Viewpoint

Family Rights Act: Certainty of Equity and Suspicion of Unfairness

Dr. Hamza Ahmad Hamza*

The 1917 Ottoman Family Rights Law is considered the legal basis for provisions of Sharia (Islamic Law) courts in Israel, and was endorsed in 1919 under the British Mandate, in addition to other legislative provisions granting Sharia courts jurisdiction over family matters.

In 2001, the Knesset enacted legislation drafted by the Committee for Equality in Personal Status. Introduced by a member of Knesset from the Labor Party, with the consensus of the government coalition then led by Ariel Sharon, the proposed legislation became Amendment Number 5 to the Family Courts Law, granting parallel authority to the Family Court in personal status cases for Muslims, except for in the areas of marriage and divorce.

The 1917 Ottoman Family Rights Law is a compendium of jurisprudence on personal status, based mainly on the al-Hanafi school of Islamic law, with the exception of some articles drawn from other schools of Islamic law in light of the need to consider the public interest. Contemporary scholars of this law had believed codifying Islamic jurisprudence to be positive as it contributed to unifying judicial rulings in cases that had multiple opinions, facilitated identification of various issues for litigation among the public, and engaged in integration of views from various Sharia schools, and thus benefited the people.

Some issues were not addressed by the Family Rights Law such as custody and other issues, for which there were several interpretations and Sharia courts have had to resort to legal scholars who have views consistent with the interests of the people to draft additional provisions utilizing juridical principles. Sharia scholars have agreed upon four sources for jurisprudence: the Quran, Sunnah (the Prophet's words and deeds), *qiyas* (analogical deduction), and *ijmaa* (consensus of opinion), while disagreeing on others such as *al-maslaha al-morsala* (public interest), *al-'uruf* (custom), *istihsan* (juristic preference) and *sad al-dhara'i* (blocking the means for committing unlawful acts). *Al-Talfiq al-Mahmoud* (desirable consolidation) is another tool which involves consolidating various jurisprudence interpretations into a specific ruling, although scholars

have placed rules and limits on its use. A Sharia-oriented policy serves as a tool for developing and formulating new laws.

In their rulings today, Sharia courts first rely on what had been approved by Muslim jurisprudence by the Family Rights Act. When a particular issue has been omitted or addressed in insufficient detail, then courts resort to the means of juridical interpretation as outlined above. The Sharia Appeals Court has legal jurisprudence in various issues in additional areas, most of which will not be addressed in this article.

Researchers, among them Dr. Yizhak Reiter, have pointed out revisions in Sharia courts in the Israel since 1994, praising the role of the Sharia Appeals Court president, Judge Dr. Ahmad Natour, for Islamicizing them. There has been advancement in the judicial system of the Sharia courts at all levels. Brief and summarized rulings of the Sharia Appeals Court have become detailed and explanatory, similar to academic research. After having been forced to rely on Civil Code, judges in Sharia courts now can rely on Sharia laws and jurisprudence corresponding to the times. A genuine revision has also occurred in the fact that we see that nominations for judges hold a minimum of B.A. degrees in law. Some judges hold M.A. while others hold Ph.D. degrees, and many in law and Sharia.

These revisions have produced a new judicial reality, whose advancement has complemented governance and the judicial system, especially in the way it has enabled jurists and ordinary people to understand issues that had been omitted or insufficiently addressed by the Family Rights Law. For example, the Sharia Appeals Court has fully fleshed out article 130 of the Family Rights Law, established the principle of the minor's interest in cases of custody, and adopted the legal opinion that calls for limiting marital age. In all of these advancements, the Sharia Appeals Court did not make any misuse or change in Sharia principles.

Through its decisions, the Sharia Appeals Court has given women enhanced status at all levels. For example, it granted women the right to divorce if continued marital life would cause them damaged, whereas women remain deprived of this right in the courts of other religions. In addition, Islamic Sharia has always granted women the right to inheritance, and in some cases women retain a majority share of property. Regarding custody, Sharia Court has adopted the principle of the minor's interest, allowing women to obtain custody if the child's interest proved to lie with her, even in cases where women remarry or children's ages exceed the age of custody. In addition, the Sharia Appeals Court has adopted marital age limitations, benefiting women in particular, so that they are more ready for marriage educationally, culturally and socially.

Women are entitled to receive alimony, even if they are very rich, their wealth and earnings are of no consideration. In addition, the Sharia Appeals Court has concluded that employment of women is no violation of the marriage bond if it was something agreed upon by the spouses prior to marriage. A husband has no grounds for preventing a wife's employment after marriage, and attempting to do so is even considered abuse.

I had believed that Amendment Number 5 to the Family Courts Law had abolished a large part of the authority of Sharia courts in the country, although its initiators had claimed it serves the interests of Muslims in general and women in particular. However, we find ourselves in a completely different reality; this amendment was opposed by large numbers of Muslims, and even by leading researchers such as Menashe Shawah. Indeed, judicial proceedings in Sharia courts are short and quick. For example, alimony cases may not exceed two months, whereas Family Court procedures may last months or years. In Sharia courts, a wife is entitled to receive alimony regardless of her wealth, whereas Family Court takes into account a woman's income when judging her entitlement to alimony. Furthermore, alimony allowances are higher in Sharia courts than in family courts, according to statistics published in *Maariv* newspaper. In addition, women tend to approach the Sharia Court for protection orders, division of financial resources, and for other issues that had originally been within the jurisdiction of the Family Court. Thus, nearly ten years after passage of the amendment, actual practice indicates its failure, since Muslims, and particularly women, have clung to the Islamic courts, and not to civil courts. Only a negligible proportion has relied on civil courts and we are not aware of satisfactory experiences.

When reviewing the amendment proposal and the debates which took place during review sessions, we find that most of its supporters were Jewish MKs. The majority of Muslim MKs did not support it and it does not reflect the will of Muslims in this country. Rather, it appears an obvious plan for the secularization of the Sharia judiciary system which may be considered the last remaining Islamic institution in the country. We have no doubt that those calling for the abolition of the Family Rights Law and replacing it with other laws are aiming to secularize the system.

Changes and amendments to personal status laws affecting Muslims in other states have been based on decisions issued by Sharia courts, drafted by Sharia judges and scholars, and ratified by Muslim parliamentarians under a Muslim regime. The task was not assigned to non-Muslims. The Sharia Court system under its administration and judges, utilizing the mentioned avenues of jurisprudence, is able to advance justice and fairness through its rulings, and

maintain the dignity of all Muslims in the country. With these findings, there is no room for change or amendment to the Family Rights Law, and the cancellation of the 2001 Fifth Amendment seems possible. No one is better able to formulate provisions in the interest of Muslims than Sharia court judges, complying with the directives and spirit of Islamic jurisprudence. I believe personal status laws are fundamental to a people's interest; imposing changes or amendments forcibly, influenced by reasons distant from Islamic Sharia spirit, aims and objectivity, and without soliciting Muslims' opinions, is a clear violation of the freedom of religion and freedom of Muslims on issues related to their personal status.

Muslims should ask, is it lawful that individuals take such a fateful step in the name of all Muslims? It is no secret that this approach could dangerously lead to full Israelization, even if it contains voluntary adherence by the Arab minority to provisions and laws of the Jewish majority (and the extreme right could be dominating this majority). Feminist movements advocating aims they believe in should be aware that their sincerity of purpose does not in any way justify alliances that blur the parameters of identity and belonging. If these important tasks are not assigned to Sharia Court judges, who are characterized by professionalism, objectivity, and upholding the spirit of Islamic law and its purposes, the personal status of Muslims is harmed. Individuals should be wary of only pursuing glamorous slogans, if that means pursuing Israelization of Sharia courts and driving the final nail in the coffin of the most important institution for Muslims in this land.

***Dr. Hamza Ahmad Hamza** is a Sharia court judge and a lecturer in Faculty of Law at the University of Haifa. He holds a Ph.D. in Arabic, a B.A. in law, and a B.A. in Sharia and Islamic Studies.