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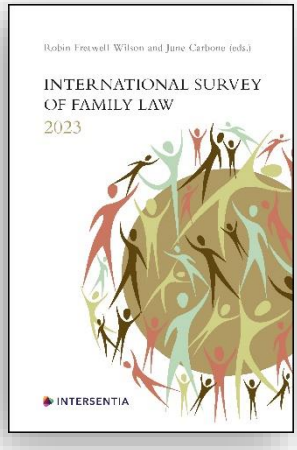

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ISRAEL

ISLAMIC LAW IN THE JEWISH STATE

The Formation of an Israeli Shariʿa

Karin Carmit Yefet* and Ido Shahar**

Résumé

Cet article présente les développements récents et passionnants du droit musulman de la famille dans l'État juif. Plus précisément, il explore les processus peu étudiés d' « israélisation du droit musulman », *i.e.* la convergence de facteurs légaux « externes » qui ont eu un impact sur l'évolution du droit musulman. L'analyse se concentre plus particulièrement sur deux formes « d'israélisation » : l'une concerne l'interprétation « civile » de la loi musulmane par les juges aux affaires familiales, l'autre est relative aux conséquences d'une réforme législative, introduite en 2001, qui a mis en place une compétence concurrente entre les tribunaux civils de la famille et les tribunaux de la *charia* pour la plupart des questions relatives au statut personnel des musulmans en Israël. L'étude est fondée sur la jurisprudence en matière de pension alimentaire pour l'épouse musulmane. Elle identifie la dynamique de deux processus parallèles, voire paradoxaux : d'une part, les tribunaux de la sharia ont eu tendance à introduire des réformes internes

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en faveur des femmes et à adopter des interprétations du droit musulman de la famille relativement libérales et favorables aux femmes au cours des deux dernières décennies ; d'autre part, les tribunaux civils de la famille ont développé une jurisprudence conservatrice et patriarcale qui est systématiquement défavorable aux femmes musulmanes et à leur famille. Cette étude se termine par un aperçu de la manière dont le droit musulman pourrait évoluer au sein de l'État juif.

1. INTRODUCTION

Israeli family law is unique among the law of Western countries: it is patterned after the Ottoman *millet* system, which imbued communal-religious courts with jurisdiction in the personal status matters of their respective community members.[1] The Israeli pluri-legal family law regime accords official recognition to 14 religious communities, including Jews, Muslims, Druze, Baha'i, and 10 different Christian denominations. Each recognised religious community possesses its own State-sanctioned tribunals and a separate set of legally binding religious codes. This State-administered religious court system co-exists alongside a parallel system of civil family courts, which have been vested with concurrent jurisdiction over the ancillary matrimonial matters of property distribution, wife maintenance, and child support and custody.[2] Family law in the Jewish state is, thus, a hybrid of civil and religious legal elements, where the interplay between the sacred and the secular unfolds in many manifestations.

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1 Y. Sezgin, 'A Political Account for Legal Confrontation between State and Society: The Case of Israeli Legal Pluralism' (2004) 32 *Studies in Law, Politics, and Society* 197; M. Abou Ramadan, 'The Shariʿa In Israel: Islamization, Israelization and the Invented Islamic Law' (2006) 5 *UCLA Journal of Islamic and Near Eastern Law* 81; M. Abou Ramadan, 'Notes on the Anomaly of the Shariʿa Field in Israel' (2008) 15 *Islamic Law and Society* 84; K.C. Yefet, 'Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women's Marital Freedom' (2009) 20 *Yale Journal of Law & Feminism* 101; K.C. Yefet, 'Israeli Family Law as a Civil-Religious Hybrid: A Cautionary Tale of Fatal Attraction' (2016) *University of Illinois Law Review* 1505; D. Hacker, 'Religious Tribunals in Democratic States: Lessons from the Israeli Rabbinical Courts' (2011) 27 *Journal of Law and Religion* 59. It should be noted that the Ottoman *millet* system underwent far-reaching transformations during the British Mandate in Palestine: G. Amir, 'The Institution of the "Religious Community" in Israeli Jurisprudence as a Mechanism for Ethnic Sorting and Control' (2014) 23 *Politika* 46 (in Hebrew); I. Agmon, 'There are Judges in Jerusalem and there were legislators in Istanbul: On the History of the Law Called (mistakenly) "The Ottoman Law of Family Rights"' (2017) 8 *Family in Law* 125 (in Hebrew).

2 F. Raday, 'Israel – The Incorporation of Religious Patriarchy in a Modern State' (1992) 4 *International Review of Comparative Public Policy* 209; R. Halperin-Kaddari, *Women in Israel: A State of Their Own*, University of Pennsylvania Press, 2004; Y. Sezgin, 'The Israeli Millet System: Examining Legal Pluralism through the Lenses of Nation-Building and Human Rights' (2010) 43 *Israel Law Review* 631; D. Hacker, 'Religious Tribunals in Democratic States: Lesson from the Israeli Rabbinical Courts' (2012) 27(1) *Journal of Law and Religion* 59.

For example, religious courts enjoy exclusive jurisdiction over matters of marriage and divorce, which they adjudicate according to religious law. However, religious and civil courts share concurrent jurisdiction over specified family law matters, and both must either apply religious law, as in matters of spousal and child support, or secular civil law, as in matters of child custody and property distribution.[3] Put differently, Israel maintains a pluri-legal system of personal status law which combines normative pluralism in the civil family courts (i.e. the application of different norms to different segments of the population) with institutional pluralism (i.e. there are designated communal-religious tribunals with exclusive jurisdiction in matters pertaining to their community members).[4]

While a wealth of literature has lavished attention on the Jewish family and the law that regulates its intimate affairs, the personal status law applicable to Israel's religious minorities has been understudied in legal scholarship. This chapter contributes to the narration of the intriguing story of Islamic law in the Jewish state. Conceptually speaking, the regulation of the Muslim-Palestinian family has given rise to two remarkable and dialectical phenomena: the Islamisation of Israeli law, and the Israelisation of Islamic law.[5] Islamisation takes place when 'Israeli legal norms are repackaged as norms that already exist in Islamic law, and are applied in the Shariʿa Courts as pure, authentic Islamic law'.[6] The case of child custody, which the shariʿa court is obliged to adjudicate according to the civil law principle of the child's best interests, is a paradigmatic example of such a process. This principle has no mention in Islamic doctrine, and yet Israel's shariʿa courts have read it into classical sources, and have thus bestowed Islamic legitimacy upon a civil principle. By 'Islamising' Israeli law, the shariʿa courts have suggested that child welfare is every bit as Islamic a term as it is Israeli.[7]

The other side of the coin, so to speak, is the Israelisation of Islamic law, i.e. the application of Islamic law within the framework of a civil 'Westernised' legal system, and within the complex context of the interrelations between a non-Muslim hegemonic majority and a Muslim minority. Broadly speaking, this process includes the confluence of 'external' legal forces and apparatuses that have impacted, overtly or covertly, on the development of Islamic doctrine. The repertoire of such secular/Israeli influences may be vast and varied, and encompass situations in which civil law criminalises Islamic practices; subjects

3 Yefet, 'Israeli Family Law as a Civil-Religious Hybrid', above n. 1.

4 For further discussion on institutional and normative pluralism, see Y. Sezgin, *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt, and India*, Cambridge University Press, 2013, pp. 5–8.

5 To the best of the authors' knowledge, these concepts were first introduced by Mousa Abou Ramadan. See Abou Ramadan, 'The Shariʿa In Israel', above n. 1.

6 Ibid., at 81.

7 M. Abou Ramadan, 'The Transition from Tradition to Reform: The Shariʿa Appeals Court Rulings on Child Custody (1992–2001)' (2002) 26 *Fordham International Law Journal* 595.

shariʿa courts to the normative hierarchy of the Israeli Constitution, or to the ultimate authority of Israel's Supreme Court; introduces forum competition by administering concurrent jurisdiction of the civil and religious tribunals; or empowers civil judges to experiment with the interpretation and implementation of Islamic norms.

While Islamisation of Israeli civil law has received considerable academic attention – primarily by Abou Ramadan[8] – Israelisation of Islamic law has, thus far, remained grossly understudied. This chapter thus seeks to shed light on this underexplored process. The formation of an 'Israeli shariʿa' gives rise to a series of pivotal queries which remain largely unanswered to date: does the constitutional character of Israel as a Muslim-minority democracy that is an avowed *Jewish* nation state have any bearing on its particular development of Islamic law? What sociolegal and structural forces work to shape the design and application of Islamic law in a Jewish state? Has Islamic law been 'feminised' and harmonised with Israel's liberal constitutional scheme? Or does it hold tightly to the traditional patriarchal regime that classically defined it? In short, what characterises Israeli-Islamic law?

In addressing some of these questions, this chapter focuses on developments that have extended Israel's civil-religious family law hybrid to Muslims. Specifically, the chapter will examine the effects of a 22-year-old momentous legislative reform which granted Israel's civil family court system concurrent jurisdiction – alongside the shariʿa courts – over personal status matters, other than the marriage and divorce, of Muslim litigants. From roughly 2002 onwards, civil courts have been tasked with the application of Islamic family law and with the expounding of its various doctrines. This statutory reform thus allows us a rare glimpse into the operation of two components of 'Israelisation': one relates to the 'civil' interpretation of Islamic law by family judges, while the other relates to the effects of competition arising from the concurrent jurisdiction accorded to the civil courts on the evolution of judicial Islamic doctrine in the shariʿa courts.

An examination of these two features of 'Israelisation' requires both an intra-tribunal comparison of the sharia courts' pre- and post-reform jurisprudence, and an inter-tribunal comparison between the case law of the shariʿa court and family court systems. Our case study under investigation is Muslim wife maintenance suits – a classic subject matter over which both the civil and shariʿa courts enjoy concurrent jurisdiction, and which treads into an uncharted territory of Islamic interpretation. Methodologically speaking, the proposed comparative analysis is based on a textual analysis of: (1) a case law corpus made up of hundreds of wife maintenance decisions passed by the shariʿa courts before, and especially after, the jurisdictional reform, and which were published

8 Ibid.

on the Shariʿa Courts Administration website; and (2) several dozen family court decisions passed between 2002 and 2020 which were published in computerised judicial databases, or which were never published, but kindly shared with us by judges, attorneys and litigants.[9]

As this chapter will show, the seemingly procedural, progressive and feminist-driven reform led to substantive and, at least in part, regressive results: on one hand, the shariʿa courts introduced internal reforms into Islamic law, in an attempt to thwart the anticipated reform, and, after its passage, to contain and constrain its impact. On the other hand, the civil family courts paradoxically developed a conservative and patriarchal Islamic jurisprudence that systematically operates to the detriment of Muslim women.

Structurally, the rest of the chapter proceeds as follows: the second section provides a brief introductory background, in order to understand the particularities and peculiarities of the shariʿa field in Israel. The third section introduces the 2001 jurisdictional reform and the impetus behind its initiative. The fourth and fifth sections analyse the aftermath of the reform in the shariʿa and civil family court systems, respectively, by focusing on wife maintenance jurisprudence. The sixth section concludes the chapter and outlines insights that may be distilled from the case study about the evolution of Islamic law in the Jewish state.

2. THE FORMATION OF AN ISRAELI SHARIʿA: AN OVERVIEW

An investigation of the evolution of Israeli-Islamic law must be conducted against the backdrop of the unusual framework governing the regulation of shariʿa courts in Israel. Under the Mandate, these courts enjoyed not only the broadest jurisdiction of all the recognised religious tribunals, but also the broadest institutional autonomy.[10] The State of Israel, established in 1948, adopted the

9 Locating family court decisions is a considerable challenge. The Israeli Courts Administration does not publish family court decisions on any official website, and proprietary computerised databases only publish them partially, sparingly, and at the family court judges' discretion. This practice prevents scholars from accessing a representative sample of these court decisions, and makes it difficult to identify and corroborate wide-ranging arguments and generalised trends. The following findings should, therefore, be read with this caveat on the inherent limitations of studying Israeli family court decisions in mind.

10 While the shariʿa courts held exclusive jurisdiction in *all* matters of personal status of Muslims, the other religious tribunals have had exclusive jurisdiction only in *some* matters of personal status of their respective community members. In addition, whereas the shariʿa courts were fully funded by the Mandate government, the other courts were funded by their respective communities. See I. Shahar, 'Islamic Law as Indigenous Law: The Shariʿa Courts in Israel from a Postcolonial Perspective' (2015) 5 *Journal of Levantine Studies* 83.

quasi-*millet* system introduced by the British,[11] yet while the broad jurisdiction of the shariʿa courts was retained (at least until 2001), they were stripped of any vestige of institutional autonomy. Undeniably, the shariʿa court system is the most regulated and subordinated legal system among the 14 recognised religious communities in Israeli law,[12] and this relatively tight civil oversight manifests in various ways.

For one thing, while Israel has avoided institutional and normative unification, the shariʿa court system is integrated into the Jewish state, with its judges appointed by a secular and non-Muslim civil body, and subject to oversight by the Israeli Supreme Court in its capacity as a High Court of Justice (HCJ).[13] The HCJ may intervene in shariʿa court decisions if they exceed their jurisdiction, if they violate the principles of natural justice, or if they disregard legal provisions that are specifically applicable to the religious tribunals.[14] A notable example is the HCJ decision which forced the nomination of female arbitrators to family councils – the quasi-judicial bodies that execute the dissolution process – in order to make divorce more woman-sensitive and promote gender mainstreaming.[15]

For another thing, while shariʿa courts enjoy formal exclusive jurisdiction over matters of marriage and divorce, Islamic law is subject to key civil legislation that imposed certain liberal norms on the shariʿa courts. These include, for example, the Israeli Constitution,[16] the Women's Equal Rights Act, and secular criminal law severely restricting polygamous and underage marriages,[17] and

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11 The Law and Administration Ordinance, the first act of legislation to be enacted by the Knesset, determined that the laws and regulations in force prior to 15 May 1948 would continue to apply.

12 Abou Ramadan, 'Notes on the Anomaly', above n. 1.

13 Ibid.; Y. Sezgin, *'Human Rights under State-Enforced Religious Family Laws'*, above n. 4; A. Natour, 'The Role of the Shariʿa Court of Appeals in Promoting the Status of Women in Islamic Law in a Non-Muslim State (Israel)' (JSD dissertation, American University Washington College of Law, 2009).

14 M. Abou Ramadan, 'La loi applicable à la minorité roum orthodoxe de l'état d'Israël' [The law applicable to the Rum Orthodox Minority in the State of Israel] (2000) 50 *Proche-Orient chrétien* 105, 109.

15 HCJ 3856/11 *Doe v. Supreme Sharia Court of Appeals* (published on Nevo, 27 June 2013) (Isr.); M. Pinto, 'The Absence of the Right to Culture of Minorities Within Minorities in Israel: A Tale of a Cultural Dissent Case' (2015) 4 *Laws* 579; M. Abou Ramadan, 'Islamic Legal Hybridity and Patriarchal Liberalism in the Shariʿa Courts in Israel' (2015) 4 *Journal of Levantine Studies* 39; I. Shahar, 'Standing at the Barricades of Patriarchy: The Israeli Shariʿa Courts and the Appointment of Women Arbitrators' (2017) 8 *The Family in Law* 81; Yefet, 'Israeli Family Law as a Civil-Religious Hybrid', above n. 1.

16 By 'Constitution' we mainly refer to Basic Law: Human Dignity and Liberty 1992, s. 11 (Isr.).

17 A. Layish, 'Muslim Women's Status in the Shariʿa Court in Israel' in C. Shalev and M. Liban-Kobi (eds.), *Women's Status In Law and Society*, Schocken Publishing, 1995 (in Hebrew); Natour, above n. 13; K.C. Yefet, 'Feminism and Hyper-Masculinity: A Case Study in Deconstructing Legal Fatherhood' (2015) 27 *Yale Journal of Law and Feminism* 49; Yefet, 'Israeli Family Law as a Civil-Religious Hybrid', above n. 1.

outlawing Muslim men's right to a unilateral *talaq* (repudiation), while making repudiation without wifely consent actionable in tort.[18]

Yet, as argued by Shahar, despite the shariʿa courts' formal lack of autonomy, these tribunals have evolved, over the years, into an arena for autonomous Muslim (and Palestinian) agency: a distinct politico-legal field, circumscribed by Israel's outer political framework yet retaining its own inner logic, values and normative system.[19] The qadis (Muslim judges) presiding in Israeli shariʿa courts have thus demonstrated their ability to initiate internal reforms, and to promote innovations in Islamic law by way of court rulings, or by issuing special 'judicial circulars' (*marasim qada'iya*).[20]

The qadis have, presently, largely remained the sole source of Islamic legal reform, in light of both Israel's restrictive policy concerning Islamic colleges and *Iftāʿ* institutions, and the persistent reluctance of Palestinian-Israeli Muslims to accept reform from a non-Muslim Israeli legislative body.[21] Accordingly, the Ottoman Family Law of 1917 – the first State codification of family law in the Islamic world – has remained binding and unreformed in Israel until this day.[22] Yet, while the Israeli legislature did not introduce substantive reforms into

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18 See. e.g. Arts. 176 and 181 of Penal Law, 5737-1977 (Isr.); s. 8(b) of the Women's Equal Rights Law 5711-1951 (Isr.); CA 245/81 *Sultan v. Sultan* 38(3) PD 169 (1984) (Isr.) (recognising unilateral divorce as vesting women with a civil cause of action against their husbands). It is noteworthy, however, that some of the protective civil and criminal norms are underenforced: see, e.g. A. Rubin Peled, 'Shariʿa' under Challenge: The Political History of Islamic Legal Institutions in Israel' (2009) 63(2) *Middle East Journal* 241, 259; I. Saban, 'The Minority Rights of the Palestinian-Arabs In Israel: What Is, What Isn't and What Is Taboo' 26 *Iyunei Mishpat* (2002) 241, 274 (in Hebrew); R. Aburabia, *Within the Law, Outside of Justice: Polygamy, Gendered Citizenship and Colonialism in the Israeli Law*, Hakibbutz Hameuchad – Sifriat Poalim, 2022 (in Hebrew).

19 I. Shahar, 'State, Society and the Relations Between Them: Implications for the Study of Legal Pluralism' (2008) 9(2) *Theoretical Inquiries in Law* 417; I. Shahar, 'A Tale of Two Courts: How Organizational Ethnography Can Shed New Light on Legal Pluralism' (2013) 36 *PoLAR: Political and Legal Anthropology Review* 118; Shahar, 'Islamic Law as Indigenous Law, above n. 10; I. Shahar, *Legal Pluralism in the Holy City: Competing Courts, Forum Shopping, and Institutional Dynamics in Jerusalem*, Routledge, 2015.

20 About the judicial circulars, see I. Shahar, 'Legal Reform, Interpretive Communities and the Quest for Legitimacy: A Contextual Analysis of a Legal Circular' in R. Shaham (ed.), *Law, Custom, and Statute in the Muslim World: Studies in Honor of Aharon Layish*, Brill Publishing, 2007. Notably, a recent HCJ decision has questioned the validity of these circulars, but they are still widely used: see HCJ 3910/13 *Plonit v. The Sharia Court System Administration* (published on Nevo, 9 March 2015) (Isr.).

21 Abou Ramadan, 'Notes on the Anomaly', above n. 1. This reluctance was revealed once again in 2015, when Muslim Knesset members led the objection to a new draft of Muslim family law, prepared by women's organisations. See <http://bokra.net/Article-1318780>, last accessed 22.05.2023.

22 About the application of the Ottoman family law in Israel, see I. Shahar, 'A law one hundred years young: The interpretive viability of the Ottoman Family Law in Palestine/Israel, 1917–2017' (2022) 65 *Journal of the Economic and Social History of the Orient* 890.

Islamic family law, it did intervene by reducing the jurisdictional scope of the shariʿa courts' judicial authority. This issue will be addressed in what follows.[23]

3. SUBSTANTIVE REFORM IN PROCEDURAL GARB: INTRODUCING CONCURRENT CIVIL-RELIGIOUS JURISDICTION

As mentioned above, until November 2001 the shariʿa courts had the broadest jurisdiction of any religious courts in Israel, holding exclusive authority over all matters pertaining to the personal status of Israel's Palestinian-Muslims.[24] Thus, while Jewish and Druze women who sought wife maintenance had the option to choose the forum in which to file their suits – their respective religious tribunals or the civil family court – Muslim women's only recourse was to approach their communal religious tribunal and to present their claims before an all-male panel of qadis.[25]

As a whole, Muslim women fared badly in pre-reform era shariʿa courts. Most notably, the shariʿa courts were taken to task for awarding women meagre and unrealistic maintenance payments that ignored their lived realities.[26] Consequently, in the mid 1990s, several human and women's rights organisations sought to better the position of Palestinian-Arab Muslim and Christian women within the legal sphere of family law. They joined forces as the 'Action Committee for Equality in Personal Status Issues', and set out 'to act in order to advance equality between the genders in family law, as well as to advance the rights of Arab litigants in religious courts and in civil family courts through the utilization of both legal and social tools'.[27] In 1995, shortly after the Knesset (Israeli Parliament) approved the Family Courts Law, the Committee initiated a draft amendment to the new law, with a view to furnishing Muslim and Christian women with the statutory option of turning to civil courts in all matters of personal status other than marriage and divorce.

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23 The empirical examples discussed hereinafter have been extensively presented and analysed elsewhere: see W. Hleihel, I. Shahar and K.C. Yefet, 'Transforming Transformative Accommodation: Muslim Women Maintenance Suits in Israel as a Case Study', *Law and Social Inquiry* (forthcoming). See also W. Hleihel, K.C. Yefet and I. Shahar, 'The Muslim Wife Between the Israeli Shariʿa Court and the Family Affairs Court: A Conservative Revolution in Liberal Clothing' (2022) 52 *Mishpatim* 319 (in Hebrew).

24 Yefet, 'Israeli Family Law as a Civil-Religious Hybrid', above n. 1.

25 Israel's first female qadi was only appointed in 2017. See S. Jacobs, 'Opposition to Israel's first Qadiya' (2020) 47(2) *British Journal of Middle Eastern Studies* 206; T. Zion-Waldoks, R. Irshai and B. Shoughry, 'The First Female Qadi in Israel's Shariʿa (Muslim) Courts: Nomos and Narrative' (2020) 38(2) *Shofar: An Interdisciplinary Journal of Jewish Studies* 229.

26 A. Kaplan, *Invisible Work: Work Time and Gender Information and Policy Principles*, the Van Leer Institute, 2012.

27 Quoted from a draft prepared by the Action Committee. No author nor date mentioned.

The rationale undergirding the proposed jurisdictional reform was the Committee's working hypothesis that the shariʿa courts were androcentric institutions which placed women in an inherently inferior position in relation to men, and that 'substantive and full equality between men and women can only be attained in civil courts and not in patriarchal Sharīʿa Courts'.[28] More specifically, it was posited that, 'when a woman files a maintenance suit in the civil court, even if her case is handled according to religious law, she will be compensated differently, she will be treated differently, [and] consequently, what she will receive will be different'.[29]

The reform initiative quite expectedly encountered resounding resistance from officiating qadis and their political allies. In the months and years that followed, a stormy controversy developed over the issue of concurrent jurisdiction: one which not only reached academic and professional circles, but also the pages of Israel's Arabic-language press. The parties facing each other on either side of the ring were clear cut: on one side, feminist and liberal speakers, who sought to break down the shariʿa courts' monopoly, and, on the other, conservative and Islamic speakers, who joined forces with the qadis in calling for the preservation of the shariʿa courts' exclusive authority over the Muslim community.[30] In their efforts to thwart the reform initiative, the qadis introduced a series of internal women-friendly reforms – which will be discussed in the next section – designed to persuade their feminist audience that demonopolisation was unnecessary and unwarranted.[31]

The ideological battles continued unabated in the parliamentary debates. While the reform's supporters insisted that concurrent jurisdiction was a key mechanism in ensuring women's rights, the opponents decried the 'contamination' of shariʿa law's purity and authenticity by civil intervention. MK 'Abd al-Malek Dahamsheh of the United Arab Party, for example, exclaimed passionately:

> I think that it is not every day, not even every month, nor even every week or two that this house is called to deliberate laws that so directly touch the thing most precious to a group of people that live in this state … this draft amendment to the law that is before you purports to do justice with Arab women, whether Muslim or Christian. It purports to achieve equality … Who determined that the most appropriate forum, the best and most fitting court, for a Muslim woman in order to be accorded maintenance and in order to sue for the paternity of a child or to litigate in any personal matter is

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28 Ibid.

29 Y. Dayan, MK, Minute No. 208, The Constitution, Justice and Law Committee (1998), p. 12 (Isr.), available at <https://fs.knesset.gov.il/14/Committees/14_ptv_485638.PDF>, last accessed 22.05.2023.

30 Hleihel, Yefet and Shahar, 'The Muslim Wife Between the Israeli Shariʿa Court and the Family Affairs Court', above n. 23.

31 See Shahar, *Legal Pluralism in the Holy City*, above n. 19, at pp. 116–118.

> not the shariʿa court … presided upon by experienced and skilled judges and qadis? [Who determined] that we should bring her to a family court – a court that knows nothing about shariʿa laws, that doesn't know them … For they [civil judges] will have to rule according to these laws. So we will throw upon them women, men and families, when they are not skilled, not trained, not capable, have not studied, and are not eligible to rule on Islamic family laws. What are we doing?!?[32]

Taleb al-Sanaa of the Mada-Ra'am party echoed this last point, professing that the ultimate victims of putting the shariʿa in the incapable hands of civil courts would, paradoxically, be women:

> My colleagues say that we care about the wellbeing of women … but we aren't changing the material law according to which these cases are adjudicated, because if it's in a shariʿa court, the judge will rule on the basis of [Muslim] personal law, and if it's in a family court, he will rule on the basis of [Muslim] personal law. So what, in essence, have we changed? We have only changed the judge, because the law is the same law. Only the judge has changed – there, there's a Muslim judge, and here there is a Jewish judge. In essence, by passing this law we are saying that we don't trust Muslim judges. We trust Jewish judges … I understand the motivations, I understand that you want the best, but sometimes you want to do good and it turns out that you have actually caused damage.[33]

These passionate parliamentary polemics culminated in the passage of Amendment No. 5 to the Family Courts Law, in November 2001. Thus, after a fierce and multi-year struggle, Muslim (and Christian) women were finally granted a forum-selection privilege – already enjoyed by Jewish women for half a century – between their communal religious tribunals and the civil family courts.

Interestingly enough, however, there has been a perplexing lack of research into the aftermath of this landmark legislative amendment: did the statutory reform achieve its stated feminist goals and live up to the hopes and expectations of its initiators? How do civil judges administer Islamic law, and to what extent have they succeeded in introducing gender-equalising and women-sensitive doctrines into their rulings? These questions have only marginally been discussed to date, let alone critically examined.

As will be demonstrated below, it appears that both the opponents and the proponents of the statutory reform were right in their estimations: whereas the shariʿa courts responded to the competition by adopting a gender-sensitive approach towards their female constituency, the family courts seem to have

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32 Ibid., at p. 58.

33 Knesset Plenum Minute no. 234, DK (1998) 1, p. 336, available at <https://main.knesset.gov.il/Activity/plenum/Pages/SessionItem.aspx?itemID=437573>, last accessed 22.05.2023.

fallen prey to an inherent cultural bias that imagines the shariʿa as intrinsically patriarchal, static and monolithic. In line with this view, the civil family courts tend to rule in accordance with patriarchal values perceived as mandatory Islamic norms.

4. ISRAELISATION OF ISLAMIC LAW IN THE SHARIʿA COURTS

The normative basis for Islamic maintenance rules rests on several key Qur'anic verses, which construct the Muslim marriage not as a relationship between equals, but rather as hierarchical relations reflecting the husband's supremacy and his wife's subordination. It is based on these patriarchal relations that the shariʿa constructs a well-defined division of labour between the spouses: the wife is to obey her husband and to accept his authority as the head of the family, while the husband, in return, commits himself to supporting his wife and providing for her needs.[34]

These basic principles of classical Islamic law have been refined into modern shariʿa codes that guide the rulings of Israel's shariʿa courts.[35] The major prerequisite for a wife to be entitled to maintenance, apart from a valid marriage contract, is the fulfilment of her duty to be confined *(muhtabasa)* in the marital house. According to this condition, the wife is obligated to reside in her husband's lodgings as long as he requires it, and she will be exempted from this duty if there are legal impediments *(mawaniʿ shar'iyya)*, or if the dwelling that he provided her does not meet the legal requirements *(maskan ghayr sharʿi)*.[36]

During the pre-reform era, female litigants often found themselves ineligible for maintenance and, moreover, even when they were considered eligible, the level and scope of maintenance was insufficient and awarded parsimoniously.[37] For example, the shariʿa courts made it ever more difficult for women to receive maintenance, by broadly construing the female duty of confinement such that

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34 Hleihel, Yefet and Shahar, 'The Muslim Wife Between the Israeli Shariʿa Court and the Family Affairs Court', above n. 23.

35 The main normative source in this regard is the Ottoman Family Law of 1917, and in cases of legislative lacunas, the qadis turn to the legal literature of the Hanafi school of law, which is perceived as the 'default' source of law, and especially to the private codification of Hanafi family law compiled by the Egyptian jurist Qadri Pasha (1875).

36 Arts. 70-2, the Ottoman Family Law.

37 Shahar, *Legal Pluralism in the Holy City*, above n. 19, at pp. 116–118. See also Hleihel, Yefet and Shahar, 'The Muslim Wife Between the Israeli Shariʿa Court and the Family Affairs Court', above n. 23; A. Layish, *Women and Islamic Law in a Non-Muslim State: A Study Based on Decisions of the Shariʿa Courts in Israel*, Routledge, 1975; See the analysis of the case law in Y. Meron, *Islamic Law in Comparative Perspective*, Magnes Press, 2001 (in Hebrew).

a wife who 'misbehaves in the household', performs her duties sloppily, or otherwise disobeys her husband, forfeits her monetary entitlement.

However, in the period of struggle against the reform, and even more so in the post-reform era, the shariʿa courts enriched their wife maintenance jurisprudence with an expansive range of women-friendly developments that have become an organic part of Israeli-Islamic law. For example, consistent case law has construed a man's duty of support as absolute, and as one which may only be revoked if the wife has left the marital house unjustifiably.[38] Even in such cases, a husband's refusal to allow his wife back into the marital home, or a woman's declaration of willingness to return to the marital home, reactivates her eligibility for maintenance. The shariʿa courts' reformist efforts also extend to approving situations in which a wife departed from the marital home for work purposes or academic studies which commenced prior to marriage as being in perfect harmony with her duty of confinement.[39] Moreover, the shariʿa courts have strictly confined the duty of confinement, and have unwaveringly dismissed any grievances concerning a wife's misbehaviour, disobedience or alleged violations of her sexual duties.[40] In its reconstructed wife maintenance jurisprudence, the one and only foundation on which the duty of confinement is predicated is residing in the marital home and not leaving it without a justified shariʿa cause.

Simultaneously, the shariʿa courts introduced innovations into the construction of the 'shariʿa justification' that allows women to leave their husbands yet still remain entitled to their support. For example, the shariʿa courts adopted an exacting and onerous definition of the 'legal abode' *(maskan shar'i)* a husband is required to provide for his wife.[41] Thus, if a household fails to live up to the ideals of a serene, secure and private dwelling, as well as one which provides a healthy and peaceful environment for married life alongside congenial neighbours, then this constitutes a valid shariʿa justification for a wife to not live with her husband.[42]

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38 Case 124/2006 (published on the Shariʿa Courts Administration website, 8 October 2006) (Isr.); Case 400/2017 (published on the Shariʿa Courts Administration website, 14 March 2018); Case 201/2018 (published on the Shariʿa Courts Administration website, 3 October 2018) (Isr.).

39 For more on this, see Appeal 262/2003 (unpublished, 24 February 2004) (Isr.); Appeal 252/2011 (published on the Shariʿa Courts Administration website, 11 December 2011) (Isr.).

40 Appeal 10/1997 (published in Al-Kashaf, 1997, vol. 1, p. 78); Appeal 37/2006 (unpublished, 28 February 2006); Case 124/2006, above n. 38; Case 358/2017 (published on the Shariʿa Courts Administration website, 15 March 2018); Appeal 315/2013 (published on the Shariʿa Courts Administration website, 27 November 2013); Appeal 201/2018, above n. 38; Case 904/2016 (unpublished, 5 June 2016) (Isr.).

41 See I. Shahar, 'A New Look at the Agency of Qāḍīs: Israeli Shariʿa Courts as a Case Study' (2019) 59(1) *Die Welt des Islams* 70.

42 Appeal 173/2005 (published on the Shariʿa Courts Administration website, 30 May 2005) (Isr.); Case 106/2020 (published on the Shariʿa Courts Administration website, 10 May 2020) (Isr.);

The post-reform era also saw the shariʿa courts breaking sharply from their traditional invidious treatment of wife-battering. Earlier rulings sought to distinguish between different forms of violence, and to apply varying normative significance according to the severity, frequency and form of violence. Thus, for example, light and sporadic violence, especially if the husband expressed remorse for it, was not held to be a legitimate shariʿa justification for leaving the matrimonial home.[43] Post-reform jurisprudence, however, has witnessed a remarkably pro-woman interpretive trend that construes domestic violence as impairing a house's capacity to constitute a 'legal abode'.[44] More specifically, the shariʿa courts introduced a doctrinal shift that no longer places the analytical centre of gravity on the 'level of violence' by the husband, but rather on the level of security experienced by the wife in the marital home. Put differently, if the wife does not feel safe in her own home, and supports this feeling with evidence, then she has a right, and even an obligation, to leave the nuptial home. Operating as it did from within this gender-sensitive interpretive framework, recent case law, in particular, embodies a decidedly pronounced intolerance towards any form of violence: the duty of confinement is voided even if the severity and frequency of violence is objectively negligible, even if it is verbal or financial abuse, and even if it is a mere threat rather than a concrete act of violence.[45]

Case 453/2012 (published on the Shariʿa Courts Administration website, 30 January 2013) (Isr.); Case 190/2005 (unpublished, 21 March 2006) (Isr.); Case 312/2005 (unpublished, 28 December 2005) (Isr.); Appeal 277/2007 (published on the Shariʿa Courts Administration website, 2 March 2008) (Isr.); Case 150/2005 (published on the Shariʿa Courts Administration website, 2 March 2008) (Isr.); Case 150/2005 (published on the Shariʿa Courts Administration website, 18 July 2005) (Isr.). See also Appeal 106/2020 (unpublished, 20 May 2020) (Isr.); Appeal 115/2005 (published on the Shariʿa Courts Administration website, 30 June 2005) (Isr.); Case 281/2004 (unpublished, 20 December 2004) (Isr.). See also Shariʿa Appeal 165/1996, and its translation in FC (Krayot) 14737-10-09 *A. v. A.* (published on Nevo, 22 March 2010) (Isr.).

43 See Appeal 25/2007 (published on the Shariʿa Courts Administration website, 9 May 2007) (Isr.); Appeal 238/2017 (published on the Shariʿa Courts Administration website, 7 March 2018) (Isr.); See also Shariʿa Case 3106/18 (published on the Shariʿa Courts Administration website, 5 March 2019) (Isr.).

44 Appeal 51/2009 (unpublished, 20 December 2009) (Isr.); Case 24/1996 (published on the Shariʿa Courts Administration website, 1 April 1996) (Isr.); Case 39/1996 (published on the Shariʿa Courts Administration website, 3 April 1996) (Isr.). It should, however, be noted that earlier Shariʿa Court case law tended to distinguish between different types of violence, and to imbue its levels of severity and frequency with normative significance. Thus, for example, minor and 'one-time' violence, especially if it was regretted by the husband and if the husband promised it would not occur again, was not perceived as a justified Shariʿa ground for leaving the marital residence. See Layish, 'Muslim Women's Status in the Shariʿa Court in Israel', above n. 17, at p. 108.

45 Appeal 290/14 (published on the Shariʿa Courts Administration website, 15 July 2014) (Isr.); Appeal 281/2008 (published on the Shariʿa Courts Administration website, 18 December 2008) (Isr.); Case 59/2012 (published on the Shariʿa Courts Administration website, 7 May 2002) (Isr.); Appeal 419/2016 (published on the Shariʿa Courts Administration website, 26 February 2017) (Isr.); Case 285/2019 (published on the Shariʿa Courts Administration website, 28 November 2019) (Isr.); Case 80/2020 (published on the Shariʿa Courts Administration website, 30 June 2020) (Isr.).

A final example relates to a procedural reform that was introduced by the shariʿa courts in the wake of the struggle against the above-mentioned legislative reform, in order to placate feminist circles that threatened their jurisdictional monopoly. The shariʿa courts sought to establish a judicial policy that would consider their female litigants' real social needs. The present authors discuss this procedural innovation – its logic, form and effects – in detail elsewhere.[46] For present purposes, it suffices to focus on its cumulative impact: it allowed the qadis to increase the amount of wife maintenance by almost 50 per cent – well beyond the average rate awarded by either the civil family courts or any other religious tribunal in Israel.[47] Moreover, the shariʿa courts held, in a long line of cases, that a woman's economic status or independent income, whether from work or any other source, has no bearing on the level and scope of maintenance she is due.

In sum, the qadis in the shariʿa courts have demonstrated an impressively creative interpretive agency in inducing changes from within the Islamic traditions. By so doing, they were literally aiming to appease not only their women constituents, but also to reduce the tension between Islamic law and the liberalised and feminist legal discourse, which had become hegemonic in the Israeli civil legal system.[48] In that sense, the Israelisation of Islamic family law meant a remarkable liberalisation and feminisation of the latter.

5. THE ISRAELISATION OF ISLAMIC LAW IN THE CIVIL FAMILY COURTS

While the story told thus far appears quite optimistic – from a feminist perspective, of course – the tables turn dramatically when we shift our gaze to the civil family courts. The Israelisation of Islamic family law in these courts appears to be proceeding in a very different direction: instead of liberalising Islamic family law, the Israelisation processes taking place in the civil courts are bringing about a stark patriarchalisation of this law. The reasons for this unexpected – and, one would add, gloomy – phenomenon will be discussed below, but first we will provide some empirical examples to illustrate this trend.

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46 Hleihel, Yefet and Shahar, 'The Muslim Wife Between the Israeli Shariʿa Court and the Family Affairs Court', above n. 23; See also Shahar, *Legal Pluralism in the Holy City*, above n. 19, at pp. 116–118.

47 See N. Barkali, *Periodical Survey No. 315: Women Receiving Maintenance Payments from the National Insurance Institute 2018*, Table 15, 2020 (in Hebrew), available at <https://www.btl.gov.il/Publications/survey/Documents/seker_315.pdf>, last accessed 22.05.2023.
See Shahar, *Legal Pluralism in the Holy City*, above n. 19, at p. 116.

48 See Shahar, 'Legal Reform, Interpretive Communities and the Quest for Legitimacy', above n. 20.

Consider, for example, maintenance's constitutive condition: the duty of the wife's confinement to the marital home. The family courts have demonstrated a tendency to construe this duty ever more broadly, demanding that a wife must not only reside in the nuptial home, but must also perform all manner of wifely duties. Thus, in sharp contradistinction to the shari'a courts, the family courts do not settle for the narrow and restricted concept of residing in the nuptial home alone, but keep on raising the bar required for the satisfaction of the female duty of confinement. At the same time, the family courts have also substantially narrowed the ambit of the justified shari'a causes that may allow wives to relieve themselves from their wifely duties without losing their eligibility for maintenance. Thus, a series of additional variables have been introduced by the civil family courts into the gendered equation, such as a woman's behaviour and her fulfilment of her intimate marital duties, as a precondition for wife maintenance. In one such case, the family court deemed a wife's 'expression of sincere desire' to 'maintain a harmonious joint life'[49] insufficient, and thus required actual adherence to the 'sum total' of her 'duties and obligations' – including sexual duties.[50]

The family courts also went so far as to impose the onerous burdens the *Halakha* (Jewish law) prescribed for Jewish women, on Muslim women. For example, the courts equated the position of a rebellious wife in Jewish law with that of a rebellious wife in Islamic law, and thus wrongfully denied Muslim women maintenance if they had failed to provide sexual services to their husbands.[51] The 'Judaisation' of Islamic law has become even more pronounced in recent years, as the family courts subjected Muslim wives to three *halakhic* grounds that would cost a Jewish wife her maintenance. To wit, these are adultery, an 'act of ugliness' (a sexual act with another man for which there is only circumstantial evidence), and *overet 'al dat*, i.e. 'a wife who violates religious precepts, a wife who does not respect her husband and goes out with other men on a non-sexual basis'.[52]

What makes this injurious judicial trend even more indefensible is the fact that, whereas the civil courts defied Jewish law in releasing Jewish women from a strict code of sexual conduct,[53] the same courts defied shari'a law in subjecting Muslim women to a strict code of sexual conduct which does not apply to them.

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49 FC (Tiberias) 59344-02-15, *S.N. v. S.N.* (published on Nevo, 23 March 2016) (Isr.), paras. 44 and 47.

50 FC (Tiberias) 30980-02-13, *Plonit v. Ploni* (unpublished, 7 June 2015) (Isr.), para. 32.

51 See *S.N. v. S.N.*, above n. 49. It should be noted that this decision severely contradicts the decision passed by the Shari'a Appeals Court which states that 'a wife that prevents her husband from enjoying her', as the latter court phrases it, is not considered a rebellious wife. See Appeal 37/2006 (unpublished, 28 February 2006) (Isr.); Case 124/06 (published on the Shari'a Courts Administration website, 8 October 2006) (Isr.).

52 See *S.N. v. S.N.*, above n. 49, at para. 71.

53 In a series of illuminating articles, Ruth Halperin-Kaddari provides an excellent demonstration of the ways in which the Israeli Supreme Court devalues the meaning ascribed to a wife's deviation from the code of proper sexual conduct. It does this, for example, by increasing the

The civil court jurisprudence thus not only Judaises and patriarchalises Islamic law, but also unduly discriminates between Muslim and Jewish women.

Another example of the differential judicial interpretation of the duty of confinement between the civil and religious courts relates to the circumstances in which a woman expresses her willingness to return to the marital home. In sharp contradistinction to established shariʿa court precedent, the family court has been reluctant to award women maintenance in such circumstances. The family court also boldly suggested that an abused wife's claim of willingness to return to the marital home is necessarily unreliable.[54]

The civil courts further resorted to a woman-unfriendly application of Islamic law by deviating yet again from shariʿa court precedent which construed husbandly consent to the issuance of protective or restraining orders against him as a waiver of the duty of confinement.[55] For the civil courts, the very pursuit of such orders is a sheer testament to a wife's disobedience, which, in turn, disentitles her to maintenance.[56] In one case involving a Muslim wife with five minor children, who had never left the marital household, the court held that the husband should 'not be obliged to pay for his wife's maintenance even though Islamic law establishes such an obligation'.[57] In rationalising this perplexing decision, the civil court reasoned that 'their [marital] path had reached its endpoint in light of the continuing dispute between them as is reflected by the motions for a court protective order filed by one party against the other and by the interventions made by the Israel Police Force and the local Welfare Services office'.[58] The court thus effectively penalises women who seek State protection with the loss of their maintenance.

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weight of evidence which is required for proving such a deviation, by devaluing the meaning ascribed to such a deviation, and by introducing a reciprocity metric. See R. Halperin-Kaddari, 'Marriage and Divorce Law and Gender Construction' in *To Be A Jewish Woman: Proceedings of the First International Conference in Israel: Woman and Her Judaism*, 2001, pp. 155, 161–62 (in Hebrew); R. Halperin-Kaddari, 'Wife Support: From Perception of Difference to Perception of [In]Equality' (2005) 7 *Mishpat u'Mimshal* 767 (in Hebrew); R. Halperin-Kaddari, 'Moral Considerations in Family Law and a Feminist Reading of Family Cases in Israel' in D. Barak-Erez et al. (eds.), *Readings in Law, Gender and Feminism*, Nevo publishers, 2007 (in Hebrew); See also, e.g. CA 277/81, *Grinhaus v. Grinhaus* PD 36(3) 197 (1982) (Isr.), with respect to the introduction of a dimension of gender equality, and for the blunting of the discrimination against women caused by the existence of a double standard in personal status law with respect to the duty of sexual faithfulness between married partners.

54 FC (Nazareth) 14135-09-14, *M.M. (A Minor) v. Y.M.* (published on Nevo, 26 April 2015) (Isr.).

55 Appeal 30/2012 (published on the Shariʿa Courts Administration website, 28 May 2012) (Isr.); Case 213/2013 (published on the Shariʿa Courts Administration website, 4 September 2013) (Isr.); Case 104/2014 (published on the Shariʿa Courts Administration website, 10 June 2014) (Isr.); Case 372/2018 (published on the Shariʿa Courts Administration website, 16 January 2019) (Isr.).

56 See *S.N. v. S.N.*, above n. 49, para. 47. See also para. 45.

57 FC (Tiberias) 30980-02-13, *Plonit v. Ploni*, above n. 50, para. 32.

58 Ibid.

The 'civil' version of Islamic law also differs substantially from shariʿa court doctrine in its radically stingy interpretation of a legitimate 'shariʿa justification' for violating the duty of confinement. The following example – of a maintenance suit that reached both the civil and religious instances – is particularly striking. In *Plonit*, the family court rejected Plonit's maintenance suit, finding her a 'rebellious wife' (*nashiz*) for preventing her husband from entering the marital household.[59] By so ruling, the family court deviated from a previous shariʿa court ruling – adjudicating Plonit's divorce – that acknowledged her right to do so since her husband had married other women surreptitiously while wasting all their money on his new wives. According to the civil tribunal, however,

> shariʿa law is an archaic and patriarchal legal system which authorizes a husband to marry up to 4 wives at once. Might the wedding of additional wives justify the wife's refusal to permit her husband to enter the marital household? I believe the answer to this question is negative.[60]

A few months after the civil decision was rendered, the shariʿa court awarded Plonit interim maintenance (*nafaqat ʿiddah*), a special type of short-term support paid for a period of three months after a divorce has been finalised. The shariʿa court found that the family court had fundamentally erred in conceptualising the wife as rebellious, and in unlawfully stripping her of her Islamic entitlement to maintenance. The shariʿa court also called its civil counterpart to task for its Orientalist labelling of Islamic law as an 'archaic and patriarchal legal system', counselling it to become conversant in classical shariʿa law sources that protect women's status and celebrate their rights.[61] This decision, which provides a rare glimpse into divergent rulings by the family court and the shariʿa court in the very same case, reveals the extent to which the civil instance is impeded by Orientalist constructions which limit the range of its interpretive creativity, and empty Islamic law of its ameliorative and emancipatory potential.[62]

Another paradigmatic example of the women-unfriendly interpretation of Islamic law that differs sharply from the qadi-made Islamic law is the family court ruling that wife-battering is the only valid justification for departing from the marital household.[63] Even this limited exception was construed so narrowly as to flip the religious paradigm entirely on its head and render the wife's duty of confinement, rather than the husband's duty of support, as an absolute mandate.

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59 FC 34133-09-13, *Plonit v. Ploni* (unpublished, 15 May 2014) (Isr.).

60 Ibid., para. 23.

61 Case 1682/2014 (unpublished, 15 November 2014) (Isr.).

62 Another example of this judicial worldview can be found in FC (Nazareth) 54724-02-13, *M.A.N. v. A.A.N.* (published on Nevo, 23 December 2013) (Isr.).

63 FC (Nazareth) 24824-04-12, *N.H.H. v. S.H.* (published on Nevo, 21 May 2013) (Isr.), paras. 24 and 11.

Thus, several family court decisions have ruled that 'ongoing violence' cannot constitute a justified legal ground for leaving the marital household: a wife in such circumstances must return, and once again be confined to her husband, if she wishes to get paid.[64] The family courts also held that 'moderate violence'[65] or verbal or financial abuse constitute part of a husband's prerogative to discipline his wife and, as such, do not amount to a 'shariʿa justification' for departing the marital household.[66] By so ruling, the civil family courts thus (ab)use Islamic law so as to 'civilise' and trivialise various forms of violence against Muslim women, and to entrench hegemonic Orientalist stereotypes that depict Palestinian-Muslim society as inherently savage.

Adding insult to injury, civil court jurisprudence also imposes a heavy evidentiary burden on Muslim women in order to prove domestic abuse.[67] For example, the family courts – in square contradiction to the shariʿa courts[68] – refused to consider court protective orders obtained by wives with their husband's consent as evidence of domestic abuse. The civil courts have also ascribed negative evidentiary value to a delay in filing a police complaint, and to the fact that no indictment resulting in a conviction had been filed.[69] In one case, the court held that a claim of marital violence should be doubted, since 'the wife, who is both educationally and behaviorally savvy, did not file a motion for a court protective order or a police complaint alleging violence, and this suffices to show that we are concerned with claims that are difficult to accept'.[70] The court

64 *M.M. (A Minor) v. Y.M.*, above n. 54; FC (Nazareth) 47674-06-14, *H.Y.S. v. M.Y.A.* (published on Nevo, 12 May 2015) (Isr.).

65 FC (Tel Aviv) 12810/06, *A.A.A.R. (A Minor) v. A.A.A.R.* (published on Nevo, 1 March 2009) (Isr.).

66 Ibid.; FC (Jerusalem) 10711/09, *A.T. v. S.T.* (published on Nevo, 11 January 2012) (Isr.). See also *M.A.N. v. A.A.N.*, above n. 62.

67 An example of such discrimination can be found in a case where a wife's departure from the marital household was caused by the mutual fault of both husband and wife, a state of affairs known in Jewish *halachic* law as a 'his and her preclusion'. In such cases, the family courts ruled – contrary to Jewish law, as well as Rabbinical Court case law – that a Jewish wife is nonetheless entitled to the award of maintenance payments. On the other hand, the same family courts ruled – contrary to shariʿa court case law – that a Muslim wife is not entitled to the award of maintenance. To the family court, a Muslim wife is only entitled to maintenance when the preclusion of joint residence is a 'his' preclusion; that is to say, is caused by the husband alone rather than being shared by both partners: FC (Krayot) 7161/05, *Plonit v. Almoni* (published on Nevo, 1 November 2016) (Isr.); FC (Nazareth) 2881/03, *Plonit v. Ploni* (published on Nevo, 29 May 2006) (Isr.). See also FC (Tiberias) 30980-02-13, *Plonit v. Ploni*, above n. 50, para. 20. But see also FC (Nazareth) 48375-12-11, *A.A. v. A.D.* (published on Nevo, 10 June 2012) (Isr.).

68 Appeal 30/2012, above n. 55; Case 213/2013, above n. 55; Case 104/2014, above n. 55; Case 372/2018, above n. 55; Case 56/2020 (published on the Shariʿa Courts Administration website, 14 May 2020) (Isr.).

69 See, e.g. *S.N. v. S.N*, above n. 49; *A.A.A.R. (A Minor) v. A.A.A.R.*, above n. 65, as well as the decisions mentioned below.

70 *N.H.H. v. S.H.*, above n. 63, para. 37.

reiterated its disbelief in claims of domestic violence in another decision, since the wife's 'testimony repeatedly noted her desire for matrimonial reconciliation, something which does not accord with her claims of violence and abuse … It is thus unclear how the wife expects this court to believe her.'[71]

The same is true with regard to a wife who claimed to have been physically and verbally abused during 14 years of marriage. The very claim of protracted violence was, in and of itself, a valid reason to suspect the woman's credibility: 'This court wonders and enquires how a battered and humiliated wife, [who] was also a rape victim, lived with a so-called violent and dangerous husband yet withstood [his conduct] for 14 years?'.[72] This judicial trend, which is oblivious to the severe under-reporting that is a hallmark of Arab-Palestinian women victims of domestic violence,[73] fails to make allowances for the cultural, social and economic impediments which lock many of them in abusive relationships, or hinder their approaching external State agents.[74]

A final illustration of judge-made Islamic law that is diametrically opposed to qadi-made Islamic law concerns the level and amount of maintenance. The family courts have released husbands from their support obligation where their wives worked for a living, and at times even in cases where the wives worked in the *un*paid labour market, and after offsetting their potential earning capacity against their maintenance.[75] In straying from established shariʿa court jurisprudence on the matter, the family courts relied on *halakhic* principles of Jewish law, and on liberal values of formal equality.[76] For the civil courts, wife maintenance belongs in 'the distant past', where a gendered division of labour reigned supreme in the family and society, and has no place 'today', since 'life has changed, and most women have joined the labor force and earn a respectable wage'.[77] In other words, the family courts adopted a false premise of imagined gender parity

71 *M.M. (A Minor) v. Y.M.*, above n. 54, para. 36.6.

72 See *S.N. v. S.N.*, above n. 49, para. 66.

73 S. Salim, 'Economic violence between spouses in the Arab Muslim sector in the State of Israel as reflected in the ruling of the Sharia court' (MA Thesis, University of Haifa, Faculty of Law, 2019), pp. 25, 28.

74 As Abu-Rabia-Queder and Weiner-Levy put it, '[an] Appeal to an external body is perceived as involving not only an alien cultural factor but also an entity in conflict with the nation, thus rendering such an appeal tantamount to treason.': see S. Abu-Rabia-Queder and N. Weiner-Levy, 'Between local and foreign structures: Exploring the agency of Palestinian women in Israel' (2013) 20(1) *Social Politics* 88, 97; A. Sa'ar, 'Contradictory location: assessing the position of Palestinian women citizens of Israel' (2007) 3(3) *Journal of Middle East Women's Studies* 45, 64.

75 See, e.g. FC (Tiberias) 30980-02-13, *Plonit v. Ploni*, above n. 50; FC 30459-03-16, *Plonit v. Ploni* (unpublished, 2 April 2020) (Isr.); FC 7161/05, *Plonit v. Almoni*, above n. 67; FC (Nazareth) 37345-12-15, *R.A. v. S.H.H.* (published on Nevo, 25 September 2018) (Isr.); see *S.N. v. S.N.*, above n. 49.

76 FC (Krayot) 7161/05, *Plonit v. Almoni*, above n. 67, para. 51.

77 See *S.N. v. S.N.*, above n. 49, para. 50 (emphasis ours). See also *R.A. v. S.H.H.*, above n. 75. See also FC 30459-03-16, *Plonit v. Ploni*, above n. 75.

which applies the rhetoric of equality to an avowedly unequal reality, and makes glib analogies between Muslim women, Muslim men and Jewish women. This judicial approach is oblivious to both inter-gender and intra-gender differences, and to the multiple marginalities of Muslim women along the axes of gender, class, religion and ethnonational status. Indeed, Muslim women are the most discriminated-against population in the Israeli labour force: they suffer from the highest unemployment rates, and from the lowest wages.[78]

The 'Israelisation' of the shariʿa, as mediated by the civil family courts, thus contributes to the patriarchalisation of Islamic law, to the feminisation of poverty, and to a gross gender injustice.

6. CONCLUSION

This chapter sought to shed light on 'Israeli shariʿa' – that is, on the impact of Israelisation processes on Islamic family law – taking place in two institutional venues: the shariʿa courts and the civil family courts. By investigating the aftermath of a momentous legislative reform that affected both these courts, the chapter strived to depict the paradoxical effect of these Israelisation processes. As illustrated above, the reactions of the two tribunals to the reform were diametrically opposed: whereas the qadis presiding in shariʿa courts invested concerted efforts in internal reforms designed to address the distinct vulnerability of Muslim women in a patriarchal Muslim-Palestinian society, the judges presiding in the civil family courts tended to apply Islamic substantive law in a conservative and patriarchal manner that, paradoxically, did not correspond either with the shariʿa or with liberal norms of gender justice.

The civil family courts appear always to opt for bad solutions: they apply conservative and traditional values in situations where a liberal and gender-sensitive interpretation would have been advisable, and they apply liberal values of formal equality in situations that call for a multicultural and intersectional feminist prism. The result is a judicial policy that is oblivious to the multiple marginalisations and intersectional vulnerability of Muslim women, located at the bottom of Israel's stratified social hierarchy.

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78 See the 2019 data from Israel's Central Bureau of Statistics, 'The Muslim Population in Israel – Data on the Occasion of Eid al-Adha (The Feast of the Sacrifice)', 28 July 2020 (in Hebrew), available at <https://www.cbs.gov.il/he/mediarelease/DocLib/2020/230/11_20_230b.pdf>, last accessed 22.05.2023. See also generally V. Kraus and Y.P. Yonay, *Facing Barriers: Palestinian Women in a Jewish-Dominated Labor Market*, Cambridge University Press, 2018. Indeed, beyond the commonplace wage gaps Palestinian women suffer by virtue of being women, they also suffer from an inbuilt inferiority caused by their ethnonational status, an inferiority which is reflected in their dismal pay data: their mean monthly pay is 45% lower, compared with their Jewish sisters: Knesset Research and Information Center, *Employment among Arab Women*, 2016 (in Hebrew).

How may we explain this paradoxical and Janus-faced appearance of the Israeli shariʿa? In the present authors' opinion, the answer resides, at least in part, in the domains of Orientalisation, expertise and motivation. The qāḍīs are – naturally – all Muslims with an excellent command of Islamic legal sources, so they obviously felt secure enough to introduce liberalising reforms in their rulings.[79] The civil judges, however, who are almost invariably non-Muslims with almost no knowledge whatsoever of Islamic law[80] – obviously did not feel authorised or capable to introduce innovation, and resorted, instead, to uninformed and prejudiced Orientalist stereotypes that prompted them to patriarchalise Islamic law. Moreover, the qāḍīs appear to be genuinely troubled about the possibility of Muslim litigants abandoning their communal tribunal, which is perceived as the final arbiter of the shariʿa, in favour of a non-Muslim tribunal. In order to prevent this danger from materialising, and considering that about 70 per cent of the cases adjudicated in the Israeli shariʿa courts are initiated by women,[81] the qāḍīs were prepared to go to great lengths in their introduction of pro-women reforms. In contrast, the civil judges lack any incentive to attract Muslim litigants, and assume upon themselves the unwieldy task of mastering and applying Islamic law. From their perspective, losing litigants to the shariʿa court would only mean a welcome relief in their workload.[82]

It remains to be seen whether these two modes of Israelisation will converge or remain bifurcated. If they converge, it would be intriguing to see the form a unified Israeli shariʿa might assume. Would it be modelled along the liberalised and feminised jurisprudence developed by the qadis in the shariʿa courts, or would it resemble the patriarchal and conservative shariʿa applied by the civil family courts? Only time will tell.

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79 Y. Reiter, 'Judge Reform: Facilitating Divorce by Shariʿa Courts in Israel' (2009) 11(1) *Journal of Islamic Law and Culture* 13, 30.

80 Y. Sezgin, 'Reforming Muslim family laws in non-Muslim democracies' in J. Cesari and J. Casanova (eds.), *Islam, Gender and Democracy in Comparative Perspective*, Oxford University Press, 2017, pp. 160, 166.

81 Shahar, *Legal Pluralism in the Holy City*, above n. 19, p. 79.

82 For a detailed discussion of the reasons behind the civil court jurisprudence, see Hleihel, Shahar and Yefet, 'Transforming Transformative Accommodation', above n. 23.