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An International Law Analysis

Sonia Boulos & Shirin Batshon

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Arab Center for Applied Social Research

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Introduction

Ecclesiastical courts in Israel enjoy full autonomy with respect to the judicial system put in place. This autonomy is rooted in Israel's adoption of a millet-like system, which can be traced back to Ottoman rule. This system granted churches autonomy over their institutions, including their courts. Unlike other courts that are regulated by State laws in all aspects of their functioning, Ecclesiastical courts are subordinate to the power of the church. Israel has not adopted any laws or procedures to regulate the functioning of Ecclesiastical courts. Instead, it opted for a non-intervention policy, even in procedural matters, out of politically motivated considerations, mainly to foster its relations with the Vatican as a State and as the leader of the Catholic world.

Ecclesiastical courts in Israel exercise jurisdiction over personal status matters, especially over marriage and divorce (in those cases where the church permits divorce in the first place), cementing, hence, the ties between social status and religious identity. Women's participation in these courts is effectively nonexistent and they have little say in decision-making. This exclusion deprives women of any role or contribution in family law matters, and ultimately deprives them from controlling their individual freedom. The laws that govern these courts date back to the distant past and require urgent amendments to adapt them to the social changes that have been taking place in modern times. Indeed, a new reality must be created to pave the way for the establishment of a modern system, one that is better equipped to meet the current needs of individuals and their families.

This research, published by the Gender Studies Program at Mada al-Carmel Center in Haifa, emerges out of our commitment to gender equality and fundamental human rights. It exhibits a deep knowledge of the legal and political practices that shape personal status affairs in Israel, as well as of the international standards on the protection of fundamental human rights such as access to justice and the right to a fair trial.

The research discusses the work of Ecclesiastical courts in Israel despite the sensitivity of the issue, which has been considered a taboo for a long time. These courts have long hidden behind a sacred aura, anointing themselves as the sole institutions capable of and authorized to deal with personal status matters.

Furthermore, the research addresses the absence of some minimal due process guarantees in these courts, the absence of proper working conditions for their judges, and the limitation imposed on litigants in challenging the decisions issued by these courts. This complicates the engagement of the lawyers and litigants with this court system, and paves the way for side deals enveloped by a veneer of legality.

This research relied on a thorough understanding of the atmosphere that dominates these courts by conducting interviews with lawyers and other officers who deal with these courts. The details and information that emerged out of these interviews accentuate the importance of adopting many reforms and amendments both on the substantive and procedural levels. Such reforms and amendments would allow for the creation of a more just and fair system, and for the creation of a legal infrastructure that reflects modern standards to serve best the needs and rights of society at large, and more specifically women. Women remain the most vulnerable group in

this patriarchal structure, unless an alternative to religious marriages and religious divorces is implemented.

The main purpose of this conceptual and field research, according to our vision, is not merely to list the problems of the Ecclesiastical courts, despite being a central aspect of the study. Rather, the research mainly seeks to provide an open and safe space for public dialogue and discussion of a judicial institution that has long been clouded by ambiguity.

Mada al-Carmel approaches applied studies like this one with the utmost importance and seriousness. The sheer effort invested in preparing such studies exemplifies the awareness of their authors to the importance of promoting social change and modernizing ideas that can contribute towards progress in relation to the issue studied or analyzed.

Mada al-Carmel is deeply indebted to Dr. Sonia Boulos and attorney Shirin Batshon for this balanced and comprehensive research, published by the Gender Studies Program. We hope that this study will promote a serious dialogue with the concerned parties, with the goal of pushing the Ecclesiastical courts to adopt a process of reform and modernization which will ultimately serve the whole society.

Dr. Johnny Mansour

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(1)
Preface

Family law regime in Israel, also known as personal status law, originates from the Ottoman *Millet system*. Under the Ottoman rule of Palestine, non-Muslim religious communities were guaranteed varying degrees of autonomy. For example, the Greek Orthodox community was autonomous, but regulated by the State, whereas the Roman Catholic community had full autonomy regarding its own internal organization.[1] These religious communities were allowed to establish their own autonomous courts and were granted jurisdiction over family law matters concerning their own members, through the application of their respective religious laws. However, the Palestinian Muslim majority was placed under the jurisdiction of *shari'a* courts that were considered official State courts.[2] This millet system reflected the view that non-Muslims are mere subjects of the empire, and not its citizens. In 1917, the Ottoman authorities introduced Ottoman Law of Family Rights of 1917 (hereinafter OLFR) as part of a broader reform to modernize the Ottoman legal system and to adapt it to the spirit of the time.[3] Among the radical

1. Abou Ramadan, Moussa. (2015). Islamic legal hybridity and patriarchal liberalism in the shari'a courts in Israel. **Journal of Levantine Studies**, 4 (2). Pp. 39-67.

2. Ibid.
- Shahar, Ido. (2012). Legal pluralism incarnate: An institutional perspective on courts of law in colonial and postcolonial settings. **The Journal of Legal Pluralism and Unofficial Law**, 44 (65). Pp. 133-163.

3. Shahar, Ido. (2019). Islamic law as indigenous law: Shari'a courts in Israel from a post-colonial perspective. In Oberauer, Norbert; Prief, Yvonne, & Qubaja, Ulrike (Eds.). **Legal pluralism in Muslim contexts** (pp. 84-108). Leiden; Boston: Brill.

changes embodied in the OLFR was the attempt to turn it into a universal family law that would apply to all the subjects of the empire, regardless of their religious affiliation. In a way, the promulgation of the OLFR symbolized a first step towards the dissolution of the millet system.[4] Out of 157 articles, 30 articles of the OLFR were dedicated to Christians and Jews. General provisions that were not specifically designated to a particular religious community applied to all.[5] The OLFR was not introduced in Palestine during the Ottoman rule, it was introduced later in 1919 under the British Mandate in Palestine. However, the British authorities decided to implement the OLFR partially, by stripping it from its universal approach and applying it only to Muslims.[6] Additionally, Muslim *shari'a* courts lost their status as official State courts and became one more sectarian and autonomous religious court system, consolidating, hence, the millet-like system in Mandatory Palestine.[7] This arrangement was further maintained by the State of Israel, which granted official recognition to additional religious communities.

Even today, religious courts in Israel (Rabbinical, *Shari'a*, Druze and Ecclesiastical) still enjoy exclusive jurisdiction over marriage and divorce; in other family law matters, such as alimony, child custody, and inheritance, religious courts enjoy concurrent jurisdiction. Alongside religious courts, Israel established a civil system of family courts with parallel jurisdiction over family law (except for marriage and divorce). Both religious courts and civil family courts must apply religious laws of the parties to the dispute, except for a few civil

4. Ibid.
5. Ibid.
6. Shahar, Ido. (2012). Ibid.
7. Ibid.

laws, such as the Spouses Property Relations Law of 1973, the Legal Capacity & Guardianship Law of 1962 and the Marriage Age Act of 1950, that must be applied by civil and religious courts alike.[8]

The imposition of a religion-based family law violates freedom of conscience, which constitutes a basic human right. In its current form in Israel, it also constitutes a serious violation of women's rights to equality, since religious institutions in Israel are inherently patriarchal. This regime grants all religious communities in Israel "a carte blanche" license to subordinate vulnerable group members, who are subjected to intra-group controls by their own group traditions under the auspices of Israel's accommodationist policies.[9] Religious personal status laws are often based on antiquated social concepts and religious interpretations that perpetuate the cultural bias against women and their subordination to men.[10] For example, in Orthodox Jewish law, only the husband is entitled to divorce his wife. The wife cannot divorce her husband without his consent; if he refuses, she might spend the rest of her life married to him against her will.[11] As for the OLFR of 1917, unlike neighboring Muslim countries where new family laws were adopted, the OLFR is still applicable to *Shari'a* courts in Israel in its original form. This law embodies a

8. Blecher-Prigat, Ayelet, & Shmueli, Benjamin. (2009). The interplay between Tort law and religious Family law: The Israeli case. **Arizona Journal of International and Comparative Law**, 26(2)**.** Pp. 279-302.

9. Shachar, Ayelet. (1998). Group identity and women's rights in family law: The perils of multicultural accommodation. **Journal of Political Philosophy**, 6(3). Pp. 285-305.

10. Hawari, Areen. (2018). Women and the struggle for change in personal status: The case of Palestinian women inside Israel. In Hawari, Areen; Shehadeh, Nahida, & Alemy, Nisreen (Eds.). **Women's Rights and Personal Status: Strategies of the Palestinian Feminist Struggle in Israel** (pp. 13-107). Nazareth: Work Committee for Equality in Personal Status Cases. [In Arabic].

11. Stopler, Gila. (2003). The free exercise of discrimination: Religious liberty, civic community and women's equality. **Wm. & Mary J. Women & L.**, 10 (3). Pp. 459-532.

patriarchal construction of rights and duties in the family. Men are constructed as superior to women, as the heads of the family, and as providers and protectors of women.[12] For example, according to Article 73 of the OLFR, the wife is under the obligation to obey her husband. The Byzantine Family Law applicable to the Palestinian Greek-Orthodox community in Israel was adopted in 1353 and last amended in the nineteenth century.[13] Its Article 125 states that the husband is the head of the family, and according to Art. 251, insults, mistreatment, and extreme forms of violence (such as flogging with a whip) do not constitute grounds for divorce. Although Greek-Orthodox courts are trying to expand the grounds for divorce by introducing new doctrines (such as the couple having antagonistic characters), the fact remains that the tolerance of severe physical violence against women is part of the applicable law. Divorce is not even an option for Catholic women, as they can only seek separation from the husband, or ask for the annulment of the marriage under very limited circumstances. Alternatively, they convert to Greek-Orthodox Christianity to seek a divorce but only if the husband agrees to do the same. According to a position paper published in 2012, 40% of divorce cases in the Greek-Orthodox courts involved converts.[14]

As a result, Palestinian-Christian women citizens of Israel are trapped in a vicious intersection of multiple overlapping marginalities and

12. Rouhana, Hoda. (2006). Muslim family laws in Israel: The role of the state and the citizenship of Palestinian women. **Women Living Under Muslim Laws**, 27. Pp. 37-49.

13. Karayanni, Michael. (2020). **A multicultural entrapment: religion and state among the Palestinian-Arabs in Israel**. Cambridge University Press.

14. Batshon, Shirin. (2012). **Ecclesiastical courts in Israel: A gender-responsive analysis**. Haifa: Kayan Feminist Organization.

have to pay a very high price under this no-exit regime.[15] Additionally, the current family law regime denies certain individuals the right to get married, such as the case of mixed couples or members of the LGBTQI community.[16]

Family law serves two basic functions: it demarcates membership boundaries of a group by deciding who is an insider and who is an outsider by virtue of birth and marriage; it also plays a distributive function by distributing rights, duties and power between men and women.[17] These functions cannot be analyzed outside of their historical context. Mir-Hosseini points out that the encounter of colonized peoples, especially in the Muslim world, with modernity "coincided with their painful and humiliating encounter with Western colonial powers, in which both women and family law became symbols of cultural authenticity and carriers of religious tradition, the battleground between the forces of traditionalism and modernity".[18] Espin argues groups going through upheavals because their identity or survival are at risk, view gender roles of women as the main vehicle for preserving their traditions. Women's roles become the bastion of tradition and their bodies become "the site for struggle concerning disorienting cultural differences".[19] The

15. Yefet, Karin, & Shahar, Ido. (2021). Divorced from citizenship: Palestinian-Christian women between the church and the Jewish state. **Law & Social Inquiry**. Pp. 1-41.

16. Hacker, Daphna. (2012). Religious tribunals in democratic states: Lessons from the Israeli rabbinical courts. **Journal of Law and Religion**, 27(1). Pp. 59-81.
- Batshon, Shirin. (2015). Civil marriage and the Palestinian minority in Israel. **Identities**, 6. [In Hebrew]

17. Shachar, Ayelet. (1998). Ibid.

18. Mir-Hosseini, Ziba. (2009). Towards gender equality: Muslim family laws and the Shari'ah. In Anwar, Zainah (Ed.). **Wanted: Equality and justice in the Muslim family** (pp.23-63). Malaysia: Musawah.

19. Espin, Oliva. (2013). **Women crossing boundaries: A psychology of immigration and transformations of sexuality**. New York: Routledge. P. 7.

Establishment of the State of Israel in 1948 and the *Nakba* had a profound impact on the sense of identity and security of Palestinians in all their locations. With the sudden collapse of all social structure, "dislocation became the norm, and social relations and structures lost their supportive or justifying elements".[20] Palestinian leadership, as well as the professional and middle classes were denied the right to return to the newly established State, leaving behind a disoriented community that became a minority in its own homeland.[21] The loss of land and the systemic dispossession of Palestinians had its toll on the status and power of Palestinian women in the family, as the loss of land and political power was compensated with efforts to preserve whatever had remained from social structures that existed before. This has resulted in the consolidation of patriarchal attitudes and tightening the grip over women's lives.[22]

Even today, Palestinian women still pay a high price for their communities' attempts to preserve internal structures of power that are reproduced through the demarcation and distributive functions of family law. For example, women choosing to marry outside their religious or ethnic communities are subjected to social sanctions, including rejection, anger, and in some cases, the breaking of all contact with their families.[23] Women are also denied of their financial rights for showing "disobedience". According to religious norms applicable to most Palestinian religious communities in Israel, the

20. Nassar, Ibrahim. (2008). Women between the dynamics of oppression and resistance. **Alternatives International**.

21. Rouhana, Hoda. (2006). Ibid.

22. Abdo-Zubi, Nahla. (1987). **Family, women and social change in the Middle East: The Palestinian case**. Toronto: Canadian Scholars Press.

23. Karkabi-Sabbah, Maha. (2017). Ethnoreligious mixed marriages among Palestinian women and Jewish men in Israel: negotiating the breaking of barriers. **Journal of Israeli History**, 36(2). Pp. 189-211.

husband is entitled to submit a petition to force his estranged wife to obey him and to return to the family residence. If the court decides to accept the petition, it cannot force the wife to return against her will, but it can deny her the right to receive alimony.[24] In 2018, the *Sharía* court issued a stay of exit order banning a woman from travelling abroad without her husband's permission, stirring up a heated controversy that was met with public outcry from feminist and human rights organizations [25].

Women are also denied the right to interpret and apply the law.[26] Rabbinical and Ecclesiastical courts remain an exclusive domain for male judges. Only in 2017, a woman was appointed to serve as a judge in the *Shari'a* court system for the first time in the history of religious courts in Israel.[27] Women's Equal Rights Act of 1951, which annuls any legal provision that discriminates against women, states that it does not "affect any legal prohibition or permission relating to marriage or divorce", nor does it apply on the appointment of women to judicial position in religious courts.[28] Furthermore, the State of Israel lacks a written constitution. The Basic Law: Human Dignity and Liberty of 1992 (hereinafter The Basic Law), which is considered a mini bill of rights in Israel,[29] does not include the right to equality. The Supreme Court has ruled that the aspects of

24. Kayan Feminist Organization. (2010). Marital obedience in sharia courts. **Position Paper No. 2**. Haifa [In Arabic].

25. Shasha. (2018 June 30). The working group for equality: Shocked by the decision of shari'a judge Hashem Sawaed to prevent a woman from traveling outside the country unless accompanied by her husband. [In Arabic].

26. Raday, Frances. (1994). On equality. **Law** ("Mishpatim"), 24. Pp. 241-281. [In Hebrew].

27. Lidman, Melanie. (2017, May 15). Israel appoints first female judge to Sharia court. **The Times of Israel**. [In Hebrew].

28. Women's Equal Rights Act of 1951, articles 5 and 7 ©.

29. United Mizrahi Bank Ltd. v. Migdal Cooperative Village, C.A. 6821/93, 49(4) PD 221.

equality that are intimately related to human dignity are protected by the Basic Law.[30] Still, the Basic Law has no effect on the validity of any law in force prior to its enactment and as a result, patriarchal religion-based family law remains intact and beyond the reach of a democratic review.[31]

The rulings of all religious courts in Israel can be reviewed by Israel's High Court of Justice (hereinafter HCJ) but on narrowly-defined grounds, such as cases of *ultra-vires* (acting beyond one's legal power or authority), violation of the principles of natural justice, or when equity relief is required and the matter does not fall under the jurisdiction of a specific court[32]. According to Karayanni, the HCJ adopted a more active interventionist approach in cases concerning Rabbinical courts, while pursuing a non-interventionist approach in relation to religious courts pertaining to Palestinian religious communities. This, in turn, buttressed the domination of this illiberal regime over the lives of Palestinian women and men.[33] Even when the Israeli authorities intervene, as Mousa Abu Ramadan points out, "the import and introduction of egalitarian norms to a legal system with a patriarchal character, without eliminating all the patriarchal trappings, increases the distortions".[34]

Karayyani exposes the double standards that exist in the official and academic debates on the family law regime in Israel. When it comes to the Jewish majority, this regime is portrayed as inherently

30. Adalah v. The Minister of Interior, HCJ 7052/03 (2006).

31. Raday, Frances. (1994). Ibid.

32. Articles 15(c) and 15(d)(4) of the Basic Judiciary Law.
- Masudi Biares v. Regional Rabbinical Court of Haifa, HCJ 7/83 (1984).
- Muassi v. Sharia Appeals Court, HCJ 11230/05 (2007).

33. Karayanni, Michael. (2020). Ibid.

34. Ibid, p. 43.

illiberal and coercive, and warrants intervention in religious Jewish intuitions, including Rabbinical courts. But when it comes to Palestinian religious communities, it is portrayed as a 'multicultural' arrangement worthy of preservation. Karayyani further argues that this regime serves as a barrier for changing illiberal and discriminatory practices within the Palestinian accommodated groups, highlighting that "vulnerable individual members among the Palestinian-Arab community end up being imprisoned in their religious identity with limited ability to maneuver in and around it."[35]

Israel has relentlessly marketed its family law regime as a multicultural endeavor.[36] Even scholars who attempted to expose the patriarchal nature of this regime, did not contest labeling it as a multicultural arrangement. Karayanni argues that the continuous labeling of this regime as a multicultural endeavor is false and disingenuous, and it masquerades its true nature and objectives. First, this family law regime serves a tool of control.This control is achieved by fragmenting the Palestinian minority in Israel into religious communities hindering, hence, the formation of a Palestinian national identity. By pursuing the fragmentation of Palestinian citizens into religious groups, Israel lowers the costs of controlling them. Additionally, this regime also aims at preserving the Jewish identity of the State through the promotion of endogamy.[37] Therefore, Karayanni labels this regime as "control

35. Ibid, p. XV.

36. See, for example, Rubinstein, Amnon. (2007). The decline, but not demise, of multiculturalism. **Israel Law Review,** 40(3). Pp. 763-810.
- Krishnan, Jayanth K., & Galanter, Marc. (2000). Personal law and human rights in India and Israel. **Israel Law Review**, 34(1). Pp. 101-133.

37. Ibid.

by accommodation".[38] Sezgin argues that the millet-like system was utilized by Israel as an instrument of exclusion and differentiation. The differentiation of non-Jewish identities was essential for achieving two goals. First, it aimed at ensuring the homogeneity of the Israeli-Jewish identity. As Sezgin puts it "Israeli leaders had a genuine interest in who got married to whom, more than in who observed Shabbat or kept *kosher*".[39] Second, it was perceived as a valuable tool to fragment the native population of Palestine along sectarian lines for establishment of an effective regime of domination.[40]

While most academic research on religious courts pertaining to Palestinian religious communities in Israel has focus on substantive issues, such as gender equality,[41] adoption,[42] custody[43] and polygamy,[44] less research exists on the procedural aspects of litigations in religious courts, and on their impact on the right to a fair trial. Among the few academic studies addressing some procedural issues relevant to

38. Karayanni, Michael. (2020). Ibid, p. 161.

39. Sezgin, Yüksel. (2010). The Israeli Millet system: Examining legal pluralism through lenses of nation-building and human rights. **Israel Law Review**, 43 (3). Pp. 631-654, 638 & 642.

40. Ibid, p. 642.

41. Yazbak, Heba, & Kozma, Liat. (2017). **Personal status and gender: Palestinian women in Israel**. Pardes Publishing. [In Hebrew];
- Batshon, Shirin. (2016-2017). The HCJ decision on women arbitrators and judicial review of religious courts: A glance at the future. **The Family in Law,** 8.

42. Karayanni, Michael. M. (2010). In the best interests of the group: Religious matching under Israeli Adoption law. **Berkeley Journal of Middle Eastern & Islamic Law**, 3. Pp. 1-80.

43. Ramadan, Moussa. A. (2002). The transition from tradition to reform: The Shari'a appeals court rulings on child custody (1992-2001). **Fordham Int'l LJ**, 26(3). P. 595-655.

44. Boulos, Sonia. (2021). National interests versus women's rights: The case of polygamy among the Bedouin community in Israel. **Women & Criminal Justice**, 31(1). Pp. 53-76.
- Abu Rabia, Rawia. (2011). Redefining polygamy among the Palestinian Bedouins in Israel: Colonialism, patriarchy, and resistance. **American University Journal of Gender, Social Policy & the Law**, 19(2). Pp. 459-493.

Ecclesiastical court in Israel is a study by Shahar and Yefet. Their study examines the functioning of Ecclesiastical courts through the prism of the concept "*Kadijustiz*". This concept was popularized by Weber to describe irrational legal systems, characterized by arbitrariness and unpredictability, with Islamic law being viewed as a prototype of such systems. While the authors admit that the term "*Kadijustiz*" reeks with orientalism and deep misconceptions about Islamic law, they still use it as a valid analytical tool while replacing it with the neutral term "*richterjustiz*" (judge-justice). Shahar and Yefet argue that Ecclesiastical courts in Israel could be classified as a "*richterjustiz*" due to the unprecedented discretion given to judges, lack of uniformity, unpredictability, and favoritism.[45]

The right to access court and the right to a fair trial constitute central tenets of international human rights law. The aim of this research is to fill the gap that exists in the literature on Ecclesiastical courts focusing on procedural matters from an **International Law perspective**.

The research attempts to open the way for new research that focuses on less explored aspects of the functioning of religious courts in Israel. We believe that the focus on the right to a fair trial exposes another dimension of the disfranchisement of Palestinian citizens in Israel, and it suggests that imposition of this illiberal family law regime on them resonates with the *millet* system's perception of minorities as mere subjects.

This initial report on the outcomes of the research project is structured as follows: The first part surveys the laws that regulate the work of

45.Yefet, Karin, & Shahar, Ido. (2021). Ibid.

Ecclesiastical courts in Israel; the second part surveys international human rights standards on the right to a fair trial and the right to access courts; and the third part presents the methodology of this research and its findings. Beyond analyzing the compatibility of the *praxis* of Ecclesiastical court with international human rights standards on the right to access courts and the right to due process, this report attempts to incorporate an "implementation-oriented" approach to help these courts rectify some of the deficiencies that exist.

(2)

The operation of Ecclesiastical courts under the Israeli legal system

In Israel, personal status issues are governed, primarily, by the religious laws of the different religious communities recognized by the State. Each religious community operates its own religious courts that exercise exclusive jurisdiction over marriage and divorce cases of their members.[46] Israel has recognized 14 religious communities, each operates its own religious courts and has authority to regulate personal status issues: Rabbinical courts for Jewish citizens,[47] *Shari'a* courts for Muslims[48], Druze courts for Druze[49] and Ecclesiastical courts[50] serving 10 different Christian denominations, officially recognized by the State.[51]

In 1971, the Bahai community was added to the list of recognized

46. Article 51 and the second addition of the Kings Order concerning Palestine 1922-1947 (hereinafter: the Order). [In Hebrew]

47. Article 53 of the Order and Rabbinical Courts (Marriage and Divorce) Judgment Law 1953.

48. Article 52 of the Order. [In Hebrew]

49. Druze Religious Courts Law, 1963. [In Hebrew]

50. Article 54 of the Order. [In Hebrew]

51. The Eastern Community (Orthodox), The Latin Community (Catholic), The Gregorian-Armenian Community, The Armenian Community (Catholic), The Syrian Community (Catholic), The Chaldean Uniate Community, The Greek-Catholic Melkite Community, The Maronite Community, The Syrian Orthodox Community and The Evangelical Episcopalian Community.
- Order of a Religious Community (The Episcopal Evangelical Church in Israel), 1970. [In Hebrew]

communities.[52] According to official statistics, approximately 182,000 Christians live in Israel today, and they constitute 1.9% of the country's population. Most of them belong to the Palestinian community in Israel (about 76%) and most of them live in the Northern and Haifa districts (70.3% and 13.5%, respectively). The cities with the largest Palestinian Christian populations in Israel are Nazareth (21.4 thousand), Haifa (16.5 thousand), and Shefa'Amr (10.4 thousand).[53]

The Palestine Order in Council 1922 (hereinafter the Order) is the legal text that regulates the jurisdiction of religious courts in Israel. The latter are granted enforcement powers, equivalent to those granted to civil courts, including the authority to subpoena witnesses, hold or seize property and issue a travel ban.[54] In addition, all religious courts are granted the authority to issue protection orders in domestic violence cases in accordance with the Domestic Violence Prevention Law of 1991.[55]

Alongside religious family courts, in 1995, Israel established civil Family Courts with parallel jurisdiction over family law disputes.[56] However, marriage and divorce remain under the **exclusive** jurisdiction of religious courts. Civil family courts can only hear cases involving other family disputes, such as alimony and child support, custody, and division of property. In Rabbinical and *Shari'a* courts, the rule that governs which court will have jurisdiction in

52. Order of a religious community (Bahai Faith), 1971. [In Hebrew]

53. CBS. (2021). **Christmas 2021 - Christians in Israel**. Media Release 432.

54. Religious Courts Law (Enforcement of Obedience and Procedures) 1956, and Religious Courts (Prevention of Disruption) Law, 1965. [In Hebrew]

55. Domestic Violence Prevention Law, 1991. [In Hebrew]

56. Family Court Law, 1995. [In Hebrew]

those matters, is the race to the courthouse rule. According to this rule, the court that receives the case first in time will be the one entitled to settle the dispute.[57] In the case of Ecclesiastical courts, as will be explained later, this race is less relevant since it applies only to alimony disputes. Alimony cases are usually initiated by women, so they are the ones who end up choosing the forum. As for other family disputes, Ecclesiastical courts cannot exercise jurisdiction over them without the consent of both parties.[58]

Moreover, even civil family courts must apply the religious law of the parties to the dispute, such in the case of alimony and child support.[59] However, there are few civil laws that must be applied by civil and religious courts alike. Those include Spouses Property Relations Law of 1973, the Legal Capacity & Guardianship Law of 1962, the Marriage Age Act of 1950, and Women's Equal Rights Act of 1951, which as stated earlier does not apply to marriage and divorce. Additionally, Israel criminalized polygamy and unilateral divorce, even when they are allowed by the religious laws of the parties involved.[60] Paradoxically, the criminalization of these practices does not affect their legal validity, it only entails the possibility of imposing sanctions on the perpetrators.[61]

57. Zafran, Ruth. (2013). The 'Jurisdiction Race' is alive and kicking—Rabbinical courts gain power over civil family court. **Law** ("Mishpatim"), 43. Pp. 571-630. [In Hebrew]
- Felman V. Felman, HCJ 8497/2000 (2003). [In Hebrew]

58. Article 54 of the Order. [In Hebrew]

59. Article 47 of the Order, & Article 3 of Family Law Amendment (Alimony), 1959. [In Hebrew]

60. Articles 176 & 181 of the Criminal Law of 1977. [In Hebrew]

61. Boulos, Sonia. (2021). Ibid.

As mentioned earlier, the rulings and decisions of all religious courts can be subjected to a legal review by Israel's HCJ on narrowly defined grounds.[62]

The authorities of the Ecclesiastical Courts in Israel are vested in Article 54 of the Order, which states that the Ecclesiastical Courts of the recognized Christian communities shall have exclusive jurisdiction in matters of marriage, divorce, and alimony. In any other matters of personal status, courts can exercise jurisdiction only when all the parties to the dispute consent to it.[63] In 2001, the Knesset passed an amendment to the Family Court Law 1995 (hereinafter the Amendment), which resulted in limiting the exclusive jurisdiction of *Shari'a* and Ecclesiastical courts to marriage and divorce. As a result, other family law disputes that had previously been under the exclusive jurisdiction of *Shari'a* and Ecclesiastical courts fell under the jurisdiction of both legal systems. Prior to the Amendment, only Jewish litigants could potentially escape the authority of religious courts by turning to the family courts system based on the race to the court rule. This legal option was not available for Muslim litigants in all family law issues, and to Christian women in the case alimony. The Amendment was the fruit of the continuous advocacy work of the Working Group for Equality in Personal Status Issues, a coalition of human rights and feminist civil society organizations, that struggled

62. Articles 15(c) and 15(d)(4) of the Basic Judiciary Law. [In Hebrew]
- HCJ 7/83. Ibid.
- HCJ 11230/05. Ibid.

63. Article 54 of the Order. [In Hebrew]

for many years to pass the amendment.[64] The Amendment aimed at improving the status of Palestinian women by securing their right to choose, ending, hence, the monopoly of religious courts in family law matters (except for marriage and divorce), especially given the possible systematic violation of the principle of gender equality by religious institutions.[65]

Unlike all other religious courts in Israel that are subject to various degrees of State supervision and regulation, Ecclesiastical courts enjoy absolute autonomy in appointing their judges and in regulating the courts' procedural norms, fees, and budgets. As mentioned earlier, their rulings can be subjected to a legal review by the HCJ on very limited grounds. The Rabbinical, *Shari'a* and Druze Courts are funded by the Ministry of Justice, their judges receive judicial salaries from the State and their procedural laws are regulated by the State. Such laws include the Regulations of the *Shari'a* Courts (Fees) of 1968[66] and the Druze Religious Courts (Fees) Regulations of 1973,[67] and the Judges' Regulations (Fees) of 1957[68] applicable to Rabbinical courts. The above-mentioned laws harmonize the fees for opening a procedure in the different religious courts. Such fees do not exceed the amount of a few hundred shekels per case. These laws also allow fees' refund and exemptions for litigants with limited

64. Al-Tufula: Pedagogical and Multipurpose Women's Center, Al-Zahraa: The Organization for the Advancement of Women, Association for Civil Rights in Israel (ACRI), Assiwar-The feminist Arab Movement, Aswat—Palestinian Gay Women, AWC—Arab Women in the Center, Kayan: A Feminist Organization, Ma'an—The Forum of Arab Women's Organizations in the Negev, Muntada Algensanya—The Arab Forum for Sexuality, Education and Health, Sidreh—Lakiya, Women Against Violence (WAV).

65. Karayanni, Michael. (2020). Ibid. Pp. 248-249.

66. Regulations of the Sharia Courts (Fees), 1968. [In Hebrew]

67. Druze Religious Courts (Fees) Regulations, 1973. [In Hebrew]

68. The Judges' Regulations (Fees), 1957. [In Hebrew]

economic resources. In comparison, there are no State laws regulating the setting of fees in the different Ecclesiastical Courts. As a result, each denominational court sets its own fees, that could differ even between first instance courts pertaining to the same denomination.[69]

In addition, Ecclesiastical Courts in Israel also enjoy full independence in appointing the judges that serve in their courts and in setting the conditions of their work. The State does not regulate, interfere, or supervise their appointment in any way.[70]

At the same time, there are different laws that regulate the appointment of the judges of all other religious courts. For example, according to the *Dayanim* Law,[71] the judges of the Rabbinical Courts are appointed by the President based on a recommendation of a committee that selects judges. The Committee has 13 members, including representatives from the Rabbinical Courts, the Minister of Justice, the Minister of Religious Affairs, Members of the Knesset, Members of the Cabinet and attorneys elected by the National Council of the Bar Association. Similarly, the *Qadis* Law[72] and the Druze Religious Courts Law[73] regulate the appointment of *Qadis* in *Shari'a* and Druze Courts. Both laws have similar provisions that mandate the creation of a committee that recommends new appointments, which are subsequently sent by the Minister of Justice to the president. The selection committees usually include representatives from the court, the Knesset, the Minister of Justice, representatives from the Israeli Bar Association and more.[74]

69. Batshon. (2012). Ibid.
70. Karayanni, Michael. (2020). Ibid.
71. Dayanim Law, 1955. [In Hebrew]
72. The Qadis Law, 1961. [In Hebrew]
73. Druze Religious Courts Law, 1962. [In Hebrew]
74. Ibid.

In the case of Ecclesiastical Courts, the only limited supervision over judges is exercised by the Ombudsman for Public Complaints against Judges. The Ombudsman is authorized by the Ombudsman of Public Complaints against Judges Act, 2002 to investigate complaints about the conduct of judges in the performance of their duties. The Ombudsman's authority extends to all judges, including those serving in religious courts. If a complaint against a judge is found to be justified, it gets reported in the Comptroller's official annual report.

Two bilateral agreements were signed by the Holy See and the State of Israel to protect the autonomy of Catholic institutions in general: The fundamental agreement signed in 1993 (hereinafter the fundamental agreement) and the Legal Personality agreement signed in 1997 (hereinafter the legal agreement). According to the fundamental agreement, the State of Israel recognizes "the right of the Catholic Church to carry out its religious, moral, educational and charitable functions, and to have its own institutions, and to train, appoint and deploy its own personnel in the said institutions or for the said functions to these ends"[75]. In addition, art 6(2) of the legal agreement ensures that Canon law will be applied for the appointment of clerks and officers.[76] An exemplification of this autonomy could be found in the case of *Muna Jabareen v. the Ministry of Education*, where the HCJ was asked to quash a decision of a private Catholic school not to allow a Muslim student to attend school while wearing a headscarf. The HCJ decided not to interfere stating that the school

75. Articles 3(2) and 4 of the Fundamental Agreement between The Holy See and The State of Israel, 1993. [In Hebrew]

76. Agreement between the State of Israel and the Holy See pursuant to Article 3 § 3 of the Fundamental Agreement between the State of Israel and the Holy See (also referred to as THE "LEGAL PERSONALITY AGREEMENT"), 1997. [In Hebrew]

enjoys independence as a private educational institution, and that banning students from wearing a headscarf is part of the private school's prerogative.[77]

The Greek-Orthodox courts apply the Byzantine Family Law in deciding personal status cases. Ecclesiastical courts pertaining to the Holy See rely on Canon Law in their judicial functioning. The Latin courts are governed by the 1983 Code of Canon Law (1983 Canon Law)[78], and the Melkite and Maronite courts are governed by Code of Canons for Oriental Churches (Oriental Canon Law).[79]

77. Muna Jabareen V. The Minister of Education, HCJ 4298/93 (1994). [In Hebrew]
78. The Holy See, (1983). The Code of Canon Law.
79. The Holy See, (1990). The Code of Canons for Oriental Churches.

(3)

International Standards on the Right to Access Justice and the Right to due Process:

The right to access courts and the right to a fair trial are two central and basic universal human rights. Both rights play a pivotal role in protecting human rights in general and in protecting the rule of law.[80] The right to a fair trial and to a due process could be defined, broadly, as the right of every person to "*a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other measure*".[81]

Article 14 of the International Covenant on Civil and Political Rights (ICCPR)[82] stipulates that *"[i]n the determination of […] his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law*." While the right to a fair trial emerged in the realm of criminal justice, today it applies to civil litigations as

80. CCPR. (2007). **General comment No. 32. Article 14: Right to equality before courts and tribunals and to a fair trial**. UN Doc. CCPR/C/GC/32.

81. The case of Genie-Lacayo v. Nicaragua, Judgment of January 29, Inter-American Court of Human Rights, para. 74, (1997).

82. UN General Assembly. (1966). International covenant on civil and political rights. **United Nations Treaty Series**, 999. P. 171.

well. In interpreting the term 'suit in law', that appears in Article 14 of the ICCPR, the Human Rights Committee (HRC), which monitors the implementation of the ICCPR by member States, clarified that it covers judicial procedures aimed at determining rights and obligations pertaining to the area of private law, including family law disputes.[83] The guarantees contained in Article 14 must be respected by States regardless of their legal traditions.[84] The HRC has emphasized that if the State recognizes religious courts and entrusts them with judicial tasks, these courts must meet the basic requirements of a fair trial and other relevant guarantees of the Covenant.[85]

3.1. The right to equal access to courts

The right to access courts is guaranteed in Article 3(2) of the ICCPR. This article requires States to ensure that any person whose rights or freedoms are violated can access an effective remedy, including through competent judicial authorities. The right to access courts is intimately tied to the right to equality before courts.

Article 14 of the ICCPR stipulates that all persons must be equal before the courts. According to the HRC, the right to equality before the courts applies "*whenever domestic law entrusts a judicial body with a judicial task*".[86] Equality before courts encompasses the right to equal access to courts and equality of arms, i.e., the duty to treat the parties to the proceedings equally without discrimination of any kind.[87] In the context of civil proceedings, this duty requires that each side be given the opportunity to contest all the arguments and

83. CCPR. (2007). Ibid. Para. 16.
84. Ibid.
85. Ibid. Para. 24.
86. CCPR. (2007). Ibid. Para. 7.
87. Ibid. Para. 8.

evidence adduced by the other party.[88] To be able to do so, each party has the right to be represented by a lawyer, whose work is not hindered by the court. As highlighted by the HRC "*[t]he availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.*"[89] The HRC has called upon States to provide legal aid for those who have insufficient means, even in civil proceedings.[90]

The term 'access' includes economic access to courts. Therefore, the imposition of fees that would *de facto* prevent access to justice could amount to a violation of Article 14.[91]

The right to access justice on an equal basis also requires removing barriers to women's participation as professionals in all bodies and levels of judicial and quasi-judicial systems. Article 7 of the Convention on the Elimination of all Form of Discrimination against Women (CEDAW) requires State parties to take all appropriate measures to eliminate discrimination against women in the political and public life, and to guarantee the equal right of women to hold public office and perform all public functions at all levels of government.[92] Likewise, Article 25 of the ICCPR recognizes the right of every citizen to have access, on general terms of equality, to public service in his or her country.

88. Ibid.

89. Ibid. Para. 10.

90. Ibid.

91. Ibid. Para. 11.

92. UN General Assembly. (1979). Convention on the elimination of all forms of discrimination against women. **United Nations Treaty Series**, vol. 1249. P. 13.

According to the UN Committee on the Elimination of all Form of Discrimination against Women (CEDAW Committee), the term 'political and public life of a country' is a broad concept, and it includes the exercise of judicial power.[93] The CEDAW Committee highlighted the need to adopt temporary special measures, to ensure that women are equally represented in the judiciary and other law enforcement mechanisms as magistrates, judges, prosecutors, public defenders, lawyers, administrators and mediators, and in other related professional capacities.[94] Likewise, in interpreting the right to access public service guaranteed in Article 25 of the ICCPR, the HRC has emphasized that discrimination based on sex or other suspicious grounds is inadmissible. Moreover, the HRC recognized the importance of adopting affirmative measures to ensure that there is equal access to public service for all citizens.[95] The Beijing Declaration and Programme of Action, adopted in 1995 at the Fourth World Conference on Women, also addresses the right of women to access the judiciary. It outlines that States must "*ensure that women have the same right as men to be judges, advocates or other officers of the court*".[96]

3.2. Competent, independent, and impartial tribunal

According to the HRC, whenever legal rights and legal obligations are determined, this must be done (at least at one stage of the

93. UN Committee on the Elimination of Discrimination Against Women. (1997). **CEDAW General recommendation No. 23: Political and public life**. U.N. Doc. A/52/38, para 5.

94. UN Committee on the Elimination of Discrimination Against Women. (2015). **General recommendation on women's access to justice**. U.N. Doc. CEDAW/C/GC/33 para. 15.

95. CCPR. (1996). **General comment No 25, The right to participate in public affairs, voting rights and the right of equal access to public service (Art 25)**. U.N. Doc. CCPR/C/21/Rev.1/Add.7.

96. UN Women. (2015). **Beijing Declaration and Platform for Action**, para 232(m).

proceedings) by a tribunal within the meaning of Article 14 of the ICCPR. The failure of the State to establish competent tribunals to determine the rights and obligations of individuals under its jurisdiction constitutes a violation of the ICCPR.[97] **The right to be heard by a competent, independent, and impartial tribunal is an absolute right that is not subject to any exception**.[98]

The notion of a competent tribunal was interpreted by various international human rights institutions. For example, the European Court of Human Rights (ECtHR) highlighted that a "tribunal" is characterized in the substantive sense "*by its judicial function, that is to say, determining matters within its competence on the basis of legal rules and after proceedings conducted in a prescribed manner*".[99] It further highlighted that inherent in the notion of a "tribunal" is the requirement that it *"be composed of judges selected on the basis of merit – that is, judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law*."[100] The ECtHR also found that the process of appointing judges necessarily constitutes an inherent element of the concept of a 'court established by law'.[101]

The UN Basic Principles on the Independence of the Judiciary (UN Basic Principles), endorsed by General Assembly Resolutions 40/32 and 40/146 emphasize that:

97. CCPR. (2007). Ibid. Para. 18.

98. Ibid. Para. 19.

99. Gumundur Andri Ástráosson v. Iceland, Application no. 26374/18 [GC], ECtHR, para. 219, (2020).

100. Ibid. Para. 220.

101. Ibid. Para. 227.

> *Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory*.[102]

As for securing the independence of the judiciary, the State must adopt **laws** establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary, and disciplinary sanctions taken against them.[103] **The status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement must be adequately secured by law**.[104]

Judicial independence also requires that individual judges be free from undue influences from outside the judiciary, and from within. Judges must enjoy internal independence and to be free from pressures from fellow judges or those who have administrative responsibilities

102. Basic principles on the independence of the judiciary. Adopted by the seventh United Nations congress on the prevention of crime and the treatment of offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 10.

103. CCPR. (2007). Ibid. Para. 19.

104. Ibid.

in the court, such as the president of the court.[105] The aim of the term 'established by law' is "*to ensure that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament*".[106] It also entails that the organization of the judicial system cannot be left entirely to the discretion of the judicial authorities.[107]

The requirement of impartiality encompasses two aspects. First, judges must be subjectively impartial. This means that judges cannot allow their judgment to be influenced by personal bias or prejudice. Additionally, judges cannot harbor preconceptions about a particular case before them, nor can they improperly promote the interests of one of the parties to the detriment of the other.[108] Second, judges must appear objectively as impartial. In other words, the tribunal must also appear to a reasonable observer to be impartial.[109]

3.3. Fair Proceedings

Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive.[110] Another central element of the notion 'a fair hearing' is the right to adversarial proceedings. This entails that each party must be given the opportunity "*not only to make known*

105. Parlov-Tkalčić v. Croatia, Application no. 24810/06, EctHR, para. 86 (2009).
- Daktaras v. Lithuania, Application no. 42095/98, EctHR, para. 36 (2000).
- Moiseyev v. Russia, Application no. 62936/00, EctHR, para. 184 (2008).

106. Richert v. Poland, Application no. 54809/07, ECtHR (2012), para. 42.
- Coëme and Others v. Belgium, Applications nos. 32492/96, 32547/96, 32548/96, ECtHR (2000), para. 98.

107. Gorgiladze v. Georgia, Application no. 4313/04, EctHR, para. 69 (2009).

108. CCPR. (2007).Ibid. Para. 21.

109. Ibid.

110. Ibid. Para. 25.

any evidence needed for his claims to succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision".[111] For this right to be effective, observations must be heard and duly considered by the court.[112]

An additional important aspect of the fairness of a hearing is its expeditiousness. Delays in civil proceedings that cannot be justified by the complexity of the case or by the behavior of the parties are inconsistent with the principle of a fair hearing. Where delays are caused by lack of resources and chronic under-funding, supplementary budgetary resources should be allocated for the administration of justice.[113]

While conducting public hearings is a cornerstone of the right to a fair trial, international law contemplates exceptional situations in which hearings could be closed to the public. For example, according to Article 14 of the ICCPR, the press and the public may be excluded from a trial when the interest of the private lives of the parties so requires. Still, the HRC highlighted that holding a private hearing does not entail that "*the essential findings, evidence and legal reasoning*"[114] cannot be published. The HRC contemplated limiting the publication of cases concerning matrimonial disputes and custody of children, but this exception must be construed as narrowly as possible; courts can still adopt a system for publishing leading cases while omitting the names of the parties and any information that can lead to their identity.

111. Nunes Dias v. Portugal, Applications nos. 69829/01 and 2672/03, ECtHR, para. 5 (2003).
112. Donadze v. Georgia, Application no. 74644/01, ECtHR (2006).
113. Ibid. Para. 27.
114. CCPR. (2007). Ibid. Para. 29.

3.4. The Rule of Law and Procedural Norms

The principle of the Rule of Law is a central component of democratic governance. In 2004 the UN Secretary-General described the rule of law as:

> *[A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires as well, measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency*".[115]

The formal aspects of the rule of law include the following requirements: Legal rules prohibiting certain behaviors must be general; legal rules must be clear and understandable; legal rules must be widely promulgated and publicly accessible; legal rules must be consistent; legal rules prohibiting certain behaviors cannot be applied retroactively; legal rules must be practicable; legal rules must create an environment of stability; and congruence between the legal rules and their actual administration.[116]

Additionally, when the authorities operate in a way that could impose penalty, stigma or serious loss on an individual, a number of

115. UNSC. (2004). **The rule of law and transitional justice in conflict and post-conflict societies** (Report of the Secretary-General). U.N. Doc. S/2004/616, para. 6.

116. Fuller, Lon, L. (1969). **The morality of law**. New Haven: Yale University Press.

fundamental **procedural** principles are derived from the principle of the rule of law.[117] Those procedural principles focus on the processes by which legal norms are administered, and on the institutions involved in their administration. They are enumerated by Waldron as follows:

A. A hearing by an impartial tribunal that is required to act on the basis of evidence and argument presented formally before it, in relation to legal norms that govern the imposition of penalty, stigma, loss, and so forth;

B. A legally-trained judicial officer, whose independence of other agencies of government is assured;

C. A right to representation by counsel and to the time and opportunity required to prepare a case;

D. A right to be present at all critical stages of the proceeding; E. E. […]

F. […]

G. A right to present evidence in one's own behalf;

H. A right to make legal argument about the bearing of the evidence and about the bearing of the various legal norms relevant to the case;

I. A right to hear reasons from the tribunal when it reaches its decision that are responsive to the evidence and arguments presented before it; and

J. Some right of appeal to a higher tribunal of a similar character.[118]

117. Waldron, Jeremy. (2011). The rule of law and the importance of procedure. In Fleming, James. E. (Ed.). **Getting to the rule of law** (pp. 3-31). New York University Press.

118. Ibid. P. 6.

These procedural aspects are equally indispensable for the Rule of Law. Waldron argues that procedural elements matter more in the ordinary person's conception of the Rule of Law compared to the formal principles mentioned earlier.

(4)

Methodology

This research focuses on the right to access courts and the right to a fair trial in Ecclesiastical courts in Israel. The research does not address substantive laws that are applied in these courts, it focuses mainly on procedural aspects that are intimately tied to due process guarantees. The research is based on a qualitative methodology that includes conducting semi-structured interviews with a group of leading lawyers in the field of family law applicable to Christian citizens and with judges and officials from Ecclesiastical Courts; it also includes document analysis regarding procedural and substantive norms applicable to these courts from an international law perspective.

The research focuses on the five largest recognized Christian communities and their respective courts: The Greek-Orthodox courts; the Latin (Roman Catholic) courts; the Greek-Catholic Melkite courts (hereinafter Melkite courts); the Maronite courts; and the Evangelical Episcopal courts.

We have chosen 12 experienced lawyers who appear regularly in front of Ecclesiastical courts for the in-depth interviews. The interviews were conducted with the aim of gaining a deep understanding of the procedural dynamics in Ecclesiastical courts. The chosen lawyers represent different geographical areas including the Center, North and Jerusalem. Two lawyers were from the Jerusalem/Ramallah area due to the extraterritorial jurisdiction of some of these courts.

The participant lawyers were assured of strict confidentiality and guaranteed anonymity. We have also conducted interviews with officials from the Latin courts, Melkite courts, Maronite courts, Evangelical Episcopal courts, and the Greek-Orthodox courts. In the case of the Greek-Orthodox court system, we managed to interview an official after months of continuous attempts to contact the court including through phone calls, contacting secretariats of two different courts, and sending official requests for information both by email and by registered mail. Our official requests were never answered; therefore we had to rely on the website of the first instance court in Jerusalem to retrieve minimal information on the locations of the courts and names of judges in each court. The website was last updated in November 2018[119] and the information was verified later on by the official we managed to interview.

119. The Holy See. (1983). Ibid. Canons 1430, 1431 & 1432.
- The Holy See. (1990). Ibid. Canon 1094.

(5)

Analysis

5.1. Competent, independent, impartial tribunal established by law

5.1.1. Established by law:

According to the information provided by the various Catholic churches, Catholic courts rely on Canon law also in procedural matters. The Latin courts rely on the 1983 Code of Canon Law, and the Melkite and Maronite courts rely on Oriental Canon Law.

The composition of the court is also based on Canon law and is similar in all Catholic courts. First instance courts are composed of 3 judges: Judicial vicar, known also as *officialis*, and two adjunct vicars, or vice-*officialis*. The Court of Appeal is also composed of 3 judges: A judicial vicar and two adjunct vicars. Additionally, there are two figures that are involved in the proceeding in Ecclesiastical courts: the promoter of justice and the defender of the bond. A promoter of justice is appointed in contentious cases which can endanger the public good, and he (or she) is bound by office to provide for the public good.[120] The defender of the bond is appointed in cases concerning the nullity or dissolution of a marriage. His (or her) role is to propose and explain everything which reasonably can be

120. The Holy See. (1983). Ibid. Canons 1430 & 1431.
- The Holy See. (1990). Ibid. Canon 1094.

brought forth against the nullity or the dissolution of the marriage.[121] The same person can be a promoter of justice and a defender of the bond but not in the same case.[122] Since both positions are opened to lay persons, they could be occupied by women. *De facto*, only men are appointed to such positions in Ecclesiastical courts in Israel.

There are two first instance courts pertaining to the Latin church accessible to Palestinian citizens in Israel, one is in Nazareth and the other is in Jerusalem. The Court of Appeal is in Jerusalem. Currently, seven judges serve in the first instance court and seven judges in the Court of Appeal.

In the Melkite church, there is one first instance court, sitting in Haifa and a Court of Appeal in Haifa too. Currently, there are three judges serving in the first instance court and 3 serving in the Court of Appeal. The Maronite church established one court of first instance, located in Haifa. There are three to four judges serving in this court. The Court of Appeal sits in Lebanon. The Evangelical Episcopal church established a first instance court in Haifa and a Court of Appeal in Jerusalem. Each court is composed of three judges, a chief judge and two additional judges.

As for the Greek-Orthodox church, four first instance courts were established, accessible to Palestinians in Israel. They are located in Acre, Nazareth, Yaffa and Jerusalem.[123] The Court of Appeal sits in Jerusalem. There are usually three judges serving in each first instance court and three judges in the Court of Appeal.[124]

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121. The Holy See. (1983). Ibid. Canon 1432.
- The Holy See. (1990). Ibid. Canon 1096

122. The Holy See. (1983). Ibid. Canon 1436.
- The Holy See. (1990). Ibid. Canon 1100.

123. The Greek Orthodox Patriarchate of Jerusalem. (2018, November 5). **Ecclesiastical Courts of the Greek Orthodox Patriarchate of Jerusalem**.

124. Ibid.

The requirement that courts must be established by law does not only refer to the legal basis for their establishment, **but it also refers to the rules that govern the courts' functions and composition, the term of office of judges and guarantees for their competence, independence, and impartiality**.[125]

The judges of **all** Ecclesiastical courts in Israel are elected by church leaders based on internal procedures and processes. The lack of **publicly promulgated laws** that regulate the appointment of judges to Ecclesiastical courts undermines the right to a fair trial. The existence of Canon law or any other church law governing the appointment of judges and conditions of their work, does not meet the requirement of 'publicly promulgated law' within the meaning of the ICCPR. To meet this requirement, Canon laws must be incorporated into the domestic legal system through an act of the Parliament.

For comparison, there are publicly promulgated laws that set up the criteria for the elections of judges to Shari'a and Druze courts. This troubling reality of Ecclesiastical courts was acknowledged by the HCJ:

This is an extraordinary situation. It was established that there is a judicial system, whose judgments have binding force in the State of Israel. Nevertheless, the legislature did not regulate, even at the most basic level, the mode of operation of this system, neither from the organizational aspect nor from the functional aspect[126]

125. Kyriazi, Tenia. (2021). Legal pluralism, Sharia law and the right to fair trial: A case for incompatibility within the Council of Europe. **The International Journal of Human Rights**, 25(8). Pp. 1233-1257.

126. Sliman v. Archbishop Siah, HCJ 3238/06 (2009), para. 12.

The existence of such laws is a *sine qua non* for meeting the definition of a fair trial under international law. **It should be emphasized that the duty to establish courts by law falls exclusively on the State. This duty cannot be delegated to the church. Therefore, the failure to fulfill this duty can be attributed only to the State.**

The right to be heard by a tribunal established by law also entails the right to be heard by a complete panel of judges. However, our interviews demonstrate that courts could issue decisions even when one judge is missing. For example, the representative of the Greek Orthodox church explained that a court can issue a decision even if one judge is missing if both parties to the dispute agree to it. This constitutes a violation of the right to be heard by a tribunal established by law. The consent of the parties cannot remedy this violation since it has far-reaching implications for the integrity of the judicial system in its entirety.

5.1.2. Competency:

According to the data provided by the Latin Church, priests must hold a master's degree in Canon law to be eligible for a judicial position. Currently, 70% of first instance judges and 95% of Appellate judges hold a PhD in Canon law or theology. Additionally, those who hold a degree in theology study several classes on Canon law. All judges obtained their degrees from Catholic institutions abroad, mainly in Rome. There is no official requirement to study Israeli law or to have a basic training in Israeli law. As for the Melkite courts and the Maronite court, there is no official requirement for judges to hold an advanced degree (MA or PhD). They must at least hold a degree in theology, which includes some training in Canon law. Today, the head of the first instance court of the Maronite church, who also

serves as the head of the Melkite Court of Appeal holds a PhD in Canon law and a formal degree in law from an Israeli university. The Episcopal church requires a university degree in theology for the appointment to the bench. It does not require a formal law degree. According to Canon law, judges must be of unimpaired reputation and doctors or at least licensed in Canon law.

As for Greek Orthodox judges, according to the information provided by the representative of the church, judges are appointed by the church and there are no mandatory requirements for their appointment beyond being priests. They are not required to study Israeli law or the Cannon Law of the Eastern Orthodox Church. However, some training in Eastern Canon Law is offered to judges. Additionally, our interviews revealed that in Greek-Orthodox courts, some judges are Greeks and have a limited knowledge of Arabic, which is the working language of the court (with Greek being also a co-official language). One interviewee explained that at times, judges speak in Greek among themselves during the hearing with the parties unable to understand the conversation. This cast serious doubts not only on the competency of judges but also on the fairness of the proceedings.

To compensate for the lack of formal legal education among judges and lack of familiarity with Israeli law, some Ecclesiastical courts appoint a secretary with a formal legal education or appoint a legal adviser with a formal law degree. This, however, raises concerns over the independence of judges as we will elaborate in subsequent sections.

Some interviewees suggested that the presence of a judge with a formal legal education and familiarity with Israeli law is helpful from a procedural perspective. For example, one of the interviewees

explained that in one of his cases both parties agreed to ask the court to issue a judgment through conciliation, a concept that is borrowed from Israeli civil procedures. The fact that one of the judges had a formal legal education proved to be helpful in this case. One interviewee suggested enhancing the role of the promoter of justice and to appoint one that is familiar with both Canon Law and Israeli law to improve the performance of Ecclesiastical courts.

While the information provided by the different Catholic churches and by the Evangelical Episcopal church suggests that judges are qualified in Canon law or theology, the lack of familiarity with Israeli law could undermine the competency of Ecclesiastical courts.

Although the exclusive jurisdiction of Ecclesiastical courts is limited to marriage and divorce, they can exercise a concurrent jurisdiction over other family law matters with the agreement of all parties to dispute. Part of these disputes requires the application of Israeli civil laws such as Spouses Property Relations Law of 1973, the Legal Capacity & Guardianship Law of 1962 and the Marriage Age Act of 1950. Even if such disputes constitute a minimal portion of the caseload of Ecclesiastical courts, **it remains very disquieting to learn that a court tasked with the application of domestic law has no deep understanding of it. This could cast serious doubts on the competency of such courts.**

As a result, lawyers turn to family courts in spousal disputes directly related to a pending divorce or separation case, such as the case of seeking a protective or restraining order against a violent spouse. They prefer to initiate new proceedings in family courts instead of turning to Ecclesiastical courts that are already hearing the divorce or separation case.

5.1.3. The independence of the judges serving in Ecclesiastical courts:

One of the recurrent issues that came up during the interviews is the fact that judges do not receive economic remuneration for their work as judges. Their judicial functions are considered part of their pastoral duties. Many judges have their own parish, and must perform additional duties, such as teaching in church-run schools, and some have their own families. Only in a few exceptional cases, judges are fully dedicated to their judicial functions, such as the case of the judicial vicar of the Latin first instance court and the judicial vicar of the Latin Court of Appeal. The adequate remuneration of judges is a core component of the independence of the judiciary. In addition, the work of judges must be recognized and valued. Remuneration is necessary from this perspective too and is necessary for upholding the dignity of judges.

A more worrying *praxis* is the one adopted by the Greek Orthodox Courts. According to the information provided by the representative of the church, the judges and secretary split the fees paid by litigants as a form of remuneration, which is not subjected to any form of parliamentary or public scrutiny. This could have far-reaching implications for the impartiality of judges, who benefit directly from the fees paid by the parties.

Additionally, the fact that judges are appointed by the church, paid for their pastoral duties including their judicial functions by the church, and are expected to treat their judicial functions as a continuation of their pastoral duties constitutes a serious breach of the principle on the independence of the judiciary. The Evangelical Episcopal church is the only church that appoints lay persons in committee for the

appointment of judges. Still, this is not sufficient to guarantee the independence of judges *vis-à-vis* the church, since they are paid by the church and the conditions of their work are also controlled by the church.

Judicial independence requires that individual judges be free not only from undue influences and control by the executive, but from internal influences and pressures as well. This requirement is unmet in the case of judges appointed to Ecclesiastical courts.

The independence of the judges also requires securing an adequate working environment. In certain States, judges are allowed to work part-time, especially in small countries. However, this should be allowed only when judges can exercise their duties adequately without creating delays and pressure on the system. The impression that we got from the interviews is that some judges are overwhelmed with all the pastoral duties they must perform, one of which is serving as judges.

Another issue that came up during the interviews that has bearing on the independence of judges is the influence that secretaries could exert on the judges. As mentioned earlier, the lack of formal legal training of judges in Israeli law is compensated by the appointment of secretaries or other legal advisors who have such an education. This trend is more common in Greek-Orthodox courts. Also, the Episcopal court has a legal advisor that attends all court hearings and brings the legal perspective on procedural aspects.

According to our interviews, at least in the context of Greek-Orthodox courts, this creates a situation in which the secretary is the dominant figure of the court. This is more noticeable in situations in which Greek priests are unable to write in Arabic. In those

situations, the secretary who often speaks Greek as well, plays a role in translating documents from Arabic to Greek. As expressed by one of the lawyers:

> *Let us say that the secretary is the one who* drafts the decision in Arabic. What does it mean that he formulates it? They (the judges) tell him what to write, so eventually he needs to be a lawyer so he can formulate the decision in legal terms, that is my guess, they (the judges) are not fluent 100% in Arabic, they know Arabic but they cannot write a decision in Arabic. The secretary has to be a lawyer who is also fluent in Arabic, Hebrew, and Greek.

This raises serious concerns over the independence of the judiciary due to the dominant role that could be exercised by non-judicial actors.

The duty to enact laws that guarantee the independence of the judiciary falls primarily on the State; it does not fall on churches themselves. However, as organs entrusted with the exercise of judicial powers, the church has the legal duty to follow international standards on the right to fair trial applicable to Israel. Currently, their *praxis* is inconsistent with international human rights norms. Urgent measures to minimize the harm inflicted on Christian litigants are needed. Those include: the establishment of public committees to elect judges to enhance the independence of the judiciary; to remunerate judges for their judicial functions and exempting them from pastoral duties that could hinder their function as judges; and adopting measures to guarantee that the role assigned to non-judicial actors does not erode the independence of judges.

5.1.4. Impartiality:

One key issue that has bearing on the question of impartiality of the judges is their prior knowledge of marital disputes before these disputes arrive to court. Many times, one of the judges on the bench is personally involved in the conflict between the spouses or has a previous knowledge of the marital problems of the couple. As one of the interviewees explains:

> *The problem is that the local priest could be the judge. Where do people go when they have problems? They go to see their priest. There is no separation between the judicial system and social relation. The local priest is involved from the beginning in the dispute then he sits as a judge.*

Additionally, the lack of a clear distinction between the role of priests as judges and their role as spiritual leaders raises concerns over their impartiality. According to another interviewee:

> *The ecclesiastical judiciary is essentially a pastoral judiciary... for Christians, marriage is a sacrament... It is not an agreement [between two parties] ... It is a sacrament and if you want to break it, it is a big deal for priests, especially for Catholics who will try to find a solution.*

One of the priests interviewed clearly stated "*all those who come to us [the court] are people that we know*". When he was asked directly what do you do if you sit as judge in a case in which you were involved as a priest in the early stages of the dispute, he answered "*I would keep the details for myself, they are the ones who should disclose this information to the rest of the judges*". He further added that as judges they try to help the couple to reconcile their differences

and try to fix their marriage. This requires addressing very private matters that are never mentioned in protocols.

These accounts raise serious concerns over the impartiality of the court. First, when one of the judges is familiar with the dispute through his other pastoral functions, this clearly constitutes a serious breach of the principle of impartiality. Second, when judges perceive their judicial function as a continuation of their pastoral duties this undermines the impartiality of judges and of the whole system. The role of a judge is to settle the dispute between the parties based on the law, and not to serve as their spiritual advisor.

During the interviews, we detected specific cases that demonstrate a serious disregard of the principle of impartiality. For example, one interviewee represented a client in a marital dispute where a clear conflict of interest existed between one of the parties and all the judges serving on the bench. The judges did not recuse themselves immediately, notwithstanding the flagrant conflict of interests. They refused to recuse themselves even when the lawyer requested that orally in the first hearing. Only when the lawyer submitted a written request stating that he would turn to the Court of Appeal, the judges agreed to transfer the case to another court.

A total lack of impartiality was evident in another case handled by one of the interviewees, where the composition of the Court of Appeal of the Armenian church in Jerusalem was identical to the composition of the lower court. In other words, the judges heard an appeal against their own decision. The interviewee had to submit a petition to the HCJ to quash the decision of the Court of Appeal.

Another interviewee spoke of a divorce case involving a Christian man and a non-Christian woman. The woman had formally converted to Christianity prior to their marriage, and the couple were married in a church ceremony. When the couple decided to separate, the woman converted back to her original religion. Since the couple were married in a religious ceremony, the Ecclesiastical court had an exclusive jurisdiction over the case. The chief judge decided that the wife cannot attend the court proceedings since she was no longer a Christian.

While regulating the work of the judiciary is the primary responsibility of the state, the church has an important subsidiary role in ensuring the independence and the impartiality of the judiciary in Ecclesiastical courts. **So far, the *praxis* of Ecclesiastical courts in general has been grossly inconsistent with international human rights standards applicable to Israel. Therefore, these court systems need to urgently adopt ethical codes that guarantee the total impartiality of judges. Such codes must create a clear distinction between the spiritual duty of the clergy and their judicial functions.**

5.2. The lack of publicly promulgated procedural laws

As mentioned earlier, Israel did not adopt any law to regulate the work of Ecclesiastical courts. There are no **publicly promulgated laws** establishing procedural laws in Ecclesiastical courts. As a result, Ecclesiastical courts pertaining to the Holy See apply the procedural norms of the 1983 Canon law and of Oriental Canon law. None of these codes were incorporated by an act of the Parliament into domestic law for the purpose of regulating the work of Ecclesiastical courts in Israel. This, too, undermines one of the very

basic components of the right to a fair trial. Furthermore, Canon law is not accessible through any official channel to lawyers and litigants. At the time of conducting this research, the webpage of Latin Patriarchate of Jerusalem contained the 1983 Canon Law in English, Italian and Latin, but not in Arabic, which is the working language of the court. In the interviews, lawyers were asked about the way in which they access Canon Law and get familiarized with it. Different answers were provided to this question. Some said that they get law books from training workshops abroad, involving lawyers from neighboring countries where Ecclesiastical courts are recognized by the local legal system. The existence of Catholic universities in Lebanon facilitates the learning of Canon law since they publish related textbooks in Arabic. Others mentioned training workshops offered in Israel either through the church or through the Israeli Bar Association. However, there was a general agreement that access to such material depends, eventually, on the personal commitment of each lawyer.

The general impression emerging from the interviews is that lawyers have a basic knowledge of the procedural side of Canon law. In the absence of in-depth knowledge of the procedural aspects of Canon Law, lawyers rarely challenge the decisions of Ecclesiastical courts on procedural grounds.

Unlike Catholic courts, the Greek-Orthodox court system operates without a procedural code. Lawyers are given instructions by the court on the steps to follow upon initiating a procedure. In some instances, the secretary of the court provides the information verbally in the presence of the lawyer or through a phone call. The provided information includes procedural matters such as deadlines

for submitting documents and how to serve the other party. The interviewees added that the Greek-Orthodox courts informally follow the Civil Law Procedure Regulations, applicable to civil litigations in Israel. However, the *praxis* of these courts lacks consistency since they seem to alternate between following the Civil Law Procedure Regulations and setting their own rules. For example, in the decisions of lower courts, the judgment itself can indicate the timeline for appealing the decision. However, according to one interviewee, this is not done consistently. When relevant dates are not indicated, lawyers submit the appeal expeditiously to avoid the possibility of the appeal being dismissed due to delayed submission. In another example, the court allowed a respondent in a divorce case to demand compensation from the applicant in his reply to the lawsuit. However, the Civil Law Procedure Regulations requires the submission of a counter lawsuit to request a new remedy. This creates confusion among lawyers, as expressed by one of the interviewees:

> *On one hand you [Greek-Orthodox courts] say that we follow the [Civil Law Procedure] Regulations, but on the other hand you do whatever you want…I don't know, there is a problem here, it is the absence of a written and a clear law that I can rely on.*

In referring to the Greek-Orthodox courts, another interviewee claimed, "*as a lawyer I prepare my client from the beginning, we are in a court where the procedure is not clear*".

The lack of officially promulgated procedural laws is inconsistent with international standards on the right to a fair trial. The right to

access courts must be "*practical and effective*".[127] The ECtHR had emphasized before that "*rules relating to the procedures and time-limits to be observed in bringing proceedings are designed to ensure the proper administration of justice and compliance, in particular, with the principle of legal certainty*".[128] The ECtHR further clarified that:

> *[F]ormalied rules of civil procedure, through which parties secure the determination of a civil dispute, is valuable and important as it is capable of limiting discretion, securing equality of arms, preventing arbitrariness, securing the effective determination of a dispute and adjudication within a reasonable time, and ensuring legal certainty and respect for the court*[129]

Additionally, the lack of clear and publicly promulgated procedural laws severely undermines the procedural aspects of the Rule of Law. Procedural rules play a pivotal role in guaranteeing the fair application of legal norms. The procedural aspect of the rule of law is also reflected in Principle 5 of the UN Basic Principles, which states: "*Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures*."

The duty of States to establish courts by law also includes the duty to adopt laws that regulate the procedural norms that should be applied by the court. There are two laws that are applicable to all religious courts in Israel. Those include the Religious Courts (Forcing Compliance and Hearing Procedures) of 1956; Religious Courts (Summons) Law of 1956; and Religious

127. Zubac vs. Croatia, Application no. 40160/12 [GC], ECtHR, para. 77 (2018).
128. Nunes Dias v. Portugal, Ibid, para. 6.
129. Zubac v. Croatia, Ibid, para. 96.

Courts (Prevention of Disruption) Law of 1965. Those laws regulate the bare minimum of the functioning of religious courts, such as granting them subpoena and judicial power to issue preliminary injunction, summon parties and witnesses to the hearings and hold litigants in contempt of the court. This minimal regulation of the procedural aspect of the work of religious court does not meet the standards established by international law. In comparison, Israel adopted various procedural laws to regulate the work of Rabbinical, *Shari'a* and Druze courts, while excluding Ecclesiastical courts. This constitutes discrimination against Palestinian Christian litigants who are denied from the enjoyment of the same protections afforded to other citizens.

It is worth noting that on February 10, 2022, it was revealed that the Greek-Orthodox church in Jordan had adopted a new procedural law applicable to Greek-Orthodox family courts in Jordan.[130] Prior to the adoption of this law, Greek-Orthodox courts used to borrow from the Jordanian civil procedural norms. The need to enact a procedural law was met by resistance at the beginning, however, leading Christian family lawyers supported the move. For example, one advocate, Al-Salaita, was quoted as saying that the lack of a procedural laws affects the course of the trial and inevitably hinders the achievement of justice:

> *[I]n the absence of procedural legislation, many cases turn into a personal conviction of the bench or the judges sitting in it." He points out that "the Greek Orthodox courts have applied the Code of Civil Procedure, but the problem lies in the lack of*

130. Al-Btoush, Dania. (2022, February 10). Litigation Principles and Procedures is the first law of the Greek Orthodox Patriarchate. **Milhalard** (originally published in Al-Maghtas magazine). [In Arabic].

application of the law in the satisfactory manner." Al-Salaita believes that "lack of full knowledge of the principles of law is the main obstacle in its application." He said, "the law allows a priest who has studied theology to serve as a judge, although a theology degree qualifies him to be a judge… the priest does not have the background and legal experience to deal with civil due process [borrowed from civil courts][131]

5.3. Equal access to courts

The lack of representation of women on the bench constitutes a violation of the right to equal access to courts. This problem remains acute in Ecclesiastical courts in Israel compared to other courts. Palestinian women in the West Bank are already serving as judges in Ecclesiastical courts. In 2014, when the President of the Palestinian Authority, Mahmoud Abbas, officially established new Ecclesiastical courts pertaining to the Lutheran Evangelical church, he appointed Judge Rawan Moualem to the Court of Appeal and Judge Scarlet Bishara to the First instance Court.[132] The move was welcomed by the leadership of the church.[133] In July 2020, the Greek-Orthodox church in Jordan announced its intention to appoint lay persons, including women, to serve in the Ecclesiastical courts. Jordan's Orthodox Archbishop, Christophoros Atallah, highlighted the importance of having women as judges for their contribution to

131. Al-Namri, Nadin. (2018, September 29). Controversy continues over the need to establish a system of due process for ecclesiastical courts. **Al-Ghad**. [In Arabic].

132. Qanon. (2014, October 29). Resolution No. (105) of 2014 regarding the approval of the establishment of the Ecclesiastical Court of appeal and first instance for the Evangelical Lutheran Church in Jordan and the Holy Land. **Palestinian Chronicle**, 109. [In Arabic].

133. The Lutheran World Federation. (2015). **Holy Land Lutherans adopt gender justice in Ecclesiastical court constitution**.

understanding family issues and affairs.[134] The 1983 Canon law itself does not preclude women from serving as judges. Canon 1421 §2 states that the conference of bishops can also permit the appointment of lay persons as judges when it is necessary. A lay person could also be a woman. A similar provision exists in the Oriental Canon law.[135]

The UN human rights institutions have criticized Israel harshly for legally endorsing gender discrimination in family law. In its Concluding Observations on the combined initial and second reports of Israel, the CEDAW Committee *"regretted the fact that women could not become religious judges and that the religious laws that to a considerable degree govern family relations discriminated against women"*.[136]

CEDAW Committee reiterated the same position in its Concluding Observations on Israel's third,[137] fourth and fifth periodic reports. [138] It further clarified that Israel's reservation to Article 16 of CEDAW, which requires eliminating discrimination against women in all matters relating to marriage and family relations, is *"impermissible as it is contrary to the object and purpose of the Convention. It also impinges on other fundamental articles of the Convention, including article 2, and implementation of the principle of substantive equality between women and men in all matters relating to marriage and family relations"*.[139]

134. Haddadin, Samar. (2020, June 8). The Greek Orthodox Church Court will include a female judge on appeal for the first time. **Abouna**, Media for human rights. [In Arabic].

135. The Holy See. (1990). Ibid. Canon 1087 - §2.

136. CEDAW Committee. (1997). **Report of the committee on the elimination of discrimination against women**. U.N. Doc. A/52/38/Rev.1, para 157.

137. CEDAW Committee. (2005). **Report of the committee on the elimination of discrimination against women on its thirty-second session**. U.N. Doc. A/60/38(SUPP).

138. CEDAW Committee. (2011). **Concluding observations of the committee on the elimination of discrimination against women**. U.N. Doc. CEDAW/C/ISR/CO/5.

139. Ibid. Para. 8.

Lack of representation of women on the bench could have implications for the principle of equality of arms, as the Canadian Judge Bertha Wilson puts it "*women who are bound by the justice system should be participants in it at all levels*".[140] A similar approach was endorsed by the International Commission of Jurists:

> *Female judicial officers may demonstrate a strong commitment to the recognition and protection of women's equality and rights which is then reflected in judicial reasoning and court decisions, particularly in cases concerning gender-based violence, divorce and family law and labour rights matters.*[141]

One of interviewees expressed best the impact of the absence of female judges as follows:

> *The tendencies in Ecclesiastical courts are primarily patriarchal and lack empathy to women. I had a case of a woman who passed away …she remained 10 years hanging in the Latin court without being able to obtain maintenance.*

The impact of the lack of women on the bench was highlighted in a previous report based on interviewing 18 Palestinian women who were involved in personal status disputes at Ecclesiastical courts in Israel.[142] Among the negative experiences expressed by women were:

140. Canadian Bar Association. (1993). **Touchstones for change, equality, diversity and accountability**. Report of the Canadian Bar Association (CBA) Task Force on Gender Equality in the Legal Profession (Chair, Justice Bertha Wilson), p. 185.

141. International Commission of Jurist. (2013). **Women and the judiciary**. Geneva forum series, 1. P. 21.

142. Batshon. (2012). Ibid. P. 10.

1) The existence of prejudices against women and insensitivity towards them. One participant noted that although she had complained about severe and life-threatening violence by husband, the judges tried to convince her to return to him.

2) Bias in favor of the husband, which manifested itself, for example, in posing more questions to him compared to the wife, even when the application for a divorce was consensual. Some women felt that they were able to obtain a divorce only because the husband agreed to it.

3) In the absence of a female official figure in the court creates a masculine atmosphere and leads to a feeling of discomfort among the litigants.

Therefore, the lack of women on the bench challenges in a structural way the principle of equality of arms.

This discrimination could be easily rectified by Ecclesiastical courts by appointing women to bench, a step that has been followed in neighboring jurisdictions.

An additional aspect of "equality of arms" is the duty to maintain a "fair balance" between the parties in civil litigation.[143] According to one interview, it is not uncommon for judges to have a meeting with one party without the presence of the other party and his/her lawyer. In one case, one interviewee was told not to attend a meeting with the adverse party and his father. In another case, the judges had a one-hour meeting alone with one party before the beginning of the hearing. While the lawyer representing the other party expressed a

143. Feldbrugge v. the Netherlands, Application no. 8562/79, ECtHR (1986).

deep discontentment with the behavior of the judges in this case, an official complaint was not filed. Such incidents violate the principle of equality of arms, which calls for the adoption of clear ethical codes to prevent these violations.

Another issue that is related to equal access to courts is the absence of counseling units in the Ecclesiastical courts. Some interviewees described the absence of such units as a "serious problem" and highlighted that Ecclesiastical courts in neighboring countries, such as Lebanon, rely on such units in their work. In Israel, these units were initially established to work alongside family courts to assist families involved in legal disputes or in a divorce proceeding to deal with the family crisis in peaceful ways. The units employ a team of social workers, lawyers, and other experts in the field of family care and mediation with an extensive therapeutic experience with families in separation and divorce proceedings.[144] The operation of these units was expanded gradually and now they work alongside religious courts too, with the exception of Ecclesiastical courts. The Latin courts took the initiative of referring litigants to private counseling centers, while covering at times, the expenses of the counseling services.

The failure of Israel to expand the operation of these units to Ecclesiastical courts constitutes direct discrimination against Christian litigants who are denied of these valuable services.

144. Ministry of Welfare and Social Security Website. **Assistance units near the Family and Religious Courts**. [In Hebrew]

5.4. The right to an adversarial proceeding

As mentioned before, the right to adversarial proceedings is a central component of the right to a fair trial. This right is jeopardized in the absence of clear rules on how the parties to a dispute can summon their own witnesses, and on how they question witnesses and submit evidence. According to our interviews, since Catholic courts follow an inquisitorial model, lawyers must get the permission of the court before inviting witnesses. Ecclesiastical courts are usually very responsive to such petitions and lawyers face no hurdles in inviting witnesses. However, as one interviewee points out, presenting evidence and subpoenaing witnesses should be treated as "*a right and not a privilege granted by the court*".

A serious issue that came up in one interview relates to the fact that some judges lack basic knowledge regarding admissibility rules of audio-visual evidence. According to the interviewee, some judges were willing to admit audiotapes without sending them to forensic examination to guarantee the originality of the tape and guarantee that it was not edited or tampered with. The interviewee claimed that it took a lot of effort to convince the judges that the tapes needed to be authenticated before they can be used as evidence. Even when judges agreed to send the tapes for authentication, the lawyer had to fight again to be able to subpoena the expert witness who authenticated the tape and to question him on his report.

In Catholic courts lawyers are not allowed to conduct direct examination or cross examination of witnesses. They are only allowed to present a list of questions to the judges, and judges are the ones who pose the questions. While judges usually accept the questions posed by lawyers, they can change the order of questions

or omit some questions, which constitutes a *de facto* intervention or alteration of the lawyers' litigation strategy. For example, one lawyer explained:

> *I sent questions for the cross-examination of the other party… when I prepare cross-examination, I know the order [of the questions] and where I want to go, when you skip three questions, or ask question number four before question number three you give the other party the answer…when I said [to the judge] this question is very important, you skipped question number three, he told me I decide which question I want to follow.*

In addition, some questions that are presented by lawyers for the direct examination of their own clients, are handled by the judges in the form of cross-examination, as expressed by one of the interviewees:

> *There were cases in which I handed the judge a list of question for the examination of my own client, and the chief judge used them for cross examination…in one case my client was telling her version, the judge told her you are lying, so I told him, father, take it easy, she is telling her version…there is a cross examination later.*

While lawyers play a less active role in inquisitorial systems, the ability of litigants to influence the court's decision with the help of their lawyer, and to confront witnesses and to comment on all evidence adduced, should not be hampered. The ECtHR applied this principle to all States regardless of the characteristics of their

judicial system.[145] When judges in Ecclesiastical courts hinder the ability of lawyers to conduct a proper questioning of witnesses, this violates the right of litigants to a fair trial.

In Maronite, Latin and Melkite Courts, the protocols of the hearings are not given to lawyers immediately after each session, they are given after the completion of the proceedings. This could have an impact on the ability of lawyers to appeal the court's decisions in the most efficient way, since it is difficult to remember the details of each session and whether they are reflected accurately in the protocol. It should be noted that in *Saliba v. Greek-Catholic court*, among the legal arguments that were raised by the petitioner is that the refusal of the Ecclesiastical court to give a copy of the protocols before the completion of the litigation, violates his procedural rights. The HCJ dismissed his petition based on different grounds stating that there was no need to rule on this specific claim at this time.[146]

Another issue that could have bearing on the right to an adversarial proceeding is absence of minority or individual opinions in the decision of courts. Decisions are reached based on consensus. The right to an adversarial proceeding entails the articulations of competing interpretation not only of facts and evidence, but also of the law. The absence of individual or minority opinions weakens the procedural aspects of the Rule of Law. Waldron argues that the procedural side of the Rule of Law "*requires that public institutions should sponsor and facilitate reasoned argument in human affairs*".[147]

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145. Carmel v. Malta, Application no. 24221/13 (2013).
- ECtHR. (2021). **Guide on Article 6 of the European convention on human rights**. Right to fair trail (Civil Limb).

146. Saliba v. Greek-Catholic court, HCJ 16/7631 (2017). [In Hebrew].

147. Waldron, Jeremy. (2011). Ibid. P. 19.

This aspect of the Rule of Law reflects a sense of freedom exemplified in the "*active engagement in the administration of public affairs, the freedom to participate actively and argumentatively in the way that one is governed*".[148] Therefore, adopting decisions based on consensus undermines the dignitarian idea behind the procedural side of the Rule of Law, i.e., conceiving the people who live under the law as bearers of reason and intelligence.[149]

In relation to guaranteeing the right to adversarial proceedings, Ecclesiastical courts have the direct responsibility in fulfilling this specific aspect of the right to a fair trial as guaranteed by international law. Ecclesiastical courts must guarantee that the parties to the dispute have full opportunity to present their case and arguments, and full opportunity to confront arguments and evidence submitted against them.

5.5. Legal certainty and coherency and the publication of decisions

Ecclesiastical courts are not bound by the principle of legal precedents. Still, some level of consistency in the application of the law is required if the rule of law is to be respected and equality before courts be guaranteed. According to one interview, one Ecclesiastical court had issued conflicting decisions in two different cases handled by the interviewee, even though the facts of both cases were sufficiently similar.

In addition, unlike other courts dealing with family law disputes in Israel, Ecclesiastical courts do not publish their decisions. Lawyers can ask for a permission to publish a specific case, however, this is rarely done since concealing the names of the parties is not seen as

148. Ibid. P. 20
149. Ibid. P. 19.

a sufficient guarantee to safeguard their privacy rights. The absence of any system for the publication of the decisions of Ecclesiastical courts stands in contradiction with the Rule of Law, particularly with the principle of legal certainty and legal coherency because lack of transparency makes it easier for the judges to issue incoherent or even arbitrary decisions. The ECtHR has long highlighted the importance of the principle of legal certainty:

[O]ne of the fundamental aspects of the rule of law is the principle of legal certainty … which, inter alia, guarantees a certain stability in legal situations and contributes to public confidence in the courts ... The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law.[150]

The publication of cases allows public scrutiny of court decisions and contributes to maintaining confidence in the judicial authority. As highlighted by the ECtHR:

> *By rendering the administration of justice visible, publicity contributes to the achievement of the aim of […] a fair trial, the guarantee of which is one of the fundamental principles of any democratic society*.[151]

It further added:

> *It cannot be regarded as decisive that the applicant was able to access the judgments in his case […] What ultimately matters is*

150. Nejdet Şahin and Perihan Şahin v. Turkey, Application no. 13279/05 [GC], ECtHR, para. 57 (2011).

151. Fazliyski v. Bulgaria, Application no. 40908/05, ECtHR, para. 64 (2013).

> *whether those judgments were, in some form, made accessible to the public.*[152]

It is true that the international law contemplates certain limitations on the publication of cases concerning matrimonial disputes and custody of children, but like all limitations on basic human rights, this must be done in a reasonable and proportionate manner. Ecclesiastical courts can select only leading or innovative cases for publication through the omission of the names of the parties and other details that could lead to their identification.

Under these circumstances, lawyers and not courts themselves, act as the guardians of the principle of legal certainty and the guardians of the legal coherence of the system. They do so by exchanging their own experiences with other colleagues. Since the number of lawyers appearing in front of Ecclesiastical courts is exceptionally small, those lawyers depend on their personal knowledge of cases and collaboration with other colleagues to maintain the coherence of the system.

Another issue that came up during the interviews that has bearing on the principle of legal certainty is the reliance of the Greek-Orthodox courts on the jurisprudence of Greek family courts, whose decisions are not accessible to lawyers due to language and other barriers. Borrowing from the decisions of Greek courts helped in promoting a minimal modernization of the very antiquated Byzantine divorce law, by introducing new grounds for seeking a divorce, such as the existence of dissonance in character between spouses. At the same time, when courts in Israel utilize Greek case-law inaccessible to

152. Ibid. Para. 65.

lawyers and their clients, due to linguistic barriers among other factors, this undermines the principle of legal certainty since neither lawyers nor their clients are able to foresee how the law is going to be applied to their case. It should be noted that the representative of the Greek Orthodox Church refuted this argument and argued that local courts here do not rely on Greek law.

Here too Ecclesiastical courts have a central role and the primary responsibility in fulfilling this specific aspect of the right to a fair trial. As a minimum, they must publish leading cases to maintain the coherency of the system and to safeguard the principle of legal certainty and foreseeability, and the Rule of Law.

5.6. The right to a legal counsel

The right to legal counsel is one of the fundamental components of the right to a fair trial. Our interviews have identified different types of limitations on the right to a legal counsel. One noticeable limitation, especially in Latin courts, is the need to get a prior authorization before a lawyer can appear in front of the court. According to the information obtained from the Latin church, a lawyer cannot appear in front of Latin courts in marital disputes unless she/he holds a degree in Canon law or has participated in a training course on Canon law, offered by the church and passed the final exam. Additionally, the ultimate approval of the bishop is required. A one-time exception could be granted by the head of the Archdiocese. These restrictions could be traced back to 1983 Canon Law, according to which "*the advocate must be a Catholic unless the diocesan bishop permits otherwise, a doctor in canon law or otherwise truly expert, and approved by the same bishop*".[153] The

153. The Holy See. (1983). Ibid.

Latin church justifies these limitations as a measure to safeguard the interests of litigants, by guaranteeing that lawyers representing them are well familiar with Canon Law and can provide high quality legal services for their clients. While protecting the rights of litigants is highly important, the measures to achieve this goal should be reasonable. For example, participation in a training course offered by the Bar Association on Canon law and taught by Canon law experts or taking a class on Canon law at the law school should suffice.

These limitations are enforced more stringently on non-Christian lawyers. One non-Christian interviewee was not allowed to represent a client in a Latin court and gave up the idea of appearing in front of these courts altogether. In 2010, a petition was filed against the Latin Patriarch of Jerusalem for limiting the access of lawyers to Latin courts, due to the imposition of the above-mentioned conditions. The applicant withdrew his petition five years later after a long negotiation process.[154]

These limitations have resulted in closing the market to lawyers wishing to appear in front of Ecclesiastical courts. For example, according to information provided by the Latin church, approximately 7 or 8 lawyers appear in the Latin court in Nazareth. This could hamper the independence of those lawyers vis-à-vis Ecclesiastical courts. During the interviews lawyers hesitated before voicing criticism, even when promised full anonymity. Some even explained that they had already paid a price for voicing their criticism during hearings and their clients were told by the courts' staff to look for a "less problematic" lawyer. This troubling dependency was captured well by a Jewish lawyer who was interviewed for the research:

154. Advocate Nassar Mses v. The Latin Patriarch of Jerusalem. HCJ 3120/2010 (2015).

> *The Ecclesiastical courts are run without order and are run as an internal community. There is nothing to compare with the family court at all ... the downside is that I do not speak Arabic or Greek but my big advantage is that I am not from the community and therefore I can say whatever I want and I can demand whatever I want, because I do not have to see the priest on Sunday at church, nor I owe him any explanation.*

Public scrutiny of Ecclesiastical courts is almost non-existent. As mentioned earlier, churches exercise full control over the appointment of judges and over setting their working conditions. The decisions of Ecclesiastical courts are not published. The only agents that can exercise some sort of public scrutiny over these courts are lawyers. However, maintaining an exclusive club of privileged lawyers has a strong potential for narrowing down the already reduced space for public scrutiny of religious courts. This dependency could inadvertently lead lawyers to overlook their crucial role in exercising public scrutiny. It can also erode the public trust in the entire system.

The only court that does not limit the right to counsel based on religious affiliation is the Greek Orthodox court. However, they require Jewish lawyers who do not speak Arabic to bring an interpreter.

Another issue that came up during the interviews is the practice of some Ecclesiastical courts of contacting the parties to the dispute directly and not through their lawyers or asking the lawyers to leave so they can speak privately with the parties.

We also identified one case that exemplified a complete denial of the right to a legal counsel. In the above-mentioned case against the Armenian Court of Appeals, where judges heard an appeal against

their own decision, the court denied the appellant the right to be represented by a lawyer, claiming that no such right exists in appeal stage. The interviewee had to submit a petition to the HCJ to quash the decision of the Court of Appeal.[155]

To meet their obligations under international law, Ecclesiastical courts must guarantee greater liberty for clients in choosing their lawyers, and they must not hinder in any way the work of lawyers in providing legal advice for their clients. Practices such as imposing excessive requirements on lawyers to be able to appear before the court are inconsistent with the litigants' right to choose their lawyer freely. As for meeting the parties to the dispute without their lawyers, this constitutes a serious breach of this right.

The lack of adequate facilities in some ecclesiastical courts was also highlighted in more than one interview. This prevents lawyers from preparing with their clients before the hearing. For example, in one court, there is no waiting room or a hall, no basic services such as photocopying machines. Lawyers and their clients have to wait outside in the sun. Many times, the estranged spouses find themselves fighting or arguing since physical separation between them is not possible. The lack of adequate physical facilities has implications for the right to privacy of litigants. People waiting outside for their hearing can easily hear what is going behind closed doors, including meltdowns of the parties in such sensitive disputes.

The lack of adequate infrastructure is also reflected in the fact that in some courts, the protocols of the hearing are handwritten. The lack

155. We can’t quote the case for privacy reasons, so we quote the interview.

of an official website for each court system where the public can be informed on basic issues, such as fees, working hours, and so on, is also an additional symptom of lack of adequate infrastructure.

5.7. The right to access courts

Economic accessibility a key element of the right to access courts. The imposition of excessive court fees for initiating a civil proceedings impairs the right to acess court.[156] In Ecclesiastical courts, fees are exceptionally high compared to other courts operating in the country. Only the fees collected by the Evangelical Episcopal courts are reasonable ranging from 500 NIS to 1,000 NIS. In other Ecclesiastical courts, fees could be as high as 12,000 NIS, 13,000 NIS or even 15,000 NIS. Even among Ecclesiastical courts pertaining to the same denomination, fees vary from one court to the other. This has led some litigants to change their place of residence in official registries to access Ecclesiastical courts where the fees are lower. The exceptionally high fees could be explained as a mean to fund the operation of the Ecclesiastical courts in the absence of State funding. Additionally, there are no official procedures for requesting the reduction or waiver of fees. According to some interviews, there are informal practices such as sending a request to the bishop asking for exemption from fees. It is worth noting that in 2017, a request for approval of a class action against all Ecclesiastical courts (except the Evangelical Episcopal court) was submitted to Tel Aviv District Court against the collection of excessive fees. The applicant argued, *inter alia*, that the collection of exceptionally high fees violates the

156. See, for example, Kreuz v. Poland, §§ 60-67 (2001);
- Podbielski and PPU Polpure v. Poland, §§ 65-66 (2005);
- Weissman and Others v. Romania, § 42 (2006);
- Georgel and Georgeta Stoicescu v. Romania, §§ 69-70 (2011),
- and conversely, Reuther v. Germany (dec.), 2003.

right to equality, the right to access courts and constitutes unjust enrichment.[157] In his response to the request, the Attorney General explicitly acknowledged that the collecting of exceptionally high fees violates the principle of equality and the right to access courts:

> *The Attorney General believes that a solution to the issue of Ecclesiastical courts should be promoted with purpose is to ensure that such high amounts are not charged from the recipients of the services, both due to violation of equality aspect; and also because of the violation of the right of access to the courts.*[158]

To the best of our knowledge, the case is still pending. It is also important to note that the imposition of exceptionally high fees has a disparate impact on women since they suffer from higher rates of poverty and unemployment, and earn lower salaries compared to men.[159]

Another aspect of the right to access courts that came up in some interviews is the question of physical accessibility to courts. Serious concerns arise in relation to the right of Maronite litigants to access courts. The Maronite Court of Appeal sits in Lebanon, a country that is defined by the Israeli law as an enemy State. Therefore, neither lawyers nor their clients can physically access the court. In *Sliman v. Archbishop Siah*, the petitioner argued that recognizing the jurisdiction of the Maronite Court of Appeal in Lebanon violated his right to due process. While the HCJ recognized the gravity of the issues raised by the petitioner, following its non-interventionist approach in non-Jewish religious courts, the HCJ found an easy way

157. Karkabi v. The Greek-Orthodox court et al., Class Action 54064-07-17. [In Hebrew]

158. The Attorney General's response, Class Action 54064-07-17, Karkabi v. The Greek-Orthodox court et al., para. 24. [In Hebrew].

159. Ministry of Social Equality. (2021). Employment in Arab society.

out by dismissing the petition based on the Estoppel doctrine.[160] This demonstrates how the Supreme Court turns its back on Palestinian litigants under the auspices of Israel's so called 'multicultural policy', even in cases involving a flagrant violation of basic human rights.

A similar concern arises in relation to Catholic litigants. The Apostolic Tribunal of the Roman Rota (Roman Rota) is the highest appellate tribunal of the Catholic Church, with respect to both Latin churches and the Eastern Catholic churches. Therefore, the decisions of all Catholic Courts of Appeal in Israel can be appealed to the Roman Rota in Rome. Although the Roman Rota is a third instance court and sits in a State that allows free entry of those who hold an Israeli passport, this does not entail that the court is *de facto* accessible both economically and linguistically. Additionally, the Roman Rota has an exclusive jurisdiction over cases concerning *ratum sed non consummatum* (Unconsummated marriage). These cases are automatically transferred to the Roman Rota, which acts as a first instance court. In such cases, the right to access courts becomes seriously undermined. According to church officials, the annulment of an unconsummated marriage is considered an administrative act. However, this internal characterization of the annulment cannot justify violating international law. The annulment of a marriage has serious consequences for the rights of the parties involved. As highlighted earlier, whenever legal rights and legal obligations are determined, this must be done (at least at one stage of the proceedings) by a tribunal within the meaning of Article 14 of the ICCPR. The tribunal itself must be accessible for the parties involved.

160. Sliman v. Archbishop Siah, HCJ 3238/06 (2009). [In Hebrew]

Although this research focuses on the rights of Palestinian litigants, citizens of the Israel, violations of the right to access courts came up also in relation to courts located in Jerusalem whose jurisdiction includes the West Bank and Gaza. Litigants from the West Bank are regularly denied permits to enter Jerusalem to attend the hearing in their own case. The restrictions on Gazans are substantially harsher. This reality has forced Latin courts to schedule a hearing once a month in Beit Jala, Ramallah or in other localities to enable litigants to participate. However, this hardly meets the needs of the community. The same option is not viable in the case of Gaza since judges cannot enter there. Even lawyers from the West Bank face hurdles in accessing courts in Jerusalem to represent their clients. According to one interviewee, lawyers could be arbitrarily denied entry at the checkpoint even if they present a one-day entry permit.

5.8. The right to expeditious procedures

The right to an expeditious trial is an important component of the right to a fair hearing. Some interviews revealed extremely unreasonable delays in the completion of cases, especially in the Maronite church. Separation proceedings can last for five or six years. These delays have a disparate impact on women and compromises their reproductive rights. As one of the interviewees explains:

> *You see women aged 35-36, still fertile, but you know there is a ticking clock, and the files hang there for years at her expense. What if she wants to marry and move on with her life?*

Another interviewee had to submit a petition to the HCJ against the Orthodox Court of Appeal for its failure to schedule a hearing in an appeal against the ruling of the first instance court in Yaffa, after waiting for more than one year for a hearing to be scheduled.

5.9. The old new dilemma

Scholars and activists working on what could be labeled as indigenous family law have to face the dilemma to what extent the colonial state structures can be trusted with protecting and defending the rights of vulnerable groups within native communities.[161] A similar approach was expressed by some lawyers who were critical of the way in which cases are managed by Ecclesiastical courts. Those lawyers believed that internal reform should be pursued. They were very skeptical about annexing Ecclesiastical courts to the Ministry of Justice out of fear of losing lands pertaining to Palestinian Christian communities in Israel. One of the interviewees explained that he believes in the full separation between religion and State, and the best way to do it is to allow civil marriages in Israel. Still, he believed that the independence of the Ecclesiastical courts should be addressed from the perspective of collective national rights. As he put it:

> *We as a national minority were subjected to attempts to control us and our decisions, they were able to control the Muslim community through controlling the Shari'a courts and the Druze community through controlling the Druze courts and through appointing judges and paying their salaries…today, the court that has jurisdiction over endowments is the Shari'a court and the ecclesiastical court …when there is full control by the Ministry of*

161. See, for example, Abdo, Nahla. (2011). **Women in Israel: Race, gender and citizenship**. London: Zed Books Ltd;
- Abu-Rabia-Queder, Sarab. (2018). The dissipation of the Green Line in Palestinian women's research in Israel: Production of ethical knowledge and research justice. In Mustafa, Mohanad (Ed**.). 70 years of Nakbah** (pp. 20-40). Haifa: Mada al-Carmel;
- Shalhoub-Kervorkian, Nadera, & Daher-Nashif, Suhad. (2013). Femicide and colonization: between the politics of exclusion and the culture of control. **Violence against women**, 19(3). Pp. 295-315.

> *Justice and the political establishment… we are seeing political appointments in those courts … of judges who serve as a runner stamp to transfer endowments to settler entities.*

As justified as these fears may be, we must be cautious of discourses that tend to narrow down the options of Palestinian Christian communities into two seemingly opposite solutions- internal reforms versus the annexation of courts to the Ministry of Justice. This construction is misconceived and inaccurate. There is no doubt that many of the deficiencies identified in this research can be rectified through internal reform. Those include measures, such as, appointing women to the bench; remunerating judges for their work; separating the judicial functions of judges from their spiritual ones; establishing public committees for the appointment of judges with a gender-balanced participation of lay persons; enhancing the competency of judges by organizing training on Israeli law; publishing leading case-law while preserving the privacy of the parties; enhancing the adversarial character of their proceedings; allowing individual and minority opinions; guaranteeing economic and physical accessibility to courts and so forth.

However, other deficiencies require State action, without which the basic core of the right to a fair trial remains unprotected and disregarded. Calling upon the State to comply with its most basic duties under international law to guarantee the right to a fair trial for Christian litigants does not amount to a call to control Ecclesiastical courts, or to necessarily annex them to the Ministry of Justice. International human rights law is very clear, the need to protect the identity and the collective rights of religious or national minorities cannot justify the violation of basic human rights. International

human rights institutions have unequivocally clarified that collective rights cannot be exercised at the expense of individual rights and liberties,[162] let alone a core human right such as the right to a fair trial.

162. See, for example, CCPR. (1994). **General Comment No. 23: Article 27** (Rights of Minorities). U.N. Doc. CCPR/C/21/Rev.1/Add.5, para. 8;
- CCPR. (1981). **Sandra Lovelace v. Canada, Communication No. R.6/24**. U.N. Doc. Supp. No. 40 (A/36/40) at 166.

(6)
Conclusions

The outcomes of this research suggest that the State of Israel has failed in guaranteeing the right to a fair trial for Palestinian Christian litigants in the ambit of family law. Almost all the components of the right to a fair trial, as established by international law, are not respected due to Israel's failure to act in accordance with its international obligations. The outcomes of this research expose another dimension of the disfranchisement of Palestinian citizens in Israel, and they suggest that imposition of this illiberal and coercive family law regime goes deeper than fragmenting and controlling them, it also resonates with the *millet* system's perception of minorities as mere subjects and not as citizens with equal rights.

While the responsibility to guarantee that Palestinian Christian litigants are treated as equal citizens falls primarily on the State, church institutions entrusted to exercise judicial powers also have the duty to respect and fulfil Israel's obligations under international law. The full autonomy of Ecclesiastical courts from all branches of power in Israel cannot be construed as an autonomy from the international legal order and from international human rights treaties binding on Israel. Therefore, Ecclesiastical courts must adopt a variety of necessary and urgent measures to meet their own obligations under international law. Those include, but are not limited to: appointing women to the bench; remunerating judges for their work; separating the judicial functions of judges from their

spiritual ones; establishing public committees for the appointment of judges with a gender-balanced participation of lay persons; enhancing the competency of judges by organizing training on Israeli law; publishing leading case-law while preserving the privacy of the parties; enhancing the adversarial character of their proceedings; allowing individual and minority opinions; guaranteeing economic and physical accessibility to courts; and operating websites that can provide comprehensive information for litigants including Arabic translation of Canon law.

Pope Pius XII famously said that the human being "*far from being an object or, as it were, an inert element in society, is rather its subject, its basis and its purpose; and so must he be esteemed*".[163] He also said that the individual "*has his own inalienable right to juridical security. To him is assigned a certain, well-defined sphere of law, immune from arbitrary attack.*"[164] However, the imposition of a family law regime that is based on the conception of religious minorities as mere subjects, deprived of basic due process guarantees, violate the human dignity of individuals belonging to these minorities. As this research suggests, Christian litigants are far more impacted by this system, compared to other religious communities in Israel. We believe that Ecclesiastical courts have a pivotal role and the legal duty to reclaim the human dignity of those who seek their doors looking for justice, by minimizing the harm inflicted on Palestinian Christian litigants through the imposition of this archaic family law regime by the State.

163. Cf. Pius XII's broadcast message, Christmas 1944, AAS 37 (1945) 12.
164. Cf. Pius XII's broadcast message, Christmas 1942, AAS 35 (1943) 21.

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