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Shari`ah and State Formation: Historical Perspective

Amira El-Azhary Sonbol*†‡

I. INTRODUCTION

In the Islamic world, personal status laws concerned with marriage, divorce, child custody, and other issues pertaining to family, stem from the Islamic Shari`ah while other forms of law, like criminal or commercial codes, are imported from Europe and, more specifically, from France.¹ However, the diffusion of law from one type of legal code to the other, specifically the impact of Western codes on personal status laws in most Islamic countries, receives little recognition. This is problematic for a number of reasons, the most important of which is that as long as the laws guiding gender relations are considered to be based purely on the Shari`ah—regarded as the word of God based on the Qur`an and Prophetic traditions as interpreted by legitimate Muslim clerics—it becomes almost impossible to change them.

Deconstructing the genesis of modern personal status and other legal codes in Muslim countries is an essential first step in changing those codes dealing with gender relations, and therefore women's rights, in Muslim countries

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† This article is heavily dependent on archival records located at the National Archives of Egypt in Cairo, Egypt and on Palestinian and Jordanian archives located at the University of Jordan in Amman, Jordan. It should be noted that these records are extremely rich with material for the study of the legal and social history of the Middle East and particularly for the study of family and women's lives, two subjects that continue to be studied through discourses of religious luminaries. While permission is needed to use these records, permissions can be received by applying to the authorities concerned. It is my hope that the material presented by this Article would encourage greater use of these archives and others located elsewhere so we can continue to unlock the realities of the past. The past determines our present and our future decisions and it is good to base these decisions on concrete realities and experiences of peoples rather than moral judgments of observers and thinkers notwithstanding how important both may be.

‡ Citations to archival cases were left in their original format. The *Chicago Journal of International Law* expresses no opinion as to the accuracy of this Article's Arabic citations and references.

¹ al-Kitab al-Dhahabi l'il-Mahakim al-Ahliyya, 1883-1933 118, 124, 128 (Cairo: Matabi' al-Amiriyya 1938).

today. Studying the history of personal status codes currently applied in Muslim countries reveals that these codes are the product of modern state committees' selection and deliberation of nation-state building issues. This explains the significant differences in particular laws and their application in various Muslim countries, notwithstanding the claim that they are Shari`ah laws. Understanding gender issues in religious dogma and looking at the historical role of the Shari`ah could lead to greater freedoms and changes in gender roles and other forms of laws pertaining to governance and citizenship.

Since these societies subscribe to discourses that rely on the Shari`ah as the source of family law and gendered conduct, any approach to legal change that does not take the Shari`ah as a starting point in Muslim societies has little potential for success. Thus, at least as a first stage in the struggle for women's rights, it is important to formulate strategies for success that take the Shari`ah into consideration if prospective laws are to have any chance of passing male-dominated legislatures and governments while gaining acceptance by the larger population. A starting point is to conceptualize the discourse surrounding Shari`ah not as the stagnant, unchanging, and unchangeable collection of laws that its critics and conservative advocates make it out to be,² but rather as a venue for deliberation and designing laws that are preferable for society (*istihbab* and *istihsan*). The very lens through which to consider what is preferable for society should in itself provide an important prism for changing laws. What should the primary goal of such deliberative discourse be? Is it the individual good and hence rights that should be the primary goal? Is it the community at large? Or is it what is "preferable to Islam," as advocates of rigid Shari`ah rules insist? The fact that the Shari`ah has not been so rigidly understood in the past, but rather was regarded and applied dynamically in courts provides a basis for looking at the Shari`ah as a source of laws for the common good rather than a rigid collection of laws. This flexible conception would enable all members of society to participate dynamically in governance and decision-making. The picture of a restricted Shari`ah that is interpreted and applied by a select few in a narrowly defined way simply does not fit with legal history in different parts of the Islamic world.

It is therefore imperative to challenge the perception of a non-changeable Shari`ah. Examining legal practices over time is the best way of doing so in the face of claims of absolute authority by conservative and fundamentalist interpreters of Islamic law. In the following discussion, *fiqh* (jurisprudence) will be contrasted with practices in Shari`ah courts in an effort to illustrate the actual

² See, for example, Leila Ahmed's seminal work on the impact of Islam on the life of women, *Women and Gender in Islam: Historical Roots of a Modern Debate* (Yale 1993). See also Asma Barlas, *Believing Women in Islam: Unreading Patriarchal Interpretations in the Qur'an* (Texas 2002).

role played by *fiqh* in pre-modern Shari`ah courts. As this Article illustrates, Shari`ah courts played a central role in the life of people and the relations between them. Court records show us how societies existed, people interacted, and women actually lived. My view of such records is that they are the product of a living society rather than text to be analyzed solely for the words and language used or particular law applied. Textual analysis of *fiqh* and other sources is at the heart of confining discourses that hang on to a word, symbol (such as veiling, seclusion, obedience, and other words whose significance is interpreted and generalized), or interpretation. Important questions to ask about Islamic law should focus on actual legal practice and not solely on what religious thinkers opined should be the practice. That is, the focus should be on how courts applied the law: did they follow the writings of the *fuqaha'* or did they see the writings of *fuqaha'* and *muftis* as part of the theologians' opinions or moral agenda? These questions need to be addressed, particularly given the centrality of theological interpretations to conservative laws and legal efforts to institute a closed, conservative Shari`ah that requires women to stay in the home—leaving only for specific purposes and with a husband's permission—and that limits women's ability to work and to earn a living or receive an education. This is particularly so given the fact that efforts to confine women's movements have already succeeded in countries like Afghanistan and Iran where laws had been interpreted differently before clerical takeover of the state. Today, there is an international movement among Muslim radicals to push such a conservative agenda forward.³

This Article focuses on issues of Islamic discrimination against women and asks how centuries of legal practice in Shari`ah courts illustrate Muslim societies' regard of the witness of women, women's work, women's seclusion, and the existence of or the need for a private/public divide in a woman's role in society. Furthermore, this Article explores the legal system when Shari`ah courts practiced Shari`ah law before the coming of the West or the modernization of law in Muslim countries. Were presumptions, such as the nature of women, at the heart of the system, or were rules of evidence the determinants of justice? How closely followed were the conclusions of jurists and *mufti's* (jurisconsults) when it came to decisions made by *qadis* (judges)? Finally, how can we define justice in Islamic courts? I deal with these questions through two main inquiries using Shari`ah archival records from Egypt and Palestine during the Ottoman period and into the nineteenth century. The first inquiry deals with the public/private divide, which is the usual justification for giving less credibility to

³ Good examples here are the pronouncements of the Council of Senior Ulama of Saudi Arabia and amendments to Hudood Ordinances being introduced by the government of Pakistan.

the witness of women. The second inquiry will deal with archival evidence regarding the witness of women including their role as expert witnesses.

II. FLEXIBILITY OF THE SHARI`AH AND ITS APPLICATION IN SHARI`AH COURTS BEFORE THE INTRODUCTION OF MODERN LEGAL CODES

In calling for a re-reading of theological interpretations, Mohammad Fadel suggests a methodology that recognizes the tensions and problems “that have long been recognized to exist within Islamic law.”⁴ He argues that “jurisprudence, precisely because it takes a broader interpretive perspective, allows for the possibility of a gender-neutral interpretation of female participation in the law to emerge.”⁵ For example, when discussing women’s witness, which is widely regarded as evidence for Islam’s discrimination against women, Fadel explains that acceptable Muslim rules on the subject revolve around the following Qur’anic imperative: “. . . get two witnesses out of your own men, and if there are not two men, then a man and two women, such as you choose, for witnesses, so that if one of them errs, the other can remind her.”⁶ *Hadith* interpretations⁷ further emphasize and explain the deficiency in a woman’s witness as well as her inability to hold public office because of the *hadith* narrative that *al-nisa’ naqisun `aqlan wa dinan* (“women are deficient in mind and religion”). Thus, the normative view of Islamic *fiqh* is that a woman’s witness alone is not acceptable in court. It has to be corroborated by that of a man and that the witness of one man is equal to two women. In other words, the general rule is that courts should not accept the witness of one woman alone; even if two women are witnesses to an event, they still need the corroboration of a man.

Fadel’s reading of theological interpretations diverges from this picture. He sees tensions and nuances in Islamic legal scholarship that allow for the witness of women without the corroboration of male witnesses, even among recognized conservative medievalists like Ibn al-Qiyyam and Ibn Taymiyya, both of whom allowed the witness of women in matters concerning feminine functions or the

⁴ Mohammad Fadel, *Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought*, 29 *Int J of Middle E Studies* 185, 200 (1997).

⁵ *Id* at 186.

⁶ Qur’an 2:282.

⁷ *Hadith* interpretation refers to commentaries on the sayings and actions of the Prophet Muhammad. They are considered to be the second source of Islamic law by Sunni Muslims.

household.⁸ In regard to public matters, Fadel finds that women's witness is allowed when it concerns financial transactions.⁹ Fadel explains that the *fugaha's* considered women's witness to be limited because they were not permitted to participate in the public sphere and social standards of public morality dictated that women should be left at home to "avoid social corruption and disorder."¹⁰ Accordingly, women could not be expected to have been witnesses to public occurrences such as matters involving death, marriage, divorce, and financial dealings. But a woman's witness could be acceptable when and if women were assigned to investigate court matters like rape or forced abortion. Put differently, Muslim theologians saw a public and private divide where public morality was important for the good of the community and therefore required the seclusion

⁸ Fadel, 29 Intl J of Middle E Studies at 200 (cited in note 4) ("Both of these jurists urged that judges be allowed to treat a woman's testimony in the same manner as a man's as long as the judge found the woman's testimony to be probative.").

⁹ Id at 194. The issue of women's witness in regards to financial dealings is a subject of controversy and reinterpretation. Fadel takes on this issue because of its centrality to rigid patriarchal forms of interpretation of Islamic laws. Another scholar who takes the same approach is Sheikh Taha Jaber al-Alwani.

Thus, the [Qu'ranic] verse indicates clearly that there are differences in the ability of women to serve, under the prevailing social conditions, as competent witnesses and givers of testimony in cases involving financial transactions. The relevant wording implies, that in general, transactions were not often matters of concern to women at that time. It also indicates that the actual witness would be one woman, even though her testimony might require the support of another woman who would "remind" her if necessary. Thus, one woman acts as a guarantor for the accuracy of the other's testimony.

See Taha Jaber Al-Alwani, *The Testimony of Women in Islamic Law*, available online at <<http://www.alhewar.com/TahaTestimony.htm>> (visited Apr 21, 2007). The more usual approach among Muslim scholars is to accept the premise that the witness of two women is equal to that of one man but to try to justify such a demand by explanations that presume that there is no connection between such a requirement and an unequal status of women in Islam. For example, Hammuda Abdul Ati states that

In some instances of bearing witness to certain civil contracts, two men are required or one man and two women. Again, this is no indication of the woman being inferior to man. It is a measure of securing the rights of the contracting parties, because woman as a rule, is not so experienced in practical life as man. This lack of experience may cause a loss to any party in a given contract. So the Law requires that at least two women should bear witness with one man. if a woman of the witness forgets something, the other one would remind her. Or if she makes an error, due to lack of experience, the other would help to correct her. This is a precautionary measure to guarantee honest transactions and proper dealings between people. In fact, it gives woman a role to play in civil life and helps to establish justice. At any rate, lack of experience in civil life does not necessarily mean that woman is inferior to man in her status. Every human being lacks one thing or another, yet no one questions their human status (Qur'an 2:282).

Hammuda Abdul-Ati, *The Status of Woman in Islam*, available online at <<http://www.unh.edu/msa/w-status.htm>> (visited Apr 21, 2007).

¹⁰ Fadel, 29 Intl J of Middle E Studies at 193 (cited in note 4).

of women in their homes. This means that women's expertise was thought to be relevant only to the domestic sphere because they had little access to other information outside of the home.

How did courts deal with women's witness, and how significant are the interpretations of theologians to the actual legal process and the life of women? Today, conservative theologians advocating a fundamentalist interpretation of Islamic law present themselves as sources for "what Islam is," while holding on to Shari'ah law as a domain to be defined by them and, as Khaled Abou El Fadl accuses, claiming to "speak in God's name."¹¹ The *fuqaha'*, or learned interpreters of Islam, have actually taken over discussions of gender laws, and their conservative interpretations today are being confused with the Shari'ah as a system for reaching legal decisions pertinent to the life of Muslim communities. It is important to ask whether the law practiced in Shari'ah courts before the modernization of law was based on the findings of *fuqaha'* and *muftis* or whether the judiciary system was more independent. The judiciary may have looked upon the decisions of *muftis* (jurisconsults whose opinions were sought in regards to ambiguous questions of law) and theologians as guides to decision-making, but did not consider them as holding any prior authority over the decisions of judges. Emphasizing this point leads to the observation that the writings of *fuqaha'* theologians, so heavily used by fundamentalists today, were regarded as opinions or discourses rather than law and that the legal system had its own source of legal precedent.

This is a complicated but important issue. Judges practicing in Shari'ah courts in the Ottoman Empire—before modern state codification of law started during the late nineteenth century—did not practice *qadi* (Shari'ah court judge) justice as scholars unfamiliar with the Ottoman judiciary system have asserted.¹² At the same time, *qadis* did have important areas of interpretation and flexibility in reaching judgments based on legal precedent, including traditions specific to the place and particular *madhhab* (school of law) of the litigants and the *qadi*, as well as to what the *qadi* himself considered to be preferable for the community. It could be said that the legal system practiced in pre-modern courts in the Islamic world was largely based on common law established through local practices, choice of legal school, and *qadi* discretion. Hence, there were both consistent judgments in particular courts during particular periods and

¹¹ See generally Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oneworld 2001).

¹² Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (George Allen 1948) (Talcott Parsons, trans).

differences between courts of different towns of the same provinces within the Ottoman Empire.¹³

A. PRIVATE VERSUS PUBLIC

Shari`ah court records from Ottoman Egypt and Palestine suggest there was no private/public divide similar to that being pushed by modern conservatives. Litigation in court seemed to be a daily activity for men and women, and there were no separate courts for the sexes. Women appeared in court routinely to register real estate purchases,¹⁴ sales¹⁵ and rentals,¹⁶ dispute ownership of property,¹⁷ register loans they made to others,¹⁸ deal in goods,¹⁹ contract their own marriage,²⁰ divorce,²¹ ask for alimony,²² report violence

¹³ Amira Sonbol, *Women in Shari`ah Courts: A Historical and Methodological Discussion*, 27 Fordham Intl L J 225, 225–53 (2003).

¹⁴ Nablus Shari`a Court, 1284 (1867), film 2, sijill 14:314; al-Quds Shari`a Court, 1033 (1623), 20-107:98-2.

¹⁵ Nablus Shari`a Court, 1284 (1867), film 2, sijill 14:317.

¹⁶ Cairo, Bab al-Sha`riyya, 1009 (1600), 599:231-884.

¹⁷ Alexandria Shari`a Court, 1074 (1663), 51:603-867; Jerusalem, 1068 (1657), videotape 31, sijill 156, page 123, case no 5; Nablus Shari`a Court, 1266-76 (1850–1860), 2-12:173; Ballas 1279 (1862) 24:8-9.

¹⁸ Nablus Shari`a Court, 1285 (1868), film 2, sijill 15:78; Nablus Shari`a Court, 1284-85 (1866–1867), 2-15:183.

¹⁹ Alexandria, 1223 (1808), 116:s31-57.

²⁰ Gami` al-Hakim, 966–67 (1558–59), 540:200-898.

The *hurma* (previously married adult) woman Zainab daughter of `Abdallah b. `Abdallah al-Zabidiya married her betrothed La`di al-Maghribi al-Nabili. The dowry (*sadaq*) was 4 gold Maghribi, of which she admitted receiving one dinar and the rest delayed until death or divorce. She married herself and the mentioned husband accepted for himself a legal acceptance (*qubul shar`i*). He determined 4 silver nisfs as clothing allowance and she gave her legal acceptance to that. He took upon himself (*wa`allaq laba`alayhi*) with his acknowledgment that if ever he took another wife or took a concubine or moved her from where she lives at present which is located in the Gura at the Suwaiqi market without her permission and she proves all this or part of it and she exempted him from one dinar of the rest of her dowry then she would be divorced one divorce with which she owned herself. With this I, the mentioned husband, permitted my mentioned wife to live in the mentioned place as long as she remained married to me (*fi`ismati*) a legal permission . . .

²¹ Marriage and divorce fill Shari`ah court sijills. Most are formulaic but some are amusing and provide a glance at spousal relations. See Manfalut, 1228 (1813), 5:45-160 (“The woman `Aliyya . . . asked her husband to divorce her in return for freeing him from the obligation of her delayed dowry and on condition that she turn over to him the wool bedcover he gifted her with at the time of their marriage consummation . . .”). A husband with feelings for the woman divorcing him? While women were often represented by a male relative in court, they also appeared in person as the above case attests. They came asking for divorce or for alimony and for

against them,²³ ask for financial support from husbands,²⁴ and demand child custody²⁵ and financial support from husbands and ex-husbands.²⁶ They came to put their property up as religious endowments (*waqfs*),²⁷ be assigned as overseer of *waqfs*,²⁸ be recognized as heads of guilds,²⁹ or answer to accusations brought against them.³⁰ While veiling the face is central to discourses of public/private divide, it is significant that Ottoman courts required identification of litigants, such that women were not veiled inside courts. For example, a contract of marriage from sixteenth-century Cairo includes a description of the woman's appearance in court to contract her marriage.³¹

However, veiling was not traditional in Muslim society; *qadis* often discussed how to treat the witness of veiled women because it was not common practice. These discussions show that veiled women were actually tribal women who veiled while in town and away from their tribes. The court's concern was to ensure that the person rendering witness or representing themselves in court was the actual person. The concern of one thirteenth-century Syrian *qadi* was that there was no way to determine whether the witnesses to the woman's identity

custody of their children. See, for example, Dishna Shari'a Court, 1908, 166:17-37; Manfalut, 1229 (1814), 5:69.

²² Alexandria Shari'a Court, 1074 (1663), 51:59-138; 1223 (1808), 116:45-76; 51:591-1370.

²³ Alexandria, 957 (1550), 1:82-388.

The woman Fatima . . . claimed that her husband Abu al-Fadl . . . did not live with her as married couples do and that he beat her on her head for no reason. She also asked him to pay the remaining balance of her dowry . . . and for the clothing allowance that he owes her . . . when asked . . . he confessed to the money he owed but denied the beating. [The court] forced him to pay and he was put in prison.

²⁴ Jordan, al-Salt Shari'a Court, 1319 (1901), 6:13-1.

²⁵ Jerusalem Shari'a Court, 1068 (1657), videotape 31:sijill 155, 85, case no 3.

²⁶ Misr, I'lamat, 1266 (1849), vol 23: 244 case no 651; Dishna, Ishhadat, 1283 (1866), 17:1-9, 3-15, 2-16, 3-25, 8-44.

²⁷ Nablus Shari'a Court, 1276-77 (1861-62), 2-13:95-96.

²⁸ Dumyat Shari'a Court, Ishhadat, 176:252-240.

²⁹ Alexandria Shari'a Court, *da'awi*, 1285 (1867), 3:143-44, case no 167; al-Quds Shari'a Court, 972 (1564), 46:12-2; 939 (1532), 3:95-3.

³⁰ Jerusalem Shari'a Court, 1071 (1661), 151:603-1.

³¹ Cairo, Dar al-Watha'iq, Qusun, 991 (1583), 246:444-1264 ("his fiancé, the woman Shahiyya daughter of Shihadha bin 'Issa, the butcher; of her beauties are her fair coloring, round face, wide-set eyebrows, medium in height . . ."). Another example comes from the Mediterranean town of Dumyat. Here the woman's whole face was unveiled and her body could be discerned.

. . . the wife is the women Hikam. Her attractions include her fairness of color, strong eyebrows, strong contrast between the whites and blacks of the eyes. She has an Arab face with green tattoos, one on her lower lip and the others on her cheeks. Graceful in face and tall in body . . .

Cairo, Dar al-Watha'iq, Dumyat, 1011 (1603), 43:84-182.

had in fact ever seen her face, so he raised this concern for court procedures with other *qadis*.³² *Qadis* dealt with the veiling problem by depending on two witnesses to identify the tribal woman in court.

It is curious that, while such discussions between judges exist and court records illustrate clearly that women wore no veil and were often described in some details by court clerks as a form of identity, discourse on the necessity of veiling as an Islamic requirement continues to be so central to fundamentalists today. The contradictions between discourses on veiling should give pause to those struggling to change women's lives in this modern world. Bedouin influence and traditions are selectively presented by *fiqh* sources to create a conservative morality confining women today instead of recognizing dominant legal practices reflecting the culture and traditions in the Muslim experience among its larger populations. This is one area that needs greater attention from researchers and activists alike.

As for leaving the home, litigation in court involved disputes between spouses over the wife's shopping activity and the husband's wish to control such activity.³³ Sometimes it was the husband who indicated his desire to divorce, without paying compensation, because his wife did not obey his wishes and left the house to shop or for other reasons.³⁴ In other cases, the wife refused to stay with her husband because he stopped her from going out. Court cases refer to wives' actions as a form of disobedience to their husbands' authority. As seen from the aforementioned examples however, these cases are usually associated with men who wanted their wives back and with women who refused to live with husbands who did not let them out or would not give them financial support because they did not obey their husbands' dictates. One can conclude that women found it natural to go out and often broke their marriages rather than be forced to stay home.

But did women work? Was it normal for them to leave home to perform jobs or financial transactions? Women's activities within the home, like weaving and manufacturing in certain parts of the Ottoman Empire, are well-studied.³⁵ Recent archival research regarding the involvement of women in the marketplace has been rich.³⁶ In this respect, the types of cases courts heard

³² Ibn abi al-Damm, *Kitab Adab al-Qada' al-Durrar al-Manzummat fil'Aqdiyya wal-Huumat* 280–82 (Dar al-Kutub al-'Ilmiyya 1987).

³³ Alexandria, Fatawi, 1305 (1881), 1:133.

³⁴ Alexandria Shari'a Court, 1187 (1773) 95:14-20.

³⁵ See generally Suraiya Faroqhi, *Making a Living in the Ottoman Lands: 1480 to 1820* (Isis 1995).

³⁶ See, for example, Afaf Lutfi al-Sayyid Marsot, *Women and Men in Late Eighteenth-Century Egypt* (Texas 1995); Amira El-Azhary Sonbol, *Women of Jordan: Islam, Labor, and the Law* (Syracuse 2003).

ranged from women buying and selling property³⁷ to women bringing disputes and charges against other sellers in the marketplace.³⁸ Some disputes include quarrels, defamation, or actual physical attacks by women or against women by other women³⁹ or men. Often the accusation was against a man for usurping a woman's spot in the marketplace or for not having paid for goods received. These cases often involved a complaint of physical violence committed by a man against a woman who was not related to him.⁴⁰ Witnesses, including both men and women, were brought in front of the judge, and there is no indication from the archives that the judges gave more credibility to a male witness than a female witness. Court records also indicate that women worked as saleswomen, vendors, beauticians, entertainers,⁴¹ and physicians.⁴² They owned mills,⁴³ fruit orchards, olive orchards, and they produced and traded in olive oil⁴⁴ and manufactured soap. Women often headed coffeehouses, and some even broke into male-dominated businesses like bakeries⁴⁵ and pawnshops.⁴⁶ If Shari`ah court records indicate anything, it is that women led active lives, and that working outside the home was something usual.

B. WOMEN'S WITNESS

With respect to women as witnesses, do there always have to be two women in place of one man? Are two women always equal to one man? Does a man have to be a corroborative witness to the testimony of two women for their witness to be acceptable in court?

There are two types of witnesses in Ottoman records. First, there is the *shubud* (witnesses), which are a permanent fixture of the court. The *shubud* are not related to litigants; they are not there to witness events outside the court, but

³⁷ Bab al-Sha`iriyya Shari`a Court, 1005 (1596), 596:624-2211.

³⁸ Al-Quds Shari`a Court, 1058 (1648), 28-141:15-2.

³⁹ Egypt, Dumyat Shari`ah Court, 1011 (1602), 43:57-110. ("the woman Shattiyya . . . claimed that the woman Ghazl . . . assailed her while she was walking on the road . . . and defamed her by calling her a prostitute and pimp . . . and asked her to pay compensation for the harm that befell her . . .").

⁴⁰ Jerusalem Shari`a Court, 1058 (1648), 28-141:15-2 (" . . . the named Ibrahim hit [her] with a stone on the right cheek then pulled her from her hair and dragged her . . .").

⁴¹ Jerusalem Shari`a Court, 972 (1564), 46:12-2; 939 (1532), 3:95-3; 1010 (1601), 83:156-6, 235-5; 937 (1530), 1:267-2.

⁴² Jerusalem Shari`a Court, 972 (1564), 46:12-2.

⁴³ Al-Salt Shari`a Court, 1320 (1902), 7:97-206.

⁴⁴ Nablus Shari`a Court, 1266-76 (1850-1860), 2-12:199.

⁴⁵ Al-Ya`qubi, 1 *Nahiyat al-Quds*, referring to records of al-Quds Shari`a Court, 974 (1566), 47:86-1; 976 (1568), 47:181-1; and 978 (1570), 53:667-2.

⁴⁶ Jerusalem Shari`a Court, 1058 (1648), 28-140:332-5.

rather to witness events taking place inside the court. They are paid by the court to give witness to court transactions such as sales contracts, marriage, and divorce. *Shubud* are easy to identify because their names appear frequently in particular court records and often in consecutive cases. Archival evidence suggests that *shubud* were all men who spent long hours in the court and were an essential part of the court system. They can be described as modern certified attorneys-at-law.

Aside from *shubud* witnesses, there were also corroborating witnesses who were brought in by litigants to testify to events. They were expected to tell the truth and when they did not, they could be severely punished⁴⁷ or, depending on its nature, the case could be dismissed.⁴⁸ Women could testify as corroborating witnesses in this context.

Frequent cases brought by and against women involved violence leading to abortion. Forced abortions brought heavy compensation to the party proving harm, including the mother, father, and the family. As such, abortions involved a financial dispute that had to be brought to court. A female witness was often involved, sometimes as an eyewitness or as a court-appointed expert sent by the judge to investigate the veracity of the accusation. Even though this involved a financial matter, there did not seem to be a need for a female witness to be corroborated by that of another woman and a man. The approach to witnessing by pre-modern courts was quite intricate in cases that involved abortion because abortion was considered a crime.

Forced abortion cases were also intricate because they often involved commercial competition and financial issues such as the situation where two women fight over a particular spot in the marketplace and one of them brings a case alleging that the quarrel resulted in her abortion. The conceptions of justice and gender at the time often implicated such laws and traditions as the blood-price (*diyya*)—the price paid for shedding the blood of a person or of killing a person. The amount paid out as compensation depended on whether a person was killed, which would entail a full *diyya*, or whether the harm was to a part of

⁴⁷ al-Zahid Shari`ah Court, 1008 (1599), 666:9-23. This is a case in which a woman claimed that a man raped her but she could not present evidence to his act and the man was able to prove his innocence. The court passed a judgment of *ta`zir* on the woman for bringing false claim. *Ta`zir* involves physical punishment.

⁴⁸ Jerusalem Shari`ah Court, tape 35, sijill 178, 26, no 1. This case shows the flexibility of the court. The normative view of Islamic law as presented by *fiqh* is that the witness of a non-Muslim is superseded by that of a Muslim. But in this case, the court accepted the testimony of the Christian woman who was accused by a Muslim woman of attacking and beating her. The Muslim woman's husband acted as a corroborative witness, but the judge asked the accusing party for other witnesses who were neutral. The Muslim woman could not present any, so the court found for the Christian woman and dismissed the case, asking the Muslim woman and her husband not to obstruct or act against the Christian woman.

the victim's body, such as the loss of a limb, an eye, or permanent disfigurement. Compensation for the latter type of harm was a fraction of the full compensation for the death of a person. Abortion involved killing a person and therefore came with generous compensation. Any case involving the payment of *diyya* was therefore dealt with as both a financial matter and a criminal matter. As noted earlier, the witness of women in financial matters was unacceptable to the general body of the *fuyaba'* as well as to proponents of modern conservative discourses on women and Shari'ah. The witness of women in abortion cases, which always involve the payment of *diyya*, is therefore a good test of how valid *fuyaba'*'s arguments with regard to gender issues were to the legal process.

The first step in abortion cases was to prove that an abortion had in fact taken place because quite often the abortion was faked. Interesting court drama included the spectacle of a woman bringing in a piece of liver and claiming that it was an aborted fetus. If not recognized immediately, the court turned to a local midwife who would appear and identify the "fetus." The testimony of one midwife seemed to be acceptable in such cases.⁴⁹ Since courts were usually closely located and accessible, claimants often brought the fetus to court or the court sent a midwife expert to investigate. During the Ottoman period, Egypt had altogether thirty-six courts located all over the country. Attached to each court were sub-courts whose records were included with the records of the main court. In the latter case, the testimony of a single midwife was sufficient. This was in contrast to rape cases, which also involved financial compensation, where practice required two midwives to testify, usually the midwife that treated the victim and another who was sent out by the court.⁵⁰ When the midwife was known to the court or could be vouched for by witnesses, her testimony was allowed without corroboration from another woman or man. Experts were treated similarly, regardless of gender. In a real estate dispute, for example, an eighteenth-century Alexandrian court sent out the head of the builder's guild to investigate property lines between two houses. It also sent out the town's chief engineer to corroborate his findings.⁵¹ In other words, whether corroboration of a witness would be required was left up to the judge and depended on the particular case.

In addition to serving as experts, women also constituted a substantial proportion of corroborative witnesses. They testified about many types of disagreements, including quarrels in the marketplace, disputes over property, buying and selling, and criminal cases that took place inside and outside the home. When it comes to contracts of all types, however, men predominated

⁴⁹ al-Bab al-'Ali Shari'a Court, 1152 (1602), 221:283-429.

⁵⁰ Cairo, al-Bab al-'Ali Court (1152), 221:283-429.

⁵¹ Alexandria Shari'a Court (1130), 65:104-198.

perhaps because most contracts were only between men. In such transactions, men seemed to be the only official witnesses in court records.

Even though women could serve as corroborative witnesses, the record is inconclusive as to whether two female witnesses were required to equal one male witness. In fact, one might conclude that the witness requirements varied depending more on the particulars of the case than it did on the exact type of dispute being reviewed by the court. Thus, quite often the *qadi* refused to accept the witness of a woman or two women and asked for corroboration from a male witness. Other times the witness of two women was considered sufficient. The following description of a case illustrates this point.

More than twenty days ago, the deceased left her husband's house intending to visit some of her relatives. She met with the woman . . . , one of the two defendants and said to her 'you are gossiping about me.' She then attacked her and called out to her paternal cousin . . . who attacked the deceased who was three months pregnant. They threw her to the floor, sat on top of her and beat her with their hands and [kicked] her with their feet as they straddled her. This took place in the presence of the women . . . who are present in court [giving witness to the events]. [The deceased] then got up and went to her husband's house where she died [from her injuries]. [The defendants disputed the details]. They were asked to bring evidence [to their story] but were unable to do so.⁵²

So here, the court accepted the witness of two women against the defendants, who could not produce their own witnesses. In crimes involving violence and death, there was usually a *diyya* as discussed earlier. In this case the court did not seem to need a male corroborative witness to support that of two females.⁵³ That the witnesses were not the defendants' associates added weight to their testimony. The court seemed to be primarily interested in the truth and determined the veracity of the witnesses before accepting his or her testimony. Reasons for rejecting testimony included: when the testimony of a man or men conflicted with the details of the case, when the testimony appeared to be clearly biased, or when a character witness could not vouch for the testifying man. In a late nineteenth century case from Alexandria, a husband asked the court to return his wife to his obedience. His wife had walked out on their marriage and refused to return to him. When the court approached her, she declared that her

⁵² Assiut al-Shar`iyya, Ahkam (1881), 19:31-55.

⁵³ Another good example of a case where two women were witnesses to the death of a woman following child-birth involved women morticians who wash bodies of the dead before burial. Here they testified in court that the woman's body did not show any signs of trauma or violence that could have led to her death. Being a matter concerning the female body, it was not expected that a man would have been witness to the childbirth and therefore to the death, thus the court accepted the witness of the women who were present when the drama occurred. Dumyat, 1195 (1780), 279:109-138.

husband had insulted and divorced her in public, and threatened her with public harm. She asked the court to stop him from harassing her and named two witnesses to the insults, threats, and public divorce. The court delegated a court clerk to find other witnesses to test the veracity of the two male witnesses the wife named. The clerk returned to court without finding anyone to vouch for them, and the court asked the wife to present other witnesses, which became unnecessary because the couple had meanwhile reconciled.⁵⁴

It was an open question whether a single woman's witness was acceptable. Interestingly enough it was. In one case, a man brought suit in court against other men for intruding on his home at night intending to rob it. They attacked his son, hit him on the head with a metal blade, and killed him. When the deceased's wife was brought to testify, she gave witness to what took place, but added that she had been so shocked at the events that she could not swear the defendants were the same men who attacked the house. Her testimony was acceptable to the court against that of the father-in-law, who was considered not to have been able to produce evidence of his allegations. The case was dismissed.⁵⁵

III. THE STATE, MODERN JUSTICE, AND THE CODIFICATION OF LAW

Given the evidence presented in the preceding section, it is ironic that with the modernization of courts and legal codes, the appearance of women in court decreases perceptibly. Except for poor women who could not afford legal representation, women almost stopped appearing in court and left litigation to lawyers. Compared to the modern state, with its codification of laws, centralized courthouses, and representations by lawyers, access to the judicial system was one of the strongest assets of the Ottoman Empire. Most importantly, codification of law meant the state decided on the actual laws that would be applied in court. These codes were formulated by committees of clergymen and law graduates who received their degrees in European or European-style law schools opened by newly modernized states.⁵⁶ Since legal codes were adopted from outside the Islamic world there were bound to be serious contradictions with personal status laws that used the Shari`ah as its basis. Most Muslim countries have adopted constitutions that invariably affirm the equal rights of all

⁵⁴ Alexandria Shar`iyya 1899, 38 old:1-329.

⁵⁵ Assiut al-Shar`iyya, Ahkam 1298 (1881), 19:50-22.

⁵⁶ See generally Amira Sonbol, *The New Mamluks* ch 3 (Syracuse 2000); Philip Gallad, 4 *Qamus al-Idara wa'l-Qad* 1954-55 (Alexandria: Matbaat al-Qamus 1895); Muhammad Abdu, 2 *Tagrir Islah al-Mahakim al-Shar`iyya* in Muhammad `Imara, ed, *al-Amal al-Kamilah li'l-Imam Muhammad Abdu* 217 (Cairo: al-Mu`assassa al-`Arabiyya li'l-Dirasa wal-Nashr 1980).

citizens. These rights extend equal citizenship, education, and work rights, but none have a clear definition of equal rights of women and men. At the same time, most Muslim countries are signatories of the Convention on the Elimination of All Forms of Discrimination (“CEDAW”), adopted in 1979 by the UN General Assembly.⁵⁷ At the time of adoption, many Muslim countries added formal reservations for religious and social reasons, specifically with respect to marriage, divorce, and inheritance.⁵⁸

The specifics of these reservations differ from one country to the other. The modernization of law also included the division of legal codes into national, criminal, and commercial codes. It was the state that decided which venues would be responsible for which codes. Various courts opened and changed according to shifting governmental and social needs. For example, Egypt divided its court system into national, mixed, Shari`ah, and *milla* (non-Muslim community) during the 1870s and 1880s. National courts oversaw interests of the state at large, and the laws applied in these courts were borrowed from French law and precedents. Mixed courts oversaw the business of foreigners living and doing business in Egypt. Judges from different European countries presided over the trials and applied European legal codes and procedures. *Milla* courts applied religious family laws to their various religious constituencies throughout the Ottoman Empire, and Shari`ah courts did the same for the Muslim population. Since the powers of church courts were limited during the Ottoman period when Shari`ah courts were open to litigation by both Muslims and non-Muslims, new religious *Milla* courts did not have legal precedents to all the legal issues litigated before them. Therefore they resorted to applying Shari`ah law when there was a gap in precedence. For example, the courts applied Muslim inheritance laws to non-Muslims, resulting in inheritances that gave non-Muslim males double the females’ shares. Ironically, other Shari`ah laws like divorce, which could have given non-Muslims flexibility and a way out of unwanted marriages, were not acceptable to churches even though the same churches accepted Islamic inheritance laws. In other words, when Shari`ah law benefited men, for example when men inherited double the portion that women inherited, the church found the law acceptable. But when the law reduced the power of the church as it did when it came to divorce, the church refused to allow the application of the Shari`ah.

The result was a gendered system that had severe repercussions on the lives of women. It would be a mistake to imagine that this was an accident. Rather,

⁵⁷ Convention on the Elimination of All Forms of Discrimination (1979) 19 ILM 33 (1980).

⁵⁸ *Convention on the Elimination of All Forms of Discrimination Against Women: Reservations to CEDAW*, available online at <<http://www.un.org/womenwatch/daw/cedaw/reservations.htm>> (visited on Apr 21, 2007).

the evolution of a gendered system was a result of the codification of the law, the division of courts, and what can be referred to as the religionization of family law (by which I mean that religion was recognized by the state as the source for laws dealing with family). Modern Shari`ah and *Milla* courts became responsible for family matters dealing with marriage, divorce, child custody, inheritance, and *awqaf* (falling within the domain of religion).⁵⁹ The whole structure was placed under the power of the *ulama* and religious authorities when the new modernized courts were created during the last two decades of the twentieth century. Courts and law dealing with family were delegated to religious authorities while criminal, national, and commercial issues were relegated to secular lawyers and judges educated in modern secular schools. Even after states moved to unify the legal systems into a single rather than multiple court system, as happened in Egypt in 1952, the legal codes and the philosophies behind them remained the same. Modern national courts were responsible for the issues of the public sphere, including business and national issues, and laws dealing with family issues were seen as strictly within the religious domain.

Looking back at the nineteenth century and the process by which this situation was reached, one cannot help but see the period of the Ottoman Tanzimat reforms (1839–1876) as a focal point in the change of gender laws. While the Tanzimat were intended to reform, reinvigorate, and modernize the Ottoman Empire, which had become the “Sick Man of Europe,” some of the results, as indicated in this Article, worked against women. The Tanzimat were the product of political and military pressure exerted by European states with an eye to exploiting the resources of the Ottoman Empire. They pushed for liberal and religious reforms as part of their discourse aimed at swaying critics at home and abroad.

The Tanzimat would have a significant impact on both women and the laws being formulated during the nineteenth century in the Ottoman Empire to deal with the modern family. The economic interests of the Ottoman Empire demanded that commercial and criminal codes governing internal affairs be modeled after European laws. But minority communities refused to have their millet powers over family matters taken away from them. The result was the division of the law into what became secular codes and the religious codes that were administered by churches and synagogues, hence the “religionization” of family law, while other areas of law including criminal, commercial, and national were placed under the secular realm. This put gender into the authoritative domain of conservative theological interpretation, with moral discourses serving

⁵⁹ 2 *Al-Majm`a al-rasmiyya l'il-mahakim al-abliyya wa'l-sbar'iyya* case no 5, 1939, 10 (al-Matba`a al-Amiriyya 1937).

as paramount determinants of the law rather than leaving matters related to family within a larger common legal system.

The patriarchal order that ensued and continues until today is hegemonic. On the one hand, “secular” codes based on European commercial, criminal, and national law helped the elite rule the commercial classes in their capacities as businessmen and professionals dealing in a Western-dominated economic and cultural system. Citizenship rules placed the male at the center of the family; hence it would be through him that women and children would receive their rights to citizenship. On the other hand, personal status laws handling gender-specific issues or family relations confined the social structure within the parameters of patriarchal power. Some of the laws instituted during the twentieth century illustrate this. It is important to recognize that the personal status laws of today are the result of modern laws introduced by the modern state. The outlook and parameters of these laws may stem from the Shari`ah, but the formulation, codification, and laws themselves are, in part, borrowed from European codes of the late nineteenth and early twentieth centuries. But since it is understood that these are religious laws, Muslim communities do not differentiate between the codified laws, how they were formulated, and the state’s role in constructing them. The belief that personal status laws are representative of Shari`ah law rather than the product of modernization makes it extremely difficult to change Muslim personal status laws today.

When it comes to criminal law, rape cases were often reported in Ottoman courts; women or their guardians sued rapists for compensation asking for punishment commensurate with the crime. The approach of the *qadi* was to first prove that a rape had taken place and then to determine what type of compensation the victim sought. If the rape was proven, the perpetrator was physically punished unless the victim withdrew her complaint or the perpetrator paid the victim compensation equal to the sum of the victim’s expected dowry. If rape was not proven, the *qadi* had to decide whether this was a false complaint—in which case the person bringing the complaint could be punished⁶⁰—or whether the case should be dismissed because it could not be proven. The latter scenario seemed to happen often due to the fact that such crimes usually take place away from the public eye. To prove rape, it was useful to have the witness of a midwife who could testify that either she had treated the victim or that the victim had been a virgin before the rape. The idea of the culpability of the victim did not play a role in Ottoman courts. Without a confession or witness, the case sometimes hinged on the moral standing of the victim and the accused. Since the communities served by courts or sub-courts were usually limited in size, the *qadi* could easily find out about the moral

⁶⁰ Bab al-`Ali, 1034 (1624), 106:342-1229.

standing of the parties and quite often litigants were required to present character witnesses.

The following cases are presented here as examples to help illustrate the handling of rape by pre-modern courts. In a case from nineteenth century Cairo, a woman alleged that a man raped her at knife-point. She claimed that she had been a virgin and demanded compensation for rape and loss of virginity. The man denied her allegations and produced character witnesses and eyewitnesses who presented testimony to the effect that they were sitting in front of his shop at the time of the alleged rape and saw him in his shop at that time. Witnesses also came forth to testify against the woman, suggesting that the victim was of ill-repute. The *qadi* found against her and expelled her from the quarter of the town where the drama unfolded.⁶¹

In another case involving a virgin, the midwife (*daya*) witnessed the fact that the victim's hymen had been recently and violently broken. The court found sufficient evidence that the rape had occurred and found for the victim, ordering the rapist to pay her due compensation.⁶² In a third case, the victim was a servant who claimed that her master raped her and got her pregnant. The man denied the allegations, indicating he was a man of good standing who took care of the mosque next to his home and opened it every dawn for prayers. The girl was unable to present evidence supporting her allegation so the court dismissed the case. However, the judge did not punish the girl. Since the Shari'ah required the punishment of those who bring false accusations, the *qadi's* action in this case indicated that he believed her story despite the fact that it was not proven in court.⁶³ In a fourth case, the victim managed to prove her case to the court and, notwithstanding the man's denial, the court ordered him to pay compensation to his victim and had him whipped as punishment for his crime.⁶⁴ Another way rape was handled was the victim and rapist could marry. Courts accepted this resolution, although the victim had to withdraw her complaint before the court dismissed the case. In one such case from Assiut, Egypt, a man raped a woman who had refused to marry him. In court he declared his wish to marry her but she refused to comply and demanded compensation and punishment through *ta`zir* (whipping or beating) for the rapist.⁶⁵

How did things change with modern criminal codes? For one thing, law categorized rape differently. Whereas the act of rape as forced sexual intercourse on an unwilling victim was referred to by the term "rape" or the Arabic

⁶¹ Bab al-'Ali, 1031 (1621), 103:176-566, 17.

⁶² Alexandria al-Shar'iyya, Da'awai, 1285 (1868), 3:163-211.

⁶³ Assiut Shari'ah Court, Ahkam, 1881, 19: 49-98.

⁶⁴ al-Bab al-'Ali Shari'ah Court, 1044 (1634), 116: 216-1145.

⁶⁵ Assiut Shari'ah Court, Ahkam, 1881, 19:69-139.

“*ighhtisab*,” modern legal codes in Egypt used the term *hatk`ird*, defined as any offence involving immodest physical, mental, or emotional action that could hurt a woman’s modesty. *Ighhtisab* is an ugly specific and focused word with little ambiguity in meaning.⁶⁶ Society uses *ighhtisab* to identify rape, but law uses it to refer to illegal acquisition of property, real estate, money, or goods.⁶⁷ By describing the crime of rape as *hatk`ird*, the impact of the crime itself becomes diluted. Furthermore, Egyptian law, Article 267 states: “Whoever has sexual intercourse with a female against her will is to receive a permanent or limited life-sentence.”⁶⁸ In other words no specific punishment is identified for rape; the sentencing is left to the discretion of the judge. This opens the door to leniency, which has proven to be the case since Egyptian law also takes the demeanour and morality of the victim into consideration. This is comparable to Jordanian Article 292(i) of the penal code which defines rape and sets punishment of the crime as “Whoever has sexual intercourse with a female (other than his wife) without her willingness whether through the use of force or threat or deception or trick will receive a temporary prison life-sentence, a period not less than ten years.”⁶⁹ Setting the punishment at a minimum prison sentence helps control rape which reflects the comparative situation in Jordan and Egypt today. It is also interesting, however, to note that forced sex with a wife is not considered rape according to the Jordanian code, nor is incomplete rape considered rape since actual intercourse did not take place.⁷⁰ Furthermore, according to Jordanian law any rape that does not involve vaginal intercourse is not considered rape even if it involved another bodily orifice.⁷¹

In regards to guardianship and the deterioration of women’s custodial rights, as court records demonstrate, judges granted women custody of their children frequently, particularly when the husband was deceased.⁷² Modern

⁶⁶ Ibrahim Saleh, *Qanun al-`Uqubat: al-Mu`adal bi-qanun raqam 97 li-sanat 1992* 190–92 (Cairo 1995).

⁶⁷ See Article 325 of Egypt’s penal code. Salih, *Qanun al-`uqubat* 216 (Cairo undated).

⁶⁸ Saleh, *Qanun* at 190 (cited in note 66).

⁶⁹ Ramzi Ahmed Madi, *Qanoun al-`Uqubat raqam 16 isanat 1960* 140 (Amman: Mktabat al-Thaqafa wal-Nashr wal-Tawzi` 1998).

⁷⁰ *Mjallat Niqabat al-Muhamiyyin* 711 (Amman: Niqabat al-Muhamiyyin 1966).

⁷¹ For a good discussion about this subject, see Kamil al-Sa`id, *Sharh Qanun al-`Uqubat: al-Jara`im al-Waqi`a `ala al-Akblaq wal-Adab al-`Ama wal-Usra* 248 (Maktabat Dar al-Thaqafa lil-Nashr wal-Tawzi` 1994).

⁷² See Amira Sonbol, *Negotiating and Disputing Marriage and Business in Early Modern Egypt and Palestine*, 17 *L’Homme: Europäische Zeitschrift für Feministische Geschichtswissenschaft* 37 (2006) (dealing in detail with the issue of custody and presenting court case documentation). The following is among the cases dealt with in this article:

The Qassam (judge in Qisma `Askariyya courts that deal with inheritance), may God bless him, assigned the woman Fatma . . . as guardian and spokes person for her two sons, the infant Shams al-Din son of the deceased Mahfuz,

personal status laws changed this with the state's selection of the Hanafi code as the basis for guardianship of children, an area in which the Hanafi code is particularly patriarchal and elitist.⁷³

Previously, Egypt's courts applied the Shafi'i, Maliki, and Hanafi codes. Litigants would select the code of their choice by selecting a judge from the particular school to which they belonged or a judge from the school which was favorable to their particular case. Modern Egyptian laws of guardianship however follow the Hanafi code in a particular interpretation which gives the mother little of the rights courts granted her before: "a mother has no right to guardianship (*wilaya*) over person or money [meaning property] according to the rule of law. But she could be selected as guardian (*wasiyya*) over money by the father or the grandfather."⁷⁴ A 1974 custody case illustrates the significance of the changes. A divorced mother asked the court for continued custody of her daughter rather than granting custody to the father when the girl reached the legal age for such a transfer. The mother based her argument on the constitutional principle that Shari'ah was the principle source of Egypt's laws. Accordingly, she asked that the Maliki *madhhab* be applied in her case rather than the Hanafi *madhhab* since the constitution specified no particular *madhhab* but only pointed to the Shari'ah as the source of personal status law. According to the Maliki *madhhab*, a daughter could stay in her mother's custody until she was married while the Hanafi *madhhab* demanded the girl be turned over to her father at age nine.⁷⁵ Because the constitution does not specify, a state's preference for

and the minor Muhammad Abul-Surur, orphan of the deceased Muhammad Abul-Surur. She is to take care of them, make decisions on their behalf and about them in regards to buying and selling, receiving and giving, cashing [funds], spending [it], [handling] all legal matters and perform all functions expected of a legal guardian according to the law and to do what is involved in guardianship legally with good will and their [the children's] welfare, until they each reach maturity to handle their religious duties and their money. This decision was rendered in the presence of the paternal grandfather of the two boys mentioned above and the *khawaja* (title given to an important merchant) the honorable al-Zini `Abdal-Rahman... the merchant from the Ja'lun market... They accepted this [mother's guardianship] in the legal way and the Qassam assigned the above-mentioned boys' grandfather, the *khawaja* `Abdal-Rahman, as *nazir* (supervisor) and spokesman on behalf of the boys over the guardian so that she cannot undertake any transactions without his prior knowledge and discussing it with him.

Qisma `Arabiyya Court, 1013 (1604), 16:119-214.

⁷³ For information about the application of Hanafi code in Egyptian courts and the education of law students and judges in the Hanafi code, please see Philippe Gelat, II *Répertoire général annoté de la législation et de l'administration Égyptiennes: 1840-1908* 256-379 (Alexandria: Imprimerie J.C. Lagoudakis 1908).

⁷⁴ I *Al-Kitab al-dhababi il-mahakim al-ahliyya, 1883-1933* 234 (Al-Matba`a al-Amiriyya bi Bulaq 1937).

⁷⁵ Muhammad al-Bakri, II *Mawsu`at al-Fiqh wal-qada' fill-Ahwal al-Shakhsiyya* 620-21 (Dar Mahmud lil-Nashr wal-Tawzi` 1991).

one *madhhab* would be contrary to the constitution as well as being discriminatory against mothers. The judgment of the court went against the mother and the case was dismissed on the ground that it was the “lawgiver’s” (meaning the state or the ruler) prerogative to choose what *madhhab* to apply and the lawgiver preferred the Hanafi *madhhab*. It was also the judge’s opinion that the lawgiver was justified in this because the state knew better the needs of society, and the Hanafi *madhhab* was more suitable in regards to child custody. While Malikis looked at an unmarried girl as inexperienced and in need of her mother’s guidance, Hanafis were concerned with her reaching puberty and reaching sexual awareness which needed to be controlled and placed under male protection.⁷⁶

When it comes to citizenship, the applicable rule followed the European precedent that a “woman follows the nationality of her husband.” An example of the impact of this rule comes from 1938 when Egypt’s courts ruled on a *nafaqa* (financial support) case brought by a wife against her husband from a different religious denomination.⁷⁷ The ruling differentiated between what the judge referred to as *jinsiyya siyasiyya* (political nationality) and *jinsiyya ta’ifiyya* (sectarian nationality or religious affiliation). In this case, both the husband and wife’s political nationality was Egyptian even though the wife was Italian, because the nationality principle stated that “a wife followed her husband’s nationality.”⁷⁸ Their sectarian nationality differed, however, because one was a Catholic Copt and the other an Italian Catholic, and both sects were recognized as separate churches by the Egyptian state.⁷⁹ As this case shows, the legal rights of the man and woman belonged to their religious institutions, while the woman’s citizenship rights stemmed from her husband.

Where did the idea that “a wife followed her husband’s nationality” come from? The subject of nationality or citizenship does not make an appearance in Ottoman courts or law before the nineteenth century. Rather it is closely connected with the Tanzimat reforms and with developments in Europe where states were defining their control over their populations following the Napoleonic wars and the Peace of Vienna in 1815. Faced with problems regarding non-Muslim citizens and privileges granted to Christian and foreign

⁷⁶ Id at 616–28.

⁷⁷ For a general discussion of this case and others see, Amira Sonbol, *Questioning Exceptionalism: Islamic Law*, 6 Arab Stud J 76 (1998).

⁷⁸ 9 *Mahkamat Askandariyya al-Ibtida’iyya al-Shar’iyya*, case no 25, year 39, 56–58 (Sept 4, 1938).

⁷⁹ Id. The different *jinsiyya ta’ifiyya* recognized by the government of Egypt were Orthodox Copts, Armenians and Greek, as well as various Catholic and Protestant groups, each of which had its own *majlis milli*. The specific case was adjudicated by the Alexandria Court of First Instance on September 4, 1938 and was published in *al-Majm’a al-Rasmiyya l’il-Mahakim al-Ahliyya wa’l-Shar’iyya* 56 (al-Matba’a al-Amiriyya 1939).

subjects through concessions enjoyed by foreigners in the Ottoman Empire since the sixteenth century, the Ottoman Empire sought to control the abuse of these concessions by passing a law in 1869. This law was a compromise between Ottoman concerns and the demands of European powers of the nineteenth century, particularly Britain and France, who were extending their power over the world. Laws of nationality accepted elsewhere were to be applied in the Ottoman Empire. Accordingly, Ottoman women who married foreign men lost their Ottoman nationality and took that of the husband. They could enjoy expatriate capitulatory privileges, including not being judged by national courts, and privileges of free-trade forced on the Ottoman Empire by the European powers at that time. These free-trade privileges included low taxation on imports (which gave foreign communities an edge in commercial transactions), the right to be judged by consular courts or mixed Courts, and judgment according to European courts rather than national courts. Following a husband's nationality meant that an Ottoman woman who married a foreign man took his citizenship and could enjoy the extra-territorial privileges.

Notwithstanding its original intent, the law stating that a wife follows the nationality of her husband has had unforeseen, far-reaching repercussions to the present day. While the laws have been changed to allow women to keep the citizenship to which they were born, they can not extend that citizenship to their foreign husbands or their children from foreign men. As for men, their wives and children receive citizenship upon request. This follows Shari'ah law, which recognizes children as belonging to the father, though the very issues of nationality and citizenship belong to the history of nation-states and have little to do with theological writing, scripture, or pre-modern legal systems. The problem of citizenship becomes critical given the movement of populations between various countries today and intermarriages between groups such as Palestinians and Jordanians. Children and husbands of Jordanian wives are given no right of citizenship inside Jordan even though they would otherwise have refugee status.⁸⁰

Defining a woman through her husband rather than as an individual was part of the new patriarchal structure placing women under the umbrella of her husband. She, in turn, owed obedience. He could divorce her at will, but she could not divorce him without his prior approval unless she could prove physical abuse, lack of support, or impotence. Giving the husband control over divorce has to be seen as one of the biggest losses to women's rights during the modern period. It has limited the ability of women to maneuver within the marriage, to demand respect from her husband, and to hold on to her financial

⁸⁰ For an expanded discussion of Jordanian-Palestinian nationality issues, see Sonbol, 27 *Fordham Intl L J* at 225–53 (cited in note 13).

rights and custodial rights, which she almost always had to give up to the husband in return for a divorce.

Women did not have equal rights to divorce before the modernization of law; men always had the ability to divorce at will and women had to go through the courts. But before the modernization of law, women were able to obtain a divorce through *kbul`*, or repudiation, by which the wife returned the dowry she received from her husband in exchange for a divorce. Neither the judge nor the husband had the right to force a wife to stay in a marriage in which she refused to stay. Modern law closed that door and added a new twist to the concept of obedience (*ta`a*) by which courts could force an unwilling wife to return to live with her husband.

While obedience was always a principle of Muslim marriages, it was regarded as the wife's submissive act in return for financial support by her husband.⁸¹ He could withhold this support if she was not obedient, but he could not force her to live with him and neither could the courts. The courts negotiated the financial settlement with or without the husband's prior agreement. The difference was dramatic particularly since *ta`a* also meant being incarcerated with a hated husband who could also be abusive or whom the wife feared in a *bayt al-ta`a* or a house of obedience where the women was kept by her husband until she agreed to return to the marriage fully. The system is described as stemming from Shari`ah law, but in fact such institutions as *bayt al-ta`a* did not exist before the end of the nineteenth century.⁸² The only such precedents to be found in British courts were the laws of coverture,⁸³ still applied in the nineteenth century, and the practice of incarcerating women who rebelled against their husbands until they resumed marital relations with their husbands.

⁸¹ The connection between financial support (*nafaqa*) and the wife's obedience is central to the Muslim marriage contract and is a general topic covered by literature dealing with the subject of the Muslim family. See, for example, John Esposito, *Women in Muslim Family Law* 26 (Syracuse 1982).

⁸² Amira Sonbol, *Ta`a and Modern Reforms*, 9 *J Islam and Christian-Muslim Relations* 285 (1998).

⁸³ Coverture was defined by John Stuart Mill in the following way "marriage relation as constituted by law . . . confers upon one of the parties to the contract, legal power [and] control over the person, property, and freedom of action of the other party, independent of her own wishes and will." See Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850-1895* 3 (Princeton 1989).

IV. CHANGING PERSONAL STATUS LAWS

On January 2000, the Egyptian parliament passed a new *kbul'* law that allowed women to obtain a divorce three months after asking the court for a *kbul'* divorce. During these three months, the court was supposed to attempt to reconcile the couple. Ultimately, the law mandated that the judge grant the divorce if the wife insisted. In return, the wife was to return the dowry she had received at the time of the marriage. This revolutionary law was couched in terms of expediting divorce procedures to end the thousands of accumulated cases that courts were unable to handle. While the law was hailed as a great success by feminists and attacked as an aberration of Islam by its opponents, in actuality it did no more than reinstate the way the courts handled *kbul'* cases before the modernization of law: giving women the right to divorce in return for the paid dowry. To argue for the law, activists used *hadith* literature as supporting evidence to this interpretation of *kbul'*.

Three years later, in October 2003, Morocco passed a new family law, the Moudawana, with unanimous approval of the Moroccan Parliament and the support of its King. The law's dramatic changes included equality of husband and wife in regards to family responsibility and child custody. It raised the minimum age of marriage for women from fifteen to eighteen years, made divorce an act requiring mutual consent, and imposed limits on polygamy. While opponents to the law declared it un-Islamic, feminists had demanded much greater changes. Importantly, the reinterpretation of the Shari`ah based on the Maliki *madhhab* made the changes to family law easier to pass and more readily accepted. But when Jordan tried to introduce similar laws during the last few years, it failed. During summer when the Jordanian parliament was in recess, the government passed a *kbul'* law allowing women to divorce within one month after applying for divorce and closing legal gaps that had allowed reduced sentencing for perpetrators of honor crimes. Once parliament came back from recess, however, it canceled the laws that the government had passed.⁸⁴

⁸⁴ Reem M. Abu Hassan, *Women's Rights in the Middle East and North Africa: Citizenship and Justice: Country Reports: Jordan* (Freedom House 2004), available online at <<http://www.freedomhouse.org/template.cfm?page=174>> (visited Apr 21, 2007)

Despite the challenges to the advancement of women's rights, the Jordanian government has taken steps to update Jordan's laws and bring them in line with international standards. From 2001 to 2003, after the king dissolved the parliament and much of the government, King Abdullah and the Council of Ministers issued a number of provisional laws that promoted women's rights. These provisions included amendments to the Personal Status Law (No. 82 of 2001), the criminal code (No. 86 of 2001), the Civil Status Law (No. 9 of 2001), and the Provisional Passport Law (No. 5 of 2003). Nevertheless, when the House of Representatives came back into session in the summer of 2003, it rejected many of the provisional laws.

Tribalism and traditions as well as an outcry that these laws interfered with the Shari`ah were at the heart of the conservative parliament's actions. Ironically, while Jordanian laws allow women to include a condition that their husband not take a second wife in their marriage contracts, Egypt's parliament refused to pass such a law claiming it was against the Shari`ah.

V. CONCLUSION

The Shari`ah has historically been a dynamic source for the formulation of law. Legal practices changed as part of the historical process and there were always differences between the moral discourses of theologians and the actual practice of deciding legal issues in courts where the ultimate interest was negotiating disputes and arriving at the truth. Today, reform of gender laws in Islamic countries has become a necessity given new conditions: a global world with a global economy, technology and media, citizenship problems, poverty and the movement of populations, goods and knowledge. For Muslims, Islam continues to be the source they look to in conducting their moral life and human relations. Bypassing Islamic discourses while writing laws makes such laws open to reversal. By immersion in legal discourses about the Shari`ah, by illustrating the genesis of contemporary personal status laws as the product of the diffusion of laws from various sources including but not exclusively Islam, and by illustrating the dynamic possibilities of the Shari`ah, women's groups and state reforms in various Muslim countries have brought about critical changes in the law. It is important that these efforts continue, and that past and present interpretations of the Shari`ah continue to be widely discussed between multiple groups outside of the confines of those who claim its nature as being exclusively religious.



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