

**THE ROLE OF JUDICIARY IN REFORMING ISLAMIC LAW IN NON-MUSLIM  
DEMOCRACIES: A COMPARISON OF ISRAEL AND GREECE**

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Abstract

Should a democratic regime formally incorporate religious laws and courts into its otherwise secular legal system? This is not a hypothetical question. Some democratic nations already formally integrate religion-based laws in the field of family law (especially Muslim Family Law-MFL). Although state-enforced MFLs often affect human rights negatively, many governments, especially non-Muslim majority ones, have refrained from direct legislative interventions into substantive MFLs. Instead they have empowered civil courts to play the role of “reformer.” But how successful have civil judiciaries in non-Muslim regimes been in “reforming” Muslim laws? On the basis of an analysis of the MFL jurisprudence of Israeli and Greek civil courts over the last three decades, I argue that civil courts could not have brought about any direct changes in Muslim law, however, they have had an indirect effect by pressuring religious courts/authorities to undertake self-reform.

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Should a democratic state accommodate the demands of ethno-religious communities for legal autonomy by recognizing and formally incorporating the laws and dispute-resolution mechanisms of these communities (especially in the field of family law) into a pluri-legal framework? Over the last decades, this question, which lies at the heart of the so-called multiculturalism debate in the West (especially as it relates to shari‘a and Muslim communities), has drawn the attention of many scholars, activists, policymakers, and politicians.

Multicultural accommodations that confer upon minority groups positive rights to preserve their distinctive religio-legal traditions pose a challenging normative puzzle, especially when well-intended group rights clash with the rights of individuals within those communities. When such a clash happens, whose rights should prevail—those of ethno-religious groups or those of individuals? And what should the liberal state do—sit silently on the sidelines or intervene to protect individuals against the “oppressive” practices of their cultural communities? Answers to these questions form the main intellectual fault lines in the literature. Apart from a small group of scholars, especially critical feminists such as Okin (1999) and Pollitt (1999), who categorically reject pluri-legal accommodations in family law, most scholars have suggested that religion or custom-based legal orders ought to be tolerated if individuals are given the right to choose between religious and secular law and to exit from their cultural communities. Scholars have differed considerably with respect to the extent and content of the right to exit and the role of the state in guaranteeing basic rights to group members. For instance, Kukathas (2003) argues that a liberal state should adopt a hands-off policy towards illiberal minority cultures so long as group members retain a right to exit. Similarly, Barzilai (2003), who emphasizes the significance of the internal autonomy of non-ruling minority groups, suggests that state intervention in communal affairs may be justified only in rare instances of severe physical violence. Kymlicka (1995) holds a non-interventionist position but places a greater emphasis on the liberal state’s responsibility to prevent gross and systemic human rights violations within minority cultures. Benhabib (2002) adopts the most comprehensive approach, suggesting that in order for multicultural legal arrangements to be accommodated within a deliberative democratic framework, the state should adhere to the principles of egalitarian reciprocity and voluntary self-ascription, in addition to the right to exit.

These contributions to our understanding of multiculturalism, excellent as they may be, are largely abstract and removed from everyday practices and the challenges of accommodating religious laws and courts within a democratic framework. The list of democratic countries that recognize and formally integrate religious laws/courts within their legal systems is short. In fact, according to one study (Sezgin 2017), there are only four such nations: Israel, Greece, India and Ghana.<sup>1</sup> Policymakers in these countries have long confronted two important questions that have been largely ignored in the literature: (1) how should secular and religious laws and courts relate to one another in a democratic regime? And (2) what role should secular state institutions (especially civil courts) play in making sure that religious courts respect fundamental rights and liberties in their decisions.

The only scholar who has taken on these practical challenges and offered a comprehensive framework to address them is Ayelet Shachar. In a series of publications, Shachar has laid out the institutional framework to address the question of jurisdictional relations between secular and religious judiciaries and the question of reducing inter-and intra-communal inequalities. In *Multicultural Jurisdictions* (2001), she proposes a joint governance model, called “Transformative Accommodation” (TA), which envisions a scheme of power-sharing between religious and civil courts in matters of family law along the lines of three cumulative principles: the “sub-matter” allocation of authority, the “no monopoly” rule, and the establishment of clearly delineated choice options (i.e., partial exit). An accommodation based on these foundational principles, Shachar argues, would potentially transform the religious communities and institutions by encouraging them to reform discriminatory internal practices and rules. TA is particularly concerned with lateral power relations between religious and civil courts, which often share concurrent jurisdiction. In a later work (2008) addressing the vertical power relations between religious and

secular judiciaries, Shachar has argued for the imposition of centralized *ex ante* oversight techniques by civil authorities to ensure that the rulings of religious court will comply with pre-defined rules and procedures (e.g., basic rights and liberties).

The transformative and regulatory accommodation model that Shachar has developed over the last two decades remains the most comprehensive and promising model for addressing the practical challenges of accommodating religious laws and courts within otherwise secular and democratic regimes. Daphna Hacker (2012), who tested the feasibility of Shachar's TA model in the context of Israeli rabbinical courts, found strong empirical evidence that, under certain conditions, jurisdictional competition between religious and secular courts may bring about internal reform in religious norms and practices. Both rabbinical and civil courts in Israel are controlled by members of the country's majority ethno-religious group. But what about shari'a courts in non-Muslim democracies? Can Shachar's accommodative framework help us to understand the relations between secular and Islamic courts in non-Muslim majority democracies such as Israel and Greece? State-enforced Muslim Family Laws (MFLs) like those in Israel and Greece are often reported to place limitations and disabilities upon the rights of women and children. Can civil courts in non-Muslim majority countries help mitigate the negative effects of MFLs by bringing about (direct or indirect) changes in Muslim laws and courts? In this article I seek to answer these questions and contribute to our understanding of challenges and possibilities of multicultural pluri-legal accommodations, with specific attention to Islamic law and institutions in non-Muslim democracies such as Israel and Greece.

As noted, there are four non-Muslim-majority democracies in the world that formally integrate MFLs into their national legal systems (Sezgin 2017): Israel, Greece, India and Ghana. Of these four, I focus on the former two due to their common heritage: both countries inherited

their MFLs directly from the Ottoman Empire. Moreover, methodologically, the two countries offer an important degree of variation on the dependent variable of the study—i.e., the civil court-initiated reform in Muslim family laws.

Although both Israeli and Greek MFL systems incorporated some of the elements of Shachar's TA model and employed some *ex ante* oversight techniques, there has been no “transformative” change in Muslim law or institutions in either country. This does not mean there was no change. There was, but it was more limited than Shachar would have predicted. The prospects for internal reform in MFL systems were better when lower and higher civil courts worked in tandem (exerting simultaneous lateral and vertical pressure on Islamic courts), and the shari‘a system was closely integrated into the normative hierarchy of the national legal system. The direction and magnitude of change was influenced by three other elements: the availability of legal aid NGOs that helped litigants to take full advantage of concurrent jurisdictions, political context (i.e., relations between the government and the Muslim minority, and relations between the non-Muslim government in question and foreign nations acting as “protectors” of the Muslim minority), and the relative legitimacy of the civil judiciary in the eyes of the Muslim minority—which correlates with the relative absence/presence of Muslim judges on the bench in civil courts.

This study is based primarily on Israeli and Greek religious and civil court decisions (in Hebrew, Arabic, Greek and Ottoman Turkish) as well as on primary data collected by the author through participatory observations and over 100 face-to-face interviews with judges, lawyers, litigants and experts in Israel proper and Western Thrace, Greece during multiple field trips between 2004 and 2015. For this study, I have analyzed approximately 200 court decisions, some published, some unpublished. Civil court decisions were obtained through electronic subscription-based databases.<sup>2</sup> The rulings were identified by keyword searches for terms such as “Qur’an”

“hadith”, “*talaq*”, “*nikah*”, and “*faraiz*.” Religious court decisions, which are often not available through databases (though some of the Israeli shari‘a court decisions can be found online<sup>3</sup>), were acquired by the author from judges, attorneys, fellow scholars and litigants. Unless otherwise noted, all translations are mine.

The article is organized as follows. First, I provide my theoretical framework by focusing on Shachar’s prescriptive suggestions for internal communal reform and the regulation of secular-religious court relations in liberal democracies. Second, I explain the historical, political and legal origins of MFL systems in Israel and Greece, describing how religious and secular courts relate to one another in each country. Third, I analyze juridical and jurisdictional relations between civil and Islamic courts and authorities both in Israel and Greece, examining the ability of civil courts to mitigate intra-group inequalities and bring about procedural and/or substantive changes in MFLs. In the conclusion, I compare the experiences of Israeli and Greek courts, identify ideal conditions under which civil-court-induced internal reforms have occurred, and summarize broader lessons of the study that may contribute to our understanding of multicultural religio-legal accommodations in liberal democracies.

## **I. Civil-Religious Court Relations and Internal Reform in Muslim Family Law**

There are currently fifty countries in the world that formally integrate MFLs<sup>4</sup> into their legal systems (Sezgin 2017). The manner and extent to which each country incorporates MFL into its legal system (“mode of integration”) varies considerably. In this respect MFL- applying countries can be divided into three distinct groups: In countries belonging to the first group, religious laws are fully integrated into the national system and applied by secularly trained judges at civil courts (“full integration mode,” as in India); in the second group they are applied by specialized shari‘a courts (“confessional mode,” as in Israel), while in the third group they are applied by state-

recognized religious authorities without a formal court system (“traditional authority mode,” as in Greece). The understanding and interpretation of MFLs across the fifty countries vary considerably—some adopt more “liberal” interpretations, some more “conservative” ones. However, despite this variation it is often reported that different aspects of MFLs (e.g., underage marriage, proxy marriage, polygyny, and unilateral divorce) negatively affect human rights, particularly those of women and children (Esposito and DeLong-Bas 2001). In other words, group-based rights accorded to Muslim communities as collectives often clash with individual rights and liberties accorded to their members under constitutional and international law. Shachar refers to this phenomenon as “the paradox of multicultural vulnerability” (2001). The paradox poses its greatest challenge to MFL-applying democracies such as Israel, Greece, India and Ghana, which are normatively expected to balance their constitutional obligations to individual Muslim citizens with their multicultural commitments to Muslim communities.

As Shachar notes, a comprehensive solution to this paradox requires establishing an institutional framework that would allow cultural differences to flourish while creating a catalyst for internal change to reduce intra-group inequalities and protect the rights of vulnerable group members (2001, p. 118). She calls her proposed framework for this challenging task “Transformative Accommodation” (TA). As noted, TA is based upon three foundational principles: the “sub-matter” allocation of authority, the “no monopoly” rule, and the establishment of clearly delineated choice options (partial exit). The three principles work in tandem to delineate the parameters for regulating relations between secular and religious courts and to set the conditions for internal change in religious jurisdictions.

With regard to family law, TA assumes that religious and secular courts will share jurisdiction by establishing their respective subject-matter jurisdiction over separate but

complementary sub-matters. For instance, if marriage and divorce are placed under the purview of religious courts, related family matters such as custody, alimony and property relations are placed under the jurisdiction of civil courts. Shachar calls this “joint governance”, i.e., neither state nor religious courts are given a monopolistic control that will have any bearing on the rights of individuals as both group members and citizens. Lastly, civil and religious courts have concurrent jurisdictions that allow individuals to transfer their disputes from one court system to another if they feel that one jurisdiction is systematically failing to address their concerns.

A quick survey of MFL systems across non-Muslim majority countries (Israel, Greece, Kenya, Singapore etc.) shows that there are two types of civil courts that regularly interact with religious courts and are responsible for the administration of MFLs: (1) high courts (supreme, constitutional or cassation courts with supervisory powers over religious courts), and (2) lower courts (district or specialized family courts that share concurrent jurisdiction with religious courts). Here Shachar’s TA model may be particularly helpful in analyzing the relations between lower civil and Islamic courts in Israel and Greece and identifying the direct or indirect role that civil courts may play with respect to the regulation and administration of MFLs in minority contexts.

In many non-Muslim countries, religious courts share jurisdiction concurrently with lower civil courts. In some instances, Muslim litigants can take advantage of concurrent jurisdictions and forum-shop<sup>5</sup> between civil and religious laws/courts. As Shachar (2001) suggests, forum-shopping may promote jurisdictional competition. Competition for clientele and textual authority usually increases when one of the rival forums systematically fails to address the concerns of a certain class of individuals (e.g., women) while the other adopts increasingly pro-plaintiff measures (e.g. granting larger maintenance/child support awards) (Klerman 2014). In the face of such competition from civil courts, Shachar hypothesizes, religious courts may feel pressured to undertake self-



reform in order to retain their authority and clientele. Thus, it may be surmised that the greater the jurisdictional competition, the greater the pressure of lower civil courts on the religious judiciary, and thus the greater the chances for “market-induced” reforms in MFLs.

In Shachar’s conceptualization, lower civil courts are an important but indirect source of internal change in religious law and institutions. By contrast, higher civil courts (e.g., supreme, constitutional courts), which are hierarchical superiors of religious courts and authorized to conduct *ex-post* constitutional review of religious court rulings, have a more equivocal and limited role. According to Shachar, the institution of *ex post* judicial review conducted by superior courts places the burden of reporting alleged human rights violations and breaches of law on vulnerable or at-risk groups (e.g., women, children) who may already have been coerced into accepting the jurisdiction of religious courts (or arbitration tribunals). *Ex post* judicial review is therefore a problematic oversight mechanism. Instead of relying solely on *ex post* review, Shachar suggests, additional *ex ante* oversight mechanisms should be adopted. Examples of *ex ante* oversight include mandatory secular legal training for religious judges and arbitrators (e.g., in constitutional law or international human rights law), mandatory legal counsel for individuals appearing before religious courts, permission for third parties to appear as *amicus curiae* on behalf of affected parties to challenge religious court rulings, and mandatory *a priori* review of religious court decisions. Shachar argues that, over time, the continuous use of *ex ante* oversight techniques, as in the case of TA, may bring about “change from within.” In order to avoid clashing with statutory laws, she suggests, religious judges should exercise self-restraint and voluntarily internalize certain secular norms (2001).

Shachar’s reservations regarding the limitations of *ex post* review are particularly germane to relations between secular high courts and shari‘a courts in non-Muslim democracies. In this

context, it is usually difficult for a Muslim litigant to challenge a religious court decision at a majority-controlled higher civil court, which is viewed by many minority Muslims as an “alien” institution. Thus, in a Muslim-minority setting, apart from issues of accessibility (e.g., financial, educational), there are also linguistic and ideological constraints on individual plaintiffs who wish to appeal against the rulings of their communal courts. In this respect, Shachar’s suggestion to adopt complementary *ex ante* oversight techniques to overcome the limitations of *ex post* judicial review and thereby bring about internal change in religious courts is particularly welcome. In fact, some of the MFL-applying democracies have already adopted different sorts of *ex ante* oversight mechanisms to control the practices of Islamic courts. For instance, in the 1990s the Israeli government began to appoint secularly-trained judges (*qadis*) to shari‘a courts (Reiter 1997). In 2002, the old Law of Qadis (1961) was amended to formalize the criteria for selection of judges, further opening the door to those with a secular higher education—especially graduates of law schools. Proponents of these reforms held the view that secularly-trained *qadis* would be more receptive to secular ideas and norms than earlier generations of *qadis* who had only often religious training (Shahar 2015, pp. 30-31). Likewise, in Greece, since 1991 the law requires *a priori* review of all *mufti* decisions for constitutional compliance (with basic human rights) before they may be declared “enforceable.” In other words, some *ex ante* oversight measures are already in place in both Israel and Greece. But have they produced any of the outcomes hypothesized by Shachar? For instance, are religious courts now more compliant with secular law? Have intra-group inequalities been reduced? Or has internal reform been facilitated? Likewise, has the competition between civil and religious courts, as Shachar suggests, brought about a transformation in religious courts?

Below, I briefly describe the MFL establishments in Israel and Greece and then try to answer these questions by analyzing the juridical and jurisdictional relations between religious and civil courts in both countries.

## **II. MFL Establishment in Israel and Greece**

Both Israel and Greece have sizeable Muslim minorities (18% in Israel, 5% in Greece)<sup>6</sup> (PEW Research Center 2011) and both have formally integrated MFL into their legal systems—Israel since 1948, and Greece since 1881. As Table I illustrates, nearly all aspects of Shachar's TA model—albeit to varying degrees—and some *ex ante* oversight techniques have long been incorporated into Israeli and Greek MFL systems, thereby enabling us to directly observe their impact on relations between religious and civil courts and on the evolution of Muslim laws in non-Muslim majority democracies.

*Table I: Comparison of Israeli and Greek Muslim Family Law Systems*

	<b>MFL System in Israel</b>	<b>MFL System in Greece</b>
<b>Sub-Matter Allocation</b>	Shari'a courts have exclusive jurisdiction over marriage & divorce (but they must abide by secular legislation that regulates the age of marriage, prohibition of polygamy and <i>talaq</i> , and registration of marriages).	No clear division of subject matter jurisdiction between civil courts and the <i>mufti</i> . Ambiguity in the judiciary.

	All other matters are under concurrent jurisdiction of shari'a and civil family courts	
<b>No-Monopoly Rule</b>	<p>Neither civil family courts nor shari'a courts have monopolistic control over family law in its entirety.</p> <p>However, no civil marriage or divorce option exists. All marriages must be religious.</p>	<p><i>Muftis</i> often have monopolistic control over family matters of Muslim Thracians who marry religiously.</p> <p>Civil marriage/divorce option is available. Family matters of those who marry civilly is subject to secular law.</p>
<b>Choice Options (Partial Exit)</b>	There are clearly delineated choice options with respect to family matters that fall under concurrent jurisdiction. However, people can opt for the forum of their choice (civil v shari'a courts), but not necessarily for the law (i.e., civil courts often apply religious law as well).	Contested. There is legal ambiguity. Greek courts issue contradictory rulings as to whether Thracian Muslims (who married religiously) have a right to opt out of religious law and the <i>mufti's</i> jurisdiction.
<b><i>Ex ante</i> Oversight</b>	Not firmly established. However, some elements of <i>ex ante</i>	Clearly established. Technically, <i>mufti</i> decisions cannot be enforced

	oversight are available, such as the appointment of <i>qadis</i> with secular education.	without prior constitutional review by a civil court of first instance. In practice, however, such review is non-existent.
<b><i>Ex post Review</i></b>	Shari'a court rulings are subject to review by High Court of Justice.	No direct challenge to <i>mufti</i> decisions are allowed. Appeals against the enforceability decision of a court of first instance can be brought to civil appellate courts and to the Court of Cassation as the court of last resort.

Israel inherited a religion-based family law system (known as the *millet* system)<sup>7</sup> from the Ottoman Empire, which ruled Palestine from 1517 to 1917. Under the *millet* system, 11 different religious communities<sup>8</sup> in Palestine were granted autonomy to have laws and courts in the field of family law. Muslim laws and courts were an integral part of this system, which was preserved under British rule (1917-47).

There are currently eight regional shari'a courts and a Shari'a Court of Appeals (SCA) (*Mahkamah al-Isti'naf al-Shar'iyya*) within Israel's pre-June 5, 1967 borders. The Israeli government appoints and pays the salaries of the *qadis*, who staff these courts and execute shari'a decisions. *Qadis* are selected from among Israeli Muslims who have a higher (university) education in Islamic studies or who are lawyers and members of the Israel Bar Association and have practiced law in the secular system for at least five years (Sezgin 2013, p. 86).<sup>9</sup>

Shari'a courts have exclusive jurisdiction over marriage and divorce and concurrent jurisdiction with civil family courts over all other matters of personal status involving Muslim citizens. Since the 2001 enactment of the Law of Family Courts (Amendment No. 5), Muslim litigants can choose between civil family and shari'a courts for matters such as custody and maintenance. Both *qadis* and civil judges apply the same material law, which includes Islamic as well as relevant secular laws. The main source of MFLs applied by Israeli shari'a courts (and civil family courts) is the Ottoman Law of Family Rights (OLFR) of 1917. For matters not covered by the Ottoman Law (e.g., custody), *qadis* often cite Egyptian jurist Qadri Pasha's 19<sup>th</sup> century compilation of Islamic personal status laws and commentaries on Hanafi jurisprudence. Shari'a courts must also consider a body of civil legislation while making their decisions. These laws include the Marriage Age Law (1950), the Women's Equal Rights Law (1951), Penal Law Amendment (Bigamy) Law (1959), and the Law of Legal Capacity and Guardianship (1962). In principle, these laws place certain penal sanctions and limitations on the interpretation of substantive MFLs. For instance, even though allowed by OLFR, a man who unilaterally divorces his wife (*talaq*: unilateral, extrajudicial divorce) against her will or who contracts a second marriage while still legally married to the first wife, may be subject to criminal prosecution.<sup>10</sup>

The Supreme Court of Israel (*Beit Ha-Mishpat Ha-Elyon*), sitting in its capacity as the High Court of Justice (*Beit Mishpat Gavoah Le-Tzedek*) (HCJ), is authorized to hear petitions regarding the competence and jurisdiction of shari'a courts. It reviews shari'a court interpretations and applications of relevant statutory laws and overturns their decisions if found *ultra vires* (Scolnicov 2006, p. 739, Kaplan 2012, p. 4, Abou Ramadan 2015, Natour 2009, p. 12).<sup>11</sup>

As a result of bilateral treaties between the Greek and Ottoman (later Turkish) governments in the late 19th and early 20th centuries, Greece continues to officially recognize the jurisdiction

of three Muslim *muftis*<sup>12</sup> in the Thrace region (one in Komotini, one in Xanthi, and a deputy *mufti* in Didymoteicho) to adjudicate family matters among Muslims in accordance with local usage and custom. *Muftis* are selected from among Greek Muslims with higher education (university) in Islamic studies, appointed and salaried by the Greek government, and accorded adjudicative functions, without necessarily establishing a hierarchical network of shari‘a courts—like those in Israel. There are no standardized or codified materials, procedural laws or rules of evidence that Greek *muftis* apply. Direct appeals against decisions of the *mufti* are not permitted.

The jurisdiction of *muftis* has long been deemed exclusive for Thracian Muslims. However, some Greek judges and legal scholars treat the jurisdiction of *muftis* optional or concurrent with that of civil courts—meaning that Muslims may (or should be able to) choose between a civil court and a *mufti* with respect to family matters (more on this later) (Tsitselikis 2001, Tsavousoglou 2015). *Mufti* decisions cannot be implemented without an accompanying enforceability decree issued by the competent Court of First Instance (CoFI) (*Monomeles Protodikeio*). The local CoFI is required by law to review whether *mufti* decisions have been rendered within the scope of its jurisdiction and whether they have contravened the constitution.

As noted, historically, MFLs in both Israel and Greece are connected to the Ottoman *millet* system. In both cases, the post-independence state has largely retained MFLs for political considerations. For instance, Israel has preserved a modified version of the old *millet* system (including shari‘a courts) and utilizes it as an instrument of vertical segmentation between Jews and non-Jews and of horizontal homogenization among Jews (Sezgin 2010). Similarly, Greece has retained *mufti* jurisdiction in Thrace to strengthen the Islamic identity of the Turkish-speaking population in the border region and to insulate the minority against the secular-nationalist ideology of the Kemalist regime in neighboring Turkey (Ktistakis, 2006).

The preservation of shari'a jurisdiction has been a strategic decision for both governments. Even though each has enacted legislation restricting the jurisdiction of MFLs, regulating the appointment of *qadis* and *muftis*, and placing restrictions (through penal sanctions) on Islamic divorce (*talaq*) and underage or polygynous marriages, neither Israel nor Greece has directly intervened in substantive MFLs, through either executive or legislative means. There are three possible explanations for this restrained approach to reforming Islamic law. First, given the history of thorny relations with their respective neighbors and internal ethno-religious tensions (Greek v Turkish, Jewish v Arab), both the Greek and Israeli governments may have refrained from direct legislative interventions into substantive MFLs in order to avoid provoking domestic Muslim minorities and antagonizing the broader Muslim world. Second, since legislative reform of MFL by a non-Muslim government is controversial, the Israeli and Greek governments, which do not possess any religious authority, may have decided against reform (Masud 1996). Third, as many critics suggest, the Israeli and Greek governments may never have been truly interested in social reform among their respective Muslim populations. As one Muslim female lawyer in Greece cynically put it: "Why should the Greek government care about gender inequality in the Muslim community...? Why would they bother reforming this archaic system? We are not equal citizens. We are not the state's concern!"<sup>13</sup>

Despite penal sanctions and prohibitions indirectly placed on the application of MFLs by secular legislation, in both countries, practices such as polygyny (albeit limited), *talaq*, child marriage, proxy marriage, and gender-unequal inheritance,<sup>14</sup> custody, and maintenance laws continue to be applied and to undermine the constitutionally- and internationally-protected fundamental rights and liberties of Muslim citizens (especially women and children) (CEDAW 2007, Hammarberg 2009, Tagari 2012, Yefet 2016). In both countries, it is not uncommon for a



Muslim wife to be denied maintenance because she is “disobedient,” or for a divorced woman to lose custody of her minor children when she remarries, or for a daughter to receive only half of her brother’s share of their parents’ inheritance.

As Shachar (2001) puts it, when religious courts systematically violate the rights of members of the most vulnerable groups in society and fail to address their concerns, people often start shopping between competing jurisdictions and legal regimes—especially if “partial exit” is allowed. This is the case in both Israel and Greece, where Muslims, under certain conditions, may choose between civil and religious laws and courts in personal status matters. Israeli and Greek Muslims may also ask higher civil courts to review and overturn the rulings of religious courts and authorities if they believe the religious authority violated the constitution, misinterpreted the law, or overstepped its jurisdiction. As a result, in both countries, the use of civil law and courts by Muslim litigants for family matters is on the rise. For instance, the secretary general of the Muftiate of Komotini reports that while the *mufti* issued about 185 inheritance *fatwas* per year between 1964 and 1985, and 20 between 1985 and 2005, the yearly average has now fallen to 3-5.<sup>15</sup> This decline indicates that the majority of Thracian Muslims now prefer to use civil law and civil courts for inheritance matters. Although there are no official statistics available, anecdotal evidence and interviews<sup>16</sup> with different stakeholders suggest that the number of Israeli Muslims who use civil family courts is also, slowly but surely, increasing—especially when one considers that prior to 2001 the civil court option for Muslim litigants was almost<sup>17</sup> non-existent.<sup>18</sup> For instance, between 2006 and 2010, 66% of child custody cases, 22% of alimony cases, and 39% of child support cases filed by Kayan, a feminist legal aid organization serving Arab women in Israel, were filed at civil family courts (Kayan 2011). In brief, in both countries, civil courts have become more involved in daily regulation and application of MFLs, especially over the last decade. How has the rising

competition and increasing involvement of civil courts (lower and higher) in the administration of MFLs affected the development of Islamic law in each country?

### **III. Israeli Civil Courts and Muslim Family Law**

#### ***A) The High Court of Justice: Ex post Review of Shari'a Court Rulings***

As noted, decisions of Israeli shari'a courts are subject to HCJ review. In cases involving shari'a law, justices of the HCJ note in almost every judgment that their intervention is limited to cases involving *ultra vires*, infringement of the principles of natural justice (*'ekronot tsedek tiv'i*), and disregard for binding statutory rules that religious courts are legally bound to apply.<sup>19</sup> For instance, as early as 1955, in a Muslim custody case, the HCJ ruled that if a shari'a court limits itself to the religious law alone and disregards the secular legislation that it is legally bound to apply, it will be acting *ultra vires*, and its decision will therefore have no effect under the law.<sup>20</sup> In the following decades, the court continued to hold shari'a courts responsible for the application of secular laws and reminded them that it would strike down their rulings if statutory laws were ignored.<sup>21</sup> The first two generations of Israeli *qadis* embraced a pragmatic approach towards the HCJ, often complying with secular laws to avoid any direct conflict with the civil judiciary (Reiter 1997, Layish 2004, p. 210, Natour 2009, pp. 196-200).

However, the nature of the relationship between the HCJ and Islamic courts began to change during the constitutional revolution of the early 1990s. In 1992, the Knesset enacted two Basic Laws<sup>22</sup> dealing with fundamental rights and liberties. In a landmark ruling<sup>23</sup> three years later, the HCJ established its authority to conduct judicial review of any unconstitutional law enacted by the Knesset (Hirschl 2004, pp. 21-24, Jacobsohn 2000, Sapir 2009). In this new era, the court

began making increasing use of its new powers to challenge the authority of religious courts and to require them to directly apply the newly enacted Basic Law of Human Dignity and Liberty (1992)<sup>24</sup> in order to ensure that individuals appearing before religious courts continued to enjoy their basic rights (Abou Ramadan 2003, p. 643, Halperin-Kaddari 2002, Kaplan 2012, Hirschl 2010, p. 121, Lerner 2011, p. 82, Woods 2008, p. 170).<sup>25</sup>

Historically, the HCJ's review of shari'a rulings have been more deferential than its review of rabbinical court decisions (Goodman 2009, p. 515). The court, uncomfortable as the "high interpreter of shari'a," has usually refrained from interfering with substantive aspects of Islamic law, particularly with respect to marriage and divorce (Peled 2009, p. 252, Abou Ramadan 2005-6, p. 102). In the post-1992 era, however, the court, while largely maintaining its policy of non-interference in marriage and divorce, began to take a more activist stance with respect to matters such as custody, paternity, and maintenance in order to promote and protect the rights of women and children. For instance in a 1995 paternity case,<sup>26</sup> the HCJ granted a Muslim child born out of wedlock civil paternity by bypassing the jurisdiction of shari'a courts, which had refused to grant the child paternity under Islamic law. The HCJ reasoned that the Basic Law of Human Dignity is the supreme law of the land (i.e., binding upon religious courts), and it grants the child a fundamental right to know her filiation so that she may fully enjoy her property, family, and human rights. Likewise in a similar decision in 2013, the court declared that gender equality, protected by the 1992 Basic Law, is integral to human dignity—thereby all state agencies, including shari'a courts, are obliged to abide by the principle of equality. Hence, there is a legal obligation, justices argued, on the part of *qadis* to seek more flexible and liberal interpretations of shari'a with an eye toward gender equality: "If there is a school of thought [*madhhab*: e.g. Hanafi, Hanbali, Shafi'i, Maliki] that accepts the principle of equality, then religious courts should prefer it over [*madhhabs*]

that are inconsistent with this principle”.<sup>27</sup> The HCJ’s increasing activism provoked a strong defensive reaction from the shari‘a courts. For instance, Qadi Ahmad Natour, who served as the President of the SCA between 1994 and 2013, strongly opposed the HCJ’s interventions and implementation of secular legislation by shari‘a courts. Upon his appointment in 1994, Qadi Natour<sup>28</sup> swiftly moved to ban the application of all secular non-shari‘a-based laws (including the Basic Laws) by the shari‘a courts (Abou Ramadan 2015, p. 60, Layish 2004, p. 191).

On the surface, relations between the HCJ and shari‘a courts have turned increasingly adversarial following the ban. In fact, however, the rhetoric and practice of confrontation has gradually given way to a new phase of dialectical transformations at shari‘a courts and to a symbiotic relationship between civil and Islamic judiciaries. To defend the jurisdiction of the Islamic judiciary in the face of the HCJ’s increasing interventions, the SCA has embraced a defensive strategy of subtle compliance: the SCA complies with the spirit of the secular law while publicly refusing to recognize it. In essence, as Abou Ramadan (2005-6) claims, the court has internalized and Islamicized concepts derived from secular legislation to prevent future HCJ interventions into shari‘a. From this point of view, principles such as “human dignity” are no longer treated as secular impositions but as concepts integral to the Islamic tradition (Abou Ramadan 2008).

The strategy of subtle compliance is most visible in child custody cases. The Legal Capacity and Guardianship Law of 1962 established the principle of “the best interests of the child” as the sole criterion in custody cases. Although the first two generations of *qadis* often based their custody (*hadana*) decisions on the 1962 law, Qadi Natour prohibited the application of that law—just like that of other secular laws—by the Islamic judiciary. The SCA has repeatedly indicated in its judgments that the 1962 law is inferior to the “noble” shari‘a and hence is not to be implemented

by Islamic courts.<sup>29</sup> Despite its refusal to recognize the 1962 law, however, the court also claimed that “the best interest of the child” (*maslahat al-saghir*) principle “originated” in Islamic law and as such is to be considered the guiding principle in custody cases.<sup>30</sup> By internalizing secular frames and references such as “the best interest of the child”, the court sought to restrict the HCJ’s interventions into its jurisdiction (Abou Ramadan 2003, 2008, 2010).

Success in fending off HCJ intervention ultimately depends on whether, in a given case, the shari‘a courts correctly interpret the best interest of the child principle, and whether they follow the procedure outlined in the civil law. According to shari‘a, apostasy results in a parent’s loss of his or her children’s custody. In two custody cases in which the mothers reportedly converted from Islam to Christianity, the regional shari‘a court in Haifa, claiming that it is in the best interests of children to be raised in a Muslim environment, revoked the custody rights of the two mothers. Although the SCA upheld the Haifa court’s rulings in both cases, the HCJ reversed the SCA’s decisions, arguing that in both cases the religious court had failed to take into consideration the welfare officers’ reports about the children’s well-being and instead based its decision solely on religious considerations.<sup>31</sup> In other words, even though the shari‘a court employed the principle of the best interests of the child, the HCJ rejected the court’s religion-based interpretation in the absence of a corresponding professional justification (Abou Ramadan 2015). However, in cases in which a religious court’s ruling complies with the procedural requirements and normative outcome that the HCJ seeks to advance, the High Court occasionally tolerates religion-based interpretations of secular principles and chooses not to intervene.<sup>32</sup> For instance, in one case<sup>33</sup> involving the shari‘a court of Taibe, which revoked the custody rights of a mother due to her remarriage, the HCJ chose not to intervene because the decision was consistent with the welfare officer’s

recommendation<sup>34</sup>—even though the Taibe court issued its decision solely on religious considerations.

Israeli shari‘a courts operate under pressure from three distinct groups and institutions: feminists, Islamists—both within the Muslim community—and the civil judiciary (Shahar 2015). In response, shari‘a courts have undergone a semi-voluntary process of dialectical transformation, by simultaneously undertaking “Islamization” and “secularization” of their substantive laws and procedures (Natour 2009, Abou Ramadan 2005-6, Zahalka 2012). The indirect role that the HCJ has played in this process cannot be denied. Its constant threat of intervention has forced the shari‘a courts to internalize certain normative frames and civil law concepts, and to amend their rules and procedures (Layish 2004). *Qadis* are more receptive to ideas and concepts (e.g. best interests of the child, human dignity) for which they can find a legitimate basis and justification in the Islamic tradition than they are to secular concepts (e.g. gender equality) that may be interpreted as contradictory to the religious texts. However, civil family courts, with which shari‘a courts have been in direct competition over jurisdiction and clientele since 2001, have had even a greater impact on this reform process than the HCJ.

### ***B) Civil Family Courts: Jurisdictional Competition and Internal Reform in MFL***

As noted, as a result of the 2001 amendment, Muslim litigants have been able to choose between civil family and shari‘a courts for any personal status matter except marriage and divorce (i.e., partial exit, in Shachar’s terms). When deciding on matters of concurrent jurisdiction (e.g., maintenance, child support, custody), however, both civil and religious judges must apply the same substantive law. Concurrent jurisdiction promotes competition between jurisdictions for clients,

discursive power, and textual authority. This is true for Israeli shari'a and civil courts insofar as their parallel jurisdiction over MFL is concerned.

In this competition, shari'a courts enjoy a number of structural advantages over their civil counterparts. First, all shari'a court judges are Muslims who speak Arabic and are familiar with the culturally specific concerns of Muslim litigants. In family courts, nearly all judges are Hebrew-speaking Jews (at the time of writing there were only four Arab judges) who are not necessarily familiar with Muslim customs and cultural and religious practices. Moreover, family courts do not provide pro bono translation services for Arab citizens. Second, the conduct of proceedings and claim submission are easier at shari'a courts. Likewise, the duration of proceedings is shorter at religious courts, where women are granted automatic exemption from application and filing fees in alimony and child maintenance cases. In family courts, this exemption requires a formal application (Kayan 2011).

What keeps family courts in the game, however, is their comparative advantage with respect to pecuniary awards. As shown in Table II, spousal alimony and child support awards made by civil family courts are usually larger than those made by shari'a courts. Despite the accessibility issues mentioned above, this discrepancy creates an incentive for female Muslim litigants to choose civil family courts over Islamic courts. However, as my analysis of the emerging case law shows, civil and Islamic courts compete not only over clientele but also over the power to interpret the "divine" law (Bourdieu 1986, p. 4, Messick 1993), which is especially in maintenance and child support cases.

*Table II: Family Courts v Shari'a Courts: Spousal Maintenance and Child Support Awards<sup>35</sup>*

	Spousal Maintenance		Child Support	
	Duration of Proceedings (average)	Minimum/Maximum Award	Duration of Proceedings (average)	Minimum/Maximum Award (per child)
Family Courts	N/A	NIS 1,100-NIS 1,800	11 Months	NIS 1,200-NIS 1,600
Shari'a Courts	N/A	NIS 1,000-NIS 1,500	4 Months	NIS 700- NIS 1,300

*Source: Kayan (2011)*

In maintenance cases, civil family court judges apply the OLFR as the source of Muslim substantive law<sup>36</sup>—just as *qadis* do. They often cite relevant articles of Qadri Pasha's Code of Personal Status (especially in regard to child support, which is not included in the OLFR).<sup>37</sup> Jewish judges, who normally are not trained in Arabic or Islamic law, often rely on Hebrew textbooks and English sources on Muslim law when making their decisions.<sup>38</sup> Civil family court judges, who have been applying Jewish law since 1953, started to apply Muslim law only in 2001. Perhaps due to their familiarity with Jewish law, in most Muslim personal status cases, judges (both Jewish<sup>39</sup> and Muslim<sup>40</sup>) often draw parallels between shari'a and *halakhah* in matters relating to spousal or parental obligations. It seems that Israeli family courts interpret Islamic law through the lens of Jewish law. However, over the last decade, some Jewish judges appear to have grown more comfortable applying Islamic law. Some have moved beyond citations from textbooks to directly citing the Qur'an<sup>41</sup> and hadith<sup>42</sup> of the Prophet Muhammad.<sup>43</sup>



Although some Jewish civil family court judges argue that they “interpret religious laws more liberally [than *qadis*] and adjust them to modern times,”<sup>44</sup> this claim is merely rhetorical.<sup>45</sup> My analysis of recent case law suggests that family courts sustain a conservative and patriarchal narrative about gender roles within the Muslim family. This patriarchal narrative becomes most apparent in the interpretation of spousal maintenance rules by family courts.

The institution of *ihtibas* (restrain) is the foundation of spousal duties and obligations in a Muslim marriage.<sup>46</sup> Judges often describe *ihtibas* as “the duty of the wife to devote herself to her husband, and to be physically available to him.”<sup>47</sup> *Ihtibas* is the *quid pro quo* of maintenance. Judges also note that a woman who leaves the marital residence without her husband’s permission may be declared disobedient (*nashiza*). A wife who is determined to be disobedient can lose her right to maintenance. In all decisions dealing with *ihtibas*, judges note that the burden of proof is on the husband.<sup>48</sup> However, if a wife has already left the home, then it is her responsibility to prove that she did not violate her confinement obligation and that her departure was justified. As indicated in some decisions, however, occasional violence by the husband is not automatically considered a “just” cause because shari‘a reportedly condones certain types of violence (e.g. violence to discipline or educate the wife).<sup>49</sup> In one family court judgement in which a woman was declared disobedient after she had left home in response to her husband’s alleged verbal assault, it was argued that because shari‘a allows a husband to “discipline” his wife by lightly beating her, verbal abuse does not qualify as a ground for violating the duty of confinement.<sup>50</sup>

A similarly conservative and patriarchal tone is observed in child support cases. According to Islamic law, maintenance of children is the sole responsibility of the father. The mother is not required to contribute to her children’s maintenance, even if she is wealthy.<sup>51</sup> With respect to a father’s obligations towards his children, there are certain similarities between Islamic and Jewish

laws: both discriminate against the father. Although family courts have challenged the inequality of Jewish child support laws,<sup>52</sup> they have turned a blind eye to the analogous inequality in Islamic law and continued to hold Muslim men solely responsible for the cost of essential needs of children who are eighteen or younger.

In brief, as far as the cases analyzed above are concerned, both court systems seem to uphold a conservative and patriarchal view of shari'a. Inasmuch as both courts operate with similar normative assumptions, but one of them systematically awards more child support and alimony (as is the case with Israeli family courts; see Table II), that court's attractiveness to potential litigants increases. This dynamic has been at the core of the competition between shari'a and family courts over the last two decades (Shahar 2015).

The 2001 amendment that reduced the jurisdiction of shari'a courts from exclusive to concurrent over matters of custody, maintenance, and child support was made possible by efforts of the Working Group for Equality in Personal Status Issues (WGEPSI)—a coalition of Israeli (Arab and Jewish) human rights and women's rights groups. The coalition was founded in 1995 and immediately began lobbying for a new law that would reduce the jurisdiction of religious courts. As Qadi Natour argues, the 2001 amendment has been the most serious threat posed to Muslim courts in Israel since the founding of the state.<sup>53</sup> Shari'a courts realized that they would lose their jurisdiction to civil courts if they continued business as usual (Shahar 2015). In response, they engaged in self-reform and issued a new judicial decree (*marsum qada'i*)<sup>54</sup> that sought to increase the appeal of the courts to female litigants by raising the amount of maintenance awards through procedural innovation. Following the issuance of the new judicial decree, as Shahar reports, spousal maintenance (and child support) awards by shari'a courts increased by almost 50 percent (Shahar 2015, p. 116).<sup>55</sup> Commentators note that the process of reform has not been

limited to maintenance. The Islamic judiciary, in order to further increase its appeal and competitiveness vis-à-vis civil courts, has undertaken substantive and procedural reforms in other areas as well (e.g., divorce) (Abou Ramadan 2005).

In this section I have described the Israeli HCJ and civil family courts' involvement in the administration of MFL and analyzed the impact of this involvement on the evolution of Muslim law. In the next section I will do the same for Greek courts by analyzing the decisions of local courts of first instance in Western Thrace and the Court of Cassation in Athens.

#### **IV. Greek Civil Courts and Muslim Family Law**

According to Law No: 1920/1991<sup>56</sup>, a *mufti* is a religious leader who also exercises judicial functions. As per Article 5§2 of the law, the following matters fall under the subject matter jurisdiction of the *mufti*: marriage, divorce, maintenance, custody, guardianship, wills and inheritance. In order to have legal effect, a *mufti*'s decisions must be declared enforceable by the civil CoFI. In the ratification process, the civil court will review the *mufti*'s decision to ensure that it is within the bounds of his jurisdiction and conforms to the constitution. As noted, no direct appeals are permitted against *mufti* decisions. The only—indirect—way to challenge them is to appeal against the enforceability decision of the local CoFI at the court of appeals and, eventually, at the Court of Cassation (CoC) (*Areios Pagos*)—the court of last resort. These stages of ratification and appeal are the two instances in which Greek civil court judges—all non-Muslims—are asked to rule over MFL.

***A) Local Courts of First Instance vs. Muftis: Jurisdictional Competition and Ambiguity***

May a *mufti* marry or divorce Greek Muslims who do not reside in his administrative district, or foreign Muslims who are temporary residents of Greece? Such questions regularly arise in the process of review and ratification of *mufti* decisions by the local CoFI in Thrace. Despite the clear provision in Article 5§1 of Law No: 1920/1991, according to which a *mufti* may exercise jurisdiction only over Muslim Greek citizens residing in his region, there does not seem to be a clear consensus among Greek judges concerning a *mufti*'s territorial or personal jurisdiction.

The analysis of first-instance and appellate-level court rulings reveals a great degree of confusion and lack of consensus among judges concerning a *mufti*'s territorial jurisdiction. Some courts take a narrow view, others a broad one. For instance, in a landmark decision in 1980, the CoC ruled that shari'a is applicable to all Greek Muslims regardless of their place of residence, with the exception of the Dodecanese.<sup>57</sup> In 2007, however, the CoFI in Xanthi ruled that the *mufti* had no jurisdiction to adjudicate a divorce involving a Muslim couple living just a few kilometers outside of his administrative district.<sup>58</sup> In a similar divorce case involving a Muslim couple from Athens, the CoFI in Rodopi took the opposite view and allowed the *mufti* to dissolve the couple's marriage.<sup>59</sup> Many contradictory rulings were also delivered with respect to a *mufti*'s purview over non-Greek Muslims and non-Muslim Greek citizens (e.g. in mixed marriages) (Tsitselikis 2012, pp. 397, 427).<sup>60</sup>

Since the enactment of Law 1250/1982, Greek Muslims have been free to choose between civil and religious marriage. The family affairs of those who enter a civil marriage are governed by the Civil Code (CC) under the jurisdiction of secular courts. Both the government and the judiciary have affirmed the right to choose between secular and religious legal systems. In an important ruling, the CoFI in Xanthi declared that

inclusion of Greek citizens of Muslim religion and residents of Thrace within the exclusive competence of the *mufti* for family and inheritance matters, despite the conclusion of civil marriage, will be held to infringe upon their freedom of religion... Their celebration of civil marriage implicitly indicates their desire not to be subject to the jurisdiction of the divine Muslim law, but to the civil law, like other Greek citizens.<sup>61</sup>

It is now widely accepted that Muslims who marry civilly can opt out of *mufti* jurisdiction. But what about Muslims who marry in a religious ceremony? In other words, is *mufti* jurisdiction compulsory for Muslim citizens or concurrent with that of civil courts. In a 2013 communiqué, Minister of Justice Antonis Roupakiotis argued that a *mufti*'s jurisdiction should be viewed as concurrent with that of ordinary courts, since viewing it as compulsory would violate the government's constitutional and international obligations to protect individual rights.<sup>62</sup> However, until recently, the majority of Greek courts have treated *mufti* jurisdiction as mandatory for Muslims residing within his district and have refused to hear pertinent family cases (Tsitselikis 2012, p. 398, Velivasaki 2013, p. 33). For instance, in 2002, the CoFI in Rodopi ruled a Muslim custody petition<sup>63</sup> inadmissible on the grounds that the dispute was between two Muslim citizens and thereby the *mufti* held sole jurisdiction (Ktistakis 2013, p. 132). Similar judgments closing the doors of civil courts to Muslim citizens were issued with respect to marital property, parent-child communications, and adoption.<sup>64</sup>

Historically, Greek civil courts have been very conservative in their dealings with Islamic law and *muftis*. The legal autonomy of the muftiate was established and guaranteed by international

treaties as part of a reciprocal minority protection regime between Turkey and Greece (Turner and Arslan 2014). Questions concerning Islamic law were therefore not merely matters of legality but also of political, diplomatic, and security concern (Oran 1986, Alexandres 1983). In the late 1990s and early 2000s, Turkish-Greek relations entered a new phase of *détente* as the European Union began accession negotiations with Turkey. At the same time, in the context of the EU's minority protection policies, the Greek government took a number of steps to improve the socio-economic status of Muslims in Thrace (Memisoglu 2007, Grigoriadis 2008). Although causation is difficult to establish, it is no surprise that right around this time, as the geostrategic value of preserving shari'a in Thrace was diminishing, some of the CoFI embraced a more assertive stance vis-à-vis the *mufti* and Islamic law. As I explain below, although they did not directly challenge the constitutionality of shari'a, they adopted an increasingly restrictive approach towards *mufti* jurisdiction. In many cases they either refused to recognize *mufti* jurisdiction or declared it concurrent with that of civil courts.

For instance, in a Muslim guardianship and paternity case in 2000, the CoFI in Thiva ruled that the *mufti*'s jurisdiction—for all personal status matters listed in Article 5§2 of Law No: 1920/1991—should be deemed concurrent with the jurisdiction of civil courts. In the event that the application of the “sacred” law infringes upon basic rights protected under the constitution and the European Convention on Human Rights (ECHR), the bench added, the state is required to give members of the religious minority the option to choose between the jurisdiction of the *mufti* and that of ordinary civil courts.<sup>65</sup> In 2008, the CoFI in Rodopi arrived at the same conclusion and claimed jurisdiction over inheritance disputes between Muslims in an effort to ensure gender equality and a fair trial:

The jurisdictional powers of the *mufti*, which are clear from the letter and spirit of the Treaty of Lausanne ... would not violate individual rights of Muslims, which are expressly protected both by the Constitution and the European Convention.... According to the holy Muslim law (Qur'an) of inheritance, a male child receives twice the share of a female child... [We] cannot overlook the provision of Article 116§2 of the Constitution, which states *inter alia* that: "...the State shall ensure the elimination of inequalities in practice, particularly against women..." [Thus]...[the case] is admitted for trial before this court, which has jurisdiction with regard to the distribution of inherited property... of Greek citizens of Muslim religion.<sup>66</sup>

Likewise, in 2001 the Appeals Court of Thrace ruled that regulating parent-child communications does not fall within the jurisdiction of the *mufti* but rather is under the purview of civil courts.<sup>67</sup> In 2006, the same court held that spousal property relations are excluded from *mufti* jurisdiction.<sup>68</sup> In a series of judgments between 2008 and 2011, civil courts ruled that child custody (*epimeleia*) is no longer<sup>69</sup> under the jurisdictional competence of *muftis*—often basing their decisions on a narrow<sup>70</sup> understanding of the concept of parental authority (*goniki merimna*).<sup>71</sup> Similarly, regional courts excluded inheritance from *mufti* jurisdiction, subjecting all Greek citizens to the CC, regardless of religion.<sup>72</sup>

### ***B) The Court of Cassation: Islamic “Exceptionalism” and the Entrenchment of Mufti Jurisdiction over Thracian Muslims***

The rising assertiveness of the courts at the local level sparked a backlash from the CoC in Athens. Historically, the CoC has been very lenient in its decisions concerning shari'a law. As Doudos notes, “High Court judges usually operate under various political pressures. Over time they

become an extension of the state power as they embrace the official policy and increasingly reflect it in their decisions.”<sup>73</sup> The official Greek policy on shari‘a in Thrace has been to preserve the status quo. This policy has been largely incorporated into the CoC’s jurisprudence. For instance, in a series of judgments, especially concerning inheritance issues, the court has repeatedly noted that the application of shari‘a law in Western Thrace is an international treaty obligation that bestows upon Islamic law the status of a “special law” within the domestic system.<sup>74</sup> Given its special status, the court argued, shari‘a cannot be said to contradict the constitution, the ECHR or *ordre public*. Although the court did not use exactly the same words as did one of the local courts in Thrace, it sent a signal to lower courts that when they are “confronted with questions about Islam, they must judge them as if they came from a different value system, not by criteria exclusive to Western societies.”<sup>75</sup>

This essentialist perception of Islam and shari‘a is particularly visible in the court’s jurisprudence on Islamic inheritance law. Most Thracian Muslims do not follow Islamic succession rules and bypass them by leaving notarized public wills (*dimosia diathiki*) (Cin 2009, p. 139). For instance, parents often distribute their inheritance equally between their sons and daughters, even though under Islamic law a male heir’s inheritance is usually twice that of a female heir. However, relatives whose interests are threatened by the public will may challenge its validity at the local CoFI and request redistribution in accordance with shari‘a. Over the years, such cases have come before the CoC as the court of last resort.<sup>76</sup> The court has consistently upheld *mufti* jurisdiction over intestate and testate succession, and rejected the right of Muslim citizens’ to leave public wills, relying upon a patriarchal interpretation of Islamic law and neglecting local customs (Jones-Pauly and Dajani Tuqan 2011, pp. 398-409):



The basis of Islamic inheritance law is intestate succession, and ‘public will’ does not have the same position [in Islamic law] that it has in Roman law-based modern systems. If there are relatives, a will cannot be utilized for devolution of inheritance. [The public will] solely complements intestate succession, ‘what the Prophet [no specific hadith is cited. YS] has ordered the faithful to do cannot be altered.’... However, there are other provisions of the Qur’an [no specific verse is cited. YS] urging the faithful to charity... Muslims, driven by the spirit of charity, may leave a will in favor of third parties up to 1/3 of their estate. Therefore, the will of a Muslim is a kind of simple legacy for a third party, not having the status of legal heir, for charitable and philanthropic purposes... Inheritance relations among Muslim Greeks are governed not by the CC but by the laws of *faraiz* over which the *mufti* has jurisdictional authority.<sup>77</sup>

As the CoFI in Xanthi ruled in 2012,<sup>78</sup> the application of shari‘a-based family laws, especially when people are held subject to *mufti* jurisdiction against their wishes, violates their fundamental rights and freedoms under both the constitution and the ECHR (Ktistakis 2013, pp. 109-34).<sup>79</sup> According to Article 5§3 of Law No: 1920/1991, the CoFI is required to review the constitutionality of *mufti* decisions and declare them “unenforceable” if they find a contradiction. However, despite the allegations of widespread contradictions (Kofinis 2011), the CoC’s policy of treating shari‘a as a “special law” and exempting it from constitutional review seems to have discouraged lower courts from conducting effective reviews of *mufti* decisions. According to Ktistakis (2013, pp. 100-01) between 1991 and 2011, three CoFIs in Thrace<sup>80</sup> reviewed 3,633 *mufti* decisions and struck down only one of them as unconstitutional, on the grounds that the unequal distribution of inheritance between a brother and a sister (7/21 for female, and 14/21 for male) violates the constitutional principle of gender equality (Article 4§2).<sup>81</sup>

There are political and institutional reasons for the ineffectiveness of constitutional review of *mufti* decisions by civil courts. Some institutional limitations that prevent civil courts from carrying out an effective *a priori* review of *mufti* decisions have already been mentioned: the CoC's negative role, the language barrier, the absence of Muslim judges in civil courts, the lack of codified material and procedural rules or even a proper Islamic court system, and the inadequate oversight and appeal process within the Islamic sector. The loose integration of the muftiate into the national legal system poses additional challenges to constitutional review. The fact that *muftis* are not professional career judges trained in civil law makes them less responsive to institutional constraints (because the cost of *mufti* defiance is very low) and less receptive to secular concepts and frames (e.g., liberal human rights discourses).

To this list we should add political constraints. Prior to the enactment of Law No: 1920/1991, *mufti* decisions were not subject to constitutional review. By the time the new law was introduced, *mufti* appointment, duties, and jurisdiction had already become an international problem between Turkey and Greece. Questions concerning *mufti* jurisdiction were too politically sensitive for ordinary judges to handle. In 1990, when the Greek government appointed two new *muftis* in Komotini and Xanthi, the Muslim minority protested the appointments as “unlawful” (Law No: 2345/1920 required elections) and elected their own *muftis*. Since then there have been two *muftis* in each city: one appointed and one elected. Elected *muftis*—who cannot function as judges—are considered by the Muslim minority as spiritual/political leaders, but by the Greek state as “Turkish agents.” Appointed *muftis*—who can function as judges—are distrusted by the minority as “Greek agents.” Against this backdrop, any challenge to the constitutionality of a state-appointed *mufti*'s rulings will have political repercussions. Such court rulings might be interpreted as symbolic support for groups who call for the abolition of the muftiate or separation of the *mufti*'s

spiritual and judicial functions. The Greek state seeks to avoid both outcomes, which would only bring more international pressure (especially from Turkey) and trouble for the government. Fully embracing this strategic foreign policy concern, the CoC has effectively discouraged lower courts from limiting *mufti* jurisdiction and challenging the constitutionality of *mufti* decisions.

As a member of the Council of Europe, Greece recognizes the jurisdiction of the European Court of Human Rights (ECtHR). A Greek Muslim who alleges a violation of Convention rights due to the application of Islamic law can lodge a complaint at the Strasbourg Court after exhausting all domestic remedies. In some regards, the Strasbourg option provides an additional layer of human rights protection to the constitutional review mechanism put in place by Law No: 1920/1991. But does the ECtHR provide effective oversight over Islamic law and authorities in Greece? It is difficult to answer this question, as the Strasbourg option remains underutilized. To this day, only two cases concerning the implementation of shari'a law in Thrace have been lodged at the court. The first case was *Dilek Cigdem v. Greece* (2010).<sup>82</sup> The applicant claimed that her rights under Articles 8 (respect for private life) and 14 (prohibition of discrimination) were violated when she was not allowed to inherit from her father under Islamic law on the grounds that she had been born out of wedlock.<sup>83</sup> The court rejected the application as inadmissible on the grounds of a procedural error by the applicant. The second case was *Chatitze Molla Sali v. Greece* (2014). The applicant complained that her rights under Articles 5 (liberty), 6 (fair trial), and 14 had been violated by the CoC's decision (1862/2013) to deny Muslim Greeks the right to make public wills, which deprived her of three-fourths of her entitlement.

At the time of this writing, the application is still pending. If the court rules that the original Greek decision violates the ECHR, its decision may have important implications for the *mufti* system in Thrace. The ECtHR requires member states to remove legal grounds and practices that

may cause violations of the Convention (Kaboglu and Koutnatzis 2008). If the Court finds a violation in the pending case, the government may choose to respond by amending Article 5 of Law No: 1920/1991 and declaring *mufti* jurisdiction concurrent with that of civil courts for all personal status matters; this, in turn, might create pressure on *muftis* to self-reform in order to protect their jurisdiction and clientele, as shari‘a courts did in Israel. Thus, if sufficiently utilized, the Strasbourg court may ultimately be a source of reformist pressure on the Islamic judiciary in Thrace, a role that Greek courts have long failed to play.

In the absence of any serious threat to their clientele or judicial monopoly, *muftis* have no incentive to self-reform. To the contrary, the political climate favors their existence and the status quo; and high courts shield them against occasional incursions into their jurisdiction by lower courts. There are few, if any, civil society organizations that lobby for their reform. In the end, the lack of top-down, lateral or bottom-up pressures allows *muftis* to continue business as usual.

## **V. Comparison of Israeli and Greek Experiences, and Concluding Remarks**

I have attempted here to answer the question of whether civil courts in non-Muslim majority democracies can bring about substantive or procedural changes in MFLs. Taking as my point of departure Shachar’s prescriptive suggestions for the accommodation of religious laws in liberal democracies, I have analyzed the relationship between secular and Islamic courts in Israel and Greece and made a number of critical observations regarding the opportunities and challenges of pluri-legal multicultural accommodation.

I have argued that civil courts in non-Muslim countries cannot bring about direct changes in MFLs, as they often lack necessary moral authority. Instead, their influence tends to be indirect by pressuring religious courts and judges to undertake self-reform. As demonstrated, this is the

case in Israel but not in Greece. Israeli civil courts have been able to effect indirect (though limited) reform in shari'a courts, whereas Greek civil courts have failed to bring about any reform in the Thracian muftiate. Why did self-reform occur in Israel but not in Greece? Under what conditions do civil courts bring about reforms in religious courts? In this concluding section, I shall identify these conditions by comparing the experiences of Israel and Greece.

Religious courts interact with two types of civil courts: high courts and lower courts. High courts exert top-down pressure on religious courts to comply with their decisions. In theory, religious courts, as part of the national system, are obliged to comply with decisions of higher civil courts by undertaking necessary changes in their substantive and procedural rules. In practice, such changes almost never happen, as relations between the two court systems are often conflictual. Moreover, as Shachar (2008) notes, high courts that conduct *ex post* review of religious court rulings often remain inaccessible to individual litigants. However, this does not mean that high courts have no effect on the evolution of Muslim law and institutions. Religious courts may choose to comply with high court rulings and reform their rules and procedures by internalizing civil discourses and principles, especially when they resonate with Islamic values and traditions.

Lower civil courts (e.g. civil family courts) apply lateral pressure on religious courts by competing with them for jurisdiction and clientele. In pluri-legal systems in which clearly delineated partial exit options are made available to litigants, competition between secular and religious courts may encourage self-reform in religious courts.

Israeli shari'a courts, despite their public opposition to HCJ's interventions into Islamic jurisdiction, have selectively and subtly complied with some High Court rulings—especially those for which they could find an Islamic justification, such as the best interest of the child. In addition to the HCJ's top-down pressure, shari'a courts also operate under lateral pressure from civil family

courts. Although the partial exit is incomplete (in most areas litigants may opt out of shari‘a courts, but not out of Islamic law, and the interpretation of shari‘a by civil courts is not necessarily more liberal), competition between the civil and religious courts has spurred shari‘a courts to undertake some internal reforms in the early 2000s.

Whereas in Israel, the HCJ and civil family courts work in tandem, in Greece, this is not the case. There is neither top-down pressure from the CoC nor lateral pressure from the local CoFI. The CoC is very conservative—especially in comparison to the HCJ in Israel. The CoC has avoided challenging *mufti* jurisdiction by treating shari‘a as a *sui generis* system, and barring lower courts from conducting *a priori* review of the *mufti* rulings and from putting any meaningful lateral pressure on the *mufti* to reform. In Israel, concurrent jurisdiction is guaranteed by law. In Greece, however, it had to be established by judicial activism, particularly by the CoFI. The CoC has discouraged lower courts from playing such a role despite their increasing assertiveness in the early 2000s. In the absence of meaningful vertical or lateral pressure from the civil judiciary—despite the existence of strong *ex ante* oversight mechanisms, at least on paper—*muftis* have been able to defy calls for substantive and procedural reform of Islamic law because the cost of defiance is considerably lower for them than for Israeli *qadis*. The latter, who are civilly trained and maintain professional ties with their civil counterparts, have been more attentive to, and dependent upon, the civil judicial hierarchy than the former. Moreover, due to their training and professional ties, Israeli *qadis* are more familiar with, and receptive to, constitutional values and to certain secular frames, than are Greek *muftis*.

The relative success of reform in Israel owes much to the presence of a vibrant NGO sector—particularly women’s rights groups. Such groups constitute the third (bottom-up) source of pressure upon *qadis* to undertake reforms. Groups like WGEPSI and Kayan were key to the

legislative process that opened the door to jurisdictional competition between civil and shari'a courts in 1995-2001. After the 2001 amendment, both groups provided legal aid to Arab women so that they might utilize civil courts. The increase in the number of people who opt for civil courts has put greater pressure on shari'a courts to self-reform. This bottom-up pressure, absent in Greece, has proved critical in the reform in Israel. Another element that is absent in Greece is a reform-minded leadership at the apex of the Islamic judiciary. By comparison to Greek *muftis*, Qadi Natour, the former president of SCA, was a highly effective, competent leader and a self-declared reformer who spearheaded the renewal process in the shari'a system (Zahalka 2012).

Another major difference between Greece and Israel is the fact that the Islamic judiciary in Greece is not fully institutionalized and only loosely integrated into the national legal system. In Israel, one finds shari'a courts, *qadis*; a shari'a court of appeals, and codified substantive and procedural rules that have been integrated into the national system. None of this is true in Greece, making it very difficult for Greek courts to effectively review *mufti* decisions and demand compliance with the constitution or the European Convention.

Finally, the legal cultures of these two countries, especially in terms of judicial attitudes toward religious law, are very different. With the enactment of Law No: 1250/1982, and Law No: 1329/1983, the Greek family law system has been almost completely secularized (Tsaoussis-Hatzis 2003). Greek judges, who are familiar only with secular law, often treat shari'a as a "special" law, not as an integral part of the national system. This attitude is one of the reasons for the ineffectiveness of constitutional review of *mufti* decisions. In Israel, by contrast, the family law system is almost entirely religion-based. Religious laws and courts are an integral part of the national system. This makes Israeli judges, by comparison to their Greek counterparts, less biased and more receptive to MFLs. This does not mean that Israeli judges are more knowledgeable about

Islamic law, but they do seem to be more eager to treat shari'a courts as part of the mainstream judiciary and, as a result, require them to comply with national norms and standards. Likewise, the closer integration of religious courts into the national system seems to make religious judges more sensitive to requests from the civil judiciary and more receptive to secular ideas.

In sum, this comparative analysis largely confirms the importance of allowing individuals to partially exit from or choose between religious and secular jurisdictions—an important element of Shachar's TA model. However, the right to choose between jurisdictions is not sufficient. There is also a strong need for legal aid organizations (e.g., Kayan and WGEPSI) to help vulnerable groups in the minority community navigate the pluri-legal system by providing *pro bono* services (e.g., translation, legal counsel) so that litigants can fully benefit from concurrent jurisdictions. The greater accessibility of civil courts will give rise to jurisdictional competition that, in turn, would incentivize religious courts to self-reform. Shachar recommends the adoption of *ex ante* oversight techniques that would complement existing *ex post* review of religious court rulings by the civil judiciary. But as this study has demonstrated, *ex ante* oversight, like *ex post* review, has strengths and limitations. In Greece, the *a priori* constitutional review of *mufti* decisions has failed, while in Israel the appointment of secularly trained *qadis* (another *ex ante* oversight technique) seems to have played a positive role in the self-reform of the Islamic judiciary. One of the main reasons for the shortcomings of both *ex post* and *ex ante* oversight mechanisms seems to be the civil judiciary's lack of legitimacy in the eyes of the Muslim minority. One way to overcome this hurdle is to increase the number of Muslim judges on civil courts. Likewise, relations between Muslim courts and non-Muslim majority-run civil courts are intimately connected to broader political issues: majority-minority relations, security issues as well as the bilateral relations between the non-Muslim government in question and neighboring Muslim nations that act as



“protectors” of the Muslim minority. In both Israel and Greece, peace and calm in domestic and international relations has empowered liberal, pro-reform groups and increased pressure on religious judges to self-reform. Tense relations do the opposite.

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NOTES:

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<sup>1</sup>Note on case selection: The number includes only countries (1) that formally integrate shari'a law (and courts) into their national legal systems (i.e., it excludes countries that occasionally but unsystematically recognize certain aspects of the Islamic law in the context of private international law [such as the United Kingdom]; (2) have a population of 2+ million; and (3) are consistently—in the last five years—classified as "free" regimes by Freedom House (FH). The author relies upon FH's civil liberties and political rights indices as well as its overall ranking of democratic regimes. Despite its known shortcomings (Steiner 2014) FH rankings—like other indices of democracy (e.g., Polity IV, EIU Democracy Index etc.)—are frequently used in the literature as a common standard of democracy, and they save individual researchers from arbitrarily deciding which countries qualify as a democracy and which do not.

<sup>2</sup> For Israel: [www.nevo.co.il](http://www.nevo.co.il), for Greece: <http://lawdb.intrasoftnet.com>

<sup>3</sup> [www.justice.gov.il/Units/BatiDinHashreim/Pages/Hipush-Piski-Din.aspx](http://www.justice.gov.il/Units/BatiDinHashreim/Pages/Hipush-Piski-Din.aspx)

<sup>4</sup> MFLs are bodies of rules and customs inspired by moral and religious precepts derived from Qur'an, Sunnah (the teachings and practices of the Prophet Mohammad) and Islamic jurisprudence.

<sup>5</sup> Forum shopping is defined as "a litigant's attempt to have his action tried in a particular court" of his choice where he thinks "he will receive the most favorable judgment" (Black, Nolan, and Connolly 1979, p. 590).

<sup>6</sup> Only about 20% of Greek Muslims live in Western Thrace.

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<sup>7</sup> The Ottoman millet system was a broad system of self-rule. However, Israel retained only family law-related aspects of this system. More importantly, when the system was first conceived, Muslims were the majority. At present, they are a minority.

<sup>8</sup> Currently, fourteen religious communities are recognized by the Israeli government.

<sup>9</sup> Until recently, all Israeli *qadis* have been male. The first female *qadi* was appointed to Israeli shari'a courts on April 25, 2017.

<sup>10</sup> In addition to penal sanctions, Israeli civil courts often grant tort claims by Muslim women who have been unilaterally divorced by their husbands.

<sup>11</sup> The HCJ does not review the validity of shari'a court interpretations of the Islamic law. However, as one learned anonymous reviewer notes, the HCJ should, in theory, review civil family court interpretations of Islamic law and determine whether the civil court has applied the Islamic law correctly.

<sup>12</sup> A *mufti* is a religious scholar/jurist who is qualified to interpret religious law and to issue non-binding legal opinions (*fatwas*). *Muftis* usually do not function as judges (*qadis*). The Greek government, however, has authorized state-appointed and salaried *muftis* to administer Islamic law by according them adjudicative functions.

<sup>13</sup> Personal interview. Subject declined to be identified, Komotini, Greece, March 2015.

<sup>14</sup> Israeli shari'a court jurisdiction in inheritance matters is conditional upon the written consent of all involved parties. Otherwise, jurisdiction in inheritance matters belongs primarily to civil courts, which uniformly apply the secular and gender-equal Succession Law of 1965 to all Israelis, regardless of religion.

<sup>15</sup> Personal interview with Mustafa Imamoglu, Komotini, Greece, March 2015.

<sup>16</sup> Phone interview with Heba Yazbak, April 2010.

<sup>17</sup> Except that Muslims could bring their inheritance cases to civil courts as per the Succession Law of 1965.

<sup>18</sup> Israeli family courts do not provide any statistics regarding the ethnic or religious background of their clients. However, various stakeholders report that the number of Muslim women who resort to civil courts is slowly but constantly rising, although the majority still prefer shari'a courts.

<sup>19</sup> For example, see: HCJ 8906/04, HCJ 1318/11, HCJ 11230/05, HCJ 5912/06, HCJ 473/09.

<sup>20</sup> HCJ 187/54.

<sup>21</sup> For instance, see: HCJ 5227/97.

<sup>22</sup> Basic Law: Human Dignity and Liberty, Basic Law: Freedom of Occupation.

<sup>23</sup> HCJ C.A. 6892/93.

<sup>24</sup> "The 1992 Basic Law was interpreted by the Supreme Court as allowing courts to declare void contravening primary legislation, but this does not apply to legislation enacted before that. Thus, the earlier legislation concerning personal status is immune from such judicial review, even if it constitutes a breach of [the Basic Law]" (Scolnicov 2006, p. 739).

<sup>25</sup> For instance, see: HCJ 3914/92, HCJ 1000/92.

<sup>26</sup> For instance, see: HCJ C.A. 3077/90.

<sup>27</sup> HCJ 3856/11. The HCJ repealed SCA 2011/28, which confirmed the decision of the regional shari'a court in Taibe, which had refused to appoint a female arbitrator in a divorce case.

<sup>28</sup> In an interview that I conducted with Qadi Natour in January 2005 in Jerusalem, he expressed his objection to the implementation of Knesset laws by shari'a courts in the following words: "As shari'a judges, I think that one of the most important duties that we have is to apply the shari'a law, and try to make it pure shari'a... [we should] not be involved with any particular Israeli law.... Shari'a is part of our identity, character, our belonging, our root.... If we apply Israeli law... all of these will be [lost]."

<sup>29</sup> For instance see: SCA 63/1994, SCA 135/1996, and SCA 127/1997.

<sup>30</sup> For instance see: SCA 63/1994, SCA 15/1998, and SCA 56/1999.

<sup>31</sup> HCJ 9740/05 and HCJ 1129/06.

<sup>32</sup> In HCJ 9347/99, the court upheld the ruling of the SCA that reversed a district shari'a court's decision to deny a woman 80% of her dower in a divorce case. Even though the SCA based its decision solely on religious justifications, the HCJ chose not to intervene because the outcome was consistent with the normative objective it sought to advance (e.g., equal rights for women).

<sup>33</sup> HCJ 8906/04.

<sup>34</sup> Giving custody to the mother, whose new husband was allegedly an abusive and violent man, would have jeopardized the well-being of the child.

<sup>35</sup> Based on cases handled by Kayan between 2006 and 2010.



- <sup>36</sup> Although the material law is the same, civil courts apply secular evidence rules, while shari'a courts apply Islamic rules of evidence. As one learned reviewer notes, this may result in two differing outcomes despite fact that the same material law is applied by the courts.
- <sup>37</sup> Although neither text was officially translated into Hebrew, an unofficial translation of the OLFR is available in an oft-cited textbook (Goitein and Ben Shemesh 1957, pp. 216-32).
- <sup>38</sup> 1410-06 Hadera Family Court (2007), 11310-04-11 Nazareth Family Court (2012).
- <sup>39</sup> 16411-08-10 Tiberia Family Court (2010), 1410-06 Hadera Family Court (2007).
- <sup>40</sup> 791-08 Krayot Family Court (2008), 2881-03 Nazareth Family Court (2006).
- <sup>41</sup> *Surat al-Talaq*, verse 6: "And if they suckle your (offspring), give them their recompense"; and *Surat al-Baqarah*, verse 233: "He shall bear the cost of their food and clothing on equitable terms" [in the court ruling, verses are cited in Arabic. Translation by Yusuf Ali. YS]. Cited in 34258-07-13 Nazareth Family Court (2014).
- <sup>42</sup> "Take what is sufficient for you and your children, and the amount should be just and reasonable. *Sahih Bukhari*, Kitab al-Nafaqat, cited in 34258-07-13 Nazareth Family Court (2014).
- <sup>43</sup> The number of family court decisions citing Qur'an has grown slightly over the years: 2001-03: 2 decisions; 2003-05: 2 decisions; 2005-07: 2 decisions; 2007-09: 2 decisions; 2009-11: 3 decisions; 2011-13: 5 decisions; 2013-2015 (May): 6 decisions.
- <sup>44</sup> Email correspondence with Judge Assaf Zagury (7 Mar 2013) (via the Office of the President of Supreme Court of Israel).
- <sup>45</sup> A good example of this rhetorical approach can be found in 2988-06-09 Tiberias Family Court (2011): "Like other personal laws, such as those applying to Jews and Christians, it is clear that MFL is an archaic law that is based on principles and rationales from earlier periods."
- <sup>46</sup> 34258-07-13 Nazareth Family Court (2014).
- <sup>47</sup> 1410-06 Hadera Family Court (2007).
- <sup>48</sup> 1320/01 Hadera Family Court (2006), 59344-02-15 Tiberias Family Court (2016).
- <sup>49</sup> 34258-07-13 Nazareth Family Court (2014), 1410-06 Hadera Family Court (2007).
- <sup>50</sup> 12810/06 Tel Aviv Family Court (2009).
- <sup>51</sup> 1410-06 Hadera Family Court (2007), 7608-07-15 Tel Aviv-Jaffa Civil District Court of Appeals (2017).
- <sup>52</sup> Jewish judges at civil family courts seem to interpret Jewish law more liberally than orthodox *dayyanim* at rabbinical courts. For instance, they have required Jewish mothers to make equal contributions to children's maintenance, especially for children over fifteen years of age; see: 35921-05-13 Nazareth Family Court (2015), 791-08 Krayot Family Court (2008).
- <sup>53</sup> Personal interview with Ahmad Natour, Jerusalem, Israel, Jan 2005.
- <sup>54</sup> In two recent cases, the HCJ has questioned the legality of internal circulars issued by the Shari'a Courts Administration and held that they should not be considered binding on individual *qadis* despite the contrary claim and practice of the Shari'a Courts Administration (HCJ 3094/13 and HCJ 3910/13).
- <sup>55</sup> Despite the reported increase, maintenance awards by shari'a courts remain lower than limits set by the National Insurance Institute (NII) or similar awards made by civil courts. For instance, in recent shari'a court rulings, spousal maintenance awards have been in the range of NIS 1,200-NIS 1,500 per month (see: SCA 12/2013, SCA 225/2016, 1233/2013 Haifa Shari'a Court), while the NII suggests a minimum payment of NIS 1,730 per month for a woman without children (<https://www.btl.gov.il/English%20Homepage/Benefits/Alimony/Pages/Alimony%20Payment.aspx>).
- <sup>56</sup> A note on referencing Greek legislations: The first number (e.g. "1920" in Law No: 1920/1991) refers to the number of the act, while the second number (e.g., 1991) denotes the year of legislative enactment.
- <sup>57</sup> AP 1723/1980.
- <sup>58</sup> CoFI, Xanthi, 203/2007.
- <sup>59</sup> CoFI, Rodopi, 98/1997.
- <sup>60</sup> For instance, see: CoFI, Rodopi, 313/2009; Multimember CoFI, Rodopi, 18/2008; CoFI, Xanthi, 83/2004.
- <sup>61</sup> CoFI, Xanthi, 1623/2003.
- <sup>62</sup> Greek Parliament Question No: 5937/16-01-2013. <http://www.hellenicparliament.gr/UserFiles/67715b2c-ec81-4f0c-ad6a-476a34d732bd/7938918.pdf> [Accessed in June 2015].
- <sup>63</sup> CoFI, Rodopi, 149/2002.
- <sup>64</sup> AP 1723/1980; CoFI, Chalkis, 1057/2000; CoFI, Xanthi, 127/2000; Appeals Court of Thrace, 356/1995.
- <sup>65</sup> CoFI, Thiva, 405/2000; for further information see: Tsitselikis (2001).
- <sup>66</sup> CoFI, Rodopi, 9/2008.
- <sup>67</sup> Appeals Court of Thrace, 7/2001.
- <sup>68</sup> Appeals Court of Thrace, 119/2006.

<sup>69</sup> Like other aspects of the jurisdiction of *muftis*, there is no consensus among lower court judges concerning *mufti* competence to adjudicate custody disputes. Despite the aforementioned rulings that removed custody from the jurisdiction of *muftis*, some courts continue to recognize and ratify *mufti* custody decisions. For instance, see: CoFI, Rodopi, 5/2014.

<sup>70</sup> Article 5§2 of Law No: 1920/1991, which defines *mufti* jurisdiction, is a verbatim copy of Article 10§1 of Law No: 2345/1920, which included custody (*epimeleia*) within *mufti* jurisdiction. *Epimeleia* was also mentioned in the CC that applied to non-Muslim citizens. However, Law No: 1329/1983, which reformed the CC, replaced custody (*epimeleia*) with a new child-centered and gender-egalitarian concept of parental authority (*goniki merimna*). Thereafter, *epimelia* has gradually fallen out of usage, and *goniki merimna* has become the main legal framework for regulation of parent-child relations within the civil judiciary. Despite the changes in the CC, Article 5§2 of Law No: 1920/1991 remains the same and invokes *epimeleia*. Some civil court judges, who ignore the historical evolution of *epimeleia* in Greek law, narrowly interpret Article 5§2 and hold that the administration of parent-child relations is beyond the scope of *mufti* jurisdiction (Kotzambasi 2001, pp. 26-27, Doudos 2009)

<sup>71</sup> CoFI, Rodopi, 11/2008, 17/2008, 130/2008, 140/2008, 183/2008; and CoFI, Xanthi, 24/2011.

<sup>72</sup> Appeals Court of Thrace, 439/2005, 642/2009, 392/2011, 192/2013; CoFI, Rodopi 50/2010; CoFI, Xanthi, 30/2010; 122/2002.

<sup>73</sup> Personal interview with George Doudos, Legal Counsel for Muftiate of Komotini, Komotini, Greece, March 2015.

<sup>74</sup> AP 1370/2014, 1862/2013, 1097/2007.

<sup>75</sup> Multimember CoFI, Xanthi, 11/2001, cited in Ktistakis (2013, p. 109).

<sup>76</sup> AP 322/1960, 2113/2009, 1097/2007.

<sup>77</sup> AP 1497/2013, 1862/2013, 1097/2007, 2138/2013.

<sup>78</sup> CoFI, Xanthi, 102/2012, cited in Bergou (2013, p. 12).

<sup>79</sup> State-enforced shari'a-based family laws violate the following constitutional rights and freedoms: human dignity (Article 2§1), equality of all Greeks before the law (Article 4§1), gender equality (Article 4§2), freedom of conscience (Article 13), right to legal protection (Article 20), and protection of family (Article 21§1). Likewise, the following rights in the ECHR are impacted: right to a fair trial (Article 6), freedom of religion (Article 9), right to an effective remedy (Article 13), and prohibition of discrimination (Article 14).

<sup>80</sup> CoFIs in Rodopi, Xanthi and Orestiada.

<sup>81</sup> CoFI, Rodopi, 152/1991. The CoFI remanded the case to the *mufti* of Komotini for retrial. The second ruling by the *mufti* was verbatim copy of his first judgment; the only difference was that this time he did not mention numerical shares (e.g. 7/21, 14/21), but rather used the word "corresponding shares." When the new judgment was returned to the court for ratification, it was declared enforceable, with no reservations (Ktistakis 2006, p. 119).

<sup>82</sup> *Dilek Cigdem v. Greece* (22009/10), <http://www.strasbourgconsortium.org/portal.case.php?pageId=10#caseId=1212> [Accessed in June 2015].

<sup>83</sup> Appeals Court of Thrace, 497/2009.