The Supreme Court sitting as the High Court of Justice

HCJ 3856/11

Before:	The Honorable Deputy President M. Naor The Honorable Justice E. Arbel The Honorable Justice N. Solberg
The Petitioner:	Anonymous
	v e r s u s
The Respondents:	1. The Supreme Sharia Court of Appeals 2. The Sharia Court in Tayibe 3. Anonymous
The Parties Requesting to Join as *amici curiae*:	1. "Kayan" – Feminist Organization 2. The Concord Research Center for Integration of International Law in Israel

Petition to Grant an Order *Nisi*

Date of Session:	13th of Kislev, 5773 (November 27, 2012)
On behalf of the Petitioner:	Adv. V. Herzberg, Adv. T Mudlij
On behalf of Respondents 1-2:	Adv. A. Avzek
On behalf of Respondent 3:	Adv. A. Natur
On behalf of Party 1 requesting to join as *amicus curiae*:	Adv. S. Batshon
On behalf of Party 2 requesting to join as *amicus curiae*:	Adv. F. Raday
On behalf of the Attorney General:	Adv. D. Bricksman

J U D G M E N T

Justice E. Arbel:

Before us is a petition against the decision of the Sharia Court of Appeals ruling it is impossible to appoint a female arbitrator in a divorce proceeding before the court.

Background and Review of the Proceedings

1. The Petitioner and Respondent 3 (hereinafter: the "**Respondent**") are Muslim Israeli citizens who are married to each other. A dispute erupted between the two, which led to various proceedings held in civil courts, including motions for protective orders, alimony actions and more. At the same time, on April 23, 2009, the Respondent filed an "Arbitration Claim" with the Sharia Court in Tayibe. There, the Petitioner claimed that the claim was filed in bad faith since the Respondent intended to divorce. Despite this, the court accepted the Respondent's petition and on November 1, 2010, instructed that each party appoint an arbitrator on its behalf pursuant to Sections 130 and 131 of the Ottoman Family Law (hereinafter: the "**Family Law**"). On January 17, 2011, the Petitioner filed a notice to the Sharia court regarding the appointment of Hajjah Rudina Amsha from Tayibe as the arbitrator on her behalf.

2. On January 18, 2011, the Sharia Court ruled that: "This court sees that the religious scholars stipulated that the arbitrators must be men, according to the Maliki, Hanbali and Shafi schools of thought…". Later the court required the Petitioner to appoint a male arbitrator. The Petitioner appealed this decision to the Sharia Court of Appeals. On April 5, 2011, the court denied the appeal. It was ruled that Section 130 of the Family Law, which is the binding law in Sharia courts in Israel, is based on the Maliki interpretation. Since the Maliki required that arbitrators be men, it is impossible to appoint women as arbitrators. Following the judgment, the Sharia Court in Tayibe decided again that the Petitioner must appoint an arbitrator on her behalf within a week. After the Petitioner did not appoint an arbitrator on her behalf, the court appointed two male arbitrators on its behalf on May 11, 2011. At the same time, this petition was filed. Notably, on June 2, 2011, this Court (Honorable Justice Meltzer) granted the Petitioner an interim order prohibiting the arbitrators appointed by the Sharia court from issuing any decisions in the entire matter handed over to their care, until another decision in the petition.

3. Following a hearing we held on July 13, 2011, we decided to issue an order *nisi*, and to have the Attorney General file its position on the matter. After receiving the positions of the parties, we held an additional hearing on May 7, 2012, in which we decided that the Sharia Court of Appeals should give a detailed and reasoned decision on the parties' arguments, and particularly regarding the applicability of the Equal Rights for Women Act, 5711-1951 (hereinafter: the "Equal Rights for Women Act" or the "Act"). Such judgment was indeed handed down and provided to this Court on August 9, 2012, whose main points we shall address immediately. On November 27, 2012, we held a final hearing in the petition and heard the parties' arguments. In order to complete the picture, it shall be noted that two organizations filed motions to join the petition as *amici curiae*. The first is "Kayan"–Feminist Organization (hereinafter: the "**Kayan Organization**"), and the second is the Concord Research Center for Integration of International Law in Israel (hereinafter: the "**Concord Center**"). Following these proceedings, it is now time to deliver our decision in the petition.

The Sharia Court of Appeals' Judgment

4. As mentioned, following our decision, a reasoned judgment in the matter was given by the Sharia Court of Appeals on June 18, 2012. The Court stated that first the question of which school of thought was chosen by the Ottoman legislator when legislating Section 130 of the law, which binds the Sharia courts in Israel, must be addressed. The Court clarified that according to the Maliki school of thought, the arbitrators serve as a kind of Qadi, and not as representatives of the parties. Their authority is to reconcile the couple or divorce them from each other even without the couple's consent. In contrast, according to the Hanafi, Shafi and Hanbali schools of thought, the arbitrators' authority ends with delivering a report to the Qadi who is the one who performs the divorce according to the arbitrators' report, and the arbitrators do not have authority to perform the divorce unless they have been permitted to do so. The Court further ruled that in Section 130 of the law, the Ottoman legislator relied on the Maliki's opinion, as the language of the section authorizes the arbitrators to dissolve the marriage and provides that the arbitrators' judgment will be final. The court also relied on the explanatory notes to the Family Law that explicitly referred to the Maliki school of thought.

5. The Court stated that the Sharia courts indeed operate pursuant to this principle when implementing Section 130 of the Family Law, and it has been ruled that the act of the panel of arbitrators is a judicial act that creates a judgment similar to the act of a Qadi. The Qadi's only role is to confirm whether the arbitrators' report is consistent with the law, and if not, to void it. It has been ruled that the Qadi may intervene in the scope of the dowry (*mahr*) given to the women if he found that the arbitrators unjustifiably reduced it, however this is only the case for a monetary matter and where the court has tools to intervene, in the absence of a Sharia reason for the reduction. It has been ruled that the purpose of the intervention is to prevent the prolonging of the litigation between the parties. In contrast, the court cannot intervene in other matters of the arbitrators' report since the arbitrators are the ones who heard the couple's arguments based upon which they reached their conclusions. In summary, the Sharia Court of Appeals rules that "the arbitrators, pursuant to Section 130 of the law, are Qadis and not representatives, and they are the ones who rule regarding the dissolution of a marriage, and the Qadi's authority is to confirm their ruling."

6. The Court stated that the law does not clarify the terms and characteristics required of the arbitrator, and therefore, it is necessary to turn to the customary opinion in the Maliki school of thought to clarify such terms. According to this school of thought, the arbitrators must be men. The court clarifies that the religious scholars that viewed arbitrators as representatives permitted women to be arbitrators, while the religious scholars that viewed arbitrators as Qadis did not permit women to be arbitrators. The Court further noted that according to the Hanafi school of thought a woman can also be a Qadi.

7. As for the Equal Rights for Women Act, the court rules that both of the Act's exceptions apply: the exception regarding laws permitting or prohibiting marriage and the exception regarding appointing a person to a religious position. The Court emphasized that the arbitrators' judgment has Sharia implications that

stem from the dissolution judgment, which is final and binding, and therefore the Equal Rights for Women Act should not be applied to the appointment of arbitrators. The Court rejected the argument that the Family Law is a civil law and ruled that this law is the codification of Sharia laws that includes laws regarding marriage and divorce that were taken from various schools of thought. The Court also stated that at hand is a religious *lex specialis* that prevails over the provisions of the Mejelle which is *legi generali*. The Court cautioned that adopting a different school of thought would harm women, since according to other schools of thought the arbitrator cannot perform a divorce without the husband's consent, while the Maliki school of thought is the only one that applies a cause of action for dissolving a marriage without the husband's consent.

The Petitioner's Arguments

8. The Petitioner's attorney claims that Section 130 of the Family Law does not prohibit the appointment of a female arbitrator. According to him, we are concerned with a statue of a civil governing body within the codification process and reforms made during the Ottoman Empire. The Family Law was intended to introduce some into the existing rules and also to reform the legislation while adopting and integrating opinions from various schools of thought and creating a single body of binding legislation. It follows, as argued, that the law is to be interpreted similarly to other civil laws, rather than according to interpretations that were customary among the religious scholars in the period preceding the law's legislation. It is further argued that the Ottoman legislature did not adopt the Maliki interpretation across the board and allowed itself to prescribe norms that diverge from this school of thought. For example, it is argued that the idea the law established, whereby the authority to dissolve the relationship is granted to the Qadi and not the arbitrators, deviates from Maliki law, as does the Qadi's authority to appoint a third deciding arbitrator. The Petitioner's attorney also refers to religious institutions in Muslim countries, such as Jordan, Egypt and Morocco, and even in the Palestinian Authority, where women were appointed in recent years to serve in the position of Qadis. The Petitioner's attorney claims that according to the civil interpretation, Section 130 of the law is to be interpreted as allowing the appointment of a male or female arbitrator, based also on comparison with the provisions of the Mejelle, which deal with arbitration and grant the parties the freedom to choose the arbitrator acceptable to them.

9. The Petitioner's attorney further claims that the Sharia court's decisions are to be reversed as they are contrary to the Equal Rights for Women Act. According to the attorney, the Petitioner's right to be heard (*audi alteram partem*) was impaired as her arguments regarding the appointment of the female arbitrator were not heard at all before the decisions of the Sharia courts were handed down.

10. In the supplementary arguments by the Petitioner, following the Sharia court giving its supplementary judgment, her attorney repeated the argument that the interpretation of Section 130 of the law must be separated from the Maliki school of thought and the law must be treated as an independent and modern

statute. According to him, the Sharia courts have also not necessarily adhered to the Maliki school of thought in interpreting the law and that it has been ruled many times that the court has the authority to intervene and revoke the arbitrators' judgment. He further argues that the Mejelle is based on the Hanafi school of thought and that that is how the residents of the country conducted themselves for several years, and therefore the rules of the Maliki school of thought should not be imposed upon them now. He states that no specific characteristics are required of the arbitrators other than them being acceptable to the parties.

The Respondent's Arguments

11. The Respondent's attorney claims first that the Petitioner's right to be heard was not impaired since all her arguments were reviewed in writing before the Sharia Court of Appeals, which is not required to conduct oral hearings. As for Section 130 of the Family Law, he argues that this is part of the material-judicial-religious law that is based on the Quran. He presents references that the arbitrator is a judge of sorts who is somewhat inferior to a Qadi. The arbitrators' authority to listen to the parties' arguments, and even to rule on a divorce, indicates, so it is argued, their judicial position. The arbitrators' authorities go to dissolving the relationship between the couple, and therefore their actions relate to the hard core of the laws of divorce. The Respondent's attorney further states that the Court must accept the arbitrators' judgment as long as it is not flawed. His conclusion is, therefore, that this is a religious judicial position that falls within the exceptions of the Equal Rights for Women Act. The Respondent's attorney agrees that the Family Law was indeed legislated primarily based on the Hanafi school of thought, but it includes sections, such as Section 130, which were legislated based on the Maliki school of thought. Furthermore, he argues that the Court is authorized to appoint arbitrators without granting the parties the option of choosing arbitrators on their behalf. Finally, the attorney argues that this is not a case for the High Court of Justice to intervene.

12. In relating to the Sharia Court of Appeals' supplementary judgment, the Respondent's attorney reiterates his arguments and supports substance of the supplementary judgment. According to him, the Family Law is not a civil law, and contrary to the Mejelle, it is directly based on the Quran, which is a religious law. It is a *lex specialis* that prevails over the *legi generali* of the Mejelle. It is also argued that one must distinguish between arbitration under the Mejelle and arbitration under the Family Law. Arbitration under the Mejelle is pursuant to the parties' desire and at their choice, while arbitration under the Family Law is mandatory by law and it is in fact the Qadi who is authorized to appoint. He further mentions that according to the Maliki school of thought, the arbitrators must be male.

The Position of the Attorney General

13. At our request, the Attorney General presented its position that the Family Law is a civil law that was legislated based on Sharia Law. During the Ottoman period it was applied to all of the subjects of the Empire irrespective

of their religion, but since 1919 this law binds only the Sharia courts. The Family Law was primarily legislated based on the Hanafi school of thought, and it is turned to only upon a lacuna in the law. However, there are sections that were legislated based on other schools of thought, including Section 130, which is based on the Maliki school of thought. According to the Attorney General, the adoption of the Maliki school of thought in this context was apparently meant to benefit women, since this school of thought allows a woman to separate from her husband in broader circumstances and causes of action than the other schools of thought. According to this school of thought, the arbitrators must try to reconcile the couple that is in conflict, but should their attempts be unsuccessful, they have the power to separate the couple even without their consent. The arbitrators are further authorized to determine the sum of the dowry that the husband must pay the wife, according to the degree of fault by each party. The Attorney General clarifies that according to the Maliki school of thought the arbitrators are Qadis for all intents and purposes, and therefore, their ruling is final and binds the Qadi who is not authorized to intervene therein. Additionally, the arbitrator must be a man. However, there are schools of thought which relate to the arbitrators as representatives and allow a woman to be appointed to this position.

14. The Attorney General examines the two exceptions of the Equal Rights for Women Act. As for the exception regarding laws permitting or prohibiting marriage and divorce, the Attorney claims that there is doubt whether this exception applies. Indeed, according to the Maliki school of thought the arbitrators are authorized to dissolve the marriage, however, on the other hand it is not actual laws of divorce that are at hand, but rather the identity of those authorized to determine the divorce. According to the Attorney, it is doubtful whether the exception was meant to apply also to those authorized to implement the marriage and divorce laws. As for the exception regarding the appointment of a religious position pursuant to religious law, the Attorney General claims that according to the Maliki school of thought arbitrators have a somewhat judicial position that requires Sharia education. However he notes that this Court has ruled in the past that the arbitrators' decision is not final and their decision is subject to the confirmation of the Sharia court, in which the court is also authorized to intervene. The Attorney General notes that the Sharia courts indeed do so *de facto*, similarly to the Hanafi school of thought. According to the Attorney General, these figures allegedly indicate that the exception does not apply to the appointment of the arbitrators. However, the Attorney General believes the exception also applies to religious positions that are not judicial. Since the position of the arbitrator was created by virtue of the Muslim religious law, it appears that the exception in the Equal Rights for Women Act does apply. The Attorney General adds that the Family Law grounds religious laws even if it was made by the Ottoman legislator which applied the law to all the subjects of the Empire.

The Position of the "Kayan" Organization

15. The "Kayan" organization emphasizes that the decisions of the Sharia court constitute an *ultra vires* act since they are contrary to the principle of equality

and to the Equal Rights for Women Act. As for the exception regarding the appointment of a religious position according to religious law, the organization argues that it is to be interpreted narrowly, so that it shall only apply to actual religious or judicial positions. It is further argued that the arbitrator's position is not a judicial or religious position and therefore does not fall within this exception. According to the provisions of the Family Law and according to the customary practice of Sharia courts, the arbitrators have the status of representatives of the parties and their recommendations are subject to the court's confirmation. It follows that this is not a judicial position. According to the organization, these arguments were already accepted and ruled in the past, by this Court. The organization further adds that according to Sharia law and customary practice, the arbitrator can be any person whom either party chooses to appoint and that there are no criteria for such choice. The arbitrators can even be relatives of the couple. It is further argued that it is obvious that a relative, who lacks objectivity and independence in performing his duties, cannot accept a judicial position. Additionally, the Qadi is the one with the authority to confirm the marriage or to declare a separation between the parties. Scholars indicate that the Sharia court has deviated from the Maliki school of thought in all that relates to the roles of the arbitrator and has ruled that the court can reject the arbitrator's judgment.

The "Kayan" organization further clarifies that it is its position that the arbitrator is not a religious position. There are no criteria for appointing an arbitrator, who may also be a relative, which indicates this is not a religious position. At issue, so it is argued, is a familial-social role that is intended to reconcile the couple. It also states that the Family Law is a civil law and argues that in any event the interpretation that minimizes the violation of the principle of equality should be chosen.

16. As for the exception relating to laws permitting or prohibiting marriage and divorce, the "Kayan" organization argues that since the arbitrator does not fulfill a judicial or religious position, and since the court is the one that rules on the divorce claim as it is permitted to reject the arbitrators' recommendation, then this is not a matter of violating laws permitting or prohibiting divorce. The arbitrator has limited discretion that amounts to examining the fault of each of the parties and making a recommendation in the matter of the dowry.

17. In general, the "Kayan" organization further argues that preventing the appointment of a woman to the position of an arbitrator in a Sharia court critically violates women's rights to dignity. It emphasizes that there is no relevant difference between men and women in terms of this position, and therefore, any distinction between them is improper. Furthermore, according to the organization, the appointment of women as arbitrators in necessary in order to realize women litigators' right to self-expression, and so that they may have an arbitrator on their behalf who would listen to their inner-most feelings in such personal and sensitive matters, who would serve as a voice and a mouthpiece to the woman. Doing so would, in fact, prevent a double infringement, both to the arbitrating women and to the litigating women.

Preventing the appointment of a woman as an arbitrator prejudices Muslim women's access to Sharia courts and contributes to silencing their voice.

The Position of the Concord Center

18. The Concord Center focuses its arguments on the implications of international law on the case at hand. According to the Center, the Family Law and the Equal Rights for Women Act must be interpreted in light of the human rights conventions Israel committed to uphold. The Center mentions the International Convention for Civil and Political Rights, which protects the right of litigating parties to equality in civil legal proceedings. According to the Concord Center, the Sharia court's interpretation violates this right, as it prevents one of the parties to the proceeding from exercising the litigating party's right to choose the person who, pursuant to her discretion, will most efficiently represent her before the family council, while the other party benefits from the option of appointing such a person. According to the center, the said interpretation particularly violates women's right to due process without discrimination. The disqualification of women to serve as arbitrators has negative implications for the status of women as litigating parties. Such disqualification signals to the litigating woman that her position is inferior to that of the man against whom she is litigating. Finally, the Concord Center argues that the Sharia court's ruling excludes women in terms of public representation. Such exclusion is contrary to Israel's commitment pursuant to Section 7(b) of the Convention on the Elimination of All Forms of Discrimination against Women, not to restrict women's participation in the public arena.

Discussion and Decision – Intervening in the Judgment of Religious Courts

19. The religious courts, including Sharia courts, are independent judicial authorities with judicial jurisdiction in matters relating to personal status. As such, this court exercises narrow and limited judicial review to decisions of the religious courts, in accordance with that stated in Section 15 of Basic Law: The Judiciary:

> 15. The Supreme Court
> …
> (c) The Supreme Court shall sit also as a High Court of Justice. When so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court.
> (d) Without limiting the general applicability of the provisions of subsection (c), the Supreme Court sitting as a High Court of Justice shall be authorized –
> …
> (4) to order religious courts to hear a particular matter within their jurisdiction or to refrain from hearing or continue hearing a particular matter not within their jurisdiction; provided that the court shall not entertain an application under this paragraph if the applicant did not raise the

> question of jurisdiction at its earliest opportunity; and if he had no reasonable opportunity to raise the question of jurisdiction until a decision had been given by a religious court, the Court may cancel a hearing that was held or a decision given by the religious court without authority.
> …

It has been repeatedly said that this Court does not sit as an instance of appeal on decisions of the religious courts. As such, and in light of the authorities granted to them by law, defined causes of actions were prescribed for this Court's intervention in decisions by religious courts (HCJ 2578/03, *Pachmawi v. Pachmawi*, para. 17 (May 8, 2006)). Among such causes of action is the cause of action of *ultra vires* – the cause of action of violating the rules of natural justice; and the cause of action enshrined in Section 15(c) of Basic Law: The Judiciary, regarding granting relief for the sake of justice (HCJ 11230/05, *Muasi v. The Sharia Court of Appeals in Jerusalem*, paragraph 7 (March 7, 2007) (hereinafter: the "*Muasi Case*"). These causes of action, and particularly the latter two, could include various matters from both sides of the coin of justice, violation of the rules of natural justice on the one hand, and relief that shall be granted for the sake of justice, on the other hand. As for this latter cause of action, it has been said:

> "The latter cause of action for intervention – 'for the sake of justice' – is a blanket cause of action which can cover various different matters. The crux of all these matters is the need to grant relief for the sake of justice in the circumstances of a given case, and there is no necessary internal logical connection between them" (HCJ 5227/97, *David v. The Great Rabbinical Court of Jerusalem*, IsrSC 55(1) 453, 458-459 (1998)).

20. An additional cause of action justifying this Court's intervention in the religious court's decisions is the court's deviation from the provisions of a law directed to it. The question whether this cause of action falls within the *ultra vires* cause of action prescribed in Section 15(d)(4) of Basic Law: The Judiciary, or rather within the cause of action justifying intervention to grant relief for the sake of justice, prescribed in Section 15(c) of Basic Law: The Judiciary, has been raised in the court's rulings. The different classification of the causes of action implicates the determination of the scope of this Court's intervention:

> "This distinction between the causes of the High Court of Justice's intervention according to the different alternatives of Section 15 of Basic Law: The Judiciary, could implicate the scope and extent of the High Court of Justice's intervention in the relevant judicial act. If at hand is a court decision that is *ultra vires* since it did not follow all of the specific details of the civil partnership rule, such decision would generally be overturned. On the other hand, if the matter is classified as a case where relief must be granted for

> the sake of justice, then there is extensive discretion to examine the essence of the result reached by the court, from a perspective of justice, even if all of the specific details of the civil law required in the path chosen to obtain it, were not strictly implemented." (HCJ 2222/99, *Gabay v. The Great Rabbinical Court*, IsrSC 54(5) 401, 426-427 (2000)).

In any event, the proper classification has yet to be ruled upon by courts, and it appears that we, too, are not required to rule on the matter.

The Matter Before Us

21. As emerging from the petition before us, the cause of action that merits our intervention in the Sharia court's decisions is that relating to the religious court ignoring provisions of law directed to it. The relevant statutory provision here appears in Section 1A(a) of the Equal Rights for Women Act, which prescribes as follows:

> "There shall be one law for a woman and a man for purposes of every legal act; any statutory provision which, for purposes of any legal act, discriminates against a woman because she is a woman shall not be followed."

This statutory provision, which is also directed to the Sharia court, must be applied by the court, even if applying the religious law brings about different results:

> "The actions of any court, which shall not act according to the law, shall be *ultra vires*. Because the Equal Rights for Women Act limited and restricted the authorities of the religious courts to act according to religious law, as they did before the Act's legislation" (HCJ 187/54, *Briya v. Qadi of the Muslim Sharia Court, Acre*, IsrSC 9(2), 1193 (1955)).

Meaning, the religious court is not permitted to rule based on discriminating against the woman, at least as long as the exceptions to the application of the Equal Rights for Women Act do not apply, or as long as there is no other statute that trumps the provisions of the Equal Rights for Women Act (see HCJ 1000/92, *Bavli v. The Great Rabbinical Court-Jerusalem*, IsrSC 48(2), 221, 241 (1994) (hereinafter: the "*Bavli Case*"). It follows that should the Act apply to the case at hand, and the Sharia court reached a result that is contrary to this provision of the Law, and if there is no other law that implicitly overrides the provisions of the Equal Rights for Women Act, the petition is to be accepted and the decision of the Sharia court is to be overturned.

Therefore, first we shall have to examine whether the Act applies to Sharia court in the case before us, and whether the exceptions prescribed in it do not. To do so we must interpret the Act's provisions, while elaborating on its fundamental principles and primarily on the principle of equality between the sexes. It is also necessary to elaborate on the essence of the Sharia court's

ruling in the matter before us. Should we find that the Act applies to the case at hand and that there is no other overriding statutory provision, it would be necessary to examine whether the Sharia court's ruling violates it. Should the answer to this be in the affirmative, we shall examine the relief that should be granted to the Petitioner in this case.

The Principle of Equality Between the Sexes and the Equal Rights for Women Act

22. When the architects of the nation wrote the Declaration of Independence they promised to ensure "complete equality of social and political rights for all its citizens, regardless of religion, race and sex". In doing so, they signed a bill for the benefit of the State, society and the women among it. A bill of promise of basic rights to life, liberty and equality. The State requested to honor the bill and in its early days legislated the Equal Rights for Women Act. The basis for the legislation of the Equal Rights for Women Act is, of course, the principle of equality between the sexes. The principle of equality constitutes one of the main foundations of our legal system and of the democratic rule, in general. The principle of equality is the soul of democracy. "Where there is no equality for a minority, there is also no democracy for the majority" (HCJ 6924/985, *The Association for Civil Rights in Israel v. The Government of Israel*, IsrSc 55(5) 15, 28 (2001) (hereinafter: the "*Association for Civil Rights Case*")). This Court has emphasized the great importance of the principle of equality on many occasions, "setting its place in the center of the legal map and in the roots of all of the rules of law" (HCJ 6845/00, *Niv v. The National Labor Court*, IsrSc 56(6) 683 (2002) (hereinafter: the "*Niv Case*"); HCJ 2671/98, *The Israel Women's Network v. The Minister of Labor and Welfare*, IsrSC 52(3) 630, 650-651 (1998) (hereinafter: the "*Second Women's Network Case*"). Violating the principle of equality creates a double violation: both to the individual and to the public. Discrimination sends out a message of inferior status to the individual and to the discriminated group, and in doing so creates deep humiliation and violates the dignity of such individual or group (HCJ 4541/94, *Miller v. The Minister of Defense*, IsrSC 49(4) 94, 132 (1995) (hereinafter: the "*Miller Case*"); (HCJ 953/87, *Poraz v. Mayor of Tel-Aviv-Jaffa*, IsrSC 42(2) 309, 332 (1988) (hereinafter: the "*Poraz Case*"). "Discrimination is an affliction that creates a sense of deprivation and frustration. It damages the sense of belonging and the positive motivation to participate in social life and contribute to it" (HCJ 104/87, *Nevo v. The National Labor Court*, IsrSC 44(4) 479, 760 (1990) (hereinafter: the "*Nevo Case*"). Equality is essential for society and for the social contract upon which it is built. Infringing the principle of equality means not only prejudicing the individual discriminated against or the group experiencing the discrimination, but also "derogating from the entire public interest, from the character of the society, the wellbeing of all those who comprise it" (HCJ 5755/08, *Aren v. The Government of Israel*, para. 4 of Justice E. E. Levy's opinion (April 20, 2009) (hereinafter: the "*Aren Case*")). It should be emphasized that the meaning of equality is, not relating differently to people who are not different in any relevant way. The existence of a relevant difference directly and concretely related to the purpose at hand, could, however, justify a permitted and legitimate distinction (the *Miller*

Case, on pages 109-110; the *Nevo* Case, on page 754). It shall further be noted that the examination of discrimination is an objective examination which is not impacted by the existence or absence of the intent to discriminate (the *Niv* Case, on page 698; the *Second Women's Network Case*, on page 654).

23. The principle of equality holds many meanings and various sub-principles. However, the core of the principle of equality, or as it is called "the principle of equality in the narrow sense", includes a list of defined causes of action which are referred to as the classic causes of action of equality or the generic causes of action of equality. Among these causes of action is equality between the sexes. Violation of the principle of equality in the narrow sense in considered especially severe, and in many countries is even deemed a violation of a constitutional right (the *Association of Civil Rights Case*, on page 27). "Discrimination due to religion, race, nationality or sex is among the most severe forms of discrimination", and "the prohibition of sex discrimination – the prohibition of discrimination against women – became one of the strongest leading principles of Israeli law" (the *Niv* Case, p. 683; 689). Sex discrimination is a form of discrimination with which many of the world's countries are dealing, and which requires eradication of prejudices and perceptions that were common in human society as to the essence of the differences between the sexes:

> "Confronting the problem of discrimination in general, and with regard to differences between the sexes in particular, is not only our concern. It concerns every free society where the principle of equality is one of its foundations. Discrimination derives from a perception that was grounded in human society as part of a perspective that for generations viewed the status of women as inferior and without rights. The granting of rights to women has developed step by step. It received impetus and strength in this century as part of the ideological and practical renaissance aimed at eradicating discrimination between people. This struggle to eradicate discrimination against women because of their sex is taking place in various arenas and with a range of weapons. It occupies a place of honor in literature, philosophy, articles, the media, political frameworks and various public arenas." (the *Miller* Case, p. 122; see also Justice Dorner's review there, p. 129).

24. The principle of equality, in general, and the principle of equality between the sexes, in particular, have both been recognized in the State of Israel, since the birth of the State of Israel. The declaration of independence establishes the new state's commitment to maintain "complete equality of social and political rights for all its citizens, regardless of religion, race and sex". Not long after the Basic Laws were enacted, the principle of equality was recognized as a constitutional principle that is encompassed within human dignity – in its narrow model – and therefore, is protected by Basic Law: Human Dignity and Liberty. The position that was voiced was that the

equality that is constitutionally protected is that whose violation amounts to humiliation. Sex discrimination was recognized as humiliating discrimination, and therefore a violation of a constitutional right (the *Miller* Case, p. 110, 132). It shall be noted that today an interim model has been adopted in the rulings of this Court, whereby "discrimination that does not involve humiliation may also be included within the boundaries of human dignity, provided it is directly related to human dignity as an expression of personal autonomy, freedom of choice and freedom of action, and such other aspects of human dignity as a constitutional right" (HCJ 6427/02, *The Movement for Quality Government in Israel v. The Knesset*, IsrSC 61(1) 619, para. 38 of President Barak's opinion (2006); HCJ 4948/03, *Elhanati v. The Minister of Finance*, IsrSc 62(4) 406, para. 17 of Justice Hayut's opinion (2008) (hereinafter: the "*Elhanati Case*").

25. Israeli courts' jurisprudence has, for many years, dealt with discrimination against women in various fields. The courts have constructed the roof beams upon the foundations laid by the legislature. Step by step, courts are taking strides towards eradicating discrimination against women, at least at the declarative and normative levels. The court applies the duty not to discriminate first and foremost to government authorities, "however since it derives from the fundamental principles of fairness and good faith that formulate any social contract and any jurisprudence that stem from them, the forms of the right to equality are not absent in the fields of private law" (the *Elhanati* Case, para. 17 of Justice Hayut's opinion). Over the years, the legal system has played an important role in advancing the status of women in society and in realizing the aspiration towards an egalitarian society in which each individual has the opportunity for self-fulfillment, and realizing their capabilities, their desires and aspirations. The Court has not been deterred from intervening in and overturning decisions and actions that were afflicted by sex discrimination, in all walks of life, in a broad and varied list of matters: in the field of employment and wages (the *Nevo* Case; HCJ 1758/11, *Goren v. Home Center (Do it Yourself) Ltd.*, (May 17, 2012); the *Niv* Case); in the matter of appropriate representation for women (the *Aren* Case; HCJ 5660/10, *Itach-Women Lawyers for Social Justice Organization v. the Prime Minister of Israel*, (August 22, 2010); HCJ 453/94, *The Israel Women's Network v. The Minister of Transportation*, IsrSC 48(5) 501 (1994) (hereinafter: the "*First Women's Network Case*"); the *Second Women's Network* Case; NLC 33/3-25, *Air Crew Flight Attendants Committee - Hazin*, IsrLC 4 365 (1973)); in the military and security field (the *Miller* Case); in the family law field (developing the partnership presumption – see for example CA 1915/91, *Yaacobi v. Yaacobi*, IsrSC 49(3) 529 (1995); FC 4623/04, *Anonymous v. Anonymous*, IsrSC 62(3) 66 (2007); during pregnancy, birth and parenting (HCJ 11437/05, *Kav Laoved v. The Ministry of Interior*, (April 13, 2011)); and more. "The equal status of women within the principle of equality is not solely formal and it must span over all the arenas of our life in a practical and real way" (the *Poraz* Case, p. 342). The meaning of all of the above is that we hear the sounds of equality but still do not see it in full. There are still things to be done, improved and advanced, and the Court has an important and significant role in this matter.

One of the sensitive fields in which the court must deal with discrimination against women is that field which directly or indirectly relates to matters of religious law, religion and state. Indeed, the Court has, on more than one occasion, addressed the principle that prohibits discrimination against women because of their sex, in this field as well, and has overturned decisions afflicted by such discrimination. Thus, this Court intervened in the matter of training and appointing female rabbinical pleaders when it appeared that the relevant institutions were attempting to make it difficult for them in order to prevent such positions from being performed by women (HCJ 6300/93, *"Hamachon Lehachsharat Toanot Beit Din" v. The Minister of Religious Affairs*, IsrSC 48(4) 441 (1994) (hereinafter: the "*Rabbinical Pleaders Case*"); thus, a petition to order that the female petitioner be added to the Religious Council in Yerucham, after such candidate was disqualified merely because she was a woman, was accepted (HCJ 153/87, *Shakdiel v. The Minister of Religious Affairs*, IsrSC 42(2) 221 (1988) (hereinafter: the "*Shakdiel Case*"); and thus it was ruled that a local authority is not permitted to avoid selecting a woman as a representative to the meeting electing a city Rabbi, merely because she was a woman (the *Poraz* Case).

26. However, this is a field in which discrimination against women at the declarative and principle level, too, still remains. This is partly protected by legislation, and the Court must maneuver its way in a manner that respects the legislator's decisions, but with maximum commitment to the basic principle and constitutional right of equality for women. This is particularly true when at hand are public and state institutions whose services are required by the entire public who cannot avoid such institutions' services. The perspective regarding discrimination against women shall be different for a member of a community that chooses to belong to it and to accept its rules and the rulings of its institutions, than for a public institution which the public cannot choose whether or not to need its services (see Ruth Haplerin-Kaddari, *More on Legal Pluralism in Israel*, IYUNEI MISHPAT 23 559, 570 (5760)). It is clear that as every right, the right to equality between the sexes is also not absolute and at times requires balancing with additional interests and rights. However, a violation of equality between the sexes shall have to comply with the tests of the Limitation Clause prescribed in Basic Law: Human Dignity and Liberty (HCJ 11163/03, *Vaadat Hamaakav Haelyona Leinyanei Haaravim Beyisrael v. the Prime Minister of Israel*, IsrSC 61(1) 1, para. 22 of President Barak's opinion (2006); the *Miller* Case, p. 138).

27. When we focus on religious courts, the difficulty is exacerbated, since discrimination is inherent to these institutions' system. This is primarily because only men are being appointed to judicial positions, the appointment to which is allegedly protected by the Act, as we shall see below. Additionally, repeated arguments are heard that the religious law itself often creates discrimination against women, and that at the very least, in terms of results, there is often some kind of propensity against women in these institutions (see for example, Frances Raday, *Religion and Equality: Through the Perspective of Jurisprudence*, THE BERENSON BOOK 341, 381, 386 (Vol B, 5760); Frances Raday, *On Equality*, THE STATUS OF WOMEN IN LAW AND SOCIETY 19 (edited Frances Raday, Carmel Shalev and Michal Liban-Kobi,

1995); Shirin Batshon, THE ECCLESIASTICAL COURTS IN ISRAEL, A GENDER-RESPONSIVE ANALYSIS (Kayan Organization, 2012); Aharon Layish, *The Status of the Muslim Women in the Sharia Court in Israel*, THE STATUS OF WOMEN IN LAW AND SOCIETY 364 (edited Frances Raday, Carmel Shalev and Michal Liban-Kobi, 1995) (hereinafter: Layish); Pinchas Shipman, *Rabbinical Courts: Where Are They Heading*, MISHPAT UMIMSHAL 2 523 (5755); Yifat Biton, *Feminine Matters, Feminist Analysis and the Dangerous Gap between Them: Response to Yechiel Kaplan and Ronen Perry*, IYUNEI MISHPAT 28 871, 875, 890 (5765)). It shall be emphasized that it is important to maintain the sense of equality and egalitarian results particularly in these institutions, which deal with most sensitive matters of family law, and already often reflect a struggle between the sexes. In any event, the principle of equality also applies in religious courts, subject to the exceptions that were prescribed in the Act (the *Shakdiel* Case, on page 278). Hence, the role of the state and the government systems, with the support and intervention of this court, is to try, to the extent possible, to balance the said picture, so that women who require the services of these institutions feel they are equal and that they receive the same treatment given to men. For example, one can encourage the appointment of candidates to judicial positions, who besides their professional skills, are supported by women's organizations (see my remark in HCJ 8756/07, *Amutat "Mavoi Satum" v. The Committee for the Appointment of Religious Judges* (June 3, 2008)); additionally, one can promote the appointment of women to managerial and administrative positions in the religious courts themselves (see HCJ 151/11, *The Ruth and Emanuel Rackman Center for the Advancement of Women's Status v. The Ministry of Justice*, (December 27, 2011)); one can also enable and encourage women to fill various positions in religious courts that do not represent the court itself, such as was done with respect to female Rabbinical pleaders in the Rabbinical Courts (the *Rabbinical Pleaders* Case). This is also the point of departure when examining the appointment of female arbitrators in Sharia courts. Having said that, we must examine the matter in light of the provisions of the Equal Rights for Women Act.

The Equal Rights for Women Act, Its Exceptions and Interpretation

28. Along with the work done by case law in advancing equality between the sexes, the legislature did not stand still either. Over the years, commencing from shortly after the establishment of the State and until this very day, statutes have been legislated with the purpose of protecting women from sex discrimination. First on the list of these laws is the Equal Rights for Women Act, which was legislated in as early as 1951, and which we discuss in further depth below. Additionally, the Authority for the Advancement of the Status of Women Act, 5758-1998, and the Local Authorities (Advisor for the Advancement of the Status of Women) Act, 5760-2000, were legislated with the general purpose of advancing equality between men and women in Israel. In the area of employment the following statutes and provisions were legislated: section 42(a) of the Employment Service Law, 5719-1959; the Equal Employment Opportunity Act, 5748-1988; the Equal Pay for Female and Male Employees Act, 5724-1964, which was replaced by the Equal Pay for Female and Male Employees Act, 5766-1996; and the Encouragement of

Advancement and Integration of Women in the Workforce and the Adjustment of Workplaces for Women Act, 5768-2008. The Women's Employment Act, 5714-1954, which was intended to protect women in the workplace was also legislated. Sections intended to obtain appropriate representation of women in various institutions and bodies were also legislated (see Section 18A of the Government Companies Act, 5735-1975; Section 4(b) of the Senior Citizens Act, 5750-1989; Sections 8(b)(3) and 16(c) of the National Laboratories Accreditation Authority Act, 5757-1997; Section 63(a)(3) of the Sewage and Water Corporations Act, 5761-2001; Section 15A of the State Service (Appointments) Act, 5719-1959; Section 11(d) of the National Battle Against Road Accidents Act, 5757-1997; see also the *Niv* Case, on page 686; the *Second Women's Network* Case, on pages 652-654). One of the long-standing and general statutes in this matter is the Equal Rights for Women Act, which stands at the heart of this petition, and on which we shall now focus.

29. As stated, the Equal Rights for Women Act was legislated in as early as 1951, and its purpose was to maintain "complete and full equality for women – equality in rights and obligations, in the life of the state, society and market and in the entire network of laws" (see the Equal Rights for Women Bill, 5711-1951, on page 191). The Act was recognized by this Court as having a special status, superior to ordinary laws. As such, it was referred to by President Barak as a "royal" law (the *Bavli* Case, p. 240), and Justice Zilberg emphasized that "this law is not like another ordinary law! This is an ideological, revolutionary law that changes social order" (HCJ 202/57 *Sides v. The President and Members of the Great Rabbinical Court, Jerusalem*, IsrSc 12 1528, 1537 (1958)). The Law is directed at all of the government authorities as well as all of the judicial instances, and religious courts were explicitly obligated to act accordingly (see Section 7 of the Act and the *Bavli* Case, p. 240). In 2000, a purpose statement was added in the following section:

> 1. Purpose of the Act
> The purpose of this Act is to set principles for the assurance of full equality between women and men, in the spirit of the principles of the Declaration of Independence of the State of Israel.

It shall be noted that within that same amendment from the year 2000 the exception provided in Section 7(c), upon which we shall elaborate further below, was also added (see Equal Rights for Women (Amendment no. 2) Act, 5760-2000). The Act's center of gravity, in my opinion, is located in the general and broad provision anchored in Section 1A of the Act, pursuant to which "There shall be one law for a woman and a man for the purposes of every legal act." This section has been interpreted broadly as anchoring women's right to equality not only regarding any legal act, but also regarding any legal aspect whatsoever (see Civil Appeal 337/61, *Lubinski v. The Assessment Officer, Tel Aviv*, IsrSC 16 403, 406 (1962); the *First Women's Network* Case, p. 522, the *Poraz* Case, p. 335). It is further important to emphasize that this is a declaratory and descriptive statue rather than one that

is constitutive, since the principle of equality between the sexes existed before the Act was legislated (see the *Niv* Case, p. 686). An interesting question then follows – what will the impact of the principle of equality on the matter be should we determine that the Equal Rights for Women Act does not apply to the case at hand (see the *Shakdiel* Case, p. 277). In any event, as we shall see below, we need not rule on this issue here. However, I find it appropriate below to add a few words on it.

30. The Equal Rights for Women Act applies broadly. Section 7(a) provides that every governmental authority is obligated to honor the rights detailed in the Act. Section 7(b) expands this application to all courts and tribunals competent to address matters of personal status as well, unless all parties agree to litigate according to the laws of their community. However the law establishes two central exceptions to its applicability, both of which relate to religious courts. Section 5 of the Act provides that "this Act shall not infringe any legal prohibition or permission in connection with marriage and divorce". Section 7(c), which, as mentioned, was added to the Act in the legislative amendment of 2000, provides that:

> The provisions of this Act shall not apply to an appointment to a religious position under religious law, including the appointment of rabbis and of holders of judicial positions in religious courts.

31. In light of the Act's objective, its unique status and the principles upon which it relies, it is my opinion that the Act should be interpreted broadly while the exceptions provided in the Act should be interpreted narrowly. This approach follows this Court's jurisprudence that legislation that violates basic human rights should be interpreted narrowly, based on the assumption that the Act's provisions are not intended to violate the principle of equality (the *Miller* Case, p. 139; the *Nevo* Case, p. 763; the *Shakdiel* Case, p. 273; the *Poraz* Case, p. 322). This is all the more relevant when the principle of equality under the Equal Rights for Women Act is concerned:

> "In this case even more weight should tip the scale in favor of the Equal Rights for Women Act. This law reflects an important and central value, a principle that formulates life in our state as a civilized state. The Equal Rights for Women Act declares a value that should encompass our entire legal system. Therefore, as long as nothing explicitly contradicts this law, an interpretation that corresponds with the principle of equality between the sexes should be preferred" (the *Nevo* Case, p. 764).

This approach certainly corresponds with the general objective of the Act, as is explicitly provided in Section 1 of the Act, which addresses securing full equality between men and women, explicitly provides. It is appropriate in a democratic state that honors human rights, in general, and equality between the sexes, in particular, and is all the more relevant when an interpretation relating to state and public institutions that serve the entire public is

concerned. This approach also addresses the need to interpret the provisions of the Act in light of the spirit of Basic Law: Human Dignity and Liberty, which protects women from discrimination (see the *Miller* Case, p. 138).

32. The exceptions that are relevant to the case at hand appear, as mentioned, in Section 5 and Section 7(c) of the Equal Rights for Women Act. Pursuant to Section 5 of the Act we must examine whether the appointment of a female arbitrator according to Section 130 of the Family Law violates laws permitting or prohibiting marriage or divorce in Muslim law. Pursuant to Section 7(c) of the Act, we must examine whether the appointment of arbitrators is an appointment to a religious position according to religious law or an appointment to a judicial position in a religious court. In order to examine whether or not the case before us falls under the said exceptions, we must first elaborate on the legislative framework in Sharia law that applies to the matter at hand and understand its essence.

Arbitrators in Sharia Law and Section 130 of the Family Law

33. Before turning to understanding the matter that was presented to the Sharia Court, I shall state in general that the authority of the Sharia courts stems from Section 52 of the King's Order in Council that grants Sharia courts exclusive jurisdiction to address matters of personal status of Muslim Israeli citizens. The matters of personal status also include matters of marriage and divorce pursuant to Section 7 of the Act of Procedure of the Muslim Religious Courts 1933 (see S. D. Goitein and A. Ben Shemesh *The Muslim Law in the State of Israel* 42, 276 (1957) (hereinafter: "Goitein and Ben Shemesh")). It shall be noted that the Family Matters Court Act, 5755-1995, was amended in 2001 to grant parallel jurisdiction to the family matters courts to address personal status matters of Muslims, except matters of marriage and divorce (see HCJ 2621/11, *Anonymous v. The Sharia Court of Appeals in Jerusalem*, para. 13 (December 27, 2011)). The matter before us, which addresses the divorce of a couple, is, indeed, still in the exclusive jurisdiction of the Sharia court.

34. The law that applies to this case is the Ottoman Family Law. The Family Law was legislated by the Ottoman regime and its purpose was to regulate the family laws that would apply to all citizens regardless of their religion. In 1919, the British Mandate adopted the law in the framework of the Muslim Family Law Ordinance, but limited its applicability to Muslims only. The statute's provisions address matters of marriage and divorce, and the drafters of the law adopted various laws from various schools of Muslim thought – the Hanafi, the Shafi, the Maliki and the Hanbali – in an attempt to choose the rules most appropriate for the twentieth century (Goitein and Ben Shemesh, p. 213; Layish, p. 371).

35. The parties before us disagree on whether the Family Law is a religious or civil law. The Family Law was legislated by the Ottoman legislature and was even intended to apply to all citizens of different religions, allegedly indicating that the law is "civil". The Family Law does not adopt each and every rule of the Quran. For example, there are forms of termination of

marriage which appear in the Quran and which were not expressed in the Family Law (see Goitein and Ben Shemesh, p. 139). The Ottoman legislature even took the liberty to select various rules from different schools of thought in Muslim law, as a sign of the times, as it deemed fit. However, the Ottoman legislature did not create rules out of nowhere, but rather, even if in a mixed manner and as per its civil discretion, anchored rules from the various schools of thought which are ultimately based on the Sharia and the Quran (see Iyad Zahalka, *The Identity of the Sharia Courts in Israel*, in IN THE FACE OF THE SHARIA COURT: PROCESSES OF CHANGE IN THE STATUS OF WOMEN IN ISRAEL AND THE MIDDLE EAST 75 (edited by Liat Kozma, 2011)). It follows that I am willing to assume that the Family Law is a law that is religious in its essence (however, see Moussa Abu Ramadan, *The Status of the Ottoman Family Law*" in IN THE FACE OF THE SHARIA COURT: PROCESSES OF CHANGE IN THE STATUS OF WOMEN IN ISRAEL AND THE MIDDLE EAST 49 (edited by Liat Kozma, 2011) (hereinafter: "Abu Ramadan").

36. The section the Sharia court applied in this case is Section 130 of the Family Law, which reads as follows, as translated by Goitein and Ben Shemesh:

> "If arguments and disagreements erupt between a couple, and one of them approached a judge, the judge shall appoint two arbitrators from the couple's families and if arbitrators from among the relatives are not found or do not have the required characteristics, the judge shall appoint appropriate arbitrators not from among the relatives. A family panel of such composition shall listen to the parties' complaints and arguments and shall try, to the best of its ability, to reconcile them. If this is not possible because of the husband, they shall rule that the marriage be untied, and if because of the wife, they shall also revoke her right to the entire dowry or a portion thereof. If the arbitrators cannot agree among themselves, the judge shall appoint appropriate arbitrators in a different composition, or a third arbitrator not from among the relatives. The decision of such persons shall be final and non-appealable."

The section anchors an additional way of dissolving the marriage in the event that disputes emerge between the couple. Each one of the couple may demand that a family "panel" or "council" be established and that it shall be comprised of one representative from the husband's family and one representative from the wife's family. The council must attempt to reconcile the couple, but if they do not succeed, they must rule to untie the marriage and determine the scope of the dowry to be paid (the *Muasi* Case, para. 9). If the first arbitrators that were appointed do not agree among themselves, additional arbitrators must be appointed or a third arbitrator must be appointed to decide (HCJ 9347/99, *Hamza v. The Sharia Court of Appeals in Jerusalem*, IsrSC 55(2) 592, 597 (2001) (hereinafter: the "*Hamza Case*").

37. The different schools of thought in Sharia law viewed the role of arbitrators differently. As the Sharia court stated in its decision here, the Maliki school

of thought allows arbitrators to dissolve the marriage themselves without the involvement of the Qadi, and they serve as a kind of Qadi themselves. According to this school of thought, the arbitrators must be male adults. In contrast, the Hanafi school of thought, along with other schools of thought, views the arbitrators as representatives of the parties, and therefore there is nothing preventing the Qadi from intervening in their decision. According to these schools of thought, a woman can be appointed as an arbitrator (see also Moussa Abou Ramadan, *Divorce Reform in the Sharia Court of Appeals in Israel (1992-2003)*, ISLAMIC LAW AND SOCIETY 13, 2 / (2006) (hereinafter: Abou Ramadan); Abu Ramadan, p. 61).

38. The matter of interpretating Section 130 of the Family Law was already brought before this Court in the *Hamza* Case, which addressed how to interpret the end of the section that "the decision of these people shall be final and is non-appealable." This Court interpreted the section to mean that after the arbitrators completed their role, the matter is handed to the Sharia court to make its decision, and it has the discretion whether or not to adopt the arbitrators decision:

> "It is my opinion that the proper interpretation of the sentence in dispute is that the finality mentioned therein means that from that stage, the matter is transferred to the decision of the Sharia court that appointed the arbitrators. At this stage, the arbitrators have completed their role, and the Sharia court is to have its say. The sentence uses the phrase "the decision of these people." "These people": the arbitrators, and the finality means that their decision is final, in the sense that their decision is the last decision to be given in by arbitrators before the Sharia court has its say. The arbitration proceeding pursuant to Section 130 has been exhausted and from this stage the Sharia court must rule in the dispute with the arbitrators' decision before it. This does not mean that the Sharia court cannot return the matter to the arbitrators. But as of this stage, the arbitrators have completed their work, the decision is "final", and the matter is transferred to the Sharia court for it to reach a decision.
>
> This interpretation accords with the fact that in order for a separation between the couple to be valid, a Sharia court judgment is required. The arbitrators' decision in and of itself does not dissolve the marriage. Only once a judgment by the court is handed down can the divorce be registered under the law (Section 131 of the law). It is unreasonable to interpret the sentence in dispute such that even though the court must issue a judgment, it does not have the discretion whether or not to accept the arbitrators' decision. Only an explicit statement that the Sharia court is bound by the arbitrators' decision and has denied the authority to rule in the matter, could bring about such an extreme result. Therefore the correct interpretation is that the arbitrators' decision is final, on the arbitration level, but does not derogate from the

> regional Sharia court's authority to consider the merits of the arbitrators' decision and decide whether or not to adopt it" (the *Hamza* Case, p. 598).

According to this interpretation, the final authority to confirm a divorce judgment is granted to the Sharia court. The arbitrators' decision itself does not dissolve the marriage, and the Sharia court must exercise its discretion and decide whether to adopt the arbitrators' decision, reject it or accept it in part. The parties may raise arguments against the arbitrators' decision before the Sharia court and the Sharia court has the authority to accept such or other arguments. It is the one that makes the final ruling in the dispute before it. It shall be noted that in its ruling, the Court also relied on the customary practice in Sharia courts, whereby the Sharia courts have consistently ruled that they have the authority to intervene in the arbitrators' decision:

> "One can see that the Sharia court intervenes in the arbitrators' conclusion when it finds that it does not accord with the facts of the case or is not based on sufficiently solid evidence. It can further be seen that in certain circumstances the court sends the case back to the arbitration level. Meaning, it also emerges from the customary practice that the court has the authority to intervene in the arbitrators' decision, and that this is how the sentence that is in dispute is interpreted." (The *Hamza* Case, p. 600).

This case law has indeed since been implemented by this Court (the *Muasi* Case).

Applying the Exceptions of the Equal Rights for Women Act on the Appointment of Arbitrators

39. After elaborating on the Equal Rights for Women Act, its purpose and the manner it is interpreted, as well as on the essence of the matter before us, it is now time to examine whether the exceptions in the Act apply to the appointment of arbitrators under Section 130 of the Family Law. The first exception is that in Section 5 of the Act whereby "this Act shall not infringe any legal prohibition and permission in connection with marriage and divorce." In this matter I agree with the Attorney General's position that this section was intended to apply to the content of the religious law itself that regulates the matters of divorce and not to the laws that apply to the persons having the authority to implement such laws. This explicitly emerges from the language of the section that deals with the prohibition and permission **laws**.

Furthermore, as mentioned, in my opinion the exceptions in the Act should be interpreted narrowly and thus the interpretation which relates only to the content of religious law, as implied by the language of the section itself, must be preferred. Section 7(c) of the Act also supports this interpretation, since it

addresses the persons holding the positions that implement the religious law. The logical conclusion is that Section 5 does not address those in these positions. However, I shall leave instances where a certain appointment in and of itself results in violating laws prohibiting and permitting marriage or divorce for future consideration. In the case of the appointment of arbitrators, at hand is an appointment to a position that exercises authorities related to divorce and not to the actual law that regulates divorce. Additionally, as we saw, there are schools of thought in Sharia law which allow women to be appointed as arbitrators. So the question left for future consideration does not arise. Hence, the conclusion is that the exception in Section 5 does not apply to the case at hand.

40. The main exception on which the litigating parties focused, is in Section 7(c) of the Equal Rights for Women Act, and in light of its importance I found it appropriate to restate it here as well:

> (c) The provisions of this Act shall not apply to an appointment to a religious position under religious law, including the appointment of rabbis and of holders of judicial positions in religious courts.

The section effectively includes two exceptions, and we must explore the application of both here. The first addresses the "appointment to a religious position under religious law," and the second addresses the "appointment of holders of judicial positions in religious courts." On its face, according to the Act's language the second exception is encompassed by the first exception, but we shall examine each exception separately.

41. Is the appointment of arbitrators an appointment to a religious position under religious law? As mentioned, I am willing to assume that the Family Law is a religious law and therefore the end part of the exception applies. This assumption is not free of challenges, because this Act was legislated by a civil legislature and was absorbed into our general system of laws (see Abu Ramadan). However, we shall leave this assumption in place, since in any event I am of the opinion that one cannot say we are concerned with a religious position. The legislature did not exclude any appointment to a position under religious law, but rather only the appointment to a religious position under religious law. This distinction by the legislature is significant. I find much logic in this distinction. There can be an appointment to an administrative position under religious law. Why should such an appointment be excluded from the provisions of the Act? I believe that the expression "religious position" must be interpreted as a position in which some level of professionalism and expertise in religious law and the exercise of such law in the course of the position are required (see the *Shakdiel* case, p. 274: "Indeed, there is nothing in the Religious Services Act that indicates that only religious and legal scholars should serve on religious councils, and in principle even a non-religious person is qualified to serve on the council"). The more professionalism and expertise in religious law are required for the position and the more religious law is actually exercised in the course of the position, the more we will tend to perceive the position as a religious position, and *vice*

versa.

The appointment of arbitrators pursuant to Section 130 of the Family Law does not meet such definition at all. The arbitrators, as we have seen, are representatives of the disputing couple's relatives. They are not required to have any familiarity with religious law, skills, understanding or qualification in this law. They have no professionalism or expertise in exercising the religious law. Even according to the Maliki school of thought, the characteristics are unrelated to the religious matter (for example, it is required that the arbitrators be fair, mature, adult persons who are not slaves, are not corrupt, are not wastrels and are not atheists. It is preferable that they be relatives or neighbors and in any event that they be aware of the problems between the parties. See Abou Ramadan, p. 264-265). Furthermore, the arbitrators are not required to implement religious law in the course of their position. All they are required to do is act according the provisions of the section – to try to reconcile the couple, and when unable to do so, they must rule a divorce while determining which party is at fault, and accordingly, the scope of the dowry. Once they encounter any problem they must turn to the Sharia court for instructions (see the *Muasi* Case, paragraph 13).

The conclusion is, therefore, that the appointment of the arbitrators is not a religious appointment under religious law, and therefore is not included in this exception.

42. Is the appointment of arbitrators an appointment to a judicial position in a religious court? I believe that the answer to this question is also in the negative. On its face, it appears that the section's interpretation must be limited only to holders of judicial positions in actual religious courts, such as rabbinical judges or Qadis. However, even were we to assume that the exception should be interpreted more broadly, it would not cover the appointment of arbitrators pursuant to Section 130 of the Family Law. As mentioned, in the *Hamza* Case the Court held that the arbitrators' decision is not final and is subject to the Sharia court's absolute discretion. In practice, Sharia courts intervene in the arbitrators' rulings (see Abu Ramadan, p. 61). It follows that even pursuant to Section 130 of the Family Law the judicial position to rule the divorce is granted to the Qadis in Sharia courts, and not to arbitrators. While arbitrators are important auxiliary tools for Qadis in ruling in the dispute between the couple, they do not make the final decision and they have no authority to divorce the couple without receiving material confirmation from the Sharia court of such decision. The conclusion is that arbitrators cannot be perceived as holding any judicial position whatsoever. It shall be further noted that contrary to holders of a judicial position, arbitrators are not an objective party in the dispute, but rather an involved party, that is generally appointed from among the relatives and as per the desire of the parties in dispute, and therefore, their position cannot be perceived as a judicial position.

Hence, Section 7(c) does not apply to the appointment of arbitrators pursuant to Section 130 of the Family Law.

43. It emerges from the above analysis that the exceptions provided in the Equal Rights for Women Act do not apply to the case at hand. It follows that the Sharia court should have ruled in this case according to the provisions of the Act that there shall be one law for a woman and a man. The parties before us did not, in fact, dispute the fact that the ruling of the Sharia court was contrary to this provision. None of the parties even raised an argument that there are contrary or conflicting interests in the matter. In my opinion it cannot be said that Section 130 of the Family Law intended for the provisions of the Equal Rights for Women Act not to apply. First of all, the Equal Rights for Women Act was legislated after the Family Law. Secondly, there is not even a hint in the section implying the intention of the law not to allow the appointment of female arbitrators. Furthermore, the purpose of the section supports the appointment of female arbitrators according to the parties' desire. The arbitrators are meant to represent the parties. They are meant to try to reconcile the couple, and if this is unsuccessful, to determine fault in the dissolution of the couple's relationship. As such, it is proper to allow the couple to choose an arbitrator who shall be acceptable to them and with whom they are comfortable. Indeed, the Sharia court, as occurred in the case at hand, approaches the couple and allows them to choose an arbitrator on their behalf who shall be approved by the court. Since we are concerned with a dispute between a couple, in a system that is generally patriarchal, it should not come as a surprise that a woman would, at times, prefer to appoint a woman, rather than a man, as arbitrator on her behalf (and of course the man may as well). Perhaps by appointing someone who is acceptable to each of the parties and with whom they are comfortable, the chances of reconciling the couple increase. Similarly, maybe the chances of reaching the correct decision regarding each party's fault in the dissolution of the relationship and the scope of the dowry would also increase. It follows that the objective of the section also indicates the need to allow a female arbitrator to be appointed.

The conclusion that emerges from all of the stated above is that the decision by the Sharia court is to be overturned as it ignored the provisions of the Equal Rights for Women Act. Before I turn to examine the relief, I would like to add one additional remark beyond the necessary scope here.

44. It is possible that we would have reached the same result even had we assumed that the Equal Rights for Women Act does not apply to this case. Religious courts, as all judicial tribunals and government authorities, are subject to the fundamental principles of the system, including the principle of equality, which has been consistently implemented in the rulings of this Court. As I mentioned, the principle of equality between the sexes was not born of the Equal Rights for Women Act, but rather only received practical and declarative grounding. Therefore, religious law must also be exercised while taking the fundamental principles of the system, in general, and the principle of equality, in particular, into consideration, to the extent possible within the limitations of the religious law itself. As President Barak stated "There is equality in the application of the principle of equality" (the *Shakdiel* Case, p. 278; see also the *Bavli* Case, p. 248). Thus, Basic Law: Human Dignity and Liberty provides that "All governmental authorities are bound to

respect the rights under this Basic Law" (Section 11). In my opinion, the implication of this provision is that if there is a customary school of thought in the religious law that conforms to the principle of equality, the religious court must prefer it over a different school of thought in the religious law that does not conform to such principle.

45. As I specified above, there are a number of customary schools of thought in Sharia law which religious courts as well as the Ottoman legislature applied in a mixed fashion, without any absolute commitment to one school of thought or another (see also Goitein and Ben Shemesh, p. 24). Indeed, part of the Family Law is based on the Maliki school of thought that only allows appointment of male arbitrators. However, there is also the Hanafi school of thought which is customary in the Muslim world and upon which the Mejelle is based (Goitein and Ben Shemesh, p. 4). Even most of the Family Law is based upon it (Iyad Zahalka THE SHARIA COURTS – BETWEEN IDENTITY AND ADJUDICATION 115 (2009)). It allows the appointment of female arbitrators (and it shall be noted that it also allows the appointment of female Qadis). In my opinion, given the principle of equality, the court should have preferred the school of thought that fits this principle over the school of thought that denies it. Especially given that in fact the Sharia courts actually conduct themselves in a manner similar to the Hanafi school of thought, since they do not relate to the arbitrators' decision as final, but rather exercise their discretion whether or not to confirm it.

46. It shall be further emphasized that I do not accept the argument that should it be decided to appoint a female arbitrator similar to the Hanafi school of thought, the Sharia court will have to also adopt the causes of action for divorce of such school of thought, which are more stringent against the wife (see Goitein and Ben Shemesh, p. 141). First of all, as mentioned, the law combines laws from different schools of thought, and therefore there is nothing preventing the appointment of arbitrators under the Hanafi school of thought, meaning allowing a female arbitrator, while the causes of action of divorce shall be determined under the Maliki school of thought, which is more friendly toward women, as has been done so far. The causes of action of divorce have nothing to do with the characteristics of the arbitrators. Secondly, the causes of action of divorce have already been grounded in the Family Law, and it is impossible to derogate from those that are grounded in the law and are customary today as per the rulings of the Sharia court (see CrimAppeal 353 **Al-Fakir v. the Attorney General**, PD 18(4) 200, 221 (1964)).

Summary and Relief

47. As we have seen, the exceptions of the Equal Rights for Women Act specified in Sections 5 and 7(c) of the Act, do not apply to the appointment of arbitrators under the Family Law. It follows that the Sharia court should have taken the provisions of the Act into consideration and it failed to do so. Taking the provisions of the Equal Rights for Women Act into consideration would have led to the result that it is possible to appoint female arbitrators, and in turn to the approval of the arbitrator suggested by the Petitioner. The

conclusion that follows is that the Sharia court's decision is overturned. The case shall be remanded to the Sharia court for the arbitration process to continue, while granting the Petitioner the option to choose a female arbitrator on her behalf. Hopefully this may open a window to equality and prevent discrimination among officers in this field.

Should my opinion be heard, the petition would be accepted. The Respondent would pay the Petitioner's costs in the amount of NIS 15,000.

Justice

Justice M. Naor

1. I agree with my colleague, Justice Arbel's extensive judgment.

2. At the basis of the Sharia Court of Appeals' reasoned decision is the approach that arbitrators are Qadis. The Sharia court summarized its approach in Section 12 of the reasoned judgment dated June 18, 2012, as follows:

> "12. In summary, arbitrators pursuant to Section 130 of the law are Qadis and not representatives, **and the judgment regarding the dissolution of a marriage is in their hands, and the Qadi's authority is to confirm their judgment**. As for the monetary rights, the dowry resulting from the dissolution, the Qadi has the authority to alter the judgment of the arbitration panel and rule that the wife receive the entire dowry in the absence of a Sharia cause of action to reduce it, and the sole purpose is to prevent prolonged litigation" (my emphasis – M.N.)

3. Accepting this approach that the judgment regarding the dissolution of the marriage is in the hands of the arbitrators and that the Qadis' authority is solely to confirm the arbitrators' ruling, could, in other cases, lead to severe results. Where Qadis conclude the facts of the case do not justify the arbitrators' ruling that the marriage is to be dissolved, are the hands of Qadis – who were authorized by the law of the State to judge – indeed tied by arbitrators' **final** judgment regarding the dissolution of a marriage? This is hard to accept. This is an approach that takes judging out of the hands of those who were appointed to judge – the Qadis. As my colleague noted, this is inconsistent with the rulings of this Court in HCJ 9347/99, *Hamza v. the Sharia Court of Appeals in Jerusalem*, IsrSC 55(2), 592 (2001) and in HCJ, *Muasi v. The Sharia Court of Appeals in Jerusalem* (March 7, 2007).

Deputy President

Justice N. Solberg

I agree.

Justice

It was decided as per Justice E. Arbel's judgment.

Given today, the 19th of Tamuz, 5773 (June 27, 2013).

Deputy President Justice Justice