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Judicial Activism of the Shari'ah Appeals Court in Israel (1994 - 2001): Rise and Crisis

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Abstract

The main thesis of this Article is that after 1994, with the nomination of new qadis to the Shari'ah Court, a process of judicial activism began, which continues until this day. This process has been characterized by the qadis' attempts to strengthen the position of the Shari'ah Appeals Court. In some fields the qadis' activism has been more successful than in others. Recently however, it seems that the Shari'ah system is undergoing a crisis. The author will analyze the actions of the Shari'ah Appeals Court on several parallel levels: (1) the strengthening of its position compared with those of the civil courts and the regional Shari'ah Courts; and (2) a symbolic strengthening of its position in relation to (i) Israeli Law; (ii) the litigants and their attorneys; and (iii) the Muslim public. The author will then analyze the current crisis of the Shari'ah system and the need for reform. The author will focus upon the internal dynamics of the Shari'ah Court of Appeals, the interaction of its different actors, and suggest reforms to be made that will strengthen the legitimacy of its position in relation to the State of Israel and with the Muslim populous. Before proceeding to the analysis, however, some background regarding the religious Muslim world in Israel is necessary.

JUDICIAL ACTIVISM OF THE SHARI'AH APPEALS COURT IN ISRAEL (1994-2001): RISE AND CRISIS

*Dr. Moussa Abou Ramadan**

INTRODUCTION

The individuals belonging to the Palestinian minority in Israel have what is known as a "multiple identity."¹ Part of their identity involves a religious dimension, and ignoring this means ignoring an important aspect of Israeli Arab legal status, especially considering the dissimilar treatment that different religious minorities receive in Israel.² Muslims in Israel are discriminated against in terms of their degree of autonomy, expressed, *inter alia*, by limits imposed on their degree of control over their religious establishments. The discrimination is also expressed in the lack of appointed *qadis*³ with a formal Shari'ah education in the Islamic religious courts,⁴ which serve eighty percent of the

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1. See, e.g., Elie Rekhess, *Resurgent Islam in Israel*, 27 *ASIAN & AFR. STUD.* 189-206 (1993) (discussing an individual in the Islamic movement in Israel who perceives himself as having a "multiple identity" due to being Muslim, Arab, and Palestinian).

2. See generally Moussa Abou Ramadan, *Les Minorites en Israel et le Droit International* (2000) (unpublished Ph.D. dissertation, Aix Marseille III) (on file with author). See also *infra* note 7 and Conclusion of this Article.

3. In the context of this Article, the term "*qadi*" is used to mean a judge in a Shari'ah Court.

4. See *infra* notes 171-76 and accompanying text.

Israeli Arabs, representing one million Muslim citizens in Israel.⁵

The religious dimension is legally relevant to Israeli Arabs in at least two areas. The first area of relevance relates to the organization of the community,⁶ the second, to family matters. Regarding family matters, there are different religious communities in Israel whose religious courts have jurisdiction under Israeli law to deal with matters of personal status that include marriage, divorce, child custody, and child support. Jews and Muslims do not compose legally recognized religious communities in Israel,⁷ but their religious courts nonetheless have jurisdiction in those matters. These courts apply the personal law that the Supreme Court of Israel has defined as being the religious law of the community in question.⁸ For an understanding of the legal status of Muslims in Israel, I will critically examine their principal religious court that deals with matters of personal status: the Shari'ah Court of Appeals in Israel. Such an examination discloses the attitude of the State of Israel toward Mus-

5. State of Israel Central Bureau of Statistics, *Statistical Abstract of Israel* No. 54 (2003), available at <http://194.90.153.197/reader/shnatonenew.htm>.

6. See *infra* Section IX.

7. A recognized religious minority has a specific legal identity in Israel. Article 2 of the Palestine Order in Council ("P.O.I.C."), as modified in 1939, states: "Religious community means any community mentioned in the Second Schedule of this order and any community which may be declared by the high Commissioner by order to be a religious community." Therefore, the P.O.I.C. definition of a religious community is substantial, and its criterion formal: a religious community is every community that is mentioned in the Second Schedule of the P.O.I.C., or is recognized by the high Commissioner. The Schedule of the P.O.I.C., as amended in 1939, lists eleven communities: the Eastern (Orthodox) Community, the Latin (Catholic) Community, the Gregorian Armenian Community, the Armenian (Catholic) Community, the Syrian (Catholic) Community, the Chaldean (Uniate) Community, the Jewish Community, the Greek Catholic Melkite Community, the Maronite Community, the Syrian Orthodox Community. See 2 ROBERT HARRY DRAYTON, *THE LAWS OF PALESTINE 1292* (1933). The Jews in Israel today do not constitute a religious community as defined by the Ordinance. The Muslims were never recognized as a religious community. For a comprehensive overview on this topic, see H.C. 6168/92, *Secular-Humanist Association in Israel v. The Government of Israel*, 51 P.D. 289.

8. C.A. 26/51, *Kotik v. Wolfson*, 5 P.D. 1341, 1345 (Zilberberg, J.). For more details on the family law in Israel, see generally MENASHE SHAVA, *THE PERSONAL LAW IN ISRAEL* (2001) (In Hebrew).

lims.⁹ Examining the Shari'ah Court of Appeals is also important for gaining a perspective of human rights issues concerning women and children as the Court attempts to reconcile the doctrines of Islamic law with the emerging concerns of feminist organizations. Thus, the first aspect of this examination concerns the State of Israel's treatment of Muslims, and the second, the treatment of Muslims by Muslim officials (*qadis*). Significantly, this second aspect has never been seriously challenged.¹⁰

The main thesis of this Article is that after 1994, with the nomination of new *qadis* to the Shari'ah Court, a process of judicial activism began, which continues until this day. This process has been characterized by the *qadis'* attempts to strengthen the position of the Shari'ah Appeals Court. In some fields the *qadis'* activism has been more successful than in others. Recently however, it seems that the Shari'ah system is undergoing a crisis.

I will analyze the actions of the Shari'ah Appeals Court on several parallel levels: (1) the strengthening of its position compared with those of the civil courts and the regional Shari'ah Courts; and (2) a symbolic strengthening of its position in relation to (i) Israeli Law; (ii) the litigants and their attorneys; and (iii) the Muslim public. I will then analyze the current crisis of the Shari'ah system and the need for reform. I will focus upon the internal dynamics of the Shari'ah Court of Appeals, the interaction of its different actors, and suggest reforms to be made that will strengthen the legitimacy of its position in relation to the State of Israel and with the Muslim populous. Before proceeding to the analysis, however, some background regarding the religious Muslim world in Israel is necessary.

I. *BACKGROUND OF THE RELIGIOUS MUSLIM WORLD IN ISRAEL*

During the Ottoman period, Muslims comprised the majority of the population in present-day Israel and as such required no special representative body. To Christian communities and Jews during this period, the *millet* system¹¹ conferred religious

9. See *infra* Section I.

10. See generally Moussa Abou Ramadan, *The Transition from Tradition to Reform: The Shari'a[h] Appeals Court Rulings on Child Custody (1992-2001)*, 26 *FORDHAM INT'L L.J.* 595 (2003).

11. For the *millet* system, see ANTON ODEH ISSA, *LES MINORITES CHRETIENNES DE PALESTINE A TRAVERS LES SIECLES: ETUDE HISTORICO-JURIDIQUE ET DEVELOPPEMENT*

autonomy, but was not relevant for Muslims. During the British Mandate in Palestine, Muslims continued to comprise the majority of society, marking this period as the first time since the Crusades that a Muslim majority had lived under a non-Muslim regime. The British formally severed Muslims from their administrative religious center.¹² In 1921, the British issued an Order establishing the Supreme Muslim Council, which was perceived as an act of "appeasement towards the Palestinian Muslims."¹³ The Head of the Council was a lifetime appointee and other members were elected. The Council had competence in religious matters and was endowed with control over religious appointments, and the *waqf*¹⁴ system. It also had the power to control and nominate Shari'ah *qadi*.¹⁵ In implementing a system of substantive law, the British, by ordinance, adopted Ottoman Family Law and adapted it exclusively for the Muslim population.¹⁶ In 1937, the British amended the Order of 1921 and

MODERNE INTERNATIONALE 188-93 (1976); GEORGES BATEH, STATUT PERSONNEL: INTRODUCTION A L'ETUDE DE LA CONDITION RIDIQUE DES CHRETIENS DE PALESTINE SOUS LA DOMINATION OTTOMANE (1517-1917) 107-30 (1963); Benjamin Braude, *Foundation Myths of the Millet System*, in 1 CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE: THE FUNCTIONING OF A PLURAL SOCIETY 69-88 (Benjamin Braude & Bernard Lewis eds., 1982) [hereinafter 1 CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE]; Kemal H. Karpat, *Millets and Nationality: the Roots of the Incongruity of Nation and State in the Post-Ottoman Era*, in 1 CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE, *supra*, at 141-84.

12. See Proclamations Ordinances and Notices Issued by Occupied Enemy Territory Administration ("O.E.T.A.") (South), art. 9, at 10 (Aug. 1919). "The right of recourse from Moslem religious Courts to the *Sheikh ul-Islam* in Constantinople shall be abolished and there shall be substituted therefore an appeal to a Court to be established." *Id.* For notification for the establishment of this court, see *id.* at 14.

13. URI M. KUPFERSCHMIDT, THE SUPREME MUSLIM COUNCIL: ISLAM UNDER THE BRITISH MANDATE FOR PALESTINE 17 (E.J. Brill 1987).

14. "*Waqf*, or religious endowment, means withdrawal from circulation of the bare ownership (*raqaba*) of a property owned by the founder, and transmission of its proceeds to goals determined by the founder. The *waqf* management is also chosen by the founder." Aharon Layish, *The Muslim Waqf in Jerusalem After 1967: Beneficiaries and Management*, in LE WAQF DANS LE MONDE MUSULMAN CONTEMPORAIN (XIX-XX SIECLES): FONCTIONS SOCIALES, ECONOMIQUES ET POLITIQUES 145 (Faruk Bilici ed., 1994). See also RICHARD VAN LEEUWEN, WAQFS AND URBAN STRUCTURES: THE CASE OF OTTOMAN DAMASCUS 11-12 (E.J. Brill 1999) (noting that the *waqf* becomes the property of God). According to al-Kasani, a jurist belonging to the Hanafi school, "the *waqf* is simply the suppression of a property right in the *waqf* and the transferring of it completely to God." AL-KASANI, BADA' AL-SANAI'I FI TARTIB AL-SHARA'I'I' 219 (1974). See *infra* Section II.C (discussing *waqfs* and the Shari'ah Appeals Court jurisdiction).

15. A Shari'ah *qadi* is a judge in a Muslim religious court.

16. *An Ordinance to Provide for the Application of the Ottoman Family Law, 25 October 1333 (1333 A.H.)*, in 1 Legislation of Palestine 1918-1925, at 48 (Norman Bentwich ed., 1926) [hereinafter LEGISLATION OF PALESTINE]. On this law, see ROBERT H. EISENMAN,

members of the Council were now appointed, as opposed to elected.¹⁷

With the creation of the State of Israel in 1948, the autonomous Muslim religious world collapsed. The Muslim *ulamas*,¹⁸ *muftis*,¹⁹ *qadis*, and members of the Supreme Muslim Council fled the country.²⁰ Only one *mufti* serving in the city of Taybe remained.²¹ The State appointed four *qadis* who had already obtained *Azharis* education.²² The Israeli State failed to resolve the problem of establishing formal religious Muslim education, although there were several limited attempts. From 1967 onwards, Muslims from Israel had the opportunity to study in the Occupied Territories,²³ even with State assistance. Muslim *imams* from the Occupied Territories were also permitted to come and preach in Israel. This exchange was significant for two reasons. First, it enabled Arabs in Israel to discover and explore their identity. Second, it provided Israeli Muslims with the opportunity of contact with the Muslim religious world in the Occupied Territories, most of which had been restructured since 1948. However, the first *Intifada*, or uprising, beginning in 1987, se-

ISLAMIC LAW IN PALESTINE AND ISRAEL: A HISTORY OF THE SURVIVAL OF TANZIMAT AND SHARI'A[H] IN THE BRITISH MANDATE AND THE JEWISH STATE 34-45 (1978); J.E. Tucker, *Revisiting Reform: Women and the Ottoman Law of Family Rights, 1917*, *ARAB STUD. J.*, 4-17 (1996).

17. Palestine (Defence) Order in Council, 1937 (Supp. No.2 to the Palestine Gazette Extraordinary § 73) (Oct. 16, 1937).

18. An *ulama* is a specialist in Islamic law. On the *ulama*, see generally MUHAMMAD MUHAMMAD QASIM, *THE ULAMA IN CONTEMPORARY ISLAM: CUSTODIANS OF CHANGE* (2002).

19. A *mufti* is a person who gives legal opinion according to Islamic law. On *muftis* and *fatwa*, see generally KHALID M. MASUD, *ISLAMIC LEGAL INTERPRETATION: MUFTIS AND THEIR FATWAS* (Brink Messick & David Powers eds., 1996). See also *infra* notes 147-48 and accompanying text (addressing the Shari'ah Court's position on *fatwas*).

20. AHARON LAYISH, *WOMEN AND ISLAMIC LAW IN A NON-MUSLIM STATE: A STUDY BASED ON DECISIONS OF THE SHARI'A[H] COURTS IN ISRAEL 1* (1975).

21. ORI STENDEL, *THE ARABS IN ISRAEL BETWEEN HAMMER AND ANVIL* 84 (1992) (In Hebrew).

22. Al-Azhar is a Muslim institution famous for its teaching of Islamic law. It is situated in Cairo, Egypt, and before 1948 Palestinians could study there. After the establishment of the State of Israel, Muslims from Israel were prevented from studying there because of the state of war. Now, even though peace exists between Israel and Egypt, Al-Azhar still does not allow Muslims from Israel to study there. On this institution, see BAYARD DODGE, *AL-AZHAR: A MILLENNIUM OF MUSLIM LEARNING* (1961); MALIKA ZEGHAL, *GARDIENS DE L'ISLAM: LES OULEMAS D'AL AZHAR DANS L'EGYPTE CONTEMPORAINE* (1996); Tamir Moustafa, *Conflict and Cooperation Between the State and Religious Institutions in Contemporary Egypt*, 32 *INT'L. J. MIDDLE E. STUD.* 3, 3-22 (2000).

23. These are the areas of the West Bank and the Gaza Strip.

verely impeded the continuity and intensiveness of the religious and cultural exchange between Israel's Muslims and those of the Occupied Territories. The rising Islamic movement that took root amongst the Israeli Arabs and those living in the Occupied Territories during the 1980s expressed increasing dissatisfaction with the Muslim Establishment and called for new leadership.²⁴ In 1996, this movement split into two separate factions. The first, considered by Israel to be the more moderate faction, sought political representation in the Knesset by participating in elections.²⁵ The second, considered by Israel to be radical, refused to seek election in the Knesset, but participated in local elections.²⁶

Another source of potential leadership in the religious spectrum of Muslims in Israel is the *Mufti* of Palestine, who tries to control and lead the Muslim community in Israel. The *Mufti* of Palestine, who is currently nominated by the President of the Palestinian National Authority, has on several occasions declared his intention to serve the Muslims of Israel. The *Mufti* has occasionally compared himself to the Greek Orthodox or Latin Patriarch, whose spiritual jurisdiction is without borders. His actions can be described better as those of cooperation with the Muslim Establishment, than as subversive attempts to challenge the Israeli State. The *Mufti* encourages Palestinian *imams* to come to Israel and encourage Israeli Arabs to study Shari'ah in the institutions of the Occupied Territories. In 1978, the *Mufti* also played an important role in obtaining permission for Israeli Muslims to make the religiously mandated pilgrimage to Mecca.²⁷

24. For the purpose of this Article, the Muslim Establishment in Israel is made up of the Shari'ah Courts, and the Board of Trust Committees that are empowered to administer the religious endowments. The Islamic movement became dissatisfied with the *qadis* because of their lack of education in Shari'ah, and also due to the cooperation of some *qadis* in delivering *fatwas* that legitimized the dispossession of Muslims from their *waqf* properties. See ALISA RUBIN PELED, DEBATING ISLAM IN THE JEWISH STATE: THE DEVELOPMENT OF POLICY TOWARD ISLAMIC INSTITUTIONS IN ISRAEL 12, 122, 141-42 (2001).

25. This faction of the Islamic movement has one member in the Knesset [Israeli Parliament] after the last elections occurred in January 2003.

26. LAURENCE LOUER, LES CITOYENS ARABES D'ISRAEL 189-90 (2003). The discussion of whether the Islamic movement should present itself to election was raised in 1992, but at that time there was no split. See Rekhess, *supra* note 1. On the municipal level, this faction of the Islamist movement won the election in the important city of Um al-Fahim.

27. For all of the information mentioned in this paragraph, see Laurence Louer, Les Citoyens Arabes D'Israel: Analyse D'une Communautarisation 453-60 (2001) (un-

Israel, however, recognizes neither the *Mufti* of Palestine nor the Islamic movement as the representative of Israeli Muslims. Moreover, the schism within the Islamic movement itself has weakened its ability to take a leadership role. The *Mufti* of Palestine, too, has had to cooperate with the religious establishment to conduct his work.

What remains of the Ottoman Muslim religious system in Israel today are the Shari'ah Courts and the Board of Trust committees. Israel established five boards of trust in 1965 that were empowered to administer the *waqfs* [religious endowments] that had been expropriated by Israel upon its creation in 1948, but which were ultimately released back to the Muslim communities.²⁸ Nevertheless these boards generally failed to assume any leading role within the Muslim community.²⁹

Within the Shari'ah system itself, the Shari'ah Appeals Court fulfills a particularly important role, because it fills the existing leadership vacuum. The importance of the Shari'ah Appeals Court derives from the fact that non-Muslims cannot legislate regarding Muslim religious matters.³⁰ This kind of problem

published Ph.D. dissertation, Institut d'Etudes Politiques de Paris) (on file with author).

28. M. DUMPER, *ISLAM AND ISRAEL: MUSLIM RELIGIOUS ENDOWMENTS AND THE JEWISH STATE* 25-62 (1994).

29. *See id.*

30. Even a Muslim ruler cannot enact a law because the origin of law is in God according to classical theory of sources of Islamic law. Wael B. Hallaq has explained:

It is well known that the legal profession in classical and medieval Islam, on all levels, was generally independent of any [S]tate regulation. Muslim [S]tates and governments throughout the centuries had no hand in the training and certification of jurists and jurisconsults whose task it was to formulate the law. True, the [S]tate exercised some influence on the court system, but it did not interfere in the processes through which the law was determined. This was exclusively the province of the jurists and jurisconsults who were largely independent in their practice of the law.

WAEEL B. HALLAQ, *A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI USUL AL-FIQH* 208 (1997).

However, in modern times, Muslim rulers assumed the ability to legislate different matters involving Islamic Law, beginning with the codification of certain portions of Muslim law, such as that of the *Mejelle* (civil Islamic law) of the Ottoman Sultan (the head of the Ottoman State). The Sultan adopted the Ottoman Family Law of 1917, which continues to be enforced in Israel today. This shifted the approach towards Islamic law from one of non-interference in legal processes, to one of adoption of law by legislation, which varied by topic and by country. However, because Israel is not a Muslim State, problems are raised in terms of the legitimacy and legality of Islamic law regarding the legislation of matters for the Muslim community.

does not exist for other recognized minorities in Israel, who maintain their own representative religious bodies. The absence of a communitarian organization and the State de-legitimization of the functions of the Islamic movement and the *Mufti* of Palestine, increase the importance of the official Shari'ah system in Israel. The Shari'ah Appeals Court, particularly since 1994, with the nomination of two activist *qadis* to the Court, has strengthened its position.

In this context it should not be forgotten that the Shari'ah Court functions within a State that legally defines itself as a Jewish State, as opposed to a Muslim State. Consequently, its starting point is weak, and thus the Shari'ah Appeals Court has frequently found itself in situations that have forced it to "prove itself." The issue of its legitimacy and its efficacy does not just concern its function in a non-Muslim State, which itself poses difficult problems regarding the status of Muslims³¹ where there is no Islamic legislator.³² Rather, the issue concerns the ability of the Shari'ah Appeals Court to function in a State that positively defines itself as a Jewish State, currently in a state of conflict with the part of the Nation to which the Court belongs.³³

The case of the Shari'ah Court in Israel is *sui generis* in that it is the only instance in which the Muslims, as a minority group, are governed by a Jewish majority. Further, the Court must also deal with the liberal character of the State, in the sense of gender equality, legislation and case law, together with the organizations battling for women's rights.³⁴ Structurally speaking, the Shari'ah Court therefore finds itself in a difficult position. Tremendous importance attaches to its location in the religious, political, and legal fields, and considerable importance attaches to the personalities of the *qadis* that served during the period under examination. I refer particularly to *Qadi Ahmad Natur*, who serves as the Head of the Shari'ah Appeals Court, and *Qadi*

31. KHALED ABU EL-FADL, ISLAMIC LAW AND MUSLIM MINORITIES: THE JURISTIC DISCOURSE ON MUSLIM MINORITIES, ISLAMIC LAW AND SOCIETY 141-87 (1994); Sami A. Al-deeb Abu-Sahlieh, *La Migration Dans la Conception Musulmane*, ORIENTE MODERNO 219, 219-83 (1994).

32. See *infra* Section VIII.

33. Ilan Saban, *The Legal Status of Minorities in Divided Democratic States: The Arab Minority in Israel and the French Speaking Minority in Canada* (2000) (unpublished Ph.D. dissertation, Hebrew University) (on file with author).

34. Such organizations include the Women's Association Against Violence, and the Network for Women in Israel.

Farouk Zoebi. Both have secular legal educations, though neither have a formal education in Shari'ah studies.³⁵ However, they both utilize their knowledge of the Shari'ah together with their knowledge of Israeli law, and it is their opinions that have helped shape the Court during this period. The rulings of the Appeals Court should be read with consideration for the external pressures to which it is subject, as well as to the internal pressures and competition between the two leading *qadis*.³⁶

The Shari'ah Appeals Court in Israel was established in 1953, under the *Qadis* (Confirmation of Appointments) Law, 1953.³⁷ From the establishment of the State of Israel in 1948 until 1953, no appeals were heard until the first judgment of the Shari'ah Appeals Court was given on October 25, 1954.³⁸ The last eight years attest to intensive judicial activism on the Court's part, in an attempt to achieve an overall reform in Islamic law. Together with the substantive aspect of reforming Islamic law in matters of divorce, custody, *waqfs*, alimony, and maintenance,³⁹ the Court's activism has also strengthened its status. This transformation in status was achieved in part by the Islamization of certain parts of Israeli civil law⁴⁰ and of various rules of procedure.⁴¹ The other key to strengthening the position of the Shari'ah Appeals Court has been its frequent declaration of relying exclusively upon the Shari'ah.⁴²

35. On the education of the *qadis* in Israel, see Yitzhak Reiter, *Qadis and the Implementation of Islamic Law in Present Day Israel*, in *ISLAMIC LAW: THEORY AND PRACTICE* 205-09 (R. Gleave & E. Kermeli eds., 1997).

36. I should further add that in the period under examination there was a third *qadi* — Zachi Madlaj. However, since his decisions related primarily to factual issues, I will not discuss them.

37. *SHARI'AH COURT LAW (CONFIRMATION OF APPOINTMENTS)* (1953).

38. According to the *sijil* (the booklet on which the judgments of the Shari'ah Court of Appeals were written) there is no official publication for the rulings of the Shari'ah Appeals Court. I consulted the *sijil*. Since 1994, the judgments have been transcribed and saved on computers.

39. See Reiter, *supra* note 35, at 208. See generally Abou Ramadan, *supra* note 10.

40. See, e.g., Abou Ramadan, *supra* note 10, at 615-23 (describing the Shari'ah Court of Appeal's adoption of the principle of the child's best interests).

41. See *infra* Section V.

42. *Id.*

II. THE ATTEMPT TO BROADEN THE JURISDICTION OF THE SHARI'AH COURTS IN RELATION TO THE CIVIL COURTS

The struggle between judicial forums is not unique to the Shari'ah Court in its interaction with the civil courts. The same struggle exists between the Rabbinical Courts and the civil courts,⁴³ as well as between the civil courts themselves, especially between the National Labor Court and the High Court of Justice.⁴⁴

The jurisdiction of the Shari'ah Courts, until the enactment of the amended Family Court Law of November 14, 2001,⁴⁵ was broader than the jurisdiction of other State religious courts at that time. The Shari'ah Courts derived their authority from Section 52 of the Palestine Order in Council ("P.O.I.C."),⁴⁶ and matters of personal status enumerated in Section 51 of the P.O.I.C. do not apply to Muslims.⁴⁷ This determination was first

43. See Ruth Halperin-Kadri, *Civil Family Law, Israeli Style: Appeasement, Dignity, Justice, Equality and Intention as the Basis of Family*, 17 MECHKAREI MISHPAT 105, 105-57 (2001).

44. See generally Aharon Barak, *Judicial Review and Governmental Responsibility: The Scope of Judicial Review by the Supreme Court Over Rulings of the National Labour Court*, 38 HAPRAKLIT 263 (1989).

45. See Family Court Law, 1995, S.H. 1537, amended by Amendment No. 5 of Nov. 14, 2001, S.H. 1810; see also Abou Ramadan, *supra* note 10, at 596 ("After this Amendment, disputes concerning custody could be adjudicated in either civil or Islamic courts.")

46. Section 52 states:

Moslem religious courts shall have exclusive jurisdiction in matters of personal status of Moslems in accordance with the provisions of the Law of Procedure of the Moslem Religious Courts of the 25th October, 1333, A.H., as amended by any Ordinance or Rules. They shall also have, subject to the provisions of any Ordinance or of the Order of the 20th December, 1921, establishing a Supreme Council for Moslem Religious Affairs, or of any Orders amending the same, exclusive jurisdiction in cases of the constitution or internal administration of a *Waqf* constituted for the benefit of Moslems before a Moslem Religious Court

3 ROBERT HARRY DRAYTON, *THE LAWS OF PALESTINE* 2569, 2581 (1934) (quoting the Palestine Order in Council, 1922 [hereinafter *P.O.I.C.*]).

47. Section 51 states:

Subject to the provisions of Articles 64 to 67 inclusive jurisdiction in matters of personal status shall be exercised in accordance with the provisions of the Part by the Courts of the religious communities established and exercising at the date of this Order. For the purpose of these provisions, matters of personal status mean suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with

given by the Special Tribunal⁴⁸ in the context of paternity in S.C. 1/62, *Abu Angele v. Registration Clerk of Residents Register, Tel-Aviv Jaffa*, 17(4) P.D. 2751.⁴⁹ The Court reasoned that although "paternity" is not included as one of the matters of personal status listed under Section 51, the Shari'ah Court nonetheless has exclusive jurisdiction over paternity because its jurisdiction is determined by Section 52 of the P.O.I.C., which refers to the Law of Procedure of the Moslem Religious Courts of October 25, 1333, A.H.⁵⁰ This law defines which matters the Shari'ah Courts are authorized to adjudicate. This law also grants the Shari'ah Court exclusive jurisdiction over maintenance litigation between Muslim spouses.⁵¹ However, the Court's jurisdiction has been limited due to later rulings by the Israeli Supreme Court and to an overall metamorphosis of personal law. The trend in applying personal law increasingly subordinated litigants to a territorial principle, applied uniformly to all, as opposed to applying the personal law of the litigants determined by their communal-religious affiliation with a particular community.⁵²

An additional limitation on the jurisdiction of the Shari'ah Court was occasioned by an Israeli Supreme Court ruling that

property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent person.

Id. at § 51.

48. According to section 55 of *P.O.I.C.*: "Whenever a question arises as [to] whether or not a case is one of personal status within the exclusive jurisdiction of a Religious Court, the matter shall be referred to a Special Tribunal of which the constitution shall be prescribed by Ordinance."

49. See S.C. 1/62, *Abd al Kader Abu Angele v. Registration Clerk of Residents Register, Tel-Aviv Jaffa*, 17(4) P.D. 2751.

50. Section 7 states:

[T]he Courts are authorized to adjudicate and rule in the following matters: Duties of endowments Assets and orphans legally created, Guardianship, Wills and Succession Incompetency and cancellation and the proof of majority, Appointment and dismissal of Guardians, Matters of Absentees, Claims in relation to Marriage and Divorce, Mohar, Child Support, registration of estates, division between heirs and establishment of entitlement under law.

Law of Procedure of the Moslem Religious Courts of the 25th of October, 1333, A.H. § 7 (1917).

51. See C.A. 250/83, *Sahar Omri et al. v. Mohamad Abd Alphatah Ibrahim Zoebi et al.*, 39(2) P.D. 113. See also Yehoshua Menashe Gruss, *Notes for the Jurisdiction of the District Court in Matters of Maintenance for the Islamic and Christian Spouses*, 34 HAPRAKLIT 258 (1982); Menashe Shava, *Jurisdiction in Maintenance Matters for the Non Jewish Spouse*, 3 IYNEI MISHPAT 640 (1981); Ya'akov Meron, *Jurisdiction and Law in Child-Support for Muslims: Proscription and the Right to Child Support*, 36 HAPRAKLIT 190 (1984).

52. See generally, MENASHE SHAVA, *THE PERSONAL LAW IN ISRAEL* (2001) (In Hebrew).

denied the Shari'ah Court jurisdiction over claims concerning paternity or child support for a child born out of wedlock.⁵³ Justice Cheshin refused to accept the claim that such jurisdiction exists,⁵⁴ writing, "one can only detract from something which exists and not from something which does not exist."⁵⁵ Justice Cheshin further added that it is inconceivable that the Israeli legislature would have interfered by instructing the Shari'ah Court to rule according to Israeli maintenance law and against its own religion.⁵⁶ Finally, he added, "[t]he [State] courts and the Religious Court both have their particular jurisdiction, but human dignity is above all these."⁵⁷

This judgment demonstrates that jurisdiction over maintenance claims, to the extent that the religious law does not recognize such a right, was given to the district court, and today, is given to the family court. This rule also applies to the recognized Christian and Druze communities.

Even though Justice Cheshin ruled that he was diminishing the authority of the Shari'ah Courts, he further added:

[A]s stated, we are required to decide regarding the *Abu Angele* ruling . . . we may leave the matter as requiring further deliberation, and content ourselves provisionally with the posing of the questions. As we will presently see, the mother has not requested that we set aside the *Abu Angele* rule; she can find her solution in the ruling itself and its interpretation as being binding within its legitimate parameters, but not in deviation therefrom.⁵⁸

In at least three other areas examined below, the Shari'ah Appeals Court unsuccessfully attempted to broaden the jurisdiction of the Shari'ah Courts.

A. Succession

The first example of the Shari'ah Court's struggle to broaden its jurisdiction in relation to the civil courts relates to an

53. See C.A. 90/3077, *Plonit et al. v. Plonit*, 49(2) P.D. 578. See also, Ya'akov Meron, *The Law of Shtuki in Islamic Law*, 46 HAPRAKLIT 407 (1997).

54. See *Plonit*, 49(2) P.D. at 619.

55. *Id.* at 620.

56. See *Id.* at 625.

57. *Id.*

58. *Id.* at 595.

inheritance matter.⁵⁹ A decedent passed away in 1960, and in 1988, respondents submitted an application to the Shari'ah Court for a probate order declaring succession. The question confronting the Appeals Court was whether the Shari'ah Court had jurisdiction when a decedent had passed away prior to the adoption of the Succession Law⁶⁰ and an application for a succession order was submitted after the law's adoption. The Court could have either applied the law as applicable prior to the adoption of the law (under Section 157 of the Succession Law) or, pursuant to Section 155, it could have authorized the religious courts to do so, "if all of the relevant parties under this law have given their written consent."⁶¹

The Shari'ah Appeals Court judgment, written by *Qadi Farouk Zoebi*, ruled that the Shari'ah Court had jurisdiction over matters involving a person who passed away prior to 1965, and that there was no need for written consent from the parties because prior to that year, the Shari'ah Court had jurisdiction. The judgment was then appealed to the Israeli Supreme Court in H.C. 2117/99, *Mansoor v. Central Taiba Shari'ah Court*, 54(1) P.D. 211.⁶² Sitting as the High Court of Justice, the Court relied upon C.A. 734/90, *Zobidat v. Zobidat*, 46(1) P.D. 749,⁶³ and concluded that Section 157 relates to the substantive rights of decedents and their successors, rather than to their procedural rights, including the rules relating to jurisdiction in succession matters. It further held that the determining date for jurisdiction is not the date of death, but rather the date at which the application was submitted for a succession order. In this case there had been no written agreement of all the parties concerned. As a result, the High Court regarded the Succession Order and ensuing decision invalid.

B. *Child Custody*

With respect to child custody, prior to Amendment No. 5 of the Family Court Law, the Shari'ah Court in Israel had exclusive jurisdiction, provided that all of the parties were Muslim. In a

59. See A. 233/98 (Oct. 1, 1999).

60. Succession Law, 1965 S.H. 63.

61. See *id.* at § 155.

62. See H.C. 2117/99, *Hasan Mansoor v. Central Taiba Shari'ah Court*, 54(1) P.D. 211.

63. C.A. 734/90 *Zobidat et al. v. Zobidat*, 46(1) P.D. 749.

custody dispute between a Christian mother and a Muslim father,⁶⁴ the Shari'ah Appeals Court ruled that the children belonged to the Muslim religion, and therefore custody went to the parent of that faith. This went against the ruling in the matter of H.C. 304/86 *Barak v. Shari'ah Court Jaffa*, 41(2) P.D. 745,⁶⁵ in which Justice Shamgar held that the exclusive interest to be considered is the best interest of the child. The Shari'ah Appeals Court ruled that the child's best interests dictate that only his religion be taken into consideration, and that since the issue concerned Muslim children, the Shari'ah Court had jurisdiction. The Supreme Court rejected this interpretation with the case of C.M. 1421/97 *Abu Ras Tibi v. Abu Ras Tibi*, 53(1) P.D. 823, ruling that, "we cannot accept [the] ruling of the Shari'ah Appeals Court in relation to the *Yael Barak* ruling[.]"⁶⁶ Further, "where parents of a child who is the subject of a custody suit belong to different religions, there is no longer exclusive jurisdiction for the Shari'ah Court, and an application must be submitted under Section 55 of the Order in Council (opening section). The same applies in the case before us."⁶⁷ The Supreme Court's conclusion is that in future similar cases, an application must be made to the President of the Supreme Court, who then decides upon the appropriate forum under Section 55 (opening part) of the P.O.I.C.⁶⁸

C. *Waqfs*⁶⁹

The issue of Islamic endowments [*waqfs*] does not relate exclusively to Islamic law, its application, or the jurisdiction of Shari'ah Courts or civil courts; it is principally concerned with land disputes. However, the Islamic movement made the struggle over endowments an important element of its political activity,⁷⁰ using it as leverage to enhance the status of the Islamic organizations. The Shari'ah Court, too, utilizes the issue of Islamic

64. A. 135/96 D.K. (June 26, 1997).

65. H.C. 304/86 *Yael Barak v. Shari'ah Court Jaffa et al.*, 41(2) P.D. 745, 750.

66. C.M. 1421/97 *Mahmud Abu Ras Tibi v. Alina Abu Ras Tibi*, 53(1) P.D. 823, 830.

67. *See id.*

68. *Id.*

69. *See supra* note 14.

70. *See* Salih Lotfi, *Altharaki alislamiya fi alkhat alakhdar*, 1 SHUOUN DUWALIYA 49, 65-69 (1994); Yaniv Yaakov, *The Islamic Movement in Israel: Between Isolation and Integration*, in MAOF UMAASEH BEMICHLELET ACHIA 156, 163-64 (1998).

endowments as a tool for enhancing its own status. As such, the matter of jurisdiction over *waqfs* became particularly important for the Shari'ah Appeals Court, considering the past involvement of *qadis* in granting *fatwas*⁷¹ validating transactions made with respect to a particular Islamic endowment.⁷² This was the background of the judgment given on December 31, 1995 by *Qadi Zoebi*.⁷³

In this judgment, the Appellants, beneficiaries of an endowment, filed an application before the Shari'ah Court in Jaffa against the Guardian of Absentee Property,⁷⁴ requesting a submission of accounts regarding a private *waqf* from which they were benefiting. The appellants claimed that the Shari'ah Court had jurisdiction over the matter, which the Guardian for Absentee Property disputed. The Shari'ah Court in Jaffa rejected the claim, citing lack of jurisdiction. The beneficiaries of the endowment appealed to the Shari'ah Appeals Court, again arguing for jurisdiction, and as described below, the Shari'ah Appeals Court used the judgment as a forum for expanding its authority.

1. Ascribing Different Meanings to *Waqf Sahih* and *Waqf gir Sahih*

The Shari'ah Appeals Court ascribed different meanings to the term *waqf sahih* and *waqf gir sahih*. According to the Court, *waqf sahih* is a legally created endowment. *Waqf gir sahih* according to this definition becomes a *waqf* that is not created legally.⁷⁵ Accordingly, a Shari'ah Court is authorized to deal with any legal *waqf*. This interpretation differs from the standard interpretation of the differences between *waqf sahih* and *waqf gir sahih*. To ascertain whether the endowment is *waqf sahih* or *waqf gir sahih*, there must be a determination as to whether the endowment was dedicated on *mulk* land.⁷⁶ If the *waqf* was dedicated on full property land the *waqf* will be *sahih* [legal], and fall under the juris-

71. A *fatwa* is a non-binding opinion given in accordance with the Muslim Law.

72. See DUMPER, *supra* note 28, at 25-62.

73. D. 85/95 (Dec. 31, 1995).

74. The Guardian of Absentee Property is the Israeli institution responsible for administrating the property of Palestinians who left their homes for an area of Palestine that was not occupied by Jewish forces on November 28, 1948. See Alisa Rubin Peled, *Towards Autonomy? The Islamist Movement's Quest for Control of Islamic Institutions in Israel*, 55 MIDDLE E. J. 378, n.37 (2001), available at 2001 WL 15732145.

75. *Gir* is the Arabic equivalent of "not."

76. *Mulk* land is full property land.

diction of a Shari'ah Court. On the contrary, if the *waqf* was dedicated on land that is not classified as full property, the *waqf* will be classified as *waqf gir sahiih*.⁷⁷

2. The Shari'ah Courts' Jurisdiction to Deal with *Ijaratin*⁷⁸

Under an order issued in 1921, the Shari'ah Court is not authorized to deal with matters related to *ijarat*, except with the unanimous approval of the Supreme Muslim Committee.⁷⁹ Though the *Qadis* Law repealed the 1921 Order,⁸⁰ the repeal did not alter the initial restriction of jurisdiction.⁸¹

3. The Shari'ah Court's Authorization to Adjudicate Under the Absentees Property Law

Qadi Zoebi stated that the Shari'ah Court is authorized to adjudicate in accordance with the Absentees Property Law. He found authority for this in H.C. 1000/92, *Bavli v. Rabbinical Court*, 48 (2) P.D. 221: "Indeed the religious court forms an integral part of the Israeli Judicial System . . . [and the law] which it applies is an integral part of the Israeli legal system"⁸² *Qadi* Zoebi further stated that in matters of personal status he would rule according to Shari'ah law, and that in other matters he would adjudicate according to positive law. This was the basis for his conclusion that the Shari'ah Court was authorized to adjudicate cases dealing with the Absentees Property Law. Despite the conventional understanding that the Supreme Court ruling in *Bavli* limits the jurisdiction of the religious courts,⁸³ the

77. Aharon Layish, *The Muslim Waqf in Israel*, 2 ASIAN & AFR. STUD. 40, 45-46 (1966).

78. *Ijaratin* means a double lease. The administrator of the *waqf* leases a *waqf* property and receives a lump sum that is equivalent to the value of the property plus an additional minor sum paid on a periodic basis. This aims to present the transaction as that of a lease and not of a sale.

79. See *Order of the 20th of December, 1921, Art. 8(2) (1921)*, in 2 LEGISLATION OF PALESTINE, *supra* note 16, at 398. The Shari'ah Courts shall not take any action affecting *waqf* of the nature of *Hikr* [rent on a long-term lease], *Ijaratin* and *Istibdal* [an exchange, in this case, of property], except with the unanimous consent of the Council. *Id.*

80. See *infra* notes 89-96 and accompanying text.

81. For discussion of this point, see Ya'akov Meron, *Jurisdiction in Matters of Waqf*, 32 HAPRAKLIT, 144-46 (1978).

82. H.C. 1000/92, *Bavli v. Rabbinical Court*, 48 (2) P.D. 221.

83. See Halperin-Kadri, *supra* note 43, at 110 (noting that in legal literature, *Bavli* and H.C. 3914/92, *Lev v. Reg'l Rabbinical Ct.*, Tel-Aviv-Jaffa, 48(2) P.D. 491, are regarded as the judgments that establish "institutional judicial imperialism," in the sense

Shari'ah Appeals Court ultimately applied it in a manner that broadened their jurisdiction.

The High Court of Justice did not accept the interpretation of the Shari'ah Appeals Court, and on petition did not substantively deal with any of the issues or arguments raised by the Court.⁸⁴ The High Court ruled that Amendment Three of the Absentees Property Law⁸⁵ removed the basis for jurisdiction over the endowment within the meaning of Section 52. It thereby concluded that the jurisdiction previously belonging to the Shari'ah Court, had now been transferred to the Guardian for Absentees Property. Reading between the lines of the case law, it is clear that the judgments reflect a fundamental, principled struggle between the Supreme Court and the Shari'ah Appeals Court.

In the three cases examined, the attempts made by the Appeals Court to expand its authority in relation to the civil courts failed. The rulings also indicate an internal struggle within the Shari'ah Appeals Court itself, between *Qadi* Natur and *Qadi* Zoebi. In the third case, *Qadi* Zoebi attempted to write material that could weigh against *Qadi* Natur in the matter of endowments, about which *Qadi* Natur had written a legal circular in 1994.⁸⁶

III. *THE STRENGTHENING OF THE POSITION OF THE SHARI'AH APPEALS COURT IN RELATION TO THE REGIONAL SHARI'AH COURTS*

As opposed to its unsuccessful attempt to broaden its jurisdiction in relation to the State of Israel's civil courts, the Shari'ah Appeals Court succeeded in strengthening its position in relation to the subordinate regional Shari'ah Courts.⁸⁷ There are four legal factors that strengthened its position, the first of which is external to the Shari'ah Court itself.

of making civil norms applicable to all judicial instances, including the Shar'iah Court, functioning in the same framework).

84. H.C. 6452/96, Guardian for Absentee Property v. Shari'ah Appeals Court, 55(4) P.D. 363.

85. Absentee Property (Amendment No. 3) Law, (Release and Use of Endowment Property) 1965.

86. See *infra*, at Section VII for discussion on this circular.

87. There are seven regional Shari'ah Courts in Israel sitting in Beersheva, Jaffa, Taybe, Nazareth, Haifa, Jerusalem, and Acco. In each court there is one *qadi*. Although the Shari'ah Courts are state courts, they sit in buildings separate from the civil courts.

A. *Permanent Appointments to the Shari'ah Appeals Court*

With the establishment of the State of Israel, the members of the Supreme Muslim Council left the country and the State did not appoint replacements. Instead, the Israeli Minister of Religion appointed *qadis* to serve in the different Shari'ah Courts under the *Qadis* (Approval of Appointments) Law.⁸⁸ While this law approved both the establishment of the courts and the appointment of *qadis*, it did not prescribe the method of appointing new *qadis*. Statutory regulation was suspended until the *Qadis* Law of 1961, which repealed the British High Commissioner's Order that had established the Supreme Muslim Council,⁸⁹ and empowered the President of the State to appoint *qadis* in accordance with the proposals of the Appointments Committee.⁹⁰ The Committee would consist of nine members, the majority of whom would be Muslim.⁹¹

Until 1953 there was no Shari'ah Appeals Court. Deputy Minister for Religious Affairs, Z. Werhaftig gave the following explanation for its absence:

[A] particular difficulty has emerged with respect to the Court of Appeals. As I explained, we do not have many *qadis* in Israel — four all together. They are definitely capable of dealing with all of the current matters. However, the establishment of an Appeals Court raises difficulties. The current situation is that men of religion, experts or professionals in this particular area, are particularly rare in the State of Israel, and clearly it is impossible to import experts from neighbor states. Israel has no appropriate educational facilities for training this kind of expert, which is the source of the lack of candidates for the appointment. This severely impaired the actions of the Appeals Court, but having recognized the need for such a court, we have established another basis: an appeal will be presented before an expanded panel of *qadis*, who did not participate in the issuing of the judgment which is being appealed. Given that under Islamic Law, each *qadi* hears

88. *Qadis* (Approval of Appointments) Law S.H. (Dec. 17, 1953).

89. *Qadis* Law of 1961, § 25 (1961).

90. *Id.* at § 3.

91. The Appointments Committee is composed as follows: (1) Two *qadis* chosen by the *Qadis* Board to serve for a period of three years; (2) the Minister of Religion and another member of the government appointed by it; (3) three members of the Knesset, of whom at least two are Muslims and chosen by the Knesset; and (4) two advocates, at least one of whom is Muslim. *Id.*

cases by himself, then the appeal against a judgment given by a *qadi* can be brought before an expanded tribunal, comprising three *qadis* or more.⁹²

Section 3 of the *Qadis* Law confirms the establishment of the Shari'ah Appeals Court retroactively, from January 1, 1953. It also confirms that the *qadis* who are to serve on the Appeals Court would be assigned from the *qadis* currently serving in the various regional Shari'ah Courts.⁹³ Section 6 of the *Qadis* Law establishes a new position: the Head of the Shari'ah Appeals Court. This appointment can be for a particular period or permanent.⁹⁴ At the end of 1994, however, there was a permanent appointment of three *qadis* to the Shari'ah Appeals Court for the first time: Farouk Zoebi, Zachi Madlaj and Ahmad Natur, Head of the Court.⁹⁵ The granting of permanent appointments strengthened the hierarchy of the Shari'ah Appeals Court. Its absence in the past meant that there was no difference between rulings of the Appeals Court and those of the regional courts since the appellate decisions were made by the *qadis* still serving at the regional court level. Accordingly, when Aharon Layish examined the rulings of the Shari'ah Courts in Israel prior to the permanent appointments, he made no distinction between *qadis* serving on the regional courts and those serving on the Shari'ah Appeals Court.⁹⁶

B. *Processing Files Transferred Between Courts*

The Shari'ah Appeals Court has jurisdiction over processing all files transferred between regional courts. The processing is evaluative, rather than technical. For example, any decision to disqualify a regional *qadi* must be assessed by the Shari'ah Appeals Court. If one of the litigants applies to have a regional *qadi* disqualified or if the *qadi* decides to recuse himself, then the decision or the application comes before the Shari'ah Appeals

92. Knesset Protocols, 3rd Session of the 2nd Knesset, § 15 at 40 (1953).

93. Sheikh Tahar Al Tabri was appointed on Jan. 19, 1950 to the Shari'ah Court in the Middle Area; Sheikh Mussa Al Tabri was appointed as a *qadi* to the court in Jaffa on Sept. 9, 1948; Sheikh Tahar Hamad was appointed to the Shari'ah Court in Jaffa; Sheikh Hassan Amin Habash was appointed as a *qadi* in the Shari'ah Court in Nazareth on Aug. 15, 1948.

94. Permanent appointment requires the approval of the Appointments Committee.

95. Official Publications 4268, at 1010 (Dec. 18, 1994).

96. See generally LAYISH, *supra* note 20.

Court. Where the position of a serving *qadi* is not filled, the Appeals Court decides where to refer the claim.⁹⁷ There are two exceptions to this rule: when the parties have initially agreed to litigate before the Court; and when following the session, the parties agree to transfer the file to another court.⁹⁸

C. *Establishing the Principle of Binding Precedent*

The principle of binding precedent is a major feature of the Anglo-Saxon legal system,⁹⁹ and its adoption by the Israeli judicial system conferred to the Supreme Court a central role in the development and the creation of common law.¹⁰⁰ Even if Islamic law can come to terms with the existence of an appeals court,¹⁰¹ on the substantive level Islamic law does not recognize the principle of binding precedent.¹⁰² In Islamic law, the *qadi's* judgment does not constitute a source of Islamic Law, and is therefore not binding. Each *qadi* must decide anew each case presented to him, without the mandatory guidance of previous decisions. The Shari'ah Appeals Court, however, has ruled that its precedents are binding, contrary to traditional Islamic juris-

97. See, e.g., A. 4/98-18 (Feb. 11, 1998); A. 69 (Apr. 23, 2000).

98. A. 151/98 (Sept. 14, 1998).

99. RENE DAVID & CAMILLE JAUFFRET-SPINOSI, *LES GRANDS SYSTEMES DE DROIT CONTEMPORAINS* 46, 156-58, 425-26 (1988).

100. Binding precedent is a source of law, and thus impacts the system as a whole. See GAD TADESCHI, *THE RULE OF THE BINDING PRECEDENT, RESEARCH IN OUR LAW* 92 (1959).

101. Claims were made regarding classical Islamic law's rejection of the Appeals Court, in the sense of rejecting an appeals forum that occupies a higher position in the hierarchy than the first instance, and which can alter and reverse the decisions of the first instance. For a presentation of these claims on the normative level, and on the factual and historical levels, see David S. Powers, *On Judicial Review in Islamic Law*, 26 *LAW & SOC'Y REV.* 315, 315-41 (1992); Mohammad Hashim Kamali, *Appellate Review and Judicial Independence in Islamic Law*, in *ISLAM AND PUBLIC LAW: CLASSICAL AND CONTEMPORARY STUDIES* 49-83 (Chibli Mallat ed., 1993).

102. MAJID KHADDURI, *THE ISLAMIC CONCEPTION OF JUSTICE* 149-50 (1984); N.J. Coulson, *The State and the Individual in Islamic Law*, 6 *INT'L & COMP. L.Q.* 49, 49-60 (1957); Donald L. Horowitz, *The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change*, 42 *AM J. COMP. L.* 233, 264 n.22 (1994); COLIN IMBER, EBU'S-SU'UD: *THE ISLAMIC LEGAL TRADITION* 7, 39 (1997); 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, 44 (1972); Badr Gamal Moursi, *Islamic Law: Its Relation to Other Legal Systems*, 26 *AM J. COMP. L.* 187, 189 (1978); JORGEN S. NIELSEN, *SECULAR JUSTICE IN AN ISLAMIC STATE: MAZALIM UNDER THE BAHRI MAMLUKS* 113, 662, 1264-789, 1387 (1985); Y. LINANT DE BELLEFONDS, *TRAITE DE DROIT MUSULMAN COMPARE: THEORIE GENERALE DE L'ACTE JURIDIQUE* 27-28 (1965); ABDL KARIM ZIDAN, *NIZAM AL-QADA' FI AL-SHARI'A[H] AL-ISLAMIYA* 269-70 (1995).

prudence. Introducing the principle of binding precedent strengthened the Court's position. It also shows the influence of Israeli law upon decisions of the Shari'ah *qadis*, since the principle of binding precedent is connected to the Israeli legal system, but is not recognized by all legal systems.¹⁰³

The case law introduction of binding precedent only occurred after some hesitation. In a July 23, 1996 ruling, *Qadi Zoebi*, with *Qadi Assalia's* consent, stated:

[D]ecisions of the Shari'ah Appeals Court in matters of personal status are not binding for other cases, for matters of personal status are different, no file resembles another given the differences in their facts. Consequently, the decisions of the Shari'ah Appeals Court do not bind any other court except for the Shari'ah Court to whom the appeal decision is addressed.¹⁰⁴

In a later decision by *Qadi Natur* and concurred with by *Qadis Zoebi* and *Zachi Madlaj*,¹⁰⁵ *Qadi Natur* ruled on a law that binds the decisions of the Shari'ah Appeals Court on the particular court to which they are addressed. He suggested qualifying the application of that law, finding it preferable that the regional courts follow the footsteps of the judicial principles fixed by the Shari'ah Appeals Court. He argued that this promotes stability in adjudication and is beneficial for litigants. Accordingly, he suggested limiting the application of the ruling from July 23, 1996, and stated that as a rule, where the circumstances are similar, there is an obligation to comply with the judicial principles fixed by the Shari'ah Appeals Court.

D. *Informational Requirements of Regional Courts to the Appeals Court*

In a ruling by *Qadi Zoebi* with the consent of *Qadi Assalia*,¹⁰⁶ the Court held that Section 7 of the Shari'ah Court's Regulations 1918-1925, requires the regional Shari'ah Court to send a

103. The principle of binding precedent is not accepted in all of the continental systems of law. For example, in France, the decisions of the *Cour de Cassation* [France's Supreme Court of Appeals] do not establish rules in the abstract sense of being binding upon courts in other cases confronted with similar facts; the court's decisions are binding exclusively upon the parties themselves.

104. A. 96/41 (July 23, 1996).

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

106. A. 54/00 (July 24, 2000).

copy of a judgment to the Shari'ah Appeals Court for the confirmation of any decision regarding a minor, even if the decision goes against a child's interest. The regional courts, however, have failed to comply with this regulation, even after the ruling of the Shari'ah Appeals Court. The Appeals Court's decision, though, ignores a Supreme Court ruling that Shari'ah religious courts are not required to submit their decisions regarding endowment disputes to the appellate courts for confirmation. In my view, the logic guiding the Supreme Court regarding endowments should be equally applicable in the context of decisions concerning minors, even though the Supreme Court ruling did not relate specifically to the approval of the Shari'ah Appeals Court.¹⁰⁷ This decision of the Shari'ah Appeals Court causes a delay in proceedings, and the attitude of the Appeals Court to the regional courts regarding minors appears to be similar to that of a parent worrying about his children.

IV. STRENGTHENING THE SYMBOLIC STANDING OF THE COURTS

The Shari'ah Appeals Court has also strengthened its symbolic standing by changing its writing style. Recent judgments are now longer and more substantively reasoned than similar judgments from the sixties and seventies. During those periods, judgments usually ranged from half a page to a page in length; today, judgments may be up to ten pages in length. The Shari'ah Appeals Court also instructs the regional courts to be precise when citing verses from the Qur'an,¹⁰⁸ to demonstrate the Court's knowledge of the Qur'an. *Qadi* Natur tends to refer to the classical sources of Islamic law, while *Qadi* Zoebi rarely does so. Both *Qadi* Natur and *Qadi* Zoebi cite sources from Hebrew and English, which indicates their broad erudition. The writing style of the judgments is now more authoritative, and one can also discern a hierarchical tone.

The Head of the Shari'ah Appeals Court is now known as the President of the Shari'ah Appeals Court. This title, conferred by the Law on *Qadis* (Modification No. 10) 2002, lends

107. C.A. 3997/91 Trustee Committee for Muslim *Waqf* Assets v. Yossi Investments Co. Ltd. et al., 49(5) P.D. 766.

108. A. 54/99 (May 4, 1999).

greater prestige to the position.¹⁰⁹ Additionally, the Shari'ah Appeals Court became known as the High Shari'ah Appeals Court, or the Supreme Shari'ah Appeals Court. The alternate usage of titles has even penetrated the rulings of the Supreme Court.¹¹⁰ Jerusalem became known as "*Al-Quds Alsharif*," a symbol of Palestinian pride, appropriated by the institutions of the State of Israel.¹¹¹ Prior to 1994, the *qadi* was called "Sheikh," literally "old man," however, the word denoted someone who was knowl-

109. Beyond mere honorary attributes, this law also confirms certain powers that were already exercised before its enactment. The *Qadis* Law (No.10) enhances this trend by allowing appeals regarding the disqualification of a *qadi* to be heard by the President of the Shari'ah Court of Appeals. Another case in which *Qadi* Natur gave a written decision on his own involved an application for the transfer of a file from one court to another; the *qadi* desired to disqualify himself from dealing with the case because one party did not give the requisite respect to the court. See A. 254/2000 (Nov. 8, 2000). An additional case concerned an attorney of the litigants who happened to be the son of the *qadi* of the local court. A. 2444/2000 (Nov. 8, 2000). In another case, there was a vacancy for a *qadi* in the court, and no *qadi* was appointed; therefore, there was a request to transfer the case to another court. A. 233/2 (Nov. 1, 2000); A. 238/2000 (Nov. 1, 2000); A. 190/2000 (Sept. 21, 2000); A. 189/2000 (Sept. 21, 2000); 179/2000 (Sept. 21, 2000). In another case, *Qadi* Natur cancelled the disqualification of a *qadi* who had recused himself because the Plaintiff's grandfather had worked as a secretary in the court. In Natur's view, this did not constitute grounds for disqualification. A. 232/2000 (Nov. 1, 2000). In another case Natur confirmed the disqualification of a *qadi* who had spoken to one of the litigants prior to the court session in which the claim was to be heard. A. 229/2000 (Nov. 1, 2000). Furthermore, upon application by a party, transfer of venue from one court to another can be made unilaterally by the President. *Id.* However, it seems that there is no confirmation of previous decisions unilaterally adopted by him. In addition, this same Article 8 gives the President competence to deliver temporary orders. This amendment, *Qadis* Law No. 10, enhances the power of the President of Shari'ah Appeals Court. One should note that Natur, the current president of Shari'ah Appeals Court, is a powerful person in the Shari'ah administrative network. He acquired power and influence by teaching Islamic law in colleges and universities and donating scholarships to Arab students. *Qadi* Natur is the head of the committee that tests candidates to become Shari'ah attorneys, and he is a highly influential member of the committee for the appointment of *qadis*. In effect, he controls Islamic law, the system which determines the Shari'ah attorneys, the system that appoints the Shari'ah judges, and the Shari'ah Appeals Court. What is strange is that he does not have a formal Shari'ah education and his knowledge of Israeli law is not always up to date. See Abou Ramadan *supra* note 10, at 652 n.190.

110. The Supreme Court refers to the Court as the "Shari'ah Court of Appeals," apparently on the basis of the translation of the judgment before the Supreme Court. See H.C. 2117/99, *Mansoor* at 213. It has also been referred to as "The Supreme Shari'ah Court of Appeals." See C.M. 1421/97, *Abu Ras Tibi* at 828.

111. For a useful comparison on this issue, see Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 882 (1988) (noting that "[s]ymbolic appropriation works the other way around as well: state law may borrow the symbols of other normative orders").

edgeable in religious matters.¹¹² Similarly, Sheikh was used as a term for *qadis* of the Shari'ah Courts, but it has fallen out of use since 1994, with the permanent appointments to the Appeals Court. No distinction is made now between the judge of a religious court and the judge of a civil court. Furthermore, with the permanent appointment of the three *qadis* to the Appeals Court, the old custom of writing the judgments of the Shari'ah Courts in *sijill* [booklets] has fallen out of use. Finally, even the dress code has changed. The Shari'ah *qadi* of old strictly wore the traditional garb, whereas the modern *qadi* wears a Western-style suit.

V. STRENGTHENING THE SHARI'AH APPEALS COURT IN RELATION TO ISRAELI LAW

The Shari'ah Appeals Court attempted to strengthen its position *vis-à-vis* Israeli law in two conflicting ways, attesting to its ambivalence regarding Israeli law. The Shari'ah Appeals Court forbids the regional Shari'ah Courts from relying on positive Israeli law, while relying on Israeli law to broaden its authority.

A. Prohibition of Reliance Upon Israeli Legislation

The religious courts in Israel are supposed to apply religious law, but where the legislature also refers to secular law, the religious courts must comply with the laws of the State (a territorial law).¹¹³ For example, the Shari'ah Appeals Court ruled in one case¹¹⁴ that had the case not concerned child support for a minor, it would have set aside the regional court's ruling as it had done in many other cases, because the court had relied upon the Family Law Amendment¹¹⁵ instead of Shari'ah law. The Appeals Court ruled:

[I]t should be mentioned that the civil law relied upon by the

112. During the Ottoman Period, the *Sheikh al-Islam*, who was in charge of the supervision of the religious Muslim hierarchy, was responsible for the appointment of *qadis*. See EISENMAN, *supra* note 16, at 32.

113. See Menashe Shava, *Is a Religious Court's Diversion from or Disregard of a Provision of Secular Law Directed Specifically to it, the Same as Deviation from Authority?*, 28 HAPRAKLIT, 299-316 (on whether the classification of the disregard of a substantive provision of this nature constitutes an act which is *ultra vires*, or a mistake in law); see also H.C. 1000/92, *Bavli*, 48(2) P.D. at 221.

114. A. 191/97 (Dec. 29, 1997).

115. Family Law (Amendment), 1959, S.H.

lower court regarding temporary maintenance is unrelated to the law applied by Shari'ah Court[s]. The lower court's ruling does not apply to Muslims, given that the Shari'ah Court is prohibited from ruling in accordance with laws that are not grounded in Islamic Law, and must only rule in accordance with the Shari'ah law.¹¹⁶

The Court's argument is odd because the State law concerned is the same State law that provides the legality for all actions of the Shari'ah Courts.¹¹⁷ Furthermore, the Shari'ah Appeals Court has ruled in numerous judgments that the Capacity and Guardianship Law,¹¹⁸ which orders the courts to take into account the principle of the best interest of the child, does not apply to the Shari'ah Courts. As *Qadi* Natur has ruled: "[t]he Shari'ah Court must not rely upon the Capacity and Guardianship Law [of] 1962. We have clarified this on numerous occasions, that the noble Shari'ah constituted a complete judicial system before it (the Capacity and Guardianship Law), and will remain such after it, and the Shari'ah does not require any positive secular rules."¹¹⁹

The Shari'ah Appeals Court has also ruled that the Israeli Rules of Procedure do not apply to the Shari'ah Court, and that the authority of the Shari'ah Courts to prevent exit or to cancel such stay derives from Islamic law and not from Israeli procedural law.¹²⁰ The Shari'ah Court did not hesitate to apply this principle to the Basic Law: Human Dignity and Liberty ("Basic Law"),¹²¹ when it ruled that the Basic Law was not applicable in

116. A. 191/97 (Dec. 29, 1997).

117. It is worthy to quote the Supreme Court of Israel from a case that actually dealt with the Rabbinical Courts because the State status of the Shari'ah 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 [Jewish religious judges] receive their salaries like all other State employees; they preside in judgment under the State emblem and their decisions appear on official stationery. Their orders become the voice of the State and it is the State that enforces them [T]he Rabbinical Court only has the powers that are statutorily conferred upon it.

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

118. Capacity and Guardianship Law, 1962, S.H. 380.

119. A. 55/2001 (Apr. 29, 2001).

120. A. 194/99 (Nov. 22, 1999).

121. Basic Law: Human Dignity and Liberty, 1992, S.H. 1391 [hereinafter *Basic Law*]. The Basic Law is a basis for human rights in Israel and declares support for the rights to life, personal liberty, privacy, and dignity among others. *Id.*

the Shari'ah Courts.¹²² There is no clear ruling on this matter, however, and it would seem that according to the High Court of Justice,¹²³ the tendency is to apply the Basic Law in the religious courts:

I have dealt with the whole gallery of general principles in the framework of which procedural jurisdiction (legislative or inherent) should be exercised. Sometimes these principles all point in the same direction, but sometimes they are in internal conflict. Procedural justice and procedural efficiency point in different directions. Both of them may point in directions which are at odds with the direction indicated by human rights. In such cases there is no escaping striking a balance between the conflicting values. In the framework of this balance, special significance should be given to considerations of human rights. This is especially true today, with the adoption of the Basic Law: Human Dignity and Liberty.¹²⁴

B. *Using the Theory of Inherent Jurisdiction*

The first method used by the Shari'ah Appeals Court to avoid resorting to Israeli legislation is to use court rulings adopted in relation to the religious courts. The second method is to use the theory of inherent jurisdiction.

Israeli case law recognized that in certain cases, jurisdiction exists even without explicit authorization for the civil courts or religious courts. This occurs when jurisdiction is required to allow the judicial forums to properly discharge their functions. This jurisdiction may be either independent or complimentary:¹²⁵

[T]he term "inherent jurisdiction" and the like is used for the capacity of the Court in appropriate cases to create either procedural tools, or tools commanding compliance, by way of contempt of court. These rules are created to protect the court in its functional-institutional capacity, to ensure that its proceedings are not abused and for the prevention of obvious injustice, which may ensue from the prescription of [a] time

122. A. 194/99 (Nov. 22, 1999) (confirming the ruling given in the judgment of 247/98).

123. H.C. 3914/92, Leah Lev v. Reg'l Rabbinical Ct., Tel-Aviv-Jaffa et al., 48(2) P.D. 491.

124. *Id.*

125. See Pinchas Goldstein, "Inherent Jurisdiction" of the Court, 10(1) *IYUNEI MISHPAT* 37 (1984).

period for doing any action under a judgment.¹²⁶

For example, in the Israeli High Court of Justice case of H.C. 1912/97, *Resh v. Council of Chief Rabbinate of Israel*, 52(3) P.D. 650,¹²⁷ Justice Dorner ruled:

Legislative history indicates that the law did not establish procedures for the Rabbinical Court, and no authority was empowered to make them. In this state of affairs, the Rabbinical Courts themselves have such authority. The source of this authority is in the inherent jurisdiction conferred upon any legally constituted forum, for which procedures, or modes for their enactment were not statutorily established. They may initiate their own procedures for operation, in order to enable them to fulfill their role.¹²⁸

The Shari'ah Court has relied on this jurisdiction without citing the relevant ruling, to broaden its authority in all matters relating to temporary measures. The Shari'ah Appeals Court noted that there was no term for "clarifying a judgment" in the Shari'ah procedures. However, by virtue of the "inherent jurisdiction of the Shari'ah Appeals Court it can clarify a decision when there is [a] printing error, punctuation, deletion, or inadvertent addition," provided that an application was filed within a reasonable period.¹²⁹ In the same manner, by virtue of its inherent jurisdiction, the Shari'ah Appeals Court can give the same decisions that the regional Shari'ah Courts were empowered to give.¹³⁰

The scope of inherent jurisdiction which the Shari'ah Appeals Court purports to have is broader than the scope contemplated by the concept of "inherent jurisdiction" as recognized by the Supreme Court. *Qadi Zoebi* used two methods for broadening its scope: the first was the combination of incidental jurisdic-

126. *Id.* at 39-40.

127. H.C. 1912/97, *Zvi Resh v. Council of Chief Rabbinate of Israel et al.*, 52(3) P.D. 650.

128. *See id.* Furthermore, in the *Lev* ruling, the Deputy President (as then referred to) wrote: "[I]n my opinion, in the absence of statutory empowerment to that effect, the authority to establish procedures rests with the Rabbinical Courts themselves. The source of this empowerment is in the inherent jurisdiction of any judicial forum to determine its own procedures." *See Lev* 48(2) P.D. 491 (citing to H.C. 364/85, *Pachar Aldrin v. Druze Ct. in Jerusalem*, 40(3) P.D. 699, 704). *See also* H.C. 2222/99, *Agzal (Ora) Gabai v. Rabbinical Ct. App.*, 54(5) P.D. 401, 424.

129. *See A.* 99/144 (Mar. 14, 2000).

130. *See A.* 5/00 (July 17, 2000).

tion and inherent jurisdiction. In a December 31, 1995 ruling, *Qadi Zoebi* ruled that Section 76 of the Court's Law confers incidental jurisdiction to the Shari'ah Courts in the same manner as it confers incidental jurisdiction to civil courts.¹³¹ Accordingly, when an ancillary matter that is not within the Shari'ah Court's jurisdiction comes before it with a main matter that is within its jurisdiction, the court may rule on the ancillary matter so long as a decision in the ancillary matter is necessary to decide the main matter. Incidental jurisdiction was originally intended only for the civil courts, but the Shari'ah Appeals Court adopted it in order to expand its jurisdiction, employing the same rationale used for establishing inherent jurisdiction.

The second method used by *Qadi Zoebi* to broaden the theory of inherent jurisdiction was illustrated in a judgment dated December 17, 2000:

[The] court has inherent jurisdiction not only in the absence of legislation relating to the procedural matter or to jurisdiction, but also when there is such legislation (which is not derived from the Divine Legislation or the Sunnah of the Prophet, but rather by positive legislation) and which does not answer the needs of the period, and is not commensurate with the values of justice and mercy and general order.¹³²

Here it is apparent that the Shari'ah Appeals Court understands inherent jurisdiction as being synonymous with natural law, which precedes positive law. In such a case the Shari'ah Appeals Court has the authority to defy the law, even when there is an explicit law stating otherwise. *Qadi Zoebi* discussed the example of the non-use of *mukhbirin* [experts] in matters of alimony, even though Section 31 of the 1917 Shari'ah Procedures require it.¹³³ A second example is the liberalization of the time period for submitting appeals. This has been allowed, disregarding Section 8 of the Regulations for Shari'ah Court of Appeals, which provides only a twenty day period in which one can appeal a decision of a regional Shari'ah Court. A third case demonstrating inherent jurisdiction concerned the determination of expenses in a manner that does not leave discretion to the Court. The Shari'ah

131. A. 85/95 (Dec. 31, 1995).

132. A. 2000/8, 94 (*Qadi Zoebi & Qadi Ziad Aslia*, concurring) (Dec. 17, 2000).

133. Law of Procedure of the Moslem Religious Courts of the 25th of October, 1333, A.H. § 31 (1917).

Appeals Court, under *Qadi Zoebi*, did not see itself as being restricted by such a provision. It preferred using inherent jurisdiction as opposed to positive legislation. Such inherent jurisdiction would only “be used when the law contradicted the needs of the period or is not appropriate to the principles of justice, mercy and general order.”¹³⁴ It could be said that the Shari’ah Appeals Court has its own normative hierarchy. At the top of the pyramid are the Qur’an and the Sunnah. Beneath them are the principles deriving from the “needs of the period, the principles of justice, mercy and general order.”¹³⁵ These are followed by positive legislation, which relates to the Islamic Law. The positive legislation is *lex specialis* and prevails over general civil legislation. At the bottom of the hierarchy is the general civil legislation. Within this normative hierarchy there is no place for the Basic Law.

VI. STRENGTHENING THE SHARI’AH APPEALS COURT IN RELATION TO LITIGANTS

The Shari’ah Appeals Court has attempted to gain the public’s trust by use of the term “justice.” The Court established the principle that justice must be seen,¹³⁶ and on that basis was prepared to grant an extension for filing an appeal when dictated by justice.¹³⁷ The Shari’ah Appeals Court has also recently ruled that the Shari’ah Courts represent “Islamic Justice.”¹³⁸

Further, it has made improvements in the following procedural matters to enhance its status as a just forum for litigants:

1) *The right to appear before the Shari’ah Appeals Court:*

According to Section 10 of the Regulations for the Shari’ah Court of Appeals,¹³⁹ there are no oral deliberations before the Appeals Court and the appeals are conducted by way of the parties’ written pleadings. Despite this section, there have been cases in which the Court

134. *Id.*

135. *Id.*

136. See A. 28/94 (June 14, 1994); A. 229/2000 (Nov. 1, 2000); A. 203/2000 (Sept. 21, 2000).

137. See A. 2001/21 (Jan. 30, 2001).

138. A. 2000/92 (June 7, 2000). See also A. 60/2001 (Jan. 18, 2001).

139. See *Moslem Religious Courts*, § 10 (Oct. 10, 1918), in 2 LEGISLATION OF PALESTINE, *supra* note 16, at 461.

summoned the parties before for oral deliberations, without determining the precise criteria for doing so.

- 2) *Requiring qadis to provide the reasoning behind their decisions:* In a long series of judgments, the Shari'ah Appeals Court has established that the regional Shari'ah Courts must state the reasons for their decisions.¹⁴⁰
- 3) *The policy of refraining from imposing expenses:* To encourage parties to restrict their appearances before the Court to a minimum, the Shari'ah Appeals Court usually does not award expenses.¹⁴¹

However, together with the improvement of procedural matters, the Shari'ah Appeals Court *qadis* were also aware that litigants relate to the Court with a certain degree of contempt,¹⁴² and for this reason determined that the sanctions imposed by civil legal organs are also applicable in the Appeals Court. In one case, the Court lashed out at the litigants, referring to the appeal that had been filed as "unprofessional."¹⁴³ The Court has even gone so far as to criticize a Shari'ah attorney who represented a wife after he had represented her husband.¹⁴⁴ The court ruled that the ethical rules binding advocates are applicable to Shari'ah attorneys by force of the Chamber of Advocates Law,¹⁴⁵ and the Court directed the administration of the Court to transfer the file to the Attorney General.

VII. THE ATTEMPT TO WIN THE TRUST OF THE PUBLIC AND THE FEMINIST MOVEMENT

The *qadis* attempted to appease the Muslim public and fem-

140. See e.g., A. 28/94 (June 14, 1994).

141. See A. 88/00, 89 C (June 11, 2000). In an exceptional judgment dated February 4, 2001, expenses were ruled for the sum of NIS 5000. NIS is the abbreviation for Israel's national currency, the New Sheqel; in February 2001, one U.S. dollar was the equivalent of NIS 4.1215. Bank of Israel, Representative Foreign-Currency Exchange Rates, Average Rates for 2001, available at <http://www.bankisrael.gov.il/deptdata/mth/average/averg01e.htm>.

142. See A. 98/15 (Oct. 27, 1998).

143. See A. 95/93 C. (Nov. 7, 1995).

144. See A. 129/97 (Nov. 9, 1997) (Natur & Madlaj concurring).

145. This is a classic example of the numerous instances of inaccuracy of the Shari'ah Appeals Court. The Chamber of Advocates Law applies to the Shari'ah Advocates Regulations, 1963, by virtue of Regulation 8, and not by virtue of the Chamber of Advocates Law. The language of the Regulation is as follows: "A Shari'ah Attorney shall operate for the good of his client in trust and devotion, and shall assist the Shari'ah Court in dispensing justice. In the discharging of his duty he shall be subject, *mutatis mutandis* to the rules of professional ethics applicable to advocates in Israel."

inist organizations by distributing *marasim* [legal circulars].¹⁴⁶ These *marasim* were signed by all of the *qadis* serving in Israel at that time following the initiative of *Qadi* Natur.

The first *marsum* was directed at other *qadis* serving at that time in the Shari'ah Courts and included directives that the *qadis* are required to comply with as obligatory norms. The Shari'ah Court relies upon the *Maslaha* as one of the sources of Islamic law, and the *Maslaha* influenced the shaping of this *marsum*.¹⁴⁷ This first *marsum* intended to prevent the persistent expropriation of Muslims. Such expropriations were effected when Shari'ah Courts had approved *fatwas* through which *waqf* property was delivered to Israeli authorities. The approbation of selling *waqf* properties through *fatwas* delivered by *qadis* severely damaged the faith reposed by the Islamic community in the Shari'ah system, and caused criticism of the Shari'ah Courts. This circular uses the example of renting an asset that was endowed for a period of forty-eight years. Relying on the interest of the *umma*,¹⁴⁸ the circular directed the *qadis* not to issue *fatwas* that permit acts against the endowment note, notwithstanding the existence of legal opinions allowing such acts. This *marsum* explains the prohibition as deriving from the fact that such acts "do not serve the national interest," and prohibits sales, leases, mortgages, bartering or granting permission for other use of an endowment. The *marsum* instructs *qadis* to appoint guardians for endowments and to review their activities on a twice-yearly basis. Any action relating to the endowment must be registered. The basic aim of the *marsum* is to achieve transparency of the endowment's administration, and it also recognizes the principle of freedom of information, stating that "Muslims have the right to know about the condition of their endowment."

The second circular, "The Role of *Mukhbirin* in Matters of Alimony," was published January 14, 1995. This second *marsum* relies upon the "*siyasa shar'iyah*." In Islamic literature, this is a discretion that is recognized as the source of the *Imam's* authority to regulate particular matters without contradicting the

146. The plural form is *marasim* and the singular is *marsum*. All three *marasim* are on file with the author.

147. *Maslaha* refers to the consideration of "public interest." For a discussion on *Maslaha*, see MOHAMMAD HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 267-82 (1991).

148. *Umma* means the Muslim community.

Shari'ah.¹⁴⁹

The circular relates to Section 31 of the 1917 Shari'ah Procedure Law and is a relatively long *marsum*. In essence, it deals with the two categories of support recognized by Islamic law: minimum support for former wives, and support for a woman whose former husband is wealthy. With respect to both categories of maintenance, the Shari'ah Courts have appointed *mukhbirin*, people whose roles are to assess the maintenance sums. The *marsum* ruled that in divorce cases women were discriminated against, being the weaker parties in handling their legal suits. In this context, the *marsum* makes note of the opinions of feminist organizations calling for the transfer of authority in these matters from the Shari'ah Courts to the district court. The *marsum* contains an apologetic discourse in which Islam is presented as protecting the woman's right to "equality and dignity," but in doing so, it ignores the problems occasioned by a clash between Islamic law and human rights. Having presented the Islamic law and the statutes adopted by Arab States, the *marsum* directs "the *qadis* of the noble Shari'ah to utilize the *mukhbirin* in the assessment of the sum of maintenance. The *qadis* rule on the basis of evidence presented to them to determine the sum of maintenance in accordance with accepted convention, thereby reaching the most just determination"¹⁵⁰

The third legal circular was adopted on February 4, 1996, and it addresses the issue of a last will and testament. Among the reasons given for this circular, it states:

[W]e are responsible firstly to God and secondly to man, to do our utmost to prevent harm. Furthermore, we are obliged to ensure justice between men, to assist both the weak and

149. See generally Mohammad Hashim Kamali, *Siyasah Shar'iyah*, 6 AM. J. OF ISLAMIC SOC. SCI. 59 (1989). Kamali states the following:

Siyasah shar'iyah is a broad doctrine of Islamic law which authorizes the ruler to determine the manner in which the Shari'ah should be administered. The ruler may accordingly take discretionary measures, enact rules and initiate policies as he deems are in the interest of good government, provided that no substantive principle of the Shari'ah is violated thereby. The discretionary powers of the ruler under *siyasah shar'iyah* are particularly extensive in the field of criminal law. The head of [S]tate and those who are in charge of public affairs, the *'ulu al amr*, may thus decide on rules and procedures as they deem appropriate in order to discover truth and to determine guilt.

Id.

150. See A. 135/98, which rather strangely refers to Section 31 of the Shari'ah Procedure Law.

minors, and to deal with topics of which complaints are increasing. The source of any reform or amendment must reside exclusively in the Shari'ah. We should use the principles and the foundations of the Shari'ah in order to generate an original reform, which is grounded in Shari'ah adjudication, and not on the ideals of litigants with no religious commitment. We have chosen to do this by way of legal circulars which were also used in the past.

The *marsum* then proceeds to elaborate upon the source of the authority and the reasons that necessitated the reform:

Given that the Muslims in this country do not benefit from endowments established to allow their coming close to God and in order to help persons in need. And for the needy persons who should have been the first ones to benefit from the endowment and the services of the Islamic institutions, which the social Islamic State established, to maintain societal harmony and human solidarity, there is no option but to appoint persons responsible for the prevention of harm to those people and by virtue of our responsibility for their well-being. It is the *siyasah shar'iyah* to open the doors of mercy to these people, the same doors that are opened by the Shari'ah itself, and to adopt the view that is easier and more convenient for them. It allows us to establish the justice which is based upon the Islamic source. Shari'ah adjudication is charged with the maintenance of justice, and our adherents in this country are entitled to benefit from Islamic justice and judicial justice. We consider it the right of all Muslims to apply to the Shari'ah Courts in order to avail themselves of the Shari'ah in their daily lives. It is, therefore, unacceptable that a Muslim should seek Islamic adjudication and not receive assistance and not find justice. We therefore have decided to mandate the principle of a Will and Testament for the deceased person's estate after his son and the other children, subject to the following qualifications

This *marsum* purports to provide a solution for the following legal issue: in Islamic inheritance law, when a father dies before the grandfather, the grandchild will not inherit from the grandfather. The *marsum* examines the legislation in Egypt, Jordan and Syria,¹⁵¹ and then proposes a legal reform. The main reform gives the grandchild the right to inherit from his grandfa-

151. See JAMAL J. NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* 241-42 (2002).

ther even if his father passed away prior to his grandfather. Such cases are treated as if there had been a will and testament.¹⁵²

Assuming their legality,¹⁵³ these *marasim* had dual roles. On a level external to the Shari'ah Courts, they give the Courts legitimacy in the eyes of the public at large. The first *marsum* indicates that the *qadis* will no longer cooperate with the Israeli authorities in the expropriation of Muslims endowments. The second and the third *marasim* indicate that Islam protects human rights generally, including women's rights.

The first *marsum* reveals the nationalistic aspect of the court as the protector of land. The other two demonstrate the harmony between human rights and Islam, and in doing so convey a message of conciliation to the groups active in promoting women's rights.¹⁵⁴

From the external Shari'ah perspective, these circulars can be regarded as strengthening the status of the Shari'ah Appeals

152. In all events, the grandchild's portion shall not exceed one third.

153. As to the legality of circulars: they violate the principle of the separation of powers, given that *marasim* are actually legislative acts; they amount to non-compliance with Section 31 of the Shari'ah Procedure Law; and they also violate the principle of legality. See generally Ramadan, *supra* note 2.

154. There are two main areas of discrimination against women in family matters in classical Islamic law: the ability of a man to divorce his wife without her consent, whereas the woman is unable to divorce her husband, except with his consent; and the possibility of a Muslim man to still have up to four wives without such possibility being offered to the women. Discrimination against the men includes the obligation of the husband to pay alimony to his wife, and the non-existence of such obligation for the wife. See SHAHEEN ALI SARDAR, *GENDER AND HUMAN RIGHTS IN ISLAM AND INTERNATIONAL LAW: EQUAL BEFORE ALLAH, UNEQUAL BEFORE MAN?* (2001) (discussing the compatibility or incompatibility of Islamic law and human rights with regard to gender discrimination); see also ASGHAR ALI ENGINEER, *THE RIGHTS OF WOMEN IN ISLAM* (1992) (making a distinction between contextual Qur'an verses and normative verses). Contextual verses described women's situation during the period of revelation of the Qur'an and are discriminatory against women. Normative verses are normative in the sense that they prescribed the status of women in terms of how it should be, and recognized the equality between men and women. See Mohammad Fadel, *Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought*, 29 INT'L J. MIDDLE E. STUD. 185, 185-204 (1997) (addressing the disparity in the treatment of testimony proffered by females as opposed to that proffered by males under Islamic law, whereby the testimony of two women is equivalent to the testimony of one man). Fadel explains that in addressing this disparity, a distinction is made between political discourse, which concerns more legalistic claims, and the normative discourse, which establishes a universal fact or norm. Whereas in the first category, in the confines of the legal context, there is a discrimination against women in testimonial matters, in the second category there is no such discrimination and a woman can transmit the saying of the Prophet as a man without discrimination.

Court, as opposed to the civil courts. For example, the first circular demands that the decisions of the Shari'ah Courts be examined by the Shari'ah Appeals Court. The appointment of a guardian for endowment assets must be reviewed by the Shari'ah Appeals Court. The second circular explicitly confronts the danger to the Court's jurisdiction, caused by calls from feminist groups to remove the jurisdiction from it to the civil court, by ordering the use of *mukhbirin* in an attempt to increase the amount of alimony allocated to former wives.

VIII. *THE CRISIS OF THE SHARI'AH SYSTEM*

Although the Shari'ah system began to gain some credibility in the 1990s, in great part to the activity of the Shari'ah Appeals Court, it entered a crisis caused apparently by three affairs. The first affair relates to a dispute that erupted between the Nazareth Municipality and the Islamic *waqf* in Nazareth, over a palladium that the Municipality claimed was designated as a public forum, known as *Shihab Aldin*. The Islamic *waqf* claimed that the site was designated for a mosque and an educational center. The matter expanded into a national problem. To resolve the legal question regarding the land classification, the Nazareth Municipality as well as other public figures requested the establishment of a clarification committee headed by *Qadi* Natur. On April 15, 1998, the Deputy Minister of Religion disallowed *Qadi* Natur from sitting on the committee, to allow the Court to decide the matter. A letter following from the Minister of Religion stated that the Deputy Minister had acted without authority. However, it also stated that the Minister did not agree to *Qadi* Natur participating on the committee; thus *Qadi* Natur complied with its instruction and did not sit on the committee. The Minister of Religion's decision was then appealed in the High Court, and the petition was rejected.¹⁵⁵

This affair harmed the position of the President of the Shari'ah Appeals Court and placed him in the difficult position of being pressured both to deliver the decision requested by the Islamic movement, and to comply with the instructions from Israeli government officials.¹⁵⁶

155. H.C. 2777/98, *Islamic Waqf Nazareth v. Minister of Religion* TK. ELY. 99(2) 132 (unpublished decision) (on file with author).

156. For further discussion, see LAJNAT AL-DIFA ET AL., *HISTORICAL, POLITICAL AND*

The second matter that pushed the Shari'ah system towards crisis relates to the adoption of children, which is proscribed by Islam. This prohibition is based upon the Qur'an and the fifth verse of the message of covenant-partners: "call the adopted children by the name of their father, for it is more correct in Allah's eyes."¹⁵⁷ This verse intends to discontinue the use of a custom from the period of *jahiliya*¹⁵⁸ by which an adopted son regarded his adoptive father as his biological father. The Prophet Muhammed himself adopted Zayd, and people referred to him as Zayd, son of Muhammed; however, after the revelation of this verse they begin calling him Zayd, son of Haritha.¹⁵⁹ In an oral opinion, *Qadi* Natur examined the issue of adoption, and in doing so adopted a more conservative view — an absolute prohibition of adoption. He was opposed by Sheikh Raed Salah, who believed in taking into account the interests of the Muslim public when considering adoption, thereby making the prohibition more flexible. Their relations deteriorated, causing an open split between the Islamic movement in Raed Salah's section, and the Appeals Court.¹⁶⁰

The third matter driving the Shari'ah system to crisis concerns the storm caused when feminist organizations petitioned the Israeli High Court to reject a *qadi* recommendation of the *Qadis* Appointments Committee, because in their opinion, he lacked the necessary legal or Shari'ah education.¹⁶¹ In the organizations' petition, they questioned the reasoning of the President of the Shari'ah Court of Appeals, A. Natur, who had previously opposed appointing a candidate because he did not have

SHARI'A[H] ASPECTS (1998); Joseph Algazy, *Les Islamistes, une Force qui Compte en Israel*, LE MONDE DIPLOMATIQUE, March 2, 2000, at 23; Daphne Tsimhoni, *The Christians in Israel: Aspects of Integration and the Search for Identity of a Minority Within a Minority*, in MIDDLE EASTERN MINORITIES AND DIASPORAS 124-52 (Moshe Ma'oz & Gabriel Sheffer eds., 2002).

157. *Al-Ahzaab* 33.5.

158. *Jahiliya* is the period preceding the emergence of Islam.

159. 2 IBN KATHIR, TAFSIR AL QUR'AN AL'AZIM § 5, at 423-24 (1970); 3 AL-QUUR-TUBI, AL JAMI' LI-AHKAM ALQU'AN AL-'AZIM 119-21 (1967). On the problem of adoption in Islamic law, see generally MOHAMMAD H. FADEL, FOUNDINGS AND ADOPTION: TOWARD AN ISLAMIC LAW OF ADOPTION (n.d.) (on file with author).

160. This opinion is based on the author's interviews with Islamist leaders in May and June 2000 in the city of Um Al-Fahim. For the position of another Islamist leader on the issue of adoption in Islamic law, see *Panel on Adoption Organized by Sanad for the Welfare of the Child and Motherhood*, SAWT AL-HAQ WAL-HURRIYA, June 16, 2000, at 2-3.

161. H.C. 1008/01, Miriam Suleiman Amar, et al. v. Minister for Religious Affairs, et al. T.K. D.S. 11455(1) (2001) (unpublished decision) (on file with author).

an academic degree.¹⁶² In this case *Qadi* Natur supported a candidate without a legal or Shari'ah degree.¹⁶³

These three cases clearly damaged the Shari'ah system. The Appeals Court had striven to achieve certain balances: the presentation of the nationalist discourse as opposed to the conservative position which was adopted in *Islamic Waqf Nazareth*, accentuated the fact that a *qadi* in Israel is subordinate to Israeli authorities and has to obey them. The case involving the adoption of children influenced a wide sector of the Muslim population and its Islamization. Finally, the attempt to synthesize Islam and women's rights was also undermined when the *Qadi* Appointments Committee was criticized by women's organization for its alleged support of a candidate without Shari'ah or legal education.

These factors are not the only reason for the crisis of the Shari'ah system in Israel. But, they are indicative of the permanent tension between the feminist movement and the Islamic movement. The Shari'ah system in Israel does not give full rights to women despite the Equality of Rights Law.¹⁶⁴ Despite the fact that this law was intended to establish equality between men and women in all legal acts,¹⁶⁵ it does not cover marriage and divorce,¹⁶⁶ areas in which the main inequalities exist in Islamic law as applied in Israel. There is an additional law, which criminalizes unilateral divorce by the husband and criminalizes polygamy, but it does not go far enough in protecting women because it only applies criminal sanctions to the offending husband without creating civil remedies for the wife.¹⁶⁷ The reservations of the State of Israel to the Convention for the Elimination of All Forms of Discrimination against Women ("CEDAW")¹⁶⁸

162. H.C. 7193/97, Mustafa 'Abed v. The Minister of Religious Affairs, 52(5) P.D. 365.

163. Petitioner's brief at 6, H.C. 1008/01, Miriam Suleiman Amar, et al. v. Minister for Religious Affairs, et al., T.K. D.S. 11455(1) (2001) (unpublished decision) (on file with author).

164. The Equality Rights Law, 1951, S.H. 82.

165. *Id.* art. 1.

166. *Id.* art. 5.

167. See LAVISH, *supra* note 20, at 73-74, 132-34.

168. 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]. "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." K.A.

and to the International Covenant on Civil and Political Rights ("ICCPR")¹⁶⁹ are symbolic of these inequalities.¹⁷⁰

From the Islamic perspective, the current Shari'ah system suffers from at least three main legitimacy problems: the education of the *qadis*; the appointment of the *qadis*; and, the absence of an organ that functions as a legislature for the Muslim community. The first generation of *qadis* was educated in Al-Azhar.¹⁷¹ By the 1960s, after the death of the last *qadis* educated there, the Shari'ah system entered a period of crisis and the problem gave rise to a widespread debate that produced no solution.¹⁷² The *Qadi* Law of 1961 did not mandate formal Shari'ah education.¹⁷³ The recent *Qadi* Law of 2002 raised the required level of education, yet it too failed to mandate formal Shari'ah education.¹⁷⁴ At the present time, no *qadi* has completed a degree in a Shari'ah school, and the recent *Qadi* Law states that the failure to impose this requirement is based on the absence of any system of permanent and formal Shari'ah education in Israel. This is inaccurate. There are at least two schools in Israel that teach Shari'ah: one is in Baqa and is recognized by the State,¹⁷⁵ and the other is in Um al-Fahim, although it has not received State recognition.¹⁷⁶ Another option available to Israel for improving the legitimacy of the Shari'ah system is to send Muslims to study Shari'ah in Turkey, Morocco, or Jordan. This absence of Shari'ah education of the *qadis* aggravates the process

1033, 197, 181, 31. CEDAW was adopted on December 18, 1979, and became effective in Israel on November 2, 1991.

169. 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].

Having consideration for Section 34 [sic 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, 295, 270, 31.

170. These inequalities are not unique to Islamic law. See Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis Under the United Nations Charter*, 35 COLUM. J. TRANSNAT'L L. 271 (1997).

171. See generally ZEGHAL, *supra* note 22.

172. PELED, *supra* note 24, at 120-27.

173. The *Qadis* Law, 1961, S.H. 339.

174. The *Qadis* Law (No. 10) 2002.

175. LOUER, *supra* note 26, at 204-07.

176. See generally Peled, *supra* note 74.

of secularization of Islamic law and the Muslim public's mistrust of the system.

Additionally, in Israel, when deciding cases the *qadi* cannot refer to *ulama*, a community of Muslim scholars who are specialists in Islamic law, and their written scholarship: there is no corpus of *ulama* in Israel. If such a body did exist, it could provide the necessary guidance and knowledge to *qadis*.¹⁷⁷

The second legitimacy problem that the Shari'ah system struggles with is the appointment system for *qadis*, in which non-Muslims are allowed to play a role. Under the *Qadi Law*, the appointment committee must be composed of nine members, of which only five must be Muslim. The other four may come from any religious denomination and there have been non-Muslim members of the government and the Parliament. Once the appointment committee nominates *qadis*, the President of Israel formally appoints them. Even though Hanafi Islamic law allows *qadis* to be appointed by infidels,¹⁷⁸ it nonetheless raises legitimacy problems. Bechor Shalom Shitrit, Minister for Minorities in 1949, had a keen appreciation of this problem, and to resolve it he proposed that Muslims in Israel appoint the chief *qadi* and that he, in turn, appoint the other *qadis*.¹⁷⁹

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'ah 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.¹⁸⁰

The third problem that the Shari'ah system suffers from is the absence of a Muslim legislature. All of the other religious

177. For a recent study of the role of *ulama* in contemporary Islam, see generally MUHAMMAD MUHAMMAD QASIM, *THE ULAMA IN CONTEMPORARY ISLAM: CUSTODIANS OF CHANGE* (2002).

178. *Id.* at 27. ("A Muslim judge, even if appointed by an infidel king, is acceptable as a Shari'ah judge.") (quoting Ashraf 'Ali Thanawi in 2 IMAD AL-FATWA 509 (*Mufti Muhammad Shafi* ed., Idarat ta'lifat I awliya 1294 A.H.)).

179. BECHOR SHALOM SHITRIT, *THE SUPREME ISLAMIC SHARI'A[H] COUNCIL* 16 (1949).

180. *See id.*

minorities in Israel apply their own personal status law that is adopted by their own responsible legislative body. The Muslim community does not have such a body and therefore does not choose its own religious law. The *qadis* apply a law that, for the most part, dates back to 1917. The procedural and substantive law was codified primarily during the Ottoman Empire. The antiquity of the law has created significant problems in adapting Islamic law to contemporary demands and circumstances. The Shari'ah Courts inevitably adapt the law, but they suffer from a lack of legitimacy because of the absence of formal Shari'ah education and the method of their appointment. Furthermore, the Israeli State does not take on the function of legislature because, according to its official policy, it does not interfere with substantive areas of Islamic law. The fact that Israel does not allow a Muslim legislature, however, does interfere with a substantive area of Islamic law.

IX. AN OUTLINE FOR A REFORM PROPOSAL

The Shari'ah Appeals Court has recently broadened its base of support. From 1954 until the middle of 1999, the Shari'ah Appeals Court gave 288 decisions dealing with child custody. More than half were given over the previous six years. About 394 claims relating to disputes under Section 130 of the Ottoman Family Law¹⁸¹ were filed from 1954 through 1999; of these, 253 claims were filed between 1994 and 1999. Between 1954 and 1966, there was only one ruling relating to child custody. Yet despite the increased judicial activity of the Shari'ah Appeals Court, it is currently in a state of crisis. The enactment of the Family Courts Law (Amendment No. 5) 2001 can be interpreted as symbolizing the failure of reform attempts within the Shari'ah system, since this amendment reduces the jurisdiction of the Shari'ah Courts in Israel. Once enacted, some matters that were formerly under exclusive jurisdiction of the Shari'ah Courts (e.g., custody, alimony, and maintenance) also fell under the parallel jurisdiction of the civil judiciary system. Feminist organizations were steadfast in their support of the enactment of this

181. Section 130 of the Ottoman Family Law recognizes the right to dissolve a marriage on the initiative of both spouses when there is "*niza' washiqaq*" [discord and incompatibility]. On Section 130, see LAYISH, *supra* note 20, at 168-71, 206-09; YA'AKOV MERON, *MOSLEM LAW IN COMPARATIVE PERSPECTIVE* 147, 150-51, 213 (2001).

law in the Israeli Parliament, despite the Court's reform attempts. Sheikh Raid Salah, the head of the northern branch of the Islamic movement, regarded the law's enactment as a plot against Muslims, and he called for the establishment of private Shari'ah Courts.¹⁸² The result is that the Shari'ah Court finds itself under attack from both sides, and one can conclude that the Court's structural crisis results mainly from both an absence of respect for women's rights and the absence of religious legitimacy.

In this section, I will briefly suggest two possible reforms that address these problems. Given the space constraints, however, my suggestions cannot be adequately developed at this time and their full exploration will have to wait for a future article. In this context, I will limit my comments to their main tenets, though many questions will need further development. Autonomy for the Muslim minority in Israel is the key to addressing both the Islamic critics and the feminist critics.

Currently, the Shari'ah system does not benefit from autonomy as do the Christian and Druze communities.¹⁸³ Autonomy

182. SAWT AL-HAQ WAL-HURRIYA, Nov. 9, 2001, at 12-13.

183. There are two primary models of religious autonomy in Israel for recognized religious minorities. The first model is the full autonomy model, in which the community in question maintains its own representative body. This representative body chooses its leaders according to their respective religious laws without any legal interference from the State and without the need for any act of confirmation by the State. In this model, the representative of the religious community is empowered to render its own rules in matters over which it permissibly exercises jurisdiction. This autonomy is protected by international agreement and cannot be modified unilaterally. All of the decisions rendered through the representative body, regardless of its position outside of Israel, are recognized. An example of this first model is the Catholic Church. Indeed, the Catholic community in Israel benefits from the highest degree of autonomy. The church itself defines its own organization and its own law. The Pope establishes canon law. The Church itself establishes its own organization without any legal intervention of the Israeli State. Concerning the organization of the Catholic community in Israel, one should differentiate between Latin Catholics, who submit directly to the authority of the Pope, and the Oriental Catholic communities who have their own autonomy within the Catholic Church. This religious autonomy is anchored in bilateral agreements between the Holy See and the State of Israel on the one hand, and in agreements between the Ottoman Empire and France on the other. See MOUSSA ABU RAMADAN, *La Protection de la Liberté Religieuse des Minorités en Israël*, 5 MEDITERRANEAN J. OF HUM. RTS. 251, 282-93 (2001); *Les accords de Mytilène de 1901 et l'Agrément de Constantinople de 1913*, in DE BONAPARTE A BALFOUR 57-69 (D. Trimbur & R. Aaronsohn eds., 2001). The second model is the restricted, or regulated, autonomy model. Under this model, the religious community has a representative body but the regulation of this representative body is not within the autonomy of the religious community. Rather, the autonomy is regulated unilaterally by the State and the community has no right to

may be defined as the recognition of jurisdiction over certain matters. Autonomy may be personal in that jurisdiction is exercised over persons based on their ethnic, linguistic, or religious affiliations. Autonomy can also be territorial if jurisdiction is exercised over all persons present in a certain territorial region of the State. In order for autonomy to emerge, the State must recognize the minority community and its representative organ.¹⁸⁴

In the Israeli Shari'ah system, the Muslim community is neither recognized by the State nor is there any Muslim representative body with the power to decide religious issues. The committee that appoints *qadis* is not permanent and it only nominates them; it is the Israeli President who officially invests *qadis* with their function. Although five of the committee's nine members are Muslim, this does not make it autonomous. The Shari'ah system itself is controlled by the Ministry of Justice, from which it receives its budget. This does not mean that the Shari'ah Courts cannot broaden their powers within the existing system or that Israel is a totalitarian State that controls every movement of all Muslim institutions. This is the case with the most prestigious Islamic institution, the *Sunni Alazhar*, which developed a certain amount of independence *vis-à-vis* the State during certain periods, even though it was incorporated in the bureaucracy of the Egyptian State.¹⁸⁵ But this is only *de facto* autonomy. Unlike the courts of the recognized religious Christian communities, the Shari'ah Courts in Israel are incorporated into the State court system, as are the Rabbinical Court and Druze

change its own organization. In contrast to the full autonomy model, the autonomy of this second model is not protected by international treaty and is subject to modification by the State, either by law or regulation. One example of this model is that of the Rome-Orthodox community. See Moussa Abou Ramadan, *La Loi Applicable à la Minorité Roun Orthodoxe de l'Etat d'Israel*, 50 *PROCHE-ORIENT CHRETIEN* 105-41 (2000). In addition, the Druze community was reorganized in 1995 and 1996 to fit this model. See GABRIEL BEN DOR, *THE DRUZES IN ISRAEL: A POLITICAL STUDY — POLITICAL INNOVATION AND INTEGRATION IN A MIDDLE EASTERN MINORITY* (1979); KAIS M. FIRO, *THE DRUZES IN THE JEWISH STATE: A BRIEF HISTORY* (1999).

184. For these elements, see Hans-Joachim Heintze, *On the Legal Understanding of Autonomy*, in *AUTONOMY: APPLICATIONS AND IMPLICATIONS* 7-32 (Markku Suksi ed., 1998). For the autonomy and international law, see generally RUTH LAPIDOTH, *AUTONOMY: FLEXIBLE SOLUTIONS TO ETHNIC CONFLICTS* (1997).

185. MALIKA ZEGHAL, *GARDIENS DE L'ISLAM: LES OULEMAS D'AL AZHAR DANS L'EGYPTE CONTEMPORAINE* (1996); Tamir Noustafa, *Conflict and Cooperation Between the State and Religious Institutions in Contemporary Egypt*, 32 *INT'L J. MIDDLE E. STUD.* 3, 3-22 (2000).

courts.¹⁸⁶ Strengthening the position of the Shari'ah Appeals Court and the present Shari'ah system does not lead to Islamic autonomy, given that the Shari'ah Courts are State courts, and as such are distinct from the ecclesiastic courts which, as stated, enjoy full autonomy. The Shari'ah Courts have undergone a process of bureaucratization,¹⁸⁷ but making them stronger has not enhanced Islamic communal autonomy. What has happened in fact has been a redistribution of power among government authorities, in this case, between the legislative authority and the judicial authority. The existence of the Shari'ah system in Israel at best could be called what one author refers to as polyethnic rights.¹⁸⁸

I propose the establishment of an organ to take charge of the appointment of the *qadis*, thus eliminating the problem of the nomination by non-Muslim authorities. This organ would have the power to adopt new Islamic law, which would be adapted to the current needs of Muslims in Israel. This organ would also develop and promote education in Islamic law. This solution would provide the Shari'ah system with the Islamic legitimacy it currently lacks. All of the officially recognized religious minorities in Israel enjoy autonomy. In granting autonomy to Muslims too, Israel will discharge its obligation to guarantee equality for all religious minorities.

Autonomy, like many other collective rights, could create a problem for minorities within the minority. This problem could be resolved by creating an opt-out provision for those who believe that their rights have been damaged. The second mechanism for limiting oppression of internal minorities is the election of members to the representative organ. Elections, particularly in a system of proportional representation, would encourage representatives of the community to undertake the necessary reforms or face the prospect of being ousted from office. Elections would also avoid the longstanding tension such as that

186. For a different point of view, see LAYISH, *supra* note 20, at 2; Ilan Saban, Framework for Comparative Analysis and the Arab-Palestinian Minority in Israel (on file with author); Ido Schahar, Palestinians in an Israeli Court: Culture, Control, and Resistance in the Israeli Shari'a[h] Court of West Jerusalem (2000) (unpublished M.A. thesis, Hebrew University) (on file with author).

187. David Neuhass, Between Quiescence and Arousal: The Political Functions of Religion: A Case Study of the Arab Minority in Israel, 1948-1990, at 33-38 (1991) (unpublished Ph.D. dissertation, Hebrew University) (on file with author).

188. WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 30-31, 37-38 (1995).

which exists in the Christian Orthodox community between members of the community and the Patriarchate, who is chosen by the Greek Orthodox Church and not the community.

The solution briefly described above will require courage from decision-makers. When the State of Israel was established, a Ministry of Minorities was created and was filled by Bechor Shalom Shitrit who tried to give some form of organization to the Muslim minority. However, the Ministry was abolished shortly thereafter and no similar attempt has been made to date. In the period stretching from the 1950s through the 1980s,¹⁸⁹ the fear was that Islam would foster nationalism. Later, in the 1980s, the Israeli authorities became afraid that the Shari'ah system would be taken over by the internal Israeli Islamist movement, forgetting that one of the reasons for the rise of the Islamist movement was the absence of a credible Shari'ah system and autonomy for Muslims. Now, after September 11 2001, political resistance to autonomy for Muslims has worsened because of the perceived "Islamic threat."¹⁹⁰

CONCLUSION

In this Article, I have shown that the Shari'ah Appeals Court attempted to occupy the vacuum existing in religious Islamic law. The Court asserted its authority in a number of ways: by reaffirming its power over the regional Shari'ah Courts; by imposing its authority over the litigants before it; and by enhancing its symbolic image. The Shari'ah Court even created its own hierarchy of law by relying heavily on Islamic law and less so on Israeli State law. The Court also attempted to pass its own version of legislation by issuing new circulars, which were designed to gain the confidence of feminist and Islamic movements. However, in some cases, it was unsuccessful in expanding its powers with relation to the civil courts. Notwithstanding this aggrandizement of power, the system is in crisis. I have argued that the crisis is structural because the Shari'ah system is, and

189. Peled, *supra* note 24, at 7.

190. On July 17, 2002, the Supreme Court of Israel dismissed a petition on behalf of *Sheikh* Raed Salah, one of the leaders of the Islamic movement in Israel, requesting the court to declare the illegality of an order issued on February 16, 2002, prohibiting Salah from traveling outside the country. See H.C. 4706/02, Raed Salah, et al. v. The Minister of the Interior, 56(5) P.D. 695. On May 13, 2003, the head of the Islamic Movement and other Islamic Movement leaders were arrested and detained.

continues to be, attacked both by the Islamic movement as lacking Islamic legitimacy and by the feminist movement as discriminating against women. To resolve this structural crisis I propose granting religious autonomy to Muslims, thereby enhancing Islamic legitimacy, while at the same time giving the right of exit to minorities who feel oppressed. For this solution to be adopted, the Israeli political community must embrace a less fearful attitude towards the "Islamic threat" and the Orthodox Jewish community must change its attitude toward the relationship between State and religion. Until this happens the Shari'ah system will face permanent structural crisis, despite its short period of strength.