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Uses of the Past: *Sharīʿa* and Gender in Legal Theory and Practice in Palestine and Israel

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In 2018 all Muslim majority countries with the exception of Saudi Arabia have codified laws in the area of family law; in Saudi Arabia discussions to codify the *sharīʿa* are ongoing. Methods such as *takhayyur* (selection of one legal opinion, of a school of law, over another) and *talfīq* ('combination and fusion of juristic opinions, and of elements therefrom, of diverse nature and provenance'),[1] together with administrative orders, reference to public interest (*maṣlaḥa*) and reinterpretation of textual sources (*ijtihād*), have been used as a juristic basis for accommodating *sharīʿa* via statutory legislation.[2] The result has been a legislation which has been characterised in contrasting ways, either as a reformed and modernized *sharīʿa* not substantially departing from Tradition, or as emerging from a "process of detachment from the *sharīʿa* and even its 'secularization'."[3]

Yet, Islamic law remains doubtless the frame of discussion in the majority if not in all Muslim states with regard to legal debates, legislative amendments and the political and social rights of men and women.[4] The past is invoked, Quranic verses are quoted to argue in favor or against women's rights and the example of the Prophet

1 Coulson 2006: 185-201; Vikør 2005.
2 Coulson 1964; Layish 2004
3 Layish 2004: 92
4 Buskens 2003; Moors 2003; Schneider 2010.

is appealed to to introduce a new means of marital dissolution. In short: classical Islamic Law is used in the context of present debates by different actors with different aims and objectives. Thus the question arises: how is the past used, by whom and to what ends? This was the central question of the Conference. A burgeoning literature in the last two decades has focused on Muslim family law, its reform, public debate as well as its adjudication in courts. This reflects a shift in paradigm from focus on rules in doctrinal works of Islamic jurisprudence (*fiqh*) to 'law in context', in application and in debates. The volume builds on these insights and adds to existing scholarship by approaching the subject of 'uses of the past' in Israel and Palestine from two angles: Muslim jurisprudence, and legal practice. Underlying these themes is a concern with how the past is harnessed with the aim of offering solutions to social problems in the domain of contemporary Muslim family law. This is a deeply political task involving the contestation of moral values which, as pointed out by Diamantides and Gearey,[5] usually falls on the shoulders of those who are often seen as a-political men of law and religion. However, beside 'men of law and religion', societal discourse about law in Muslim-majority states includes in the 21st Century a wide range of different actors: the state apparatus itself – in the form of parliaments, government ministries and bureaus – and the civil society organizations in which especially women become active.[6] At the same time, as is reflected in this volume, women have recently enjoyed greater access to the realm of the religious and political elites,[7] which therefore surely cannot be seen as a monolithic block of 'a-political men of law and religion'.

To ensure a strong thematic unity, contributors to this volume were asked to pay attention to the following questions: is the Islamic past used? And if so, how is it used? And: how are gender relations (re)constructed and adapted to the needs of society in the 21st Century? Are these norms constituted on the basis of equality or gender hierarchy?

While most existing scholarship focuses on the constraining role of Islam as it exists in the form of legal codes, this volume provides a new perspective by looking at the ways in which the Islamic legal tradition is invoked as a normative resource in modern argument by contemporary legal scholars and practitioners in the context of Palestine and Israel. The volume addresses areas of hybridity and overlap where new forms emerge and where old patterns are asserted against the pressures of socio-political and legal change. This approach is suitable to capture inner dynamism in Muslim thinking. There is little doubt that by drawing upon Quranic verses, *aḥādīth*, and medieval *fiqh*, contemporary actors contribute to adapting Islamic Law to legal modernity.

Second, this volume also explores the gender implications of discursive engagement with Islamic tradition in areas such as maintenance, divorce, and custody

5 Diamantides & Gearey 2012.
6 See Buskens 2003 for Morocco, Schneider 2010 for Iran.
7 See, e.g., Künkler 2010; Sonneveld & Lindbekk 2017.

at the level of legislation and court practice. The interplay between old and new in the Muslim family has created a discursive space in which legal reasoning moves back and forth between past and present with a view to ensuring the 'authentic' character of the Muslim family, the protection of its traditions and moral values. In the perspective adopted, gender hierarchy does not arise mechanically from a pre-existing essence which is 'Islamic law'. Instead, it is constructed and reproduced in everyday practices.[8] At other times hierarchy is disrupted. Hence, discursive engagement with the past have yielded contradictory gender effects, variously emphasizing contradictory hierarchical and egalitarian discourses.

The regional focus of the volume is Israel and Palestine (the West-Bank and Gaza). Both, Israel and Palestine's legal systems are the inheritors of the Ottoman and British political authorities that administered the region before 1948. In the 19th Century the Ottoman Empire created a new secular court system – as part of a series of modernizing reforms called the *tanẓīmat* beside the existing *sharīʿa* courts. Legislation of the ruler (*qānūn-nāme*) co-existed with religious law (*sharīʿa*). While the 1876 Constitution authorized *sharīʿa* courts to deliberate all *sharīʿa* cases, a piece of legislation in 1886 redefined the jurisdiction of civil courts (*niẓāmiyye*) and *sharīʿa* courts, limiting the former to cover commercial transactions (*muʿāmalāt*) and most criminal cases, and the latter to family matters (including marriage, divorce, *nafaqa*, inheritance and the like) in accordance with *sharīʿa*. In 1875, Muhammad Qadri Pasha's (d. 1888) *al-Aḥkām al-Sharʿiyya fī al-Aḥwāl al-Shakhṣiyya* was published, which, although never promulgated, was the first full-fledged codification of Hanafi provisions regarding the family.[9] *Sharīʿa* became 'personal status law' (*qānūn al-aḥwāl al-shakhṣiyya*), a distinct sphere of civil law covering marriage, divorce, filiation, and inheritance.[10] This conception of law contrasted with that of classical *fiqh*, which, Peters observes is "discursive and include[s] various, often, conflicting opinions [… and] are open texts in the sense that they do not offer final solutions."[11] Despite the existence in some countries of 'Islamic' penal codes and the influence of Islamic legal norms in other relevant fields of law (such as constitutional law or Islamic banking, etc), the linking of family and religion entailed that the institution of the family became portrayed as a bastion of religious law where reform is viewed as particularly sensitive.[12] As such, it has become the symbol of the Islamic identity of many Muslims.[13] Struggles over Muslim family law have continued to be waged in the name of cultural authenticity, civilization, modernization, and development. In the context of Palestine and Israel, a widespread view of Muslim family law as a pillar of Palestinian identity in Israel and Palestine lends a particular significance to contemporary debates.

8 See also Lindbekk 2013, 2016; Shaham 2010.
9 Qadri Pasha 2006.
10 Cuno 2015: 78; Vikør 2005: 236.
11 Peters 2002: 84.
12 Welchman 2007.
13 An-Na'im 1988: 9.

It should be noted that this book makes no claim to present an exhaustive coverage of the subject matter. Instead, it aims to contribute to discussions of the gender implications of 'uses of the past' in jurisprudence and jurisdiction and suggests avenues for further research. The volume acknowledges the necessity of exploring 'uses of the past' in a broad variety of sources including jurisprudence, legislation, drafts, international law as well as court decisions and university textbooks. The contributors to this volume selected topics that, while speaking generally to the themes of gender and Islamic Law, happened to converge on particular themes, such as the 'best interest of the child' (Abou Ramadan, Damiri, Edres, Shahar). Authors focusing on Palestine centered their attention more on national and international legislation and education while the scholars focusing on Israel dealt more with court decisions and political movements. For this reason the volume was divided into two broad sections. The first, titled "The Case of Palestine: International Law, National Legislation and Legal Education", includes articles by Mutaz Qafisheh, Lara-Lauren Goudarzi-Gereke, Irene Schneider and Somoud Damiri. The second section, titled "The Case of Israel: Feminism and Liberal Patriarchy as Reflected in Politics and Court Decisions", comprises articles by Moussa Abou Ramadan, Nijmi Edres, Ido Shahar and Yitzhak Reiter.

The Case of Palestine: International Law, National Legislation and Legal Education

The legal system of Palestine (the West Bank and Gaza) under the Palestinian Authority is described by Asem Khalil as a mixture of Ottoman, British, Jordanian, Egyptian, Israeli, and finally Palestinian laws: "Each regime supersedes the previous one without completely abolishing its legal system."[14] As in Israel, personal status issues are regulated by the religious communities themselves. During Jordanian and Egyptian control of the West Bank and Gaza, personal status laws were endorsed by the respective state authorities. Those codes apply only to Muslim Palestinians, whereas Jewish or Christian communities continued to be judged according to their respective personal status laws, adopted by their religious authorities. Nowadays, Khalil writes, there are more than thirteen Christian communities and one Jewish community in Palestine, with different personal status laws and different court systems.[15]

In 1967, both the West Bank and Gaza fell under Israeli occupation. Israel did not only maintain the different legal systems in place; it enhanced and institutionalized their distinctiveness, argues Khalil.[16] Thousands of military declarations and orders were issued separately for the West Bank and Gaza, and the court system was further

14 Khalil 2009: 172.
15 Ibid.
16 Ibid.

weakened by the creation of separate (Israeli) military courts.[17] This was the historical legacy on which the Palestinian Authority was founded after the Oslo Peace Accords in 1993. In 1994, just after the establishment of the Palestinian Authority, President Yasser Arafat proclaimed that all laws that were passed before Israeli occupation of the West Bank and Gaza on 5 June 1967 will remain in force, until further amendment. Still the aim of the Palestinian Authority was and is to start a process of law-changing with at least one clear legislative policy: legal unification.[18] Since 2003 a Basic Law exists giving all citizens equal rights regardless of race, religion and gender (Article 9). Gender equality is thus rooted in the constitution. However, in the West Bank the Jordanian Law of Personal Status of 1976 (JLPS) is currently applied, and in Gaza the Egyptian Family Law (EFL) of 1954. There is to date no Palestinian family law. As these laws are clearly outdated, many attempts were made to draw up a draft personal status law, so far without success. "The implementation of this goal so far has not been successful for a number of reasons, among them different ideas of what family law regulations should look like," Goudarzi-Gereke writes in her chapter in this volume. This is why the Supreme Judge Department issued regulations (*taʿmīmāt*) to deal with the most pressing social and legal problems of the Palestinian society. One regulation was issued in 2012 with regard to *khulʿ*-divorce, a kind of divorce based on redemption. This kind of divorce was according to JLPS (Article 102) only possible with the husband's consent. The Department ruled that now women could obtain this kind of divorce even against the husband's will, but, in contrast to the Egyptian Law 1 of 2000, only before the consummation of the marriage. This regulation, which has been applied by the *sharīʿa* courts since 2012, practically meant a reform of the existing law.[19]

The personal status regime is thus influenced by a tension between trends toward diversity and legal pluralism on the one hand, and forces of legal homogenization, standardization, and positivization on the other. Furthermore, as highlighted by Mutaz Qafisheh in his contribution, "the legislative process in Palestine went a step back with the division between the West Bank and Gaza after the takeover of the Gaza Strip by Hamas in June 2007. Since then, Hamas has been ruling Gaza, while the Fatah-led PA retained its role over the West Bank. Each party claims legitimacy for ruling and legislating. Fatah bases its regime on the presidential elections of 2005 in which President Abbas won; Hamas justifies its regime by its victory in the 2006 parliamentary elections."

The first chapter of the volume introduces the reader to the complex local overlapping of regulations in recent history before zooming out to review international law and, in particular, the ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), without reservations, by President Abbas in 2014. The meaning of such a response to international regulations

17 Ibid.
18 Ibid.
19 Schneider 2016.

on the part of the Palestinian Authority is analyzed by Mutaz Qafisheh, who investigates the PA's willingness to ensure equality between the sexes by means of the domestic application of CEDAW. Qafisheh's article proceeds from a thought provoking question: "Can Palestine enforce this treaty taking into account centuries-long traditions that discriminate against women, notwithstanding the conservative nature of local communities and the rise of Islamist renaissance across the Middle East?" The contribution tries to answer this question by addressing selected issues of family law in light of CEDAW: age of marriage, a guardian's approval of a woman's marriage, inter-religion marriages, polygamy, divorce, and inheritance. After considering that the mere enactment of legislation that adheres to the principle of equality is a relatively easy task given the political will to ensure gender equality, the paper shows that current family law regulations in Palestine are not in accordance with CEDAW as discrepancies are still encountered in areas ranging from the age of marriage to divorce and inheritance. In his survey, Qafisheh also includes Christian law, drawing attention to the massive levels of diversity in legal outcomes across Gaza and the West Bank. As a jurist arguing on the normative level, he recommends a general solution to this problem by introducing a civil family law as an additional option to whoever wants to escape the difficult applicability of these different laws. With regard to uses of the past, Qafisheh's article is especially noteworthy for its stress on the social embeddedness of the law and for his suggestions on how to "heal legally", with reference to the past, the discrepancies observed: e.g. the approval of a male guardian is still required for women in contracting the marriage contract despite the fact that Hanafi law (which was recognized as official school of the region under Ottoman rule and still is the predominant school in Palestine as well as in Israel) gives the adult woman the possibility to contract her marriage herself – the law can, Qafisheh argues convincingly, adopt this position. Inheritance is identified as an especially difficult topic but here, too, Qafisheh finds solutions rooted in the past and leading to more gender equality as demanded by international law, as in the introduction of the *qassām*, an official who works under the authority of a judge by making an inventory on all the property items owned by the deceased person. Expressing uncertainty about the possibility that the PA might later express official reservations towards CEDAW, Qafisheh recommends, as the most likely option available, implementation of CEDAW by reforming domestic legislation, policies and practices in order to ensure gender equality in line with international standards. Yet, he concludes, adding another element of complexity to the discussion, such a process of change could only lastingly succeed if it were to involve further socio-economic, educational, and cultural transformations.

Lara-Lauren Goudarzi-Gereke's contribution similarly explores the struggle of Palestinian legislators to overcome the problems of multiple legal inheritances by reworking the fragmented existing legal directives and drafting a unified Palestinian personal status code. She summarizes the history of draft laws with particular attention to the "Palestinian Model Parliament: Women and Legislation" in 1997/98 initiated by women's organizations and reflecting the influence of vibrant Palestinian civil

society discussions of draft laws. Her contribution also explores at some length the draft law prepared under the Supreme Islamic Judge (*Qāḍī al-Quḍāt*) in 2013, looking on women's legal options to divorce (especially through '*khulʿ*') and comparing it to the existing laws and, in particular, to the Jordanian Personal Status Laws of 1976 and 2010. As Goudarzi-Gereke points out, the context of Palestinian attempts towards a unified personal status code have been characterized by demands to improve women's legal status and to comply with international standards on the one hand and to maintain Islamic family law as the main source of legislation on the other. Regarding uses of the past, Goudarzi-Gereke not only focuses on the regulations in the draft and on comparison with the different existing laws but also investigates the terminology used. Thus, the draft includes *khulʿ*, which is normally conducted outside of court, as it gives husband and wife the possibility to agree mutually to separation, with the woman giving up mostly her dower. As the chapter illustrates, judicial *khulʿ* was introduced in 2012 with a regulation of the Supreme Judge (*Qādī al-Qudāt*) and renamed in the draft as '*iftidāʾ*' – with reference to the Quran, which was seemingly more appealing for Palestinian men than to be called "divorced" in the passive voice. Such terminology, Goudarzi-Gereke concludes, apparently aims at proving a clear distinction between the still existing classical *khulʿ*, which requires the husband's consent and remains untouched, and judicial *khulʿ*. The lines between *khulʿ* and *mubāraʾa* are blurred and *mubāraʾa* is sometimes used as a synonym of *khulʿ* in the legal texts. But also in the research literature the lines between the different forms and terminologies become blurred. Goudarzi-Gereke unpacks these concepts and puts them into conversation with classical Hanafi literature, which is enforced in the absence of legislative provision. In the end, the draft is understood by her to be more inclined to women's rights than the old version of the Jordanian Law of 1976. Goudarzi-Gereke also outlines the differences between the draft and the Jordanian Law of 2010 applicable in Jordan and in East-Jerusalem.

The following chapter, by Irene Schneider, investigates uses of the past in a textbook for the course on personal status law at Birzeit University/West Bank (BZU) in winter-semester 2012/2013 and how the book contributes to evolving notions of gender relations. University textbooks so far have been little studied, despite their important role in the education of future lawyers, judges and scholars. Schneider's contribution explores *khulʿ* – typically referred to in this context as *mukhālaʿa* – in greater detail than Goudarzi-Gereke's and Damiri's chapters, whose main emphases are elsewhere.

Schneider is readily aware that only in connection with the teaching process a comprehensive insight into the way the Islamic past is used to construct gender roles in university teaching of law can be gained.[20] Strangely enough, it turns out that the textbook deals primarily with Islamic fiqh and makes little reference to the Jordanian Personal Status Law of 1976, ironically, given the module title. The textbook fits neatly into the general definition of textbooks given by Issitt according to which

20 See for this Schneider 2016

knowledge is presented in a handy digest.[21] It is more a summary of knowledge about family law rooted in the Islamic past than an introduction into critical thinking about how to adapt it to the necessities of the 21st century. With regard to the 'use of the past', first the classical sources are named: Quran and Sunna and consensus. Then a case of *ikhtilāf*/difference of opinions of the scholars is dealt with. But there is no introduction into *ḥadīth* critique, guiding the students to the classical method of finding out whether a *ḥadīth* is 'strong' or 'weak'. No clue is given to which method might be used to interpret these sources, i.e. there is no mention of *ijtihād*.[22] Thus, Schneider concludes that the authors of the textbook take the 'easy way out', – to use a phrase Denker coined to describe the Egyptian debate[23] – i.e. they refer to the sources fleetingly without any attempt to explain how they might be understood. While there is a great deal of continuity with medieval fiqh at the level of substantive rules, the methodology and epistemology adopted by contemporary legal textbooks and the means through which they refer to this material differ fundamentally from pre-modern approaches. With regard to the second aspect, i.e. the construction of gender relations, the text reveals quite an interesting ambiguity. On the one hand, the *libās* verse (2:187) as well as the concept that whoever of the spouses wants the divorce, has to pay, could have served as starting points to argue in favour of more gender equality with regard to divorce. Interestingly, here reference is made to the medieval author Ibn Rushd who seems to support this idea. However, this is immediately followed by a misogynistic commentary on Quran 2:229 which considers the woman's right to redemption as violation of the man's right to obedience. The result upholds what has been termed the 'maintenance-obedience' equation.

Somoud Damiri's chapter closes the first section of the book. According to Giunchi (2013), the semi-legislative function performed by courts acquires considerable importance in countries where the legislature and executive are unable, or unwilling to reform the law, such as is the case with the law of personal status in Palestine.[24] In her contribution Damiri draws on her experience as a judge on the *Sharīʿa* court in Ramallah as well as Head of Prosecution in family law matters in Palestine in order to comment on the jurisdiction and the judicial system in Palestine. The chapter briefly highlights the chronology and development of the personal status system, and its operative jurisdiction. Damiri's article is of especial interest given her role as a practicing judge, in which capacity she elaborates on the necessity of implementing *ijtihād fiqhī*, jurisprudential innovation in the realm of personal status in Palestine. According to Damiri, such an implementation provided "real legal guarantees for women based on justified clear *sharīʿa* rules that were carefully examined in order to realize the *maqāṣid*" (the aims of the Islamic *sharīʿa*). It is in this sense that the paper addresses a particular topic already touched upon in previous

21 Issit 2004.

22 Compare here the article by Somoud Damiri in this volume and her access to the new interpretation of law.

23 Denker 2004

24 Giunchi 2013.

contributions: *khulʿ*. The *Sharīʿa* Judiciary Council in the West Bank has approved judicial *khulʿ* before personal privacy (*khalwa*) and consummation and has defined, in detail, its operation in 2012. In this framework the Council has explained that *khulʿ* issued by the judge is understood not as *talaq* but as *faskh*. This innovative position, which diverts from the mainstream, has been based on the opinion of Ibn Taymiyya and his student Ibn Qayyim, showing how the 'the past' of Muslim tradition can be recalled by modern jurists in order to justify positions that grant women greater agency and equality. As reported by Damiri, the Council has stressed the absence of the requirement of the husband's consent at least before consummation of the marriage. At the same time, it has highlighted the necessity to acknowledge the woman's ability to gain divorce based on 'dissent and discord' without oblidging the woman to prove her case. Damiri takes these two examples, *khulʿ* and 'dissent and discord' to highlight the active attitude of the *Shari'a* Judiciary towards 'uses of the past' of Muslim tradition and to use *ijtihād fiqhī* to improve the conditions of Palestinian women. She goes one step further proclaims, from her perspective as a judge, the necessity to review and amend the provisions of custody (especially the age of custody) in the West Bank, Gaza Strip and East Jerusalem. In this regard, Damiri points to the complexity connected with the term 'best interest of the child', arguing that it is necessary to establish more precise standards. This recalls Edres' article in this volume, which analyses court judgments, and highlights the critical importance of the 'best interest of the child' concept to both the Palestinian and Israeli contexts.

One point which bears repeating here is Damiri's unique position as a woman in the *sharīʿa* court system in Palestine. As Sonneveld and Lindbekk have recently shown, while adjudication in Muslim courts has for long been a predominantly male exercise, the last decades have seen a significant increase in the appointment of women to the bench in Muslim majority countries in the Middle East and South Asia.[25] In this research the example of Palestine is missing. Furthermore, while women's appointment to the civil courts was a smooth process arousing little opposition from society and the judiciary, in Palestine and elsewhere, the picture was different in relation to the *sharīʿa* courts, where the appointment of female judges has been met with protracted opposition from different segments of society, including litigants, male magistrates and academic (religious) scholars. Damiri's contribution to this volume provides insights into the experience of a female *sharīʿa* judge in Palestine from her own perspective and not from the perspective of Western scholars. According to her a combination of societal customs, and certain interpretations of Islamic *sharīʿa* played a significant role in preventing the appointment of female judges to *sharīʿa* courts in the West Bank until the introduction of a token number of four female judges after 2009, eight years before the first appointment in Israel of a female *sharīʿa* judge, Hanāʾ Manṣūr Khaṭīb, in spring 2017. As noted by Somoud Damiri in her contribution to the volume: "We were accused of deviating from the

25 Sonneveld & Lindbekk 2017.

religious text. Luckily, other citizens welcomed us and others started to inquire. During conferences, Arab and Muslim colleagues felt awkward and that was obvious in their modest discussions with us as they asked: How did Palestine go beyond the text of *sharīʿa*? Especially while maintaining a system of *sharīʿa* judiciary that is financially and administratively independent from the civil judiciary?"

The Case of Israel: Feminism and Liberal Patriarchy as Reflected in Politics and Court Decisions

In Israel there are no less than 14 recognized religious communities, among them a Muslim minority which constitutes around 18% of the total population. The state of Israel has refrained from interfering directly, through legislative or executive means, in the religious law of its Muslim and other religious minorities.[26] Instead, similarly to what had happened with the Ottoman *millet* system and under British Mandate, it granted *sharīʿa* courts jurisdiction in matters of personal status for its Muslim citizens. Marriage and divorce still remain under the exclusive jurisdiction of religious courts. Today, the main source of law applicable in the Israeli *sharīʿa* and civil courts is the Ottoman law of family rights, which dates to 1917. For matters not covered by the Ottoman law, judges often resort to Qadri Pasha's 19th century compilation of Muslim personal status law, and other commentaries on Hanafi jurisprudence.[27]

During the last decades, women's rights activists in Israel have advocated the adoption of a modern code of personal status to be applied in Muslim religious courts. Detailed discussion took place among a group of activists (Muslim, Christian and Druze women) gathered in the feminist organization *Niāʾ wa-Āfāq*. Despite their request to submit a draft law to the Knesset, no agreement has been reached so far. This stalemate came as a result of obstacles posed by religious forces inside the Knesset (from the different religious communities). Some Knesset members have been unwilling to support an interference of the Knesset in the jurisdiction of religious courts. Additionally, some Muslim Knesset members have been reluctant about the possibility that a Muslim code issued by a non-Muslim institution could be formally applied by *sharīʿa* courts. As such, legislative efforts to modernize the applicable personal staus law in *sharīʿa* courts have failed so far. Other attempts to reform have been pursued by means of scholarly interventions by Muslim judges and legal practitioners. Justice Iyad Zahalka's book *Al-Murshid fī al-Qaḍāʾ al-Sharʿī*, mentioned in Edres' contribution, portrays one such attempt. As in Palestine, in Israel attempts to modernize and reform the law are often excited by means of judicial decree. This was particularly true during the tenure of Justice Aḥmad Nāṭūr as President of the *Sharīʿa* Court of Appeals.[28] Some kind of reform has also taken place

26 Layish 1975; 2006.
27 Layish 1975; Zahalka 2009; Sezgin 2017.
28 Reiter 2009.

through court practice.[29] In Israel, many litigants from all class backgrounds resort to the *sharīʿa* and civil courts to claim their rights in family matters, ranging from the establishment of marriage and paternity, to child support, and child custody. Hence, courts have played an important role in defining the religious sensibilities proper to family and parent-child relations by drawing upon sources as diverse as legislation, custom, Quran, *aḥādīth* and medieval *fiqh*.

As already mentioned, religious courts (and in particular *sharīʿa* courts in case where litigants are Muslims) still maintain exclusive jurisdiction in Israel in matters of marriage and divorce. Before 2001, the exclusive jurisdiction of *sharīʿa* courts was broader, including almost all matters of personal status and family law for Muslims in Israel. In 2001, the approval by the Knesset of the 5th amendment to the Law on Parallel Jurisdiction of 1995, granted family civil courts parallel jurisdiction in matters such as custody and maintenance. As a result, Palestinian Muslims in Israel can now choose between civil and religious courts to handle their cases. Yet, the law applicable in both civil and *sharīʿa* courts is Muslim law.

The first chapter of our section on Israel, by Moussa Abou Ramadan, takes the hybrid legal system as its point of departure, questioning the results of such a reform in terms of respect of equality standards in court judgements. Abou Ramadan investigates how Muslim law and in particular its 'past' is referred to in civil courts' practice. The contribution introduces the reader to the place of legal pluralism and to the conflict between secular and religious jurisdictions in Israel by highlighting some of the regulations that affect the legal aspects of marriage dealt with by religious courts. It proceeds to discuss the regulation of child support (in cases involving Muslim litigants) by the civil family courts in Israel. With reference to 'uses of the past', Abou Ramadan's article analyses how Hanafi legislation is referred to by civil family courts in Israel when allotting child support to Muslim children taking into consideration the following issues: amount of child support; content of child support; person obliged to pay child support and due date for the payment. With regards to each topic, he compares classical Hanafi *fiqh* with the judgements of family courts on the matter. Interestingly, Abou Ramadan argues that such a hybrid legal system does not have a positive impact on the application and respect for the standards of gender equality mentioned in the Israeli Basic Law (Human Dignity and Liberty) and by international treaties ratified by Israel. On the contrary, he claims that such a systematic hybridity distorts the implementation of the rights and duties of husbands and wives, reinforcing what he calls 'patriarchal liberalism'. By this he means a development in a liberal direction alongside obstacles and barriers that prevent advancement to full equality between men and women, with the outcome remaining patriarchal. Comparing classical Hanafi law with the law applied by family courts in the above-mentioned matters, he comes to the conclusion that Israeli family courts apply a distorted version of Hanafi law; a law substantially different from what the *fuqahāʾ* have conceived. At the same time he highlights that serious violations of the

29 Ibid.

principle of gender equality, contravening international legal standards, persist. The family courts, as Abou Ramadan shows, seem to apply Muslim law relying more rigidly on Quranic verses, Hanafi law and the above-mentioned code of Qadri Pasha to come to their verdicts. Remarkably the process in custody related issues, claims the author, does not respect equality standards and is often detrimental for male litigants.

Nijmi Edres' chapter provides an example of different practical and theoretical approaches towards the strategic use of classical concepts of Muslim jurisprudence by contemporary Muslim judges when facing juridical and socio-political challenges. Edres' paper explores the topic of 'uses of the past' of Muslim tradition in describing how the classical concept of '*ḥaqq Allāh*' is used by contemporary Palestinian *sharīʿa* judges in Israel to cope with the challenges and socio-political pressures posed by the Israeli context. The paper draws on the concept of protection of the interest of the child as '*ḥaqq Allāh*', as described in a guideline book edited by *Qādī* Iyad Zahalka (judge of the *Sharīʿa* Court of Appeals in Israel) and argues that reference to '*ḥaqq Allāh*' represents a strategic act of resilience, framed to anchor to the soil of classical Muslim law the concept of the 'best interest of the child' referred to by Israeli civil law as a paramount aim in custody proceedings. As Edres convincingly argues, such a conceptualization is influenced by the necessity perceived by Muslim judges in Israel to Answer very different demands: the need to protect the interests of the 'Muslim nation' in the Israeli context; the necessity to face the pressure exercised by organizations for women's rights, advocating gender equality and the modernization of the law applied in *sharīʿa* courts, and the obligation to answer the requests of the Israeli Supreme Court, which forces religious minority courts to apply the principle of 'the best interest of the child' as conceived by international law. According to Edres, while identifying the 'interest of the child' as a paramount aim in custody proceeding, such a conceptualization also highlights the importance of the role of the judge, who is conceived as the ultimate figure responsible for upholding the 'claims of God' in the Israeli context. Edres' article moves from this theoretical framing to a discussion of its concrete application, looking at how such a conceptualization is expressed in judgments. The article highlights that despite the advantages of this approach for the *sharīʿa* court establishment on the theoretical level, practical implications on the ground remain still complex and incoherent. As the paper points out, such a conceptualization fails to solve the conflict between Israeli civil law and *sharīʿa* law practically as it does not provide clear guidelines for the definition of the 'best interest of the child' standards. Another line of inquiry in Edres' chapter explores how uses of the past relate to large shifts in the social and political environment. The case of custody is discussed by Edres in a broader historical context whereby *sharīʿa* courts in Israel are struggling to maintain authority among the Palestinian Muslim community. In this framework, Edres' chapter further argues that such reference to '*ḥaqq Allāh*' represents a theoretical bedrock by which judges assert their role of political authority as leaders and protectors of the Muslim community.

The criteria of the 'best interest of the child' is further examined by Ido Shahar in his contribution, in which the socio-legal implications of the breakdown of interfaith

marriages are investigated. In Israel, where religious courts hold exclusive jurisdicton in matters of marriage and divorce, inter-religious couples do not have an easy life. Indeed, differences of religion between respective spouses can form an impediment to marriage, in some jurisdictions, or can be the cause of considerable social stigma. As a result, one of the spouses often converts. The social implications of the dissolution of interfaith marriages are equally complicated. Shahar's research focuses on the comparison of two court judgments (issued by *sharīʿa* and civil courts in Israel) looking not so much at the legal but more at the social implications of the dissolution of mixed marriages. He also elaborates upon the concept of the 'best interest of the child' and reference to it in *sharīʿa* courts practice and the Israeli High Court of Justice's practice. Indeed, when mixed marriages are dissolved in Israel several difficulties occur especially when children and child custody (*ḥadāna*) are involved. On the basis of the judgments analyzed – and bearing in mind that one cannot generalize on this basis – Shahar concludes that while it is not uncommon for a wife to adopt her husband's religion, the breakup of inter-religious marriages often involves a struggle for custody based more on the religious identity of the parents than on the best interest of the child per se. Thus the concept of 'best interest of the child', which comes in for heavy criticism and is dismissed as 'hollow and highly malleable' is, according to his findings, understood by *sharīʿa* courts foremost as the obligation that the child is raised as Muslim. With regards to such reference to the 'best interest of the child' by *sharīʿa* courts Shahar refers to a previous article by Moussa Abou Ramadan, in which it is argued that judges 'Islamize' a concept which was not classically considered as a principle of overwhelming importance in awarding custody. In his contribution Shahar pursues this argument further, claiming that Muslim judges appropriate this concept and 'Islamize' it, promoting patriarchal values as Islamic norms.

The last chapter of the book moves the debate from inside *sharīʿa* and civil courts in Israel to the realm of the politics and the agency of religious women's activists. Yitzhak Reiter addresses the current phenomenon of 'women activism within religion' at sacred sites in Jerusalem, analyzing religious female activism on the basis of the agendas of two groups: the Jewish WOW (Women of the Wall) and the Muslim *Murābiṭāt Al-Aqṣā*. Reiter considers these groups as separate case studies to be compared and analyses how women confront male representatives of the state or a rival group, as well as their emancipatory narratives and motivations, In an attempt to answer the following questions: what motivates the two groups of women activists and what is the nature of their agenda, religious, feminist, or national? What is the legal basis for their breakthrough activity in Halacha and *sharīʿa*? To what extent do the two movements respond or fight against patriarchal religious practices? And how do they reconcile or separate religion and feminism? The article argues that both groups of women made their respective religious norms the basis for their breakthrough activity, and highlights how women invoke their religious tradition to justify their activism. As far as Muslim women are concerned, it demonstrates that the Muslim *Murābiṭāt Al-Aqṣā* refer to *sharīʿa* and the concept of *ribāṭ* (guard duty at the

frontier outpost), but also to the *ḥadīth*s recommending to visit *al-Aqṣā* Mosque and to *daʿwa* activities (i.e. the invitation to Islam) more generally, to challenge religious and customary norms and pursue their activities on *Al-Ḥaram al-Sharīf*. Interestingly, such attitudes by the Muslim *Murābiṭāt Al-Aqṣā* are compared to similar 'uses of the past' by the Jewish Women of the Wall, who re-interpret *Halacha* in order to improve women's status beyond the religious realm. In his conclusion, Reiter suggests that while the Women of the Wall (WOW), "are a group of Jewish religious women, representing mainly the liberal streams among Jewish religious congregations, who have a deliberate feminist agenda against conservatism", the *Murābiṭāt* are Muslim pious women, associated with an Islamist movement, "who have a nationalist agenda, while supporting religious conservatism". As a result of such reasoning, he argues that while the activity of the WOW could be defined as *religious feminism*, the activities of the *Murābiṭāt* provide an example of *feminism within religion*.

Through its various contributions, this volume portrays the complexity of the legal debate on the reform of the law of personal status, as well as the problems entailed by the legacy of multiple overlapping and inconsistent personal status codes. For Palestine, much of these legal debates today revolve around the pursuit of a unitary (coherent) code of personal status. While in Israel the possibility of a national personal status law applicable to all citizens seems to be out of question, the debate focuses on the necessity of a modern personal status law for Muslims to be applied by *sharīʿa* courts.

What the volume demonstrates with regards to 'uses of the past', is that the past is appealed to very frequently, in different sources and in different ways. If on the one hand (as highlighted by Schneider in her contribution) the past is sometimes used to uphold patriarchal norms, it can equally be used to "heal legally" (quoting Mutaz Qafisheh in this volume) the discrepancies observed between locally implemented regulations and standards of gender equality provided by international treaties ratified by both Israeli and Palestinian authorities. The contributions of Qafisheh, Abou Ramadan and Damiri provide examples of solutions in this vein; solutions both rooted in the Islamic legal tradition and able to address, in their opinion, the demand for gender equality expressed in international agreements. On the basis of the very different contexts of Israel and Palestine, contributors imagine different future landscapes. If in Palestine modernization can conceivably be achieved by means of legislation, in Israel change will probably continue to be implemented via *sharīʿa* courts' practice.

While exploring 'uses of the past' in different sources (jurisprudence, legislation, drafts, court decisions and textbooks), the volume also provides interesting insights into terminological shifts through time and into the re-tooling of classical legal concepts (see Goudarzi-Gereke, Schneider and Edres). Moreover, it demonstrates how the use of terminology reflects changing gender relations and how books and legal texts contribute to the evolution of notions of gender equality and to the construction of gender roles.

In so doing, the book reflects on the dynamic relationship between social demands to improve women's legal status and the perceived necessity to maintain Islamic family law, conceived as one of the pillars of Palestinian identity, as a main source of legislation. As such, it acknowledges that legal reform and modernization can only succeed when they involve comparable socio-economic, educational and cultural transformations.

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