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## The Transition from Tradition to Reform: The Shari'a Appeals Court Rulings on Child Custody (1992-2001)

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# The Transition from Tradition to Reform: The Shari'a Appeals Court Rulings on Child Custody (1992-2001)

Moussa Abou Ramadan

## Abstract

The principal object of this Article is to demonstrate that Islamic law, like any system of law, is dynamic rather than static. Islamic law cannot be thought of as law disconnected from history and society. Like any other legal system, it is influenced by political, economic and social factors. In order to illustrate this idea, this Article takes as a case study the rulings concerning custody of the *Shari'a* Appeals Court in Israel. This Article surveys the rulings of the *Shari'a* Appeals Court addressing child custody from 1992 through 2001. This Article's central claim is that the Appeals Court's approach to child custody underwent a metamorphosis during that period. In Part I, I will analyze the essential features of this transition. This will require an examination of classical Islamic law's treatment of custody, specifically the Hanafi school's treatment of it. I will focus on the new interpretation that the *Shari'a* Appeals Court gave to custody. In Part II, I will offer an explanation for this transition.

# THE TRANSITION FROM TRADITION TO REFORM: THE *SHARI'A* APPEALS COURT RULINGS ON CHILD CUSTODY (1992–2001)

*Dr. Moussa Abou Ramadan\**

## INTRODUCTION

Many writers look at Islamic law as immutable, law without any change or evolution. They perceive Islamic societies as reproducing themselves without changing. In order to understand the behavior of Muslims, we should look to the Qu'ran for an explanation.<sup>1</sup> This monolithic perspective is not limited to secondary literature. As stated in a decision of the European Court of Human Rights: "the Court considers that *Shari'a*, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable."<sup>2</sup> The principal object of this Article is to demonstrate that Islamic law, like any system of law, is dynamic rather than static. Islamic law cannot be thought of as law disconnected from history and society. Like any other legal system, it is influenced by political, economic and social factors. In order to illustrate this idea, this Article takes as a case study the rulings concerning custody of the *Shari'a* Appeals Court in

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1. See Bernard Botiveau, *À propos de . . . gardiens de l'Islam: les oulémas d'al-Azhar dans l'Égypte contemporaine*, available at <http://www.irmcmaghreb.org> (briefly addressing this trend).

2. Refah Partisi, *Erbakan, Kazan and Tekdal v. Turkey*, 35 Eur. Ct. H.R. at 3 (2001).

Israel. In Israel, for certain matters, the law recognizes the jurisdiction of different religious courts. Before the adoption of Amendment No. 5 to the Family Court Law on November 14, 2001,<sup>3</sup> the *Shari'a* Appeals Court had exclusive jurisdiction over matters of alimony, custody, divorce, maintenance, and marriage. After this Amendment, disputes concerning custody could be adjudicated in either civil or Islamic courts. In Israel, there are seven *Shari'a* courts from which there is a right of appeal. These courts serve the Muslim minority in Israel, constituting around twenty percent of the entire population.<sup>4</sup>

This Article surveys the rulings of the *Shari'a* Appeals Court addressing child custody from 1992 through 2001.<sup>5</sup> This Article's central claim is that the Appeals Court's approach to child custody underwent a metamorphosis during that period. What began as a traditional approach, based upon a literal reading of the *Kadri Pasha* Code, developed into a reformist approach. Prior to 1994, the *Shari'a* courts considered the child's best interests exclusively because of Israeli law. Subsequently, the courts Islamized the principle and applied it as a matter of *Shari'a* law itself. The *Shari'a* Appeals Court, however, did not limit the scope of the reform to the subject of child custody; it was applied to other subjects as well, including child support, dissolution of marriage, maintenance for wives, and wills.<sup>6</sup>

In Part I, I will analyze the essential features of this transition. This will require an examination of classical Islamic law's treatment of custody, specifically the *Hanafi* school's treatment of it. I will focus on the new interpretation that the *Shari'a* Appeals Court gave to custody. In Part II, I will offer an explanation for this transition.

## I. FROM TRADITION TO REFORM

The rulings of the *Shari'a* Appeals Court evolved between

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3. Family Court Law, 1995, S.H. 1537, *as amended by* Amendment No. 5 of Nov. 14, 2001, S.H. 1810.

4. See Laurence Louër, *Les citoyens arabes d'Israël: Analyse d'une communautarisation* (2001) (unpublished Ph.D. dissertation, Institut d'Etudes Politiques de Paris) (presenting a recent study on the Muslim minority in Israel).

5. See AHARON LAYISH, *WOMEN AND ISLAMIC LAW IN A NON-MUSLIM STATE: A STUDY BASED ON DECISIONS OF THE SHARI'A COURTS IN ISRAEL* (1975) (providing a systematic examination of the rulings of the different *Shari'a* courts, from the reconstitution of the courts after the establishment of the State of Israel, to the beginning of the 1970s).

6. The author of this Article intends to cover all of these issues in future research.

1994 and 2001, in a manner indicating a basic and complete re-vamping of its fundamental conceptions. On a substantive level, there was a transition from the traditional model to the reformed model. The rulings of the *Shari'a* Appeals Court from 1994 through 2001 are the concrete expression of this transition. Prior to outlining the cases, and in order to fully appreciate the nature of the transition and its power, however, I must first deal briefly with the *Hanafi* school.

A. *Classic Islamic Law Regarding Child Custody with an Emphasis on the Hanafi School*<sup>7</sup>

In matters of personal status, Israeli religious courts adjudicate in accordance with the personal law of the specific "community" to which the litigants belong. For Muslims, Islamic law is applicable. The primary normative source of Islamic law is the Qu'ran, which, according to Muslims, is the embodiment of the Divine word that was revealed in stages to Muhammad by the Angel Gabriel. The second source is the *Sunna* of the Prophet — a record of all of Muhammad's acts and sayings, as well as acts performed by others that were not opposed by him. The third source is the *Ijma'*. This term can be translated as "consensus." There is no consensus in *Sunni* legal methodology about whose consensus is requested. The fourth legal source is *Qiyas* — "analogy." In Islamic law, these primary sources are complemented by secondary sources, such as "custom," "general interest," and the *istihsan*. This is a theoretical description, as it appears in the book of the methodology of law.<sup>8</sup> It is stressed, however, that these are the formal normative sources of Islamic law,

7. See Y. LINANT DE BELLEFONDS, TRAITÉ DE DROIT MUSULMAN COMPARÉ 152-76 (1965) [hereinafter DE BELLEFONDS, TRAITÉ]; Mahdi Zahraa and Normi A. Malek, *The Concept of Custody in Islamic Law*, 155 ARAB LAW QUARTERLY 177 (1998). For Arabic literature of 20th century scholars, see generally MUHAMMAD ABU ZAHRA, AL-AHWAL AL-SHAKHSIYYA 413-40 (3d ed. 1957); BADRAN ABU AL-'ININ BADRAN, AL-FIQH AL-MUQARIN LL-AHWAL AL-SHAKHSIYYA BAYNA AL-MADHAHIB AL-ARBA'A AL-SUNNIYYA WAL-MADHAB AL-J'AFARI WAL-QANUN 543-74 (1967); 10 Abd al-Karim Zidan, *Al-Mufassal Fi Ahkam al-Mara' wal-Bait al-Muslim Fi al-Shari'a al-Islamiyya* 5-83 (1st ed. 1993) [hereinafter AL-KARIM ZIDAN]; WAHBIH AL-ZUHAYLI, AL-FIQH AL-ISLAMI WA'DILATI 732-29 (4th ed., 1997); MAHMUD ALI AL-SARTAWI, SHARH QANUN AL-AHWAL AL-SHAKHSIYYA 559-91 (1997); AHMAD AL-HAJI AL-KURDI, BUHUTH WAFATAWA FIQHIYYA MUA'ASIRA 104-53 (1999); 2 MUHAMMAD ZID AL-IBIANI, SHARH AL-AHKAM AL-SHARA'IYYA FI AL-AHWAL AL-SHAKHSIYYA 65-80 (1911).

8. See MUHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE (revised ed. 1991); WAHBI AL-ZUHAYLI, USUL AL-FIQH AL-ISLAMI (1986).

whereas the materially substantive sources of the law are found primarily in the works of the Islamic jurists, to whom I shall refer in this Article as "scholars."<sup>9</sup>

Islam is divided into different streams, the principal division being between *Sunni* Islam and *Shi'i* Islam. *Sunni* Islam comprises four schools, each named after its founder. The *Hanafi* school was established by Abu Hanifa; the *Maliki* school by Malik b. Anas; the *Shafi'i* school by Al Shafi'i; and the *Hanbali* school by Ahmad b. Hanbal. The schools are divided with respect to the specific sources of Islamic law, as well as numerous other subjects.

As stated, the founder of *Hanafi* was Abu Hanifa, who had two students: Abu Yusuf and Muhammad. A long line of scholars subsequently interpreted the works of the scholars of the different schools. In order to understand the Classical Law, I will refer principally to the writings of these scholars, focusing primarily on the *Hanafi*. Where necessary, I will also refer to scholars of the other schools. Incidentally, in the *Hanafi* school there was additional development, as evidenced in the works of Chafik Chehata<sup>10</sup> and Ya'akov Meron.<sup>11</sup> The development extended beyond the well-known disputes between the founders of the school. In this Article, however, I shall focus upon the dominant views.

Under the Ottoman Empire, the *Hanafi* school was ascendant over the other schools.<sup>12</sup> Slowly and cautiously, the Ottoman Sultan initiated a legislative process that climaxed in the nineteenth century. The legislative process was expressed in the codification of various fields, although occasionally it meant no more than the importing of translations of foreign legislation.

9. See DE BELLEFONDS, TRAITÉ, *supra* n.7 (discussing the distinction between formal sources and materially substantive sources).

10. See CHAFIQ CHEHATA, ETUDES DE DROIT MUSULMAN (1971).

11. See YA'AKOV MERON, L'OBLIGATION ALIMENTAIRE ENTRE EPOUX EN DROIT MUSULMAN HANÉFITE (1971) [hereinafter MERON].

12. See JUDITH E. TUCKER, IN THE HOUSE OF LAW: GENDER AND ISLAMIC LAW IN OTTOMAN SYRIA AND PALESTINE (1998); HENRI LAOUST, LES SCHISMS DANS L'ISLAM: INTRODUCTION À UNE ÉTUDE DE LA RELIGION MUSULMANE 311 (1965); MUHAMMAD AL-ZUHAYLI, TARIKH AL-QADA', FI AL-ISLAM 448 (1st ed. 1995). While the *Hanafi* school had an official status, in the large towns the Ottomans customarily appointed *Qadis* belonging to the other three traditions. This custom was initiated by the Mamluk Sultan Bifris in 1265. See Joseph H. Escovitz, *Patterns of Appointment to the Chief Judgeships of Cairo During the Bahri Mamluk Period*, XXX ARABICA TOME 147-68 (1983).

Thus, the Swiss Code was translated, and it influenced the civil procedure. Another aspect of the codification was the codification of Islamic law, as interpreted by the *Hanafi*, the *Mejelle* being the most prominent example. It was only in 1917 that matters of personal status were partially codified.<sup>13</sup> While this legislation relied primarily upon the *Hanafi* tradition, it also absorbed elements from other traditions, using the legal tool of *talfik*.<sup>14</sup>

The process of codification, however, was partial; many areas were ignored, among them child custody, child support, inheritance, and lineage. Theoretically speaking, in these areas the *Shari'a* courts were supposed to continue relying upon the classical books of *Hanafi fiqh*. Nonetheless, quite rapidly, a new custom of using the *Kadri Pasha Code* emerged.<sup>15</sup> This Code regulates personal status in Islamic law according to the *Hanafi* school. The codification committee relied principally upon Ibn 'Abdin, the *Mufti*<sup>16</sup> in Damascus, who was regarded as one of the last great *Hanafi* scholars. Use of the Code increased, despite its lack of official legislative force. The Egyptian government avoided giving the Code legislative status for fear of creating a perception of infringing on *Shari'a* jurisdiction.<sup>17</sup> Aharon Layish attributes the use of the Code in Israel to the fact that some of the *Qadis*<sup>18</sup> in Israel, prior to the establishment of the State of Israel, studied in al-Azhar in Egypt, from where they brought the Code.<sup>19</sup>

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13. See S. GUTTEIN & A. BEN SHUSHAN, *ISLAMIC LAW IN THE STATE OF ISRAEL* (1957) (discussing the translation of the law and the explanatory notes). See also Judith E. Tucker, *Revisiting Reform: Women and the Ottoman Law of Family Rights, 1917*, 4(2) *ARAB STUDIES J.* 4, 4-17 (1996).

14. *Talfik* is a technique used by the Islamic legislature in order to institute reform in Islamic law by way of reliance on more than one tradition. See NORMAN ANDERSON, *LAW REFORM IN THE MUSLIM WORLD* 47-58 (1976) (providing examples of this technique in practice).

15. See MUHAMMAD ZID AL-IBIANI, *supra* n.2.

16. A "*Mufti*" is a Muslim scholar who gives legal opinion.

17. Y. Linant de Bellefonds, *Immutabilité de Droit musulman et reformes législatives en Égypte*, in *REVUE INTERNATIONALE DE DROIT COMPARÉ* 5-34 (esp. 12-13) (1953) [hereinafter de Bellefonds, *Immutabilité*].

18. In the context of this Article, the term "*Qadi*" is used to mean a judge in an Islamic court.

19. Aharon Layish, *The Qadis and the Shari'a in Israel*, in *THE ULEMA AND RELIGIOUS PROBLEMS IN THE ISLAMIC WORLD* 294-315 (G. Bach ed., 1971).

### 1. Definition of the *Hadana*

“*Hadana*” is defined by the *Hanafi* as “caring for the child, ensuring the fulfillment of his needs in all areas at a certain age, by a person who has the right of *hadana*.”<sup>20</sup> *Hadana* purported to moderate paternal power in a system that was essentially paternalistic.<sup>21</sup> Some scholars view *hadana* as being a component of *wilaya*, or guardianship.<sup>22</sup>

The uniqueness of *hadana* lies in its attitude towards women.<sup>23</sup> The question of *hadana* only arises after divorce, at least in the opinion of al-Sarakhsi.<sup>24</sup> Accordingly, the chapter addressing *hadana* is part of the law that applies to the child upon dissolution of the marriage. Al-Kasani, on the other hand, did not view *hadana* as beginning with the dissolution of the marriage.<sup>25</sup> The two views, however, can be reconciled. On a practical level, *hadana* becomes relevant only after the dissolution of the marriage.

### 2. Conditions for Custodianship Legal Capacity: Majority and Sanity

In order to qualify for *hadana*, a person must have reached the age of majority. A minor lacks the legal capacity to receive *hadana*, for he is unable to guard and take care of himself. Eligibility for *hadana* is further contingent upon sanity. Consequently, an insane person cannot become a custodian of children. The two reasons have a shared rationale: in order to take care of another, the entitled person must first prove his ability to take care of himself.<sup>26</sup>

#### a. Freedom

Entitlement to *hadana* is dependent upon the person being

20. 14 IBN NUJAYM, AL-BAHR AL-RA'IQ 179 (1997) [hereinafter IBN NUJAYM]. See generally 3 IBN 'ABDIN, HASHIYAT RADD AL-MUHTAR (1960) [hereinafter IBN 'ABDIN].

21. DE BELLFONDS, TRAITÉ, *supra* n.7.

22. IBN NUJAYM, *supra* n.20, at 182; 5 AL-SARAKHSI, AL-MABSUT, 207 (4th ed. 1976-1980) [hereinafter AL-SARAKHSI].

23. 4 AL-KASANI, BADA'I' AL-SANA'I' 41 (1974).

24. AL-SARAKHSI, *supra* n.22, at 207.

25. AL-KASANI, *supra* n.23, at 4045.

26. 2 IBN 'ABDIN, HASHIYAT RADD AL-MUHTAR 871-72 (1960) [hereinafter IBN 'ABDIN].



free. Classical Islamic law recognizes slavery.<sup>27</sup> According to some scholars, *hadana* is an integral part of *wilayah*, and a slave cannot be a guardian. Furthermore, a maidservant is inevitably occupied with service of her master and lacks the requisite time to care for a child. This is the opinion of the *Hanafi*, *Hanbali*, and *Shafi'i* schools. According to the *Maliki* school, the right of *hadana* is given to the mother and to the maidservant whose child is free.<sup>28</sup>

#### b. Physical Capacity

The child's custodian must have physical strength. In the event of physical incapacitation, he is not entitled to *hadana*.<sup>29</sup>

#### c. Religion

Receiving *hadana* is not contingent upon being a Muslim. Conceptually, *hadana* is rooted in compassion. Thus, even if the mother belongs to the *Dhimmi*,<sup>30</sup> she is entitled to keep the child.<sup>31</sup> This, however, is not the case regarding a person who was a Muslim and left the religion, for a woman apostate would be imprisoned until her return to Islam. No school other than the *Shafi'i* requires that the mother pray as a condition to her entitlement to *hadana*.<sup>32</sup>

#### d. Special Conditions for Women

In addition to the conditions stipulated above, the blood

27. Books on Islamic law deal extensively with the status of the slave. Today, however, most of the Islamic States have abolished the institution of slavery. See Sami A. Aldeeb Abu-Sahlieh, *La définition internationale des Droits de l'homme et l'Islam*, R.G.D.I.P. 625, 625-706 (1985). An attempt was also made to abolish the institution of slavery by having resort to one of the Islamic sources of law, *ijma'*.

28. 4 AL-HATTAB, MAWAHIB, AL-JALIL LI-SHARH MUKHTASAR KHALIL 214-15 (1969); DE BELLEFONDS, TRAITÉ, *supra* n.7, at 163. Section 98 of the Moroccan law is derived primarily on the *Malikis*, and it enumerates the conditions that a custodian must satisfy. Being a free man is not one of the conditions.

29. HAZIM AHMAD MUHAMMAD, DHIYAB, AHKAM AL-HADANA FI AL-SHARI'A AL-ISLAMYYA 73 (unpublished Masters Graduate Thesis in Islamic Law and Constitution, University of al-Najah) (1995).

30. In order to receive the status of *Dhimmi*, it is necessary to pay a tax, known as "*jizya*." This tax, however, is not accepted from every group. See WAHBIH AL-ZUHAYLI, ATHAR AL-HARB FI AL-FIQH AL-ISLAMI: DIRASA MUQARINA 712-27 (4th ed. 1992) (defining *Dhimmi*).

31. AL-KASANI, *supra* n.23, at 42; IBN NUJAYM, *supra* n.22, at 185.

32. IBN NUJAYM, *supra* n.22, at 181.

connection of the woman must preclude her marriage to another man. Most scholars find that if a woman marries another man, she is unable to continue her custodianship of the child and forfeits her entitlement to *hadana*. This view is disputed by Ibn Hazm of the *Zahiri* school, which finds that a woman's marriage to another man does not remove her claim to *hadana*.<sup>33</sup>

This rule is based upon the *hadith* of the Prophet, according to which a woman complained to the Prophet that her husband wanted to take her child away from her. The Prophet responded to her: "You have more right to him so long as you do not marry." Scholars understood this prohibition to apply only to marriage to an "alien" man, i.e., a stranger. The prohibition derives from the fear that the stranger will not take care of the child. The man is "alien" in the sense that there is no rule forbidding him to marry the child. On the other hand, if the woman were to marry the child's uncle, she would not forfeit her entitlement to custody of the child.<sup>34</sup>

This law is given the following expression by al-Sarkhasi, who states that:

[i]f the mother marries another man, the father can take the child away from her, for the Prophet of blessed memory said 'for as long as you do not marry' — hence the right of custody is until she marries . . . for if she marries she will be occupied in taking care of her husband and will have no time to educate the child, and the child will generally live in difficult and humiliating conditions due to the woman's husband; the father can therefore withhold agreement and remove the child from her.<sup>35</sup>

### 3. Duration of *Hadana*

*Hadana* is only granted for a limited period. Upon its expiration, the son or daughter is transferred to paternal custody. Different ages for the custody transfer were established for sons and daughters.

The son goes to his father when he no longer depends on female help, which is when he both eats and purifies himself

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33. Ibn Hazm, 11 AL-MUHALLA 742, 745 (1970).

34. AL-KARIM ZIDAN, *supra* n.7, at 44; AL-KASANI, *supra* n.23, at 42.

35. See AL-SARAKHSI, *supra* n.22, at 210; IBN NUJAYM, *supra* n.22, at 183-85; IBN AL-HUMAM, FATH AL-QADIR 317 (1987) [hereinafter IBN AL-HUMAM].

independently. Generally speaking, the *Hanafi* ruled that the age for the boy was seven, based upon the *hadith* that male prayer is obligatory from the age of seven. In order to be able to pray, however, he must also purify himself — the assumption being that at seven he is able to purify himself independently, meaning that he is in control of his personal hygiene. After this age, the boy is transferred to paternal custody. The fear behind this rule was that the boy's continued presence with a woman would imbue him with feminine attributes of soft and delicate speech, which would lead to him being considered inhibited. Furthermore, when the son becomes seven, the father begins educating and teaching him.

This was not the logic used to justify the daughter's transfer to paternal custody when she was no longer needed to perform domestic duties. The scholars ruled that a daughter must learn how to cook and knit, but upon reaching the age at which she could entice others, she should be transferred to paternal custody to ensure her continued protection.<sup>36</sup> Thus, Section 391 of the *Kadri Pasha* Code mandates maternal custody of the daughter until the age of nine and of the son until the age of seven.

#### 4. Order of Those Entitled to Child Custody

In the case of the mother's death, or in the event that she no longer satisfies any one of the threshold conditions for *hadana*, the scholars offered a long list of people who were supposed to replace her. Women related to the mother were preferred and the men were next in line.

The first on the list came from the maternal side. *Hanafi* scholars based this ruling on the *hadith* of the Prophet:

A women said: messenger of God: my stomach was the shelter for my son, my breasts his drink and my garment his shelter. His father divorced me and wants to take him away from me. The [P]rophet of blessed memory said: your right prevails over his right, for as long as you have not married.<sup>37</sup>

The preference for the mother was also prescribed in the dictum of the first *Calif*, Abu Bakar, who was known as "the righteous one." After Omar (who thereafter became the second *Calif*) divorced his wife, she complained about him to the *Calif*,

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36. See AL-SARKHASI, *supra* n.22, at 206–07.

37. Quoted in AL-KARIM ZIDAN, *supra* n.7.

who subsequently conveyed to Omar that his wife's spittle was preferable to his honey.

The scholars explained the mother's preferred status as derived from the nature of *hadana*, which is based upon compassion, for by nature, the mother is more merciful. In her absence, or if she failed to satisfy the conditions for *hadana*, her mother was next in line as the person most closely related to the mother. Following the grandmother, there was a long list of women, graded according to their genealogical proximity to the mother. In the *Hanafi*, a number of views exist regarding the order of entitled women and the codifier of *Kadri Pasha* states his own order of preference in Sections 384–86.

#### 5. The Child's Will in the *Hadana*

The *Hanafi* did not consider the minor's wishes regarding the custodian's identity as a relevant factor for determination of custody. Al-Kasani's explanation for the disregard of the minor's wishes is that children generally prefer to play than to be serious and will therefore tend to choose the worst of the two parents (the more lenient one).<sup>38</sup> The *Shafi'i* on the other hand, contend that after the "age of discernment" (which is normally viewed as seven years of age) the child is allowed to choose. This view is based on the *hadith* of the Prophet in which he allows the child to choose between his two parents. Al-Sarkhasi contests the reliance upon this *hadith*, which, he argues, is not applicable because the Prophet was praying for that particular child and he had made the correct choice.<sup>39</sup>

#### 6. The Nature of the *Hadana*

With respect to the *Hanafi* school, it is unclear whether the right is the child's or the mother's. *Hanafi* scholars generally rule that the right simultaneously belongs to the mother and the child. The importance of this distinction is expressed in the different laws determined therewith. If the right belongs to the child, the mother is unable to waive it in the event of consensual divorce. On the other hand, if the right belongs to the mother, she can waive the right because she is under no obligation to be

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38. AL-KASANI, *supra* n.23, at 42.

39. AL-SARKHASI, *supra* n.22, at 208; IBN AL-HUMAM, *supra* n.35, at 318.

the minor's guardian.<sup>40</sup>

### a. Child Support Payments

Scholars examine a number of different situations regarding the mother's entitlement to payment. During the marriage itself, or the time when the mother is in a waiting period, if there is a revocable divorce, she is not entitled to a separate payment for being the custodian, since at all events, she is entitled to maintenance payments from the father. Following divorce, scholars distinguish between cases in which there is a female volunteer for custody over the child and ones where there is no such volunteer.<sup>41</sup>

Where there is no volunteer, there are four distinct possibilities:

- (1) rich father and poor child: the father is obligated to pay a fee for the mother's custodianship;
- (2) poor father and rich child: the fee will be withdrawn from the child's money;
- (3) rich father and rich child: the fee will be withdrawn from the child's money; or
- (4) poor father and poor child: the mother is obligated to educate the child and her fee becomes her ex-husband's debt, payable by him when he becomes rich.

When there is a female volunteer:

- (1) rich father and poor child: the mother receives custody of the child and will receive appropriate payment;
- (2) poor father and rich child: the mother can choose between custody without remuneration or giving the child to the volunteer;
- (3) rich father and rich child: the mother can choose between custody without remuneration or giving the child to the volunteer; or
- (4) poor father and poor child: the mother is requested to raise the child for free, or to give the child to the volunteer.

Classical Islamic law establishes a detailed system of norms regarding the qualifying conditions for child custody and trans-

40. IBN NUJAYM, *supra* n.22, at 180.

41. IBN 'ABIDIN, *supra* n.20, at 560-62; 2 AL-IBIANI, SHARH AL-AHWAL AL-SHAKHSIYYA 73-77 (1920).

fer of the child from the mother to the father. The institution of *hadana* and the particulars of custody allocation are obviously designed for the child's protection. Al-Kasani, for example, refers to the child's interests.<sup>42</sup> In referring to the child's interests, however, the intention is not to exclusively serve the child's interests. Rather, the concept purports to preserve a particular tradition of role division between the two sexes, with a view towards preparing members of each gender for their own gender-based vocations. Furthermore, importance also attaches to the religion of the custodian, his social status (whether he is free or a slave), and his moral standing in accordance with the standards of an Islamic society. This Article observes that the *Shari'a Appeals Court* altered the normative standing of the child's best interests. From being one factor to be considered among a plurality of considerations, the best interests of the child became the dominant and exclusive consideration in matters of child custody.<sup>43</sup>

B. *The New Reading of the Shari'a Appeals Court: The Theory of Presumptions*

The *Shari'a Appeals Court* came a long way in its transition from the classical format to the reformed one. Methodologically, having accepted the basic principle of the child's best interests as the controlling principle in child custody, the Appeals Court proceeded to interpret the classical rules governing child custody as a system of presumptions, all intended to maintain the child's best interests. The sub-text of the child's best interests inherent in these presumptions, therefore, becomes a principle guiding judicial discretion, allowing flexibility if the judge determines that a child's best interests are incompatible with the positive law. The *Shari'a Appeals Court's* use of this technique is strikingly similar to proposals of Pinchas Shifman,<sup>44</sup> who, with respect to Jewish law governing child custody, wrote:

If the presumption of Jewish law — by which the best interests of the boy over six dictate paternal custody, and for girls,

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42. AL-KASANI, *supra* n.23, at 60.

43. See DINA CHARIF FELLER, *LA GARDE (HADANAH) EN DROIT MUSULMAN ET DANS LES DROITS ÉGYPTIEN, SYRIEN ET TUNISIEN* 60–80 (Droz 1996) [hereinafter FELLER].

44. Pinchas Shifman, *The Child's Best Interest in the Rabbinical Court*, 5 *MISHPATIM* 421, 421–30 (1974). See also E. Shochetman, *The Nature of the Halachic Rules Governing the Subject of Child Custody*, 5 *SHENATON HAMISHPAT HAIVRI* 285, 285–320 (1978).

maternal custody — was a rigid one, which could not be deviated from, it could be claimed, justly, that it conflicted with the judge's obligation to apply his discretion regarding the welfare of the child, having consideration for the particular facts of each case. In reality, however, Jewish law does not establish such rigid, binding presumptions. Quite the opposite—where the child's interests demonstrably indicate a particular parent as being the preferred custodian, the judge will not hesitate to rule in accordance with the presented evidence. Generally speaking, the judge will be guided by a presumption as to the best interests of the child in view of such evidence. The judge's presumption as to the best interests of the child will be the controlling factor in the decision, as long as there is no clear conflicting evidence regarding what his best interests are . . .<sup>45</sup>

### 1. Analysis of the New Rules Regarding Child Custody

In this section, I will first analyze the principle of the child's best interests; then, I will examine the use of the presumptions regarding the Classical rules.

#### a. The Principle of the Child's Best Interests

In this sub-section I will examine the recognition of the principle of the child's best interests; the inaccuracy of the *Shari'a* Appeals Court's ruling on the non-applicability of the legal capacity and guardianship law; the Islamization of the principle of the child's best interests; the principle of the child's best interests as infringing upon Islamic rules of evidence; and the effect of the principle of the best interests of the child on the distinction between the different schools of law.

#### i. Recognition of the Principle of the Child's Best Interests

The principle of the child's best interests is enshrined in international law in the Convention on the Rights of the Child in Sections 3(1), 9(1), 9(3), 18(1), 21, 37(c), and 40(2) (iii);<sup>46</sup> in

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45. Shifman, *supra* n.44, at 426–27.

46. See Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. GAOR, Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989), *reprinted in* 28 I.L.M. 1448 (1989) *with corrections at* 29 I.L.M. 1340 (1990). See also SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 9-85 (1999) (analyzing the child's best interests principle in the Convention on the Rights of the

Section 16 of the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW");<sup>47</sup> and in Sections 16 and 24 of the International Covenant on Civil and Political Rights ("ICCPR"),<sup>48</sup> according to the interpretation of the Human Rights Committee.<sup>49</sup> Israel expressed reservations regarding Section 16 of CEDAW,<sup>50</sup> as well as Section 23 of the ICCPR.<sup>51</sup> There are no such reservations, however, regarding Section 24 of the ICCPR.

While some Arab States have recognized this principle in certain cases, it is certainly not universally applicable to the entire subject of child custody.<sup>52</sup> It does not constitute a "fundamental principle" as it does in the French law, or even in Israeli law. Some Arab States attach greater importance than others to

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Child); Philip Alston, *The Best Interest Principle: Towards a Reconciliation of Culture and Human Rights*, 8 INT'L J.L. & FAMILY 1, 1-25 (1994).

47. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, Supp. No. 21, at 193, U.N. Doc. A/RES/34/180 (Sept 3, 1981) [hereinafter CEDAW].

48. International Covenant on Civil and Political Rights, G.A. Res. 2200 A (xxi), 999 U.N.T.S. at 171 (Dec. 16, 1966) [hereinafter ICCPR].

49. The ICCPR only mentions the principle of the child's best interests within the context of Sections 23 and 24, which deal with the child's protection. In its *Comments* on Section 24(1) of this convention, the Human Rights Committee stated that "[i]f the marriage is dissolved, steps should be taken, keeping in view the paramount interest of children, to give them necessary protection and, so far as is possible, to guarantee personal relations with both parents." Human Rights Committee, *General Comment 17* (35th Sess., 1989), reproduced in COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. Doc. HRI/GEN/1/Rev. 5, 22-24, para. 6 (2001).

50. "Israel registers its reservation regarding section 16 of the Convention, to the extent that the laws of personal status which bind the religious communities in Israel do not cohere with the provisions of that Section." CEDAW was adopted on December 18, 1979, and became effective in Israel on November 2, 1991. K.A. 1033, 31, 181, 197.

51. "Having consideration for Section 34 [*sic*. The correct citation should be to Sec. 24] of the Convention and any of its other provisions regarding which this current qualification may be relevant, personal status matters in Israel are subordinate to the religious law of the affected parties and in the event of such a law not being consistent with its undertakings under the Convention, Israel reserves the right to apply the law." K.A. 1040, 31, 270, 295.

52. See FELLER, *supra* n.43, at 60-80. See also FATIMA AGHA & AL-HAYANI, LEGAL MODERNISM IN IRAQ: A STUDY OF AMENDMENTS TO FAMILY LAW (unpublished Ph.D. dissertation, U.Mich.); MUHAMMAD CHAFI, 'CODE DU STATUT PERSONNEL ANNOTÉ (TEXTES LÉGISLATIFS, DOCTRINE ET JURISPRUDENCE) (1996); LYNN WELCHMAN, ISLAMIC FAMILY LAW, TEXT AND PRACTICE IN PALESTINE 203-20 (1999); AHMAD NASER AL-JUNDI, AL-Ta'liq 'ala al-Ahwal al-Shakhsiyya (1998); MAHMUD 'ALI AL-SARTAWI, SHARH QANUN AL-AHWAL AL-SHAKHSIYYA AL-URDUNI (1997); AHMAD SALIM MELHIM, AL-SHARH AL-TATBIQI LIQANUN AL-AHWAL AL-SHAKHSIYYA AL-URDUNI (1998).



the child's best interests, but even then, it does not constitute an exclusive interest. For example, Section 109 of the Moroccan Family Law provides that the child shall remain with his legal custodian, unless the *Qadi* himself finds that the child's best interests dictate otherwise.<sup>53</sup> Section 166 of Law No.61 of Personal Status in Jordan provides that a person with whom the child is staying cannot leave the Kingdom with the child, unless the guardian agrees, subject to the prior assurance of his welfare.<sup>54</sup> Under Section 157 of the Jordanian Personal Status Law, in the event of there being more than one candidate for custody, all sharing the same degree of entitlement, the *Qadi* is entitled to choose between the various candidates in accordance with the child's best interests. Under Section 164, the custodian of the child may travel within the Jordanian Kingdom for as long as this does not conflict with the child's interests. Consequently, under Jordanian Law, the principle of the best interests of the child is recognized only in very specific statutorily-defined cases. Neither the legal literature addressing the interpretation of the law, nor the Jordanian case law on child custody, place any particular emphasis on this principle.<sup>55</sup>

The Algerian Family Law of 1984 discusses, in Sections 62-72, the issue of child custody.<sup>56</sup> Section 64 lists the persons who are entitled to the custody of the child and directs these custodians to ensure the child's best interests. Under Section 65, when a judge terminates the period of *hadana*, he takes the child's best interests into account. Section 66 permits the custodian to waive custodial rights, provided that it does not endanger the interests of the child in custody. Where a judge terminates the *hadana* entitlement of a person who does not satisfy the legal require-

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53. See ABD AL-AZIZ TAWFIQ, *THE FAMILY LAW WITH ITS RECENT AMENDMENTS — DAHIR 10/9/1993* (1997).

54. See 2 AHMAD MUHAMMAD, 'ALI DAHUD, *AL-QARARAT AL-ISTI'NAFIYYA FI AL-AHWAL AL-SHAKHSIYYA* 1423 (1999).

55. See Lynn Welchman, *The Development of Islamic Family Law in the Legal System of Jordan*, 37 I.C.L.Q. 865, 877-78 (1988); OMAR SLIMAN AL-ASHKAR, *AL-WADIH FI SHARH QANUN AL-AHWAL AL-SHAKHSIYYA AL-URDUNI* 291-302 (1997). In Jordanian case law, the child's best interests are an important consideration when a *Qadi* rules on matters of child custody, but they are not the paramount consideration, and do not constitute nor have the status of the basic principle. See 1 AHMAD MUHAMMAD, 'ALI DAHUD, *AL-QARARAT AL-ISTI'NAFIYYA FI AL-AHWAL AL-SHAKHSIYYA* 497-585 (1999) (referencing the best interests of the child principle in Jordanian case law from 1951 to 1999).

56. See Leila Hamdan, *Les difficultes de codification du droit de la famille algerien*, 37 REVUE INTERNATIONALE DE DROIT COMPARÉ 1001-15 (1985).

ments, he must also consider the child's best interests under Section 67. In most of its provisions, the Algerian law makes the law regarding child custody contingent upon the child's best interests. In the absence of a general provision relating exclusively to the child's best interests, however, it cannot be regarded as a fundamental principle in the normative sense. Furthermore, Section 66 provides that when a woman marries a man who is permitted to marry the minor, she loses her entitlement to *hadana*. Algerian law does not even give consideration to the recognized exceptions in Islamic law for cases in which there is no custodian, there is a claim against the woman, or the subsequent custodian does not satisfy the requirements for receiving custody of the child.<sup>57</sup>

In domestic Israeli law, the principle of the child's best interests has received legislative recognition.<sup>58</sup> In addition to specific legislation, the principle of the child's best interests also has the status of a fundamental principle, above and beyond specific legal provisions. Its autonomous status derives from its application in numerous pieces of legislation. The technique of establishing the general, independent status of a principle on the basis of its frequent legislative application allowed Cheshin J. to establish the principle of civil paternity due to its application in a series of laws.<sup>59</sup> Similarly, a general principle of affirmative action was derived from a series of laws, which applied the principle of affirmative action for women.<sup>60</sup> This does not mean that the principle of the child's best interests constitutes an extra-legal principle, but rather, that it is a controlling judicial norm.

The principle of the child's best interests has been cited in numerous judgments.<sup>61</sup> It must be mentioned that the compet-

57. See 32 A'RAB BILQACIM, MUSQITAT ALHAQ LILHADANA FI AL-QANUN AL-JAZA'IRI WALFIQH AL-ISLAMI, REVUE ALGERIENNE DES SCIENCES JURIDIQUES, ECONOMIQUES ET POLITIQUES 139-50, 145-46 (1994).

58. See Women's Equality of Rights Law, 1951, S.H. 82, Sec. 3(b); Capacity and Guardianship Law, 1962 S.H. 380, Secs. 17, 25; Adoption of Children Law, 1981, S.H. 1028, Sec. 1(b); Welfare Law (Procedure in Matters of Minors, Minors, Mentally Ill and Absentees Persons), 1955 S.H. 187, Sec. 8; Youth Law (Trial, Punishment and Modes of Treatment), 1971 S.H. 629, Secs. 18(a), 20(a), 33; Prevention of Domestic Violence Law, 1991 S.H. 1352, Secs. 2(g), 4.

59. See C.A. 90/3077, Anon v. Anon, 49(2) P.D. 578.

60. See H.C. 2671/98, Israeli Women's Lobby v. Minister of Labour and Welfare, 52(3) P.D. 630.

61. See, e.g., Yehiel S. Kaplan, *The Interpretation of the Concept 'The Best Interest of the Child' in Israel*, in CHILDREN RIGHTS AND TRADITIONAL VALUES 47-85 (Gillian Douglas &

Lesslie Sebba eds., 1998); Shifman, *supra* n.44; Avner Chai Shaki, *Features of the Laws of Custody, with Emphasis on Implementation of the Principle of the Best Interests of the Child*, 10(1) *Iynei Mishpat* 5, 5-35 (1984); SAADIA SHMUEL, *CHILDREN'S CUSTODY* 47-52 (1992); L.C.A. 7994/98, T.D. v. S.D., 53(3) P.D. 270, 270-71. The decision states:

The principle of the child's best interests is an important, central value in all [S]tates who are sides to the Convention, and there can be no discussion of matters concerning minors without consideration of their interests. Consequently, even if the principle of the child's best interests is not independently recognized in the Hague Convention, it is no doubt a principle that was taken into account when considering the interests receiving expression in the Convention.

*Id.* See also H.C. 5227/97, Michal David v. Rabbinical Court of Appeal, TK-EI(3) 443, 446 (stating that "[T]he principle of the child's best interests or alternatively, the child's rights, is universally accepted as the *mega principle*. The question only relates to what constitutes those interests and what constitutes the content of that right."); C.A. 2266/93, Anon v. Anon, 49(1) P.D. 221, 250-51. The decision states:

It seems that the importance of 'the child's best interests' cannot be overstated. This principle has long been recognized as a guiding principle in the resolution of family-law related disputes, e.g., abrogation of parental rights, kidnapping of children, and custody disputes. In each of the fields, the principle receives a slightly different emphasis. The issue before us bears a close resemblance to custody disputes between parents. The principle receives its statutory expression in the Capacity and Guardianship Law as well as in the International Convention on the Rights of the Child (Sec. 3).

*Id.* It also states:

Ultimately, while I am unable to accept the bifurcation of custody into 'physical custody' and 'spiritual custody,' I can accept that the subjects contemplated by the term 'custody' are separable in the sense that, at a practical level, certain areas may be allocated to each parent, subject to the principle of 'the child's best interests,' which, in my view, is and always was the guiding principle, constituting the appropriate deciding mechanism in the issue before us. The implementation of this principle involves exercising judicial discretion in balancing between the interests of the minor and his parents — jointly and separately. Each of these interests is examined and assessed through the prism of the best interests of the child. The undisputed supremacy of this principle amongst enlightened States in matters concerning minors, indicates its centrality in modern society.

*Id.* at 276-77. The decision further states: "Should there be any need to take a side in this dispute, which in my mind is not of vast importance, I would take the view, in concurrence with Justice Strasbourg Cohen, that the child's best interests also include the rights of the child." *Id.* at 279-80; C.A. 4616/94, Att'y Gen. v. Anon, 48(4) P.D. 298, 307-08 (Strasbourg Cohen J.) (remarking that "[T]he subject is a particularly sensitive one, involving a child and adoptive parents, each of whom has interests, between which a balance must be struck, the supreme value being the child's best interests."); C.A. 5942/92, Anon v. Anon, 48(3) P.D. 837, 843-44 (remarking that "[f]urthermore, the appropriate regard for the child's best interests is one of the expressions of human dignity . . ."); C.A. 473/93 Tali Leibovitz v. Michael Leibovitz, 47(3) P.D. 63, 81-82 (noting: "[E]ven so, and we except this principle too, the Court will have regard for the circumstances of the particular case before us, in accordance with the supreme principle of the child's best interests."); H.C. 1985/91, Ruti Kagan v. Rabbinic Court of Appeal, Tk-EI 92(3), 1130, 1130 (noting that "[T]he guiding principle in custody disputes

ing doctrine of the “rights of the child” also occupies a place in the case law, but has yet to become the dominant doctrine.<sup>62</sup>

In most of its judgments, the *Shari'a* Appeals Court recognized the child’s best interests as being a guiding principle in all cases of child custody. The Court systematically referred to the doctrine, making it an integral part of all judgments dealing with *hadana*, sometimes calling it “the basic consideration.”<sup>63</sup> In recognizing and applying the principle of the child’s best interests, however, the Court was careful to note that its application was not by force of the Capacity and Guardianship Law (“Capacity Law”), but rather, by virtue of the Islamic law.<sup>64</sup> This constitutes a double-edged judicial strategy. On the one hand, the Court proclaimed its independence from positive Israeli law as expressed in the Capacity Law, but on the other hand, it “Islamized” the principle of the best interests of the child.

#### ii. The Inaccuracy of *Shari'a* Appeals Court’s Rulings Regarding the Non-Applicability of the Capacity and Guardianship Law

In many of its judgments, the Court ruled that the Capacity Law does not apply to the *Shari'a* Courts and that they are not bound by its provisions. *Qadi Zoebi* explained the non-applicability of the law to *Shari'a* Courts in the following manner:

I have no choice but to state that while the Court may have been correct in its decision, which relied upon Section 25 of the Legal Capacity and Guardianship Law, nonetheless, the *Shari'a* Court operates in accordance with the rules of the *Shari'a*, which are derived from the *Shari'a*, as revealed to the Prophet of God. The *Shari'a* is complete, general, comprehensive, and valid at all times and places. The *Shari'a* Courts were established to adjudicate claims and disputes in accordance with the *Shari'a* and not in accordance with the positive law. How is this possible? Are we permitted to apply positive law, when our *Shari'a* is complete and abounds with *Shari'a*

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between parents is the principle of the child’s best interests.”); L.C.A. 4250/90 Anon v. Attorney General Tk-El 90(3) 1089, 1091 (remarking: “[B]ut in the final analysis, the child’s best interests prevail over any other consideration.”).

62. See Yehiel S. Kaplan, *From the Child’s Interests to the Child’s Rights: Independent Representation for Minors*, 31 *MISHPATIM* 623 (2001).

63. See A. 15/98 (Feb. 16, 1998); A. 56/99 (Apr. 27, 1999); C. 254/98 (Oct. 10, 1998); A. 63/94 (Oct. 13, 1994); A. 48/94 (Jan. 16, 1994); C. 31/96 (Apr. 17, 1996).

64. See Capacity and Guardianship Law, 1962, S.H. 380 [hereinafter Capacity Law].

texts applying to all the subjects relating to people (*'ibad*). A *fortiori* this is the case when Section 79 of the Capacity Law declares that it does not add to or derogate from the powers of the religious courts . . . The result is, therefore, that when the Court gave its judgment, it ought to have relied upon the *Shari'a* texts, which should be the basis for its rulings, and it should not have relied upon the Capacity and Guardianship Law . . .<sup>65</sup>

Section 79 of the Capacity Law deals with jurisdiction and states that the court with jurisdiction shall retain its jurisdiction. For example, the Rabbinical Courts and the Courts of the Christian Communities have parallel jurisdiction and they retain their parallel jurisdiction following the adoption of the Law. The same applies to the exclusive jurisdiction conferred upon the *Qadis* in the religious courts. To illustrate, after the adoption of the Capacity Law, the other Courts retained their exclusive jurisdiction.<sup>66</sup> Even so, Sections 24 and 25, which refer to the best interests of the child, are substantive and not procedural, and there is a great deal of uncertainty regarding the distinction between procedure and substance.

Another attempt to explain the non-application of the Capacity Law was made by *Qadi* Natur in judgment 135/96, where he wrote: "I want to make it clear that a religious court is not obliged to apply the provisions of the Capacity and Guardianship Law, because the Law, unlike the Women's Equal Rights Law of 1951, makes no specific reference to the *Qadi* Court." In the earlier rulings of the *Shari'a* Appeals Court, however, reference is made to the Capacity Law.<sup>67</sup> Consequently, the claim that *Shari'a* recognizes the principle of the child's best interests was only made during the last six years, even though the *Shari'a* predates the establishment of the Court of Appeals. Until approximately six years ago, the *Shari'a* courts generally mentioned their compliance with the Capacity Law when justifying decisions that were based on the child's best interests.

The *Shari'a* Appeals Court's central mistake lies in its failure to acknowledge the ruling of the High Court of Justice. A judg-

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65. A. 127/97 (Nov. 24, 1997).

66. This rule existed before the reform by the Knesset of the Family Courts (Amendment No. 5) Law, 2001, S.H. 1810.

67. See, e.g., A. 27/92 (Sept. 13, 1992). See also A. 30/95 (Mar. 10, 1995). In these cases, the *Shari'a* Appeals Court relied upon Sections 24 and 25 of the Capacity Law.

ment on this issue was recently published in *Michal David v. the Rabbinical Court of Appeal in Jerusalem*. Cheshin J. wrote:

Our concern here is with one of the basic rules that has developed in case law. Accordingly, the High Court of Justice will interfere with the judgments of a religious court in cases where the decisions conflict with a statutory provision addressed by the religious courts, deviate therefrom, or ignore it. *See e.g.* the *Levigrund* and *Yehudit Levi* cases cited above and the references cited. Additionally, there are those who classify this actionable cause as being *ultra vires* . . .<sup>68</sup>

Paragraph 10 of the judgment reads:

[t]he statutory provisions for our purposes appear in the Capacity and Guardianship Law of 1962. The Capacity Law deals with parent-children relations in a number of provisions, and, as we well know, the guiding principle in these relations is the minor's best interests. In the words of Section 17 of the Capacity Law: "In the exercise of their guardianship, the parents shall act in the best interests of the minor in such manner as devoted parents would act under the circumstances."<sup>69</sup>

It is commonplace that guardianship includes the obligation and the right to ensure the provision of the child's needs, including his education (Sections 15 and 38 of the Capacity Law). The Court is bound by the same obligation to act in the best interests of the minor whose case comes before it. In the words of Section 25 of the Capacity Law: "The Court may determine the matters referred to in Section 24 as may appear to it to be in the best interests of the minor."<sup>70</sup> These provisions are supplemented by Section 79 of the Capacity Law, which states that "[w]here a religious court is competent by law, any provision of this Law which refers to a court — except Section 75 — shall be deemed to refer to a religious court."<sup>71</sup> Regarding this provision it was mentioned in the *Levigrund* case that:

Section 25 [of the Capacity Law] is directly applicable to the religious courts. In other words, the religious courts should and must rule in accordance therewith, and the controlling consideration must be the best interests of the minor. The

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68. H.C. 5227/97 (1998).

69. *See, e.g.*, A. 27/92 (Sept. 13, 1992). *See also* A. 30/95 (Mar. 10, 1995).

70. Capacity Law, *supra* n.64, Sec. 24.

71. *Id.* Sec. 79.

High Court of Justice must and will intervene when a religious court fails to rule in compliance with its duty, namely, in accordance with the best interests of the minor, preferring other considerations that are not necessarily consistent with the child's best interests.<sup>72</sup>

It is clear that the *Shari'a* Appeals Court's statement that the Capacity Law did not apply to it was inaccurate. Furthermore, even if there is a minority opinion in the legal literature adopting the same position,<sup>73</sup> the principle of the best interests of the minor is also applicable by virtue of the Women's Equality of Rights Law.<sup>74</sup> The *Shari'a* Appeals Court's attempt to wave a red flag in the eyes of the High Court of Justice was thus misinformed and superfluous.

#### b. The Islamization of the Principle of the Child's Best Interests

After describing the process of Islamization of the principle of the child's best interests, I will explain the phenomenon of Islamization by first, using the theory of legal pluralism and then, the fields theory.

#### i. Description of the Process of Islamization

The *Shari'a* Appeals Court, by contrast to positive Israeli legislation, views the principle of the child's best interests as having originated in the *Shari'a*. The principle underwent a process of Islamization.<sup>75</sup> The *Shari'a* Appeals court ruled:

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72. (2000).

73. See Shifman, *supra* n.44, at 425 (stating: "Section 25 of the Law applies to a religious court only in the sense that in principle, a religious court too is authorized, under the circumstances enumerated in the Law, to rule in matters of child custody and guardianship, but the Section provides no answer regarding the substantive law that the religious court is obliged to apply.").

74. See Woman's Equal Rights Law, 1951, S.H. 82, Secs. 3(b), 7.

75. The Islamization movement began in the 1970s. It gained power in the Islamic world after the revolution in Iran. See OLIVIER CARRÉ, *LE NATIONALISME ARABE* 178-203 (1993). In Egypt, for example, the Islamization of the law was expressed in the Amendment to the Egyptian Constitution of 1980, in which Section 2 established the *Shari'a* as the principal source of the law. See BERNARD BOTIVEAU, *LOI ISLAMIQUE ET DROIT DANS LES SOCIÉTÉS ARABES* 281-86 (1993). See, e.g., Ann Elizabeth Mayer, *The Shari'ah: A Methodology or a Body of Substantive Rules?*, in *ISLAMIC LAW AND JURISPRUDENCE* 177-98 (Nicholas Heer ed., 1990); Riaz Hassan, *Islamization: An Analysis of Religious, Political and Social Change in Pakistan*, 21 *MIDDLE EASTERN STUDIES* 263, 263-84 (1985); Muhammad Aslam Syed, *Modernism, Traditionalism and Islamization in Pakistan*, 8(4) *J. SOUTH*

The *Shari'a* Court relied upon Section 25 of the Capacity Law, which is a positive law, whereas in fact the *Shari'a* Court is capable of ruling exclusively in reliance upon the Islamic law. Needless to say, the rules of the noble *Shari'a* are complete and provide solutions for all problems or questions.<sup>76</sup>

In another ruling, the Court stated that “in this context, we again stress that the *Shari'a* Appeals Court applies the orthodox *Shari'a*, which it views as a complete and self-contained legal system. We have explained this on a number of occasions in the past.”<sup>77</sup> Accordingly, the *Shari'a* Appeals Court ruled that the Court is “volunteering” its compliance with the Capacity Law, given that the Islamic *Shari'a* is a self-contained, complete system, which does not require supplementation from any other law, such as the Capacity Law. Further buttressing its claim to self-sufficiency, the Court added:

Scholars gave numerous concrete descriptions of the child's best interests, whereas the Israeli law has no such ability. An Israeli court would [so it is claimed] have approved the custody agreement concluded between the parents without examining whether it evidenced appropriate consideration for the child's best interests.<sup>78</sup>

This description is inaccurate, because the Israeli law protects the child's best interests and any agreement between the parents must be consistent with these interests. Thus, I must attempt to prove not only that the *Shari'a* recognizes the child's best interests, but also that its protection of children extends beyond the protection provided by Israeli law. Furthermore, despite its inaccuracy, the decision indicates a clear internalization of the dominant dialogue regarding the supremacy of the principle of the child's best interests.<sup>79</sup> The *Shari'a*'s totality and self-sufficiency equips it to solve every legal problem, without assistance from the secular legislature. In doing so, the *Shari'a* Appeals Court fortifies its position, for in its substantive application

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ASIAN & MIDDLE EASTERN STUDIES 62, 62–84 (1985) (providing examples of other Arab States in which the process of Islamization is not limited to the legal system, but also includes educational institutions and other social institutions).

76. A. 63/94 (Oct. 13, 1994).

77. A. 4/94 (Mar. 31, 1995).

78. *Id.*

79. See PIERRE BOURDIEU, *LA DOMINATION MASCULINE* (1998) (stating that the internalization of the dominant dialogue is part of the ruling mechanism).



of the *Shari'a*, it reigns supreme and the High Court of Justice cannot preside over it in an instance of appeal, but rather, must examine if the Appeals Court operated *ultra vires* in the sense of having violated the principles of natural justice.<sup>80</sup> Additionally, by invoking the self sufficiency of the *Shari'a* — the banner waved by the Islamic movement over the entire Arab Islam world<sup>81</sup> — it buttresses its Islamic legitimacy, blunting the scathing criticism of the Islamic movement that was previously directed at the *Shari'a* courts.<sup>82</sup>

The *Shari'a* Appeals Court thus enlists the assistance of the *Shari'a*, Islam, and God in its struggle against besiegement. The threat to its legitimacy is, *inter alia*, the result of the defective system of appointment of the *Qadis*, and the implication of *Qadis* in the illegal sale of Islamic burial plots.<sup>83</sup> Invoking Divine assistance is expressed in its admonitions that whoever opposes the Court *Din* will be considered an infidel.<sup>84</sup> This technique of religious patronage is more powerful than the objectifying technique used by the secular legislature.<sup>85</sup> Accordingly, by undermining the broadened conception of the *Shari'a*, the Appeals Court does not violate the rule of law, but rather, infringes on the freedom of religion. The principle of the child's best interests is further empowered when classified as a "religious principle."

## ii. Islamization and the Theory of Legal Pluralism

The *Shari'a* Appeals Court views the *Shari'a* as an independent legal system. There are at least two legal systems: the theory of the Israeli secular legal system and the Islamic legal system.

80. See, e.g., *Gabbi v. Rabbinical Appeals Court*, 54(5) P.D. 401, 430, para. 9. See also comments of England, J. in H.C. 2222/99 (1999).

81. See GILLES KEPÉL, *LE PROPHÈTE ET PHARAON, LES MOUVEMENTS ISLAMISTES DANS L'ÉGYPTE CONTEMPORAINE* 179 (La Découverte, 1984); MUNEEER GOOLAM FAREED, *LEGAL REFORM IN THE MUSLIM WORLD: THE ANATOMY OF A SCHOLARLY DISPUTE IN THE 19TH AND THE EARLY 20TH CENTURIES ON THE USAGE OF IJTIHAD AS A LEGAL TOOL* 107, 109, 114 (1996).

82. See generally Alisa Rubin Peled, *Towards Autonomy? The Islamists Movement's Quest for Control of Islamic Institutions in Israel*, 55 MIDDLE EAST J. 378 (2001).

83. MICHAEL DUMPER, *ISLAM AND ISRAEL: MUSLIM RELIGIOUS ENDOWMENTS AND THE JEWISH STATE* 25–62 (1994).

84. MUHAMMAD SAYID AL-ASHMAWY, *L'ISLAMISME CONTRE L'ISLAM* 30–31 (1989). "*Din*" can be translated as "statute."

85. Pierre Bourdieu, *Habitus, code et codification*, in 64 ACTES DE LA RECHERCHE EN SCIENCES SOCIALES 40, 41 (1986).

Muslim scholars regard the Islamic legal system as *lex perfecta*. It is neither complemented by, nor reliant upon, the secular legal system, but is, rather, independent and self-contained. This concept of Islamic law is part of the theory of legal pluralism in the sense that the construction of the law is not solely the State's responsibility — other societal organs also participate in building the edifice of the law. In this case, the second system is the Divine law. This legal system co-exists with the secular system without any points of contact. The secular law is the Israeli law that draws its authority from the sovereign — in this case, the people of the democratic regime. Islamic law, on the other hand, is grounded in the Divine Will.

A possible theoretical construction that explains the phenomenon of the two legal systems is the theory of legal pluralism.<sup>86</sup> Accordingly, the State is not the exclusive author of norms and a legal system may exist independently from the State. The concept of the Islamic legal system, as existing independently of the Israeli legal system, is incompatible with the positive law in Israel. In Israel, religious law is viewed as subsumed within the category of a statute, which does not require proof. Consequently, religious law in Israel is an integral part of secular Israeli law. Where reference is made to Islamic law in matters of personal status, the reference is limited to the law as a material source, in the same manner as it is referred to in Ottoman and Mandatory laws.

The concept of Islamic law, as subsumed within Israeli law, was expressed by the Supreme Court in three separate judgments. In the *Milhim* case, the Supreme Court interpreted the Qu'ran and reached the conclusion that according to the Qu'ran, polygamy is permitted, but is not obligatory.<sup>87</sup> In the judgment of *Anon v. Anon*, the Supreme Court interpreted the

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86. See generally NORBERT ROULAND, *ANTHROPOLOGIE JURIDIQUE* 74-96 (1988); Gordon R. Woodman, *Ideological Combat and Social Observation: Recent Debate About Legal Pluralism*, 42 *J. OF LEGAL PLURALISM* 21 (1998); Ruth Halperin Kadari, *Legal Pluralism in Israel: The High Court of Justice and the Rabbinical Courts — After Bavli and Leo*, 20 *IYUNEI MISHPAT* 683 (1997); Issi Rozen Tzvi, *Subject Community and Legal Pluralism (After H.C. 3269/95 Catz v. Jerusalem Regional Rabbinical Court)*, 23(2) *IYUNEI MISHPAT* 539 (2000); Ruth Halperin Kadari, *More About Legal Pluralism in Israel: Response to Article of Issi Rozen Tzvi, "Subject Community and Legal Pluralism,"* 23(2) *IYUNEI MISHPAT* 559 (2000).

87. See H.C. 49/54, *Milhim v. Shari'a Judge, Akko & District*, 8 P.D. 910; see also Ya'akov Meron, *Polygamy for Moslems and the Legality of the Prohibition*, 3 *MISHPATIM* 515, 515-39 (1971).

Islamic law to declare that a child born out of wedlock has no right to child support from his father.<sup>88</sup> In the judgment of *Ali Hamza v. Shari'a Appeal Court of Jerusalem*, the Supreme Court gave a literal construction to Section 130 of the Ottoman Family Law without making any reference to the sources of Islamic law.<sup>89</sup>

Furthermore, the appointments and the powers of the *Qadis* are based upon the *Qadis* Law, a piece of secular Israeli legislation. The *Shari'a* courts are the creation of the Israeli legislature, which grants them a certain form of coercive power, without which they would not exist. This means that the model of legal pluralism is inapplicable in the case of Islamic law, given that the body charged with its application is the secular State. The condition for the emergence of legal pluralism is that the law itself must originate in communal Islamic bodies or organizations, as in the case of the Israeli-Islamic movement. Consequently, various statements made by the Appeals Court cannot be viewed as expressions of legal pluralism, given that the *Shari'a* courts belong to the secular State judiciary. In this context, the comments made in the majority opinion of the *Katz* case are applicable (the case actually dealt with the Rabbinical Courts, but the State status of the *Shari'a* Appeals Court is identical to that of the Rabbinical Courts):

The Rabbinical Court was established by legislation and is legislatively-based; its budget comes from the treasury and the *Dayanim* receive their salaries like all other State employees; they preside in judgment under the State emblem and their decisions appear on official stationary. Their orders become the voice of the State and it is the State that enforces them . . . the Rabbinical Court only has the powers that are statutorily conferred upon it.<sup>90</sup>

In light of the above, although the phenomenon of Islamization purports to legitimize the *Sharait* Court in the eyes of the Islamic public, it also increases State control over the public and the Islamic law. It is therefore clear that the Court is not

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88. See H.C. 3077/99, *Anon v. Anon*, 49(2) P.D. 578; see also Ya'akov Meron, *The Child of an Unknown Father in Islamic Law*, 23 HAPRAKLIT 407, 407-15 (1966) (revised in 1967).

89. H.C. 9347/99, *Ali Hamza v. Shari'a Court of Appeal*, 55(2) P.D. 592.

90. H.C. 3269/95, *Katz v. Jerusalem Regional Rabbinical Court*, 50(4) P.D. 590, 604.

bound up with the increased autonomy of the Muslim community. In fact, the reality is quite the opposite: Islamization reflects the increased State control over Islamic law, its secularization, and subordination to the secular system of justice. Paradoxically, this is really an Israelization and secularization of the religious law.

Interestingly enough, this is the opposite of the Egyptian experience. In Egypt, under the 1980 Amendment to the Constitution, Islamic law became the primary source of Egyptian law.<sup>91</sup> In Israel, the *Shari'a* has been shackled by the State and secularized by its subordination to the decisions of the supreme secular judicial authority. In response to this, the *Shari'a* Appeals Court is attempting to supercede a concept taken from the positive law by giving it an Islamic coating.

### iii. Islamization and the Fields Theory

In my opinion, the fields theory best explains the Islamization of the principle of the child's best interests. One of its most prominent spokesmen is Pierre Bourdieu, a French sociologist and anthropologist, who analyzes the societal expanse by analogy with the field concept:

Diverse, antithetical social phenomena are referred to as concurrent fields of power, co-existing in the same larger power field. Each field has its agents — the elements comprising a particular field — that explain and justify the necessity of that particular field. Within the broader power field, there are struggles among the agents themselves, expressed by their variant agendas and positions in the hierarchy of a power field. The agents thereby contribute to the ongoing process of change and maintenance of the structures of which they are a part.<sup>92</sup>

Interpretation plays an important role in the field of law, and the nature of the system also dictates the identity of the main players.<sup>93</sup> In the Continental legal system, particular importance is attached to the interpretation of texts by academics,

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91. See Kiliam Balz, *La reconstruction séculière du Droit islamique: la Haute Cour Constitutionnelle égyptienne et la bataille du voile dans les écoles publiques*, in 39 DROIT ET SOCIÉTÉ 227, 277–91 (1998).

92. PIERRE BOURDIEU, *RAISONS PRATIQUES: SUR LA THÉORIE DE L'ACTION* 55 (1994).

93. Pierre Bourdieu, *The Force of Law: Towards a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 814–53 (1987).

whereas in the Anglo-Saxon system, practitioners of the law are the main interpreters. Each player strives to monopolize the interpretation, and the interpretation constitutes an increase of the interpreter's symbolic capital.

According to Bourdieu, the law itself is a relatively autonomous field. There are reciprocal influences between the different fields, as, for example, between the academic field and the social field. A medical professor can have potential power in the academic field even though academically, his contribution is not great. Furthermore, the stored strength is utilized in a particular place and time. This process is dependent upon the exchange value of the symbolic capital. Another example of this is provided by the interaction between art and social standing. The theory of fields is therefore a useful tool for explaining the rulings of the *Shari'a* Appeals Court.

With respect to Islamic law in Israel, the field comprises the following players: academics, who are experts in Islamic law; attorneys; *Qadis* of the *Shari'a* courts; *Shari'a* advocates, and the Supreme Court. Prominent advocates generally refrain from appearing in the *Shari'a* courts, because their appearance could undermine their standing as "powerful" professional attorneys. The power of *Shari'a* advocates is limited by the general paucity of their knowledge of Islamic law, which is the result of the waiver of the minimal statutory requirements for formal education.<sup>94</sup> In the academic field, Aharon Layish's and Ya'akov Meron's writings on Islamic law, notwithstanding their quality and quantity, have failed to influence the Supreme Court and the *Shari'a* courts. Evidently, neither the Supreme Court nor the *Shari'a* courts are willing to rely on authors who are not Muslims. Thus, only the *Shari'a* courts, especially the *Shari'a* Appeals Court, are left. In its efforts to purge the *Shari'a* of traces of the positive law, the *Shari'a* Appeals Court uses interpretative manipulations.

Regarding the "competition" with the Supreme Court, religious law in Israel is regarded as statutorily binding, thus vesting the Supreme Court with interpretative power. Generally speaking, the Supreme Court avoids interference with the rulings of the *Shari'a* Appeals Court. In fact, the Court ruled on numerous

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94. See 1993, 3 K.T. 1440, 1374. This regulation deals with the representation of litigants before the *Shari'a* courts by *Shari'a* advocates who are not lawyers.

occasions that in its capacity as the High Court of Justice, "the Supreme Court will only overturn religious court rulings which are *ultra vires* by reason of a denial of natural justice or in exceptional cases which demand intervention for the proper administration of justice."<sup>95</sup> The Supreme Court grants the religious courts a relatively broad area for maneuvering, but the Supreme Court is not without interpretative power. To the extent that the religious law is statutory law, it is subject to interpretation by the Supreme Court, whose interpretation is binding. Accordingly, the Supreme Court has not backed down from interpretation of Islamic law, when necessary.

Under the Supreme Court's rulings in matters regarding personal status, the religious courts are exclusively competent to interpret religious law, even at the expense of the general statutory arrangement. The application of personal law, however, does not extend to matters beyond personal status. Effectively, this ruling restricts the ability of the religious courts to maneuver.<sup>96</sup> When it comes to personal law, the Supreme Court is authorized to interpret it and its interpretation is binding; this is also true in relation to the religious law. Regarding the latter, however, the Supreme Court lacks the necessary expertise for such interpretation. Thus, the Supreme Court limits the application of the religious law and as regards the positive secular law, the Supreme Court's interpretative authority is exclusive and its rulings binding.<sup>97</sup>

In this context, the comments of Barak D.P. (as then known) bear mention:

In fact, the religious courts are an integral part of the Israeli judiciary. The law they apply is an integral part of the Israeli legal system. These are combined tools which dictate that in all matters connected to civil law, which are not part of the matters of personal status and personal law, it is incumbent upon the religious courts to apply the general civil law, as enacted by legislature and interpreted and developed by the

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95. H.C. 187/54, *Brier v. Qadi of the Islamic Shari'a Court of Akko*, 9 P.D. 1193.

96. See H.C. 3914/92, *Lev v. Tel Aviv Regional Rabbinical Court* 48(2) P.D. 491, 505.

97. See F.H. 1/69, *Boronowski v. Chief Rabbis of Israel*, 25(1) 7,15; see also M. Drori, *Who is Qualified to Interpret Secular Legal Provisions Directed at the Religious Court*, 3 *IYUNEI MISHPAT* 34, 941 (1973).

courts.<sup>98</sup>

This means that by declaring that the principle of the child's best interests is an Islamic principle, the *Shari'a* Appeals Court is attempting to restrict the intervention of the High Court of Justice. On the other hand, the High Court of Justice is aware of its limitations in the interpretation of religious texts and therefore, attempts to restrict the applicability of the religious law.

Islamic law, however, also belongs to the religious field. In the religious dimension, there are three central players, who are attempting to monopolize the religious "truth." The first player is obviously the *Shari'a* Appeals Court itself. Next, there is the *Mufti* of Jerusalem, who sees himself as the *Mufti* of Palestine. The Jerusalem *Mufti* is active in the raising of funds for the Israeli Muslim community and sees himself as the supreme religious authority over Palestine in its entirety.<sup>99</sup> The third player is the Israeli-Islamic movement, both of whose factions attempt to interpret the religious texts.

This power struggle is demonstrated by considering the subject of adoption of Muslim children. *Qadi* Natur adheres to the traditional interpretation, which forbids adoption, while Cheikh Raid Salah proposes a broader approach in order to prevent the smuggling of Muslim children abroad. In essence, this is a clash between the head of the *Shari'a* Appeals Court in his official capacity and the head of the Islamic movement in Israel, each of the players claiming the authenticity of his interpretation. On the one hand, this interpretation is external to the *Qadi* Natur's judicial function, but essential in buttressing the position of the *Shari'a* Appeals Court. On the other hand, the process of Islamization in the case law is intended to strengthen the status of the *Shari'a* in both legal and religious arenas. The *Shari'a* Appeals Court has an interest in demonstrating its loyalty to the religious law. It is therefore quite natural that the religious court will "make an effort" to show its adherence to religion.

### c. The Principle of the Best Interests of the Child as Infringing Upon the Muslim Rules of Evidence

Despite its declarations regarding the legal self-sufficiency of the *Shari'a*, in reality, the *Shari'a* Appeals Court needs the Is-

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98. H.C. 1000/92, Bavli v. Rabbinical Appeal Court, 48(2) P.D. 221, 247.

99. The author's conversations with the *Mufti* of Palestine.

raeli legislature to exercise its authority. An example of this is the Court's use of secular law for the appointment of welfare officers. Its reliance upon welfare officers obviates the need for the evidentiary laws that apply to the *Shari'a* courts. By using welfare officers, the *Shari'a* Appeals Court is actually deleting Section 1676 of the *Mejelle*<sup>100</sup> as well as the Sections that follow it and which deal with rules of evidence, as interpreted by the *Hanafi* school.

The *Shari'a* Appeals Court established criteria and modern tools for assessing the best interests of the child. In exercising these tools, the *Shari'a* Appeals Court can use the services of a social worker, pursuant to Israeli law,<sup>101</sup> given that the social worker has both, necessary expertise and training.<sup>102</sup> While the appointment of a social worker is discretionary, having appointed one, the Court has to give reasons if it chooses not to accept the worker's recommendation.<sup>103</sup>

The social worker's report must include two elements: the questions asked by the *Shari'a* Appeals Court and the social worker's opinion regarding the child's best interests.<sup>104</sup> The Court further ruled that if neither party disputes the social worker's report, then the Court must take the initiative, because the Court's role is that of the Guardian General, and in that capacity, it is the guardian of someone who does not have a guardian.<sup>105</sup>

#### d. The Principle of the Child's Best Interests Blurs the Distinction Between the Different Schools of Law

The *Shari'a* Appeals Court adopted a consciously eclectic approach, utilizing all four *Sunni* schools as normative legal sources, despite the absence of any legal or *Shari'a*-based authority for its deviation from the *Hanafi* school to which it had been subordinate. The principle of non-subordination is also mentioned in the legal circulars issued by the head of the *Shari'a* Appeals Court since 1994. The disengagement from the *Hanafi*

100. See *AL-MAJALLA* (3rd ed. 1888).

101. C. 42/93 (July 5, 1994). Hassan al-Asadi gave the judgment and Zoabi concurred.

102. A. 48/94 (Jan. 16, 1994).

103. *Id.*

104. A. 39/97 (May. 15, 1997).

105. A. 50/98 (Mar. 25, 1998).



was part of an historical development, as, historically speaking, the *Qadis* had been accustomed to relying upon different schools. There is an internal dispute between the schools regarding the sources of Islamic law as well as the various branches of the law. The mandatory reliance exclusively upon the *Hanafi* was felt, but it did not contribute to the stability of the Islamic law, which was finally achieved by legislation. One example is the *Mejelle*, which relied upon the accepted norms of the *Hanafi* school.

Ultimately, it became clear that the technique of exclusive reliance provides certainty and stability, but also causes a certain rigidity. In the Ottoman Family Law, the *talfik* technique was used. In that case, the uncertainty was avoided and the Ottoman legislature succeeded in blazing the trail of reform. When the *Shari'a* Appeals Court sees itself as not being restricted to a particular discipline and refers to different scholars without mentioning the school to which they belong, it is, in effect, intentionally ignoring a historical development of hundreds of years, which all contributed to the increase in stability.

The following are two examples of instances in which the *Shari'a* Appeals Court diverged from the *Hanafi* school, without stating so openly. In the first case, the *Shari'a* Appeals Court ruled that in order to assess the child's best interests, it was necessary to consider the child's own desires.<sup>106</sup> As discussed above, giving expression to the best interests of the child is accepted in the *Shafi'i*, whereas the *Hanafi* expressly rejected the child's right to choose between his parents. This is also known as "the right of discernment." The principle of the child's best interests thus served as a means of blurring the distinction between the *Hanafi* and other approaches.

The second case reflecting divergence from the *Hanafi* deals with the definition of "custody" in the *Shari'a* tradition. As previously discussed, *Hanafi* law does not clearly define whether custody is the right of the mother or the child. The *Shari'a* Appeals Court ruled that custody is simultaneously the right of the mother, the child, and even God.<sup>107</sup> Imputation of the custodial right to God universalized the right of action. This law is op-

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106. A. 58/92 (Feb. 9, 1993). The judgment was given prior to the appointment of the *Qadis* Medlag, Natur, and Zo'bi.

107. A. 67/99 (May 31, 1999).

posed to the *Hanafi* position, which sees the *hadana* as a double-edged system of rights belonging to the mother and the child, and not as a triangle that comprises the mother, the child, and God. Incidentally, in its early rulings, the *Sharaiite* Court endorsed the *Hanafi* rule.<sup>108</sup>

Reliance upon different schools means conferring tremendous power on the *Shari'a* courts to make contradictory decisions. Furthermore, neither the litigants nor the public at large can have advance knowledge or expectations as to the manner of the law's interpretation. Ya'akov Meron wrote the following regarding the different schools:

The discrepancy between the different streams in Islamic law is as significant as the discrepancies existing between totally independent systems of law. The similarity between the *Hanafi* and the *Maliki* approximates the degree of similarity existing between English law and German law. Each system has its own institutions, conceptions, and terminology, notwithstanding the fact that in Islam, all of these systems use one language — Arabic.<sup>109</sup>

Later on, he adds: "It seems to us that the maximalists — i.e., those who choose to deal on an equal basis with all of the streams and divisions of Islamic law — are in effect minimalists, who diminish the image of Islamic law, superficially and in distortion of Islamic law."<sup>110</sup>

The conclusion is, therefore, that the absence of a limitation to one system infringes on the rule of law in the narrow sense. The official law in the Ottoman Period was *Hanafi*, and the British and the Israelis also preserved that tradition. Furthermore, the rule of law is undermined by a lack of legal certainty, which is so critical to litigants in planning their strategies. The combination of rules external to the *Hanafi*, together with the principle of the best interests of the child, increases legal uncertainty. One of the critiques of the principle of the best interests of the child is connected to the resultant lack of certainty of legal rules,<sup>111</sup> a certainty which all legal systems strive for, including the Islamic system. The principle of the best inter-

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108. A. 33/92 (1992); see also A. 29/93 (Dec. 7, 1993).

109. YA'AKOV MERON, *MOSLEM LAW IN A COMPARATIVE PERSPECTIVE* 37 (2001).

110. *Id.* at 43.

111. See Barbara Bennet Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 *FAM. L.Q.* 815, 820 (1999).

ests of the child, in addition to the *talfik*, causes legal anarchy or even a state of *non droit*. Reliance upon the principle of the child's best interests blurs the distinctions between the different schools. The *Shari'a* Court will choose the opinion that is more or less consistent with the best interests of the child, regardless of the school to which it belongs.

Incidentally, it bears mention that legal certainty in a country like France, has constitutional status.<sup>112</sup> Strangely, the *Shari'a* Appeals Court relied upon the principle of judicial stability to support its claim that its rulings ought to have the power of binding precedent.<sup>113</sup>

## 2. Presumptions

Presumption is a frequently used tool in rules of evidence. In certain cases, presumption presumes the existence of a certain fact, unless proven otherwise (presumption of fact). In other cases, certain basic facts must be proven in order to exercise the presumption (presumption of law). Both Israeli<sup>114</sup> and English laws<sup>115</sup> recognize presumptions of fact and presumptions of law.

Presumptions of fact are assumptions, which may be made when a particular fact has been proved, in the absence of any evidence refuting the assumption. Presumptions of law are legal conclusions that the judge is obliged to draw when a certain fact has been proved and there is no evidence refuting the proven fact. There are two types of presumptions of law: presumptions that can be refuted with contradictory evidence, and those which are absolute — not admitting of rebuttal. Presumptions of fact and presumptions of law that can be refuted thereby transfer the burden of proof.

Presumptions are not just evidentiary techniques used to establish the truth. They are also partially intended to protect certain interests and values. Factual presumptions express our life

112. Bertrand Mathieu, *Retroactivité des lois fiscales et sécurité juridique: l'application du principe constitutionnel implicite: observations à propos de la décision 98-404 DC du 18 décembre 1999 du Conseil Constitutionnel*, R.F.D.A., 89-95 (1999).

113. A. 39/97 (May 15, 1997).

114. I. E. HARNON, *THE LAWS OF EVIDENCE* (1974); S.Z. Feller, *The Categories of Presumptions: Note on Subach, Tzlenko and Anon Judgments*, 13 *MECHKAREI Mishpat* 357, 357-80 (1996).

115. ADRIAN KEANE, *THE MODERN LAW OF EVIDENCE* 656-63 (5th ed. 2000).

experiences, which indicate that, generally speaking, events occur in a particular manner, in particular factual sequences. This conclusion relies upon probability alone; however, there is still the possibility of claiming that the assumption is not consistent with reality.<sup>116</sup> Presumptions of law, or legal presumptions, are not exclusively a tool for arriving closer to the truth, but also reflect certain value judgments. The classic example of this is the presumption of innocence, for not every person who benefits from the presumption is indeed innocent of the offence. Similarly, the concern for the child's interests engenders presumptions regarding his lineage.<sup>117</sup>

The *Shari'a* Appeals Court borrowed certain concepts from the secular Israeli law and grafted them onto classical Islamic law. Given that the guiding principle regarding the *hadana* in the *Shari'a* Appeals Court is the child's best interests, the rules determined by judicial authorities are actually presumptions, which, if adhered to, will ensure the child's best interests. But like other presumptions, these too may be refuted. For example, in judgment 22/98, it was held that maternal guardianship of the child was preferable for as long as the minor was in need of female care, provided that the female guardian was an adult, legally competent, and unattached.<sup>118</sup> Given that factual basis, it was presumed that she would be capable of educating and taking care of the minor. The holding does not constitute an absolute axiomatic rule; rather, it is a presumption drawn on the basis of certain facts, which may be refuted. A person claiming the non-applicability of the presumption bears the burden of proof. Thus, for example, if a woman wants to prove that another man is preferable to the biological father, she must prove it. It should be noted that this provides an example of the main shortcomings of the innovations made by the *Shari'a* Appeals Court. In the modern framework, as reflected in CEDAW and the Convention for the Rights of the Child, presumptions are not acceptable, as they are expressive of prejudicial views. Consequently,

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116. P. Foriers, *Présomptions et fictions*, in *LES PRÉSUMPTIONS ET LES FICTIONS EN DROIT* 7, 7-26 (Ch. Perelman & P. Foriers eds., 1974).

117. Jerzy Wroblewski, *Structure et fonctions des présomptions juridiques*, in *LES PRÉSUMPTIONS ET LES FICTIONS EN DROIT* 43, 57-58 (Ch. Perelman & P. Foriers eds., 1974).

118. (Feb. 28, 1998).

the *Shari'a* Appeals Court ceased to apply this approach prior to reaching total equality.

a. The Classic Rules as Presumptions

The *Shari'a* Appeals Court applied the theory of presumptions in two main fields: the child's age and the mother's marriage to another man.

i. Age

Regarding the age of the child, as noted above, it is in accordance with the *Kadri Pasha* Code that the daughter stays with her mother until the age of nine, whereas the boy stays with her until the age of seven. Having reached these ages, the children are transferred to the custody of the father. The *Shari'a* Appeals Court held that both ages represent presumptions, namely that until the age of seven for a boy and nine for a girl, the child's best interests dictate remaining in the mother's custody, whereas thereafter, best interests favor a transfer to paternal guardianship. These presumptions, however, are refutable. In the event that the mother can prove that, despite having passed the age of *hadana*, as fixed by the scholars, the child's interests nonetheless dictate staying with the mother, then the Court will rule that the child should remain in her custody.<sup>119</sup> The establishment of the specific ages is an *ijtihad*<sup>120</sup> of the scholars and the important factor is the principle of the best interests of the child.<sup>121</sup> Although there are early rulings that the establishment of the ages is *ijtihad*,<sup>122</sup> it is clear that the source is not the Qu'ran or the *Sunna*, and that the matter is open to interpretation. Even so, in its current rulings, the Court combines the theory of the *ijtihad* with the theory of presumptions. In any event, the rulings re-

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119. A. 28/94 (June 14, 1999); A. 248/98 (Nov. 29, 1998).

120. *Ijtihad* refers to the making of an intellectual effort to derive legal norms from the sources of law.

121. A. 13/92 (July 7, 1992); see also A. 36/93 (June 5, 1993).

122. See, e.g., A. 72/89 (Jan. 30, 1990). The decision reads:

The *Shari'a* Appeals Court cannot but mention that the principle of child custody with one of the parents is a way of guarding the child's interests. This is evidenced by the fact that in many Islamic States, there is no age limit; [the age at which the child is supposed to be in the father's custody] and the age limit is an *ijtihad* of the jurists, in the absence of a text from the Qu'ran or the *Sunna*.

*Id.* See also A. 41/88 (1988); A. 51/88 (1988); A. 39/90 (1988).

flect the *ijtihad* with a certain orientation to realizing a particular goal. It should be stressed that the *ijtihad* is not used as an interpretative tool for textual understanding in order to ascertain the divine will, but rather, for the sake of improving the child's status. For example, in one judgment, *Qadi Natur* ruled:

this Court notes that it is the presumption of the necessity of the mother's care that determines the ages of *hadana* for minors, and that the interests of the minor no longer requiring such care dictate his placement with the father, so that he can become accustomed to being in the community of men. Consequently, scholars also presumed that if a child still requires mother's care, then his best interests are served by staying with the mother. The scholars emphasized, however, that this is not a general principle, valid in every case, but rather a general presumption made on the basis of a set of facts, which may be valid for most, but not all of the cases. The role of the presumption is to determine which party bears the onus of proof to refute the presumption as to what the child's best interests are. Thus, if the minor is at an age at which he requires his mother's care, then the father has the onus of proving that despite the factual situation, which points to the child's need of his mother's care, it is nonetheless not in the child's best interests to be in his mother's custody. In the same way, the mother bears the onus of proving that the child's being among adults will work to his detriment, even after the age at which he no longer requires his mother's care. It is the mother who has to refute the presumption of the child's best interests of being with the father after a certain age.<sup>123</sup>

This summary of the law appears in other cases too. In another case, the *Shari'a* Appeals Court ruled that the mother had not proved that the children's interests dictated their remaining with her, even after the termination of the *hadana* period, nor had she proved that remaining with their father would not be in the children's interests.<sup>124</sup> Consequently, as far as the child's age, it is clearly an arbitrary choice of the scholars.

There are three judgments, however, which do not support the theory of presumptions. According to these judgments, the theory of presumptions is not to uproot the dichotomy of the

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123. See A. 17/2000 (2000).

124. See A. 97/94 (July 20, 1997).

*hadana*, but rather, to indicate that the dichotomy is a tool for realizing the child's best benefit.<sup>125</sup>

The blurring of the dichotomy found expression in one exceptional judgment where the *Shari'a* Appeals Court took an extreme position and ruled, against the traditional Islamic law, that after the *hadana* period, when the children were no longer in need of their mother's care, they should go to a place which was better suited for them, without declaring that any particular place was *a priori* preferable to any other place.<sup>126</sup> As previously discussed, however, under Islamic law, after the termination of *hadana*, the *wilaya* period — during which the men are the guardians of the minor — begins.<sup>127</sup>

The dichotomy is further distorted by the judicial endorsement of joint custody exercised by the mother and the father, in which they divide the days of the week for having custody of their child.<sup>128</sup> A division of this kind is absolutely foreign to Islamic law, which clearly delineates the periods for child custody with either the mother or the father, but not jointly. Joint custody has its roots in the West and chronologically speaking, is a recent phenomenon.<sup>129</sup>

Even so, the *Shari'a* Appeals Court did not draw all possible logical conclusions dictated by its extension of the *hadana* period. In one of its judgements it stated that only during the

125. In these judgments, the purpose of the theory of presumptions is to divide the time periods for the custody of minors in the way that is thought to be best for the child. During the period of early childhood, the child should generally be with the mother, whereas after a certain age, determined by gender, the child is transferred to the custody of the father.

126. A. 30/96 (May 7, 1996).

127. DE BELLEFONDS, TRAITÉ, *supra* n.7, at 153.

128. A. 244/98 (Nov., 22, 1998).

129. Kirsti Kurki-Suonio, *Joint Custody as an Interpretation of the Best Interests of the Child in a Critical and Comparative Perspective*, 14 INT'L J.L. POL'Y & FAM. 183, 188 (2000). This Article states that:

[t]he ideals regarding custody arrangements in the context of divorce have been the following: first, maternal preference, reflecting the idealized notion of care by a loving mother, which only later brought mothers full custodial rights; second, custody by the parent, who, without any consideration of her or his sex, could provide the child with a psychologically happier childhood; and third, care by both parents, fulfilling the child's needs in harmonious, complementary co-operation as joint custodians.

*Id.*; see also Shannon Dean Sexton, *A Custody System Free of Gender Preferences and Consistent With the Best Interests of the Child: Suggestions for a More Protective and Equitable Custody System*, 88 Ky. L.J. 761, 801 (1999-2000).

*hadana* period is the father obligated to make child support payments.<sup>130</sup> Beyond that time period, maternal custody of the child is no longer by virtue of *hadana*, and the father, therefore, bears no obligation to make *hadana*-based payments. When the Court extends the period during which the children are with the mother, it is no longer *hadana*. The Court further ruled that it was unable to use the *ijtihad* technique to extend the financial obligation of the father to children beyond the ages of seven and nine.

The ruling of the *Shari'a* Appeals Court is illogical. First, according to the *Hanafi* school, there is no unanimity regarding the age. It was only the later scholars who fixed the respective ages of the children. The *ijtihad* technique cannot be resorted to in the absence of a text, and the case here concerns judicial opinions and not a text. As stated, unanimity does not exist in the *Hanafi* or outside of it. Furthermore, Islamic law established a very clear distinction between the *hadana* period, during which the minor is generally with the woman, and the *wilayah* period, which is spent with the man. When a child remains with the mother without defining the period as "*hadana*," it is legally illogical. This, in fact, is the creation of a new situation, which was not foreseen by the scholars. This ruling eliminates the dichotomy that was determined by the sages. Instead of two periods, one under the tutelage of women and the other under that of men, an intermediary situation is created, where the child's being with his mother without custody is considered either *hadana* or *wilaya*, or both.

## ii. The Mother's Marriage to Another Man

The question of the woman who marries another man is comprehensively dealt with in the judgment 28/98.<sup>131</sup> In that case, following his parents', the appellants', divorce, the son remained with his mother. The father applied to the *Shari'a* Appeals Court, claiming that the mother's marriage to another man would cause her to forfeit her *hadana* rights. A social worker's report stated that the child's interests dictated that he stay with his mother. The *Shari'ite* Court ruled that in this case, the mother had lost her right. The Court relied on the com-

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130. See A. 59/98 (May 12, 1998).

131. (May 26, 1998).



ments of the scholars from the different schools and the *hadith* of the Prophet who said: “[y]ou are preferable to him for as long as you do not marry.”

Having reviewed the relevant law, the *Shari'a* Appeals Court asked two questions: (1) what is the logic behind the rule; and (2) is it an absolute rule or does it admit exceptions? The Court ruled that the Islamic law was based on the best interests of the child and had constructed its rules accordingly. The presumption was that granting another man guardianship of the child would cause that person to adopt an improper attitude towards the child.

In explaining the rationale behind its decision, the *Shari'a* Appeals Court opined that the mother's forfeiture of her custodial rights in the event of marrying another person is a rule derived from the controlling principle of the child's best interests. The principle is based on the presumption that marriage to another man places a woman at his service. She will inevitably be burdened with discharging her obligations to that man, and this will occur at the expense of properly attending to her son's needs. A mother with *hadana* who is unable to properly care to her child's needs is universally considered as having forfeited the *hadana*, conferring it to the next in line. The exception referred to in the *hadith* takes into account the inability of the new husband to display compassion toward a child who is not his or to grant him warmth and love, displaying a hostile attitude instead.

The Court then proceeded to question whether the rule is an absolute one or whether it has exceptions. The Court quoted Ibn 'Abdin:

Conceivably, he [the child] could have a relative who displays hostility towards him and wishes his death, whereas his mother's husband has compassion for him. The relative may wish to take him in order to harm him and harm her, or in order to use the maintenance payments of the child and the like. Conceivably, the relative may have a wife who will hurt the child more than the mother's husband and it could be that he has sons and is, therefore, fearful for the daughters. If the *Mufti* or the *Qadi* know that this is the case, then the mother should not be denied her child, because the *hadana* is based upon the best interests of the child.<sup>132</sup>

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132. IBN 'ABDIN, *supra* n.20, at 565.

A petition was filed against this ruling, claiming, *inter alia*, that it violated the woman's rights and did not correctly apply the Capacity Law. In *Shaabani v. Sharaite Court of Appeals*, the Court ruled:

With the agreement of the attorneys for the parties, we decide that the proceedings regarding the custody of the child shall be restored to the Regional *Shari'a* Court of Nazareth. The Court will receive an expert opinion on the welfare and the rights of the minor at this time, and shall decide upon the issue of his custody, being guided by the minor's best interests in the light of the comments of the *Shari'a* Appeals Court. The welfare authorities of the Nazareth municipality shall appear before the *Sharaite* Court of Nazareth and they too shall give their expert opinions to the Court.<sup>133</sup>

The High Court did not make any decision on principle, being content simply to affirm the previous ruling. When the Court approves an agreement regarding child custody, however, it must act in the minor's best interests. In approving the agreement, the High Court effectively stated that the child's best interests would be determined in accordance with the judgment of the *Shari'a* Appeals Court. It should be remembered, however, that the Appeals Court was prejudicial to the woman. If the father were to marry another woman he would not forfeit his *hadana* rights. On the other hand, it was incumbent upon the mother to prove that the child's interests dictated his being left in her custody.<sup>134</sup> Furthermore, it is important to emphasize that the rules of classical Islamic law were not made exclusively on the basis of the best interests of the child as a *meta* principle, but rather as a consideration of equal value, to be considered together with all other principles. In that particular case, the Court contradicted its own rulings under which an exception to an accepted presumption could be proved via the report of a social worker.<sup>135</sup>

Using the principle of the child's best interests has made other legal tools superfluous. In fact, the penetration of the child's best interests principle into the rulings of the *Shari'a*

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133. H.C. 3872/98, *Shaabani v. Sharaite Court of Appeals* (Jan. 5, 1999) (not yet published).

134. See H.C. 187/54, *Brier v. Qadi of the Islamic Shari'a Court of Akko*, 9 P.D. 1193, 1198.

135. See, e.g., A. 248/98 (Nov. 29, 1998).

courts has emptied the classical rules of Islamic law of content. The rules are being invented and not discovered. When the question is one of emptying the Islamic law of content, the substantive claim of the unchanging essence of Islamic law is often raised. Here, however, there is no clearly defined Islamic essence that can be built or destroyed, or that can undergo a process of authentication and verification. When the issue is one of law, this changes, because there are more or less clear norms that can be described at any particular moment in time and compared with norms at another point in time. While there is still the issue of the burden of proof, the transfer of that burden becomes irrelevant, because in custody disputes the *Shari'a* courts tend to resort to a social worker's report, which, in the majority of cases, is endorsed by the court. Consequently, the proposition that Islamic law recognizes the principle of the child's best interests and the appointment of a social worker is meaningless in terms of the rules of Islamic law.

The restriction of the scope of Islamic law was not the result of an initiative of the legislature or the Supreme Court. It was the *Shari'a* Appeals Court itself that brought about the situation. The principle of the child's best interests is a veritable magic formula, which solves all problems. The normative depletion of *Shari'a* occurred as part of the Islamization of the principle of the child's best interests. As indicated above, the theory of legal pluralism could not provide an appropriate explanation of this process. According to the fields theory, on the other hand, the *Shari'a* Appeals Court Islamized the concept of the child's best interests in order to retain control of its symbolic legal capital in the battle with the Supreme Court.

## II. AN ATTEMPT TO EXPLAIN THE CHANGE

In this part, I will attempt to explain the metamorphosis of the *Shari'a* Appeals Court's rulings. By way of introduction, it must be stressed that there is no single explanation, but that the metamorphosis was the confluence of different factors that caused the change. The first category of explanations attempts to respond to the question of why the Court decided to adopt the reformist approach. The second category attempts to explain why there was a reform at all.

### A. *Why the Reformist Approach?*

The first category of explanations purports to give a structural explanation by presenting the three options with which the Appeals Court was confronted: traditionalist, reformist, and modernist. The other category of explanations identifies the reasons for the transition to the reformist approach with its search for legitimization.

#### 1. The Structural Explanation

The *Shari'a* Appeals Court was confronted with three options. The first was to continue applying the *Kadri Pasha* Code, as it reflects the *Hanafi* school. This is the traditional approach and the one closest to classical Islamic law. The second option was to initiate a reform, using the legal tools provided by the *Shari'a* itself, such as reliance upon the well-known *ijtihad* of Islamic law, in order to effect a transition to a reformed approach. Third, there was the option of applying the principle of the child's best interests, as reflected in the Capacity Law. Support for the third option can be found in the modernist approach.

The first option, the adoption of the traditional approach, is difficult due to the pressures from the Israeli legislature and the Supreme Court, as well as pressures from women's organizations, threatening to restrict the jurisdiction and powers of the *Shari'a* Appeals Court by lobbying for legislation.<sup>136</sup> Consequently, the Court must attempt to present an image of enlightenment and flexibility.

The second option was frequently mentioned by Islamic thinkers, as early as the middle of the nineteenth century. Jamal Aldin al-Afghani, for example, attempted to create a synthesis between Islam and modern life, by suggesting an interpretation of Islam that would be compatible with modern life, while maintaining the traditional Islamic framework. This challenge guided and continues to guide the reformist stream in Islam, the aim being to bring about internal change within the Islamic legal framework without causing an upheaval. Muhammad Abdo, a student of al-Afghani, has carried on this tradition and still

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136. M. Shawa, *The Family Courts Law, Bill (Amendment No.4) (Equating of Judicial Powers): Is it Really a Blessing for Moslem and Christian Women?*, 44(2) *HAPRAKLIT* 358, 358-400 (1998). Since then, the Family Court Law, 1995, S.H. 1537, as amended by 5th Amend. of Nov. 14, 2001, S.H. 1810, has been adopted.

views the *ijtihad* as a legitimate tool.<sup>137</sup> The classical scholars, however, reject Abdo's view.<sup>138</sup> Abdo maintained that it was possible, indeed crucial, for Muslims to offer different interpretations, adducing the polygamy question as proof of the feasibility of innovative interpretations. The fourth Chapter of the Qu'ran, fourth verse, known as "Women *Surate*," provides the legal basis for polygamy. The verse reads:

And if you fear that you will not be fair in dealing with the orphans, then marry of women as may be agreeable to you, two, or three, or four; and if you fear you will not deal justly, then marry only one or what your right hands possess. That is the nearest way for you to avoid injustice.<sup>139</sup>

Verse 128 of the same Chapter states: "[y]ou cannot keep perfect balance between wives, however much you may desire it. But incline not wholly to one, so that you leave the other like a thing suspended. And if you amend and act righteously, surely Allah is Most Forgiving and Merciful."<sup>140</sup> The first verse permits polygamy, but restricts it to four women simultaneously. The second verse states that it is impossible for a man to treat these women equally, even if he should so desire. On their face, the verses are contradictory, with one verse making polygamy contingent and the other verse establishing a requirement that no person is capable of satisfying. Muhammad Abdo explained the first verse by placing it in the material context, whereas the second verse relates more to the psychological element of love. One can control the first factor, the material dimension, but not the second factor, the emotional dimension. Muhammad Abdo adds that a harmonious reading of the verses invites the conclusion that polygamy in Islam should be restricted and only permitted in urgent situations.<sup>141</sup> Under the traditional approach, polygamy is a man's right, whereas a modernist approach would not recognize polygamous marriages. The reformed approach

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137. M.A. ZAKI BADAWI, *THE REFORMERS OF EGYPT* (1978) [hereinafter BADAWI]; TARIQ RAMADAN, *AUX SOURCES DU RENOUVEAU MUSULMAN: D'AL-AFGHANI À HASSAN AL-BANNA, UN SIÈCLE DE RÉFORMISME ISLAMIQUE* (1998).

138. Compare JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 70-71 (1964) with W. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 *INT'L J. OF MIDDLE EAST STUDIES* 3, 41 (1984).

139. QU'RAN (Hazrat Mirza Tahir Ahmad trans., 1988).

140. *Id.*

141. 4 M.'ABDU, *TAFSIR AL-QURA'N* 348-49 (2002).

suggested by Muhammad Abdo is an intermediate approach, legitimizing polygamy, but in a restricted form.

For Muhammad Abdo, Islam is a religion and, hence, not restricted by a particular discipline. *Talfik* may always be used to facilitate a more desirable result. *Talfik* is a technique by which the legislator, who is not content with rules from a particular school, deduces rules from a number of disciplines.<sup>142</sup>

The modernist approach emerged due to the inability of the reform approach to synthesize Islam with modern life and modern concepts. The failure of the reform was particularly evident in its inability to deal with the issue of universal human rights. There was an increased recognition of the importance of exercising human rights, but this was insufficient in the confrontation with an unequivocal, clear text, the reliability and contents of which were unimpeachable. An example of this is the verse dealing with the beating of women.<sup>143</sup> The result is that the modern scholars proposed changing the rules of the game. In a sense, this is a change of the basic paradigm. Below are two outstanding examples.

#### a. Nasir Hamid Abu Zayd

Nasir Hamid Abu Zayd has a particularly critical reading of the religious Islamic discourse.<sup>144</sup> He attempts to understand the ideological considerations controlling the religious discourse, with no distinctions between moderates and extremists, given that in his view, they share a common basis.

In his books, he proposes a new reading of the canon of Islamic law, not being content with reform interpretations. His central claim is that the Qu'ran was written with Divine inspiration and is not the precise word of God. The Prophet Muhammad was a person living in a particular time and place and as such, conveyed the Divine message in his own words. In the transition from Divinity to the mortal Prophet, the message is

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142. See BADAWI, *supra* n.137, at 79-82.

143. See, e.g., Ronald L. Nettler, *Muhammad Talbi's Commentary on Qur'an 4:34 A "Historical Reading" of a Verse Concerning the Disciplining of Women*, 24 *MAGHREB L. REV.* 19, 33 (1999) (interpreting verse 34 of the fourth Chapter of the Qu'ran).

144. See, e.g., NASIR HAMID ABU ZAYD, *NAQD AL-KHITAB AL-DINI*, (3d ed. 1995); NASIR HAMID ABU ZAYD, *AL-KHITAB WAL-TA'WIL* (2000); NASIR HAMED ABU ZEID, *CRITIQUE DU DISCOURS RELIGIEUX* (Muhammad Chiret trans., 1999).

severed from its Divine source, and becomes human. The Qu'ran must, therefore, be interpreted accordingly.

Regarding the *Sunna*, the religious discourse centers exclusively on the authenticity of the *hadith* and not on its meaning, given that after being convinced of the authenticity of the prophesy, the content of the prophesy should be accepted in its totality. According to Abu Zayd's approach, both the scholars and the Islamists broadened the meaning of the text, interpolating their own views into it. As such, comments of the scholars are subsumed within the category of the "miraculous." In other words, having become part of the Divine canon, the scholars' comments are legitimate subjects for legal interpretation. The broadening of the "miraculous" category limits the role of logic. Abu Zayd, therefore, calls for a new reading of the sources of Islamic law, which can lead to a humanistic view of Islam.

#### b. Mahmud Muhammad Taha and Abdullahi An-Na'im

Mahmud Taha, a Sudanese, is the founder of the movement of the Republican Brothers. The essence of his philosophy is presented in his book, *THE SECOND MESSAGE OF ISLAM*.<sup>145</sup>

According to Taha, the Qu'ran consists of two basic messages: the Divine message that was given to the Prophet Muhammad in Mecca and the Divine message that was given to the Prophet Muhammad in Medina. This presentation does not constitute a diversion from classical Islamic law. An accepted tenet of Islamic law is that chronologically later verses are normatively preferable when in conflict with earlier verses. The earlier verses are not revoked and continue to be part of the Qu'ran; they are no longer normative however, with respect to the laws derived from them.<sup>146</sup>

The change introduced by Mahmud Taha and followed by Abdullahi An-Na'im, who interpreted his teaching,<sup>147</sup> lies in the fact that, in Taha's view, the main and authentic message was the earlier message from Mecca. The message from Medina is no

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145. MAHMUD MUHAMMAD TAHA, *THE SECOND MESSAGE OF ISLAM* (Abdullahi Ahmed As Na'im trans., 1987).

146. See, e.g., IMAM ABU AL-QASIM BIN SLAMEH, *AL-NASIKH WAL-MANSUKH FI AL-QU'RAN AL-KARIM* (1994).

147. ABDULLAHI AHMED AS NA'IM, *TOWARD AN ISLAMIC REFORMATION, CIVIL LIBERTIES, HUMAN RIGHTS AND INTERNATIONAL LAW* (1992).

more than a temporary one, which was only valid for the time during which Muhammad the Prophet ruled in Medina.

This construction is an attempt to reconcile the model of human rights with Islam. Muhammad the Prophet began by addressing mankind as a whole, speaking of the Garden of Eden, Hell, and the stories of the early Nations. In the Medina Period, both his style and tone changed, given that his words were primarily addressed to those who already believed in him. The others were infidels or the people of the Book. The laws regarding women were introduced together with penal legislation. The reformist approach had no appropriate answer to the problem of human rights in these areas. Taha's solution was, therefore, to disregard the problematic verses. The determination that the verses from Medina are of a higher normative status is exclusively the result of interpretation.

It cannot be said that either of these interpretative models was accepted in the Islamic world. A divorce suit was filed against Naser Hamed Abu Zeid on the ground of his having become a heretic. As such, he could not remain married to a Muslim woman under Islamic law. Additionally, his request to receive a Professorship in the Department for Arabic Language in Cairo was rejected. The Leiden University in Holland currently employs him.<sup>148</sup> Muhammad Taha also failed to receive official renown. The various theses that he developed were not accepted and the President of Sudan, Nueri, ordered his execution in 1984.

The *Shari'a* Appeals Court thus finds itself in an untenable situation. On the one hand, it is under tremendous pressure from feminist organizations. On the other hand, it is unable to continue the process of transition to the reformed framework. These pressures caused the Court to introduce changes from within the Islamic law, without the help of the Israeli legislature. Implementation of the human rights model would amount to legitimizing the abolishment of the *Shari'a* system. Adoption of such a position would undermine the constitutional basis for the *Shari'a* Court's authority. The institution, therefore, protects it-

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148. See George N. Sfeir, *Basic Freedoms in a Fractured Legal Culture: Egypt and the Case of Naser Hamed Abu Zayd*, 52 *MIDDLE EAST J.* 402, 414 (1998); Baudouin Duperet, *Argumentation des tribunaux: Le procès*, 151 *MONDE ARABE MAGRHEB-MACHREK* 19-22 (1996).



self within the law. The results reached by the Appeals Court are dictated by reality and are connected to the status of the Court and its maneuvers within the fields of law, politics, and religion.

## 2. The Explanation of Legitimization

The *Shari'a* Appeals Court was statutorily established and its legality is assured. Nonetheless, there is another problem relating to its legitimacy. Legitimacy has been defined as "a sentiment whereby people feel morally obliged to submit to power that is perceived to be valuable and conforms to the general will of the society."<sup>149</sup>

The *Shari'a* Appeals Court currently finds itself confronting a challenge to its legitimacy. The challenge has a number of possible sources. First, the Court is located in a State that defines itself as "Jewish." The Jewish nature of the State conflicts with the Palestinian identification of the Arab minority in Israel and with the religious Islamic aspect. *Qadi* Natur attempts to exploit this national aspect to draw attention to the fact that Arabs are a minority that is discriminated against and deprived of its rights. For a religious court, the more important aspect is the fact that the State is not an Islamic one. According to some of the scholars of the *Hanafi* school, there is no prohibition for non-Muslims to appoint the Muslim *Qadis*. In this context, Ibn 'Abdin cites the opinion of another Muslim scholar that "the appointment of the *Qadis* is valid, regardless of whether the ruler is just, an oppressor, or even a heretic." Ibn A'bdin also quotes the opinion cited in the *Tatrachania*,<sup>150</sup> that the appointer of a *Qadi* need not be a Muslim himself.<sup>151</sup>

Despite the lack of a prohibition, the situation is not ideal in terms of Islamic law. If non-Muslims are unable to testify against Muslims in *Shari'a* courts,<sup>152</sup> whence the power to appoint its

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149. 1 INTERNATIONAL ENCYCLOPEDIA OF SOCIOLOGY 722 (Frank N. Magill & Hector L. Delgado eds., 1995).

150. This is a collection of laws written by Alim Bo Awla, who passed away in 1384. The collection was dedicated to Prince Tatrakhan. See Muhammad Khalid Masud, Brinkley Messick & David S. Powers, *Muftis, Fatwas and Islamic Legal Interpretation*, in ISLAMIC LEGAL INTERPRETATION: MUFTIS AND THEIR FATWAS 14 (Muhammad Khalid Masud, Brinkley Messick & David S. Powers eds., 1996).

151. 4 IBN 'ABDIN, HASHIYAT RADD AL-MUHTAR 307-08 (1960). See also 3 ALFATAWI-AL-HINDIYA, BULAK 1310, 307 (1973).

152. ABD AL-KARIM ZIDAN, *NIZAM AL-QADA' FI AL-SHARI'A AL-ISLAMIYYA* 175 (3d ed. 1995) (accepting non-Muslim testimony in cases of necessity).

judges? Bechor Shalom Shitrit served as the Minister for minorities in 1949 and stated (on the basis of *Hanafi* scholarship):

Given that the Islamic community in Israel requires a legal authority for matters related to personal status, some kind of resolution must be made. In my opinion, the easiest way is to declare the election of a Supreme *Shari'a* Judge by members of the Islamic community, who will have the authority to appoint both, judges and *Muftis* in Israel, with the approval of the Prime Minister of the State of Israel. This will enable us to satisfy all the opinions and we will not have to rely upon the scholars of Islamic law, whose views on the issue are problematic.<sup>153</sup>

Given the fact that the State of Israel abolished the autonomy which Muslims had enjoyed in regulating their religious matters during the Mandate Period in Israel until 1937, the *Qadis* are not appointed by a Muslim organization. The resultant harm did not have an effect solely on Muslim organizations. The appointment procedure proved unsuccessful in ensuring that the *Qadi* positions would be filled by people from the Muslim population with broad and formal *Shari'a* education. This, in turn, led to a crisis in which the *Sharaite* Courts lacked the confidence and trust of the public who tended to deride them.<sup>154</sup> Furthermore, in the past there were *Qadis* who were implicated in approving the sale of holy Islamic objects.<sup>155</sup>

The *Shari'a* Appeals Court began attempting to reinforce its legitimacy within the *Shari'a* system in Israel. These attempts necessitated receiving Islamic legitimacy and not secular legitimacy, given that the *Shari'a* Appeals Court is a religious court, and the laws it makes must reflect the *Shari'a* law. Thus, the Court attempted to ground its rulings in classical Islamic literature. In matters of custody, it did not rely on the Capacity Law, even though, generally speaking, the results would be the same.

153. BECHOR SHALOM SHITRIT, *THE SUPREME ISLAMIC SHARI'A COUNCIL* 16 (1949) (introducing legislation in the land of Israel under the Turkish and British Rule).

154. Yitzhak Reiter, *Qadis and the Implementation of Islamic Law in Present Day Israel*, reprinted in *ISLAMIC LAW, THEORY AND PRACTICE* 205-31 (R. Gleave & E. Kermeli eds., 1997). For demonstration of awareness of this contempt by the *Shari'a* Appeals Court, see, e.g., A. 156/98 (Oct. 27, 1998).

155. See, e.g., A. 22/74 (Nov. 19, 1974) (referring to *Fatwa* of the Jaffa *Qadi* regarding the cemetery).

### a. The Reasons for the Change

While the first sub-section attempted to find the reasons for the choice of the reformist approach, this sub-section attempts to give three categories of reasons for the change itself. These explanatory factors are: legal considerations, the relation between law and social change, and the *Qadis'* education.

#### i. The Legal Considerations

The *Shari'a* courts do not operate in a vacuum and are subordinate to the Israeli legal system. The State of Israel has signed and ratified numerous conventions relating to human rights.<sup>156</sup> At the internal level, there is the legislative pressure exercised by the State concerning matters of personal status. In Family law, there is no single, unified territorial law for all areas; rather, the legislation has regulated particular areas in a piecemeal fashion.<sup>157</sup> The problem is further compounded as a result of the *Bavli* and *Lev* judgments, which narrowed the jurisdiction of the religious law, obliging the religious courts to ensure human rights. The result is that the legal environment presses for the restriction of religious law and the application of secular law. In addition to the general principle governing the Israeli law of child custody, there is the principle of the child's best interests, which has forced the *Shari'a* Appeals Court to alter its strategy. The *Shari'a* Appeals Court gave a new interpretation to the Muslim law by ruling that the principle of the child's best interests was a *meta* principle. The penetration of this consideration into the classical law of the *Hanafi* school caused the transition from the classical framework to the reformist framework.

#### ii. Law and Social Change

It can be claimed, that the practice of the *Shari'a* Appeals

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156. See, e.g., Committee on the Elimination of Discrimination Against Women, A/52/38/Rev.1, pt. 11, paras. 132-83, esp. para. 157 (Dec. 8, 1997) (stating: "The Committee regretted the fact that Israel had maintained its reservations to Articles 7(b) and 16 of the Convention. It also regretted the fact that women could not become religious judges and that the religious laws that to a considerable degree govern family relations discriminate against women.").

157. See E. Naveh, *Application of the Shari'a in Civil Courts in the Twentieth Century: Comparative Research of Case Law in Matters of Personal Status, of the Wakf in an Islamic State (Egypt) and a non-Islamic State (Israel)* (unpublished Ph.D. dissertation, Hebrew University of Jerusalem).

Court reflects the change that has occurred within traditional Muslim society. On the one hand, the law is a tool for social change.<sup>158</sup> Laws lead to the enactment of social legislation that protects workers' rights or the rights of particular minorities or minorities in need. There are also examples of ideological legislation aimed at maintaining the character of the State. An examination court reform in Indonesia in the area of Family law indicates that, over four years, there was a significant change in the patterns of behavior in the particular areas that were the subject of the reform.<sup>159</sup> The relation between law and society is based upon reciprocity. Law influences society by establishing the norm. Thus, something that is normative becomes normal.<sup>160</sup> On the other hand, political and societal processes also influence the law.

This Article proposes that the changes that occurred in the legal conceptions of Islamic law can be regarded as reflections of societal change. In order to understand this claim, I will turn to examples from France and the Soviet Russia. The socio-economic and political models are also expressed in Family law. According to the Marxist approach, the family organism undergoes various changes in accordance with the economic changes occurring in society at large. The institution of the family has undergone numerous changes that have taken the form of different structural models: the patriarchal family, the bourgeois family, the workers' family, the agricultural family, and the social family of workers.<sup>161</sup> The assimilation of these changes into the societal framework necessitated an appropriate economic framework.

This framework is provided by the State in the form of the abolition of private property and the socialization of means of industrial and agricultural production. In the socialist family,

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158. For discussions of social change and the law see STEVEN VAGO, *LAW AND SOCIETY* 285-318 (5th ed. 1997); Donald L. Horowitz, *The Q'uran and the Common Law: Islamic Law Reform and the Theory of Legal Change*, 42 *AM. J. COMP. L.*, 233-93 (esp. 218-54) (1994).

159. See generally June S. Katz & Ronald S. Katz, *Legislating Social Change in a Developing Country: The New Indonesian Marriage Law Revisited*, 26 *AM. J. COMP. L.* 309, 309-20 (1978).

160. Baudouin Dupret, *Le juge et le jeu de la normalisation islamique due Droit positif*, 42 *J. OF LEGAL PLURALISM*, 199, 213-14 (1998).

161. V. Tadevassian, *La famille et le développement social en U.R.S.S.*, in *FAMILLE, DROIT ET CHANGEMENT SOCIAL DANS LES SOCIÉTÉS CONTEMPORAINES* 88-119 (1978).

women are equal to men. The concepts of a "patriarchal structure" and of the "head of the family" have disappeared.<sup>162</sup> This is an example of the change in the family law comports with the social-political change. Incidentally, following the collapse of the Eastern Bloc, the Socialist family and the Socialist theory were attacked from all sides, and both, analysis and practice proceeded in more liberal directions.<sup>163</sup>

Another example of this transition is France. Until the first half of the twentieth century, the French Family law was based on two basic concepts: *puissance paternelle* and *puissance maritale*. The concept of *puissance* represents power and strength. Even after the Revolution, the family was still paternally controlled. The 1970 law purported to replace the concept of *puissance paternelle*, reflecting the social development, which now waved the flag of *autorité parentale*, in which there was no longer any differentiation between the sexes and the presumption of maternal custody at an early age no longer applied.<sup>164</sup>

The change in the law was not intensive and, furthermore, as a tool of change, the legal system is only partially effective today. Dissonance still exists between the normative plane and reality. Continuing with the French example, however, the 1970 legislation reflected a widely accepted reality. By comparison, in the Soviet Russia, the State succeeded in influencing the family model by way of legislation.

Arab society in general, including the Islamic society and the family unit, has undergone many changes since the establishment of the State.<sup>165</sup> The status of a woman is different despite the fact that her status is still inferior to that of the Jewish woman and the Arab man. There have been changes in the level of education, and Muslim women now go out to work. Urbanization and economic changes have weakened the extended family unit. Most of the judgments of the *Shari'a* Appeals Court only involve the husband and the wife, and the Court is rarely concerned

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162. O.M. Stone, *The New Fundamental Principles of Soviet Law and their Social Background*, 18 I.C.L.Q. 392, 410-11 (1969).

163. See Mari V. Antoholshay, *The 1995 Russian Family Code: A New Approach to the Regulation of Family Relations*, 22 R. FOR CENTRAL AND EAST EUROPEAN L. 600-35 (1996).

164. MALAURIE PHILIPPE, COURS DE DROIT CIVIL 431-34, 461-62 (1998).

165. Ibtisam Ibrahim, *The Status of Arab Women in Israel*, 12 J. FOR CRITICAL STUDIES OF THE MIDDLE EAST 107, 107-20 (1998); E. SHTENDEL, ISRAELI ARABS: BETWEEN THE HAMMER AND THE SYCLEL 178-88 (1992).

with the grandmother. The long list of those entitled to *hadana* according to the *Hanafi* school is now totally irrelevant. A woman can establish her own household without the aid of her husband and she even receives assistance from the State in case of divorce. Effectively, this enables her to receive custody of the children. The *Shari'a* Appeals Court's interpretation of the law represents the changes and events that have occurred within the Muslim society. The *Qadis* in Israel have assumed the role that in Islamic society traditionally belonged to the *Muftis*, who mediated between the theoretic Islamic law, which had been formulated in the legal literature of the scholars, and the concrete Islamic law.<sup>166</sup> The process of change began with the ruling issued by the *Mufti* and the judgment was then inserted in the Islamic books of law. From there, it became authoritative.<sup>167</sup> The followup is that the effect of the reform was not restricted to changing the applicable norms regarding child custody, but rather, involved a total revamping of the role of the *Qadis* in Israel.

### iii. *Qadis'* Education

In explaining the transition to the reformist approach, importance attaches to the *Qadis'* education. A legal change is not a change unrelated to people's lives. As stated by Donald L. Horowitz: "Innovations require innovators; legal innovations require legal innovators. No theory of legal change can afford to

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166. See Muhammad Khalid Masud, Brinkley Messick & David S. Powers, *Muftis, Fatwas and Islamic Legal Interpretation*, in *ISLAMIC LEGAL INTERPRETATION: MUFTIS AND THEIR FATWAS* 3-32 (Muhammad Khalid Masud, Brinkley Messick & David S. Powers eds., 1996).

167. See WAEL B. HALLAQ, *AUTHORITY, CONTINUITY AND CHANGE IN ISLAMIC LAW* 233 (2001) (stating:

Our enquiry compels us to conclude that it was the *Muftis* and the author-jurist who responded to the need for legal change by means of articulating and legitimizing that aspect of general legal practice in which change was implicit. The *Qadis*, as a community of legal practitioners, may have been involved in the application of a newer or weaker practice, assuming that it permeated all of the schools. This was merely a necessary, but by no means sufficient, condition for the implementation of change. In the entire process of change, the *Qadis'* contribution, whenever it was present, was only at an embryonic stage and could not, in and by itself, have culminated in change. For in order to effect legal change in a formal and authoritative manner which represents the full extent of the process of such change, the intervention of other agents was needed. These were the *Mufti* and the author-jurist.

*Id.*

neglect the forces that animate lawyers, the more so as legal systems tend to be arcane and therefore unusually dependent on those with specialized knowledge."<sup>168</sup>

The process of changing Islamic law is not a simple procedure, given the perception of it as the Divine Will from which the sages derive and learn about the Will. Admittedly, there is an opinion in the professional literature that the concept of Islamic law being derived from religion is basically a later innovation of al-Shafi'i.<sup>169</sup> There are even those who maintain that, practically speaking, the Qu'ran or the collections of *hadiths* are insufficient for the purposes of learning the Islamic law.<sup>170</sup> Nonetheless, the subjective beliefs of Muslims are important. Anyone interested in changing Islamic law must be aware of the departure from the Muslim paradigm. There is also the fear of *bid'a*.<sup>171</sup>

Islamic law differs from the Western culture, which sees changes, inventions, and innovations as positive phenomena. The Islamic legal tradition does not take a favorable view of changes or innovations in matters of religion. One of the explanations for the transition to the reformist approach is the fact that there has been a tendency on the part of the *Qadis* to ignore the restrictions rooted in traditional Islamic law and religion. Their disregard for these restrictions is the result of the fact that the *Qadis* of the Appeals Court received secular education, which is reflected in their rulings.

Islamic law requires that candidates for the position of the

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168. Donald L. Horowitz, *The Q'uran and the Common Law: Islamic Law Reform and the Theory of Legal Change*, 42 AM. J. COMP. L. 233, 250-51 (1994).

169. WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI USUL AL-FIQH 30-35 (1997).

170. DE BELLEFONDS, TRAITÉ, *supra* n.7, at 31-34.

171. The *bid'a* is an innovation without the reliance upon the way the Prophet behaved. Not all innovations are necessarily undesirable, but there are still various categories of *bid'a*. Even so, the opposition to innovation is inherent in the religious perception, which represents the whole and the absolute. For a discussion of the problem of *bid'a* and its definitions see ABD AL-WAHAB RASHID SALIH ABU SAFYIH, SHARH AL-ARBA 'IN LIL-NAWAWI FI TAWBIN JADED 70-100 (2d ed. 1993); VARDIT RISPLER, TOWARD A NEW UNDERSTANDING OF THE TERM BID'A DER ISLAM 320-28 (1991); MUHAMMAD KHALID MASUD, *The Definition of Bid'a in the South Asian Fatwa Literature*, in 27 ANNALES ISLAMOLOGIQUES 55-75 (1993); MUHAMMAD AL-ATAWNEH, THE BID'A IN THE VIEWS OF MODERN WAHABIS (unpublished).

*Qadi* have, *inter alia*, a *Shari'a* education.<sup>172</sup> The Egyptian practices regarding the appointment of *Qadis* and *Muftis* were examined (over the years 750–868) by Mod Du Baker, and they indicated that as opposed to the lecturers in Islamic law, or *Muftis*, there was no official requirement for the *Qadis* to have studied Islamic law. Even so, most of the *Qadis* did have formal education in the *Shari'a*.<sup>173</sup>

Prior to its recent amendment,<sup>174</sup> the *Qadis* Law required neither general education nor formal *Shari'a* education. There is no statutory requirement for an academic degree or studies in an institution of Islamic law. The Knesset addressed the subject when the law was adopted. M.K. Yosef Chamim (Mapam) and Tufik Tubi (Maki) raised the issue of education. Moreover, Zerach Werhaftig (then Chairman of the Constitution, Law and Justice Committee of the Knesset) explained that there were no sufficient Muslim candidates with law degrees, nor were there schools in Israel for education in Islamic law. Thus, the law could not prescribe restrictions that would prove impossible to comply with.<sup>175</sup>

The High Court of Justice did not see fit to interpret the *Qadis* Law in a manner that would impose a requirement of formal legal or *Shari'a* education:

There is no doubt that it is preferable that the offices of the *Qadis* be filled by people who have the appropriate knowledge and education, and even legal education would *prima facie* enhance the candidates' suitability. However, legal education is not one of the conditions included in Section 2 of

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172. 8 AL-ZUHAYLI, AL-FIQH WA-ADILATIHI 6237 (1997); AL-MAWRDI, AL-AHKAM AL-SULLTANIYYA WA-AL-WILAYAT AL-DINIYYA 60 (1983).

173. Mohd Daud Bakar, *A Note on Muslim Judges and the Professional Certificate*, 20 A.Q. 467, 467-86 (1999).

174. See *Qadis* Law, 1961, S.H. 339, amended by 10th Amend., 1969, S.H. 555. Section 2 instructs:

The following persons are eligible to be appointed as *Qadis*. Any Muslim:

1. who has had suitable training in *Shari'a* law;
2. whose way of life and character befit the status of a *Qadi* in the State of Israel; and
3. who is at least thirty years of age and is married or had been married.

*Id.* Section 2A of the *Qadis* Law adds that a *Qadi* must be an Israeli citizen. *Id.* Rule 11(1) of the *Qadis* Rules provides an alternative qualification between "knowledge or ability to study the Islamic *Shari'a*." See *Qadis Regulations, Procedures and Work of the Qadis Appointment Committee* 5756 (1996).

175. See D.K. (1961) 1723.



the Law. Similarly, the tests established in Rule 11 of the *Qadis* Regulations do not include any requirement for formal *Shari'a* education.<sup>176</sup>

The appointment of the *Qadis* in Israel is, therefore, based more upon political rather than professional considerations, given that the *Shari'a* system has been unable to enlist Muslims with professional *Shari'a* education. Today, none of the *Qadis* serving in the *Shari'a* system have any formal *Shari'a* training.<sup>177</sup>

The education of the *Qadis* is of crucial importance to their rulings.<sup>178</sup> In the absence of sufficient control over Islamic law, the change and the reform of the law have been expedited with greater ease. *Qadi* Natur has a first degree in law and a first degree in Islam and Arabic literature. *Qadi* Zoebi Avd worked as an advocate for a period of twenty years. Yet, *Qadi* Zoebi usually does not indicate the substantive sources of Islamic law and is content with making general statements based on the writings of the scholars and their texts.<sup>179</sup> His main contribution is in the area of legal procedure. In his conception, there is no clear distinction between the Israeli civil procedure and the *Shari'a* procedure. He rarely cites to case law and he speaks of the "Canon" in an absolute sense, as if there were one universal law, without any attempt to qualify it by the positive Israeli law. As previously

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176. H.C. 891/01 Zo'bi Ubaid v. the Minister for Religious Affairs, Tk-El 2001(2) 1186. The Supreme Court displayed extreme paternalism. It was within the Court's power to intervene on a number of grounds. At one level, the Supreme Court could have seen that on its face, the decision recommended that the candidate of the petition was obviously unreasonable, preferring a non-lawyer to a lawyer, even though there was no reason to oppress the advocate. On the second level, another interpretative option was open to the Court. The *Qadis* Law required neither formal *Shari'a* nor legal education, given the dearth of people with law degrees or formal *Shari'a* education at the time of the Law's adoption. Yet, in the passage of the forty years since the Law's adoption, conditions changed. The Court could have interpreted the Law in the spirit of the time in which the law was being interpreted. See Barak in C.A. 105/92 Re'em Contractors Engineers Ltd v. Upper Nazareth Municipality et al, 47(5) P.D. 189, para. 10. Today, there are numerous Islamic lawyers and also a large number of people with formal *Shari'a* education.

177. The *Qadi* of the *Shari'a* Court in Haifa, Ziyad 'Aslia, is currently studying toward a second degree in Islamic law in the *Shara'ite* College of Hebron.

178. The *Qadi* Zaki Madlaj. His father and grandfather served as *Qadis*. He has a Matriculation Certificate and serves as a *Shari'a* advocate. This Article does not include his rulings, which amount to mere restatements of the appellate writs of the parties and very frequently cite the *Malabiani* without distinguishing between the text of the *Kadri Pasha* and the *Alabiani* commentary. After this, the rulings examine the factual bases of the appeal, without presenting any *Sharaitic* or legal analysis.

179. See, e.g., A. 122/98 (Oct. 21, 1998). The dispute itself is dated Nov. 2, 1998.

stated, generally speaking, no references are made to the works of jurists, with the exception of reliance on the book of Cheikh Abu Zahra, in which the *Shari'a* is discussed as it was practiced in Egypt on the basis of writings of Ibn al-Hamam.<sup>180</sup> As is well known, the Egyptian legislature intervened in a series of laws, making a quasi-codification of Islamic law in that field, but this codification does not relate to all fields. The Ottoman Family law never actually applied in Egypt and is therefore a different Islamic law, even though in Egypt there is also reliance upon the *Hanafi* to a certain extent.

An important contribution in the transition to the reformist approach in the area of child custody was made by *Qadi* Natur. In reading his judgments, one discerns a lack of sufficient familiarity with the methodology of Islamic law.<sup>181</sup> In surveying the law, *Qadi* Natur examines the legal literature, and, from all available views, chooses the most flexible one. This, however, is not the criterion for adopting an opinion. The preferable opinion should have a stronger textual basis.<sup>182</sup> This system is known as "*talfik*" and is generally used by Islamic legislators. A *Qadi*, however, should not make use of *talfik* unless he is the Sultan. By law, *Qadis* are restricted to the *Hanafi* teachings. The result is that the reform is facilitated by the lack of familiarity with the methodology of the *Shari'a* rules.

In the nineteenth century, the *ijtihad* was the refuge of the reformists in their attempt to develop the Islamic law. The question is whether the *Shari'a* Appeals Court utilizes the *ijtihad*. The position taken by *Qadi* Zoebi regarding *ijtihad* is not consistent across his rulings. In one of the rulings the *Qadi* states:

[i]t goes without saying that according to the principles of Islamic law, we can not reconcile the change of the rules with the changes of the times. Article 39 [of the *Mejelle*] is a constitutional and judicial principle, which opened the door of *ijtihad* [which was never closed] to adapting the rules to the places where they were issued.<sup>183</sup>

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180. MERON, *supra* n.11, at 4.

181. Conceivably, there is control over the methodology used in Islamic law, but it receives no expression in the case law. Alternatively, the failure to use Islamic methodology is intentional, given that this methodology may inevitably lead the Court to the traditional interpretative format, thus frustrating attempts at a reform.

182. OMAR SLIMAN ABDALLA AL-ASHKAR, AL-WADIIH FI SHARH QANUN AL-AHWAL AL-SHAKHSIYYA AL-URDINI 10-11 (1997).

183. A. 6/96 (Feb. 27, 1996) (emphasis added).

In another judgment, *Qadi Zoebi* cites Section 1801 of the *Mejelle*, which states that the ruling law is the *Hanafi*, unless the Sultan gives a specific instruction otherwise.<sup>184</sup>

The two apparently contradictory rulings can be reconciled by recognizing that the *ijtihad* used by *Qadi Zoebi* is restricted to the *Hanafi* school.

*Qadi Natur* did not take a clear position regarding the applicability of the *ijtihad*. In both legal circulars regarding the *Wakf* and in some of his rulings, however, the *Qadi* made it clear that he is not limited to the *Hanafi* school, and that he prefers the law that is more beneficial to the people. In a judgment, *Qadi Natur* wrote:

Since the appellant's attorney told us that we are obliged to rule exclusively in accordance with the *Hanafi* school, even though he knows that the issue itself is a source of dispute, our tendency is to try and mediate between the different opinions, i.e. *talfik*. [We accomplish this] by relying on the opinion which is less rigid with people and thus, more accommodating, even if it involves adopting a view which is not the *Hanafi* view. We see no difficulty in adopting this approach, for Islam is a unity.<sup>185</sup>

*Qadi Natur*, therefore, sees himself as a *mujtahid fi al-madhab* without expressly saying so. The *mujtahid mutlak* is the highest level of the scholarly grading of the sages and the *mujtahid-fi-al-madhab* falls into this category. A close connection exists between the non-restriction to a particular school and the classification of a sage as a "*mujtahid mutlak*."<sup>186</sup> *Qadi Natur* is not *mujtahid mutlak* because he is operating within the framework of the four *Sunni* schools. In order for the *talfik* to be valid, the *mujtahid* must rely on *Dalil*, a text.<sup>187</sup> In the case of *Qadi Natur*, such reliance does not exist. Rather, there is presumably a grafting of the principles taken from the principles of civil law onto classical Islamic law.

It could be said that this is not *ijtihad* in its traditional sense.

184. A. 7/97 (Sept. 1, 1997). Incidentally, there is no clear distinction between the Section of the Law and the interpretation.

185. A. 174/2000 (Jan. 30, 2001).

186. See, e.g., Lutz Wiederhold, *Legal Doctrines in Conflict: The Relevance of Madhab Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on Taqlid and Ijtihad*, 13 ISLAMIC LAW AND SOCIETY 234, 251 (1996).

187. Wael B. Hallaq, *Taflik*, in 10 ENCYCLOPEDIA OF ISLAM 161 (2000).

*Ijtihad* is a determined effort to draw the particular classical rules from the sources of the law.<sup>188</sup> The *Shari'a* Appeals Court does not interpret the sources. In the Qu'ran itself, there is no mention of the custody of children. There are two *hadiths* of the Prophet, and there is the dialogue between Abu Bakr and Omar. The Court does not take issue with the *hadith* of the Prophet, nor does it question its authenticity. It does not try to derive rules from the source, but rather, attempts to find the *ratio legis* (wisdom) in the words of the scholars and not the words of God or of the Prophet.<sup>189</sup> Consequently, the analysis takes place at a level below the sources. The choice of the writings of the scholars is not consistent with the classical Islamic methodology and there is no explanation for the choice of any particular sage.

The picture is, therefore, one in which the *Qadis* of the courts are partially alienated from the material sources of Islamic law (as it exists through the words of the scholars), and partially from the primary sources of Islamic law. As stated above, this actually facilitates the process of reform.<sup>190</sup> The difficulty in the implementation of reform derives from the fact that the law is a religious law. In any process of reform in Islamic law, there is a presentation of a new methodology. This was the case in relation to Muhammad Abdo and it is also the case with Professor Hashim Kamali.<sup>191</sup> Additionally, this is the case with the

188. AL-SARAKHSI, *supra* n.22.

189. *E.g.*, A. 174/2000 (Jan. 30, 2001).

190. Despite the secular legal education of *Qadi* Zoebi and *Qadi* Natur, both of them are cut off from the developments occurring in Israeli law. This Article already noted that the *Shari'a* Appeals Court ruled that the Capacity Law does not apply to the religious courts. Had it ended with that, it could be claimed that the Court was challenging the secular legal system. In one of the judgments, however, *Qadi* Natur attempts to justify the non-applicability of Israeli law, as I previously observed. This justification, however, is not consistent with Israeli case law. In one of his rulings, *Qadi* Natur cites an old version of Professor Menashe Shawa, from 1983, while the judgment itself was given in 1991, after the third edition had already been published. Even the citations to Sections in the law are divorced from the context and the case law in the Arabic world, and are occasionally inaccurate. For example, citations were made to the Law of North Yemen, despite its revocation after the unification of Yemen, which lead to a unified law being passed for all of Yemen (A. 92/98 (Aug. 18, 1998)). Similarly, *Qadi* Zoebi interprets the Israeli laws without the assistance of the Supreme Court. For example, the judgment 233/98 deals with matters of jurisdiction regarding inheritance and there is no use made of the rulings of the Supreme Court, aside from the case law cited by the parties, and no reference is made to any legal literature.

191. See generally Muhammad Hashim Kamali, *Issues in the Legal Theory of Usul and Prospects for Reform*, in 40 ISLAMIC STUDIES 5 (2001).

modernist stream of Abdullahi An-Na'Im, Mahmud Taha, and Abu Zeid. Nonetheless, as long as the members of the *Shari'a* Appeals Court remain unfamiliar with the methodological rules, which was the problem of the reformers and the modernists, the problem does not arise.

### CONCLUSION

This Article observed that the rulings of the *Shari'a* Appeals Court developed from the classical approach in the direction of the reform approach. The path adopted by the Court involved the use of techniques taken from the secular civil law, apparently influenced by Professor Shifman. Despite the close similarity between the analyses of Professor Schiffman and of the *Shari'a* Appeals Court, an effort has been made to hide the borrowing from the civil system by way of the Islamization of the principle of the child's best interests. As opposed to the theory of legal pluralism, which did not provide a convincing explanation, the fields theory of Bourdieu indicated that the *Shari'a* Appeals Court worked in that manner in order to manipulate its interpretation of the Islamic law.

Together with the description of the transition from the traditional approach to the reformist approach, this Article proposed five explanations for the process itself. The structural explanation showed that the approach adopted by *Shari'a* Appeals Court was in fact the approach dictated by reality. The Court was unable to allow itself to retain its traditional position due to the threat of its powers being curtailed. On the other hand, the Court was unable to adopt the modernist approach, which would render its very existence superfluous. An additional explanation for the process of transition to the reform framework is found in the theory of legitimacy. The *Shari'a* courts in Israel have been in a state of crisis relating to their legitimacy since their inception, given that the State within which they operate is non-Muslim, and due to the absence of formal *Shari'a* education among the *Shari'a* judges. The legitimacy of the existence of the *Shari'a* Appeals Court must therefore originate in religious Islamic legitimacy and not secular legitimacy. These two reasons attempt to explain why the Court decided to choose the reformist approach.

This Article also attempted to explain the reason for the

change. The first explanation was based upon the fact that the *Shari'a* courts do not exist in a legal or legislative vacuum. Rather, they find themselves in an environment replete with human rights legislation at both the internal and international levels. This is the legislation that the Court cannot ignore. The second reason for the change is the fact that the *Shari'a* Appeals Court played the role of the *Mufti* to the extent that the Court transferred and translated the social change within Islamic law. The third explanation focuses on the secular education of the *Qadis* and their unfamiliarity with the rigid Islamic rules. Their lack of knowledge allowed more flexibility, thus facilitating reform.

These changes within Islamic law prove the extent to which the Islamic law in Israel differs from the classical Islamic law. Thus, the expression "Israeli Islamic law" is an exact one and describes the precise legal situation of Islamic law in Israel. The Israeli Islamic system is a compilation of statutes from different legislators (British, Israeli, and Ottoman), and laws rooted in the *Hanafi* school, as has been interpreted by the *Shari'a* Appeals Court. The topic is of importance on a number of levels. Regarding the Islamic law, this Article has shown the dynamics of the practice in the sense that it is no longer the classical Islamic law. The importance of the Article increases to the extent that it indicates the manner in which the law of a minority is formulated by the different forces working upon it.

This Article also illustrated that Islamic law is not Islamic jurist law, i.e., a law which has been developed and interpreted by jurists who did not necessarily belong to the State framework; rather, it is judge-made law.<sup>192</sup> Islamic law applied in Israel by the *Shari'a* Appeals Court is not the law of the writings of the scholars, but rather, the law that was created by the *Qadis* for the *Shari'a* Appeals Court. Its rulings have accelerated the secularization of the Islamic law in Israel and its severance from the classical sources.

This Article indicates that one cannot analyze Islamic law in a general manner; rather, one must analyze Israeli Islamic law in

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192. See Herbert J. Liebesny, *Comparative Legal History: Its Role in the Analysis of Islamic and Modern Near Eastern Legal Institutions*, 20 AM. J. COMP. L. 38, 38-52 (1972); BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* 113 (U.Ca. Press, 1998).

the same way that one examines the Algerian Islamic law<sup>193</sup> and the Anglo-Muhammadan law.<sup>194</sup> The Israeli Islamic law is also distinct from classical Islamic law due to the codification of different parts of the Islamic law. It was the act of codification, as such, that connected Islamic law to the State. The particular areas that underwent the process of codification became part of the positive State law, and will therefore be interpreted similarly to the other laws of the State. What really occurred is the Israelization of Islamic law.

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193. JEAN-ROBERT HENRY ET FRANCOIS BALIQUE, *LA DOCTRINE COLONIALE DU DROIT MUSULMAN ALGÉRIEN: BIBLIORAPHIE SYSTEMATIQUE ET INTRODUCTION CRITIQUE* (1979).

194. S.G. Vesey-Fitzgerald, *Le droit Anglo-Musulman*, in 16 *REVUE INTERNATIONALE DE DROIT COMPARÉ* 250-63 (1954).