THE FAMILY IN LAW

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Abstracts

The HCJ Decision on Women Arbitrators and Judicial Review of Religious Courts: A Glance at the Future

Shirin Batshon

The petition of a Muslim woman to the High Court of Justice (HCJ), against the refusal of the Appellate Sharia Court and the Sharia Court in Taybe to appoint a woman arbitrator based on her gender, ended in a verdict that overruled the Sharia Courts' decision and obliged them to appoint a woman as an arbitrator. In its verdict, the HCJ set an important and precedential rule of interpretation, according to which, in the light of its objective, its unique status and the principles on which it rests, the Women's Equal Rights Law from 1951 should be interpreted widely, whilst the exceptions in sections 5 and 7(c) should be interpreted narrowly. Furthermore, the HCJ set an additional rule, according to which whenever there is an acceptable religious school of thought that does not violate the equality principle, the religious court is obliged to adopt it and prefer it to other schools of thought that contradict the equality principle. This article examines whether the precedential rulings in this HCJ decision, will pave the way for the appointment of women to the position of Kadi in the Sharia Courts and to other judicial positions in religious courts. My main argument in this article is that besides the remarkable achievement that this HJC decision has brought for women in general and Muslim women in particular, by breaking the existing male monopoly on appointment of arbitrators, the precedential rulings that the HCJ has set, can contribute to reducing women's rights violations in religious courts.

Appointment of a Woman as an Arbitrator in a Petition for Separation and Divorce in the Sha'aria Court: Between Sharia Law and Israeli Law

Iyad Zechalka

In recent years, the public discourse in relation to the issue of the status of women in religious courts and the eligibility of women to serve in judicial and quasi-judicial

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positions in religious courts has intensified. This subject has been discussed in various contexts in different frameworks, including in relation to the appointment of a women as an arbitrator in Sharia courts, within the process of separation between couples between whom there is a dispute, in accordance with the provisions of section 130 of the Ottomon Law on the Rights of the Family.
This issue came before the High Court of Justice as a result of a petition submitted to it in relation to a decision of the Sharia Court of Appeals which adopted the decision of the Sharia Court in Taibe not to appoint a woman as an arbitrator in arbitration proceedings relating to the separation of a couple under section 130 of the Ottomon Law on the Rights of the Family. The High Court of Justice granted the petition, relying on its interpretation of the function and powers of the arbitrator and in the light of the provisions of the Women's Equal Rights Law.
This article analyses the issue of the appointment of a woman as an arbitrator from three perspectives: Muslim law; interpretation of the Women's Equal Rights Law in the light of the analysis of the Mulsim law and that of the pluralistic system of Israeli law.

Legal Hybridism and Patriarchal Liberalism: A Woman as an Arbitrator in the Sharia Courts

Moussa Abu Ramadan

The hybrid legal system causes the fortification of patriarchal liberalism. There is development in the liberal direction, but there are blocks and barriers preventing progress to full equality. To the extent that legal hybridism causes infiltration of liberal norms, it also preserves patriarchal characteristics. In order to illustrate this claim, I will focus in this article on one example which relates to the problem of appointing a woman as an arbitrator in arbitration proceedings between spouses in "conflict and dispute" cases in the Sharia court. This example teaches how the Sharia Court acts under pressure from the civil secular legal system. It can be seen how the system of legal hybridism causes a plethora of discourses drawn from different normative systems and how the different actors try to navigate the discourse, so that it will serve well their interest. Legal hybridism is not only integration and mixing of legal systems, but also reflects the fact that in every legal system there are different interpretations, even if we only talk about "formal" law and the law in the literature. In practice, the content of the literature is not self-evident because writings don't talk for themselves and someone

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needs to read them and to apply them. As soon as there is interpretation and application, there is transformation and countless factors influence the result.

Up on the Barricade of Patriarchy: The Sharia Court and its Opposition to the Appointment of a Woman Arbitrator in Divorce Proceedings

Ido Shahar

This article seeks to explain the determined opposition of the Israeli Shari'a Courts to the appointment of a female arbitrator in cases of "discord and strife" (*niza'a wa-shiqaq*) between husbands and wives. The article shows that the functional role which the arbitrators fulfill in "discord and strife" proceedings carries with it considerable patriarchal ideology, drawn from two sources: (a) from the patriarchal cultural properties of arbitration in Arab/Muslim societies; and (b) from the structural context of such arbitration, which usually takes place in the family-private domain. Since this domain is conceived to be more authentic and less invaded than the public domain, the threat of intervention in it – e.g., by nominating female arbitrators, thus, undermining the patriarchal values on which arbitration is based - gives rise to fierce opposition. It is argued that the combination of these two elements led to the unambiguous stance of the Israeli Shari'a Courts against the appointment of women to the role of arbitrator in "discord and strife" cases in these courts.

The Need for a Right to Culture for a Minority within a Minority: Following HCJ 3856/11 Plonit v. the Sharia Appeals Court

Meital Pinto

The HCJ decision in Plonit, which deals with the refusal of the Sharia Court to appoint a woman as an arbitrator, is a classical examples of a situation in which a dominant group within a religious minority group claims that there is only one interpretation of the religion, which apparently requires exclusion of the weaker group within the minority group. In this article I will assume that religion is only one example of comprehensive culture and the authority given to the Sharia Courts in this case is in fact given to them within the framework of the right to culture, intended to safeguard the culture of the minority. I will argue that the right to culture is a group right, not because it is given to the leaders of the minority group so that they can do with culture as they

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wish and fill it with content and norms compatible with their exclusive worldview; the right to culture is a group right because it protects a participatory good which all the members of the minority participate in creating and in enjoying. In other words, the right to culture belongs to all the members of the minority and protects the right of all of them to take part in creating the culture, as amended and adjusted in accordance with the views of all of the members of the minority.

Further to this conceptual assumption, I will argue that Courts should make more use of the right to culture when they face claims by weaker members within a minority group, who constitute a minority within a minority. In cases in which the minority within the minority wishes to change or challenge the dominant culture practice within the minority group, the claim can be conceptualized within the framework of the right to culture, including the right to change the minority culture and to design it. When the majority within the minority refuses and reacts to the request to change by excluding the minority within the minority, the claim should be understand within the framework of the right to exclude or to expel from the minority group members who oppose or seek to change cultural norms which the majority within the minority are interested in preserving.

There are Judges in Jerusalem and There were Legislators in Istanbul: On the History of the Law Called (Mistakenly) "The Ottoman Law of Family Rights"

Iris Agmon

This article was written following a ruling of the High Court of Justice on an appeal by a woman who asked to appoint on her behalf another woman to serve as an arbitrator in her marriage dispute. The court's discussions in the case referred to the question of legal continuity with the "Ottoman Law of Family Rights" of 1917. This article examines the circumstances in which it was legislated, arguing that both the concept of legal continuity, in the name of which two instances of the Sharia Courts rejected the petitioner's appeal, and the construction of legal continuity attributed to this Law are misconceived. The article explains the methodological importance of the historical context for understanding the meaning of the Family Law and the need to revise the common wisdom about this law. The Ottoman Family Law constituted an essential link in a series of Ottoman legal reforms in the 19th century, which sought to design a centralized and territorial legal system. The codification of family law was intended to

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complete the unification of the judicial system, to render it applicable to all the citizens of the Empire and to strengthen state control by constructing family patterns in accordance with the vision of Ottoman modernity. The British overturned this trend when they applied the Family Law on Muslims only, thereby contradicting their claim that they were continuing the Ottoman tradition. Analysis of the provisions relating to arbitration in marital disputes in the Ottoman Family Law, which lay at the centre of the decision of the High Court of Justice, serves as a point of departure for advancing the present argument, namely that the Ottoman law was originally intended to provide the state with legal tools for re-fashioning family patterns.

Women in Judicial Positions in the Rabbinical Court: A New Examination in the Light of the Decision of the High Court of Justice

Tehila Be'eri-Alon

The HCJ decision in *Plonit v. The Sharia Appeals Court*, throws new light on an ancient debate: eligibility of women for judicial positions in Rabbinical Courts. In the light of this decision of the HCJ, the question to be asked is not whether the prevailing halachic position is that women cannot serve as religious judges, but rather whether there is a halachic position, which carries weight, that supports the possibility of the appointment of women and so perhaps the Rabbinical Court ought to prefer it, in the light of the principle of equality. Accordingly, this article examines the possibility of a halachic channel which would allow for women to serve as religious judges in the Rabbinical Court, presenting two angles to the discussion. The first deals with the existence of positions which allow women to serve as religious court judges *ab initio* or by virtue of their acceptance by the sides or by the community. The second, which is more novel, examines whether there is in fact any need for a full bench of the Rabbinical Court in relation to those issues which are decided today in the Rabbinical Courts of the State of Israel, and whether perhaps, even according to those views which deny the eligibility of women to serve as religious judges, decisions of a Rabbinical Court which includes a woman religious judge, will be valid halachically.

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