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Transforming "Transformative Accommodation": Palestinian-Muslim Women's Maintenance Suits as a Case Study

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"Transformative accommodation," one of the most influential models proposed and debated in multiculturalist literature, is designed to strike a fine-tuned balance between minority community culture and the rights of its most vulnerable constituents. This article seeks to challenge the model's theoretical premises and predictive normative outputs. Drawing on a novel empirical case study—the adjudication of Palestinian-Muslim wife maintenance suits in both Israel's sharia courts as well as its civil family courts—we contend that multicultural transformation is a bidirectional process. That is, the complex encounter between liberal normativity and indigenous-religious normativity may bring about transformation not only in the minority community's nomos, as the model envisions, but also in both normative legal systems. The article concludes with an analytical discussion aiming to transform transformative accommodation such that the model may indeed live up to its ambitious multiculturalist goals.

INTRODUCTION

Multiculturalism advocates the right to culture (Margalit and Halbertal 1994; Kymlicka 1995) and the right of Indigenous or religious minorities to autonomy and recognition (Barzilai 2003; Broyde 2017). The cultural heritage of such non-ruling communities, however, may often entail patriarchal and discriminatory norms that adversely affect their most vulnerable constituents (Levrau and Loobuyck 2018).[1] The

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1. More specifically, the multicultural literature is engaged with the issue of Muslim communities in the West and with accommodating Islamic normativity—which is usually highly patriarchal in nature—with the state legal system.

core inquiry occupying multicultural theorists thus grapples with an agonizing problem: accommodating group-differentiated rights habitually means compromising the well-being of individual group members and rendering women—the minority within the minority—the victims of liberal tolerance. Indeed, this well-known dilemma, and the politico-legal arrangements envisioned in order to solve it, has dominated "the multiculturalism debate" in recent decades (Yarbrough 1992; Triandafyllidou, Modood, and Zapata-Barrero 2006; Levrau and Loobuyck 2018).

While some critics of multiculturalism prioritize individual rights and gender equality and hence oppose the very idea of multicultural jurisdictions (Moller Okin 1999; Pollitt 1999), most participants in this debate strive to promote a synthetic approach by striking a balance between the communal right to culture and the protection of liberal individual rights. Will Kymlicka (1995, 1996), to take a prominent example, forcefully advocates multicultural arrangements in various social domains with minimum state intervention. He does acknowledge, however, that should violations of human rights within the indigenous/religious community become "intolerable," the state must intervene and limit "internal restrictions" imposed by virtue of the right to culture. In a somewhat similar vein, Seila Benhabib (2002), another influential political philosopher, advocates the recognition of multicultural domains in democratic liberal states under the condition that minority group members would possess "egalitarian reciprocity" and a "right of exit" from their communities (see also Kukathas 1998; Ballard et al., 2009).

A much-cited model of multicultural accommodation that draws on both Kymlicka's (1995, 1996) and Benhabib's (2002) works, was proposed by Ayelet Shachar (2001). Shachar argues that one of the purposes—if not the *raison d'être*—of multicultural accommodations is to improve the position of traditionally subordinated classes of individuals within minority cultures (Shachar 2001, 118). In order to rise to this challenge, she devised an elaborate and sophisticated institutional model that is based on three complementary principles:

- "'Sub-matter' allocation of authority": for example, the jurisdiction over various personal status matters is to be divided between communal tribunals and civil courts;
- "'No-monopoly' rule": neither the communal tribunals nor the civil courts are to have exclusive control over a contested social arena that affects individuals as both group members and citizens;
- "Establishment of clearly delineated choice option": a choice of exit is to be guaranteed so that a member of the minority community that wishes to resign therefrom is allowed to do so. (118–26)

Implementing such an accommodation scheme, according to Shachar, is supposed to produce an ongoing, closely monitored dialogue between the normative orders of the liberal state and the minority community. Over time, she surmises, this dialogue is likely to bring about transformations in the minority community culture and institutions by encouraging them to change discriminatory internal practices and rules "from within" (118–26; see also Shachar 2006, 2009).

Shachar's (2001) model of transformative accommodation has been well received in the multiculturalist literature and has attracted a considerable degree of academic attention, especially after it was endorsed by the Archbishop of Canterbury, Rowan

Williams (2008), in his famous lecture entitled "Civil and Religious Law in England." In the wake of this lecture, "transformative accommodation" became a buzzword for multiculturalism, and numerous researchers have endeavored to test its validity in empirical studies (Baumeister 2006; Jackson 2009; Cohen 2012; Hacker 2012; Sandberg et al. 2013; Shah 2016; Sezgin 2017). By and large, their findings were ambivalent: some researchers have argued that, under certain circumstances, the jurisdictional division of labor and forum competition between religious and secular courts may bring about internal reform in religious norms and practices (Hacker 2012; Sezgin 2017). Other researchers, in contrast, have been more skeptical in their evaluation of the feasibility of Shachar's (2001) model. A number of researchers have argued that transformative accommodation is unnecessarily complicated and that there are more suitable models of "joint governance" that may be more effective (Sandberg et al. 2013). Others have noted that transformative accommodation may be effective with respect to the domain of personal status and family law, but that it fails to deliver in the arena of criminal justice and education (Baumeister 2006). Lastly, some scholars have argued that Shachar's model is based on simplistic neoliberal assumptions that highlight the competition between courts or normative orders as an instant multicultural remedy for human rights violations. Such critics have also questioned the ability of vulnerable individuals within a minority community to freely choose a judicial forum and cautioned that the application of Shachar's model may bring about unintended counter-consequences: not only will it not motivate internal reforms in religious/indigenous law, but it may also actually increase the patriarchal religious leadership's power over its constituency (Cohen 2012; Sandberg 2016).

This article joins this unsettled intellectual debate even as it offers a fresh and overlooked critical perspective that challenges the model's theoretical premises and its predictive normative outputs. More specifically, we argue that Shachar's (2001) model fails to take into account an important possible outcome of the complex encounter between liberal normativity and indigenous/religious normativity. Despite the rhetoric of dialogue that Shachar embraces,[2] her model rests on the underlying assumption that transformation will only occur in the religious/indigenous domain. In other words, Shachar's multicultural vision posits that transformation is unidirectional: it is affected and induced by the liberal state (the active, accommodative side of the multicultural equation), and it affects—indeed, transforms—the accommodated side—that is, the minority community. In this sense, Shachar's model not only puts forward a self-contained, well-defined indigenous culture, as argued by some critics (Phillips 2009), but also one that is Eurocentric in nature: it is predicated on Western law's superiority and on the Orientalist supposition that any encounter between the "enlightened" Western system and the "backward" indigenous/religious system must necessarily result in the transformation of the latter.

Remarkably, this overarching and Orientalistically inflected assumption about the transformation's unidirectionality has been embraced uncritically by both critics and supporters of Shachar's (2001) model. Indeed, all empirical attempts to put Shachar's model to the test have focused on the question of whether the allocation of

2. In fact, it appears that it was this dialogic rhetoric that attracted the Archbishop of Canterbury to Shachar's (2001) model in the first place.

jurisdictional authority between religious and secular courts may motivate the former to conduct internal reforms. The complementary yet pivotal question of whether the de-monopolization of the judicial marketplace may induce reforms or normative transformations in the civil state courts has never been asked or contemplated, let alone examined and answered. This article addresses this lacuna by closely examining the effects of a twenty-year-old momentous, albeit understudied, feminist legislative reform in Israeli family law. This 2001 legislation granted Israel's civil family courts concurrent jurisdiction—alongside sharia courts—over personal status matters other than the marriage and divorce of Muslim litigants (Sezgin 2010). The statutory reform marked a watershed in Israeli family law: for the first time in Israel's history, a civil tribunal gained direct jurisdiction to adjudicate the ancillary matrimonial matters of Muslim couples while treading into the treacherous territory of Islamic interpretation. The forum selection privilege—as posited by both women's rights organizations and pro-amendment legislators—would work both ways to protect women's rights and promote their welfare: in one sense, by allowing them access to the state civil courts—widely considered as liberal and enlightened agents of gender equality—and, in another, by compelling sharia courts to become more women-sensitive when faced with jurisdictional competition.

The impetus behind this reform appears to squarely conform with the rationale of Shachar's (2001) model: shattering the exclusive jurisdiction of sharia courts and entrusting the civil judicial system with concurrent authority was designed as an ameliorative intervention aiming to "save" women from their patriarchal communal institutions. In contradiction to Shachar's prescription, however, the reform left intact the monopoly of religious normativity—that is, that civil courts employ religious law rather than civil law. As we will show below, the reform had complex and counterintuitive effects that paradoxically exacerbate, rather than alleviate, the tension between multiculturalism and feminism. Whereas sharia courts have indeed exhibited reformist tendencies (Abou Ramadan 2002, 2003, 2006; Sezgin 2018), developing an emancipatory and gender-sensitive exegetical tradition, the civil family courts have put forward patriarchal and conservative Islamic interpretations that systematically operate to the detriment of Muslim women. In other words, it is the civil tribunals, presided over by mostly Jewish female judges and laying claim to values of progress and equality (Boguch, Halperin-Kaddari, and Katvan 2012, 619), that have compromised Muslim women's rights and reproduced the gendered power imbalance in the Palestinian-Muslim community.

In line with postcolonial theorists such as Homi Bhabha (1996), who argued that the encounter between North/South or West/East is bidirectional in nature and mutually constitutive,[3] we contend that transformative accommodation is a two-way path: it exerts an impact on the communal religious legal system as well as on the state civil legal system. Indeed, while the normative encounter that took place in the wake of the legislative reform has brought about a liberalizing transformation within sharia courts, it has also brought about a counter—illiberal—transformation in the civil family courts. By "transformation" in the civil court system, we do not refer to a narrow change between pre- and post-reform wife maintenance doctrine, but rather to a change in the

3. Surprisingly, this perspective has rarely been embraced in the multicultural literature. For a rare exception, see, for example, Rodríguez-García 2010, 271.

broader ideological fundaments of the civil court system and its otherwise purportedly women-friendly policies. We contend that this perplexing phenomenon—which belies the model's Eurocentric underpinning—is itself nurtured and fed by uninformed and prejudiced Orientalist stereotypes that construct Islamic law as a static essence that is endemically patriarchal.

The article proceeds as follows. The first section focuses on the background of the legislative reform. Following a brief methodological note, the core of the article—divided into two sections—provides a systematic and inter-tribunal comparative analysis of the rulings of Israel's sharia courts *vis-à-vis* its civil family courts concerning the maintenance suits of Palestinian-Muslim wives. The article ends with a discussion section that distills the theoretical and practical applications and implications of its findings. We suggest that the civil family courts' avowedly women-unfriendly jurisprudence is not only harmful in itself but also may give rise to chilling consequences—that is, inducing sharia courts to withdraw from their innovative women-sensitive reforms. Finally, the article concludes with insights on how to transform transformative accommodation in ways that would foster an ongoing dialogue between different sources of authority and better redress women's multicultural vulnerability.

TRANSFORMING RELIGIOUS ACCOMMODATION IN ISRAEL: THE STORY OF A MOMENTOUS STATUTORY REFORM

The State of Israel has endorsed—as a remnant of its Ottoman legal heritage—a *millet*-like legal system in the domain of family law (Friedman 1975, 206). The *millet* system that had been in force in the Ottoman Empire for centuries constituted a kind of "personal status regime" (Galanter and Krishnan 2001), which imbued a number of non-Muslim minorities with limited religious and cultural autonomy (Braude and Lewis 1982). For various reasons, the colonial British administration that inherited the Ottoman Empire in Palestine in 1917, and the state of Israel that was established in 1948, opted for sustaining a *millet*-like personal status regime.[4] The religious courts were officially recognized by the Israeli judicial system, gaining formal authority and a state-backed power of enforcement (Abou Ramadan 2008, 87). Alongside these religious tribunals, the state has also established civil family courts that were granted jurisdiction in some matters of personal status and that—in certain circumstances—are obliged to employ different substantive religious rules in cases involving litigants from different religious communities (Shava 1998).

In the case of Muslims, until November 2001, sharia courts have possessed the broadest jurisdiction of any other religious court in Israel, holding exclusive authority over all personal status matters pertaining to Israeli Muslims (Layish 1965, 52). As a result, only Jewish (and Druze) women enjoyed a jurisdictional choice between the civil and religious courts over ancillary matrimonial matters, while Muslim (and Christian) women were limited to the exclusive jurisdiction of their all-male communal religious courts (Edres 2020). During the mid-1990s, a coalition of women's rights organizations

4. For a discussion of different explanations for this decision, see Karayanni 2020, 1–9.

joined forces under the Action Committee for Equality in Personal Status Issues in order to extend Muslim (and Christian) women the same forum-selection privilege enjoyed by their Jewish sisters for half a century.[5] The women's organizations, however, were not demanding a change in the substantive laws applying in personal status matters of Muslim (and Christian) litigants. The rationale underlying this legislative initiative therefore had uncovered an Orientalist approach toward sharia courts, which were perceived as the gatekeepers of male privilege and an inevitable site in which gender abuse is routinized, ritualized, and rationalized. "Substantive and full equality between men and women," the Action Committee for Equality posited, "can only be attained in civil courts and not in patriarchal sharia courts,"[6] since, among other things, "when a woman files a maintenance suit at the civil court, [even if] her case is handled according to religious law, she will be compensated differently, she will be treated differently, and as a result, what she will receive will be different."[7]

This feminist initiative stimulated a torrent of academic, professional, and popular discourses even as it encountered fierce opposition from officiating qaḍis and their conservative political allies.[8] The qaḍis vehemently resisted the imminent risk to their unfettered judicial monopoly; they employed heavy political pressure to thwart the reform, and, as Ido Shahar (2007) has shown elsewhere, they also introduced internal judicial innovations designed to raise wife maintenance awards. Put differently, the very threat to rob sharia courts of their exclusive jurisdiction over Muslim litigants served as a powerful impetus for a series of women-friendly reforms (Sezgin 2017). Despite the best of efforts of the qaḍis and their supporters, however, the draft bill was presented to the Knesset in July 1999.[9] The parliamentary debates continued unabated: some members of the Knesset (MKs) insisted that the bill might in fact harm Muslim women as it would subject them to the jurisdiction of unskilled and ignorant civil judges who "know nothing about sharia laws ... so we will inundate them with women, men and families when they are unskilled, untrained, incapable, have not studied, and are not eligible to rule on these family laws. What are we doing?!?"[10] MK Taleb as-Sana

5. The first author of the present article's mother, the late social worker Hakmiyya Hleihel, was one of the Action Committee's founders and one of the initiators of the struggle to amend the law and reduce the sharia courts' exclusive jurisdiction. She believed that the amendment would offer the Arab public—and especially Arab women—"another door, a choice, an alternative to address important issues that until now were under the monopoly of the religious courts. Its passing would promote democratic processes in Arab society." See Protocol no. 52 of the Interior Committee of the 14th Knesset, January 21, 1997 (Israel), https://www.nevo.co.il/law_word/Law103/14_ptv_480176.pdf.

6. Quoted from a draft prepared by the Action Committee for Equality in Personal Status Issues (no author or date mentioned) (our translation).

7. Protocol no. 208 of the Constitution, Law, and Justice Committee of the 14th Knesset, June 23, 1998, 12 (Yael Dayan, MK) (Israel), https://fs.knesset.gov.il/14/committees/14_ptv_485638.pdf (our translation).

8. For example, in early May 1997, the official mouthpiece of the Islamic movement in Israel, Sawt al-Haqq wal-Hurriyah (1997, 8) published a *fatwa* (a nonbinding Islamic legal opinion) that was signed by two sharia Appellate Court qaḍis as well as by three prominent leaders of the Islamic movement. The fatwa stated that "the draft amendment was flawed and invalid, that its passing in the Knesset will harm [the interests of] Islam in Israel, and that it stands in sharp opposition to the Holy Quran and to the benevolent sharia since it seeks to transfer personal status matters pertaining to our country's Muslims to the hands of civil authorities."

9. Legislation Bill no. P/1421, July 16, 1997, *Official Acta* 5758, Legislation Bills, 2749, 570 (Israel).

10. Knesset Plenum no. 242, November 5, 2001, 55 (Israel), https://main.knesset.gov.il/activity/plenum/pages/sessionitem.aspx?itemid=161387 (our translation).

perceptively highlighted the Orientalist undercurrents that uncritically embraced the thesis that the sharia court system turns gender hierarchy into a cultural marker of a distinctive identity that sets it apart from the Jewish-dominated civil courts:

> We are doing an injustice. We are carrying out a distortion. My colleagues say that we care about the wellbeing of women ... but we aren't changing the substantive law according to which these cases are adjudicated, because if it's in a sharia court, the judge will rule on the basis of [Muslim] personal law, and if it's in a family court, it will rule on the basis of [Muslim] personal law. So what, in essence, have we changed? We have only changed the judge, because the law is the same law. ... In essence, with this amendment we are saying: We don't trust Muslim judges. We trust Jewish judges![11]

This heated parliamentary controversy ended with the passage of Amendment no. 5 to the Family Courts Law in November 2001.[12] Puzzlingly, despite the obvious importance of this legislative reform, the issue seems to have been shunned from both the public and academic purviews following its passage. As a result, even though the amendment has already celebrated its twentieth anniversary, we know almost nothing about its implementation in practice, about whether it attained its stated goals, or about its potential gender repercussions on the rights and status of Muslim women.[13] The pages that follow shed a revealing light on these lingering pivotal questions.

MUSLIM WOMEN BETWEEN SHARIA COURTS AND CIVIL FAMILY COURTS: AN INTER-TRIBUNAL COMPARISON

Methodological Note

This article utilizes an empirical comparative research method that focuses on the decisions of sharia courts and civil family courts in cases of Muslim wife maintenance suits. Sharia courts have publicized a vast majority of their rulings on a dedicated official website ever since 1992.[14] We thus benefited from access to a rich database of almost five hundred wife maintenance decisions that were issued between 2002 and 2020. In addition, we obtained several dozen unpublished sharia court decisions that were provided to us via professional connections with both qaḍis and prominent lawyers catering to the Muslim community. In contrast to the ease of access to sharia court

11. Knesset Plenum no. 234, July 28, 1998, 366 (Israel), https://main.knesset.gov.il/Activity/plenum/Pages/SessionItem.aspx?itemID=437573 (our translation).

12. Amendment no. 5 to the Family Courts Law, November 14, 2001 (Israel), https://www.nevo.co.il/laws/#/5fedc707d998c4bcda593b1c/amendment/600548036bbbb7ba22963fa3/amendments.

13. Although a number of published articles sought to examine the impact of this legislative reform, this examination was not systematic or comprehensive and generally focused on the application of Islamic law in the sharia courts and neglected to cover civil family courts. See, for example, Blecher-Prigat and Schuz 2012; Blecher-Prigat, Schuz, and Abou Ramadan 2016–17; Abou Ramadan 2017.

14. The decisions of both the Sharia Court of Appeals as well as the Sharia Courts of First Instance are regularly published on the Sharia Courts' Administration's website, https://www.justice.gov.il/Ar/Units/TheShariaCourts/Pages/Verdict.aspx.

cases, the task of locating family court decisions is a considerable challenge. These decisions are not published officially by the Israeli Courts Administration, and proprietary computerized databases only publish family court decisions partially, sparingly, and at the judges' sole discretion. This publication practice prevents scholars from accessing a representative sample of these court decisions and makes it difficult to identify and corroborate overarching judicial patterns and generalized trends.[15] The following findings should therefore be read with this caveat on the inherent limitations of studying Israeli family court decisions in mind.

We scrutinized a corpus consisting of seventy-five decisions in cases of Muslim wife maintenance that were issued by the civil family courts between 2002 and 2020. Of these, about thirty cases were published in electronic databases, while forty-five additional decisions were not published and were obtained primarily from lawyers and litigants who were involved in the proceedings. Our analysis indicates that no significant differences—in terms of judicial policy—were found between the published decisions and the unpublished ones. Therefore, while we disclaim any pretense that a corpus of seventy-five cases constitutes a representative sample, we nonetheless believe that there is no reason to suspect a systematic skewing with regard to this sample and that we were still able to identify a valid common thread that crystalizes into a clear and discernible judicial trend.

Adjudicating Maintenance in Sharia Courts: Toward Women-Friendly Islamic Law

Wife maintenance suits are one of the most common legal procedures carried out in sharia courts, yet the scholarly literature is virtually bereft of systematic studies analyzing sharia court maintenance jurisprudence in the post-reform era.[16] This section will thus provide a critical glimpse into the corpus of sharia courts' maintenance cases that has taken form over the past two decades. Concededly, wives' entitlement to maintenance is organized around a patriarchal family structure that has a hierarchical gender regime at its core. Yet, notwithstanding that certain jurisprudential aspects are profoundly embedded in a conservative gender role ideology, sharia courts have nonetheless demonstrated a creative interpretive range that systematically works to benefit women and evinces a striking sensitivity to their subordinate status and lived realities in Palestinian-Muslim society.

15. The decisions of Israel's family courts are only published partially and only after all identifying details have been meticulously erased. For the problematic nature of this situation insofar as it concerns academic researchers, see Boguch, Halperin-Kaddari, and Katvan 2011, 619; Hacker 2015. For the difficulty of conducting comprehensive and reliable research without access to a wide-ranging database of case law, see HCJ 8001/19, *Trigger v. Director of Courts* (published on *Nevo*, November 30, 2020) (Israel).

16. For pre-reform discussions of maintenance rulings in the Israeli sharia courts, see Layish 1975; Abou Ramadan 2003, 2006.

Eligibility for Maintenance: Constitutive Conditions

According to Islamic jurisprudence, the first condition for the establishment of the husband's maintenance obligation is the existence of a valid marriage contract (*ʿaqd saḥiḥ*); the second condition is the fulfillment of the wife's duty to be confined (*muḥtabasa*) in the marital house.[17] The Israeli sharia courts have shaped wife maintenance as an absolute male obligation that may only be shirked if a woman fails to uphold her "duty of confinement" (*iḥtibas*)—that is, residence in the marital household. A review of hundreds of decisions reveals that sharia courts have established an exegetical presumption that deems a woman in conformity with her wifely duty in a valid marriage and that imposes on her husband a heavy burden of proof to rid himself of the confines of his absolute support obligation.[18] As part of this woman-sensitive presumption, sharia courts have engaged in a kind of interpretational "pincer" maneuver: on the one hand, they have conceptualized the duty of confinement extremely narrowly; on the other hand, they have broadened the spectrum of justifications that may exempt women from their wifely duty.

Insofar as the first process is concerned, in a long string of cases, sharia courts have strictly confined the reach of the duty of confinement, holding in the post-reform era that it is based on a sole foundation: dwelling in the marital house and not leaving it without permission.[19] A compelling example of such a narrow interpretation—which sharply broke from pre-reform decisions[20]—is consistent case law that has emphatically dismissed any husbandly grievances concerning a wife's disobedience, rebelliousness, or alleged violations of her feminine and sexual duties.[21] Moreover, according to sharia court jurisprudence, a husband is obliged to support his wife even if she does not reside with him as long as he did not ask her to move into his house. Likewise, a husband's refusal to allow his wife back into the marital home, even if she left willingly,[22] or to allow her family to visit their home,[23] constitutes an implied renunciation of her duties toward him. In fact, a woman's declaration of willingness to return to the marital home

17. Ottoman Family Law, Dustur, 2nd series, vol. 9, 762–83 (1917), arts. 70–72.

18. See, for example, Appeal 63/1996 (published on the Sharia Courts Administration website, June 13, 1996) (Israel); Appeal 112/2005 (published on the Sharia Courts Administration website, September 7, 2005) (Israel); Appeal 88/2008 (unpublished, April 24, 2008) (Israel); Appeal 283/2018 (published on the Sharia Courts Administration website, October 2, 2018) (Israel); Appeal 101/2015 (unpublished, May 9, 2015) (Israel).

19. Appeal 124/2006 (published on the Sharia Courts Administration website, October 8, 2006) (Israel); Appeal 400/2017 (published on the Sharia Courts Administration website, March 14, 2018) (Israel); Appeal 201/2018 (published on the Sharia Courts Administration website, October 3, 2018) (Israel).

20. For pre-reform rulings, see Layish 1975. Aharon Layish provides many examples of Israeli sharia court decisions between the 1950s and the 1970s that state that a woman who disobeys her husband in the broadest sense of the word—that is, "behaves improperly at home" or that neglects her duties—is not entitled to maintenance. Notably, the decisions in most of the cases discussed by Layish do not declare these women to be "rebellious wives" (*nashiz*). However, they do state that they are not entitled to maintenance since they do not fulfill the duties of confinement and obedience to their husbands.

21. Appeal 215/1998 (unpublished, September 22, 1998) (Israel); Appeal 489/2012 (published on the Sharia Courts Administration website, February 5, 2013) (Israel).

22. Appeal 262/2003 (unpublished, February 24, 2004) (Israel); Appeal 126/2019 (published on the Sharia Courts Administration website, May 29, 2019) (Israel).

23. Appeal 261/2007 (published on the Sharia Courts Administration website, January 16, 2008) (Israel).

re-establishes her eligibility for maintenance irrespective of the original reasons for which she left the marital home.[24] Sharia courts have also introduced innovations that have construed a woman's departure from the marital home for work purposes or for academic studies that she commenced before marriage as being in perfect conformity with her duty of confinement.[25] Similarly, a pre-divorce suit for *taḥkim* (mediation) served by the husband was interpreted as a waiver of a husband's right to "confine" his wife,[26] while the filing of a *taḥkim* suit on the part of the wife was not considered a violation of the duty of confinement but, rather, an important legal mechanism that would allow her to live in dignity (Abou Ramadan 2006, 65).[27]

In a complementary interpretive move, sharia courts simultaneously broadened the established list of justified grounds that exempt a wife from confining herself to the marital household.[28] Thus, for example, a husband is required to provide his wife with a marital household that constitutes a "legal abode" (*maskan shara'i*)—that is, a house that satisfies the criteria set by sharia courts—as a precondition for perfecting the duty of confinement (Shahar 2019). Sharia courts have adopted a strict and demanding definition of such a "legal abode" and have made it ever more difficult to satisfy this husbandly responsibility. It must thus be a proper, serene, and peaceful residence that provides a wife with privacy, security, and a healthy and calm atmosphere suitable for married life alongside reputable neighbors.[29] Another striking example relates to the conferral of a sharia seal of approval on a contractual stipulation that allows a wife to

24. This is true in cases where a husband refuses or delays a wife's return to the marital home. See Appeal 64/2019 (published on the Sharia Courts Administration website, December 31, 2018) (Israel); Appeal 102/2015 (unpublished, March 29, 2015) (Israel); Appeal 429/2013 (published on the Sharia Courts Administration website, February 9, 2015) (Israel). A wife's declaration during a sharia court case's first session where she states that she is willing to return to the marital home entitles the wife to maintenance from the date of filing. However, the wife's maintenance payments will be denied, and she will be required to return whichever maintenance payments she had already received, if it is later shown that her willingness to return was solely declarative and that the wife actually presents unjustified conditions for her return. See also Appeal 407/2018 (published on the Sharia Courts Administration website, January 31, 2019) (Israel).

25. For more on this, see Appeal 262/2003; Appeal 252/2011 (published on the Sharia Courts Administration website, December 11, 2011) (Israel).

26. Appeal 118/2010 (unpublished, June 3, 2010) (Israel); Appeal 460/2012 (unpublished, January 14, 2013) (Israel); Appeal 10/2008 (published on the Sharia Courts Administration website, April 30, 2008) (Israel); Case 4/1999 (unpublished, January 24, 1999) (Israel).

27. Appeal 238/2018 (published on the Sharia Courts Administration website, September 2, 2018) (Israel); Appeal 259/2018 (published on the Sharia Courts Administration website, September 2, 2018) (Israel); Appeal 10/1997 (published in Al-Kashshaf, 1997, volume 1, 78) (Israel); Appeal 37/2006 (unpublished, February 28, 2006) (Israel); Appeal 124/2006; Appeal 358/2017 (published on the Sharia Courts Administration website, March 15, 2018) (Israel); Appeal 315/2013 (published on the Sharia Courts Administration website, November 27, 2013) (Israel); Appeal 201/2018; Case 904/2016 (Jerusalem Sharia Court, unpublished, June 5, 2016) (Israel).

28. Appeal 297/2010 (published on the Sharia Courts Administration website, June 23, 2014) (Israel).

29. Appeal 173/2005 (published on the Sharia Courts Administration website, May 30, 2005) (Israel); Appeal 106/2020 (published on the Sharia Courts Administration website, May 10, 2020) (Israel); Appeal 453/2012 (published on the Sharia Courts Administration website, January 30, 2013) (Israel); Appeal 190/2005 (unpublished, March 21, 2006) (Israel); Appeal 312/2005 (unpublished, December 28, 2005) (Israel); Appeal 277/2007 (published on the Sharia Courts Administration website, March 2, 2008) (Israel); Appeal 150/2005 (published on the Sharia Courts Administration website, July 18, 2005) (Israel); Appeal 115/2005 (published on the Sharia Courts Administration website, June 30, 2005) (Israel); Case 281/2004 (unpublished, December 20, 2004) (Israel); Appeal 165/1996 and its translation in FC (Krayot) 14737-10-09, A. v. A. (judgement passed on March 22, 2010) (Israel).

determine her place of residence as part of the definition of a wife's right to a "*maskan shara'i*."[30] In one such case, a woman abandoned her marital residence in the West Bank because it had been agreed that the couple would live within the territory of Israel. The sharia court ruled that the husband failed to satisfy the "legal abode" requirement, notwithstanding that he was legally barred from residing in Israeli territory as an alien Palestinian.[31]

In line with its new gender-sensitive judicial framework, sharia courts have further construed domestic violence as impairing a house's capacity to constitute a "legal abode."[32] Recent case law, in particular, embodies a sheer intolerance toward any form of violence; the duty of confinement is voided even if the severity and frequency of violence is objectively negligible, even if it is verbal or financial abuse, and even if it is a mere threat rather than a concrete act of violence.[33] Finally, sharia courts' women-friendly jurisprudence not only comes into play on the substantive plane but also on the procedural plane. To illustrate, sharia courts have administered a procedure that allows them to significantly expedite the award of "temporary maintenance" (*nafaqah mu'aqqatah*) regardless of the husband's awareness of the pending proceedings or lack thereof. Such a decision may be passed as early as on the very same day in which a suit is filed (Shahar 2007, 127–28).

The Scope and Level of Maintenance

The issue of the scope and amount of maintenance has represented the very lifeblood of the feminist initiative to demonopolize the sharia courts' jurisdictional authority (Shava 1998, 373).[34] It is thus unsurprising that an internal reform aiming to enlarge maintenance awards was one of the first judicial endeavors introduced by the qaḍis in the wake of the struggle against the proposed reform. Sharia procedure in the pre-reform era had the qaḍi appoint two "experts" (*mukhbirin*) who were tasked with determining the sum of maintenance according to their folk knowledge of the couple's standard of living. This procedure, in turn, served the interests of men who were able "to bring the 'appropriate experts'" (375). In a concerted effort to convince women's organizations that their initiative was moot, sharia courts have spearheaded a procedural

30. Appeal 316/2010 (published on the Sharia Courts Administration website, May 23, 2011) (Israel).

31. Appeal 141/2000 (unpublished, December 3, 2000) (Israel).

32. Appeal 51/2009 (unpublished, December 20, 2009) (Israel); Appeal 24/1996 (published on the Sharia Courts Administration website, April 1, 1996) (Israel); Appeal 39/1996 (published on the Sharia Courts Administration website, April 3, 1996) (Israel). It should, however, be noted that earlier sharia court case law tended to distinguish between different types of violence and to imbue its levels of severity and frequency with normative significance. Thus, for example, minor and one-time violence—especially if it was regretted by the husband and if the husband promised it would not occur again—was not perceived as a justified sharia ground for leaving the marital residence. See Layish 1975, 108.

33. Appeal 290/2014 (published on the Sharia Courts Administration website, July 15, 2014) (Israel); Appeal 281/2008 (published on the Sharia Courts Administration website, December 18, 2008) (Israel); Appeal 59/2012 (published on the Sharia Courts Administration website, May 7, 2012) (Israel); Appeal 419/2016 (published on the Sharia Courts Administration website, February 26, 2017) (Israel); Appeal 285/2019 (published on the Sharia Courts Administration website, November 28, 2019) (Israel); Appeal 80/2020 (published on the Sharia Courts Administration website, June 30, 2020) (Israel).

34. Draft bill submitted by the Action Committee for Equality in Personal Status Law (no author or date).

reform that transferred legal authority from the "appointed experts" into the hands of the qaḍis themselves who were to base their decisions on such "objective documents" as pay slips and tax documents (Natur [1995] 1999).[35]

Sharia courts have further instituted a series of exegetical and procedural innovations that have allowed them to increase the amount of wife maintenance above and beyond the average rate awarded by either the civil family courts or any other religious tribunal in Israel (Barkali 2020). In a number of precedential rulings, the Sharia Court of Appeals has established that every maintenance allowance must include three components: "food expenses," "clothing expenses," and "lodging expenses."[36] Ostensibly, this interpretative elaboration may not appear to have been a major innovation in the sense that every basic manual of Islamic law addresses these three elements in the payment of maintenance. In practice, however, this new framing of maintenance eligibility has brought about a revolution. Formerly, only a wife who had left the marital home and rented substitute lodging was eligible for lodging expenses; now, following this judicial reform, every wife who has left the marital home and is living in her father's house—as was often the case—was also eligible to lodging maintenance.[37] Moreover, even wives who continued living in the marital home after separating from their husbands could now sue for lodging maintenance that would provide them with money for household expenses.[38] Finally, sharia courts' systematic and unyielding policy insists that a wife's economic status, her assets, and her professional income are utterly irrelevant for determining the level of maintenance. It is thus little wonder that sharia courts have broken records in awarding the largest sums of wife maintenance compared to any other court in Israel.[39]

In sum, Israel's sharia courts have made a concerted effort to accommodate their most vulnerable constituents in wife maintenance cases in the wake of the struggle against the statutory reform and during the two decades that followed. Thus, at every step, the sharia court's jurisprudence seems to be benevolent toward women: beginning with the swiftness of its decisions (Hamza 2012; Hleihel, Yefet, and Shahar 2023),

35. Appeal 96/1995 (published on the Sharia Courts Administration website, October 31, 1995) (Israel); Appeal 65/2005 (published on the Sharia Courts Administration website, March 28, 2005) (Israel). For a discussion of this reform, see Shahar 2007.

36. The sharia court's decisions address the three types of maintenance payments—clothing, housing, and food (*an-nawa'ha ath-thalatha*). See Appeal 44/2002 (unpublished, May 4, 2003) (Israel); Case 259/2018; Appeal 283/2018; Case 1/2020 (published on the Sharia Courts Administration website, February 13, 2020) (Israel); Case 24/2020 (published on the Sharia Courts Administration website, March 11, 2020) (Israel); Jaffa Sharia Court Case 802/2017 (published on the Sharia Courts Administration website, August 13, 2017) (Israel); Sakhnin Sharia Court Case 195/2018 (published on the Sharia Courts Administration website, May 17, 2017) (Israel).

37. Appeal 212/2006 (published on the Sharia Courts Administration website, December 12, 2006) (Israel); Case 135/2013 (unpublished, May 28, 2013) (Israel); Jerusalem Regional Sharia Court Case 2878/2003 (unpublished, October 28, 2003) (Israel); Appeal 552/2004 (unpublished, April 4, 2004) (Israel).

38. In such cases, the housing maintenance payments are meant for paying household expenses (electricity, gas, municipal tax, and so on). See Appeal 56/2020 (published on the Sharia Courts Administration website, May 14, 2020) (Israel).

39. Appeal 56/2020; Appeal 48/2020 (published on the Sharia Courts Administration website, April 6, 2020) (Israel); Appeal 42/1993 (published on the Sharia Courts Administration website, September 27, 1993) (Israel); Appeal 293/2003 (published on the Sharia Courts administration website, March 8, 2004) (Israel); Appeal 262/2003; Appeal 132/2018 (published on the Sharia Courts Administration website, September 2, 2018) (Israel); Appeal 42/1993; Appeal 489/2012.

through the criteria that establish eligibility for maintenance, and concluding with the rate and extent of maintenance. So salient is this new women-friendly jurisprudence that some prominent Islamic law scholars have gone so far as to view this cumulative judicial corpus as discrimination against men that breeds female "laziness" and harms Muslim women's prospects of integrating into society (Abou Ramadan 2006, 68–69).

Adjudicating Maintenance in the Civil Family Courts: Applying Women-Unfriendly Islamic Law

The civil family courts, as this section will demonstrate, oscillate between two contradictory interpretational poles. Ironically, whether they adopt conservative and patriarchal Islamic law or gloss over its doctrines in the name of civil principles of liberal equality, family courts' jurisprudence is inimical to Muslim women's rights and places them in a position of structural inferiority *vis-à-vis* Muslim men.

Eligibility for Maintenance: Patriarchal Interpretations of Islamic Law in Action

The gendered power balance reverses itself in civil family court jurisprudence. In what constitutes a mirror image of sharia court jurisprudence, family courts have adopted a wide-ranging and ever-broader interpretation of the wife's duty of confinement, on the one hand, and a narrow and obstinate interpretation of the justified sharia grounds that liberate a wife from her marital duty, on the other hand. For example, you may recall that sharia courts are satisfied with a woman's joint residence with her husband. Nonetheless, the civil family courts take a wife's entire behavior into account and insist on her adherence to a range of marital duties and expectations.[40] In a series of decisions, family courts have equated the position of a rebellious wife in Jewish law to the Muslim sharia law concept of *nashiz* (rebellious wife) and insupportably ruled that a Muslim wife forfeits her maintenance if she does not allow her husband sexual access to her body.[41] This trend of "Judaizing" Islamic law to the detriment of Muslim women has recently been strengthened by subjecting them to three *halachic* grounds that would cause a Jewish wife to forfeit her maintenance. The first of these is an "act of adultery," while the second is "an act of ugliness" (a situation where there is only indirect and circumstantial evidence that a wife has engaged in a sexual act with another man) and the third is "a wife who violates religious precepts, a wife who does not respect her husband and goes out with other men on a non-sexual basis."[42]

40. MPC (Krayot) 281/08, *Plonit v. Ploni* (published on Nevo, March 31, 2008) (Israel); FC (Krayot) 7161/05, *Plonit v. Ploni* (published on Nevo, November 1, 2006) (Israel); FC (Hadera) 1320/01, *A.A. v. A.Y.* (published on Nevo, October 18, 2006) (Israel); FC (Tiberias) 59344-02-15, *S.N. v. S.N.* (published on Nevo, March 23, 2016) (Israel), paras. 45, 47.

41. FC (Tiberias) 59344-02-15. It should be noted that this decision severely contradicted the decision passed by the Sharia Court of Appeals, which states that "a wife that prevents her husband from enjoying her," as the latter court phrases it, is not considered a rebellious wife. See Appeal 37/2006; Case 124/2006.

42. FC (Tiberias) 59344-02-15, para. 71.

This inscription of Islamic doctrine with moralistic considerations that are alien to its spirit gives rise to a particularly invidious intra-gender discrimination between Muslim and Jewish women. While family courts have defied Jewish law in releasing Jewish women from a strict code of sexual conduct (Halperin-Kaddari 2001, 2007), the same court defied sharia law in subjecting Muslim women to a strict code of sexual conduct from which they are religiously exempted. The civil court's approach to wife maintenance thus not only Judaizes and patriarchalizes Islamic law but also unjustifiably differentiates between Palestinian-Muslim and Jewish women.

A woman's expression of willingness to return to the marital home is associated with another manifestation of a differential treatment of the duty of confinement. The family court's approach—which is the polar opposite of the sharia court's—refused to view these circumstances as satisfying the duty of confinement. The family court also went so far as to suggest, for example, that an abused woman's claim of willingness to return to the marital home is *ipso facto* unreliable.[43]

Another example of the woman-unfriendly interpretation of Islamic law relates to the husband's consent to the issuance of protective or restraining orders against him. While sharia courts have construed husbandly consent as a waiver of the duty of confinement,[44] family courts have treated such orders as evidence that the wife is no longer interested in obeying her husband and thus no longer entitled to his support.[45] One such maintenance case involved a Muslim woman with five minor children who had never left the marital household even as her husband resided in an adjacent warehouse for two years.[46] Even if we ignore the court's erroneous reference to the Muslim litigants as being married "according to the laws of Moses and Israel," and its repeated citation of Jewish *halachic* precepts, it is hard to ignore its conscious deviation from Islamic law in underscoring that the husband should "not be obliged to pay for his wife's maintenance even though Islamic law establishes such an obligation."[47]

The rationale behind this odd decision, the court reasons, is that this pattern of "living together but separated" attests to the fact that "their [marital] path had reached its endpoint in light of the continuing dispute between them as is reflected by the motions for a court protection order filed by one party against the other and by the interventions made by the Israel Police Force and the local Welfare Services office."[48] Beyond the pernicious judicial practice of penalizing a wife who files a restraining order with the loss of her maintenance, the court patently keeps on raising the bar required for the satisfaction of the female duty of confinement. The court does not settle for a wife's "expression of sincere desire" to "maintain a harmonious joint life"[49] but requires actual adherence to the "sum total" of her "duties and obligations," including sexual duties.[50]

43. FC (Nazareth) 14135-09-14, M.M. *(A Minor) v.* Y.M. (published on Nevo, April 26, 2015) (Israel).

44. Appeal 30/2012 (published on the Sharia Courts Administration website, May 28, 2012) (Israel); Appeal 213/2013 (published on the Sharia Courts Administration website, September 4, 2013) (Israel); Appeal 104/2014 (published on the Sharia Courts Administration website, June 10, 2014) (Israel); Appeal 372/2018 (published on the Sharia Courts Administration website, January 16, 2019) (Israel).

45. FC (Tiberias) 59344-02-15, paras. 45, 47.

46. FC (Tiberias) 30980-02-13, *Plonit v. Ploni* (unpublished, June 7, 2015) (Israel).

47. FC (Tiberias) 30980-02-13, para. 32.

48. id.

49. FC (Tiberias) 59344-02-15, paras. 44, 47.

50. FC (Tiberias) 30980-02-13, para. 32.

In other words, this ruling constructs and stultifies the duty of confinement as an impenetrable barrier that, in effect, reads women's right to maintenance almost entirely outside the doctrinal framework of Islamic law.

In addition to extending the duty of confinement beyond the narrow and restricted concept of joint living, family courts have also radically confined, with no Islamic law grounding, the definition of a "sharia justification" for departing the marital household. A compelling example of this exegetical trend manifests itself in a maintenance suit that was deliberated by both the sharia court as well as the civil family court. In *Plonit v. Ploni*, the family court rejected a maintenance suit, ruling that the wife constituted a "rebellious wife" (*nashiz*) since she refused to admit her husband into the marital household.[51] The family court did so notwithstanding a previous sharia court ruling that found the woman justified in doing so since her husband had married other women without her consent or knowledge and wasted their money on these new wives while failing to support her. According to the civil tribunal, "sharia law is an archaic and patriarchal legal system which authorizes a husband to marry up to 4 wives at once. Might the wedding of additional wives justify the wife's refusal to permit her husband to enter the marital household? I believe the answer to this question is negative."[52]

Several months after the civil decision was passed, the sharia court awarded the wife interim maintenance (*nafaqat 'iddah*)—a special type of short-term maintenance paid for a period of three months after a divorce is finalized. The sharia court rejected the husband's reliance on the family court decision's finding that his wife was *nashiz* as fundamentally wrong and as unlawfully injurious to the wife. The sharia court also took issue with the Orientalist labelling of Islamic law as an "archaic and patriarchal legal system," advising its civil counterpart to familiarize itself with classical sharia law sources that safeguard women's status and celebrate their rights.[53] This decision—which provides a rare glimpse into the manner in which the family court and the sharia court rule differently in the very same case—reveals the extent to which the civil instance is encumbered by Orientalist imagery that limits the range of its interpretive maneuverability and empties Islamic law from its ameliorative and emancipatory potential.[54]

An even more problematic type of decision, however, is the civil case law insisting that the one and only justification for violating the duty of confinement is wife battering.[55] Even this limited exception was interpreted in a restrictive, narrow, and conservative fashion that flips the paradigm entirely and establishes the wife's duty of confinement, rather than the husband's duty of support, as being absolute. A number of family court decisions, for example, have ruled that "ongoing violence" cannot be considered a justified cause for leaving the marital household; in such cases, a wife must return and once again be confined to her husband if she does not wish to be considered

51. FC 34133-09-13, *Plonit v. Ploni* (unpublished, May 15, 2014) (Israel).
52. FC 34133-09-13, para. 23 (our translation).
53. Case 1682/2014 (Nazareth) (unpublished, November 15, 2014) (Israel).
54. Another example of this juridical worldview can be found in FC (Nazareth) 54724-02-13, *M.A.N v. A.A.N* (published on Nevo, December 23, 2013) (Israel).
55. FC (Nazareth) 24824-04-12, *N.H.H. v. S.H.* (published on Nevo, May 21, 2013), paras. 11, 24 (Israel).

rebellious.[56] Family courts have further ruled that "moderate violence"[57] or verbal or financial abuse are part of a husband's prerogative to discipline his wife and, as such, cannot constitute a justified legal ground for departing the marital household.[58]

This lenient treatment of domestic violence—as constructed via the civil court's normalizing hegemonic gaze—constitutes a kind of legal imprimatur for abusive practices toward Muslim women. In other words, rather than demonstrating a judicial policy characterized by gender sensitivity, family courts have demonstrated a "cultural sensitivity" that is grounded in problematic Orientalist misconceptions about both Islamic law and Palestinian-Muslim society (Adelman, Erez, and Shalhoub-Kevorkian 2003). In this framing, the civil family courts make use of sharia law in such a way as to "civilize" and trivialize various forms of violence against Muslim women and entrench hegemonic stereotypes that racialize their men as inherently savage.

Moreover, this patriarchal interpretation of Islamic law also brings to light a problematic ethno-national gender dynamic that discriminates against Muslim women. Family courts have developed benevolent civil mechanisms that fortify Jewish women's rights to maintenance—mechanisms that they fail to apply with respect to Muslim women. For example, family courts have devised a new and remarkably lenient evidentiary rule in maintenance law known as the "featherweight evidence rule," which settles for a minor burden of proof for justifying Jewish women's departure from the marital household.[59] In marked contrast, the same courts have refrained from implementing similar evidentiary relief with respect to Muslim women. In fact, civil court jurisprudence exhibits an even more problematic trend of an increase, rather than a decrease, in the evidentiary burden they impose, especially in cases of domestic abuse.[60] This doctrinal differentiation thus conveys a normative expectation from Muslim women to bear more marital violence than their Jewish counterparts. For example, family courts have refused to consider court protection orders obtained by wives with their husband's consent—in one case, as many as nine such orders—as evidence of marital violence. As noted above, this approach squarely contradicts sharia court precedents that consider a husband's very consent to the issuance of restraining or court protection orders as tantamount to a waiver of the duty of confinement.[61]

56. FC (Nazareth) 14135-09-14; FC (Nazareth) 47674-06-14, *H.Y.S v. M.Y.A* (published on Nevo, May 12, 2015) (Israel).

57. FC (Tel Aviv) 12810/06, *A.A.A.R (A Minor) v. A.A.A.R* (published on Nevo, March 1, 2009) (Israel).

58. FC (Tel Aviv) 12810/06; FC (Jerusalem) 10711/09, *A.T. v. S.T.* (published on Nevo, January 11, 2012) (Israel); FC (Nazareth) 54724-02-13.

59. CA 256/65, *Miller v. Miller*, PD 1 9(4) 171 (1965) 178, 178 (Israel).

60. An example of such discrimination is in a case where a wife's departure from the marital household was caused by the mutual fault of both husband and wife, a state of affairs known in Jewish *halachic* law as a "his and her preclusion." In such cases, family courts have ruled—contrary to Jewish Law as well as rabbinical court case law—that a Jewish wife is nonetheless entitled to the award of maintenance. On the other hand, the same family courts have ruled—contrary to sharia court case law—that a Muslim wife is not entitled to the award of maintenance. To the family court, a Muslim wife is only entitled to maintenance when the preclusion of joint residence is a "his" preclusion—that is, is caused by the husband alone rather than being shared by both partners. FC (Krayot) 7161/05; FC (Nazareth) 2881/03, *Plonit v. Ploni* (published on Nevo, May 29, 2006) (Israel); FC (Tiberias) 30980-02-13, para. 20; FC (Nazareth) 48375-12-11, *A.A. v. A.D.* (published on Nevo, June 10, 2012) (Israel).

61. Appeal 30/2012; Appeal 213/2013; Appeal 104/2014; Appeal 372/2018; Appeal 56/2020.

The civil family courts also ascribed negative evidentiary value to a delay in filing a police complaint or to the fact that no indictment resulting in a conviction has been filed.[62] In one case, the family court ruled that a claim of domestic violence should be doubted since "the wife, who is both educationally and behaviorally savvy, did not file a motion for a court protection order or a police complaint alleging violence, and this suffices to show that we are concerned with claims that are difficult to accept."[63] In another decision, the family court rejected a wife's claim that she left the marital household because of husbandly violence as "her testimony repeatedly noted her desire for matrimonial reconciliation, something which does not accord with her claims of violence and abuse. … It is thus unclear how the wife expects this court to believe her."[64]

A similar kind of reasoning was invoked by the family court in the maintenance suit of a wife who alleged physical and verbal violence spanning the course of fourteen years. Ironically, the very claim of prolonged abuse sufficed for the court to question the woman's allegation. The court ruled that it is unlikely that a wife would agree to live in such a way for such a long period: "[T]his court wonders and enquires how a battered and humiliated wife, [who] was also a rape victim, lived with a so-called violent and dangerous husband yet withstood [his conduct] for 14 years?"[65] This judicial trend, which ignores the severe underreporting that typifies Palestinian women victims of domestic violence (Salim 2019, 25, 28), miserably fails to make allowances for the cultural, societal, and economic barriers that prevent many of them from leaving abusive relationships or approaching external state agents.[66] In this way, civil courts have become active accomplices in the oppression of women in Palestinian-Muslim society.[67]

The Scope and Level of Maintenance: Liberal-Equality Interpretations of Islamic Law

The case law on the level and amount of maintenance passed by both tribunals represents another mirror image of sorts: sharia courts proceed from a conservative and traditional premise that has led the qaḍis to benefit Muslim women, while family courts have proceeded from a liberal premise of formal equality, which has led judges to harm them. To illustrate, family courts have exempted husbands from maintenance where their wives worked for a living[68] and, occasionally, also in cases where the wives did not work outside the home but where they offset their potential earning capacity from their maintenance. In straying from established sharia court precedents on the matter, family

62. FC (Tiberias) 59344-02-15; FC (Tel Aviv) 12810/06; as well as the decisions mentioned below.
63. FC (Nazareth) 24824-04-12, para. 37 (our translation).
64. FC (Nazareth) 14135-09-14, para. 36.6 (our translation).
65. FC (Tiberias) 59344-02-15, para. 66 (our translation).
66. "Appeal to an external body is perceived as involving not only an alien cultural factor but also an entity in conflict with the nation, thus rendering such an appeal tantamount to treason." See Abu-Rabia-Queder and Weiner-Levy 2013, 97; Sa'ar 2007, 64.
67. CADA (Nazareth) 46096-09-19, *Plonit v. Ploni* (unpublished, August 29, 2020), para. 32 (Israel).
68. FC (Tiberias) 30980-02-13; FC 30459-03-16, *Plonit v. Ploni* (unpublished, April 2, 2020) (Israel); FC (Krayot) 7161/05; FC (Nazareth) 37345-12-15, *R.A. v. S.H.H.* (published on Nevo, September 25, 2018) (Israel); FC (Tiberias) 59344-02-15.

courts have gone so far as to rely on *halachic* principles of Jewish law and on civil principles anchored in liberal values of formal equality.[69] In one such case involving a wife with no employment history who maintained her household as a housewife and mother of three children during her fourteen-year marriage, the court deemed it appropriate to explain that the award of maintenance belongs

> in the distant past, when living conditions were different, and the husband bore the lion's share of breadwinning for his family, it was the husband who was charged with the laborious duty of leaving the household to work so he could support his wife and children. On the other hand, the wife was tasked with the burden of maintaining the household and was thus confined to her home and engaged in carrying out all manner of housework and childrearing. Today life has changed, and *most women have joined the labor force and earn a respectable wage*.[70]

Family courts thus have adopted a false premise of imagined gender parity, which applies the rhetoric of equality to an avowedly unequal reality and makes artificial analogies between Muslim women, Muslim men, and Jewish women. Put differently, a judicial approach that assumes that "most women have joined the labor force" and "earn a respectable wage" is oblivious to both inter-gender and intra-gender differences and superficially universalizes Israeli women as a homogeneous category bereft of intersectional vulnerability. The civil family court jurisprudence is thus anchored in the life experience of middle-class Jewish women as a normative point of reference and misses the multiple marginalities of Palestinian-Muslim women along the axes of gender, class, religion, and ethno-national status. This willful blindness to the distinct differences between diverse categories of Israeli women has led family courts to ignore the fact that Palestinian-Muslim women, and especially married women, are the most discriminated population in the Israeli labor force: they suffer from the highest unemployment rates and from the lowest wages (Knesset Research and Information Center 2016; Kraus and Yonay 2018; Central Bureau of Statistics 2020; Miaari, Khattab, and Sabbah-Karkabi 2020).[71]

Acknowledging the distinct positionality of Palestinian-Muslim women in Israel, while still recognizing their heterogeneity and internal variations,[72] would mean, therefore, that the application of liberal norms of formal equality to spouses who belong to an avowedly patriarchal society is not an act of liberal feminism but, rather, of "patriarchal liberalism" (Abou Ramadan 2017). The "civilization" of the sharia thus

69. FC (Krayot) 7161/05, para. 51.

70. FC (Tiberias) 59344-02-15; FC (Nazareth) 37345-12-15; FC 30459-03-16 (our translation; emphasis added).

71. Indeed, beyond the commonplace wage gaps that Palestinian women suffer from by virtue of being women, they also suffer from an inbuilt inferiority caused by their ethno-national status, an inferiority that is reflected in their dismal pay data—their mean monthly pay is 45 percent lower compared to their Jewish sisters.

72. Indeed, nothing in our critique of family court jurisprudence and of the patterns characterizing Palestinian-Muslim society should be construed as denying its internal diversity or as essentializing or flattening the identity of Muslim women and ignoring intra-community lines of difference that shatter the homogeneity of this minority gender category.

contributes to the patriarchalization of Islamic law, to the feminization of poverty, and to gross gender injustice.[73] All in all, when viewed together, the civil court jurisprudence effectively nullifies Muslim wives' entitlement to maintenance and strips women of the limited power they are vested with in Islamic law and in the patriarchal society in which they live.

DISCUSSION: THE UNEXPECTED PERILS OF MULTICULTURAL ACCOMMODATIONS

This article offers a rare window into the aftermath of a momentous statutory reform whose underlying logic was very much in line with Shachar's (2001) model. This reform aimed to introduce forum competition into the domain of Islamic family law and to obviate the sterility of mutually exclusive monopolies by enabling Muslim women to self-select their chosen jurisdictions. This new regime of joint governance, it was anticipated, would benefit women by according them access to the civil courts' progressive and egalitarian jurisprudence while spurring the sharia courts to introduce reformist and women-friendly changes from within the religious tradition. Shachar's model is partly validated by the case study. The imposed jurisdictional competition—indeed, even the very threat of it—has pushed Israel's sharia courts to attune themselves to the needs of Muslim women and to initiate a series of "feminized" internal reforms: they have made it harder for men to evade their monetary obligations and made it easier for women to prove their eligibility for maintenance while dramatically raising the level of maintenance awards. In this regard, it appears that this legislative reform has responded well to the logic of the "transformative accommodation" model and has thus brought about a remarkable success story.

This positive evaluation is turned on its head, however, when we examine the other side of the multiculturalist equation: the accommodation process that has unfolded in the civil family courts has unveiled these Jewish-dominated institutions as extremely gender-biased state agents that "Islamize" gender hierarchy and promote patriarchal values as Islamic norms. Not only have the civil family courts failed to introduce gender-equalizing norms, but they have also, in fact, opted for pronouncedly patriarchal principles that have done violence to the interests of Muslim female litigants. In this regard, the reform may be described as an abysmal failure: rather than improving the status of Palestinian-Muslim women, civil courts have fostered their intra-group subordination. In fact, their treatment of Muslim wives is so poor and uninviting that these female constituents have voted with their feet and overwhelmingly opt for filing their maintenance suits in sharia courts rather than in civil courts.[74]

How can we account for these dual and paradoxical results, and what insights may be distilled from the analysis of the case study on the analytical and theoretical levels? We contend that the case study considered in this article powerfully illustrates some of

73. FC (Nazareth) 37345-12-15.

74. There is currently no certified data that compares the number of maintenance cases filed by Muslim litigants at civil family courts and at sharia courts. Nevertheless, several lawyers that represent Muslim women on a regular basis in both forums that we interviewed have insisted that the absolute majority of Muslim claimants vote for the sharia courts.

the misguided core suppositions of Shachar's (2001) model. For one thing, the model falsely assumes that state courts will be forced to vie for the loyalty of subjects who are simultaneously members of both civic and religious communities and develop means for appealing to their shared constituents. This operative assumption has failed miserably to pass muster in the Israeli case study. Moreover, as we have seen, contrary to Shachar's (2001) fundamental premise, it is not only the accommodated minority party that is affected and transformed by the accommodation process but also the hegemonic accommodating party. This conclusion corresponds with the arguments of Homi Bhabha (1994a, 1996) and other postcolonial theorists (Ashcroft, Griffiths, and Tiffin 1989; Lavie and Swedenburg 1996) who remind us that, in spite of the fact that the encounters between colonizers and colonized are always characterized by asymmetrical power relations, it does not mean that they are one-sided and unidirectional. Simply put, colonial encounters constitute dialogues rather than monologues. Both parties in the encounter—the colonizer and the colonized—are affected by the encounter, are responsive to it, and are transformed by its dynamic. Both parties also take part in creating a new hybrid "third space"—a productive and reflective space that engenders new possibilities (Bhabha and Rutherford 2006).

Indeed, a hybrid "third space," combining elements of sharia law and Israeli civil principles, was first created in the sharia courts, even in the pre-reform era, and, later, in the civil courts in the post-reform era. In their attempt to thwart the legislative amendment and compete for their female constituents, the qaḍis went out of their way to introduce internal reforms that were more responsive to the particular circumstances and concerns of Palestinian-Muslim women. To that end, they not only incorporated liberal ideas about women's rights into their jurisprudence but also incorporated civil procedures and practices (for example, the replacement of the experts (*mukhabirin*) in the evaluation of maintenance awards with official state documents).

A parallel hybrid space was created in the civil family courts that have been experimenting with the application of substantive Islamic law in the wake of the statutory reform. There are clearly obvious differences between the "third spaces" generated in each forum: while sharia courts have been able to produce a relatively coherent amalgamation of these two normative value systems, the hybrid amalgamation produced by civil family courts seems to be rather incoherent, paradoxical, and even perverse: the "civilization" of sharia law has given rise to doctrines that accord with neither Islamic law nor with norms of gender justice. Both "third spaces" are transgressive in nature, yet only the one produced in the sharia courts "initiates new signs of identity, and innovative sites of collaboration and contestation" (Bhabha 1994b, 1).

A trio of components may explain the differences in the characteristics of the "third spaces" that have evolved in the two judicial forums: the tools at the judges' disposal; the level of the forum's legitimacy in the Palestinian-Muslim community; and the judges' motivation to promote reforms.

Tools

The qaḍis presiding in present-day Israeli sharia courts are better equipped to hybridize Islamic law and Israeli civil law than judges presiding in civil family courts.

While most of the qaḍis are trained lawyers just like the family court judges, the difference between them lies in their familiarity with the rules and principles of Islamic law. Many of the qaḍis have degrees and a higher education in sharia law (Shahar 2015, 111), but even those who lack an official sharia education are well versed in Islamic family law and possess an extensive familiarity with the Arabic source materials. In marked contrast, the overwhelming majority of the almost exclusively all-Jewish family court judges are ignorant of Islamic law, and nearly all of them lack a basic command of Arabic or access to both the original Islamic sources as well as modern-day sharia court decisions. As a result, the civil courts' maintenance jurisprudence is necessarily uninformed and prejudiced. Furthermore, many family judges appear to fill in the gaps in their knowledge with avowedly Orientalist presumptions about the patriarchal rigidity of Islamic law as a pre-existing essence that victimizes women. It is no wonder, therefore, that their interpretative tendency is to flatten Islamic law into a caricature of an oppressive and conservative normative system that is archaic, static, and monolithic. This Eurocentric predisposition is the antithesis of the interpretative tendency possessed by the qaḍis, who tend to be much bolder, innovative, and benevolent in their approach to Islamic law.

Legitimacy

The qaḍis are not only more knowledgeable about Islamic law, but also possess more legitimacy than civil judges as they attempt to challenge the established doctrines of their religious tradition and initiate transformations from within. For one thing, while all the qaḍis are adherents of the Muslim faith, only one family law judge is Muslim. In addition, the Israeli sharia court system, despite its subordination to the Israeli legal system (Abou Ramadan and Monterescu 2008), is nonetheless a Muslim-Palestinian space: Arabic is the language spoken in these institutions, they are run by trained Muslim-Palestinian qaḍis, and they employ Islamic normativity, to wit, Islamic material family law, Islamic procedures, and Islamic rules of evidence (Shahar 2015). Most of these characteristics are completely absent in family courts, which constitute a markedly Israeli-Jewish socio-legal arena: the language spoken in these institutions is Hebrew, they are mostly run by Jewish judges, and they employ civil procedures and rules of evidence. Given these differences, the qaḍis naturally enjoy a broader and more solid grounding in the kind of communal legitimacy necessary for the introduction of exegetical innovations into their Islamic jurisprudence.

Motivation

The qaḍis are not only better equipped and backed by more legitimacy than their civil colleagues, but they are also pronouncedly more motivated to introduce pro-woman reforms than the civil courts. To put it bluntly, whereas the sharia courts' very lifeblood are their Muslim litigants, and they largely depend on the female clientele that constitutes about 70 percent of their workload (Shahar 2007), civil family courts mostly treat these litigants as an administrative and judicial burden. In other words, contrary to

Shachar's (2001) model, the forum competition generated in the wake of the joint governance reform was nothing but one-sided. The civil state institutions showed little concern about losing their constituency to the sharia courts and made no effort whatsoever to make their courts friendlier and more hospitable to Muslim female litigants. As we have seen, the different institutional logics of these two systems yielded different levels of motivation, which, in turn, translated into substantially different judicial policies.

This brings to light the unexpected perils embedded within the transformative accommodation model. If motivation is a key component of this process, and if the state side of the multiculturalist equation lacks a self-professed interest to vie for female Muslim constituents, then this may yield counterproductive outcomes in which the decisions of civil courts may function as a cultural straitjacket that forces Muslim women into a false regime of Islamic authenticity. If this is indeed the case, then transformative accommodation fails to live up to its vision of forum competition and fails to create institutional conditions that could act as a catalyst for internal reform.

Moreover, the family courts' failure to amalgamate sharia law and civil law in a coherent manner may exert spillover effects that could jeopardize the accomplishments of the sharia courts thus far. Indeed, a backlash may result if the civil court jurisprudence effectively negates the external pressure that would increase women's intra-group leverage and impel the qaḍis to continue their women-friendly reforms. In fact, the seeds of such a backlash have already been sown: a recent Sharia Court of Appeals decision, for example, seems to withdraw from a key component in its consistent benevolent approach toward women. In a 2021 decision, the court held that an adulterous wife forfeited her entitlement to maintenance. The qaḍis' cognizance that their decision squarely contradicts their own well-settled and established doctrine on the matter notwithstanding, the majority insisted that, given the "moral deterioration of current society," they are obliged to draw a line and prevent ill-behaving wives from being rewarded for their transgressions.[75] It is highly doubtful whether this deviant decision and its conservative rhetoric would have ever been published if the sharia court was still threatened by a rivaling liberal forum. Put succinctly, the regressive potential of transformative accommodation may come into play with regard to both the state side and the community side of the multiculturalist equation.

In order for transformative accommodation to match up to its progressive potential, we submit that multicultural accommodations must take place in an informed and purposeful manner. Allocating authority to civil courts and providing an option for forum shopping is an important starting point, but it cannot be the ending point of the multicultural endeavor. Shachar's (2001) "'no-monopoly 'rule" thus requires some elaboration: the regulator of the legal market (that is, the state) must make sure that civil courts are staffed by informed and trained judicial personnel capable of employing and interpreting religious doctrine and coherently integrating the civil and the religious bodies of law. The state also needs to generate appropriate institutional conditions that would facilitate a constructive and dynamic dialogue between Muslim qaḍis and civil judges and thus ensure the civil judges' awareness of, and familiarity with, the latest

75. Case 272/2021 (published on the Sharia Courts Administration Website, September 23, 2021) (Israel).

innovations in Islamic law. Otherwise, the latter may fall prey to an uncritical Orientalist bias that misperceives religious law as a backward, androcentric, and woman-victimizing tradition. In other words, for multicultural accommodation "to improve the position of traditionally subordinated classes of individuals within minority cultures" (Shachar 2001, 118), we must make sure that state institutions present these subordinated individuals with genuine and meaningful choices.

CONCLUSION

Transformative accommodation is one of the most influential developments introduced in multicultural theory in recent decades. While this model of joint governance has attracted considerable academic analysis and been challenged both normatively and empirically, its problematic underlying presuppositions have remained unquestioned thus far. By employing the Israeli reform initiative that structurally positioned civil courts as complementary power holders over Muslim litigants, this article has argued that transformative accommodation is inflicted with flawed premises at two critical junctures. First, the model's point of departure is the Orientalist supposition that the encounter between civil and religious normativity may only bring about transformation of the minority religious community. The model has thus simply not entertained the possibility that both jurisdictional parties may be mutually influenced and transformed by the encounter.

Second, while the demonopolization of the judicial marketplace should theoretically work in the litigant consumer's favor, the state agents' cultural bias may jeopardize the very feasibility of this neoliberal expectation by exacerbating differences in the "wrong" direction: civil judges have construed the maintenance doctrine according to what they believed to be an authentic version of Islamic law, despite or perhaps precisely because of the in-group gender subordination that their rulings fostered. Moreover, by embracing a decidedly patriarchal construction of the sharia, civil judges may endanger the very emancipatory and gender-sensitive redesign of Islamic law being effected painstakingly by sharia courts. It may thus be concluded that the failure to acknowledge the bidirectionality of transformative accommodation does not constitute a marginal or a negligible model oversight but, rather, is a fundamental flaw that may lead the model into a dead end.

Hopefully, the theoretical insights garnered from the analysis of this empirical case study may serve as a cautionary tale for future reformers who may wish to employ transformative accommodation as their operative model of multiculturalist policy. At the same time, the comparative methodology employed herein may assist in the study of legal forums' different modes of reaction to legislative reforms in general and to "transformative accommodation" reforms in particular.

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