. Decree-Law No. 1 of 2011 regarding the Sharia Judiciary

17. Decree-Law No. 3 of 2012 regarding the Sharia Judiciary

18. Decree-Law No. 17 of 2016 regarding Sharia Implementation

19. Decree-Law No. 8 of 2021 regarding the Sharia judiciary

20. Sharia Courts Formation Law, Law No. (41) of 1951

work of Sharia courts, provided that no person is allowed to participate in the examination unless he holds an academic degree not less than a full secondary education and has completed a period of no less than five years as the head of the registry of one of the Sharia courts. d. That he has not been convicted of a felony or misdemeanor involving moral turpitude, except for political crimes. e. He should be of good conduct and reputation.²¹

After the Palestinian Authority began ruling in 1994, amendments included the establishment of a Sharia Supreme Court in 2003, based on a decision by the presidents to unify the Sharia judicial jurisprudence in Palestine. This became the head of the Sharia judicial pyramid, its operations regulated by the Sharia Procedure Code, comprising two sub-institutes: the sharia judicial council and the chief justice. Litigants and Personal Status Prosecutors have the right to appeal at the Sharia Supreme Court in cases specified by the law.

In 2011, a presidential decree was issued (in the absence of the legislative council) to establish a temporary Sharia judicial council, followed by two additional decrees during the same year identifying the names and titles of the temporary council members, with no clear information on how they were selected. In 2012, another decree was issued on the establishment of a permanent Sharia supreme judicial council, comprising: 1. The President of the Sharia Supreme Court as Chairman, 2. The Deputy Chief Justice as Vice President, 3. The most senior judge of the Sharia Supreme Court in the northern governorates as a member, 4. The most senior judge of the Sharia Supreme Court in the southern provinces as a member, 5. The most senior head of the Court of Appeals in the northern governorates as a member, 6. The most senior head of an appeals court in the southern governorates as a member, and 7. The head of the Judicial Inspection Authority as a member.

For ecclesiastical courts' judiciaries, the supreme religious authority in the church is the bishop, who acts as the natural judge of the believers who belong to that church and exercises judicial authority over his local church. This means that he is the first instance judge; the appeals judge (or the second instance judge) is the bishop to whose authority the bishop of the local church is subject, if any. In the case of the Catholic Church, for example, the Roman Pontiff is the supreme judge of the entire Catholic world.²²

According to the analysis of Dr. J Salem, canon law permits a bishop to exercise his judicial power himself, or through others; but there is no obligation in canon law on the bishop to prevent him from practicing the original judicial authority himself. In the event that the bishop decides to appoint one or more judges to the ecclesiastical court, the appointed judge represents a deputy judge with ordinary judicial power. The judicial representative/deputy and the local bishop form one court.

Dr. Salem proposes that despite differences that may exist between canon laws on the regulation of some issues, such as marriage, they all agree that specialties are centralized with the supreme head bishop of the church concerned, including the judicial authority.

21. Law No. (19) of 1972 on the Formation of Sharia Courts

22. The sharia and ecclesiastical judiciary in Palestine, Birzeit University, 2012

Given that the recognized Christian churches transcend political state borders resulting from the colonization era of the British Mandate and the current occupation of Palestine, the jurisdiction of the ecclesiastical courts for each sect extends beyond the Palestinian territories to include Palestine, the occupied Palestinian areas of 1948 (Israel), Jordan, Syria, Lebanon, and for some churches also Cyprus.

This presents a need to have more than one court of first instance, and in some cases more than one court of appeals, to cover the different areas of the churches' jurisdiction. For instance, for the Latin community in the occupied Palestinian territories, including East Jerusalem, courts of first instance are located in Jerusalem and in Nazareth (headed by the same deputy judge); and in Amman, Jordan (headed by a second deputy judge); while the court of appeals is only located in Jerusalem and Amman, headed by the same Judge.²³

The Roman Catholic Patriarchate is based in Syria, and there is a Patriarchal Vicar in Jerusalem for the occupied Palestinian territories; however, the members of this church are tried before the Latin first instance court in Jerusalem, as in the case of other eastern Catholic denominations. For the ELCJHL, the law of the denominational councils has provided that the Arab Evangelical Court will have two courts of first instance in Jerusalem and Amman, and a court of appeals in Jerusalem or anywhere else, according to the needs according to the Personal Status Law of the Arab Evangelical Episcopal Congregation (1954).²⁴

No changes to the laws that regulate formulation of ecclesiastical judiciaries were made after the establishment of the Palestinian Authority. The existing laws relating to the independence of non-Muslim community judiciaries in personal and family matters were validated on several legislative occasions, which also supports the authority of religious traditions represented by judges and leaders over significant areas of the lives of individuals.

RELIGIOUS COURTS: WOMEN'S PARTICIPATION (CURRENT AND PROSPECTIVE)

This section provides evidence that the goal of women's participation in religious courts' decision making is not yet fully achieved, although we have good examples and models that can support turning the wheel towards equal participation rights. The section also proposes evidence for why women's participation in religious courts could influence women's accessibility to justice in family-related settings, and its potential to increase the independence of judicial decision making from traditional and stereotype-driven mindsets and discourse.

Women's participation in religious courts is not only linked to their existence and participation as judges, but also to their participation in whole processes within the court system, starting from the formulation of the courts until the stage where judgments are pronounced.

23. Latin Patriarchate of Jerusalem

24. The Personal Status Law of the Arab Evangelical Episcopal Congregation of 1954.

The previous section addressed the historical and legal background for the formulation of the religious courts. However, it is worth noting that these laws did not tackle conditions related to gender: no law nor authenticated religious text sets the condition that religious judiciary courts or decision making should be limited to men. Similarly, masculinity in the Anglican Lutheran Church law is not a condition for the priesthood and thereby for the ecclesiastical judiciary.

Most denominations in Palestine, as in other Eastern churches, especially the Catholic Church and the Orthodox Churches, adhere to granting priesthood only to men because Jesus Christ, in establishing the priesthood at the Last Supper, selected men and not women; therefore, masculinity is considered a condition for priestly ministry as part of the church theology of the Sacrament of Priestly Service. This includes the ordained ministries of bishop, priest, and deacon, and the sacrament or rites to which candidates are ordained to those orders. However, women's participation in decision making within these churches also exists, for example in giving religious women (such as nuns and sisters) roles in the diocesan parish council at the local level and through the Confederation of Nuns, which was established decades ago and has been an effective body for bringing monastic associations closer to each other, contributing to greater participation of monastic orders and monastic institutions and their members in the life of the Church. In these ways women also contribute to building the believing community.

Still, participation in higher-level decision making in Catholic and Orthodox churches is restricted to men. However, in both Islam and Christianity, there are no clear religious statements that forbid equal participation of women in courts; whereas there do exist clear statements that people are equal as believers, for instance: "All believers, by the power of their renewal in Christ's baptism, enjoy equal dignity. They are all called to holiness, and all participate in building the one body of Christ, each according to his calling and the gifts he received from the Spirit (Rom 3-8)," and "Ya ayoha al nas ina Khalnaqom min thakar o untha lIta3arafu, In akramakom ind Allah atqakom, in Allah khabir Aleem" (13 Hojurat), which translates to "O people, we created you from a male and a female, and made you peoples and tribes, so that you may know each other by God, the most honorable of you are the most pious of amongst you, God is All-Knowing, All-Aware".

Currently in Palestine, women's participation in religious courts includes their participation within the internal setting and environment of the religious courts, holding judicial seats in Sharia courts including first instance and appellate courts, and at the Lutheran Evangelical Ecclesiastical Courts' first instance and appellate court. However, the number of women occupying religious judiciary seats is very low, representing fewer than 1% (4/43) in Islamic Sharia courts, 33% (2/6) in the Lutheran Evangelical Ecclesiastical Courts, and 0% in other denominations' ecclesiastical courts. Other positions held by women within the Sharia courts include religious family prosecution, with a percentage of 71% within 26 Sharia courts in the West Bank and Jerusalem. In addition, women make up a majority of social and family workers/advisors who report to judges on child psycho-social and emotional best interests, as well as additional administrative positions and court reporting positions, according to our observation and interviews. It is worth noting, however, that no women participate in any of these positions in the East Jerusalem Sharia court. At the Lutheran Evangelical Ecclesiastical Courts, women's participation within the courts includes positions as social and family workers/advisors, positions which are currently exclusively occupied by women, and administrators. In other denominations, including the Catholic/Latin and Orthodox

ecclesiastical courts, women are found in receptionist positions only.

When women hold decision-making positions inside the court, it not only promotes equal opportunities but also contributes to creating a more natural environment for women, as in other public spaces where women and men practice their daily life. This is seen as necessary by most interviewees in order to create a welcoming environment for women to access these courts seeking justice.

As prescribed in the legal analysis above, holding judiciary seats in most religious courts until now is not primarily dependent on legal education, but on religious education. In Sharia court, despite the revisions of the law, factors such as seniority and years of experience are still the number one factor that contribute to promotions. In the Lutheran Evangelical Ecclesiastical Courts, a combination of religious education and legal education is considered in the formation of the judiciary committee. In other ecclesiastical courts, legal education is not a basis for establishing a judiciary committee. Challenges faced by women in these courts include strict rulings based on the Byzantine law, a very old family law which, according to the interviewees, does not take into account more recent social and economic developments within the current context. Additional challenges from the Orthodox and Catholic ecclesiastical courts is the level of comfort women feel in discussing intimate family matters, which according to lawyers from all courts are discussed with religious men (and who in the case of the Orthodox Ecclesiastical Court in Jerusalem are Greek-speaking). This court recently recruited a judge with both a religious and a legal education background, however it was noted that the legal education of the judge was obtained in Israeli universities, which creates an additional challenge according to the lawyers since he refers to a different legal system and to different clauses from theirs, whereas most of the Palestinian lawyers in the ecclesiastical courts study Palestinian law.

Evaluating the achievements of women in decision-making positions in religious courts was challenging, as it is difficult to quantify evidence of increased accessibility and independence from traditional and stereotype-driven mindsets and discourse. However, below we introduce some achievements of women in decision-making positions in Sharia courts and the Lutheran Evangelical Ecclesiastical Courts, as proposed by our interviewees, including judges, lawyers, and women litigants.

Sharia Courts:

- The participation of women as judges in Sharia courts committees made some improvements in matters of custody and visitation by invoking the legally correct aspects of situations in which religious interpretations differ, for example invoking juvenile law into legal discussions, leading to decisions prescribing specific timeframes for judges to make decisions in relation to custody, alimony and visitation (no longer than two months).
- The participation of women as judges in Sharia courts institutional committees influenced the introduction of new positions and functions within the court system necessary to promote effectiveness in processing cases and in creating a gender-friendly environment within the court system. Examples include: 1. women leading judicial planning committees promoted important accessibility factors such as alignment of some buildings, 2. revisions of the processes of receiving and processing the files from the different governorates, and 3. introducing a reporting system that informs decision making and planning.

- The active participation of women in several coalitions that bring together the public sector and civil society, in which the chief justice office did not previously participate, helped to bridge a dialogue gap between religious courts and civil society.
- The participation of women in decision-making committees and processes alongside male judges created some form of moderation over the nature of speech and discourse in internal discussions.

Lutheran Evangelical Ecclesiastical Court

- Women's participation in decision making in the Lutheran Evangelical Ecclesiastical Court introduced the concepts of equality and equity from a woman's perspective, where gender policies and practices developed by the Lutheran World Federation are promoted and used as a road map in preaching and continuous awareness-raising of gender quality and equality principles for the church community.
- Women's participation in decision making in the Lutheran Evangelical Ecclesiastical Court promoted revisions to family law and introduced gender-responsive revisions in areas of custody, alimony, visitation, divorce, and others, as well as revision to the inheritance laws toward equal inheritance rights for women and men.
- Women's participation in decision making in the Lutheran Evangelical Ecclesiastical Court introduced revisions to litigation costs, which were challenging accessibility to justice.
- Women's participation in decision making in the Lutheran Evangelical Ecclesiastical Court introduced practices that promote women's access to information where laws are disseminated widely, even within the court hall, where screens are made available so that women can better read court documentation.
- Women's participation in decision making helped to influence male judges' sensitivity towards women's issues from a gender perspective.
- According to one lawyer, "at the Lutheran evangelical court they consider the child's interest and benefit above all other interests. I have seen that in cases where a father had moral issues, the court would not allow him custody as the child did not want to be around him. In other ecclesiastical courts, I have seen children forced to visit and stay with such fathers without their consent." Another example was when a case of granting a mother the right to issue a passport for her children was made at the Lutheran Evangelical Ecclesiastical Court because the children expressed to the social worker that "they see other family members and their friends travel for entertainment and it breaks their heart; [they wonder] why they cannot do the same."
- The active participation of women in several coalitions that bring together public sector and civil society in which church did not participate in before has helped to bridge a dialogue gap between religious courts and civil society.

Despite these achievements, challenges related to women's access to justice still remain, according to lawyers from the Women's Center for Legal Aid and the litigating women we interviewed.

Examples include:

In Sharia court:

- The maximum percentage of rights women obtain when they select litigation options does not exceed 80% of their rights in discord and conflict-related cases, according to a lawyer with the Women's Center for Legal Aid.
- Lack of gender sensitivity of private lawyers; according to one contributor, even female lawyers can be insensitive when their economic benefit is at stake.
- Lack of gender sensitivity of male judges and dependence on traditions and social norms that victimize women in their discourse prevails: "between sessions, the judge said that women look as strong as iron, but when they arrive home, they cry," said one lawyer.
- Limited oversight over arbitration processes and arbitrators' certifications increases the potential for dependence on traditions and social norms in decision making, and a lack of accessibility to arbitration options. Often, meetings are held inside a mosque and arbitrators are usually men; court buildings' alignment are not yet gender-responsive; among other challenges. "I would not go to the Abdel Nasser Mosque in the middle of the shopping center to discuss my private personal life with one or two men," said a litigant.

In ecclesiastical courts, besides the challenges proposed above that are directly linked to women's participation, challenges of accessibility include:

- The military checkpoints challenge the ability of lawyers and litigants to enter Jerusalem, the location of main courts in Jerusalem. According to a lawyer, "during the COVID 19 pandemic, I was surprised that the Israelis did not grant me a permit to enter Jerusalem and attend a session. The court lawyer got annoyed and accused me of wasting the time of the court."
- Limited time allocated to judges to hold sessions, which affects the speed of processing cases and could lead to increased damage for the litigants.
- Lack of gender sensitivity of religious judges, which raises the question of their ability to relate to the actual challenges and responsibilities of family management in our current times rather than strictly committing to the old canon laws which influence the whole litigation process. For instance, a litigant proposed, "I lost 26 years of my life because of laws developed very long time ago."
- Use of language other than Arabic by judges during the sessions is not comfortable for the lawyers; according to one lawyer, "They discuss among themselves in Greek during the session, which I do not understand."
- Power struggles within the church and between denominations influence the justice system and directly affect litigating women, as one court lawyer proposed: "Having Women as decision makers would increase their competition over power, and question their decisions; [so] why would they do it? They already have power issues with other denominations."

A key position in religious courts is the social advisors' role, a positions mostly held by women in Sharia and Lutheran Evangelical Ecclesiastical Courts. While it is referred to individual advisors and independent institutions in the case of the Orthodox and Catholic courts, it was brought about by lawyers that there exist no clear guidelines for the practice. It highly depends on the individual's own experiences and traditional background, which creates challenges as a result, lawyers observed.

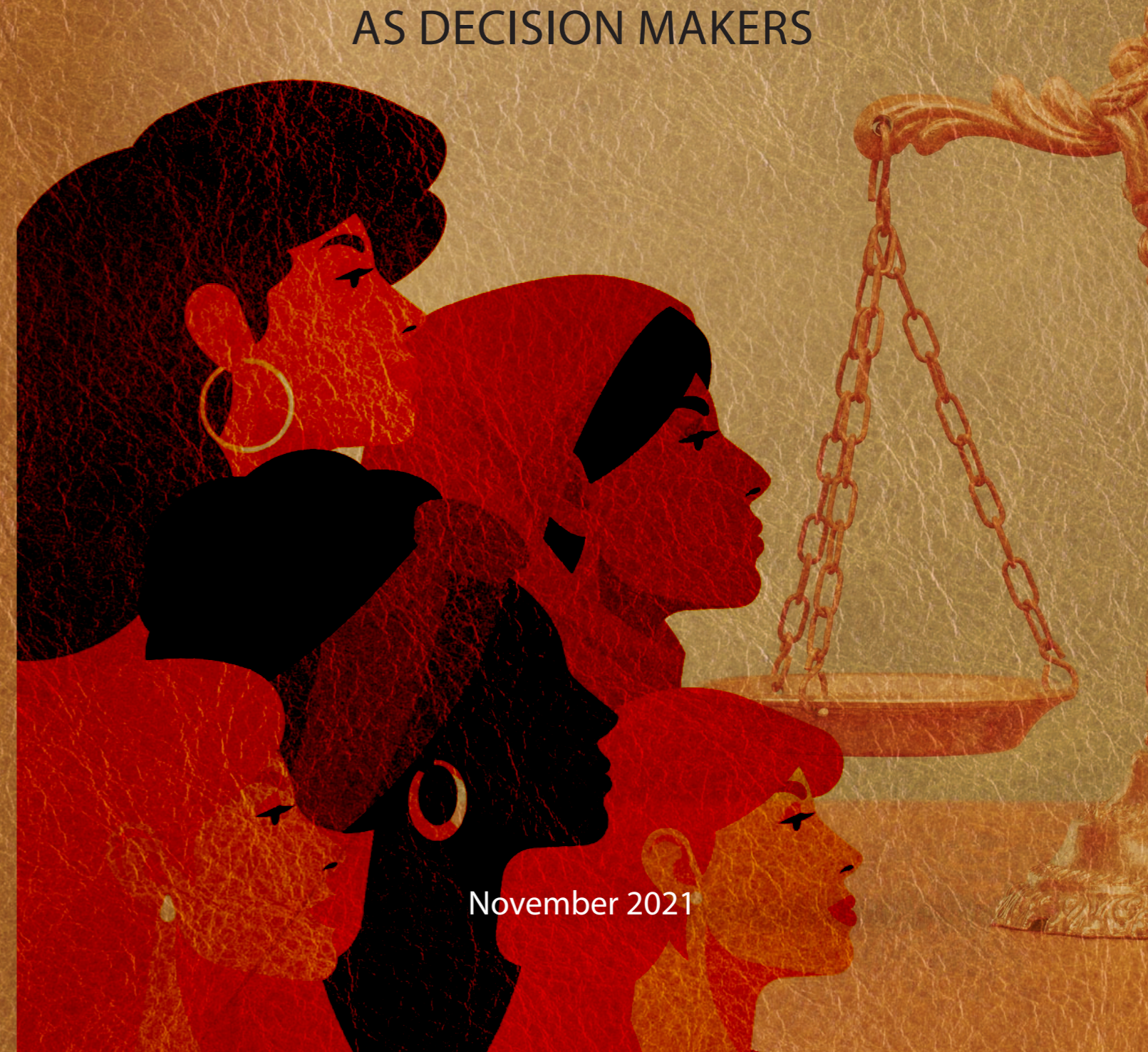
RECOMMENDATIONS

The achievements related to women's participation in decision making in religious Sharia and Lutheran Evangelical courts so far are to be celebrated as a starting point for more strategic decisions that pro-reform champions need to advocate for. Our recommendations, based on the previous analysis and the input of participants in this research, include:

1. Disseminate the findings of this study and increase pressure towards enhancing the presence of women in the court environment in different positions.
2. Disseminate the experience of legal reform in family and inheritance laws in the Lutheran Evangelical Ecclesiastical courts, and promote the opening of a permanent dialogue between different sects.
3. Focus on awareness-raising that targets lawyers in religious courts for increased gender sensitivity.
4. Advocate for court formulation laws that promote a relevant legal background for judicial committees besides their religious qualifications.
5. Advocate for women's participation in the Supreme Sharia Court based on qualifications rather than seniority.
6. Revise arbitration-related policies and practices to provide greater oversight of the recruitment of arbitrators, the environment they conduct the meetings in, and the processes followed by them to reach decisions.
7. Develop guidelines for religious courts' social advisors/workers to minimize the influence of individual judgment and practices and to increase independence from the undue influence of tradition and social norms.

Research Paper

WOMEN'S PARTICIPATION
WITHIN RELIGIOUS COURTS IN PALESTINE,
AND THE IMPORTANCE
OF THEIR PARTICIPATION
AS DECISION MAKERS



November 2021