

## **WOMEN IN SHARI'A COURTS: A HISTORICAL AND METHODOLOGICAL DISCUSSION**

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In his book The Protestant Ethic and the Spirit of Capitalism, Max Weber divided law into tribal law, bureaucratic law, and what he termed "the legal order." 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, a legal system which is remote from personal interest and which is applied equally to all classes and sectors of society. In this scheme, Islamic law fell historically first under "tribal system" and later during the Ottoman period, the legal system 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 had to be present before a capitalist order could evolve. Only the Western Protestant ethic could have provided the culture through which the spirit of capitalism was possible. According to Weber, even though "capitalism [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."<sup>1</sup> Beginning with this thesis, Weber proceeded to lay down a theory concerning the relationship between modern socio-economic systems and religion that became the accepted basis for future scholars interested in explaining why the Western experience was not repeated elsewhere in the world. Privileging religion was at the center of this thesis.

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<sup>1</sup> Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (New York: Charles Scribner's Sons, 1858), p. 52.

Weber's model and methodology have become normative for comparative studies that begin with what an author considers to be a "superior" model or system to which others can only compare unfavorably for lacking all the ingredients of that model. This has been a serious problem with comparative studies whose primary interest or takeoff point involve historical transformations unique to a particular part of the world and therefore fall short of explaining the nature of culture or institutions of the other areas of the world under scrutiny. The methodology and intent are at the heart of the problem. One would imagine that the very fact that studying the process by which capitalism rose in Western Europe required placing that process within its evolving concrete historical experience would point to the need to apply a similar methodology in reference to other areas of the world with which the Protestant world was being compared. That has not been the case however; only little effort was exerted to apply the same methodology of focusing on specifics relevant to the historical process or the legal systems of Muslim countries. Like Weber, a "superior" legal framework based on the history of the Western world is presented followed by a discussion of how non-Western laws fit within the framework and where they fell short. The historical narrative becomes cursory and conveniently deductive.

In recent years research in the history of the Islamic world has grown perceptibly in quality and quantity. We know much more about the life of peoples of that area of the world and the archival record is being tapped for concrete evidence about how the legal system functioned and the type of justice people expected. Yet the Weberian model continues to underline analysis of Islamic history and society, to which the application of exogenous theories reflecting the experiences of other parts of the world is normative. While it is important to emphasize comparative studies to come up with a universal understanding of human history, it is even more important to interpret the histories of different societies making up the human family according to the actual facts and concrete experiences pertaining to them before any general conclusions about human history can be arrived at. From within such a perspective, the history of Islamic law and

legal practices is a long way from being written notwithstanding the great interest the subject is receiving today. Connecting law, society, and history is still a young science and the Islamic world continues to be seen as permanently ruled by unchanging principles of the Qur'an and Islamic medieval practices lingering under structures that have been defined as "sultanism" where the ruler has absolute power over all those he ruled. "Sultanism"--or "Oriental Despotism" 2 --appears in the pervasiveness of the "Qadi Justice" paradigm, 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. 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.<sup>3</sup> Haim Gerber's contribution<sup>4</sup> in particular has effectively dented Weber's thesis which, as Gerber explains, is based more on scholars' predetermined paradigms than on serious research. 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. He took particular issue with Weber's view that "Islamic law was judicially primitive and undeveloped" in comparison to its rational

2 Wittfogel, Karl A. *Oriental Despotism: A Comparative Study of Total Power*. New Haven: Yale University Press, 1957.

3 Jennings, Ronald C. "Kadi, Court, and Legal Procedure in Seventeenth-century Ottoman Kayseri." *Studia Islamica* 48 (1978): 133—72; "Limitations on the Judicial Powers of the Kadi in Seventeenth-century Ottoman Kayseri." *Studia Islamica* 50 (1979): 151—84; "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*. Edited by Anthony Bryer and Heath Lowry. Birmingham, 1986.

4 Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (New York: State University of New York Press, 1994).

archetype in the West. Gerber is correct in his criticism of Rosen, even though Rosen does criticize the exotic picture of Muslim judges that is 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."<sup>5</sup> 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.

This article takes up this discussion by focusing on the practice of law in Shari`a courts before the modernization of law and courts in the Islamic world, a process which began in the nineteenth century and continues until today. It shows that the laws practiced in Shari`a courts of the Ottoman Empire before the modernization of law fell somewhere in-between the two extremes presented by Gerber on the one hand and Weber and Rosen on the other and that Islamic law presents a system definable within its own terms, a system which loses its logic through comparatives and efforts to place it within grids fitting with other systems. While precedent was essential in Ottoman courts, qadis had important areas of maneuverability in which they decided cases. Here however, they were following important basic principles of law acceptable as common law, perhaps the most important principle being the sanctity of contracts. Respecting contracts as a primary objective of the legal system is of long standing in legal practices in the countries of the Islamic world extending to before the appearance of Islam and it is one of the most important admonishes of Islam repeated often in the Qur'an and Prophetic Sunna. Another important basic principle, common to most legal systems, is the protection of the weak particularly children and their property followed by women. Principles of istihsan and istihbab (preference) guided the judge in the direction of what was expected and preferable depending on the sociocultural and economic context of the

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<sup>5</sup> Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (New York: Cambridge University Press, 1989), p. 59.

people he served. Government qanun (edicts) were followed by the judge who ultimately represented it. But unlike modern nation-states, the pre-modern state did not establish legal codes determining social relations; rather it passed executive orders pertinent to collecting taxes, payment and amount of the diyya (blood-price), and various types of security measures. With these guides and the Islamic Shari`a as 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 or court procedures, these took place only in the modern period as nation-states were being carved out of the previous Ottoman Empire 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 have been transformed in shape, philosophy and intent.

In the case of Egypt whose archival record will be one focus of this study, modernization of law began early in the nineteenth century under Muhammad `Ali Pasha. 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. This was followed in 1882 by the establishment of a national court system with jurisdiction over property, business, national and criminal litigation. Later between 1880 and 1897, modern Shari`a courts and milla (sectarian) courts were established to deal with litigation regarding family and personal affairs of Muslims and various non-Muslim religious denominations. This divided court system remained in effect until 1952 when they were unified into one court system. As inspiration for its new courts, Egypt turned to the European example, which should have been expected since the reformers themselves were either British advisors to the Egyptian government or Egyptian graduates of French and British law schools. In Shari`a Courts, the Islamic Shari`a was designated as the source and basis of the law, while in Milla Courts, Christian or Jewish laws pertaining to family and marriage sanctioned by church or synagogue, were to be followed supplemented by Islamic law

where laws were lacking as was the case in regards to inheritance laws which were applied to all religious groups and denominations.<sup>6</sup> The main purpose from 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, and modernizing the legal system through standardization of legal procedures and applying principles of legal process and rule of law. By streamlining the legal system, laws became more homogenous throughout the country. By educating judges 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-state building.

Future generations of lawyers and legists looked positively on the reforms. Scholars as well regard the modernization of law positively and feminists lament the fact that the same westernization of 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`a applied by modern Muslim states is an extension of the laws in practice since the rise of Islam and that this Shari`a continues God's basic laws for his believers as dictated by the Qur'an and the Prophetic Sunna (actions and words of the Prophet Muhammad) and Hadith (Prophet's saying collected over a hundred years after his death). Liberal aspects of Shari`a 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, fundamentalists 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

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<sup>6</sup> 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.

medieval theologians of their choice with little reference to actual legal practice in Islamic courts before the modernization of law. Translated into calls for change regarding women and family, the Shari`a is looked at by feminists and those calling for westernization of law as being the main cause for the backwardness and patriarchy of the laws under which Muslim women live today, at the same time 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, that they be confined to the home, not going out except for emergencies or with their husbands' approval, that they do not work except from within the home and that they limit their movements and education to what is prescribed to them by Islam. As for contemporary courts in Muslim countries, they apply a legal system somewhere in between these two extremes. For example, while allowing women to work in accordance with constitutions promulgated by modernizing states, they nevertheless require that a wife receive her husband's approval before she could take a job. Some countries, like Jordan, have permitted the wife to work but in return her husband no longer had the responsibility to financially support her even though that 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. As for marriage, the modern state has allowed a husband the same rights as always to divorce his wife at will but forbade the wife from having a similar right to divorce from the husband except with his approval or if he is impotent or for lack of financial support. Even impotence is not an absolute reason for divorce since in most countries applying the Hanafi school of Islamic law, if the wife knew at any time of the husband's impotence and did not proceed immediately to sue for divorce, she is denied the right to do so in the future. Though personal status laws under which women live today are said to be the Shari`a and fundamentalists are calling for a further extension of a conservative form of this Shari`a, the Shari`a in practice today has very little to do with the one practiced in Shari`a courts before the reform of the law. After all, women worked and invested in businesses and they had access to divorce through the courts. Unlike courts

today, qadis had no right to force a woman to stay with a husband that she wanted to divorce nor did he question her reasons for asking for divorce. His was a role of negotiation regarding financial rights and support given the circumstances of the divorce. Modern family law clearly worked against women.

One of the main reasons for the change in the treatment of women in modern Shari`a courts is the fact that when modern states build new separate Shari`a courts, they did not apply precedents from pre-modern Shari`a courts as basis to be followed by judges. Rather, they constructed legal codes compiled by committees and then handed the new codes to judges educated in newly opened judge schools and had them apply them in court. In the process, the logic of the court system and the philosophy behind Shari`a law with the maneuverability and flexibility it provided to the public and qadis alike was 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 which ultimately worked against the weaker members of society—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 judges, 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. Altogether I hope to illustrate that a viable court system existed which was organically linked to society, in which precedent played an important role, where judges had certain rules to follow but who were guided by urf familiar to the people they served and judged according to the madhhabs they belonged to as well as their own judgment. The system was flexible and there to provide an avenue to 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 come and sue in court, the flexibility of the system allowed women to maneuver to determine their marriage contracts and the conditions under which they lived. They also had complete access to divorce a husband they did not want to continue with, a far cry from modern law that adopted rules of placing women under the full control of their husbands who had to agree before divorce could take place, the exception being lists set up by the state which had to apply to a particular situation before divorce could be granted. Because Shari`a court records were not used as precedent for modern Shari`a 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.

#### **Justice in Shari`a Courts**

While the Hanafi madhhab (school of law) was the “officially” recognized legal school of the Ottoman Empire, all four schools (Hanafi, Maliki, Shafii and Hanbali) were practiced in Shari`a courts. The theological collections and interpretations of these legal schools were available to qadis to consult in their decision-making although there tended to be a preference for particular madhhabs depending on place and class. In Egypt, whose Ottoman records will be the focus of this article, the Shafii and Maliki madhhabs were preferred in Lower and Upper Egypt respectively while the Hanafi was preferred by Ottoman Turks from Anatolia where the Hanafi madhhab was almost universally followed and other Ottoman subjects living or traveling in Egypt, e.g. Syrians, as well as wealthier citizens and government officials. While the chief qadi was always a Hanafi assigned from Istanbul, qadis specialized in the various schools rendered court-decisions and each school had its own mufti (jurist) who delivered fatwas (juridical opinions) in answer to questions from the public. Qadis could search widely for interpretations among exegetic writings and juridical literature, more usually

however, their findings were determined according to local `urf (traditions). It was also not uncommon for a judge to follow his decision in a particular case by declaring that he reached it in “accordance to whichever school of law accepts it” (`ala madhhab man yara dhalik).

In other words, even though the qadi may have belonged to one particular school, all legal schools and their branches were open to him as legal reference and judicial discretion seemed to be more oriented toward the type of common law expected by the people whom the court served. This conclusion is supported by the great consistency in legal decisions given time and place. It is also supported by the fact that those who came in front of a qadi of a particular madhhab seemed to know something about the position of the madhhab in regards to the issue being litigated. Since any person could take his case in front of the qadi of a particular school to litigate, people tended to choose the madhhab they believed would be most beneficial to them. Hence the consistency in resorting to qadis of particular madhhabs depending on types of dispute, socioeconomic status and gender of the individual seeking justice. For example, the Hanbali school seems to have been a favorite among those who were signing rental contracts of waqf property. This was probably due to the fact that the Hanbali school did not approve of raising rent once a contract was written and allowed for the inheritance of contracts at the same price and conditions. In contradistinction, rich patrons preferred the Hanafi school for contractual transactions because the Hanafis regarded the value estimated in contracts on the basis of gold/bullion and therefore fluctuating with time while the other schools insisted on the return of a loan at the same amount as contracted no matter the change in the value of money. Class therefore played a role so that we see towns which were becoming more important as commercial or administrative centers turning slowly toward the Hanafi madhhab which was more amenable to commercial and administrative authority. The towns of Dumyat in Lower Egypt and Isna in Upper Egypt are such examples. Having started off as Shaf'i and Maliki towns respectively at the beginning of the Ottoman period, Dumyat and Isna moved increasingly toward the

Hanafi madhhab and by the end of the seventeenth century the majority of cases recorded in Dumyat courts were Hanafi. This is evidenced by court records.<sup>7</sup> When it came to marriage and other family issues, the tendency was to go to the qadi of the particular madhhab the person belonged to. That is why we see a greater density of Maliki jurisdiction in towns like Alexandria where there was a large Maghribi (North African) community and in Upper Egypt where most people belonged to the Maliki madhhab. But even in non-Maliki areas, women often preferred to have their financial support and alimony judged according to the Maliki madhhab because it was more favorable to women, for example it considered alimony as payable from the moment of divorce, while other madhhabs calculated the alimony from the time a wife won litigation in court.

In contradistinction, after Egypt's legal reforms, which began in the 1870's, judges were assigned the government's legal code and told to apply it in court. They had to stick to the letter of the law. The difference between the two approaches was quite significant but was perhaps to be expected given the historical transformations Egypt was experiencing as it moved from being a province of the Ottoman Empire toward independence as a nation-state. Politically, during direct Ottoman rule of Egypt (1517-1798), the state had a weak presence, and Egypt located at some distance from the Ottoman centre, was independent of direct centralized administration controlled from Istanbul. 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 (elite or establishment) combines formed of mamluks, tujjar (large-scale merchants) and multazims (tax-farmers), with the 'ulama', guilds and other social groups playing important roles within the hegemony.

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7 For a detailed discussion about the connection between changes in application of madhhabs in Shari'a courts and historical transformations see Amira Sonbo, "Adults and Minors in Ottoman Shari'a Courts and Modern Law," *Women, The Family and Divorce Laws in Islamic History* (Syracuse University Press, 1996).

The control over Egypt was therefore indirect and the ottomans acted through a Pasha who was sent out from Istanbul and who acted more as an agent of the Sultan in Cairo than a despot. Pashas held on to their positions for short terms and the turnover was fast, the usual appointment being about one to three year. Fast turnovers were not unique to Pashas but also applied to most leading personnel sent from Istanbul including the qadi askar or qadi al-qudat (chief judge) who acted as head of the Ottoman judges in Egypt as well as the muftis of the four religious schools. The qadi askar was also responsible for collecting government taxes and overseeing legal affairs of Turks in Egypt. Short tenure made it difficult for leading officials to form power centres or alliances with the different khassa combines in Egypt as was to happen later to help Muhammad `Ali become Egypt's Pasha.

The administration of Egypt was organized through the Pasha's diwan (council) in Cairo Citadel. Here top officials met to discuss and make suggestions to the Pasha. They included the chief justice, head of the treasury, the mamluk beys, chief `ulama', and the heads of the different ojaks (Ottoman military corps).<sup>8</sup> The muftis of the Hanafi, Shafi and Maliki madhahib also had a place in the diwan because of their importance as legal officers and credibility among the public. According to Farhat Ziadeh, the Ottomans relied heavily on the muftis and qadis, who were "indigenous" to Egypt. "This reliance on the cooperation of indigenous jurisconsults was notable in Egypt because it did not undergo the heavy imposition of Turkish reorganization, as did many Ottoman provinces."<sup>9</sup>

The Pasha followed orders sent out from Istanbul, he 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

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8.. Henry Laurens, Charles Gillispie, Jean-Claude Golvin, and Claude Traunecker, L'expédition d'egypte : 1798-1801 (Paris: Armand Colin, 1989), p. 63.

9 Farhat Ziadeh, Lawyers, the Rule of Law and Liberalism in Modern Egypt. Stanford 1968.

diyya (blood-price) and the kharaj or religious tax.<sup>10</sup> However, the chief justice, heads of military corps, head of treasury and Azhari `ulama' did not come under the direct authority of the Pasha. The chief treasurer was answerable 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. Malikis 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 mobility and freedom of the judiciary and most importantly a linkage between society and the judiciary where common law played a significant role in the rules and decisions made by judges in court. This does not mean that the Hanafi code was not the "official" law school of the Ottoman Empire, that was the case, but "official" did not mean centralized official control over the judiciary as is the case in modern nation-states; such centralization had little relevance before the modern period. If anything, Hanafi law may have been applicable to the Ottoman executive Qanun or political edicts, but it had little relevance to laws concerning social relations before the modern state formulated a uniform law and enforced it on all its citizens. Survey of Shari`a court archival records before the Hanafization of law which I date during the nineteenth century when the Hanafi code was made the source of new personal status and family law, shows an overwhelming dependence on Shaf'i and Maliki qadis throughout Egypt. 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

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<sup>10</sup> `Abdal-Razaq Ibrahim `Isa, *Tarikh al-qada' fi misr al`uthmaniyya: 1517-1798* (Cairo: al-Hay'a al-`Ama lil-Kitab, 1998), p . 14.

code predominated, for example the Syrian community. Moreover, if administrative supervision by the Hanafi qadi was required, records do not show any direct interference of the qadi al-qudat in court decisions. Such approval would have been recorded if that was required, but the freedom of the qadi to reach decisions seems to have been the practice in Ottoman courts. Furthermore, while the qadi al-qudat's office was located in Cairo, provincial courts show daily personal transactions that in theory have been indicated by scholars as being the sole authority of the qadi al-qudat such as tatliq (divorce granted a woman by a judge) by which a woman asked the judge to divorce her from her husband. We do not see references in provincial court records that the presiding qadi referred his decision to grant tatliq to the qadi al-qudat for his final decision. One must assume that either the records are lacking in details and that women had to wait for the result to be returned from the office of the qadi al-qudat in Cairo, or that the authority of the chief qadi 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 qadis often postponed trials for further investigation or the presentation of witnesses or documents and these reasons were written down in the case record. Delaying a decision for a final decision by qadi al-qudat would therefore have been recorded if that was the action taken by court.

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 are basically similar in shape and function as those from the much better studied ones dating from the Ottoman period.<sup>11</sup> Recording contracts in courts, usually seen as regulated under the Ottomans, actually existed since Ancient Egyptian

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<sup>11</sup> See Islamic marriage contracts from the third to fifth century Egyptian courts published in Adolph Grohmann, *Awraq al-Bardi al-'Arabiyya bi Dar al-Kutub al-Misriyya*, Vol. I (Cairo: Matba`at Dar al-Kutub al-Misriyya, 1994).

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 of debts, wills and inheritance.<sup>12</sup> Even more telling is the fact that the first four pages of sijill 1 (volume 1) of the Ottoman archives for the Shari`a court of the Mediterranean port town of Dumyat date back to 1505 when the Ottoman invasion took place in 1517. The rest of sijill 1 dates from after the Ottoman takeover. 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. This necessitated the payment of fees, a fact which angered Egypt's people who had the option to register or not register their marriages before the Ottomans. 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 the extraction of wealth from the country while at the same time making it pay for itself. Consequently, they expected the courts to support the structures and the remuneration of the personnel attached to the courts. Requiring the registration of marriage in court made the court a direct player in personal relations and family relations. Another impact of the Ottomans on the Egyptian judiciary system is that they extended and spread the court system throughout Cairo and various parts of Egypt and the hierarchy of courts seemed to grow with sub-courts to serve a wider network of people and providing greater accessibility to legal services.<sup>13</sup> It should be

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12 Anne K. Capel and Glenn E. Markoe, eds., *Mistress of the House, Mistress of Heaven* (New York: Hudson Hills Express with Cincinnati Art Museum, 1996), p. 181.

13 Ramadan al-Kholi, "Archives as a Source of Women's History: Problems and Limitations." A History of Her Own: Deconstructing Women in Islamic Societies, ed. Amira Sonbol, forthcoming: Syracuse University Press, 2004.

pointed out that the existence of extensive nets of sub-courts is only now being researched, the delay in recognizing their existence is due to the fact that the records of sub-courts were included with the record of the major court of the 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 Ottoman rule<sup>14</sup> each was headed by a qadi and assisted by numerous deputies (na'ibs). 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 court-rooms or sub-courts of the town or its environs.

At the beginning of Ottoman rule, only na'ibs (qadi deputies) 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.<sup>15</sup> Qadis had significant authority in the communities they served. Since a qadi's tenure lasted a long time, he was generally familiar with the neighborhood and its traditions as well as those who lived there. His 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, land-survey, and, the supervision of customs and control of the income they generated in port-towns, which was one reason port judiciary

<sup>14</sup> `Abd al-Hamid Suliman, Tarikh al-mawani al-misriyya fi al-`asr al-`uthmani (Cairo: al-Hay'a al-Misriyya al-`Ama l'il-Kitab, Tarikh al-Misriyyin series no. 89, 1995), pp. 91-92.

<sup>15</sup>. Ziadah, p. 31-34.



districts were considered a prize for any qadi.<sup>16</sup> 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 judge and his community shows us a different dynamic to inter-societal relations than is usually understood when the picture is seen 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.

#### **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 they became quite busy as evidenced by court records. Reading these records, the researcher feels indebted to court-clerks who recorded details that are often missing in archives of other Islamic countries. While some entries are formulaic and/or short and give limited information, others are lengthy descriptions of the transactions undertaken in court that allow a glimpse at court culture. A picture of a vibrant society emerges from reading the records. Men and women, going on with the business of living; buying, selling, and renting property; recording marriages, demanding divorce or child-custody; reporting rape, murders, thefts and other crimes; demanding restitution, diyya (blood-price) compensation, or disputing property rights and partnerships. All were normal functions that were disputed or recorded in court. Lists of what the dead left behind sometimes give minute details of the items that people had in their houses, that they

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<sup>16</sup>.Farahat, p. 21.

prized, and that they collected over the years. Division of wealth through inheritance is also very telling, for example if the husband had two wives when he died, how many children and whether they were from different wives and so on. 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, rich 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, not the least of which is that 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 individual expectations. Altogether, if Shari`a court archives demonstrate anything, it would be the great diversity of the transactions executed there depending on the time, place, and social conditions of the parties involved. This means that even though the basic laws followed were Shari`a laws, their administration and execution differed not only from place to place but also from case to case. Suiting specific conditions was no problem as long as the main outlines of the Shari`a were followed. Basic Shari`a requirements in marriage include the necessity that the wife be khaliyya (free) to marry and that the marriage be witnessed and public. Other matters included by fuqaha' as necessities without which a marriage could not be valid, were often waived in court. These are particularly pertinent to "rights" due to either party to the contract. Thus, even though the Shari`a guarantees a wife support from her husband, including food, housing, and clothing, such conditions could be waived or amended in the contract when the wife agreed. Similarly, the Shari`a may allow the husband to take four wives, but that right was frequently waived as a wife's condition for marriage.

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 for a general picture, but detailed reading, comparison and analysis is necessary if we are to understand how women really lived, how realities fit with general

exegetic discourses, and in what way legal practice changed from one period to another. Ultimately, how changes in a legal system transform the status of women. Because so many conclusions have been established and accepted about modernity and the status of women, a superficial reading of court archives yielding fast and immediate results can only harm social history. A systematic approach with the intent of reading over as many years as possible with an eye to comparison and determination of consistency and change is almost imperative in research regarding gender. Given the hundreds of thousands of records available in this archival treasure, it makes little sense not to cover the material adequately.

Given the condition of the records, the ambition to cover as much as possible may be just that, too ambitious. These are handwritten documents and the handwriting leaves a lot to be desired as is usual with such records. Still, some clerks wrote more eligibly than others and some had pretty good calligraphy skills. There are also “pointers” 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 colour—usually red—is used. Thus words like “nikah” (marriage) or “asdaqqa” (paid the dowry, which is another way of saying “marriage”) would be included in large script and the reader looking for such entries can do so much easier. Dating is also very important. Unlike modern records that compile cases according to type in various archives, Shari`a 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. So, 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 the court and the process of registration is not entirely clear. However, we do know that in major cities like Cairo and Dumyat, qadis of the various schools 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.

Records of sub-courts were brought to the major central court and recorded, usually all at the same time at the end of the working day. Only Hijri dates are used until the end of the nineteenth century when the Gregorian calendar was added to the Hijri date for all entries, an indication that the records were being modernized and that state-records were now following European dates. One can call that a further step toward globalization. As for the shape in which pre-modern Shari`a court records are found today, i.e. bound together in volumes with page numbers and numbers given to the various entries, this is quite modern. Modern librarians have introduced one system after the other to try and control these records, hence the often double entries and discrepancies among researchers whose data may be the exact same but the references change. Fortunately, indexes are kept to reconcile the various references. Because certain records were left out and not bound with the rest or it is not clear exactly where they belong, they are banded together into a group called sijillat dasht (records to be discarded) and are available to the researcher.<sup>17</sup> These are extensive and important, they are also numbered. These are problems that the researcher has to contend with.

Reading court records gives the impression of crowded courts, with various judges present, each judging according to his madhhab. Assisting the judges were court witnesses (shuhud), usually `udul (trusted men) who were really official court personnel whose job was to witness court procedures, and court clerks, each with his own style and

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<sup>17</sup> Until recently, such documents were collected together and bound, sometimes by researchers. IN 1992, I remember contributing LE 10 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 doing the preservation of these records by his own hands.

handwriting skills. Clerks recorded what transpired in front of 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 description. Thus we often get a description of the litigants when the woman appeared in court and the clerk recorded her features or how she was dressed or her colouring. Some recorded the conversations that went on between the litigants, while others simply recorded a short record of their findings. One can generalise about these records by noting that the larger and more active the town, the more detailed are the court entries. Perhaps that was required in recording various types of transactions as well as the need to identify the individuals involved who originated from various provinces of the Ottoman Empire and towns of Egypt. Thus we find that court records from Cairo, the Mediterranean port of Dumyat, and Isna in Upper Egypt, all show a tendency toward descriptiveness into the nineteenth century. It should be noted that court records from Alexandria in the North, all the way until the middle of the nineteenth century, are quite similar to other Egyptian towns like Assiut in the South. The nature of court records tell us a great deal about the history of towns. 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.

Another indicator of legal and social change in court records has to do with crime. Reports of various crimes or citizen complaints and litigation regarding crimes committed against them 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. One thing that becomes immediately evident from crime records is that the numbers of various types of crimes seem to climb with the coming of the nineteenth century. Since bureaucratic

rationalisation was extended under the rule of Muhammad `Ali Pasha, we see that crimes began to be recorded as a separate category in their own record books. During the Ottoman period, court cases were recorded as they appeared, were 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, and so on. The nineteenth century witnessed the categorization of cases beginning with the Muhammad `Ali period when crimes begin to be recorded separately so that by the second part of the century they are 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). Each ma'dhun kept records of the transactions in which he officiated separately; today they can be found catalogued under their particular names in the national archives. This seems to follow the same system introduced in France during the nineteenth century by which particular types of transactions undertaken in court were organized together in a separate archive. Also like France, marriage and divorce transactions were recorded under the name of the notary-public who officiated and they are indexed under the name of notary-public in French archives.

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. They contain details about life situations like for example when a thief breaks into a home, a murder takes place, rape is reported, a field is burned, a cow, donkey or horse lost or stolen, arguments in marketplaces that often lead to violence, wives in polygamous marriages quarrelling together leading to violence, and so on. We learn of gender relations, the power women wielded in their homes and villages, what constituted owning property in contrast to what the laws tell us must have existed, and so on. For example, the court records may include the husband's name as the owner of a particular piece of property or to the home in which he and his wife lived. Yet, the

Zabtiyya record usually referred to property where a theft or arson has taken place as belonging to the husband and wife together and did not designate it as belonging to the husband alone.

Study of court records indicates the role that the judicial institution played. Courtrooms, as daily entries testify, were full of people. People of ordinary background, women, plaintiffs and petitioners with a variety of problems had little hesitation to bring their problems to the qadi. There are a number of reasons for this. First, justice was rapid and simple, punishment was executed right away except when it came to sentencing to death, here procedures demanded taking the matter up to higher officials and 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 judgement of a case on social traditions and expectations, the 'urf' of the population. Thirdly, each court room had representatives of the four schools of law, Hanafi, Shafi'i, Maliki and Hanbali, thus giving the claimant the choice of having his case handled by the one he preferred. As Nelly Hanna has shown in her biography of Shahbandar al-Tujjar Isma'il Abu Taqia, courts were vital as a supporting institution for commercial activity. There they recorded transactions, filed complaints and had their partnerships witnessed. The documents detailing these partnerships included the amounts of money being 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. Hanna's significant analysis of the commercial activity of the seventeenth century showed a dynamic economy and a population active in production and trade.<sup>18</sup> If anything, courts constituted an important and familiar institution in people's lives in Ottoman Egypt, going to court was simple, court-houses were located in accessible points and the doors were opened to all. This included non-Muslims who came to court to register land, establish waqfs, inheritance, custody and all

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<sup>18</sup> Nelly Hanna, Making Big Money in 1600: The Life and Times of Isma'il Abu Taqiyya, Egyptian Merchant (Syracuse University Press: 1997).

other matters that Muslims litigated or resorted to court for. Non-Muslims also came to Shari`a court to sue for divorce or transact a second marriage, acts that were forbidden by their own churches but could be transacted in Shari`a courts. In other words, even though Shari`a courts may be looked at as religious courts, in actual fact before the modernization of law, Shari`a courts were really state-courts open to all people for legal matters. 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 that they submit to the law of the church to which they belonged to.

#### **Women in Ottoman courts**

Courts did not differentiate on the basis of gender. Men and women were equally required to appear in court in cases involving them. If they were not able to appear in court or did not wish to, the man or woman usually delegated someone else to appear in court in their place. For example a husband could have been represented by his father in a nafaqa case because he was not present in town; a wife could have sent her father in her place when she was summoned to court to hear her husband's request that she return to the marital home and live with him or else he would cut off her nafaqa; or a woman may have sent her son to represent her in a dispute over her share in a palm tree grove. When such a deputation took place, either a written document had to be presented to the qadi or witnesses be brought to court to testify to the legitimacy of the proxy. Both men and women had to be identified in court and from some of the descriptions left by clerks we know that women were not usually veiled when they appeared in court. When they were veiled, as was the case with tribal women, the veiled woman had to bring witnesses to vouch for her identity.

How to handle a veiled woman (al-mar'a al-mutanaqiba) in court seemed to be a subject of debate among qadis and fuqaha', an indication that it was not usual for women



to appear veiled in court. All saw a need to ascertain her identity, but they differed according to the methods by which they could identify her as the person she represented herself to be. Such a debate among judges is discussed in Kitab adab al-Qada' of the Syrian Shaf'i judge Shihab al-Din Ibrahim ibn `Abdallah (d. 1224) who worked as judge in Aleppo, Damascus and Cairo. In a chapter titled "In regards to witnessing by or about an unknown person and a veiled woman identified by two male guarantors" al-Damm discusses how various qadis debated exceptional cases brought in front of them in court. One case judged by a qadi al-Qaffal involved a veiled woman who was identified by two men accompanying her. The usual practice in regards to women wearing the niqab (full face veil) appearing in court was that they bring two male witnesses of good judgment to vouch for their identity. Al-Qaffal however refused her witness because his two assistant shahid `adl found her witness to be unacceptable because there was no guarantee that the two men who vouched for her identity had seen her face uncovered.<sup>19</sup> In other words, the appearance of veiled women in court was the exception and not the rule, and the courts were concerned that a person must be identifiable by other witnesses who would have been present at the time a particular incident took place. This is supported by court records, identity of witnesses or litigants was essential including that of Bedouin women who were identified as Bedouins in the record and the names of their tribes or clans were also normally included. The niqab was normal for Bedouin women while they are in urban centers, but was not normal for women in general which is evident from the archival record where we find the facial descriptions of a woman clearly outlined, her coloring, shape of the eyes, her tattoos and so on. In other words and in contradistinction to stereo-typical images of Muslim society before modernization, women normally went about without their faces being covered.

Women were also victims and perpetrators of crimes. Courts did not seem to differentiate between women and men when it came to crime although what is evident is

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<sup>19</sup> Ibn abi al-Damm, Kitab adab al-qada' al-durrar al-manzummat fil'aqdiyya wal-humat (Beirut: Dar al-Kutub al-`Ilmiyya, 1987), pp. 280-282.

that women were more victims of male violence than the other way around although female violence against men was also recorded. Violence against women included murder, sometimes at the hand of a husband who confessed to the authorities after having killed.<sup>20</sup> A body could have been found and the court daya or qabila (midwife) was sent out to investigate the death if it was a woman, or a male practitioner, barber or doctor, was sent to investigate if it was a man. Women brought complaints of rape to court demanding compensation or the punishment of the offender. While rare in smaller courts, the courts of large towns like Cairo, Dumyat and Alexandria received frequent complaints of rape committed not only against women and girls but also against boys. Comparison of how courts handled rape cases against different genders is illuminating regarding such basic gender issues like a girl's virginity given the equal treatment of rapists by courts whether the victim was a boy or a girl. The requirements in rape cases to prove that such a crime actually took place is also very important for what it tells us about the legal system, courts, evidence, and the intricate system of witnessing and determination of a witness's credibility. It also tells us of the importance of social relations and personnel reputation given the necessity of providing creditable character witnesses in disputed cases. Finally, given the willingness of fathers, brothers, mothers and girls to come forward in court to demand punishment of a rapist and the payment of compensation, questions regarding morality and the outlook of society regarding sexual crimes clashes with the usual tribally-oriented image of punishing the victim for sexual crimes committed against her.

A serious change took place with the introduction of Western laws as a basis for criminal law in Muslim countries ruled by colonial powers. Criminal codes and legal precedents particularly from France became the norm for countries like Egypt, Lebanon and Syria. While Ottoman Shari`a courts required that an accusation of rape be proven before passing any judgment against the perpetrator, modern courts were not satisfied

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<sup>20</sup> Egypt, National Archives (Dar al-Watha'iq al-'Umumiyya), Shari`a Court records, Isna 1193 [1779], 30:11-40.

with proof of rape but introduced the issue of intent as part of the formula. According to the new laws and following French courts, the actions of the victim became a source of scrutiny. Did she entice him? Was it her actions rather than his intent to commit rape that pushed him to take such an action? Opening such questions not only put women on the defensive and allowed men to get away with rape, but it also meant that families were not willing to come forth with accusations of rape since the morals of their female member, or young male or female child, would be the focus of the trial and the dishonor would not go away. This has had a direct impact on the rates of various types of gender and sexual crimes that are constantly rising. The consequence to women and children cannot be undermined.

If premodern Shari`a courts illustrate anything, it is that the stereo-typical image of Muslim Women as secluded women living outside of the public sphere under the full control of male relatives is seriously challenged by the variety of activities that are included in litigation or contractual records. Like men, women came to court for all sorts of reasons. They sued husbands, brothers, fathers, children and business partners for property and loans. They also sued for wages or for payment of debts for goods and services. They disputed property lines, brought grievances against those who stole their spots in marketplaces, and against men or women who may have insulted or beaten them. Women also sued their husbands for financial support, for loans that husbands did not reimburse them for, delayed dowry, divorce and child-custody. They recorded their marriage contracts in court and made sure to include whatever conditions made them happy. In other words, women seemed familiar with the courts and used them when there was need. Suing for divorce in particular constituted an important percentage of cases brought by women to court. This was probably because unlike husbands who could simply divorce their wives at will, a woman had to be divorced by the qadi (tatliq). While more men appeared in court to answer to crimes they committed or to stop paying nafaqa (financial support) to disobedient wives, wives came for family issues. Recording of marriage contracts was a major reason for men and women to appear in court and it

was quite normal for a wife to be present when the contract was transacted. Women also came in their capacity as guardians to transact the marriages of their minor children. Even though today's Shari`a law demands that a male relative, father or brother, be present to contract the marriage for a daughter or sister, in premodern courts it was quite normal for a minor child to be married by the mother as his/her guardian. This right of wilaya (guardianship) was denied women by modern state-Shari`a law which confined wilaya to a male. Besides family and personal reasons, it was common for women to register sales or debts due them or by them in court. They also registered waqfs they set up with all the details involved in such transactions like who are the direct beneficiaries and how the waqf would be handled and by whom. Women also disputed property rights in court. A good example is that of an 1862 Upper Egyptian woman from the town of Ballas who sued her neighbors, three brothers, for extending their house into her property. The brothers denied the fact in court, but after the woman presented her evidence and witnesses, the brothers decided to settle the matter out of court and financially compensated her after which the woman returned to court and dismissed her complaint.<sup>21</sup> 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.<sup>22</sup>

It should also be pointed out that Shari`a court records illustrate clearly that women were very active in business and crafts in the Otoman Empire. For example Palestinian records show us that women did daily work for which they were paid by the day, they worked in quarries, they owned property, lent and borrowed money, and controlled waqfs. They also acted as multazims (tax-farmers), they were also chosen as heads of women-guilds in crafts where women worked in large numbers. There are citations of women having been heads of guilds of physicians, weavers, dalalas,

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<sup>21</sup> Ballas 1279 [1862] 24:8-9.

<sup>22</sup> Dumat 1011 [1602], 43:57-110.

beauticians and entertainers<sup>23</sup>, we know that these were 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.<sup>24</sup> Women owned grinding mills<sup>25</sup> or owned such mills in partnership with a husband<sup>26</sup> or another person.<sup>27</sup> They owned olive orchards and were involved in the production of olive oil.<sup>28</sup> They invested in mulberry orchards and other fruit producing trees.<sup>29</sup> Real estate was one of the most important areas in which women invested as the archival records demonstrate.<sup>30</sup> Women were also involved in traditionally male crafts like manufacturing soap,<sup>31</sup> goldsmith<sup>32</sup>, pottery<sup>33</sup>, and bakeries<sup>34</sup>. Waqf records show us that property held by women included village real estate, orchards, rental houses, shops, olive oil juicers (ma`sara), baths (hamams), bakeries, and sale-spots (masatib) in marketplaces.<sup>35</sup> Women also owned and ran coffeehouses,<sup>36</sup> worked as sagqas (water carrier), an essential service for cities of the Middle East. They served in baths as attendants, masseuses, beauticians/hairdressing (mashata), kahalas (pseudo-oculist who uses kuhl as cure) and even ran pawn-businesses.<sup>37</sup> They had jobs in the entertainment

23 Al-Quds 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; 939[1532], 3:12-1; 957[1550], 23:585-12 in al-Ya`qubi, Nahiyat al-quds, vol. 1, p. 127.

24 Document published in al-`Assali, Watha`iq Muqadissiyya Tarikhiyya, vol. 1, pp. 108-121.

25 Muhammad `Isa Salahiya, Sijil aradi alwiyya (Safad, Nablus, Ghaza, and qada' al-Ramlah:974H-1556 (Amman: Jami`at Amman al-Ahliyya, 1999), p. 15.

26 Amman, University of Jordan Library, Al-Salt Shari`a Court, 1320[1902], 7:97-206.

27 Salahiyya, p. 58.

28 Nablus Shari`a Court, 1266-1276[1850-1860], 2-12:199.

29 Al-Quds Shari`a Court, 1228[1813], 296:64 in Ziyad al-Madani, Ballas 1279 [1862] 24:8-9., 1998), p. 152

30 al-Madani, p. 158.

31 Ibid., p.172

32 Ibid., p. 93.

33 Ibid., p. 92.

34 Al-Ya`qubi, Nahiyat al-quds, vol. 1, 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.

35 Salahiyya, p. 55.

36 Alexandria Shari`a Court(1130), 65:141-247.

37 Al-Quds Shari`a Court, 1058[1648], 28-140:332-5.

business, danced and sang at weddings and acted as heads of guilds of those groups.<sup>38</sup> Spinning, weaving, embroidery and sewing were all important areas for women's employment, and they sometimes owned textile shops.<sup>39</sup> Traditionally, particularly among tribesmen and villagers, it was the women who were involved in wool production. Families could already own their stock and use its wool or milk to produce goods to be sold in the market.<sup>40</sup> They also sewed and embroidered tablecloths, sheets and sacks for storing food and clothing.<sup>41</sup> Women also owned workshops for sewing clothes and shops for selling them although most of the textile retail businesses were owned and run by men.<sup>42</sup> Courts also show that women came to court to sue for lack of payment for good they delivered.<sup>43</sup> Sometimes dalalas were forbidden from practicing by the qadi because of malpractice, in this they were treated like their male counterparts.<sup>44</sup>

In short, Shari`a court records illustrate that women participated widely in almost all aspects of the marketplace, and that qadis did not question their rights to work in particular jobs. Whether a husband agreed to his wife's work or owning her own business did not have relevance to the court as is the case in modern labor laws in Muslim countries which require a husband's permission before his wife is allowed to work and denies her his financial support if she does. Generally speaking, personal contemporary status laws of Muslim countries seem to consider a wife's movements as dictated 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 dictates of the Shari`a

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38 Al-Quds 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; 939[1532], 3:12-1; 957[1550], 23:585-12 in al-Ya`qubi, vol. 1, p. 127.

39 Al-Quds Shari`a Court, 1230[1814], 291:322 in al-Madani, p. 90.

40 al-Madani, p. 81.

41 Amman Shari`a Court, 1320[1902], 2:39-490.

42 Ahmad al`Alami, Waqfiyat al-Maghariba (Amman: Markaz al-Watha'iq wal-Makhtutat, 1981), p. 60-61.

43 Al-Quds Shari`a Court, 1054[1644] 27-134:131-6.

44 Al-Quds Shari`a Court, 1071[1661], 151:603-1.

even though that was not the concern of courts before the establishment of modern legal codes including those titled Shari`a. Deconstructing the historical image of women shows that the controls under which they live today are really state-made and do not constitute normal practices before the modernization of law. This does not mean that the system was not patriarchal, it was, but it was a different type of patriarchy than exists today in which state-power is used to enforce legal patriarchal rules confining the activity 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 being an excuse that is put into question once the specificities of women's history and the history of legal practices are brought to the light.

#### **Closing remarks**

From the above one can conclude that 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 until today. It was more than natural to walk into the court and present a complaint, the courts were located in such a way as to make them accessible to the public, and the language used was the normal every day 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 discounting 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`a 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 and denied any rights to

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women, confining them basic needs like free movement, custody of their children or even going out in public. Shari`a courts themselves have been regarded as arbitrary and primitive and the 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. As this article proposed, the normative picture of Islamic history and particularly the history of Muslim women is based more on ideological presumptions than on research in 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`a 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`a 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`a courts were disregarded.