CHAPTER TEN

LEGAL REFORM, INTERPRETIVE COMMUNITIES AND THE QUEST FOR LEGITIMACY: A CONTEXTUAL ANALYSIS OF A LEGAL CIRCULAR

Ido Shahar

The purpose of this article is to take up Brinkley Messick’s (1995) suggestion and produce a ‘textual ethnography’, in which a particular ‘local document will serve as point of departure for an interrelated contextual, doctrinal, and discursive analysis’ (ibid. 157). The document to be analyzed and contextualized here is a legal circular (marsūm qadā‘ī) issued in 1995 by the president of the Israeli Shari‘a Court of Appeal. Under the title, “The Role of Informants in Cases of Maintenance” (waṣṭifat al-mukhbirīn fī ṣadāyā al-nafaqā), this circular—one of three issued between 1994–96—deals with the matter of determining the size of maintenance awards allotted to women in cases of family dispute. The circular directs that instead of relying on information supplied by informants for the purpose of evaluating the financial ability of husbands, qādis presiding in Israeli shari‘a courts should rely primarily on official documents (e.g., paychecks and income tax forms).

The circular therefore heralded a reform that entailed a shift from a reliance on the oral testimony of witnesses, who must be present

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1 An early version of this article was presented at the conference, “Law in Islamic Societies: Historical Issues and Current Directions”, held at the Institute of Asian and African Studies, the Hebrew University of Jerusalem on June 10, 2002. I would like to thank the participants in this conference for their valuable comments, and especially Qādī Ahmad Nāṭūr, who chaired the session in which the paper was presented. I would also like to express my gratitude to Aharon Layish, Ron Shaham, Moussa Abou Ramadan, Dror Zeevi, Nimrod Harvitz, Sam Kaplan and David Powers, who read earlier versions of this paper and helped me to sharpen my arguments. Needles to say, any remaining faults are my own.

2 The first circular (promulgated in 1994) deals with the prohibition to sell all waqf properties to non-Muslims; the second is the one at issue here; and the third and last circular (1996) deals with ‘obligatory bequest’ in favor of the orphaned grandchild. All three circulars appeared in a collection of judgments issued by the Shari‘a Court of Appeal that was published in al-Kashshāf 1999, vol. 3.
in court, to a reliance on written, official documents. The reform also brought about a certain shift in the power distribution in Israeli shari'a courts: the status of the qādīs was strengthened at the expense of informants—that is, at the expense of non-professional elements involved in the judicial process. In this sense, the reform promoted processes of professionalization, rationalization and bureaucratization in the Israeli shari'a court system. Moreover, although the reform was procedural in nature, its impact has been far-reaching: since 1995, a significant increase has been noted in the sums of maintenance payments that Israeli shari'a courts apportion to women.

One peculiar feature of this reform had to do with the mechanism that the President of the Sharī'a Court of Appeal chose in order to realize it—namely, the legal circular. This is a highly unusual legal instrument, both within the framework of the Israeli legal system and in the context of Islamic law. Aharon Layish, in a lecture delivered at the Van Leer Jerusalem Institute on May 14, 1997, described the circumstances under which the idea of issuing a legal circular was conceived. Layish recounted that Qādī Ahmad Naṭūr—President of the Sharī'a Court of Appeal and a former graduate student of his—had been searching for a mechanism that would allow the introduction of a legal reform without resorting to statutory legislation by the Israeli parliament (the Knesset). Having studied legal documents from the period of the Sudanese Mahdī (Layish 1996; 1997), Layish suggested the mechanism of the ‘legal circular’ (mānsūr qaḍāʾī), which the British applied in the Sudan after the Mahdī’s defeat. Shaykh Naṭūr embraced the idea, and the Israeli legal circulars (mārsūmāt qaḍāʾīyya, as they were called locally) came into being.

Nevertheless, whereas the Sudanese circulars were legally ratified by the British colonial administration, those issued by the President of the Israeli Sharī'a Court of Appeal have no legal standing whatsoever. Indeed, Abou Ramadan (2003, 287, n. 153) claims that the mārsūm, as an act of legislation, violates the principle of separation of powers. Prof. Layish also wondered in his lecture at the Van Leer Institute what would happen “if someone

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3 See Messick 1993 for an illuminating discussion of such processes in Islamic law over the last 150 years.

4 From the point of view of the qādīs presiding in Israeli shari'a courts, any interference by the Knesset in procedural and material laws applied in the shari'a courts is highly problematic, for it might undermine the Islamic legitimacy of these courts. See below for further discussion of the legitimacy problems encountered by Israeli shari'a courts.

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