5. The Shari‘a Court in West Jerusalem and the Civil Family Court: Forum Shopping and Inter-organizational Competition

The shari‘a court in West Jerusalem and the civil family court in the city are both Israeli statal tribunals: both are accountable to Knesset legislation and to judgments of the High Court of Justice, and both are part and parcel of the Israeli legal system. The subjection of the Muslim population in Jerusalem, in certain matters of personal status, to both tribunals is therefore a clear case of “state legal pluralism” (Woodman 1998, 1999). Nevertheless, despite the fact that these two tribunals operate under the aegis of one overarching system, they are also radically different in almost every respect: they employ different bodies of law and different rules of procedure; they speak different languages (Arabic is spoken in the shari‘a court, Hebrew in the civil family court); and they are characterized by different legal and organizational cultures.

According to John Griffiths (1986a), this type of legal pluralism, which occurs within the framework of the state legal system, should be regarded as "weak” legal pluralism – that is, legal pluralism that bears no social significance (see chapter 2). In his view, real, "empirical", “strong” legal pluralism cannot exist within the framework of the state legal system, for after the state grants recognition to a body of law, this law may no longer be considered a separate legal system. Thus, if scholars refer to such a situation in terms of legal pluralism, their point of view is normative or doctrinal (hence “juristic”), but not empirical or “social-scientific”. And yet, contrary to Griffiths’ view – which has become prevalent among students of legal pluralism – I contend that this type of “state legal pluralism” is in fact very significant and very consequential. I argue that if we replace Griffith's state-centered perspective with an agent-centered perspective, and focus our attention on the litigants’ point of view, it becomes clear that appealing to one tribunal rather than the other may have crucial implications even if both tribunals belong to the same state apparatus. State legal pluralism cannot be perceived, therefore, as “weak” or socially insignificant.

As I will try to show, the choice whether to appeal to the shari‘a court or to the civil family court in certain matters (e.g. maintenance suits) is indeed a significant choice: it is consequential not only with regard to the legal outcomes of the suit, but also

with regard to the very future of the family unit. No wonder, therefore, that Muslim litigants in Jerusalem (primarily women) are engaged in active "forum shopping", striving to have their dispute tried in a particular court, where they feel they will attain the most favorable judgment or judgment.[1] The staff of the Israeli shari'a court in West Jerusalem are not indifferent to the implicit (and sometimes explicit) competition posed by the civil family court, and they respond to this competition in various manners.

It is my contention, therefore, that contrary to Griffiths' (1986a) suggestion, the study of legal pluralism that occurs within the parameters of the state legal system should not be left to jurists or to scholars interested in doctrines alone. Rather, social scientists should pay attention to this phenomenon and to its social and institutional implications. This chapter therefore examines the far-reaching consequences – from the litigants' point of view, as well as from the institutional point of view – of the parallel operation of the shari'a courts and the civil family courts.

Since the relations between these two court systems and their respective jurisdictions have changed over the years, the chapter traces the historical development of these relations. The most significant landmark in the history of the relations between the two systems has been a legislation amendment that passed in the Knesset on November 2001, which accorded civil family courts jurisdiction in several matters pertaining to Muslims' personal status that were previously under the exclusive jurisdiction of shari'a courts. The direct result of this legislation was that Muslim litigants gained even greater freedom of choice between the shari'a and the civil courts, and that legal pluralism became even more pronounced. The chapter opens, therefore, with a discussion of the state of legal pluralism that had prevailed before the passing of the 2001 legislation amendment. Following this brief presentation, the second section reviews the conflictual process that led to the legislation amendment, focusing on the fierce struggle between various groups and interests that pushed for and against the legislation. The next two sections examine the consequences of the 2001 shift to a more conspicuous state of legal pluralism. The third section describes the consequences at the individual level, and particularly the greater possibilities of "forum shopping" opened to litigants. The fourth

[1] For a simple definition of legal forum shopping, see Black's Law Dictionary, 2001 (2nd pocket ed.): 590. See also chapter 2 above.

and concluding section examines the consequences at the institutional level – that is, the growing competition between the two court systems, and the reactions of shari'a courts in general, and the West Jerusalem shari'a court in particular, to this competition.

A. Shari'a Courts in the Israeli Legal System until 2001: Legal Pluralism, but Certainly Weaker

As thoroughly discussed in chapter 2, my conceptualization of "weak" and "strong" legal pluralism diverges from Griffiths' (1986a) conceptualization. Griffiths' criterion for distinguishing "strong" from "weak" legal pluralism is the recognition or non-recognition of the state: according to his terminology, "weak" legal pluralism occurs when the legal systems under consideration are recognized by the state, while "strong" legal pluralism occurs between the state legal system and other systems external to it. My own suggestion, following Vanderlinden (1989, 1993), is to distinguish between these two types of legal pluralism on the basis of the actors' – or in this case, the litigants' – point of view. "Strong" legal pluralism, according to my approach, thus occurs when an active individual, an agent, may choose to appeal – in a particular situation and for particular purposes – to more than one tribunal of law. In contrast, when a legal system designates specific tribunals (or "legal mechanisms", to use Vanderlinden's term) to specific categories of population (e.g. Muslims, Chagas, Navahos, soldiers, tradesman, minors, etc.), and any one individual may only appeal to one of the tribunals, then this is a case of "weak" legal pluralism.

Bearing this conceptualization in mind, we may claim that until 2001, legal pluralism from the point of view of Muslim litigants in Israel was relatively weak. As described in chapter 3, due to historical contingencies, shari'a courts in Israel maintained broader jurisdiction than any other religious courts. In fact, unlike the rabbinical, the ecclesiastical and the Druze courts, the shari'a courts were awarded exclusive jurisdiction in almost all matters of Muslims' personal status. As a result, Muslim women, for example, were unable – unlike their Jewish or Druze counterparts – to file maintenance suits in civil courts. Furthermore, while the Israeli legislator granted the civil courts jurisdiction in matters of child custody and child support among Jews, Druze and all

Christian denominations, for Muslims the exclusive jurisdiction of the shari'a courts in these matters has been retained.

Thus, from Muslim litigants' point of view, legal pluralism until 2001 has been relatively weak. Still, civil and penal legislations that were passed by the Knesset have resulted in the strengthening of legal pluralism for Muslims as well. Several laws (e.g. the Age of Marriage Law, the Succession Law) have granted the civil courts jurisdiction in some matters of personal status of Muslims (see chapter 3). Moreover, the strategy adopted by the Israeli legislator, of criminalizing certain "traditional" mores that are sanctioned by Islamic law (such as polygamy, minor marriages, unilateral divorces), has also resulted in enhancing legal pluralism.

Thus, for example, the ban on unilateral divorce (without the wife's consent)[2] created a situation in which a matrimonial dispute between Muslim spouses could have been dealt with in three separate legal procedures: a shar'i procedure, a civil one, and a penal procedure (each in a separate court). Even if these parallel procedures are not held simultaneously, the mere option of resorting to more than one court of law has implications for both the management of the dispute and the legal litigation in each of these courts (Shahar 2004). In addition, since matrimonial disputes often constitute complex, multi-dimensional conflicts, spouses may resort to different legal mechanisms or different legal tactics in their struggle with the opponent party.

This is illustrated by a case I witnessed back in 1998, where an obedience suit (*ta'a*) was filed by a wealthy husband against his wife, who allegedly left the nuptial house without a proper shar'i justification.[3] The husband therefore demanded the immediate return of his wife to the nuptial house. During the hearings in the shari'a court it became clear, however, that the *ta'a* suit was filed in response to a civil suit for the "division of property between spouses", which was filed earlier by the wife in the civil family court.[4] Although the procedures for handling these parallel suits were very different, and although the legal confrontation between the spouses was conceptualized in a totally different manner in the two tribunals, the matrimonial dispute behind these two suits was one: the wife, who had been separated from her husband for more than two

[2] Women's Equal Rights Law, 5711-1951, article 8 (b).
[3] On *tā'a* suits, see chapter 4, note 9.
[4] On the establishment of specialized family courts see below.

years, was afraid – as I was later told by her lawyer – that the sewing workshop that her husband owned was about to be liquidized. Seeking a way to ensure her share in this family asset, she filed a suit for the division of property between spouses in the civil family court (for a detailed description of this case, see Shahar 2000: 68-71).[5]

Eventually, this dispute was apparently resolved outside the courts that dealt with it,[6] but it clearly demonstrates litigants' ability to manipulate the legal system for their advantage. It appears that although Muslim women have been unable to file maintenance suits in civil courts until 2001, they could circumvent this restriction by filing a civil suit for the division of property. Conversely, husbands who felt that the litigation in the family courts would work against them, could always file an obedience suit in the shari'a court, striving – if not to compel their wives to return to the nuptial house – at least to complicate things and to forestall the legal proceedings.

We may conclude, therefore, that although prior to 2001 the shari'a and the civil courts did not have parallel jurisdiction in most matters of personal status (except for succession), the same matrimonial dispute could yield several suits, which were adjudicated simultaneously in both these courts (and in other courts as well).[7] In such cases, the actions taken by one of the courts and the judgments it issued affected the actions and judgments of the other court(s) dealing with the same dispute. Thus, from Muslim litigants' point of view, legal pluralism was quite significant even before November 2001. However, the 2001 legislation created an even stronger situation of legal pluralism, as will be described in the next section.

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[5] I could not follow the hearings in this case closely back in 1998. Nevertheless, since it was an interesting case, I returned to this file several years later. It appears that the hearings were postponed several times, and that eventually the case was deleted from the court schedule, after the parties did not return for more than six months. I asked the wife's lawyer – a prominent "repeat player" in the shari'a court – why was this suit abandoned by the husband. He told me that the wife's family – some of them high ranking officers in one of the Palestinian Authority's security mechanisms – have exerted some not-very-delicate pressures on the husband, who consequently agreed to pay the wife 100,000 shekels. Following that, all the cases were dropped in all the tribunals (A conversation with M.R., June 16th 2002; file number is not disclosed).

[6] It is noteworthy that the husband, who was not satisfied with the obedience suit he filed in the Israeli shari'a court, has also filed a similar suit in the Jordanian shari'a court as well (See Shahar 2000:70). As described in the previous note, the dispute was resolved when the husband paid 100,000 shekels to his separated wife.

[7] For a detailed discussion of the powers of Israeli civil courts to deal – before the amendment of 2001 – with the "civil aspects" of family disputes of Muslim litigants, see Shava 1998b: 361-364.

B. A Threat Materialized: The Struggle over Exclusive Jurisdiction, 1995-2001

The Family Courts Law, 5755-1995, which ordered the establishment of civil family courts in Israel, was enacted in the Knesset on July 31, 1995.[8] A persistent debate concerning the necessity of family courts in Israel, their possible jurisdictions, and their place within the Israeli legal system has preceded the enactment of this law (Arbel & Geifman 1997; Zamir 2002: 463-464). The main purpose of the Family Courts Law was to concentrate all the judicial jurisdictions of the various civil courts in matters relating to family disputes within the jurisdiction of one civil tribunal – the family court. Furthermore, the law was meant to concentrate all legal litigation relating to a single family dispute in the hands of a single judge, presiding in the family court (Shava 1998a: 49). The Family Courts Law was therefore a centralizing law, designed to solve the problem of "split hearings" in matters relating to the same matrimonial dispute (Arbel & Geifman 1997: 432).[9]

Undoubtedly, the establishment of integrative family courts constituted a major reform in field of family law in Israel, which affected not only the institutional structure of the judicial system, but also procedural and material laws (ibid; see also Geifman 1998: iii). However, this reform was not intended – as specifically noted in article 25 of the Family Courts Law – to reduce the jurisdictions of the religious courts. Thus, as revolutionary as it was, the establishment of family courts should be viewed as an internal reform within the civil legal system, and not as an attempt to change the "status quo" between religious and civil domains. Indeed, the enactment of the Family Courts Law in July 1995 was not meant to change the basic millet-like features of the personal-status regime employed in Israel.[10]

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[8] *Sefer Ha-Chukim* 5775-1995, 1537, p. 393.

[9] According to Arbel and Geifman (1997: 432), the old arrangements "opened room for manipulations employed by litigants, and invited multiplicity of pleas and suits, which were only meant to thwart the legal procedure, or at least meant to serve as a tactical move, aimed to put pressure [on the other party], in order to achieve a better result". Thus, it may be argued that the purpose of the law was to reduce the legal pluralism that prevailed in the legal system. This pluralism is often viewed by lawyers and legal scholars in negative terms, for not only does it reduce the "efficiency" of the legal system, it also impairs the principle of the unity of law. See, for example, Steinberg 1990; Norwood 1996. For a succinct criticism of the plurality of legal procedures in the field of family law in Israel, see Rozen-Zvi 1990: 203-209.

[10] Nevertheless, some judges presiding in the recently-established family courts seized the opportunity to reshuffle the "division of labor" between the civil and the religious courts. Their attempts to further

Nevertheless, during the early 1990s, concurrent with the debate concerning the establishment of family courts, voices – originating primarily from liberal and feminist circles among the Palestinian Israeli community – have begun to demand that the respective jurisdictions of the civil courts and the shari'a courts would be changed. Specifically, they called for the equalization of the status of Muslim and Christian women to that of Druze and Jewish women. These Palestinian-Israeli activists argued that Muslim and Christian women are discriminated against, since unlike Jewish and Druze women, they are not allowed to file maintenance suits against their husbands in civil courts, and have no choice but appealing to religious courts. Muslim women in particular, more than the women of any other religious community, were denied access to the civil courts in family disputes,[11] and this, according to those feminist activists, prevented them from improving their position within the traditional patriarchal family (see e.g. Ibrahim 1993: 26-27).

Blaming the qadis presiding in the shari'a courts for being "conservative", and viewing the procedural and material laws employed by shari'a courts as inherently discriminating against women (Bishara & Toma- Suliman 1997), Palestinian feminists demanded that jurisdictions in matters of personal status of Muslim litigants would be conferred upon civil courts. Several women's organizations and civil rights organizations, both Palestinian and non-Palestinian, have joined hands in this struggle, and by 1995, a "Working Group for Equality in Personal Status Issues" has been established.[12] The

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broaden the jurisdictions of family courts, at the expense of the rabbinical courts, were promptly blocked by appellate courts decisions and by legislation amendments. See Shava 1998a; 2003.

[11] While Christian women were allowed to resort to civil courts in order to obtain maintenance for themselves or for their minor children, Muslim women were denied this option. Due to historical circumstances – which were discussed in detail in chapter 3 – shari'a courts had exclusive jurisdiction in all types of maintenance suits, while ecclesiastical courts maintained exclusive jurisdiction in alimony suits, and only concurrent jurisdiction in other types of maintenance suits. The difference between alimony and maintenance suits is as follows: "alimony" denotes the allowance that a husband who deserted his wife is ordered to pay to her; "maintenance" denotes the payments by parents for the support of their children, by children for the support of their parents, or by other relatives. "Maintenance" also denotes the allowance secured to a wife when the parties are separated by mutual consent, as well as the payment that a court orders following a divorce or a judicial dissolution of the marriage (see Goadby 1926: 160-162; Shava 1998a: 283, n. 18. See also High Court of Justice judgment 106/79, P"D 34 (1), 825). Notably, in Islamic law, a divorcee is not entitled to maintenance beyond the period of the *'idda.*

[12] The following organizations participated in this working group: "Women Against Violence"; "The Association for Human Rights in Israel"; "The Arab Association for Human Rights"; "Altufula: Pedagogical and Multipurpose Women's Center"; "Israel's Women Network"; "Shatil: Equal Access Project"; "Al-Siwar: Arab Feminist Movement in Support of Victims of Sexual Violence"; "Haifa Women's Shelter"; "The Association for Nurturing Family Relations"; "The Social Workers Association".

proclaimed goal of this group was to "combat discrimination against Arab women in the area of personal status, and change social norms by promoting significant changes in attitudes and behavior toward Arab women and their personal status issues".[13]

The Working Group for Equality in Personal Status Issues thus waged a public and political campaign for equalizing the legal status of Muslim and Christian women to the status of Jewish and Druze women. In 1995, shortly after the Family Courts Law passed in the Knesset, the group initiated a bill for the amendment of this law.[14] The main purpose of the proposed amendment was to grant Muslim and Christian women the option of recourse in maintenance suits – as well as in all other matters of personal status, except for marriages and divorces – to the new civil family courts.

In a clarification annexed to the legislative bill, the drafters presented statistical data from the database of the National Insurance Institute, which indicate that the sums of wives' maintenance and child maintenance payments adjudicated by shari'a courts are significantly lower than the sums adjudicated by family courts. They therefore concluded that in order to improve the status of Muslim and Christian women, it is mandatory to grant these women better access to the civil family courts. The implicit underlying assumption was that substantial and comprehensive legal equality between men and women can only be achieved in the civil courts, and not in the patriarchal shari'a courts.[15]

The relatively meager maintenance payments that shari'a courts allocated to Muslim women therefore not only attracted criticism towards these courts, but also motivated women's organizations to demand a restriction of these courts' jurisdiction. This enterprise was met by fierce opposition on the part of the qadis presiding in shari'a courts. Realizing the danger for shari'a rule, and aiming to prevent any detraction of their status and authority, the qadis – led by the charismatic, recently-nominated president of the shari'a court of appeal, Ahmad Natur – initiated a legal reform of their own.

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[13] Most of the information I managed to gather on the activities of the "Working Group for Equality in Personal Status Issues" is drawn from other civil society organizations that cooperate with this organization. See, e.g. the websites of the Association for Human Rights in Israel (http://www.acri.org.il/hebrew-acri/engine/story.asp?id=496); and the New Israeli Fund (http://www.nif.org/content.cfm?id=1370&currbody=1).

[14] See report in the website of the Association for Human Rights in Israel (http://www.acri.org.il/hebrew-acri/engine/story.asp?id=496).

[15] A bill draft prepared by the Working Group for Equality in Personal Status Issues, no individual author, no date is mentioned.

Striving to take the sting out of the bite of the feminist-liberal initiative, qadi Natur sought a method that would yield a systematic increase in the sums of maintenance payments adjudicated in shari'a courts. The solution he found was to initiate a reform that transfers the authority to determine the sums of maintenance from appointed informants (*mukhbirun*) to the qadis themselves. Instead of relying on informants for the purpose of gathering information concerning the husband's financial state, Natur suggested that the qadis themselves would determine the sums of maintenance payments, relying, for that purpose, on official state documents such as income tax and national insurance forms.

Interestingly, in order to achieve this reform, the qadis have made creative use of a unique judicial mechanism: the legal circular (*marsum qada'i*). This is a highly unusual legal instrument, both within the framework of the Israeli legal system and in the context of Islamic law. Prof. Aharon Layish, in a lecture at the Van-Leer Institute on May 14th, 1997, described the circumstances under which the idea of issuing a legal circular was conceived. Prof. Layish recounted that qadi Ahmad Natur – who is a former M.A. student of his – had been searching for a mechanism that would allow the introduction of legal reform without resorting to the statutory legislation of the Knesset.[16] Having studied legal documents from the period of the Sudanese Mahdi (Layish 1996, 1997), Layish suggested the mechanism of the "legal circular" (*Manshur qada'i*), which the British applied in the Sudan after the Mahdi's defeat. Qadi Natur embraced the idea, and the Israeli legal circulars (*marsumat qada'iyya,* as they were called here) came into being. Yet, while the Sudanese circulars were legally ratified by the British colonial administration, the circulars issued by the president of the Israeli shari'a court of appeal have no legal standing whatsoever.[17]

[16] From the point of view of the qadis presiding in Israeli shari'a courts, any interference of the Israeli parliament in procedural and material laws applied in the shari'a courts is highly problematic, for it might undermine the Islamic legitimacy of these courts. See chapter 6 for further discussion of the legitimacy problems encountered by Israeli shari'a courts.

[17] Indeed, Abou Ramadan (2003: 287, n. 153) claims that the *marsum*, being an act of legislation, violates the principle of separation of powers. Prof. Layish also wondered in his lecture what would happen "if someone would appeal to the High Court of Justice against a judgment based on these circulars". And yet he also quoted qadi Natur, who had claimed that the *marsumat* may be defended in the High Court of Justice on the grounds that they fall within the interpretive authority of the qadi (Layish, a lecture at the Van-Leer Institute, 14.5.97, and personal communication. See also Layish, forthcoming). For a detailed discussion of this circular see Shahar, forthcoming.

Nevertheless, all the qadis holding office in Israeli shari'a courts signed the circular, thereby committing themselves to apply the procedural reform suggested by it.[18] It seems, however, that the qadis have committed themselves not only to the procedural reform, but also to the notion of allotting more generous sums as maintenance payments. In the months following the promulgation of the circular, a 50% rise in the sums of maintenance has been noted in the shari'a court inWest Jerusalem.[19]

This procedural reform, which was proposed and enacted by the qadis independently of Knesset legislation and of any other governmental ministry/agency, was explained and legitimized by way of adopting a liberal "Islamicized" discourse, combined with a Palestinian nationalistic discourse. Thus, the author of the legal circular - qadi Natur - acknowledges that the previous procedure of determining the sums of maintenance payments in shari'a courts had been deficient, and that it is only natural that "certain – justifiable – voices were heard, calling for a rectification of the harm which is being caused to Muslim women". Yet qadi Natur also severely criticizes "these voices", which are

> vague, unable to offer a remedy, [because they tend to] generalize, rather than to scrutinize [the problem] in details. A few [of these voices] even went so far as to accuse the shari'a courts and the shari'a itself in iniquity, suggesting therefore to transfer the jurisdiction over maintenance cases [of Muslims] from the shari'a courts to the regional [civil] courts. Surely, from the start we have understood that such calls emanate from a grave distortion of sight, and from incredible shallowness and myopia. Instead of calling for the destruction of the shari'a courts, and for casting away Muslims' affairs into the grip of worldly laws, it was proper to call – and moreover, to struggle – for a reform in the shari'a courts, which are the

[18] The qadis have gathered for a three-day seminar, in which they discussed the implications of this reform (personal communication with qadi Ziyad 'Asaliyya, former qadi in Jerusalem and Haifa).

[19] My data is based on a sample of maintenance files that were adjudicated by the shari'a court of West Jerusalem between the years 1994-1998. I have no systematic estimations of the maintenance sums in other shari'a courts in Israel, but I was told (proudly) by qadi Natur, who is actually the author of the legal circular, that the sums of maintenance payments have significantly increased following the issuance of the circular (interview with qadi Natur, January 1998). It is therefore reasonable to assume that the same rise in maintenance payments has also occurred in other courts (see also Reiter 1997: 226).

> most just and most truthful among all other [courts]. We firmly believe that the shari'a court is the only official Muslim institution left for the Muslims in this country, [and therefore it is] our duty to strengthen it, in order to apply the shari'a, and to further establish the adherence to the principles of creed in god's land. The preservation of the shari'a courts is, thence, a basic Islamic demand, providing that they will implement justice and equity (*Al-Kashshaf*, vol.3: 12).

Nevertheless, despite the pungent rhetoric, and despite the reform and the substantial increase in maintenance sums adjudicated by shari'a courts, the initiative to confer jurisdiction to the family courts in matters of Muslims' personal status refused to die.

In their struggle against this bill, the qadis found a strong, influential ally: the Islamic Movement. Although the leaders of this Movement (and in particular, the leaders of the more "radical" northern faction) were usually critical towards the Israeli shari'a courts system,[20] they were willing, under these circumstances, to cooperate with the qadis in order to thwart this initiative. The following years witnessed a heated debate, internal to the Palestinian community in Israel, between feminist and liberal circles, which called for conferring jurisdiction on the civil family courts, and Islamist circles, which insisted that the shari'a courts must retain exclusive jurisdiction. On May, 2, 1997, for example, a *fatwa*, signed by two qadis presiding in the shari'a court of appeal and by three prominent leaders of the Islamic movement, was published in the official journal of the Islamic movement – *Sawt al-Haqq wa'l-Hurriyya*.[21] The *fatwa* declared bluntly that the legislation bill is a damaging, erroneous endeavor, that it is detrimental to Islam in Israel, and that it contradicts the holy Quran and the benevolent shari'a, for it will result in the application of non-shar'i rules in matters of personal status of Muslims (*Sawt al-Haqq wa'l-Hurriyya*, 2/5/1997: 8).

[20] See for example the harsh criticism pronounced by Shaykh Hashim 'Abd al-Rahman, speaker of the Islamic movement, concerning the lack of Islamic education of presiding qadis in Israeli shari'a courts (*Sawt al-Haqq wa'l-Hurriyya*, 1/7/1994, 28). See also Landau 1969, 10; Dumper 1994; Peled 2001, 121; Abou Ramadan 2005.

[21] The *fatwa* was signed by qadi Natur and qadi Da'ud Zini, and by Shaykh Ra'id Salah, Shaykh Kamil Rayan and Taufiq Khatib of the Islamic Movement. As noted by Abou Ramadan (in progress), although this document was entitled "a *fatwa*", it cannot be viewed as a proper *fatwa*, for it was not given in response to a petition or query.

Several weeks after this fatwa was publicized in the official newspaper of the Islamic Movement, another fatwa was issued – this time by the highest religious authority in Palestine, the mufti of Jerusalem, sheikh ʻAkrama Sabri. Sheikh Sabri is an appointee of the Palestinian National Authority, and his rulings have no legal standing in Israel. Nevertheless, he is considered a highly respectable *ʻalim*, and the opponents of the legislation amendment sought to recruit his voice in support of their struggle. Zahi al-Majidat – secretary of the *Mizan* Association[22] affiliated with the Islamic Movement – addressed a query (istifta') to mufti Sabri, asking for his opinion with regard to the proposed legislation amendment. Sheikh Sabri responded with an unequivocal fatwa:[23]

> Matters of personal status – which include in addition to the issue of waqf such issues as marriage and divorce, maintenance, guardianship, bequests and so forth – belong to the domain of acts of worship (ʻ*ibadat*). Therefore Muslims are forbidden to act in discordance [with shariʻa rules] in these matters. A Muslim must perform God's directives with regard to maintenance or bequests, just as he must perform God's directives with regard to the duties of prayer, alms giving and the Hajj, even if he lives in a non-Muslim state.
>
> [….] The implementation of non-Islamic laws in matters of personal status is hence considered a direct assault on the realm of worship […] and therefore it is forbidden for Muslims to resort to courts which adjudicate in these matters in a non-Islamic manner. What we need is to safeguard the shariʻa courts, and to invest effort in broadening their jurisdiction so that it will include all aspects of life, and not in reducing it.[24]

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[22] The *Mizan* Association deals with issues of human rights and with the status of the Palestinian minority in Israel. It is affiliated with the southern faction of the Islamic Movement in Israel.

[23] I thank Dr. Moussa Abou Ramadan for bringing this fatwa to my awareness, and for providing me with a facsimile copy of it.

[24] The istifta' was posed in July 21, 2001, and the fatwa was issued ten days later, in July 31. Undoubtedly, the issuance of this fatwa illustrates the close cooperation of the Israeli and the Palestinian Muslim establishments. For a discussion of the interrelations between the Israeli shariʻa court system and its Palestinian and Jordanian counterparts, see chapter 6.

Still, despite this "heavy artillery", and despite all the qadis' efforts,[25] the legislation bill was laid before the Knesset on July 1997.[26] It was presented by Nawwaf Masaliha, a Muslim member of the Knesset representing the Zionist Labor Party, but 53 other members of the Knesset (including four Muslims and all the women members of the Knesset) added their signatures to the bill. At this phase, the confrontation between the opposing parties shifted primarily to the parliamentary arena, where members of the Knesset affiliated with the Islamic movement did their best to forestall and thwart the legislative process. Consequently, this process lasted more than four years, and raised impassioned debates whenever the bill was discussed – both in the Constitution, Justice and Law Committee and in the Knesset plenum.[27]

Unexpected support for the opponents of the legislation bill came from an academic scholar – Prof. Menashe Shava. Shava, a well known expert in Israeli family law, published an article, in which he harshly criticized the legislation bill (Shava 1998a). He argued that the aspiration of the bill institutors to equalize the jurisdiction of the shari'a and ecclesiastical courts with the jurisdiction of the rabbinical courts may cause more damage than benefit to Muslim and Christian women. Such an unwanted outcome, according to Shava, may be the result of the application of the "connection principle" (*iqaron ha-krikhah*) in the shari'a and ecclesiastical courts, in a similar way to its application in the rabbinical courts. This principle restricts the ability of Jewish wives to file civil suits in the family courts (e.g. maintenance suits), since it maintains that the rabbinical courts have exclusive jurisdiction in any matter that is connected to a divorce suit.[28] Shava thus argued that the application of this principle in other religious courts

[25] Qadi Ahmad Natur was particularly active in this struggle. Not only did he personally participate in meetings of Knesset committees that dealt with this bill, he also wrote and spoke extensively against this legislative reform on various occasions. See, for example, Natur 1998.

[26] Legislation bill no. p/1421, presented on July, 16, 1997. See *Official Acta*, Legislation Bills, 2749, p. 570.

[27] See for example: Legislation Bill The Family Courts (Amendment – equalization of jurisdiction), 1997, Knesset minutes, July 16, 1997 (http://www.knesset.gov.il/Tql//mark01/h0001253.html#TQL); Legislation Bill The Family Courts (Amendment No. 5), 2001, Knesset plenum minutes, October 23, 2001 (http://www.knesset.gov.il/Tql//mark01/h0001245.html#TQL); See also minute no. 208, The Constitution, Justice and Law Committee, June 28, 1998; Minute no. 91, The Constitution, Justice and Law Committee, February 22, 2000 (http://www.knesset.gov.il/protocols/data/html/huka/2000-02-22.html).

[28] Article 3 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, states that "[w]here a suit for divorce between Jews has been filed in a rabbinical court, whether by the wife or by the husband, a rabbinical court shall have exclusive jurisdiction in any matter connected with such suit, including maintenance for the wife and for the children of the couple" (*Sefer Ha-Chukkim* 134, p. 165).

may indeed decrease – instead of increase – the ability of Muslim and Christian women to file suits in the civil family courts.

Following Shava's criticism, some changes were introduced into the bill draft, to ensure that the "connection principle" will not apply to the shari'a and ecclesiastical courts. Nevertheless, the main subject of the legislation amendment – granting family courts jurisdiction in matters pertaining to the personal status of Muslims and Christians – remained intact. The legislation bill passed in the Knesset on November 5, 2001, and by this act, a new era of interrelations between the family courts and the shari'a courts has commenced.

It is noteworthy that the original initiative for this act was born among Israeli-Palestinian feminist and liberal activists, and not in the legal or political Israeli establishment. The fact that this legislation amendment has eventually passed attests, perhaps, to the effectiveness of this lobby. Moreover, the struggle over the jurisdiction of the shari'a courts attests to the heterogeneity of the Palestinian community in Israel, which is evidently comprised of various opposing factions and groups – each holding and promoting its own political and cultural agendas. Whatever may be our sociological conclusions from this episode, one thing is clear: the legislation amendment that passed in the Knesset on November 2001 has dramatically changed the circumstances under which the shari'a courts function. Let us continue, therefore, to a detailed discussion of this acts' implications and consequences.

C. Forum Shopping in Jerusalem, or: How to Decide Where to File a Maintenance Suit?

As described above, from Muslim litigants' point of view, the legislation amendment of November 2001 created a situation of deep or "strong" legal pluralism. Except for issues of marriage and divorce (which were left under the exclusive jurisdiction of the shari'a

This seemingly harmless article created an incessant "jurisdiction race" between the rabbinical and the civil courts (now the family courts). The "connection principle" determines that if a divorce suit was filed in the rabbinical court, and if maintenance and other issues (such as child custody, for example) were connected to this suit, then the other party was forbidden from filing legal suits in these matters in the civil court. Thus, the question of who files the suit first, and in which tribunal, became of utmost importance, and husbands and wives were racing each other to the courts. For a critical discussion of this "connection principle" see Rozen-Zvi 1989; Maoz 1989; Shava 2003.

courts)[29], all other issues pertaining to personal status matters of Muslims in Israel can be dealt with – following the ratification of this amendment in the Knesset – either by shari'a courts or by civil family courts. Muslim men and women may now freely choose to appeal to either one of these forums in diverse matters such as child and wife maintenance, custody, guardianship over minors. Furthermore, since a "connection principle" does not apply, filing a suit by one of the spouses in the shari'a court does not prevent the other party from filing a related suit in the family court, and vice versa.[30] Although the material laws that apply to matters of personal status of Muslims are presumably similar in both tribunals, in effect, the differences in rules of evidence, in procedures and in legal cultures – produce dissimilar judgments. To take, for example, the issue of maintenance suits: an appeal of a Muslim woman residing in Jerusalem to the family court will probably yield very different results from one filed in the shari'a court. First, since shar'i rules of evidence are much stricter than civil rules of evidence, there is a fair chance that a woman will find it more difficult to substantiate her claims in the shari'a court than in the civil family court. One of the advocates working in the shari'a court in West Jerusalem once told me:

> I recommend to my clients to appeal to the family courts, since rules of evidence are less restrictive there. [In the family court] it is enough to have a deposition [stating that the husband beat the wife] and a medical report signed by a doctor in order to obtain a maintenance judgment and a protection order. In the shari'a court you have to present evidence, to bring witnesses… it's much more difficult (conversation with A. Sh. May, 26th, 2002).

[29] Issues related to waqf are also under the exclusive jurisdiction of the shari'a courts.

[30] Notably, fully parallel suits (for example, suits for child custody) may not be dealt with in both tribunals, due to the principle set by the High Court of Justice, according to which a tribunal shall not have jurisdiction over a matter that is already being dealt with by another tribunal (see High Court of Justice 8497/00, P.D. 57 (2), 118, 132). Yet, it is perfectly reasonable – and moreover it occasionally happens – that in response to a maintenance suit that a wife files in the family court, the husband files an obedience suit (*da'awat ta'a zawjiyya*) in the shari'a court. Such cases may result in a serious tangle, if the two tribunals issue contradictory judgments (e.g., the family court grants maintenance to the wife, while the shari'a court declares her a rebellious wife, and hence denies her entitlement to maintenance). As far as I know, no such contradicting judgments were issued thus far. For examples of such cases of simultaneous hearings that took place in the Israeli shari'a court in West Jerusalem and in the civil family court in Jerusalem, see files: 1751/2001; 621/2002 (shari'a court files).

Indeed, as indicated by case no. 509/02, a wife appealing to the shari'a court may fail to substantiate her claims for maintenance payments due to insufficient evidence. In this particular case, a young woman sued her much older husband, claiming that he, together with his first wife and her adult children, have all attacked her in the nuptial house and injured her so badly that she was forced to attend the hospital several times for treatment. According to her statement of claim, she did not return to the nuptial house ever since this incident (which occurred three and a half months earlier), and she stayed instead in a "state of anger" (*hardane*) in her father's house. Her husband, she further argued, expressed no will to bring her back to the nuptial house, for he has never sent a delegation of notables (*jaha*) in order to try and settle the dispute. She therefore asked the court to establish that she is entitled to maintenance, and to determine the sum of maintenance payments as it sees fit.

On the hearing day (April 29th, 2002),[31] both husband and wife – who were represented by lawyers – attended the court. The young wife was covered from head to toe by a black robe, her face veiled by a *hijab*, and even her hands wrapped in black gloves; her husband, a sixty years old man, was dressed in a plain-looking outfit, and a big white knitted skullcap on his bald head. Both the husband and the wife were accompanied by relatives (the husband by three of his grown-up children, and the wife by her mother and brother), and the two parties expressed their mutual antagonism by constantly heckling and taunting each other. The difficulty faced by the wife was that the presumed beating took place in the nuptial house, and there were no witnesses to the event. Instead of witnesses, she tried to support her claim by presenting corroborating textual evidence: a signed confirmation that she was taken by ambulance – in a specific time, from a specific location – to a hospital; some medical reports of her injury and treatment; and a copy of a complaint against her husband that she had filed at the police station.

[31] This was in fact the second hearing in this case. I did not attend the first hearing, which took place on April 11th, two and a half weeks earlier. On the first hearing – according to court minute – the plaintiff proclaimed her statement of claim, and the defendant responded to it by denying that he ever beat his wife. He then argued that there was no proper shar'i justification for his wife's leaving of the nuptial house, and asked the court to determine, therefore, that she is not entitled to maintenance. The court ordered the wife to supply evidence supporting her claims in the next hearing, which was scheduled for April 29th, 2002.

The husband's attorney was not impressed by this evidence, and claimed that none of it proves that the wife was indeed beaten by her husband. He further stated that for all we know, she could have done this physical damage to herself, and then called an ambulance and filed a false complaint in the police. In response to these suggestions, a small insurgency developed in the courtroom, as the parties began shouting and cursing each other. Only after several minutes of rumpus, the qadi – aided by the lawyers – managed to restore order in court. He rebuked the husband's attorney for suggesting that the wife fabricated her complaint, but he accepted his assertion that the evidence supplied by the plaintiff does not substantiate her claims. The qadi thus determined that the wife failed to prove her claims, and that the husband may now take an oath of innocence. The husband took the oath, and the qadi ruled that the wife's suit for maintenance payments is hereby repelled.

Thus, as we may conclude from this example, stricter evidence rules – which are applied in the shari'a courts – do indeed pose difficulties for women, and may prevent them from earning maintenance payments. Yet another difference between shari'a and family courts has to do with the average sums of maintenance that each tribunal adjudicates. It is common knowledge among attorneys, as well as among women litigants, that a maintenance suit filed in the family court will probably yield larger sums of maintenance payments than a maintenance suit filed in the shari'a court. Although there has been a significant increase over the last decade in the sums of maintenance adjudicated by shari'a courts,[32] the family courts still have the upper hand. This gap may be explained, perhaps, by a the socio-economic context: the population that attends the shari'a court (that is, the Arab-Muslim population in Jerusalem) usually comes from lower socio-economic strata than the population attending the family court (that is, mostly secular Jewish population). As a result, the sums of maintenance payments – requested, and thence adjudicated – in the family court are necessarily higher.

But there is also another explanation for the larger sums of maintenance adjudicated by the family courts: these – unlike the shari'a courts – have set a minimum sum of maintenance to be granted to entitled wives, regardless of their husbands'

[32] Primarily due to the procedural reform discussed above, that was accomplished by the promulgation of a legal circular in 1995 (see discussion above). Some other developments with regard to maintenance suits have also occurred in the last several years, and will be discussed below.

financial situation, or of their ability to pay such sums.[33] The shari'a courts, on the other hand, which "do not wish to disintegrate families", as one of the lawyers told me, "find ways to reduce the sums of maintenance adjudicated to wives and minors".[34] The underlying assumption is that if the maintenance sums would be higher, husbands would be motivated to divorce and hence to avoid the need to pay their wives. Therefore, ideological preferences drive the shari'a courts to determine lower maintenance payments.

In terms of pros and cons – from Muslim women's point of view – we have thus far recounted two very obvious advantages of filing a maintenance suit in a civil family court, in comparison to filing such a suit in a shari'a court. Yet, there are also some noticeable advantages to shari'a courts. First of all, the civil family courts are often regarded as hostile and uninviting legal institutions for all Muslim litigants, men and women alike: the language of litigation in these courts is Hebrew; security measures are stringent; and the procedural and material law is alien to Islamic norms. The shari'a courts, on the other hand, are perceived as much more familiar and accessible: litigation is held in Arabic; security measures are relatively loose; and procedural and material laws – although considerably transformed – are still based on shar'i traditional concepts.

Another, more concrete advantage of the shari'a courts in cases of maintenance suits rests in the expeditiousness of issuing maintenance judgments. As one of the attorneys once told me,

> [I]f a client is [financially] strained, I recommend to her to appeal to the shari'a court. Here you may get a temporary maintenance judgment (*qarar*

[33] Conveniently, the minimum sums set by the family courts are exactly the sums of pensions determined by the National Insurance Institute (henceforth: NII). Current sums paid by the NII are as follows (in Israeli Shekels): a woman without children, 1,393; a woman with one child, 2,333; and a woman with two children or more, 2,716. Notably, according to the regulations of the NII, maintenance payments are delivered to those women entitled to maintenance by court judgment. The institute pays the entitled woman the sum determined by the court judgment or the sum determined by the NII regulations – the smaller of the two. The NII pays entitled women a monthly payment, and then demands refunds from the husband. If the NII succeeds in collecting the full maintenance sum that was determined by the court judgment, and this sum is greater than the sum paid by the NII, those entitled to the maintenance receive the difference between these two sums. See the NII website:
http://www.btl.gov.il/English/btl_indx.asp?name=newbenefits/alimony.htm.

[34] Interestingly, it appears that the same phenomenon may be observed in the rabbinical courts as well. For statistical data indicating that adjudicated sums of maintenance are significantly larger in the family courts than in the rabbinical courts, see Hacker 2003: 166, n. 63.

> *mu'aqat bil-nafaqa*) within a day, while in the family court it may take a full month (conversation with A. Sh. May 26th, 2002).

When I articulated my puzzlement concerning this difference between the two tribunals, the attorney explained that the procedure in the shari'a court is shorter since – unlike the civil procedure – the shar'i procedure does not require to inform the defendant husband about the suit before issuing a temporary judgment. As long as a guarantor (*Kafil*) commits himself to refund maintenance payments given to the wife (in case it will turn out eventually that she had not been entitled to these payments), the court will issue a temporary maintenance judgment, solely on the grounds of the wife's deposition. Such a procedure is very common, and as far as I know, rarely was a guarantor required to refund maintenance payments.

Lastly, one more crucial difference between filing a maintenance suit in a shari'a court and filing such a suit in a family court has to do with the expected effect of these choices on the marital life. Although there are no credible statistical data, the general belief among advocates working in the shari'a court is that matrimonial disputes that are adjudicated in the civil family court are much more likely to end in divorce. One of the lawyers explained:

> I ask my client [the wife], what do you want to achieve? Do you want reconciliation with your husband? Or do you wish to divorce? If she says that she wants a divorce, I file a suit in the family court; if she says that she wants reconciliation, I file a suit here (conversation with M. R., March 22nd, 2004).

And another lawyer told me that

> Every woman in Jerusalem whose husband 'caressed' her, now goes to complain at the police station and to file a suit in the family court. She gets maintenance and a protection order, and the husband [gets] a criminal record, and sits in prison […]. I went to Luba [police officer in charge of

> family violence cases in the Jerusalem district – I.S.] and told her, 'you divorce half of Jerusalem'. She said, 'why?' I told her, 'because you charge husbands for beating their wives too easily. You destroy Muslim families this way (conversation with N.S June 8th, 2004).[35]

These comments by lawyers illustrate the complex considerations of litigants (in this case, women litigants) when opting for a legal tactic. It often appears that a maintenance suit may serve more as an effective device for pressuring an obstinate husband, than as a real cry for financial help. In many cases wives file maintenance suits only after long periods of separation from their husbands. Usually, separated wives (with or without minor children) dwell during this period with their agnatic families, which naturally pay for their living expenses. If this is the case, and if the husband does not seem to be in a hurry to end the dispute (i.e. to divorce his wife or to bring her back to the nuptial house), then the wife will need some sort of "leverage" in order to push the husband into action.

The most effective leverage is indeed a maintenance suit. It is an effective maneuver for pressuring husbands, since it is rather difficult to evade payments that were adjudicated by a court.[36] Thus, a maintenance judgment may force the husband either to reconcile with his wife, or to divorce her. Many maintenance suits that are filed in the shari'a court are therefore pressuring devices, and all the more so, probably, when a Muslim woman files a maintenance suit at the civil family court.

But why is it that an appeal to the family court is more likely to bring about a divorce than an appeal to the shari'a court? There are three possible explanations: first, as argued in the previous chapter, the shari'a court in West Jerusalem – like other shari'a courts in Israel and outside it – prefers a strong preference for mediation and conciliation over adjudication. While such a tendency is also evident in family courts in the recent years,[37] it seems that generally, the relatively pliable procedures of the shari'a court are

[35] It should be noted that this man is a Jordanian lawyer, who is not allowed to represent clients in Israeli civil courts.
[36] Even if a husband refuses to pay maintenance, the wife may hand the judgment to the National Insurance Institute and ask for an allowance. Based on the court judgment, the NII will provide the wife with a pension, and will try to collect the money from the husband by the aid of the execution office.
[37] See Arbel and Geifman 1997: 438-441.

more prone to bring about conciliation than the relatively formal procedures of the family court.

Second, as clearly manifested in the lawyers' words above, the two tribunals rest on very different cultural and ideological assumptions concerning the status and roles of men and women in the marital unit. While "occasional" beating of a wife (as long as it is not brutal beating (*darban mubrihan*) is perceived by the common Muslim Jerusalemite as a legitimate, although undesirable behavior,[38] it is perceived as an abominable, not to say criminal behavior by the common secular Jew. Now, even if the judges presiding in the two courts share exactly the same progressive attitudes concerning gender relations, the fact that they serve different populations, which cling to different values and norms systems, may produce very different judicial policies in such cases. Thus, it is reasonable to assume that family disputes that involve violence towards the wife[39] have a much better chances of ending in conciliation if tried by the shari'a court, than if tried by the family court.

Third and last, filing a maintenance suit in the two courts may yield different results due to the different positions of these tribunals in the socio-legal field. As argued by many law-and-society scholars, filing a claim in a court attests to a sharp escalation of the dispute, for it draws the marital problems between the spouses from the private realm to the public. As a result, people often postpone this extreme course of action as much as possible, hoping that their problems will be solved in other ways (see e.g. Merry 1991: 3). Still, there are degrees of exteriorization of private problems, and appeals to different tribunals may be perceived as involving different degrees of "going public". Accordingly,

[38] This statement is based on my impression from dozens of conversations with litigants and legal professionals. Thus, for example, several of my male interlocutors paraphrased a well known Qur'anic verse (Surat al-Nisa', verse 34), which instructs husbands how to treat a "wrongheaded" wife. They explained to me that "if a husband has problems with his wife, what should he do? First, he should approach her, and explain to her patiently and calmly what she did wrong. If this doesn't work, he should move to another bed for a couple of days, and refrain from sleeping with his wife. If this measure doesn't help either, he should seek the assistance of *ahl al-khair* (mediators), who will intervene in the dispute, trying to achieve reconciliation. If this does not help, and his wife is still rebellious, and refuses to obey him, he may resort to the most persuasive method: educational beating (*darb ta'dibi*)." Of course, the fact that such views are held – again, to my impression – by the majority of the litigants (men and women alike) does not mean that there are no liberal and feminist circles among Muslim Jerusalemites, which may fiercely oppose such views.

[39] My impression is that some acts of physical violence (e.g. slapping, shoving) are very common in the context of matrimonial disputes among the Muslim-Arab population of contemporary Jerusalem. Complains of such behaviors, as well as of "verbal abuse", may probably be found in nine out of ten statements of claim (although I have not checked this systematically).

the perceived intensification of the dispute as a result of the appeal may also differ. We may therefore assume, that Muslim husbands in present-day Jerusalem may view an appeal to an Israeli civil court as a more serious deterioration of the conflict than an appeal to the Israeli shari'a court. Muslim Jerusalemites are well aware, of course, that both these courts are Israeli institutions; and yet, an appeal to a Muslim, Arabic-speaking court is more legitimate and more acceptable than an appeal to a secular, Hebrew-speaking court. An appeal to the shari'a court may be viewed, consequently, as less radical and less offending, leaving the "door of reconciliation" (*bab al-musalaha*) relatively open.

The combination of these three factors produces a sharp distinction between the two tribunals: the family court is notorious as a "family breaker", while the shari'a court has a more moderate and neutral reputation in this regard. These images invite, in turn, active forum shopping on the part of Muslim women in Jerusalem, who must consider in advance what they wish to achieve by the legal procedures. In the rather scanty socio-legal literature on forum shopping, there is an ongoing debate over the social implications of this phenomenon. Scholars attempt to answer questions such as: who benefits from the ability to perform forum shopping? Is it the strong, dominant side in the dispute (usually this means men), or is it the disadvantaged, subordinate side (mostly women)?[40] In the case of contemporary Jerusalem, it appears that the answer is unequivocal: the greater freedom of choice that was granted to Muslim litigants by the 2001 legislation amendment works primarily to the advantage of women. The fact is that the family court usually provides judgments that are more favorable to women than the shari'a court. The investiture of parallel, concomitant jurisdiction to the family court in matters of Muslims' personal status has therefore served to strengthen women in the context of family disputes.

Another interesting question that arises here has to do with the issue of divorce rates. What could be the impact of the new option of recourse to the family court on divorce rates among the Muslim-Arab population in Jerusalem? One possibility is that there is no impact at all. Indeed, if women decide in advance whether they wish to divorce or not to divorce, and then choose a court accordingly (as suggested in the

[40] see, e.g. Benda-Beckmann 1981; Molokomme 1991: 242-249; Baerends 1994: 84; Peletz 2002: 174-176.

quotation above), then the 2001 legislation would not make any difference: only women who would divorce anyway would appeal to the family court. Indeed, if spouses decide in advance whether they wish to divorce or not to divorce, then the strategic choice to appeal to one court or another is not that important. Such a choice may determine, perhaps, the nature of the separation/conciliation arrangements, but not the continuation/ discontinuation of the marital relations. Such a conclusion will be in line with the view of some researchers, who believe that the impact of formal law on divorce negotiations between spouses is negligent (see e.g. Erlanger et al. 1987; Jacob 1992).

However, based on countless observations of court hearings, and on numerous conversations with litigants (both men and women), I would estimate that many litigants do not know exactly, in advance, whether they want a dissolution of the marriage or matrimonial reconciliation. Often people are angry with their spouses; they may be vindictive, or they may want to teach them a lesson, but they have not made up their mind to divorce. Many litigants, as far as I can tell, are confused about the legal procedure. As a result, they tend to change their minds repeatedly; they are open to persuasion, and they are very much affected by the qadi's and the lawyer's suggestions.[41] Moreover, they usually do not perceive the appeal to court merely in utilitarian terms: they want justice; they want recognition of their normative behavior; and they may want public acknowledgment of the maltreatment that they had suffered, in their view, in the hands of their spouse.

My impression of litigants' behavior in the shari'a court in West Jerusalem is therefore in line with the view that courts play a crucial role in determining the outcomes of disputes, and that the development of disputes is often not determined in advance, before the commencement of the legal procedure. In Mark Galanter's (1983: 34) words, "courts not only resolve disputes, they prevent them, mobilize them, displace them, and transform them". As argued above, for various reasons, the family court tends to mobilize litigants towards divorce much more than the shari'a court. Thus, we may hypothesize

[41] Many studies have shown that divorce lawyers exert tremendous influence on their clients' decisions with regard to divorce settlements (see, for example: Relis 2002: 172; Sarat and Felstiner 1995: 17-20).

that the new option that was opened to Muslim women, of filing maintenance claims in the family court, will result in a rise in the divorce rate.[42]

To conclude, from the perspective of Muslim litigants residing in Jerusalem, the strengthening of state-legal-pluralism following the November 2001 legislation amendment was anything but "socially insignificant". As we have seen, it opened new options to women who are involved in matrimonial disputes, and thus improved their bargaining power in their negotiations with their husbands.[43] Even if a Muslim woman eventually chooses not to resort to the family court, the mere possibility of such a move works for her benefit. Indeed, as estimated by several of my informants (all lawyers), the absolute majority of maintenance cases of Muslim litigants in Jerusalem are still adjudicated by the shari'a court in West Jerusalem, and not by the family court.[44] Nevertheless, the fear of losing their current position in the Muslim community drives the qadis presiding in the Israeli shari'a courts (in Jerusalem, as elsewhere) to dedicate particular efforts to improving the "services" that they provide to the population. It is these kind of institutional and judicial measures – taken in response to the "competition" with the civil family courts – that will stand at the focus of the next, concluding section of this chapter.

[42] An attempt to provide a credible statistical answer to this question will be premature, since the legislation amendment became effective only four years ago. Current data on divorce rates among couples whose case was considered by the West Jerusalem shari'a court are as follows: 1998 – 285 divorces; 1999 – 297 divorces; 2000 – 245 divorces; 2001 – 250 divorces; 2002 – 301 divorces; 2003 – 299 divorces. These numbers are based on internal statistics collected by the shari'a court of Jerusalem secretariat.

[43] It is important to note, however, that an appeal to the family court may turn out to be counterproductive in terms of a woman's interests. Not every lawyer is as attentive to his/her client's wished as the lawyer quoted above, and not every woman understands the full meaning of appealing to the civil family court. Consequently, it may very well be that an appeal that was primarily aimed to mobilize the husband to initiate matrimonial reconciliation leads eventually to an unnecessary divorce. In such cases, a wife's advantage might turned out to be a disadvantage, and she may find herself divorced inadvertently.

[44] One lawyer estimated that 95% of the maintenance cases are filed in the shari'a court (conversation with I. 'A., 2/5/2004). Other lawyers offered more moderate assessments, and estimated that the shari'a court deals with 70% to 90% of the cases. For a similar estimation with regard to maintenance cases of Muslim Israeli citizens, see Algazi, 15/9/2002.

D. Institutional Responses to the Increased Competition: Improving Services and Favoring Women Litigants

During the years of parliamentary struggle over the issue of according civil family courts jurisdiction in matters of Muslims' and Christians' personal status (see section 2 of this chapter), opponents of the legislation amendment voiced their grave concerns with regard to the consequences of this act: they anticipated that the religious courts will be left with no litigants, and that the civil family courts will not be able to deal with Muslim and Christian litigants in a proper manner. Their main concern was that the civil judges (who are almost exclusively Jewish) will not be able to implement – for lack of knowledge – the material Muslim and Christian laws,[45] and that religious values and norms will therefore not be sustained.[46] Supporters of the amendment argued in response, that the entrance of family courts to this field will only benefit the religious courts, which will have to become more efficient. State officials from the Ministry of Justice (which supported the legislation amendment) have also sought to appease the opponents' misgivings by pledging that Muslim and Christian judges – versed in the religious law – will be nominated to the family courts, and that the presiding judges in these courts will be trained in religious laws.[47]

Four years after the legislation passed, it is perhaps too early to assess its full implications. And yet, we can already say that both opponents and supporters of the legislation amendment were partly right. Supporters of the amendment were right in estimating that the new competition posed by the civil family courts will drive the religious courts to perform some duly needed reforms. Indeed, as will be shown in this section, the fact that the shari'a courts are no longer monopolistic players in the legal

[45] As explained above, the legislative "status quo" was not changed by the establishment of the civil family courts. As a result, the material laws in matters of personal status remain religious, and the civil family courts are obliged to employ different laws for litigants of different persuasions. See Arbel and Geifman 1997; Shava 1998b.

[46] See, e.g.: Legislation Bill The Family Courts (Amendment No. 5), 2001; Knesset plenum minutes, October 23, 2001 (http://www.knesset.gov.il/Tql//mark01/h0001245.html#TQL).

[47] See for example the comments of the Ministry of Justice's delegates to the Constitution, Justice and Law Committee, minute no. 91, February 22, 2000 (http://www.knesset.gov.il/protocols/data/html/huka/2000-02-22.html).

"niche" of Muslims' personal status has driven the qadis to turn their courts into a more "user-friendly" arena.

While the opponents' fear that the religious courts will be drained from litigants has not materialized to date, their skeptic attitude towards the promises that accompanied the legislation seem rather accurate. Despite the fact that the family courts have became accessible to a large constituency of Muslim and Christian Israeli citizens (and permanent residents), no re-organization has taken place in these courts: training workshops for judges were not held; no additional translators to and from Arabic were enlisted; and Muslim and Christian judges were not nominated in significant numbers.[48] As a matter of fact, it appears that the broadening of the family courts' jurisdiction had no significant impact on their operation, and that they continue to function pretty much as they have before.

This reaction, or rather – this lack of reaction – of the family courts to the changing situation is of course symptomatic of the indifference that often characterizes Israeli authorities' treatment of non-Jewish populations. This indifference may provide us, nonetheless, with one more clue for understanding the unenthusiastic attitude of Muslim and Christian women litigants towards the family courts. As mentioned in the previous section, these courts are viewed as rather hostile institutions towards non-Jewish, non-Hebrew-speaking litigants, and their lack of preparedness to supply the legal needs of this population may indeed drive it away from them.

Whereas the family courts did not take any significant measures in response to the 2001 legislation, the shari'a courts took quite considerable measures. After investing extensive efforts in thwarting and forestalling the legislation initiative (see description above), the qadis must have felt a sense of defeat when the amendment had finally passed in the Knesset. Facing a concrete and palpable danger of personal and institutional "fall from grace", the qadis could have reacted to their predicament in two possible ways: they could decide to compete or not to compete with the family courts, which literally encroached on their jurisdiction.

[48] For a harsh critique of this situation, see Adalah's newsletter, http://www.adalah.org/newsletter/eng/feb05/CEDAW.pdf; see also a report on the representation of Arabs in the Israeli civil service, governmental companies and judicial system, Sikkuy Association, http://www.sikkuy.org.il/2003/word/yitzug03.doc [in Hebrew].

It would have been perfectly understandable if the qadis – following the pass of the legislation amendment in the Knesset – would have declared that they no longer wish to participate in this game. Frustrated with a civil legislation policy that completely ignored their opinion, the qadis could have chosen, as an expression of protest, to resign from their offices;[49] or otherwise, they could have decided that they are going to completely ignore the new legislation and continue doing exactly what they did before. In effect, the qadis' response was nothing of this sort. Instead of falling into acrimony and resentfulness towards the state, the qadis reacted in a burst of internal initiatives, designated to reform and to improve the services provided by the shari'a courts. Whether they were motivated by direct personal interest or by a genuine sense of Islamic, nationalist-Palestinian, or communal commitment (or all of these together, of course), the qadis have waged an uncompromising struggle over potential litigants – striving to convince as many litigants as possible that their courts constitute the best place to deal with matrimonial problems. Thus, unlike the family courts, which displayed no interest whatsoever in attracting Muslim litigants into their courtrooms, the qadis went out of their way in order preserve – and even to enlarge – the number of files adjudicated in their courts.

Why did the qadis react in a competitive manner? Why do they care at all about attracting more litigants – after all, courts are not business firms and litigants are not customers? Indeed, the motivation behind the qadis' efforts is probably not economic: their salaries remain the same regardless of the number of files they deal with, and they are not compensated in any way for a greater workload The answer, I argue, is that more litigants imply more legitimacy to the shari'a courts, while a significant decrease in the number of appeals might constitute a serious blow to the legitimacy and prestige of the courts, as well as of the qadis presiding in them.

As observed by organizational theorists, nonprofit organizations (such as courts of law), much more than business organizations, tend to compete over legitimacy and prestige (see, e.g. DiMaggio and Powel 1983; Scott and Meyer 1992: 123, 125). All the

[49] In fact, shaikh Ra'id's Salah, the leader of the Northern faction of the Islamic Movement in Israel, has threatened at a particular point that if the legislation amendment will pass, the Muslims in Israel will ban the Israeli legal system altogether, and will establish their own private shari'a courts. Shaikh Ra'id also advised the qadis presiding in the Israeli shari'a courts to resign from their offices if the legislation will pass. See, Sawt al-Haqq w'al-Huriyya, 11.9.2001, p. 13.

more so, when an organization suffers from a chronic problem of legitimacy. Bearing in mind the problematic status of the Israeli qadis, who lack any formal shar'i education (see, Reiter 1997a; Abou Ramadan in progress), it is easy to understand why it was so important for them not to lose litigants to the family courts.[50] This need is even more obvious in Jerusalem, where the Israeli shari'a court suffers not only from dubious religious prestige (like other Israeli shari'a courts), but also from a negative nationalist sentiment.

In response to the 2001 legislation, the qadis of the Israeli shari'a courts have preferred, therefore, the active, competitive way of action. Even before November 2001, and surely afterwards, they have gathered for several times, trying to figure out how they can make their courts more appealing to litigants. Three years later, on June 2004, an urgent qadis' meeting was convened in order to discuss a slight decrease in the number of files that was noted in all Israeli shari'a courts during 2003 (see Table 4, p. 160).[51] The qadis' main concern was that despite the demographic growth of the Muslim population in Israel, the number of files adjudicated in the shari'a courts has fallen. In this meeting they also discussed what they called "the bad reputation of the shari'a courts", and tried to suggest possible actions that may contribute to an improvement of the courts' image. Thus, for example, among other things, they decided to further loosen-up court procedures for issuing declarative judgments and registered deeds (such as marriage and divorce ratifications); they decided that lawyers and litigants will be allowed to ask for postponements in hearings by way of sending a fax, instead of having to come to court in person in order to file such a request; and they decided to enforce a stricter dressing code on lawyers and shar'i advocates (dark trousers, white blouse, dark jacket…).[52]

[50] Indeed, the qadis could have chosen another parameter as a measure of legitimacy – such as legal equity or religious prestige, which are based on high expertise in shar'i jurisprudence. In a way, their choice to earn legitimacy by concentrating on quantity (of files) rather than on quality (of judgments) expresses their lack of confidence and their shaky positioning.

[51] This description is based on a conversation with one of the qadis on June 22, 2004.

[52] On this new code of dressing, see also administrative directive number 18 (*zii al-murafa'in al-shar'yyin*), which was issued by the administration of the shari'a courts: http://www.justice.gov.il/NR/rdonlyres/70C1FE0A-4ACD-49E9-8D7A-091229D258D0/0/twjeeh18.doc.

Table 4: Number of Files Opened in Israeli Shari'a Courts, 2001-2003

(Source: shari'a court administration)

Courts	2001	2002	2003
Jerusalem	2547	3144	3021
Beer- Sheva	1580	1566	1524
Jaffa	515	679	499
Tayyibe	1533	1435	1498
Haifa	667	669	629
Acre	1279	1298	1191
Nazareth	722	699	653
Appellate Court	271	369	343
Sum Total (not including appellate court)	8843	9490	9015

The institutional responses of the shari'a courts to the new competition posed by the civil family courts may be divided into two categories:

1. Minor adjustments were introduced into the courts' administrative procedures and daily routines, with the aim of making the court bureaucracy less burdensome for litigants and lawyers. Indeed, in recent years, following the 2001 legislation amendment, the principle of being "user-friendly" has become a major organizing principle in the Israeli shari'a court in West Jerusalem.

2. Minor legal reforms have been initiated and enacted by the qadis, who made, for this purpose, creative use of their relatively broad judicial agency. As could be expected, most of these legal reforms were designed to improve the status of women litigants in court. There are three possible reasons for the fact that the legal reforms were meant to improve women's status (and attract women litigants), rather than cater to men's interests (and attract men). First, we have seen that women, unlike men, have much to gain from appealing to the civil family court, and it is therefore they who are targeted for persuasion. From a marketing perspective, men may be viewed as "captive clients" of the shari'a courts, simply because they have no better alternative; women, on the other hand,

constitute a much more difficult clientele, since they have an alternative, and presumably, a good one. Thus, in order to prevent the desertion of women in favor of the rival civil family courts, they are being offered "better bargains", which may convince them to remain loyal to the shari'a courts. Second, since women are undoubtedly the largest constituency of the court,[53] it makes perfect sense to give precedence to their interests, even at the expense of smaller constituencies (that is, men). Third, the current generation of qadis presiding in Israeli shari'a courts are all graduates of Israeli universities – either of law schools and of social sciences and humanities departments (see Reiter 1997a). Such an educational background may enhance their inclination towards liberal and feminist conceptions of gender equality, and drive them to implementing such ideas in their judicial practice (see also Shahar 2004).

Let as turn, now, to a detailed examination of the procedural and judicial reforms that took place in the Israeli shari'a courts, and in the West Jerusalem shari'a court in particular, during the last few years.

D.1. Identification of litigants and witnesses

Two of the most burdensome procedures in shari'a courts have been the practices of identifying the litigants and the witnesses (*ta'rīf*) and of establishing their personal credibility (*ta'dīl*; *tazkiyya*). As a rule, any person appearing before the court must first be identified by two other persons who personally know him. In addition, if a person is required to testify, the court must first establish the "good morals" ('*adala*)[54] of this person by performing a rather complicated procedure.[55] As one can imagine, such procedures, if strictly enforced, may become truly costly in terms of court time, and it may also put some extra-burden on the litigants and their legal representatives, who need to bring such "accrediting agents" to court.[56] Thus, being loyal to the principle of "user-friendliness", the qadi presiding in the Israeli shari'a court of West Jerusalem decided to nullify these procedures altogether. Instead of identifying litigants and witnesses by the

[53] Women initiate more than 70% of the cases that the shari'a court deal with. See also note 79 in chapter 4.
[54] Article 1705 of the Majalla determines that "The '*adl* person is one in whom good impulses prevail over bad ones".
[55] See Tyan 1960 (s.v. 'Adl, EI2, Vol I: 209a).
[56] See a description of these procedures as they were performed in a cairene shari'a court some 150 years ago (Lane 1954 [1908]: 117).

testimony of an acquaintance, identification is presently performed by way of reviewing their personal I.D. cards. When opening a case file, the court secretary will usually add a photocopy of the plaintiff's I. D. card to the file. Photocopies of the defendant's I. D. and of witnesses who were summoned to give testimony are added to the file on the day of the hearing. Witnesses are also be asked to present their I.D. cards to the qadi just before they are put under oath,[57] but no *ta'dil* procedure is enacted.

D.2. Facilitative bureaucratic policies in issuing registered deeds

As already mentioned in chapter 4 (see tables 2 & 3, pp. 103,104), about 50% of the judgments issued by the Israeli shari'a court in West Jerusalem may be categorized as declarative judgments or as registered deeds (*mu'amalat*; *musadaqat*; *hujaj*). The court staff makes a particular effort to provide such judgments in minimum time (that is, within a single day), but beyond that, the court staff goes out of its way in order to assist litigants in filing these lawsuits. Generally speaking, filing such a petition does not require significant expertise in legal language, nor in court procedures: all it takes is to provide the necessary documents[58] and to testify in front of the qadi to the truthfulness of these documents. Nevertheless, many litigants are so insecure, that they tend to hire a legal representative even for this evidently simple task. In fact, some lawyers or shar'i advocates have specialized in "hunting" such litigants just before they enter the court. The lawyers wait in the corridor leading to the court or at the entrance to the building, and approach people who come to court unattended by lawyers. They offer to assist them in filing their petitions, and charge for their services a "modest" fee (usually several hundred Israeli shekels).[59]

In recent years, the court staff has begun to actively help litigants in filing such petitions – first by providing them with a detailed list of required documents that they need to supply; and second, by preparing detailed, printed forms for each and every type

[57] After examining their I.D. cards, the qadi hands them to the court scribe, who writes down the I.D. numbers of the witnesses in the court minute. The I.D. cards are then handed back to the witnesses.

[58] For example, in cases of marriage ratifications, the couple is required to provide the following documents: an original marriage certificate, two photocopies of their I.D. cards, and a signed deposition by the two spouses that the marriage is still intact, and that there are no legal or religious grounds to nullify the marriage.

[59] Abu Shaqib, the court acting chief secretary, often expresses his resentment of these lawyers' conduct. When speaking of these people, he may even call them "vultures" (*'uqbān*).

of petition, to be filled-in by the litigants.[60] When some people still found it difficult to get by, Abu shaqib either directed them to me for assistance, or provided them with a photocopied example of a relevant petition, which they may use as a model for their own deposition. All this, of course, was done in order to assist litigants, and to "rescue" them, as Abu Shaqib says, from the "vultures talons" (that is, from exploitative lawyers).

D.3. Judicial pliability

In recent years, it appears that the ideology of "user-friendliness" has become salient not only in the court's daily routines, but also in the judicial practices of the qadis.[61] The qadis often display a particularly lenient approach in regard to both procedural and material "formalities". For example, the qadis usually abstain from imposing on litigants extra fees, beyond the fee that they have already paid. Thus, they sometimes insert seemingly irrelevant statements into court judgments, which are meant to exempt litigants from the need to file additional lawsuits. They may add, for instance, to a declarative judgment of divorce (*ithbat talaq*) a sentence stating that the children are under the custody of the mother/father, or a sentence establishing the financial arrangements agreed upon by the couple (e.g. maintenance payments for the waiting period, payment of the deferred dower, etc.).

Qadi Zibdi in particular goes even farther than that, and actively corrects statements of claim during hearings, in a manner that better serves the interests of the litigants. For example, he may advise a woman litigant to change the formulation of a lawsuit from "request for approval to rent an apartment" (*idhn bi-'isti'jar maskan*) to "lodging maintenance" (*nafaqat sukna*).[62] The following case may serve as an illustration of the qadi's pliable approach. A woman, aided by a shar'i advocate, filed a lawsuit,

[60] See, for example, such a form in appendix no. 4.

[61] I refer here to the judicial practices of the two qadis that presided in the Israeli shari'a court of West Jerusalem during my fieldwork: qadi Ziyad 'Asaliyya and qadi Muhammad Rashid Zibdi.

[62] The second type of requests is much easier to attain. Assuming that the court already established that a separated woman (and her children) are entitled to maintenance, a lawsuit for additional lodging maintenance becomes only a matter of formality (a woman is automatically entitled to this kind of maintenance. See discussion of this issue below). An approval to rent an apartment is much more difficult to attain, for the husband may raise all sorts of objections: the rental price may be too high in his view, the neighborhood not fit for his children, etc. In addition, the husband may offer to accommodate his wife and children in an apartment that he himself provides (the nuptial house or any other apartment for that matter), and the wife may be forced to agree to this settlement, or otherwise begin a long legal confrontation as to the lawfulness of this accommodation (shar'iyyat al-maskan).

claiming custody over her two minor children. The woman and her husband were familiar to the qadi, since they have been confronting each other – across various suits – for several months. This time, the husband did not attend the hearing, nor did he send a legal representative, and it appeared that he had not been notified of the lawsuit according to the rules (*hasab al-'usul*).[63] The qadi told the woman that the hearing must therefore be postponed, and the woman, in response, burst into tears. Qadi Zibdi tried to calm her, and asked what the problem was. She said that even now, when she was finally granted child maintenance payments, she cannot obtain the payments, since the National Insurance Institute demands that she first present a court judgment giving her custody over the children.[64] Hearing the woman's story, the qadi reproached her legal representative, telling him that he filed the wrong suit: the children already live with their mother, under her custody, so what was needed was "a request for declarative custody judgment" (*qarar tasrihi bi'l-hadana*), and not a "custody lawsuit" (*da'wat hadana*). The qadi explained to the shar'i advocate and to the woman that in cases of "requests for declarative custody judgment" there is no need to inform the other party at all, so no harm was done if the husband was not notified of the hearing. He therefore suggested that the shar'i advocate would reformulate the statement of claim, and change it into "a request for declarative custody judgment". Moreover, qadi Zibdi himself dictated the request for a reformulation of the claim (on behalf of the advocate), and immediately accepted this request.

The woman left court that day with a declarative custody judgment over her children in her pocket.[65] Not only was she not obliged to file a new suit and to pay an additional fee, she also obtained the judgment that she needed in minimum time. Such instances of active correction or rephrasing of statements of claim by the qadi are not rare occasions. Yet, it is noteworthy that qadi Zibdi usually intervenes in this manner only

[63] There was no delivery confirmation on the dossier, so there was no indication that the defendant or his representative had been properly notified of the hearing.
[64] In recent years, the National Insurance Institution has begun to demand that women who had been granted child maintenance payments must first present a court judgment confirming that they have custody over their children. Without such a court judgment, no maintenance payments are paid by the National Insurance Institution. As a result of this new demand, a dramatic rise in the number of declarative custody judgments has been noted in the Israeli shari'a court of West Jerusalem (see tables 2 & 3, pp. 103,104).
[65] Case 2295/2001. The described event took place on March 3, 2002.

when the litigants are not represented by professional lawyers. If lawyers are involved in a case, his attitude is usually much more formalistic and reserved.[66]

Another example demonstrates qadi Zibdi's permissive approach in a somewhat different context. A young couple – a Jerusalemite man and his Japanese (Muslim) wife – accompanied by their two and a half years old daughter, came to court and filed a request for ratification of their marriage. It turned out that the couple had married several years earlier in Las Vegas. The marriage ceremony was conducted by a civil judge, but it was also confirmed by a dubious document that was issued by the Center for Islamic Culture in Las Vegas. As the couple stood in the courtroom (the man translating what was being said to English, so that his Japanese wife could follow), the qadi inquired whether this union could be regarded as a proper Islamic marriage. Were two Muslim witnesses present when the judge conducted the marriage? Were there unequivocal declarations of offer and acceptance *ijab waqabul*)? And did they agree on the amount of the dower (*mahr*)?[67]

The husband answered the qadi's questions reluctantly, admitting that he is not sure whether all these conditions have been fulfilled in their marriage. The qadi then replied that in case of a doubt, it will be better perhaps to perform another marriage ceremony, and this time in a proper way. Clearly disappointed with this development, the husband inquired what will be of their little daughter. Will she not be regarded as a bastard, fruit of an illegitimate liaison (*bint al-haram*)? Qadi Zibdi admitted that this may constitute a problem. After several seconds of hesitation, he instructed the husband to write a new request, and this time to state explicitly that the marriage had been conducted according to Islamic law. He also advised him to add that the marriage was affirmed by the Center of Islamic Culture in Las Vegas. The husband did exactly that – with the aid of Abu Shaqib – and the qadi signed a registered deed, ratifying the validity of the couple's marriage.

[66] In this sense, the occurrence described above was unique. My guess is that the qadi really felt sorry for the woman, and for that reason he went out of his way and corrected the statement of claim, despite the presence of the shar'i advocate. We may also speculate that if the other party was properly notified of the hearing, and if the husband or his legal representative were present in court, such intervention on the part of the qadi would not have occurred.

[67] On the mandatory requirements for a proper shar'i marriage, see Schacht 1995 (S.v. nikāh, *EI2*, VIII: 26b).

Later on that day I asked qadi Zibdi about this case, and he told me:

> This was the best solution. He [the husband] was not sure whether the marriage was conducted according to Islamic law or not, so it was better to say that it was [according to Islamic law]. This way we ratify their marriage, and we avoid the entanglement of a bastard daughter. You think that I should have handled this case differently?
> **- No. I…**
> You tell me, who would have benefited if I had insisted on the necessity of remarriage? Me? Islam? This couple? Certainly not their daughter, who is completely innocent. Believe me, this was the best solution.[68]

As clearly illustrated by this case, qadi Zibdi does not perceive himself as a servant of some rigid, sacred doctrine, but as a servant of public good – he considers himself obliged to contribute to the well being of the litigants who appeal to his court.[69] This approach has become increasingly prominent in the West Jerusalem shari'a court in recent years, and it definitely turned it into a more "litigant-friendly" institution. However, an even more significant method that the qadis employ in their efforts to attract litigants (and again, mainly women litigants) is their ability to introduce minor judicial innovations in material law. Here are some examples.

D. 4. Substantial increase in maintenance payments

As described in section B of this chapter, during the 1990s liberal and feminist circles have harshly criticized the shari'a courts for adjudicating relatively meager sums of maintenance payments – especially in comparison to the much more generous sums adjudicated by the civil courts. In light of this situation, an initiative to confer jurisdiction in matters of Muslims' personal status to the civil courts was launched. Aiming to placate some of this criticism, the qadis initiated a procedural reform, which accorded them much

[68] This occurrence as well as my conversation with the qadi took place on January, 11, 2004.
[69] This approach may also be viewed as a judicial manifestation of the well-established principles of *istislāh* and *istihsān* – namely, of acting for the sake of general welfare. On *istislāh* and *istihsān* see Paret 1978 (*EI2*, vol. IV: 255b).

more discretion in determining maintenance payments. This procedural reform, in turn, brought about a significant rise in the maintenance payments adjudicated in the shari'a courts. And yet, despite their efforts, and despite this rise in maintenance payments, the qadis were unable to "stop the legislation train".

Nevertheless, as argued above, following the pass of the 2001 legislation amendment, the qadis have literally doubled their efforts to convince potential litigants that the shari'a courts offer a better "deal" than their "competitors", the civil family courts. Much of these efforts focused on maintenance payments, which already proved to be a most crucial and sensitive issue for women litigants. Hence, since 2001 the qadis presiding in the Israeli shari'a court of West Jerusalem appear to have gradually increased the maintenance payments that they adjudicate for wives and children – far beyond the rise in the cost of living. A comparison of maintenance cases from the years 1998, 2001, and 2004 reveals that the average monthly sum of maintenance adjudicated to a wife and two children has risen from 1855 NIS (in 1998), to 2010 (in 2001), to 2660 (in 2004).[70] This is a rise of more than 40% (between the years 1998-2004) – and it is far beyond the rise in the consumer price index.[71]

This impressive rise in maintenance payments resulted not only from the procedural reform described above, but also from a new judicial policy that enabled women to ask for much larger sums of maintenance. In May 2003, the shari'a court of appeal issued a precedent judgment (no. 44/2002) that defined types of maintenance payments and criterions for eligibility to maintenance, in a much more detailed manner than before.[72] According to this judgment (which relied on both classical fiqh texts and modern statutes of neighboring Arab countries), a woman and her children are entitled to maintenance payments that may secure their existence with dignity. Existence with

[70] The sample included 4 cases from 1998, 8 from 200, and 7 from 2004 – each of maintenance cases of a wife and two minor children. It should be noted that it is somewhat complicated to trace general trends in maintenance sums over the years, since the sum allocated to each child depends on the number of children in the family. The more children – the smaller the sum allocated to each child (of course, the total sum of maintenance will probably be larger). For this reason, I chose to compare similar families – wives with two children. These cases are particularly revealing, for the maintenance sums adjudicated by the court may also be compared with the maintenance pensions that were paid during these years by the National Insurance Institution. In 2004 the NII pension for a woman with two minor children stood on 2,716 NIS.

[71] See: http://www1.cbs.gov.il/shnaton56/diag/13_01.pdf.

[72] As a matter of fact, treating judgments of the shari'a court of appeal as binding is an innovation, which was introduced by qadi Natur, the president of the shari'a court of appeal. See Abou Ramadan 2003, Layish, forthcoming.

dignity entails, according to the shari'a court of appeal, "that a man (*insān*) will have enough food to eat, proper clothing, and a roof over his head". The general term "maintenance" (*nafaqa*) therefore consists of three subcategories of payments: "provisions maintenance" (*nafaqat ma'kal*); "garment maintenance" (*nafaqat malbas*); and "accommodation maintenance" (*nafaqat sukna*). Only a combination of these different kinds of maintenance payments may ensure an existence with dignity, and therefore a woman is entitled to ask for all of them together. Moreover, the judgment determines that a woman is entitled for accommodation maintenance even if she dwells in her agnatic family's compound.

This judgment, which may appear trivial and insignificant in its content,[73] in fact had far-reaching consequences. It meant that a woman in a state of anger (*hardaneh*), who left the nuptial house and stays in her father's house, is entitled to ask for – and hence has a good chance to be granted – "accommodation maintenance". If previously, only a woman who had rented an apartment was entitled to ask for reimbursement of her rent expenses from her husband,[74] now this option was opened also to women who live with their agnatic family, that is, to a much wider group of women litigants. This was indeed a radical change in court policy, and it resulted in an additional rise in the sums of maintenance, beyond the rise that resulted from the procedural reform described above.[75] Furthermore, as several furious husbands told me, the idea that they will have to finance the accommodation of their wives in their father's house was downright outrageous in their view. While husbands perceived it as their duty to pay children maintenance, even if the children live in their in-laws' house, they seemed to reject the idea that it was also their duty to support their wives in a similar situation. One man, for example, who sat in the court's waiting room and listened to my conversation with a husband who was sued for "accommodation maintenance", intervened in the conversation and said:

[73] It is trivial in the sense that every textbook on Islamic family law makes the same typology as to types of maintenance payments. See, for example, Abu Zahra, n.d.: 243-273; al-Faqih 1989: 292-296. See also Peters 2002 (S.v. "nafaqa", EI2, Vol.XII: 643).
[74] Of course, she needed first to receive permission from the court to rent this apartment (see note 62 above)
[75] See, for example, files 1198/2003, 1935/2003, 2878/2003, 552/2004 – in which separated wives asked for and were indeed granted accommodation maintenance, even though they stayed in their father's house.

> My wife goes every year to visit her family in Ramallah, and she sojourns there with the children for three weeks. This happens each and every year, since we were married eight years ago. She also stayed there every time a baby was born. Now her father may demand that I will pay for her accommodation in his house! I'm telling you, it doesn't make any sense!

Hearing this man's words, other men who overheard our discussion also nodded their heads with approval. It seems, therefore, that the new policy with regard to "accommodation maintenance" is indeed colliding with some well-established cultural norms. As such, it provides separated wives with an extremely efficient leverage for pressuring their obstinate husbands to either initiate reconciliation or agree for a divorce.

D.5. The Israeli shari'a courts broadening their jurisdiction

If the result of the 2001 legislation amendment was an "invasion" of the family courts into the jurisdiction of the shari'a courts, the qadis have proved since then that they too are capable of invading into the jurisdiction of the family courts. Thus, for example, one day in July 2003, I was sitting in the courtroom in the shari'a court of West Jerusalem, watching qadi Zibdi managing case after case in his calm, tranquil manner. Suddenly it dawned on me that I have just witnessed qadi Zibdi issuing a "protection order" (*amr himayya*) – an order that forbids a violent party in a dispute (and in the absolute majority of the cases this means men) from entering the nuptial house or from coming near the victim of the violence. I was so surprised by the seemingly natural and unproblematic way in which this order was issued, since I was accustomed that whenever a woman asks for such an order in the shari'a court, the answer is that in order to obtain a protection order, she needs to appeal to the family court.[76] Only these courts, the qadis (both 'Asaliyya and Zibdi) used to explain, have the authority to issue a protection order.

It appears, however, that the qadis were wrong in this point. Later that day I approached qadi Zibdi, and asked how could it be that he suddenly issues protection

[76] I must admit that my surprise was mixed with a sense of embarrassment. Just a couple of days before this hearing took place, I told a woman litigant, who Abu Shaqib referred to me for consultation, that she will have to resort to the family court in order to get a protection order. I thus had a guilty conscience for misleading this woman.

orders. He answered that the shari‘a courts have always had the authority to issue such orders, but it was simply not exercised by the qadis until now. Indeed, according to the “Prevention of Violence in the Family Law, 1991 – 5751”, religious courts (shari‘a courts included, of course), just like civil courts, have authority to issue protection orders. The qadis were apparently unaware of their jurisdiction in this regard,[77] or perhaps they were reluctant to exercise powers that were accorded to them by civil legislation. I did not ask qadi Zibdi that day what brought about the change, but I believe that the answer to this question is straightforward: in light of the increasing competition with the family courts, the shari‘a courts could no longer afford to needlessly refer women litigants to the family courts. Thus, since May 2003 the number of protection orders issued by the shari‘a court in West Jerusalem has continuously risen.[78]

The most salient attempt, however, to invade the jurisdiction of the family courts was blocked, surprisingly, by the shari‘a court of appeal. In January 2004, qadis Daoud Zini and Farouq al-Zu‘bi, both permanent members of the shari‘a appellate court, rejected an appeal on a judgment that was issued by qadi Zibdi.[79] The issue that stood at the center of this judgment was “compensation for arbitrary repudiation (*ta‘awid ‘ala talaq ta‘assufi*). The appeal was indeed rejected, but contrary to qadi Zibdi's expressed opinion in this judgment, Qadi Zini ruled (and qadi Zu‘bi agreed) that the shari‘a courts in Israel have no jurisdiction to deal with lawsuits concerning the compensation of a wife whose husband has repudiated her arbitrarily – that is, without her consent and without a proper shar‘i justification. I met qadi Zibdi in the shari‘a court in West Jerusalem several days after the appellate judgment was issued, and he was clearly disappointed, even though the appeal on his judgment was rejected. He approached me when I was standing in the secretariat area, told me that he has something interesting to show me, and invited me to his chamber. I bring here his words (that were pronounced in Hebrew) as I wrote them down soon after I left his room:

[77] Qadi Zibdi admitted to me that he was unaware that this type of order had been included in his jurisdiction.
[78] See e.g. files number: 1731, 1744, 1974, 2379, 2438, 2564 – all from 2003.
[79] Appellate judgment no. 259/2003.

I wanted to show you this judgment [the appellate judgment. Qadi Zibdi shoved the judgment into my hands]. I had an idea: why should we not begin to grant compensation to divorced women who were repudiated arbitrarily by their husbands? We have here many many such cases,[80] and I thought – why must a woman in this position resort to the family court in order to be compensated for her sufferings? Wouldn't it be better to find a solution for this problem within the framework of Islamic law?

- **Is there an Islamic solution to this problem? I thought that compensation may only be adjudicated in civil courts, according to civil law…**

No, no, no. You are wrong. In Jordanian law, for example, compensation for arbitrary repudiation may be up to one year of maintenance payments; and in the Egyptian law, compensation is even larger - up to three years of maintenance payments. Anyway, I spoke with some lawyers, urging them to file lawsuits on behalf of their clients for compensation over arbitrary repudiation. Indeed, some such lawsuits have been filed, and I have begun to conduct hearings in these files.

I wanted to issue such a compensation judgment, and then to have this judgment overviewed by the appellate shari'a court. Unfortunately, it went to the appellate court for the wrong reason. One of the lawyers who filed a compensation suit was not wise – I asked him if his client has proofs that the repudiation was arbitrary, and he insisted that any repudiation without the consent of the wife is arbitrary. I told him that this was not the case according to the shari'a, but he simply repeated his argument. Finally I had no choice but to reject his suit.

[80] For a description of such a repudiation that took place in the courtroom itself, see chapter 4, pp. 107-108).

- How can someone prove according to Islamic law that it was arbitrary repudiation?

You have to prove that there were no legitimate shar'i reasons for divorce. That the husband committed injustice in divorcing his wife without shar'i justification. The problem is, that this lawyer appealed against my decision, and the appellate shari'a court rejected his appeal on two grounds: that there is no proper clause in the Ottoman Family Rights Law to deal with such a lawsuit; and that the civil family courts already adjudicate in these cases according to penal and civil laws.

- This is what they said?

Yes. And it's a pity. So what if the family courts adjudicate according to civil law? This shouldn't prevent us from dealing with this problem in Islamic terms. And if we don't currently have an adequate clause in our law book – okay, so there is room for judicial *ijtihād*. It's a pity, because I will now have to reject all the lawsuits that were filed for lack of jurisdiction.[81]

The attempt to introduce a new type of lawsuits – "compensation for arbitrary repudiation" – into the shari'a courts' routine has therefore failed. This failure may be attributed to the unfortunate circumstances under which the case was brought to the review of the shari'a court of appeal. Another explanation, however, is that this initiative was rejected primarily because it was launched by a regional court, and not by the shari'a court of appeal itself.[82] Whatever the reasons for this failure, this episode clearly illustrates both the dynamism of the Israeli shari'a courts in general, and of the shari'a

[81] Indeed, nine such lawsuits were deleted from the court schedule soon afterwards: 1748/02, 1860/02, 2930/02, 55/03, 411/03, 747/03, 1207/03, 2416/03, 2654/03.
[82] On the attempts of the shari'a court of appeal to fortify its position relative to the regional, first instance courts, see Abu Ramadan 2003b.

court in West Jerusalem in particular, and the "competitive" frame of mind which brings about this dynamism.

E. Summary

This chapter revolved around the legislation amendment that passed in the Knesset on November 2001, which broadened the jurisdiction of civil family courts in matters pertaining to Muslims' personal status. It was argued that this amendment resulted in a "strengthening" of the legal pluralism that characterizes the legal environment of Israeli shari'a courts in general, and of the West Jerusalem shari'a court in particular. The new legislation enabled Muslim citizens – and residents – of Israel to resort to family courts in matters that previously fell under the exclusive jurisdiction of shari'a courts. It therefore opened to litigants extensive options of "forum shopping", more than ever before. Muslim women in particular benefited from this broadening of agency: new, and better, legal trajectories have become available to them, undoubtedly improving their position in relation to their husbands in cases of matrimonial disputes.

Moreover, it has been shown that even if a woman chooses to file a lawsuit in the shari'a court and not in the family court,[83] her situation and her chances to obtain a favorable judgment have significantly improved in recent years. The reason for this, I argued, is that the 2001 legislation amendment intensified the "competitive impulse" that throbs in Israeli shari'a courts – the motivation to convince potential litigants that the shari'a courts offer them a "better bargain" than other courts. The court officials strive to attract more litigants because for them, more litigants means more legitimacy; and as non-profit organizations with dubious religious and national prestige, Israeli shari'a courts are in particular need of legitimacy. Since women constitute the largest pool of potential litigants for shari'a courts, and since the legislation amendment created a threat that women in particular will prefer the civil family courts – it was only reasonable that special efforts have been put in improving women's status in shari'a courts.

[83] Indeed, as noted above, the majority of Muslim women still prefer, for various reasons, the shari'a courts over the civil family courts.

As we have seen, this determination to attract potential litigants to the shari'a courts led to an organizational ideology of "user friendliness", which has become even more salient in the shari'a court in West Jerusalem in recent years. Burdensome procedures were loosened up, and facilitative bureaucratic and judicial practices were adopted. More important, the process of bettering the position of women in Israeli shari'a courts has continued to unfold, and even more pronouncedly than before: sums of maintenance payments continued to rise, and the shari'a courts incessantly broaden the "services basket" that they offer to women litigants.

No doubt, this process of continuous improvement in the status of women in shari'a courts is not unique to the Israeli shari'a courts,[84] it would also be wrong to perceive it as resulting from the competition with the civil family courts alone.[85] Notwithstanding, the competition with the family courts drives the qadis presiding in the Israeli shari'a courts to strive towards particular goals: they aim to become no less efficient than the civil family courts, and to provide similar services as provided by these courts. At the same time, as we shall see in the next chapter – they also attempt to differentiate themselves from these courts, and to retain their unique Islamic and Palestinian character. In other words, in their incessant quest for legitimacy, the shari'a courts in Israel are trying to achieve the impossible: to run with the hare and to dance with the hounds at the very same time.

[84] See for example the articles by Moore, Wurth, Welchman, Buskens and Schltz, all published in a special issue of *Islamic Law and Society* (2003, vol. 10, 1) on "Public Debates on Family Law Reform: Participants, Positions and Styles of Argumentation in the 1990s".

[85] For example, other manifestations of this tendency to improve the status of women in court – which has no direct relations to the competition with the family court – are to be found with regard to obedience suits on the hand, and to dissolution of marriage on the initiative of the wife, on the other hand. While obedience judgments (*ta'a zawjiyya*) have almost disappeared from court records (the last obedience judgment was issued by the shari'a court in West Jerusalem in 1998, and ever since that year, the court has systematically rejected all obedience lawsuits), a reverse process occurred with regard to "discord and incompatibility" (*niza' washiqaq*) lawsuits. Such lawsuits, which enable wives to seek a divorce on ground of disharmony in marriage life (in itself, a far reaching innovation in *hanifī* law), have become, in recent years, the most popular mechanism for achieving a judicial dissolution of marriages. As argued by Abu Ramadan, the qadis presiding in the Israeli shari'a courts have adopted, in recent years, a particularly pro-women policy with regard to "discord and compatibility" lawsuits: not only have they lighten up the required criterions for proving a situation of "discord and incompatibility", they also tend to adjudicate in favor of women with regard to the issue of financial rights following a judicial dissolution of marriage. See, Abou Ramadan, forthcoming(a) and Abou Ramadan, forthcoming(b).