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Amira Sonbol*

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Abstract

This Article focuses on qadis and courts before modern legal reforms with particular emphasis on the life of women and their interaction with the courts. A number of issues will be discussed and points made pertaining to the laws and madhahib [Islamic legal schools] applied in courts, the hierarchies and roles of qadis, and the accessibility of the legal system and knowledge of court procedures to the general public. Court culture, personnel, and record-keeping will also be discussed, as will the philosophy behind the law. The author hopes to illustrate that a viable court system existed before modernization. Although precedent played an important role, and qadis had certain rules to follow, the court system was nonetheless linked to society. Qadis were guided by 'urf [traditions] familiar to the people they served and judged according to the madhhabs [schools of law] they belonged to as well as their own judgment. The system was flexible and provided an avenue for the public to achieve justice and litigate disputes rather than to enforce a particular philosophy of social laws and norms formulated by the State. Women had clear rights to sue in court. The flexibility of the system allowed women to determine their marriage contracts and the conditions under which they lived. Women also had complete access to divorce a husband they did not want to be with, a far cry from modern law which adopted rules of placing women under the full control of their husbands. Under modern law, with certain exceptions, husbands must agree before divorce takes place. Because pre-modern Shari'ah court records were not used as precedent for modern Shari'ah courts, the rights of women, including the right to work and determine their marriage contracts, were lost. By rediscovering these rights through court records, contemporary personal status laws can be questioned. Particularly important here is questioning the religious sanctity that the State gives to personal status laws on the books in Muslim countries today.

WOMEN IN SHARI'AH COURTS: A HISTORICAL AND METHODOLOGICAL DISCUSSION

*Amira Sonbol**

INTRODUCTION

Max Weber has divided law into "tribal law," "bureaucratic law," and what he termed the "legal order."¹ According to Weber, only Western society, due to its historical evolution, has ever really experienced the "legal order" built on a rational approach to law. This type of legal system is remote from personal interest and applied equally to all classes and sectors of society.² In this scheme, Islamic law historically fell under the "tribal system" and later, during the Ottoman period, it was promoted to the "bureaucratic order." Weber's interest in Islamic law was peripheral and guided by a comparative approach to explain his primary thesis that the spirit of modern capitalism must be present before a capitalist order can evolve.³ Weber theorized that only the Western Protestant ethic provided the culture through which the spirit of modern capitalism was possible. According to Weber, even though "[c]apitalism [as differentiated from modern capitalism] existed in China, India, Babylon, in the classic world, and in the Middle Ages . . . in all these cases . . . this particular ethos was lacking."⁴ Beginning with this thesis, Weber proceeded to lay down a theory concerning the relationship between modern socio-economic systems and religion. His theory became the accepted basis for future scholars interested in explaining the reason the Western experience was not repeated

* Associate Professor of Islamic History, Law and Society, Georgetown University.

1. See generally MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., 1958).

2. See *id.* at 14; HAIM GERBER, *STATE, SOCIETY, AND LAW IN ISLAM: OTTOMAN LAW IN COMPARATIVE PERSPECTIVE* 27 (1994) (explaining that "the only known exemplar of formal rational law is the Western legal system," and defining the rational approach to law as a legal system where "judicial opinions were reached through a process of intellectual reasoning of some sort").

3. See GERBER, *supra* note 2, at 26 (providing that Weber "was interested in [Islamic] law because he held the notion that rational, predictable, and dependable law was a root cause of the rise of capitalism in the West from the sixteenth century on").

4. Weber, *supra* note 1, at 52.

elsewhere in the world. Privileging religion was at the center of this thesis.

Weber's model and methodology have become normative for comparative studies that begin with what authors consider to be a superior model or system to which others can only compare unfavorably for lacking all the ingredients of that model.⁵ Comparative studies with a primary interest, or takeoff point, involving historical transformations unique to a particular part of the world are problematic. These studies fall short of explaining the nature of culture or institutions of other areas of the world under scrutiny. Weber's methodology and intent are at the heart of the problem.

Studying the process by which capitalism arose in Western Europe required placing that process within its evolving historical experience. This should have indicated the need to apply a similar methodology in other areas of the world as they were compared with the Protestant world. That has not been the case however; only little effort has been exerted to apply the same methodology of focusing on specifics relevant to the historical process or the legal systems of Muslim countries. Following Weber's approach, a superior legal framework based on the history of the Western world is presented in many comparative studies followed by a discussion of how non-Western laws fit within the framework and where they fall short. The historical narrative becomes cursory and conveniently deductive.

In recent years research into the history of the Islamic world has grown perceptibly in quality and quantity. We know much more about the life of the peoples of the Islamic world, and archival records are being tapped for concrete evidence about how the pre-modern Islamic legal system functioned and the type of justice people expected. Yet the Weberian model continues to underline analysis of Islamic history and society.⁶

5. See, e.g., Fariba Zarinebaf-Shahr, *Women, Law and Imperial Justice in Ottoman Istanbul in the Late Seventeenth Century*, in *WOMEN, THE FAMILY AND DIVORCE LAWS IN ISLAMIC HISTORY* 81 (Amira El Azhary Sonbol ed., 1996) [hereinafter *WOMEN, THE FAMILY AND DIVORCE LAWS*] (explaining that "Western and native modernist (and Orientalist) biases regarding the history of the Middle East in general . . . has [sic] affected the nature of scholarship on women in the Islamic world").

6. Under the Weberian model, exogenous theories reflecting the experiences of certain parts of the world, i.e., the Western world, are applied to other parts of the world, i.e., the Islamic world.

While it is important for comparative studies to come up with a universal understanding of human history, it is even more important for these studies to interpret the histories of different societies making up the human family according to the actual facts and concrete experiences pertaining to them before reaching any general conclusions about human history. The history of Islamic law and legal practice is a long way from being written in accordance with such perspective, notwithstanding the great interest the subject is receiving today. Connecting law, society, and history is still a young science in relation to Islamic law.

The Islamic world continues to be seen as permanently ruled by unchanging principles of the Qur'an, and Islamic medieval practices continue to be seen as lingering under structures defined as *sultanism* where the ruler has absolute power over all those he rules. *Sultanism*, or "Oriental Despotism,"⁷ appears in the pervasiveness of the "*qadi*⁸ justice" paradigm — i.e., Weber's description of the Islamic legal system in which judicial decisions are said to be arbitrary with little reference to cumulative laws and traditions.⁹ Weber's theory of *qadi* justice continues to enjoy great popularity and is particularly normative for studies of gender in Islamic history. As more meticulous archival research is undertaken, thereby providing detailed knowledge of the legal system practiced during various periods of Islamic history, the *qadi* justice paradigm has fallen under serious attack.

Beginning with Ronald C. Jennings' classical articles about women and the judicial system in Ottoman Kayseri and Trabzon, the Islamic legal system appears to be different in comparison to *qadi* justice paradigms.¹⁰ Haim Gerber's contribution¹¹ in partic-

7. See KARL A. WITTFOGEL, *ORIENTAL DESPOTISM: A COMPARATIVE STUDY OF TOTAL POWER* 101 (1957) (defining "Oriental despotism" as "an extremely harsh form of absolutist power").

8. A *qadi* is a Shari'ah judge.

9. See 2 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETATIVE SOCIOLOGY* 806 n.40 (Ephraim Fischhoff et al. trans., Guenther Roth & Claus Wittich eds., 1968) (defining *qadi* justice as "the administration of justice which is oriented not at fixed rules of a formally rational law but at the ethical, religious, political, or otherwise expediential postulates of a substantively rational law"). See also Cass R. Sustein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 22 (1996) (defining *qadi* justice as the kind of legal system where "all judgments are unaccompanied by reasons, and where no judgment has stare decisis effect").

10. See generally Ronald C. Jennings, *Kadi, Court, and Legal Procedure in Seventeenth-century Ottoman Kayseri*, 48 STUDIA ISLAMICA 133 (1978); Ronald C. Jennings, *Limitations on the Judicial Powers of the Kadi in Seventeenth-century Ottoman Kayseri*, 50 STUDIA ISLAMICA

ular has effectively dented Weber's thesis which, as Gerber explains, is based more on scholars' predetermined paradigms than on serious research.¹² In his criticism of Lawrence Rosen's application of the *qadi* justice paradigm to the legal system in Morocco, Gerber launched his attack on the applicability of the paradigm to Islamic societies as a whole.¹³ He took particular issue with Weber's view that "Islamic law was judicially primitive and undeveloped" in comparison to its rational archetype in the West.¹⁴ Gerber is correct in his criticism of Rosen. Even though Rosen criticizes the exotic picture of Muslim *qadis* [judges] prevalent among Westerners, he still accepts the principle of *qadi* justice at least as he found it in Morocco whose legal system he describes as "that form of judicial legitimacy in which judges never refer to a settled group of norms or rules but are simply licensed to decide each case according to what they see as its individual merits."¹⁵ Gerber contradicted this picture concluding that the Ottoman archives of Turkey, which he studied extensively, show great consistency in the application of law and legal decisions.¹⁶

This Article takes up this discussion by focusing on the practice of law in Shari'ah courts before the modernization of law and courts in the Islamic world. In the case of Egypt, whose archival record will be a major focus of this Study, modernization of law began early in the nineteenth century under Muhammad 'Ali, the *Pasha*¹⁷ of Egypt.¹⁸ The Article shows that the laws practiced in the Shari'ah courts of the Ottoman Empire before the modernization of law fell somewhere between the two extremes presented by Gerber on the one hand, and Weber and Rosen on the other. Pre-modern Islamic law presented a system definable within its own terms, a system that loses its logic through com-

151 (1979); Ronald C. Jennings, *The Society and Economy of Macuka in the Ottoman Judicial Registers of Trabzon, 1560-1640*, in CONTINUITY AND CHANGE IN LATE BYZANTINE AND EARLY OTTOMAN SOCIETY 129 (Anthony Bryer & Heath Lowry eds., 1986).

11. See generally GERBER, *supra* note 2.

12. See *id.* at 25-26.

13. See *id.* at 11-12, 189 n.34.

14. *Id.* at 11.

15. LAWRENCE ROSEN, THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY 59 (1989) (defining *qadi* justice generally).

16. See GERBER, *supra* note 2, at 54-55.

17. A *pasha* is a high ranking civil or military officer.

18. See Library of Congress, *Muhammad Ali, 1805-48*, at <http://memory.loc.gov/frd/cs/egtoc.html> [hereinafter *Muhammad Ali*].

parisons and efforts to place it within grids fitting with other systems.

Precedent was essential in Ottoman courts and basic principles acceptable as common law were followed. Perhaps the most important principle was the sanctity of contracts. Respecting contracts as a primary objective of the legal system is of long standing importance in Islamic countries. Respecting contracts predates the appearance of Islam, and it is one of the most important admonishes of Islam repeated often in the Qur'an and in the Prophetic Sunnah.¹⁹ Another important basic principle, common to most legal systems, is the protection of the weak, particularly children and women.

Qadis, however, had discretion in deciding cases. Principles of *istihsan* and *istihbab* [both defined as preference] guided the *qadi* in the direction of what was expected and preferable depending on the sociocultural and economic context of the people he served. Government *qanun* [edicts] were also followed. Unlike modern Nation-States, however, the pre-modern State did not establish legal codes determining social relations; rather it passed executive orders pertinent to collecting taxes, the amount of the *diyya* [blood-price] and various types of security measures. With these guides and the Islamic Shari'ah as a framework, the *qadi* reached his decisions.

In court, *qadis* were assisted by clerks and advisors, and uniform intricate procedures for giving testimony were followed. As for centralization and homogenization of legal codes and court procedures, these took place only in the modern period as Nation-States were carved out of the former Ottoman Empire which had been under foreign tutelage during the colonial period experienced by most of the Islamic world. During the last century, depending on the particular Muslim country, the legal system and the laws followed were transformed in shape, philosophy, and intent.

Egyptian modernization and the adoption of Western codes took place in 1875 with the introduction of a new legal innovation called "Mixed Courts" to handle litigation involving foreign residents and businesses.²⁰ This was followed in 1883 by the es-

19. "Sunnah" can be defined as actions and words of the Prophet Muhammad.

20. Baudouin Dupret & Nathalie Bernard-Maugiron, *Introduction: A General Presentation of Law and Judiciary Bodies*, in EGYPT AND ITS LAWS xxiv, xxv (Nathalie Bernard-

establishment of a national court system with jurisdiction over property, business, national, and criminal litigation.²¹ Later between 1880 and 1897, modern Shari'ah courts and *Millah* [sectarian] courts were established to deal with litigation regarding family and personal affairs of Muslims and various non-Muslim religious denominations.²² This divided court system remained in effect until 1952 when it was unified into one common court system.²³

As inspiration for its new court system, Egypt turned to the European example, which was not surprising since the reformers themselves were either British advisors to the Egyptian government or Egyptian graduates of French and British law schools.²⁴ In Shari'ah Courts, the Islamic Shari'ah was designated as the source and basis of the law, while in *Millah* Courts, Christian or Jewish laws pertaining to family and marriage, and sanctioned by churches or synagogues, were followed.²⁵ The laws of these *Millah* Courts were supplemented by Islamic law where laws were lacking, as was the case for inheritance laws which were applied to all religious groups and denominations.²⁶

The main purpose of the reforms was to improve and organize court procedures, putting an end to the inefficiency and corruption that courts were said to have fallen into. The reforms helped modernize the legal system by standardizing legal procedures and applying principles of legal process and the rule of law. By streamlining the legal system, laws became more homog-

Maugiron & Baudouin Durpet eds., 2002) (providing that the Mixed Courts were established in 1875 and began functioning in 1876).

21. See *id.* (providing that the National Courts were established in 1883 for Egyptian nationals); FARHAT ZIADEH, *LAWYERS, THE RULE OF LAW AND LIBERALISM IN MODERN EGYPT* 103-04 (1968) (explaining that these courts' jurisdictions were limited to personal status matters, i.e., divorce).

22. See Dupret, *supra* note 20, at xxv (explaining that Shari'ah law was applied by Shari'ah courts and that "religious provisions of the different non-Muslim communities were applied by their respective religious councils").

23. See MARK S. HOYLE, *MIXED COURTS OF EGYPT* 191 (1991).

24. See DUPRET, *supra* note 20 at xxi-xxvii.

25. See Abdal-Rehim Abdal-Rahman Abdal-Rehim, *The Family and Gender Laws in Egypt During the Ottoman Period*, in *WOMEN, THE FAMILY AND DIVORCE LAWS*, *supra* note 5, at 97 (explaining that Christian and Muslim marriages were conducted by priests or rabbis).

26. It should be pointed out here that Islamic inheritance laws give men double the inheritance as women, a fact which made it easy for male leaders of non-Muslim Egyptian communities to accept what is in their favor. This is a good example of State-patriarchy which developed with the modern State.

enous throughout the country. By educating *qadis* in newly opened government run schools, the level and efficiency of the judiciary was raised and the will of the State was established through standardized laws and procedures. A standardized system was believed to be a fairer system of justice from which Egypt's population at large would benefit. Intentions were thus fitting with positivist modernizing Nation building.

Future generations of lawyers, legists, and scholars looked positively on the reforms, while scholars and feminists lamented the fact that the same Westernization of the law had not been applied to family and personal laws, which were left to outworn traditional codes. The general belief today is that the Shari'ah applied by modern Muslim States is an extension of the laws since the rise of Islam, and that this Shari'ah continues God's basic laws for his believers as dictated by the Qur'an and the Prophetic Sunnah and Hadith.²⁷ Liberal aspects of Shari'ah law today are considered to be the result of Western influence. Those believing in modernization demand more Western law — human rights or women's rights — as replacement to a defunct Islamic legal system. At the same time, fundamentalists²⁸ and those calling for the establishment of an Islamic State demand the establishment of rules that they consider to be Islamic, based on the writings of medieval theologians of their choice with little reference to actual legal practice in Islamic courts.

Translated into calls for change regarding women and family, the Shari'ah is looked at by feminists and those calling for Westernization of law as being the main cause for the backwardness and the patriarchal nature of the laws under which Muslim women live today. Simultaneously, fundamentalists look in the opposite direction demanding that women live according to the dictates of an Islam that requires women to be covered in public and confined to the home.

Contemporary courts in Muslim countries apply a legal system somewhere between these two extremes. For example, modern States require that a woman receive her husband's per-

27. Hadith refers to the Prophet Mohammed's saying collected over a hundred years after his death.

28. See Sherman A. Jackson, *Jihad and the Modern World: To 'Abd al-Karim Salabuddin*, 7 J. ISLAMIC L. & CULTURE 1, 5-6 (2002) (providing that fundamentalists "grant the rules of classical Islamic law a *prima facie* presumption of correctness and authenticity" (emphasis added)).

mission before she takes a job. Some countries, like Jordan, permit a woman to work against her husband's wishes only if she waives her right to *nafaqa* [financial maintenance or support] even though it is the very basis of the Islamic marriage contract, i.e., that she withhold herself sexually for him alone and in return he is responsible for her financial support.²⁹ As for marriage, the modern State continued to allow a husband to divorce his wife at will but forbids the wife from having a similar right to divorce the husband, unless she has his approval, he is impotent, or he fails to financially support her.³⁰ Even impotence is not an absolute reason for divorce, since most countries applying the Hanafi school of Islamic law deny a wife the right to sue for divorce in the future if she previously knew of her husband's impotence and did not proceed to sue immediately for divorce. The personal status laws under which women live today are said to be the Shari'ah, and fundamentalists are calling for a further extension of a conservative form of this Shari'ah. However, the Shari'ah in practice today has very little to do with the one practiced in Shari'ah courts before the reform of the law. After all, under the old laws, women worked and invested in businesses and they had access to divorce through the courts without the need for their husband's permission.³¹ Unlike courts today, *qadis* had neither the right to force a woman to stay with a husband she wanted to divorce, nor did they question her reasons for asking for divorce.³² The *qadi's* role was that of a mediator regarding financial rights and support given the circumstances of the divorce.³³ Modern family law clearly worked against women.

One of the main reasons for the change in treatment of women in modern Shari'ah courts is that when modern States built new separate Shari'ah courts, they did not apply precedents from pre-modern Shari'ah courts. Rather, modern States con-

29. See Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L & POL'Y 1, 22 (1997) (noting the patriarchal nature of the contract based on a husband supporting his wife in exchange for "housework and sexual ability and confinement").

30. See *id.* at 13 (discussing wife's right to initiate divorce).

31. See Abdal-Rehim, *supra* note 25, at 103-06 (explaining that women sued husbands for divorce in court).

32. See Amira El Azhary Sonbol, *Adults and Minors in Ottoman Shari'ah Courts and Modern Law*, in WOMEN, THE FAMILY AND DIVORCE LAWS, *supra* note 5, at 281.

33. See *id.* at 382.

structed legal codes compiled by committees, handed the new codes to *qadis* educated in newly opened *qadi* schools, and had them apply the codes in court. In the process, the logic of the court system, the philosophy behind Shari'ah law, and the maneuverability and flexibility it provided to the public and *qadis* alike were curtailed. Common practices, at the heart of a system which had been organically linked to the society it served, were replaced by particular laws suitable to nineteenth-century Nation-State patriarchal hegemony. These laws ultimately worked against the weaker members of society (i.e., women and children) even while making the legal system more streamlined, homogenous, and efficient.

This Article focuses on *qadis* and courts before modern legal reforms with particular emphasis on the life of women and their interaction with the courts. A number of issues will be discussed and points made pertaining to the laws and *madhahib* [Islamic legal schools] applied in courts, the hierarchies and roles of *qadis*, and the accessibility of the legal system and knowledge of court procedures to the general public. Court culture, personnel, and record-keeping will also be discussed, as will the philosophy behind the law. I hope to illustrate that a viable court system existed before modernization. Although precedent played an important role, and *qadis* had certain rules to follow, the court system was nonetheless linked to society. *Qadis* were guided by '*urf* [traditions] familiar to the people they served and judged according to the *madhhabs* [schools of law] they belonged to as well as their own judgment. The system was flexible and provided an avenue for the public to achieve justice and litigate disputes rather than to enforce a particular philosophy of social laws and norms formulated by the State.

Women had clear rights to sue in court. The flexibility of the system allowed women to determine their marriage contracts and the conditions under which they lived.³⁴ Women also had complete access to divorce a husband they did not want to be with,³⁵ a far cry from modern law which adopted rules of placing women under the full control of their husbands. Under modern law, with certain exceptions, husbands must agree before divorce

34. See Abdal-Rehim, *supra* note 25, at 111 ("Women had a direct hand in determining their marriage contracts.").

35. See *id.*

takes place. Because pre-modern Shari'ah court records were not used as precedent for modern Shari'ah courts, the rights of women, including the right to work and determine their marriage contracts, were lost. By rediscovering these rights through court records, contemporary personal status laws can be questioned. Particularly important here is questioning the religious sanctity that the State gives to personal status laws on the books in Muslim countries today.

I. JUSTICE IN SHARI'AH COURTS

The Hanafi *madhhab* was the officially recognized *madhhab* of the Ottoman Empire.³⁶ All four schools, i.e., the Hanafi, Malaki, Shaf'i and Hanbali, were practiced in Shari'ah courts however.³⁷ Every *qadi* belonged to and was specialized in one particular *madhhab*.³⁸ The theological collections and interpretations of all four *madhhabs*, however, were available to him as reference in deciding cases. More frequently, a *qadi*'s decisions were informed by, and made according to, local '*urf*'.³⁹ It was also not uncommon for a *qadi* to follow his decision with the declaration that he reached it in "accordance to whichever school of law accepts it ('*ala madhhab man yara dhalik*)."

Because people could bring their cases in front of any *qadi* from any *madhhab*, they tended to choose the *madhhab* they believed would rule most favorably on their case.⁴⁰ There tended to be a preference for particular *madhhabs* depending on loca-

36. See Moussa Abou Ramadan, *The Transition from Transition to Reform: The Shari'ah Appeals Court Ruling on Child Custody (1992-2001)*, 26 FORDHAM INT'L L.J. 595, 598 (2003) (citing JUDITH E. TUCKER, IN THE HOUSE OF LAW: GENDER AND ISLAMIC LAW IN OTTOMAN SYRIA AND PALESTINE (1998); HENRI LAOUST, LES SCHISMS DANS L'ISLAM: INTRODUCTION A UNE ETUDE DE LA RELIGION MUSULMANE 311 (1965); MUHAMMAD AL-ZUHAYLI, TARIKH AL-QADA', FI AL-ISLAM 448 (1st ed. 1995)). See also JOHN L. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW 137 n.2 (1982); Abdal-Rehim, *supra* note 25, at 96. The chief *qadi* was always a Hanafi assigned from Istanbul. See NELLY HANNA, MAKING BIG MONEY IN 1600: THE LIFE AND TIMES OF ISMA'IL ABU TAQIYYA, EGYPTIAN MERCHANT xxii (1997) (providing that the *qadi al-qudat* or chief *qadi* in Egypt was from Istanbul).

37. See HANNA, *supra* note 36, at xxi (providing that all four schools were represented in court). Each *madhhab* also had its own *mufti* [jurist] who delivered *fatwas* [judicial opinions] in response to questions from the public. *Id.*

38. See Sonbol, *supra* note 32, at 237.

39. See HANNA, *supra* note 36, at xxi; Nelly Hanna, *Marriage Among Merchant Families*, in WOMEN, THE FAMILY AND DIVORCE LAWS, *supra* note 5, at 146.

40. See Hanna, *supra* note 39, at 146.

tion, class, type of dispute, and gender.⁴¹ The Shaf'i and Malaki *madhhabs* were preferred in Lower and Upper Egypt, for example, while the Hanafi *madhhab* was preferred in commercially important cities.⁴²

The role of class is evidenced by examining contractual transactions. The Hanbali *madhhab* seems to have been a favorite among those signing rental contracts, for example.⁴³ This was probably because the Hanbali *madhhab* did not approve of raising rent once a contract was written and it allowed for the inheritance of contracts at the same price and conditions.⁴⁴ In contrast, wealthy patrons preferred the Hanafi *madhhab* because it regarded the value estimated in contracts on the basis of gold and bullion, which fluctuate with time, while the other *madhhabs* insisted on the return of a loan at the same amount as contracted, regardless of the change in the value of money.⁴⁵

The type of dispute and the gender of the claimant also informed the decision as to what *qadi* to go to. For marriage and other family issues, people tended to go to the *qadi* of the particular *madhhab* to which they belonged.⁴⁶ Thus, there was a greater density of Malaki jurisdiction in towns like Alexandria where there was a large Maghrebine [North African] community and in Upper Egypt where most people belonged to the Malaki

41. *See id.*

42. *See* Abdal-Rehim, *supra* note 25, at 97 (providing that "the Shaf'i *madhhab* predominated in the Nile Delta, the Malaki was predominant in Upper Egypt, and the Hanafi was the most used in Cairo and other important commercial cities"); Sonbol, *supra* note 32, at 237. *See also* Abdal-Rehim, *supra* note 25, at 97 (explaining that the Hanafi *madhhab* was preferred in important commercial cities like Cairo). For example, at the beginning of the Ottoman period, the towns of Dumyat in Lower Egypt and Isna began as Shaf'i and Malaki towns respectively, and over time they moved increasingly toward the Hanafi *madhhab*. By the end of the seventeenth century, the majority of cases recorded in Dumyat courts were Hanafi. *See* Sonbol, *supra* note 32, at 236 (providing a detailed discussion about the connection between changes in application of *madhahibs* in Shari'ah courts and historical transformations). The Hanafi *madhhab* was also preferred by Ottoman Turks from Anatolia and other Ottoman subjects living or traveling in Egypt, e.g., Syrians. *See* Abdal-Rehim, *supra* note 25, at 97; Sonbol, *supra* note 32, at 237.

43. *See* Sonbol, *supra* note 32, at 237 n.3 (explaining that the Hanbali *madhhab* was preferred in the signing of rental contracts generally and of *waqf* properties [religious endowments]).

44. *See id.*

45. *See id.*

46. *See* Abdal-Rehim, *supra* note 25, at 97 ("The Muslim husband . . . and the wife . . . used to go to the judge of the particular *madhhab* according to which they wished to be married.").

madhhab.⁴⁷ Even in non-Malaki areas, however, women often preferred to have their *nafaqa* claims judged according to the Malaki *madhhab* because it was more favorable to women. The Malaki *madhhab* considered alimony to be payable from the moment of divorce for example, while other *madhhabs* calculated alimony from the time a woman won the litigation in court.

In contrast, after the Egyptian legal reforms that began in the 1870s, *qadis* were assigned the government's legal code and told to apply it in court. The difference between the two approaches was quite significant but was, perhaps, to be expected given the historical transformation Egypt experienced as it moved from being a province of the Ottoman Empire toward an independent Nation-State.⁴⁸

During the direct Ottoman rule of Egypt (1517-1798), the Ottoman State had a weak political presence in Egypt.⁴⁹ Egypt was located at some distance from the Ottoman center and was independent of direct centralized administration controlled from Istanbul.⁵⁰ While an Ottoman *Pasha* and troops were present on Egyptian territory, hegemony over the country was held in the hands of various power coalitions or *khassa combines* [elite groups whose purpose is to further political interests].⁵¹

The control over Egypt was therefore indirect. The Ottomans acted through a *Pasha* sent from Istanbul to govern Egypt.⁵² However, *Pashas* held onto their positions for short terms; the turnover usually occurred every one to three years.⁵³ The short tenure made it difficult for leading officials to form power centers or alliances with the different *khassa combines* in Egypt.⁵⁴ The administration of Egypt was organized through the *Pasha's diwan* [council] in the Cairo Citadel.⁵⁵ Here top officials

47. See Sonbol, *supra* note 32, at 237.

48. See Hanna, *supra* note 39, at 144.

49. See *id.*

50. See *id.*

51. These *khassa combines* were formed of *mamluks* [warrior slaves], *tujjar* [large-scale merchants], and *multazims* [tax-farmers], with the '*ulama*' [society of learned men], guilds, and other social groups playing important roles within the hegemony.

52. See Hanna, *supra* note 39, at 145 (explaining that the *pasha* governed Egypt).

53. See *id.* Quick turnovers were not unique to *Pashas* but also applied to most leading personnel sent from Istanbul including the *qadi al-qudat* [chief judge] who acted as head of the Ottoman *qadis* in Egypt, as well as the *muftis* of the four *madhhabs*. See, e.g., *id.*

54. See *id.*

55. See *id.*

met to discuss and make suggestions to the *Pasha*.⁵⁶ They included the chief justice, the head of the treasury, the *mamluk beys* [highest ranking mamluks], chief '*ulama*', and the heads of the different *ojaks* [Ottoman military corps].⁵⁷ The *muftis* of the Hanafi, Shaf'i, and Malaki *madhahib* also had a place in the *diwan* because of their importance as legal officers and their credibility among the public. The Ottomans relied heavily on the *muftis* and *qadis*, who were indigenous to Egypt.⁵⁸ This reliance was notable because unlike many other Ottoman provinces it did not undergo heavy Turkish reorganization.

The *Pasha* followed orders sent out from Istanbul, made sure that taxes were collected, and ensured the security of the province to Ottoman rule. While the judicial hierarchy was independent of the *Pasha* since it followed the office of Sheikh al-Islam in Istanbul, the *Pasha* did have some judicial responsibilities regarding crimes involving *diyya* and the *kharaj* [religious tax].⁵⁹ However, the chief justice, the heads of military corps, the head of treasury, and Azhari '*ulama*' did not come under the direct authority of the *Pasha*. The chief treasurer answered directly to Istanbul, the '*ulama*' had their own hierarchy, and the Azhar, Egypt's main religious center and school, had its own powers and was independent of government organization or interference during the Ottoman period. Accordingly, it is not until 1875 that the first Hanafi Sheikh al-Azhar was assigned by the central State, in this case Khedive Isma'il. Until then the Sheikh was always selected by the body of the Azhar clergy and was almost always a Shaf'i in keeping with the dominant *madhhab* of Lower Egypt. Malakis did make it to the deanship of the Azhar, but only rarely. However, no Hanafi ever headed the Azhar until 1875, even though the Hanafi *madhhab* was the official *madhhab* of the Ottoman State.

The diffused nature of Egypt's administration allowed for judicial mobility, freedom, and, most importantly, a linkage to society because of the significant role that common law played in the *qadi's* decision-making process. The mobility of these pre-modern Shari'ah courts is evidenced by the fact that although

56. See *id.*

57. See HENRY LAURENS ET AL., L'EXPEDITION D'EGYPTE: 1798-1801, at 63 (1989).

58. See ZIADEH, *supra* note 21, at 9.

59. See 'ABDAL-AZAZ IBRAHIM 'ISA, TARIKH AL-QADA' FI MISR AL-'UTHMANIYYA: 1517-1798, at 14 (al-Hay'ah al-Misriyah al-'Ammah lil-Kitab, Far' al-Sihafah 1998).

the Hanafi *madhhab* was the official school of the Ottoman Empire, it did not have centralized official control over the judiciary.⁶⁰ For example, there was an overwhelming dependence on Shaf'i and Malaki *qadis* throughout Egypt. Decisions were rendered in all four *madhhabs*.⁶¹ The freedom of these courts is evidenced by a lack of administrative supervision. There is no indication in archival records that cases were ever referred to the *qadi al-qudat* for a final decision, even in cases of *tatliq* [divorce granted to a woman by a judge], which scholars indicate the *qadi al-qudat* had sole authority to decide. Either the records are lacking in detail or the authority of the *qadi al-qudat* was actually theoretical and automatically delegated to the various *qadis* sitting in court and rendering justice. The latter possibility gains credibility given the fact that delays for other reasons, e.g., investigation or the presentation of witnesses or documents, were recorded.

Continuities in the legal system are important in assessing the development of Islamic law. Just as important for that purpose are the continuities in court decisions and interaction between people and courts. Here marriage records dating from various periods in Egypt's history point the way. For example, marriage contracts dating from the third century *Hijra* [Islamic calendar] are basically similar in shape and function as those from the much better studied ones dating from the Ottoman period.⁶² Recording contracts in courts, usually seen as regulated under the Ottomans, actually existed since Ancient Egyptian times, and was traditional for Islamic Egypt before the arrival of the Ottomans. Thus papyrus and leather collections dating since Ancient Egyptian times up to the Ottoman period include contracts for buying, selling, divorce, marriage, payment

60. Such centralization had little relevance before the modern period. If anything, Hanafi law may have been applicable to the Ottoman executive *Qanun* but it had little relevance to laws concerning social relations before the Hanafization of law, which I date to the nineteenth century when the Hanafi code was made the source of the new personal status and family law.

61. The exception was in particular courts, like the Bab al-'Ali court in Cairo, that served wealthier Egyptians and Turks or other communities of the Ottoman Empire where the Hanafi code predominated, for example, the Syrian community. See Sonbol, *supra* note 32, at 237 n.3

62. See 1 ADOLPH GROHMANN, *AWRAQ AL-BARDI AL-'ARABIYYA BI DAR AL-KUTUB AL-MISRIYYA* 71-114 (al-Qahirah: Matba'at Dar al-Kutub al-Misriyah 1934) (containing examples of Islamic marriage contracts from the third to the fifth century Egyptian courts).

of debts, wills, and inheritance.⁶³ Even more telling is the fact that the first four pages of the first volume of the *sijill* [Shari'ah court records] of the Ottoman archives for the Shari'ah court of the Mediterranean port town of Dumyat date back to 1505 while the Ottoman invasion took place in 1517. The format of the individual entries in the first four pages — mostly marriages — is followed in the later entries dating after the Ottoman invasion. This is an indication that registration of cases in court took place before the arrival of the Ottomans and the practice was continued by the Ottomans.

The changes introduced by the Ottomans into the legal system included the requirement that all marriages be registered in court.⁶⁴ This necessitated the payment of fees, a fact which angered Egyptians who previously had the option to register their marriages before the Ottomans.⁶⁵ But, as is usual with empires, the Ottomans were interested in raising funds to pay their way as they administered foreign provinces. This is made clear from the *Qanunname* [imperial law] formulated by the Ottomans for the administration of Egypt. Foremost in their minds was extracting wealth from the country while simultaneously making it bear the cost.⁶⁶ Consequently, they expected the courts to support the structures and the remuneration of the court personnel attached. Requiring the registration of marriage in court made the court a direct player in personal and family relations.⁶⁷

Another impact of the Ottomans on the Egyptian judiciary system was the extension of the court system throughout Cairo and various parts of Egypt. The hierarchy of courts grew, sub-courts were created to serve a wider network of people, and greater accessibility to legal services was provided.⁶⁸ It should be pointed out that the existence of extensive networks of sub-courts is only now being researched. The delay in recognizing their existence is due to the fact that the records of the sub-courts were included with the records of the major court of the

63. See MISTRESS OF THE HOUSE, MISTRESS OF HEAVEN 181 (Anne K. Capel & Glenn E. Markoe eds., 1996) (providing examples of marriage and divorce contracts).

64. See Hanna, *supra* note 39, at 145.

65. See *id.*

66. See *id.*

67. See *id.*

68. See Ramadan al-Kholi, *Archives as a Source of Women's History: Problems and Limitations*, in A HISTORY OF HER OWN: DECONSTRUCTING WOMEN IN ISLAMIC SOCIETIES (Amira El Azhary Sonbol ed., forthcoming 2004).

town the courts served. While we do not know the exact numbers of sub-courts in Egypt, it is generally accepted that Egypt was served by thirty-seven courts under the Ottoman rule⁶⁹ and that each was headed by a *qadi* and assisted by numerous *na'ibs* [*qadi* deputies]. The most important court in the country was the *mahkamat al-bab al-ali* located in Cairo and presided over by the chief justice. As for central courts of important towns like Dumyat or Alexandria, these were also known as *bab al-ali* [high] courts because of the principal role they played in connection with other courtrooms or sub-courts of the town or its environs.

At the beginning of the Ottoman rule, all *na'ibs* were Egyptians, while the upper levels of the judiciary were appointed from Istanbul and were usually disciples of the chief *qadi* from whom they derived their authority. Things changed with time and Egyptian *qadis* began playing an increasing role in the judicial hierarchy so that by the time the French Napoleonic invasion of Egypt took place (1798-1801), most *qadis* except for those serving the *bab al-ali* court of Cairo, were Egyptian. The *bab al-ali* served the Turkish members of the *khassa* who were followers of the Hanafi *madhhab*, the *madhhab* of the chief justice and his Turkish deputies. *Qadis* had significant authority in the communities they served. Because they had lifetime tenure, they were generally familiar with the neighborhood and its traditions, as well as those who lived there. Their authority was further increased because *qadis* were also required to fulfill a number of other functions over and above their job in court. These included the supervision of mosques and *awqaf* [religious endowments], land-survey, and the supervision of customs and control of the income generated in port-towns, which was one reason port judiciary districts were considered a prize for any *qadi*.

It should also be noted that the class status and wealth of a *qadi* were tied to the particular location in which he served. Some were wealthy, enjoyed influence, and were therefore partners with the elite, while others, usually serving judicial districts in less important towns and agricultural areas, were quite poor and did not enjoy the same influence. However, the relationship between the local *qadi* and his community shows us a different dynamic to inter-societal relations than is usually understood

69. See 'ABD AL-HAMID SULIMAN, *TARIKH AL-MAWANI AL-MISRIYYA FI AL-'ASR AL-'UTHMANI* 91-92 (Series No. 89, 1995).

when analyzed from the top down or through patron-client relationships. The local power of judges and other officials depended largely on their ties to their communities rather than on the support they received from the central government, which gave them their authority in the first place. This too would change in the nineteenth century with Nation-State building.

II. KEEPING RECORDS

Accessibility to courts was paralleled by the population's use of them. Perhaps slower at the beginning of the Ottoman period, activity in *qadi* courts grew with time and soon became quite busy. Reading these records, the researcher feels indebted to court-clerks who recorded details often missing from archives of other Islamic countries. While some entries are formulaic, short or give limited information, others are lengthy descriptions of court transactions that allow a glimpse at court culture. A picture of a vibrant society emerges from reading the records: men and women bringing claims involving crime, divorce, and property — in short, going on with the business of living.⁷⁰ Lists of what the dead left behind sometimes give minute details of the items that people had in their houses, what they prized, and what they collected over the years.

Division of wealth through inheritance is also very telling. If a husband had two wives when he died, for example, the number of children that he had and what wives they were from became important. Inheritance and registration of *waqf* property [religious endowments] fill a large part of the *sijills* and both are invaluable sources of social history. Young and old, men and women, wealthy and poor, came to these courts, making court records a rich source for social history.

At the same time, court records present shortcomings that limit their usefulness. Quite often, the punishment or ruling reached by the *qadi* is not included in the entry. The details included in presentation of cases in court, however, yield enough information, and their consistency gives firm indicators about the law and the people's individual expectations. Altogether, these records demonstrate the great diversity of activities

70. See HANNA, *supra* note 36, at xx ("The archival material . . . is alive with daily life — the problems that people encountered with business partners, with family, and with neighbors and the alternatives that were offered as solutions.").

conducted in court, which varied depending on place, time, and social rank of the involved parties.⁷¹ Although Shari'ah law was followed, its administration differed depending on a person's geographic location and class.⁷²

Basic Shari'ah requirements in marriage include the necessity that the wife not be involved in another marriage, and therefore free to marry, and that the marriage be witnessed and public. Other matters included by *fuqaha'* [experts in Islamic jurisprudence, *fiqh*] as necessities for a valid marriage were often waived in court. Although Shari'ah law guarantees that the husband give his wife support, including clothing, food, and housing, this was waivable so long as the wife consented.⁷³ Similarly, although the Shari'ah law allowed the husband to take four wives, that right was frequently waived as a wife's condition for marriage.⁷⁴

The importance of detail and the diversity presented by details make a close reading of the archival record a must for social or legal history. Using sample cases is a good way to obtain a general picture, but a more detailed reading, comparison, and analysis is necessary if we are to understand how women really lived and how changes in the legal system transformed their status.

Given the condition of the records, the ambition to cover as much as possible may be just that — too ambitious. These records are handwritten. However, some clerks wrote more legibly than others and some had good calligraphy skills. There are also pointers [indicators] that were used by clerks probably to help them in future access to records. One of the most important *pointers* is the inclusion of an active word, denoting the nature of the case, in a much larger script than the rest of the document. Sometimes a different color — usually red — is used. Thus words like *nikah* [marriage] or *asdaqa* [paid the dowry], which is another way of saying marriage, are included in large script so that the reader looking for such entries can do so more easily. Dating is also important.

Unlike modern records that compile cases according to type

71. See Abdal-Rehim, *supra* note 25, at 102.

72. See *id.*

73. See *id.* at 102-03.

74. See *id.* at 103.

in various archives, Shari'ah court records, until the last decades of the nineteenth century, were kept on a first come first serve basis following the order they appeared in court. No separate records were kept of cases seen by *qadis* according to name or *madhhab*, nor were records kept according to particular type of case. Thus, when a court case was seen by the Shaf'i *Qadi*, for example, it could be followed by one seen by the Hanafi *Qadi*, and so on. Given this method of registration, the physical structure of courts and the process of registration are not entirely clear.⁷⁵ Records of sub-courts were brought to the major central court and recorded, usually simultaneously at the end of the work day. Only *Hijra* dates were used until the end of the nineteenth century when the Gregorian calendar was added to the *Hijra* date for all entries.⁷⁶ Some pre-modern Shari'ah court records are bound together in volumes with page numbers and numbers given to the various entries.⁷⁷ Certain records were left out altogether and bound together into a group called *sijillat dasht* [records to be discarded].⁷⁸ Reading court records gives the impression of crowded courts, with various judges present, each judging according to his *madhhab*. Assisting the judges were *shuhud* [court witnesses], usually '*udul* [trusted men],⁷⁹ and court clerks. Clerks recorded what transpired before them, following more or less a formulaic order. Still, individual clerks left their impact on court records; some were quite wordy, while others were brief in their descriptions. Clerks often gave descriptions of the litigants. When a woman appeared in court a

75. However, we do know that in major cities like Cairo and Dumyat, *qadis* of the various *madhhabs* sat in separate rooms to render justice and litigants came directly to them. At the same time, we can see from the style and the handwriting that it was the same clerk who filled in the entries from the various court rooms. Sometimes other handwriting appeared, indicating that another clerk recorded the entry, but it is not clear whether there is a correlation between the clerk and the particular *madhhab*.

76. For example, cases were dated as follows: *Isna*, 30/11-40 (1193 Hijra calendar/1779 Gregorian calendar) (on file with National Library and Archives of Egypt).

77. Modern librarians have introduced one system after another to try to control these records, hence the often double entries and discrepancies among researchers whose data may be the exact same but whose references change. Fortunately, indices are kept to reconcile the various references.

78. Until recently, such documents were collected together and bound, sometimes by researchers. In 1992, I remember contributing 10 L.E. [Egyptian pound] for such an effort which was being undertaken at the Shahr al-'Aqari in Cairo before the records were moved to Dar al-Watha'q. The Historian Muhsin Shuman was working on the preservation of these records with his own hands.

79. '*Udul* were official court personnel whose job was to witness court procedures.

clerk might have recorded her features, her dress, or her coloring. Some recorded the conversations that went on between litigants, while others simply recorded a short record of their findings. In general, the larger and more active the town, the more detailed the court entries were. Thus, pre-modern court records from Cairo, the Mediterranean port of Dumyat, and Isna in Upper Egypt, all show a tendency toward descriptiveness,⁸⁰ providing a glimpse into the history of the towns.⁸¹

Another indicator of legal and social change in court records concerns crime. Reports of various crimes or citizen complaints and litigation regarding crimes constitute an important part of court records. The numbers of various crimes and particular types of crimes recorded, not only illustrate the vibrancy of the society, but also the nature of social relations, State-society relations, and the nature of life during the pre-modern period of Egypt's history. Crime records demonstrate that the numbers of various types of crimes seemed to climb at the turn of the nineteenth century. Since bureaucratic rationalization was extended under the rule of Muhammad 'Ali *Pasha*, crimes began to be recorded as a separate category in their own record books. During the Ottoman period, court cases were recorded, litigated, and then registered in court. A marriage could be followed by a sale, a crime, a *waqf* deed, a child-custody or alimony dispute, etc..

The nineteenth century witnessed the categorization of cases beginning with the Muhammad 'Ali period when crimes began to be recorded separately so that by the second part of the century they were completely distinct from other records. The same went for marriage contracts and other gender matters. By the last quarter of the nineteenth century, separate records of marriages were placed together in accordance to the *ma'dhun* [government official given the responsibility for transacting marriage and divorce].⁸² This seems to follow the same system intro-

80. It should be noted that until the middle of the nineteenth century, court records from Alexandria in the North were quite similar to other Egyptian towns like Assiut in the South.

81. For example, studying the records of Alexandria during the Ottoman period shows us that to understand the history of the southern Mediterranean it would be an error to concentrate on Alexandria alone because of its importance as a major port in the nineteenth century. Dumyat and its port located to the East toward the Levant and the Ottoman Empire was Egypt's most active port during the early Ottoman period.

82. Each *ma'dhun* kept records of the transactions in which he officiated sepa-

duced in France during the nineteenth century in which particular types of transactions undertaken in court were organized together in a separate archive.⁸³

Nineteenth century Zabtiyya police records, some of the least used records in the collection of Egyptian archives, proved to be fascinating in the picture presented about the life of people in the courtrooms. They contain details about various crimes like robbery, murder, and rape. We learn of gender relations, the power women wielded in their homes and villages, what constituted owning property, and so on. For example, the court records may include the husband's name as the owner of a particular piece of property, or the home in which he and his wife lived. Yet, the Zabtiyya record usually referred to property where a theft or arson had taken place as belonging to the husband and wife together rather than to the husband alone.

Studies of court records indicate the role that the judicial institution played. Courtrooms, as daily entries testify, were full of people.⁸⁴ People of ordinary background, women, plaintiffs, and petitioners with a variety of problems had little hesitation bringing their problems to the *qadi*. There are a number of reasons for this. First, justice was rapid and simple.⁸⁵ Punishment was immediately executed except in death penalty cases, thus leaving the determination of guilt and punishment to the chief *Mufti*. People did not need to be educated or sophisticated to understand what was going on. Second, *qadis* very often based their judgment of a case on the 'urf of the population.⁸⁶ Third, each court room had representatives of the four schools of law, Hanafi, Shaf'i, Malaki, and Hanbali, thus giving the claimant the choice of having his case handled by the one he preferred.⁸⁷ As courts were vital to supporting institutions for commercial activity,⁸⁸ People recorded transactions, filed complaints and had their partnerships witnessed in court.

rately; today they can be found catalogued under their particular names in the national archives.

83. Also like France, marriage and divorce transactions were recorded under the name of the notary-public who officiated them, and they are indexed under the name of the notary-public in the French archives.

84. See HANNA, *supra* note 36, at xxi.

85. See *id.* at xxi.

86. See *id.*; HANNA, *supra* note 39, at 146.

87. See HANNA, *supra* note 36, at xxi.

88. See *id.* at 10-12.

The documents detailing these partnerships included the amounts of money invested by the various parties, the items to be traded or produced, the places inside and outside of Egypt to which goods were to be sold, or from which goods would be bought and so on. The commercial activity of the seventeenth century showed a dynamic economy and a population active in production and trade.⁸⁹ If anything, courts constituted an important and familiar institution in people's lives in Ottoman Egypt. Going to court was simple, as court-houses were located in accessible points and the doors were open to all. This included non-Muslims who came to court to register land, establish *waqfs*, inheritance, custody, and all other matters that Muslims litigated or resorted to court for. Non-Muslims also came to Shari'ah court to sue for divorce or transact a second marriage, acts that were forbidden by their own churches but could be transacted in Shari'ah courts. In other words, even though Shari'ah courts may be considered religious courts, before the modernization of law in the early nineteenth century, Shari'ah courts were actually State-courts open to all people. This would change with modern reforms when the umbrella of religion was extended to family affairs — marriage, divorce, child-custody, inheritance, and *waqfs* — making them distinctly religious matters so that non-Muslims were no longer allowed the freedom to go before the court that best suited their needs, but were required by law to submit to the law of the religious institution to which they belonged.

III. WOMEN IN OTTOMAN COURTS

Courts did not differentiate on the basis of gender. Men and women were equally required to appear in court cases involving them. If they were unable to appear, they could delegate someone else to appear in their place.⁹⁰ For example a husband could be represented by his father in a *nafaqa* case, as could his wife by her father. Similarly, a woman could send her son to represent her in a dispute over her share in a palm tree grove. When such delegations took place, either a written document

89. *Id.* at 166-67.

90. See Svetlana Ivanova, *The Divorce Between Zubaida Hatun and Esseid Osman Aga: Women in the Eighteenth-Century Shari'a[h] Court of Rumelia*, in *WOMEN, THE FAMILY AND DIVORCE*, *supra* note 5, at 123.

had to be presented to the *qadi* or witnesses brought to court to testify to the legitimacy of the proxy.⁹¹

Both men and women had to be identified in court. Some of the descriptions left by clerks suggest that women were not usually veiled when they appeared in court. This is evident from archival records where facial descriptions of women are clearly outlined, including their coloring, their tattoos, and the shape of their eyes. Although tribal women, like those of the Bedouin tribe,⁹² wore *niqabs* [full face veils] when they appeared in urban centers, most other women did not.

How to handle a veiled woman [*al-mar'a al-mutanaqiba*] in court seemed to be a subject of debate among *qadis* and *fugaha'*, which is an indication that it was not usual for women to appear veiled in court. The usual practice entailed bringing two male witnesses of good judgment to vouch for her identity. In one case, a *qadi* found a veiled woman's witnesses unacceptable because of insufficient proof that the witnesses knew how her face looked uncovered.⁹³ Thus, the appearance of veiled women in court was the exception and not the rule.

Women were also victims and perpetrators of crimes. Courts did not seem to differentiate between women and men in criminal cases, although it is evident that women were more often victims of male violence than the other way around. Violence against women included murder, sometimes at the hand of a husband who later confessed.⁹⁴ Court *daya* or *qabila* [midwives] investigated female corpses, and male practitioners, barbers or doctors, male corpses.

Women brought complaints of rape to court, demanding compensation from, or the punishment of, the offender.⁹⁵ While rare in smaller courts, the courts of large towns like Cairo, Dumyat, and Alexandria received frequent complaints of rape

91. See *id.*

92. The word Bedouin is derived from the Arabic word *bedu* and literally means inhabitant of the desert. The Bedouin people are nomadic and spread throughout the Middle East. They are, generally speaking, devout Muslims. See THOMAS W. SIMONS, ISLAM IN A GLOBALIZING WORLD 5-8 (2003) (describing the devout nature of the Bedouins).

93. See IBN ABI AL-DAMM, KITAB ADAB AL-QADA' AL-DURRAR AL-MANZUMAT FIL'AQDIYYA WAL-HUMAT 280-82 (Dar al-Kutub al-'Ilmiyya 1987).

94. See *Isna*, 30/11-40 (1193 /1779) (on file with National Library and Archives of Egypt).

95. See Sonbol, *supra* note 32, at 285.

committed not only against women and girls, but also against boys. Rapists were treated equally regardless of the victim's gender, even in cases of rape against virgin girls.

In pre-modern Shari'ah courts, social relations and personal reputation were important in disputed cases of rape because credible character witnesses were required to prove rape. However, the willingness of fathers, brothers, mothers, and girls to come forward in rape cases casts doubt on the usual image of punishing the victim for sexual crimes committed against her.

A serious change took place with the introduction of Western law as a basis for criminal law in Muslim countries ruled by colonial powers. Criminal codes and legal precedent, particularly from France, became the norm for countries like Egypt, Lebanon, and Syria. These modern courts introduced the issue of intent as part of the formula for proof of rape. According to the new laws, the actions of the victim became a source of scrutiny. This focus on the woman's actions put victims on the defensive and allowed men to get away with rape. It also made families unwilling to come forward with accusations of rape because attacking the victim family member's morals dishonored the family. The consequences of this legal change in regards to women and children cannot be undermined.

Premodern Shari'ah court records challenge the stereotypical image of Muslim women leading secluded lives outside of the public sphere under the full control of male relatives. Like men, women came to court for all sorts of reasons. For example, women went to court to record marriage contracts and added any conditions they pleased.⁹⁶ They also sued husbands for *nafaqa*,⁹⁷ delayed dowry,⁹⁸ and child custody.⁹⁹

Women also had the right of *wilayah* [guardianship].¹⁰⁰ They came to court in their capacity as guardians to transact the marriages of their minor children. Even though today's Shari'ah

96. See Abdal-Rehim, *supra* note 25, at 103.

97. See *id.* at 104; Iris Agmon, *Muslim Women in Court According to the Sijill of Late Ottoman Jaffa and Haifa: Some Methodological Notes*, in WOMEN, THE FAMILY AND DIVORCE LAWS, *supra* note 5, at 128.

98. See Agmon, *supra* note 97, at 128.

99. See Sonbol, *supra* note 32, at 108.

100. See Margaret L. Meriwether, *The Rights of Children and the Responsibilities of Women: Women as Basis in Ottoman Aleppo, 1770-1840*, in WOMEN, THE FAMILY AND DIVORCE LAWS IN ISLAMIC HISTORY, *supra* note 5, at 227-28 (providing that women served as *wasis* [guardians] more often than men).

law demands that a male relative be present to contract the marriage for a daughter or sister, in premodern courts it was quite common for a minor child to be married by the mother as his or her guardian.

Suing for divorce constituted an important percentage of cases brought by women to court.¹⁰¹ This was probably because unlike husbands who could divorce their wives at will, a woman had to be divorced by a *qadi*.¹⁰²

Women also came to court for a variety of reasons outside of the family realm. Women often took men to court for physical or verbal abuse. They also brought cases against other women with whom they may have quarreled in the street, neighborhood, or marketplace.¹⁰³ Additionally, it was common for women to register sales or debts due them, or by them, in court. For example, women registered *waqfs* and provided all of the details involved in such transactions, i.e., who the direct beneficiaries were and how the *waqf* was to be handled and by whom. They also sued for wages and for payment of debts for goods and services. They sued fathers, children, and business partners for repayment of loans.¹⁰⁴

Women also disputed property rights in court.¹⁰⁵ A good example is that of an 1862 upper Egyptian woman from the town of Ballas who sued her neighbors for extending their house into her property.¹⁰⁶ The brothers denied the allegations, but after the woman presented her evidence and witnesses, the brothers decided to settle the matter out of court.¹⁰⁷ They financially compensated her and she dismissed her complaint.¹⁰⁸

Shari'ah court records also illustrate that women were very active in business and crafts in the Ottoman Empire. They

101. See, e.g., Zarinbaf-Shahr, *supra* note 5, at 88 (providing that of all petitions brought by women in 1675 Istanbul, 4.9 percent were for divorce); Agmon, *supra* note 97, at 127-30 (describing divorce cases in Shari'ah courts).

102. See Ivanova, *supra* note 90, at 124-25.

103. See Dumyat, 43/57-110 (1011/1602) (on file with author).

104. See Zarinbaf-Shahr, *supra* note 5, at 88, 91 (providing that in 1875 16 percent of cases brought by women in Istanbul involved loan disputes).

105. See Meriwether, *supra* note 100, at 220 (explaining that women's property rights were often upheld in court); Zarinbaf-Shahr, *supra* note 5, at 88 (providing that in 1675 Istanbul, 34 percent of cases brought by women were property disputes); *Id.* at 89.

106. See Ballas, 24/8-9 (1279/1862) (on file with author).

107. See *id.*

108. See *id.*

served as heads of guilds of physicians, weavers,¹⁰⁹ beauticians, entertainers, and all areas in which large numbers of women were employed. There were even *ribat nisa's* [orders of women] for women *Sufis* in important mosque schools like the Tankaziyya School in Jerusalem.¹¹⁰ Women were also involved in traditionally male crafts like soap manufacturing,¹¹¹ goldsmithing,¹¹² pottery,¹¹³ and bakeries.¹¹⁴

Real estate was one of the most important areas in which women invested. Women owned grinding mills¹¹⁵ or owned such mills in partnership with a husband¹¹⁶ or another person.¹¹⁷ *Waqf* records reveal that property held by women included orchards,¹¹⁸ village real estate, rental houses, shops, *ma'sara* [olive oil juicers], *hamams* [baths], bakeries, and *masatib* [sale-spots] in marketplaces.¹¹⁹ Women also invested in mulberry orchards and other fruit producing trees.¹²⁰

Court records also show that women did work and were paid daily. Women worked in quarries, acted as *multazims* [tax-farmers], and lent and borrowed money. They owned and ran coffee houses¹²¹ and worked as *saqqas* [water carriers], an essential service for cities of the Middle East. Women also served in baths as attendants, masseuses, *mashata* [beauticians or hair-dressers], *kahalas* [pseudo-oculists who use *kuhl* as a cure] and

109. See Zarinebaf-Shahr, *supra* note 5, at 88.

110. See 1 AL-ASSALI, WATHA'IQ MUQADISSIYA TARIKHIYA 108-21 (on file with author).

111. See *id.* at 172.

112. See *id.* at 93.

113. See *id.* at 92.

114. See *al-Quds*, 47/86-1 (974/1566), 47/181-1 (976/1568), 53/667-2 (978/1570), in 1 MUHAMMAD AHMAD SALIM AL-YA'QUB, NAHIYAT AL-QUDS AL-SHARIF FI AL-QARN AL-'ASHIR AL-HIJRI (al-Tab'ah, 1st ed. 1999) [hereinafter AL-YA'QUB] (on file with author).

115. See MUHAMMAD 'ISA SALAHIYA, SIJIL ARADI ALWIYA (Safad, Nablus, Ghaza, and qada' al-Ramlah: 974H-1556) 15 (1999).

116. See *id.* at 58.

117. See *al-Quds*, 296/64 (1228/1813); *Ballas*, 24/8-9 (1862) (on file with University of Jordan in Amman).

118. See *Nablus*, 199/2-12 (1266-1276/1850-1860) (on file with University of Jordan in Amman) (providing that women owned olive orchards and were involved in the production of olive oil).

119. See SALAHIYA, *supra* note 115, at 55.

120. See *al-Quds*, 296/64 (1228/1813), *Ballas*, 24/8-9 (1862), in ZIYAD AL-MADANI [hereinafter AL-MADANI] (on file with University of Jordan in Amman).

121. See *Alexandria*, 65/141-247 (1130) (on file with author).

even ran pawn-businesses.¹²² They had jobs in the entertainment business, danced and sang at weddings, and acted as heads of guilds of those groups.¹²³ Spinning, weaving, embroidery, and sewing were all important areas for women's employment, and they sometimes owned textile shops.¹²⁴

Traditionally, particularly among tribesmen and villagers, it was the women who were involved in wool production. Families that owned stock used its wool or milk to produce goods to be sold in the market.¹²⁵ Women also sewed and embroidered tablecloths, sheets, and sacks for storing food and clothing.¹²⁶ Although most of textile businesses were owned and run by men, some were owned by women.¹²⁷

In short, Shari'ah court records illustrate that women participated widely in almost all aspects of the marketplace, and that *qadis* did not question a woman's right to work in a particular job. A husband's approval of his wife's work or ownership of a business was irrelevant, in sharp contrast to modern labor laws in Muslim countries. Modern laws not only require a husband's permission before his wife takes a job, the wife must waive her husband's financial support of her if she works.

Generally speaking, personal contemporary status laws of Muslim countries seem to consider a wife's movements as dictated by, or at least under the control of, her husband. While social norms may be the determinant factor, this control is given justification as being the dictate of the Shari'ah. However, even though that was not the concern of courts before the establishment of modern legal codes including those now known as Shari'ah. Deconstructing the historical image of women shows that the controls under which they live today are really State-made and differ from practices before the modernization of law. This does not mean the pre-modern system was not patriarchal. It was a different type of patriarchy than exists today where State-

122. See *al-Quds*, 28-140/332-5 (1058/1648) (on file with University of Jordan in Amman).

123. See *al-Quds*, 46/12-2 (972/1564), 3/95-3 (939/1532), 83/156-6, 83/156-6, 235-5 (1010/1601), 1/267-2 (937/1530), 3/12-1 (939/1532), 23/585-12 (957/1550), in *AL-YA'QUB*, *supra* note 114, at 127.

124. See *al-Quds*, 291/322 (1230/1814) in *AL-MADANI*, *supra* note 120, at 90.

125. See *id.* at 81.

126. See Amman, 2/39-490 (1320/1902) (on file with University of Jordan in Amman).

127. See AHMAD AL-'ALAMI, *WAQFIYAT AL-MAGHARIBA* 60-61 (1981).

power is used to enforce legal patriarchal rules that confine the activities and rights of women. Put differently, it is not a question of God's laws that cannot be changed; rather it is a patriarchal State that refuses to change laws controlling gender and family. The pretext that this is in fulfillment of God's wishes is an excuse that is put into question once the specificities of women's history and the history of legal practices are brought to light.

CONCLUSION

Courts played a direct and important role in the life of both Muslim men and women before the legal reforms that began during the nineteenth century and continue today. Anyone could walk into court and present a complaint. The courts were located in such a way as to make them accessible to the public, and used non-formal language. Even the laws used were familiar to the population since they were largely based on local *'urf* and the *madhhab* most familiar to the population of that area. The modern State created a multi-court system in which personal status and family were itemized under *religious* law and the selections of codes compiled by committees was confined to the Hanafi code, resorting to the other *madhhabs* only when it suited the committee. The new legal system discounts the validity of legal practices accumulated over the centuries which had constituted a common law for Egypt's population even though it is presented as the same Shari'ah law that has always been in practice in Egyptian courts.

This Article has questioned the normative picture of Islamic history which paints legal practices that pre-existed modern reforms as backwards, denying any rights to women and restricting their basic needs like free movement and custody of their children. Shari'ah courts themselves have been regarded as arbitrary and primitive, and Weber's *qadi* justice paradigm as a picture of judicial discretionary power in an absolute form continues to be almost universally acceptable by Western scholars.¹²⁸ As this Article proposed, the normative picture of Islamic history and particularly the history of Muslim women is based more on

128. See, e.g., GERBER, *supra* note 2, at 1 (providing that sociologists and historians "are deeply influenced by the theories of Max Weber on patrimonialism and sultanism").

ideological presumptions than on research into the concrete realities of Islamic societies. Similarly, seeing modern law as bringing about greater rights for women is a misreading of the actual impact of these laws and the genesis of the Shari'ah law that guides personal status laws in Muslim countries today. These laws have been picked and instituted by the modern State and its reformers, who paid little attention to legal precedent from pre-reform Shari'ah courts as they sought to modernize and bring about new administrative structures. In so doing, State-society relations, the logic and function of the law, and the historical role of premodern Shari'ah courts were disregarded.