Editorial

Issues of personal status of Palestinians in *al-dakhel* (inside Israel) deserve considerable attention and serious treatment, since personal status laws affect the social and economic situation of individuals, and determine social values related to personal and social status of individuals, particularly of women.

Amendment Number 5 to the Family Courts Law passed in 2001. It provides the possibility of choosing to litigate certain procedures in the civil Family Court or in the religious courts, in most issues of personal status for Muslims and Christians, except in cases of marriage and divorce.

The articles published in this volume of *Jadal* address some of the issues related to personal status; some pieces review the debates and ramifications of the aforementioned amendment. Other articles discuss the importance of changes in the Sharia (Muslim) and Christian courts, or in community awareness concerning values associated with these changes. Due to the wide range of issues, all topics and opinions cannot be debated here; however, we make an attempt to present some of the leading concerns.

The analytical article by **Areen Hawari** addresses the importance of personal status issues in determining individuals' social status, and addresses the amendment to the Family Rights Law, while commenting on some of the debates that took place among various parties, namely among preservers of the Sharia courts and feminist activists and forums.

In her article, **Heba Yazbek**, a coordinator of the Committee for Equality in Personal Status, presents a reading of the legal amendment put forth by the committee, emphasizing the amendment's importance in creating legal and gender-inclusive alternative debate based on concepts of human rights, which could affect social change.

Judge **Hamza Ahmad Hamza** emphasizes the importance of the Ottoman Family Rights Law, and the role of the Sharia Court of Appeals in reviving the judicial system of Sharia courts. He argues that amendment enacted in 2001 came from outside of Islamic jurisprudence, and has failed since the majority of the people still prefer to conduct litigation in the Sharia Court.

In her article, Dr. **Naifeh Sarrissi** emphasizes the necessity of amending the Ottoman Family Rights Law to accommodate new developments taking place

within the society and to enhance women's status and their role in the private and public spheres. Dr. Sarrissi describes how Women and Horizons Organization is working on developing new provisions of the law from an enlightened jurisprudential perspective.

Through analyzing eighteen interviews she conducted with women turning to Christian Courts, advocate **Shirene Batshoun** addresses the ways these courts treat divorce and separation cases. Batshoun discusses how women suffer in these courts, due in large part to their independence, emphasizing the need for state supervision.

Advocate **Rawia Abu-Rabia** presents the phenomenon of polygamy in Palestinian society in the Naqab (Negev), stating that this phenomenon cannot be understood without being aware of the fact that it does not flourish in a vacuum. It thrives on a combination of patriarchal and colonial power relations, which turn women into an invisible group, unprotected by the law; laws are bypassed without any regard from the state and its institutions.

We chose to also include an article regarding the discourse taking place following the revolutions in the Arab world, especially in Egypt concerning the new constitution in the light of the victory of political Islam. Researcher **Marwa Sharafeldin** calls for amending personal status laws from within Islamic law, viewing it as a system capable of interacting with reality and allowing for gender equality.

Analytical Paper

Personal Status in Civil Versus Religious Courts: A Controversial Issue

Areen Hawari*

Personal status issues are considered among the most private and sensitive issues in all societies. As they concern private and family life, we do not generally wish to address them outside the scope of our homes and families; we often perceive these issues as sacred. However, reality sometimes obliges us to turn to the legal system to resolve family disputes, such as in cases of complicated cohabitation, failure of spouses to fulfill familial responsibilities, and the need to decide on child care and guardianship. Thus, litigation becomes inevitable, and even at times preferable to living in unhealthy relationships, including ones accompanied by violence and psychological, physical, and economic insecurities. In many cases, women suffer more than men in unhealthy relationships, since they tend to be the weaker party within existing social, economic, cultural, and political structures. Resorting to a third party becomes necessary. In doing so, we bestow great value on the legal institution, not merely because the issues are private and sensitive, but because we empower it to regulate our lives within the private sphere, and to determine our individual status and behavior within the public sphere as well. For example, a woman suffering from domestic violence cannot exercise her life in the public sphere with confidence, freedom, and well-being. Similarly, a father who is unjustifiably deprived from seeing his children cannot be fully productive in his work or social activism.

Laws reflect the values of the legislature, which consequently perpetuate these values within the society. As noted, these legislative values define personal status issues, which make the laws central in individuals' lives. This explains the presence of great disagreements over such laws, whether in *al-dakhel* (inside Israel), in the Arab and Muslim societies, or worldwide. The debate over amending personal status laws in the Arab world has reached a boiling point, whereby feminist and human rights activists have taken a major role in enacting these amendments, while absorbing much of the attack as well.

The Moroccan Personal Status Code is among the most successful achievements. Approved in 2006, the Moroccan Personal Status Code raised the marital age to

18, granted women *willaya* (the right to decide who and when to marry), and placed divorce under judiciary supervision. It also acknowledged women's monetary rights to claim their spouses' earned resources.

Egyptian activists have succeeded in enacting the Kholoa Law, which granted women the right to attain a divorce without the approval of her husband. Legislative amendments to other laws enable women to travel without their husbands' approval.

It is not a coincidence that personal status issues were raised again immediately following the revolutions in the Arab world, especially in Tunisia and Egypt.[1] In *al-dakhel,* the process of amending the Family Rights Law lasted several years and has raised considerable debate among different community groups regarding its legitimacy and its essence.

The rest of the article will address the amendment to the Family Rights Law, its causes, content, and the debates surrounding it. In conclusion, I will briefly address the issues of debate for changes at present.

Enacted by the Knesset in 2001, following the initiative and efforts of the Committee for Equality in Personal Status, Amendment Number 5 to the Family Courts Law provided the opportunity for Muslims and Christians to choose to conduct litigation in either the Family Court or religious courts over most matters of personal status. However, marriage and divorce cases are exclusively kept within the jurisdiction of Islamic and Christian religious courts, similarly to Rabbinical courts. This amendment granted Muslims and Christians a right already enjoyed by Jewish citizens since the enactment of the Family Courts Law in 1995. Prior to this amendment, Muslims could only approach Sharia courts in most issues of personal status,[2] and Christians could only approach Christian courts in issues of marriage, divorce, and alimony for married woman. The 2001 Fifth Amendment enabled Muslims and Christians to choose either their respective religious courts or Family Court for resolving matters such as alimony, child support, custody, and guardianship.

The debate on the amendment addressed issues of principles and procedures. Those rejecting the bill on grounds of principle argued for preserving religious institutions and preventing the transfer of their authority to civilian courts. As a

[1] See NGOs statement against nominating Judge Albaja as head of Family Appeals Court, and on Personal Status Program which includes cancelling *Kholoa* Law and termination of mothers' custody at the age of 7 for boys and 10 for girls. See New Woman Foundation: http://nwrcegypt.org/en/.

[2] Except for inheritance cases where jurisdiction has been solely with civil courts, unless all stakeholders agree and approach religious courts by written request.

minority living in a Jewish state, Arabs have the right to autonomously oversee their cultural and religious affairs. Nonetheless, cultural autonomy is a collective right that should not supersede or sacrifice individual rights.

Supporters of the amendment argued that it is the individual's right to choose the legal system she prefers to adjudicate her case, whether religious or civil, as it is an inherent human right to be preserved by the principles of democracy. The Committee for Equality in Personal Status claimed that rulings issued by religious courts were unfair to women. Others pointed out the importance of change coming from within the Palestinian society, especially on matters concerning values and social behavior, rather than through Israeli legislation, while ignoring the fact that religious courts are subject to oversight by the Israeli Ministry of Religion and the Ministry of Justice. Moreover, Islamic religious court judges are appointed by the Committee for Nomination of Judges, an official committee that consists of representatives from the Israeli government, rather than nominated by the Palestinian society. In addition, the law governing the Sharia Court has an unsacred and secular basis, since it is based on the Ottoman Family Rights Law, and established under the Ottoman Empire. Indeed, as a product of jurisprudence relying primarily on the al-Hanafi school of Islamic Law, its content can be subject to amendments, as has been done in most Arab countries from a jurisprudence perspective.

The Committee for Equality in Personal Status also claimed that non-religious individuals should have the right to choose litigation in civil courts on personal status issues. However, the Family Rights Law demands that the Family Court apply religious provisions just as they are applied in religious courts, granted they do not contradict Israeli laws, in correspondence to the litigant's religious denomination in personal status cases. This provision places Israel's civil laws above religious laws. However, the Committee maintains that the Family Court is more committed to applying civil laws, particularly the Law of Equal Rights for Women of 1951 and the Law of Legal Guardianship of 1962, which provides for both parents sharing equal custody of their children.

Some critics noted that the amendment would replicate those applied to Jewish women and thus reproduce their weaknesses. In the matter of the jurisdiction of courts, if the husband approaches the religious court first, then proceedings will take place in the religious court. Furthermore, it would reproduce the principle of "linking litigation," whereby if a husband files for custody in a religious court, for example, other matters (such as alimony and child support) may be

connected to it.[3] The Committee followed the litigation model for Jews, believing that contradicting this model would be difficult. Nevertheless, through the process towards enactment, the Committee succeeded in canceling the "linking" requirement to resolve all issues within a single court.

Other objections to the law were procedural, such as in noting that proceedings in religious courts are conducted in Arabic. Women may thereby feel less alienated and confused, resulting in faster proceedings and consequently lower legal fees. Considering the aforementioned criticisms, it is clear that the legislative debate cannot be reduced simply to positions of "secular" versus "religious," nor human rights versus conservative. This is not to say that debate along these lines did not occur; there were voices insisting on limiting litigation to Muslim and Christian religious courts since they are considered the preservers of "holiness" and a "national" stronghold. Others object since they consider the Family Court the ultimate expression of "secular" practice.

Eleven years have passed since the amendment which provided women and men the possibility to choose litigation procedures for personal status issues (except for marriage and divorce). Nonetheless, we cannot firmly state that one court or the other is more equitable in terms of its decisions, actions, or women's feeling of fairness, since no reliable research has been conducted on these issues. However, the feedback from many lawyers indicates that the amendment has challenged religious courts to improve their performance and make more equitable decisions. Lawyers and activists in the Committee for Equality in Personal Status point out that the Family Court relies more on the principle of equality, as well as on "the interest of the child" principle, and equal rights for both parents in matters of custody of minor children.

Numerous issues remain to be addressed. Feminist platforms have it taken upon themselves to engage with many of them. Recently, the Committee for Equality in Personal Status succeeded in changing the marital age to 18 years old and ran an important campaign against polygamy. Kayan Feminist Organization supports litigant women in personal status issues, providing papers on personal status such as gender readings to the Christian courts. Moreover, Women and Horizons Organization is conducting research in order to amend certain provisions of the Personal Status Law applicable to Sharia courts, and it launched a campaign several years ago to defend women's right to inheritance.

[3] This might have especially harmed Christian women if we are to assume a Christian woman would prefer Family Court, since before the amendment Christian women could only approach the civil court in cases of child custody and alimony. According to the "linking litigation" principle, suits are to be adjudicated in the Christian court if the husband approaches it first.

Feminist platforms seem to be carrying the burden. In my opinion, legal, civil society and political parties should all be part of the process to make changes in personal status issues, not only legally, but also socially and culturally. Raising the marital age will not be sufficient protection for young women, since the society lacks readiness to abide by the statute, and anti-polygamy laws will only succeed through firm social attitudes and leaders taking positions against this phenomenon. Religious and civil laws will not defend women's right to inheritance so long as political and religious leaders do not uphold this right and the educational leadership does not instill principles of equality and human dignity in future generations.

***Areen Hawari** is a feminist activist and a Ph.D. candidate in Gender Studies at Ben Gurion University.

Viewpoint

Eleven Years Since the Amendment to the Family Rights Law: Achievements and Challenges

Heba Yazbek*

In 2001, the Knesset passed amendment No. 5 to the Family Courts Law (1995), under which Muslim and Christian litigants were provided with the option to approach Family Courts on issues related to personal status (except in cases of marriage and divorce, which remain under the exclusive jurisdiction of the different religious courts). Prior to the amendment, litigants were able to approach only religious courts for issues pertaining to personal status. The amendment is the result of a six-year struggle led by feminist and human rights organizations through their participation in the "Committee for Equality in Personal Status," which aims to improve Arab women's state in areas related to their personal status. The committee relies on the experience of many lawyers, who through their work have seen how religious courts adversely affect women's rights by adhering to stereotyped gender roles and the patriarchal structure of the society.

The Nakba affected Palestinians' status in the state, in particular women's status. Consequent to economic hardships and the political, national, and cultural marginalization experienced by Palestinians in Israel, culture has turned into an end in itself, whereby its preservation symbolizes defense of the homeland. Women have become a symbol of nation, land, and culture. Culture, with its religious values, beliefs, norms, customs, and family tradition, has become a tool for dominance: it justifies and legitimizes social norms, including in aspects related to women's status and role.[1] This situation has rendered any attempt to make changes in personal status laws subject to broad and complex debate due to potential national, cultural, religious, and civil ramifications.

Personal status laws regulate spousal and familial relations such as marriage, divorce, child custody, alimony, division of property, and the like. These laws reinforce national, religious, and cultural identity, and can serve as tools for preserving cultural uniqueness and autonomy.[2] Thus, the aforementioned amendment stimulated considerable debate among the state's religious, human

[1] Ghanem, H. (2005), *Attitudes Towards the Status and Rights of Palestinian Women in Israel*, Issued by Women Against Violence Organization (WAVO) (Arabic).
[2] Note that Sharia courts in Israel are subject to Israeli laws and the judiciary system.

rights, political, and feminist circles, which lasted throughout the drafting period of the amendment, from 1995 until its passage in 2001.

In my opinion, the occurrence of the debate is not surprising, but to be expected within a society that has suffered occupation and marginalization of its cultural and linguistic features, as well as other facets of collective and personal identity. The society perceives any change in its patriarchal structure as a threat to its continuity, especially if these changes concern women, as they are perceived to be the primary conveyers of identity, heritage, and culture. The initiative to provide Arab citizens the option of civil courts for personal status issues can be considered a challenge: it alters the societal and legal discourse prevailing among Palestinians in the state concerning their status in general, and Palestinian women's status and rights in particular.

Undoubtedly, the amendment has had serious implications on gender and legal discourse, which subsequently has affected societal practices. There is a dire need to initiate alternative social discourse based on human and women's rights charters, one that emphasizes the necessity to guarantee equality, freedom of choice, and freedom of faith. Through its tireless activity, the Committee for Equality in Personal Status has been emphasizing these principles.

Aimed at providing Arabs, particularly women, with the option to pursue litigation in either civil courts or religious courts, the amendment highlighted the plight of women under the existing personal status laws and constituted a challenge for religious courts to improve their functioning. In addition, it assisted in articulating critical and sensitive issues which were not previously debated politically or socially, especially from feminist and human rights perspectives, in order to create alternative frameworks. Some of the more notable advances include: raising the marital age from 17 to 18 (recently achieved);[3] fighting polygamy; launching mass campaigns on issues that were long considered "taboo" (since they are closely associated with religious laws and are socially rooted); proposing reforms to the Sharia Court, such as the nomination of female judges and arbitrators; reforming dowry processes; abolishing marital obedience (of a wife to her husband); and advancing other reforms related to inheritance.

On the other hand, it should be noted that despite the contribution of the amendment in stimulating debate and creating alternatives for dealing with sensitive social issues, one cannot claim that civil courts' rulings are more just than those of Sharia courts towards Muslim women. A relatively short period of time has passed since the amendment was enacted, hence any conclusive statement regarding its efficacy for women would be inaccurate and uninformed.

[3] See the working group for equality in personal status issues: http://pstatus.org/en/

To date, no comparative research has been conducted in this area, and lawyers' anecdotally-based positions differ.

Kayan's data indicates differences in rulings in custody cases between Sharia Courts and Family Affairs Courts: Family Affairs Courts tend to grant guardianship to women, and their proceedings are usually shorter.[4] Conversely, there is a relative advantage for women in Sharia Courts in alimony cases, especially as concerns the duration of proceedings and accessibility. However, civil courts have awarded higher amounts, which indicates a partial application of equality within civil courts, and which have begun applying principles of the civil code, even though patriarchal terms are still in use: *noshoz* (deviation), *ihtibas* (keeping woman at home), and *taa'a* (obedience).[5]

In addition, family courts still pose several barriers for Muslim litigants: accessibility (they are usually not located in Arab neighborhoods); financial burdens (fees and expenses are higher in family courts than in Sharia Courts); Arab women's sense of "alienation," especially due to the use of Hebrew in the court; the national and gender identity of the judges; and the court's extensive bureaucracy. It lies within the state's and the court administration's responsibility to ensure the courts' accessibility by Arab litigants, particularly women.

Finally, it is still too early to judge the experience of women in civil courts. Nonetheless, providing a democratic choice is an achievement in itself that must be maintained and further developed to ensure de facto equality. There is no doubt that bringing women's issues from the private to the public sphere, and through it criticisms of the patriarchal societal structure, has the potential to strengthen Palestinians' social resilience within the state, since patriarchal practices weaken society and constrain the advancement of social justice for the individual.

***Heba Yazbek** is a political and feminist activist, a Ph.D. candidate in Social Sciences and Humanities at the University of Tel-Aviv, and a coordinator of the Committee for Equality in Personal Status.

[4] A summary of the legal department activity 2006-2010, "Legal Advocacy in Personal Status," Kayan Organization can be found at: http://www.kayan.org.il/ar/inner.php?ID=196
[5] Batshoun, Shirene (2010), Wife's Alimony and the Principle of Equality between Men and Women, Al-Siwar publication, Vol. 37 (Arabic).

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.

Viewpoint

Towards Amending Personal Status Law in Sharia Courts

Naifeh Sarrissi*

Women and Horizons Organization was able to break the wall of silence regarding personal status law applied in Sharia courts in Israel since 1917 without any significant changes to this day.[1] Muslims in Israel are still governed by Ottoman law, imposed on us as if it were sacred, even though it was formulated by religious scholars who are humans like the rest of us. Not to mention that Sharia courts present themselves as faithful trustees of the law, restricting it mostly to the al-Hanafi school and overlooking the needs of current times and reality, which substantiate changes pursuant to the principle that the law corresponds to the times.

The Ottoman Family Rights Law needs amendment of its essence, as well as changes in terminology to suit developments taking place in the society, with reference to human rights and in particular to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child. Women and Horizons Organization considers their application an urgent need, and is currently working on developing legislative proposals. Amending the law could elevate women's status within the society and enhance their role in public and private spaces in all areas, suiting recent developments related to modern Muslim families, in addition to social, economic, and cultural transformations in the Arab Palestinian community in Israel.

The suggested amendments to personal status laws applied in the Sharia Court are based on religious scholarship. While they are considered new on the local level among the Arab Palestinians in *al-dakhel* (inside Israel) and may lead to some controversy, they are not new compared to what has been happening in the Arab world, where serious changes and amendments have taken place, including preventions or restrictions placed on polygamy and the choosing or

[1] This article addresses the laws applied in Sharia courts only, while noting that in most cases of personal status, except in marriage and divorce, there are many litigation options, for instance, the Civil Court adjudicates in inheritance cases unless all stakeholders agree to approach the Sharia Court. In other cases of personal status, i.e., child custody and alimony, the litigant may chose the Sharia Court or Civil Court, according to Amendment Number 5 to the Family Courts Law passed in 2001 following the recommendation of the Committee for Equality in Personal Status.

elimination of the requirement of a guardian to consent to marriage (traditionally, the bride's father).

As noted, these laws rely on the four schools of Islamic jurisprudence and these schools rely on individual scholars who interpret the Quran and Sunnah from the very distant past. We need jurisprudence to suit the current reality and the status of women, respecting their human dignity and equal treatment before the law without discrimination based on gender, through new readings and diversifying reference to the different schools. It is time to build on international charters and conventions to amend statutes that relate to women as minors, regardless of their age, placed under male custodianship.

Personal status refers to the sum of natural or familial characteristics distinguishing a person from others that have significance under the law, i.e., male or female; married, widowed, or divorced; legitimate birth; legally competent or a minor; and incompetent due to insanity or another legal reason. Personal status laws form sets of rules, provisions, and principles regulating relations among individuals according to their kinship, including provisions on engagement and marriage, dowry, alimony, divorce, custody, inheritance, and trusteeship. They also establish rights and duties arising from such relationships at different stages, derived from provisions of the Islamic Sharia schools and interpretations addressing new circumstances. The Family Rights Law and other personal status laws address issues of marriage and divorce, their implications, inheritance issues, wills, and so forth.

Personal status laws play an important role within the family, with significant influence on women and children. The laws concern men and women together since they regulate family relations before and during marriage and in cases of divorce. However, they are more associated with women since women are considered the weaker party in personal relations, and a place where they are denied rights due to prejudice, oppression, and inequality. Their status is reflected in the use of legal terms offensive to women, such as *akid nikah* (conjugal contract) and "obedience." These terms refer only to legitimizing the sexual relationship with no reference to building a family. While a conjugal contract gives legitimacy to marriage in general, obedience is limited to women obeying men, even though we know that the time of slavery is over.

Over the past two years, Women and Horizons Organization has conducted research on personal status laws as applied in Sharia courts in Israel. Dr. Mousa Abu Ramadan is leading the study, assisted by Dr. Ashraf Abu Zarqa and the author of this article. The study aims to examine the extent to which the laws correspond to principles of dignity and equality, and at building several openings for amendments from enlightened religious perspectives to suit real situations

and incorporate human rights. Based on the results, the organization has drafted several legislative provisions and is currently advocating for its reforms, including: minimum age for marriage, guardianship in marriages, and preventing or restricting polygamy. The research and its findings will be published soon. Women and Horizon Organization will also work to advocate that these provisions be enacted into law by the Knesset. Women and Horizon Organization has already started the process of collaboration of members of Knesset, clerics and judges in Sharia courts, and has organized two workshops attended by judges from the West Bank, as well as MKs, feminist activists, and lawyers.

***Naifeh Sarrissi** is the Director of Women and Horizon Organization. She holds a Ph.D. in international law.

Viewpoint

Christian Courts: A Feminist Perspective

Shirene Batshoun*

Christian courts in Israel enjoy special legal status and considerable autonomy compared with the other religious courts. While religious courts in Israel are subject to state supervision and/or intervention, regarding procedural functioning, appointment of judges, and other issues, Christian courts in Israel enjoy complete independence regarding appointment of judges, imposing and collecting court fees, managing budgets, and in setting legal procedures. In this article, I present the ways different denominations of Christian religious courts address divorce and separation cases, based on my interviews with eighteen women who have approached these courts. I then discuss some of the consequences stemming from the autonomy enjoyed by Christian courts in Israel.

Divorce is not allowed in Roman Catholic and Malkite Catholic courts. Orthodox courts recognize reasons for divorce and annulment of marriage, although these reasons differ for husbands and wives. In Roman and Malkite Catholic courts, annulment and voiding a marriage can be requested: annulment based on the absence of sexual relations, and voiding based on various legal reasons with the free consent of both spouses. In both procedures the marriage can be annulled and the spouses' status reverts to single. In addition, abandonment may be requested which is a declaratory ruling and does not liberate spouses from marital status.

Analysis of the interviews I conducted with women who approached Orthodox courts shows that the majority of divorce proceedings (66% of procedures) were submitted with the consent and initiation of both spouses. In 40% of the cases the parties changed their denomination from a Catholic to an Orthodox denomination, in order to make divorce possible. Fees collected for divorce proceedings in Orthodox courts range from 3,000 to 6,000 ILS, and in cases where the parties change their denomination, fees can increase to 13,000 ILS due to additional fees for changing denominations.

It is worth noting that these fees are considered high in comparison with fees collected by other religious courts (223 ILS for divorce fees in Islamic and Druze

courts), or when compared with fees collected in Family Affairs Courts (230 to 467 ILS for divorce, and 2,798 ILS, or up to 1% of the amount of assets in cases of property claims). The fees collected by Orthodox courts are extreme in the judicial system and there are no clear procedures for requesting their exemption or reduction—one of the consequences of the lack of state control.

Regarding the duration of proceedings in the Orthodox courts, there is a noticeable difference between cases having the consent and initiation of both spouses and cases without mutual consent. Cases involving mutual consent tend to last for two months with two hearings at most. Cases without this consent last for years (from two to eleven years) with six hearings on average.

When asked about their perspectives of divorce proceedings, litigating women pointed out many issues, including: a perception of a lack of professionalism in the court; an insufficient sense of the "rule of law"; a male-dominated atmosphere; an absence of female presence and a lack of sensitivity to women's issues, especially in cases of domestic violence; and an inability to address emergency situations. Many women pointed out the detrimental requirement for consent from the other party—a spouse lives in "jail" until the other spouse agrees to set her or him free. This situation can cause blackmailing, such as asking the other party to waive financial rights. Due to their socio-economic status, women suffer the most from this state of affairs.

Catholic courts are even less sympathetic to women. They do not come to their aid in abandonment cases, since separation of the spouses may last years before release from marriage is granted. Annulment of marriage can also last years, as there are complex procedures requiring authorization of additional bodies, such as the Appellate Court in annulment cases and the endorsement of the Vatican in cases of dissolution of marriage, which makes proceedings long and complex.

I believe the existing legal situation in these Christian religious courts, reflected in collecting exorbitant fees, prolonged and complex procedures, and the scarcity of chances for dissolving partnership in Catholic marriages, results from the broad autonomy these courts enjoy. Granting the sole and exclusive authority to these courts in marriage and divorce cases obliges spouses to remain in "imposed" marriages, even if they had begun with consent. Limited avenues for dissolving the marital partnership can have considerable economic, psychological, and social consequences on both spouses.

The prevailing situation jeopardizes the individual's fundamental right to choose a spouse with serious effects on Arab women, whether due to social sanctions stemming from cohabitation without marriage, or economic consequences stemming from being forced to waive financial rights. The right to marry and

found a family, and the state's responsibility to ensure the equal rights and responsibilities of both spouses during marriage and in cases of divorce, are guaranteed by international conventions signed by Israel, including the International Covenant on Civil and Political Rights 1966 (ICCPR). The local committee concerned with the implementation of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) included in its recommendations issued February 4, 2012 that the state take responsibility to create additional or alternative civil options for marriage and divorce.

I believe the state adopting a role in regulating or supervising religious courts is very important for protecting litigants, especially women. Furthermore, I believe that the issues raised by women and discussed here must be addressed by the Christian courts themselves, and efforts made on their part to solve them.

***Shirene Batshoun** is a lawyer and coordinator of the legal department at Kayan Feminist Organization.

Viewpoint

Polygamy as a Phenomenon External to the Legal System: Colonial Versus Patriarchal Power[1]

Rawia Abu-Rabia*

There is no accurate data on the real prevalence of polygamy within Palestinian Bedouin society, but many estimates confirm that polygamy exists in roughly 20% to 36% of households.[2] Over the last 20 to 30 years, there appears to have been a consistent increase in polygamous marriages at all levels of Palestinian-Bedouin society.[3] Polygamy seems to be increasing across broad social spectra, irrespective of age, education, or socio-economic status.

Under international law polygamy is perceived as discriminatory and attributed with multiple forms of harm towards women: physical, mental, sexual, reproductive, and economic.[4] Women's rights activists contend that the practice of polygamy violates many fundamental human rights recognized by international law.

Yet, in the Sharia law that governs Muslim private affairs in Israel, polygamy is permitted. Even though polygamy is a criminal offence according to the state penal code, the State of Israel does not enforce this particular statute among Palestinian citizens.[5]

This state of affairs raises many unanswered questions. How can this issue affecting the Palestinian-Bedouin women in the Naqab be addressed, an issue that is simultaneously legal, social, cultural, and political? How can the three-fold invisibility of Bedouin women be ended: in polygamous marriages, as citizens in the eyes of Israeli law, and as women in the eyes of Bedouin society? How can we break through the conspiracy of silence around this practice? By what

[1] This article is based on the author's thesis "Redefining Polygamy among the Palestinian Bedouins of the Naqab: Colonialism, Patriarchy and Resistance." LL.M studies Washington College of Law, American University, 2009.
[2] Almagor-Lotan, Orly (2006), *Polygamy Among the Bedouin Community in Israel*, The Knesset Research and Information Center.
[3] Abu-Rabia, Aref, Salman Elbedour and Sandra Scham (2008), Polygyny and Post-Nomadism among the Bedouin in Israel, *Anthropology of the Middle East,* 3 (2), pp. 20-37.
[4] See Article 16 1(b) The convention of on the elimination of all forms of discrimination against women ("CEDAW") http://www2.ohchr.org/english/law/cedaw.htm.
[5] According to the Punitive Statute, section H clause 176 (1977) polygamy is a criminal offense.

mechanisms and in whose interest is its perpetuation? In this viewpoint, I primarily discuss the legal aspects of this issue.

Polygamy in Palestinian-Bedouin society does not occur in a vacuum. It operates at the intersection of colonial power and patriarchal power.[6] "Colonial power" describes how Israel exercises its political power as a state towards its non-Jewish citizens. It works to segregate Bedouin society internally by supporting the traditional tribal structures, and through practices such as polygamy.[7] "Patriarchal power" describes how Bedouin men exercise domination over Bedouin women in a hierarchy based on gender differences.

In Bedouin society, patriarchal power operates both actively and reactively and in relation to the colonial power of the state. The line between these two mechanisms of power is not fixed but fluid, and changing constantly. The State of Israel's colonial power buttresses patriarchy and weakens Bedouin women. The operation of these forms of power enables polygamy's exemption from the legal system and Bedouin women's invisibility in the eyes of the law.

The State of Israel applies two distinct legal systems against the Bedouin population: one in relation to land and demography, and another in relation to marriage and family. The first system represents the state's sovereignty and takes advantage of its mechanisms of enforcement to pursue its interests in the public sphere. The second system is governed by the religious courts that address legal matters in the private sphere.

The state activates its colonial power in both domains. In the first system it acts directly as the state and colonizer. In the second system it acts indirectly by choosing not to act—native norms are maintained for the native. This creates a strict dichotomy between the state-based penal law and religion-based family law. The state prohibits polygamy, yet it avoids enforcing the law in the case of the Bedouin population.

In terms of rights, the structure of the law leaves little power to women. It gives more power to men since they can manipulate the system to marry more than one woman by failing to register additional marriages with the Israeli authorities. Local government has turned a blind eye to this practice, as evidenced by the way the children of such unions are added to the population registry either under the first wife's name or solely with a declaration of paternity.

[6] I am adopting the colonial paradigm suggested by Yiftachel. See Yiftachel, Oren. (2008). Epilogue: Studying Naqab/Negev Bedouins:Toward a Colonial Paradigm?*HAGAR Studies in Culture, Polity and Identities*, 8 (2), pp. 83-108.
[7] Ibid.

Another way Bedouin men manipulate the legal system is by marrying additional wives according to the Bedouin way of *zawaj'urfy* (informal marriage). If a man marries a woman from the occupied Palestinian territories, he does not bring it to the attention of the Israeli authorities. If this second wife gives birth in an Israeli hospital, the man will claim she is his "girlfriend," "known in public,"[8] or will sign documents stating that he is the legal father of the baby without claiming that the mother is his wife.[9]

The state activates two legal systems that serve to externalize polygamy from the sphere of law enforcement and allows Bedouins to activate their customary law in the guise of "multiculturalism."However, this autonomy is granted by the state only in the family law sphere, leaving Bedouin women outside the legal system as invisible citizens. The jarring silence of the State of Israel and the patriarchal society is suggestive as to how Bedouin women are treated generally and to the ways they are marginalized. Future study is required to hear the narratives of Bedouin women on polygamy and to analyze the ways these women challenge this practice and struggle for their rights as women and as part of an ethnic minority.

***Rawia Abu-Rabia** is a Ph.D. candidate at the Faculty of Law at Hebrew University.

[8] This term is used to indicate a situation in which spouses live together, in a familial frame without marriage, usually used by Israeli Jews. According to Sharialaw this term is illegal.
[9] Abu-Rabia, Aref, Salman Elbedour and Sandra Scham. (2008), Polygyny and Post-Nomadism among the Bedouin in Israel, *Anthropology of the Middle East,* 3 (2), *supra* note 4, p.29.

Viewpoint

Women and Sharia in the Constitution and Possibilities for Opening Horizons[1]

Marwa Sharafeldin*

As a citizen whose female gender has led her to have certain rights and duties and to be deprived of others, I want to raise some questions that may help us write a better constitution.

As we write a new revolutionary constitution, we should keep in mind that the strength of nations is now measured by the extent to which marginalized citizens are treated. Are the poor, the followers of other religions, the disabled, the unemployed, the pregnant women, the elderly, the children and the sick given rights to guarantee them a decent life?

Such nations do not follow the law of the jungle where the strong survives at the expense of the weak. To the contrary, they place a greater value on sense and mercy, just as Prophet Muhammad did when he opened Mecca and became stronger in the political balance of power. Why can we not follow his example today?

Creating awareness

In his book *Pedagogy of the Oppressed*, which inspired several countries to change their school curricula, Brazilian educator Paulo Friere helps us to understand the reasons why a person who had been oppressed in relationship of unequal power cannot be automatically expected to be merciful to his oppressed colleagues or play a role in their liberation when he or she is granted some power. On the contrary, this person will most likely oppress his or her colleagues like he or she had been oppressed before.

To escape that destiny, we should engage in what Freire calls the "conscientization" process, which is to become conscious of why we are caught in a circle of oppression, and how to get out of it. All of us in post-revolution Egypt need to enter into that process of creating awareness, particularly as we write our new constitution. I repeat, all of us.

[1] A longer version of this article was published in the weekly *Egypt Independent* on November 6, 2012: http://www.egyptindependent.com/opinion/my-problem-your-problem.

My question is: if we decide not to act similarly to other nations, but rather to let those who think they are stronger take over on the pretext of abiding by religion, then why do we insist on sticking to an oppressive interpretation and understanding of religion? Why do we think that in order to follow religion correctly, we need to have oppression and inequality? Why is it that whenever a sheikh or priest or rabbi preaches and fuels discrimination and oppression, we grant him greater respect and see him as being closer to God? Are those qualities really encouraged by your God and mine? We know that the answer is an emphatic no.

As we have been taught before, Sharia is supposed to be the divine message which does not change with time or place, and it aims to help people lead a better life in this world and in the afterlife. Jurisprudence, on the other hand, is the continuous human effort to understand and implement this divine message.

For jurists to understand the divine message, they developed the science of *usul al-fiqh,* the sources of jurisprudence, which consist of rules and tools, such as *qiyas* or analogy, which are used by jurists to elicit rulings from the Quran and Sunnah.

Therefore, those rulings are a human effort to understand the divine will. This effort is essentially influenced by the development, or lack thereof, in various realms of life.

There is, for example, a ruling which gives a father the right to marry off his prepubescent daughters. Several scholars agree that a father has the right to marry off his daughter without soliciting her consent. They only disagree on whether her approval is necessary when the female in question has reached the age of puberty. Today, knowing the associated physical dangers to young girls and that some fathers marry their daughters to rich men from the Gulf for monetary gains, do we still want this ruling to remain in post-revolution Egypt?

I want to give some examples that might broaden our horizons, while at the same time not deny religion its ability to establish gender equality. For instance, in Muslim majority countries like Libya and Algeria, to avoid the incidence and ills of unregistered divorces, divorce has to take place in court and a husband cannot unilaterally divorce his wife.

Morocco has promulgated what they term “divorce for discord,” which is based on the Quran, whereby both the husband and wife apply for divorce due to disagreements. The judge would grant the divorce and order the payment of compensation to the aggrieved party, even if it is the husband.

Polygamy, the incidence of which is already decreasing due to economic conditions and the change in society's view of the practice, has been conditioned in several countries, such as Jordan, Syria, Algeria, and Morocco.

Regarding inheritance, Egypt has come up with the creative idea of the "obligatory will," which allows a grandson whose father dies within his grandfather's lifetime to receive inheritance, not otherwise possible if inheritance rulings are applied literally and in a rigid manner.

These examples show that Sharia does not have to be synonymous with inequality for it to be "authentic." There is ample room for coming up with creative solutions that help us come closer to equality if only we nurture a kind of awareness that resists oppression and discrimination and encourages equality and freedom.

However, concerning alimony, we do have a serious problem. We know that today women are the sole breadwinners in a third of Egyptian households, and in the remaining two thirds they almost inevitably have to share in household income in light of the grueling economic conditions. Wives also share in household maintenance by doing the housework for free, and thus saving expenditures on such services.

We are aware that courts have issued rulings in favor of women obliging husbands to pay alimony that are not implemented in Egypt today. So, which alimony are we talking about that women supposedly enjoy and for which social class exactly?

The Singaporean Muslim Family Law sought to solve this problem by giving a divorced Muslim wife at least one third of the wealth accumulated during marriage, excluding money and real estate inherited by either spouse. This allocation is subject to increases commensurate with the wife's expenditure during the marriage, in order to protect her and her children's rights.

My problem, your problem

Classical Muslim jurists did not witness these changes in spousal roles and problems when they produced their rulings. Anyone studying Islamic law today knows that Islamic jurisprudence currently faces an epistemological crisis, particularly when it comes to women. This is largely because Islamic jurisprudence, with its classical knowledge and assumptions, is facing new realities. However, contemporary jurists do have the tools of *usul al-fiqh* that they can utilize to better apply religious laws to everyday lived reality. But, first we have to exhibit willingness to reject oppression and inequality and rid ourselves of fear.

It remains for us to acknowledge that throughout history, before the establishment of the modern state, the Islamic legal system was a flexible one that actively interacts with the changing realities on the ground. Differences in legal opinions were normal and seen as positive. It was a system that refused to have one guardian dictating to what Sharia should be for everyone in order to protect itself and the religion it represents from authoritarianism. It was a living system that breathed with its society which therefore respected it.

But when we try to enclose the Islamic legal tradition in rigid, positive laws, which are issued by elected parliaments on the basis of limited constitutional articles, it loses its ability to breathe and adequately address people's needs. Until we succeed in addressing such developments, some suggest that the new constitution today should only refer to the "principles," rather than the "rulings" whenever Sharia is mentioned.

I do not know if this is a solution or not, but I am presenting it here for discussion. What I do know is that after the revolution we deserve much better than what we are now offered in the draft constitution. I also know that not so long ago, in January 2011, we all firmly believed that my problem is your problem and we were actually prepared to give our lives for that principle.

***Marwa Sharafeldin** is a feminist Egyptian activist, and a board member of Musawah—For Equality in the Family. She is a Ph.D. candidate in Law at the University of Oxford.