Women Judges in the Muslim World

Women and Gender

THE MIDDLE EAST AND THE ISLAMIC WORLD

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Women Judges in the Muslim World

A Comparative Study of Discourse and Practice

Edited by

Nadia Sonneveld and Monika Lindbekk

BRILL

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Cover image by Amr Okasha. The image depicts a veiled woman—Lady Justice—who carries the scales of justice on her shoulders. She is surrounded by a court of justice.

The Library of Congress Cataloging-in-Publication Data is available online at http://catalog.loc.gov
LC record available at http://lccn.loc.gov

Typeface for the Latin, Greek, and Cyrillic scripts: "Brill". See and download: brill.com/brill-typeface.

ISSN 1570-7628
ISBN 978-9004-30691-2 (hardback)
ISBN 978-9004-34220-0 (e-book)

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Contents

A Note on Transliteration VII
Acknowledgements VIII
Foreword: Making the Case for Women Judges in the Muslim World
Valentine M. Moghadam XI
List of Contributors XIX

1 Introduction: A Historical Overview of Gender and Judicial Authority in the Muslim World 1
Nadia Sonneveld and Monika Lindbekk

PART 1
Comparative Understandings of Women's Appointment as Judges

2 Do Female Judges Judge Differently? Empirical Realities of a Theoretical Debate 23
Ulrike Schultz

3 Women's Access to Legal Education and Their Appointment to the Judiciary: The Dutch, Egyptian, and Indonesian Cases Compared 51
Nadia Sonneveld

PART 2
Country Studies

4 Female Judges at Indonesian Religious Courtrooms: Opportunities and Challenges to Gender Equality 101
Euis Nurlaelawati and Arskal Salim

5 Seeking Portia and the Duke: Male and Female Judges Dispensing Justice in Paternity Cases in Morocco 123
Nadia Sonneveld

6 **Female Judges in Malaysian *Shari'a* Courts: A Problem of Gender or Legal Interpretation?** 153
Najibah Mohd Zin

7 **Tunisian Female Judges and 'The Mobilization of the Emancipative Potential of the Tunisian Family Law'** 178
Maaike Voorhoeve

8 **Lady Judges of Pakistan: Embodying the Changing Living Tradition of Islam** 204
Rubya Mehdi

9 **The Politics of Exclusion: Women Public Prosecutors and Criminal Court Judges in Syria (1975–2009)** 237
Monique C. Cardinal

10 **The Best of Times, the Worst of Times: State-Salaried, Female Legal Professionals and Foreign Policy in Post-Qadhafi Libya** 259
Jessica Carlisle

11 **Women Judges in Egypt: Discourse and Practice** 284
Monika Lindbekk

Index 317

A Note on Transliteration

This book deals with many different languages, of which Arabic and the various languages of Pakistan use non-Roman scripts. We have given the authors the freedom to choose how to transliterate these non-Roman characters as long as it was done consistently throughout the chapter. In general, a simplified system of transliteration is used in order to make the book accessible to non-specialists. Regarding Arabic, most chapters use just two diacritical marks: the single closing apostrophe' to represent the *hamza* and a single opening apostrophe 'to represent the *'ayn*. In one chapter, full transliteration of Arabic is used.

In Indonesia, Malaysia, and Pakistan, where Arabic is not the official language, many Arabic terms have nevertheless been integrated into local languages in varying ways. The authors of the chapters studying these countries have opted for the region-specific spelling of localized Arabic terms.

Acknowledgements

On one particular day in October 2011, after the Egyptian revolution had changed many things, we longed for the one thing that had not changed: a delicious carrot cake served at the cafeteria of a well-known bookstore in the city center of Cairo. Enjoying our big chunks of cake, we talked about our research projects on the function of family law in the courthouses of Cairo, and how it had changed in the post-revolutionary period. We could not help but notice that one thing had proven to be resistant to change; the appointment of women as judges in Egypt. A token number had been appointed in 2003 (1) and in 2007–2008 (42), but the numbers were so small that we had never met a single one of them despite our frequent visits to the family courts. “This,” an Egyptian judge and friend of ours had said, “is searching for a needle in a haystack. Forget it.”

This was antithetical to the situation in Pakistan, where our colleague, Livia Holden, had told us that the mass appointment of women as judges in 2009 had caused the percentage of women in the judiciary to jump to more than one third. This development had inspired her and her husband, Marius Holden, to make a documentary titled *Lady Judges of Pakistan*. Released in 2013, it recounts the experiences of the women judges in dealing with litigants, lawyers, male colleagues, and male superiors. As many women were appointed to courthouses in remote areas, including (former) Taliban strongholds, Holden’s and Holden’s research project led them to very different parts of the country, both rural and urban—an enterprise which was not always void of personal safety risks.

Inspired by Holden’s and Holden’s research in Pakistan, we wanted to delve further into the subject of gender and the judiciary in the Muslim world. Not only did we want to know how Egypt and Pakistan were doing in terms of appointing women to the judiciary as compared to other Muslim-majority countries, but also learn more about public opinion concerning women in positions of judicial authority. After all, while women hold positions of authority within the walls of the courthouse, this cannot always be said in situations outside the courthouse. At least on a legal level, women in the Muslim world are usually under the legal authority of a man, with the notable exceptions of Morocco, Tunisia, and Turkey. In addition, we were interested in gaining more insight into the court practices of female judges compared to those of their male peers. There was, however, very little information available on the subject. In order to continue our search for scholarly knowledge, we decided to organize a workshop and invite the few legal scholars experienced in the subject of women judges in the Muslim world.

In December 2012, when the city of Oslo was covered in snow, we were very pleased to welcome a number of people to the Department of Criminology and Sociology of Law, University of Oslo: Ulrike Schultz, a world-renowned expert on gender and judging; Valentine Moghadam, who had published a report on the situation of women judges in the Middle East and North Africa, and who offered insightful and helpful comments that helped set the tone of the 2012 workshop; Monique Cardinal, who had done extensive fieldwork and research on women judges in Syria; and Maaike Voorhoeve who, very much to her own surprise, had noticed that her fieldwork research in the Family Court of Tunis had brought her in contact with women judges only, simply because all family law judges in this court were female. We were also very pleased that it was during our workshop that Livia and Marius Holden screened *Lady Judges of Pakistan* for the first time in Europe. We extend our thanks to these scholars who visited Oslo, some of them travelling long distances, to share their knowledge and experiences with us and to support the idea of a book publication.

We also thank the scholars who were not at the workshop but who have contributed to this volume. Euis Nurlaelawati and Arskal Salim immediately agreed to contribute a chapter on Indonesia, the largest Muslim-majority country in the world, and one of the first to appoint women as judges. At the time, Malaysia had just appointed the first women judges to the *shariʿa* courts (2010), and we are very pleased that Najibah Mohd Zin has taken the time to describe this process in detail, both on the level of discourse and, through her interviews with some of the women judges, on the level of practice. Likewise, Rubya Mehdi's fieldwork research in Pakistan and her interviews with the 'lady judges' provides detailed and vivid glimpses into what it means to be a woman and a judge in Pakistani society. We are equally pleased that Jessica Carlisle agreed to write a chapter on women judges in Libya under tight time constraints. Based on fieldwork in 2013, her chapter is the only one that examines the performance of women judges in a post-revolutionary context.

This volume is a collaborative effort which brings together scholars from different countries in order to address a hitherto unexplored aspect of *shariʿa* in practice, namely women's participation in judicial decision making processes. The chapters in this book are based on empirical studies that draw on several disciplines, ranging from law, social anthropology, sociology of law, to gender studies. We would like to thank our contributors who patiently responded to our requests throughout the writing process. Our thanks also go to the anonymous peer-reviewers for comments and suggestions to the chapters included in the volume. We would also like to express our sincere gratitude to Valentine Moghadam for her generous foreword.

We are grateful to the Wenner-Gren Foundation for their grant, which enabled us to organize the workshop. Funding for this workshop was also

provided by the researcher group RIKS at the Faculty of Law at Oslo University. The Centre for Migration Law/Sociology of Law, Radboud University Nijmegen, the Netherlands, provided the funding necessary to turn the project into the present book.

Our special thanks goes to Ian Priestnall, Hannie van de Put, and Amenah AbouWard, who edited the text many times, often under considerable time pressure. They played a crucial role in making the present book ready for publication.

Amr Okasha, Egyptian caricaturist, political writer, and deputy manager of *al-Wafd* newspaper, did not hesitate when we asked him to design the image on the cover of the book. It was a great pleasure to meet with him, his colleagues, and the 22 cats and four stray dogs who he had decided to take care of, and who eagerly await Amr's arrival every morning at al-Wafd premises in Cairo.

Finally, we would like to thank our editors at Brill, Nienke Brienen-Moolenaar and Nicolette van der Hoek, for assisting and facilitating this book project as well as Brill's series editors, Judith Tucker and Susanne Dahlgren, for including the present volume in their *Women and Gender: The Middle East and the Islamic World* series.

Foreword: Making the Case for Women Judges in the Muslim World

Valentine M. Moghadam

The political-juridical structure continues to be a key domain for feminist analysis, advocacy, and activism for at least three reasons. First, state policies and legal frameworks determine women's status, social positions, and access to resources and rights. These include rights within the family (marriage, divorce, child custody, marital assets); access to property and inheritance; reproductive rights; freedom from domestic violence; and socio-economic rights (e.g. maternity leaves and childcare, freedom from workplace harassment). Second, women's participation in political and juridical decision-making is a measure of women's empowerment and gender equality. Throughout the world, women have made impressive gains in the field of law, as practicing lawyers, legal counsellors, and law professors. This has changed the legal profession, which once was dominated by men, in at least two ways: first, in terms of the gender composition, and second, in terms of the availability of lawyers who are aligned with the women's movement and advocate for women's equality and rights. Now women are making inroads into another profession that historically has been reserved for men: the profession of judge. Yet, in many countries, women judges are clustered in the family courts and lower civil courts, and a kind of 'glass ceiling' prevents their promotion to the upper courts. In some countries, however, we do see women appointed to the highest courts. There is a third reason for the importance of studying women judges. Just as research has suggested that women may be able to engage in agenda-setting for women's equality and rights when they constitute a 'critical mass' in political bodies, there is some evidence that women in the legal profession may adjudicate differently and have a sense of justice that is shaped by ethical and care considerations. Women judges also may be more likely to sympathize with women plaintiffs in cases concerning domestic violence, sexual harassment, divorce, abandonment, and child custody. In other words, women's descriptive representation could also prove substantive, although this hypothesis continues to be debated and requires further testing.[1]

1 The terms descriptive and substantive representation have been deployed by feminist political scholars in connection with women's participation in parliaments. If descriptive representation requires that women have a legislative presence, substantive representation goes

Women's involvement in the political-juridical domain is also promoted in international standards and norms. The global women's rights agenda is inscribed in, inter alia, the 1954 Convention on the Political Rights of Women; the 1966 International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR); the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the 1995 Beijing Platform for Action, which specifies that governments should "ensure that women have the same right as men to be judges, advocates or other officers of the court, as well as police officers and prison and detention officers, among other things"; and Security Council Resolution 1325 on Women, Peace, and Security, adopted in October 2000. The presence of women judges on the International Criminal Court (ICC) is an indicator of the importance that the international community attaches to gender equality, women's participation in decision-making, and women's perspectives on legal matters (even though, at the time of this writing, the ICC has come in for criticism from a number of African countries, on account of presumed bias).

Barriers remain, however, at national levels. Critical legal scholars have found that gender, class, and racial biases—which themselves reflect power relationships and social hierarchies—are inscribed in constitutions, the law, and policies throughout the world.[2] In Muslim-majority countries this fact is complicated by the presumed religious foundations of legal frameworks, especially family law. That men have more rights over women, and Muslims over non-Muslims, is ostensibly derived from the *sharīʿa*. These distinctions can be found in the region's family laws and penal codes, though in some cases even the constitutions reflect certain biases. Reforming such laws becomes a challenge.

The issue of women judges in the Muslim world is pertinent because under strict interpretations of Islamic law, women should not be judges. This not only suggests women's second-class citizenship but also leaves women

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beyond numbers and proportions to refer to advocacy for, or at the very least attention to, the interests and issues of a group. With respect to women, the assumption is that a critical mass of women—30 percent and over—makes it more likely that women's interests, needs, and perspectives are represented and acted upon, or at least heard. Other research suggests that women legislators with links to the women's movement may introduce bills in favor of women's rights. For an overview, see Moghadam and Haghighatjoo (2016) and Paxton and Hughes (2014, 221).

2 See various writings by such legal scholars as Duncan Kennedy, David Kennedy, Martha Minnow, and Adrian Wing. For an overview, see http://www.law.cornell.edu/wex/index.php/Critical_legal_theory, accessed May 2015.

vulnerable to male perspectives on issues pertaining to personal status and family law—which in many Muslim-majority countries, especially in the Middle East and North Africa (MENA), remains a bastion of male privilege. As chapters in this book show, a number of Muslim-majority countries have long had women judges as well as lawyers, but elsewhere the numbers remain very small, and some countries—notably Saudi Arabia—ban women from juridical decision-making entirely. Such countries are thus contravening international standards and norms as well as frustrating the aspirations and talents of a segment of the female population. In many countries, the appointment of women as judges remains a controversial issue, due to a general perception that such appointments might not be in conformity with the *shari'a*. The majority view among the founding jurists Shafi'i, Malik and Ibn Hanbal regarded women as being disqualified as judges based on an interpretation of *sura* an-Nisa' 4:34, that men are *qawwamuna* (protectors) over women.[3] A common argument against women serving as political leaders is that they are too emotional and sensitive—a perspective broadly held not only by men but also by women. Even women can believe that: "Women are emotional by nature.... It is better for a woman to stay away from politics."[4] Thus women remain under-represented in the judiciary and in governance more broadly, although women's rights organizations are campaigning to change this reality.

In 2006, while employed as a section chief in the Social and Human Sciences Sector of UNESCO, I organized a workshop in Amman, Jordan, and commissioned a number of papers. These were meant to obtain a better understanding of the status of women in the judiciary in MENA countries, the relationship between women's judicial decision-making and gender justice, and appropriate advocacy and policy recommendations. Authors were asked to provide a mapping of the different types of legal systems and courts in the countries under consideration; the paths by which women and men train for legal and judicial professions; the existence of associations for women lawyers and judges; the identification of codified discrimination against women; and the delineation of policies that promote women's participation in the law and in the judiciary. We needed information on whether or not anti-discrimination legislation existed, and if mechanisms were present for its implementation and enforcement. Authors also were asked to provide quantitative information

3 Cited in Sisters in Islam (2002, v–vi). Sisters in Islam, a progressive women's rights group from Malaysia, advocates for the presence of women judges in the religious courts, among other issues.

4 See for example, Katulis (2005, 19–20).

on the numbers and percentages of women and men in law schools, in the Ministry of Justice, and in the different courts.

The overriding question that framed that study was: *would there be more justice for women, and could the legal environment improve for women and girls, if the judiciary contained more women throughout the legal system, and especially in the higher courts?* And: *what steps need to be taken to promote gender equality in the judiciary?* The papers were edited and compiled in a report that was posted on the UNESCO website. Subsequently, three studies were commissioned by UNESCO's office in Rabat, Morocco, and they examined in depth the state of women's rights in family law, and the role of women in the judiciary in Algeria, Morocco, and Tunisia.

Various studies, including the UNESCO ones mentioned, have noted a political and cultural shift in the MENA region from the liberal era (famously analyzed by the late Albert Hourani (1970) to a more conservative and even fundamentalist era, beginning in the latter part of the 1970s. This change does not pertain to the Gulf countries—which have always been conservative—but it has been especially noticeable in Egypt, Iran, Iraq, Syria, and Algeria (as well as in Pakistan, Malaysia, and Indonesia, three of the country case-studies in this book). It was during the pre-fundamentalist era of the 1950s–1970s, for example, that the first women judges were appointed in Iraq, Iran, Lebanon, Morocco, and Tunisia, a move that also may have been motivated by the need on the part of the newly independent or modernizing states to fill positions in the expanding state bureaucracy. Later, however, the role of women in decision-making positions, and especially in the judiciary, came to be hotly contested, by Islamists and other conservative forces. In Iran, for example, a woman judge was appointed for the first time in 1976, but after the 1979 Islamic Revolution, Shirin Ebadi lost her position, though she continued to work as a lawyer for the rights of women, children, and political prisoners. The acclaimed 1998 documentary film by Kim Longinotto and Ziba Mir-Hosseini, *Divorce Iranian Style*, showed how women tried to negotiate a divorce settlement or custody of a child. It depicted strong women determined to assert their rights under the law or to question unfair aspects of the law, but the film also showed the arbitrariness or lack of sympathy of the (male) judges.

An opposite trend has been observed for Morocco and Tunisia. Since the early 1990s, a reform movement has taken root in Morocco, and while contested by Islamists, it has succeeded in reforming the family law in women's favour. This reform movement, which has been spearheaded by women's rights groups and their allies in political parties and civil society, also has been instrumental in the creation of family courts, the appointment of more women lawyers and judges, the amendment of Article 475 of the Penal Code, which allowed rapists

to escape prosecution if they married their victim, and in the creation of a new category of women spiritual guides and rights advocates, known as *mourchidates*.[5] In Tunisia, not only does the proportion of women in parliament and in the judiciary continue to grow, but women legal professionals played a key role in defending the legacy of the Bourguiba secular republican era. This was especially noticeable during the contentious period after the January 2011 political revolution, when the Islamist Ennahda party dominated government and Salafists threatened liberal norms and social practices.[6] Tunisian women legal professionals, many of them associated with feminist organizations or with human rights groups, defied Islamist attempts to roll back the legal gains made in previous decades, insisted on greater female representation in political party lists for parliamentary elections, and defended victims of sexual violence. Two examples are instructive. In the first, a young woman, Meriem, was raped by two policemen after they found her in a car with her boyfriend. When the public prosecutor wanted to charge her with 'indecency,' feminist lawyers Ahlem Belhaj and Mounia Bousselmi challenged the move, successfully defended Meriem and finally won the case against the two policemen in 2014, two years after the incident.[7] In the second case, when the Islamist justice minister tried to reduce the judiciary to an arm of the Ennahda party, it was a woman judge, Koulthoum Kennou, president of the association of Tunisian magistrates, who denounced the plan and organized a successful campaign against it.[8] Judge Kennou subsequently ran for the presidency in November 2014, though she lost to Béji Caid Essebsi. These Tunisian examples show how women legal professionals can work to ensure a more equitable legal environment for women.

In contrast to the progress in Morocco and Tunisia, Egypt has stagnated. Not only was the first woman judge appointed decades after Morocco and Tunisia (2003 in Egypt), but the proportion has remained miniscule. This reality would seem to reflect the absence of gender justice for Egyptian women, who long have endured sexual harassment in public. Even before the Tahrir Square protests that brought down the Mubarak regime and inaugurated a new era for Egypt, the Egyptian Center for Women's Rights (ECWR) was trying to raise awareness of the deficits in women's human rights. In August 2010,

5 See Merran (2015). The 2014 amendment to Article 475 followed from the 2012 suicide of Amina Filali, who had been compelled to marry her rapist and endured continued abuse.

6 Here I use the Tunisian spelling for the Islamist party, although some studies refer to Al-Nahda.

7 See BBC News (2012) and Kottor (2014).

8 For details, see Al-Rashed (2012).

the ECWR issued a statement criticizing the Muslim Brotherhood for mock presidential elections held by its Youth Forum that denied the request by the Forum's Muslim Sisters' Group to be included in the nominations to the mock presidency. The following November, the ECWR issued another press release protesting the parliament's overwhelming vote against the appointment of women judges.[9] In March 2011, the ECWR decried the absence of women from the committee drafting Egypt's new constitution. Meanwhile, the Muslim Brotherhood won the presidency along with the majority of parliamentary seats, but the party proved unable to address the citizens' pressing socio-economic concerns and needs and seemed uninterested in improving the legal status and social positions of Egyptian women. Although the new Islamist government gave legal recognition to female-headed households, it also sought to decriminalize female circumcision and undo the quota law.[10]

After the second uprising—or military coup, as some would prefer—of July 2013, the new constitutional committee did see representation by five women, including a well-known feminist lawyer. Action has begun to be taken against the rampant sexual harassment of women, mainly due to advocacy and monitoring by groups such as HarassMap, but critics suggest that the new legal measures are piecemeal and token in nature.[11] It would appear, therefore, that many more women are needed in Egypt's political-juridical domain if substantive change in favor of women's equality and rights is to come about.

In this context, the appearance of the present book represents an enormous contribution. As the book's editors, Nadia Sonneveld and Monika Lindbekk, point out, the 2003 study by Ulrike Schultz and Gisele Shaw provided a *tour d'horizon* of women and the law in 15 countries, but lacked attention to women in the judiciary in the Muslim world. The present volume, therefore, is the first of its kind. *Women Judges in the Muslim World: A Comparative Study of Discourse and Practice* provides a comprehensive study of women in the judiciary in Muslim-majority countries across the globe, with an excellent overview chapter by the editors and case studies of Egypt, Indonesia, Libya,

9 See Aboul Komsan (2010); and ECWR (2010).

10 As Moushira Khattab (2012) succinctly notes: "The Muslim Brotherhood failed to see that the revolution was all about the economy, job creation, and poverty alleviation" rather than "the decriminalizing of FGM, abolishing women's rights, and banning toys they deem offensive over the more pressing social and economic reforms or the worsening security situation. They have consistently shown an unprofessional and narrow-minded approach."

11 See Worldwide Movement for Human Rights (2015).

Malaysia, Morocco, Pakistan, Syria, and Tunisia. The book answers many questions but raises some, too, such as why woman judges in a number of the countries surveyed seem to eschew a gender-sensitive approach. Pakistan, where women comprise about one-third of the country's judges, remains overwhelmingly patriarchal and discriminatory toward women and girls. Why is this the case? Is there not a correlation between the number of women judges and an equitable legal environment for women? This pioneering study, and the further cross-national and ethnographic research that it will doubtlessly inspire, will enable analysis of similarities and differences in women's descriptive and substantive representation in the judiciary, the relationship between women in the judiciary and justice for women, a better understanding of those factors impeding women's recruitment and promotion in the judiciary, and appropriate policy recommendations toward greater participation by women in the political-juridical domain.

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(PhD University of Amsterdam 2009) has an academic background in anthropology, Arabic, and law. She works at the Centre for Migration Law, Radboud University, Nijmegen, the Netherlands. Generally, the common factor in all her research activities is the focus on *shariʿa* as a lived and contested reality that must be studied against the black letter of state-codified Islamic law. She has conducted extensive research in Egypt and Morocco on the introduction and implementation of *shariʿa*-based family law reform. Previously, she was a guest scholar at the School of Oriental and African Studies (SOAS) in London, and Al-Akhawayn University in Ifrane, Morocco. She authored *Khulʿ Divorce in Egypt: Public Debates, Judicial Practices, and Everyday Life* in 2012, and has co-authored *Women and Social Change in North Africa: What Counts as Revolutionary?* with Doris Gray, which will be published by Cambridge University Press in the fall of 2017.

Monika Lindbekk

obtained her doctoral degree in Sociology of Law from the Department of Criminology and Sociology of Law at the University of Oslo. Her PhD research focused on adjudication of Muslim and Orthodox Copt marriage and divorce law by Egyptian courts before and after the 2011 revolution. More generally, her research focuses on the intersection between law, religion, and gender in this field. She is also the co-organizer of an international research collaboration dealing with Gender and Judging in Muslim Courts under the Law and Society Association. Prior to joining the Department of Criminology and Sociology of Law, she worked as an Assistant Lecturer in Political Science at the British University in Egypt.

Monique C. Cardinal

is an Arabist and an Associate Professor of Islamic Studies at the Faculté de théologie et de sciences religieuses of the Université Laval in Quebec, Canada. Her main areas of interest are the history of Islamic law, its teaching and institutions. She has done extensive fieldwork in the Arab world, particularly in Syria since 1992. Her present research focuses on the history of the legal system in modern Syria. Since the Syrian uprising of March 2011, she is documenting the work of the judges and public prosecutors who defected from the state judiciary.

Jessica Carlisle
(PhD SOAS 2008) has completed fieldwork based research on law, Islam and society in Syria, Morocco, Egypt and Libya, in particular on the practice of Islamic family, constitutional, and administrative law. Her current research is on Science in Muslim Societies at Newman University, Birmingham, UK.

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CHAPTER 1

Introduction: A Historical Overview of Gender and Judicial Authority in the Muslim World

Nadia Sonneveld and Monika Lindbekk

In their influential book *Women in the World's Legal Professions*, Schultz and Shaw (2003) present studies of female legal professionals from 15 countries around the world. What remains to be written, they maintain, is the story of female legal professionals from the Muslim world (Schultz and Shaw 2003, xxv). Dealing with women in the judiciary in eight Muslim-majority countries in the Middle East and Southeast Asia, this is the first comprehensive study of women judges in the Muslim world.

In the Muslim-majority countries studied in this volume, the appointment of female judges has provoked heated debates among their male peers and the public at large. It is frequently argued that the inclusion of women in the judiciary violates Islamic *shariʿa*, as the majority of the classical scholars held that women's deficient intellectual and religious capacities made them unfit for a position that involved imposing their decisions on others. Sometimes opponents of female judges point an accusatory finger to the West, claiming that their appointment is the result of international conferences on women that force Muslim governments to impose measures geared towards gender equality. In addition, both proponents and opponents of women working as judges argue that women are more empathic and sensitive than men. While these presumed qualities could be regarded as a strength, they are also used to generate doubt about the suitability of women as judicial authorities and their ability to judge objectively.

Despite domestic opposition, the appointment of women judges in countries with a Muslim majority has taken a high flight over the previous decade and a half. International pressure combined with financial aid and assistance from national and international donor organizations played an important role in what might be called a third phase of appointment of female judges in the Muslim world (see below). When Schultz and Shaw wrote their introduction, Egypt had only just appointed its first female judge (2003). Bahrain followed in 2006 (e.g. al-Awad 2006), the UAE in 2008 (e.g. al-Dusri 2008), Kuwait in 2010, and Mauretania in 2013 (al-Amal 2014). In Pakistan, the percentage of female judges swelled to 35 percent after mass appointments in 2009. In a similar

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vein, the percentage of Algerian female judges jumped to more than one third after the Bouteflika government appointed 121 females to positions of judgeship in the summer of 2010 (Al-Qawarir 2010).

This same period also witnessed a rapid increase in legal-anthropological studies dealing with the implementation of *shariʿa*-based legislation in the courts, mostly courts dealing with family law matters (e.g. Bowen 2003; Buskens 1999; Carlisle 2007a, 2007b; Dahlgren 2010; Eijk, van 2012, 2016; Lindbekk 2013, 2016; Peletz 2002; Rosen 1989; al-Sharmani 2008; Shehada 2005; Sonneveld 2010, 2012; Voorhoeve 2012, 2014). Studying *shariʿa*-based legal texts in relation to their actual implementation in the family courts of Muslim countries as divergent as Indonesia and Morocco, this field of study has, to date, paid very little attention to the perspective of women judges and the impact of gender in the management of justice within a Muslim context.[1] With the appointment of women judges being such a live and controversial one, both in Muslim-majority societies and within the national and international donor community, this is remarkable and shows that the issue is in need of further academic exploration.

1 Aim of the Book Publication

The main aim of this book is to fill this gap in academic scholarship by approaching the subject matter from two angles: discourse, and practice.

With regard to discourse, we pay attention to both domestic and international debates concerning the appointment of women to the judiciary. As the appointment of women judges provoked much controversy on the domestic front, we investigate the portrayal of female judges in the public debate in order to see why this topic was, and sometimes continues to be, so controversial. We asked the authors to pay attention to the following questions: (i) on what grounds is the inclusion of women in the judiciary justified or considered necessary; (ii) is there international pressure to conform to certain standards of Human Rights; (iii) who were/are the main initiators behind the appointment of women judges; (iv) what strategies did/do they use to encourage their appointment and bypass opposition; and (v) who were/are the main opponents, and how did/do they justify their point of view?

We have two reasons for exploring the everyday practices of women judges. First, academic research on female legal professionals draws heavily on the famous work of psychologist Carol Gilligan's *In a Different Voice: Psychological Theory and Women's Development* (see, for example, the different contributions

1 Exceptions are Cardinal on Syria (2010) and Voorhoeve on Tunisia (2014).

in Schultz and Shaw's 2003 volume). One of her main premises is that, when confronted with ethical dilemmas, women's judgement is driven by a so-called 'ethic of care' while men adjudicate according to an 'ethic of justice.' In the context of the judicial review process, the different moral outlook of men and women would lead to different judgments, with female judges being more protective of the interests of marginalized groups, including female litigants, than male judges. In the words of Gilligan: "The psychology of women that has consistently been described as distinctive in its greater orientation toward relationships and interdependence implies a more contextual mode of judgment" (Gilligan 1982, 22).

A second and important reason is that in national and international discourses on gender equality, the inclusion of women in the judiciary is viewed as a necessary step to improve women's access to justice, since women are believed to judge differently than men (UN Women 2012, 61). By way of example, Malaysian NGOs representing feminist groups referred to the idea of a different voice by depicting male judges as discriminative toward women (see Mohd Zin, this volume).[2]

It should, however, not be assumed that female judges will adjudicate in a manner favourable to female litigants, nor that male judges profess a misogynistic attitude. Framing arguments in such dichotomous terms is problematic since it risks reifying qualities perceived as unique to women, such as emotionality, empathy, and mercy. Furthermore, arguments based on the concept of a different voice obscure from view a number of other factors that may influence judging. Given the complexity of social reality, one should be careful not to attribute too much influence to gender alone, but rather explore the combination of variables such as judicial training, court rituals, and the prevailing political regime along with personal attributes, such as age, marital status, gender, social class background, place of birth, and political preference, which impact the performance of male and female judges (Boyd, Epstein and Martin 2010; Feenan 2008; Herz 2013; Lindbekk 2016; Sommerlad 2003; Sonneveld and Tawfik 2015; Stribopoulos and Yahya 2007; Voorhoeve 2014. See also the chapters in this volume).[3] In the context of the Muslim world, moreover, various

2 In addition, the inclusion of women into the judiciary has been justified with reference to a range of other reasons. A central argument put forward stresses the need for a judiciary which reflects the gender composition of society. Another rationale offered is that it guarantees that (academic) qualification instead of gender is the main criterion in assigning candidates to positions of judgeship (e.g. Feenan 2008).

3 Scholars of legal philosophy, the school of legal realism in particular, have long since argued that judicial adjudication is a highly subjective process driven by factors such as political, cultural and religious characteristics of individual judges, judges' fear of being corrected on

legal-anthropological scholars have pointed out that male judges are protective of female litigators' interests and factor in personal costs into their decisions in the field of highly gendered family laws. This was the case in the more distant past, where archival research has demonstrated that in the Ottoman period, women often received favorable judgments from the *shariʿa* court (e.g. Abdal-Rahman Abdal-Rehim 1996; Sonbol 1996; Tucker 1998). Similar to their Ottoman counterparts, male judges in, for example, contemporary Gaza, Indonesia, Malaysia, and Morocco are context sensitive and protective of women and children's rights when dealing with matters relating to marriage and divorce (e.g. Bowen 2003; Buskens 1999; Peletz 2002; Rosen 1989; Shehada 2005). In contemporary Morocco, male judges are even more inclined to interpret the law in a loosely defined manner than their female counterparts when the interest of children is at stake (see Sonneveld, this volume). Along similar lines Lindbekk (2013) has shown that male judges in Egypt partly counteract gender hierarchy by laying great emphasis on mercy and the principle of protection for the weak in their rulings. Meanwhile, other research on Egyptian court practice has shown the opposite (al-Sharmani 2008; Sonneveld 2010, 2012). This underscores the necessity to not treat gender as a separate factor influencing judges' decision-making processes.

Hence, on the level of practice, we asked the authors to pay attention to the following questions: (i) do male and female judges rule differently; (ii) to what extent do gender and other factors influence judging; (iii) how do women perceive working in a previously male-dominated environment; (iv) do they see their position as judges as being in accordance with their perceptions of gender roles; and (v) are there differences in the aforementioned countries in terms of the number of female judges appointed, as well as the type (civil vs *shariʿa*) and level (lower vs appelate) courts to which women are nominated?

It should be noted that this book makes no claim to present an exhaustive coverage of the subject matter. In fact, it might provoke more questions than it answers. This is partly related to the scant historical and statistical information available on such issues as women's entrance and reception in the world of legal education, the lawyers' profession and the Bench in general (Albisetti 2000), and in the Muslim world in particular. On the level of discourse, it has not been easy to find information on seemingly simple questions as to when and to which jurisdictions the first female judges were appointed, let alone to questions as to why women decided to study law, and whether they were extended a warm welcome by their male colleagues and the public at large.

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appeal, and power relations in society. See for an overview, Gilmore (1961). See also Friedman (2006).

With regard to practice, several authors faced difficulties gaining access to courts and court records. Hence, the ambition of the volume is not to obtain authoritative answers to whether or not female judges in the Muslim world practice law differently than their their male counterparts. Instead, it aims to be a contribution to discussions about the impact of the increased presence of women in the judiciary on different aspects of judging, ranging from their performance of judicial office to judicial decision-making. In addition to the predominantly qualitative data provided in this book, quantitative analysis focusing on judicial decisions is needed to establish whether, and the extent to which gender is an important factor influencing judges' decisions. Much of the story of female legal professionals in the Muslim world must still be written and this book is a largely qualitative attempt thereto.

2 The Structure of the Book

The book comprises two main parts. The first part contains two chapters, which are informed by a comparative perspective. In continuity with previous academic work on women in legal professions, the book opens with a chapter written by Ulrike Schultz, who looks at the position of women in the judiciary worldwide, Germany in particular. Drawing upon 15 years of research, she provides an outline of the debate on gender differences in relation to the judicial review process. Asking whether women judge differently, Schultz suggests that it is not so much the outcome of female judges' work that is different, but their communicative behavior and style of work. Her chapter is also a powerful reminder of the fact that the appointment of women as judges in Germany, while perhaps a more straightforward process than in countries with a Common Law tradition, did not materialize until far into the twentieth century. Germany did not stand alone in this regard; in many 'Western' countries, the judiciary was not open to women until after the Second World War.[4]

By drawing a historical comparison between two large Muslim-majority countries (Egypt and Indonesia) and a Western country (the Netherlands), Nadia Sonneveld's study (chapter 3) on the impact of professionalization and legal education on women's access to the judiciary connects the Western and Muslim worlds. Exploring the period lasting from the early twentieth until the early twenty-first century, she finds that, while the Netherlands were

4 By way of example, in Great Britain, the first female judge was appointed in 1945 while French women were first admitted to the bench in 1946. Italy followed in 1963 and Portugal in 1974 (Schultz and Shaw 2013, 10–13). Switzerland also appointed its first female judge in 1974.

comparatively quick to open the Bar to women (1903), the first female judge was only appointed in 1947, and it would not be until the 1970s before their numbers increased to more than 5 percent. Under Dutch colonial rule, native Indonesians, be they men or women, were denied access to legal education and the judiciary, and it was not until after independence in 1945 that their entrance to legal education was encouraged. Unlike the Netherlands (and Egypt), in Indonesia, women's access to legal education went hand-in-hand with their inclusion in the judiciary: in the 1950s, women were appointed as judges, and only a few years after the first Dutch female judge was appointed. The Egyptian trajectory differed in many respects. Although in the early decades of the twentieth century, the liberation of the nation went hand in hand with *tahrir al-mar'a* (the liberation of women), in Egypt, independence (1922) did not mean that the floodgates concerning the entrance of women to legal education and the judiciary were opened. It was only in January 2003 that Egypt appointed its first female judge, and until this day the percentage of female judges stands at less than 1 percent.

Accounting for these differences, Sonneveld argues that different combinations of factors should be taken into account. Since the current ratio of male and female law students in all three countries is almost equal, access to legal education alone cannot explain the differences. She argues that, inter alia, the willingness of male judges to welcome women among their ranks, a shortage of judges after independence from colonialization, the judicial rotation system, and the availability of part-time employment, are also important factors in explaining the earlier or later admission of women to the judiciary.

In the second part, contributors bring together analyses and case studies of female judges in Southeast Asia (Indonesia and Malaysia), South Asia (Pakistan), and the Middle East and North Africa (Egypt, Libya, Morocco, Syria, and Tunisia). Their stories are presented in a chronological manner, according to three main phases which we identify regarding first appointments of women to the judiciary in the Muslim world. In this light, we have chosen not to make a distinction between women's appointment to the civil courts and the religious courts. Wherein the Western world women's ascension to the Bench was controversial anyway, regardless of the jurisdiction they would hold, in the Muslim world we find a more complicated picture. In all countries under study, the religious basis of family law[5] separates it from other fields of law that have been patterned either after the European civil law model or the Anglo-Saxon common law system. Whereas in Egypt and Syria the idea

5 In some countries, parts of criminal law (Libya, Malaysia, Pakistan) and commercial law (Indonesia) have been modeled after Islamic *shariʿa* as well.

that women could have authority over men was rejected outright, regardless of whether they would serve as judges in religious or secular courts, in other Muslim countries, their appointment to the secular courts was a smooth process arousing little opposition in society and the judiciary. The picture was different in relation to the religious (family law) courts, where initiatives to make the personnel structure of the religious courts reflect the gender composition of society were met with heavy opposition from different segments of society, such as male magistrates and academic (religious) scholars. This transpires very clearly in the Malaysian case, where women started working as judges in the lower civil courts in the 1960s, while it would take until 2010 before the first female judges were appointed to the *shari'a*-based (family) courts (see Mohd Zin, this volume).

3 Female Judges and the Post-Colonial State

In newly independent, post-colonial countries, ruling elites increased educational opportunities for women in order to fill positions in the expanding state bureaucracy (Moghadam 2003, 18). However, when it came to appointing women to the judiciary, their policies diverged. In the 1950s and 1960s, in a first phase of women's appointment as judges, only a small number of states began appointing women to the Bench as part of a process of modernization and post-colonial nation building. In some countries, this was driven by a shortage of judges following independence.[6] As the European colonizers had been careful, if not outright opposed to, allowing 'natives' access to legal education and the legal professions (Oguamanam and Pue 2006), the number of law graduates and legal professionals was too small, and women were needed to help fill empty spaces in the judicial ranks.[7]

Such was the case in Indonesia. After independence in 1945 and the end of the war of independence in 1949, the new nation faced an acute shortage of legal professionals who could staff the court system. As a result, in the

6 By way of comparison, in the period following World War II, a shortage of judges also opened up the way for women in European countries to enter the judiciary and work as judges (Albisetti 2000, see also chapter 2).

7 See also Dahlgren (2010, 131–132). It could even be argued that in countries where the colonized had more opportunities to study law (such as in Egypt) there was a sufficient number of male students and legal professionals to fill the empty posts in the expanding bureaucracy of the post-colonial state. In turn, this might have delayed the acceptance of women into positions of judicial authority (chapter 3).

1950s women were appointed to serve as judges in the civil courts (1957) in a move, which Euis Nurlaelawati and Arskal Salim (chapter 4) claim, passed without eliciting substantial opposition. This was different with regard to the appointment of women judges to the *shariʿa* courts (1954). Probably, Muslim leaders paid more attention to Islamic institutions established by the state, while other legal institutions were considered to be parts of the secular state of Indonesia. In their chapter on female judges in the *religious* courts of Indonesia, Nurlaelawati and Salim show that while the appointment of female judges to the Islamic courts initially provoked much controversy, compared to other Muslim countries, Indonesia has been at the forefront, if not been the frontrunner, in encouraging women to occupy a position as judges in the Islamic courts. In their chapter, Nurlaelawati and Salim address the question as to how Indonesian women could ascend to the top of the ladder of the Islamic judiciary in the largest Muslim country in the world. What kind of rationale was developed to justify female judges presiding over Islamic courts?

By paying attention to domestic debates on this matter, they not only make an important contribution on the level of discourse, but in the second part of their chapter they also show how international discourses promoting gender equality had an impact on the way the Indonesian government worked towards a fairer representation of women in the judiciary. Finally, Nurlaelawati and Salim ask whether the gender awareness programs that were developed in order to increase objectivity and fairness in the legal process led judges in Indonesia's Islamic courts to speak in 'a different voice,' that is to say, a voice, which defends the interest of disadvantaged, female litigants.

The question as to whether male and female judges dispense justice in a different manner forms the main question guiding the analysis in Nadia Sonneveld's contribution on Morocco (chapter 5). In this North African Kingdom where women were appointed to serve as judges as early as 1960 and where, today, women constitute almost 25 percent of all judges, Sonneveld asks whether Moroccan male judges employ an 'ethic of justice,' in that they are more rule-oriented than their female counterparts who, employing an 'ethic of care,' interpret the law in a flexible manner in order to arrive at a situation in which (family) relationships are preserved? Focusing on paternity disputes cases, she finds that both male and female judges are first and foremost oriented to the best interest of the child, but that the way in which they work towards that goals sometimes differs, with women judges being more likely to employ an 'ethic of justice' than their male counterparts.

Similar to the situation in Indonesia, Malaysian women have been appointed to serve as judges in the lower civil courts since the 1960s and in the High Court since 1983 (Nik Noriani Nik Badlishah and Masidi 2002, 1). These

appointments, Najibah Mohd Zin (chapter 6) claims, never aroused the same heated reactions as the appointment of women to the religious courts did. Mohd Zin provides a detailed account of the public debates that surrounded the issue of women's appointment to the religious courts from the 1980s until 2010, when the first two women were appointed as judges in the *shariʿa* courts. She shows how the exclusion of women from the religious (family law) courts was justified by invoking religious arguments claiming that women are deficient in intellect and should therefore not exercise authority over men. Interestingly, women's supposed lesser intellectual capacity was never an issue in regard to the functioning of female judges in the civil courts. Even though several states have appointed female judges to sit in the *shariʿa* courts of the subordinate level, and two women were even appointed as Shariʿa High Court judges for a first time in 2016, in the majority of the states the overall perception of appointing female judges into the service is still a contentious matter. And while women are well represented at all levels of the federal courts, making up 35.5 percent of judges in 2012, with full authority to decide on all matters, female *shariʿa* court judges represent only 3.7 percent. Mohd Zin's contribution ascertains which factors constitute the main obstacles to the appointment of female judges to Malaysia's *shariʿa* courts.

On the level of practice, Mohd Zin makes an important observation, which points to a discrepancy between how female judges are viewed by others and how they view themselves. Since both domestic and international organizations for women's rights believed that female judges are better equipped to understand and care about women and their legal problems, their appointment to the religious (family) courts was thought to alleviate the situation of female litigants involved in, inter alia, divorce and custody cases. Women judges interviewed, however, disagreed with this contention, arguing that like their male colleagues, their decisions were guided by adherence to the Qur'an, the *sunna* (sayings and doings of the Prophet), and the law. Statements to the same effects were made by Egyptian female judges (see Lindbekk, this volume). Such a reaction is not surprising given that a focus on a different voice goes to the core of perceptions regarding the judicial role as objective and neutral.

Similar to Indonesia, Morocco, and Malaysia, the appointment of women as judges only occurred in Tunisia when a period of political upheaval and crisis had ended and the Bourguiba government adopted the draft law on judicial organization in July 1967 (Ben Achour 2007, 11). In chapter 7, Maaike Voorhoeve shows that the appointment of women as judges was part of the independent government's feminist politics. Based on 14 months of anthropological fieldwork in 2008 and 2009, her chapter provides a thick description of the judicial practice of two female judges in the family court of Tunis. Voorhoeve explores

whether these judges marshal the emancipatory potential of the 1956 personal status code, arguably the most progressive *shariʿa*-based family law code existing in the Muslim world. One of her conclusions is that while in the field of divorce female judges allowed women to divorce without the consent of the husband, they simultaneously stressed women's financial dependence on men, and their primary duty as mothers and caretakers. Voorhoeve is nevertheless careful to attribute this and other differences to gender alone and argues that other factors should also be taken into account.

4 Female Judges in a Period of Islamic Revival and International Human Rights Discourses

In addition to Indonesia, Morocco, Malaysia, and Tunisia, a small number of other countries, such as Iraq (1959) (Ramzi 2011), Lebanon (1967) (Ahmad 2010), and Afghanistan appointed women to the office of judgeship.[8] However, it was not until the 1970s that a significant number of countries followed in their lead. While in pioneering countries the appointment of women as judges was largely an internally driven process, geared towards modernizing the country, in a second phase of appointing women as judges, international discourses on equality between the genders and pressure from international organizations played an important role in governments' policies. The first UN conference on women, held in Mexico in 1975 played a particularly important role in this regard.

In her contribution on Syria (chapter 9), Monique Cardinal vividly shows how, upon the return of the Syrian delegation from this first World Conference on women, the government was swift to act upon the recommendations of the 'World Plan of Action' adopted at the conference. Yet, most Syrian legal professionals and the public were adamantly opposed to the appointment of women to the judiciary, thinking it was inconceivable that a woman should have the authority to impose her decisions on others. The government consequently walked the tight rope between staying in favor with the international (donor)

8 Afghanistan appointed its first woman judge, Jameela Farooq Rooshna, in 1969, to the juvenile specialized court. In later years, she would move on to become the head of the juvenile specialized court and the criminal division of the appeals court (this information was obtained by author Sonneveld from lawyer and former Afghani judge Najla Ayubi on September 13, 2014. In contrast to the other pioneering countries mentioned above, in Afghanistan there was a long gap between independence from colonial rule (1919) and the inclusion of women into the judiciary.

community while not provoking too much domestic opposition. In doing so, it made a deliberate choice not to appoint the first female judge to a position that involved sitting as a judge on the bench: in 1975, Ghada Murad was appointed as a public prosecutor to a juvenile court in Damascus. Appointing women as public prosecutors had the advantage that women were not clearly visible in the courthouse, neither were they in a position to impose sentences on others (in particular, men). At the same time, the Syrian government could show the outside world that Syria was a modern and progressive nation that supported women's rights and empowerment.

When it came to practice, Cardinal describes the everyday practices of women public prosecutors and criminal court judges and the challenges they face due to gender norms and certain forms of intimidation, which undermine their authority as decision-makers. She argues that women's family responsibilities and career patterns explain their recurrent presence in the criminal courts.

Together with an increasing foreign influence on domestic politics in many Muslim-majority countries, the last quarter of the twentieth century was a period of religious insurgence that found its most visible expression in new modes of dress with an increasing number of women donning the veil (e.g. Macleod 1991) and men growing beards. On the legal level, this period was witness to numerous attempts to Islamize the legal system, for example, by including constitutional stipulations to the effect that Islamic *shariʿa* is the main source of legislation; by the reintroduction of the Islamic corporal punishments of *hudud* and *qisas*;[9] and by reform of personal status law.

In general, personal status law is regarded as the last bastion of a dismantled Islamic legal system and, hence, the only field of law where the principles of Islamic *shari'a* still apply (e.g. Welchmann 2007). As such, it has become the symbol of the Islamic identity of many Muslims (An-Na'im 1988, 9). With the majority of the classical scholars opposing the appointment of women as judges (because of perceived deficiencies in religion and intellect), appointing women to courts where religious inspired rulings are the norm is a contentious matter in some Muslim countries. In Syria, for example, female law graduates are legally barred from working as judges in the courts dealing with family law matters. At the same time, however, the field of personal status encompasses the private domain of the house, and the lawsuits family members bring to the attention of the judge often involve matters such as alimony, divorce, and custody. With the majority of the litigants being women, it is not unusual to find

9 According to Islamic jurisprudence, *hudud* refers to crimes which are punishable by a pre-established punishment found in the Qur'an. In the case of crimes, such as murder, the victim has a right to seek retribution (*qisas*).

that both proponents and those who are wary of women working as judges claim that by nature female judges are better disposed to understand the predicament of female litigants and for that reason should preferably work in courts dealing with family law matters.

In Pakistan, The Family Court Act of 1964 (Act XXXV 1964) even requires that at least one Family Court in each district shall be presided over by a female judge[10] (although it would take another decade before the first female judge of Pakistan was appointed, to the Peshawar civil court in 1974). Contributing on the level of discourse, Rubya Mehdi (chapter 8) notes that the admissibility of women to the judiciary has nevertheless been challenged twice before the Federal *Shariʿa* Court—in 1982 and again in 2010—after the massive induction of female judges in 2009 (see below). In both cases the claimant stated, among others things, that: according to the Prophet's saying, there will be no blessing or prosperity for a nation which is ruled by a woman and that, according to traditional Islamic jurisprudence, the testimony of a woman is worth half that of a man and her share in inheritance is equal to half of that of her brother. Hence, the judgment of two ladies can only be equivalent to that of one male. The Federal *Shariʿa* Court dismissed the petitions, concluding inter alia that it was unclear whether there was any explicit or implicit restriction on the appointment of women as judges. If such a restriction could not be inferred, the court argued, the appointment would be legal in *shariʿa*.

Vis-à-vis practice, Jessica Carlisle's contribution (chapter 10) is based on fieldwork in and around the main courthouse in post-revolutionary Tripoli, where high female participation in state-salaried legal professions is a legacy of the former, Qadhafi regime. The Libyan judiciary has been open to women since the enactment of Law 8/1989 on the Right of Women to Assume Posts in the Judiciary. The first female judge was appointed in 1991 and there were an estimated 50 judges in Libya in 2010. In 2013, women were still well represented within Libya's state-salaried legal professions, particularly in the office of the 'public lawyers'—the state run legal aid service available to all Libyans throughout the court system. However, the rapidly deteriorating security situation throughout 2012–13 was threatening to destabilize the professional environment that has supported women's careers. Moreover, the embedding of women in Libya's judicial institutions seems to have been rather taken for

10 Section 3, "Establishment of Family Courts," Article 1. For the complete Act, see http://punjablaws.gov.pk/laws/177.html, accessed November 16, 2016. This Act was amended by the West Pakistan Family Courts (Amendment) Act, 1994 (Federal Act XXI of 1994. See http://www.na.gov.pk/uploads/documents/1329800195_814.pdf, accessed November 16, 2016.

granted by foreign donors in the post-revolutionary period, while the Libyan Ministry of Justice has had to defend the status quo against accusations of it being un-Islamic, or perpetuating Qadhafi's policies and thought.

Carlisle observes that women's involvement in state legal professions has come under two ideological assaults in the post-revolutionary period: constitutionally based legal challenges to women holding office as judges, and pressure to dismantle institutions associated with Qadhafi. While Libya's Ministry of Justice and the Association of Libyan Judges have tried to hold off both assaults, the foreign donor community—pursing a 'rule of law' agenda and based on limited fieldwork—have made recommendations that may weaken women's positions in the system of the judicial institutions, and undermine Libya's comprehensive legal aid system. Carlisle consequently develops criticism of the lack of knowledge underpinning international donor interventions in legal systems and analyzes the potential impact of rule of law programs on women in Libya's judicial institutions.

5 Female Judges in the New Millennium

According to Petersen (2012), Schultz' work is a strong reminder of the negative role of authoritarian regimes regarding women's rights and access to the legal professions. In Nazi-Germany, female lawyers disappeared almost entirely during the Third Reich (in the 1930s, Egyptian advocates of women's entrance into the legal professions even used this as an example not to be followed by Egypt). This, however, is not always the case; in the Muslim world, authoritarian governments played a pivotal role in admitting women to the bench, at least in the countries under study. In Libya, Qadhafi's regime instigated the promotion of women into the judicial institutions in a period in which it was also committing widespread human rights abuses. In Syria, the authoritarian Assad government pushed through the appointment of female judges, despite considerable domestic opposition. This also applies to Egypt where opposition to the inclusion of women in the judiciary was strong, first and foremost within the judiciary itself, but where the first female judge was nevertheless appointed in 2003.

As noted before, international pressure played an important role in the twentieth century and this continued to be the case in the twenty-first century. The UN conference on women held in Beijing in 1995 recommended the appointment of women to 33 percent of positions of judicial authority, pressuring governments to either appoint their first female judges, or to make sure the percentage of female judges reflected the gender composition of society

more accurately. In the first decade of the twenty-first century, a significant number of countries appointed their first female judges ever (Egypt, 2003, 2007–8, 2015; Bahrain, 2006; UAE, 2008; Kuwait, 2010, and Mauretania, 2013). Some states which already had women working as judges in the civil courts, appointed women to work as judges in the religious courts for the first time (the West Bank, 2009; Gaza, 2010; Malaysia, 2010). Other governments significantly increased the number of female judges (Algeria, 2010). In Jordan, the number of female judges climbed gradually to around 7 percent after the first woman was admitted to the judiciary in 1995 and, according to official government publication, the aim is to have women represent 40 percent of the total number of judges in the near future (Department of Press and Public Publications of the Hashemite Kingdom of Jordan 2012).

In Pakistan, the increase in female judges was achieved in the context of the movement for the independence of the judiciary, which started in 2007. In the period following this, many reforms were made in the working of the subordinate courts, including the large-scale employment of female judges (Mehdi 2012, 114. See also, Mehdi, this volume). Although the appointment of female judges in Pakistan dates back to 1974, the 2009 massive appointment of women judges led the female representation in the judiciary to jump to more than one third. Furthermore, in 2013, the first woman was appointed to the federal *shariʿa* court of Pakistan, an institution tasked with determining whether laws of the country comply with Islamic *shariʿa*.

While in Egypt, Morocco, and Tunisia women are often appointed to courthouses located in large urban centers (in Tunis women even formed a large majority in the family courthouse where Voorhoeve conducted her fieldwork), in Pakistan the newly appointed female judges were sent to remote areas of the country. Rubya Mehdi sheds light on how women judges tackle the challenges posed by a culture that sets high value on gender segregation. Among other things, she finds that female judges are considered less prone to corruption. While it is common for male lawyers to enter the room of the male judge for 'deliberation,' female judges are not available for a discussion behind closed doors. This situation, she argues, might well explain the aggressive behavior of male lawyers towards female judges. She also finds that, while the legal barriers for women wishing to work as judges have been removed, on a practical level women judges still face many challenges, such as insufficient childcare facilities.[11] Further, courthouse facilities, such as restrooms are not adjusted to the presence of women judges.

11 Difficulties in combining professional duties with domestic ones have caused some women to delay marriage (see also Mehdi 2012). In this context it is interesting to

In Yemen, the situation seemed opposite to the one above. In 1980 the High Judicial Institute, which is responsible for the training of judges, was established. Expecting a significant influx of female law graduates, the management had equipped its buildings to accommodate female judges, including the presence of female restrooms.[12] After unification in 1990, Yemen's judicial training program moved to the new capital Sana'a and women were no longer allowed to train for the judiciary (Dahlgren 2010, 132) due to the heavy presence of Islamists on the board of the organization.[13] Hence, when Yemen expert Laila al-Zwaini visited the Institute during a period of fieldwork in 1997, the female restrooms had been bricked up again and she—under courteous surveillance—had to make use of the male restrooms.[14] A decade later, in 2006, the High Judicial Institute announced the decision to allow female law graduates to enter the judicial examination process after all.[15] Also in that year, the first female judge was appointed to the Supreme Court (Manae 2010, 21). Although women continue to be underrepresented in the Yemeni judiciary, a study by Glosemeyer, Abdul-Rehman Shamiri and Würth (2012, 418) found that the majority of juvenile courts are presided over by women, although Dahlgren notes that in the late 2000s all female judges still tended to work in what was formerly South Yemen (Dahlgren 2010, 132).

The final chapter turns to Egypt where the appointment of its first female judge in 2003 makes the country a latecomer in this area. Monika Lindbekk argues that this situation has to be seen in the light of constitutional ambiguity, societal customs, and certain interpretations of Islamic *shari'a*. Lindbekk discusses the strategies adopted by the Egyptian civil society organizations to introduce women into the judiciary as well as the ensuing public debates. She also describes the everyday practices of a sample of female judges and shows that, although given a hostile reception by male colleagues, they gradually became members of the judicial family. Furthermore, legislation in the field of personal status law was subject to considerable reform during course of

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mention the case of Khulud al-Zahri, the first Emirati woman to obtain a position as a judge. At the age of 30, she was the youngest ever Arab female judge (al-Dusri 2008). Although considered young from a professional perspective, her status as an unmarried woman rendered her an old candidate on the marriage market. This relationship between the increasing presence of women in positions of judicial authority in the Muslim world, on the one hand, and their marital status, on the other hand, merits more attention.

12 Personal communication author Sonneveld with Laila al-Zwaini, July 8, 2014.

13 Ibid.

14 Ibid.

15 See, for example, http://www.aleqt.com/2006/03/25/article_32247.html, accessed March 25, 2006.

the 2000s. The so-called *khul‘* law, which was passed in 2000, challenged male authority in the family by giving women the right to petition for divorce without the husband's consent in exchange for returning the prompt portion of the dower and relinquishing their financial rights arising from divorce. Lindbekk's chapter analyzes how this and other law reforms are applied by male and female judges. She argues that a tendency to invoke an 'ethic of care' among both male and female judges can be attributed to a thematic consolidation under the influence of computer technology rather than gender. At the start of 2013, Egypt's first female judge, Tehani al-Gebali, was dismissed during a conflict between the (then) Islamist-led government and the judiciary. Lindbekk asks if the post-uprising environment could result in a backlash against women judges.

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PART 1

Comparative Understandings of Women's Appointment as Judges

CHAPTER 2

Do Female Judges Judge Differently? Empirical Realities of a Theoretical Debate

Ulrike Schultz

1 The Influx of Women into the Judiciary

In the Western world, the increase in highly-qualified working women over the course of the last two or three decades has raised the question of whether this would change the nature of traditionally male-dominated professions. Consequently, this leads to the question of whether women as judges and prosecutors would change the judiciary and its decision making.[1] From a male point of view, this question was legitimate, as access to certain professions was denied to women until the start of the twentieth century in most of the Western world.[2]

In Western Europe, this situation even lasted until the later decades of the twentieth century. It was only after women gained the right to vote that they were admitted to the judiciary in countries like France (1946), Italy (1963) and Portugal (1974).[3] Although continental European countries had passed constitutions containing equality principles in the course of the nineteenth century, women were not involved. Equality was for men only, according to the *fraternité* (brotherhood) principle in the French Revolution of 1789, which abolished the class structure, but did not introduce gender equality. It was not until after the emergence of socialist movements after the First and Second World Wars

1 In Germany judges and prosecutors both form part of the *Justiz* (judiciary), which is headed by the State Ministries of Justice, although the prosecution service is a government agency and judges are by definition independent.

2 In some states of the U.S. women were admitted in the later part of the nineteenth century. For details cf. New York Women's Bar Association, *Major Milestones in the History of Women Attorneys and Judges in the United States*. http://www.nywba.org/history2.shtml, accessed June 3, 2015.

3 In the Netherlands women had earned the right to vote in 1919, but they were denied access to the judiciary until 1947 because that would have required them to be appointed for life, a situation that many deemed undesirable for married women. Until 1956, it was standard practice for working women to be dismissed upon marriage, as by law they gained a breadwinner (see Sonneveld, this volume).

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that the new constitutions of the twentieth century finally introduced equality for men and women. In the same period, women had been denied the legal entitlement of a person in most parts of the Anglo-American world, and it took the Persons' Acts[4] to give them the right of access to higher professions and the judiciary. Today, in Europe, anti-discrimination legislation has abolished any kind of legal disadvantage, and provisions for affirmative action and quota regulations help women advance professionally, although they still face drawbacks in the labor market and career obstacles in the judiciary (Schultz 2012, 2013a).

In many Central and Southern African countries, judges of both sexes encountered particularly serious obstacles, given that during the colonial period judicial matters were in the hands of colonizers trained in their respective homelands, while natives were only permitted to deal with informal matters in tribal courts. The first law faculties were set up in these regions in the early 1960s, which laid the foundation for institutionalized academic legal training (Kamau 2013, 169). However, only the modern constitutions of recent decades have guaranteed legal equality for women and thus their right to be admitted to the judiciary. In South Africa, it was not until the regime change at the end of the apartheid era that the first black women could gain admission to the bench as judges. In many Muslim countries too, women had to wait decades for this to happen, although in Morocco, Tunisia, Indonesia, and Malaysia, for example, women were appointed as judges in the 1950s and 1960s, after independence from the colonial power. There are now female judges even in countries under strict Islamic rule, such as Kuwait (2010) and the United Arab Emirates (2008). Ever since the First International Conference on Women's Rights in Mexico in 1975, NGOs working towards equal rights for women had vociferously demanded the admission of female judges, thereby exerting political pressure on governments to do so. This was reinforced by donor countries making development aid dependent on the actual implementation of legal equality for women. Development politics were also significant in East Asian states such as the Philippines (Miwa 2013) and Cambodia (Sawa 2013). Nevertheless, there are still countries with no female judges. In Saudi Arabia, *shariʿa* law bans women from participation in public life, including any legal profession. The same applies in Iran.[5]

4 E.g. the British North America Act of 1867 needed an extension in its interpretation by the Privy Council in *Edwards v. A.G. of Canada* (1930) [1930] [A.C. 124].

5 In Iran, Shereen Ebadi became the first female judge in 1970, but female judges were prohibited from judicial practice following the Iranian revolution in 1979. See http://news.bbc.co.uk/2/hi/middle_east/3181992.stm, accessed November 12, 2016. It is interesting to note that the Islamic Republic of Pakistan has a considerable number of female judges.

As women began to gain ground in the judiciary, questions regarding their qualifications and abilities gained a new flavor. In the Western world, for example, the debate about gender disparities was picked up once again by the new, second-wave of feminism in the 1980s. While the first Women's Movement in the nineteenth and early twentieth centuries had taken differences for granted and fought for access to education, equal rights, and participation on the basis of equal qualification, this time, the discussion was different. As a reaction to the male atrocities in the two World Wars, adherents of the second wave of feminism focused on two questions. First, were women 'better' individuals than men, and, second, would women's inclusion in powerful positions in society positively influence the world order?

With regard to the judiciary, questions arose as to whether women were better, more humane judges, and whether the growing number of female judges would therefore positively influence the practice of law and the public perception of the judiciary. In this chapter, an attempt is made to answer these questions, mainly using the example of Germany, as the bulk of my work in this field concentrates on women in the German judiciary, supported by results from international comparative research on gender and judging, which I have initiated and headed for more than 20 years.[6] In the following segment, a historical overview of women's participation in German legal professions is presented. This is followed by a section in which the context of the research question is explained. Section four discusses whether professional work as jurists changes or has changed practicing women, leading them to adopt a male model of justice, followed by an examination of the differences between male and female judges in terms of their professional behavior, attitude, and decision making.

2 Gender Issues in the German Judiciary

Women had the opportunity to enroll in German law faculties for the first time in 1908. By 1912, they were allowed to take part in the first state examination, which follows legal education at university, and only in 1919 were they admitted to practical legal training that leads to the second state examination,[7] which

6 For details, http://rcsl.iscte.pt/rcsl_wg_professions_subgr_women.htm, accessed November 2, 2016.

7 This is the German model of *Einheitsjurist*. Academic lawyers in Germany, i.e. judges, public prosecutors, notaries, practising lawyers (*Rechtsanwälte*), lawyers in the higher civil service and a good part of company lawyers go through the same dual phase legal training, studying law at university first, followed by a practical training organized by the appeal courts, each phase ending in a state examination set up by the state ministries of justice. After the second

qualifies them to hold judicial office and enables jurists in Germany to practice as lawyers and notaries and—if their grades are good enough—to be admitted as judges or prosecutors, or to be employed in higher positions in the civil service. This process was followed by an intense debate in leading legal journals like the *Juristische Wochenschrift* (*JW*) about whether women could or should practice law. The arguments presented were that women would not be able to judge objectively due to their emotionality and their biologically-based mood swings. Therefore, it would be unthinkable to let them pronounce justice in court. It was also argued that women would be too delicate for the tough legal world and would need to be protected from it (Schultz 1990, 324 f.).

This was in line with the bourgeois middle-class ideology that women's, especially married women's, rightful place was in the home as mothers and housewives. Furthermore, in respect to complaints of an overcrowded legal profession, the hidden fear was that the economic situation of lawyers would further deteriorate with an influx of women. Despite their access to legal education, female law graduates were still unable to practice. Although the *Weimar Constitution* (which had been passed after the First World War in 1919) gave women the right to vote and proclaimed the legal principle of gender equality,[8] it was still necessary in 1922 to pass an explicit act to regulate the admission of women to legal professions. The path for women to possess legal occupations was thereby opened, but not facilitated: the prejudice against women in legal occupations still prevailed, although women proved to be good jurists. A mentoring judge of the first female legal trainee in Germany attested in a reference of 27 January 1923:

> She (Miss ...) has fulfilled in the most pleasing and delightful manner all expectations directed at her in her role as the first female law trainee, through her modest and truly feminine demeanour in personal relations as well as through objectivity and clarity in official contexts. Her powers of comprehension and attention even to detail, as for instance in taking down court minutes, put her well ahead of most of her male predecessors; added to this she has a sound knowledge and an obvious desire to expand this as well as her life experience whenever possible. For this rea-

state examination the young lawyers are *Volljuristen* (fully-fledged jurists). For further details of legal education in Germany, cf. Schultz (2011b).

8 Dogmatically it was considered to be a 'programme sentence,' i.e. a rule the state should implement over time. Only the Bonn Basic Law, the German Constitution (*Grundgesetz*), which was passed in 1949 when the German state was rebuilt after the Second World War, finally gave women an individual right to equality which could be claimed in court.

> son, her period at the criminal court X has also been truly stimulating for me, her mentoring judge.

The number of women increased slowly, but female lawyers and judges disappeared again almost entirely during the Third Reich. In 1936, Hitler passed a decree that women had to be removed from legal occupations (Deutscher Juristinnenbund 1984, appendix 26). According to Nazi ideology, women's destination was to breed the Germanic race and raise heroes for the war, not to interfere with power positions in the state structure. Former female judges were moved to administrative positions, mainly child care and custody, where they were less visible and could exercise their perceived female capacities and competences: caring attitudes, empathy, and motherliness. By 1939, only nine female advocates remained in total. Female lawyers could only practice as stakeholders when their male colleagues had to leave practice for the battlefields and they were to resign again when the men returned (Schultz 1990, 326).

The end of the Second World War brought no real change. Whenever men were available, women took second place. Some female judges and prosecutors were hired, but only 'on probation'; they had to quit when men returned from the prisoner of war camps. In 1950, the preliminary Statute on the Civil Service[9] still contained a celibacy clause.[10] Women could be discharged when they got married, or else they 'voluntarily' retired from public service in order not to cause social offence. In the 1950s and 1960s, a persistent, very conservative family ideology kept women from professional work (Schultz 2003b). Although women had played a major role in the wartime economy and in rebuilding the cities and civil society after the War, the dominant family values in a post-war phase of restoration were that of the male breadwinner and the female housewife. It was considered inappropriate for married women to be gainfully employed, as this was viewed as taking jobs from breadwinners. Two earners in a family were looked at with dismay or at least incomprehension. In 1960, less than 4 percent of judges and advocates were women, and there were only very few female prosecutors.

Economic prosperity from the 1970s and campaigns to tap the full educational potential in society lead to a boom in education for men and women. The introduction of the pill as a safe method of birth control, and the accompanying change in notions of family life and women's roles within it finally

9 Prosecutors are civil servants, and judges, despite their judicial independence, hold the status of a quasi-civil servant.

10 Cf. footnote 3 on a comparable regulation in the Netherlands.

resulted in a substantial and continually growing increase in the numbers of women in legal education and legal professions.

Since the turn of the millennium, more women than men are studying law. Law has developed into a favorite choice for women, a development that has not occurred in other male-dominated subjects, such as the natural sciences, where the percentage of women is still low in spite of all campaigns directed at 'Women in Male Professions.' After a little delay, the share of women in the legal professions has also risen, very rapidly in the past two decades, and faster in the judiciary than in the rest of the legal professions. In recent years, more than 50 percent of the newly appointed judges and prosecutors have been women, so the judiciary will be 'feminized' even further.[11] There is, however, no linear trickle-up effect into leading positions in the judiciary, which is still a male stronghold (Schultz 2012, 2013a). Important career decisions are taken by predominantly male court presidents after the proverbial 'tap on the shoulder' rather than in formal recruitment procedures (Rackley 2008, 507). Women with children are still assumed to be treating their careers as a matter of secondary importance, or to lack professional ambition. Part-time work, which many female judges with children prefer, is interpreted as part-time commitment. There is no open discrimination, but gender perceptions persist beneath the surface (Schultz 2012, 2013a).

Until 1993, the judicial statistics for judges and prosecutors counted heads, like the statistics of the Chamber of Advocates. The percentages until 1993 in the table below, therefore, do not reflect the actual share of women in the judiciary, as considerably more women than men work part-time. Since 1995, the judicial statistics for judges and prosecutors reported the workload performed by men and women, which means that the actual number of women in the judiciary is far higher: in 2014 46 percent of judges and 48 percent of prosecutors were women (Roloff and Schultz 2016). In Germany, half-day kindergarten and school in the morning were the rule; only in the past ten years have daycare facilities and day school been extended due to feminist demands to give women financial independence. This development fits well with European politics to make the best use of human resources—including well-qualified women—in the competition for the international market.

11 In France, the Netherlands, Italy, Spain and Portugal, for example, the demands for gender equality in the judiciary have now reversed, leading once again to an increase in the proportion of men with the newly appointed.

TABLE 1 *Share of women in legal professions*

	judges %	public prosecutors %	advocates %
1961	2.6		>2.0
1971	6.0	5.0	4.5
1981	13.0	11.0	8.0
1989	17.6 = 3,109 of 17,627	17.6 = 661 of 3,759	14.7 = 7,960 of 54,108
1995	26.3	28.9	19.3
2001	27.7	30.9	25.3
2009	35.79 = 7,195 of 20,101	38.71 = 1,983 of 5,122	31.08 = 46,736 of 150,377
2011	38.45 = 7,848 of 20,411	41.03 = 2,152 of 5,246	32.04 = 49,872 of 155,679
2015	42.15 = 8,557 of 20,396 on probation 57	43.85 = 2,315 of 5,279 on probation 53	33.58 = 54,912 of 163,513

Official statistics: Federal Ministry of Justice, Federal Chamber of Advocates.

The increase of around 3,000 judges and attorneys shortly after 1989 is a consequence of the German reunification. Otherwise the number and proportion of judges and prosecutors per head of the population has remained remarkably stable since the foundation of the German empire in 1871 (Schultz 2011b, 10). In any case, the number of women in the legal occupations are now beyond the 'critical mass' for effective participation in former male-dominant occupations (around a third had been set as the standard by the women's movement).

3 Do Women Judge Better or Differently? Theoretical Underpinning of a Research Question

In the late 1980s, I initiated a large international comparative project on female lawyers, which has led, over time, to two major publications on women lawyers and judges (Schultz and Shaw 2003, 2013). The question of whether the growing share of women in legal professions would change legal practice was central to both volumes.

In the 1980s, part of the women's movement was strongly influenced by Carol Gilligan's book, *In a Different Voice* (1982). The underlying difference theory was extended to the legal field by feminist jurists like Carrie Menkel-Meadow (1985) and became the basis for our research, which aimed at proving or falsifying the research question. Gilligan, a developmental psychologist,

tried to refute her teacher Kohlberg's condemnation that women do not reach the same level of moral development as men.[12] In her book, she reaches the conclusion that Kohlberg drafted a model that mainly encompassed the male method of moral thinking, but which fell short of a specifically female reasoning. Moral maturity was measured by asking young test subjects of different ages to resolve dilemma cases. Gilligan claims that: men follow a 'logic of justice' in their decisions, implying that they refer to principles of 'blind justice'; that they are bound to a way of thinking that is strongly influenced by norms and rules; and that they rely on abstract rules and universal principles in order to solve conflicts in an impersonal and unbiased manner. On the other hand, women use a 'logic of care,' their moral way of thinking and acting, being socially conditioned towards care, "relatedness", and feeling responsible for others. Gilligan considered 'the other voice' more humane and likeable.

The female orientation towards relatedness is also the leading topic of the book *You Just Don't Understand. Women and Men in Conversation*, published in 1991 by the linguist Deborah Tannen, which became another milestone of feminist difference literature. Based on empirical research, she established that the male style of speech corresponds to a report format which aims at preserving their own independence, and that conversation mainly serves as an agent for negotiating and establishing one's own position in the social hierarchy. In contrast, the female style of communication is characterized by establishing a relationship with the dialogue partner and aims to build bonds, create communality and intimacy, and avoid isolation. These findings suggest the pair of opposites: cold (inhumane) and warm (humane) styles of communication.

Gilligan's work is specifically relevant to evaluating the impact of the increasing representation of women in the judiciary, as decision-making and choosing between alternatives is part of the daily practice of judges, who are regarded as guardians of morality and the value system in society. In respect to Tannen's work, it matters because language is the jurists' main tool, their work-

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12 Kohlberg had developed a differentiated graded scale to classify the moral reasoning according to level and stage of development. His findings were based on empirical research on male children and adolescents, like those of Piaget and Freud. In comparison, girls often did not reach the same level of development and were therefore considered 'retarded.' The target groups were confronted with moral dilemmas. A famous one is the 'plank of Carneades,' which was first used by the Greek philosopher Carneades and has been discussed by philosophers since the Roman Cicero: Two shipwrecked sailors see a plank that can support only one of them. Each has to decide: Should I take the plank and let the other drown or should I be noble and leave the plank to the other and drown? Female adolescents had more problems than boys choosing either solution A or B and often tried to find a 'third way,' avoiding a black or white solution.

ing equipment. So when women are 'different' in these respects, it cannot be without consequence for any kind of legal practice, and will change the legal profession.

In the 1990s, the German feminist mainstream, which was dominated by sociologists and political scientists, criticized these books in addition to those of other so-called *difference theorists* (Field-Belenky 1984 inter alia) as essentialist because they assigned women gender-specific characteristics.[13] At that time, German feminism committed itself to structuralism and the deconstruction of gender. Its aim was to overcome the social gender concepts with traditionally-assigned gender roles constructed by the patriarchy (Benhabib 1993), although many feminists cherished a 'we, the women' rhetoric, which in itself presupposes difference.

Decades of heated discussions about gender differences followed. Some contradictions came from developmental psychologists and neurobiologists. After the turn of the millennium, theories stressing diversity prevailed, putting the spotlight on the individual and his or her complex bundle of qualities, character traits, and different biographical factors, including age, education, financial situation, family status, political views, health, sexual orientation, etc., sex being just one factor among others. No definite evaluation can be given here as to whether gender-specific qualities exist and how much sex or gender contributes to a person's views, actions, decisions, or their performance in professional roles. This, after all, is as difficult to solve as the fundamental question of how much of a person's intelligence is inherited or due to life circumstances and surroundings. Hence, the focus of our research was to observe, describe, and interpret differences in legal work, and not to solve the question whether those differences may be inherited or socially acquired.

Of course, there is an obvious problem attached to this research: if differences between men and women are pointed out, one immediately drifts towards the 'patriarchal dilemma' and tends to reinforce those men who always knew that 'women were different' (usually meaning weaker). As a consequence, my research on the impact of feminization on the legal profession was not welcomed by German mainstream feminism. It was less of a problem to present the findings in the Anglo-American world, that is to say, in common-law systems where judicial decisions are based on distinguishing cases from precedent, and where the personality of the judge matters more than in a civil-law system where the application of the codified law leaves less room for individual interpretation. In Germany, the judge is considered the neutral and objective tool of the third estate. France upholds the so-called universalism

13 Sociologists criticized Gilligan severely, also methodologically (cf. Nunner-Winkler 1995).

principle. Except for decisions of the German Federal Constitutional Court, in Germany the names of the deciding judges are neither known nor cited in recorded cases, whereas in the US, for instance, the process of appointing or electing judges involves scrutinizing their personal characteristics, which are widely discussed due to expectations that their individual traits might influence the outcome of the cases presented to them.

Of course, there have been discussions in Germany about individual bias, prejudice, and preconceived opinions in the application of law and the passing of judicial sentences. This mainly applies to the 1970s and 1980s, when the sociology of law was flourishing and sought to come to terms with the unjust and inhuman decisions of judges during the Nazi regime.[14] In general, however, judges show a strong aversion to discussing any kind of individual bias in their decision, as this might mar their professional ethics (Schultz 2013b).

4 Do Women Judges Change Judicial Practice?

In the 1990s, when I was working on the effects of gender in the legal profession and the judiciary, I had a prominent confederate. In a speech given on the German *Judges' Day* in 1995, which focused on the topic of 'the changing judiciary,' the president of the Federal Constitutional Court, Jutta Limbach, spoke about the 'trends' within the judiciary, including the increasing numbers of female judges and prosecutors. She placed the following questions: Do women change the judiciary? Will women influence jurisdiction with empathy and leniency? Will penalties become milder? Or indeed, do law schools and the judiciary initially attract women who are similarly as authoritarian as men?

On that same *Judges' Day*, Renate Jaeger, judge in the Federal Constitutional Court, later the German judge at the European Court of Human Rights, had been asked to discuss the topic: 'Women change the judiciary—do women change the judiciary?' She criticized the way the question was put, as she feared this would arouse the same expectations and attitudes that had hampered women from accessing legal occupations at the start of the century, and she also worried that outdated assigned gender characteristics could be revived. She held that lawyers (female or male) choose a certain profession due to individual characteristics and character traits (logic, abstract thinking skills, eloquence), and that men and women would equally be exposed to and

14 They were related to the triplet of race, class and gender. These days it is politically incorrect in Germany to use the term race, which has been replaced by ethnicity, while class, as a term from Marxist class struggle, has been replaced by social stratum.

socialized by the influence of the male-dominated judiciary. She concluded that male and female lawyers would therefore not be very different from one another after all.

4.1 *Legal Practice Changes Women*

Renate Jaeger made an important and correct point: female jurists are 'molded' during the course of their seven to ten years of legal education, the famous '*formation professionelle*.' They undergo character-forming processes (Schultz 2003c, 301), which are still organized and led by men who, in turn, are influenced by traditional conservative ideals and paradigms (Schultz 2012).[15] In Germany, even today, legal education is still a 'prerogative' of men; not more than 16 percent of female law professors hold a chair, while only approximately 13.5 percent hold one of the 'big' chairs.[16]

Besides the necessary acquisition of knowledge and practical skills, these adjustment processes lead to a homogenization of attitudes and opinions; this applies equally to men and women. Individuals tend to adapt to and imitate existing patterns, and respond to organizational normative requirements. It is established knowledge in the sociology of organizations that individuals are more likely to be transformed by institutions than vice versa. One external sign of adaptation is that women in legal occupations change their outward appearance, similarly to women in other male-dominated professions. Women at work demonstrate their incorporation by their clothes: for at least three decades, skirts have been scarce, being replaced by discreet pantsuits. Dresses and skirts have now returned—in unobtrusive forms and colors in the legal world[17]—which shows that growing numbers gave women the freedom to express their femininity again. Men *and* women have changed. What is still particularly obvious are the differences in the style of speech and body language.[18] Men and women also display different behavioral patterns in their

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15 For example, the teaching materials used reveal an old-fashioned model of society and family (cf. Schultz 2003e).

16 The overall statistic for 2015 is 16.5 percent. In contrast to other countries, female law students in Germany do not perform better than their male counterparts. A considerably larger number of women fail in the state part of the first legal examination, while men and women fare equally well in the second state examination. The overall dropout rate is about 50 percent.

17 At a conference on Gender and Judging in Lisbon in June 2013, the female Portuguese judges and prosecutors were dressed in a very feminine way, with high heels and deep décolleté dresses, which I think demonstrated a kind of offensive femininity to signal 'We are women and we have arrived.'

18 This is my experience as a communications trainer of young lawyers and the judiciary.

habit, and women today differ from their sisters of preceding generations, an obvious example being that (professional) women usually speak with deeper voices than their mothers.

4.2 *The Subjective Perspective: What Women Jurists Think about their Work, Professional Attitudes, and Behavior*

To find out whether there are differences in attitude towards their work, I analyzed biographical reports of female jurists (Deutscher Juristinnenbund 1984; Fabricius-Brand 1986), sent out questionnaires, participated in female jurists' gatherings as a participating observer, and made notes of impressions and observations during teaching and 'informal' conversations (Schultz 1990, 1994a and b, 2003c).

Female jurists in the 1980s definitely considered themselves different from the men in their field; they claimed to work in a more flexible, patient, and less formal manner (Schultz 1990, 346). This also applied to female jurists with whom I talked in the 1990s. They named further female attributes: sensitivity, compassion, understanding, willingness to compromise, social skills, charm, perfection, reliability (Schultz 2002, 2003c). An American study of how female divorce lawyers self-assess their behavior resulted in a similar list of attributes (Mather 2003). During a founding meeting of a network for female attorneys in North Rhine-Westphalia in 1999 one of the attorneys stated:

> My way of working is totally different from that of my male colleagues. For me the most important thing is quality; only then do I think of the money. After I opened my practice I had a tough time financially for quite a while. But now people know that I am particularly motivated and as a result I meanwhile have a number of loyal clients and my accounts are straight.

One female defense lawyer from Cologne, specializing in the defense of youths, stressed how different she felt from her male colleagues in her way of working during a talk in 1995. She pointed out that for her, the most important thing would be to create an agreeable atmosphere in court and be fair to all parties involved. She would feel responsible for the course and the outcome of a trial, and she would try to help her clients on an interpersonal level, take care of them, even mother them and follow the moral aim of bringing them back on track.[19]

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19 In the 1990s, I attended several talks by female jurists about their professional work. It turned out that female lawyers were less reluctant than judges to talk about gender differences.

In a questionnaire issued during a training course I offered attorneys in 1997, the female attorneys claimed they had the impression that male colleagues treated their clients differently, for example, not taking female clients seriously, or treating them in a patronizing, patriarchal, or paternal way (Schultz 2003, 312). Female judges and prosecutors also claimed that their style of working was different from that of their male colleagues. Evidence for this was obtained from a small research project with female judges in the federal state of Hesse in 1988. The women specified feminine elements that should be incorporated into the administration of justice: improving the emotional climate, strengthening communication and cooperation between the involved parties in the trial, reduction of authority vis-à-vis the parties, and reduction of competitiveness between colleagues. The quality of being more attentive to the clients was also emphasized.[20] Surprisingly congruent with the results from Hesse were the statements by a group of mainly male judges and prosecutors during training in the Academy for the Judiciary in Treves in June 1993, whom I asked which characteristics (of their colleagues) they considered specifically feminine. The main answers were: emotionality, preparedness to solve problems on an emotional level, a high level of sensitivity, empathy, a lower risk of restricting oneself to legalistic dogma.[21] To my surprise, the male judge chairing the course labeled these as elements of a more humane justice, worth being applied and lived by both sexes.

The female judges and prosecutors from Hesse furthermore stated that, on the one hand, parties to a dispute, both the accused and lawyers, court personnel and their colleagues, expected them to behave in a gender-specific way by, for example, showing understanding, empathy, charm, a higher level of collegiality, and a certain level of feminine reserve. On the other hand, they were confronted with negative prejudices, such as incompetence, an inability to cope with the workload, adapted behavior, subordination, a lack of authority, and a lack of career ambition.

20 In her empirical research in recent years, Anne Boigeol heard from a female Procureur Général that to her mind "(N)either men nor women hold a monopoly on a particular behavior, but a quality encountered perhaps more frequently with women than men is a capacity to listen. They are happy to consult with others, discuss issues with their team, and make sure that questions have been fully explored, without this impeding their ability to take a decision" (Boigeol 2013, 141).

21 Kohen (2008, 116) found in her interviews with family judges in Buenos Aires, Argentina, a greater tendency of the women judges to resort to interdisciplinarity as an essential tool for their work.

Inversely, the male participants in the training course in Treves answered a question regarding the prejudices they observed female jurists facing. They added diligence and ambition to the list of expected behavior, though not for themselves and their colleagues, but for the lawyers, the non-legal personnel and further parties to the proceedings. One participant, who apparently had had some frustrating experience, wrote: frequent rigidification, especially when pursuing a career, and adaptation of a negative male attitude. In her report about interviews with female magistrates in England written almost twenty years later, Hillary Sommerlad underlined the notion that female judges may go for harsher and masculinized performances in order to counteract gendered expectations (Sommerlad 2013, 365 ff).

During gender trainings in the German Academies for the Judiciary in 2003 and 2004, I realized that these perceptions of difference had become less marked but were still existent (Schultz 2013b). In any case, it had become more difficult to talk about them, obviously due to advancing perceptions that this might be politically incorrect in times of gender equality. In seminars on judicial decision making, which I have been arranging since 2005, any mention of gender is met with hostility from a significant fraction of the participants, although most of the women in the group signal that they do perceive differences in style and behavior (Schultz 2013b). In the narrative interviews for our research into female judges' careers in the judiciary in the Federal state of North Rhine-Westphalia in 2009 and 2010, not much was mentioned about these differences. It was always stressed by both men and women that women are as good as men. There was no longer any mention of women being incompetent or too slow at their work. The female president of one of the appeal courts only stated as a notion of difference that women bring more color to the administration of justice. What remained unchanged was that women complained about career deficits due to male-dominant behavior (Schultz 2013 a), arrogance and excessive self-esteem. During her interviews with female magistrates, Hillary Sommerlad, captured statements such as the following: "The men convey that sense of self-importance in their body language, there's no sense of awkwardness or embarrassment—they look you straight in the eye and demand attention" (Sommerlad 2013, 364).

The subjective perceptions presented above are supported by socio-linguistic analyses of communication in court hearings in Israel (Bogoch 2003). Female prosecutors had a more agreeable style of cross examination, which aligns with Tanner's thesis that women have a 'warmer' style of communication. Female attorneys were more likely to deal with the emotional needs of their clients during the court proceedings than their male counterparts, which

can be related to Gilligan's 'ethic of care.'[22] During divorce proceedings and in divorce mediation cases, it was rather obvious that female attorneys discovered and named disadvantages for the women involved more quickly than male attorneys (Bogoch and Halperin-Kaddari 2007), which shows that they better understood their clients' needs. Revital Ludewig and Juan LaLlave (2013), in their research on judges' strategies of coping with stress, found that female judges reported more frequently than their male colleagues that they use social support (discussion of cases and conversation with family and friends), which aligns with notions of empathy as a coping strategy and considering mediation as a suitable means to resolve a case.

In our research project, the question discussed between researchers from common law and civil law countries was whether female jurists in an adversarial system try to avoid legal proceedings more often than their male colleagues due to their less contentious attitudes. This was not fully confirmed. A study by Mather (2003) came to the conclusion that attorneys, both male and female, prefer amicable solutions. In Germany, though, it became evident that considerably more female jurists show an interest in training in mediation than their male counterparts.[23] To what extent this translates into their professional strategies and behavior cannot be answered clearly.[24] Another question asked was whether female judges and prosecutors behave more ethically than their male counterparts, as women overall are considered to be more law-abiding and 'virtuous.' Data from the Netherlands confirmed that female lawyers came into conflict with the rules and regulations of vocational and professional law less frequently than their male colleagues, and were therefore less often subject to disciplinary proceedings (De Groot-van Leeuwen 2003, 347).[25] There was no evidence in the reports from countries in Western Europe and North America about differences in the ethical behavior of judges—male or

22 Clients also confirmed that they experienced more respect and sympathy when consulting a female lawyer.

23 In Germany judges are also trained in mediation techniques.

24 Cf. Felstiner et al. (2003).

25 This could match the general results of criminal statistics, which also show that women break rules less often. At the time of writing, the overall share of women in criminal sentences in Germany is about 25 percent, and less than 4 percent of inmates in prisons are women. A clear interpretation of these results is not possible, however. Feminist criminologists advance the view that this is not necessarily because women are the 'better' part of mankind but rather because the specific forms of female misbehavior are not being captured by criminal law as legal wrongdoing.

female[26]—although in some developing countries the opportunity for women to gain higher political and judicial positions has been linked to their being less susceptible to bribery (Cardinal 2013 for Syria). In these countries the participation of women has helped to restore public trust in the judiciary (Kamau for Kenya, Owor and Musoke for Uganda).[27]

Maria Rita Bartolomei, in her fieldwork in Ivory Coast and Italy (the Marche region), came to the conclusion that in both societies women occupy their role as judges in a constructive way. They imagine and build a more complete vision of the law and its impact on people's everyday lives. Developing strategies for articulating an alternative vision of reality, they re-draw the boundary between the legal and the social. She also found that female judges had a greater sensitivity to, and advocated for, human rights and minority groups' claims and needs.

Can it be concluded, then, that rather than merely introducing different working styles and behaviors, women in the judiciary do indeed make a specific contribution to adjudication (or judicature), that female judges promote substantive justice? That they take a more interdisciplinary approach, avoiding the rigid application of universal rules and narrow doctrinal issues? That they arrive at other results?

5 Do Female Judges Pass Different Judgments than Male Judges?

In thinking about gender effects in judgments it seemed clear that gender issues would matter most—if at all—in criminal proceedings where the personality of the accused has to be evaluated, and in family law, which deals with personal relations mainly in cases concerning divorce, alimony, and custody. This section therefore explores in some detail research on gender issues in these fields, while gender effects in other fields of law are summarized in the following section.

5.1 *Criminal Law: Do Women Pass More Lenient Sentences?*

Some aspects of the question of whether women judge differently were investigated in Germany by criminologist Regine Drewniak at the start of the 1990s.

26 In Germany there have been virtually no noteworthy cases of bribery or perversion of justice committed by judges and prosecutors since the Second World War. Numerous sentences of perversion of justice (sec. 339 Criminal Code) have been passed against former Nazis (all men) and after reunification against former GDR judges and prosecutors.

27 See also Ruby Mehdi on Pakistan in this volume.

She conducted an empirical study of gender-related attitudes in the judiciary and different ways of passing judgments between female and male judges. The research hypothesis employed was fully influenced by Gilligan and the 1980s *Zeitgeist*. It assumed that female judges would show more sympathy and sensitivity to the individual situation of the accused (ethics of care) rather than focus strictly on enforcing legal principles (ethics of justice).

Drewniak concluded that female judges had a distinctly more negative opinion of their work as a criminal judge than their male colleagues,[28] but that generally there was no greater intent to take the accused's individual personality and situation into account.[29] She left the question of whether the specific judicial personalities were created by an individual's choice of profession or by their socialization as jurists open.

The idea that gender matters to the outcome of a case, and that there is some kind of 'male justice,' had been put forward by the leading German feminist Alice Schwarzer in 1977. Following her analysis of criminal court verdicts in manslaughter cases, she concluded that gender-specific perceptions influenced the description of the accused's personality profile on which the sentence is based, to the disadvantage of women. At the time, she could not compare judgments from male and female judges as there were very few women judges and prosecutors. In verdict reviews published in the feminist magazine *EMMA*, she continued to criticize 'male justice' over the years:

> In Germany, the risk for a woman to be killed by her husband is ten times higher than for the husband to be killed by his wife. In court, the risk for the women is higher as well: the murderess usually obtains a prison sentence of ten to 15 years, if not a life sentence; the murderer not rarely obtains a sentence of acquittal or just a few years on probation.

Monika Raab (1993) has also dealt with 'male justice' in her research on 'male judges—accused women.' She observed that gender-specific stereotypical notions could influence male judges, that the innocent-looking, nice woman who had committed theft, for example, was treated leniently, and the female role-breaker who had infringed classical expectations geared towards women

28 By contrast, in a comparative study of the family justice in France and French Canada, female family judges had a more positive opinion of their work than their male colleagues (Bessière and Mille 2014).

29 Furthermore, she found that criminal judges (both female and male) in general had a different orientation vis-à-vis the offender and society, and different intentions in sentencing than judges working in other fields of law.

by neglecting the family or committing acts of violence could face harsher punishment.

The questions remained whether female judges generally show more empathy or tend to pass more lenient sentences. Motivated by Schwarzer, Dagmar Oberlies (1995) analyzed 177 penalties in German manslaughter cases against women and men and came to the conclusion that the participation of female professionals sometimes influenced the outcome of a case. The involvement of a female defense lawyer correlated with the conviction for murder (instead of the less serious crime of manslaughter) and could therefore have a negative effect for the accused. The participation of female prosecutors and women in juries had a moderating influence on the sentence, while the participation of female professional judges remained without influence (Oberlies 1995, 188 ff).[30] These results are not necessarily proof of differing attitudes of women in the proceedings, but of difficulties they may have in achieving their professionally desired result. The prosecutor's aim is basically to gain a stiff(er) sentence, the aim of the defense lawyer to achieve a mild(er) sentence or an acquittal. The research may also back the notion that women jurors are easier to influence, and may show more empathy to accused persons or victims.[31] It is comforting for men that sentences from female judges did not differ from those of their male colleagues, which may again demonstrate their adaptation to general (or male) standards in their professional training and work.[32]

The interactions of judges, state attorneys, and witnesses in criminal courts in Israel were described in-depth from a sociolinguistic point of view and differentiated by Bryna Bogoch (2003). In the lawsuits she examined, she discovered that each sort of male statement directed at female parties to the proceedings was geared towards establishing male supremacy and hierarchical status. Interestingly, the statements women made (as witnesses and female judges) before other women (prosecutors and lawyers) were likewise less respectful than those directed at men. Altogether, the statements made by women received less consideration and therefore carried less weight.

These communication structures had tangible results, comparable to those found by Oberlies in her research: sentences turned out higher when an accused had a female defender, but lower with a female prosecutor. In regard

30 These correlations were not very strong, but they were present.

31 Cf. John Grisham (1992, 329): "Women," said Lucien. "Always pick women for criminal trials. They have bigger hearts, bleeding hearts, and they are much more sympathetic." Cited in Schultz and Shaw (2013, 1).

32 In more severe criminal matters German judges sit in panels with two or three fellow judges. The older, more experienced colleagues are likely to influence the younger ones.

to representation and power assertion in the course of the court proceedings, this means that women were weaker (Bogoch 2003, 265; Schultz 2003a, XLI). In contrast to Oberlies' findings, Bryna Bogoch observed that, in cases of violence, female judges in Israel tended to pass lower sentences than male judges, and that they did not show any specific sympathy for female victims. This could be seen as a part of a strategy of not wanting to seem biased and not acting differently than male colleagues, as this could make them appear unprofessional. Bogoch inferred that this reflects the still ambivalent situation of women in society, in which their competence is still being questioned and their self-confidence undermined.

In our course on judicial decision-making in the National Academy for the Judiciary[33] we used made-up files with test cases and presented them to judges. We consistently observed that women overall tended to pass milder sentences. We wondered whether this could demonstrate a less punitive attitude of the female judges.

The results reported from Poland (Fuszara 2003) and Brazil (Junqueira 2003) deviate slightly. In these two countries, female judges were more likely to show empathy with male accused persons, for example in the evaluation of personality factors that are taken into account in calculating sentences. Only in cases of physical violence did the female judges tend to adopt a more rigid approach than their male colleagues, possibly because they identified with the victims.

5.2 *Family Law: 'Do Women Judges Favor Female Litigants?'*

The colleagues from Brazil and Poland also found that female judges—themselves working women—tended to be less generous to housewives with alimony cases than male judges. Apparently, in these cases, gender-specific attitudes play a role, informed by the female judges' own personal experiences and life situations. The obvious explanation is that female judges, as 'working women', feel less sympathy for women who rely financially on their husbands. This fits the general observation that women tend to regard consexuals more critically than members of the opposite sex,[34] and accordingly members of the opposite sex are treated more leniently (Raab 1993). Bregje Dijksterhuis (2013),

33 Our sample contained approximately 250 participants of whom about 35 percent were women. The cases tested the so-called 'anchor effect' in decision-making. If a high or low sum or punishment is mentioned at the start of a case, the result will be oriented to this amount or figure, which means that an initial statement of a mild punishment will lead to a milder sentence than an initial mention of a harsh punishment (cf. Englich and Mussweiler 2001).

34 This is also described in the management literature (Schultz 2013a).

who attended the meetings of the Dutch Judicial Alimony Commission, where maintenance issues are discussed and guidelines for the judicial decision-making process are developed, found that female judges did not display a pro-women attitude in their arguments.

The question is whether a reverse effect could prevail in custody cases, taking into account that women were traditionally seen as the natural caretakers of children. In research in Poland (2003, 376) and also in France (Bessière, Mille 2013, 9, 24), it was found that the overwhelming majority of decisions in these cases were in favor of women, but the number of women who gained custody were equal to the total number of requests made.

Taking these results into account, I asked German judges during gender training at the Academy for the Judiciary in 2003 and 2004, whether they had observed something similar in family law cases in Germany. They—men and women—supposed that women would show more empathy with female parties, but were convinced that gender stereotypic perceptions and reactions could only become apparent in the way they led the proceedings, but would not influence the outcome of the trial, which again shows how important it is for them that their objectivity should remain unquestioned.

A somewhat different trend could be observed in Tunisian and Egyptian family courts. In her contribution to this volume, Maaike Voorhoeve shows that female judges in Tunisia continued to regard the man as responsible for maintaining wife and children and their own salary as merely complementary. Monika Lindbekk found that Egyptian judicial panels headed by female judges upheld the role division within marriage, where men are seen as the financial caretakers. She also argues that a tendency to invoke an 'ethic of care' among both male and female judges in divorce cases can be attributed to an increasingly prominent thematic perspective rather than gender.[35] Accordingly, cases of divorce in the family courts she studied were more often won by women than by men.

In other countries, it has been reported that the 'style of judgments' in family matters differs: female judges in Israel wrote longer and more detailed judgments (Bogoch, Halperin-Kaddari and Katvan (2009). In Brazil, it was observed that female judges provided more thoroughly elaborated reasoning than men (Junqueira 2003).[36]

35 It would be interesting to compare in research whether there is a difference between single, divorced and married female judges or judges with or without children, as they will have different life experiences.

36 Comparable research has been reported in the US (Choi et al. 2011).

Gender effects have also become visible in social law cases. To give just a few examples: in Germany, the female judges in the Social Appeal Court of North Rhine-Westphalia differed from their male colleagues in their vote whether Viagra should be paid for by health insurance, and the German Attorney General, Juliane Kokott, at the European Court of Justice, advocated uniform tariffs for insurance for men and women, whereas previously women had to pay more than men.

There is extensive research in the U.S. on gender effects in workplace sexual harassment cases (Boyd, Epstein and Martin 2010; Peresie 2005).[37] In administrative law, female judges have extended the right of asylum to cases of threatened female genital mutilation (Rackley 2008), and female immigration judges in the United States were overall 44 percent more likely to grant asylum than their male colleagues (Menkel-Meadow 2010).

To summarize our findings relating to gender-coded cases, it becomes clear that they have failed to produce an unambiguous answer to the question whether women judge differently from men. Although, for instance, participants in mediation courses in Germany tend to be mainly women, in their judicial practice female judges have not been found to behave in a more conciliatory fashion than men. Nor can it be said that judges' gender permits any prediction as to how they will resolve particular cases (Bartolomei 2013). Rather, we have to acknowledge that individual female judges' decisions reflect both their particular mix of individual characteristics and life experience resulting from age, marital status, social class background, financial situation, region of origin, etc., on the one hand, as well as their shared features based on their professional education, training and experience (*formation professionelle*) on the other.

6 Conclusion

The evidence presented both from inside and outside Germany as a whole neither confirms nor refutes Gilligan's thesis of women's 'other voice' in regards to the outcome of cases. The conclusion that suggests itself is that it is not so much the female judges' work results that are different, but their attitudes,

37 These cases are heard by panels of several judges. A so-called 'panel effect' was discovered: male judges were more likely to find for plaintiffs when at least one female judge was on the panel. They obviously assign the competence in these cases to their female colleagues. Similar results have been reported in racial harassment cases. African-American judges and white judges as a group perceive racial harassment differently (Chew and Kelly 2009).

their style of work, and their communicative behavior. The latter at least underlines Tannen's thesis that women adopt a 'warmer' style of communication. Considering the outcome of their work, they feel first and foremost obligated to do their job properly and employ whatever they have learned at law school, and also to fit in with the rules and norms of their profession. The examples given above have shown that men do not need to fear that they will be treated less equitably by female judges: rather the opposite may happen, especially in criminal and family law.

It is important to bear the time factor in mind; in Germany, for instance, marked changes in the judiciary have occurred in the past 25 years. Overall, the culture in the judiciary and in the legal profession has changed, as it has in other professions. A 'de-formalization' of legal work can be observed, with a greater service orientation. To what extent this can be attributed to an increase in the number of female judges cannot be estimated reliably as it is part of a general process of modernization in society.[38] It would, however, be speculative to assess the effect of increasing numbers of female jurists on the status, prestige, and reputation of the legal occupations. Too many factors are playing a role here.[39] Women in the judiciary do not speak with one voice. A 'female jurists' movement' as such, does not exist, as there is no clearly defined and locatable female culture in legal practice. There are female judges who are part of the feminist movement and others who are totally indifferent to questions of women's rights.[40]

There might be complaints that there is no female jurists' movement. The women of the Second Wave Women's Movement were in agreement that they wanted to search for a different and a better way out of the traditionally male-dominated world, with its violence and wars. Women should become visible as women in society, male power monopolies should be broken up, and alternative, female drafts to the male designed world should be implemented. This goal has been achieved in part, but partly it also seems to have been forgotten over time; maybe it is also outdated. At the forefront for both female and male

38 Although this is also characterized by an increase in the numbers of women in higher education and the workforce.

39 Europeanization and globalization are intense agents of change—especially in advocacy—in addition to feminization (Schultz 2003, 2004).

40 Female jurists can hardly be seen as a homogenous group. There are completely different patterns of professional identity, ranging from the edgy female attorney who is represented in the glossy legal magazines of the internationally networked global law firms, to the motherly female judge who is interested in the individual good of those entrusted to her; but there are also reversed attributes plus many different 'types' in between.

jurists is the aim of achieving financial independence through their professional work and participating in the prestige and power that the legal professions offer. The reform of the professions and the practices carried out, geared towards a better morality, is hardly under discussion these days, although there is at least some discussion in the judiciary—from men and women equally—about the importance of quality control and citizen orientation. With a heightened orientation to commercial interests, particularly from lawyers (Schultz 2003d, 2005), it could be said that the opposite of the feminist vision has set in, which is a loss. In developing countries, however, hopes are still vested in female judges to educate the people and help improve living conditions and economic wellbeing.[41]

There is one area that female jurists in Germany clearly and sustainably influence: they change the law. Female judges at the Federal Constitutional Court in Germany—often on the motion of female lawyers—have helped to assess the constitutionality of legislation with regard to gender equality and adapt it to modern ideas of equality (Jaeger 1996, 123 ff). In addition, female politicians with legal qualifications integrate women's interests and needs into the legislative process towards the redistribution of goods and facilitating women's participation in societal functions and the power structure of the state. A prerequisite for this was work at grass-roots level: the increasing number of female jurists in all legal occupations have picked up and dealt with the multitude of legal questions concerning women in everyday life and brought them to the attention of judges, politicians and the population at large; a task which, of course, is not ended.

What is the final conclusion? Do women judge better or differently? In spite of the evidence given, no clear answer is possible.[42] If we cannot be sure that women are better judges, why is it important to have women on the bench? Even though it is not unambiguous, the influence of women in the judicial system should not be underestimated as their attitudes, their style of work, and their communicative behavior are different, and as they bring in different life experiences as women and mothers, which should be valued.

41 This could be another reason why donor countries demand the participation of women in the system of justice.

42 We could also ask in turn: Do men judge differently? There are many examples from the first decades of the twentieth century when only men were sitting on the bench. Even in the 1950s and 1960s, judges in the Supreme Court stressed, as a rule derived from natural law, that men are the head of the family (Schultz 2013b).

Renate Jaeger, a female judge in the Federal Constitutional Court, whom I have cited at the start of this chapter, concluded in her article for the *Judges' Day* 1995:

> We will realize that the judiciary has changed when we will stop reassuring ourselves about the share of women and stop speculating about it. The judiciary will have changed when both female and male lawyers together with female and male judges will fend for a humane judiciary (1996, 125).

Let us wish and work for a humane legal practice.

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CHAPTER 3

Women's Access to Legal Education and Their Appointment to the Judiciary: The Dutch, Egyptian, and Indonesian Cases Compared

Nadia Sonneveld

Introduction

In June 1994, the appointment of women to positions of judicial authority entered into public consciousness and became an issue of much public debate in Egypt. A number of international conferences on women's rights, which were held in Cairo during the same period, had brought to light that there were no women currently serving as judges in Egypt.[1] These conferences served as a powerful catalyst to spark discourse and debate of women in the legal system. Expression of these debates could be observed in popular culture images. In a context where Egyptian women had (and still have) a legal obligation to pay obedience to their husbands, the cartoon below aptly captures one of the main issues permeating the ensuing public debate. Published in June 1994, this cartoon illustrates the thought that women's ascension to the Bench would change the social patterns of patriarchal authority. Following these assumptions and concerns, not only might women assume (judicial) authority over men in the public sphere, but their advance in the judiciary would also transform the gendered nature of authority inside the home. This is captured by the sentence in which the first female judge asks the presiding female judge how her husband is doing (now that he has been placed under her protective authority).[2]

The preceding chapter by Ulrike Schultz clearly demonstrates that the controversy provoked by women's entrance to the Bench is not novel to Egypt or any other country in the Muslim world, for that matter. Furthermore, one may note, in countries where women are no longer under the direct legal authority

1 These were a national conference on women held in Cairo in June 1994 and the International Conference on Population and Development (ICPD) of the United Nations, held in Cairo in September 1994.

2 Personal communication with caricaturist Amr Okasha, October 3, 2014.

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FIGURE 1 The Woman Judge. *The judge on the right asks the presiding judge: "Come on, tell me, madam judge, how is your husband doing?"* Al-Wafd, *June 17, 1994. Courtesy of Amr Okasha, caricaturist, political writer, and deputy manager of* al-Wafd *newspaper.*

of their husbands, and where the presence of female judges has long since become a common sight, women's capacity to adjudicate objectively is still put into question. Skeptics frequently make references to their alleged soft and emotional nature to debase women's credibility within the legal system. Hence, the issue of women's authority in the courthouse, on the one hand, and

FIGURE 2 Rechter [*judge*]. *"Judge!!! I've always wanted to be a judge!! Lovely!!" "All thieves and road traffic offenders who appear before me will be sentenced for rape too, because every man is a rapist!!!" "Slowly, this will satisfy my feelings of revenge, increase my self-confidence, and make me feel safer on the streets . . ." ". . . and since an increasing number of men will spend time in prison, there will finally be far more employment opportunities for women"* [*translation by author*], *Elderen, van* (*2009, 24*). *Courtesy of caricaturist Karin van Elderen.*

their position in society outside the courtroom, on the other hand, still permeate much of the discussions.

For instance, the Dutch cartoon displayed above shows a female judge enthusiastically exclaiming that finally the time has come to take revenge on all the men who have done an injustice to her in the past. In so doing, the female judge not only conveys a message of women judges being anything but objective, but also of their authority over men in the courtroom not necessarily extending to the home and society outside the courthouse.

Similar to the cases mentioned above, Indonesia forms an interesting case. Much like their Egyptian counterparts, Indonesian women have a legal obligation to be obedient to their husbands. Despite their inferior legal position in the private sphere, Indonesian women have exercised authority over men within the confines of the courthouse for many decades. In fact, their appointment as judges in the 1950s has put them on a par with many Western countries, which did not start appointing women to the judiciary until after World War II. In this chapter, I compare the Dutch, Egyptian, and Indonesian cases. The main question guiding the following investigation is: what factors explain the earlier or later admission of women to the judiciary in Egypt, Indonesia, and the Netherlands?

The countries in this study have been selected for a variety of reasons. In the Muslim world, Egypt was a pioneer in admitting women to the bar, but a latecomer in welcoming them to the judiciary. In contrast, Indonesia was relatively late opening the bar to women, but was one of the first, if not the very first, to permit women to work as judges. Writing about these two large Muslim majority countries[3] and the historical processes through which the inclusion of women in the bar and the judiciary was either facilitated or impeded, fills a gap in the academic literature which to date has paid very little attention to gender and judging in a Muslim context. This is remarkable for the following reasons.

First, there is extensive scholarship in feminist legal studies that is concerned with the relationship between law, gender, and power.[4] In the context of the Muslim world, however, the role of women working in the field of law—a male bulwark par excellence—has seldom been investigated. Second, as noted in the introduction, the issue of placing women on the Bench ranks high on the agenda of many a Muslim-majority government. Combined with international pressure, financial aid, and assistance from national and international

3 By population, Indonesia is the largest Muslim country in the world, while Egypt is the largest Muslim country in the Arab world.

4 For an overview, see Collier (2010).

donor organizations, this has led to a considerable increase in the number of female judges in the Muslim world over the last few decades. For example, Egypt, Bahrain, and the United Arab Emirates welcomed women to the ranks of the judiciary for the first time in 2003, 2006 (al-Awad 2006), and 2008 (al-Dusri 2008), respectively.

Yet the paradoxical relationship between Muslim women's allegedly inferior position in the home (where the husband exercises guardianship over his wife) and the increasing number of Muslim female judges who display judicial authority over male (and female) litigants within the closed walls of the courthouse remains unexplored. The recent appointment of female judges in a number of Muslim majority countries should not lead us to the conclusion that, compared to the West, the Muslim world as a whole is lagging behind in appointing women as legal professionals. During an international lecture in which I gave a speech on the sociology of law,[5] students were astonished to hear that 'developing' Muslim majority countries such as Indonesia, Morocco, and Tunisia had appointed women judges at the earliest opportunity, that is to say, after colonial independence in the 1950s and 1960s.[6] They also found it thought-provoking that these governments were quicker to open the judiciary to women than the governments of their own 'developed' non-Muslim majority countries of origin: in Australia, Italy, New Zealand, and Switzerland, women were not able to become judges until 1965, 1963, 1975, and 1974, respectively. For this reason, the present chapter also draws a comparison between two Muslim majority countries (Egypt and Indonesia) and one non-Muslim majority one (the Netherlands). Like Egypt in the Muslim world, the Netherlands was among the earliest European countries to admit women to the bar in 1903 (Kok 2009, 158), but it resisted opening the judiciary to women until 1947. Note that three decades later, the proportion of female judges had only reached 3 percent. In 2009, female Dutch judges outnumbered their male counterparts for the first time in history.

This chapter focuses on the appointment of women as judges in more detail than on women as lawyers. In contexts where (married) women had (the Netherlands) and still have (Egypt and Indonesia) a legal obligation to obey their husbands, it arguably makes sense to dedicate primary focus of investigation to the judiciary, which is a male bulwark par excellence, and one ultimately linked to power, authority, and decision-making. Furthermore,

5 Nijmegen, the Netherlands, November 4, 2013.

6 Indonesia, Morocco, and Tunisia gained independence in, respectively, 1945 (although it took the Dutch until 1949 to leave the country), 1956 and 1956. They appointed their first female judges in 1954, 1960, and 1968.

Egypt, Indonesia, and the Netherlands have all been influenced by the Code Napoleon, either directly (Egypt and the Netherlands), or indirectly (Indonesia). Until the present day, civil law is the dominant legal tradition.[7] In contrast to common law countries where attorneys are the dominant group within the legal profession, many civil law jurisdictions have a tradition wherein becoming a judge represents the peak of a judicial career (Lev 1976, 135–136; Schultz and Shaw 2003, xxvi). Having said this, in general, women's appointment as lawyers preceded that of judges by a few decades. The process by which this happened is also described.

Socio-historical studies on the entry of women into the legal professions are scarce. This not only applies to the Muslim context, but also to that of Europe, where until recently, "Historians of the legal profession [in Europe] have [...] displayed little interest in issues of gender" (Albisetti 2000, 825. See also, Schandevyl 2014). After 2000, an increasing number of scholars have started to produce work that explores the matter of women and the legal professions from a historical perspective.[8] By exploring the historical struggles by Dutch, Egyptian, and Indonesian women (and their male supporters) to gain access to legal education and the legal professions, the judiciary in particular, this chapter adds to this new tradition in a comparative manner. By focusing on women's entry to the legal profession from a historical perspective, it also contributes to the field of comparative law, whose practitioners should, according to Zweigert and Kötz, pay more attention to the ideological and historical contexts of legal systems (Zweigert and Kötz 1998).

To varying degrees, Egypt, Indonesia, and the Netherlands were affected by the French revolution, the subsequent Napoleonic wars, and the introduction of the Code Napoleon. One of the main reforms of the Code Napoleon was the appointment of government jobs to the best qualified individuals. Not surprisingly, education came to play an increasingly important role during the Napoleonic period, and the new emphasis on professionalism and education paved the way, albeit slowly, for women to also enter into education and, since law and administration became new central aspects of state power and legitimacy, to opt for a legal career. Hence, in section one, the establishment

7 In Egypt and Indonesia *shari'a*-based legislation also plays an important role, mainly in the field of family law. From 1971 until the present day, Egypt's different constitutions have declared that the principles of Islamic *shari'a* are *a* (1971) or *the* main source of legislation (1980, 2012, 2014). This constitutional declaration does not apply to legislation issued prior to 1980 (Arabi 2002).

8 See, for example, Kimble and Röwekamp (2015); Mossman (2006); Röwekamp (2011); Schandevyl (2014).

and development of law schools in Egypt, Indonesia, and the Netherlands as well as female students' admission to them at the beginning of the nineteenth century plays a central role. Historical studies of female law students are scarce in all three countries under study, Indonesia in particular. Section one of this chapter is a preliminary attempt to start describing this history in a more complete manner.

Women gaining admission to law faculties does not ensure that they will be equally distributed across legal professional roles (Abel 1988, 36), and for this reason, the entrance of female law graduates into the judiciary and the bar is explored in section two. This book, of which this chapter forms part, focuses on the appointment of female judges (and lawyers) in Muslim-majority countries from two unique angles: discourse and practice. By comparing the public debates that surrounded the appointment of Egyptian and Indonesian women as lawyers and judges in the twentieth and twenty-first centuries to public debates on the performance of their Dutch counterparts in the same period, this chapter contributes to the study of female legal professionals from the perspective of discourse.

The study of public discourse is not necessarily limited to an analysis of written materials only. Rather, as I have argued elsewhere, both verbal and non-verbal messages can be used to make a statement in the public debate, through conversational texts and words, on the one hand, and graphic and artistic expressions on the other (Sonneveld 2012, 35). A look at the Egyptian and Dutch cartoons presented above (figures 1 and 2) clearly demonstrates that general norms concerning the appointment of female legal professionals are intimately connected to societal notions of what it means to be a man or a woman.

By connecting the issues of female submission—violence against women and their submission to men—and female authority—women as judges—both cartoons make it clear that women may occupy a professional position of physical immunity and moral authority within the walls of the courtroom. This, however, does not necessarily suggest that the same situation exists outside the court premises; nor does it imply that the appointment of women as judges is likely to have an effect on that societal matter. In order to arrive at a better understanding of this possible discrepancy between female submission and female authority, we need to compare women's appointment as legal professionals to more general views on what it means to be a man or a woman in a given society. This chapter does so by comparing women's enrollment in legal education and the legal profession to concomitant developments in Dutch, Egyptian, and Indonesian personal status laws. Personal status laws regulate the intimate private relationships between husbands and wives, and parents

and children. Therefore, developments in personal status law (or family law) provide insight into the question of whether female judges' authority in the courtroom is indicative of women's authority within the family home and society at large.[9] An important conclusion that might be drawn is that historical, political, cultural, and religious differences between the three countries notwithstanding, spaces of converging transnational normativity can be detected with regard to the appointment of women as judges (and lawyers).

1 Women and Legal Education

1.1 *The Napoleonic Code: Liberté, Égalité, Fraternité inside the Family?*

The French revolution of 1789 was a catalyst spurring political and legal changes not only in France and Europe, but also in the Middle East. Centuries-old ideas and traditions concerning the monarchy, feudalism and religious authority slowly gave way to new ideas regarding equality, citizenship, and inalienable rights. When Napoleon assumed power in 1799, he enforced these new ideas through conquest, not only in large areas of Europe, including the Netherlands, but also in the Middle East, most notably Egypt and Syria. Through the Napoleonic Code (or Code Napoleon), he and his followers tried to implement the ideals of the French Revolution and create a uniform legal system in the areas he conquered. In light of the subject of this chapter, one of the most outstanding features of the Code Napoleon was its emphasis on appointing those who were most qualified to government jobs. In practice, however, the changes were not implemented immediately. For example, while merit played an increasingly important role in assigning government jobs, factors such as gender and class still presented obstacles to women and individuals from the lower socio-economic classes.

The ideals of the French Revolution had negligible impact on the existing notions of femininity and masculinity that existed throughout Europe. For example, French women were excluded from active citizenship after the revolution; and it was made clear that their proper place was in the home where they had to devote their time and energy to being good mothers and housewives (and men to being responsible breadwinners). In 1793, women were even banished from public life (Hannam 2007, 13). Throughout the eighteenth and

9 I am aware of the fact that there might be a difference between 'law in the books' and the way laws are implemented in the courts and everyday life. For more, see Sonneveld (2012).

nineteenth centuries, women's appearance in public spaces was often equated with immorality (Hannam 2007, 21). The Napoleonic Civil Code of 1804 reflected these sentiments to a great extent. Although it was revolutionary in that it eliminated privileges based on birth, promoted freedom of religion, and stated that government jobs should go to the most qualified, this same Code also gave a husband full legal authority over his wife, her property and her children. One might also note that there were harsh penalties if she committed adultery. Article 1388, for example, stated that the husband was the head of the family; Article 1124 that married women, together with infants and persons of unsound mind, were expressly declared incapable of settling contracts; and Article 213 stipulated that the husband owed protection to his wife, and the wife obedience to her husband. This Code was widely adopted throughout Europe, including the Netherlands, during a period in which industrialization and urbanization set in and an increasing number of working-class and unmarried women needed to gain employment.

At the same time, educational reforms stressed the need for girls' education. Educated girls, it was argued, would become more effective wives and mothers and would be in a better position to educate the new generation; the cornerstone of the new, liberal nation. Throughout Europe and North America, feminists used this to demand access to higher education (e.g. Hannam 2007, 19). In France, for example, women attempted to gain access to the baccalaureate and university faculties in the 1860s. A decade later, Paris's faculty of law opened its door to female students, although regular study would not commence until the mid-1880s (Albisetti 2000, 830). By 1900, women in Europe had gained (marginal) entry to most professions. According to Hannam, however, there was one exception: law (2007, 22). Hannam makes this remark in passing and does not explain why female graduates found employment in all but the legal professions. Did it mean that the number of female law graduates was relatively low, or that female students used their law studies to become good mothers and housewives—educated mothers were better mothers than uneducated mothers—or did they find it difficult to gain employment in the legal field? For the case of the United States, Harris claims:

> Practicing law was even more incompatible with nineteenth-century ideas about women than was practicing medicine. Female doctors could claim that their careers were natural extensions of women's nurturing, healing role in the home and that they protected feminine modesty by ministering to members of their own sex. By contrast, women lawyers were clearly intruding in the public domain explicitly reserved for men (quoted in Albisetti 2000, 826).

In the remainder of this section, I explore the prevalence of similar normative notions of masculinity and femininity in Egypt, Indonesia, and the Netherlands, and ask whether they played a role in the relatively slow admission of women to institutes of legal education as compared to other academic fields of study, such as medicine and languages.

1.2 *Women and Legal Education in Egypt*

Although the French presence in Egypt only lasted three years (1798–1801), its impact on Egyptian political and legal culture was significant. Since Egypt was a province of the Ottoman Empire, the Ottoman sultan sent a military force under the leadership of Muhammad Ali to end the French occupation. When the French troops left the country in 1801, Muhammad Ali (1769–1848) declared himself Egypt's legitimate leader. Muhammad Ali was able to secure the country an autonomous position within the Ottoman Empire by establishing a monarchical dynasty that would remain in power until its overthrow in 1952. Inspired by the French, he implemented a rigorous program of modernization: the state apparatus, military, education system, laws, and legal institutions were reformed according to European, particularly French, models (e.g. Berger and Sonneveld 2010, 53–54). The simultaneous creation of uniform professional profiles and education played a crucial role in the country's modernization.

From the late 1820s onwards, many Egyptian scholars were sent abroad, mainly to France, to study modern sciences and French military techniques.[10] Muhammad Ali's main interests were military, and he did not send students to Europe to study law. Under the rule of his grandson, Isma'il (r. 1863–1879), who took a more profound interest in law, many Egyptian students started studying law in Europe, mainly in Paris and Aix-en Provence. Between 1863 and 1882, 64 of 247 Egyptians students specialized in law (Reid 1981, 17). Inside Egypt, Isma'il established the School of Administration and Languages, which developed into a French-style law school in 1868 (Reid 1981, 11). This school officially became the Cairo Law School in 1886 (Reid 1981, 18). During this period, law graduates took up positions in the bureaucracy or the newly established Mixed Courts and National Courts. In opposition to the centuries old system of *shari'a* courts, where religious scholars from al-Azhar applied *shari'a*-based law, the new courts applied French substantive and procedural law. Slowly, *shari'a*-based law made room for French-inspired, secular laws. It was only in the field of personal status law that it retained such influence.

10 See for more, Nordbruch (2014).

Around the turn of the twentieth century, Egyptian reformers stressed the importance of education for women in the same way their European counterparts were doing at that time. A large number of these reformers had studied in France. For example, al-Tahtawi (1801–1873), who had been appointed as the imam of the first group of Egyptian students sent to France by Muhammad Ali in 1826, argued that educated women would be better wives to the growing number of educated husbands, which would stabilize the marital relationship, which was suffering from high divorce rates.[11] Moreover, educated mothers would also play an important role in educating their children to become good citizens of a new and free nation. Another icon of the Egyptian reform movement was Judge Qasim Amin (1863–1908). Amin had studied law in France and even equated the liberation of women with the liberation of the nation. Yet, perhaps the most well-known Egyptian student having studied in France was the blind al-Azhar scholar Taha Hussein (1889–1973). Coming from a lower-middle class and rural background, he himself had been one of the first students to be admitted to the newly established secular Cairo University (1908) at a time when higher education was still a privilege of the very few. In later years he would come to play an important role in women's access to higher education, legal education in particular, as we will see below.

At a time when education for women was encouraged as part of a struggle for independence, the study of law was proliferating and an increasing number of secondary school graduates opted for a career in secular law. In 1904, for example, 78 percent of the secondary school students continued their education by studying secular law (Reid 1981, 21). Of these students, a certain number would go on to play an important role in the nationalist movement of the early twentieth century. In fact, "The presence of a large number of lawyers within the first twentieth-century Egyptian nationalist movement and in the political life of Egypt up to the end of the constitutional monarchy in 1952 is a well-known fact" (Cannon 1975, 299). It has led several authors to give the study of law in Egypt a historical importance that separates it from other professions such as medicine or military science (Cannon 1975, 299).[12] Yet, the large presence of law graduates within the nationalist movement, coupled with the fact that education for women was seen as essential to the establishment of a new, strong nation did not result in a growing number of women studying law and opting for a legal career. On the contrary, women's entry into (secular) education in general and institutions of higher education in particular was a

11 In the 1930s, the divorce rate was as high as 50 percent in urban centers such as Cairo (Fargues 2003).

12 For example, Sa'ad Zaghlul, the leader of the nationalist movement, was a law graduate.

slow process, even after independence had been attained in 1922, and a new constitution proclaimed compulsory schooling for both boys and girls (Reid 1990, 105).

In fact, it was only in the late 1920s that the first Egyptian universities opened their doors to women, after a four-year struggle in which women tried to convince the public and decision-makers of their right to enroll in secondary and tertiary education. Egypt's first female law graduate and lawyer played an important role in this struggle. Her name was Na'ima al-Ayubi. In 1929, she and four other young women approached the dean of Cairo University and Taha Hussein, then Minister of Education, to ask them permission to study at Cairo University. Almost 20 years later, al-Ayubi would recall:

> Taha Hussein promised he would help us. In order to make our dream come true we had to remain silent so as not to make the press aware of our desire to enter the university, have public opinion enter in and render his help in vain. Indeed, the press did not take note until the decision to allow us to the university was released but Taha Hussein's advice remained valid [nevertheless] (Mas'ud 2014).

While this group of five young women had succeeded in gaining access to higher education,[13] the interview provides evidence that education for women remained controversial. It also shows that women relied on men to open the door to university education and, as we will see later, the Bench. The gendered nature of higher education was poignantly highlighted in 1933, when, immediately upon graduation, al-Ayubi became Egypt's first female lawyer. Although she received a warm welcome by her new colleagues (Rizk 2004; Sa'id n.d.), outside the legal sphere al-Ayubi's appointment provoked much controversy. In newspapers, opponents argued that educating women should only be encouraged as a way to train them to become good mothers, loyal housewives, and competent homemakers. They maintained that the education of women should not train them for jobs that would take them away from home (Rizk 2004), and expel men from an already scarce labor market during the years of the Great Depression. The case of Egypt's first female law graduate and lawyer illustrates that in a context where education was still a privilege of the very few, education aimed at preparing men for a salaried job, and women for their future roles as mothers and wives. The personal status laws issued during this period further reflected these ideas to a great extent (e.g. Kholoussy 2010).

13 Of these five women, two would enroll in philosophy, one in Roman and Greek history, one in literature, and al-Ayubi was to join the law faculty (Sa'id n.d.).

During the revolution of 1919, the liberation of the nation from British occupation was closely related to *tahrir al-mar'a*, the liberation of women. Nationalists believed that giving women more access to education and increased rights in family law matters would strengthen the marital bonds—thought to be the foundation stone of the emerging nation—and prevent Egyptian society from once again falling under foreign domination. Accordingly, the rules pertaining to the family were codified in a series of reforms, which were largely inspired by Maliki jurisprudence, which gives women more grounds for divorce than the Hanafi school of law (the official school of Egypt with regard to personal status law matters in Egypt).[14] The reforms of the 1920s stressed husbands' duty to provide maintenance (*nafaqa*) to their wives and wives' duty to pay obedience to their husbands in return, in much the same way the Code Napoleon did. When the husband was providing *nafaqa*, wives had a legal obligation to pay obedience, meaning (inter alia) that they had to ask their husband's permission to leave the house. But if the husband was not living up to his role as a breadwinner, due to illness or imprisonment, for example, women were given more grounds upon which they could ask the judge for a divorce and subsequently remarry. The right of husbands to divorce their wives was, however, slightly curtailed; a repudiation pronounced under duress, for example, was no longer valid. In terms of parental authority, husbands, as heads of the household, were afforded the right and duty to guardianship (*wilaya*) of their children, meaning that they should supervise the children's financial affairs and in matters such as the choice of school and education. Custody (*hadana*) refers to the day-to-day care of children and was the right and duty of mothers. The reforms were presented as an Islamic way to improve the lives of Egyptian women, particularly since women were given more grounds for divorce. In practice, however, these reforms underscored women's economic and legal dependence on men, in much the same way as the Napoleonic Code did. As one may notice, official discourse and public opinion made it clear that married women's place was in the private sphere of the house. This affected women's entrance into institutions of higher education, and the study of law in particular. More than in any other domain, such as medicine, modern languages, and history, women lawyers were clearly intruding in a world that was

14 In the nineteenth century, men had a legal right to end the marital relationship unilaterally and outside court by pronouncing the *talaq* (repudiation). Women could only divorce by mutual consent or, when this proved impossible, through the intervention of a male judge to whom they had to prove that the husband was impotent (e.g. Masud 1996). The Maliki school of Islamic jurisprudence gave women more grounds for divorce, on the basis of *darar* (harm), for example.

perceived to be explicitly reserved for men. Despite the reality that the law faculty had been one of the earliest in opening up to female students (Reid 1990, 105), women's entry into legal education remained a comparatively slow process. Between 1938 and 1939, a decade after al-Ayubi had begun her law study, the number of female law students had grown to 45 (Reid 1981, 122–23). By way of comparison, in 1937, 1,979 women held university degrees, reaching 4,000 in 1947 (Ahmed 1992, 189). These numbers illustrate the discrepancy. However, further evidence may be demonstrated.

In December 1952 a film featuring the popular Egyptian actress Fatin Hamama was released: *Ustadha Fatma* (Dr. Fatma) (1952). This film was released in the months following the 23 July Revolution of the Free Officers. The film heralded a new era in Egyptian history, including the introduction of new ideas related to the role of men and women in society. The film clearly embraced the idea of a companionate marriage: within the film a male and female law student fall in love and marry. When the time has come for their graduation, both lovers anxiously wonder what will remain of their relation after they will have left the university. They can think of one solution only: marriage. After initial opposition from the young woman's father, the two lovers not only marry, but also establish a small law firm. Not long into their relationship they enter into endless quarrels about the importance of women's work outside the home. The husband no longer wants his wife to work in general, let alone in a field where she is competing with him. Near the end of the film the husband is accused of killing one of his clients. His wife defends him and manages to convince the judge of his innocence. This, in turn, convinces the husband of the importance of women's paid labour. In the beginning, the film arguably aligns with nationalist discourse at the turn of the twentieth century, where companionate marriage is encouraged as a way to build a more stable and enduring relationship in which the husband works outside and the wife inside the home. Near the end, however, the film heralds a new period of modernization where, under Nasser, women were encouraged to get an education and enter the labor force as part of a program for economic progress and social development. It is no coincidence that the film illustrates this change in ideas about women's employment through the lens of the legal profession—at that time a typically male dominated profession.

The Nasser regime was committed to expanding educational and employment opportunities for all Egyptians and securing full employment of university graduates (Ahmed 1992, 257).[15] Its strong emphasis on science and

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15 The increasing enrollment of women in institutions of higher education notwithstanding, when the socialist Nasser regime came to power in 1952, the illiteracy rate for women ranged between 86 (Reid 1990, 113) and 91.3 percent (Howard-Merriam 1979, 257).

technology caused a shift in student career perspectives, and under Nasser, law lost most of its prestige. "First Medicine [. . .] and then Engineering passed up Law as students' top choices" (Reid 1990, 183). During this period, the ratio of female to male law students increased, as did the number of rural to urban law students (Reid 1990, 178). These developments reflected the diminishing prestige afforded to law. This trend continued throughout the remainder of the twentieth century and well into the twenty-first. Until the 1950s, graduates of law had often held prominent governmental posts. In the decades that followed Egypt's 1952 Revolution, law schools were packed with students who had achieved low marks in school-leaving examinations and whose graduates ranked (and still rank) high among those who fail to find employment after graduation (Khaled 2010). The deteriorating situation inside Egypt's law schools led former Minister of Higher Education (Hani Hilal) to announce a ban in May 2010 on the formation of new law schools and a reduction in the number of law students, which had grown exponentially from 169,000 in 2002 to 244,000 in 2009 (Khaled 2010). To give an example, for the academic year 2013–2014, the total number of first year students at two of the three main faculties of law amounted to 6,462 at Cairo University and 6,076 at Alexandria University. Of these students, a respective 34 and 40 percent were female.[16] Compared to 1929 when Na'ima al-Ayubi entered the law faculty, in the 2010s Egyptian law faculties are home to men and women alike. This situation is not unique to Egypt; in general, the large increase of women in law schools "[h]as no parallel in any other academic subject" (Schultz and Shaw 2003, xxxviii). The Netherlands was no exception. Here the influx of women even led to the feminization of law studies, as will be explored in more detail below.

1.3 *Women and Legal Education in the Netherlands*

> Binnen eenige jaren zal ons wetboek herzien worden, en waarschijnlijk zal er dan niet één vrouw zijn, die haar stem als rechtsgeleerde daarbij kan laten hooren, en dat zou jij kunnen voorkomen, Hildy! Waarom zou je niet in de rechten studeeren? (Van Steen 2011, 139)[17]

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16 The author wishes to thank Omnia Mehanna for supplying this information in March 2014.

17 "Within a few years our Code will be revised and there will probably not be one single woman who can have her voice as a law expert be heard, and you, Hildy, can prevent this from happening! Why don't you consider studying law?" (translation by author).

The French expansion into Europe led to conflict with the Dutch Republic. Internal conflicts within the Republic between the Patriots and the regime of Stadtholder Willem V reached their height in 1795 when the Dutch Stadtholder fled to England and the pro-French Batavian Republic was proclaimed. Napoleon established the Kingdom of Holland in 1806, and in 1810, he annexed what is now called the Netherlands. The revolutionary ideas of the French Revolution and the Napoleonic Civil Code in particular had a great impact on the country; even after Napoleon was defeated and the Kingdom of the Netherlands was proclaimed in 1813. The Napoleonic Code was imposed on the Netherlands on 1 March 1811 (Limpens 1956, 94) and it became the foundation of the Dutch Civil Code of 1838 (Limpens 1956, 92). Alongside the introduction of the Code Napoleon, the French also introduced a French-style system of judicial organization, which differed from its Dutch counterpart in many respects,[18] most importantly in that it brought about the professionalization of the judicial organization. From that time onwards, being a judge was no longer an honorary position but a profession (Van Boven 2011, 9). The Dutch response to the modernizations included in the Code was divided among people. While proponents believed that the Code was an improvement on the plethora of local laws, opponents felt that Napoleon had not taken into consideration the greatly varying local customs and arrangements. After the fall of Napoleon and the restoration of independence, both the Code Napoleon and the French judicial organization nevertheless remained largely intact (Van Boven 2011, 9).

During the remainder of the nineteenth and the early decades of the twentieth century, men, mostly from the upper classes, dominated the legal profession, an observation that is closely related to the fact that only children (to be read: boys) from the upper echelons of society were permitted to enter university. Although the first Dutch university was established in 1575 in Leiden, it would take until 1871 before Aletta Jacobs, who studied medicine at the University of Groningen, became the first Dutch female student ever (De Wilde 1998, 53). Around 1910, female students accounted for approximately 15 percent of the total number of students (De Wilde 1998, 287).

The number of female students and graduates increased steadily from that time on. The University of Groningen, for example, registered 558 female students during the period between 1871 and 1915 (De Wilde 1998, 87), of whom only 115 would go on to gain an academic degree (De Wilde 1998, 90). Although

18 Instead of the judicial organization differing from province to province—sometimes even from region to region—the new system required all citizens to submit to the jurisdiction of the new courts; the judicial process to be in the hands of jurists only; the separation of the executive, legislative and the judiciary branches of government; the removal of all exceptional courts; and the introduction of appeal and cassation facilities.

still small in number, women had gained entry to most academic studies around 1885. As in Egypt, the field of law, however, lagged behind. The first Dutch woman to earn a degree in law was Elisabeth van Dorp, who graduated at Leiden University in 1899 (Albisetti 2000, 837). At the University of Groningen, it would not be until 1900 before the first female law student registered (De Wilde 1998, 94) and their numbers would rise to only 30 in 1915 (De Wilde 1998, 96). This was a small number considering the fact that the study of law was considered to be relatively easy and—as in Egypt—popular among male students. At least at the universities of Groningen and Leiden, where female students selected studies that offered more opportunities for finding employment, modern languages (English, French, and German), mathematics, physics (De Wilde 1998, 94), as well as medicine were far more popular than law.[19] There are a number of factors that help to explain this. First, around the turn of the nineteenth century, many girls with secondary schooling did not possess the so-called 'gymnasium' diploma, which was required for some studies, such as mathematics, physics, and law, but not for modern languages and the natural sciences (De Wilde 1998, 94).[20] Second, many female students wanted to become teachers at secondary schools. At the time there were no studies that specifically prepared them for this profession and, hence, selecting a study that did not require a gymnasium diploma was the most common way to prepare for the entrance exams to become a teacher in a secondary school, while a prestigious university degree could be obtained at the same time (De Wilde 1998, 92). Third, according to De Wilde, women's poor career prospects in law made them reluctant to opt for legal studies. Similar to Egypt, legal studies and the legal profession remained an almost exclusive male profession in the Netherlands during the first half of the twentieth century. It should be noted, however, that considering the legal position of Dutch women during this period, the study of law offered *married* women who wanted to become lawyers career prospects that were far more attainable than those encountered in most other professions.

19 In the academic year 1914–15, when 130 female students constituted 28 percent of the total student population (470), eight female students were studying law, nine medicine, 23 mathematics and physics, and 90 modern languages. It should be noted that the University of Groningen was the only university to offer students the possibility to study modern languages (De Wilde 1998, 94). In general, medicine and pharmaceutics were popular among female students until the 1920s (De Wilde 1998, 93. See also Van Steen 2011, 137).

20 In the Netherlands, gymnasium was (and still is) the highest variant of secondary education.

First, according to Dutch law, married women lacked legal capacity and had to be represented by their husbands in public life. In contrast to widows and unmarried women (over 25 years of age), married women could not perform legal acts, such as conducting legal transactions, entering into contracts, and appearing before court, a situation that persisted until 1957 (Braun 1992; Verwey-Jonker 1985, 152). In the century following the introduction of the Code Napoleon, husbands had remained the head of the household and the guardians of women and children who were legally obliged to obey them. Had there been an Act on Advocates at the time, requiring all its members to possess full legal capacity, it would not have been possible for married female jurists to become lawyers at all.

Second, in addition to the law regulating married women's incapacity, 1904 also witnessed the entry into force of a regulation that barred married women from taking public service jobs, a situation that lasted until 1955 (Braun 1992).[21] Since judges were civil servants, this might explain why there is a 40-year gap between the appointment of the first female lawyer in 1903 and the first female judge in 1947. While Dutch society increasingly accepted the entrance of unmarried women to the work floor, married women had to stay at home (Verwey-Jonker 1985, 154). This is exemplified by the census of 1899, which shows that women constituted approximately 25 percent of the work force. While this percentage remained the same until the 1960s, the composition of the female labor force changed considerably during this period: whereas the percentage of young women increased continuously, the number of women between 25 and 65 (and thus presumably married) declined significantly, a pattern that would start to change only in the 1970s (Verwey-Jonker 1985, 155).

Considering the legal position of Dutch women in the first half of the twentieth century, it is not surprising that the overall number of female students remained below 20 percent (De Groot-van Leeuwen 2013, 124). Most of these female students studied languages, medicine, and social sciences.[22] While only a small percentage opted for law study,[23] it should be noted that female law students were highly motivated to use their studies to reform what was called

21 This was a regulation copied by local governments and institutions of national government throughout the country. In 1934, Minister Romme tried to extend it to married women in general. It failed to reach the status of law and the proposal was withdrawn by his successor in 1938 (Verwey-Jonker 1985, 155).

22 This was the case in 1970 (Sloot 1980, 10).

23 Where in 1930 the proportion of female law graduates was 12.8 percent, it even declined to 12.2 percent in 1950, and then rose to 13.0 percent in 1960 and 23.4 percent in 1979 (Sloot 1980, 9).

'*het achterlijke huwelijksrecht*' (backward marriage law) in feminist circles. The publication of the Dutch novel *Hilda van Suylenburg* in 1897, an excerpt of which is included at the beginning of this section, is likely to have been an important contributing factor in motivating women to study law. The focus of much attention and debate, the novel's main characters fulminated against the inferior legal position of Dutch women, and they urged each other to look for husbands who would be lovers and who would not dominate them. The main protagonist—Hilda—even ventured one step further. Although she first wanted to study medicine, after she had taken notice of all the injustices done to unmarried pregnant women specifically, she decided to study law.

In the same year as the novel's publication (1897), female student Elise van Dorp decided to switch her studies in modern languages to law, and in doing so became the first female law student in both Leiden and the Netherlands. In 1903, Adolphine Kok (1879–1928) became the first female law graduate who obtained a doctorate. In her dissertation, she critically examined German laws on matrimonial property. Her inauguration as the Netherland's first female lawyer to the Rotterdam bar took place in the same year and did not arouse much controversy (Braun 1992, 131). Kok married a year after her inauguration but, instead of succumbing to society's expectations of married women, she did not become a housewife. She and her husband[24] continued their law practice in Rotterdam, where Kok's clientele mainly consisted of women who sought out her help in matters relating to marriage and property law. Apart from offering legal assistance, Kok took an active stance in the reform of laws dealing with matrimonial property rights and throughout her (short) life, she struggled to abolish the legal incapacity of Dutch women. Kok was not the only female law student to desire legal change for women.

Similar to Kok, other female law students used their law studies to improve and reform the legal position of women in Dutch society. For instance, the first female law student, Elise van Dorp, played an important role in the women's movement as did the other female law students from Leiden University (Van Steen 2011, 140).[25] They were encouraged by the Dutch feminist movement, which perceived the lack of female legal professionals to be a major factor contributing to the persistent inferior legal and social position of Dutch

24 At the time of her appointment, Kok was engaged to Van den Hoek. Both Kok and Van den Hoek were appointed as lawyers to the Rotterdam bar on April 20, 1903. They married in 1904 (Kok 2009, 157–158).

25 Well-known examples are Betsy Bakker-Nort, who took up law studies in 1908 and who also wrote a critical dissertation on marital law, and Christina Clasina van Bosse. See for more, Braun (1988, 92); Van Steen (2011, 140).

women. In the 1880s, when there were no female law students, let alone female legal professionals, feminist organization *Vrije Vrouwen Vereniging* (Free Women's Movement) even considered opening a scholarship fund in order to give girls from less-affluent backgrounds the opportunity to study law with financial support. Lack of financial capital prevented them from eventually doing so (Braun 1992, 131). Not only did the *Vrije Vrouwen Vereniging* believe that female lawyers possessed the legal knowledge necessary to help female clients with marital and property related issues (Braun 1992, 131), the fact that married women lawyers continued working is likely to have been an example in itself.

In direct opposition to the feminist movement mentioned above, law professors did not always encourage female students to take their studies seriously. In a study on Dutch female law students, Sloot found that women, especially those who had commenced law study prior to 1940, were frequently told by both law professors and male students that, while legal education was a sheer necessity for men, it amounted to nothing more than a luxury for women (Sloot 1980, 29). Sloot is probably correct in claiming that male peer pressure might have had a more profound influence on female law students' future perspectives than remarks made by older law professors (Sloot 1980, 29), something which is also the case in the Egyptian film *Ustadha Fatma*. As potentially future spouses, interactions with male students might have pressured women to live up to societal notions of what it means to be a woman and, consequently, stay at home.

As both legal and societal norms required married women to stay at home, it should come as no surprise that while it was not easy for women to work as lawyers, women's entrance to the Bench—a public service job par excellence—was even more difficult to achieve as a goal. For example, after law student Anna Post (1890–1980) gained her doctorate, she was appointed to a position as a clerk in the registry (*klerk op de griffie*) of the Winschoten courthouse in 1915. As a rule, clerks with a doctorate who had taken the oath could sometimes replace the Court Clerk (*griffier*). In Post's case, however, the court of Leeuwarden ruled against this decision, claiming, inter alia, that since women could not hold positions in the *staatsmacht* (state authority), especially the judiciary, they were not eligible for a position as Court Clerk or deputy court clerk, either (Sloot 1980, 47; De Werd 1994, 125).

In 1916, the Supreme Court ruled that clerks who had taken the oath should not be considered members of the judiciary, thereby evading the question as to whether women could be appointed judges (Sloot 1980, 49; De Werd 1994, 125). Interestingly, in a similar case, which was conducted a few years later in 1921, the Dutch colonial authorities in Padang (West-Sumatra, Indonesia) ruled

differently, saying that due to new insights and needs, women should no longer be excluded from the judiciary (Sloot 1980, 51–52; De Werd 1994, 125–126).

1.4 *Women and Legal Education in Indonesia*

While the appointment of Dutch women to the Bench was anything but an easy process inside the Netherlands, things were different in the Dutch colony of Indonesia, where Dutch women gained the right to work as judges as early as 1921, a fact that was even used inside the Netherlands as an argument to have women appointed as judges (De Werd 1994, 136).[26] This section does not deal with the subject of Dutch women working as judges in Indonesia, but instead explores whether the colonial administration afforded indigenous women the same opportunities to enter legal education and opt for a legal career as their Dutch counterparts.

During the Napoleonic wars, the French occupied the Netherlands, including its possessions in today's Indonesia. In 1815, after the defeat of Napoleon, these territories were returned to the Dutch. "When the Dutch government took over the Indonesian heartland of Java as a colony following the Napoleonic wars, the administration they established was one of indirect rule, built on a political alliance between the Dutch and the Javanese *priyayi* elite" (Lev 1976, 138). After 1830, however, Dutch colonial policy changed considerably. Influenced by the French occupation along with the introduction of the Code Napoleon in the Netherlands in 1811, the Dutch embarked on a process of codification. To illustrate, Royal Decree no. 96 of 30 July 1830 states that codified law as it related to the Kingdom had to be applied to the Kingdom's possessions in what was then called the Netherlands East Indies.

This Royal Decree additionally emphasized the importance of '*concordantie*': lawmaking in the colonies had to resemble that of the Netherlands to the greatest extent possible (Dekker and Van Katwijk 1993, 11). On May 1, 1848, the new codified law was promulgated in Indonesia (Dekker and Van Katwijk 1993, 12). It applied mainly to Europeans, as the Dutch had divided the population into three groups: Europeans, Natives, and non-native Orientals (*vreemde Oosterlingen*), with each group having its own legislation and judicial institutions. "It was the judiciary that most accurately manifested the meanings of colonial pluralism," as there were four distinct kinds of courts: government courts for Europeans, government courts for non-Europeans, Islamic courts, and *adat* (customary law) courts (Lev 1976, 140–141). Initially, all judges and prosecutors were Dutch nationals trained in Dutch law faculties, including Dutch students living in Indonesia who had returned to Holland for higher

26 Further research should establish why this was the case.

education (Lev 1976, 145). Throughout the nineteenth century this was an option that was not open to Indonesians, regardless of their gender and class background.

Towards the end of the nineteenth century, the Dutch occupied more territory, and the colonial administration was confronted with a growing need for trained personnel to fill new positions in the growing colonial administration (Dekker and Van Katwijk 1993). In 1908, the *Rechtsschool* (*Opleidingsschool voor Inlandse Rechtskundigen*) in Batavia (now Jakarta) was established. This move was opposed by Dutch lawyers who claimed that 'natives' would find it impossible to meet the demands which six years of legal education and subsequent legal practice would require (Lev 1976, 145–146). From 1914 onwards, graduates of the Rechtsschool could work as clerks, vice-clerks, chairmen or vice-chairmen in so-called *Landraden* on Java and Madura (Dekker and Van Katwijk 1993, 20).[27] After the first law faculty was opened in Batavia in 1924 and the first Indonesian student had obtained a law degree in 1928, the Rechtsschool was abolished and replaced by the *Rechtshogeschool* (Lev 1976, 147). By that time, only a small number of Indonesians (45) had law degrees, all of them from Leiden University in the Netherlands. Their numbers had grown to 274 in 1939 (Lev 1976, 147).

Information on Indonesian women's entry into legal education is very scarce, but we know that women entered the Rechtshogeschool in Batavia in small numbers. In 1927, for example, ten women out of 131 students had enrolled in the law faculty, of whom six Dutch, two ethnic Chinese, and two Indonesian (Lev 1976, 147). Maria Ulfah Santoso (1911–1988) was the first Indonesian woman to receive a degree in law. Together with her father, she traveled to Holland and enrolled in Leiden Law School in 1929. She graduated in 1933. In 1940, nine Indonesian women held law degrees, four from Leiden and five from the Rechtshogeschool (Lev 1976, 147).[28] Similar to Egypt, it is known that Indonesian lawyers, especially those who had studied in Holland, took up influential positions in the movement for independence (Lev 1976). Conversely, Egyptian female law graduates did not play a role in the nationalist movement (after all, the first woman graduated in law in 1933, 11 years after independence).

27 'Landraden' would become courts of first instance after independence (Lev 1976).

28 By way of comparison, in 1930, the number of female law graduates in the Netherlands was 35 (14.5 percent of the total number of law graduates) (Sloot 1980, 9). The nine Indonesian female law graduates of the 1940 cohort constituted approximately 3 percent of the total number of Indonesian law graduates (274 in 1939; see Lev 1976, 147).

Maria Ulfah Santoso became involved in the independence movement during her studies in Holland, and stayed an active member after she had returned to Indonesia in 1934. She was also a well-known member of the Indonesian women's movement and was determined to improve women's rights in education and marriage. Similar to the fictitious Dutch character *Hilda van Suylenburg*, she had witnessed many injustices against women in her early life and instead of studying medicine (a wish of her father), Santoso, like *Hilda*, decided to study law to improve the position of Indonesian women through law.

In the first half of the twentieth century, the number of Indonesian female law students was low. This was largely the result of the Dutch colonial administration, which had been reluctant to establish education for the native population, but societal notions of men and women's proper position in society also played a role, at least to some degree. To demonstrate, in the matrilineal society of the Minangkabau of West-Sumatra, women owned and were held responsible for cultivating the land. Throughout the 1920s–1940s, they were therefore not encouraged to pursue an education, in contrast to Minangkabau males whose status in the family and society increasingly came to depend on their level of education (Gunawan 1990, 53).[29] This changed with the growth of the nationalist movement and under the slogan of *kemajuan* (progress), education for both men and women was proclaimed to be a necessity to build up a new, strong nation (Vreede-de Stuers 1960, chapters 2 and 3).[30] "To be an Indonesian woman is to be the mother of her country" (Vreede-de Stuers 1960, 91), and for this reason, nationalists, both men and women, demanded the improvement of female education.

The educational system established by the Dutch could not absorb the growing demand for education. With regard to girls, for example, "between 1908 and 1914 the number of girls attending elementary schools in Java and Madura had increased 300 percent" (Vreede-de Stuers 1960, 69). As the number of teachers and buildings did not increase proportionately, Indonesians turned often to the religious schools (*surau*'s and *madrasa*'s), which underwent a process of transformation and modernization throughout the archipelago. For example, in 1918, Hadji Rasul modernized the Minangkabau *surau* at Padang Panjang (West-Sumatra), which, in this context, means allowing the admission of female students. On the initiative of Rahma El Junusia, a young divorcee

29 In 1928, only 58 girls were able to enter European secondary schools and obtain a final examination certificate (Vreede-de Stuers 1960, 70).

30 After independence in 1945, the new Indonesian state established a new educational system and made it compulsory for both boys and girls to attend primary school.

committed to improve the position of women through modern education, girls and young women (not seldom married) were allowed to attend this *surau* and follow an education in Arabic and later, when they had successfully mastered the Arabic language, the teachings of Islamic law (Vreede-de Stuers 1987). "This achievement in the center of Minangkabau territory must be considered as a decisive step in the history of the Indonesian women's movement…" (Vreede-de Stuers 1960, 73).

It is not clear what has become of the female graduates of this *surau*, and whether they entered the labor force or, given the fact that a significant number of them were married women, merely used their education to become better mothers, housewives, and, possibly, farmers, given that Minangkabau women were held responsible for the cultivation and maintenance of the land. It should be noted that for the women's rights organizations, which had stressed education for girls, the primary role and responsibility of women remained towards their nuclear family. Education, so it was thought, would help them in fulfilling these duties in a responsible manner, in ways similar to the Egyptian reform and nationalist movement. In addition to education, Indonesian women's rights organizations advocated improving the rights of married women in the field of divorce and polygamy. This was another characteristic which these organizations shared with their Egyptian and Dutch counterparts.

Similar to the first Dutch female law graduates, Indonesia's first female law graduate Santoso played an important role in gaining attention and support for the rights of women in marriage. As long as the problems of polygamy and the right of a husband to arbitrary repudiation (*talaq*) were not solved, she and other women's rights advocates argued, the emancipation of the Indonesian woman would remain incomplete, and the Indonesian family, the cornerstone of society, an unstable institute plagued by high divorce rates (Vreede-de Stuers 1960, 108). The Egyptian personal status law reforms of the 1920s, which I discussed above, inspired her by the way the Egyptian legislator had expanded the grounds for divorce available to women by making use of Maliki principles.[31] On the occasion of the third congress of Indonesian women in 1938, Santoso held a nearly two-hour long speech in which she, among others, urged Indonesian Muslim women (most of them adhering to the teachings of the Shafi'i school of law) to follow the example of Egypt and make use of the teachings of the Maliki school of law in cases of divorce (Vreede-de Stuers 1960, 112).

31 The teachings of the Maliki school of law offer women more grounds for divorce than the Hanafi (Egypt) and Shafi'i (Indonesia) schools of Islamic jurisprudence.

In the years following independence in 1945, the participation of women in university education increased. According to university statistics of two main Indonesian universities, in 1955–56 and 1956–57 female students constituted 17 and 19 percent of the total student population.[32] Interestingly, in opposition to Egypt and the Netherlands, where law was not popular among female students, the majority of Indonesian female students studied Law and Social Sciences (912), followed by literature (395), medicine (333), and economics (295) (Vreede-de Stuers 1960, 149). Near the end of the 1950s, however, the numbers of girls completing their law studies dropped significantly. This, according to Vreede-de Stuers, contributes to the large number of students, both male and female, who had opted for law study for the simple reason that compared to other studies, a law degree could be obtained in a shorter period of time (Vreede-de Stuers 1960, 149). In opposition to the early decades of the twentieth century, when education for girls was primarily valued because educated mothers were thought to be better mothers than uneducated mothers; in the decades following independence, national leaders as well as women's movements started to emphasize the importance of female students using their studies and talents for the needs and development of the post-independent nation instead for the prestige conferred by higher education (Vreede-de Stuers 1960, 149–150). It raises the question as to whether this led to an increase in the number of female legal professionals, judges in particular.

In the decades following independence, the relative and absolute number of female judges in Indonesia increased. With the appointment of its first female judge in the early 1950s, Indonesia was even one of the first, if not the foremost, Muslim-majority country to accept women to the Bench. In their contribution to this volume, Nurlaelawati and Salim nevertheless point out that at approximately 20–80 percent, the ratio of female to male judges remains low. Does this mean that despite equal access to legal education, female law graduates, for whatever reason, do not wish or are unable to become judges? To demonstrate, in a study I conducted among female Minangkabau law students in the late 1990s, the majority of the students had opted for Law School for two reasons. First, for some, studying law was a second choice. These students either did not pass the entrance exams of the university or study of their first choice, or parents did not approve of their daughter's college choice. In such cases, students opted for law as they considered this to be an easy way to obtain a degree. Second, female students expressed the hope that they would find a suitable partner on campus, that is to say, an intelligent and understanding husband

32 These are the Gadjah Mada University in Yogyakarta and the Universitas Indonesia in Jakarta.

who would not object to them working outside the home. Although the majority of the women students wanted to become civil servants (*pegawai negeri*), none of them aspired to become judges, an issue that is explored in more detail in section two, which deals with women's entrance to the legal profession.

2 Women and the Legal Profession: 1910–2010

In all three countries under study, the presence of female students in law schools has become a common sight. In this section, I explore whether this rapid increase in female law graduates is paralleled with the increasing presence of women in the judiciary and, to a lesser extent, the bar, during the period spanning from 1910 to 2010. By exploring the public discourse surrounding their appointment as legal professionals, I hope to shed more light on the main question guiding the analysis: what factors influenced the earlier or later opening of the judiciary and the bar to women in the three countries under study?

In this section, special attention is paid to the 1970s and 1980s. In all three countries this was a period of social change: Dutch women were affected by the so-called second wave of emancipation, which gave them more legal rights in marriage and more possibilities to combine professional and domestic duties. During this period, the number of female judges increased considerably. In Egypt, international pressure revived the issue of women's rights in marriage (after two decades of neglect under Nasser), as well as the issue of women's enterance to the judiciary. After decades of lobbying by women's organizations, Indonesia witnessed the enactment of the Marriage Act of 1974: its first codification of *shari'a*-based rules dealing with personal status law matters. The Act was followed by the Islamic Courts Law of 1989, which not only gave the Islamic courts a much stronger position and jurisdiction within Indonesia's legal system, but which also established women's legal right to become judges in the Islamic courts.

2.1 *Women Judges in Egypt*

> In the second half of the twentieth century the roles of Egyptian women underwent massive expansion and transformation. Women entered all arenas of white-collar and professional work ... The only positions they have not occupied are judge and head of state (Ahmed 1992, 208).

Upon her graduation in 1949, an Egyptian woman by the name of Aisha Ratib applied to become a judge in the State Council. This was the first time a woman

had requested to be appointed as a judge. Her request was turned down and when Ratib appealed the decision in the Administrative Court, the court ruled in favor of the State Council in 1952, saying, inter alia, that the principle of equality had not been violated (El Sayed 2006–2007, 138). When a member of the committee that had presided over the decision published a letter in a national newspaper stating that there was nothing in either Islamic or Egyptian law that prevented women from becoming judges, and that it was merely a matter of Egyptian society not yet being ready, the door to women's appointment as judges seemed to be left ajar. These hopes were shattered when the following year the Administrative Court delivered a ruling in a similar case. This time the court explicitly concluded that "there is no rule that women are unfit to hold judicial positions, but [that] the administration had determined that the time was not yet right for women to be appointed in the public prosecution" (El Sayed 2006–2007, 139).[33] Existing family law legislation under the Nasser regime (1952–1970) illustrates very well the discrepancy between women's legal rights as citizens under the Egyptian constitution, and the way women's rights as wives and mothers and men's rights as husbands and fathers, were regulated in the field of family law.

Nasser introduced free access to education and adopted measures that facilitated women's participation in the labor force and made it easier to combine professional with domestic duties. He did not, however, introduce accompanying changes in personal status law legislation, not even after the regime abolished the *shari'a* courts in 1955 and brought them under the jurisdiction of the national courts. In terms of substance, the legal rules governing personal status law matters remained the same: it was the husband's duty to provide for his family, and in return, his wife needed to pay obedience to him and not leave the marital home without his permission, on pain of losing her right to alimony. According to Bernard-Maugiron and Dupret, the "reformist momentum in the field of personal status was interrupted and relegated to the domain of questions of secondary importance when the Arab Republic of Egypt was declared in 1952" (Bernard-Maugiron and Dupret 2002, 2).

Hence, while women could pursue higher education, work outside the home and even occupy positions as ministers,[34] in order to leave the home they still needed their husband's permission. Not much changed under his successor, Anwar al-Sadat (r. 1970–1981). Illustrative of this is the fact that Aisha

33 This ruling concerned the case of a woman who had applied for a position in the public prosecution service and who had appealed against the Supreme Judicial Council's rejection of her application.

34 Dr. Hikmat Abu Zayd became Egypt's first female minister in 1958.

Ratib, the first Egyptian woman who had requested appointment as a judge in 1949, moved on to become Egypt's Minister of Social Affairs in 1971, Egypt's first female ambassador in 1979, and the first female professor of Law in the 1980s.[35] In legal terms, however, she and all other Egyptian Muslim women,[36] still had a duty to pay obedience to their husbands and ask them permission to leave the house.[37]

A few decades later, in 1978 and 1989 respectively, two women responded to vacancies on the State Council. Similar to Aisha Ratib, their applications were rejected. One of them, Hanim Muhammad Hassan, appealed the decision before the newly established Supreme Administrative Court in 1978. In June 1979, the court rejected her appeal. According to Umar, the court justified its decision by referring to Articles 2 and 11 of the 1971 constitution as well as *fiqh* jurisprudence (Umar 2013), and in doing so, religious argumentation was provided for the first time to bar women from occupying a position as judge.[38] In 1989, a female lawyer, Fatma Lashin, applied to become a judge. In an interview, she stated that her request was turned down because she was a woman (Digges and Hammond 1998). By the end of the 1980s, the only professional positions Egyptian women had not yet occupied were judge and head of state, as noted by Ahmed at the start of this section. Both positions are ultimately linked with power, authority, and decision-making, a complete reversal of the maintenance-obedience relationship that continued to apply in Egyptian Muslim personal status law.

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35 See, for example, Zakariya (2013). Aisha Ratib passed away on May 4, 2013.

36 In personal status law matters, Egyptian Christians and Jews are governed by their own religious laws.

37 The family law reforms which Sadat introduced in 1979 did not aim at altering this relationship. Instead, the enactment of personal status law no. 44 of 1979 was geared towards providing women with more options to escape a problematic marriage. Women could ask for a divorce in cases where they felt harmed by a husband's second marriage. In contrast to the previous period, women did not need to prove in court that the second marriage had caused them harm. The personal status law of 1979 also aimed at enhancing the position of divorced women: husbands no longer had the right to expel their wife and children from the home in case of divorce, and women who were divorced against their will and who were not to be blamed for the marital breakup were given compensation of at least two years' alimony (*mut'a*).

38 In 1971 Sadat introduced for the first time a constitutional provision (Article 2) that decreed the principles (*mabadi*) of Islamic *shari'a* to be a main source of legislation. Increasing religiosity is also reflected in Article 11, which states that "the state [supports] the equality of women and men in the political, societal, cultural, and economic realms as long as this does not infringe upon the rulings (*ahkam*) of Islamic *shari'a*."

Yet, the 1970s and 1980s were a period of increasing international influence on domestic policies, including pressure from international donors and human rights organizations to improve the (legal) position of Egyptian women (e.g. Sonneveld 2012). Backed by international counterparts, this led to a series of personal status law reforms in the 2000s. In January 2000, the Egyptian parliament 'passed' a law which gave women the right to divorce unilaterally, that is, without the husband's permission, and without the need to prove grounds in court. The maternal custody age was raised from nine for boys and 12 for girls to 15 for both in 2005. These reforms had a profound effect on men's authority over their wives and children, and provoked great controversy in Egyptian society.

It was argued that the changes were a violation of Islamic *shari'a* and that women were irrational beings who would divorce for frivolous reasons, and that in the process, the Egyptian family would be destroyed (e.g. Sonneveld 2012, chapters 2 and 3). Although these changes did not alter the maintenance-obedience relationship, an analysis of the public debates surrounding these legislative reforms reveals that according to many, they seriously challenged husbands' authority in the home. While Egypt did not go as far as Morocco and Tunisia, which abolished men's authority and women's obedience inside the home in 2004 and 1993, respectively, in 2008, the Egyptian legislature did introduce an amendment to the effect that, in the event of divorce, (educational) guardianship over children moved from the father to the custody-holder (usually the mother).

By the end of the 2000s, men's authority over their wives and children had been dealt a serious blow, at least from a theoretical and legal perspective. Their wives could divorce them without their consent and in the case of divorce, their children came under the guardianship of the mother. Amidst all the legal developments that reshuffled men and women's authority in the home, Egypt's first female judge was appointed in 2003, and a group of 42 women judges followed in 2007 and 2008. In doing this, Egypt had finally joined the ranks of a significant number of Muslim-majority countries, which had welcomed women to the Bench a few decades earlier.

Still, women's appointment as judges led to ardent protest inside Egypt, both among the general public and the judiciary. In general, opponents objected to their appointment on two grounds. First, although in civil law countries, the judicial professions are a career (Schultz and Shaw 2003, xxx), matters are different in Egypt where, similar to most common law countries, the selection process is less transparent. The appointment of Egypt's first female judge is a case in point. While the position of judge in the High Constitutional Court represents the peak of a judicial career, in 2003, female lawyer Tehani al-Gebali

was appointed to a position of judge in the High Constitutional Court. Being the first female judge of Egypt, al-Gebali came from the ranks of the advocacy and had not previously served as a judge, something that provoked heated debates within the judiciary. The same applied to the appointment of 31 judges in March 2007 to different courts in Cairo, Giza, and Alexandria. Like the appointment of Tehani al-Gebali, the procedural details surrounding their appointments remain unclear and a point of contestation within and outside the judiciary, both among advocates and opponents of women's entry to the judiciary (Hamad 2008). Several judges interviewed claimed that the women appointed were daughters of practicing influential judges and that their appointment was merely a way to appease international demands for the introduction of women into Egypt's judiciary (see also Badri 2007; Rashwan 2007).

Secondly, the capacity of women to serve as judges constituted a great worry to many legal professionals and laypersons. Women were portrayed as emotional and irrational beings. Where the personal status law reforms described above were presented as dealing a huge blow to men's authority in the private sphere of the household, the appointment of women as judges was viewed as threatening men's authority in the public sphere. In the public and political world of power and decision-making that belonged to men, the appointment of Egypt's first women judges constituted "the final blow to men" (see the cartoon below).

The most fervent opposition was (and arguably still is) coming from within the judiciary itself (Sonneveld and Tawfik 2015). For example, in interviews with two male judges in October 2011, I found that both of them opposed the entrance of women to the judiciary on two grounds. First, they argued that a woman's domestic duties make it impossible to combine professional duties with domestic ones. One judge said that judges do the bulk of their work at home, where they prepare and review cases. Male judges, he claimed, simply close the door of their home offices when their wife and children are in the house, but he could not see how a female judge could work at home with children present. Being pulled in different directions by court files that needed to be prepared and children who needed attention, he considered this an impossible balancing act. The result, he said, is that the female judge will appear in court being ill-prepared.

Second, both judges were of the opinion that women should not work as criminal law judges because dealing with crime does not suit what they believed to be the soft and tender female nature. For similar reasons, many judges in the Egyptian State Council, the Judges' Club, as well as influential Egyptian lawyers, frequently claimed that while women could perhaps serve

FIGURE 3 Women Judges. *When the man reads in the newspaper that women have become judges, he says: "Now this is the blow of the woman judge" [this will be the final blow to men, personal communication Amr Okasha, September 29, 2014]. Amr Okasha,* al-Wafd, *June 19, 1994.*

as judges in the Family Courts, they should be barred from entering the criminal law courts (e.g. al Jazeera Net 2007). A survey conducted during a general assembly meeting in the Judges' Club in November 2005 indicated that 85 percent of the judges did not accept the appointment of women to the civil or

39 It should be noted that *al-Qadiya* can be translated both as female judge and as fatal blow.

other courts, while 97 percent did not accept the notion of women working as criminal law judges.

In newspapers and on television, high-ranking judges repeatedly made it clear that they feared that the ascent of women to the Bench would have a negative impact on the image of the judiciary. Opposition from within the judiciary is such that while the proportion of lawyers who are women is nearly identical to the percent of women in law schools,[40] in 2014, women judges still constitute a tiny minority of less than 1 percent.

Where in the late 1970s, the Supreme Administrative Court justified the exclusion of women to the State Council on the basis of religious argumentation, it should be noted that formal religious authorities, such as Egypt's Grand Mufti and Imam, approved of women serving as judges (Sonneveld and Tawfik 2015). They issued *fatwa*s in 2002, 2006, 2007, every time making it clear that there were no religious obstacles on the matter. On 18 October 2013, Egypt's newly appointed State Mufti issued a *fatwa*; like his predecessors, he stated that according to the Hanafi school of law, women can work as judges; they could even become head of state. Until this day, however, the issue of women occupying positions of ultimate authority remains controversial.

One may note that in January 2014, more than 25 female law graduates who had applied for a position with the State Council were explicitly told that "the application procedure is confined to males only" (Uthman 2014), despite the fact that the newly promulgated constitution of January 2014 explicitly, and for the first time in history, declares that the Egyptian state shall ensure women's appointment in judicial bodies without discrimination (Article 11). One of the rejected candidates appealed the rejection before the Administrative Court, where the case is still pending. In 1952, the Administrative Court rejected Aisha Ratib's appeal. Will it rule differently this time, 62 years later?

2.2 *Women Judges in the Netherlands*

Until the 1970s, the trajectories of Dutch and Egyptian women aspiring to become judges did not diverge much. While, in Egypt, the first female judge was yet to be appointed, in the Netherlands, the proportion of female judges did not exceed 3 percent. However, four decades later, female judges constitute a very small minority in the Egyptian judiciary, whereas in the Netherlands the

40 According to the Egyptian Lawyers' Syndicate, the total number of registered Egyptian lawyers who have a right to work is 350,000, of whom 110,000 are women (31 percent). By comparison, at Cairo University and Alexandria University the percentage of first year female law students was 34 and 40 percent respectively (academic year 2013–2014).

number of female judges exceeds that of their male peers, to the extent that the Council for the Judiciary (*Raad voor de Rechtspraak*) publicly expressed worries about the judicial gender imbalance in Dutch courthouses (Koch 2014). In this section, I explain the trajectory from Dutch female judges' minority to majority status through the use of a historical perspective, beginning in 1921.

The year 1921 was remarkable in the history of female judges in the Netherlands. When the Padang court of West-Sumatra ruled that women could be judges, a discussion was taking place in the Netherlands on the desirability of appointing women legal professionals to a position as children's judge. That very same year, the Ministry of Justice asked the Dutch Supreme Court for advice on the matter. Treading cautiously, the Supreme Court declared that while there were no legal impediments preventing women from becoming judges, there might be other obstacles. Women, the Supreme Court believed, were likely to be too emotional for the job and the Court feared that female judges would be led by their emotions rather than by the law.

The Court also feared that married women would not be in a position to devote all of their time and energy to their work as judges since they would surely prioritize their family obligations over their professional ones (Sloot 1980, 52–53; Verburg 2001, 257–259; De Werd 1994, 128–129). The Supreme Court's advice, which removed, at least, the legal obstacles to nominating women to the Bench, encouraged the Dutch parliament to urge the government to prepare legal amendments in order to make it possible for women to become judges. Subsequent Dutch governments, however, were extremely hesitant to do so, as the Dutch constitution clearly required judges to be appointed for life, a reality which these governments deemed undesirable for married women. This idea was legally reinforced by the 1904 regulation, which forbade married women from continuing work in public service jobs. In 1946, for example, the Dutch government declared that while in general women were well-fitted for a position as children's judge, the lifetime appointment requirement made it hard to dismiss them at the moment they would become less qualified for the job (as marriage would divert attention away from their professional duties) (De Werd 1994, 136).

Nevertheless, the first female judge—Johanna Clementine Hudig—was appointed in 1947, amidst an acute shortage of judges as a result of World War II (Kok 2009, 341; Sloot 1980, 66). While Hudig would become a well-known children's judge and remain in the profession for 30 years, her appointment did not mean that the floodgates had opened for the inclusion of women in the judiciary. Her appointment provoked heated debate, and it should come

as no surprise that Hudig was unmarried when she was selected to become a judge in the Rotterdam court.[41]

In 1956, the so-called Lex-Van Oven lifted the provisions pertaining to the legal incapacity of married women and the prohibition of married women from occupying governmental positions. Although it removed the legal barriers to appointing women to the judiciary, the issue of women serving as judges remained a delicate subject, and 30 years after Hudig's appointment in 1947, the proportion of female judges had barely risen above 5 percent (De Groot-Van Leeuwen 2009, 27). In 2009, the number of female judges exceeded that of males for the first time. This raises the question of what had happened in the underlying three decades.

Verwey-Jonker believes that the introduction of the washing machine and other household appliances, as well as (and especially) the introduction of the contraceptive pill, paved the way for a second wave of women's emancipation in the late 1960s (Verwey-Jonker 1985, 162–165). This resulted in the introduction of a new personal status law in 1971, which gave men and women equal divorce rights and abolished the provision that had stated that husbands were the head of the household. New social welfare regulations, such as the Unemployment Benefit Act (*Bijstandswet*) of 1965 considerably decreased divorced women's financial dependence on men and afforded them more opportunities to divorce. What also served to reduce their position of financial dependence was women's increasing enrollment in institutions of higher education and married women's entry into the labor market.

The second wave of emancipation did not leave the judiciary unchanged. For example, whereas in 1970, female students had constituted 20 percent of all law students, their numbers had risen to 51 percent in 1995. Likewise, the appointment of female judges took flight, from 3 percent in 1970 to 34 percent in 1995 (De Groot-Van Leeuwen 2003, 342) and, as said, 51 in 2009. It should be noted that the introduction of a 1989 regulation permitted judges to work part-time (De Groot-Van Leeuwen 1991). In 1999, when women constituted 42 percent of the total number of judges, 16 percent of the female judges were working part-time (De Werd, 1999, 169). Although this is a small percentage compared to the total proportion of Dutch women who work part-time in different fields, it might explain why, in the legal profession, the number of women working in the higher levels of the hierarchy remains very small (De Groot-Van Leeuwen 2003, 343).

41 Perhaps it is no coincidence that first female judge, Hudig, never married; first female lawyer, Kok, married but never had children; first female law professor, Hazewinkel, only became a law professor after her children had grown up.

The quantitative domination of female judges over male judges notwithstanding, over the course of a century, one can detect significant similarities in the way the debate on gender and judging has unfolded in the Netherlands. In the early twentieth century, public debates within and outside the judiciary focused first of all on women's mental suitability to access the legal profession and the judiciary in particular, and, secondly, whether their 'natural disposition' as mothers and housewives would leave them sufficient time and energy to combine professional duties with domestic ones. A century later, women's mental faculties are no longer questioned as such.

However, in the public debates, which unfolded in 2009 when the number of female judges (1,207) exceeded that of male judges (1,190) for the first time in Dutch history, the main issue permeating much of the discussions was whether female judges rule different from their male colleagues. For example, the former MP of controversial political party List Pim Fortuyn (*Lijst Pim Fortuyn*, *LPF*), Joost Eerdmans, announced in a well-known Dutch national newspaper the establishment of a 'Civil Committee against Injustice.' He argued that criminal law judges were soft and shaded their opinions to such an extent that murderers and rapists did not receive the punishments they deserved, while their victims were abandoned to fend for themselves. Eerdmans believed there was a dire need to establish a Committee such as his, especially since the number of female judges continued to grow. His statements became the subject of fervent discussion and, in the days that followed, many legal professionals rejected his views.

By portraying female judges as emotional and irrational beings who subject male rapists and thieves to severe penalties, the cartoon presented at the beginning of this chapter ridicules female judges' alleged softness. In line with this, lawyer Erik de Mare claimed that while it was true that the number of female criminal judges had increased over the last decade, sentences had not softened, but instead perpetrators had received harsher penalties (De Mare 2009). This trend towards harsher penalties, he argued, might be related to the fact that female judges were more likely to identify with the victims of violence-related crimes, of whom women form the majority. De Mare also believed that in family law matters, female judges might not sympathize much with non-working, divorced women who approach the court for alimony, a finding which both Dijksterhuis' research in the Netherlands (2013) and Botelho Junqueira's research in Brazil confirm (2003).

Male criminal attorney Theo Hiddema claimed that the judgments of female judges did not differ from those of their male colleagues in terms of quality. Efficiency-wise, however, he believed that female judges did a better job, because: "When a female judge is judging, you are sure to be home early,

because the potatoes are waiting" (cited in Dijksterhuis 2013, 272). This remark is a clear gendered reference to Dutch women trying to find a balance between their professional and domestic duties.

Initially, Dutch lawyers and other legal professionals were quick to denounce Eerdmans' view of women being too delicate to be criminal law judges. However, a few years later the quantitative feminization of the Dutch judiciary became the topic of prominent debate again. With the ratio of male to female judges moving in the direction of 40/60, high ranking legal professionals publicly expressed worries that the judicial gender imbalance was making it increasingly difficult for the judiciary to maintain the image of the impartial, objective, and fair judge. They argued in national newspapers that male litigants in rape cases, for example, might feel disadvantaged when faced with a panel consisting of mainly female judges. Research, it was argued, should determine why fewer male law graduates wanted to become judges. Possibly, it was suggested, males prefer working as lawyers in the private sector since the prestige and the salary are higher, while women would prefer the safety of the public sector. Moreover, the public sector offers female law graduates more opportunities to work part-time and combine professional duties with domestic ones (Koch 2014). Although the right of married women to work outside the home is no longer questioned, public debates surrounding the feminization of the Dutch judiciary make it clear that married Dutch women (especially those with children) are still expected to fulfill their roles as mothers and housewives, and that their work should not have a negative impact on the organization of the household and the welfare of the children.

Gendered conceptions of what it means to be a father or mother in Dutch society are reflected in the composition of the labor force, where 75 percent of Dutch women (aged 25–54) with dependent children work part-time (compared to only 26 percent in France, for example).[42] The judiciary deviates from this general pattern as 16 percent of female judges worked part-time in 1999. This reality notwithstanding, when there is a general belief that different capabilities makes the genders vary in the types of professions they are suited for, this might deter male law graduates from pursuing a career in the judiciary. Moreover, when general perception has it that female judges work part-time, this might negatively impact women's career prospects within the Dutch judiciary. The persistence of vertical gender segregation within the judiciary, however, was not a topic worth of public discussion.

42 Www.oecd.org/netherlands, accessed April 8, 2014.

2.3 *Women Judges in Indonesia*

Before independence from the Dutch in 1945, Indonesian women were slow to enter into legal education, especially when compared to the trajectories of their Dutch and Egyptian counterparts during the first four decades of the twentieth century. After independence from the Dutch in 1945, the number of female law students increased swiftly. It is not entirely clear, however, when and how female law graduates became the first women judges of Indonesia, be it in the civil or religious courts.[43] It seems that female judges were appointed to the religious courts in 1954 and 1957 and to the civil courts in the late 1950s (see also Nurlaelawati and Salim, this volume).

As for the religious courts, prior to independence an Indonesian religious court judge was usually a *penghulu* (local chief) who had other responsibilities within the community in which he operated. Following Shafi'i doctrine requirements (the dominant school of Islamic jurisprudence in Indonesia), all judges were mature male Muslims. Other doctrinal requirements, such as adequate knowledge of Islamic law, were generally ignored and, until independence, religious court judges were poorly educated (Lev 1972, 103–105). Although Lev remarks that the Islamic courts emerged from the 1945 revolution almost unaltered (Lev 1972, 102), the professionalization of the Islamic judiciary after independence forms an important exception. Gradually, the Islamic court judge changed from a local authority with little education into a full-time judge with decisively more education. The admission of women judges constituted another significant change in the Indonesian Islamic judiciary. In late 1956, the Ministry of Religion organized a course for women to become judges. It was the first of its kind and the result of prolonged pressure from the Indonesian Women's Conference (*Kongres Perempuan Indonesia*). Of the 28 women who passed, around ten would become religious court judges (Muqoddas 2011, 162). On July 24, 1957, Prayitno was appointed as the first woman religious court judge by a decree of the Minister of Religious Affairs (Muqoddas 2011, 161). Seven years later, in an interview with the then Director of Religious Justice Zabidi, Lev found that there were 'only' 15 honorary women judges and one full-time working women judge (Lev 1972, 110).

Although the appointment of the first five female judges to the civil courts in the 1950s hardly provoked substantial opposition, the appointment of 16 female judges to the religious courts met with considerably more disapproval (Nurlaelawati and Salim, this volume). Religious leaders in particular claimed that the appointment of women violated Shafi'i legal doctrine, which clearly

43 After independence, Indonesia retained the division between civil and religious courts.

states that women cannot serve as judges. The director of Religious Justice defended the permissibility of appointing women to the Islamic courts by using the Islamic principle *darura*, or necessity. The lack of qualified male candidates made it necessary to appoint women as religious judges (Lev 1972, 110). The religious justification notwithstanding, Zabidi, the Director of Religious Justice, anticipated opposition from religious scholars and appointed the first woman judge to a court in Tegal (North Central Java) "because he himself came from this area and felt he could control the situation should protests occur" (Lev 1972, 110). The potential controversy, which the appointment of women as judges could provoke, was underscored by an Islamic court judge from the matrilineal Minangkabau society in Padang (West-Sumatra), who was present when Lev conducted the interview with Zabidi. This judge remarked that it would be most difficult for the Minangkabau people to accept a woman judge. Zabidi then responded that "he had every intention of moving slowly even in Java on the issue" (Lev 1972, 110).

Although the number of women civil and religious court judges steadily increased in the decades that followed independence, it would take until the enactment of the Islamic Courts Law of 1989 before Indonesia was able to fully accommodate female judges in the Islamic court system. Nevertheless, compared to other Muslim-majority countries, Indonesia was at the forefront, perhaps even the frontrunner in allowing women to occupy positions of judicial authority. By way of comparison, while Malaysia appointed female judges to the civil courts almost as early as Indonesia, it would take until 2010 for the first two women to be appointed as judges in the Malaysian Islamic courts (see Mohd Zin, this volume).

Nurlaelawati and Salim (this volume) believe that the speed with which Indonesian society has permitted its female members to occupy positions of judicial authority is related to a long tradition of economic partnership and joint marital property between husband and wife among the numerous different ethnic groups that make up the Archipelago's population. This, they believe, has ensured the relatively easy inclusion of women in the labor force, be it in government service or in the private sector. In a recent study, Fattore, Scotto and Sitasari even show that the Indonesian population deems the participation of women in the (top positions of the) public sector as important as their labor in the domestic sphere (2010). Yet, male judges still considerably outnumber female judges. For example, in 2011, the percentage of women judges in the religious courts of first instance was 22 percent. The situation in the civil courts was quite similar: here 23.4 percent of all trial court judges and 15.4 percent of all appellate judges were female (Asrianti 2011). Despite a general societal acceptance of women's employment outside the home, in

Indonesian society, people simultaneously attach great value to women's status as wives and mothers. Indonesian women also have a legal obligation to pay obedience to their husbands. The 1991 Indonesian Compilation of Islamic Law states that the main duty of a wife is to obey (*taat*) her husband in affairs, which are not in contradiction with Islamic doctrines.[44] A wife is considered to be disobedient if she refuses or fails to perform her duties as a wife except when her disobedience is based on valid reasons. My fieldwork research in the late 1990s confirmed that female law students (and female students in general) were eager to put their studies into practice but only if they, first, had the consent of their future husbands, and, second, when work outside the home could coexist with domestic responsibilities such as cooking and raising children. For this reason, most students wanted to find employment in the government sector as civil servants (*pegawai negeri*). None of the students I surveyed, however, wanted to become a judge, a public sector job par excellence.

Nurlaelawati and Salim (this volume) show that interviews with female law students at the Shariʿa Law Faculty in 2010 and 2013 indicated that women had two reasons for not wanting to work as judges. First, female law students felt that the nature of judgeship was hard and impossible to reconcile with their work at home. While working part-time could probably be a solution—after all, of the first 16 women judges appointed to the religious courts in the late 1950s, 15 worked part-time—due to new regulations issued in the early 1990s, this option is no longer possible. Second, female law students were afraid that working as a judge would require them to relocate to a different, possibly very remote area of Indonesia every few years. For this reason, the students indicated that they would rather occupy a position with the judiciary courts' administrative units, where relocation is not required, or only rarely required. Indeed, in the Civil Administrative Courts (appellate level) representation of men and women was nearly equal in 1997 (Soetjipto 2004, 55–56). What might have contributed to female law graduates' low interest in becoming full-fledged judges is the Indonesian judiciary's persistent lack of prestige. This was the case after independence in 1945 (Lev 1972, 108–109; Wallace and Lister 2011, 33) but even later, after the forced departure of the second president of Indonesia, Soeharto (r. 1967–1998) in 1998, the public perception of the courts is generally low.

The only exceptions are the religious courts "which consistently score highly in surveys of public trust and competence" (Wallace and Lister 2011, 33). Hence, where in the period following independence in 1945 the judiciary suffered from

44 The Compilation of Islamic Law (*Kompilasi Hukum Islam*) elaborates and makes explicit the interpretation of the 1974 Marriage Act as a version of Islamic law (Cammack, Bedner and Van Huis 2015).

a poor reputation, the religious courts being no exception, in the course of the last decades the religious courts have emerged as comparatively efficient and less susceptible to corruption (see also Lev 1972). In this light, it is interesting that the number of females working as religious court judges is almost as high as that of their counterparts working in the courts of General Judicature, an observation which deserves more attention.[45] Although the presence of female judges has become a common sight in both the civil and the religious courts, women in the religious courts in particular are still portrayed as being irrational and too emotional to work as judges (Soetjipto 2004, 55). That the issue has not abated became apparent in 2010 when Djazimah Muqoddas defended at the Universitas Agama Indonesia her doctoral thesis, titled: *Women Judges in the Religious Courts: A Comparative Study on the Legal Position of Women Judges According to Fuqaha and Positive Laws in Muslim Countries*.[46] Herself a female judge at the Religious High Court in Jakarta, Muqoddas found that the Indonesian discourse on women judges, Islamic court judges in particular, was reflective of a society that still has not completely accepted the positive role women play in society (Muqoddas 2011; Abdel Aziz MMM 2012).

The thesis, which was turned into a book a year later, presents the opinions of experts on the position of women as judges and compares the practice in Indonesia to those in other countries, such as Malaysia, Pakistan, and Sudan. What is of interest is that the book was well received among Muqoddas' colleagues at the religious courts. Two high-ranking legal professionals (both male) and one female professor featured in the foreword. Other judges appreciated the book to the extent that they uploaded it on their court website.[47] In addition, Muqoddas was praised by her colleagues for becoming the first religious court female judge to obtain a doctorate degree cum laude. Compared to Egypt, where the most fervent opposition to women becoming judges emanates from within the male dominated judiciary, Indonesian male religious court judges were full of praise for what their female colleague had achieved. They welcomed her critical analysis, at least publicly.

In her book, Muqoddas claims that patriarchal thinking underlies the argumentation of those who oppose women's right to serve as judges. Such thinking, she maintains, also distorts the way the sources of Islamic law are being

45 In 2011, the civil courts were home to 906 female judges and the religious courts to 791 female judges (Muqoddas 2011, xi).

46 Translation by author. The original Indonesian title is: *Hakim Perempuan di Peradilan Agama: Studi Komparatif tentang Kedudukan Hukum Hakim Perempuan Menurut Fuqoha dan Peraturan Perundang-Undangan di Negara-Negara Muslim*.

47 Personal communication with Euis Nurlaelawati, October 3, 2014.

interpreted. She argues that none of the arguments put forward by opponents are based on definitive (*qath'iyy*) Islamic principles. Hence, men and women have the same rights to become judges in all fields as long as they have the capacities to establish the truth and uphold justice (Muqoddas 2011; hukumonline.com 2011). In December 2013, Muqoddas moved from Java to Pontianak, West Kalimantan, on the occasion of her inauguration as Vice-Chairman of the High Religious Court of Pontianak. It was the second time for an Indonesian woman to be appointed vice-chairman of a High Religious Court. In the presence of her husband and two children, the Chairman of the Pontianak court expressed the hope that the inauguration of a female chairman would contribute to the softness (*kelembutan*) and fineness (*keindahan*) of the court building (Badilag.net 2014). The future will learn whether the flying career of Djazimah Muqoddas, who is also a social activist, will inspire female law students to opt for a career as a (religious court) judge. If anything, during the farewell ceremony, her colleagues at the High Religious Court of Yogyakarta praised her for being a judicial heroine (*srikandi peradilan*), who, armed with softness (*kelembutan*) and knowledge (*ilmu pengetahun*) was to embark on a new journey (Pta-yogyakarta 2013).

3 Conclusion

This chapter has explored the opening of the judiciary and the bar to women in two Muslim majority countries (Egypt and Indonesia) and one non-Muslim country (the Netherlands). The main question guiding the investigation was what factors explain the earlier or later admission of women to the judiciary in the three countries under study.

The first section dealt with the history of women's access to legal education. Although the countries are different in many respects, a number of similarities could nevertheless be detected. First, while women's access to institutions of higher education was not an easy process in the first place, in all three countries, law schools were relatively slow in attracting female students. In the first half of the twentieth century, education was meant to prepare young women to become competent mothers, housekeepers, and wives. Their perceived rightful place in the nation was within the confines of the home. Nowhere was this more evident than in the Netherlands, where married women were legally incapacitated and, upon marriage, automatically discharged from jobs in the government sector. In all three countries under study, family law legislation defined husbands as the head of the household, and women had to pay obedience to their husbands. With official national discourse delegating women to

the realm of the private sphere, it is not surprising that few women aspired to study law. More than, for example, medicine, law was considered an exclusively male domain, where the judge was the ultimate figure of objectivity and authority.

The high prestige of the judiciary in Egypt and the Netherlands is likely to have further contributed to the slow admission of women to law schools, as male judges may have feared that the prestige of the profession would be contaminated by the presence of women. This, in any case, applies to the current Egyptian situation where the strongest opposition is coming from within the judiciary itself, and where some male magistrates fear that women's biological disposition (monthly periods, pregnancy, and childbirth) will reflect negatively on the prestige of the judiciary (Sonneveld and Tawfik 2015).

Second, the early women law students, although few in number, were social activists. In general, they were highly determined to undo injustice. In particular, they wanted to improve the position of women in marriage (through reform of personal status laws) and society (by fighting for women's voting rights).

Third, while initially slow, in all three countries under study, the ratio of men to women law students increased dramatically in the last quarter of the twentieth century, with female students outnumbering male students in the Netherlands, and being near to reaching equality in Egypt and Indonesia.

In the second part, I paid attention to the question whether women's admission to law faculties ensures that they will be equally distributed across professional roles. While this question can be answered in the affirmative with regard to the advocacy (in all three countries the proportion of female lawyers equals the proportion of female law graduates), this does not necessarily apply to the judiciary where we have seen a more complex picture emerge. While in the Netherlands the number of female judges skyrocketed over the past three decades (with women outnumbering men in 2009), in Indonesia we see a steadier increase, and in Egypt, women judges form a tiny minority of less than 1 percent.

There is not one single factor that can account for these differences, but rather a combination of factors, which differ for each individual country. The strong resistance against women judges in Egypt has its roots in the high prestige of the judiciary, as aforementioned, in addition to the fact that upon independence in 1923 there was no shortage of judges and, therefore, no urgent need to appoint women to the Bench. In contrast, an acute shortage of judges after independence and the end of World War II opened the door to the appointment of the first female judges in Indonesia and the Netherlands, respectively. More research is needed to establish whether the availability of

part-time work has encouraged the entrance of women to the Dutch judiciary (where part-time employment is a possibility) and somewhat slowed down the entrance of Indonesian women to the judiciary (where part-time employment is no longer a possibility), despite the fact that women students aspire to jobs in the public sector. The same applies to the judicial rotation system. Although applicable to women in all three countries, it might have a more profound impact on female law graduates' wish to become judges in vast countries such as Indonesia where judges can be sent to areas that are not only remote, but where different languages are being spoken as well.

Despite the differences, in all three countries, strong notions about women's rightful place in society continue to play a role. Women's enrollment in higher education and their participation in the labor market have not necessarily altered existing notions of what it means to be a man or women in Dutch, Egyptian, and Indonesian society. Over the course of almost a century, general opinion still has it that ultimately, a woman's main place is within the confines of the home and the family. Hence, even in the case of the Dutch female judge, one can be sure that she goes home early, because the potatoes are waiting.

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PART 2

Country Studies

CHAPTER 4

Female Judges at Indonesian Religious Courtrooms: Opportunities and Challenges to Gender Equality

Euis Nurlaelawati and Arskal Salim

Introduction[1]

One may note that in many classical Islamic jurisprudence texts it is specified that a traditional judge is required to be a mature, Muslim male (Ibn Qudama 1967, 39–41). Historically, deviation from this rule was rare and scarcely occurred in the numerous Muslim countries. In Indonesia, for example, where the Shafi'i legal jurisprudence has been prevalent for centuries, the initial appointment of female judges to the Islamic courts was a particularly difficult process. Starting in the 1960s, the Ministry of Religion and the Directorate of Religious Justice, whose main responsibility was to oversee the Islamic courts, sought to overcome this gender-based issue. The Directorate of Religious Justice wished to enhance the overall quality of Islamic judges, and provided the Islamic judges with specific training on technical matters that would elevate their expertise to the desirable standard of civil judges (Lev 1972, 106). Furthermore, the Directorate of Religious Justice not only appointed young male graduates of the Islamic university to replace older Islamic judges, who had no recognized academic degree and lacked required judiciary skills, it also recruited women as members of Islamic courts.

In comparison to other Muslim countries, Indonesia was at the forefront, perhaps even the frontrunner, in welcoming women to occupy positions as judges in both general and Islamic courts; with notable improvements in the latter. Nevertheless, despite the fact that Indonesia was a progressive leader since the 1960s, it was only in 1989 that Indonesia fully accommodated female judges in religious courts. Indeed, in the 1960s a few Indonesian women were already sitting in Islamic courtrooms, hearing cases on family law issues (and economic issues since 2006). Yet, from 1989 onwards, female judges were recruited in increasing numbers, accessing a number of rights and positions equivalent to those of their male counterparts. While some were promoted to

1 An earlier version of this chapter has been published in *Al Jamiah, Journal of Islamic Studies* 51 (2), 2013 under the title "Gendering Islamic Judiciary in Indonesia: Female Judges in the Religious Courts of Indonesia."

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work for the appeal courts at provincial levels, others were offered top positions to manage municipal or district religious courts in particular regions of Indonesia. To illustrate, the Islamic courts of Lamongan and Madiun in East Java, for example, are now chaired by female judges (Hermansyah 2012). In spite of this, there are still fewer female judges than males in the religious courts.

In general, there were and are no serious challenges to the appointment of female judges to the Indonesian civil courts. During the early days of Indonesia's independence, Muslim leaders seemed prone to focus attention on the Islamic institutions established by the state. Other legal institutions were considered to be parts of the secular state of Indonesia, so there were very few, if any, criticisms from the Islamic point of view. In contrast, the appointment of female judges to the Islamic courts was initially quite fierce, and it is for this reason that this chapter explores this topic in greater depth and breadth. The lack of criticism from those who share the Islamic point of view does not mean that the number of female judges in the civil courts exceeds that of their counterparts in the Islamic courts. For various reasons, which will be explained below, the percentage of women judges in both religious and non-religious courts fluctuates around 20 percent.

This chapter is divided in two sections. In the first section, we discuss the way women were appointed to the position of judges in the Indonesian Islamic courts. In addition, this section highlights some factors that lead Indonesian women to first engage in the judicial practice. Section two looks to what extent female judges exercise their authority to protect the interests of female litigants. The data gathered for this section are based on interviews with 24 judges, both male (16) and female (8), of Tangerang (Banten now, and West Java previously), Serang (now in Banten and in West Java previously), and Aceh (Sumatra) Religious Courts of first-instance, and on observing court hearings and reading court rulings in three courthouses during 2009 and 2011.

Within the chapter it is argued that despite equal educational and professional opportunities, and a strong presence of women in some important positions within Indonesian religious courtrooms, challenges to gender equality in both the low number of female judges and the way in which women judges deal with female litigants remain in place.

1 The Islamic Judiciary of Indonesia

1.1 *Administration and Management*

Since its inception, the Islamic court of Indonesia has gone through several transformative developments. Formally established in the colonial period

as a *priesterraad*, the Islamic court system has developed over time in terms of its institutions, laws, and human resources.[2] For example, authority over the courts has shifted over the years. During the colonial period, Islamic legal institutions fell under the administrative purview of the Ministry of Justice. After achieving independence in 1945, the Indonesian government formed the Ministry of Religious Affairs to address the matter of authority over the Islamic courts in its first official act (Hooker 1984, 255; Lev 1972, 41–42). Under the Ministry of Religious Affairs, the Islamic court of Indonesia was supervised for several decades by the Directorate of Development of Religious Justice (Direktorat Pembinaan Badan Peradilan Agama, or 'Ditbinbapera'). Despite the many challenges it encountered periodically, the court survives today and has even become stronger. The court now has the status of an official state court, as dictated in Law 14 of 1970 of the Basic Act on Indonesian Judiciary.

This Law additionally introduced significant changes in both the institutional and juridical supervision of the Islamic courts. Article 10 of the Act appropriates judicial power to the four types of courts: general courts, Islamic courts, military courts, and the administrative courts.[3] Furthermore, it is stated that the Supreme Court is the highest judicial authority in the country and, as such, has the power to review decisions from the top-echelon appellate authority within all four systems. The management and administration of the Islamic court was further regulated in 1989 when the Religious Judicature Act was issued. This act assigned administrative responsibility for the Islamic courts to the Ministry of Religion, and responsibility for 'technical juridical matters' to the Supreme Court.[4]

This division of judicial responsibility ended in 2004 as a more general package of judicial reforms was introduced following the forced resignation of President Suharto in 1998. In 1999 the government issued an amendment to the 1970 Basic Act on Judicial Power. The 1999 Amendment established a 'one roof' system of judicial administration; this Amendment aims to transfer administrative, structural, and financial authority from the four branches of the Indonesian judiciary to the Supreme Court (Mujahidin 2007, 91). The Ministry of Religion was initially reluctant to implement this rule as it would place the Islamic courts under the authority of the Supreme Court. However, the Ministry of Religion eventually transferred the administration, structure, and finances of the Islamic courts from its own auspices to the Supreme Court

2 For an account on this issue, see for instance, Cammack (2007), Cammack and Feener (2012) as well as Lev (1972).

3 See Basic Act on Judicial Power No. 14 /1970.

4 See Religious Judicature Act No. 7/1989.

in 2004 (Mujahidin 2007, 99). The Bureau of Islamic Courts (Badan Peradilan Agama or 'Badilag'), the office within the Supreme Court that supervises the Islamic judiciary, adopted and recruited most of the personnel from the Directorate of Development of Religious Justice. The Ministry of Religious Affairs then eliminated this directorate from its structure.

1.2 *Recruitment and Number of Judges*

In Indonesia, a judge is recruited under the civil law system, where the judiciary is a separate career path in the system. Indeed, judges are selected from new law graduates, typically devoting their entire career to judicial service (Nurlaelawati and Rahim 2012, 50). Each year an 'announcement' letter is issued in order to pronounce the recruitment plans for the coming year and invites applications (Nurlaelawati and Rahim 2012, 50–51). University graduates with degrees in either Islamic or civil law who are interested in serving as religious judges are required to submit an application letter, statement of interest, and various supplemental and required personal documents.[5] Applicants who meet certain qualifications specified in the Law on the Religious Judicature (Nurlaelawati and Rahim 2012, 49)[6] must then pass a multitude of examinations to officially be appointed as a judge. Note that the examination process is conducted in two sessions.[7]

The number of Islamic courts and judges has increased significantly in the past decade. According to the data released in 2009 by the Supreme Court's Bureau of Islamic Courts (*Badan Peradilan Agama* or *Badilag*), the number of first-instance Islamic courts in Indonesia consisted of 343 district court offices with 29 appellate court offices (Nurlaelawati and Rahim 2012, 57). While the number of appellate courts remained unchanged until 2012, the number of

5 For the details of the documents to be attached, see generally "Badan Peradilan Agama, the Islamic Court Division of the Supreme Court." http://www.badilag.net/, accessed on August 19, 2013.

6 The letter specifies a minimum age of 25 for judges and a mandatory retirement age of 60. Candidates for the bench must provide medical proof that they are drug-free. The Supreme Court has also established height requirements for judges. To be appointed as a judge, men must be at least 160 cm (5 feet 3 inches) tall and women must be at least 152 cm (5 feet) tall.

7 The first session consists of two examinations, one testing 'basic competency' (Tes Bakat Skolastik or 'TBS'), which includes cognition, psychosomatics and mathematics, with a second one on 'general competency,' which covers civic knowledge, languages, history, and government administration. The examination administered in the second session tests both specific knowledge (Tes Pengetahuan Khusus or 'TPK') and specialized or substantive knowledge (Tes Kemampuan Bidang or 'TKB'). This encompasses Islamic law, the procedural and substantive law of the Islamic courts, and Islamic astronomy (*hisab rukyat*).

original jurisdiction courts increased from 343 district court offices in 2009 to 359 in 2012.

Each court office houses a chairman, a vice-chairman, six to eight judges, a clerk, and a dozen administrative supporting staff members. The number can vary in some district court offices and is not static. From 2004 to 2006, the number of judges in some district courts in Jakarta oscillated between nine and ten, including the chairman and the vice-chairman. Arguably this was the optimum situation within that period (Nurlaelawati 2010). The religious courts outside Jakarta, the capital, always housed fewer judges, with very few in certain periods. This disproportion in the number of judges outside Jakarta was due do to the fact that fewer cases had to be examined outside the capital (Nurlaelawati 2010, 34).

The promotion and demotion process of judges varies from one region to another, and in part helps to explain why one court office might have more or fewer judiciary personnel than the other. In 2005, for example, the religious court of Cianjur, West Java, employed nine judges. The religious court of Rangkasbitung, Banten[8] had nine judges as well, while the religious court of South Jakarta had ten, as did the court of East Jakarta.

2 Women in the Indonesian Judiciary

The involvement of women in the labour market has been a long-standing cultural phenomenon observable in Indonesia. This can, in part, be explained by the local tradition of economic partnership between Indonesian husbands and wives. Women and/or wives in Indonesia have for many centuries not been prevented from actively supporting their spouses by working in the fields, cultivating lands and harvesting rice, or selling food or garments in the market. Interestingly enough, Indonesia's acceptance of women in the workforce in some ways represents a paradox. In one dimension of society, a majority of Indonesians subscribe to Shafiʿi Islamic jurisprudence. In accordance to this branch of Islamic jurisprudence, it is not considered acceptable for women to serve such a prominent role in economic activity for the family. In another societal dimension, the economic partnership has traditional cultural roots and takes precedence. This economic partnership helps explain why the local practices of many Muslim ethnic groups in Indonesia recognize and

8 Rangkasbitung was part of West Java province. Since 2000, it became one of the six districts of a newly established province, Banten.

accommodate the concept of joint marital property between husbands and wives (Cammack and Feener 2008, 92–115).

Women in Indonesia have had access to property for a very long time. Their engagement in paid jobs in both government public positions and private professional sectors is generally welcomed. A recent study has confirmed that a majority of the Indonesian population supports the idea of working women and even supports women who hold top positions in offices. Many consider women's engagement in the public sector as important as in the domestic sphere (Fattore, Scotto and Sitasari 2010, 261–275).

Progressively, over time, there has been a general increase in the number of female employees in Indonesia's judicial structure. Initially, in the late 1950s, five female legal scholars were appointed as the first women judges to serve in the lower civil courts in different cities. In 1968, the first female judge was appointed to the Supreme Court, Sri Widoyati Wiratmo Soekito. Almost 15 years later, in 1983, nine female judges were sitting on the Supreme Court bench (Pompe 2005). Currently, there are 28 females who serve as judges in the Supreme Court. The increased number of female judges in the Supreme Court has only encouraged more females to enter the civil courts. In 2011, civil courts were nearly one sixth percent female (15.6 percent) and one third of courts' personnel in general. This example of female judges in the Supreme Court illustrates how women, even if only a small number of them, can hold professional positions in all of Indonesia's judiciary institutions. This situation is paralleled in the Islamic courts, as one will note in the following.

In the first two decades after Indonesia's independence (1945), the recruitment of female judges to serve in the Islamic court attracted protest from many conservative Muslim groups. Despite the fact that the general court had appointed female judges in the late 1950s, they considered women sitting on the bench of the Islamic courts to be a violation of the Islamic legal tradition, especially in light of the Shafi'i juristic doctrine. The Shafi'i legal scholars denied women the right to be a judge in Muslim contexts based on the following *hadith*: "People who appoint a woman over them will never succeed." The Prophet Muhammad allegedly made this statement in response to the fact that the daughter of the Persian king had been appointed as a new ruler after her father's death. They, and other Muslim jurists, interpreted the *hadith* as placing a restriction on women's right to occupy public positions.

In response to this criticism, the Directorate of Religious Justice of the Ministry of Religious Affairs issued a statement, assuring that the appointment of women judges to Islamic courts has a strong basis in Islamic legal theory (Hermansyah 2012). The Directorate justified the recruitment of women to serve as judges in Islamic courts by referring to a notion of necessity or

legal emergency (*darura*). According to the Directorate, the appointment of women judges was considered *darura* because Indonesia lacked qualified Islamic judges. At the time, many of the male judges who were employed in the Islamic courts did not meet the full requirements, such as standard knowledge of Arabic and familiarity with classical Islamic legal references. In addition, as Lev noted, the appointment of women judges did not constitute "an overwhelming threat to any essential interest" (Lev 1972, 110). It appears that, to many Indonesians, the crucial threat to the Islamic courts came from the fact that, at the time, the civil courts (*pengadilan negeri*) had greater jurisdiction compared to other tribunals. Many Muslim leaders were extremely unhappy that the Islamic courts were subordinate to general courts, especially in relation to the issue of Muslim family law, and hence criticized this biased legal structure (Lukito 2003, 26–27).

2.1 *Initial Recruitment of Female Judges to the Islamic Courts*

The recruitment of women to act as judges in an Islamic court was a gradual process which started at the local level with a small number in the first decades after Indonesia's independence. Once the incorporation of women began, however, it gained momentum and spread to other regions and, in time, became acceptable even to those who had initially opposed it in Islamic circles. In an interview with the Directorate of Religious Justice in 1964, Lev discovered that the top official in this institution, Zabidi, was the person in charge who strongly supported the appointment of women judges. He commenced this plan in the small district of Tegal in Central Java province. Zabidi was from the Tegal district and therefore he felt confident he could handle any resistance to his program from conservative Islamic circles, should it occur (Lev 1972, 110).

According to female judge and scholar Muqoddas, Arifiyah Chairi was Indonesia's first female religious court judge (Muqoddas 2011). Chairi was appointed to the district religious court of Tegal in 1954. However, Mrs. Prayitno,[9] is noted to have been the first female judge who was *formally* appointed by the Minister of Religious Affairs to the religious court of Temanggung (Central Java) (through a decree dated 24 July 1957) (Muqoddas 2011, 160–61). A decade later, in 1964, there were 15 female part-time judges and one full-time judge serving the district religious court of Tegal. Around the same time, Zabidi stated that there was one woman of high social rank from Pekalongan (also a district in Central Java) who applied for an appointment as a judge in the Pekalongan district religious court, a request which Zabidi approved, and

9 Her original name is not known. It is assumed that she was the wife of a man named 'Prayitno' and she was associated with her husband.

this religious court could then be named as the third religious court to have appointed female judges.

Despite some changes during this period, to observe female judges serving in Islamic courts was still a rare local phenomenon. A male judge from Padang, West Sumatra, who was present when Lev was interviewing Zabidi, confirmed that female judges serving on Islamic courts would be unimaginable and unacceptable to people in his hometown. Almost paradoxically, this view existed despite the fact that Muslims in this province live in a strongly matriarchal society. In response, Zabidi strategically emphasized that the Directorate of Religious Justice's program to appoint female judges to Islamic courts would be gradual, and would be limited to Java (Lev 1972, 110). Ten years later, however, this program became popular and some regions outside Java began to participate.

From the mid-1990s onwards, almost all district religious court offices have employed female judges one time or another in their history. Although the majority of the judges in district religious courts are male (reaching up to 80 percent in some cases), the sight of female judges in religious courtrooms is no longer uncommon. Due to these early acts of incorporation, Indonesia is considered one of the first Muslim countries to initiate the engagement of women in the legal profession and judicial system. Indonesia's experience of recruiting female judges to Islamic courts was not an experience followed by its neighboring state, Malaysia. In fact, although Malaysia has a long history of appointing Muslim women to the general judicature, it was only in 2010 that the Malaysian *Shariʿa* Court appointed the first women judges (see for more, Mohd Zin, this volume).

2.2 *Educational Backgrounds of Female Judges*

As noted above, the 1989 Religious Judicature Act stated that prospective judges have to meet a number of requirements to become judges in both the Islamic and the civil courts. In terms of education, they must have at least a bachelor's degree in *shariʿa* and secular law. While the Islamic law graduates could not become judges in the civil courts, unless they also have a law degree from the law faculty, those from the law faculty were able to work as judges in Islamic courts. Furthermore, although the minimum educational requirement is only a bachelor degree, a growing number of religious judges have obtained master and doctoral degrees. In 2009, there were 842 first-instance judges with degrees higher than bachelors. In the appellate courts, even more than half of all judges had obtained master or doctoral degrees (Nurlaelawati and Rahim 2012, 50). A gender disparity is evident when one looks at the percentage of individuals holding these degrees. If one were to classify the number of

judges with advanced degrees by gender in the first-instance courts, the number of male judges with advanced degrees is proportionally higher than that of female judges with advanced degrees. Thirty percent of male first-instance judges had advanced degrees in 2009 compared to 21 percent of female judges. However, this is not the case in the appellate courts, as the proportion of advanced degree holders is essentially the same for male and female judges; just over 50 percent of the judges in both gender groups have advanced degrees (Nurlaelawati and Rahim 2012, 50).

2.3 *Number and Positions of Female Judges in Islamic Courts*

The increased presence of female judges on judicial boards may serve as a powerful measure to challenge gender inequality in the legal practice of the Muslim world, including the inequality present within Indonesia. Activists for the rights of women hope that the inclusion of women on judicial boards might minimize, if not eliminate, the problem of gender inequality within society. Interestingly enough, the idea that women's engagement is crucial to the wellbeing of the public sector has led the Indonesian government to pursue policy remedies. More recently, the Indonesian government adopted a policy that women should fill 30 percent of key positions in several sectors, including in the legislature, local community boards, and the judiciary. Despite progressive policy changes, in 2011, the percentage of female judges in the civil courts reached only around 15.6 percent of the total positions. As Table 1 exhibits, while the total number of first-instance judges and appellate court judges throughout Indonesia is 3,687, only 507 were female (471 in the first-instance and 36 in the appellate court).

In the civil courts of first-instance, the pattern of gender composition is roughly 80 percent male and 20 percent female. This same pattern holds true for almost every district religious court, where two or three out of ten to 11 judges are female (Nurlaelawati 2010, 34). There are three principal factors that explain the relatively small number of female judges in both the civil and

TABLE 1

No	Gender	First-Instance Court	Appellate Court	Total
1.	Male judges	2,442	738	3,180
2.	Female judges	471	36	507
	Total	2,913	774	3,687

Islamic courts. First is the widespread notion among some Muslim circles that women are sensitive, emotional, and irrational. This notion still influences many Muslim women and prevents them from applying for judicial positions in both the Islamic and civil courts (Soetjipto 2005). Second is the nature of the tasks undertaken by judges, which are often thought to be too hard or difficult for women to carry out. In interviews with six female graduates of the faculty of Shariʿa, five of them are reluctant to apply for judicial positions because they view judges as having to perform a task too hard to bear for themselves.[10] Judges have an obligation to resolve cases brought before them and to examine them carefully and fairly, which often leads to laborious work schedules. When the work of a judge cannot be entirely finalized in the courtroom, judges take their cases home. Since most lawsuits cannot be settled immediately or within only a single hearing, judges are often burdened by these cases even at home. Due to this situation, many female law graduates consider this demanding workload to be inappropriate for the role of women. Many women tend to avoid the compounding burden of work both at home and in the office. They argue that enabling women to work as judges part-time, as was indeed the case in the 1960s, could be a more viable solution to this problem. Female judges who work part-time may flexibly balance their time between office and home. However, part-time positions were abolished in the early 1990s.

Third, the judicial rotation system provides a challenge for many female judges. The judicial rotation allows for newly appointed judges to be placed in any number of Indonesia's districts, which may not be of their own preference. Although this placement system applies to newly appointed civil servants in other state institutions as well, it is more widely observed in the judiciary than in other state agencies. Indeed, prior to taking up the position or commencing their job, judges have to agree and prepare to be relocated elsewhere. Matters are quite different for newly appointed civil servants in fields other than the judiciary. Although they also have to sign a letter stating their willingness to relocate at any time, anywhere in Indonesia, these government employees are more often assigned to locations of their preference. Newly appointed judges, however, do not have the same luxury and are usually relocated to remote areas.[11]

Coupled with the heavy burden of work responsibilities they would have to carry, female law graduates frequently feel they have to carefully take these

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10 Interviews with four respondents from the faculty of Shariʿa, Jakarta, HY, NF, SF and WU, July 2010, Jakarta, and two respondents from the faculty of Shariʿa and Law, Yogyakarta, AM and NJ, November 2013, Yogyakarta.

11 Interview with one of the female judges in the Islamic court of Yogyakarta, July 2013.

variables into account before applying for a position as a judge. Most women interviewed expressed that they prioritize their responsibility as both wife and mother, and thus judicial positions are not especially attractive jobs. With these facts in mind, it is no wonder, then, that the number of female graduates who apply for positions as judges in both the Islamic and the civil courts has been significantly lower than that of the male applicants. In the 2009 judgeship recruitment, of 75 applications for judicial positions,[12] only 19 were submitted by women—a significant decrease compared to the number of applicants prior to 2009.[13]

Acknowledging that the number of female judges in (religious) courts is still limited, the Head of the Department of Youth Development in the Supreme Court argued that women are less interested in being judges than men, and that this explains why the required 30 percent of women involved in decision-making processes has not yet been achieved. This pattern of gender distribution, this official believes, had nothing to do with structural barriers. Rather, he suggested that it was all internally driven by factors specific to women themselves, namely what the Head termed women's 'inability' and their 'lack of interest' despite vacancies (Ruslan 2007).

The aforementioned factors are reinforced by the fact that more women in the religious court offices are working in administrative units. Most of these positions do not necessarily require rotation and relocation to other places. As of 2011, it was recorded that out of 3247 clerks, 1183 (about 35 percent) were women. This data indicates that women do not avoid employment by the court; women simply do not prefer to serve as judges. The nature and burden of the judge's work have discouraged a number of women from applying for a judge's position in the Islamic court. What is observed with regard to the Islamic courts also applies in the civil courts.

Regardless of the smaller number of female judges, clerks, and bailiffs (compared to the number of men), one can say that the presence of female personnel in the Islamic judiciary system of Indonesia is appreciable. In total, as noted above, women contribute to about one-third of the personnel in the Islamic judiciary. Of the 11,743 technical and non-technical employees, 3,944 are female (Hermansyah 2012). This is certainly a significant development, especially when compared to other Muslim majority countries.

12 *Calon Hakim PA Harus Lebih Kuasai Hukum Acara Jakarta*, www.badilag.net, accessed January 18, 2013.

13 In 2008 the Supreme Court received 100 applications. This was the number that was decided by the Ministry of Pendayagunaan Aparatur Negara in the letter identified as No. B/28.F/M.PAN/8/2008, dated August 4, 2008.

In any case, optimism about the increase of women's participation in the judicial Islamic institutions of Indonesia remains relatively high. Many female judges have now occupied positions as chairpersons in religious court offices. Before 2000 no women had chaired any religious court office, currently some women have assumed a position as the head of an Islamic court. As of 2009, 20 female judges had been appointed to chair the first-instance Islamic courts. Above all, the shortage of judges and the significant difference in number between male and female judges has attracted wide public attention.

3 *Legal Notions of Female Judges on Gender Issues*

Since their establishment, the Islamic courts have had jurisdiction mainly on familial issues, however, since 2006, the Islamic courts' reach has expanded to include economic issues as well. The majority of familial cases heard by Islamic courts have dealt with divorce, with the petitioners mostly being women. According to data found in some studies, more women attend court and petition for divorce than men (Cammack and Feener 2007; Nurlaelawati 2013a; Sumner and Lindsey 2010, 32–33). This phenomenon has given rise to the idea that the inclusion of more female judges is a necessity, since they are deemed more capable of understanding the problems experienced by female litigants, regardless of women's diverse social status and ethnic-group backgrounds. Despite the existence of female judges in Indonesia's Islamic courts, there remains the concern among scholars and women's organizations to what extent female judges have contributed to solve problems of gender inequity in legal transactions. Embodied within this concern are cases such as polygamy. Judges often approve proposals for polygamous unions by husbands despite the fact that these husbands do not always present the legal reasons specified in the laws (Nurlaelawati 2013b). Interestingly enough, the *Kompilasi* and the 1974 Law of Marriage[14] very clearly specify the conditions upon which husbands could enter into polygamous marriage: infertility of wives, failure of wives to perform their marital duties, and acute illness of wives that could not be cured.[15] Yet, many judges often approve proposals brought by husbands under certain illegal reasons such as illicit sexual intercourse of husbands with prospective wives and husband's will of having more children (Nurlaelawati 2013b).

14 The Law of Marriage is a national law and applies to all citizens. It therefore is a reference for both Civil and Religious Courts working on familial issues. The *Kompilasi* is a special reference for judges of Religious Courts.

15 See art. 57 of the *Kompilasi* and art. 4 of the 1974 Law of Marriage.

Many studies have been conducted to try and understand the way judges of the Islamic courts make their decisions. Some investigators particularly paid attention to gender issues in the courtrooms, (Bowen 2003; Hirsch 1998; Moors 1995; Peletz 2002; Starr 1992; Tucker 1998). Hirsch's study in Kenya, for an example, demonstrated that the majority of marital conflicts handled by the local Islamic courts are initiated by women and reached a favorable outcome for the women involved. According to Hirsch, success lies in the female litigants' ability to transform the perception of womanhood to their advantage in their disputes with their husbands. Instead of accusing their husbands shamefully, they make indirect claims against their husbands. In addition, Hirsch pointed out that the success of female litigants was in part due to the fact that the Islamic judges sided with these women in order to look for ways to reinforce their authority with the public; especially to resist pressure of local elders or other Muslim men (Hirsch 1998, 129). Hirsch's study demonstrated how gender notions in Kenyan Islamic courts reflected the way women litigants were active agencies, negotiating their rights and claims. However, the way in which female judges examine and approach cases where women are litigants was not touched on in Hirsch's study, simply because female judges did not exist when Hirsch undertook her fieldwork in the 1990s.

Nurlaelawati discusses divorce cases to observe Indonesian Muslim judges' attitudes toward female litigants. In regards to the divorce procedures, Indonesian women are now equal to men. Historically, this was not always the case. Until 1974, it was more difficult for women to initiate divorce than for men because women had to petition the court. By contrast, men only needed to see registrars at the sub-district office of religious affairs. Since 1974, however, both women and men are required to go to court and present one or more valid grounds, as specified in the 1974 Law of Marriage and the 1991 *Kompilasi*, in order to be granted a divorce.[16] In recent years, women have greater faith in the Indonesian legal system. Consequently, more women have sought legal remedy within the courts. To win their divorce cases, Indonesian female litigants, similar to those in Hirsch's study, have developed various strategies to convince judges that their petitions for divorce are based on valid grounds. These strategies have to some extent allowed women to win their cases (Nurlaelawati 2013a). In Indonesia, female litigants often divulge stories of their marital conditions, proclaim their firm intentions to divorce, and assert that they are willing to bear the burden and effects of divorce (Nurlaelawati 2013a).

16 See Article 116 of the *Kompilasi* and the Elucidation of the Law of Marriage. For a good discussion on the proceeding of divorce, see Nakamura (1983). See also Bowen (2001).

It is often thought that due to their emotional nature, female judges would serve the interests of women claimants better than male judges. In 2009, we did several case studies of female judges serving in two religious courts in Aceh province. In addition to conducting interviews, we also observed court sessions preceded by female judges to study their rulings. We found that among the key reasons why women judges are more inclined to defend the interests of female litigants is their attendance and active involvement in particular training sessions of women's empowerment programs (Salim et al. 2009, 26–50). We will elaborate on this below.

From 2006 to 2009, two women's organizations (the Center of Women Studies of Sunan Kalijaga State Islamic University Yogyakarta and the Putroe Kandee Foundation of Aceh) have worked, albeit independently, to enhance the gender sensitivity of religious court judges and Islamic registrar officers in various parts of Indonesia. Specifically, these training sessions were aimed at religious officials who deal with legal and gender relations between men and women in family life. The training desired to provide new perspectives for judges and sensitize them by exploring inequities in husbands' and wives' access to and control of resources. These types of inequity may take the form of biased verdicts on joint property and custody cases which went against the law. Such verdicts are often produced by male judges who strictly refer to the Qur'anic verses or classical legal doctrine affiliated mostly with the Shafi'i school of Islamic law (Nurlaelawati 2010; Salim et al. 2009). Some judges, for example, often dismiss a woman's right to custody of their under-aged children on the ground of the mother's apostasy. Since there is no regulation in both the *Kompilasi* and the Law of Marriage on the detailed qualifications for custodians, these judges rely on the legal religious doctrines which state that one of the qualifications for an individual to be considered to be a custodian is that he or she be a Muslim (Nurlaelawati 2010, 144; 2013). Through these training sessions, judges in religious courts were able to gain a broader sensitive approach, which they can apply when dealing with family disputes (Salim et al. 2009, 52–86). The results of the training sessions were that judges of different Islamic courts felt motivated and legitimated to reinterpret the texts of laws. Judges now view regulations and consider if they contain a gender bias, such as those on polygamy and custody, or to go even further, beyond the legal texts, to uphold the Indonesian 'sense of justice' in inheritance (Bowen 2003, 156).[17] In the case of eligibility to be a legal guardian of orphaned children in Aceh (Sumatra), following the post-tsunami recovery process, many Islamic

17 This particular 'sense of justice,' which is arguably more a societal notion, has its roots in the bilateral principle that rights to property extend through sons and daughters, and

jurists and traditional religious teachers considered that the rule of guardianship for those orphaned children, including the management of the estate that the children inherited from their deceased parents, is similar to marriage guardianship. This meant that should parents and other immediate male family members have died or gone missing in the tsunami disaster, the responsibility of guardianship should go to the male relatives of the children, even if they are distant kin or live far away from the children (Salim 2006).

Nine female judges in two religious courts in Aceh who participated in the women empowerment training were more prone to appoint female relatives or family members of the children's mother to take over this responsibility. As the Indonesian court system adopts a judiciary panel that consists of a chair and two members, these female judges had to convince their male counterparts in many cases. In the view of these women judges, as far as the cultural context of Aceh is concerned, children usually feel more comfortable living with their female relatives or their mother's relatives (Salim et al. 2009, 54). Unlike the Minangkabau people who live in another province on the same island and who embrace a matriarchal family system, Aceh in principle is a patriarchal community. However, Aceh has a system of matri-local residence, where newly married couples are likely to stay at the bride's parent's home or in a house granted to the bride by her parents. In turn, this leads children to attach more closely to their mother's family. As of March 2006, less than two years after the tsunami, both *Shari'a* Courts located in Banda Aceh and Jantho had appointed 100 female relatives (of 243 all appointed guardians), to act as legal guardians for the orphaned children. These female guardians included elder sisters, aunts, or maternal grandmothers (Salim 2006, 47). It may be considered that this case is about sensitivity to cultural norms, rather than gender sensitivity with special reference to the interest of the child. Although there may be some truth to this statement, it should be understood that, the female judges in Aceh used their knowledge about cultural norms relating to parental care in a way which had important gendered effects. They would also be able to avoid unnecessary resistance from within the community should they base their decision exclusively on gender notions on that particular issue.

Apart from the issue of female guardianship, female judges also expressed more gender sensitivity than their male counterparts in the case of divorce. In this case, it is worth describing an experience of a female judge from Aceh, Rosmawardani, who was actively involved in the gender sensitivity training described above. Rosmawardani served as the vice-chairman of the district

these descendants should have priority over other relatives, such as siblings or parents, in inheritance division.

Shariʿa Court in Jantho, and was once confronted with a case where a wife had petitioned the court for divorce. The wife considered her husband to be an irresponsible person since he failed to fulfill his marital obligations, such as offering her regular financial support and providing her with sexual access. Despite her perspective, the wife actually had no lawful ground that would strongly support her petition. This was because one of the grounds that permit divorce is the husband's lack of maintenance for more than three months. Although the husband was often away for work, he remained faithful to his wife, neither having a second wife nor becoming violent with her. At one point, he accidentally came home within the three-month time frame, however, offered a little money to his wife, and stayed for a couple of weeks before making the next trip. His wife's motivation for seeking a divorce was likely due to her unhappiness in the marriage. Judging from the applicable textual laws, there was no *explicit* excuse that would allow judges to dissolve this couple's marriage.

Yet, considering the wife's distressful situation and her unhappiness, Judge Rosmawardani nevertheless went beyond the black letter text and gave her view that the couple's marital relationship could be lawfully ended by reinterpreting divorce stipulations specified in both the 1974 Marriage Law and the *Kompilasi Hukum Islam*. Judge Rosmawardani interpreted 'penganiayaan berat' (severe ill-treatment)—one of the reasons that may lead to divorce—in such a way that it should be understood to encompass emotional and mental implications, and not necessarily be limited to physical injuries only. Before the court made a final decision on this case, two of Rosmawardani's male colleagues, who were in the same judiciary panel, challenged the way she had reinterpreted the legal text. They both refused such legal reinterpretation because it went beyond the text, and was not a proper application of Islamic law. To this internal criticism, Judge Rosmawardani explained the gender concept of non-physical violence in the family and assured her two colleagues that what they were going to decide was not incorrect. Finally, all panel judiciary members agreed and issued a joint court decision (Salim et al. 2009, 63).[18]

As far as the issue of polygamy is concerned, Acehnese female judges stressed that polygamy is permitted, but that its application should be strictly limited. They often warned their male peers to be suspicious and careful of any husband's polygamy proposals. In particular, they warned against husbands who presented justification on grounds that deviated from the laws. Hereafter, a male judge who happened to hear a case for a polygamy permit application

18 Interview with Judge Rosmawardani and notes from a focused group discussion with other Acehnese judges, both male and female, Aceh, July 2009.

was very aware that polygamy would distress the existing wife, and thus he was able to convince the husband to withdraw his proposal (Salim et al. 2009, 77).

However, what happened in Aceh's Islamic court was not necessarily shown in other district Islamic courts, such as in Tangerang, Banten (before it was part of West-Java). Despite the fact that female judges of religious courts in Tangerang had received training on gender sensitivity (and many did acknowledge they were receptive to gender issues), in practice they demonstrated a different sense of receptivity, especially with regard to polygamy. Taking an example of the judgments on 14 polygamy cases issued in Tangerang Court in 2009 (nine) and in 2008 (five) no significant difference, in term of substance, was found between those decisions issued by a panel in which a female judge was involved (six decisions) and the eight decisions issued by a panel with no female judge. As an illustration, judgment No. 280/001/Tgr/2009 was decided by a panel where one female judge and two male judges were involved. In this case, the panel approved the husband's request, even though the reason he presented was not lawful, i.e., the husband had been so close to his prospective wife that he was afraid that he would commit the crime of *zina* (extramarital intercourse). A judgment that goes along the same line is demonstrated in judgment No. 322/ 003/pdt/Tgr/2009,[19] where the husband wished to have more children. In this case, his existing wife, who had given birth to two children, could no longer become pregnant. Two earlier judgments (No. 211/ 003/ Pdt/Tgr/ 2008 and No. 164 002/Pdt/Tgr/2008),[20] were issued by a panel involving another female judge in the same court.

These decisions by the Tangerang religious court can be interpreted in two ways. The first is that, compared to male judges, female judges were not especially responsive or sensitive to gender issues, at least in the case of polygamy. The second is that female judges have some level of gender awareness, but the panel system that applies in the Indonesian judiciary[21] might have prevented female judges from expressing their gender sensitivity more clearly, so as to argue against their male counterparts.

Given that Acehnese female judges have in several cases succeeded in ensuring their male counterparts to support their legal interpretation, it can probably be assumed that the former interpretation is more accurate than the latter. In fact, all the judgments issued by panels involving female judges

19 See decision No. 322/003/pdt/Tgr/2009.

20 See decisions No. 211/ 003/Pdt/Tgr/ 2008 and No. 164 002/Pdt/Tgr/2008.

21 For the rule on this system, see Religious Judicature Act, Act No. 7 of 1989, Articles 9–10, and Basic Act on Judicial Power, Act No. 4 of 2004, Article 17(1). For a discussion on the panel system in the Islamic judiciary in Indonesia, see Cammack and Feener (2012, 22).

mentioned above went along the same line, demonstrating that none of the female judges in the Tangerang religious court made any strong endeavour, unlike their female counterparts in Aceh's religious courts who contended against the voices of their male colleagues. This interpretation was confirmed by conversations and debates in an academic forum attended by a number of the Islamic court judges, including female judges from the Tangerang religious court.[22] The forum addressed the issue of access to Islamic justice and was divided into several sessions. One forum was devoted to legal issues concerning women. When the issue of polygamy was discussed, one of the speakers, Maria Ulfah, a gender activist from *Fatayat* female NU (Nahdlatul Ulama) organization, expressed her view, disapproving of the practice. Suddenly, one male judge of the court of Tangerang angrily stood up and declared his unwavering support for polygamy, arguing that, although the law restricts it, permission for polygamy is clearly stated in the Qu'ran. His female counterpart of the same court supported his view by offering a more elaborate and practical case. This female judge told the forum that she and her colleagues often had to deal with requests for polygamous marriages by husbands. In the hearings, wives frequently told the judges that they would have been, and were, badly treated by their husbands if they refused to give their consent. For this reason, this female judge assumed that if the husband's petition would not have been approved, he would have attacked his wife more violently. Concluding her point of view, the female judge stated that giving permission to a polygamous marriage was a way of protecting the first wife. This response, which is meant to show that women judges are not insensitive, invited fierce criticisms from other participants, gender activists in particular, who claimed that the female judge's way of thinking was absurd and actually compounded the problems of domestic violence.[23]

It should be noted that in 2004, Indonesia issued a law on the elimination of violence against women (Undang-undang Penghapusan Kekerasan Dalam Rumah Tangga/UUPKDRT). This law, number 23 of 2004, thoroughly regulates the issue of domestic violence by categorizing it in four ways: physical, mental, sexual, and by omission. By examining this provision, contending views emerge as to whether domestic violence has taken place in the case of a hus-

22 In 2011, Nurlaelawati did fieldwork in Tangerang's Religious Court and interviewed three female judges and seven male judges of the court.

23 Based on Nurlaelawati's notes on the conference held at Niko hotel, on *Access to Justice for Women*, organized by the Van Vollenhoven Institute for Law, Governance and Society (VVI) and Bappenas, November 16, 2010. This note was also discussed in Nurlaelawati (2013b).

band's polygamous marriage. On the one hand, from the perspective of the female judges of the Tangerang religious court, a husband is not committing physical violence when his request for a polygamous marriage is approved by the religious court. On the other hand, according to Indonesian feminists, a husband commits mental violence in polygamous marriage since it results in misery for the wife. Given this, the feminists insisted that proposals for polygamous marriages should not be accepted because, although it avoids physical violence, it would facilitate a husband to commit another kind of domestic violence.

4 Conclusion

Although it has been a long and sometimes uneasy process, the engagement of women in Indonesia's Islamic judicial system has, over time, brought the female judges to several important roles and positions alongside with their male peers. Six decades ago, women acting as judges in Islamic courts did not exist in Indonesia, while in some other Muslim countries even nowadays the presence of female judges in the religious courts is still opposed.

Having key positions in the Indonesian religious judiciary system, female judges play a crucial role. With their male counterparts, they are expected not only to contribute time and energy in upholding justice, but more particularly also to help defend the interest of poor and disadvantaged female litigants. This chapter discussed cases from three religious courts. Two courts were located in Aceh (Sumatra), the other one in Tangerang (Java). In the religious courts of Aceh, female judges were more able to understand what women or wives and children had to undergo in family life matters and, showing great confidence, handed down a decision that closely attended to women's best interests. This kind of gender awareness has its origin in internal and external sources. Some may have acquired it from their own intuitions or experiences as judges, who discover similar issues almost every week in their courtrooms. Others may not have conceived such awareness from within, but they subscribed to it because of their intense exposure to notions of gender equity through education and training.

However, there were some (female) judges with little gender sensitivity or with a different understanding of what the best interest of female litigants consisted of. Many factors could have contributed to this condition. One of them could be a prejudice that the problem with the women or wives originated within themselves and that the resolution should come from wives' willingness to relent and concede. This lack of both male and female judges' gender

awareness is a serious challenge that still persists in different courts (general or religious). This condition is exacerbated by the judicial panel system, which applies throughout Indonesia's judicatures. Even female judges with strong gender awareness would not be able to aim for gender equity in their decisions, should other panel members prefer to stick to the letter of the law and oppose the idea of going beyond the text to achieve gender justice.

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CHAPTER 5

Seeking Portia and the Duke: Male and Female Judges Dispensing Justice in Paternity Cases in Morocco

Nadia Sonneveld

Introduction

This chapter focuses on the most recent reform of Moroccan family law (*mudawwana al-usra*) in 2004.[1] The main question guiding the analysis is: is there a difference in the way male and female judges dispense justice in family law cases, most particularly in paternity dispute cases?

The first codification of family law in Morocco in 1957–58 was conservative in nature. Moroccan women remained under the legal authority of their husbands, even having a legal obligation to obey them. And yet, the same women who had to pay obeisance in the private sphere were given far-reaching authority over both men and women in the public sphere when Morocco appointed its first woman judge in 1960.[2] This move turned Morocco into one of the first countries in the Muslim world to appoint women as judges. In comparison, it took Tunisia until 1968 to appoint its first female judge.

Nevertheless, in later decades, when Morocco started signing international treaties such as the Convention on the Elimination of all forms of Discrimation Against Women (CEDAW, 1993), the issue of women's obedience to husbands remained an important issue, to the extent that the Moroccan government insisted on including reservations in CEDAW to guarantee that international conventions would not undermine women's obligation to obey their husbands (Buskens 2003, 109).

1 Funding for this research project was made possible through a research grant from the Netherlands Organisation for Scientific Research (NWO).

2 Her name was Zaynab Abd al-Razzaq. She was born in 1938 in Fes. In August 1960, she was appointed to the so-called *sadad* court in Rabat. *Sadad* courts were the lowest courts, which had jurisdiction in matters which used to be adjudicated by religious tribunals (Liebesny 1975, 113). In February 1961, Zaynab's sister, Amina Abd al-Razzaq, who was born in Fes in 1937, was appointed as a judge too. The father of the sisters served as a judge in the small town of Tissa, some 50 kilometers north of Fes. In 2014, there were 3060 male judges (76,6 percent) and 939 female judges (23,4 percent) in Morocco (written information provided by the Ministry of Justice in Rabat on May 18, 2015).

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Given the patriarchal nature of Moroccan family law, we focus here on its latest reform, commonly known as the *mudawwana al-usra*. The introduction of the reformed *mudawwana al-usra* on 4 February 2004 (hereafter MU2004) was hailed by many organizations and advocates of women's rights, both domestic and international, as a great step forward toward gender equality and women's emancipation in Morocco. Among the major changes were the provisions which: gave women (and men) access to unilateral divorce through a *tatliq* procedure called *shiqaq* (Articles 94–97); abolished the need for a marriage guardian (Articles 24–25); gave husband and wife the possibility to divide assets acquired during marriage equally in case of divorce by composing a written statement to be added to the marriage contract (Article 49); abolished women's obedience to their husbands and instead gave each spouse equal responsibility for the management and care of household and children's affairs (Article 51); and increased the marital age from 15 to 18 for both boys and girls (Article 19). These provisions provoked much controversy in Moroccan society, both before and after the draft law was enacted. In the public debate, conservatives, religious leaders, and Islamist groups opposed the draft law, saying that it was a Western invention that deviated from Islamic *shari'a* and Moroccan culture (Buskens 2003). In the years following the law's enactment, several studies portrayed a gloomy picture of its implementation in practice (El Hajjami 2009; Newcomb 2012; Rosen 2008; Žvan Elliott 2015). Apart from litigants', especially women's, ignorance of the law,[3] criticism frequently pointed to the ambiguities in the law and, given these open norms, the wide latitude judges enjoy in interpreting the law in a manner they deem appropriate. Judges were consequently accused of being corrupt and conservative. On a more positive note, anthropologist Rosen claimed in 2008 that it may "… be very relevant that in Morocco a large number of the lawyers are now women, and that […] Moroccan women may already constitute more than 20% of the bench" (Rosen 2008, 139). This statement implies that, for reasons that Rosen does not make clear in his chapter, the gender of the judge may make a difference in the way justice is dispensed.

Rosen does not stand alone. Influenced by the 1982 publication of American feminist and educational psychologist Carol Gilligan's *In a Different Voice*, feminist legal scholars, such as Menkel-Meadow, asked whether women's different voices in moral development would lead them to bring a different perspective to bear on judidical adjudication processes as well (e.g. Menkel-Meadow 1985, 44; Chamallas 1999; Chunn and Lacombe 2000). Where men would follow

3 Žvan Elliott argues that the people in her fieldwork site, a village in rural southern Morocco, were not ignorant about the law; they even tricked the law (2015, 104).

an 'ethic of justice' (i.e. applying pre-existing general rules to the dispute in question in accordance with specified procedures), women were thought to bring the language of care, mercy, communication, and preservation of relationships into the adversial system of legal decision-making, which would preferably lead to solutions that the disputants would mutually agree to. Yet, importantly, Gilligan very clearly states in the beginning of her book that: "The different voice I describe is characterized not by gender but theme" (1993, 2) and "... the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus [on] a problem of interpretation rather than to represent a generalization about either sex" (1993, 2). Hence, when Gilligan introduces in her book the character of Portia, the heroine of Shakespeare's *The Merchant of Venice*, who disguises herself as a male lawyer[4] (1993, 105), this should not lead us to the conclusion that Portia, by interpreting the law in such a way that mercy prevails and death is prevented, embodies the female lawyer or judge (e.g. Rackley 2003). To the contrary, some scholars have argued that by dressing as a lawyer, Portia defies categorization as either a man or a woman (see overview in Rackley 2003, 34) and her actions should, moreover, not be interpreted as, using the words of Gilligan: "... bring[ing] into the masculine citadel of justice the feminine plea for mercy" (1993, 105). These scholars argue that instead of bringing mercy, Portia simply interpreted the law in a new manner. She rejected rigid, rule-oriented reasoning and instead utilized the ambiguities that surround legal reasons to arrive at an interpretation of the legal rules in which "... the letter of the law, the spirit of the law, the quality of mercy, love in friendship and in marriage ... are not forces contending with one another ... [but which] properly conceived ... work together (Lowenstein, quoted in Rackley 2003, 39). Therefore, by seeking alternatives within the legal framework, Portia represents the judge (or lawyer) who is the antipode of the Duke, the ruling male judge in *The Merchant of Venice*. In the play, the Duke clearly is a 'bouche de la loi,' that is to say, a judge who goes by literal interpretation of the black letter of the law. The Duke does this to the extent that he is unable to issue a ruling that would prevent the death of the accused, a close friend.

In this chapter, I pay particular attention to the implementation of the 2004 family law reform in the courthouses of Morocco. As stated above, the main question guiding the analysis is: is there a difference in the way male and female judges dispense justice in family law cases, most particularly in paternity dispute cases? In other words, do Moroccan male judges employ 'the

4 Portia disguised herself as a male jurist and is alternately interpreted as a lawyer, judge, or law clerk (Menkel-Meadow 2005, 274).

Duke approach,' in that they are more rule-oriented than their female peers who, employing 'the Portia approach,' interpret the law in a flexible manner in order to arrive at a situation in which (family) relationships are preserved?

The data to answer this question were collected during a period of fieldwork lasting from January 2015 until August 2015.[5] During this period, I presented 61 family law judges a hypothetical case involving a paternity dispute, asking them what they would do when confronted with such a case. The sample of 61 judges consisted of 36 males and 25 female judges, from 17 different courts of first instance and two courts of appeal in Morocco. The courts were dispersed over nine legal districts.[6]

This chapter consists of four sections. Section one provides an outline of the academic debate on the gendered nature of judgeship in Muslim majority countries. We shall see that scholars hold divergent views on whether or not the judge's gender makes a difference in dispensing justice. Focusing on Morocco specifically, various academic studies have concluded that the implementation of the MU2004 is obstructed in practice for a number of reasons, such as poverty, women's ignorance of the law, and importantly, corruption and conservatism among judges (Ennaji 2011; Sadiqi and Ennaji 2006; Zoglin 2009). The judges I interviewed frequently claimed that they were torn between a discrepancy between the law they had to apply and the social reality with which their clients confronted them. In sections two and three, therefore, the focus shifts to the social and legal reality in which paternity claims arise. Section two highlights a difference between what I call 'informal marriage' and 'secret marriage.' Both are illegitimate from a legal perspective because they are not registered with the relevant state authorities. But where informal marriages are made public and socially accepted, secret marriages are concluded without the knowlegde and consent of the two families and the community in which the man and woman live. Regardless of whether the child is born of an 'informal' or 'secret' marriage, we shall see that people in a given community attempt to avoid the consequences caused by illegitimacy by attaching the child to the lineage (*nasab*) of a 'father' who might not be its biological father.

Given the fact that the 61 judges interviewed all state that the MU2004 is the most important source in dispensing justice in family law matters, section

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5 This chapter and the analysis presented is part of ongoing research. One part of the research is quantitative in nature and seeks to provide an answer to the question which factors (including gender) have an influence on judicial decision-making in the family courts of Morocco. The second part of the research is qualitative in nature and seeks to explain why this is the case.

6 There are 16 legal districts in Morocco. For an overview, see: http://www.justice.gov.ma/lg-1/cartejudiciaire/default.aspx#.

three examines how paternity is defined in the MU2004 and how it can be proven in case of dispute. Section four shows how judges, faced with a claim for paternity, try to bring the spirit of the MU2004 in line with the social reality of Moroccan society, and whether they apply the 'Duke' or 'Portia' approach to resolve the dispute.

1 Speaking about the Judge: Male Dukes and Female Portias?

The assumption that female lawyers or judges have a different voice, which shows more understanding and awareness of the interests of women who bring their grievances for legal discussion by interpreting the legal rules in a flexible way has been of much dispute by scholars focusing on gender and judging in the West (see for an overview Rackley 2003, 39). Nevertheless, domestic and international organizations for the rights of women have often advocated the inclusion of women into the judiciary, in general (Beijing 1995),[7] in the Muslim world at large, and in Morocco specifically. They had and have various reasons for doing so.[8] One important reason to have women work as judges, they argue, is that they bring a female perspective to bear. This will improve women's access to justice, as female litigants will feel more comfortable disclosing the secrets of the house to a female judge than to a male judge (see for example, Mehdi, this volume). Interestingly, these alleged distinctive characteristics of Muslim female judges have also been detected in Muslim male judges. From the 1990s onwards, a growing number of scholars analyzing historical court records in different regions of the Muslim world have demonstrated that Muslim male judges interpreted the law on the basis of non-legal considerations, a practice which Max Weber in his ideal types of law referred to as 'khadi-justice' (Kronman 1983, 76). Named after the judge presiding over a *shariʿa* court, Weber regarded such practices as 'substantively irrational lawmaking': 'irrational' because the adherence to fixed principles was absent, and 'substantive' because both legal and non-legal norms were taken into account (Kronman 1983, 76–77).[9] Scholars studying Ottoman court records have shown that, from the fifteenth to the early twentieth century, Muslim male judges employed great flexibility in interpreting the teachings of the four schools of

7 Held in 1995, the Beijing conference was the fifth United Nations conference on women.

8 For a review of scholarly literature on this subject, see Hunter (2015, 4–7).

9 Much has been said about the problems associated with Weber's classification of four ideal types of legal thought, a debate that falls outside the scope of the present discussion. See for more Sonneveld (2010).

Islamic jurisprudence.[10] They were concerned with the context in which the dispute was embedded and applied *'urf* (local custom) within the limits set by the principles of the Islamic *shari'a* (Rosen 2008, 135; Sonbol 1996, 12). Scholars have heralded the flexibility of these male *qadi*s (judges) as contributing to the ability of female litigants to obtain their rights (e.g. Agmon 1996, 138–139). After the emergence of nation-states in the twentieth century and the subsequent codification of the teachings of the four schools of law into national lawcodes, the flexibility that characterized the *shari'a* courts/judges was greatly diminished, some of these scholars argue (e.g. Charrad 2011, 421; Sonbol 1996, 12; Tucker 1998, 185). It seemed that in the process of modernization, 'the Portia approach' gave way to 'the Duke approach,' and Muslim male judges became 'bouches de la loi.'

Following on the study of historical Ottoman court records in the 1990s, in the 2000s, the study of contemporary application of *shari'a*-based legislation in modern courts became increasingly popular among scholars of gender in the Middle East. These studies present a mixed picture of the way (mostly) male judges dispense justice in family law cases, a divergence, which is also demonstrated by the chapters in this book. Oftentimes, scholars have come to the conclusion that judges are careful to safeguard the interests of the weaker parties in the legal dispute, namely women and children, by interpreting the law, usually family law, in a flexible manner.[11] Other scholars have demonstrated the opposite.[12] These divergent conclusions show that codification of family law matters does not necessarily work to the disadvantage of women litigants.[13] Interestingly, while some scholars lament the rigidity that came with the codification of family law matters, women's rights activists in the Muslim world

10 *Fuqaha* (scholars in *fiqh*), who studied the sources of Islamic law, including the primary ones such as the Qur'an and the sayings and doings of the Prophet (*sunna*), mainly laid down their understandings of the sources in four main schools of (Sunni) Islamic jurisprudence around the tenth century CE: the Hanafi, Hanbali, Maliki and Shafi'i schools. Each school has a certain geographical distribution, with the Hanafi school being dominant in areas formerly occupied by the Ottoman Empire. The Hanbali school has most of its adherents in Saudi Arabia and Qatar. The Maliki school is dominant in northwest Africa, and the Shafi'i school of Islamic jurisprudence in Southeast Asia.

11 See, for example, Lindbekk (2013) for Egypt; Peletz (2002) for Malaysia; Shehada (2005) for Palestine.

12 See, for example, Al-Sharmani (2008) for Egypt; Sonneveld (2010; 2012) for Egypt; Voorhoeve (2014) for Tunisia.

13 It should be noted, that most of these studies deal with female litigants and male judges. Sonneveld (forthcoming) argues why it is important to also take account of the perspectives of female judges and male litigants.

were instrumental in demanding codified family laws, which, they argued, had to be detailed to the extent that judges' discretion would be restricted considerably and rulings would become more unified (Welchman 2007, 22–23).

Codification of Shari'a-Based Family Law Matters in Morocco

In Morocco, family law matters were first codified in 1957 and 1958, immediately after Morocco gained independence from France in April 1956. Prior to codification, Moroccan judges in family law cases dispensed justice on the basis of leading works grounded in the teachings of the Maliki school of Islamic jurisprudence (Al-Akhrisi 2005, 17). Due to the flexibility of the teachings of the Maliki school of law, judges took into account local *'urf* (customary law) and *taqalid* (customs and habits), with the result that there was great diversity in the way they ruled on a particular issue. After independence, King Muhammad V established a royal committee with the special task of drafting a code of family law, which would put an end to this diversity and which would help judges in dispensing justice in a uniform manner (Al-Akhrisi 2005, 17), based on the teachings of the Maliki school of jurisprudence and in line with the demands of modern times. These goals were reflected in the name of the committee: '*mudawwana* of all Islamic jurisprudence rulings.'

The royal committee was headed by the then Minister of Justice (Abd al-Karim Ibn Jalun) and consisted of ten members, most of whom were graduates from the famous al-Qarawiyyin University for Islamic studies in Fes (Al-Akhrisi 2005, 21).[14] The committee was established on 19 October 1957 and after three meetings, on November 15, 1957, it presented a draft law on marriage and divorce. The draft was based on a proposal provided by the Ministry of Justice. The King approved it on November 22, 1957. The law was enacted in January 1958 (Zahir Sharif 1–57–343). The other books on the effects of birth (Book Three, 1–57–379, December 18, 1957), legal capacity and representation (Book Four, no. 1–58–019, January 25, 1958), wills (Book Five, February 20, 1958), and inheritance (Book Six, no. 1–58–112, April 3, 1958) were implemented in the months that followed.

Henceforth, Moroccan codification explicitly served to make the process of judicial decision-making more uniform. While codification would curtail judges' flexibility in using their discretion and dispensing justice case-by-case, studies of Morocco have nevertheless presented a mixed picture. Rosen, who conducted ethnographic fieldwork in a Moroccan courthouse in Sefrou[15] between 1970 and 1980 concludes that judges (just as their historical

14 For a list of their names, see Al-Akhrisi (2005, 21).

15 Sefrou is a medium-sized town near Fes, in the foothills of the Middle Atlas Mountains.

counterparts) favour regularized process over the mechanical application of formal laws (Rosen 2008, 135) and their actions are geared towards mediation in legal disputes. He notes that "…the aim of the qadi is to put people back in the position of being able to negotiate their own permissible relationships without predetermining just what the outcome of these negotiations ought to be" (Rosen 1989, 134).

At the same time, in a study of family law disputes brought before two courthouses in Morocco in 1989, one in Rabat, the other in Sale,[16] Mir-Hosseini findings are different, at least with regard to claims for legal paternity of children. The codification of the teachings of the Maliki school of Islamic jurisprudence in 1957 had significant impact on legal claims to establish paternity since marriages, which were socially valid but not registered with the relevant state authorities (known as *fatiha*), were not recognized by the modern legal system as valid marriages. When the father denied the union in such cases, there was no way the mother could claim paternity for her children and demand registration of the children in the family civil status booklet of their alleged father (Jordens-Cotran 2007; Mir-Hosseini 2000, 145).[17]

In a study conducted after the implementation of the *mudawwana al-usra* in 2004, El Hajjami examines the impact of age, gender, formation and milieu on the attitude of 18 judges in three courts in and around Marrakech towards the MU2004, including the way the judges implemented the law in practice (El Hajjami 2009, 31). Her sample consisted of three female judges (one of whom worked in the Marrakesh Court of Appeal) and 15 male judges. She notes that compared to their male counterparts, the female judges were more sensitive to the interests of female litigants in alimony cases, while they held equally disapproving views on how the MU2004 abolished the need for a marriage guardian and raised the minimum age of marriage to 18 (El Hajjami 2009, 33–34). In general, El Hajjami found it difficult to detect a gender difference in these judges' attitudes to the reformed family law and this included their attitudes to Articles 16 and 156 MU2004, which deal with recognition of marriage (*zawaj*) and engagement (*khutuba*) respectively. Some judges (their number is not specified) said that social reality, with which they are daily confronted in the courthouses, such as illiteracy, poverty and the weight of tradition, led them to rule contrary to their religious and personal beliefs. Although the majority of

16 Sale is located on the Atlantic Ocean, on the right bank of the river Bou Regreg. Rabat is located opposite Sale, on the other side of the river.

17 The family civil status booklet (*kunnash al-hala al-madaniya*) records vital events of different family members, such as birth, death, marriage and divorce (law on civil status, Article 1) and serves as an identity card for children. It enables children to receive medical care, register at school, and is proof of their legal filiation (Mir-Hosseini 2000, 216).

the 18 judges said Articles 16 and 156 were legitimizing extramarital sexual relationships and pregnancies, almost all judges acknowledged their importance in protecting the interests of (unborn) children and young engaged women (El Hajjami 2009, 39). Similarly, in an ethnographic study on the impact of the women's right discourse on different categories of women in a rural area in southern Morocco, Žvan Elliott shows how a senior male judge heading a family law court clearly felt that social reality often left him no choice but to authorize a request for underage marriage, especially when the minor girl was pregnant (Žvan Elliott 2015, 107–112).

2 The Social Reality of Paternity Disputes

Meknes-Tafilalt: Ifrane.[18] January 2015. Going with my research assistant, Taziri, through the judges' questionnaire in a teahouse in a large provincial town in the Middle Atlas Mountains, Northern Morocco. Altitude of 1250 metres. Cold but sunny. We sit outside. Questions about divorce. About alimony. About polygamy. Every question reminds her of an event experienced by a sibling. A neighbour. Herself. She speaks freely. Almost angrily. Coming close to the end of the questionnaire, the question about paternity and illegitimate birth appears. Her tone changes. Images of suffering. The story of the child in the bag follows:

> Not even a week ago, they found her. A three-month-old baby girl in a bag just outside of town. They were a group of children on their way to school. The baby girl was well-dressed. She even had a pacifier in her mouth and looked healthy. The children had reported to the police who had come and taken her. She is probably in the hospital now where the staff will take care of her until someone comes to take her into *tabanni* (adoption). If nobody comes she will be brought to an orphanage.

Taziri pauses. Flashbacks from longer ago:

> My neighbours could not have children and so they adopted a boy. That must have been 20 or 30 years ago. Everybody in our neighborhood knew that the boy was not their biological son but nobody told him openly,

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18 The first part of the geographical reference refers to the name of the legal district. As already stated, there are 16 legal districts in Morocco. The second part of the reference refers to the name of the legal subdistrict. Each subdistrict is further divided into a certain number of courthouses.

> until two years ago, when somebody revealed the secret in a fit of anger. The boy, he is a young man now, threatened to kill his mother. "Tell me the truth. I want to know who my real father and mother are," he yelled frantically. The mother told him she truly did not know. She only knew that she had taken him from the hospital and that they had raised him as their own son. He even carried the name of his adoptive father. In the end the son accepted his new reality. His adoptive parents had taken good care of him. They were growing old. Now it was time to take care of them.

Secret Marriage: Undesired and Illegitimate Children

It is a well-known fact that Moroccan hospitals are home to a significant number of infants whose mothers either abandon them right after having given birth in the hospital or who, as in the case described above, leave their babies alone in the street to the mercy of strangers, whom they hope will subsequently surrender the baby to the hospital. Drawing from years of professional experience, Nouzha Guessous, a medical doctor and professor at Hassan II University in Casablanca, and one of the three female members of the royal commission for the elaboration of the *mudawwana al-usra*, narrates how the hospital in Casablanca where she worked had a special facility for unmarried women with children.[19] Usually, these children are born of a relationship which is, first, not officially registered, and, second, socially not approved of by parents, family, and the community in which the father and mother of the child live. These relationships, which I hereafter refer to by the term 'secret marriage,' include: secret love affairs; situations in which, in return for sexual favours, male employers make false marriage promises to young live-in domestic servants; and rape. In a study of illegitimate children in 1990's Moroccan society, anthropologist Jamila Bargach found that in addition to special facilities for abandoned children, hospitals also house large waiting rooms where couples who (usually) cannot have children of their own, anxiously wait for their dream to be realised: becoming a parent. Sometimes these 'adoptions' are officially regulated. Sometimes they are not (Bargach 2002. See also Borm 1994, 206). Taziri knows it all too well:

> A rich woman I know could not have children and so she asked me to help her adopting a child. [Taziri uses the word *tabanni*. Again.] I called the hospital and the nurse told me that they were looking for a solution for a pregnant woman who wanted to abandon her child after birth. The baby she was carrying was conceived outside of wedlock and she could

19 Informal communication, Ifrane, December 1, 2014.

> not see how to take care of the child once it was born. She agreed to leave her baby to the care of the rich woman immediately after birth. In return, the rich woman promised to take her in until the time of delivery. The realization that she would never see her child grow up made the poor expecting mother cry uncontrollably. For days, she hardly ate, just cried. In the end, she changed her mind, saying that she could not give up her child. The rich lady also changed her mind. She would keep her promise and look after the expecting woman until the day of delivery, but she no longer wanted to have the child. This woman, she said, will bring problems. In the end, the choice was made for them as the child died within a day after birth.[20]

Sexual relationships outside of marriage are forbidden under Morocco's penal law and can lead to up to one to 12 months' imprisonment in the case of fornication (Article 490), and one to two years' imprisonment in the case of adultery (Article 491). And yet, the occurence of childbirth from 'secret marriages' is a common one, not only in big cities such as Casablanca but also in the provincial town where Taziri and the members of her lower-middle class neighbourhood, all had, in one way or another, experience in dealing with the phenomenon of illegitimate childbirth, for example, by being an unmarried mother, by being a 'broker' between the pregnant woman and the childless couple, or by 'adopting' an abandoned or bastard child. Adoption in the sense of transferring all rights and responsibilities, including filiation and inheritance, from a child's biological parent(s) to the adoptive parent(s) is strictly forbidden in Islam and void under the MU2004 (Article 149). The anecdotes narrated above illustrate, however, that for the sake of the abandoned or bastard child, people are willing to turn a blind eye to and condone fictive kinship ties.

While the women in the cases described above decided to keep their babies until after delivery, there are also women who deal differently with situations of undesired pregnancy, by aborting the child, or by keeping and raising it. It is probably fair to say that the more extensive the financial possibilities, the higher the likelihood that the expecting unwed mother will opt for abortion. Although legally prohibited, abortion is a rather easy and safe option for women who are financially well off. Discussing this subject during a lecture in a Moroccan university course on gender and development, I was surprised to hear that some female students knew exactly where to have an abortion should the need arise, details which they had learned from friends who had

20 Meknes-Tafilalt: Ifrane, March 3, 2015.

already undergone the process.[21] Other women, who do not have this option or who are against abortion, keep their babies and assume responsibility for the child's upbringing. Depending on the area, in such cases, the unwed mothers are sometimes assured of support by members of their (extended) families, despite the fact that their pregnancies are the result of a short-term secret relationship engaged in by the mother without the knowledge of her parents and/or community. For example, in Ain Leuh, a small town not far from Taziri's hometown, ethnographic research conducted in 1988 and 1990 demonstrated that Berber women who are sex workers do not fear repercussions from family members. These women and their children were even maintained and taken in if the financial situation of the family permitted this (Bakker and Borm 1994, 164). In one case, I witnessed a fight in court between a woman who was beating a man who appeared to be the biological father of her child. Many years ago, in a state of drunkenness, the man had visited the woman, a sex worker working in Ain Leuh, and fathered the child. At the time, the woman had felt so secure in the support of her brother that she had demanded the biological father to provide financially for the child, something which the biological father agreed to after the (non-judicial) DNA test, which he had requested, had proved the biological bond between him and the girl. When I told the coordinator of a local community development association about the incident in court he was not surprised, saying that in this part of the Middle Atlas mountains it is not unusual for parents with sufficient financial means to take back a daughter who has lost her virginity or who got pregnant out of wedlock.

Informal Marriage: Desired but Illegitimate Children

In addition to the category of unwanted children, there is probably a much larger category of children who are illegitimate in the eyes of the state but not in the eyes of the community into which they were born. In such cases, the child is desired, but the marital relationship of its parents is simply not registered with the relevant state authorities. In what follows I call these relationships 'informal marriages.' In contrast to the cases presented above, such children are not the product of a secret relationship, but of a communal one, whereby the sexual relationship between the father and the mother is embedded in a socially recognized marriage (often even arranged by that same community), with the birth of children seen as the natural outcome of this relationship. There are several reasons why parents do not register their marriage.[22] According to most judges interviewed, informal marriages con-

21 Al-Akhawayn University, Ifrane, November 24, 2014.

22 For the case of Egypt and the United Arab Emirates, see Hasso (2011). For Egypt, see Sonneveld (2012).

ducted through a communal ceremony called *fatiha* (in which the first verse of the Qur'an, the *fatiha*, is recited) are part and parcel of local custom; and when the distance between the village and the office of the *'udul* (the government employees responsible for registering marriage) and the courthouse is significant or blocked by snow for part of the year, people simply postpone registration of their marriages. This reality has prompted the Ministery of Justice to urge judges to visit the villages that fall within the jurisdiction of the courthouse. These so-called *jalasat tanaquliyya* (mobile sessions) are primarily aimed at registering a large number of informal marriages in one day and prevent paternity disputes from arising.[23] Talking about her experiences, a woman judge in her late twenties from a courthouse in the Middle Atlas learnt about the following local custom, of which she, originally from a big city two hours away, was initially unaware, but which, she felt, forced her to let the best interest of the child take priority over the MU2004's new provision on polygamy:

> Meknes-Tafilalt: Ifrane. January 27, 2015. When children born in a village in the area of the courthouse reach the age of four, their parents will want to send them to school. Since there are no schools in the village, the father sends the children to a school in this town. As the distance to the village is too far, the father rents an apparment in town for his wife and their children. The father goes back to the village where his work is and marries another woman who will look after him, that is to say, who will cook for him, do his laundry and all other household chores. This is preferable to taking a housekeeper, who might steal or not be so committed. He will ask the court permission to marry the second wife. Although the law of 2004 has made it much more difficult for men to be granted judicial authorization for a polygamous marriage, we will most likely grant him this permission. We do this for the sake of the children's education and because it is an *'urf* [local custom] to which the first wife has no objections.

I ask her whether the father will have children with the second wife:

> Yes, and when they reach the age of four, they will also move into the household of the first wife and her children in town. The second wife will remain in the village to look after the husband. The two wives might also alternate. We, as judges, have enough grounds to refuse such a request. After all, the first wife is not barren, nor is she ill. However, this is a local

23 See, for example, the following newspaper article: http://www.maghress.com/map/29550. Accessed April 11, 2016.

> custom and something people have done for decades. The new regulation on polygamy will not change this practice. As long as the father recognizes the children from both marriages, there is no problem: the children are eligible for medical care and can be registered for school. But when the father, for whatever reason, denies paternity, the interest of the children is in serious jeopardy. In such cases, the burden of proving the marriage falls on the wife in the same way an unwed pregnant mother must provide evidence of a marital relationship, a prerequisite for securing *nasab* [lineage]. We do not want *zina'* [fornication or adultery] to arise and therefore we are inclined to accept such requests for polygamy.

What transpires from the account of this judge is the juxtaposition she makes of *nasab* and *zina'*, that is to say, of lineage and adultery/fornication. Like all other judges interviewed, this judge attaches great importance to *nasab* in securing children's legal and social rights in Moroccan society. Under *shari'a nasab* refers to lineage and signifies the reputed relationship with regard to father and mother. *Nasab* is the most fundamental organizational principle of Muslim society and the preservation of proper *nasab* is one of the main purposes of the *shari'a* (e.g. Bargach 2002; Geertz 1979; Sachedina 2009, 103). While lineage to the mother is established through birth (see also MU2004, Article 146), lineage to the father can only be established through marriage. It is the most fundamental relationship as the child follows the father in *nasab* (Welchman 2007, 143). It is the only way a child will be entitled to his or her father's surname, maintenance and inheritance. Children whose paternal *nasab* is unknown, that is to say, who are born out of *zina'*, oftentimes suffer great social stigma. Under *shari'a*, the prevailing custom (*'urf*) is a major source of legitimacy that relates a child to his or her biological parents, most particularly the father (Sachedina 2009, 103). The following section demonstrates how *nasab* is codified in the *mudawwana al-usra*. After all, as we have seen in section one, the interviewed judges believed the MU2004 to be the most important source of judicial decision-making.

3 The Legal Reality of Paternity Cases

Paternity disputes in Morocco constitute a small percentage of all legal disputes related to family law matters, both before (Mir-Hosseini 2000, 141) and after the 2004 law reform (Ministry of Justice).[24] Nevertheless, in all the stud-

24 This is confirmed by statistics I drew from court archives in seven courts dispersed over five legal districts. I took May 2014 as the point of analysis. Paternity disputes were

ies mentioned above, both judges and academics present the claims for legal paternity for children as significant since they most poignantly point out the difference between codified law and social reality (e.g. Mir-Hosseini 2000, 141). Without any prompting, both the family law judges in El Hajjami's study and the family judge in Žvan Elliott's study pointed out how Articles 16 and 156 of the MU2004 especially bring to light a discrepancy between their personal beliefs and the daily social reality with which they are confronted when litigants turn to the court to find a solution for their undocumented marriages and the resulting pregnancies and offspring.

During the period of my fieldwork, there was ongoing public and parliamentary debate about Article 16 of the *mudawwana al-usra*. This article reads:

> A marriage contract is the accepted legal proof of marriage.
>
> If for reasons of force majeure the marriage contract was not officially registered in due time, the court may take into consideration all legal evidence and expertise;
>
> During its enquiry the court shall take into consideration the existence of children or a pregnancy from the conjugal relationship, and whether the petition was brought during the couple's lifetimes;
>
> Petitions for recognition of a marriage are admissible within an interim period not to exceed five years from the date this law goes into effect.[25]

Until February 2014, this article gave couples who had married without official registration of the relationship the opportunity to register the marriage retroactively during two subsequent periods of five years following the promulgation of the law in 2004. Although people could no longer register undocumented marriages retroactively at the time of my fieldwork (January 2015–August 2015), the continued occurrence of informal marriages forced the parliament to consider a new period of retroactive marriage registration.

Now that the road to *thubut al-zawaj* (proof of marriage) is closed, at least temporarily, and, hence, also the possibility to establish paternity indirectly, couples or single (unwed) mothers have no option but to prove *nasab* directly. Tracing *nasab* from the mother's side is usually easy, as filiation to the birth mother produces the same effects regardless of whether the children are

classified under two headings: proof of paternity and proof of marriage. For example, in one big courthouse in the Fes-Boulemane legal district, out of 366 family law cases, 16 requests for proof of marriage (*thubut al-zawaj*) were made and none for proof of paternity (*thubut al-nasab*).

25 Unofficial translation of the *mudawwana al-usra*. See: http://www.hrea.org/programs/gender-equality-and-womens-empowerment/moudawana/

the result of a legitimate or illegitimate relationship (MU2004, Article 146). However, illegitimate filiation to the father does not produce any of the effects of legitimate filiation (MU2004, Article 148) because paternity has always been, and still is, connnected with licit sexual relationships through marriage on a social, legal, and religious level.[26] Consequently, both before and after the 2004 legal reform, children from couples in unregistered marriages were illegitimate in the eyes of the state. However, whereas before 2004, mothers in informal marriages stood no chance of proving paternity when the alleged father denied it,[27] after 2004, mothers in unregistered marriages can prove paternity, even when the putative father denies it, through a procedure called *shubha*.

Proving Paternity in a New Way: Shubha and Engagement

According to the MU2004, paternity can be established in three ways: *al-walad li l-firash* (conjugal bed); *iqrar* (acknowledgement by the father); and *shubha* (sexual relationships by error) (Article 152). Both the doctrine of *al-walad li l-firash* and *iqrar* were already included in the 1993 family law, and while this equally applies to the principle of *shubha* (Article 87 of the 1993 family law), the way the MU2004 defines *shubha* is innovative.

The doctrine of the *al-walad li l-firash* refers to a situation in which a child is conceived in the marital bed. This concept derives from Islamic jurisprudence (*fiqh*) and is the most important way through which a child can be attached to its father's lineage (*nasab*) and all its concomitant rights, such as the right to the father's family name, maintenance (*nafaqa*), and inheritance. The MU2004 only recognizes marriage by way of an official marriage contract. When the marital bond is proven by the marriage contract and the child is born no less than six months after the conclusion of marriage, or a year after divorce, the paternity of the child is proven even when the father denies it (Article 153).

A second way to attach a child to its father's lineage (*nasab*) is through acknowledgement by the father through a procedure called *iqrar* (Article 160). As the MU2004 does not demand proof of *nasab* through witness testimonies or DNA, this is a relatively easy way for a man to acknowledge paternity of a child that, while biologically his, was conceived outside the marital bed, as happened in the abovementioned case of the man who fathered a child with a

26 Or ownership of a slave woman in older times (Shabana 2013, 158).

27 Under the old family law of 1993, it was formally forbidden to investigate paternity of a child conceived during the engagement period (El Hajjami 2009, 147–148). But if both parties agreed, they could register the marriage retroactively (Jordens-Cotran 2007; Mir-Hosseini 2000, 145), after which filiation to the father would be established automatically.

sex worker in Ain Leuh. *Iqrar* can even be used to attach a child to the lineage of a man who is not its biological father, as happened in the cases presented above, where childless couples adopted babies abandoned in hospitals (see also Buskens 1999).

While the doctrine of *al-walad li l-firash* and *iqrar* are not new, the *mudawwana al-usra* introduced a new understanding of *shubha*: engagment. The equation of *shubha* with engagement makes it easier for women to successfully establish paternity for their children. In contrast to the situation prior to 2004, when mothers in 'secret' or 'informal' marriages stood hardly a chance of proving paternity when the alleged father denied it, nowadays mothers in 'informal' marriages can request legal proof of paternity through Article 156 of the MU2004. This article clearly defines pregnancy during engagement as a form of *shubha*, a sexual relationship by error:

> If an engagement takes place by an offer and acceptance but for reasons of force majeure the marriage contract was not officially concluded, and during the engagement period the engaged woman shows signs of pregnancy, the child is affiliated to the engaged man on the grounds of sexual relations by error when the following conditions are met:
> a. If the two engaged person's families are aware of the engagement, and if the woman's legal tutor, if required, has approved the engagement;
> b. If it appears that the engaged woman became pregnant during the engagement period;
> c. If the two engaged persons mutually acknowledge that they are responsible for the pregnancy.
>
> These conditions are established by a judicial decision not open to appeal.
>
> If the engaged man denies responsibility for the pregnancy, all legal means may be used to prove paternity.[28]

In contrast to the situation predating 2004, Article 156 offers women the opportunity to establish paternity of their children without an official marriage contract, even when the alleged father denies it. The judges in El Hajjami's study felt that Articles 16 and 156 open the way to *zina'* and this, they claimed, violated their personal and religious beliefs. At the same time, they felt that the best interest of the child required them to acknowledge paternity of children born out of unregistered relationships. It is not clear whether these judges were referring to 'informal marriages' only or whether they would even grant

28 Translation provided by: http://www.hrea.org/programs/gender-equality-and-womens-empowerment/moudawana/

paternity to children born from 'secret marriages.' Article 156 of the MU2004, which requires that 'the two engaged person's families are aware of the engagement,' seems to imply that paternity can be established in cases of 'informal' marriage. In the next section, I explore, first, whether the 61 interviewed judges would grant paternity in the following hypothetical case of a paternity claim petitioned by a child born of a 'secret marriage,' and, second, whether there is a difference between male and female judges in the way they dispense justice in this case. The case is stated as follows:

> A ten-year-old boy is born of a 'secret marriage' [*'alaqa ghayr shara'iya*]. Although his mother knows who the father of the child is, the alleged father denies paternity. This prompts the mother to bring a court case and demand her son's legal rights, such as lineage (*nasab*), maintenance (*nafaqa*)…

4 The Judge Speaking: Male Dukes and Female Portias?

Meknes-Tafilalt: Ifrane. February 12, 2015. The corridor leading to Judge A's office is long and narrow. A few benches are placed against the wall. They make the corridor look even narrower. The court is situated in the mountains. Sun and snow outside. The walls of the courthouse do not absorb the sun, just the cold. Judge A is the judge responsible for the authorization of marriages, including underage ones. For the past few days, marriages of minors have been a recurrent topic of heated debate on Moroccan television. Opponents say it harms the health of young brides and also deprives them of proper education. Proponents argue that it prevents the occurrence of *zina'*, a graver danger. Taziri and I wait for our appointment with Judge A. Four other ladies want to consult with him, too, but none of us focus on the door of his office; instead we are drawn to the sight of a young girl who occupies one of the few seats in the corridor. Is she 15? Maybe 16? She looks uncomfortable. Frightened, even.

She is the first to go inside. Her empty seat breaks the silence. Three standing women urge me to sit down in her seat. Next to me sits a voluptous lady, probably in her sixties. She fills me in: the girl (*al-bint*) is here to ask the judge permission to marry. Her parents were here, too. It seems her father was a little against it, but her mother was very eager to see her married. I think the judge will decline her request. Looking me straight in the eyes, she says, I hope so:

> I married when I was 13, through *fatiha*. The marriage was not registered. When my first child, a son, was born, I asked my husband to register the baby. He refused and ran off instead. What could I do but register

> the child in my name? I took all responsibility for his upbringing, emotionally and financially. When my son grew older, he put up a terrible fight with his father and demanded the father to recognize him as his son. After all these years, the boy's father's finally recognized him. Now my little boy is married to a Moroccan woman. They live in Italy and they just had a baby. My son was lucky. But marrying at a young age puts a mother and her children at great risk. Really, women should never marry this way.

A little later, inside the office of Judge A, this 39-year-old male judge tells us the more complete story. The poorly educated girl of 15 or 16 years had intended to marry a man who was not only 30 years her senior, but who was also a highly educated journalist. This great difference in their ages was what led Judge A to disapprove of the marriage. He had spoken first with the father, mother, and daughter, and asked both parents individually whether the girl genuinely wanted to marry the man. Both had said yes. He then asked them to leave the room to tell the girl that he could not approve of the marriage. The age gap was too great and there was also a great difference in their education. People should aspire to more suitability (*kafa'a*) in age, background, etc, he said. He was certain that the journalist would use the girl as a servant. I asked his opinion on Article 20, which deals with the minimum age of marriage, currently set at 18, and a source of heated public and parliamentary debate. He sighed:

> Personally, I would like the minimum age to be raised from 18 to 20. Children should not raise children. Most of all, however, I hope parliament will put a stop to allowing exemptions from age requirements for marriage. These exceptions make life hard for judges. We can never do it right. When we reject a request for marriage of a minor, and problems arise [*zina'*], they will blame it on us. When we authorize such a request, and problems arise, they will equally put the blame on us. In 2012, Amina Filali's request for marriage was granted by a judge. It did not take her long to commit suicide.[29]

A few days later, when I am in a courthouse one hour down the mountain, in the Fes-Boulemane legal district, I ask a female judge what she thinks of Judge A's statement regarding how the judge can 'never do it right.' It is my first encounter with this judge. She, Judge W, has a flamboyant personality, to say

29 Amina Filali was a 16-year-old girl from a town in north Morocco who is alleged to have committed suicide after a judge authorized the marriage to the man who had raped her. At the time of her suicide, in 2012, her case was the focus of extensive media attention, both in and outside Morocco.

the least. She enters her office flipping her long black hair over her shoulders. Her big black sunglasses give her a dominant and self-assured appearance, as does her skirt, which does not cover her knees, and her knee-high boots with high heels. She shares her office with three other male colleagues and appears to feel anything but intimidated. Upon hearing my question, she nods in agreement:

> Fes-Boulemane: Fes. April 4, 2015. A few years ago, a 13-year-old girl had requested the judge responsible for the authorization of underage marriages for permission to marry. He did not hesitate to decline her request. A year later she was back. This time visibly pregnant. She had filed for proof of marriage and I was responsible for her case. She told me that if I declined her request, she would give birth to a bastard. I felt I had no choice. I could not put the future of the girl and the baby she was expecting in jeopardy. I felt extremely bad about it, but even more so when various organisations for the rights of women and children accused me of having violated the interest of the mother and the child. How do they know what it is like to choose between two evils? I had no choice. Had I declined her request, I would have given the mother and the baby the worst possible start in life.

Although both Judge A and Judge W deeply believe that the marriage of minors should vanish from practice altogether, they worry about the consequences of such a new legal provision, most particularly about the occurence of illicit sexual relationships (*zina'*) and illegitimate birth. This worry translates into the way Judge A responded to the hypothetical case I presented her. In this case, the child was clearly presented as a bastard. Judge A nevertheless responded that the judge should still research whether the child was born of an 'informal' or a 'secret' marriage. The best solution, he believed, was to have the alleged father compensate the child, an innovative way of dealing with the issue of financial responsibility as it relates to illegitimate childbirth (explained in more detail in section four).

The majority of the 61 judges interviewed felt uncomfortable when I asked them what they would do when presented with a case in which a mother claims paternity for a child born of a relationship, which is not only *ghayr qanuniya* (non-legal, i.e. unregistered) but also *ghayr shara'iya* (un-Islamic). The MU2004 clearly states that illegitimate filiation to the father does not confer any of the effects of legitimate filiation (Article 148). Most judges recommended the mother to simply claim proof of paternity. As long as she does not disclose any of the particularities pertaining to the relationship of which the child was born, they will not probe, and will simply try to find a way to attach

the child to the lineage of its alleged father in the same way they would for a man who comes to court to acknowledge paternity for a child which is not his biological child or which was born out of official marriage. The judges will accept the father's recognition (*iqrar*) and not verify his claim as long as he does not make it explicit that he is not the biological father (or that the child was conceived out of official marriage).[30] When I asked them why, they said that, first, Article 160 on *iqrar* does not request any additional evidence, and, second, that the interest of the child overrides any other concern. Things are different, though, when a parent leaves no room for doubt by honestly and immediately confessing that the child is born to parents who are not married, not even engaged. In my hypothetical case, this prompts the judges to have recourse to four different approaches. Regardless of whether they use the 'Duke' or 'Portia' approach, we shall see that all judges work towards the best interest of the child.

Portia One: Proving Engagement through DNA

As the snow in the mountains surrounding Ifrane begins to melt and the roads leading out of the mountain are no longer closed, I am able to visit courthouses in areas outside the legal district Meknes-Tafilalt, such as Tanger-Tetouan in Morocco's northwest corner, where I visit a courthouse located on the Atlantic coast. In the context of discussing the hypothetical case, I ask the head of the family court what he thinks of Judge W's predicament caused by the courtcase of the pregnant young girl. Judge Mh is quick to propose a different course of action: I would not have granted the girl *thubut al-zawaj* (proof of marriage) because I do not want to encourage the phenomenon of underage marriage. Instead, I would have suggested *thubut al-nasab* (proof of *nasab*) on the basis of *shubha*. My primary aim is to protect the child. I ask Judge Mh what he would do in case the father denies paternity. Without hesitating, he responds that he will encourage the mother to request a DNA test: "*ruh al-qanun tismah*" (the spirit of the law allows this), even in the absense of witnesses. He says:

> Tanger-Tetouan: Tanger. February 17, 2015. There are five goals (*maqasid*) in Islam, of which *nasab* is one. *Fuqaha* have closed the doors of *ijtihad* (independent reasoning) centuries ago, with the result that if somebody comes up with an innovative interpretation, that person will be accused of deviating from Islamic law [*mukhalif 'an al-shari'a al-islamiya*]. But

30 One of the (male) judges in my sample said that a ruling of the Agadir Court of Appeal was groundbreaking in this respect. The ruling was issued on December 4, 2007, No. 07/154 (on file with author).

> science (*'ilm*) is important in Islam, so what conflict (*khilaf*) between science and Islamic law are we talking about?[31]

A male judge heading a small courthouse tucked away deep in the Middle Atlas mountains is even more outspoken:

> Fes-Boulemane: Boulemane. June 25, 2015. These days, witnesses are no longer of much use. What do witnesses actually witness? That the couple consumes a cup of tea in a teahouse? That they sit together in a car? Does this prove anything? It is so much better to make use of modern science, notably DNA. The results of DNA testing give almost complete certainty with regard to paternity.

According to Welchman, organizations for the rights of women in Morocco had lobbied for the inclusion in the MU2004 of possibilities for mothers in unregistered marriages to prove paternity through DNA. The introduction of the requirement of a 'formal' engagement (Article 156, a), however, obstructs access to this remedy, they argue.[32]

Nevertheless, both Judge Mh and the judge in the Fes-Boulemane district do not hesitate to grant a mother in an unregistered marriage the authorization to request a DNA test, even if she has no witnesses to prove that she was engaged to the alleged father. Moving to the southern Atlantic Coast, two judges (one woman and one man) in a family court in the legal district Souss-Dra'a (Agadir-Idawtanan) say they would act in exactly the same way. Lamenting the large number of tourists visiting the city where the courthouse is located, they claim that they have to deal with numerous occasions when mothers request paternity of children born out of wedlock. Similar to Judge Mh and the judge in the Fes-Boulemane district, they will first try to establish engagement but if this attempt fails, they will urge the mother to request a DNA test, even when the

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31 See also Shabana (2013, 191–192).

32 These organizations also consider the cost of the test, born by the woman, prohibitive, at some $ 350 US (Welchman 2007, 145). When I ask judge Mh whether it is expensive for women (and men) to request a DNA test, he is quick to respond that the test costs around 2000 MAD, but that it is not so much the costs of the test but the scarcity of officially recognized clinics that forms a far greater problem. There are two clinics in Morocco, one in Rabat, the other in Casablanca, which can perform the test. This, he claims, means that most litigants have to travel great distances: "in one of our court cases, it took a woman between three and four years to settle the case and this is because she had to travel a lot and because these two clinics are overburdened."

alleged father denies the engagment and/or paternity.[33] These judges' view on the use of DNA in paternity disputes is supported by a number of other judges. Of the 61 judges to whom I presented the hypothetical case, a group of six male and two female judges say they will authorize the use of DNA, even when the first requirement of Article 156 is not fulfilled, namely, that the two engaged person's families are aware of the engagement, and the woman's legal tutor, if required, has approved the engagement. Overall, the fact that 13 percent of the interviewed judges encourage the use of DNA testing in paternity disputes as a source of evidence independent of another source of evidence (i.e. witnesses) indicates two things. First, these judges define 'engagement' in a manner that not only allows children of 'informal' but also those of 'secret' marriages to be attached to the lineage of their biological fathers, even when the latter opposes it. Compared to the situation under the previous family law of 1993, where not even mothers in 'informal' marriages could prove paternity without the support of the father; this is a remarkable development.

Secondly, the women's rights organizations referred to by Welchman are not completely correct in claiming that the requirement of engagement obstructs access to the use of DNA in paternity dispute cases. And yet, it is equally untrue to claim that "Now…[Moroccan] courts will use scientific testing to resolve the [paternity] dispute," as claimed by Hursh in a study on Moroccan women's rights in Islamic law (Hursh 2012, 266–267). After all, the other 53 judges in the sample (87 percent) displayed greater reticence in allowing DNA. This, however, does not mean that they let the interest of the alleged father override that of the child and its mother.

Duke One: Al-Walad li l-Firash

Table 1 is a schematic represenation of the way the 61 judges in the sample responded to the hypothetical case on paternity in a context of legally and socially prohibited sexual relationships. As stated, judges approach the issue of illegitimate childbirth in four different manners and the table clearly shows that the largest group of judges (group one) adhere to the *al-walad li l-firash* doctrine. These judges said that when the child is not born within the confines of the marital bond, Article 148 of the MU2004 does not permit the judge to attach the child to the lineage of the putative father. By denying the ten-year-old boy in the hypothetical case attachment to the lineage of his father, these judges expose him to significant stigmatization in a society where illegitimate childbirth is anything but accepted. Women judges were over-represented in this group, relatively and almost absolutely as well. Interestingly, these judges

33 Personal interview, May 27, 2015.

TABLE 1 *The Different Approaches of Judges According to Sex*

		% women judges	% male judges	% total
1	**Al-walad li l-firash**	52 (13)[a]	36 (13)	43 (26)
2	**Al-walad li l-firash & compensation**	0 (0)	19 (7)	11.5 (7)
3	**Shubha: through witnesses and DNA**	28 (7)	17 (6)	21 (13)
4	**DNA**	8 (2)	17 (6)	13 (8)
5	**No fill**	12 (3)	11 (4)	11.5 (7)

a The number between brackets signifies the absolute number of judges.

were quick nevertheless to justify their approach in terms of the best interest of the child. In this particular case, they acknowledged, the doctrine of the conjugal bed did not protect the boy but, seen in a wider perspective, the MU2004 as well as jurisprudence from the Court of Cassation use the doctrine of the conjugal bed to protect children and their mothers. Indeed, analyzing various rulings on paternity disputes issued by the Court of Cassation between 2006 and 2008 make it clear that in the majority of the cases the claimants are husbands who try to negate paternity and frequently request a DNA test. The magistrates of the Court repeatedly declined these husbands' claims, including their requests for DNA, ruling that as long as the child is born within the bonds of marriage (i.e. no sooner than six months after the conclusion of marriage and no longer than one year after divorce), the husband has no right to negate paternity of children that were born during the period in which he was married to their mother, not even when there were strong reasons to believe that the alleged father was not the biological father of the children in question. After all, so they argued, *nasab* is [not only a private matter, but also] a matter of public policy.[34] According to the interviewed judges, the marital paternity presumption is a better way to safeguard the interest of children than DNA. After all, DNA can be used to establish but also to negate paternity. Allowing large-scale use of DNA testing in paternity disputes is like opening a can of worms, a female judge in the Fes-Boulemane-Sefrou district stated. Husbands will request DNA testing on a large scale and many families will fall apart. This judge, like the other judges of group one, urged unwed mothers not to reveal in court the circumstances under which their children were born. If they do not

34 Court of Cassation. Ruling No. 363/2/1/2006, December 20, 2006.

say it, we will not ask for it and it will give us an opportunity to see whether we can prove engagement through witnesses, she concluded.

Duke Two: Proving Engagement Through Witnesses

In opposition to their colleagues in group one, the second largest group of judges (group three) would pretend not to have heard the honest confession of the mother as this allows them to explore the existence of an 'engagement.' They define engagement in an open manner, as a formal or informal intention to marry. By requesting minimal evidence, that is to say, a minimum number of witnesses, they try to avoid the consequences that accompany illegitimate childbirth. In terms of evidence, they prefer witnesses over the use of DNA testing because a DNA test can be used to establish paternity as well as negate it. For this group of seven female and six male judges, including Judge W, DNA is a last resort, only to be used when the 'engagement' has been proven by witnesses, and moving down the ladder of requirements mentioned in Article 156, when the alleged father denies paternity. While these judges view the presence of witnesses as essential, they differ in the number of witnesses they believe are necessary to prove the 'engagement.' According to one male judge, the required number of witnesses used to be 12 (*lafif*) under the old family law of 1993 (see also Jordens-Cotran 2007; Mir-Hosseini 2000, 171). The MU2004 does not stipulate a definite number of witnesses, merely stating that the families of the engaged couple must be aware of the relationship. While most judges accept a lower limit of two witnesses, Judge W said that when a mother comes to court to prove the paternity of her child, and she can only find one witness to confirm the 'engagement' then 'we will turn a blind eye' [and attach the child to the *nasab* of its alleged father].

Although these judges use considerable discretion in establishing the number of required witnesses, they are 'bouches de la loi' in that they follow the different steps of Article 156 carefully. This group of judges, which prefers the relative uncertainty of witnesses over the certainty of DNA testing in establishing paternity, includes more female than male judges, both relatively and absolutely.

Portia Two: Al-Walad li l-Firash and DNA Testing Combined

There are two groups of judges in which women are conspicuous by their absence. The third largest group (group four) consists almost solely of male judges (6 male and 2 female). As we have seen above, they are the judges who advocate the use of DNA testing, even when the child is born outside the conjugal bed (less than six months after the conclusion of marriage or more than a year after divorce). In contrast to their colleagues in group three, they do not insist on witnesses and feel that they are morally permitted to deviate from

the law (i.e. Article 156 MU2004). Hence, should the interest of the child and its mother so require, they do not hesitate to request a DNA test.

The smallest group of judges (group two) consists of seven male judges, including Judge A, who adhere to the doctrine of the conjugal bed but in such a way that the financial interest of the child is always secured. They use a combination of old and modern evidence collecting techniques to protect the child's interest. When Islamic doctrine cannot be used to prevent illegitimacy, they use DNA testing as a basis on which they can oblige fathers to maintain their biological children. Moving between the dictates of Islamic law as embodied in the *al-walad li l-firash* doctrine and the best interest of the child, they argue that a child should not suffer from mistakes its parents had made. Both the father and the mother should carry responsibility for the upbringing of the illegitimate child. A positive DNA test does not attach the illegitimate child to the father's lineage, but forces the latter to shoulder the financial responsibility for the child's upbringing. According to a former family law judge, one judge who had established the biological bond between a father and a child through a DNA test, subsequently had resorted to the law on obligations and contract (*qanun al-iltizamat wa l-ʿuqud*) to force the father to extend financial compensation (*taʿwid*) to the mother of the minor child. This male judge's ruling had caused heated debates, within the legal profession as well as in the public media, with the result that awarding financial compensation to the mother is still anything but common legal practice in paternity dispute cases.[35] The fact that seven judges in my sample still recommended this course of action in case of illegitimate childbirth indicates their strong wish to interpret the MU2004 in a manner that protects the best interest of the child as well as of the mother who is shouldering the main responsibility for the child's upbringing.

5 Conclusion

The publication of *In a Different Voice* by Carol Gilligan in the early 1980s inspired feminist legal scholars to ask whether women's different voice in moral development would be a characteristic that also pertains to the performance of women legal professionals. Inspired by the way Gilligan had included Shakepeare's male figure, the Duke, and the female figure, Portia, in her analysis, feminist scholars argued that where male judges (Dukes) would follow an 'ethic of justice' (i.e. applying pre-existing general rules to the dispute in question in accordance with specified procedures), female judges (Portias)

35 Personal interview with Judge F. Taza, May 14, 2015.

would follow an 'ethic of care' and bring into the adversial system of legal decision-making the language of care, mercy, communication, and preservation of relationships. In this chapter I asked whether there is indeed a difference in the way male and female judges dispense justice by focusing on the category of family law in Morocco, particularly paternity dispute cases under the new law of 2004: the *mudawwana al-usra*.

Based on a sample of 25 female and 36 male judges, I found that judges responded to a hypothetical case regarding proof of paternity in a situation of illegitimate childbirth in four different ways. Two groups of judges employed the 'Duke' approach, in that they followed the law and jurisprudence rather strictly with the result that the child in the case was deprived of rights such as inheritance and financial maintenance by its father. Together, these two groups of judges not only constituted the majority of the judges (64 percent) but also the greater majority of female judges (80 percent).

In contrast, the two other groups of judges employed the 'Portia' approach, in that they interpreted the law in an innovative way, by allowing the use of DNA testing and by awarding mothers financial compensation, thereby securing the financial rights of the child in question. These two groups constituted a minority of 24.5 percent[36] consisting of almost only male and hardly any female judges. On the basis of these observations, one might be tempted to raise the question why male family law judges in my sample follow an 'ethic of care,' or the 'Portia' approach, in relatively greater numbers than women family law judges who, employing an 'ethic of justice,' are more rule-oriented and therefore share features characteristic of the male Duke?

In this research, however, the gender of the judge is not a decisive, but rather a contributory factor to the different ways of achieving justice in paternity cases. After all, not all male judges are Portias while not all female judges are Dukes. It is only through a quantitative analysis that we can start detecting other factors, such as education, age, years of professional experience and political activism, which equally contribute to the way family law judges in Morocco try to achieve justice. Therefore, I argue that it is more interesting to ask why the majority of the Moroccan family law judges in the sample follow an 'ethic of justice' and deprive the child of essential rights such as financial care and attachment to the lineage of its father?

I argue that, in contrast to the perspective of their minority colleagues, the perspective of the majority judges in clear cases of illegitimate childbirth is informed by a broader and longer-run perspective with regard to the legal and social consequences that accompany the use of modern evidence-collecting

36 The remaning judges (11.5 percent) had not provided an answer to the case.

techniques such as DNA testing. While in the hypothetical case DNA testing can be used to *establish* paternity, in many other cases it can be equally used by husbands to *negate* paternity and, hence, disturb family stability in Moroccan society. The majority judges are very careful to not open the floodgates of husbands raising court cases in which they dispute the paternity of children that were born during the period of their marriage to the children's mothers. These judges believe that the best interest of the child should be an overriding factor, but not at the expense of family stability in a more general sense. This explains why, in the end, all judges, irrespective of whether they are men or women, prefer to turn a blind eye. They do not want the mother to disclose in court the circumstances under which her child was conceived. This allows them to investigate her case by remaining within the boundaries of the law and in the process protect both children's interest and family stability. In this, the male and female judges in my sample are clearly a product of the Moroccan society in which they were born and raised, and in which the consequences of illegitimate childbirth are often mitigated by strategies, such as adoption, which, while legally forbidden, are widespread and serve to protect the child and its mother from the grave consequences that illegitimate childbirth can have in Moroccan society.

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CHAPTER 6

Female Judges in Malaysian *Shariʿa* Courts: A Problem of Gender or Legal Interpretation?

Najibah Mohd Zin

Introduction

The Federation of Malaysia is currently made up of 13 states and three federal territories.[1] Its legal system is based on Common Law, a direct influence of British colonialization, which ended in 1957. The parliament of Malaysia enacts federal laws that apply throughout the country. The different states enact laws that have limited application in a particular state only. A particular feature of the Malaysian legal system is its dual system of law, meaning that there are civil courts and Islamic *shariʿa* courts.[2] *Shariʿa* courts fall under the jurisdiction of the states rather than the federal government. In general, the *shariʿa* judiciary deals with personal status laws and *taʿzir* offences;[3] it does not include *hudud*[4] and *qisas*,[5] which, as we shall see below, are the two types of punishment that constitute the main basis for rejecting the appointment of female judges. The majority of cases brought before the *shariʿa* courts are family issues, with women making up the majority of litigants (Peletz 2002).[6]

In Malaysia's dual legal system, female judges were appointed to the lower civil courts as early as the 1960s (Nik Noriani and Masidi 2009) and the High Court in 1983 (The Malaysian Judiciary Yearbook 2012), whereas their entrance

1 Kuala Lumpur, Putrajaya and Labuan.

2 See Part IX and List II Schedule 9 of the Constitution.

3 *Taʿzir* offences are punishments other than *hudud* and *qisas*.

4 *Hudud* refers to a fixed penalty in cases of adultery, drinking liquor, highway robbery, apostasy, theft, and *qadhaf* (false accusation of fornication), where evidentiary requirements and the standard of proof are higher.

5 *Qisas* refers to the punishment of like for like, involving intentional murder and injury to the body. The standard of equality must be strictly adhered to if such a punishment is to take place. Otherwise, the victim is advised to accept compensation.

6 Common grounds are judicial divorces, which are generally applicable to women, maintenance for children after divorce, and property rights such as *mutʿah* (compensation after divorce) and matrimonial property. Some of these concerns are discussed in the report by Moghadam (2006).

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to the *shariʿa* courts did occur until 2010. By way of comparison, in 2012, women represented 35.5 percent of judges at all levels of the federal courts, with full authority to decide on all matters, while only constituting 3.7 percent of judges in *shariʿa* courts (Statistics on Women, Family And Society 2012).[7] In this chapter, I explore the factors that impeded and continue to impede the appointment of women judges to the religious courts.

The chapter is divided in three sections. The first examines the debates surrounding the appointment of female judges to the religious courts in order, first, to identify the main opponents and proponents of women's appointment as judges, and, second, to examine how they have justified their particular point of view. Section two asks whether the small number of women judges in the *shariʿa* courts can be attributed to particular features of the Malaysian legal system. Currently, only ten women are working as judges in the subordinate *shariʿa* courts and recently, in June 2016, two women judges have been appointed to the Shariʿa High Court in the state of Selangor. In section three, seven female judges were interviewed and asked about their position on the issue of women judgeship as it relates to Islamic jurisprudence. They were also asked to respond to those who argue that there is a dire need to appoint women as judges, as they will be more sensitive to the needs of female litigants.

1 Public Debates

The Perspectives of the Classical Scholars and the 1982 Fatwa

The institution of the *qadi* (judge) is well established in Islamic tradition, as the state is obliged to establish a judicial system to attend to society's needs. The importance of this exercise has been addressed in Islamic jurisprudence, going so far as to consider rewards to judges who, while having made errors in their judgments, only did so after a careful consideration had been performed to arrive at a fair judgment. As the parties could not be expected to be exceptionally reasonable when the dispute arose, *shariʿa* law imposed and still imposes the heavy burden on the judge to exercise justice and to provide assistance to the aggrieved party, either in awarding its rights or initiating efforts at reconciliation (Ibn Qudamah, n.d.), for instance, through the process of arbitration (*hakam*) or peaceful settlement (*sulh*) (Qur'an: 4:34).[8] On that basis, the jurists set a high standard of qualification for the appointment of judges.

7 See Statistics produced by the Ministry of Women, Family and Community Development 2012, Table 7.9 (Women and the Civil Judiciary 2011–2012).

8 See the Qur'an, al-Nisa: 34.

Judges must be legally competent and knowledgeable and profess their trust in Islamic jurisprudence. They should also be trustworthy and impartial (Ibn Qudamah, n.d.), for they are commanded by their religious duty to deliver a judgment that is just, equitable, earnest, and humane. The requirement to dispense justice and forbid oppression is repeatedly mentioned in Islamic traditions (Qur'an: 6: 42; 4: 135 & 65; 14: 90).[9] Judges are also required to take into account that submitted questions that arise in the community are not necessarily identical, even though the subject of the claim is similar. Most often, this requires more than just knowledge of the facts at hand; a deeper understanding can be gained by various means, including experience and knowledge of other related fields, such as relevant aspects of the humanities and a knowledge of psychology.

Taking into account that women were often thought to lack many of the above qualifications, the issue of female judgeship has generated considerable disagreement among classical and contemporary scholars. The classical jurists are divided on the qualification of women to be a judge.[10] For example, in his celebrated work *al Mughni* (the most widely known textbook of Hanbali *fiqh*), Ibn Qudamah (d. 558 AH–1223 CE–) explains that the root of the differences originates from the nature of the judgeship itself. The proponents of women judges, championed by the Hanafis, argue that a person's gender is not a barrier, except in offences involving *hudud* and *qisas*, where women are not well-exposed to work outside the house. Ibn Jarir al Tabari stated that women have an absolute right to be appointed to the judiciary, arguing that if a woman qualifies as a *mufti*, she will also qualify as a judge (Ibn Jarir al Tabari, d. 310 AH–923 CE–). The opponents represent the majority of the classical jurists (Shafiʿi, Malik, and Ibn Hanbal), who expressly prohibit women from being judges. Among other things, they fear that justice would not be served due to women's lack of exposure to mundane matters, which might affect the quality of the judgment (Ibn Qudamah, n.d.). This argument is adopted by the Malaysian *shariʿa* system, which is predominantly based on the Shafiʿi school of law.

The complexity of legal arguments in Islamic classical law and contemporary writings on female judgeship significantly affected the appointment of women as judges in the Malaysian *shariʿa* courts. This has found reflection

9 The requirement to dispense justice and forbid oppression is repeatedly mentioned in Islamic traditions. See the Qur'an: al Maidah: 42; al Nisa': 135 and 65; al Nahl: 90.

10 By 'classical scholars' I mean the religious scholars of the tenth century. As will be seen, the perspectives of these early scholars still constitute an important source of reference for participants in contemporary debates dealing with religious issues.

in a *fatwa* issued in 1982 by the National Fatwa Committee, which prohibited women from being appointed as judge for the reason that the post is equal to the position of a leader (Mohd Hisham Mohd Kamal 2009).[11] This ruling was derived from a literal understanding of the *hadith* which states that "the people who appoint women as rulers will never be successful" (al-Qaradawi 1996).[12] The Egyptian religious institute, Al Azhar,[13] ruling in the mid-twentieth century that the major public posts are reserved for men only, had a significant impact on the 1982 *fatwa* (Abu Haniffa and Mohd Yazid Zul Kepli 2008).[14]

The Response of Civil Society and the Promulgation of a New Fatwa

Public debates on whether women should serve as judges did not start immediately after the declaration of the 1982 *fatwa*, as the codification of Islamic law was still being worked on. It was during the late 1990s, when procedural laws were enacted, that lawyers representing clients expressed dissatisfaction with the way male judges in family courts passed judgment, especially in custody dispute cases. In general, the problems pertaining to family litigation proceedings were urgent and the need for more *shariʿa* court judges, including female ones, continued to be highlighted in the media (Bernama 2000).[15] Among the complaints that were raised in many workshops and seminars dealing with legal issues in *shariʿa* courts were delay in litigation, problems in enforcing court orders, and the long court process needed to obtain an order for maintenance (Workshop on Just and Speedy Trial, 2007 and Towards the Implementation of A National Family Policy: Socio Legal Perspectives, 2011).[16]

11 The National Fatwa Committee comprises a membership of selected, qualified individuals and state *mufti*s. A *fatwa* issued by the National Fatwa Committee is not binding on the state. The *fatwa* will take effect after it has been adopted and gazetted by the respective states. For further reading, see Mohd Hisham Mohd Kamal (2009).

12 As quoted in Rosman (2008, 51). This *hadith* is widely quoted by modern Islamic scholars with different modes of interpretation. See for example, al-Qaradawi (1996, 165–166).

13 Founded in 970 CE in what is now the medieval quarter of Cairo, al-Azhar is a main center of Islamic and Arabic learning in the world.

14 See also Abu Haniffa Mohammed Abdullah and Mohd Yazid Zul Kepli (2008, 5).

15 See for example, the Malaysian National News Agency Bernama (May 2 and May 5, 2000).

16 For example, see the workshops 'Perbicaraan Adil and Cepat di Mahkamah Shariah' (Workshop on Just and Speedy Trial) organised by SUHAKAM and JKSM, April 12, 2007; 'Towards the Implementation of A National Family Policy: Socio Legal Perspectives,' organised by the Faculty of Human Ecology, University Putra Malaysia (UPM) and Lembaga Penduduk dan Pembangunan Keluarga Negara (Board of the National Population and Family Development) September 14–15, 2011. The author was invited to participate in and speak at these seminars and workshops.

Nevertheless, no single appointment was made by the 14 states, out of respect to the 1982 *fatwa*.

From the late 1990s onwards, many Muslim legal professionals and female-oriented NGOs in Malaysia urged that appointments should be based on qualification rather than gender (Abu Haniffa Mohammed Abdullah and Mohd Yazid Zul Kepli 2008; Andek Masnah Andek Kelawa 1997). As we have seen, initially, the call for female representation in *shariʿa* courts was based on a perceived lack of competence, particularly among junior male judges, in the resolution of family issues. This was attributed to a lack of training in related disciplines, and inadequate experience in judicial proceedings in the application and implementation of the law. *Shariʿa* lawyers and academic scholars claimed that female judges could offer a better perspective when dealing with highly emotional disputes such as custodial rights and lengthy divorce proceedings (Seminar on Islamic law in Shariah Courts: Practices and Challenges, 1997).[17] They cited many cases in which women had lost the right to child custody when they remarried, despite the fact that, they argued, the child's welfare should be paramount.[18] According to these legal practitioners, male judges in *shariʿa* courts employed a literal interpretation of Islamic law, despite clear guidance by statutory provision in Malaysian Islamic Family law to consider the interests of the child as of foremost importance (Section 83 of Islamic Family law Act 1984).[19] The occurrence of these types of cases accelerated the

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17 This concern has been raised in 'Seminar Undang-Undang Islam di Mahkamah-Mahkamah Shariah di Malaysia: Amalan dan Permasalahan' (Seminar on Islamic law in Shariah Courts: Practices and Challenges), University of Malaya, February 19–20, 1997, in which the author participated. Among the issues raised was the delay in court proceedings regarding an appeal for child custody that could result in the mother losing her right to care for the child. The child was taken by force from the mother's custody after her remarriage to a man not related to the child.

18 See for example *Rusnani v. Haji Marzuki* (1990) 7 *Jurnal Hukum* 98; *Kamaruddin v. Rosnah* (1989) 6 *JH* 282; *Nooranita bte. Kamaruddin v. Faiez b. Yeop Ahmad* (1989) 2 *MLJ cxxiv*. For further reading see Mohd Zin (2005).

19 See for example, section 83 of Islamic Family law Act 1984, which provides that: The right of *hadana* (custody) of a woman is lost:
(a) by her marriage with a person not related to the child.
within the prohibited degrees if her custody in such case.
will affect the welfare of the child but her right to custody.
will revert if the marriage is dissolved;
(b) by her gross and open immorality;
(c) by her changing her residence so as to prevent the father.
from exercising the necessary supervision over the child,
except that a divorced wife may take her own child to her birth-place;

demand for the appointment of competent female judges. Accusations that male judges discriminate against women are also common among NGOs representing feminist groups (Women's Aid Organisation 2012).[20] Numerous studies by a variety of groups maintain that the problems may equally be attributed to incompetent lawyers and litigants who are not well-informed about the proceedings or who are simply tired of the litigation process, which is adversarial in nature. These NGOs voice their concern about the need to improve the adjudication process, and a suggestion that has been strongly emphasized, inter alia, is that female judges, who are both competent and able to understand and care about women and their legal problems, should be appointed.

Meanwhile, the demand for female judgeships persisted, as the success of court proceedings also depends on efficiency in the adjudication processes and the ability to deliver fair and just decisions. In this regard, Ahmad Ibrahim (2000), a prominent scholar in the administration of Islamic law, claimed that "It is only when the *Shari'a* court judges and officials can show that they are capable of dispensing fair and equitable justice to all, that the prejudice and apprehension against them will be removed." Apparently, this element of prejudice remains, especially in court proceedings that involve highly contentious matters, due to a lack of professionalism in handling the cases, lengthy litigation, and poor enforcement of court orders, especially regarding conjugal maintenance and child support. Among the solutions that have been suggested in many seminars and workshops is to have women participate more widely as judges, since they will be more sensitive to female litigants' needs and feelings (Workshop on Just and Speedy Trial 2007; Towards the Implementation of A National Family Policy: Socio Legal Perspectives 2011).[21]

The voicing of concern at the failure to appoint women as judges in *shari'a* courts finally led to the issuing of another *fatwa* in 2006 by the National Fatwa Committee. This time, it officially announced that qualified women may be appointed as *shari'a* court judges after consultation with the State Fatwa

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(d) by her abjuration of Islam;

(e) by her neglect of or cruelty to the child.

20 See the shadow report on CEDAW and Malaysia (Women's Aid Organisation 2012, 168–186).

21 All these issues were addressed in the workshops 'Perbicaraan Adil and Cepat di Mahkamah Shariah' (workshop on Just and Speedy Trial) organised by SUHAKAM and JKSM, April 12, 2007; 'Seminar Undang-Undang Islam di Mahkamah-Mahkamah Shariah di Malaysia, Amalan dan Permasalahan' (Seminar on Islamic law in Shariah Courts; Practices and Challenges) University of Malaya, February 19–20, 1997; 'Towards the Implementation of A National Family Policy: Socio Legal Perspectives', organized by the Faculty of Human Ecology UPM and LPPKN, September 14–15, 2011.

Committee (National Fatwa, 2006).[22] This *fatwa* needs to be passed by the respective states in order to take legislative effect (Section 49 Administration of the Religion of Islam (Selangor) Enactment 2003).[23] However, the record shows that only the state of Federal Territories had passed the *fatwa* in 2007, while the states of Kelantan, Sarawak and Kedah have officially declared that they would not. Other states have not declared their express acceptance or refusal (Department of Islamic Affairs, Prime Minister Department 2006).[24]

The Debate after the 2006 Fatwa

Despite the publication of the 2006 *fatwa* by the National Fatwa Committee, the debate surrounding the appointment of female judges continues, and the available literature, by both academic scholars and legal professionals, on the feasibility of appointing female judges to serve in the *shariʿa* judiciary reflects both positive and negative responses. Since the *fatwa* does not have a binding effect until after it has been passed by the different states,[25] it creates uncertainty and confusion among the public as to the correct attitude to having women sit as judges in the *shariʿa* courts. This is aggravated further when the dispute plays out among those who have authority on the issue. For example, in his 2007 article, the then-Chief *Shariʿa* Judge of the Malaysian *Shariʿa* Court disapproved of female judgeship, citing several authorities from classical Islamic law, especially the books of the Shafiʿi school of jurisprudence. In his writing, this judge argued that women were not competent to be judges due to the complexity of the service and the need to adhere strictly to the Shafiʿi view, the school of law that is officially adopted in Malaysian *shariʿa* law, which disapproves of women serving as judges. Instead, he concurred that women can be appointed to serve in the *shariʿa* judiciary as registrars, research officers to Higher Court *Shariʿa* judges, *sulh* (mediation) officers and other functions within the judiciary. It has been recorded that the *Shariʿa* Judiciary of Malaysia

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22 The Fatwa Committee consists of the Mufti (who serves as the Chairman), the Deputy Mufti, the State Legal Adviser, two members of the Majlis, and an officer of the Religious Department established under the respective states to advise the Sultan or Head of the State on Islamic law matters. The National Fatwa Committe consists of all individual Muftis from the respective states and it discusses matters concerning national interests.

23 See for example, Administration of the Religion of Islam (Selangor) Enactment 2003 s. 49 (1). A similar provision is available in all states.

24 Portal Rasmi Fatwa Malaysia, www.e-fatwa.gov.my. This address is the formal portal to access all *fatwas* that are issued by the Fatwa Committee and that are managed at the federal level by the Department of Islamic Affairs, Prime Minister Department.

25 The institutions of *fatwa* and the *shariʿa* judiciary are two separate entities under the respective states.

has been recruiting female officers since 1994 to serve in various departments, except as judges in *shariʿa* courts (Abdul Rahman 2007, 1).

The view of the former Chief *Shariʿa* Judge has received support from an influential scholar who is closely associated with the *shariʿa* judiciary: Mohd Salleh Ahmad. He argues that it is not permitted to appoint women as judges in *shariʿa* courts based on the majority view of Muslim jurists. Ahmad literally supports the view of the opponents who claim that lack of competence, fear of psychological impacts, and the burden of a woman's duties may lead to a failure to hand down a just decision. He also argues that the Hanafi accommodating approach in allowing women to be judges has been misconstrued, and the fact that women have been entrusted with specific and primary duties as the leader in the household does not qualify them for the post of judgeship (Ahmad 2007).

On the other hand, legal professionals, academics, and women activists are pressing for a more flexible approach, arguing that the interpretation of the legal texts must take contemporary needs into account (cf. Md Nor 2007, 191). They are supported by religious scholars with international reputations, such as Muhammad Saeed Ramadhan al Buti (Syria, 1929–2013), Yusuf al-Qaradawi (b. 1926) and Baghdad-born Yemeni scholar Abdul Karim Zaidan (1917–2014), who endorsed the appointment of female judges in view of the current needs of society, where women are playing an active role in all aspects of life, including the judicial system (Arif 2011). According to these scholars, the opinion of classical jurists (the opponents) should not be the only criterion to decide on the current need to have female judges in the judicial service—a view that is in line with the 2006 *fatwa*. Those who support female judgeship contend that the classical views are questionable, and even opposed to what had been practiced in the classical period, when women held important posts including that of *mufti*, and thus are interpreted out of context. This is evident from the fact that many Muslim countries, such as Indonesia and Pakistan, have been active in appointing women to serve as judges in the *shariʿa* judiciary. They additionally argue that the post of female judgeship is not comparable to that of the head of state. In the context of Malaysia, the *shariʿa* judiciary deals with personal status laws and *taʿzir* offences; it does not include *hudud* and *qisas*, the two types of punishment that constitute the main basis for rejecting the appointment of female judges. On a similar note, another academic expert in the administration of *shariʿa* law (Ramizah Wan Muhammad 2008) supports the idea, asserting that the opportunity should be extended to women as long as they fulfill the qualifications for appointment as a judge. Furthermore, there is no express restriction on appointing female judges under the existing law. Therefore, any attempt to disqualify women from appointment as judges due

to their gender will be against the spirit of Article 8 of the Malaysian Constitution of 1957, which prohibits discrimination on the basis of gender. Furthermore, the legal requirement that the judge must reach the level of *mujtahid* (able to exercise *ijtihad*) would be met if a person is able to make a fair and just decision (Ramizah Wan Muhammad 2008).

Another significant body of literature claims that the lack of consistency among Muslim jurists in their arguments in terms of legality has contributed to the confusion (Arif 2011). Arif, a religious scholar who specializes in contemporary issues dealing with Islamic law, claims that most of the arguments are based on rebuttable presumptions. For example, the arguments that women lack intellectual capacity and are weak in their judgment are presumptions that are based on the position that women are not actively exposed to social activities. On the other hand, women in contemporary society are in a parallel position to men in terms of the opportunity to acquire knowledge through education and the freedom to express their thought. According to Arif, even though women were not known in Islamic history to hold any judicial post, except for the post of *mufti*, there is no comparison between the needs of the past and the present; they are completely different and the law must accommodate such changes. Above all, Arif continues, the role of a judge concerns the needs of society and has nothing to do with worship (*ibadah*). Arif hopes that his arguments will alleviate the fear of opponents that they might hand down a ruling contrary to *shariʿa* principles as well as strengthen the argument of those advocating the appointment of women as *shariʿa* court judges (Arif 2011).

As the above discussion demonstrates, there are different perceptions among contemporary scholars and legal professionals on the role of women judges in Malaysia. These perceptions are generally influenced by the way *shariʿa* law is interpreted, either taking it literally or applying the law in context. The latter view is usually portrayed as a reflection of contemporary needs, especially on matters where the role of women is perceived to be highly relevant, as in adjudicating family disputes. What is interesting is that the main participants in the debate are legal professionals, academics and activists with no formal education in Islamic law (Sonneveld and Tawfik 2015). While they display divergent views on whether women should work as judges in the *shariʿa* courts, they have one thing in common: they all use religious argumentation to justify their point of view.

2010: The Appointment of Women Judges to the Shariʿa Judiciary

The fierce and continuous debates finally led to the appointment of more women to the *shariʿa* judiciary. In some states women had previously served

as *sulh* officers, in other states they came from the ranks of research officers or lawyers. For example, despite the fact that the state of Kelantan officially declared it would not issue the 2006 *fatwa*, it was the earliest state to officially appoint female *sulh* officers (court-annexed mediators) in 2007. As section two explains in more detail, *sulh* officers conduct mediation proceedings with the authority to perform limited judicial functions (extrajudicial), such as to confirm a divorce settled outside the court.[26] These appointments were not announced publically, as the *sulh* officer is not a judicial post, even though these posts could enjoy the same salary scale as a lower court judge.

In 2010, two female *shariʿa* court judges were officially appointed in the Federal Territories. They were Suraya Ramli and Rafidah Abdul Razak, who were 31 and 39 years old at the time of their appointment, respectively. Both women had served as senior assistant directors of the Training Division of the Malaysian Islamic Judicial Department.[27] Although women's NGOs had argued for the inclusion of women judges on the basis that women judges would be more sensitive to women's needs, Suraya Ramli said she would take it as a challenge to dispel the notion that women *shariʿa* court judges would tend to side with female litigants.[28] Ramli and Abdul Razak's appointments became nationwide news as they were the first such appointments in Malaysia (Mohd Zin 2012, 126).[29] Prime Minister Najib described the appointments as a historic moment for the country. The move, so he claimed, was meant to "enhance justice in cases involving families and women's rights" in Malaysia, where nearly two-thirds of the country's 28 million people are Muslims. To a question on whether there were plans to increase the number of women *shariʿa* judges in other states, Najib said it would be up to the relevant state authorities as the matter was under the juridiction of the Islamic Council of that particular state.[30] Several other states, such as Malacca, Perlis and Pahang, soon followed, appointing qualified female candidates to judicial posts in their respective Shariʿa Subordinate Courts in 2012 (Statistics on Women, Family and Community 2012).[31] In 2016, the state of Selangor appointed two female judges

26 The Malaysian *shariʿa* court introduced court-annexed mediation in 2000, starting with the Federal Territories and followed by the rest of the states.

27 See http://en.islamtoday.net/artshow-232-3702.htm, accessed May 22, 2015.

28 See http://en.islamtoday.net/artshow-232-3702.htm, accessed May 22, 2015.

29 This information is briefly discussed in Mohd Zin (2012, 126).

30 See http://en.islamtoday.net/artshow-232-3702.htm, accessed May 22, 2015.

31 See Statistics on Women, Family and Community 2012, Table 7.10 (Women and the Shariah Judiciary 2011–2012). The yearly report is published by the Ministry of Women, Family and Community Development.

to serve in the *Shariʿa* High Court, which is a breakthrough for further recognition of female judges at the higher court level. What is interesting is that while the Federal Territories had passed the 2006 *fatwa* prior to the appointment of the first women *shariʿa* judges, this was not the case with the other states that appointed women as *shariʿa* court judges. All these states have yet to pass the *fatwa*.

2 Legal Framework for the Appointment of Shariʿa Judges

As the previous section has shown, both opponents and proponents used the sources of Islamic law as a justification for their point of view in the public debates surrounding the appointment of women to work as judges in the *shariʿa* courts. Legal professionals, often high-ranking *shariʿa* court judges, participated actively in the debate. In this section, I examine the extent to which there are features in the Malaysian legal system that prevent or encourage women to work as judges in the *shariʿa* courts.

Shariʿa Courts Independent of Civil Courts

While the issue of female judgeship in the *shariʿa* judiciary has provoked much controversy over the past few decades, the appointment of female judges to the civil courts has never been a public issue, as they are appointed under the federal scheme, which is standardized throughout the country and well protected under the Malaysian Federal Constitution of 1957, which was inherited from the British and modified. Women were appointed to the subordinate courts in the 1960s, and the first appointment of a woman to a High Court position occurred in 1983 (Malaysian Judiciary Yearbook 2012). Since then, the presence of female judges in the High Courts has increased, almost reaching equality with that of their male counterparts in 2012 (see table below). The proportion of women judges in the subordinate courts is relatively high (35.5 percent), which is significant in that it demonstrates that gender is not the main obstacle for women who wish to become a judge (Statistics on Women, Family and Community 2012).[32]

32 These numbers were obtained from Statistics on Women, Family and Community 2012 and the Malaysian Judiciary Yearbook 2012. The number of female judges has increased in 2013, but the latest figures were not available at the time of going to press.

TABLE 1 *The presence of female judges in the Courts*

Level of court	Female judges (2012)	Male judges (2012)
Federal Court	2	7
Court of Appeals	4	18
High Courts	30	35
Judicial Commissioner of High Courts	9	18

In contrast to the *shariʿa* system, which is under state jurisdiction, judges in the civil courts are appointed by the Federal Government, and can be transferred throughout the country (Article 122 of Federal Constitution and Muhammad 2003).[33] The career path to become a judge in a Federal court starts with a degree in law (LLB) which is necessary to qualify for appointment. The prospect for further promotion is much better, as the Federal court has a five-tier court system, beginning with the Magistrate Court, Session Court, High Court, Court of Appeal, and Federal Court.

Until 1988, *Shariʿa* Courts were regarded as subordinate to the High Court, and were presided over by a lower civil court judge and the Chief *Qadi* in each state (Section 45(6) of Selangor Muslim Law Enactment 1952; Ibrahim 2000).[34] But Act A704 provides that the civil High Court shall not interfere in *Shariʿa* Court matters. Due to this legal development the *shariʿa* courts were upgraded, starting with the state of Selangor in 1989,[35] and followed in subsequent years by the rest of the states. The institution of the *shariʿa* judiciary is now independently governed, and has been separated from the Council of Muslim Religion and the Mufti office. Moreover, where the *Shariʿa* Court system had two levels before 1988 (subordinate and High Court), all 14 states now have their own three-tier court system, i.e. Subordinate, High Court and Appellate courts, governed by the administration of Islamic law. The upgrading of the Shariʿa Court system also created more vacant posts for judges to fill; prior to 1988, the size of the *shariʿa* court's structure contributed to the reluctance to appoint female judges, as only a limited number of judicial posts were available in the respective states.

33 See Federal Constitution 1957, Article 122. See also Muhammad (2003, 9).

34 See for example, Selangor Administration of Muslim Law Enactment 1952 section 45(6); see also Ibrahim (2000, 87–130).

35 Selangor Administration of Islamic law 1989 replaced the earlier law of 1952.

In terms of jurisdiction, the *shariʿa* courts deal mainly with personal status law; there is limited jurisdiction over criminal offences.[36] The cases are mostly related to Islamic family law disputes, such as marriage and divorce, maintenance, ancillary claims after divorce, gifts (*hibah*) and inheritance, and other claims that do not exceed RM 100,000 (equivalent of approximately USD 30,000 or 25,000 Euros). In criminal jurisdiction, the courts hear cases that are classified as *taʿzir* offences (Shariah Offences Act (Federal Territories) 1997),[37] and the punishments must not exceed three years of jail, a fine not exceeding RM 5000, six strokes of the rattan, or both.[38] The prescribed punishment as reflected in the federal law does not reach the level of *hudud* as prescribed in classical Islamic law, and there should be no restriction on females presiding in criminal matters (Section 52 Administration of Islamic Law (Federal Territories) 1993).[39]

Even though the power of the lower *shariʿa* judge is rather restricted in terms of jurisdiction, most of the complicated legal disputes, such as marital conflicts and divorce proceedings, are heard in the lower court, apart from child custody and property rights, where the *Shariʿa* High Court has original jurisdiction. Until 2016, when none of the women judges were appointed to the higher *shariʿa* court level (as explained in more detail below),[40] the role of the *Shariʿa* Subordinate Court judges, where women are among those appointed, was significant in the administration of the justice system. For comparison, all family disputes for non-Muslims in civil jurisdiction begin in the High Court, where a significant number of female judges sit.[41]

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36 For non-Muslims, family matters are brought before the civil courts, while for Muslims they are heard in the *shariʿa* courts. Besides these courts, other non-judicial bodies also deal with family disputes. The Marriage Tribunal, which was established under the National Registration Department of Malaysia, has been given the authority to reconcile non-Muslim separating couples. The Malaysian Mediation Centre provides family mediation services, and the Legal Aid Department gives legal advice, provides mediation and assistance to the parties in litigation. The services offered by the Legal Aid Bureau are available to both Muslim and non-Muslim parties. On the other hand, for Muslims, the Islamic Religious Councils, which are established in every state in Malaysia, exercise non-judicial functions when helping the conflicting parties.

37 See, for example, Shariah Offences Act (Federal Territories) 1997.

38 All states must provide punishment within the approved limit as set out in the *Shariʿa* Court (Criminal Jurisdiction) Act 1965 as amended in 1984.

39 Administration of Islamic law (Federal Territories) Act 1993, s. 52.

40 Pahang explicitly restricts this in the statute while other states, except for Selangor, simply have not yet appointed women judges at the higher court level.

41 See Law Reform (Marriage and Divorce) Act 1976, s. 2 under the definition of court.

The Judicial Selection Process

In 1997, during a time when the *Shariʿa* Courts were gradually gaining independence from the Civil Courts, the Rulers in Council passed a resolution that led to the unification of Islamic law across the different states. Before then, Islamic laws[42] were not all uniform, and were governed by the respective statutory laws (Ibrahim 2000). This caused much confusion, especially when people moved from one state to another. The administration of Islamic law as it currently stands has been made uniform throughout the country, with state laws providing general qualifications, which the Chief *Shariʿa* Judge has to consider for the appointment of judges, as provided under the states' Administration of Islamic law. The Sultans[43] or the Kings[44] will appoint judges based on the recommendation of the Chief *Shariʿa* Judge of the respective states.

The administration of Islamic law in all states provides several criteria that must be fulfilled for the appointment of judges to the *Shariʿa* High Court, including: that a person must be a citizen; that, for a period of not less than ten years preceding this appointment, he has been a Judge of a *Shariʿa* Subordinate Court, or a *Kathi*,[45] or a Registrar or a *Shariʿa* Prosecutor of a State, or sometimes one and sometimes another; or is a person learned in Islamic Law (Section 44 of Administration of Islamic Law (Federal Territories) 1993).[46] In principle, civil court judges cannot serve in *Shariʿa* High Courts (although they can be appointed to preside with *shariʿa* judges at the appellate level). The above criteria generally provide for the appointment of *shariʿa* judges in the Federal Territories, and similar provisions are available in other states. Literally this implies that judges are appointed from qualified male candidates only. However, the issue is not significant, as the Interpretation Act allows for the use of 'he' to represent both sexes.[47] The state of Pahang forms an exception as it spells out very clearly the legislative intent, which is to exclude women as judges in the *Shariʿa* High Court.

It should be noted, however, that the above law as applicable in the state of Pahang mentions the exclusion of women as judges in the *Shariʿa* High Courts

42 Administration of Islamic law, Islamic family law, Islamic evidence, Islamic criminal law, and Islamic procedural laws for both civil and criminal courts.

43 The states that have sultans are Selangor, Perak, Kedah Perlis, Kelantan Terengganu, Pahang, Johor and Negeri Sembilan.

44 The states that have kings are Penang, Federal Territories, Malacca, Sabah and Sarawak.

45 The old terminology for *shariʿa* court judge.

46 Administration of Islamic law (Federal Territories) Act 1993, s.44.

47 Interpretation Act 1948, s. 4(2). Words and expressions importing the masculine gender include females.

only.[48] It does not disqualify women from appointment to lower courts, and in 2013 the state appointed two female judges to serve in the *shariʿa* subordinate courts. They were Sarah Fawzia Ahmad Fuzi, who had been a *sulh* officer for three years and practicing lawyer for two years, and Norhidayah Mat Darus, a practicing lawyer and a Research Officer to the Chief *Shariʿa* Judge of Pahang.

Until June 2016, it was difficult for newly appointed female judges to be promoted to higher posts, such as that of *Shariʿa* High court judge, even though they may serve in equivalent salary grades as *shariʿa* officers.[49] This was the case in the *Shariʿa* Court of the Federal Territories, where the first two female judges (appointed in 2010) were eventually transferred to different posts in the *shariʿa* judiciary instead of being promoted to the *Shariʿa* High Court. After their departure in 2013, two other female judges were appointed to take their position in the *Shariʿa* Subordinate Court.[50] While in the Federal Territories the *Shariʿa* High Court judges are all male,[51] things are different in the state of Selangor where two women judges were appointed to the Sharia High Court in June 2016. Their appointments constitute an important development: denying women judges access to higher positions in the *shariʿa* judiciary not only has an impact on the career path of women in the judiciary, but also excludes women judges from working on custody cases. As noted, organisations for the rights of women and children had often argued that it was precisely in child custody cases that women judges could make an important difference.

Even though the appointment of female judges to the *shariʿa* courts is still in its infancy, the move marks significant progress in the projection of gender

48 The law provides that the Chief *Shariʿa* Judge and *Shariʿa* High Court Judge shall be appointed by the Sultan (or the King) on the advice of the Majlis (State Religious Council) and a person is qualified for appointment if he is a male Muslim and a citizen. Apart from that, the qualified candidate must have not less than ten years' experience in practice as *shariʿa* lawyer or *Shariʿa* officer or as a member of *Shariʿa* courts or is learned in Islamic legislation. *Shariʿa* officers include *shariʿa* prosecutors, *sulh* officers and research officers. The Chief *Shariʿa* Judge is also responsible for appointing *Shariʿa* Appeal Court judges for a period not exceeding three years. Even though the gender of selected candidates has not been addressed clearly in the provision, practice has taught that preference will be given to male judges to decide on highly complex matters.

49 It should be noted that at present, the post of High Court judge is rather limited as there is only one *Shariʿa* High Court in each state. In densely populated states, such as Selangor and the Federal Territories, there are slightly more of them due to the bulk of cases brought.

50 This information was obtained from a telephone interview with the Registrar of the *Shariʿa* Court of the Federal Territories on April 17, 2013.

51 Data obtained from the Department of *Shariʿa* Judiciary on March 11, 2013.

equality in a predominantly male job. For example, in July 2010 the Malaysian government lifted its reservation on Article 7 of the Convention on Elimination of all Forms of Discrimination against Women (CEDAW), to which it had previously expressed its reservation on the ground that women are not permitted to hold certain posts, such as *mufti*. The current state of the law and the court structure cannot accommodate many women in the service, but the receptive attitude towards accepting women judges is significant in removing gender stereotyping in the *shariʿa* judicial service.

Appointment of Women as Shariʿa Officers

While the issue of women working as judges in the *shariʿa* judiciary has been the focus of much debate and attention, few scholars and activists have paid attention to the appointment of women legal professionals as *shariʿa* officers. The appointment of women as *shariʿa* officers other than judges has been well received by the members of the *shariʿa* judiciary. Since 1994, several *shariʿa* officers have been appointed to the *shariʿa* judiciary of Malaysia, to serve as Registrars, Research Officers for Appeal Court judges, and other administrative posts such as court registrars (Abdul-Rahman 2007, 17). Currently, a significant number of women have been appointed as *shariʿa* officers, which can be partly attributed to the increase in the number of women who are academically qualified. The table below shows the number of women appointed to the respective posts in all states. Only one woman has attained the level of Chief Registrar; the remaining 13 states do not have women in that position.

With regard to *shariʿa* officers who work as *sulh* (mediation) officers, the ratio of male to female *sulh* officers is almost equal. The *sulh* process was formally introduced in Kuala Lumpur as a pilot project in 2001 (though it had been practiced informally there since 1976) and spread to various states in the following years. The goal of these experiments was to reduce the backlog of suits that have long plagued the Islamic courts and to help resolve disputes amicably (Peletz 2013).

Sulh officers mediate husband and wife in the settlement of disputes on ancillary matters such as *nafkah* (spousal maintenance), *mutʿah* (financial compensation for the wife in case she is not to blame for the divorce), matrimonial property, and custody. If the parties agree to settle, this agreement will be finally endorsed in the court as a consent order. Many Islamic family law matters must be dealt with in *sulh* proceedings before the matter is brought to trial. The post of *sulh* officer is occupied by a good proportion of women in judicial service. Their ability to handle mediation processes is beyond question, as they have been given training to handle the proceedings and, so far, no complaints have been raised accusing them of being incompetent. On that

note, the state of Kelantan extended the power of mediators with the power to adjudicate (*tauliah hakim*), even though there is no record of any official appointment of female judges in that state (Wan Muhammad 2008, 34–35). In fact, the state of Kelantan was one of the states that explicitly declared its unwillingness to pass the 2006 *fatwa*.

TABLE 2 *Number of female Shariʿa officers*[52]

	Number of judges in *shariʿa* courts throughout Malaysia in 2011		**Number of judges in *shariʿa* courts throughout Malaysia in 2012**	
	Female	**Male**	**Female**	**Male**
Shariʿa Chief Judge	0	1	0	1
Judges of the Court of Appeal	0	5	0	5
States *Shariʿa* Chief Judge (JUSA C)	0	14	0	14
Chief Registrar of the State *Shariʿa* court (LS 54)	0	14	1	13
Shariʿa judge (LS 44–48)	3	113	4	107
Sulh officers	35	38	44	40
Shariʿa Officers	41	64	26	44

Despite the substantial physical restructuring of the *shariʿa* court legal system, generally, Malaysian legal scholars did not pay much attention to the issue of gender in judgeship, as their main focus was to upgrade the status of the *Shariʿa* Courts and improve the uniformity of the *shariʿa* laws across the states. In addition, as we have seen, only a limited number of posts are available in the *shariʿa* judiciary, especially in the High Courts. This is related to the fact that there are only a few *Shariʿa* High Courts in any case. For example, in Selangor, Malaysia's biggest state, there are only three *Shariʿa* High Court Judges (of whom two are now women). Moreover, some states explicitly forbid women from occupying positions in the higher levels of the *shariʿa* judiciary. Hence, even though men and women have equal opportunity in the realm of higher education, and females outnumber males in Malaysian higher education,

52 Data taken from the Department Shariah Judiciary of Malaysia (December 2012).

there are still considerably fewer opportunities for women to occupy higher positions in the Islamic judiciary than for their male counterparts. A number of female judges from different states relate their experiences as judges in the *shariʿa* courts in the following section.

3 Perceptions of Female Judges in *Shariʿa* Courts

A number of academic studies suggest that women judges rule differently than men in some fields, and that certain feminine attributes would be better suited in certain legal disciplines, such as family law (Boyd et al. 2010; Feenan 2008).[53] Despite these arguments, a number of legal-anthropological studies have shown that male judges display a positive approach to women, such as those of Peletz (2013) on Malaysia, and Moors (1999, 142), and Tucker (1998) on the Middle East. Hirsh (1998) reveals that many women in Kenya won their court cases against their husbands. For this section, we asked a number of female judges what they think of the contention that women judges rule differently than their male peers, and whether they agree with those who say that women are less qualified than men to work as judges.

The fact that the state and federal governments have started to open a pathway for women in the lower *shariʿa* judiciary is an indication that the old contention among a number of judicial officials and academic scholars, who believe that women cannot hold a judicial post, is slowly losing its vigour. In order to understand the working culture of female judges who have been appointed to a *shariʿa* court, we conducted interviews with 7 out of 10 female *shariʿa* court judges in Spring 2013 and Spring 2015. The aim was to get their views on: (a) the perception expressed by senior male colleagues that women are not competent to be judges due to the complexity of the service and the need to adhere strictly to the view expressed by the Shafiʿi school of Islamic jurisprudence, which, as we have seen, disapproves of women serving as judges, and (b) the perception expressed by female-oriented NGOs that women judges are more sensitive towards the needs of female litigants, including whether these female judges think they rule differently than their male colleagues.

The interviews in 2013, either face-to-face or by telephone, were conducted by the author with the assistance of a research assistant. In 2015, we also

53 This observation has been generally discussed in Boyd, Epstein and Martin (2010). While acknowledging that female judges may judge differently, Feenan (2008) claims that the participation of women should be based on the need for diversity in the role of judicial officer due to background and experiences rather than gender.

distributed questions through e-mail. All women judges are working in subordinate *shariʿa* courts, in five different states.[54] The majority of the respondents have a personal relationship with the present author, as students in the institution of higher learning. Since the author sits on several committees under the Shariah Judiciary of Malaysia and is one of the permanent trainers for the 'Diploma in Administration of Shariah Judiciary' (DAIJ), a professional qualification essential for the recruitment into the post of *shariʿa* officers, the assumption is that the information given is relatively frank and reliable.

All female judges are graduates of local universities in Law and have obtained a professional diploma from a local university. They had previously served for a number of years in *shariʿa* related posts in the *shariʿa* courts, either as *sulh* officers, research officers or practicing lawyers. They hear all cases except for cases concerning the appointment of the *wali hakim* or *wali raja*. The concept of *wali hakim* refers to the appointment of a marriage guardian (*wali*) to those women who have no marriage guardian among their own relatives. Since the marriage guardian (*wali*) is a male post, women judges are exempted from acting as *wali hakim*.

Are Women Competent Enough to be Judges?

As we have seen above, in 2007, former Chief *Shariʿa* Judge Abdul Rahman disapproved of female judgeships in *shariʿa* courts, arguing that women were not competent enough to be judges due to the complexity of the service and the need to adhere strictly to the Shafiʿi view, which disapproves of women serving as in the judiciary. In April 2015, we asked ten women judges to respond in writing to the statement of this senior judge. We received five responses from newly appointed female judges in the northern states (Perlis and Kedah) where the *mufti* of Kedah had issued a *fatwa* in favour of women's appointment as judges in 2013.

All five women judges disagreed with the statement of the former Chief *Shariʿa* Judge. Women, they argued, are sufficiently qualified in terms of education. One judge, a young woman in her twenties whom I will refer to as Zara, even claimed that the large number of women in institutions of higher education shows that women are more intelligent than men, and therefore more competent to become judges. The mere fact that many women are judges in the civil courts shows that women are competent and qualified enough too. Her colleague, Nor, who was appointed to work as a judge in 2013, added that women judges are generally not only more disciplined and work more

54 One woman judge worked in the state of Malacca, one in Perlis, three in Kedah, one in Pahang, and one in the Federal Territories.

efficiently than their male colleagues, but also have a greater desire to study and acquire knowledge.

While all five women judges felt that women are as qualified as men to become judges or even more so, Aishah, who was appointed as judge in 2013, admitted that the teachings of the Shafiʿi school of Islamic jurisprudence hardly justify the inauguration of women as judges. Although she did not want to claim that she was against the opinion of the majority of classical scholars, she felt that since the jurisdiction of contemporary Malaysian *shariʿa* courts is limited to family law and *taʿzir* cases only, it would make more sense to follow the opinions of the Hanafi jurists instead of those of their Shafiʿi colleagues. According to her, the teachings of the Hanafi school of law are more suitable to keep Islamic law abreast of the demands and welfare of modern society. Damia, a judge in her late twenties, also believed that the Shafiʿi point of view was stricter than the teachings of the other schools of law, and that it limits women to work in specified fields of law only. By contrast, Zara said that the *Mufti* of Kedah had issued a *fatwa* giving women the right to work as judges and, consequently, the opinions of the Shafiʿi jurists were no longer an issue worth discussing.

Although all women judges were of the opinion that women are as competent as men to act as judges, or even more so, in some cases they nevertheless experienced forms of discrimination. Rafidah, who obtained her first degree from the International Islamic University of Malaysia in a double degree programme (LL.B and LL.B in *Shariʿa*), was appointed as a *shariʿa* subordinate court judge in Pahang in 2013. At the start of her service, she experienced difficulty in demonstrating her ability to hold the post, especially among local Muslim scholars and the public. However, such perceptions gradually changed and she now says she enjoys equal treatment, meaning that she no longer experiences prejudicial perceptions from senior male judges and administrative staff about women's ability to serve in the judiciary. When asked about the issue of gender differences with regard to judicial competence, Rafidah argued that allegations insinuating that women are weak and less intelligent are not true; it all depends on an individual's competence, knowledge and integrity.[55]

In the northern state Kedah, women judges reported that they faced discrimination. Following the proclamation of a *fatwa* in 2013 by the *Mufti*, in which he stated that women can work as judges, three women judges were appointed to the *shariʿa* subordinate court in 2015. However, these appointments, Zara argued, did not have the desired effect, as she and her colleagues are not carrying out the duties expected of a judge but instead work as *sulh* and

55 Face-to-face interview, May 27, 2013, in the state Terengganu.

research officers, which means that they have to help the judge in pre-court mediation and research to prepare for judgment. Even as judges, she claimed, we do not have the same rights and opportunities as our male colleagues.[56]

Other female judges had different experiences. In the state of Perlis, which is the smallest state in Malaysia, Khadijah was the first female *shariʿa* court judge. Appointed in 2012, Khadijah had previously served as a registrar under the *Shariʿa* Judiciary of Malaysia, and had been posted to the *shariʿa* court of the Federal Territories. Between her appointment in April 2012 until the interview in April 2013, she was the only lower court judge in Perlis.[57] Only recently has the state appointed another judge, who is male. At present, there are two *Shariʿa* High Court judges and one Chief *Shariʿa* Judge serving in the *Shariʿa* High Court of Perlis.[58] Khadijah further stated that throughout the period she sat as a judge, she had received good cooperation from all staff, male judges, and lawyers. In her view, there is no personal discrimination. The only problem she faces is the bulk of cases that need to be handled, with only two judges available in the lower court. In general, Khadijah stated, the number of cases brought before the *shariʿa* courts has increased steadily year by year, but the number of judges has not increased for several reasons, including the lack of suitable infrastructure and a lack of staff,[59] an issue about which most female judges voiced their concern. With only a limited number of judges available in the lower courts, there is a relatively large bulk of cases that need to be handled.[60] Any improvement will depend on sound finances and the state's level of bureaucracy. After all, the post is a state appointment, where the salary, benefits, and promotion are the responsibility of the state.

Do Female Judges Rule Differently?

In section one, we have seen how Malaysian female-oriented NGOs often argue that it is of paramount importance to have more women working as judges in the *shariʿa* family courts, as they are more sensitive and understanding of female litigants. Judge Damia agreed that female judges are more sympathetic and supportive of the needs of female plaintiffs. According to her, God created women to be more sensitive and capable of dealing with emotions than

56 E-mail correspondence, May 29, 2015.

57 Telephone interview, April 19, 2013.

58 The small number of judges is due to the geographical location of the state, the state's staffing budget, and the relatively small number of cases registered compared to the rest of the states in Malaysia.

59 Telephone interview, April 19, 2013.

60 Telephone interview, April 19, 2013.

men. Women, for example, have more patience than men in dealing with the needs of children. Nowadays, single mothers are capable of raising their children without receiving any maintenance from the children's fathers. This, she claimed, clearly shows that women are more responsible than men. Female judges will have a good understanding of how much maintenance it takes to raise a child, how a mother who has lost custody of her child feels, and, most importantly, what the best interest of the child is. In custody cases, for example, most divorced women do not remarry, as they are afraid of losing custody of the child. Nevertheless, Damia argued, women will discern these feelings when making a decision.[61] Aishah and Alya, however, disagreed, saying that a judge must be free of bias and be able to set her emotions aside. The most important thing is for judges to be qualified and to serve the needs of society.[62] Similarly, Khadijah agreed that gender is not an issue because judges are guided by the Qur'an, the *sunna* (saying and teachings of the Prophet Muhammad), and the law.[63] One senior female federal civil court judge vehemently disagreed with the contention that gender makes a difference in judicial decision-making, arguing that the function of judges is to follow and apply the law.[64] Although this survey does not permit generalizations as to whether female judges judge differently than male judges, it does indicate that six out of the total number of seven interviewed female *shariʿa* court judges disagree with the contention that female judges rule differently than their male counterparts. In general, this small survey provides an interesting insight into the involvement of women in the *shariʿa* judiciary, where they are presiding over all cases involving personal law, ranging from marriage and divorce, through ancillary claims, to criminal matters that fall within the jurisdiction of *shariʿa* subordinate courts.

Even though the number of women as judges is not that significant, certainly not in comparison to the civil jurisdiction, women have been playing important roles in the *shariʿa* judiciary for a long time as *shariʿa* officers. The current receptive attitude among those in legal circles is demonstrated by the allocation of more posts to female judges; moreover, the public at large also seems to be in favor, as discussed in many newspapers where positive references outnumber those of the opponents. This also goes to show that the female judges' competence is a measure of their intellectual capabilities, an

61 E-mail correspondence, April 2015.

62 E-mail correspondence, April 2015.

63 Telephone interview 19 April 2013.

64 This information was obtained on December 5, 2013 in a random interview with a female civil court judge who works at the Court of Appeal level.

area in which they are comparable to their male colleagues. It would therefore seem reasonable to conclude that the issue of gender and the complex nature of legal arguments in classical Islamic law texts no longer form a significant barrier to the appointment of women as judges in the *shariʿa* courts. This applies to their appointment as such: the scope and content of their work differ from state to state. In some states, women perform the same duties as their male counterparts, whereas in other states, such as Kedah, they perform ancillary tasks to benefit a male judge.

4 Conclusion

This chapter on the entrance of women to the Malaysian *shariʿa* judiciary indicates that there is a significant correlation between gender and the interpretation of the classical Islamic texts. Though this situation should not create rigidity in practice, one of the continuing causes of the disagreement among contemporary religious scholars is methodological, that is to say, an inability to relate the theory of justice to practice and to translate divine justice to practical human concerns (Khadduri 1984, 193). The conservatives (opponents) view the Islamic texts as eternal commands, while the modernist (proponents) give weight to social change and the need for wider representation of qualified female judges.

This unwillingness to interpret the text and the law within its context has caused considerable confusion among the public and led the public to blame the *shariʿa* courts for being less sensitive to women and to having a bias against them. Hence, the demand for the appointment of female judges, with the understanding that they could provide a different way of judging, has been viewed as a solution when litigating family conflicts. In another perspective, the appointment of female judges in civil jurisdictions is significant, where, by comparison, the appointment is decided by the qualification, experience, and background of a person, and there are no restrictions on the type of cases to be heard. Thus, the latest development in the appointment of female judges in the Malaysian *shariʿa* courts should be viewed as an attempt to open up the *shariʿa* judicial system to women. However, restrictions remain in a number of aspects. These include: the limited number of judicial post available in the states, which reduces women's (and men's) opportunity for future promotion in the *shariʿa* judiciary; state legislation which explicitly forbids women from occupying positions as judges in the High Courts; and discrimination sometimes experienced from male colleagues or court personnel.

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CHAPTER 7

Tunisian Female Judges and 'The Mobilization of the Emancipative Potential of the Tunisian Family Law'

Maaike Voorhoeve

Introduction

The Tunisian transitional period following the 2010–2011 uprisings has given birth to numerous initiatives to place women in high positions. Examples include: a law imposing a quota for women in the Constitutional Assembly;[1] the appointment of a woman as vice-president of this same Assembly,[2] and of three female ministers in the first democratic government;[3] and a change to the constitution allowing a woman to be elected President of the Republic.[4] Individuals and institutions in Tunisia have welcomed these steps for a variety of reasons: they serve gender equality at the level of employment, they influence patriarchal mentalities, and women are said to secure the interests of other women.[5] This hope or expectation of female solidarity is widespread in the current context of political transition. In fact, in the specific socio-political context of present-day Tunisia, where the rise to power of an Islamist party (Ennahda) provoked a general fear of a reversal of women's rights (Voorhoeve 2015), it is thought that the appointment of women to powerful positions will counterbalance the possibility of such a reversal.

This chapter aims to test the hypothesis of female solidarity, which is defined as women securing the interests of other women, be they financial, social or other. The chapter uses the judiciary as a case study. The case of female judges is useful because, in contrast to other positions of authority, women have

1 Article 16 of Decree 35 of October 23, 2011. The only political party to uphold this quota was Ennahda.

2 Meherzia Laabidi Maïza, a member of the Ennahda party.

3 Sihème Badi, minister of women's affairs for CPR, Mémia el-Benna, minister of environmental issues, independent, and Chahida Ben Fraj Bouraoui, Secretary of State of housing.

4 Article 74 of the 2014 constitution.

5 For instance, Sana Ben Achour and Latifa Lakhdar, as noted at http://www.tunisienumerique.com/parite-hommefemme-a-la-constituante/21733, accessed September 22, 2015.

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formed part of the judiciary in Tunisia for 50 years. In fact, the first woman entered the judiciary in 1968, and by 2010, 29 percent of Tunisian judges were women, some of whom hold positions in the higher courts (Ammar 2010, 137, 139, 157).[6] Women were represented in all legal domains, and occupied high hierarchical positions, including head of chamber (Ammar 2010, 133–137)[7] or even president of a court (Ammar 2010).[8]

In order to examine whether women in the judiciary do secure the interests of other women, this chapter focuses on family law judges. This field of law is particularly suitable to test the hypothesis of female solidarity because family law cases are typically gender-coded, that is: "cases that automatically evoke categorization by gender" (Peresie 2005, 1761). Moreover, in the field of family law, judges have wide judicial discretion: the law is vague on many delicate topics. This allows us to examine whether female solidarity influences their interpretation of the law.

In its examination of whether, through their practice, women in the position of family judge secure other women's interests, this article recalls the writings of the famous Tunisian feminist and scholar Sana Ben Achour, who stated that, unlike their male colleagues, female judges *do* "mobilize the emancipative potential of the law," specifically the family code (Ben Achour 2007). This statement was based on a series of court decisions by women-only family chambers in the Court of First Instance, which deviated from decisions from the Court of Cassation. In contrast to the latter, these chambers granted Tunisian Muslim women the right to marry a non-Muslim foreign man, they permitted a non-Muslim woman to inherit from her Tunisian Muslim husband, and they recognized a foreign court judgment that gave a non-Tunisian woman the right to custody over her Tunisian child.[9] These decisions show that in cases where the law is vague and where the highest court has a solid record in its interpretation, women judges *may* deviate from jurisprudence in a manner that secures the interests of women. In this article, I will examine whether Ben Achour's findings on female judges securing the interests of women litigants

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6 In 2008–2009, 29.5 percent of the appeal judges and 20 percent of the judges working in the Court of Cassation were women, although many of the latter do not actually sit in this court but are sent elsewhere, e.g. the ministry.

7 In 2008–2009, 46.1 percent of heads of chamber in at the Courts of First Instance were women, against 22.9 percent in real-estate courts, 29.1 in appeal courts, and 47.6 percent at the Court of Cassation.

8 In the judicial year 2008–2009, three women were president of a court, namely in the cantonal court of Tunis, the Court of First Instance of Tunis 2, and the appeal court of Tunis.

9 Mixed marriage: CFI Tunis, 29 June 1999. Succession: CFI Tunis, 18 May 2000, 7602. Child custody: CFI Tunis, 8 December 2003, 46026.

can be extended to divorce cases. This is an important question, since the cases described by Ben Achour are rare, whereas divorce cases are very common: divorce-related proceedings account for about 95 percent of the cases dealt with by family chambers in Courts of First Instance.

The academic quest to test the hypothesis of female solidarity builds on Cornwall's article "Myths to Live By" (Cornwall 2007). On the basis of her observations of development programs in Nigeria, Cornwall questions the expectation that women cooperate and mobilize as women to seek greater social justice (Cornwall 2007, 150). In her article, Cornwall shows convincingly how other factors can frustrate female solidarity, such as age, kinship, and financial or romantic competition. Cornwall is certainly not alone in questioning the presupposition of female solidarity: others have also written about factors that interfere with female solidarity,[10] resonating with the post-modern current in gender studies according to which 'sex' as the distinguishing factor is essentialist and socially constructed (Butler 1993). In the present study, I examine whether factors other than sex inform the practices of women in the position of judge, interfering with a possible inclination to secure the interests of other women.

This chapter is also grounded in *Critical Legal Studies* (*CLS*), since close attention is paid to the issue of judges' legal interpretation. CLS argues that rather than being 'bouches de la loi,' many factors other than the law impact on judicial discretion. While one of these may be female solidarity, others are political preferences, race, age, social background, etc. Critical Feminist Theory is where questions of gender and Critical Legal Studies come together. According to this current in CLS, law is white and male: white men produce and apply the law, and as a consequence, it principally serves their interests. In order to change this, Critical Feminist Theory (and Critical Race Theory) argue(s), adjudication should be by women and people of color (e.g. Cole 1999). In response to this theory, numerous academics have tried to test the hypothesis that women

10 Ong (1996) criticizes the discourse of strategic sisterhood between women from all over the world as expressed at the 1995 Conference in Beijing, arguing that ideological differences (communitarianism versus individuality) frustrate such international sisterhood. Afro-American feminist Hooks argues that sisterhood is mainly a middle class white women phenomenon, emphasizing how race and social class may divide women (Hooks 1986, 127). Furthermore, Hooks states that women are also divided by sexism, in that they are themselves influenced by prejudices concerning women (Hooks 1986, 128). Drachman, discussing solidarity between female professionals (here medical doctors) seeking to enter and obtain a position in the profession writes how, within the walls of hospitals, female medical doctors in New England failed to "reconcile their commitment to female solidarity with their desire for professional success" (Drachman 1982, 607).

in the judiciary make a difference, especially with a focus on gender-coded cases. However, the results remained generally inconclusive (Schultz 2010). This article deviates slightly from the studies of Gender and Judging, in that it examines whether women judges' practices are informed by female solidarity or also by other factors.

In order to examine whether women in the judiciary secure the interests of other women, this article analyzes the practices of two female family law judges. I analyze their practices on two levels, namely courtroom behavior and final decision-making. The study is based on data I collected during a 14-month research residence in Tunis in 2008 and 2009 for my dissertation (Voorhoeve 2014). This study does not present general findings on female judges' practices. First, it examines only a specific type of case, namely civil divorce cases. It is possible that female judges adjudicate differently in gender-coded penal cases such as rape, sexual harassment, domestic violence, and adultery. Second, its findings pertain to a specific context, namely Tunisia under authoritarian rule that was characterized by state feminism (Voorhoeve 2014). It is possible that female judges' practices have changed in post-regime-change Tunisia. Third, the data pertain to a specific court, namely the largest court of Tunisia, situated in the capital. It is likely that the practices in rural areas and provincial towns will be different. Nevertheless, the two judges studied here represent 25 percent of the total number of female family law judges in Tunisia (Ammar 2010, 159),[11] which thus permits at least partial generalizations.

This chapter proceeds as follows: section one begins with a description of the method underlying this study. Section two presents the empirical material, focusing on four types of cases. Section three examines why the female judges dealt with the cases the way they did, in terms both of decision-making and courtroom behavior.

1 Method

The data for this study were collected between October 2008 and September 2009. During this period, I spent roughly every weekday at the family division of the Court of First Instance (CFI) in Tunis.[12] I obtained around 100 court rulings,

11 Of the 24 family judges, 16 were men and eight were women in 2008–2009.

12 The Court of First Instance in Tunis was selected because it is the largest trial court in Tunisia, with a large and varied territorial competence, stretching from middle to upper class to lumpen proletariat neighborhoods and including all Tunisians living abroad. A trial court was chosen because it is here that the judges are closest to the litigants and the

handed down by two family chambers, which consisted of women only. I also attended around 450 reconciliation sessions in divorce cases. Most of these were presided over by one of the family judges, who have been assigned the fictitious names Sarra and Sondos. I also interviewed Sarra and Sondos on numerous occasions.

In Tunisia, each Court of First Instance has a family division and each family division has a family chamber. A family chamber is composed of three judges: the family judge, who is the most experienced of the three (he or she is head of chamber and vice-president of the court), and two younger, less experienced judges. The family chamber rules in cases of divorce and paternity. Since Tunisian legislation states that divorce may only take place in court, all married couples who wish to divorce are obliged to go to court. The law also states that every couple who wishes to divorce should attend between one and three reconciliation sessions.[13] In principle, it is the family judge alone who presides over these sessions. Reconciliation sessions in divorce cases take place behind closed doors in the absence of lawyers or witnesses. In these sessions, the plaintiff explains why he or she wishes to divorce, and on which grounds: litigants can file a petition for divorce without grounds, on the grounds of harm, or by mutual consent. The reconciliation judge takes temporary measures with regard to the marital home, childcare and maintenance, which can be amended in the final ruling.

The CFI in Tunis, the capital, has two family chambers instead of one. During my research, chamber one was headed by Sarra, and chamber two by Sondos. Because of the large amount of divorce cases at this court, Sarra and Sondos had the help of six other judges (specialists of civil law, not of family law) to deal with reconciliation sessions, four of whom were also women. This means that ten of the 12 judges dealing with family cases in this court were women.[14] Most of the sessions I attended were presided over by either Sarra or Sondos, who dealt with ten to 15 reconciliation sessions in average per day. Apart from the reconciliation sessions, I observed one meeting behind the

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facts of the case. Since the author's interest lay mostly in the interaction between judges and litigants, a trial court was preferred to a higher court.

13 Divorce by mutual consent and divorce in the absence of children only require one session, the other divorce types require three.

14 This number resonates with the relatively high number of women at the court: instead of the average of 29 percent, 47 percent of the judges at the CFI Tunis were women (Ammar 2010, 134, 157). To compare: in the second largest city of Tunisia, Sfax, this percentage was 18.4 percent and in the southern city of Tozeur it was 11.1 percent.

closed doors of Sarra's chamber, where the three judges deliberated over the files and handed down their final rulings. In between the reconciliation sessions, I talked with the judges, ranging from small talk to interviews on the basis of questions that had been prepared in advance. Apart from these observations and interviews, I analyzed 100 divorce judgments, which were handed down by the family chambers of Sarra and Sondos. These judgments do not concern the same litigants as those ones who attended the reconciliation sessions, because of the time lapse between reconciliation session and the final pronouncement of the divorce.

To qualify the practices of Sarra and Sondos, one important source is the *outcome* of their decisions, which shows how they interpret the vague law. It should be pointed out in this respect that the Court of Cassation, the highest court of Tunisia, has filled most gaps in the law, explaining how the vague articles should be interpreted. This does not mean, however, that the lower judges have no more discretionary powers: since Tunisian law is inspired by the French system, lower court judges *can* set aside the practice established by the highest court. As Ben Achour observed, family judges have done so in the past. If the family chambers in this study follow a precedent that does not secure the woman's interests, this tells us that they did *not* make the extra effort to deviate from case law. As we will see below, the chambers hardly deviated from existing practice, even if this practice did not secure the interests of women.

Judicial *argumentation* is another source of information for our study. It is the way in which judges justify or explain their decision in their written court ruling. Judicial argumentation can be either concise or elaborate. An example of concise reasoning is when a judgment is presented as following the facts and the law, in the form of a syllogism (premise 1: facts of the case + premise 2: the law = conclusion: legal decision) (Feteris 1997). Most decisions handed down by Sarra and Sondos's chambers are drawn up in this way, indicating that they handed down these judgments as a matter of routine (Posner 2008). They did not take the time or exert extra effort to search for additional arguments in order to come to a conclusion different from the one that, in their minds, followed logically from the facts and the law or jurisprudence. In some decisions, however, the judges in this study employed elaborate argumentation, meaning that they mentioned additional arguments to show that the syllogistic model needed modifying because it did not lead to the outcome that they wished for (Perelman and Olbrechts-Tyteca 1971). The distinction between concise and elaborate reasoning is useful in this study because it indicates the cases in which Sarra and Sondos made an effort to bring about a result that they believed was 'just,' which is indicative of their female solidarity.

Apart from outcome and argumentation, another informative source to qualify the practices of Sarra and Sondos is their *courtroom behavior*. We can observe judges' social interaction with litigants especially in reconciliation sessions. With respect to social interactions in general, Goffman distinguishes between ceremony and substance, namely *what* one does and *how* one does it (Goffman 1982). In this study, the 'what' is the judgment, and the 'how' is the courtroom behavior or the interaction with litigants. The ceremonial aspect in this study can reflect a concern for women's interests, for example by listening patiently and directing them to resources that can empower them; or irritation, impatience, or even hostility. In her study of courtroom encounters in a lower criminal court in the US, Mileski distinguishes four 'manners' or attitudes of judges towards criminal defendants: good-natured (courteous, welcoming, supportive); bureaucratic (businesslike, routine, impersonal); firm or formal (conveys moral authority); and harsh (nasty, abrasive, contemptuous) (Mileski 1971, 523–525). Ptacek mentions a fifth attitude, which he calls condescending or patronizing (with the use of situational sanctions of reprimands, warnings, and lecturing) (Ptacek 1999, 98). A characterization of the courtroom behavior of the female judges in this study is useful because it tells us a lot about female solidarity. If, for instance, judges show irritation when a woman accuses her husband of misogynistic behavior, we can consider this as an indication that female solidarity does not influence their courtroom behavior.

2 Practices: Female Solidarity?

This section describes the practices of Sarra and Sondos in four fields of gender-coded family cases, namely damages to the wife upon divorce, divorce for harm on the grounds of domestic violence, adultery, and failure to fulfill marital duties. The reason for this selection is that these cases were particularly gender-coded. The three levels mentioned above are considered: the outcome of cases, judicial argumentation, and courtroom behavior.

Damages to the Wife upon Divorce by Mutual Consent

According to the personal status law of 1956, the court pronounces divorce in three cases: on the demand of both spouses (by mutual consent), on the demand of one of the spouses without grounds, or on the grounds of harm. The law states that in case of divorce due to harm, the defendant pays damages, while in cases of divorce without grounds, it is the plaintiff who pays. If the husband is the one who receives damages, he is only entitled to moral damages resulting from the divorce, while the woman also receives material

damages (all Article 31). The law is silent on the payment of damages in cases of divorce by mutual consent, leaving room for judicial interpretation. The Court of Cassation has decided numerous times that no payment of damages should be made in cases of divorce by mutual consent. This practice protects the financial interests of the wife if it is she who files the petition for divorce by mutual consent, because she will not be obliged to pay damages.[15] If it is the husband who files for divorce, however, it does not protect the financial interests of the wife.[16] The judges at the CFI Tunis followed this practice: in the 25 decisions I collected on divorce by mutual consent, on the demand of the wife or of the husband, not one grants damages to the wife in cases of divorce by mutual consent. This shows that the family chambers at the CFI Tunis did not deviate from case law to secure the wife's financial interests.

All 25 decisions are concise, drawn up according to the syllogistic scheme, and remain entirely silent on damages. No decision was obtained in which the court explains why, despite the wife's financial interests or despite the specific circumstances of the case (e.g. that the wife had no income, that the wife had given up her job in order to take care of the family, that the husband had offered to pay damages, or that the couple had agreed on the husband paying compensation), damages could not be granted, adhering to the highest court's practice. This means that the judges did not make the extra effort to explain why they did not secure the wife's financial needs in cases of divorce by mutual consent; they handed down their decisions as a matter of routine, and the decisions do not reflect any solidarity with the wives in question.

The courtroom behavior of the two female family judges in reconciliation sessions concerning cases of divorce by mutual consent confirms this finding. What is more, it shows that Sarra and Sondos discouraged couples from changing their petitions to facilitate the payment of damages. In a number of cases where the couple had agreed that the man should pay compensation, both Sarra and Sondos (independently of each other) told the couple that this is forbidden. They did not explain how they should establish this, namely by changing their petition into divorce without grounds on demand of the husband. In cases where the couple insisted on paying, the judges hinted at how to proceed, but instead of explaining it well, or encouraging them to do so in order to secure the wife's financial interests, both judges displayed irritation and impatience. In this way, both family judges, independently of each other, signaled to litigants that it would possibly not be in their interest if they were

15 In this way, the practice forms a break with the pre-1956 past, where the wife was to pay damages in cases of divorce by mutual consent (the Islamic *khul'* divorce).

16 Unless waiving the wife's financial rights is considered a way of women empowerment.

to change their petition. As a result, litigants, who did not understand why the payment of damages was forbidden in the first place, displayed an incomprehension of the divorce process and did not change their petition, leaving the woman without compensation.[17] The judges' behavior here frustrated the woman's financial needs. This practice is surprising in the light of economic reality: statistics show that although 27 percent of women had a job in 2010, men continued to be the main breadwinner, meaning that it was difficult for women to maintain themselves after a divorce (ITUC CSI IGB 2011).[18]

Domestic Violence

Male and female litigants have a strong financial incentive to file a petition for divorce for harm, as it grants damages to the petitioner. As the family code does not define 'harm' (*darar*), the article leaves much room for judges to interpret this term, and to decide what behavior within marriage is acceptable and what is not. The Court of Cassation has been very active in setting solid precedents on divorce for harm. The principal grounds for harm as defined by this court are non-payment of maintenance by the husband, violation of the duty to cohabit, adultery, and domestic violence. As the family code is equally silent on the matter of evidence, it leaves wide discretion to judges to define how harm (e.g. domestic violence) should be proven. Here, too, the Court of Cassation has set numerous precedents.

With respect to domestic violence, the Court of Cassation decided that a single 'attack with violence' (*i'tida' bi-l-'unf*) does not justify divorce for harm on the basis of domestic violence.[19] Domestic violence, so the court argued, should be proven with a penal sentence, while a medical certificate and a written deposition from the police testifying to the physical consequences of the violence are insufficient (Voorhoeve 2012).[20] In this way, the Court of

17 Of course, nothing could keep the husband from paying anyway, but since this would not be mentioned in the ruling, the woman could not enforce it as a legal obligation.

18 In 2010, 27 percent of Tunisian women were active on the labor market, as against 74 percent of the men. These statistics hide informal paid labor.

19 Interview with the head Public Prosecutor at the CFI Tunis, 13 May 2009. However, no decisions have been found that reflect this practice.

20 This means that a victim of domestic violence needs to file a complaint at the police station (a regular police station or the special public prosecutor for such cases at the CFI Tunis), after which the case lies in the hands of the public prosecution, who decides whether to prosecute or not. If so, the prosecutor brings the husband in for a hearing, and when the prosecution has collected sufficient evidence, it transfers the case to the penal chamber of a CFI. Once the CFI has handed down a sentence, the victim can file a case for divorce for harm.

Cassation made it more difficult to obtain divorce for harm on the grounds of domestic violence than to sentence someone to prison on the same grounds. The Penal Code punishes domestic violence with two years in prison and the payment of damages of 2000 Dinars (about EUR 1000), without distinguishing between a single act of domestic violence and repetitive acts,[21] and penal judges may content themselves with a medical certificate and a written deposition from the police to send someone to prison.[22] The family chambers at the CFI Tunis followed the practice of the Court of Cassation: the only judgment collected granting divorce for harm on the grounds of domestic violence mentions that the wife had obtained a penal sentence. Moreover, the ruling points out that it concerns a severe case of domestic violence: it talks about recurrent and severe violence (*'unf shadid*) against a woman during her pregnancy. I did not obtain a single decision where the court rejected the demand.[23] The reason for this is that in cases where the petition could not be backed with the required evidence, the judges had already encouraged the woman in the reconciliation session to change her petition into divorce without grounds, meaning that cases where the violence could not be proven with a penal sentence never attained the judgment stage. As a result, no information is available on whether the rulings display female solidarity, for instance by stating that despite the woman's financial interest in obtaining divorce for harm in a case of domestic violence, they simply *could not* grant the demand in light of practice from the Court of Cassation.

The courtroom behavior of the two female judges in reconciliation sessions gives us more information about how the judges dealt with the wife's interests. One reconciliation session was observed in which the wife, who had come alone because her husband was in prison, showed a penal sentence to the court. She also showed pictures of her injuries, demonstrating that her husband had broken her skull. In this session, the family judge responded supportively, displaying sympathy, and suggesting that the demand would be granted. In all the

21 Article 218 of the Tunisian Penal Code qualifies violence committed onto one's spouse as an aggravating circumstance, doubling the sanction. This is the result of an amendment dating from the year 1993 (Law 93–72 of July 12, 1993), which, together with the abolition of the wife's duty to obey her husband in Article 23 PSC, was part of former president Ben Ali's state feminism.

22 Interview with the head of chamber of one of the penal chambers at the CFI Tunis, 2009.

23 Three rulings were obtained where the wife had filed a combined petition, namely on the grounds of harm for domestic violence and other grounds; in these rulings the family chamber granted divorce for harm on the other grounds (non-payment of maintenance and the husband's refusal to live together).

other sessions where a wife accused her husband of violence, such evidence was not produced, and the judges' response was detached and formal, rather than comprehensive and interested. If a woman simply mentioned domestic violence, the judges would not react at all. If the woman made clear that she wished for a divorce for harm on these grounds, they would tell her that she needed a penal sentence. If a woman showed the court pictures, a medical certificate, and a written deposition, both judges would say irritably: "Show me a penal conviction." This was also true in a session in which a husband confessed before the judge that he had attacked his wife with a chair. Although a confession during a reconciliation session is sufficient evidence and there is no longer a need for a penal conviction, the judge was not impressed and did not make a note, because the incident had only occurred once. I observed that the women did not grasp that the documents that they produced were insufficient. They did not understand what was being asked of them, and they expressed feelings of injustice. The judges, however, did not show sympathy for such feelings of unjust treatment by the judicial system. They did not take time to explain what they were asking from the plaintiffs, how they should proceed, and why it was necessary to produce more evidence in the form of a penal sentence. In these cases, the judges' manner was impersonal, with minimal involvement, and affectively neutral.

I asked Sarra and Sondos independently why they proceeded in this way, and they both told me that this is because most women lie about domestic violence, since it has financial benefits. Moreover, both explained, even if the medical certificate, pictures and the written deposition proved violence, it was impossible for a family judge to ascertain who the perpetrator was, which is why they left that task to the penal chamber. As such, their practice with respect to domestic violence does not reflect a lack of female solidarity: they did grant divorce for harm on the grounds of domestic violence, and they were sympathetic towards the woman who had obtained a penal sentence. Their practice reflects a lack of female solidarity towards women who could not produce the necessary evidence or who were complaining about a single act of violence that did not recur.

In light of the financial benefits of divorce for harm, it certainly makes sense to ask for evidence (the financial benefit forming an incentive to lie about such matters), and as such, the judges' practice does not refute the hypothesis of female solidarity. However, their opinion that most women lied about this issue was not in accordance with reality: domestic violence is a widespread phenomenon in Tunisia. According to the *Association Tunisienne des Femmes Démocrates*, one in four women has suffered from physical domestic violence

at least once in her life (ONFP/AECID 2010, 52).[24] In light of these statistics, the judges could have made an exception in cases where women produced the same evidence as was required in penal cases, thus deviating from court practice. Alternatively, if they felt bound by jurisprudence, they could have given women the benefit of the doubt in their courtroom behavior, by taking time to explain how they should proceed or by using the court hearing as an opportunity to make it clear to the man that no matter what the circumstances were, wife battering is not allowed and is punishable by law.

Adultery

Although the family code does not mention faithfulness as a marriage requirement, the Court of Cassation defines adultery as harm and, hence, a ground for divorce. This practice is in line with the fact that the penal code forbids adultery (*zina* in the Arabic translation), which is punished with five years in prison.[25] The penal code does not define *zina*, leaving room for interpretation. In divorce cases, the Court of Cassation defines as adultery: all legal accusations of adultery that are proven with a penal sentence (as in cases of domestic violence); adultery that is not proven with a penal sentence; and adulterous behavior that does not consist of sexual intercourse (both termed *khiyana*, disloyalty, rather than *zina*). Sarra and Sondos followed this practice. Nevertheless, the family chambers had a considerable degree of discretion in the qualification of the facts, because they did not need a penal sentence as evidence. For this reason, it is interesting to look at the outcome of the cases they treated.

Of the six cases on divorce for harm on the grounds of adultery, two were initiated by the wife. One of these petitions was rejected for procedural reasons,[26] and the other was granted. In this case, the wife's demand was backed by a penal sentence, and the husband was living with another woman as if they were married. Of the four cases where the husband had filed the petition, the

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24 Findings of the project « Promotion de l'équité de genre et de prévention de la violence à l'égard des femmes » carried out by ONFP/AECID.

25 The Penal Code was introduced by the French in 1913 and is based on the French Code Napoléon. Under the French protectorate, only female adultery was punishable by law, but this was extended to both sexes in 1968.

26 The plaintiff had already obtained a divorce decision abroad, making the Tunisian court incompetent to hear this case. Since many European countries no longer qualify adultery as grounds for granting damages, some Tunisians living abroad prefer to file a petition in a Tunisian court in a case of adultery.

court granted all. One case concerned prostitution which was proven with a penal sentence. The other case files did not contain a penal sentence: one case concerned explicit e-mail conversations with another man and two involved sexual relations with another man. The difference in numbers (four against women and one against a man) and in the concrete accusation (living with another person as if married versus flirty conversations with another man) give us an indication that the judges ensured a larger interpretation of adultery when it concerned a woman, but this cannot be definitely ascertained.

A study of the judicial argumentation in these rulings suggests that the decisions on demand of the husband were more elaborate, showing that the judges made an extra effort to bring about the result they deemed just. In these rulings, the family chambers invoked extra-legal considerations justifying their conclusion, referring to duties of protecting the husband's honor and the wife's obligation to chastity. One of the decisions on the wife's adulterous behavior can serve as an example here. In this case, the husband had not obtained a penal conviction because of a procedural defect in the police hearings (the absence of a cross-examination of the two suspects). The divorce ruling, however, invokes the police hearings to grant the demand. It stated that a family law case requires less evidence than a penal one (note the difference from cases of domestic violence). In contrast, in the case of divorce on the wife's demand, the reasoning was concise and syllogistic. That the two women-only family chambers made an extra effort in cases of the wife's adulterous behavior suggests that it was especially in those cases that they were eager to bring about a result that they found just, namely to sanction a wife for her adulterous behavior, which was confirmed by their courtroom behavior.

I observed numerous sessions where men accused their wives of transgressive behavior with other men. Sarra and Sondos listened to long stories about a wife's interaction with other men and reprimanded the woman. For instance, in one session, a lower middle class, middle-aged man accused his wife of being in touch with another man by text messaging. He recounted a long story about an incident where the couple was driving in their car and the wife continuously received and sent text messages. At a certain point, the wife got out of the car and walked a few meters away, which the husband took to imply that she was hiding her action from him. He took her telephone away from her to discover what was going on, and found a text message in which a man asked his wife to meet him in person. He confronted her, to which she replied that she did not know the man, that he was an employee in the telephone company where she had bought her SIM card, which is how he obtained her number, and that he had started sending her text messages to which she never replied. The husband continued his story by saying that in order to verify his wife's

story, he had offered her a new SIM card, to see whether the texting stopped. But the texting continued, so the man was sure that it was indeed she who had initiated contact with the man. Sondos, who was acting as the reconciliation judge in this session, was very angry with the woman. She reprimanded her, being very firm in her manner, engaging in a moral discourse and telling the woman that her conduct was not 'normal.' No such behavior was observed when it was the wife who accused her husband: most women would merely mention adultery in a long list of accusations, and the judges would not ask her to elaborate. The judges were also interviewed about a case concerning a man who filed for divorce for adultery on the grounds that his wife was sending flirty emails to her childhood sweetheart who was living in France. Here, too, one of the judges in particular qualified this as 'not normal.' More on this case will be found below.

The practices described do not reflect a lack of female solidarity since the court granted divorce on the grounds of harm in the case where the husband was living with another woman. However, if the wife merely mentioned adultery as one of many bad habits, the judges would make no effort to help the wife obtain a divorce for harm on these grounds. If, by contrast, it was the man who accused his wife of adulterous behavior, be it adultery or flirtatious email conversations, the judges made no extra effort to secure the wife's (financial and social) interests, instead making her pay damages. They did not apply the same strict evidential requirements as they did in domestic violence cases, and even made an extra effort to justify and explain their ruling against the woman.

Neglecting Marital Duties

Article 23 on marital duties states:

> Both spouses should treat their spouse with care, live on good terms with him or her, and avoid harming him or her. The two need to fulfill their marital duties in accordance with custom and practice ... The husband, as the head of the family, should maintain the wife and the children in accordance with his means ... The wife should contribute to the household costs if she has the means.

It is clear that the principal financial duties lie with the husband, which is further elaborated in Article 39, which states that the judge pronounces the divorce if the husband has not paid maintenance after a two-month delay. The law is thus relatively clear on the fact that non-payment of maintenance qualifies as harm justifying divorce, while it is not clear on the evidence requirements. The Court of Cassation qualifies harm as non-payment of maintenance proven by

a penal sentence against the husband, issued by the canton court. The family chambers of Sarra and Sondos followed this practice: of the six cases collected, the court granted four petitions in which the wife had obtained a penal sentence.[27] While three of these are more or less concise, the fourth judgment is particularly elaborate. The case concerns an unemployed man, and thus, the family chamber makes an extra effort to bring about a result it deems 'just,' in this case a divorce for harm regardless of the specific circumstance of the case where the husband was unemployed.

In their courtroom behavior, the judges dealt with cases of non-payment of maintenance in a routine way. They asked the husband how much he earned, which he had to prove with pay slips. The judges displayed great irritation to husbands who were unable to maintain their families, regardless of these men's personal circumstances. Despite the context of mass unemployment, the judges showed neither comprehension nor sympathy. Through their unpleasant behavior towards the men, the judges' behavior was indirectly sympathetic towards the women, in that they defended their right to maintenance.

While the law is clear on the husband's marital duties, it is less so with respect to the wife's. Until 1993, Article 23 obliged the wife to be obedient to her husband. This left room for interpretation, since the law did not define obedience nor the consequences of its violation. The Court of Cassation repeatedly decided that obedience meant living in the marital home, that is: in the house where the husband wished to live. If a wife abandoned the marital home, the court suspended the husband's maintenance duty and granted him the right to divorce for harm. The Court of Cassation continued this practice even after the obedience clause was abolished in 1993. The family chambers at the CFI Tunis followed this practice: they qualified abandonment of the marital home as a violation of marital duties, obliging the wife to live under one roof with the husband. However, of the 11 decisions collected, the court granted only two such demands. One reason for rejecting a demand was lack of evidence: the court followed the practice of the Court of Cassation to require three summons by a

27 It appears that compared to cases of domestic violence, it was easier to obtain divorce for non-payment of maintenance, primarily because the penal sentence was easier to obtain. Out of the five rulings on petitions for divorce for harm on the grounds of non-payment of maintenance, the court granted three. This difference is probably due to simple court proceedings in the penal case: a single judge at the cantonal court decides these cases, as opposed to the three-person penal chamber at the Court of First Instance, which rules on domestic violence and adultery. The fieldwork also supplied the impression that filing a complaint with the public prosecutor for non-payment of maintenance is much more normalized than filing a complaint on domestic violence or adultery.

bailiff, sent to the marital home and returned unopened, proving that the wife was no longer living there. Another reason to reject the demand was that the wife had a good reason to leave, such as domestic violence or non-payment of maintenance.[28] The decisions suggest that the family chambers were reluctant to grant a demand for divorce for harm on the grounds of the wife's abandonment of the marital home, not because they did not subscribe to the duty to live together, but because they were suspicious of husbands filing for divorce on these grounds. This was confirmed in reconciliation sessions, where Sarra and Sondos's attitudes to men accusing their wives of abandoning the marital home reflected suspicion. Their first question was: "Are you sure she did not have a reason to leave you?" In this way, they secured the wife's interest of being able to abandon the marital home in case of mistreatment. That the judges did consider it the wife's duty to cohabit with her husband became clear in cases where one of them wished to move house: in such cases, the judges adhered to the principle that the husband decided where the marital home was, insofar as this was in the best interest of the family and especially the children.

Of the two cases where the husband filed for divorce as he wished to move house and the wife refused to follow, the court granted one divorce on the grounds of harm. In this case, the wife's defense was that they owned their home and could not afford to pay another rent, that their children went to school close to their former residence, and that she was close to her parents. The husband argued that the very fact that they were living in the same apartment building as his wife's parents had been exactly the reason to move since her care for her parents interfered with her duties as a wife and mother. The decision granting the husband's demand is elaborate, showing that the women only family chamber exuded extra effort to bring about the result it deemed just, obliging the wife to pay damages for causing a divorce by unjustly refusing to follow her husband. The decision confirms that these women only family chambers ruled that a woman's duties as a wife and mother take precedence over her personal wishes as to where to live and how much time to spend with her parents. That the wife's interests are subsidiary is confirmed by the ruling where the court rejects the husband's demand: the ruling stresses that the move harmed the interests of the children who would be obliged to move schools; the interests of the wife are not mentioned.

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28 In contrast to cases where a wife filed a petition for divorce for harm on the grounds of domestic violence or abandonment of the marital home, the chambers did not require evidence for this if it was a defense: if the wife presented violence or financial neglect as a justification, the judges rejected the husband's demand.

I observed one reconciliation session where the judge reprimanded a wife for giving priority to her job over her family life. In this case, the husband had found a new job in a different city. As his wife refused to move, he had filed a petition for divorce for harm on the grounds of disobedience, stating that the marital home was where *he* wanted it to be. In the reconciliation session, the woman explained why she did not want to follow: she had her own job as a nurse in Tunis, and she did not want to give up her job to follow her husband. The family judge in this case listened to the woman and showed comprehension, asking questions about how long she had been a nurse, where she was working, etc. In the end, however, the judge told the woman that she was to follow her husband, suggesting that the wife's wishes with respect to her career were not sufficiently important to be taken into account here. In this way, the female judge did not secure the wife's interests of combining her work with her relationship. There was no room for compromise: the husband had moved house and so the wife had to follow him, even if that meant that she had to give up her job.

In this context where the female judges did not secure the wife's interest to attach as much importance to her career or her parents as to her marriage, it is important to note that the judges in our study did not qualify the wife's employment as inherently disobedient. They did point out, however, that women should make sure that their extramarital activities did not interfere with their duties as a wife and mother, for instance by working part-time or taking a *bonne*. Therefore, in the cases where a husband complained about the wife's employment being time-consuming and interfering with her duties as a wife, the judges took it seriously. Although I obtained no court rulings where the family chambers granted divorce for harm on the grounds of a wife's neglect of the household duties, their courtroom behavior did indicate that such was a violation of a norm. For example, in one reconciliation session presided over by Sondos, the husband complained that his wife did not spend sufficient time at home and with the children, since she worked three days a week and also attended a one-week business trip once a year. In another, presided over by Sarra, the husband complained that his wife left at six in the morning and returned at six in the evening, neglecting her household duties and her husband. Sarra and Sondos listened and asked questions as to what kind of job the wife had, how many hours she was working, etc., and how she had arranged for childcare and household duties. They also asked how much both were earning to establish whether the wife's income was necessary for the financial interests of the nuclear family. They made clear to the women in question that a wife's job is only justified when, first, it serves the interest of the nuclear family, and, secondly, when the wife has secured her household

and caretaking duties with one or more *bonnes*. The judges put the women in a position to justify their job in financial terms and they urged them to reduce the working hours or give up their jobs completely. The judges did not consider that the wife attached importance to her career or that she simply enjoyed a professional life as an argument for her having a job. This suggests that the judges did not secure the interests of married women who have other aspirations than being a good wife and mother.

3 Female Judges' Practices Explained

The practices described above show how in four types of gender-coded cases—namely damages, domestic violence, adultery, and marital duties—Sarra and Sondos's practices were securing the interests of other women if a wife could prove domestic violence with a penal sentence; if a man was living with another woman as if he were married; if a wife had abandoned the marital home because of (the presumed reason of) violence or non-payment of maintenance; and if the husband did not pay maintenance. The following paragraphs focus on the cases where they did *not* secure the interests of women.

The judges did not secure women's interests in cases where a husband wished to pay damages in a divorce by mutual consent; where a wife complained about domestic violence without showing a penal sentence; where a husband complained about adultery or adulterous behavior; and where a wife attached importance to her job or something else (her parents) which, according to the husband, interfered with her duties as a wife and mother. In these cases, the judges did not use their discretionary powers, either in their decisions or their courtroom behavior, to counter the patriarchal structure underlying family relations in Tunisia. In these cases, female solidarity did not inform their practice, and as such, the hypothesis that women in powerful positions such as the judiciary secure other women's interests can at least partly be refuted.

The question arises as to why female solidarity did not inform their judicial practice in these cases. Had they simply internalized patriarchal conceptions of male-female relationships? Did class differences or other differences between the judges and female litigants intervene with solidarity? Did they consider it part of their professional role to adjudicate in a certain manner? Did they feel that if they were to display solidarity with their fellow women, they would not be accepted as judges, that it would be harmful to their career? Or were there other factors that interfered, such as their workload?

In order to examine why female solidarity did not inform the practices of Sarra and Sondos, I distinguish between two categories of cases. In the first category are the cases of domestic violence and divorce by mutual consent. In the second are the cases of marital duties and adultery. The reason for this distinction is that in the first category, the judges had a distant manner, and their decisions were syllogistic. In category two, however, the judges were more emotionally involved and applied more elaborate argumentation.

Syllogistic Judicial Argumentation and Distant Courtroom Behavior

In cases of divorce by mutual consent and divorce for domestic violence, the judges' courtroom behavior was firm and distant and resembles what Mileski calls the 'bureaucratic' manner, which she describes as "a routine, bureaucratic, businesslike way towards [the litigant], a manner that at least borders on the impersonal. [...] the personal involvement of the judge remains minimal. [She] is routine and affectively neutral in [her] outward behavior" (Mileski 1971, 524).

Mileski found that in a trial court in the US, over three-quarters of the cases were dealt with in this manner, where judges remained personally detached and affectively neutral. The findings in Tunis were similar: in sessions concerning divorce by mutual consent, Sarra and Sondos were disinterested in the details of the case and instead of hearing them out, or advising them on other possibilities or procedures, they became irritated when litigants wished to recount their problems. The same was true of the bulk of sessions where the wife complained about domestic violence, except in the single session where the woman entered a penal sentence into the proceedings. In the same vein, the final court rulings in these cases revealed a restrictive interpretation of the law and a concise and syllogistic judicial argumentation.

The way the judges dealt with these cases resonates with Posner's arguments in his book on how judges think. He writes that at trial courts, judges merely function as a machine: trial courts, especially large ones, are bureaucracies, where the large part of judges' practice is a matter of routine (Posner 2008). According to Posner, this is due to the judges' heavy caseload: one obvious way to deal with heavy caseloads is to deal with cases rapidly. And indeed, the caseload at the family division of the CFI Tunis was particularly heavy since the judges were working in the largest trial court in Tunisia. On an average morning of reconciliation sessions, they received between ten and 15 couples four mornings a week, meaning that they had an important incentive to deal with litigants rapidly. The same was true of the final decision. After the weekly plenary session where each family chamber dealt with around 100 cases in a courtroom cramped with lawyers and litigants, they divided the pile of files

between the three of them (the three judges of one family law chamber), which they took home to study. Each chamber had weekly reunions to hand down the court rulings, where I observed that they dealt rapidly with the majority of cases before handing down concise syllogistic judgments.

Their handling of the cases of divorce by mutual consent where the husband wished to pay compensation best demonstrates the influence of workload. Both Sarra and Sondos tried to convince litigants to file a petition for divorce by mutual consent, officially because it was in the best interest of the children, but they admitted it was mainly because it reduced their workload considerably. In cases of divorce by mutual consent, couples needed only one reconciliation session instead of three, which was an important reason for the judges to prefer this type of divorce, since reconciliation sessions took most of their time. But even more importantly, in cases of divorce by mutual consent, the spouses would agree on the terms of the divorce themselves, specifically whether the wife could stay in the marital home, and the amount of child maintenance. Establishing the amount of child maintenance and, in cases of divorce without grounds, damages to the defendant, was especially time consuming: the judges needed information on the financial situation of husband and wife, including pay slips, for their calculations, and as many people did not have official jobs, they did not have ordinary pay slips. Moreover, accusations of fraudulent pay slips and other documents (bills for rent, gas and electricity, etc.) were frequent. Thus, as a husband's wish to pay compensation would involve amending the petition into a petition of divorce without grounds, which would significantly increase the judges' workload, the judges routinely discouraged divorcing couples from following this course. Pragmatic considerations informed the way they dealt with the litigants. Their concern about their workload took precedence over solidarity with female litigants who, as a consequence, missed out on financial compensation.

Workload also affected the way they dealt with court cases concerning domestic violence. For Sarra and Sondos, cases of divorce for harm on these grounds were bureaucratic procedures: if a penal sentence was available, they would grant the demand of divorce for harm; if there was not, they would reject it. In that way, they avoided lengthy procedures with documents proving the violence, witness declarations, lawyers' pleas in rebuttal, and so on and so forth. The judges thus reduced the workload involved with cases of divorce for harm. Indeed, cases of divorce for harm are more complex and lengthy than other divorce cases, principally because it is only in these cases that litigants tend to hire lawyers. This complicates matters for the judges for two reasons: first, since both lawyers have two rounds of written pleas, which are often quite substantial, the files are much thicker than other case files. Second, if lawyers

are involved, there is a good chance that one of them would appeal, meaning that there is a higher probability that judicial errors will be caught. By dealing with domestic violence in this bureaucratic manner, Sarra and Sondos were successful in reducing the workload in this type of harm cases.

That Sarra and Sondos appeared emotionally detached in these cases means that they could detach from the "moral outcry" in society caused especially by domestic violence (cf. Mileski 1971, 525). In the years 2008–2009, both domestic violence and women's poverty were much debated, in the sense that they were commonly seen as a 'social problem,' something that society had to deal with. Specifically, the women's rights organization Association Tunisienne des Femmes Démocrates was very active in bringing these topics to the public's attention. Sarra and Sondos, however, did not uphold these moral sentiments, at least in their outward behavior towards litigants and in their decision-making. This, I argue, is best explained in terms of professional detachment and resembles medical doctors' treatment of patients: the greater their workload, the less they can afford to be emotionally involved with each individual patient's case.

Extensive Judicial Argumentation and Involved Courtroom Behavior

In reconciliation sessions in which gendered norms on chastity and role division within marriage were concerned, Sarra and Sondos' courtroom behavior was very different: they allowed litigants to talk, showed interest and involvement, and even asked questions. Also, most court rulings that were not drawn up syllogistically concerned adulterous women and wives refusing to follow their husband who was moving house. Instead of being driven by the aim of reducing their workload, the family judges and chambers made an extra effort to bring about the result that they aimed for. This suggests that for these judges, the gendered norms on chastity and on the role division within marriage were stronger than any aim to reduce their workload or to secure women's interests. In fact, the judges seemed the opposite of emotionally detached where these topics were concerned, and these are both topics that provoked "moral outcry," as Milesky puts it, in contemporary Tunisian society.

The case of a young mother who initiated a divorce can serve as an example. When the woman approached Sondos after a reconciliation session to ask when she would be able to remarry, Sondos was very eager in expressing her disapproval: once the woman had left the room, she turned to me to complain about "such women" who do not "take marriage seriously" and simply file for a divorce once they have met another man. The case described above concerning a married woman who had sent explicit emails to her childhood sweetheart provoked similar reactions: when Sondos told me about this case, she

became emotional, raising her voice and searching for signs of equal disgust on my side. She insisted on showing me the transcripts of the email conversation in question, and while I was flipping through the printout of the emails I heard her say that "a woman like this" should not be allowed to raise children. Because of her outrage, Sondos was determined to award child custody to the father, which is significant: during the research period in the courthouse I encountered hardly any cases in which the judges considered relinquishing a mother's custody of her children. The reactions with respect to a woman's household duties were similar. The case of a working class woman who left the marital home at six in the morning to return home only 12 hours later can serve as an example: I remember my surprise when Sarra appeared very upset by this lack of responsibility for the household, whereas the wife had pointed out during the reconciliation session that her husband did not spend any money on the household and that she had to pay all the bills. A similar attitude could be observed in a case where the husband filed for divorce because his wife refused to move with him to the countryside. In this case, the husband had found a job on farmland far from the capital, whereas the wife claimed that as she was originally from La Marsa, a suburb of Tunis, she could not be obliged to leave the city. "But you're *from* the countryside!" Sarra exclaimed with great frustration, disregarding the woman's desire to live in the city. The question arises as to why the judges were so emotional about these topics and not about, for instance, domestic violence.

In private conversations, I observed that the topics of female chastity and gendered role divisions within marriage played a major role in the private lives of these female judges. In fact, in private conversations in between the sessions, the judges continually talked about how they combined their professional life with their duties as a wife and mother. Sondos, who was living alone (her husband lived abroad for work) with three sons between the ages of six and 14 and no help, had put a halt to her social and private life: she did not see any friends, and, as she pointed out to me, her only bedtime reading was limited to bedtime stories for her children. She was certainly ambitious, but considered her husband's career to be more important than hers: when her husband had been transferred to Germany, she had stepped out of the profession for three years to follow him. She told me how terrible it had been for her, how sad she was not to work and to be far away from her family, but that it had been a matter of marital duty to make this compromise between having a career and a family. Sarra's story was similar, although her situation was slightly different. This judge also had three children but since she was ten years older than Sondos, all but her youngest son had married and left the house. Sarra's husband was retired and helped out at home, together with two *bonnes* who

cleaned, did grocery shopping, and cooked, allowing Sarra to sustain a social life and spend more time in court. Nevertheless, she did not invest much in her career. Sarra had been a family law judge for over 14 years, and numerous times had refused promotion to different functions and higher courts, as she did not find this important: what was essential to her, she said, was her children's happiness and success in life, it was their turn now, not hers. In this way, both judges abided by the same norms as the ones that they imposed on female litigants.

Contrary to the topic of gender roles, chastity was not easily discussed, at least not by Sondos. Sarra, however, did talk about this quite often, showing that it played an important role in her personal life. She confided to me that her husband was the first and only man in her life, whereas he had not always been faithful. She also said numerous times that: "In Tunisia, a man should never know that his wife was cheating on him because, unlike a husband's unfaithfulness, this is not accepted in our society."

In the conversations about their private lives, it became clear that the gendered norms on the role division within marriage and on chastity played a significant role in the lives of these judges, much more so than topics of domestic violence or financial benefits after divorce. This probably explains why they were far from detached from the moral outcry in society where these topics are concerned. Instead, they were eager to sanction violations of norms that they were so determined to abide by in their private lives.

4 Conclusions

In the Tunisian transitional period following the 2010–2011 uprisings, there have been numerous initiatives to place women in high positions; women are part of government and parliament, and a woman can be elected president. Tunisians, and especially women's rights organizations such as the ATFD, welcomed these moves, as women in high positions would secure other women's interests out of female solidarity. In order to test this hypothesis, this chapter used the judiciary as a test case. It examined whether women in the judiciary secure other women's interests in the gender-coded cases of divorce.

The practice of two female family judges at the Court of First Instance Tunis in four types of divorce cases shows that their practices reflected female solidarity only to a certain extent. In cases of divorce by mutual consent, the judges did not oblige women to pay compensation, but neither did they allow men to compensate their wives. In cases of divorce for harm on the grounds of domestic violence, the judges secured the wife's interest in

obtaining divorce for harm and receiving damages, but only if she could prove the violence with a penal sentence. In cases of adultery, the judges secured the rights of women whose husband had left them for another woman, but at the same time they were very strict on women who displayed adulterous behavior. In cases concerning marital duties, the judges secured the wife's interest in receiving maintenance, even if the husband was unemployed, and they made it difficult for men to obtain divorce for harm on the grounds of abandonment of the marital home. At the same time, however, they obliged women to follow their husband if they moved house, and to give precedence to their duties as a wife and mother over their duties towards their parents or their careers.

Unlike the cases observed by Sana Ben Achour mentioned at the beginning of this chapter, Sarra and Sondos did not deviate from the practice of the Court of Cassation, even if this practice was not in the interest of women. Analysis of the practices revealed that in many cases, their workload interfered with possible inclinations toward female solidarity. It would be interesting to explore whether judges in provincial towns, who probably have a different workload, might engage in different practices. In some other cases, they made an extra effort to reach a result that they deemed 'just,' but this was not necessarily in the woman's interest. The two judges' practices were informed by norms that dominated their private lives: they were very strict on women violating norms of female chastity and marital duties, showing that if a woman had violated prevalent notions of what it means to be a wife in Tunisian society, they would adjudicate in such a manner that made it clear that such transgressions were not permitted.

The findings in this chapter show that if Tunisians wish to enhance women's rights and protect women's interests, it does not suffice merely to appoint women to key positions such as the judiciary.

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CHAPTER 8

Lady Judges of Pakistan: Embodying the Changing Living Tradition of Islam

Rubya Mehdi

Introduction

This chapter examines the circumstances surrounding the steady increase in the number of female judges appointed to the lower courts of Pakistan since 2009. Female judges are commonly known as 'lady judges,' an expression which has its origin in the British colonial rule, when the term was introduced for female doctors ('lady doctors'), and was later extended to include female judges. This chapter shows that the inclusion of women in the judiciary was motivated by the lawyers' movement for judicial independence (2007), as well as a shortage of judges in the lower courts of Pakistan. This took place against the background of public and legal controversies regarding whether the appointment of women to the judiciary is permissible in Islam. Focusing on practices of women judges in daily life, the main argument is that, regardless of controversy, they have become popular with the general public by virtue of the difference they bring about, more specifically their sensitivity towards living customary norms and traditions.

This chapter is divided into three sections. It begins by providing a brief review of public and legal debates in Pakistan regarding whether women are permitted to work as judges in a Muslim society. Based on interviews with women judges, section two argues that they show sensitivity to living customary norms (plural legal realities), and dispense justice in a comparatively objective way in a legal system known for its corruption. In continuation, I argue that female judges practice 'soft justice' in order to gain a better understanding of the problems female litigants present before them. Finally, section three tackles the challenges faced by the women judges who work in a male-dominated profession as well as in a society that attaches value to a traditional and gendered division of labor.

The chapter is based on empirical data collected during 2012 in South Punjab with follow up interviews in 2014. South Punjab is located in the mid-East of the country and forms part of Punjab, one of Pakistan's four provinces. There are 36 district courts in the province of Punjab, and the lady judges whom the

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research assistant[1] and I interviewed were dispersed over five district courts and their further sub-divisional courts.[2] Having obtained the permission and consent of the relevant district and session judges, we conducted qualitative interviews with ten female judges, mainly from the Southern Punjab (Mehdi 2012a; 2012b). We also had the opportunity to attend a number of court proceedings conducted by female judges in four different courts. We carried out further empirical investigation in 2014–2015 and interviewed an additional four female judges from district courts in the Northern Punjab.[3] All 14 judges worked in the lower judiciary. Their ages ranged from 27 to 40, the majority (8) of them being unmarried. Of those who were married (6), three were married to judicial officers. Those married with children included experienced judges with more than ten years of experience, while others were young law graduates, without children, who had been recently appointed. The fieldwork results from these two parts of Punjab may not be representative of the country as a whole, but provide some important insights into the subject and opens doors for further investigation.[4]

Pakistani law is based on the Common Law legal system of British India, with references to Islamic law in the constitution as well as penal and family law. The judiciary of Pakistan consists of two classes of courts: the higher Judiciary (consisting of the Supreme Court, High Court, and Federal *Shariʿa* Court), and the lower judiciary (consisting of District and Session Courts).

The lower judiciary may be broadly divided into two classes: (1) civil courts, established under the West Pakistan Civil Court Ordinance 1962, and (2) criminal courts, created under the Criminal Procedure Code 1898.[5] The

1 I am thankful to research assistant Mian Sajid Sultan, (Lecturer Gillani Law College, Bahauddin Zakariya University, Vihari Branch, Pakistan) for facilitating the interview process.

2 To maintain a standard professional confidentiality and keeping in mind the sensitive nature of their job, the names of the judges are not mentioned and fictitious names are used. Moreover, with a view to keeping the courts they work in anonymous, the expressions Southern and Northern Punjab are used as a broad indication of the different regions of the province Punjab. The position of the women judges in the court hierarchy is mentioned in parentheses.

3 Interviews were conducted in Urdu, English, Punjabi and Saraiki, whichever language was found convenient to communicate with the female judges.

4 In this regard a documentary film by Livia Holden and Marius Holden is greatly appreciated. The documentary provides glimpses of the court lives of female judges working in the lower courts of the four provinces of Pakistan, https://vimeo.com/ondemand/…/79861968.

5 In addition to the above, there are other courts and tribunals, both civil and criminal, created under special laws and enactments. Their jurisdiction, powers and functions are specified in the statutes that created them. The decisions and judgments of such special courts may be

civil courts are presided over by District Judges, Additional District Judges, Senior Civil Judges, and Civil Judges Class I, II & III. Similarly, the criminal court bench comprises Session Judges, Additional Session Judges, and Judicial Magistrates Class I, II & III.[6] The position of higher court judge is considered to be more prestigious than that of District Court judge. Higher court judges increasingly review the judgments of the District Court judges, which confirm the latter's low status. The District Court judges usually have to simply apply the rules; they do not play a prominent role in interpreting the law, which is mostly done by the High Court and the Supreme Court. The High Court judges have more power, due to the fact that they can interpret laws in a dynamic manner and set precedents. Furthermore, the rulings of districts courts can be appealed before the higher courts. Moreover, judgments of the High Court are published, while the judgments of the district courts are not.

However, the female judges we interviewed for the present work took into account local customary norms and, in so doing, interpreted the law in their own way. It should be noted that this way of informal interpretations are common in many systems of law, to interrelate between the state and widely spread practices of customary norms. The lower courts, which deal with the bulk of cases that affect women and their lives within families, do not always determine issues pertaining to customary law in terms of the assumed legal framework. Local courts are described as legal melting pots, as they are situated at the junction between the customary laws and state legislations. The innovative directions that are experienced in such courts are frequently not carried through at the higher levels of the judicial system (Bentzon et al. 1998; Shaheed 1997; Shaheed et al. 1998). The role of the local courts in relation to the customary law is elaborated in the subsection discussing local norms.

Pakistan's first female judge, Khalida Rashid Khan, was appointed as a civil judge in 1974 and eventually elevated to High Court judge in 1994. Subsequently, the number of female judges increased steadily, although their appointment was contested twice in the Federal *Shariʿa* Court (explained in more detail below). Most female judges are appointed to the lower courts of Pakistan, where they work as district and session judges and, to a lesser extent,

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assailed before the superior judiciary (High Court and/or Supreme Court) through a petition for revision or appeal (Hussain 2015; Tiwana 1985).

6 The provincial governments appoint the civil and criminal court judges, and the terms and conditions of their service are regulated under the Provincial Civil Servants Acts/Rules. The High Court, however, exercises supervision and administrative control over such courts see Hussain (2015).

senior civil judges (Yasin and Shah 2004).[7] In 2009, the mass appointment of women judges to the lower courts of Pakistan caused the proportion of female judges to jump to approximately one third of the judiciary.[8] In 2013, the first female judge was appointed to the Federal *Shariʿa* Court (Ashraf Jehan). The appointment of a large number of female judges in four provinces of Pakistan in 2008/2009 and their subsequent elevation to the high courts may be seen against the backdrop of the movement for independence of the judiciary (Abdullah 2009; Ahmed 2007; Waraich 2007).

The 2007 movement for independence of the judiciary was motivated by, suicide bombers, a shortage of electricity, dissatisfaction with the performance of state courts, as well as disappointment with the country's politicians. It originated among lawyers and enjoyed widespread popular support. Women lawyers participated actively in this movement. Their participation contributed not only to stabilizing their existence in the legal profession, but also built pressure to open the door to their appointment to lower and higher positions in the judiciary. Moreover, the post-movement period saw many reforms introduced, geared towards enhancing the operation of the subordinate courts, the employment of female judges on a large scale being one of them (Abdullah 2009; Ahmed 2007; Waraich 2007).

Another contributing factor underlying the large-scale inclusion of female judges was a shortage of judges and other court personnel. The resources of the judicial system, and its lower courts in particular, had not kept pace with the rise in litigation, leading to a huge backlog of cases. This stood in sharp contrast to the recommendations of several state-led commissions and committees that the number of cases pending before a Civil Judge should not exceed 500, and the number of units pending before a District and Sessions Judge should not be more than the prescribed limit of 450 at any one time. Thus, in order to alleviate the suffering of litigants caused by delays, in June 2009, the National Judicial Policy Making Committee (headed by the Chief Justice of Pakistan with Justices of the Federal *Shariʿa* and High Courts as members) launched the National Judicial Policy. The Policy set targets for the

7 After appointment, the civil judges are usually attached for a few weeks to the Court of Senior Civil Judge/District & Sessions Judge to receive practical training. They also receive specialized training at the Federal Judicial Academy and in the respective provincial academies. This training comprises education in various substantive laws, court management, case processing, judicial procedure, code of conduct, etc.

8 A precise estimate of the number of female judges is difficult to find. The estimate mentioned is drawn from secondary sources such as newspapers and Pakistan's Law and Justice Commission, also see http://lhc.gov.pk.

disposal of cases by the superior/subordinate courts. This served as motivation for the inclusion of women as judges. Furthermore, over the past decades, the percentage of women enrolled in law schools has increased, and there was a large pool of female law graduates ready to occupy the new positions in the judiciary.[9]

These developments took place simultaneously with the increasing prominence of radical Islamism and conservatism inside Pakistani society, the most visible manifestations of which were an increase in women donning the headscarf (*hijab*), the appearance of religious schools (*madrasas*) on a large scale, and the inclusion of compulsory education in Islamic studies in general schools and colleges. In the following section I analyze the public and legal debates surrounding the large-scale appointment of women judges in Pakistan in 2009.

1 Public and Legal Debates

A historical review shows that the positions of traditional Muslim jurists on the inclusion of women as judges were not unanimous; therefore, there is no single, consistent view on this issue (Bauer 2010; Masud et al. 2005). Usually a *hadith* attributed to the Prophet Muhammad where he stated: "A people who entrust their affairs to a woman will never prosper," as well as Qur'anic verse 4:34 ("Men are in authority over women, because He made the one superior to the other") are cited by the jurists on the issue.

Against this background, it may not come as a surprise that the inclusion of women as judges in Pakistan has not been without challenges, something which is reflected in the public debates and in petitions filed before the courts. In the following, I analyze the arguments put forward by opponents and proponents as reflected in cases before the Federal *Shariʿa* Court, which has jurisdiction to determine whether any law or provision of law is repugnant to the

9 Unfortunately, the record keeping on women in the legal profession in Pakistan is anecdotal and impressionistic rather than based on statistics. During my three years as visiting professor at Gillani Law College (2011–2013), Bahauddin Zakariya University, Multan, and the Law department of Islamia University of Bahawalpur (both in Southern Punjab), I realized that the number of female students made up half of the total students enrolled in law departments and there seems to be a steady rise in the number of females graduating with law degrees.

injunctions of Islam.[10] The way the court interprets the sources of Islamic law depends very much on the judges and *'ulama* who are sitting in the court. There has been controversy with regard to the jurisdiction of the Federal *Shari'a* Court vis-à-vis the powers of the legislature. Some describe the court as a parallel legislature (Yasin and Banuri 2004, 81).

The admissibility of women to the judiciary has been challenged twice before the Federal *Shari'a* Court, in 1982 and again in 2010, after the mass induction of female judges. The question regarding the appointment of a woman as *qadi* (judge) or *hakim* (ruler) was challenged first in the Federal *Shari'a* Court in 1982/1983.[11] At that time, the number of female judges was still insubstantial. The petition challenged the inclusion of women on the following grounds: first, it was argued that women discharge their functions of *qadi* without observing *pardah* (the veil), which is a clear violation of the injunctions of Islam. The petitioner, Ansar Burney, a philanthropist, argued that during the period of the Holy Prophet and his companions the duties of the *qadi* were never entrusted to women, since it appeared to be a violation of the injunctions of Islam. Moreover, he argued, according to traditional Islamic jurisprudence, the testimony of a woman is worth half that of a man and her share in inheritance is equal to half of that of her brother. Hence, the judgment of two ladies can only be equivalent to that of one male. Finally, women do not fulfill the qualification of *qadi* according to the established principles of Muhammadan jurisprudence.[12] The petition further relied on the abovementioned *hadith*: "A people who entrust their affairs to a woman will never prosper."

The Federal *Shari'a* Court dismissed the petition. The arguments used by the court in favor of women judges are interesting, since they shed light on the ability of the court to interpret *shari'a* in a way that accommodates changing

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10 The Federal *Shari'a* Court (FSC) was constituted under Article 11 of the Provisional Constitution Order 1981. Article 203-D confers powers, jurisdiction and functions on the court. It provides that the Federal *Shari'a* Court may either on its own motion, or on the petition of a citizen of Pakistan, or the Federal Government, or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam as laid down in the Holy Qur'an and *sunna* of the Holy Prophet. By an amendment to this article in 1982 the court's powers were considerably extended by giving them *suo motto* powers to examine laws. The court is not to have more than eight Muslim judges, including the Chief Justice and three *'ulama'* that are well versed in Islamic law. For more details on the jurisdiction of the FSC, see Munir (2008).

11 PLD 1983 Federal *Shari'a* Court 73, *Ansar Burney v Federation of Pakistan and others*, pp. 73–93.

12 PLD 1983 Federal *Shari'a* Court 73, *Ansar Burney v Federation of Pakistan and others*, pp. 73–93.

social and political conditions.[13] For example, in answer to the objection that the number of *qadis* to decide a particular case should correspond to the number of witnesses, the court magistrates argued that if such a concept is given effect, it will follow that no male judge sitting alone can decide a civil or criminal case as, according to *fiqh*, in cases other than that of adultery (in which four eye-witnesses are required to prove the offence), at least two male witnesses must prove disputes of property or criminal cases such as *hudud* and *qisas*. Moreover, the second objection (excluding women from appointment as *qadi* because the Holy Prophet and his companions did not appoint any women) was rejected on the basis that "we have to see whether there is any explicit or even implied restriction on the appointment of a female *qadi*. If no such restriction can be inferred, the appointment will be legal in *shariʿa*."[14] The court also decided that women's entrance into the judiciary as judges should not be restricted to family law only.

This judgment was assailed in the Supreme Court by an appeal lodged in 1983. It was dismissed; however, as it was filed after the duly required time had expired.[15] After a lapse of about 28 years, the matter was once again brought before the Federal *Shariʿa* Court in 2010, through a new petition (*Murtaza v Federation of Pakistan and others*). The petition was dismissed based on the reasoning that judgment on the matter had already attained finality in the apex court of the country, and so there was no reason for further interference.

The two discussions in the Federal *Shariʿa* Court reflect the arguments advanced in major newspapers following the appointment of a great number of women to Pakistan's lower courts in 2009.[16] In addition, a frequently heard argument in public debates, voiced by opponents and proponents of women judges, is that women are more emotional and sensitive than male judges and, therefore, cannot perform the difficult job of pronouncing justice. Opponents of women's inclusion in the judiciary were mostly found among religious

13 Reformists, like Fatima Mernissi, Ustadh Mahmoud Mohammed Taha and Abdullahi Ahmed An-Na'im, have provided some excellent examples of retrieving the dynamism and flexibility originally characterizing Islamic jurisprudence (see, for example, Abdullahi Ahmed An-Na'im's book *Islam and the Secular State*).

14 PLD 1983 Federal *Shariʿa* Court 73, *Ansar Burney v Federation of Pakistan and others*, pp. 73–93.

15 *Shariʿa* Appeal No. K-1 of 1983.

16 See, for example, http://www.indiatvnews.com/news/world/female-judges-in-pakistan-must-wear-veil-says-clerics-council-22489.html, January 21, 2015.

clerics, while human rights activists and women's rights organizations were found among the proponents.

Nevertheless, the inclusion of female judges in the judiciary is increasing, and not only in the lower courts of the county; they are also forging ahead to assume judicial posts in the higher courts.[17] As the following subsections will show, my fieldwork indicates that lady judges face more challenges from lawyers within the judiciary than the general public. Moreover, the fact that the general public is broadly positively disposed towards lady judges is documented in the public media. For example, in September 2012, a judge of the Supreme Court—Justice Nasir-ul-Malk —met with the litigant public in Swat, a remote area in the North West of Pakistan and, until recently, a Taliban stronghold. The public delegation told him that female judges do not discriminate, do not grant unnecessary adjournments, and they even asked him to replace the male judges with female ones.[18]

2 Female Judges: A Deeper Understanding of Pakistan's Plural System of Justice

This section focuses on practice, that is to say, on the issues with which women judges are confronted when they dispense justice in the Punjab. It looks at three issues in particular. It first focuses on the way women judges cope with local customs prevalent in the area, some of which are detrimental to the interests of women litigants and their children (such as child marriage and forced marriages), while others are favorable, for example, the payment of dowries to women. These local customs play an important role in the lives of the people who bring their grievances to the courthouse. I argue that female judges make a difference in dispensing justice by displaying a greater willingness to take local customs into account than their male colleagues.

Secondly, I demonstrate that the main beneficiaries of female judges' more detailed understanding of local norms are the underrepresented strata of society, such as the poor, women, and children. Moreover, women judges claim to have a better understanding of the problems that women litigants bring to the courthouse. The main reason may be that most of the lady judges are drawn from the middle class and can therefore better understand the problems of

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17 See http://tribune.com.pk/story/543832/peshawar-high-court-pakistan-gets-first-all-female-bench/, May 3 2013.

18 *The Nation*, September 11, 2012.

female litigants with a similar class background. This sensitivity, arising from gender and class, towards local cultural norms is reflected in their decision-making, specifically in cases related to marriage patterns, inheritance, abduction, and rape. While opponents in the public debate used this sensitivity to accuse women judges of being 'soft,' conversations with women judges revealed that they attach different meanings to that term, such as 'agreed compromise' and 'speedy justice.'

Finally, this section looks at the way women judges deal with issues pertaining to approachability. Similar to the female litigants and other women in Pakistani society, women judges have a socially ordained obligation to maintain a certain distance from unrelated men, and I show how this influences the way they deal with members of the opposite sex, both litigants and legal professionals, who try to approach them. On the basis of women judges' accounts, I argue that they have come to make a difference in the long-practiced corruption in the country's legal system, which again goes in favor of the non-privileged and the weak who seek justice.

2.1 *Local Norms*

The Pakistani legal system is highly pluralistic; it represents a mixture of ideal justice of Islam,[19] ideas derived from the Anglo-Muhammadan law,[20] and customary laws. Customary laws are of vital importance in the rural areas of Pakistan since the state courts are expensive, time consuming, involve long procedures, and in the end the justice delivered may not be in accordance with the expectations of the recipient (Siddique 2013). This is why poor people often resort to traditional alternative methods of dispute resolution outside the purview of the courts. Pakistan's systems of justice constitute a wide network of formal and informal institutions, which interact and complement each other (Mehdi and Dhandale 1999). They are combined with instruments of informal negotiation, manipulation, power plays, and many other cultural, political,

19 The 1973 Constitution of Pakistan requires: "Pakistan shall be a Federal Republic to be known as the Islamic Republic of Pakistan" (Article 1) and "No law shall be repugnant to the teachings and requirements of Islam as set out in the Holy Quran and Sunna" (Article 29).

20 British colonialism brought to India the legal rules known as Common Law. But Hindu and Islamic law continued to be applied as the personal law of Indian litigants, which in many instances were interpreted by British judges or by indigenous judges with British training. Centralization and unification of the legal system was important for the British rule to control the vast land of India, in this effort they acted as if Islam consisted of universal rules, disregarding the diversity of Islamic law. This intermixture of common law and Islamic law came to be known as Anglo-Muhammadan law.

and social pressures which provide an added layer of complexity. The subordinate courts of the country, in which most of the female judges are working, are more closely connected to informal justice systems, as these courts are situated near rural areas where most of the population lives (Chaudhary 2011; Lawrence 2000; Mehdi 2001; Siddique 2013).

Besides the conventional sources of law, which include legislation, statutes, case law, and practices of the courts, custom was assigned a significant source in both colonial British law and in Islamic jurisprudence, and also in the combination of the two, i.e. in the colonial innovation of Anglo-Muhammadan law. Recognizing only state law, there is a tendency in the traditional mono-centralist approach to cast customary law as unchanging, stagnant or static, as opposed to the legally pluralistic perspective towards custom (Woodman 1997). In the following, I draw upon the grounded theory approach (Bentzon et al. 1998) to shed light on the practices of lady judges. Besides a close proximity to customary law, lower courts are less precedent-driven than the superior courts, as the judgments of lower courts can be appealed before the high courts. Consequently, they are better able to respond to new social and economic conditions, and changing attitudes within the community in adjudicating matters that come before them. Because the functioning of these courts is in large part pragmatic, lower courts have the potential to improve the position of women, depending on the personal characteristics of judges and lawyers. Besides being less precedence-driven, it is worth mentioning that there are several instances where judges in the lower courts have resisted applying legislation viewed as detrimental to women. Moreover, they are likely to be affected by a number of factors, such as the procedural framework within which the interplay between the different actors takes place. Hence, judges enjoy considerable flexibility in the interpretation of custom within the constraints imposed by procedural rules (Bentzon et al. 1998; Mehdi 1997, 37).

Despite the fact that most of the legal activity takes place outside the formal legal system of the country, members of the legal professions, viz. advocates and judges, tend to approach the law from a strictly legal positivistic perspective dominated by a mono-centralistic understanding of law, which makes them less equipped to secure the interests of their clients and litigants (Patel 1979). Their interaction with the informal, non-state legal sphere, however, is unavoidable, as their clients mostly come from backgrounds wherein the understanding of justice is legally pluralistic, and they use both systems as it suits them (Chaudhary 1999, 2011). My fieldwork shows that female judges are slowly breaking this mono-centralistic attitude, as most of them are keen to learn of the local customs and traditions in the places where they are appointed, with the aim of integrating these into their judgment.

Southern Punjab is known for customary practices, such as arranged marriages, child marriages, exchange marriages (also called *adal-badal*),[21] the marrying away of a woman to the Qur'an or places of worship,[22] oral marriage contracts, divorces which are orally performed, the unrestricted practice of polygamy, the practice of *hilala* (intervening marriage for a divorced woman in cases where a man wants to remarry his divorced wife), no inheritance of immovable property for women, restricted and heavily controlled mobility of women, honor killings, and violence against women (cf. Chart of Customary Practices in Pakistan in comparison with the statutory law 1995; Kurin 1986; Shaheed 1997, 1998; Weiss and Akbar 1996).

Female judges tend to look at law from the perspective of people's everyday lives, i.e. they see the significance of law in people's lived realities: what it means to people, how they interact with it, and how law does or does not impact their lives. For example, one judge in her thirties, who was among the female judges appointed in 2009, stated the following:

> I am more conscious of local customary practices than my male colleagues, and I keep them in mind while making judgments. For example, in accordance with custom in the Southern Punjab, a very high dower consisting of, for example, a house, land, and a water hand pump is fixed for women. In cases of land property and inheritance this customary practice should be taken into consideration. My husband, who is also a civil judge and who comes from an upper middle class, belongs to this area and speaks the Sariki language. I do not speak the language, but understand it.

21 Exchange marriage is an established institution in Southern Punjab which consists of a marriage arrangement between two families where a girl and boy from one family are married to a boy and a girl from another family. The exchange marriage system is usually used to keep a balance in the relationship, which means that if one family does not treat their daughter-in-law well they should keep in mind that the exchange family may treat their daughter similarly. Any marital or other trouble in one household will affect the relations between husband and wife in the other (Jacoby et al. 2010).

22 For the Landed Feudal classes, keeping their land undivided is of primary importance as they derive their power through their lands. Allowing sisters to marry outside the family would entail letting some of the property (the sister's share of inheritance) pass out of the family. If a suitable match is not found within the family, they can forcibly be symbolically married to the Qur'an. In this way the woman is forced to remain unmarried for the rest of her life.

Even this judge, who was appointed to an area with a language she did not speak, demonstrated openness to considering prevalent customs. In a similar vein, another middle-aged female civil judge with a middle class background, who had extensive experience working as a judge, gave three examples of situations in which local customs played an important role: exchange marriages, village councils of elders, and inheritance. She said:

> In dispensing justice, it is important that one should know the people and their customs. For example, in the South Punjab, there are exchange marriages. In Lahore, where I am originally from, there is no such tradition. Cases are very simple and direct. Now, in exchange marriages there are two connected families. In both families the girls are treated equally; if one family is richer, the less rich family would try to keep the girl to a more or less similar standard as the rich one. One couple may be more compatible than the other couple. We have to keep all these things in mind when making decisions.

She continued by providing another example:

> In South Punjab we should be aware of the existence of *panchayats.*[23] This does not happen in Lahore. Here, due weight should be given to the existence of *panchayats*. People also sit in the mosque and resolve disputes through mediation. Our law allows us to acknowledge these mediations, and when decisions are made outside the courts, we just have to pass decrees from the court [i.e. approving the unofficial agreements]. Traditions in fact carry the force of law. This sometimes favors and sometimes goes against women, the poor, and children, as these groups live most of their lives under the customary laws which are used in the informal institutions. Judges can interfere with customs which are against women to a limited extent, as there are other pressures as well.

She illustrated this by pointing out the issue of inheritance:

> According to customary law, all property goes to the eldest son. This custom still exists. We, judges, have our own limits. We can use our discretion only to a certain extent and must give consideration to the local customs

23 Also called *parya* in some parts of Punjab. This is a council of village elders where disputes are settled, an informal institution of conflict resolution, with popular roots in the villages of South Punjab.

> and traditions. For the cases of inheritance, we also have to give consideration to different sects in Islam. The Shi'a sect has their own rules of inheritance. Usually there is reluctance to give property to women, so all of it is taken by the brothers, showing that sisters have given up their share in favor of their brothers. When in doubt, we want to make sure that the free consent of the sisters was given without any pressure from the brothers. If we are suspicious that it has not been given freely and there is no tradition of compensating women in the area, then we can give a strict decision in favor of the sisters.

Other increasingly widespread phenomena in rural areas of Southern Punjab are run-away brides, cases of abduction, and rape (for a similar situation in India, see Chowdhry 2013). Usually when young people in the rural areas of Pakistan do not feel that their love for each other would be accepted by their parents (the reasons for such non-acceptance could be many; for example, two persons, liking each other, may not belong to the same *biradari* (clan) or parents, in accordance with the customary laws, want to make an arranged marriage), they overcome customary rules by running away from home in order to marry of their own free will, something which is permitted under the official law of the country. In response to this, parents often file a criminal case of abduction against the runaway male. In such cases, the state usually colludes with the patriarchal family in controlling its women and in maintaining the *biradari* ideology (honor and norms of a clan) that governs marriage alliances even though this position cannot be sustained by the law.

During court proceedings in Southern Punjab, I noticed how the sensitivity shown by a female judge toward local customs facilitated compromise in a case that could otherwise easily have resulted in an incidence of honor killing. The case concerned two runaway couples who got married (two brothers married to two sisters). Charging the brothers with abduction, the case was brought before the court by the father of the sisters. Before the court handed down its final decision, the father of the two sisters was permitted a word with his daughters; he urged them to state that they had been forced to marry and had not left home of their own free will. The youngest daughter broke into tears when informed by her father that her mother was about to die due to the stress and shame emanating from dishonor. Finally, the court, in favor of the two couples, dismissed the case of abduction. Subsequently, the lady judge made a conciliatory move by asking the boys to kneel at the feet of the girls' father (a customary gesture of begging for forgiveness and showing respect to the elders). This gesture was important, as the self-esteem of the father was hurt, and he and the family could have resorted to revenge in a dispute of this

kind. However, once a gesture of forgiveness had been performed before the dishonored father, a type of compromise was reached and the two couples remained married.

This example shows that the interest of this, and most other interviewed female judges, in gaining a detailed understanding of local customs can make a big difference in the way they dispense justice. Any judge, male or female, with an understanding of the local customs would use such conciliatory methods, while cases where the judge is unaware of local customs would end up in bloodshed in the name of honor killing.

2.2 *Understanding the Needs of Female Litigants in the Context of the Extended Family: Soft Justice*

In the view of the interviewed lady judges, their interest in learning to understand customary practices leads them to be more attuned to the needs of female litigants and children. A prominent theme is the importance attached to preserving and strengthening family ties. This was reflected in the interviewed lady judges' preference for reaching mediated solutions between the parties and their concern about the perceived increase in the divorce rate. It should be noted that mediation is mainly used in customary settings, where people get together in homes or under a tree to resolve conflicts, while official courts usually pronounce judgments. One female judge justified her extra effort of mediating between the parties by referring to the rules prescribed in the Code of Conduct 2 (34) for members of the subordinate judiciary: "He (or she) should make endeavor as far as possible to act as '*musleh*' (mediator) and help the parties to resolve the dispute through amicable means acceptable to them, without leaving any impression of siding with anyone."

The following interview extract shows that female judges believe they are more sensitive to the situation of women than their male counterparts. Khadija (CJ (civil judge) Class-III),[24] for instance, considered an increase in divorce as negative because it not only affected children and social equilibrium, but also family honor. She believed strenuous efforts should be made to affect a compromise before any extreme step is taken. She said:

> First and foremost, women judges can understand women's problems better than male judges. They can share and help in family problems more than a man. Sometimes women show signs of violence on their body to us, which they would not show before a male judge. Recently, divorce rates are on the increase. The reason behind the increase is that

24 Class I is higher than class III.

> the willingness to sacrifice is disappearing and a materialistic approach towards life is on the rise.
>
> In family cases, I try to mediate between the parties, especially in cases where there are children involved. I try to make both parties think about the children and make compromises. Sometimes when you are trying to reconcile, you feel that clients come with a rigid mind, but women who come from good, educated families are more flexible. Usually when women come to the court, they are very desperate and inflexible, and come with a mind fully prepared for separation and divorce. It's very difficult to prepare them for compromise. Men are more flexible and usually want compromise. When a man feels that he would lose his respect (*Nak kut jai gi*) and would be disgraced and dishonored in the society, he wants to compromise and is ready for negotiating terms and conditions. Their ego is broken. From the very beginning, within a glance we can see if a woman is ready to compromise.

Generally speaking, divorce is considered undesirable in both rural and urban environments, but specifically in rural areas of Pakistan. Following divorce, women usually return to live with their parents, which, in many situations, become an economic burden on them. Although the percentage of women with an education and a job is increasing,[25] most women still depend on male members of the family for financial maintenance. Thus, in cases of violence or other tensions between husband and wife, the best solution is believed to be to compromise. Consequently, the families and communities concerned put great pressure on the husband to change his violent behavior while women are instructed to tame their husbands with tolerance and tactfulness. Traditionally, women are also reminded and advised to sacrifice their own interests for the sake of their children (Mehdi 2001). Interestingly, this traditional approach, seems to be the one adopted by the lady judges, and is in accordance with their 'parental' role (explained in more detail below). Judge Roukayya (CJ Class-II) said:

> Women litigants have become more confident and have started to confide their problems to us. Once, in the case of a woman who murdered her husband, she told me many things which a woman would not tell a male judge. Judges enjoy the social status of being 'parents' to their clients.

25 There is a dire need to conduct more studies in this area.

In this light, her colleague Judge Farida (CJ Class-I) said:

> As a lady judge, I have a better understanding of family matters. Whatever family matters I get, I deal with them with understanding. I am strict with divorce cases. But once a divorce case has come up in the courts, it is difficult to make compromises between the parties. For whatever reason, they are not ready to accept any conditions. The laws of our country have also made the act of divorce very easy. Most of the family law cases concern exchange marriages. If one woman in the exchange marriage is divorced there is pressure on the other woman of exchange to be divorced too. The spouses may be living happily and may not want divorce but there is family pressure and sometimes also pressure of the *panchayat* (traditional institution to resolve disputes).
>
> Some of the cases from the rural areas consist of pure revenge. We can only make limited efforts at reconciliation between the parties. If we take too much interest, we may be accused of taking the side of a particular party.

This example shows how a good understanding of local custom helps in understanding women's problems, although it does not necessarily mean that women judges will readily side with the female litigant. On the contrary, oftentimes women judges feel they are as parents to the litigants, and they will do their utmost to prevent the marriage from ending. The implications of this knowledge for a judge in terms of judicial decision-making is most important in divorce cases where the involvement of the extended family triggers the marital dispute. There are examples where a judge makes families recognize the illogic of separating a happy couple, just because the other couple of the exchange marriage are not doing well in their relationship and ended up divorced. However, as Judge Farida stresses, an ascribed objectivity as a value prevents the judges from choosing a side, making their task of reconciliation more difficult.

While the lady judges consider themselves more sensitive to context and the needs of the weaker party, their preference for mediated solutions over divorce raises the question whether they regard protecting the stability of families as more important than securing the interests of female clients.

Here it may be recalled that a frequently heard argument in public debates aired by opponents and proponents of women judges is that women are more emotional and 'softer' than male judges. The female judges countered these claims by drawing a distinction between 'softness' on the one hand and justice/consideration/humaneness on the other. In the words of Mariam (CJ Class -III/FJ):

> I am not soft. I am a judge. I often say that I am like a parent to my litigants. Having to decide between parties is like deciding between two of my children who are both dear to me. It's a great responsibility to adjudicate between two children. There is or may be a softness, but I try to decide cases based on merits. I will not decide the cases by looking at people, even though they may look innocent. You can say we are doing paper justice. I have to decide based on what's there in the files. Softness is in the sense of delivering justice and not making people suffer. And if the litigants are present in the court, I prefer that they should record their evidence; then I proceed and get their counsels in the court. Afterwards I go through the files again and again and my 'softness' is in the sense of providing speedy justice.

Roukayya (CJ Class-II) formulated the following opinion:

> We are considerate, not just soft and lenient. We should not be emotional when making decisions. For example, we all know how significant dowry is in our society. All parents give dowry to their daughters. Now, usually no evidence is kept for the dowry of a daughter and, hence, evidence is missing. But because I know that dowry plays an important role in society, I tend to be considerate in such cases. I also discuss tradition and customs with clients in the court. In a criminal case, on the one hand, there could be a habitual criminal with a big theft while, on the other hand, there could be a small theft, for example, an instance of cycle lifting. By looking at the personality of the person concerned, we can see that he is not a habitual criminal and if he goes to prison for three years, he would become a more hardened criminal. I am considerate in these types of situations as well.

The statement of Judge Roukayya shows that her knowledge of the customs prevalent in Punjab society, prompt her to take into account the significance of the dowry in dispensing justice in divorce cases. She does not describe this knowledge as soft or emotional, but as considerate. Like Roukayya and the other judges, Rehana (CJ Class-III) took issue with the term 'soft justice' and said that: "I would rather use the word 'humane' instead of soft. I am very considerate and give time to reconciliation in family cases. My aim is an agreed compromise in both criminal and civil cases."

In general, the women judges interviewed understood 'soft justice' to mean that they are humane and deliver mediated solutions on the basis of facts presented to them in the court files. They felt that they were encouraged in doing

so because, in contrast to their male colleagues, they were not approachable and did not accept bribes offered to them.

2.3 *Issues of Corruption, Limited Social Circle, and Non-approachability*

I would like to start this section on corruption with Rule 37 of the Code of Conduct, referred to by a lady judge: "One should never forget that he/she is accountable to God Almighty in the end."

One of the biggest challenges facing female judges is the corruption of the judicial system of Pakistan, which is often associated with having a vast social network. The Pakistani legal system is ranked as one of the most corrupt in the world (Chaudary 2011; Hoebel 1964; Mehdi 1994; Nadeem 2004). According to Siddique, successful litigation in the district courts of Lahore depends on the ability to stave off opponents through duress and violence, whereas the operators of the legal system constantly expect 'speed money' to push the process along; subsequently, the integrity of the judicial officers is doubtful (Siddique 2013, 143). In his analysis of the Pakistan's court system in the 1960s, Hoebel comments that papers move only on golden or silver wheels (Hoebel 1964), which is equally true today. A female judge, Rahila (CJ Class-II) from Northern Punjab, explained this as follows:

> People use the any means to get their work done. People come here on a daily basis, and we know that bribes are given to the staff and the clerks (*munshi*) of the advocates. Bribes are a burden on the clients. It is said that even the walls of the courts demand money (*kachehri ki diwarein bhi paisay mangti hein*). From the cycle stand to the reader sitting, to the advocate and his clerk, everyone demands money.

There is a dilemma here: while social networks are indispensable in a region where customary law operates as a parallel system, approachability simultaneously opens the door to partiality, bribes, and other types of corruption. The approachability or accessibility of the judges is limited by rules, provided in their code of conduct,[26] which repeatedly mentions that "He should always live within his honest means and believe in *rizq-e-halal*" (honest earning).[27]

26 Article 111 of the Code of Conduct for judges of the Supreme Court and the High court states: "To be above reproach, and for this purpose to keep his conduct in all things, official and private, free from impropriety is expected of a Judge."

27 2(1) Revised Code of Conduct for Members of Subordinate Judiciary: Sayed Zahid Hussain, Chief Justice, 31–10–2008, says: "The judicial power is a sacred trust and divine duty. A judicial officer should exercise it honestly, efficiently and to the best of his

It is here that female judges are believed to make a difference. For example, in an interview published in a Pakistani newspaper, a judge of Pakistan's Supreme Court, Justice Tassaduq Hussain Jilani, admitted that in Pakistani society, female judicial officers are seen as more honest, more hardworking, and less accessible.[28] This statement is endorsed by most women judges we interviewed. It is difficult for female judges to have a wide social network and freely socialize with menfolk in a gender-segregated society such as that of Pakistan. Conversely, their prospects of engaging in corruption are presumably limited as compared to male judges. Fatiha (CJ Class-III) said:

> We do not have many links to society. Our social life is very limited. Our residences should also be separated from the general public. People try to approach us outside the court, but we are not approachable. We do not get a separate residence in all cities of our appointment. If we are not living in a segregated, guarded area, we are vulnerable to people who would like to approach us privately. But in general, we are more trusted than men, as women are hardworking, they are honest, and generally do not opt for unfair means. We have four female Civil Judges and one additional Session Judge,[29] and up to date, none of them have been accused with any corruption whatsoever. They are known to be straightforward, as they go by the book [of codified law] only.

The inapproachability of female judges leads to a different working relationship with advocates. While male judges meet with advocates in their offices inside the courthouse as well as outside, women judges' interaction with advocates is strictly limited to visible public interaction in the courtroom. Sometimes, so Judge Malika (CJ Class II) claims, this restriction also extends to the interaction between female judges and female advocates.

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capacity keeping always in mind that he is accountable not merely to his superior officers but to God allmighty Himself. He should all the time be conscious of his onerous duty and his integrity." The Code of Conduct continues by demanding a very high standard of character from both male and female judicial officers, it says: "A judicial officer should be God fearing, law abiding, abstemious, truthful of tongue, wise in opinion, cautious and forbearing, patient and calm, blameless, untouched by greed, completely detached and balanced, faithful to his words and meticulous in his functions."

28 See http://nation.com.pk/national/08-Jun-2010/Female-judges-more-honest-Justice-Jilani, June 8, 2010.

29 A Session Judge is a senior position in a court and not very many female judges are appointed to this post. The judge in this post is responsible for maintaining discipline among all judges in a particular court.

> Yes it is correct that even female advocates are not allowed to contact the lady judges, because when Session Judge passed the directions for a smooth operation of the system, male judges were allowed to attend to male advocates, but this access has been denied to the female judges. Male advocates should not come to our chambers; this restriction has been extended to the female advocates too. So this is a way to block any effort in approaching the female judges. Secondly, as women, we don't move in society very freely, while male judges have contacts with many different people, who subsequently try to approach them. Whether they allow them to approach them or not is another debate, but they are easily accessible. When it comes to women, if I receive a missed call and the person does not leave his name, I just switch off my phone. So the female judges cannot easily be accessed.

Judge Roukayya (CJ Class–II), whose husband is a lawyer, trying to find work in the judiciary, was very adamant about the working relationship between judges and lawyers. She expressed the following view:

> Why should we be accessible to advocates? They give service to their clients. The main stakeholder is the client. After we have heard the arguments from both sides we should be inaccessible during the time of decision-making. Yes, of course, some people try to interfere with our decision-making. Criminals ask for favors. On one occasion my husband was hurt physically by someone. He did not tell anyone about the episode, but later told me that some criminals hurt him because of a verdict I made in court. My father is very supportive. Once he was told by some clients that they would like to explain the case to me in private and my father refused, saying "My daughter has become disobedient; since she has become a judge, she no longer listens to me."

The interview fragments presented above make it clear that female judges' relationship with male lawyers can be difficult and strained. In the last section, I elaborate on this and other challenges women judges face in an environment that until recently was male-dominant.

3 Challenges

In this section I focus on the everyday practices of women judges in relation to prevalent notions of 'proper' gender roles in society. For example, how do

women perceive working in a previously male-dominant environment? Do they see their position as judges to be in accordance with their personal perception of gender roles? During the course of their work, they must respond and adjust not only to a complex structure of legal pluralism, but also to the pressure to perform in the 'manly' way, characteristic of the profession. This working style involves negotiations and upholding predominantly feudal values. When working alongside their male colleagues, they are also expected to deliver justice like men. They say: "We should not think we are women, but on the seat of the judge we are like a man." Women judges fear that if they fail to perform like their male colleagues, their authority as judges will be questioned. Does dispensing justice like men mean delivering 'hard justice' or withholding the use of consideration?

Interviews with lady judges in South Punjab suggest that they face challenges on numerous levels. First, they often encounter opposition when they express a wish to study law. When they have entered the profession they are usually appointed to the family courts and to remote areas. Moreover, there are challenges with regard to the chambers allotted to lady judges and their dress code as they become the center of attention in the courts. On entering the profession, they face considerable opposition from within the legal profession, directed by male lawyers in particular. Male judges may also experience the lawyers' harsh behavior, but, as displayed above, they can interact with them freely and find an understanding with them, an opportunity which is not afforded to female lawyers. Finally, female judges complain about not receiving adequate training which would allow them to do their work more accurately and effectively, an issue with which they have different experiences than their male colleagues. Lastly, in a context where women remain the primary caretakers, women judges face challenges in trying to combine work and domestic responsibilities.

3.1 *Choosing a Career Path and Studying Law*

Generally, Pakistani parents do not encourage their daughters to join the legal profession. This prompted me to ask the lady judges what led them to choose this career path. It struck me that most of the young women employed as judges were unmarried and from middle-class families. A young female judge, Khadija (CJ Class-II), who received her basic education in a provincial city in the South of Punjab and obtained her law degree from a university in Lahore, said the following:

> My family did not think that law was an appropriate profession for girls. Nobody in the family encouraged me to join. I had to struggle for it. Now

> that I am judge, I think they are quite pleased with it. I earn almost Rupees 83,000 [equivalent of 788 USD], which is a handsome amount for a family.
>
> Before, people did not think that law was a profession for a woman, but now they have started reevaluating it as an option for their daughters. I think decision-making power is a blessing. It is not awarded to women in our society even in small family matters, so it is a big thing that this power is awarded to the lady judges.

While Khadija had to convince her family to attend law school, other judges had different experiences, with some even being pushed by family members to study law. Mariam, a young judge (CJ Class-III), stated:

> My mother wanted me to become a medical doctor, but I couldn't get the required merit and, therefore, I was left with nothing to do. Then one of my relatives advised me that I should apply for admission to law school. I didn't have any choice, so I joined law as a profession. Now I feel that I am lucky, because I never thought I would become a judge. In fact, I did not want to be a working lady at all. It's too difficult.

A young female judge, Abida (CJ Class-II), explained in greater detail:

> My brother not only inspired but even compelled me to join the profession. However, I am very critical towards it. It's a very hectic job; I do not have any time for healthy activities. No time for reading or visiting anybody. After work, I have very little time to rest because I have to prepare and study files for the next day. I think our working hours should be until one in the afternoon instead of five in the afternoon.

While some women were intrinsically motivated to study law, others were compelled to or forced by family members. Security, financial stability, and prestige have become the aspiration of lady judges, and they encourage or are encouraged by their families to take the examination to become a judicial officer. But the profession is not without challenges for them.

3.2 *Appointment made in Remote Areas*

A number of the newly appointed female judges complained about appointments to remote areas. This may be because there were no male judges who wanted to be appointed to these places, and, since women are new in the profession, they might not dare to object. Some of these places have special housing reserved for judges. In others, there are no allotted residences for judges,

and the government rents apartments for them. Moreover, it is very difficult to find caretakers who they can trust to look after the children. In some cases, female judges get their mothers to come with them to look after their children while they are away at work. Two of the ten lady judges from Southern Punjab and two of the four from the Northern Punjab complained about the problems faced by female judges who are posted in remote areas of Pakistan[30] away from their hometowns. Firdaous (CJ Class-I) dwelled in detail on this issue:

> Our job is very hectic and challenging. We can cope better with family and our professional responsibilities if we were stationed near our permanent residence. If we are posted at a remote station, where we cannot enjoy the family life umbrella on a daily basis, life becomes hell due to multiple problems like insecurity of one's own life and of the children especially. When the mother is working in the court and the father is a hundred kilometers away from the children, the children's security and well-being becomes a real issue, and their education suffers badly. Sometimes, health problems become a very serious issue too; for example, if there is an emergency in the middle of the night, or when your child is suffering from acute vomiting, or is running a high temperature [timely medical assistance is not available due to poor medical facilities in remote areas]. What can you do and where can you go when you suffer from serious health hazards? It becomes a life and security threat, but who can come to help the lady judge in such a situation? For example, due to the long travels, a few lady judges had abortions while others still suffer from severe backache and spinal cord damage issues.

Apart from the fact that courthouses can be remote, there are also problems inside the courthouse. Although the recent appointment of women to the judiciary has led to women now representing one third of the judiciary, the courthouses have yet to accommodate this change. We asked the female judges whether they were satisfied with the arrangements of their chambers. Roukayya (CJ Class-II) narrated:

> Our working rooms are such that they were basically made for men. I would prefer a chamber made for the convenience of a lady judge. Women chambers should be more protected; our chambers are built in such a way that there is easy access from all sides of the room. Sitting

30 The expression is used for the poorly developed areas of Pakistan, i.e. areas which have a relatively low number of schools, hospitals and other basic facilities of modern life.

> places and washrooms should also be according to the needs of female judges.

3.3 *Dress Code*

Here it is relevant to discuss the dress code for the lady judges. First, Islamization movements in the Muslim world in general, and in Pakistan in particular, pressure women to change their way of dressing, especially by requiring them to wear the *niqab* (where the face is fully covered and only the eyes can be seen). In Pakistan, despite rising extremism, women judges are not forced into the *niqab*; some of them wear it of their own free will. Secondly, dress code plays a part in how female judges adapt to a male-dominated environment. The lady judges seem to de-emphasize femininity in favor of 'simplicity' with minimal colour, make-up, or jewels. As one of them said: "We are here as judges, not models." The covering of the hair and the face also plays a role in the way the women judges want to present themselves to the public in the courthouse. Of the 14 judges interviewed, nine wore the *dupatta* (long traditional scarf used by women in Pakistan), four wore the *hijab* (where the face is not covered), and one wore the *niqab*.

No dress code is prescribed for the District and Session Court judges, and therefore the interviewed judges followed the dress code prescribed for the Supreme Court and High Court judges. This code mainly targets male judges requiring the *shalwar qameez* (traditional dress of Pakistan). This is a common style of dress used by both males and females in Pakistan, therefore the inference is that women may dress similarly.[31] However, the Judicial Estacode 2011 of the Peshawar high court prescribed dress for female judicial officers as follows: "Ladies: White *Shalwar Qameez* with black scarf (*Dupatta*) and black shoes (black coat—optional)."

The following statements reflect a moderate viewpoint about the dress code among the female judges. This viewpoint seems representative of most of interviewed female judges. Khadija (CJ Class-III) says:

> I like wearing simple clothes in the court. It should not go to the extent that people would come and watch us as if we were models. We are here as judges not as models. Generally, I think all female judges should display a simple appearance in the courts.

31 Superior Courts (Courts Dress and Mode of Address) Order, P.O. 15 of 1980.

Her colleague Roukayya (CJ Class-II) confirmed this, saying: "We have to look after children. I do not have time for make-up. Court is a serious place and make-up and jewelry do not make a good impression." With regard to covering up, there are two extremes, on the one side, female judges with no *hijab*, and on the other side, those who wear the *hijab* and the full *niqab*. Fatiha (CJ Class-III), who wears the *niqab*, said:

> I feel that the *niqab* is no problem in the administration of justice. In fact, it is appreciated in the courts by male judges and lawyers. I have heard this from lady judges in other courts who wear the *niqab* like me, and they have similar experiences. In Lahore, some of the female judges were without *dupatta* and they were criticized by the Session Judge that they should wear a *dupatta*.

On the other hand are female judges who wear jeans and do not want to cover their heads. They justify their view by interpreting the dress code provided. Abida (CJ Class-II) described: "I wear trousers or jeans and feel more comfortable in it, though I am much criticized in the court. In fact, in the official dress code of judges a suit is mentioned while *dupatta* is not. This means that the head cover is not necessary."

3.4 *Assignment to Family and Civil Courts Only*

While women judges try to blend into their new environment by dressing modestly, in muted colors, and by de-emphasizing their femininity, there are areas where women judges, especially the junior ones, experience gender-based discrimination. In some courts, female judges have complained about the discrimination of being assigned only to positions in the civil courts. However, most of the female judges interviewed in Northern and Southern Punjab claimed not to have experienced such discrimination. The reasons are, first, that it seems that this is a problem faced mostly by young, newly appointed judges. Senior judges do not feel as discriminated against as, owing to their experience, they are assigned to all types of courts. Secondly, in some courts where female judges are more numerous and where the workload of cases is high, such discrimination is simply not feasible. For example, senior judge Mariam (CJ Class-I) states: "My first appointment was as a family judge. For a year and a half I worked as such. I prefer to work on both civil and criminal cases. It took some time until I was allowed to do this." However, in one of the courts in South Punjab, a junior female judge recounted a conflicting experience. Khadija (CJ Class-III) said:

> Lady judges are usually not assigned to a position in the criminal court, but once they are assigned there, I think they perform better than the male judges. I love working in the criminal law court. There, you deal with the liberty of people and you enjoy considerable discretion. There are more challenges. You have to be strong, courageous, confident, and blunt. You cannot show any hesitancy. I think there should be courses for lady judges to increase their understanding of criminal matters. One reason that lady judges are reluctantly assigned to the criminal law courts is that in our society the general understanding is that a woman should not interact with men. In the criminal law court, female judges are not only interacting with men but also with hardened male criminals who are accused of matters such as robbery, physical injury, fights, and theft. Another reason why criminal work is not given to us is that male advocates do not find us easily accessible for bribes. Moreover, when women work in branches of law other than family law they come into competition with the male judges.

What we can insinuate from these interview fragments is that there seems to be a difference between junior and senior women judges in the way they feel about their appointments. Generally, junior women judges feel they are too easily assigned to a position in the family court, while senior women judges know from experience that in time they will be appointed to work in other fields of law as well. Nevertheless, the number of women working as judges in the criminal courts is still relatively small. As we have seen above, Judge Khadija claims this is because, more than in any other field of law, women judges in criminal law experience opposition from male colleagues, especially male lawyers. As mentioned before, women judges are generally not accessible, which is a requirement for corruption, and corruption is mostly prevalent in criminal cases, due to the immediate threat of punishments and fines.

3.5 *Male Lawyers and Female Judges*

This section supports the argument that the main source of opposition to female judges comes from within the legal professions and not the public. Female judges frequently complain about the aggressive attitude of male peers, advocates especially, towards them. Although the attitude of judges towards advocates is controlled by the Code of Conduct,[32] the accounts of most women

32 "His behavior and conduct should be gentlemanly particularly towards the litigants and lawyers. He should be courteous and polite but firm and dignified to maintain decorum

judges interviewed indicate that they do not feel that male lawyers reciprocate judges' courteous behavior. For example, Mariam (CJ Class-III/FJ) asserted:

> Male advocates show a lot of resistance to lady judges. In fact, it is hard for them, not for us. They are standing and looking up to us and they try to create problems by telling a Session Judge that the lady judge has done this and that. They have also gone to the Lahore High Court with complaints that madam [lady judge] is too harsh and strict. In most of the cases, I just wanted to have a short adjournment and dispose cases as quickly as possible, and the advocates filed complaints against me to the Session Judge. They said: "She is strict and works until six in the afternoon. She has no children, she is unmarried, and she has no liability. The entire staff is suffering." I am thankful to the [male] Session Judge who supported me and threw the complaint paper in the dustbin.

Now the question is why male lawyers are so aggressive. Are they aggressive to male judges too? It seems from the comments of some female judges that they are specifically aggressive towards female judges. There could be a variety of reasons for this: they are not used to women making decisions and they may perceive lady judges as less knowledgeable. They may also feel irritated by male judges who decline their cases, but with them they have the possibility to interact and negotiate freely as we have observed above. Hence, while male judges also suffer from lawyer's bad behavior, they have different ways of dealing with it.

The different ways of dealing with professional legal colleagues of the other sex might probably explain why women judges express a strong wish for more training and refresher courses. This need may point to the fact that in the male-dominated profession and its culture, newly appointed male judges adjust by learning from senior male colleagues and advocates, in a 'man-to-man understanding.' Female judges are more likely to 'go by the book' and, hence, have to work out problems with no guidance and are in dire need of extra courses. In the words of Khadija (CJ Class-II) from Southern Punjab: "I have been a judge for three years. We had only three months of training. This was sufficient in the light of the fact that there is dire need of judges in Pakistan. But I think

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of the Court. His conduct in and out of Court should be exemplary which should enhance the prestige, respectability and honor of the court in the society." 2(3) Revised Code of Conduct for Members of Subordinate Judiciary: Sayed Zahid Hussain, Chief Justice, 31–10–2008.

that refresher courses should be held periodically to overcome the absence of training."

3.6 *Choice of Husband*

A husband from the same profession seems to be a preferred choice for almost all the female judges interviewed. Interestingly, nobody mentioned the possibility of competition between the married partners. Farida, who is a civil judge, Class-I, with ten years of experience, is married to a civil judge with whom she has three children. She said:

> I have a harmonious family since my husband is also a civil judge. Because we both are in the same profession, we understand each other better. We can easily adjust to and understand a busy routine. At home, I always cook the food myself and I am skillful in many different cuisines. My husband helps me with childcare. He also makes good coffee and milkshakes. I come from the Northern Punjab and my husband from South Punjab. There is a big cultural difference between these two sides of the same province, but you know: "Couples are made in the heavens" (*jorey aasmanon per baentey hain*).

Female judges seem to be aware of the fact that combining a busy professional schedule with traditional family life is not an easy task. Abida, an unmarried civil judge (Class-II) explained:

> All women have problems: they perform the second duty of taking care of the family as well as the profession. Female colleagues are responsible for pick up and drop off of their children at school. They are always worried. My mother worried a lot about my marriage prospects. If I marry, I have to choose a right person, and it's not an easy job. My brother, who encouraged me to join the profession, actually tells me not to go for marriage.

Roukayya (CJ Class-II) said:

> A lady judge has to look after both her family and her job. So, while your husband rests, you look after the children. I feel this has to be changed. Sometimes I also fight with my husband and sometimes try to make him realize my struggle, especially when he is in a good mood. He likes my job very much, to the extent that he is also trying to get a job in the judiciary.
>
> Precisely speaking, family life is not a bed of roses for the married lady judges. They have to look after many household matters, from

> miscellaneous chores to teaching their kids in the evening, along with cooking, attending to in-laws or frequent uninvited guests. Their lives become more mechanical than that of any other professional person, because they have to work under pressure and threats. I feel that we should be provided with a permanent servant at home who can assist us in household matters in the evening, like the servants army personnel have.

3.7 *Day Care Facility for Children*

A matter of great concern for married female judges is the lack of daycare facilities for their children. Even unmarried women judges are of the opinion that it is important that there should be available daycare centers so that judges would not have to worry about their family when they work. The absence of this facility, so they argue, diverts attention away from work. Due to the lack of daycare services, some women judges bring their young children to court. Malika, a mother of two children, and a civil judge (Class-III) explained the seriousness of the situation in these words:

> The problem is that when there is no school or daycare centre, then what is there to do? So, we are pressured to appoint these *Maasi* and so-called *Mais* (traditional maid servants). Some of our colleagues bring the kids to the chambers and leave them seated there with the maids. But a child gets tired of sitting in one place all the time. Then he/she moves out in the court and sees the prisoners and litigants and hears their language.

In a bid to solve the problem of managing the household and the care for young children, other women asked their mothers to stay with them and look after their children when they were at work. This is how civil judge Fatiha (Class-III) solved the problem of having a young child and an absent husband: "My husband is an advocate working in a different city. We have a one-year old son and my mother has come to live with us so that she can look after him when I am in court."

This section shows that lady judges in Pakistan have to face challenges at the home as well as at the working front. The challenges stem from the very basic question of whether, if at all, women should enter the legal profession. Once they are in the judiciary, balancing household and professional responsibilities becomes a new challenge. Obstacles continue in professional life, where female judges are confronted with issues which male colleagues may not have

to face, such as: appointments in remote areas of Pakistan; exclusive appointments in family courts; their dress code and chambers; issues of training, etc. However, a main challenge at work is produced by male colleagues, especially lawyers, who are not used to recognizing the authority of a female judge.

4 Conclusion

Although the positions adopted by classical jurists were not unanimous in answering the question as to whether women can work in the judiciary, most of them prescribe a restricted or limited role for women as judges. However, the increasing inclusion of women as judges, motivated in Pakistan by the lawyers' movement, is evidence of the fact that the classical Islamic position is changing with the times and is allowing greater flexibility.

Moreover, the increasing presence of female judges in the lower courts of Pakistan shows that they are acquiring a great deal of experience: in working with the lower strata of society (the majority of the legal population visiting the courts) women judges are becoming aware of their living customs and traditions. Although this needs further study, there might be a relationship between female judges' interest in understanding customary law provisions and the acceptance of women judges by the people who bring their grievances to the courthouse.

However, this study has also shown that women judges face considerable challenges in performing their work as judges. Although most judges interviewed try to dress in manner that makes them appear objective and not too different from their male colleagues, the challenges they face are directly related to what it means to be a judge in a society, with patriarchal definitions of manhood and womanhood, especially in marriage, where men are expected to be the breadwinners and women the caretakers.

Women judges in Pakistan not only take care of their own children, but also view litigants as children whom they must take care of. They feel it is difficult to juggle professional commitments with domestic responsibilities, especially when they are appointed to remote areas where they cannot rely on support for raising their children. In the absence of their husbands (who often work far away), other female members of the extended family, and childcare facilities, some female judges have come to the conclusion that judgeship is not a suitable profession for women. Some women judges feel that while their sensitivity to customary norms places them in a better position to take care of their clients' interests, in the end it is difficult to take good care of litigants and family members simultaneously.

Apart from women judges' more profound understanding of local norms, another factor that possibly contributes to the public's acceptance of women judges is that the public considers women judges to be less corrupt than their male colleagues. This unapproachability is related to societal notions which do not allow women to socialize freely with men to whom they are not related. This makes it difficult for litigants and lawyers to approach the female judges and ensure 'speedy' justice through bribery. While women judges have a different notion of speedy justice—delivering a fair and quick judgment based on the facts on paper—their non-approachability disturbs their relationship with male lawyers, who treat the lady judges offensively. These challenges notwithstanding, it is likely that in time, male legal professionals will join the general public in accepting the authority of female judges in Pakistan's courthouses, both in the lower and the higher courts.

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CHAPTER 9

The Politics of Exclusion: Women Public Prosecutors and Criminal Court Judges in Syria (1975–2009)

Monique C. Cardinal

1 Introduction

The most un-Islamic of judicial functions in the legal systems of the Arab-Muslim world today is the office of public prosecutor (Peters 2005, 11).[1] Since it is equally un-Islamic for women to hold judicial office (Cardinal 2010), the first woman appointed to the judiciary in the Syrian Arab Republic, commonly known as Syria, was a public prosecutor. On October 26, 1975, Ghāda Murād was assigned as public prosecutor to a juvenile court of the Damascus courthouse.[2] It is also as members of the public prosecution service that women rose to the highest ranks in the judiciary. In August 2006, Ghāda Murād retired as the Attorney-General of Syria; she had reached the compulsory retirement age of judicial officers in Syria: 65 years old. Ghāda Murād remains the only woman to have been appointed Attorney-General of an Arab state.

As a former part of the Ottoman Empire and later a French mandate (1920–1946), Syria restructured its legal and judicial systems according to the French civil law model. The Syrian ordinary judiciary[3] comprises the offices of public prosecutor and judge and most members hold both offices during their careers. This chapter describes why the Ministry of Justice of Syria decided to appoint women first as public prosecutors when they were granted the right to hold judicial office. It also explains the reasons for why it is more advantageous,

1 An official like a public prosecutor, who could investigate criminal offences and bring offenders to trial, did not exist in Islamic law.

2 This is the report of the appointment given in the Damascene daily newspaper *al-Baʿth*, October 30, 1975, 4. However, during an interview in 2006, Ghāda Murād stated that she also prosecuted cases outside of the juvenile jurisdiction.

3 The judicial system in Syria, as in France, is divided into two court structures: the ordinary and the administrative courts. Since women have not yet been appointed to the administrative courts of the State Council (*Conseil d'État*), this article focuses on the process of appointment to the ordinary judiciary.

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even today, for a woman to be a public prosecutor and a criminal court judge. Data culled from interviews conducted with 117 female public prosecutors and judges[4] in the courthouses of southern, central, and northern Syria over a five-year period[5] show that most women have more experience in criminal than civil courts. A close analysis of women's family responsibilities and career patterns explains their recurrent presence in the criminal courts. Finally, the chapter attempts to measure the impact women judicial officers have had on criminal justice, which is necessarily limited since they constitute only 14 percent of the judiciary.[6]

2 First Prosecutors, then Judges (1975–1982)

As observed by the French sociologist Anne Boigeol, the public prosecution is a service that deals with the predominantly male environment of the police and the prison system (Boigeol 1999, 149, n. 1; 154). It is a function that requires 'male qualities' of authority and control (Boigeol 1999, 155) to maintain public order, investigate, or take charge of a crime scene. This is also true of the public prosecution service in Syria, which raises the question: Why did the Ministry of Justice choose to appoint women as public prosecutors in a society where the qualities of authority and control are not associated with women, and where social divisions and roles based on gender differences are strictly maintained?

4 The author is grateful to all participants who agreed to be interviewed. She also extends her thanks to the Ministries of Culture and Justice of Syria, which granted her the permission to do the field work and conduct the interviews with members of the judiciary. To protect their anonymity, only the dates of the interviews are given, and not the names of the interviewees.

5 The southern region includes the governorates (administrative districts of municipal government and the court system) of Damascus, Damascus Countryside, al-Suweida and Dar'a; the central region Homs, Hama, Tartus and Lattakia and the northern region Idlib, Aleppo, al-Raqqa, Deir Ez-zor and al-Hasaka. Quneitra, in the South, does not have a courthouse; its courts are located in the Damascus courthouse. The 13 main courthouses are headed by a chief public attorney in charge of courthouse personnel and administration.

6 As of December 31, 2008, there were 175 female members of the judiciary (Source: Statistics Bureau of the Ministry of Justice). This number has increased to about 224: the fifth and sixth cohorts of the Institute of Judicial Studies, respectively 13 and 29 women, finished their training and are now working in the courts in addition to the appointment of seven female lawyers to the judiciary by Presidential Decree No. 100, March 6, 2012. This figure does not take into consideration the dismissal, retirement or resignation of members of the judiciary since 2009. Likewise, it does not reflect the possible deaths of members of the judiciary since the Syrian Revolution of March 2011.

In the 1970s, most Syrian legal professionals, as well as the public, were adamantly opposed to the appointment of women to the judiciary. It was inconceivable that a woman would have the authority to impose her decisions on others. Despite the widespread resistance to women holding positions of power, political or otherwise, the government pushed forward with change. Why did the Syrian government appoint a woman to the judiciary in 1975? As announced by state media, the appointment of the first woman to the judiciary was "in commemoration of International Women's Year." Upon the return of the Syrian delegation from the first World Conference of International Women's Year held in Mexico in June-July 1975, the government was swift to act upon the recommendations of the 'World Plan of Action' adopted at the conference. In accordance with Paragraph 59 of the plan, which calls for women's "participation in political life" as "public officials in the various branches of government, including the judiciary,"[7] Ghāda Murād was appointed to the judiciary, as was Najāḥ al-ʿAṭṭār to the executive branch as Minister of Culture in 1976 (women had already acted as members of parliament as early as 1960 during the period of the United Arab Republic of Syria and Egypt). With these two token appointments, Syria intended to demonstrate to the international community that it was indeed a modern and progressive nation that supported women's rights and empowerment.

Given public sentiment and the outright conservatism of the legal profession, senior judges of the High Judiciary Council (the body responsible for the recruitment, appointment, promotion, and removal of the judiciary) thought it unwise to appoint women to the bench immediately, as it was feared that men, especially the lawyers, would simply not submit to the authority of a court assigned to a woman.[8] The status and prestige of judgeship would thus be compromised if women presided over the courts. They were therefore appointed as public prosecutors, who come under the direct supervision of the Ministry of Justice and are not independent decision-makers to the same extent as judges. In addition, prosecutors assigned to the lower courts do not attend hearings, but basically work in their offices when not investigating a crime scene; at the courthouse, they do not have the same visibility as judges on the bench. The first women members of the judiciary were thus not exceptionally visible and independent in the judicial structure. Their entry to the judiciary neither changed the male-dominated environment of the courthouse nor, with time, did it undermine the male hegemony of the judicial community.

7 The 'World Plan of Action' is included in Tinker and Bramsen (1976).

8 Interview of June 3, 2004.

In an interview granted to al-Jazira television network after her retirement, Ghāda Murād talked of the fierce opposition to her appointment to the judiciary in 1975. She was a successful lawyer of nine years' experience at the Damascus courthouse when asked by the ruling Ba'th Socialist Party if she wanted to become a public prosecutor.[9] She soon came to learn that her colleagues were hostile to the idea of a woman holding judicial office, doing their utmost to discourage her and make things difficult. Her reaction was to work twice as hard, because she knew that if she failed, it would be a while before other women were offered the same career opportunity. After approximately six months as a public prosecutor, she was evaluated by a senior judge, graded as 'good,' and then promoted (*al-Mar'a al-'arabiyya* 1978, 11).[10]

Thanks to Ghāda Murād's success, women were granted the right to participate in the National Judicial Examination, a competitive examination held to recruit members of the judiciary. In 1977, the Ministry of Justice drew up the examination qualifications to fit the career profiles of female law graduates who, at the time, were few in number (Cardinal 2010)[11] and, for the most part, were not practicing law but were employed as civil servants. As a one-off occurrence, it was announced that eligible candidates were to be recruited among civil servants employed in the different ministries, schools, national institutions, and enterprises (*al-Mar'a al-'arabiyya* 1978, 47–49).[12] The largest group of working women with law degrees was to be found in the public sector.

Normally the National Judicial Examination comprises two parts, a written and an oral examination. However, the 1977 examination consisted of an oral exam only,[13] thus making it more accessible to law graduates who perhaps had not opened their law books for some time, or did not practice law. Obviously,

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9 Up to 25 percent of the ordinary judiciary can be recruited from a pool of experienced lawyers, law professors, administrative court judges and state lawyers. Judicial Authority Act No. 98, November 15, 1961 (with amendments), Article 72.

10 *al-Mar'a al-'arabiyya* (The Arab Woman) (1978), No. 140. This women's magazine is the official organ of the Women's General Union, one of the popular organisations sponsored by the Ba'th Socialist Party, the ruling party of Syria since 1963. Ghāda Murād granted an interview to Rawān al-Dāmin on 7 December 7, 2007 for the programme 'Women Pioneers' (*al-Rā'idāt*) produced by the Qatari satellite television network, al-Jazira. A transcript of the interview in Arabic is available online at the following address: http://www.aljazeera.net/programs/pages/dac02e8a-d486-46b0-aace-13ed8ca81e36, accessed January 30, 2014.

11 For example, in 1975–1976, 15 women graduated from the only law faculty in Syria (Damascus University).

12 *al-Mar'a al-'arabiyya* (The Arab Woman) (1978). No. 121.

13 Interview of June 3, 2004.

the Ministry was determined to introduce as many as women as possible to the judiciary and took the necessary measures to widen the recruitment pool in order to accommodate the working patterns and profiles of the female candidates. Of the 21 women who passed the oral exam and underwent a full year of training in 1978, nine were finally appointed to the judiciary in March 1979, as deputy public prosecutors in their respective courthouses: Qamar Ṣarṣar, Luṭfiyya 'Ubayd and Ḥasnā' al-Aswad in Damascus; Ḍuḥā Yakin in Aleppo, Sabīḥa Jalab and Amīra Aḥmadū in Idlib; Su'ād Qaṣṣār in Deir ez-Zor; Salwā Kaḍīb in Homs and Rafīqa al-Ṣūfī in Lattakia.[14] Most of them were appointed to the juvenile courts, except in the smaller courthouses, such as in Idlib, where public prosecutors were assigned to more than one court and given additional duties due to the heavy case load and limited personnel.[15] Women of the second cohort, recruited in 1981, were also first appointed as deputy public prosecutors.[16]

The confinement of the first women members of the judiciary to the juvenile jurisdiction was a means of granting them a form of judicial power that seemed to coincide with the traditional status and realm of women: the care and education of children. In many jurisdictions of the world, when special laws and courts were created to judge minors, it was also recommended that women work in these courts. For example, in France, the creation of the office of juvenile court judge in 1945 was immediately followed by the appointment of the first woman to the judiciary in 1946. At the time, the majority of the French judicial corps believed that the most appropriate office for women was that of judge, not public prosecutor, more specifically, a judge in the juvenile court (Boigeol 1999, 153–154). In Tunisia, the first female law graduate was sent to France to train as a juvenile court judge in the late 1960s (Ben Achour 2007, 63, [n. 35]). Similarly, when 42 women were appointed in 2007 and 2008 to the Egyptian judiciary (Lindbekk, this volume; Sonneveld, this volume),[17] the

14 *al-Jarīda al-rasmiyya l-il-jumhuriyya al-'arabiyya al-sūriyya, al-juz' al-thānī* 1981. Legislative Decree No. 540, March 5, 1979.

15 Interview of June 2, 2009.

16 Interviews of June 21, 2004; June 23, 2004; June 29, 2004; July 23, 2006; May 27, 2009.

17 In 1998, Hind Ṭanṭāwī was the first Egyptian woman to be appointed to judicial office as the head of the Administrative Prosecution Body (attached to the administrative court system of the State Council). Then, in January 2003, the first woman, Tahānī al-Jabālī, was appointed to the ordinary court structure as judge of the Supreme Constitutional Court (Hamad 2006, 262). Given the social opposition to women's entry to the judiciary in Egypt, be it on the part of the legal professionals or the general population, the appointment of al-Jabālī as judge did not undermine the functioning of the courts since the position of constitutional court judge is one of non-contact with litigants and their lawyers.

judicial authorities assumed that it was more appropriate to appoint them to the bench and not to the public prosecution office, which is "the traditional starting point in the career of any judge."[18] Criminal courts and the public prosecutor's office were perceived as unsuitable environments for the women (details to follow); therefore, women in Egypt were appointed to the family courts (El Sayed 2006–2007, 136). Here again, women are associated with the family and welfare of children, and are deemed more competent to work as judicial officers in this area of the law.

In Syria, the avenue for women's entry to the judiciary via the courts of family law and personal status is blocked since these courts are religious courts, traditionally presided over by men, either law school graduates for the *shari'a* and Druze courts, or priests for the Christian courts (see Cardinal 2010).[19] On the one hand, the appointment of women to the public prosecution office may seem atypical since it is a judicial office traditionally reserved for and desired by men. On the other hand, the Syrian government's strategy of introducing women into the judiciary is also typical, because their appointment to the public prosecutor's office for juvenile courts corresponds to the equation between women and children in the legal system and society at large. Earlier on, in 1962 and 1967, two committees were set up in Syria to study the amendment of the Young Offender's Act of 1953. They both recommended that special courts be established for young offenders and that women preside over these courts since the general opinion was that women would work well with young offenders given their "natural ability to understand children's psychology" and to "take care of and educate the young."[20] However, as previously mentioned, Syrian women were not immediately appointed to the bench, unlike their French, Tunisian and Egyptian counterparts. It was only once women had proved to the Ministry and the legal community that they were indeed competent as public prosecutors that they finally became judges in 1982 at the

18 *Ibid.*

19 With the exception of the Greek Orthodox courts to which law graduates, regardless of their sex, can now be appointed since the amendment of the law in 2004: Personal Status and Procedural Law of the Greek Orthodox Patriarchate of Antioch and All the East (in Syria) No. 23, June 27, 2004, Article 86. However, priests are still the only judges to preside over these courts (observation based on field work conducted in the summers of 2007 and 2008).

20 *Qānūn al-aḥdāth al-jāniḥīn, mu'addalān wa-murfaqān bi-l-asbāb al-mūjiba* (Young Offenders Act with Amendments and Preamble) (Damascus: Mu'assasat al-nūrī, 2002), 42.

Damascus courthouse.[21] Again, they were appointed to the juvenile courts. It was believed that the decision to grant women judicial authority through the office of juvenile court judge would not meet with outright opposition for a number of reasons. First, juvenile courts hold sessions in private. Therefore, how could the public oppose the appointment of women to the bench if they weren't visible? In addition, a juvenile court does not resemble a regular court with the raised area of the bench occupied by the judge. In juvenile court, the judge sits at a desk and does not wear a robe but civilian clothes, a presence less intimidating for the offender and his or her family. Without the attire of a judge, these first female judges did not look the part. The Ministry foresaw that appointing a woman judge to a juvenile court would most probably not encounter resistance from the public, but, on the contrary, reassure parents and offenders that perhaps justice was on their side, since it was (and often still is) assumed that a woman would pronounce a judgment of a more lenient type. Almost all of the women trainees of 1977–1978 began their careers as judges in juvenile courts, a situation that seemed to accommodate everyone, since these women were perceived not as judges but more as facilitators of the eventual reform of a child who had 'misbehaved.' These female judges were 'the mothers of the courts'[22] whose duty was to decide which measures were to be taken to protect children and re-educate those who had gone astray. The appointment of the first cohort of women as judges to peace courts, both civil and criminal, also followed in 1982.[23] It took about six years for women in Syria to move from the public prosecution office to the bench.

3 Women Prosecutors and Criminal Court Judges Today

Judicial officers in Syria do not specialize in any area of law or jurisdiction. During his or her career, a member of the judiciary will most probably work as a public prosecutor and a judge in a variety of courts. Women were exclusively

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21 According to the *Official Gazette* No. 34 (1986), 3875, Rafīqa al-Ṣūfī was appointed a judge on March 21, 1981. However, the court to which she was assigned was not specified. A year later, al-Ṣūfī requested a transfer to work as a state attorney. Thus, her judicial career was short-lived. Further research is required to determine which court she was appointed to. Luṭfiyya 'Ubayd and Ḥasnā' al-Aswad were appointed judges to the juvenile courts at the Damascus courthouse on February 1, 1982 (Decree No. 179L, January 20, 1982/Rabī'a al-awwal 25, 1402 H. Muslim Hijrī dates are indicated if available. H stands for the Hijrī year).

22 The expression is the author's.

23 It should be mentioned that Ghāda Murād was appointed to a criminal court of first instance in the summer of 1981: Decree No. 2137L, July 4, 1981/Ramadan 3, 1401 H.

appointed as public prosecutors when they were admitted to the judiciary first in 1975, then in 1979 and 1981; even today, the majority of women begin their careers in the public prosecution service. Interviews conducted with 117 female judges and public prosecutors, 108 of whom were nominated after 1981, show that 59 percent of these women were first appointed as public prosecutors.

It is a well-known fact that first being a public prosecutor is the best preparation for later appointment as a judge to a criminal court because one learns all the stages of criminal case processing. This could explain why a majority of women preside over criminal courts during their careers. Of the 117 women interviewed, 50 (43 percent) have more experience in the criminal jurisdiction as judges and public prosecutors than in the civil court system. In comparison, the number of women to hold office in the civil courts for a long period of their careers is very small in Syria. Of the 117 women interviewed, 23 (20 percent) had more experience in civil law courts. In addition, six women had worked exclusively in civil law, three of whom were recruited as senior lawyers of 16 years' experience in 2003 on their appointment to civil appeal courts. In fact, thus, only three women who had embarked on a judicial career at a relatively young age were assigned exclusively to the civil courts. Another female judge who was appointed to the civil court, which some consider the most important at the Damascus courthouse—the commercial court of first instance—has spent almost all of her career in the civil jurisdiction except for a four-month stint as a public prosecutor during her pregnancy. In contrast, 35 of the 117 women interviewed have worked exclusively in the criminal jurisdiction. It is clear that the overall percentage of female members of the judiciary in Syria who have worked exclusively in the criminal jurisdiction (30 percent) is much higher than those who have worked only in the civil jurisdiction (5 percent).[24]

Unlike the French system where the best-ranking graduates of the *École de la magistrature* (School of Judicial Studies) can choose the jurisdiction and court in which they wish to work (Boigeol 1999, 160–161), Syrian members of the judiciary, junior and senior, do not, theoretically, have a direct say in their career paths. All appointments and transfers are decided by the High Judiciary Council, which consults with the chief public attorneys in charge of courthouse personnel in order to determine the local needs of each governorate. Despite the fact that members of the judiciary are not consulted regarding their appointments, it transpired during the interviews that women would often submit a request to the chief public attorneys of their respective courthouses to be transferred to the public prosecution office during their

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24 Two percent of the interviewees (three women in all) were equally experienced in the criminal and civil jurisdictions.

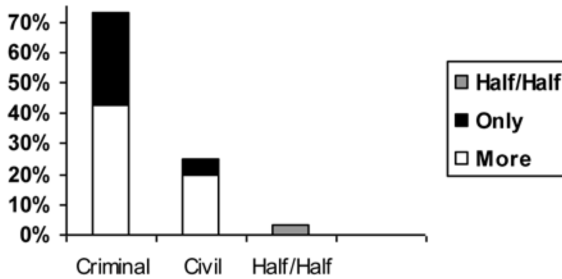

FIGURE 1 *Women's Experience in criminal and civil jurisdictions (1975–2009).*
SOURCE: 117 INTERVIEWS WITH WOMEN PUBLIC PROSECUTORS AND JUDGES IN SYRIA (2004–2009). COMPILED BY THE AUTHOR.

pregnancy and upon their return from maternity leave because of the lighter workload. As one female public prosecutor stated: "A prosecutor's job starts when she gets to work, but a judge's work starts when she gets home where she researches a case and spends time writing up a decision."[25] Likewise, many women prefer appointment to a criminal rather than a civil court because it generally takes less time to decide a criminal case and write up the decision. Given the fact that 70 percent of the 117 women interviewed are married and most of them have children to care for—though often helped by mothers and sisters—, the constraints on their time due to family responsibilities explain their predilection for the criminal jurisdiction. As mentioned earlier, the four long-term career women who have worked exclusively in the civil jurisdiction (except for a four-month period as a public prosecutor during pregnancy in one case) are single or, in the case of one, a widow with two children. The fact that an overwhelming majority of female members of the judiciary work in the criminal jurisdiction is perhaps due to three major factors: 1. Their initial experience as public prosecutors, which channels them towards working as judges in the criminal courts; 2. The lighter work load in deciding a criminal case, which allows women more time to attend to their domestic responsibilities; and 3. The accommodating attitude that senior judges, either as chief public attorneys or members of the High Judiciary Council, have shown women

25 Interview of November 3, 2004.

judicial officers with family responsibilities by appointing them to less time-demanding positions such as public prosecutor and criminal court judge. If it is advantageous, on a certain level, for women to work in the criminal jurisdiction, has it been advantageous for the judicial system on the whole? What impact have women had on the administration of justice as public prosecutors and criminal court judges?

4 The Impact of Women on Criminal Justice

In the Syrian judicial system, criminal procedure is divided into three basic stages: 1. The pre-trial stage when the public prosecutor (*qāḍī al-niyāba*) investigates a minor or more serious offence in order to determine whether or not to prosecute; 2. The examining stage when the examining judge (*qāḍī al-taḥqīq*) investigates and collects evidence of a major crime (demanding three years' imprisonment or more), and recommends whether it goes to trial before the Assize Court, his or her decision being subject to review by the judge of the Indictment Division (*qāḍī al-iḥāla*) who has the power to accept or reject the recommendation in addition to requesting further investigation and evidence; and 3. The trial stage when the judge of a criminal court (*qāḍī al-ḥukm*) renders a verdict of guilty or not guilty, and decides on sentencing. Finally, the judge who "decide[s] issues related to the execution of judgments" (Harrap's Dictionnaire juridique, Law Dictionary 2004, 80)[26] (*qāḍī al-tanfīdh*) is responsible for assuring that decisions made by the court are implemented.[27] In order to evaluate the impact women have had on criminal justice, their roles as judicial officers at each stage of criminal proceedings must be examined. In addition, the appointment of women to the various judicial offices and the extent to which they fulfill their duties differs significantly from one courthouse to another. The women's ability to exercise their office therefore depends to a great extent on the judicial culture and social environment of each region in Syria. Close to 40 percent of female judges and public prosecutors work in Damascus; this figure jumps to 53 percent if one includes the suburbs and small towns surrounding the city, referred to administratively as the Damascus Countryside (*rīf dimashq*). It would be tempting to draw conclusions about the career patterns and strategies of the Syrian female judicial corps based uniquely on the experience of women in the capital and its countryside. This,

26 Definition of Harrap's *Dictionnaire juridique, Law Dictionary*.

27 Only two of the 117 women interviewed worked as judges who implement criminal court decisions. This office will therefore not be discussed due to lack of data.

however, would be a methodological error. Fieldwork conducted outside the capital shows that regional diversity in judicial culture and practice impacts on women's career patterns and status as judges and public prosecutors. In addition, the family situations, personal qualities and outstanding character of certain female judges and public prosecutors also defy generalization.

4.1 *The Public Prosecution Service*

Prosecutors are in charge of the criminal investigation. Female prosecutors in Syria participate fully in the investigation process, except for three aspects: 1. Visiting the crime scene; 2. Viewing the corpse (if there is one), and 3. Assignment to around-the-clock duty. During their training, almost all women said they had viewed a corpse. For many of them it was a once-in-a-lifetime experience, since afterwards, during the exercise of their functions as public prosecutors, they did not view any.[28] For instance, it is general policy at the Damascus courthouse that women prosecutors should not be sent to investigate crime scenes. Some women reportedly fainted while on duty, although the 117 women interviewed never mentioned doing so. Women are not considered to have the necessary composure and authority at the crime scene to deal with the police, the victim's family, the accused, the bystanders, etc. For example, one of the women who had worked for almost 20 years in the public prosecution service had never seen a corpse until a murder occurred at the courthouse while she was the acting chief public attorney; in this function, she had to take charge of the crime scene, a unique occurrence in her career.[29] When asked if she had ever viewed a corpse, another female prosecutor, who at the time was assigned to the Assize Court in Damascus and attended hearings, looked bewildered and said, "Do you think I like to see dead bodies?" She then severely criticized a female colleague whom she described as 'mannish' (*mustarjala*) because she 'enjoyed' attending executions in her function as head judge of the first instance civil courts at the Damascus courthouse, even though she could ask to be excused from this duty. In addition, female prosecutors are not required to be on call 24 hours per day. Their domestic duties, such as taking care of children, make it difficult for them to leave their homes at night, and possibly be absent the following morning. One female public prosecutor in Damascus spoke about the social stigma associated with around-the-clock duty: "Imagine, the police pulling up to your door

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28 Interviews of June 20, 2004; October 24, 2004; November 1, 2004; November 8, 2004; November 22, 2004; June 20, 2006; June 22, 2006; June 28, 2006; June 5–6, 2007; June 17, 2007; May 26, 2008; June 9, 2008; July 27–30, 2008; May 25–26, 2009; May 28, 2009.

29 Interview of June 26, 2006.

in the middle of the night in order to accompany you to the crime scene: what would the neighbors think and say?"[30] General practice has resulted in female public prosecutors working mainly within the confines of the courthouse, with their male colleagues being assigned out-of-courthouse and around-the-clock duties.

However, during interviews conducted at the smaller courthouses in Syria, female public prosecutors from Tartus and Idlib said they were systematically assigned to investigate crime scenes.[31] This is partly due to the fact that the smaller courthouses, unlike the larger courthouses of Damascus, Aleppo and Homs, often have a shortage of judicial officers. As a result, those in function must take on a number of duties. The Idlib courthouse consists of four public prosecutors and two examining judges. The public prosecutors, no matter what their gender, take turns at around-the-clock duty: each is assigned one week per month. In addition, they are often sent to investigate crime scenes, which would normally be done by an examining judge.[32] Even after leaving the public prosecution service and during her office as a civil court judge, one of the women at the Idlib courthouse was periodically sent to investigate a crime because of her reputation as thorough and highly observant.[33] She spoke of an incident when she was called at around 11 in the evening to investigate the death of a young woman who had been run over by a tractor. At the morgue, she viewed the victim, who had obviously sustained injury to the pelvis area; the tractor's tire tracks were clearly visible on her body. However, her arms were strangely bruised and twisted. When the medical examiner arrived, the judge asked him about these peculiar injuries, but he didn't seem to want to comment on them. On the spot, she decided to open a criminal investigation and asked a female doctor at the hospital to examine the body to verify whether the young woman, who was not married, was still a virgin; according to Syrian custom and social norms, only married people should have sex. Her hymen was not intact and the judge felt that there had been foul play. At one in the morning, the police accompanied the judge to the farm where the accident had occurred. Upon arrival, she noticed that the farm women, gathered in mourning, seemed very upset; after some questioning, it transpired that the young woman had been murdered, held down by her brother and run over by a tractor because she was suspected of having an illicit relationship with a young

30 Interview of November 3, 2004.

31 Interviews of May 28–29, 2008.

32 Interview of June 2, 2009.

33 It should be mentioned that this woman remained single and did not have the domestic responsibility of children and husband.

man. The so-called accident turned out to be an honor killing. If the incident had not been properly investigated by this judge, it is possible that the murder would have been passed off as an accident.[34]

Likewise, the female public prosecutors at the Tartus courthouse are systematically sent out to investigate crime scenes and view the victims, even though the courthouse is smaller and better staffed than the one at Idlib, with six public prosecutors. Four of the six public prosecutors in 2008 were women.[35] It might be concluded that there are not enough men to be sent out to the crime scenes and, therefore, women must take on the same duties as the men. Another explanation as to why women prosecutors in Tartus assume out-of-courthouse duties is perhaps due to the fact that the regions of Tartus and Lattakia are known for their high rate of female employment (around 20 percent) (Courbage 2007, 194; 204). Therefore, it might be a more frequent occurrence to see a woman in a position of power and authority, such as a public prosecutor who takes charge of a crime scene, because women are very visible in the public sphere, mainly as government employees in all services and sectors. (However, women who were public prosecutors in Lattakia were not sent out to investigate crimes scenes or view victims, despite the fact that women of this region are very active in the work force.)[36] To the contrary, elsewhere in Syria where women work less outside the home, for example in Aleppo, their chances of being accepted in a position of authority are perhaps smaller. Aleppo is the second largest city in Syria and has the second largest courthouse, but there are very few female judges and public prosecutors, totaling 15 members (or 7 percent) of all judicial officers at the courthouse (December 2008). The courthouse is also staffed with fewer female clerks than in other courthouses of Syria; only six percent of the labour force (other than agricultural) in the Aleppo governorate is female (Courbage 2007, 194; 204). It is not surprising therefore to learn that female public prosecutors in Aleppo, who are few in number, are not assigned duties outside of the courthouse.[37]

Over the years, the Ministry of Justice has continued to apply a politics of protection towards the female members of the judiciary. With regards to criminal cases, female public prosecutors are often spared the hardship of viewing a corpse, investigating crime scenes and being on around-the-clock duty. To the contrary, in civil cases, female judges systematically go on out-of-court inspection missions; one day a week is scheduled for such inspections. It is the context

34 Interview of June 2, 2009.

35 Interviews of May 28–29, 2008.

36 Interview of May 26, 2008.

37 Interview of June 6, 2007.

of the crime scene, the possible havoc and chaos, the potential danger, the sight of the blood and the victim, and the necessary authority and composure required to deal with all parties involved, all of these factors that are believed to be beyond a woman's scope and capacity. The context of the criminal case demonstrates how social norms and values can restrict a woman in her work. Nonetheless, as mentioned, many female public prosecutors have viewed corpses, investigated crimes scenes and dealt with all types of criminals face to face. However, general practice in the larger courthouses of Damascus, Aleppo, and Homs has resulted in female public prosecutors working mainly within the confines of the courthouse while their male colleagues are assigned out-of-courthouse duties. The limitations imposed on female public prosecutors have created the impression, among court staff, lawyers, and male members of the judiciary, that female judicial officers are less competent because they do not shoulder the same responsibilities as their male colleagues. However, this claim is demonstrably false since female judicial officers in the smaller jurisdictions perform the same duties as their male colleagues.

4.2 *The Examining Judge*

Working in close collaboration with the prosecutor at the pre-trial stage of a crime is the examining judge. Once mandated by the prosecutor's office, the examining judge proceeds to investigate a crime which involves interviewing suspects, victims, and witnesses, and gathering evidence to determine whether there is a valid case against the accused. Of the 117 women interviewed, only eight had been appointed as examining judges. At the Damascus courthouse, two women were appointed for a brief period (seven and five months, respectively). Their mandate did not last long as they were not considered to be very successful. The general consensus[38] among the court staff is that women do not make good examining judges mainly because: 1. During questioning, the women do not command the same authority as their male colleagues, so criminals do not take them seriously and, as a result, cooperate less; and 2. It is inappropriate for women to investigate crimes of a sexual nature, be they sexual abuse, rape, sodomy, etc., for it is assumed that women are by nature modest and should be shielded from such immoral acts. One woman appointed to a regional court in the 1980s[39] at the start of her career relates how her status as a woman was a social handicap to her conducting a criminal investigation:

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38 Opinions expressed by courthouse staff of the examining division, court clerks, judges and prosecutors (both men and women).

39 Regional courts have general jurisdiction. The trial judge often has to perform the functions of a public prosecutor or an examining judge since she is the only judicial officer

> I was assigned to a regional court when a murder occurred. I had to act as an examining judge because there are not always such judges in regional courts. A man had been murdered and I arrived on the scene with a forensic expert and the police. I asked that the victim be undressed and examined in order to verify if he had incurred any injuries before death. The police took off the victim's shirt. I asked the officer to undress him completely because all of his body had to be examined. Everyone was stunned, not believing that a woman could make such a request.[40]

This anecdote illustrates, in part, one of the social norms that a woman must circumvent in order to fulfil her duties as a judicial officer working in the criminal jurisdiction: the norm of feminine modesty which stipulates that it is socially and morally inappropriate that a woman should see a man's naked body. The same norms apply when questioning witnesses or suspects: to talk about certain issues, such as sexual misconduct and crimes of a sexual nature, is to transgress the norm of modesty imposed by society. A number of female public prosecutors and examining judges commented that the men accused of sexual offenses often try to exploit this social norm to their advantage by embarrassing the women during questioning with lewd remarks and language, and the details of their crimes. One female examining judge working in the countryside of Damascus and considered by colleagues, both women and men, to be very competent, developed a technique to counter this sexual intimidation practiced by the men. When it was time to question a man about a sexual offence, she would summon a female clerk to her side to replace her male clerk. In Syrian procedural law, both civil and criminal, the judge dictates to a clerk everything that goes into the file; the testimony of a witness or the statement of the accused are not transcribed verbatim. This is partly due to the significant difference between spoken and written Arabic. The judge must ensure that all written documents are composed in a grammatically correct idiom; only key expressions pertaining to the case, such as an admission of guilt on the part of the accused, are transcribed in the spoken Arabic dialect. This female examining judge felt more at ease dictating the accused's statement, narrated in the first person, with the details of his crime, to a woman

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on location. The best possible training a judge can receive at the start of her career is an appointment to a regional court. Since women cannot be judges in the personal status courts that apply religious law, they are not appointed as regional court judges unless a male colleague in a neighboring court can take charge of the personal status cases. Of the 117 women interviewed, only four were appointed as regional court judges.

40 Interview of June 28, 2004. This account is not verbatim.

like herself. In addition, during the examination, the accused found himself in the company of two women and thus was at a numerical disadvantage, which seemed to discourage any arrogant behaviour on his part.[41]

An important exception to women not investigating crime scenes and having close contact with the accused is the career of Salwā Kaḍīb, one of the 1979 trainees and the first woman to be appointed at the courthouse in Homs, the third largest city and courthouse in Syria. In common with her fellow women at the Damascus courthouse, she started out as a deputy public prosecutor to a juvenile court, but soon afterwards was given additional duties outside the juvenile jurisdiction. She remained a public prosecutor for over six years, during which she investigated many crime scenes, viewed corpses, and was assigned around-the-clock duty. As she remarked, she didn't have a 'woman's schedule' with household responsibilities towards children and husband since she remained single. In 1987, Salwā Kaḍīb was the first woman to be appointed an examining judge, and remained one for a total of five years. She was also the first and only woman to be appointed as the presiding judge of an Assize Court and president of one of the criminal divisions of the Court of Cassation in the capital (each division is staffed with three judges: a president, and two assessors). Because of her competence and achievements, she set a precedent at the Homs courthouse: from then on, other women were appointed as examining judges, five in all. The Homs courthouse is the only one to have had so many female examining judges, but it should be specified that they were appointed to the juvenile jurisdiction and therefore worked mainly with minors.[42] One of the women who had been an examining judge in the juvenile jurisdiction in Homs for about two years only lasted seven months when later appointed to investigate adult crimes in Damascus. If female examining judges have been successful in Homs, perhaps it is because they work mainly with young offenders. However, more women would have to be assigned to this office in order to determine objectively if it is beyond their ability to carry out their duties due to social norms and constraints.

4.3 *The Judge of the Indictment Division*

Reviewing the decisions of the examining judge and public prosecutor is basically an office job. The judge of the Indictment Division is commonly called *bawābat al-jināya*: the gate to the Assize Court. In other words, this judge decides whether a criminal should stand trial in the country's highest criminal

41 Interview of December 22, 2008.

42 If a case involves both minors and adults, it is the examining judge assigned to the juvenile jurisdiction who will question the adults.

court. He or she can reject a case or demand the investigation be reopened and that additional evidence be collected; he or she can even conduct the investigation. However, for the most part, this is left to the public prosecutor and the examining judge. It is often said that this judicial office is one of non-contact. The judge deals with crimes, but on paper. In this respect, this position is considered to be somewhat more appropriate for a woman. Women with many years of experience in the criminal jurisdiction are appointed to this office. Of the 117 women interviewed, six have held this office.

If this position is one of non-contact; however, it is one of power. When interviewed, one woman assigned to this office for eight years was of the opinion that women had made a significant contribution to the administration of justice in Syria thanks to their integrity and capacity to be independent in their decision-making. She claimed that female judges and public prosecutors did not belong to the same networks as their male colleagues and, therefore, were less influenced in their decisions (see Cardinal 2013). Obviously, in her position, the capacity to make an independent decision is crucial since this judge has the power to decide if a case shall be tried before the highest criminal court in the country.[43] This comment, though significant at the time, took on a new meaning after an interview conducted with a female judge in the northern governorate of al-Raqqa, who had been assigned to the Indictment Division, but who lasted only two years in this office because of the enormous pressure put on her by lawyers to dismiss cases against their clients. The resulting stress and anxiety made her life miserable and her request for a transfer was eventually granted. How were the lawyers able to put pressure on this female judge in al-Raqqa, while her colleague in Damascus seemed immune to any outside influence? The answer lies perhaps in the personal history of each female judge. While the Damascene judge was from an influential and powerful family and was married to an important man with political connections, the Raqqan woman, though from a respectable family, her father having been the first lawyer to pratice in al-Raqqa, had been married twice and was now divorced. The lawyers applied pressure on her by questioning her reputation as a woman in an effort to taint her reputation as a judge. They claimed she was not objective, but strong-headed, and 'obviously' held a grudge against men since she had been twice divorced. Therefore, they questioned the impartiality of her decisions. Sometimes they would make insinuating remarks in order to embarrass her in all-male company, implying that as a divorcee she was perhaps a woman of loose morals. For example, an older lawyer advised her not to remain alone with a lawyer of the opposite sex in her chambers with the door

43 Interview of June 29, 2004.

closed because people had started spreading rumors that she was a woman of ill repute. Despite the warnings against such harassment issued by the chief public attorney of al-Raqqa courthouse and the Minister of Justice himself, the men persisted in tormenting the female judge. The only way to put an end to the intimidation was to transfer this woman to a less powerful position, a judge in a first-instance criminal court.[44]

4.4 *The Criminal Court Judge*

The transition from working in the juvenile jurisdiction to working in the ordinary criminal courts was not easily accomplished. One of the first female judges appointed to juvenile court at the Damascus courthouse recalls one of her earlier cases when she was transferred to a criminal court of first instance in the mid-1980s. Three women were accused of prostitution, and she had to question them. During the years she presided over a juvenile court, she was used to private hearings, but now she would have to adjust to the public hearings of the first-instance criminal courts. When the time for questioning approached, she was surprised to see the courtroom slowly filling up with lawyers, notably all men. Apparently, word had spread that a female judge was going to question a group of sex workers in a public hearing—a first at the Damascus courthouse—and all those interested had come to watch the 'show.' It was a trying experience for the female judge to face an exclusively male audience and address an issue that violated the rules of modesty and proper social conduct.[45] All female public prosecutors and criminal court judges have had to find the courage to surmount their embarrassment and overcome their social inhibitions when trying cases that involve sexual misconduct and crimes.

Many people believe that it is more appropriate for women to work in civil law because of the respectable and 'morally clean' (far removed from acts of sexual misconduct) environment of court matters. Despite this belief, female members of the judiciary are more prevalent in the criminal jurisdiction, from the lowest to the highest ranks, in the public prosecution service and the criminal courts as discussed above in Part three. For example, in 2007, six of the seven women of the 1979 and 1981 cohorts held office in the criminal divisions of the Court of Cassation; only one had sufficient experience and expertise given her past appointments to sit in a civil division. This overwhelming presence in the criminal divisions of the highest ranking court of the country is due to the fact that these female judicial officers worked almost all their careers in the criminal jurisdiction, first as public prosecutors then as judges

44 Interview of May 28, 2009.

45 Interview of July 23, 2006.

in the juvenile courts, then later as judges in the ordinary criminal courts. As observed earlier, even today, the majority of women continue to be appointed to the public prosecution service when they start their careers, the next logical step being appointment to a lower criminal court thanks to the experience acquired as a public prosecutor. Twenty-two women interviewed who graduated from the new Institute of Judicial Studies were all first appointed to the criminal jurisdiction, with the exception of one who lasted only two months in a civil peace court before being transferred to a criminal peace court, and another woman appointed to a regional court. Eighteen were appointed to the public prosecutor service, with the remaining two assigned to a criminal peace court and as examining judge. Although the Ministry of Justice, more specifically the High Judiciary Council, has made efforts to improve the selection process and the training of future public prosecutors and judges with the founding of the Institute of Judicial Studies in 2000, which offers a two-year training program (training previously lasted only six months), the process by which women are appointed as members of the judiciary has not evolved over the past 30 years. It is still assumed that the best place for women to start and continue their careers is in criminal law, an easier branch with less knowledge and time required to process and decide a case. In fact, some women stated that criminal law was not intellectually stimulating, but the only reason they remained in it was to have more free time to attend to their families and domestic responsibilities. A few of these women requested a transfer to the civil jurisdiction because, even if they were overworked, they needed the intellectual stimulation and wanted to advance their knowledge of the law, which they felt they could only do as a civil court judge. A few women working in the criminal jurisdiction also requested transfer to a civil court because they could not endure the sordid and violent crimes of a sexual nature.[46] However, these marginal voices do not reflect the majority of women who work in the criminal jurisdiction, either as public prosecutors or judges. On the whole, they are pleased with their office because, first of all, it represents a conveniently lighter workload[47] and, in addition, they feel they are making a valid contribution to solving social problems and alleviating human misery. Many of them explained that when they decide a case, they take into consideration the personal history and responsibilities of the accused, for example, whether or not he is the head of the household. If he is the main provider, some female judges

46 Interviews of October 17 and 25, 2004 (women working at the Damascus courthouse).

47 Interviews of June 15, 2004; June 28, 2004; October 25, 2004; November 2, 2004; November 8, 2004; November 21–22, 2004; June 20, 2006; June 6, 2007; May 28, 2008; June 9, 2008; July 27–28, 2008; July 30, 2008; December 23, 2008; May 25, 2009.

said they do their best to lighten his sentence so that his family will be spared extreme economic loss while he is in prison.[48] Many of the women assigned to juvenile courts expressed their profound concern for the welfare of the young offenders and described their efforts not to send them to the correctional centers where living conditions are appalling and the youngest learn more deviant behavior from the older, more experienced youths.[49] The women preferred the power of discretion available to a criminal court judge when deciding a case and sentencing, in contrast to the limitations placed on the civil court judge who must remain within the confines of the law; his or her decision is firmly restricted by the legal text and jurisprudence.[50]

As criminal court judges, the women feel they are closer to society and its problems and that their decisions can contribute more directly to bettering people's lives.[51] Additional research on court decisions in a comparative perspective would have to be conducted to determine whether women really judge and sentence people differently from their male colleagues.

5 Conclusion

In the 1970s and early 1980s, the Ministry practiced a politics of exclusion as a strategy to progressively introduce women into the judicial corps without jeopardizing the courts' functioning; women were only prosecutors in juvenile courts, then mainly judges in juvenile courts. However, the question remains: is the Ministry still applying a politics of exclusion by appointing most women to the criminal jurisdiction as public prosecutors and criminal court judges? Or do the appointment practices of the Ministry simply reflect a realistic and pragmatic approach to accommodating women's career patterns which must leave room for their responsibilities as caretakers of the home and children? Likewise, one could ask whether female members of the judiciary would be willing to take on more responsibility, to devote more hours to their jobs by working more in the civil courts? Is it important that more women work in civil law? A possible response is that all members of the judiciary in

48 Interviews of November 22, 2004; June 17, 2004 and June 2, 2009.

49 Interviews of June 6, 2004; October 17–18, 2004; October 24, 2004; July 27, 2008.

50 Interviews of October 24, 2004; June 28, 2006; June 5–6, 2007; May 26, 2008; May 28, 2008; July 28, 2008; May 25, 2009; June 2, 2009.

51 Interviews of June 17, 2004; October 14, 2004, October 24, 2004; October 26, 2004; November 22, 2004; June 28, 2006; July 23, 2006; July 17, 2007; July 27, 2008; May 26, 2009; June 2, 2009.

Syria should have a balanced career profile since the basic principle of the Syrian judicial system is that there is no specialization and that all members of the judiciary work as either public prosecutors or judges, in the civil and criminal jurisdictions. One of the women of the 1981 cohort expressed a profound regret that all of her experience, 28 years, was in the criminal jurisdiction. She felt ignorant of civil law because she did not have the applied knowledge of the courts, which is sometimes required to decide certain criminal cases; she had to depend on the expertise of her male colleagues who had experience in the civil courts in order to judge certain cases.[52] As in all legal traditions, civil law is the foundation of the law, and the judicial officer who does not know civil law is ignorant of much of the law. When women who have worked only in criminal law are transferred to a civil court, they stated that they found it excruciatingly difficult to know which law to apply and how to write up a decision. It was not long before some of them requested a transfer back to the criminal jurisdiction. Another female judge of the first cohort of 1979 related that after working for three years as a public prosecutor she categorically refused (she had the courage to do so) to continue in that service and specifically requested that she be assigned to a civil court, fully aware that her knowledge of the law would be inadequate if she remained in the criminal jurisdiction. Seventeen of her 27-year career were spent in the civil jurisdiction. Her interest in civil law and her willingness to devote the necessary time to become proficient in that branch can partially be explained by the fact that she remained single throughout her life.[53] Similarly, the other women whose experience is exclusively (or almost so) in the civil courts are single or widowed (in one specific case, with two older children). The only female judge assigned to a civil division in the Court of Cassation as of the summer of 2009 is divorced with one child. Civil law in Syria seems to be more the domain of the single, widowed, or divorced woman with few or no children, who is able to devote much of her time to her career, while criminal law is more the domain of married women with the domestic responsibilities of a husband and children.

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CHAPTER 10

The Best of Times, the Worst of Times: State-Salaried, Female Legal Professionals and Foreign Policy in Post-Qadhafi Libya

Jessica Carlisle

1 Introduction

The corridor outside of judge Maha's family court, in the central Tripoli courthouse, is packed with lawyers and litigants on a Monday morning in May 2013. The lawyers chat amiably between themselves and briefly enter the office in which the hearings will be held to check for information about their cases in the court register. By the time the judge arrives, between nine and nine-thirty, her room is buzzing with men and women who are ushered out by her court clerk, Wafa, and the doorman, Selim. Several lawyers greet her as she enters: including Amal, who is employed in the family law section of the Directorate of Public Lawyers, a legal aid service staffed by lawyers directly employed and salaried by the Ministry of Justice. Amal has been working in the family law for a few years and so is well known in Maha's court. The two women exchange pleasantries as Maha settles down to begin her morning session.

Maha's court is housed in a small office on the second floor of a slightly dilapidated, functional block that is situated behind the older courthouse building. On the floors below, there are chambers that are more recognizably courts, with a bench for the judge, a stand for witnesses, seating for spectators, and sometimes a cage to confine the accused. Maha makes do with this room, in which the white walls could do with redecoration and the records of the court's work are handwritten by the court's clerk, Wafa. The files of the day's cases are already stacked up on Maha's desk when I arrive. There are three large filing cabinets along one wall, which I assume contain the current case files, and at the end of the room is a window overlooking an apparently abandoned schoolyard. There are a couple of chairs left free for visitors. I sit, conspicuously, behind a third desk under the window.

Maha is in court for morning sessions twice a week, and deals with 18 and 24 case files on the two Mondays that I attend. Her work environment is poorly resourced. None of the court's work is computerized, and I have been told that judges and lawyers lack access to systematic, archived rulings. Nevertheless,

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Maha is respected by the lawyers I meet in the corridor outside of her courtroom for her patient attention to cases. I can also see that she spends a considerable amount of time listening to litigants' stories, exploring their feelings about the situation that has brought them to court, applying the relevant law in response to litigants' social circumstances and encouraging families to reach mediated agreements.

In addition to Maha and Wafa, the majority—if not quite the overwhelming majority—of lawyers and litigants in the court are women. Many litigants have brought lawyers with them, although it is not compulsory to have legal representation in family cases, and occasionally lawyers energetically plead their clients' cases standing in the small space between the filing cabinets and the judge's desk. Maha evidently knows many of them quite well: both members of the public legal aid service and lawyers in private practice.

It takes me a while to realize that only private lawyers wear black robes. Before the revolution, the public lawyers also used to wear robes, but these were decorated with bright green sashes associated with the Qadhafi regime. They have been recalled to be redesigned and, in the meantime, public lawyers work in their own clothes. Some of the female public lawyers are very fashionably dressed, while others wear more modest manteau coats. All of the male lawyers seem to be in suits.

Some of this morning's business is simply the submission of documents or information by lawyers. A few litigants or their lawyers fail to turn up for their hearings. However, several of the cases involve interactions between the judge and litigants. The applicable substantive legislation is Libya's Law No. 10/1984 (concerning the Regulation of Marriage and Divorce and Their Effects). Wives, husbands, fiancés and fiancées, parents, and other relatives come in with legal requests for the registration of divorce, post-divorce maintenance and housing, permission to marry before the legal age of marital consent, and legalization of child custody arrangements.

Sometimes litigants stumble over what they want to say or are confused about the law. Maha suggests postponing their hearings and directs them to the public lawyers for legal advice and representation. On one occasion, she spots Amal standing outside and calls her into the court to talk to a woman who wants to make a claim for unpaid child maintenance from her ex-husband. The morning ticks by with the judge, sometimes aided by lawyers, noting submissions, taking testimony, notifying litigants to expect a ruling shortly, overseeing agreements negotiated between the spouses themselves, and sometimes trying to mediate outside of the law.[1] In the course of the session, she questions

1 In one complicated case Maha and Wafa urged an elderly man to reconsider the veracity of his testimony about previously repudiating and then reconciling with his wife, since the

parents at length about why they are requesting the court's permission for their daughters to marry before the legal age of consent, checks that a young divorcee is really willing to accept a very low amount of child maintenance, and ensures that a child custody arrangement is properly legalized.

She is also determined to try to reconcile one young, estranged couple, whose case comes up towards the end of the second court session I observe. The husband and the wife's brother have come in to court to finalize a *talaq* (repudiation) divorce. The wife is not with them since her brother has agreed to act as her proxy in finalizing the divorce and accepting the mandated financial settlement (her unpaid dower) on her behalf. The marriage seems sufficiently doomed for the husband to have bought in a plastic bag containing a huge block of ten dinar notes wrapped in cellophane. However, Maha has noticed that he has also included a small box of chocolates in the bag as a gift. He explains that the breakup isn't his wife's fault, accusing their extended family of being at the root of their problems. In addition, the wife's brother confirms that the marriage has been a good one. Wafa, the court clerk, tells the husband that the judge has "a feeling" about his case. Maha asks the wife's brother to phone the wife to ask her to come into the court.

When the wife later arrives at the end of the morning's session, Maha speaks both to her and her husband separately in an attempt to bring about a reconciliation. It seems that it is too upsetting for them to come into the office together. Each of them blames their problems on the other spouse's relatives. The wife says that the husband's mother and sister are hostile to her, while the husband says that the wife's sister constantly interferes. Accusations fly. No matter how many times the judge reminds them that they have children and the right to a private married life free from interference from their extended family, they both reply that the situation is hopeless. After around half an hour, the judge relents. The wife's brother signs to say that he has witnessed the divorce, while the wife stays outside of the courtroom. After the husband has gone, leaving the money and the chocolates behind him, Maha asks her to come in for a final talk. The wife becomes tearful, in response to which both Maha and Wafa stress that she and her ex-husband could try to save the marriage within the upcoming waiting period (*ʿidda*).[2]

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implication of the dates he gave was that he had not been legally married to his wife for the past three years. Maha sent him away to think about the timing of events and to consider remaining in his marriage. He returned to the court the following week still determined to go through with the divorce, which Maha then allowed.

2 This period lasts for three months during which the couple may reconcile and revoke the divorce.

Other judges and lawyers in Syria and Morocco have previously told me that family cases are the most taxing to deal with, given their emotional complexity. After a couple of hearings in which warring spouses have battled their disputes out in front of her, Maha confirms that she shares this sentiment when she turns to me and remarks, "Judges have a tough life!"

Moreover, it is apparent, even after only two days in Maha's court, that these are unusual times. The aftermath of the 2011 revolution has impinged on the ebb and flow of the family court's business when I look up from writing my field notes and notice that the judge is taking an unusual witness statement. At first I wonder if this session is related to a judicial divorce request from a wife and if Maha is collecting testimony from this witness in support of the husband. It is the only way I can make sense of her questions about whether this witness's neighbour ever appeared to own any weapons, or voiced any support for Qadhafi. However, I later learn that Maha is sometimes asked by the Public Prosecution to take witness testimony related to appeals from suspected Qadhafi loyalists against decisions made by the Integrity and Patriotism Committee, which has powers to sack public sector employees found to have supported the former regime.

2 Making the Case for Women in Libya's Legal Professions

This brief interruption in the familiar rhythm of family court hearings served as a reminder of the seismic political and social change happening outside of the courtroom in the wake of Libya's 2011 revolution. This change had had a greater impact on women working in the state-salaried legal professions than simply disrupting the order of Maha's working day. Women's employment as judges and public lawyers was under pressure from groups mobilizing articulations of two ideologies in the post-revolutionary context: anti-Qadhafism and Islamism.[3] Domestic calls for sweeping anti-Qadhafi restructuring, lustration, and deep rooted reforms in the aftermath of the revolution threatened the system of state-salaried, legal professionals established by the former regime. In

3 By referring to articulations of Islamism and anti-Qadhafism I mean to stress that there were multiple expressions of, and commitments to, Islam and opposition to the legacy of the former regime in Libya in 2012–2013: not all of them supporting policies that would have a negative impact on women's participation in the legal professions. All of the state-salaried judges and lawyers I met expressed anti-Qadhafi sentiments and several told me that Islam was crucial to Libyans' personal development and/or the future development of Libya.

addition, Islamist opposition to women's full involvement in the public sphere[4] included objections to the presence of women in the judiciary. In addition to these domestic pressures, the restructuring and reform of Libya's legal professions was a frequent topic in the numerous scoping visits, mapping exercises, consultations, workshops, and consultant-authored reports that made up the internationally funded 'rule of law' initiative in Libya in 2012–2013. All of this took place in a volatile security situation in which legal professionals, including women, had been murdered by unknown persons and groups.

In this chapter, I argue that the foreign donor-sponsored rule of law project failed to support women in Libya's state-salaried legal professions as they came under scrutiny from domestic critics in 2012–2013. I suggest that this failure is attributable to a combination of the 'startlingly thin' knowledge on which policy recommendations from donors are based (Carothers 2006, 15), gender blindness, and an ideological coalition between proponents of strands of 'anti-Qadhafism' on the one hand and advocates of rule of law programmes informed by a commitment to market economics on the other.

I begin my analysis by describing my position as a researcher in post-revolutionary Libya and my introduction to female, state-salaried legal professionals working in the Tripoli courthouse. I next describe the history, work, and status of women judges and public lawyers; the system of the 'legal institutions' that has facilitated the development of their legal skills and professional standing; their position in post-revolutionary Libya; and the pressure they experience from lobbies mobilizing forms of anti-Qadhafism and Islamism. I next discuss the flood of international 'rule of law' and technical assistance programmes that were being planned by consultants working for foreign donors throughout my fieldwork. These assessments both failed to focus on the position of Libya's state employed female legal professionals and to consider access to justice for women and the poor when making their recommendations for reform of the legal system. I then analyze the way in which anti-Qadhafi positions that would negatively impact on women's participation in the state-salaried legal professions combined with international consultants' recommendations for reforms. I further suggest that foreign donor rule of law programmes have been complacent about female participation in, and women's access to, Libya's legal system.

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4 In April 2013, Libya's Grand Mufti Sheikh Sadeq Al-Ghariani called for gender segregation in universities and offices. In October 2013, Sheikh Al-Ghariani called on the Libyan government to ensure that female teachers wear *niqab* when teaching mixed classes. See Abdul-Wahab (2013a). See also Abdul-Wahab (2013b).

In conclusion, I note that it is impossible to make any meaningful predictions in 2016 regarding the future roles of women in Libya's state-salaried legal professions. I argue that analysis of international policy towards the legal system in post-revolution Libya nonetheless confirms that there continues to be a 'problem of knowledge' in donor sponsored rule of law projects, in particular about the gender implications of proposed reforms.

3 Researching Libya's Legal System after the Revolution

I met Maha and was allowed into her court as a result of being hired to work on one of the numerous scoping, knowledge transfer, and research-based 'rule of law' projects that proliferated under the auspices of the international community in post-conflict Libya.[5] My fieldwork consisted of four visits to Tripoli from mid-2012 until late 2013: an initial fieldtrip of a week's length, followed by a further three visits, each lasting a month. My Arabic is adequate enough for me to talk to judges and lawyers without the use of an interpreter, and I had support from a network of English-speaking Libyan academic colleagues. There were no bureaucratic obstacles to conducting research in the Libyan courts in 2012–2013. No one in the courts asked if I had a research permit. Moreover, the Minister of Justice, Salah Al-Marghani, was supportive of the project's aims.

However, I was constrained by the security situation concerning the extent to which I was able to travel and only left Tripoli to travel twice to Benghazi, once to a local NGO-run workshop in the Jebel Nafusa, and once to visit a judge at her home in Al-Zawiya. In Tripoli I had good contacts in the Ministry of Justice, the UN Special Mission in Libya, the Higher Institute for the Judiciary, staff at the main Tripoli courthouse and the Tripoli office of the Directorate of Public Lawyers. During my fieldwork I observed court proceedings, and interviewed several judges, state-salaried and private lawyers and administrative staff, mostly women. I also briefly met several female judges in family, administrative, and lesser criminal courts after hearings had ended, and at workshops. I additionally observed two court sessions presided over by Maha in May 2013 while doing research on the family court.

5 The project was given the title "Access to Justice and Institutional Development in Libya" and ran as an academic collaboration between the Van Vollenhoven Institute at the University of Leiden and scholars co-ordinated by the Benghazi Centre for Research and Consulting at the University of Benghazi. It was commissioned by The Hague Institute for Global Justice with funding from The City of The Hague. I was employed to carry out and support fieldwork in Libya and to co-edit the final report.

I was introduced to Maha by Jamila, a public lawyer with three years' experience of working in the administrative circuit of the central Tripoli courthouse, who I met via the head of the Tripoli Directorate of Public Lawyers. I had no contact with Maha outside of her court sessions, but I regularly met Jamila at court and in her home over a period of a month. I was also a frequent visitor to the adjoining Tripoli branch office of the public lawyers. In total, I interviewed four public lawyers at length—all of them women whose real names, ages, and personal circumstances are anonymized in the following account—and the male head of the Tripoli office. I also talked to several members of the administrative staff at the Tripoli office, where I was able to look through the registers of cases. In addition, I asked several judges, private lawyers, and public prosecutors about the status and work of the public lawyers, spoke to the legal expert from the UN Special Mission on Libya, and attended a two day conference organized by the UNDP, during which there was an hour and half long session discussing the future of legal aid in Libya.

The family courts in Tripoli were unusually busy in the spring of 2013. Other courts, in particular the criminal courts, were handling few cases in the capital, and the courts were not open at all in many areas of the country. In the aftermath of the revolution, Libya's legal system was not only facing challenges caused by neglect, interference, and underfunding by the Qadhafi regime, it was also subject to serious security threats including the violent physical occupation of the Ministry of Justice and the General National Congress, and the effective paralysis of the courts in some parts of the country by militia.

This situation has worsened since the end of my fieldwork in the winter of 2013, with increasingly frequent clashes between government forces and armed groups, between multiple armed groups and, as of the summer of 2014, in Benghazi between a faction of the military lead by General Khalifa Haftar in alliance with other armed groups, and a coalition of opposing militias, including Ansar Al-Sharia. Furthermore, by the late summer of 2014, legislative authority was being disputed between the (supposedly outgoing) Tripoli-based General National Congress (GNC), and the recently elected House of Representatives (HoR) in Cyrenaica (the east of Libya). In November 2014, a Supreme Court ruling that the HoR was unconstitutional increased the ferocity of violence between loose coalitions in support of each rival parliament.[6]

6 This ruling was justified on the grounds that a vote for an amendment to the transitional roadmap in May 2014 had been inquorate. The court found, as a result, that the subsequent election of the HoR in June 2014 had been invalid. In the summer of 2015, the HoR remains the government recognized by the US and EU states, while the GNC claims political legitimacy from Tripoli. See UN Security Council 2014.

In late May 2015, Daʿish issued a statement that it had secured control of the airport outside the city of Sirte, on the coastal road halfway between Benghazi and Tripoli.

During the course of the resulting insecurity, legal professionals have been targets of violent assault. By April 2014, at least seven judges and public prosecutors had been assassinated throughout Libya provoking judges in the east, notably in Benghazi and Derna, and the south, around Sebha, to refuse to work.[7] Lawyers have also been targeted. In June 2014, the lawyer and women's rights activist Salwa Bugaighis was murdered by gunmen in her home. This followed the assassination of the human rights lawyer Abdulsalam Al-Mesmari in the street in July 2013. Both lawyers had been actively involved in the February 2011 uprising in Benghazi and are presumed to have been targeted as a result of their criticism of the influence and ideologies of Islamist groups in Libya.

Consequently, throughout my fieldwork from August 2012 to December 2013, both the legal system's perceived lack of capacity and the dire security situation were causes of concern for the Libyan government and for multiple international governmental and non-governmental actors offering technical advice and assistance. The Ministry of Justice, the Higher Institute for the Judiciary, and the Libyan Bar Association were recipients of a stream of visits from international consultants describing and evaluating the legal system for foreign governments; Tripoli hosted numerous workshops dedicated to discussing future policy; and legal professionals formed lobbies to press for reform. However, the roles and importance of female legal professionals were not highlighted during this process. Moreover, it became apparent that some of the recommendations that were being forcefully made by international consultants, if implemented, would negatively affect women in state-salaried positions.

4 Changes to the Legal Professions under the Former Regime

Female employment throughout the state-salaried legal professions is a legacy of the Qadhafi regime's instrumental policies towards the legal system. Libya's civil, administrative and criminal legal system was established shortly after the state achieved independence under a monarchy in 1951 and was modeled on the legal system in Egypt. After Qadhafi came to power through a military coup in 1969, his regime adjusted and readjusted the mix of code provisions, religious

7 Individuals working for the army and police have been the main targets of assassinations, in particular in and around Benghazi. However, legal professionals have also been targeted, as have journalists and civil society activists. See Human Rights Watch (2014); Salah (2014).

law, and religious interpretation to suit political events (Mayer 1995, 113–114; St John 2011, 71). The former regime briefly pursued a legislative programme of Islamization,[8] before implementing increasingly draconian 'revolutionary' reforms to legislation and the legal system throughout the late 1970s and into the 1980s. The final, legalistic phase at the end of the 1980s and into the 1990s introduced policy in conjunction with a drive to attract foreign investment.[9]

The 'revolutionary' period was initiated by Qadhafi's announcement of a Cultural Revolution in 1973 which "unleashed his Green terror: purges, mass arrests, summary trial by Revolutionary Committees and executions" (Hilsum 2012, 69). The regime set up a succession of revolutionary, security and military courts to persecute, punish, disappear, and execute actual or perceived opponents. Hilsum (2012, 94) has since commented that in the aftermath of this extreme brutality "Libya is a land of hidden graves." The former regime used arrests, torture, and summary trials to instill terror in the population, with public and televised hangings becoming common-place in the 1970s and 1980s. Mass killings—most notoriously the massacre of 1,270 political prisoners in the Abu Selim jail in 1996—also later came to light.

In 1981, in line with other 'revolutionary' policies, private practice as a lawyer was prohibited. Lawyers were subsequently either directly employed by the state, in which capacity they were to be known as peoples' (later renamed public) lawyers, or were forced out of the profession. The subsequent system created under Qadhafi is perceived by many foreign consultants as unusual in grouping public lawyers, public prosecutors, government lawyers (tasked with defending the state in administrative cases) and judges together as the 'judicial institutions' under the direction of the Ministry of Justice (ILAC 2013, 58).[10] Although private legal practice was re-permitted in 1989, the system of the judicial institutions remains intact in 2015. As a result, public and private lawyers practice side-by-side in the courts.

8 Law 70 on Sexual Offences (1973) relating to accusations of *zina*, Law 52 on Sexual Slander (1973) relating to *qadhf*, Law on Prohibition of the Consumption of Alcohol (1973), Article 375 of the Penal Code enabling reduced sentences for convictions for killing female relatives accused of adultery, and the Law on Homicide (1973) making provisions for *qisas, diya* and *kaffara*.

9 In practice, this period of legalism, which included restoring the Supreme Court's power of constitutional review under Law 17/1994, did not significantly restrain the regime's abuses.

10 The International Legal Assistance Consortium (ILAC) describe the public lawyers as "not the sort of independent legal aid or public defender organizations seen in other countries, which provide free, independent legal services for the indigent." They do not explain to which legal aid service(s) the public lawyers can be unfavorably compared.

Entrants to the judicial institutions complete a year of additional training at the Higher Institute for the Judiciary after graduating from university law faculties. At the time of my fieldwork, an alternative route to becoming a public lawyer was also available to court clerks and other administrative employees who could take exams after several years of working at the court. Amal, who I met working in Maha's court, had entered the profession via this route, and subsequently worked in the family section of the Directorate.

Perhaps to distance the institution from its past, the Directorate of People's Lawyers was renamed the Directorate of Public Lawyers under Law 4/2013. Branch offices of public lawyers are attached to Libya's seven nationwide appeals courts, with sub-offices situated alongside courts across the country, making them easy to find. Public lawyers' services should be available in all areas and at all levels of Libya's court system.[11] This includes the facility to prepare documentation in respect of constitutional cases, theoretically facilitating a litigant's access to the highest level of the legal system regardless of their income.

The work of all employees within the judicial institutions is subject to review by the Judicial Inspectorate. The inspectorate includes judges on its staff and has the power to evaluate the work of judges, state-salaried lawyers, and public prosecutors if a complaint has been made against them, or in relation to possible promotion. Employees in the judicial institutions are all paid the same salary, dependent on their length of service, with ten grades of increasing seniority. Perhaps the most unusual aspect of this system is that all employees' positions are reviewed on an annual basis by the Supreme Judicial Council, which subsequently reappoints or reshuffles public and administrative lawyers, judges, and public prosecutors for the forthcoming year.[12] As a result, many state-salaried legal professionals have worked in more than one branch of the judicial institutions, with judges and public lawyers commonly having experience in each other's positions.

Although the profession is tainted by an association with revolutionary justice and its origins in Qadhafi's policies, the Directorate of Public Lawyers has developed to provide easily accessed legal aid provision to anyone free of charge, including migrants.[13] However, it was difficult to source much statistical

11 However, given the security situation this was unlikely to be an actuality in 2013.

12 However, according to the public lawyers I asked about this, employees can to some extent negotiate their forthcoming positions (since some staff, such as Jamila, had remained in the same position for several years) and may develop considerable expertise as a result.

13 Article 10 of Law 4/1981 enables foreigners to seek the service of the public lawyers in return for payment. However, they may be exempted from paying based on a decision by the Minister of Justice acting on a recommendation from the head of the Directorate of

information about the Directorate of Public lawyers, which did not seem to collect data about the litigants who used its services.[14] As a result, I have limited quantitative data about the service and its clients, and have no comparative quantitative data at all about the work of private lawyers.

In 1989, shortly before it reauthorized lawyers to work in private practice whilst continuing the system of public lawyers, the regime initiated the second policy shift that was to have a significant impact on female involvement in the state-employed legal professions: passing Law 8/1989 on the Right of Women to Assume Posts in the Judiciary. I was not told, and have since been unable to find out, how many women were employed as judges in Libya in 2012–2013.[15] An estimated figure of 50 female judges is often quoted in international literature, as is the fact that the first female judge was appointed in 1991.[16] If there were only about 50 female judges working in Libya in 2012–2013, I encountered around 20 percent of them in the Tripoli courthouse and at various workshops during my research. These women were presiding over lower courts dealing with cases of family, administrative, and minor criminal law.

5 The Current Status of Women Working within the Directorate of Public Lawyers

In June 2013, 1,139 public lawyers were in the employment of the Libyan state: 773 of them women and 366 of them men.[17] However, it was noticeable after spending a short period in the Directorate that the gender distribution throughout the different sections of the Tripoli office was not even; all of the

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Public Lawyers. In practice, non-Libyans who do not have private lawyers and who face major criminal charges for which they are obliged to have legal representation are represented by public lawyers for free. Personal communication, former public prosecutor, June 2013.

14 I visited the administration of the Tripoli branch of the Directorate of Public Lawyers. It only registered the name of the client, the type of case they were involved in and the name of the public lawyer allocated to represent them.

15 The Ministry of Justice website does not host this information. Neither can I find it on the Facebook pages of the Higher Institute for the Judiciary.

16 See Pargeter (2011). She attributes the statistic to Mahmoud al-Obeidi (2006).

17 This figure was published on the Facebook page of the Libyan Judges' Organization. Attempts to find this statistic from a more formal source were unsuccessful. The LJO's Facebook, therefore, can be considered the official source provided by the Libyan judges for this information. See Libyan Judges' Organization. http://tinyurl.com/sjpgl-066, accessed July 3, 2013.

nine public lawyers working on family cases in May 2013 were women, while I heard that most of the lawyers in the criminal section were men.

The reason commonly given for the predominance of women throughout most of the Directorate is that the hours are short and can be fitted around childcare. Jamila, the public lawyer with whom I spent the most time, freely admitted that she was generally only in court one or two days a week, pointing out that her caseload in the administrative section was reduced in the post-revolution period. The rest of the week, she worked from home. During the month I spent with her, she was handling five cases.

The workload of the public lawyers in the family courts, at least in Tripoli and Benghazi, was reportedly much the same as it had been before 2011. The branch office in Tripoli registered 430 new family cases from January to May 2013.[18] My observation from sitting in on sessions in Maha's court was that the public lawyers were frequently, if not exclusively, used by litigants from underprivileged socio-economic backgrounds. It also seemed that public lawyers—predominantly young women—handled more family cases than private lawyers. Moreover, as I described above, when litigants came before the court without any legal representation, Maha often recommended that they contact the public lawyers for advice and assistance.

Maha and Jamila had each had previous experience of working both as judges and in the Directorate of Public Lawyers. Other women I met who were working in the judicial institutions had rotated during their careers through combinations of the judiciary, the public prosecution and public lawyers. It seemed that typically state-salaried legal professionals did not go straight into to the judiciary. The head of the Tripoli branch of the public lawyers told me that 80 percent of judges had former experience of working for the Directorate. This system seemed to foster a general consensus among members of the judicial institutions that working as a public lawyer better prepared staff for the complexities of being a judge. Moreover, it was clear from the conversations I had both with individual, and with groups of, state-salaried legal professionals that there is a strong feeling of solidarity within the judicial institutions.

18 Throughout the entirety of 2012 the section representing Libyans accused of minor criminal offences only dealt with a total of 215 cases. I collected these figures from the administrative section in the Tripoli branch of the Directorate of Public Lawyers.

6 The Politics of Public Lawyer Representation in the Administrative Court

While the work Maha did in her family court remained much the same as it had been before the 2011 revolution, Jamila had noticed a post-revolutionary shift in her work representing litigants in the administrative courts, as efforts to weed out and punish Qadhafi loyalists had altered her workload. When we met she already had four years' experience representing clients in administrative cases. She explained that she had recently become interested in taking on the appeals of public sector employees dismissed after they had been subject to an enquiry by the Commission for Integrity and Patriotism, which had powers to dismiss Qadhafi loyalists from public office.

On the first full working day I meet her, Jamila is sitting with a client in a hallway, waiting for an administrative court session to begin. She quietly tells me that her client is here to contest the evidence on which he has recently been dismissed from his job with the Ministry of Foreign Affairs. She adds that she is taking more and more cases like this and is representing three such clients at the moment. The cases are a new challenge for her professionally, but also she feels strongly that the people involved have a right to bring a legal appeal against their dismissals in these circumstances. She believes that civil servants are best judged for their past actions in court.

I am not able to ask her client why he has chosen to be represented by a public lawyer, rather than hiring a member of the private bar. Private lawyers can be expensive, but this man is well-dressed and was a fairly senior employee in a Libyan embassy at the outbreak of the 2011 revolution. Although judges, public prosecutors and public lawyers often told me that the public lawyers provide a valuable service to low income clients, they also stated that wealthier Libyans regularly choose to be represented by public lawyers. They gave me a number of reasons for this: that the public lawyers are just as effective as private lawyers in less complicated matters, that their service is freely available regardless of income and that the wealthy can always hire a private lawyer at a later stage if they become dissatisfied with a public lawyer's work on their case.

Jamila's current client has told her that he was notified of his dismissal by letter. In 2013, the Commission for Integrity and Patriotism does not invite the subjects of their enquiries to their deliberations, and makes its decisions based on files of evidence. Jamila has managed to get a copy of the reasoning behind the commission's decision to terminate her client's employment. His name and signature have been found on a document that was sent by his embassy in support of the regime at the height of the 2011 revolution. Jamila's client says that he can prove that he was not present when this document was signed. He

contends that the embassy's staff were intimidated into drafting the letter on orders from Tripoli and that his colleague signed it on his behalf in order to protect him.

Jamila is adamant that he should be able to make his case in court. She tells me that in the post-revolutionary political climate people are easily accused and convicted of collaboration with the former regime. Legal professionals are also not immune from these accusations in 2013. There are rumors that, rather than expose them to scrutiny by the Commission for Integrity and Patriotism, long serving judges have been being quietly transferred into the Directorate of Public Lawyers since 2011.

During my fieldwork, the judicial institutions came under increasing domestic political and legal pressures favoring lustration and a clean slate. Although much of this pressure was put on the judicial institutions as a whole, some was specifically targeted towards, or would have had a particularly detrimental impact, on women's participation in the state-salaried legal professions, which was explicitly associated by some critics with the former regime.

7 Domestic Threats to Women's Place in the State-Salaried Legal Professions

Following its election in July 2012, the principle mandate of the 200 member General National Congress (GNC) was to oversee the constitutional process.[19] However, the GNC was vigorously lobbied by a coalition of Islamist and anti-Qadhafi politicians and militia to pass anti-Qadhafi and pro-revolutionary legislation. In 2013, Political Isolation Law 13/2013 was passed under pressure from street protests, armed blockades of government ministries and the occupation of the General National Congress. The law had the effect of excluding anyone employed in senior positions by the former regime from such state employment for ten years and led to the resignation of several influential figures who had been instrumental in the 2011 uprising from the government.[20] This

19 This process was ongoing in the autumn of 2014 with the constitutional drafting committee still in deliberation in Al Baida. See "Security Council Briefing, 15 September 2014 Special Representative of the Secretary-General and Head of UNSMIL, Bernardino León." http://unsmil.unmissions.org/Portals/unsmil/Documents/SRSG%20Leon%20Briefing%20to%20UNSC%2015%20September%202014%20Final.pdf, accessed October 11, 2014.

20 Resignations included the head of the GNC, Mohammed Magariaf, who had headed the audit bureau and acted as Libya's ambassador in India, before defecting from the former

legislation was seen as a major victory for the Muslim Brotherhood's Justice and Construction Party and smaller Islamist and Salafist parties, since their members were unlikely to have held senior positions under Qadhafi.

Former judges were potentially included in the ban proposed by the Political Isolation Law. On June 6, 2013, the Libyan Judges' Organization anticipated the effects of the legislation by arguing that punishment and sacking of judges should remain the remit of the Supreme Judicial Council.[21] In mid-2014, the body charged with implementing the legislation, the Public Officials Standards Commission (POSC), had yet to begin investigating state-salaried legal professionals; nevertheless, many judges and prosecutors had periodically been on strike in protest against the policy, causing further delays in the judicial process.[22]

In addition to this general scrutiny of the judiciary, women's employment as judges specifically came under attack when two claims were submitted to the Supreme Court in 2013, which challenged the appointment of women into the judiciary on the grounds that this former regime policy was unconstitutional (Omar 2013). Both claims referred to Article 1 of the 2011 Transitional Constitutional Declaration, which states that the *shari'a* is the main source of Libya's legislation. The claimants referred to interpretations of Islamic legal sources against women having the authority to pass judgment on a man, adding the argument that women lack the necessary emotional restraint and rational skills for employment in the judiciary (ibid.).

In response to the first of these challenges, the head of the country's General National Congress and the Prime Minister submitted a memorandum to the court, followed by a memorandum from the Minister of Justice. Both memoranda supported the continual employment of female judges. The GNC/PM memo noted the difference of opinion between schools of Islamic law permitting, and restricting, women's right to work, adding that the government had the authority to select which opinion to adopt into law (ibid.). In addition, several female members of the Libyan Judges' Organization listed themselves as

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regime in 1980 to oppose it. The law also halted the political ambitions of Mahmoud Jabril, the leader of the National Forces Alliance which emerged as a political party out of the 2011 revolutionary movement, given his position under the former regime as the reforming head of the National Planning Council of Libya and of the National Economic Development Board of Libya.

21 See the second post on the Libyan Judges' Organization's Facebook pages on June 6, 2013. https://www.facebook.com/pages/المنظمة-الليبية-للقضاة-Libyan-Judges-Organization/504909442859142?ref=ts&fref=ts, accessed October 11, 2014.

22 Mangan and Murtaugh (2014).

third parties to the case. An additional memorandum submitted by the Libyan Judges' Organization avoided entering into the debate about the correct interpretation of Islamic law, limiting itself to procedural and technical matters, including the prohibition on directly filing a claim before the Supreme Court and Libya's obligations before the UN Committee on Human Rights (ibid.). In addition, on October 25, 2013, the Libyan Judges' Organization posted a link to a *fatwa* from Egypt's Grand Mufti, Dr Shawki Allam, stating that it was licit for women to be employed in the judiciary and other state offices.[23] By mid-2015, the Supreme Court had still not ruled on the constitutionality of female employment in the judiciary.

8 Bringing the 'Rule of Law' to Libya

Consultants working for foreign donor states on 'rule of law' programmes in 2012–13 made their evaluations of Libya's legal system in the midst of this complex, post-Qadhafi, post-conflict environment.[24]

The international community offered extensive advice and technical assistance in the immediate post-revolutionary period, including establishing a permanent UN Special Mission in Libya. The Paris conference on February 12, 2013 on Support to Libya in the Areas of Peace, Justice, and the Rule of Law was attended by ministers and representatives from Denmark, France, Germany, Italy, Malta, Qatar, Spain, Turkey, the UAE, the UK, the USA, as well as the African Union, the Arab Maghreb Union, the EU, the Gulf Cooperation Council, the

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23 See post from October 25, 2013 on the Libyan Judges' Organization Facebook page. https://www.facebook.com/المنظمة-الليبية-للقضاة-Libyan-Judges-Organiztion-504909442859142 In spring 2013, Libya's Grand Mufti Sheikh al-Ghariani told the Crisis Group that there was a need to remove judges who had been close to the former regime or were corrupt, but he did not "question the overall judicial structure" (International Crisis Group 2013, 17).

24 The UN Secretary-General (2004) has defined the rule of law as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

Arab League, and the UN.[25] The official communiqué following the conference affirmed an ongoing international commitment "to build a modern democratic and accountable state solidly anchored in a rule of law system, institutions and practices, and in respect for human rights."[26] Delegates at the Paris conference pledged to support the Libyan government's implementation of both National Security and a Justice and Rule of Law Development Plan.

Libya was, consequently, embraced by a rule of law movement promoted at an international level by the UN, the World Bank and the IMF, and supported by intergovernmental organizations such as the International Development Law Organization, donor governments (through agencies such as the Department for International Development in the UK) and NGOs working on human rights. There has been a surge in the promotion of the rule of law as "a solution to the world's troubles" in a slew of international donor-sponsored reform initiatives since the 1990s in Asia, the former Soviet Union, Eastern Europe, Latin America, sub-Saharan Africa and the Middle East, with an emphasis on reforming judiciaries (Carothers 2006, 3–20; Trebilcock and Daniels 2008, 2). The broad aims of these initiatives were outlined during the 1993 Vienna World Conference on Human Rights, which recommended that the United Nations should offer technical and financial assistance to "national projects in reforming penal and correctional establishments, education and training of lawyers, judges and security forces in human rights, and any other sphere of activity relevant to the good functioning of the rule of law."[27] This ambition was later endorsed by a series of General Assembly resolutions citing the rule of law as "an essential factor in the protection of human rights."[28]

Subsequent international efforts towards promoting the rule of law have tended to be presented as a form of technical assistance, targeted to support the "formal architecture" of a legal system, rather than to shape the content of its legal processes (Chesterman 2008, 341). Most programmes consist of

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25 "Conference in Paris Calls for Action on Libyan Security," *Libya Herald*, December 2, 2013. http://www.libyaherald.com/2013/02/12/conference-in-paris-calls-for-action-on-security/#ixzz3F1K0oLdg, accessed October 11, 2014.

26 "International Ministerial Conference on Support to Libya in the Areas of Security, Justice and the Rule of Law, Communiqué Paris 12 February 2013," *France Diplomatie*. http://www.diplomatie.gouv.fr/en/country-files/libya/events-7697/2013/article/international-ministerial, accessed October 11, 2014.

27 Vienna Declaration and Programme of Action, pt.I, ch. Ill, sect. II, para.69 U.N. Doc A/CONF. 157/24 (1993).

28 G.A. Res. 48/132, pmbl. (1993). See also G.A. Res. 48/132 (1993); G.A. Res. 49/ 194 (1994); G.A. Res. 50/179 (1995); G.A. Res. 51/96 (1996); G.A. Res. 52/125 (1997); G.A. Res. 53/142 (1998); G.A. Res. 55/99 (2000); G.A. Res. 55/99 (2000); G.A. Res. 57/ 221 (2002).

"diagnosing the shortcomings in selected institutions—that is, determining in what ways selected institutions do not resemble their counterparts in countries which donors believe embody successful rule of law—and then attempting to modify or reshape them" (Carothers 2006, 21). However, despite this technocratic facade, "closer examination reveals that rule of law assistance is supported because of perceived outcomes it may achieve in the recipient community" (Chesterman 2008, 341). The foreign consultants carrying out these evaluations usually have a legal background, but minimal foreknowledge of the legal system under study and little time in which to conduct their field assessments. The outcome of multiple agencies pursing unco-ordinated rule of law programmes informed by each foreign donor governments' own ideology, and consultants' own expectations, is likely to be that countries are "bombarded with fervent but contradictory advice on judicial and legal reform" (Carothers 2006, 11).

In 2012–2013, it was the turn of the Libya's Ministry of Justice and the Higher Institute of the Judiciary to be the focus of this kind of intensive donor activity, including scoping missions, and frequent invitations to consultations and workshops.[29] Several reports on Libya written by consultants working for the UN, the EU, INGOs, and foreign governments emphasized the critical importance of the rule of law, warning that economic, political, and technical programmes were otherwise vulnerable to failure.

Some of these reports authored in preparation for foreign donor-sponsored 'technical assistance' programmes in support of Libya's legal system were open source. These provide an interesting insight into the working practices and assumptions of their authoring consultants. Each of these reports presents a slightly idiosyncratic view of the legal system, given the significant diversity in their methodological approaches, the differences in their level of engagement with the 'field' under study, and their publication across the year and a half following the end of the revolution. However, Libya's judicial sector is perceived

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29 The scale of the challenge facing Libya was laid out in the government's own assessment that the needs of the country's "justice sector" included the tasks of "i) building judicial capacity, competence, independence, coordination and training; ii) undertaking a review of relevant legislation; iii) building prosecutorial and criminal investigative capacity; iv) reforming the Libyan prison system; vi) strengthening the coordination between the military and civilian justice systems; vii) promoting transitional justice through truth-seeking processes and national reconciliation, in addition to locating and identifying missing persons; and viii) building state institutions that respect and promote human rights, as well as a vibrant civil society." See "International Ministerial Conference on Support to Libya in the Areas of Security, Justice and Rule of Law," *France Diplomatie*, February 12, 2013. http://www.diplomatie.gouv.fr/en/country-files/libya/events-7697/2013/article/international-ministerial, accessed October 11, 2014.

in all of these reports as weak, ill-equipped, and challenged by rival centers of power after the defeat of Qadhafi's regime.

The two open source scoping reports that are most ambitious in attempting to map and diagnose the needs of Libya's legal system were published by consultancy teams commissioned by Euro-Med (in an advisory capacity to the EU) and the International Legal Assistance Consortium (ILAC). The assessments of judicial competence in both reports are perception-based, with both sets of consultants interviewing legal professionals about their work and status. Neither delegation presents any evidence of having observed court sessions or consulted case files, and—perhaps as the result given the lack of statistical information held by the Ministry of Justice—their findings are not substantiated by any quantitative data. A great deal of confidence is invested in information provided by private lawyers. These reports' recommendations are consequently based on the perceptions of the consultants' limited pool of informants.

Carothers (2006, 11) has warned that assessments preparing for projects in support of the rule of law often fail to adequately understand the legal systems that are destined to be the recipients of technical assistance. He notes that a combination of the parochial frames by which legal systems are understood, a poor knowledge base, and time pressures have resulted in a "breathtaking mechanistic approach" to institutional reform which has inevitably faced resistance from donor-recipient countries with "deep seated reasons, whether good or bad" to reformist ideas promoted from abroad. Pereira (2003, 4) adds to this analysis in observing that local actors are constrained or motivated in their attitudes towards legal and judicial reform by their experiences of policies pursued by former, authoritarian regimes.

All of the conditions identified as problematic in critiques of rule of law projects were present in Libya in 2012–2013: a plethora of foreign donor-sponsored technical assistance programmes based on short assessments completed by foreign, frequently non-Arabic speaking consultants; a subsequent tendency for mapping reports to rely on a limited number of informants and consultant's own prior experiences and assumptions; and an ideological hostility to the former regime's legacy. To further complicate matters, the security situation steadily deteriorated following the 2011 revolution. This had consequences for consultants hired to make recommendations to strengthen the rule of law through severely curtailing their access to observation of legal practice and restricting most of their field operations to Tripoli's handful of four and five star hotels.

These restrictions were probably detrimental to foreign consultants' evaluations of, and responses to, domestic calls for reforms that would have an impact on women's positions in the judicial institutions. Although women in

the judiciary, public lawyers and private lawyers participated in the succession of workshops and consultations that were held in this international hotel circuit, the issue of women's continuing or increased participation in the legal professions was not a tabled topic of discussion. Neither did I come across any specific proposals in foreign-authored reports in explicit support of women in the legal professions. It seemed, at least in 2012–13, that foreign donors took the level of women's participation in legal professions for granted. Moreover, there appeared to be an emerging consensus amongst international consultants that there was a need to disband the only branch of the state-salaried legal professions predominantly employing women.

9 Converging Criticism of the Public Lawyers and Ambivalent State Responses

This position is identifiable in assessments from Euro-Med and ILAC recommending the disbandment of the public lawyers. These reports are rooted in a combination of partisan criticism from members of the private bar, and assumptions about the requirements for judicial independence. There is no mention in either of interviews with members of the Directorate of Public Lawyers itself, or of the consultants having observed or accessed the work of public lawyers, the Directorate's files, or the service's clients.

The effect of consultants' reliance on evaluations of the public lawyers by private lawyers hostile to the Directorate is indicated in the ILAC/ABA report on their workshop, which included a session on legal aid attended by two members of the judiciary and (apparently) private lawyers in 2012. The report documents that discussants agreed that the public lawyers "are generally ineffective, and that either they should be (1) retrained; (2) dismissed with some avenue to other employment; or (3) be used in administrative law cases."[30] The recommendation of the subsequent working group was definitively to abolish the public lawyers and to pass legislation enabling private lawyers to represent legal aid cases with financial support from the government. The absence of a representative from the public lawyers meant that while the Directorate was spoken about, its membership was not able to add to the discussions.

The Euro-Med report echoes this evaluation of public lawyers by describing them as "a sort of parking lot for judges and lawyers seen as less than compliant with the imperatives of the state," although it concedes that private lawyers can no longer be forced to become public lawyers (Bardet et al. 2012, 29). ILAC

30 ILAC/ABA (2012, 5).

(2013, 23) similarly concludes that the creation of public lawyers in 1981 meant that "the legal profession was forced into illegality until 1990" and further marginalizes the Directorate by noting that the Libyan judiciary is "understood as including both judges and prosecutors with the latter eligible to become judges after reaching the requisite level of seniority" (ILAC 2013, 41). This reflects an assumption in most of the international, policy related discussion,[31] when it discusses the public lawyers at all, that an institution directly salaried and managed by the state cannot provide the kind of independent legal representation required within the framework of the rule of law (Bardet et al. 2012, 49; ILAC 2013, 57–58). This claim is particularly made in respect of cases pitting litigants against the government, or in criminal trials.

Delegates demonstrated both the strength of Libyan support for, and of the antipathy against, the public lawyers amongst other legal professions during a UNDP-sponsored conference in Tripoli in April 2013. During a session I attended on legal aid there were very public disagreements between speakers, who included private lawyers, public prosecutors, the national head of the Directorate of Public Lawyers and members of the judiciary. One male lawyer in private practice described the profession of public lawyers in extremely hostile terms, associating it with the Qadhafi regime and demanding its abolition. In reaction, a female judge from Benghazi defended the institution on the grounds that it was of particular benefit to the poor and women in court. Following this intervention, a private lawyer with a high profile and an established reputation for activism added her support to the public lawyers given their work representing female clients. However, although the American Bar Association made a short presentation outlining alternative systems of legal aid provision, the complexities of a system of adequate legal aid provision in a future Libya did not seem to be a priority for foreign donors.[32]

Additionally, there appeared to be no assessments of the importance of access to justice for women, the poor or migrants by international consultants in 2012–2013, nor openness to considering the public lawyers as an institution that could continue to provide legal aid supported by structural reform and investment. At the most, consultants grudgingly conceded that the public lawyers might have to fill a gap that would not be filled by private lawyers; ILAC

31 This assumption was not shared by a senior staff member of UNSMIL who argued that the Directorate of Public Lawyers, although in need of reform, was an effective, relatively professional legal aid service. Personal communication, November 5, 2013.

32 I did not come across any policy documents or workshops addressing the issue other than this ten minute presentation during a panel that was subsequently dominated by debate between Libyan legal professionals about the future of the public lawyers.

granted that "critics have yet to propose an alternative system that would guarantee representation to all indigent criminal defendants. Indeed, if the private bar is unable or unwilling to provide legal representation to the current backlog of 'conflict-related' detainees, the People's Lawyers [sic] may be the only option" (ILAC 2013, 58).

Libyan government responses to calls to break up the Directorate of Public Lawyers appeared ambivalent throughout this period of intense lobbying and international attention. The embedding of the public lawyers in the state's judicial institutions was underpinned until 2011 by the inclusion of the Head of the (then termed) Peoples' Lawyers in the Supreme Council for Judicial Institutions, which also included the Minister of Justice and representatives of the Mufti's Office (*dar al-ifta'*) and other judicial institutions. However, in the immediate period after the revolution, Law 4/2011 appeared to marginalize the institution by transferring the management of the judiciary to the newly formed Supreme Council for the Judiciary, the membership of which was restricted to the president of the Supreme Court, the presidents of the seven appeals courts and the public prosecutor general. This change was regarded with concern by many state-salaried legal professionals as demoting the 'people's' lawyers in the judicial hierarchy, and as signaling future changes to the profession. The impact of this amendment, however, was subsequently reversed by the Minister of Justice in 2013. Law 4/2013 Concerning the Amendment of the Judiciary not only refers to the institution as 'public lawyers,' thereby seeming to distance the institution from Qadhafi's ideology, it also reintegrated the head of the Directorate of Public Lawyers into the Supreme Council for the Judiciary.

10 Conclusions: Lessons from Libya Regarding the Rule of Law Project

Despite continuing support from Libya's Ministry of Justice, women's wide scale participation in state-salaried legal professions was facing serious challenges from an unlikely coalition of anti-Qadhafists, Islamists and market orientated, foreign donor-employed consultants at the end of 2013. This is clearly demonstrated by the disjunction between the representations in international authored reports of women's work in the legal professions in 2012–2013 and my observations of Maha and Jamila in the Tripoli courthouse.

The escalation of violence throughout 2014 and 2015 severely curtailed international involvement in rule of law projects on the ground and has drawn foreign governments' attention towards the more pressing need to limit the damage done by the civil war. Nonetheless, the record of the foreign donor community is questionable given its superficial evaluations of aspects of the

Libyan legal system that are thought to be anomalous to the current blueprint for rule of law assistance. This includes the apparent gender-blind assumption that the position of female judges was secure and not a matter for concern, and ideological hostility towards better understanding the branch of the judicial institutions in which women predominate, namely the public lawyers.

Libyan's experience confirms Carothers' (2006, 27–28) findings that the rule of law is "an area of great conceptual and practical complexity" which is ill-served by short scoping visits by international consultants who do not have the time, resources, or expertise to comprehensively understand and analyze legal systems, and therefore, have a tendency towards recommending 'one size fits all' solutions to perceived problems, informed by the underlying goals of market economics and democracy. Or, what Golub (2006, 130) has termed programmes based on "the view from the [consultant's] hotel window."

In the Libyan case this approach has both failed to recognize the strengths inherent in the legal system that has partly been fostered by, and partly survived, the Qadhafi regime: in particular, the prominent role of women in the judicial institutions and the existing system of government legal aid provision that allows access to justice for the poor. The system of judicial institutions that has fostered women's participation in the judiciary and maintained the public lawyers was established under a non-democratic, authoritarian regime hostile to market economics, so that aspects of this participation are considered ideologically suspect, both by international donor-sponsored consultants and by some Libyans, notably Islamist factions and many private lawyers. However, as Carothers (2006, 23) and Upham (2006, 100) have argued—referring to previous rule of law programmes—internationally sponsored reforms can have unanticipated, unintended and unwelcome consequences.

Amongst the unwelcome consequences for Libya could be that foreign donor proposals have a detrimental impact on legal aid provision in Libya. Libya currently has an easily accessible, ubiquitous, non-means tested, legal aid service at a calculable cost to the state in the Directorate of Public Lawyers, which is unlikely to be matched through alternative *pro bono* systems or state-funded, means tested payments to private lawyers. In addition, in pressing for changes the current system of judicial institutions including the abolition of the public lawyers, much of the international community aspires to dismantle the only state-salaried legal profession in Libya, which is dominated by women. This might consequently negatively alter the ecology supporting women's current relatively high participation in the state-salaried legal professions.

Had international consultants asked them, women working in Libya's judicial institutions would have likely told them, as they told me, that they needed training, better facilities and improved access to sources of legal information.

However, chatting to me in a corridor while waiting for her client to be heard in court, Jamila argued that the proposed changes to the judicial institutions were poorly informed and ideologically driven. While acknowledging the difficulties, she could have been lobbying for all women in the state-salaried legal professions when she told me that: "The public lawyers started off badly. They were Qadhafi's idea. But they do good work now."

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CHAPTER 11

Women Judges in Egypt: Discourse and Practice

Monika Lindbekk

1 Introduction

Women were excluded from the Egyptian judiciary until 2003, when Tehani al-Gebali was appointed to the High Constitutional Court by presidential decree. This was followed by the appointment of 42 female judges to the ordinary courts in 2007–2008. This chapter examines discourses and practices with regard to the appointment of women to the Egyptian judiciary in light of public debates, interaction in courts, and judicial practice in some areas of family law. Firstly, it is argued that a combination of constitutional ambiguity, societal customs, and certain interpretations of Islamic *shariʿa* have played a significant role in preventing the appointment of female judges until the induction of a token number during the 2000s. Second, I examine whether female judges bring a different perspective to bear on their rulings than their male colleagues, in light of Gilligan's theory of 'care ethics.'

The chapter is divided into four parts: the first section provides an outline of the legal framework surrounding the appointment of judges, and investigates the reasons for resistance on the part of male members of the judiciary, based on rulings by administrative courts. By way of elaboration, this is followed by an examination of strategies developed by civil society organizations to promote women judges in an authoritarian context. I then go on to analyze the circumstances surrounding the appointment of 42 female judges in 2007–2008. In addition to observations of interactions in a Family—and an Economic Court, I briefly analyze a sample of judgments by three panels including female judges in some areas of family law. The aim is to see whether female judges apply perspectives to their judgments that differ from male judges, drawing conceptually from Gilligan's theory of an 'ethics of care.' The analysis is based on research conducted in 2013, including court observations and interviews with civil society activists. Data was also collected from interviews with six Egyptian female judges, four of whom worked in the Cairo Economic Court, one in the Court of Cassation, and one as the head of a Family Court in Cairo.

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2 Legal Framework

The Egyptian judicial system, which was established in the 1880s, is heavily influenced by the French model (Bernard-Maugiron and Dupret 2002; xxv; Hamad 2006, 261). For a historical analysis of Egypt's legal system and the admission of women to law schools and, gradually, their entrance into the legal profession, I refer the reader to Nadia Sonneveld's contribution to the present volume (chapter 3). The following part of my chapter focuses on the legal framework surrounding the appointment of female judges in Egypt. Since 1923, Egyptian constitutions have stipulated the equality of all citizens before the law, and equal opportunity.[1] It is also noteworthy that the conditions listed in the law governing the judiciary provide equal access for male and female candidates (Bernard-Maugiron 2008; Hamad 2006).[2] Until 2003, however, only the Office of the Administrative Prosecution and the Authority for State Cases appointed women to their offices.[3] My primary focus is on the legal argumentation used to bar women from other parts of the judiciary.

The Egyptian judicial system is divided into three branches: the ordinary judiciary, which is competent in civil, economic, and criminal matters; an administrative judicial system headed by the State Council, which rules on administrative matters; and a constitutional judicial system, at the top of which is the High Constitutional Court (Bernard-Maugiron 2008, 6). Historically, the Egyptian judiciary has demonstrated a degree of political liberalism by fighting for independence of the judiciary. At the same time, it has displayed entrenched belief in gender roles by opposing the admission of women. The issue was first raised when Aisha Ratib, a law school graduate, applied for employment by the

1 The Egyptian constitution of 1923 provided that "Egyptians are equal before the law and in holding civil and political rights. There is no discrimination among Egyptians concerning public duties and obligations on the basis of origin, language, or religion." While the article clarified that the state stipulated equality among citizens in all domains, it did not include equality between the genders. Article 31 of the 1956 constitution determined that Egyptians are equal before the law and in rights and duties without discrimination on the basis of sex, origin, language, religion, or conviction.

2 According to the judiciary law of 1972, candidates who seek appointment to the judiciary must have Egyptian nationality and be law graduates. The candidates must also present all guarantees of morality and reputation and enjoy their civil rights.

3 Although these organs are parts of the judicial system, they differ from other judicial bodies since they are not endowed with competence to adjudicate lawsuits. For more, see Bernard-Maugiron and Dupret (2008, 64) and Wahab (2006).

State Council. The State Council rejected her application, and according to al-Islambuli (2001, 38), appointed a male colleague with poorer grades than hers. She responded by filing a lawsuit before the Administrative Judiciary Court, arguing that the State Council had misused its powers of appraisal. In February 1952, the Administrative Judiciary Court issued a ruling in which it denied her request based on the argument that restricting the rank of judge to men did not constitute "a diminution of women's ethical and cultural standing."[4] As Sonneveld (chapter 3, this volume) pointed out, the refusal of Ratib's application makes it clear that although women had joined several professions, this had not altered existing notions of femininity and masculinity, according to which participation in the public domain should be restricted to men.

While religious arguments were not invoked in the verdict against Aisha Ratib, a subsequent ruling issued by the Administrative Court reflected the increasing influence of Islamist ideology during the 1970s. In 1978, Hanim Muhammad Hassan challenged the State Council's refusal of her application to assume the position of assistant representative. The State Council had based its rejection on "customs which consider women as inferior to men (…) and a common understanding (*mafhum sha'bi*) that the stipulations of *shari'a* do not allow women to assume positions of public guardianship (*wilayat al-'amm*)."[5] In 1979, the Administrative Court rejected her petition. In addition to basing its decision on the reasons mentioned by the Administrative Judiciary Court, the court invoked Article 2, which was included in the 1971 constitution. Article 2 read as follows: "Islam is the religion of the state. Arabic is the official language and the principles of Islamic *shari'a* are a main source of legislation."[6] The adoption of Article 2 had profound implications. While the description of Islam as the religion of the state was not new, the stipulation that the principles of Islamic *shari'a* are a main source of legislation represented a significant shift from earlier constitutional discourse and conferred on the state a more

4 Hence, the court concluded that the State Council's appraisal was not "in violation of the principle of equality from a legal perspective." Administrative Judiciary Court, case No. 33, judicial year 4, February 20, 1952. In 1953, the administrative court repeated these reasons on the occasion of another lawsuit raised by another young woman who had applied for the office of public prosecutor. It denied the existence of an absolute principle prohibiting women from assuming the rank of judge, yet it concluded that it was left for the administration to decide whether the time was appropriate for women to assume certain positions, taking into consideration "surrounding circumstances, customs, and traditions." See Administrative Court, case No. 243, judicial year 6, December 23, 1953. See also Al-Islambuli (2001) and Omar (2013).

5 Case No. 2317, judicial year 20, June 2, 1979, Administrative Court.

6 In 1981, Article 2 was changed to say: "Islam is the religion of the state. Arabic is the official language and the principles of Islamic *shari'a* are the principle source of legislation."

pronounced Islamic character. The ruling by the Administrative Court was also based on Article 11 of the constitution, according to which the state should support the accommodation between women's duties to the family and her work in society, and her equality with men in the political, social, cultural and economic arenas, "without violating the stipulations of Islamic *shariʿa* (*ahkam shariʿa*)."[7] There is a tension between these articles and women's rights to equal citizenship, which set the scene for long-standing debates about the responsibility of the state to protect women against gender discrimination on the one hand, and to protect the family as the basis of society, constituted by religion, ethics, and patriotism on the other (Hatem 2000, 48).

The case at hand provides an illustrative example of this tension. The Administrative Court referred to the four main schools of Sunni-Islamic jurisprudence, which have different viewpoints on the issue of whether women can hold positions of judicial authority. According to the Hanbali, Maliki and Shafiʿi schools, maleness is a precondition for being a judge.[8] Meanwhile, Imam Abu Hanifa and his followers stated that women may become judges in all areas, except *hudud* and *qisas* crimes (Ammar 2003, 73–74; Sonneveld and Tawfik 2015).[9] The Ottoman Empire, of which Egypt was a part, traditionally followed the Hanafi school. For this reason, Egyptian personal status legislation instructs the judge to employ the predominant opinion of the Hanafi school in the absence of a textual provision.[10] However, in the case of women's right to occupy the rank of judge, the State Council adhered to the more restrictive interpretation of the other three schools of Islamic jurisprudence. The Administrative Court admitted that there are opinions among the schools of Islamic jurisprudence that permit women to hold the rank of judge, but reserved for the State Council the right to select which doctrine it found most suited to the condition of women at any particular historical juncture.[11]

The above ruling speaks to the contested relationship between prevailing perceptions of appropriate gender roles, traditional Islamic jurisprudence, and the constitutional principles of gender equality. By conceding that customs and traditions evolve with time, the Administrative Court did not lay

7 Case No. 2317, judicial year 20, June 2, 1979, Administrative Court.

8 See for example, Ibn Qudama (1985).

9 According to this viewpoint, women are not permitted to be judges in crimes of theft, illicit sexual relations, consumption of alcohol, apostasy (*hudud* crimes), and murder (*qisas* crimes).

10 Article 3 of law No. 1 of 2000 instructs the judge to employ the predominant opinion of the Hanafi school in the absence of a textual provision.

11 Case No. 2317, judicial year 20, June 2, 1979, Administrative Court. See also, Hassan (2001, 14–15) and Omar (2013).

down an absolute rule prohibiting women from assuming the rank of judge. This might lead us to infer that women could be permitted to assume positions on the State Council at a later point in time. However, in a telling decision by the State Council in 2010, it became apparent that these barriers had not yet been removed.[12] In 2009, more than 60 years after Aisha Ratib was barred from the State Council, the special committee of Egypt's State Council agreed unanimously to appoint male and female law school graduates from the year 2008–2009 as members of the council. However, while the applications were being reviewed by the special committee, the State Council's general assembly convened a meeting and voted in February 2010—by an overwhelming majority of 334 to 42—not to appoint female judges (Hassib 2012; Lindsey 2010).

Among the female law school graduates whose applications were refused was Mayeda Fahmi. She subsequently filed a suit against the State Council before the Administrative Court, arguing that the decision by the general assembly of the State Council was unconstitutional, since it contradicted the principles of equality before the law and equal opportunities. She also argued that it contradicted the Convention on the Elimination of Discrimination against Women, which Egypt ratified in 1981. Notably, she further claimed that instead of relying on the constitution and legislative texts, the State Council had recourse to the stereotypical view that "the strenuous work associated with being a judge does not suit women without taking into consideration that the woman (*al-mar'a*) constitutes half of society and enjoys the same rights as a man and is committed to the same duties." Mayeda Fahmi's statement was strongly reminiscent of arguments resorted to by the State Council for the last 60 years in denying men and women equal citizenship rights in the public sphere, and suggests that they remain relevant to contemporary debates and practices.[13] In the following section, I look at strategies of argumentation developed by civil society activists during the 1990s and 2000s in an attempt to overcome resistance from members of the judiciary who consider it inappropriate for women to serve as a judge.

12 See also Ammar (2003) and al-Islambuli (2001) on other cases of women who applied to the State Council.

13 Lawsuit filed by Mayeda Shawqi Fahmi against the State Council, on file with author. A ruling in this case was expected during 2014 and could shed more light on the matter.

3 Strategies Employed by Civil Society Activists

From the late 1990s onwards, Egyptian civil society organizations campaigned to introduce women into the judiciary. The Alliance of Arab Women, The Egyptian Center for Women's Rights, and the Arab Center for the Independence of the Judiciary (ACIJLP) were particularly active in lobbying for the participation of women in the judiciary. In this section I analyze strategies adopted by the civil society organizations to promote the appointment of women to judicial posts. The purpose is to shed some light on the arguments adopted by different participants in the debate, as well as the alliances formed.

In tailoring their campaign to the Egyptian context, the Alliance of Arab Women and ACIJLP formed multiple arguments in order to counter accusations from Islamists, conservative religious scholars, and most importantly, members of the judiciary itself, of being 'Western.' Iman Mandour led the campaign for female judges as a member of the Alliance of Arab Women in the 1990s. In 1998, she arranged an event in cooperation with the Judges' Club where she tried to link the Egyptian situation to the global discussion regarding women as judges:

> This was a big break. We invited a high profile British female judge to be speaker. This was proof that is it possible for women to enter and be successful in what was regarded as a men's club in the UK. She told the audience how she managed to enter and advance in a male domain. The present judges said this was all nice, but related to the west; we are different here. "This is not for us." In the media they argued that this was contradictory to Islamic *shariʿa*. This made us realize we had to show that having female judges was not against *shariʿa*. In this we relied on a vision of 'true, enlightened Islam' in contrast to traditional male-oriented interpretations.[14]

Another frequently heard argument was that it would be unacceptable to let women serve as judges without them having first served in the Office of the Public Prosecution. Although Egyptian women do not work as Public Prosecutors before becoming judges, they have occupied positions in the Administrative Prosecutors and in the Authority of State Cases (Omar 2013). In order to counter this argument, the civil society activists invited female members from the Office of the Administrative Prosecution, a professional group prevented from becoming judges although they are qualified and handle

14 Interview with Iman Mandour, November 19, 2012.

critical situations. After the male judges argued that the time was not yet ripe, Mandour responded by organizing yet another seminar carrying the title "suitability." She said: "We were mocking their argument that the time was not yet ripe for women to be included in the judiciary. We also brought women judges from Arab countries (Morocco, Tunisia, Yemen, Syria, among others) in order to demonstrate that including women in the judiciary does not conflict with Islamic *shariʿa*, since they are allowed in other Arab and Islamic countries."[15]

Proof of continued resistance from within the judiciary was a booklet compiled by the Judges' Club in 2002 entitled "The woman and the judiciary." The volume included contributions from supporters and detractors of women judges. Some arguments coalesced around the idea of women's difference, since their biology subjects them to pregnancy and childbirth, which renders them unfit to hold the position of judge. Another argument put forward by judges was that women were not suited to work in the Public Prosecution service, a prerequisite for appointment as a judge. The Public Prosecution service, they contended, sends its members to remote places to investigate crimes. Women would not be able to perform the hard work required, nor leave their homes to work long and late hours while investigating crimes. In response to this argument, another judge retorted that women work in other public posts, such as that of forensic doctors, who routinely inspect corpses and perform autopsies. Yet other judges based their opposition on a masculinist perspective. Some argued further that women were not eligible to participate in the secret deliberations among judges, since this would constitute a forbidden privacy (*khalwa*). A related line of argument was that women's natural timidity rendered them incapable of conducting investigations into crimes such as rape (Omar 2013).

These are the contours of a lively internal debate. Proponents and detractors in the Judges' Club Booklet also resorted to religious arguments. Above, I mentioned that civil society activists couched their demands in terms of what they termed a 'true, enlightened Islam' as opposed to male-centric interpretations. Since the 1970s, Egypt has witnessed an Islamization of the public sphere (Ammar 2003, 70–71; Hirschkind 2001, 205; Skovgaard-Petersen 1997) where participants in debates resort to the language of Islam. The detractors argued that the appointment of female judges was not in conformity with Islamic *shariʿa*. In a *hadith* narrated by Abu Bakr, the Prophet said that those who appoint a woman to rule over them will not succeed. The opponents concluded from this *hadith* that women may not assume positions of authority, including that

15 *Ibid.*

of judge (Omar 2013). In response, proponents among the judiciary and civil society activists argued that this was merely evidence that women should not hold the position as head of state. Secondly, the opponents argued that women's testimony is not accepted as long as there is no man among them. This was based on a Qur'anic verse in which God said: "that if one of the two women errs the other will remind her." On the other hand, the proponents argued that women are not mentally deficient, and countered this verse with a *hadith* according to which the Prophet said that women are the keepers of their husband's homes and are responsible for their children. Hence, they were qualified to assume the position of judge (Bayoumi 2001, 56; Fawzi 2001, 22; Hassan 2001, 17; Omar 2013).

3.1 *Courting the Ruling Regime and Galvanizing External pressure*

In addition to approaching members of the judiciary, the civil society organizations attempted to engage members of the ruling elite. Although under pressure from the international community to show some commitment to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Mubarak regime's reluctance to push for women's inclusion in the judiciary seems, in part, to have been born out of fear of its Islamist opposition contending for legitimacy.[16] Another explanation offered was that Egyptian feminists had since the nineties focused attention on the task of revising the personal status codes (al-Din 2001, 8) (see below).[17] Unable to receive support from the regime due to their marginalization from the closed circles of power, the civil society activists changed their strategy and began simultaneously to employ international tools. Among other initiatives, they followed in the footsteps of the (then) first lady Suzanne Mubarak to various international forums, where they coordinated with other participants to ask her questions such as: "Why does Egypt not have a female judge?" In this manner the activists managed to obtain support from Hosni and Suzanne Mubarak in addition to the (then) head of the High Constitutional Court, Fathi Naguib (Hassib 2012, 40; El Sayed 2006–2007, 136). These key figures in the regime played a critical role in the appointment of Cassation lawyer Tehani al-Gebali to the High Constitutional Court in 2003.[18]

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16 Egypt ratified CEDAW in 1981.

17 The introduction of the so-called *khul'* law in 2000 shows that women's rights activists were able to engage powerful political players (Singerman 2005).

18 Al-Gebali's appointment corresponds with the 'boomerang' model proposed by Keck and Sikkink (1998), where domestic organizations appeal to transnational actors, who in turn, generate international pressure on states. The subject of female judges was the subject of

Tehani al-Gebali's appointment may be considered a classic top-down measure where a female judge was directly appointed to a top position in the judiciary without having first worked as public prosecutor (El Sayed 2006–2007). Since the government did not take further steps to increase the number of women in the judiciary in subsequent years, the ACIJLP launched another campaign in 2006 with support from the EU (Hassib 2012, 40). The purpose behind the campaign was the admission of women as judges to the ordinary courts. As a consequence, female administrative prosecutors were notified of a competition for ordinary judicial posts in 2007 on condition that they passed oral and written tests following training courses arranged by ACIJLP (Hassib 2012). In December 2006, the Supreme Judicial Council selected 31 female members of the Authority for State Cases and the Administrative Prosecution to serve among the ordinary judiciary. They were later appointed by a presidential decree in 2007 to serve on economic, civil, criminal, and family courts in Cairo, Alexandria, Tanta, Ismailiya and Mansura (Omar 2013).[19] According to a female judge, whom I shall refer to as Judge Sou'ad, the appointments owed much to the political will of Suzanne Mubarak and Hosni Mubarak in response to foreign pressure.[20] "When they were asked at international conferences whether Egypt had female judges, they could say they had 31."[21] In May 2008, another group of 12 women were appointed to the rank of judge.

This was another example of a reform dictated from above, and it provoked heated public debate, showing that Egyptians were divided on the issue.[22] The strongest resistance, however, came from within the judiciary itself (see also Sonneveld and Tawfik 2015). In spite of the admission of women to the ordinary judiciary, the Public Prosecution service continued to refuse the appointment of female judges. In 2010, the Public Prosecution announced the recruitment of a batch of new members, stating that only males could receive appointments (Omar 2013). The exclusion of women clearly contravened the constitutional principles of equality and equal opportunity. However, the most noteworthy incident in this regard occurred during the same year, when the State Council once again refused the appointment of women as judges in a manner that

heated debates within the High Constitutional Court for two months before her appointment was endorsed (Elbendary 2003).

19 See also Kadyonline (2010).

20 Fictitious names are used to maintain the anonymity of the women judges interviewed, with the exception of Sally al-Saidi on the Criminal Court, who agreed that her name could be mentioned.

21 Interview with judge Sou'ad, February 20, 2013.

22 It was criticized inter alia by a member of parliament, Muhammad El-Umda, who filed suit against the appointment, claiming it contradicted Islamic *shari'a* (Leila 2007).

brought to light the presence of a rift within the judiciary with regard to this issue (see above).

4 Judicial Selection Processes: 'A Happy Family'

Although Egypt's female judges did not rise through the ranks of the Public Prosecution service prior to their becoming judges, the women judges interviewed claimed that they had been subject to the same selection criteria as male applicants, following meticulous examination. However, that does not necessarily mean that there was no discrimination with regard to their appointment as judges. With this, I move to the second part of my chapter, which deals primarily with practice pertaining to women judges. Based on examination of the circumstances surrounding their appointment, I am going to show that the aforementioned challenges facing women judges are exacerbated by judicial selection processes that lack transparency and rationality. It is further argued that the token number of female judges have advanced within the judicial hierarchy by virtue of considerable social and cultural capital, among other factors.

Judicial selection in Egypt is based on the civil law model of continental Europe, where judges enter the judiciary by sitting an entrance examination shortly after completing their university education. Although the appointment process is formally merit-based, members of the Egyptian judiciary are usually drawn from the upper-middle or upper stratum of society (Hamad 2006, 263). Further, positions are frequently handed to the relatives of sitting or former judges and government officials (Bernard-Maugiron 2008, 8; Hamad 2006, 276; Hassib 2012, 51). This was succinctly formulated by Ahmed al-Zind, the former president of the Judges' Club, who referred to this practice as the 'holy march' of judges' sons (al-Essawi 2012). In light of this and other challenges facing the organization of the Egyptian judiciary, the leader of ACIJLP, Naser Amin, argued that: "the gender issue is merely a reflection of a profound, urgent managerial problem" (IRIN 2006). As has already been shown, the competition was not announced openly, but only among members of the Administrative Prosecution service and the Authority for State Cases. The female judges were hence drawn from members of the existing judicial community. Moreover, they tended to be family members of male judges. In the words of Ahmed Tawfik: "The female judges were recruited from our own: the administrative prosecution. In addition, they were mostly wives and daughters of judges."[23]

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23 Ahmed Tawfik is an Egyptian judge and PhD candidate at the University of Leiden writing a dissertation on Islamic *shari'a* in constitutional orders. Interview November 2012.

For instance, Judge Samar told me that her father was a member of the State Council. As his daughter, she said she "drank the law" and became interested in it at a very early stage of her life, deciding to study it. She was quick to follow up by saying that her father did not influence her in any of her decisions, nor aid her appointment and later career advancement. Similarly, Judge Iman thanked her father who dreamed that she would one day become a judge for her decision to enter the competition for judgeship. However, it is important to point out that not all the women judges were wives or daughters of male judges. During an interview with Sally al-Saidi—the first Egyptian woman on the Criminal Court bench—she told me that her father was a police officer, something which sparked her enthusiasm for criminal law, while her husband worked as an engineer. In addition to a particular family background, most of the six interviewees seemed to be included in informal male judicial networks, which is important for mentoring and promotions. The female judges would also sometimes meet to support each other and exchange information.

Besides considerable social capital, the female judges interviewed appeared to possess considerable cultural capital in the form of judicial expertise. Many of them held more than one university degree and had acquired legal specialism. By way of example, Sally al-Saidi wrote a Master's dissertation comparing capital punishment in the United States and Egypt.[24] She became a member of the Juvenile Criminal Court in Cairo in 2009 and later advanced to become a member of the Criminal Appeal Court in Cairo. During our interview, she told me she had always dreamed of a career within the criminal judiciary. Prior to her appointment as judge, she had worked in the Administrative Prosecution service for seven years. After inclusion among the 31 candidates selected in 2007, the minister of justice said that those who wished to become members of the Criminal Court should consider the matter thoroughly before deciding. Sally though about it and decided. Proudly, she said she considered criminal law to be the most interesting and challenging field of law because of the discretionary power given to judges, and since it involved cases of rape and homicide. She added that she studied the work of the Public Prosecution in order to hone her skills.[25] It is interesting that a female judge was appointed to the Criminal Court in light of the fact that Egypt adheres to the Hanafi school of jurisprudence, which states that women can be judges in all areas except criminal law (see above).[26] In her application for promotion from the Criminal

24 Interview with Sally al-Saidi, February 3, 2014.

25 Ibid.

26 In 2013, Sally al-Saidi was appointed to the technical bureau at the Court of Cassation, criminal law section.

Appeal Court to the Court of Cassation in 2013, Sally stressed her formal qualifications: "I told the head of the court that I may not be the daughter of a judge, but I have excellent academic qualifications. I showed him that I hold a Master's degree in criminal law and that I speak French as a second language."

The scant data available to the author seems to suggest that, although appointed by way of top-down presidential decrees, the other five female judges also experienced professional advancement through the judicial hierarchy, to the extent that they became heads of judicial circuits in the family appeal courts, economic appeal courts, and the technical bureau at the Court of Cassation. Still, other female judges acquired prestigious positions in the Ministry of Justice.[27] This could possibly be attributed to their social background in addition to professional achievement, among other formal qualifications. Following their appointment in 2007, many female judges sat in Family Courts. This could be interpreted as a way of offering them a form of judicial power that reinforced women's role as mothers and nurturers (El Sayed 2006–2007, 136). It is difficult to obtain specific data on the proportion of women in different fields of law. However, personal interviews with female judges revealed that they later moved away from the Family Courts. In fact, at the time of my research, only one female judge remained in the Family Courts, Judge Iman, to whom I shall return in the following section. After interviewing Sally al-Saidi of the Criminal Court and the female judges in the Economic Court, my impression was that they were all keen to distance themselves from the Family Courts, which rank rather low in the hierarchy of judicial specialization. A recurrent theme among the women judges on the Economic Court was that they preferred to practice their profession there since it was preoccupied with the application of abstract law, "not people and emotions," as they put it.

When I asked if they had been subjected to gender discrimination during the course of their professional careers, two respondents out of six started out by averring that they had not experienced any difficulties. However, four women in the sample admitted that they had not been welcomed by all their male colleagues. In the words of Judge Sou'ad of the Economic Appeal Court: "Some of them believed that we would be thinking about our families or cooking during court hearings. Further, it is sometimes argued that women should not be judges for the sake of protecting the family." In the beginning, Sally

27 According to Ahmed Nabil, deputy head of the National Center for Judicial Studies, there are no statistics on the location of the female judges. He also said they change position almost annually. However, according to Nabil Sadeq, vice-president of the international relations department at the Court of Cassation, in 2014, there were five female members of the technical bureau at the Court of Cassation. Interview, February 3, 2014.

al-Saidi told me that the male judges in the Criminal Court objected to the idea of a female judge on the judicial panel, and inquired why she had left the Office of the Administrative Prosecution to join the Criminal Court instead of the Family Courts. She established support from her male colleagues in the following manner:

> My male colleagues on the judicial panel, lawyers, and members of the Public Prosecution were all astonished by my decision to join the Criminal Court. They considered the Family Courts a more suitable place for a woman judge since these courts primarily deal with cases involving women and children. [...] People would flock to my courtroom in order to see if I would lose concentration during court proceedings. [...] A majority of Egyptian judges are conservative and refuse the idea of women presiding over cases of murder and rape, and other cases where verdicts of imprisonment are issued. At the outset, I countered this by telling my male colleagues that I would not be able to succeed unless they helped me. After I told them so, they offered help. Later, as I gained more experience, nobody questioned my capability. [...] They also saw that I demonstrated considerable work commitment and could work long hours.[28]

Similarly, Judge Samar said that other male judges were willing to help her by providing advice on "the law, how to write a legal report, etc." After having worked among the judiciary for 21 years (13 years among the administrative prosecution, and five as a judge), Judge Samar had grown very confident in her professional role and was comfortable dealing with her younger male colleagues. However, she said, this had not always been so. Samar told me that at the start of her work as a judge she felt afraid because she was inexperienced, and that the minister of justice at the time had told the recently appointed female judges that they would be subjected to more critical scrutiny than their male colleagues. The newly-appointed female judges were subjected to considerable pressure to perform. "We had a lot to prove," Judge Samar said, "for ourselves and the next generation." Indeed, they considered this to be the greatest in a series of achievements regarding women's participation in public life. According to the female judges interviewed, their male colleagues gradually grew to respect them as they saw they were genuinely interested in the law and sometimes worked until late in the evening.

28 Interview with Sally al-Saidi, February 3, 2014.

However, the persistent influence of gender roles assigning the role of caretaker to women continued to place them in a double-bind by clashing with those attached to their professional role as judges. There appears to be a prevalent assumption among several male judges that female judges receive favorable treatment. In the words of one male judge:

> They were appointed on the basis of being wives and daughters of male judges. Moreover, while male judges have to rotate in the governorates for several years before receiving a post in Cairo, female judges argue that as mothers and wives, this will entail travel away from their families. Hence they receive posts in Cairo at an early stage in their career.[29]

Faced with arguments by fellow judges that it would be unacceptable if women received preferential treatment when it comes to the location of their postings, Judge Sou'ad said the following in response to the story of one of the 31 female judges who resigned because she could not take a position in Kafr al-Shaikh:[30]

> Some judges argue that women are being given preferential treatment so that they don't have to travel. Men sometimes have the same option if they are sick, for instance. There is a need for both objective criteria and social flexibility in deciding this. Islam gave me the right to care for my family. Besides, some female judges do travel to other governorates to practice as judges.

Despite significant obstacles, the female pioneers in positions of judicial authority had obtained prestigious positions in what remains a male-dominated profession. While dissociating themselves from Family Courts, the idiom of the family was invoked when describing the professional setting in which they worked. Judge Sou'ad put it this way: "In this court we are all like a family." The judges interviewed also spoke of flexible working conditions that could be combined with family life. Judge Iman told me that she went to court three days per week, enabling her to balance work and family life, including childcare. She was aided in this by the fact that her husband was also a judge. Together, they managed their work schedule so that they were in court on different days of the week.[31] All interviewed judges seemed to have been allowed

29 Interview with the head of Family Court Prosecution in Cairo, January 30, 2013. See also El-Nahhas (2007).

30 For more on this episode, see Leila (2007) and El Sayed (2006–2007, 141).

31 Interview with Judge Iman, May 11, 2013.

to work in judicial fields based on their interest, be it family law, commercial law, criminal law, or civil law, with the possibility of promotion to the ministry of justice or the technical bureau at the Court of Cassation. As mentioned, the admission of women to the judiciary encountered strong resistance from male judges. Although they were given a hostile reception, the women judges seemed eventually to have become members of the judicial family. Nonetheless, the somewhat tenuous nature of their position became apparent when I met some of their male colleagues. One of the male judges called the appointment of female judges a "successful experiment" (*tagruba*), indicating that it was a novelty imposed on Egyptian society. It is worth mentioning that several of the women judges interviewed referred to their admission to the judiciary in the same terms. He continued by saying that although he might have been skeptical about female judges in the beginning, he had learnt to respect them during the course of their work together in the court. He believed the experiment had been successful because the appointed female judges were competent.[32] He afterwards added, sounding a cautionary note: "Not all women are like that." Judge Sou'ad was visibly annoyed by her younger male colleague's comments since they clashed somewhat with the metaphor provided of the court as a family. Similarly, Sally al-Saidi argued that the male judges who have experienced work with female judges accepted them, while those who had not refused to do so.[33] This shows that although male judges may be biased against women, the experience of working with them in this particular professional setting may change their perception of female colleagues.

5 Interaction in Courts

Carol Gilligan (1982, 62–63) argued that women bring a distinctive perspective to professional roles and that their mode of reasoning about moral conflicts differs from that of men. Drawing on Gilligan's theory, Carrie Menkel-Meadow (1995) claimed that women may practice the law in different ways from men. Both coupled the idea of gender difference with an 'ethic of care' toward marginalized groups, grounded in a relational, contextual form of reasoning. They opposed this to a mode of moral and legal reasoning associated more with men, which they argued was bound by abstract, universalistic principles. Gilligan and Menkel-Meadow's approach has not been without its critics; it has been charged with subscribing to essentialist views of what constitutes femininity

32 Interview with Judge Yasser Khalifa, February 20, 2013.

33 Interview with Sally al-Saidi, February 3, 2014.

and masculinity while ignoring axes of difference among women and other social forces that shape gendered subjectivities (Mather 2003, 34; Sommerlad 2003, 203; Voorhoeve 2014, 12). At this point it should be mentioned that the female judges themselves denied that feminization of the judiciary influenced judicial practices. Mindful of this, I shall argue that it is important to consider the impact of contextual factors such as legal training, judicial field, and institutional setting when analyzing judicial behavior. Indeed, as noted above, when I interviewed the Egyptian female judges at the Economic Court, a recurrent theme was that they preferred the work there since it was associated with values of objectivity and universality. On the other hand, they perceived the Family Courts as 'emotional' and 'messy' because intimately connected with the private sphere. Although the sample of female judges interviewed is too small to be representative, this indicates that legal reasoning based on the traditional subsumption method is not intrinsically male. However, this does not mean that I overlook gender as a possible influencing factor, especially in light of the social and constitutional significance accorded to Egyptian women's role as caregivers.

Judicial practice is embedded in concrete institutional contexts, including ritual frameworks such as special rooms and procedural rules (Skyberg 2004, 24). During April 2013, I attended a session at the prestigious Economic Court situated in New Cairo, which at the time, among other matters, handled cases of corruption involving top officials of the Mubarak regime. The Economic Court asserted its authority through the use of imposing architecture, symbols, and interior design. On one side of the spacious courtroom were benches for members of the public, lawyers, and litigants as well as a rostrum providing skilled lawyers with space for legal rhetoric aimed at persuading the panel of judges. On the other side of the room the judges were sitting on tall, ornately carved chairs. The panel was presided over by Judge Samar, who was dressed in a black robe, symbolizing her impartiality in the dispensation of justice.

During the session, the litigants and lawyers showed deference to Judge Samar, as the authoritative embodiment of the law, cordially referring to her as *ra'is* and *affandim*. On that particular day a lot of time was devoted to investigation. While reviewing documents and questioning witnesses, Judge Samar wielded authority equal to that of male judges, something that was reinforced by the use of Modern Standard Arabic among all legal actors. The proceedings were very formal and all legal actors, ranging from the litigants and lawyers to the witnesses, conducted themselves in a very respectful manner without approaching the judges' platform, making it clear that the panel presided over by the female judge commanded full public authority.

Interaction in the institutional setting of the Family Courts differed very much from the Economic Court. The following month, I was permitted to attend some sessions presided over by another female judge, to whom I shall refer as Judge Iman. In stark contrast to the Economic Court mentioned above, the Family Courts are usually situated in modest buildings and court sessions take place in a private chamber. The setting of this particular court was a small room with worn rugs and curtains, broken windows, and a malfunctioning air-condition system, reflective of the Family Courts' low rank within Egypt's judicial system. The particular institutional setting of the Family Courts represents a mix of formality and informality involving, among other things, the occasional use of first names, and the application of Modern Standard Arabic mixed with colloquial Egyptian Arabic. Instead of the functional spatial design characteristic of other courts, there is often close physical proximity between judges, lawyers, and litigants—in other words, 'people and emotions.'

Analysis of the language used in the courtroom shows that the informal aspect was accentuated during the sessions presided over by Judge Iman. Rather than an official judicial robe, she wore everyday clothing and was precariously seated on a bulky office-chair, which was missing one wheel, and from which her feet could not reach the floor. Nevertheless, Judge Iman appeared very confident, joking comfortably with her younger male colleagues who wore suits and seemed to respect her authority and competence. The presiding female judge used colloquial Egyptian more frequently than the male judges I observed in the Family Courts. While some judges say "*mashi*" (OK) in order to ensure that the parties to the dispute understand what is happening, Judge Iman used the expression to show that she was listening actively. She also used words like "*yabni*" (my son) and "*habibi*" (my dear) when speaking to the male judges on the panel and the scribe, all of whom were younger than herself.[34] At the same time, she seemed to make a point of being very methodical, verifying the authenticity of documents and the identities of the parties to the disputes.[35]

During our interview, Judge Iman thanked God that she has not faced obstacles from her co-panelists, lawyers, and litigants. After she was initially appointed to the Family Court in 2007, people grew used to seeing a woman on the panel. Hence, no serious objections were raised when she became president of the court in 2010. A colleague who came from Upper Egypt, who was very reserved about the prospect of working in her circuit, was won over when he learnt that she was conservative in appearance and attitudes. However,

34 Observations made in Family Court, May 11–12, 2013.

35 Observations in Family Court, May 4, 2013.

notwithstanding all her confidence, Judge Iman was not able to convince some of the litigants and lawyers of her competence and professionalism through her non-hierarchical approach. While waiting to enter the judges' chamber, I overheard a conversation between a male lawyer and his female client. The client asked whether the presiding female judge had arrived yet. The lawyer said: "No, fortunately the presiding female judge is not here today, only the judge on the right." Then the female client said: "That is good. She seems very stupid (*ghabiya*)." Then they both laughed mockingly. It was the first time I had heard a judge ridiculed in this manner. While the lawyers in the Economic Appeal Court were very formal and polite, I also noticed that some parties would address Judge Iman more informally than they would have addressed the male judges I observed. For instance, a husband in the midst of an alimony dispute addressed Judge Iman in her role of mother instead of judge by saying, "God bless your children." Meanwhile, a lawyer addressed the panel of judges in a slightly sarcastic way. Such disrespectful behavior is something I have not before observed in a courtroom.

The above observations suggest that female judges may help make the structure of judicial work more inclusive and less confrontational, depending on the institutional context. The example of Judge Iman also illustrates that a less formal manner of address had the potential to undermine professional authority among lawyers and litigants. Further, while interviewing the female judges during informal interaction with their predominantly male colleagues inside the chamber of judges after the court sessions and other places in court, I noticed that the female judges behaved differently from the male judges I have observed. While the male judges all exhibited distinct types of characters (the family man, the vain man, the joker, the strict judge), the female judges interviewed women had adapted to the profession by exhibiting typically feminine virtues in this particular setting. They would invariably make nice comments and jokes in an attempt to create a good atmosphere and were less confrontational than male heads of court. For instance, whereas the male family court judges I observed would invariably let some harsh words fall during course of the court session or after, the females remained friendly throughout. Their behavior indicates that the women judges shared a certain view of what constituted appropriate feminine behavior in a male-dominated professional environment, something which resonates with Butler's (1990, 141) insight into gender as an accomplishment which "the mundane social audience, including the actors themselves, come to believe and to perform in the mode of belief." This again raises the question of whether their acceptance among male colleagues was contingent on their conforming to prevailing norms of feminine conduct. This accords with findings by Cardinal (this volume), Menkel-Meadow

(2009, 205), and Schultz (2003, 313) and, in turn, affected the interaction in the chamber of judges.[36]

6 Law Enforcement and Access to Gender Justice

In this section, I briefly address the question whether female judges bring a different approach to judicial decisions, based on interviews with female judges and examination of a sample of judicial decisions stemming from three panels presided over by female judges. I focus on the application of personal status laws because they are relevant to the broader debate about gender and citizenship as well as the impact of women in the judiciary. In Egypt as in other Middle Eastern countries, the constitutional principle of equality among citizens is curtailed by *shariʿa*-derived personal status codes, which embody gendered hierarchy (Joseph 2000; Tripp 2013, 177). While the laws are at times ambiguous and contradictory, they define women as persons (*ashkhas*) whose status in the family is not autonomous. Normative concepts in the construction of the spousal relationship in Egyptian law remain the *fiqh*-based notion of the husband's duty to maintain his wife in exchange for her duty of obedience. Women do not have an equal right to divorce as this is defined as a prerogative of the husband. The laws also codify men's right to take up to four wives.

Since 2004, Family Courts were established in order to simplify and accelerate procedures in matters dealing with family law. The Family Courts are important institutional sites of power with discretion over vital aspects of citizens' lives, such as paternity, establishing marriage, maintenance, divorce, and custody (see also Lindbekk 2016; Moussa 2011). Partly due to its staunch opposition to female judges, it has been argued that Egypt's judiciary is 'conservative' (Bernard-Maugiron and Dupret 2008, 64). In the same vein, it has been suggested by activists and academics that the asymmetric gender relations institutionalized by Egypt's family laws have been exacerbated by the near exclusion of women from the judiciary (Moussa 2011, 243). For example, Farida Deif (2004) of the Human Rights Watch questioned whether male judges were able to "sufficiently appreciate the concerns of women seeking divorce," implying that women judges could be more sensitive to the needs of female litigants, in line with Gilligan's theory of an 'ethic of care.'[37]

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36 See also Thornton (1996) and Wells (2003, 240) on the position of women in law schools.

37 In a survey conducted by Fawzi (2001), it was found that the divorced women were the group who most welcomed the idea of female judges, especially in personal status cases.

However, based on an analysis of 20 court decisions, Bernard-Maugiron and Dupret (2008, 63) could not confirm a conservative tendency among male Family Court judges. Further, in a study of the enforcement of personal status law by Egyptian Family Courts, Lindbekk (2013) found that male judges in four Family Courts emphasize qualities characteristic of a 'care ethic' in the relationship between husband and wife. A recurrent theme in rulings by male judges is that marriage should be characterized by Qur'anic emotion-based virtues such as amity (*mawadda*) and mercy (*rahma*) which are conceptualized in a romantic way as strong emotional ties between spouses. She also noted that the discourse idealizing love and deep affection between spouses plays an ambiguous role, since it may be used both to support gender hierarchy and challenge it. In addition, some male judges attempt to compensate women for legal arrangements which privilege men by utilizing principles such as that of protection for the weak. This demonstrates that the adoption of a 'care approach' is not synonymous with adherence to feminism in the context of Egyptian *shari'a*-based family law. In the following, I shall show that the invocation of emotion-based virtues is a point of convergence between male and female judges. Thus, it may be attributed to a theme articulated by both male and female judges rather than a distinctly female form of moral reasoning.[38] I argue that this has been bolstered by the introduction of computer technology which enables judges to base their judgements on pre-determined texts. I shall also show that the deployment of categorizations such as more or less 'conservative' are problematic in view of the fact that a majority of the women judges interviewed referred to themselves as exactly that.

6.1 *Do Women Judges Rule Differently from Male Judges in Matters Relating to Marriage and Divorce?*

None of the women in this study defined themselves as feminists. Instead, as mentioned above, they regarded themselves as conservative (*muhafidha*). This could partly be explained by the fact that the word 'conservative' is often opposed to 'liberal' and 'secular,' normative stances with negative connotations in Egyptian popular discourse. Intriguingly, the women judges interviewed also adhered to the fundamentals of the gender contract on which Egyptian personal status law is predicated. Accordingly, the interviewed women judges argued that wives should be deprived of maintenance if they were disobedient to their husbands. Judge Iman defined marriage as a contract whereby

38 Egyptian law does not contain a holistic definition of the marriage contract. Nonetheless, the courts have taken an active role in defining the essence and purposes of marriage. These ideas are expanded elsewhere (Lindbekk 2013 and 2016).

the wife gives consent to (her husband's) guardianship (*wilaya*), and offered the following absolute statement: "If the wife was *nashiz* (disobedient), she should lose her financial rights."[39] In line with Egyptian personal status law, she defined disobedience (*nushuz*) as a woman's act of abandoning the marital residence without her husband's permission for a valid reason.[40] This shows that although mixing professionally with men and holding positions of public power, the women interviewed espoused deeply anchored conceptions that reinforce spatial segregation of men and women. On the other hand, a female judge in the Economic Court told me she believed Egypt should follow the model of Morocco's family law of 2004.[41] The '*Mudawanna*' was highly significant since it did not stipulate that the wife owes obedience in return for maintenance (El Hajjami 2013, 84). These and other viewpoints expressed in the following sub-section demonstrate that the Egyptian women interviewed did not speak with a unified voice. Although they shared similar social backgrounds and regarded themselves as conservative, they differed considerably among themselves on crucial issues pertaining to women's citizenship rights, in ways that do not follow a gendered pattern.

In addition to interviewing women judges, I analyzed a total of 80 rulings issued by three different Family Court panels containing one female judge and two male judges. Aside from the ritual framework outlined in the previous section, the judges' approach is constrained by their orientation to legal relevance, reflecting their bureaucratic resistance to the possibility of being overruled (Dupret 2007). As mentioned, the female judges avoided the field of family law because it was associated with emotions. Judge Iman made a point of stressing that she was not swayed by the tears or emotional outpouring of female litigants:

> I do not blame women for their tears since some of them are subjected to real injustices, but the outcome of cases is determined by the law. [...] The sentence "The court rules to ..." (*Hakamat al-mahkama* ...) included in judgments signify that the Family Courts issue critical decisions impinging on the life paths of litigants.

39 Interview with Judge Iman, October 23, 2012.

40 According to Egyptian personal status law, a wife has the right to seek lawful employment, provided she does not misuse this right, that it does not conflict with the family's interest, and provided her husband did not ask her to refrain from this.

41 Interview February 12, 2013.

She continued by drawing attention to the fact that the court based its verdicts on papers and documents (*awraq wa mustanadat*), a standard phrase included in most Family Court judgments. In many ways, these statements set the tone for the following exposition by being reflective of what Schultz and Shaw (2013) call a strong 'civil law ideology' and the salience of documents over oral pleading. This was a matter which became apparent during court hearings and was compounded by time pressure.

The sources of law used by Family Court judges include statutory legislation and precedence. Judicial practice is also influenced to a considerable extent by local custom, since the laws permit judges to exercise considerable discretionary power and, as shown elsewhere, Egyptian judges bring different perspectives to the bench (Lindbekk 2013, 2014). The judicial bench of the Family Court consists of three judges, something which makes it difficult to identify a gender factor behind the rulings. Yet it is worth noting that all three panels with one female judge promoted the same model of marriage outlined in judicial practice by exclusively male panels, appealing to moral feelings such as mercy and amity in the relationship between husband and wife. As a consequence, the tendency to invoke an 'ethic of care' may be attributed to an increasingly prominent thematic perspective rather than gender. This repetitive property of legal texts has been bolstered by the introduction of computer technology, which enables judges to copy the same passages into judgments over and over. Another important factor influencing legal work was time pressure, preventing judges from contextualizing demands. Returning to the Family Court presided over by Judge Iman, her weekly roll consisted of a number of cases ranging from 50 to 100.[42] Hence, she emphasized the importance of swift justice (*'adala najiza*), as did many interviewed male judges. During that month, verdicts were reached in 45 cases. Meanwhile, some were postponed and others cancelled. Judge Iman told me that she encouraged families to reach mediated agreements and that the court was often successful in doing so. However, during that particular month reconciliation was only reached in one out of the 45 cases.

The discourse of moral emotions was accompanied by one about asymmetric gender roles, according to which both the male and female judges upheld the husband's right to unilateral repudiation and to marry up to four wives. In an intriguing case presided over by a female judge, a wife raised a case requesting the court to establish her husband's repudiation. The couple married on July 29, 2007. The day after signing the marriage contract, the husband

42 These numbers matched those found in the Family Courts of Misr al-Jedida, al-Salam, al-Zaytun and al-Matariya.

travelled to the United States where he repudiated the wife on the following day. However, he refused to register the repudiation in an attempt to push his wife to an agreement where she relinquished her financial rights in regards to it. Consequently, the wife decided to file a case requesting to establish the repudiation. The Family Court of Misr al-Jedida ruled as follows:

> Repudiation (*talaq*) comes into effect as soon as the husband pronounces it. This is in accordance with all four schools of Islamic jurisprudence (*madhahib*) as well as the Prophet's companions. The registration of the repudiation and ways of notifying the wife of its occurrence have no bearing on its effect. They also have no bearing on the right of repudiation which God has solely granted to the husband.[43]

This excerpt provides an insight into the court's legal argumentation. The panel of judges established the man's right to repudiate his wife without her knowledge or his registering it with the state. In their recourse to substantive law, the panel of judges drew upon traditional Islamic jurisprudence and examples by the Prophet's companions. It is worthy of note that the same excerpt was copied into a judgment issued by a panel presided over by Judge Iman from 2012.[44] Thus, female judges contributed to normalizing unilateral repudiation as a male privilege.

Most of the cases filed with the Family Courts deal with issues pertaining to men who failed to adhere to their side of the gender contract by paying alimony. While acknowledging that there were problems with the implementation of judicial decisions in this area, Judge Iman viewed the issue of alimony as vital, and believed that the Family Courts made critical decisions affecting women and children without a male provider. Yet time pressure prevented her from considering often complex personal histories. In connection with a petition for jailing of a husband who failed to provide for his family, a female lawyer deemed it suitable to inform the judge that her client was a poor woman without any source of income. Judge Iman answered hurriedly: "Just give me the papers" (*Hat al awraq bas.*). While upholding male prerogatives of repudiation and polygamy, rulings of imprisonment were consistently handed down by the female-headed panels in response to non-compliance with the duty of maintenance, in accordance with Law No. 25 from 1920. With high levels of unemployment, many men are not able to sustain their wives

43 Case No. 930, February 25, 2009, Misr al-Jedida Family Court. See also case, No. 622, Misr al-Jedida Family Court, January, 28 2010.

44 Case on file with author.

and family financially. Furthermore, many women now work outside the house and contribute to the costs of marriage and setting up the matrimonial home (Lindbekk 2013; al-Sharmani 2013; Sonneveld 2012). In one case brought before the Family Court of Misr al-Jedida, a husband and wife had reached an agreement that he should pay her a monthly marital alimony of L.E. 250.[45] The husband worked in a glass shop owned by his wife, and consequently received his salary from her. Nonetheless, the court presided over by another female judge obliged him to pay the above amount according to their previous agreement.[46] In light of shifting gender roles, this ruling might appear unreasonable, but the principle of sanctity of contracts did not allow the court to take into account such mitigating factors, reflective of an 'ethic of justice.' This shows that the panels presided over by female judges included in my material did not necessarily give more consideration to specific individual circumstances than exclusively male ones.

I now turn to another central aspect of adjudication, namely judicial divorce through *khul'*. As mentioned above, repudiation has been institutionalized in Egyptian law as an inherent right of the husband. However, the wife has the right to petition the judge to obtain judicial divorce through the use of a legal fiction where the state, represented by the judge, assumes the husband's place and divorces the wife in his stead. In their professional capacity, the female judges may thus order divorce although they do not have that right as wives. In 2000, a new law that granted women unprecedented divorce rights was introduced. By virtue of the so-called *khul'* law, a woman can obtain a swift and irrevocable judicial divorce, provided that she returns her prompt dower[47] and relinquishes all her financial rights. This represented a fundamental challenge to the husband's authority and sparked considerable controversy after it was issued.

How do female Egyptian Family Court judges implement this law? Judicial divorce through *khul'* is by far the most frequently invoked divorce mechanism among women in comparison with others, because they do not have to establish harm before the court, and also because a ruling of *khul'* is not subject to

45 Equivalent to approximately EUR 26. Case No. 576, Misr al-Jedida Family Court, January 28, 2010.

46 Case No. 576, Misr al-Jedida, January 28, 2010.

47 Although Egyptian law does not regulate the dower at all comprehensively, it is an integral feature of the standard marriage contract as spouses are not allowed to waive it entirely. The legal institution of the dower is customarily divided into two parts: a *muqaddam al-sadaq* (prompt dower) which is paid at marriage, while a *mu'akhkhar al-sadaq* (deferred dower) is paid at the husband's death or divorce (Lindbekk 2013).

appeal.[48] However, during the initial years, the implementation of the *khulʿ* law was beset with resistance and confusion over the exact steps to be followed (Sonneveld 2012, 94). Although judicial divorce through *khulʿ* appears to have become a more straightforward and standardized process (Bernard-Maugiron and Dupret 2008, 63), there are still some lingering ambiguities and doubts concerning the law. Like many of her male colleagues, Judge Iman felt that female-initiated divorce was rampant. She therefore stressed the importance of achieving reconciliation (*sulh*), since divorce caused the breakdown of marital life. She claimed this happened in two out of ten divorce cases, including *khulʿ*, and that this was an achievement of the panel. Meanwhile, a judicial panel presided over by another female judge in the Family Court of Ain Shams would routinely reiterate a warning issued by the Prophet Muhammad to women who opt for *khulʿ* without a legitimate reason: "A wife who requests divorce without misery shall be deprived of smelling the scent of paradise."[49] This indicates that the judicial panel believed women should only request dissolution of marriage if they had been subjected to severe suffering and that this panel harbored doubts about the legitimacy of *khulʿ* in some of the cases brought before it.

Moreover, disputes frequently arise over the amount of the prompt dower, which the wife is obligated to return in exchange for her release from the marriage contract. The dower may take two forms: 'specified dower' (*al sadaq al-musamma*) or 'appropriate dower' (*mahr al-mithl*). A specified dower is usually agreed at the time of marriage and is recorded in the marriage contract, whereas appropriate dower refers to a dower that has not been specified in the marriage contract but is determined by judges according to the bride's social status and other factors (Lindbekk 2013).[50] Different judicial approaches have developed regarding the issue of dower. Some judges refer such disputes to the civil courts after issuing a ruling of divorce, while others decide to open an investigation into the amount of dower. In the former case, the *khulʿ* suit is dealt with comparatively swiftly, while in the latter protracted investigations may ensue, involving witnesses from both sides of the marriage contract. In

48 Reasons for judicial divorce stipulated by Muslim personal status legislation are as follows: prolonged absence of the husband, imprisonment, chronic defect, a husband's failure to provide maintenance, implacable discord, and a husband's harming of the wife (Bernard-Maugiron and Dupret 2008).

49 Case No. 892, February 9, 2009, Ain Shams Family Court.

50 In the field of the prompt dower there is a trend toward token dower in urban areas. Frequently, a symbolic amount, ranging from L.E. 1 to 50 piasters, is registered as the prompt dower in the marriage contract (Lindbekk 2013; Sonneveld 2012, 88).

a case brought before Judge Iman, a husband alleged that he had provided the wife with a prompt dower of L.E. 5000 instead of the L.E. 1 registered in the marriage contract. Rather than resorting to the method that could be perceived as most advantageous to female litigants, Judge Iman decided to open investigation.[51] This was also the approach adopted by another panel including a female judge.[52] However, it is worth mentioning that the women were usually successful in such disputes since the husband failed to provide proof in support for his claim.

Sometimes a legalistic streak could be detected in the rulings analyzed. Interestingly, this was evident in one of few instances in my material where a petition for judicial divorce through *khul'* was denied. The ruling stems from another female judge, who served as head of the Family Court of Misr al-Jedida a few years ago. A wife brought a suit for judicial divorce through *khul'* and offered to return the prompt dower in exchange for her release from the marriage contract. However, in this case the dower was not specified in the marriage contract. In such cases, the court should determine an appropriate dower (*mahr al-mithl*), calculated according to the amount received by other women in the bride's family upon marriage, in addition to consideration of the female petitioner's "beauty and morals" (*jamal wa khuluq*). In deciding this case, the court relied on a contemporary work of jurisprudence as well as practice by the court of Cassation to the effect that the burden of proof should be on the debt-holder. Since the wife failed to provide a marriage contract from a female family member or establish an appropriate dower, her suit for judicial divorce through *khul'* was refused.[53]

This sample of judicial decisions served to stabilize the current legal order, including institutionalizing the right to repudiation and women's access to judicial divorce through *khul'*. The sample also showed that in cases where the law is unclear, the female judges did not necessarily adopt an approach that strengthened the position of women involved in disputes over judicial divorce through *khul'*. Similarly, in other areas of law where judges exercise discretion, such as judicial divorce on the basis of harm and other reasons, no significant difference could be noted between judicial practices of panels

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51 In this particular case, the husband failed to bring evidence in support of his claim. Judge Iman therefore proceeded to ask the wife to declare under oath the amount she had received from the husband. The female plaintiff stated that the husband had indeed only presented her with a dower of L.E. 1 and was granted judicial divorce through khul' (observation made in the Family Court of Ain Shams, May 12, 2013).

52 Case No. 170, April 20, 2011, Zaytun Family Court .

53 Case No. 70, January 28, 2010, Family Court of Misr al-Jedida.

containing women judges and those without. Based on the above, I conclude that Egyptian female judges are not necessarily more attuned to the concerns of women seeking divorce than male judges, or at least, they do not disrupt prevailing gendered legal norms. Consequently, there is no indication that more women on the bench increased the court's propensity to rule in favour of women. Judicial practice in the field of *shari'a-* derived family law is shaped by factors that include knowledge of higher court practice, renowned jurisprudential works by contemporary legal scholars, and respect for the sanctity of contracts. Institutional factors, such as juridical field, the number of judges on the panel, along with time pressure are also in play.

7 Conclusion: A Successful Experiment?

As we have seen, the appointment of women to the Egyptian judiciary under the Mubarak regime depended greatly on civil society advocacy with EU funding in conjunction with support from of the (then) first lady and prominent legal figures. Several female judges, when interviewed, described the inclusion of women in the judiciary as a successful experiment. Indeed, they considered this to be the greatest in a series of achievements regarding women's participation in public life. Yet we have seen that over a decade following the appointment of Tehani al-Gebali, the ratio of women in the Egyptian judiciary remains very low. Examination of the circumstances surrounding their appointment shows that a token number of women judges eventually became members of the judicial family and advanced within the hierarchy of the judiciary. However, ambiguous constitutional language, entrenched notions of masculinity and femininity, positions in traditional Islamic jurisprudence, and reliance on political will combined to frustrate the inclusion of more women in the judiciary until 2015 (see below).

Finally, by examining day-to-day practice and judgments, it has been shown that the presence of female judges affected the structure of work on judicial panels, since their style appears to be less hierarchical than their male colleagues whom I observed. This was also shown to depend on the field of law in which they were working, with the female judge on the economic court being more authoritative than Judge Iman on the Family Court. However, in comparing judicial practices as between male and female judges, I did not find any influence of gender on court rulings in personal status law cases. Family courts presided over by female judges upheld the fundamentals of the gender contract on which Egyptian personal status law for Muslims is predicated. I have argued that a tendency to invoke an 'ethic of care' among both male and

female judges (by saying that the marital bond should be based on mercy and amity) can be attributed to an increasingly prominent thematic perspective rather than gender. Meanwhile, judicial panels headed by female judges did not display greater sympathy toward women seeking judicial divorce, or an appreciation for individual circumstances than exclusively male ones. Instead, I have highlighted the importance of key contextual factors such as ritual framework and legal training.

The repercussions of the post-uprising environment on policies pertaining to female judges remain to be seen. Tadros (2011) argued that a reliance on an authoritarian state as a vehicle for social change can seriously undermine women's citizenship rights. Similarly, the top-down manner in which they were appointed may have had a negative effect on the view of female judges (Dawoud 2012).[54] Although it is difficult to predict subsequent developments, the women judges interviewed did not expect the proportion of women in the judiciary to rise in the near future, given the highly volatile socio-political context and resistance from within the judiciary. In particular, the youngest female judge in my material, Hala, was pessimistic. When I asked her whether she thought more women would be appointed to the judiciary, she went so far as to say that: "There is no hope," (*mafeesh amal*) based on the aforementioned reasons. As a result, there were concerns that the 42 newly appointed female judges could remain lonely pioneers. And yet, in June 2015, the minister of justice announced the appointment of a new batch of 26 female judges to the ordinary courts by a ministerial decree. The statement was made during a conference held by the United Nations Development Program (UNDP) and a women's organization.[55] However, the State Council continues to exclude

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54 A male judge made a statement to this effect when he said: "Appointing Tehani al-Gebali, Egypt's first female judge, was the most dangerous thing the Mubarak regime did!" Interview with Judge Abdalla al-Baja, June 3, 2013. Following the 2011 revolution, Egypt's judiciary became embroiled in a political struggle between Egypt's secularist elite and the Islamist counter-elite (Brown 2012). The 2012 constitution, issued under the presidency of Muhammad Mursi, challenged the High Constitutional Court's authority by reducing its number of judges. Among the judges dismissed was Egypt's first female judge, Tehani al-Gebali. See, for example, http://english.ahram.org.eg/NewsContent/1/64/62016/Egypt/Politics-/New-Egypt-charter-encroachment-on-judiciary-Dismis.aspx, accessed January 8, 2013, and http://www.dailynewsegypt.com/2012/12/24/why-the-reduction-in-scc-justices/, accessed January 2, 2013.

55 See http://www.egyptindependent.com/news/26-new-female-judges-take-oath, accessed June 16, 2016.

women from the bench.[56] In other words, the admission of women to the judiciary remains dependent on efforts by the government and civil society organizations.

I end the chapter with an anecdote. Over a decade ago, a lawyer by the name of Amira Bahay El-Din (2001, 8) wrote that: "female graduates seek employment where they may find it, without giving much consideration to discrimination against them and the promotion of their male counterparts on the basis of sex alone." In 2013, I met two young, aspiring female law graduates. Magda told me she aspired to become a judge like her father, who was the head of a court. Although she was the daughter of an important judge and therefore well-connected, she believed that the dream of becoming a judge herself was impossible due to a lack of political will. Similarly, Reem, who graduated in 2009 and held two Master's degrees in law, applied to become a member of the Administrative Prosecution. In 2008, 103 female law school graduates were admitted to the Office of the Administrative Prosecution, but no law school graduates were admitted during the following years (NCW 2012). Unlike the attitude of complacency described by El-Din, Reem was profoundly dismayed to see that while fellow male students progressed to become members of the Public Prosecution service, the female law graduates were forced to pursue other career paths. At the time of this research she had joined a university as an assistant lecturer. Like Magda, her ultimate dream was to become a judge. Besides a lack of political will, she considered her professional aspirations to be hemmed in by obstacles emanating from the judiciary itself. She seemed to be acutely aware of her socially inferior status as a woman."They do not like to have female judges among them," she said.[57]

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56 See http://www.dailynewsegypt.com/2016/02/09/womens-rights-organisations-decry-discrimination-by-state-council/, accessed February 9, 2016.

57 Interview with Reem, April 23, 2013.

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Index

Abdul Razak, Rafidah, see *first female judges*
Abd al-Razzaq, Amina, see *first female judges*
Abd al-Razzaq, Zaynab, see *first female judges*
Academic legal training 24
Aceh 102, 114–115, 117–119
Administrative court(s) 77–78, 82, 89, 103, 237n. 3, 240 n. 9, 241 n. 17, 271, 284, 286–288
Administrative Judiciary Court 286
Administrative law 43, 268, 278
Administrative Prosecution 241 n. 17, 285, 289, 292–294, 296, 312
Admission 6, 24, 26, 54, 57, 60, 73, 87, 91–92, 225, 251, 285, 292, 298, 312
Adultery 59, 133, 136, 153 n. 4, 184, 186, 189–191, 192 n. 27, 195–196, 201, 210, 267 n. 8
Adversarial 37, 158
Al-ʿAṭṭār, Najāḥ 239
Al-Ayubi, Naʿima 62, 64–65
Aleppo 238 n. 5, 241, 248–250
Alexandria 65, 80, 82, 292
Al-Gebali, Tehani, see *first female judges*
Al-Hasaka 238 n. 5
Ali, Muhammad 60–61
Alliance of Arab Women 289
Ali, Ben 187 n. 21
Alimony 11, 38, 41–42, 77, 78 n. 37, 85, 130–131, 301, 306–307
Al-Raqqa 238 n. 5, 253–254
Al-Saidi, Sally 292 n. 20, 294–296, 298
Al-Suweida 238 n. 5
Al-Zind, Ahmed 293
Anti-discrimination 24
Appointment in remote areas 225, 233
Arab Center for Independence of the Judiciary 289
Assassination 266
Attitude 3, 25, 27, 32–34, 36–37, 39–43, 45, 113, 130, 159, 168, 174, 184, 193, 199, 213, 229, 245, 277, 300, 312
Authority for State Cases 285, 292–293

Bar 6, 23 n. 2, 54–55, 57, 69, 76, 78, 91, 266, 271, 278–280, 285
Batavia 72
Baʿth 237 n.1, 240
Bourguiba, Habib 9
Breadwinner 23 n. 3, 27, 58, 63, 186, 233
Bureaucratic 184, 196–198, 264, 304

Cairo 51, 60–62, 65, 80, 82, 156 n. 13, 284, 292, 294, 297, 299, 312
Care 3, 8–9, 16, 27, 30, 34, 37, 39, 42, 63, 115, 124–125, 130 n. 16, 131–133, 136, 149, 157 n. 17, 158, 185, 191, 193, 231–233, 242, 244–245, 247, 284, 297, 298, 302–303, 305
Career 11, 12, 24, 28, 35–36, 56–57, 59, 61, 65, 67, 71, 86, 91, 104, 164, 167, 194–195, 199–201, 224, 237–238, 240, 242–247, 250–252–257, 270, 294–295, 297, 312
Career obstacles 24
Caretaking duties 195
Chairi, Arifiyah, see *first female judges*
Change 23–25, 27–29, 31–33, 36, 44–46, 51, 58, 64, 68–69, 71, 73, 76, 77, 79, 84, 87, 103–104, 108–109, 124, 131, 133, 136, 161, 172, 178, 180–181, 186–187, 214–215, 218–219, 226–227, 231, 239, 259, 262, 266, 280–282, 291, 294, 298, 302, 308–309, 311
Chastity 190, 198–201
Children's judge 83
Choice of husband 231
Civil Court(s) 6–9, 12, 14, 87–88, 90, 102, 106–111, 153, 163–166, 171, 205–206, 228, 238, 244–245, 247–248, 255–257, 308
Civil jurisdiction 165, 174–175, 244–245, 255, 257
Civil law 6, 31, 37, 56, 79, 104, 182, 237, 244, 254, 256–257, 293, 298, 305
Class 3, 18, 23, 26, 32, 43, 50, 58–59, 61, 72, 133, 180–181, 190, 195, 199, 206, 211–212, 214–215, 217–233, 263, 292
Classical scholars 1, 11, 154–155 n. 10, 172
Code of conduct 207, 217, 221–222, 229, 230 n. 32
Code Napoleon (Napoleonic Code, Napoleon) 56, 58, 63, 66, 68, 71, 189 n. 25
Colonial period 24, 102–103
Colonial power 24
Common law 5–6, 31, 37, 56, 79, 93, 153, 205, 212

Communication 15, 30, 33, 35–36, 40, 44, 51, 81, 90, 125, 132, 149, 269, 279
Complexity of legal arguments 155
Computer technology 16, 303, 305
Constitution 24, 26, 56, 62, 77–78, 82–83, 153, 161, 163–164, 178, 205, 209, 212, 285–288, 311
Contemporary scholars 155, 161
Corruption/non-approachability 14, 90, 126, 204, 212, 221–222, 229, 234, 299
Court 2, 7, 11–12, 36, 41, 54–55, 57–58, 70, 77–78, 83, 85, 89–91, 103, 105, 110–111, 113, 116, 118, 125–126, 135, 137, 140, 143–144, 146, 162, 164–165, 168–169, 174 n. 64, 179, 181–189, 191–193, 197, 199, 200–201, 205 n. 2, 207–213, 215–216, 218–222, 224, 226–228, 230, 232–233, 238–239, 241–243, 246–250, 252, 254–257, 259–262, 264–265, 267–268, 270, 273, 284, 286, 294–295, 298, 300–301, 303–307, 309–310
Courthouse(s) 11–12, 14, 54–55, 70, 83, 102, 125, 129–131, 135, 137, 140–141, 143–144, 199, 211, 222, 226–227, 233–234, 238–241, 243–244, 246–250, 252, 254–255, 259, 263–265, 269, 280
Court of Cassation 146, 179, 183, 185–187, 189, 191–192, 201, 252, 254, 257, 284, 294–295, 298, 309
Courtroom 54, 57–58, 101–102, 108, 110–114, 116–119, 121, 181, 184–185, 187, 189–190, 192, 194–196, 198, 202–203, 222, 254, 260–262, 296, 299–301
Criminal Court(s) 11, 27, 39–40, 81, 166, 184, 205–206, 229, 237–238, 242–246, 253–256, 264–265, 292, 294–296
Critical legal Studies 180
Critical mass 29
Culture 14, 44, 51, 60, 124, 170, 230, 238 n. 4, 239, 246–247
Custodial disputes 157
Custody 9, 11, 27, 38, 42, 63, 79, 114, 156–157, 165, 167–168, 174, 179, 199, 260–261, 302
Customary norms/practices 204, 206, 233

Damages 184–187, 189, 191, 193, 195, 197, 201
Damascus 11, 17, 237–238, 240–244, 246–248, 250–255
Damascus countryside 238, 246
Dar‘a 238 n. 5
Day-care facility for children 232
Decision-making 4–5, 30, 41, 56, 78, 80, 125–126 n. 4, 129, 136, 149, 151, 174, 181, 219, 223, 225, 253, 274 n. 24
Deir Ez-zor 238, 241
Development politics 24
Difference 4–6, 10, 25, 29–31, 33–34, 36–37, 42, 58, 92–93, 112, 117, 123–126, 130, 137, 140–141, 149, 155, 167, 172, 174, 180–181, 190, 192, 195, 204, 211–212, 217, 222, 229, 231, 238, 251, 273, 276, 290, 298–299, 309
Difference theorists 31
Discretion 129, 147, 179–180, 183, 186, 189, 195, 215, 229, 256, 294, 302, 305, 309
Divorce 4, 9–11, 16–19, 34, 37–38, 42, 46, 61, 63, 73–74, 78–79, 84–85, 97, 112–113, 115–116, 120–121, 124, 129–131, 138, 146, 148, 150, 152–153, 157, 162, 165, 168, 174, 180–201, 203, 214, 217–220, 253, 257, 260–262, 302–303, 307–311, 313–316
Dorp, van, Elisabeth (Elise) 67, 69
Dower 16, 214, 261, 307–309
Dowry 220
Dress code 224, 227–228, 233
Dual legal system 153
Duke
  Duke approach (ethic of justice) 13, 8, 39, 125–128, 143, 148–149, 307
  Portia approach (ethic of care) 3, 8, 16, 37, 39, 42, 284, 290, 302, 305, 310

Economy 27
Economic court 284, 295, 299–300, 304, 310
Education 4–7, 25–28, 31, 33, 43–44 n. 38, 51, 56, 58–67, 70–75, 77, 79, 84, 87, 91, 93, 102, 108, 119, 124, 135, 140–141, 149, 161, 169, 171, 207–208, 218, 224, 226, 241, 275, 293
Educational reform 59
Effects of feminization 31
Egypt 1, 4–7, 9, 13–16, 18–19, 42, 51, 54–58, 60–65, 67, 70, 72, 74–80, 82, 87, 90–93, 128 n. 10, 134 n. 21, 156, 239, 241–242, 266, 274, 284–285, 287–294, 296–305, 307, 310–311 n. 55
Emotion 83, 105, 173–174, 196, 198–199, 210, 219–220, 262, 273, 295, 299–300, 303–305

Emotional disputes 157
Empathy 3, 27, 32, 35, 37, 40–42
Empowerment 11, 114–115, 137 n. 24, 139 n. 27, 185 n. 16, 239
Ennahda 178
Equality 1, 3, 8, 10, 23–24, 26, 28 n. 11, 36, 45, 58, 77–78 n. 38, 92, 102, 109, 124, 137 n. 24, 139 n. 27, 153 n. 5, 163, 168, 178, 274 n. 24, 285–288, 292, 302
Ethics 32, 39, 284, 287
  Ethic of care 3, 8, 16, 37, 39, 42, 149, 284, 290, 302, 305, 310
  Ethic of justice 3, 8, 39, 125, 140–149, 307
Europeanization 44 n. 39

Family 2, 9, 12, 14, 16, 39 n. 28, 40, 42, 45 n. 42, 58–59, 63, 73, 78 n. 37, 81, 93, 105, 116, 126, 130, 134, 137, 143, 179, 182–187, 189–196, 198–199, 214 n. 22, 216, 218–219, 224, 226, 229, 231, 242, 247, 259, 262, 264–265, 268, 270, 287, 295–297, 299–302, 304–310
Family breakdown 308
Family chamber 179–183, 187–190, 192–194, 196–198, 200
Family Code 178–179, 182, 186, 189–190
Family court 2, 7, 9, 12, 14, 42, 81, 126 n. 4, 143–144, 156, 173, 224, 229, 233, 242, 259, 262, 264–265, 270–271, 284, 292, 295–297, 299–310
Family law 2, 4, 6–7, 9–12, 38, 41–42, 44, 56 n. 7, 58, 63, 77–78 n. 37, 85, 91, 101, 107, 123–126, 128–130, 136–138, 145, 147–149, 157, 165–166 n. 42, 168, 170, 172, 178–179, 181–182, 184–185, 190–191, 193–195, 197, 199–200, 205, 210, 219, 229, 242, 259, 284, 298, 302–304, 310
Family litigation 156
Farooq Rooshna, Jameela, see *first female judges*
Federal Shariʿa Court 12, 14, 205, 206, 207–210
Female judges 35, 41, 43, 84, 101–102, 106–120, 130, 174, 181, 184, 194, 205–206, 213–214, 219, 223, 226–228, 231, 293–296, 299, 301, 304, 307, 309
Female judgeship 155, 158–160, 163, 171
Female judges lower courts 167, 173, 204–207, 210–211, 213, 233, 239, 269
Female litigants 3, 8–9, 12, 41, 55, 102, 112–114, 119, 127–128, 130, 154, 158, 162, 170, 173, 186, 195, 197, 200, 204, 211–212, 217, 302, 304, 309
Femininity 33, 58, 60, 227–228, 286, 298, 310
Feminism 25, 31, 181, 187 n. 21, 303
Feminization 25, 31, 181, 187 n. 21, 303
Feudal values 224
First female judges
  Abdul Razak, Rafidah (Malaysia) 162
  Abd al-Razzaq, Zaynab (Morocco) 123
  Abd al-Razzaq, Amina (Morocco) 123
  Chairi, Arifiyah (Indonesia) 35, 107
  Farooq Rooshna, Jameela (Afghanistan) 10
  Al-Gebali, Tehani (Egypt) 16, 79–80, 284, 291–292, 310–311 n. 54
  Hudig, Johanna Clementine (Netherlands) 83–84
  Murād, Ghāda (Syria) 11, 237, 239–240, 243
  Prayitno (Indonesia) 87, 107
  Ramli, Suraya (Malaysia) 162
  Rashid Khan, Khalida (Pakistan) 206
  Al-Zahri, Khulud (United Arab Emirates) 15
First World War 26
Formal and informal legal systems 212
French revolution 23, 56, 58, 66

Gender 3, 7, 8, 10, 13, 51, 62, 86, 114–116, 124, 126, 149, 167, 198, 200, 264, 269, 285, 293, 303, 306, 310
Gender-coded cases 43, 181, 195, 200
Gender effect 38, 43
Gender equality 1, 3, 8, 23, 26, 28, 36, 45, 101–102, 124, 137, 139, 178, 287
Gender issues 25, 38, 112–113, 117
Gender perception 28
Gender prejudice 26, 32, 35–36, 119, 158, 180 n. 10
Gender sensitivity 114–115, 117, 119
Gender training 36, 42
Gilligan, Carol 2, 3, 29–31, 37, 39, 43, 124–125, 148, 284, 298, 302
  In a Different Voice 2, 29, 124, 148
Globalization 44
Groningen 66–67

Hakam 154
Hama 238
Harm 63 n. 14, 78, 140, 182, 184, 186–189, 191–195, 197–198, 200–201, 307–309
Hassan, Hanim Muhammad 78, 286
High Constitutional Court 79–80, 284–285, 291–292, 311 n. 54
Homs 238 n. 5, 241, 248, 250, 252
Household 63, 68, 80, 84, 86, 91, 124, 135, 160, 191, 194, 199, 214 n. 21, 231–232, 252, 255
Housewife 27, 69
Hudig, Johanna Clementine, see *first female judges*
Human resources 28, 103
Human rights 2, 10, 13, 32, 38, 79, 211, 266, 274–276, 302
Hussein, Taha 61–62

Ideology 26–27, 216, 276, 280, 286, 305
Idlib 238, 241, 248–249
Impartial 86, 155, 253, 299
Income level 185, 271
Indonesia 2, 4–10, 24, 51, 54–57, 60, 71, 73–76, 87–92, 101–114, 117–119, 160
Inheritance 12, 114–115, 129, 133, 136, 138, 149, 165, 209, 212, 214–216
Interest of children
Adoption (*tabanni*) 131–133, 150
Desired 134
Fictive kinship ties 133
Financial compensation (*ta'wid*) 148–149
Illegitimate 126, 131–134, 138, 142, 145, 147–150
Medical care 130 n. 16, 136, 226
Polygamy 135–136
Undesired 132, 133
International donors 79
Interpretation of family law
'Bouche de la loi' 125, 128, 147, 180
Codification 71, 76, 123, 128–130, 156
Codified law 31, 71, 137, 129, 222
Discretion 129, 147, 179–180, 183, 186, 189, 195, 215, 229, 256, 294, 302, 305, 309
Flexibility 127–129, 210 n. 13, 213, 233
Non-legal considerations 127
Rigidity 128, 175
Social reality 126–127, 130–131, 137
Uniformity 169
International Women's Year 239
Islam 89 n. 44, 116, 133, 143–144, 158 n. 19, 159, 204, 209, 210 n. 13, 212, 216, 227, 234, 262, 286, 289–290, 297
Islamic court 8, 71, 76, 87, 88, 90, 101–104, 106–114, 117–119, 168
Islamic courts law 76, 88
Islamic jurisprudence 11–12, 63 n. 14, 74 n. 31, 87, 101, 105, 128–130, 138, 154–155, 170, 172, 209–210 n. 13, 213, 287, 306, 310
Islamic rule 24
Islamism 208, 262–263

Jacobs, Aletta 66
Jakarta 72, 75 n. 32, 90, 105, 110 n. 10, 111 n. 12
Java 71–73, 88, 91, 102, 105, 107–108, 117, 119
Judges 1–16, 23–46, 51–58, 68, 70–71, 75–77, 79–93, 101–120, 123–131, 134–137, 139–150, 153–175, 178–201, 204–215, 217–234, 238–239, 242–257, 259, 262–275, 278–279, 281, 284–285, 287–290, 292–312
Judges' appointment 1–2, 5–15, 51, 54–58, 62, 68–69, 71, 75–84, 87–88, 92, 140, 153–155, 157–164, 166–169, 171–173, 175–178, 204, 206, 207–210, 222–226, 228–229, 233, 237–246, 251, 254–256, 273, 284–285, 289–295, 298, 310–311
Judges' Club 80–81, 289–290, 293
Judgment 3, 12, 117, 155–156, 161, 173, 179, 183–184, 187, 192, 209–210, 213, 234, 243, 273, 306
Judicial body 239, 273
Judicial system 45, 108, 119, 154, 160, 175, 188, 206–207, 221, 237, 246, 257, 285, 300
Judicial training 3, 15
Judiciary 1–3, 5–8, 10, 12–16, 23–25, 28, 32–39, 41–42, 44–46, 51, 54–57, 66 n. 18, 70–71, 76, 79–80, 82–86, 89–93, 101–106, 109–111, 115–117, 119, 127, 153–155, 159–161, 162 n. 31, 163–164, 167–175, 178–179, 181, 195, 200–201, 204–211, 217, 221 n. 27, 223, 226, 230 n. 32, 231–233, 237–245, 249, 251, 254, 255–257, 263–264, 266, 268–270, 273–274, 276, 278–281, 284–286, 288–294, 296, 298–312
Judiciary/legal profession
Admission to 6, 24, 26, 54, 57, 91–92, 225, 298, 312

Appointment to 6–7, 9, 167, 207, 237 n. 3, 240, 242, 244–245, 251 n. 39, 255, 285 n. 2
Entry into 56, 80, 239, 241–242
Inclusion in 1–3, 6, 10 n. 8, 13, 54, 83, 109, 112, 127, 162, 204, 207–211, 233, 291, 310
Jurisprudence 11 n. 9, 12, 63, 74 n. 31, 78, 87, 101, 105, 128–130, 138, 146, 149, 154–155, 159, 170, 172, 179, 183, 189, 209, 210 n. 13, 213, 256, 287, 294, 306, 309–310
Justice 8, 26, 91, 124, 149, 155, 204, 219, 224, 243, 274

Khalwa 290
Khulʿ 16, 185 n. 15, 291 n. 17, 307–309
Kaḍīb, Salwā 241, 252
Kohlberg, Lawrence 30
Kok, Adolphine 69, 84 n. 41

Lack of intellectual capacity 9, 161
Lady judges 204, 211, 213, 217–219, 223–232, 234
Lashin, Fatma 78
Lattakia 238 n. 5, 241, 249
Law faculties 24–25, 57, 65, 71, 92, 268
Law School (faculty of law) 32, 44, 57, 60, 65, 72, 75–76, 82, 91–92, 96, 208, 225, 242, 285, 288, 302 n. 36, 312
Cairo Law School 60
Establishment 56–57
Leiden University 67, 69, 72
Rechtsschool 72
Rechtshogeschool 72
University of Groningen 66–67
Lawyers 4, 12–14, 18, 25–27, 29, 32–37, 40, 45–46, 55–59, 61, 63, 67–68, 69 n. 24, 70, 72, 80, 82, 86, 92, 124, 127, 156–158, 162, 171, 173, 182, 196–197, 204, 207, 211, 213, 223–224, 228–230, 233–234, 238 n. 6, 239, 240 n. 9, 241 n. 17, 244, 250, 253–254, 259–260, 262–272, 275, 277–282, 296, 299–301
Legal aid 12–13, 165 n. 36, 259–260, 265, 267 n. 10, 268, 278–279, 281
Legal authority 52, 59, 123
Head of household 124
Housewives 26, 41, 58–59, 62, 74, 85–86
Legal incapacity 69, 84
Mothers 10, 26, 34, 45, 58–59, 61–63, 74–75, 77, 85–86, 89, 91, 115, 132, 134, 137–139, 144–147, 149–150, 174, 226, 232, 243, 245, 295, 297
Obedience 51, 59, 63, 77–79, 89, 91, 123–124, 192, 194, 302, 304
Legal interpretation 117, 153, 180
Legal notion 112
Legal opinions
Legal education 4–7, 25–26, 28, 33, 56–57, 60–61, 64, 70–72, 75, 87, 91
Legal system 11, 13, 51–52, 56, 58, 76, 113, 130, 153–154, 163, 169, 204–205, 212–213, 221, 237, 242, 263–268, 274–277, 281, 285
Legislation 2, 11, 15, 24, 45, 56 n. 7, 71, 77, 78 n. 38, 91, 128, 167 n. 48, 175, 182, 206, 213, 260, 267, 272–273, 276 n. 29, 278, 286–287, 305, 308 n. 48
Leiden 66–67, 69, 72, 264 n. 5, 293 n. 23
Lengthy litigation process 158
Libya 6, 12, 260, 262 n. 3, 263–266, 268–269, 274–277, 279–281
Local culture 14, 230
Logic of care 30
Logic of justice 30
Lustration 262, 272

Mainstream 31
Maintenance 42, 63, 78, 116, 136, 138, 140, 149 153 n. 6, 156, 165, 174, 182, 186, 187 n. 23, 191–193, 195, 197, 201, 218, 260–261, 302–304, 306, 308 n. 48
Malaysia 4, 6, 9–10, 14, 24, 88, 90, 108, 121, 128 n. 10, 153, 156 n. 16, 157, 158 nn. 20–21, 159–162, 165 n. 36, 168–173
Male domination 4, 23, 28–29, 33, 36, 64, 90, 92, 223–224, 227, 239, 301
Male lawyers 14, 46, 223–224, 229–230, 234, 260
Male profession 28, 67
Management of domestic affairs
Marital home 77, 182, 192–195, 197, 199, 201
Marriage
Engagement 130, 138–140, 143–145, 147,
Fatiha 130, 135, 140
Informal 126, 134–135, 137, 139, 140, 142, 145
Proof of marriage (*thubut al-zawaj*) 137, 142–143

Marriage (cont.)
  Registration 130, 135, 137, 260
  Secret 126, 132–133, 139–140, 142, 145
  Shubha 138–139, 143, 146
  Underage 131, 140, 142–143
  Zina' (fornification or adultery) 117, 136, 139–142, 189, 267 n. 8
Menkel-Meadow, Carrie 29, 43, 124, 125 n. 3, 298, 301
Middle class 26, 211, 215, 224
Minangkabau 73–75, 88, 115
Ministry of Justice 13, 29, 83, 103, 123 n. 1, 129, 136, 237–240, 249, 255, 259, 264–267, 269, 276–277, 280, 295, 298
Modernization 7, 44, 60, 64, 66, 73, 128
Modesty 59, 251, 254
Morocco 2, 4, 6, 8–10, 14, 24, 55, 79, 123–127, 129–131, 133, 136, 141 n. 28, 143–144, 149, 262, 290, 304
Mother 10, 26, 34, 45, 58–59, 61–63, 73–75, 77, 79, 85–86, 89, 91, 111, 114–115, 130, 132–134, 136–150, 157, 174, 193–195, 198–199, 201, 216, 225–226, 231–232, 243, 245, 261, 295, 297, 301
Movement for independence of judiciary 14, 204, 207
Mubarak, Hosni 292
Mubarak, Suzanne 291–292
Mudawwana al-Usra 123–124, 130, 132, 136–137, 139, 149,
Muqoddas, Djazimah 90–91
Murād, Ghāda, see *first female judges*

Naguib, Fathi 291
national independence 6–7, 10 n. 8, 24, 55, 61–62, 66, 72–73, 75, 87–89, 92, 102–103, 106–107, 129, 266
Nationalist movement 61, 72–74

Official Gazette 243 n. 21
Ordinary court(s) 241 n. 17, 284, 292, 311

Padang 70, 83, 88, 108
Pakistan 1, 6, 12, 14, 18, 25 n. 5, 38 n. 27, 90, 160, 204–208, 209 nn. 10–12, 210–212, 214, 216, 218, 221–222, 226–227, 230, 232–233
Parallel systems of justice 213, 237, 279, 281
Participation 12, 24–25, 29, 38, 40, 45, 75, 77, 88, 93, 112, 170 n. 53, 207, 239, 262 n. 3, 263, 272, 274 n. 24, 278, 280–281, 286, 289, 296, 310
Paternity
  Abortion 133–134
  DNA 134, 138, 143–150
  Filiation 130 n. 16, 133, 137–138, 142
  Iqrar (acknowledgement by father) 138–139, 143
  Inheritance 133, 136, 138, 149, 209
  Lineage (*nasab*) 126, 136–140, 143, 145–149
  Maintenance by father 136, 138, 140, 149
  Surname 136
  Shubha (sexual relationships by error) 138–139, 143, 146
  Al-walad li l-firash (conjugal bed) 138–139, 145–148
  Witnesses 143–145, 147, 138, 146
Penal 133, 181, 186–190, 192, 195–197, 201, 205, 275
Personal status code 10, 291, 302
Personal status law 11, 15, 57–58, 60, 62–63, 74, 76–80, 84, 92, 153, 160, 165, 184, 302–304, 310
Persons' act 24
Plural legal realities 204
polygamy 74, 112, 114, 116–118, 131, 135–136, 214, 306
Portia
  Duke-approach (ethic of justice) 3, 8, 39, 125, 148–149, 307
  Portia-approach (ethic of care) 3, 8, 16, 37, 39, 42, 149, 284, 298, 302, 305, 310
Post, Anna 70
Post-conflict transition 264, 274
Prayitno, see *first female judges*
Preconceived opinion 32
Prestige 44–45, 65, 75, 86, 89, 92, 206, 225, 230 n. 32, 239
Prosecutors 11, 23, 25 n. 7, 26–29, 32, 33 n. 17, 35–40, 71, 167 n. 48, 237–239, 241–242, 244–251, 253–257, 265–268, 271, 273, 279, 289, 292
Public controversy 2, 8, 51, 62, 69, 79, 88, 124, 163, 204, 209, 307

Public debate 2, 9, 15, 51, 57, 79, 85–86, 124, 154, 156, 163, 208, 210, 212, 219, 284, 292
Public discourse 57, 76
Public prosecution 77, 186 n. 20, 237–238, 242–244, 247–248, 254–255, 262, 270, 289–290, 292–294, 296, 312
Public prosecutor(s) 11, 25 n. 7, 29, 186 nn. 19–20, 192 n. 27, 237–257, 266–268, 271, 279–280, 286 n. 4, 289, 292,
Punishment 11, 40, 41 n. 33, 85, 153, 160, 165, 229, 273, 294

Qadhafi 12–13, 259–260, 262, 265–268, 271–274, 277, 279–282
Qualifications for appointment 160
Queneitra 238 n. 5

Race 27, 32 n. 14, 64, 84, 115, 180, 218, 275
Radical Islamism 208
Ramli, Suraya, see *first female judges*
Rashid Khan, Khalida, see *first female judges*
Ratib, Aisha 76–77, 78, 82, 285–286, 288
Reconciliation session(s) 182–185, 187–188, 193–194, 196–199
Religious court(s) 6–9, 14, 87–91, 101–103, 105, 107–109, 112, 114–115, 117–119, 154, 242
Religious interpretations 15, 206, 273, 284
Rotterdam 69, 84
Routine 183–185, 192, 196–197, 231, 290, 308
'Rule of law' programmes 274
Run-away brides 216

Santoso, Maria Ulfah 72–73
School of Islamic jurisprudence/school of law
Hanafi 63, 74 n. 31, 82, 128 n. 9, 155, 160, 172, 287, 294
Hanbali 128 n. 9, 155, 287
Maliki 63, 74, 128 n. 9, 128–130, 287
Shafi'i 74, 87, 101, 105–106, 114, 128 n. 9, 155, 159, 170–172, 287
Second World War 5, 23, 26 n. 8, 27, 38 n. 26
Security threats 265
Sensitivity 34–35, 38–39, 114–115, 117, 119, 204, 211–212, 216, 233
Sentence 11, 26 n. 8, 32, 37 n. 25, 38–41, 51, 53, 85, 186–190, 192, 195–197, 201, 256, 267 n. 8, 304
Sex 31, 41, 59, 125, 134, 139, 180, 212, 230, 242 n. 19, 248, 253–254, 285 n. 1, 312
Shari'a 1–2, 4, 6 n. 5, 7, 10–11, 15, 24, 56 n. 7, 60, 76, 78 n. 38, 79, 89, 108, 110, 124, 128–129, 136, 144, 155, 160–165, 167–169, 172, 284, 286–287, 289–290, 292 n. 22, 293 n. 23, 302–303, 310
Shari'a court(s) 4, 8–9, 12, 14, 60, 77, 108, 115–116, 127–128, 153–154, 156–167, 169–173, 175, 205–210
Shari'a judiciary 159–160, 167–168, 170–171, 175
Sisterhood 180 n. 10
Socialist movement 23
Social network 221–222
Socialist Party 240
Soft justice 204, 217, 220
Solidarity 178–181, 183–185, 187–188, 191, 195–197, 200–201, 270
State Council 76–78, 80, 82, 237 n. 3, 241 n. 17, 285–288, 292, 294, 311
State Fatwa Committee 156, 158–159
State law 166, 213, 240 n. 9
Statistics 28, 75, 136 n. 23, 154, 162–163, 186, 189, 208 n. 9, 238 n. 6, 295 n. 27
Status 3, 10–11, 13, 15, 27 n. 9, 31, 40, 43–44, 57–58, 60, 62–63, 68 n. 21, 73–74, 76–80, 83–84, 89, 92, 103, 112, 130, 153, 160, 165, 169, 184, 206, 218, 239, 241–242, 247, 250, 251 n. 39, 263, 265, 277, 287, 291, 302–304, 308, 310, 312
Stereotype 42
Succession 179 n. 9, 267, 278
Sulh officers 162, 167 n. 48, 168, 171
Supreme Court 15, 45 n. 42, 70, 83, 103–104, 106, 111, 205–206, 210–211, 221 n. 26, 222, 227, 267, 273–274, 280
Supreme Judicial Council 77 n. 33, 268, 273, 292
Sympathy 37 n. 22, 39, 41, 187–188, 192, 311
Syria
Administrative Court(s) 77–78, 82, 89, 103, 237 n. 3, 240 n. 9, 241 n. 17, 271, 284, 286–288
Assize Court 246–247, 252
Attorney-General 237
Chief public attorney 238 n. 5, 244–245, 247, 254

Syria (cont.)
Civil Court(s) 6–9, 12, 14, 87–88, 90 n. 45, 102, 106–111, 153, 163–164, 165 n. 36, 166, 171, 174, 205–206, 228, 238, 244–245, 247–248, 255–257, 308
Civil jurisdiction 165, 174–175, 244, 245, 255, 257
Courthouse(s) 11–12, 14, 54–55, 70, 83, 102, 125, 129, 130–131, 135, 137 n. 23, 140–141, 143–144, 199, 211, 222, 226–227, 233–234, 237–241, 243–244, 246–250, 252, 254–255, 259, 263–265, 269, 280,
Criminal Court(s) 11, 27, 39–40, 166 n. 42, 184, 205–206, 229, 237–238, 242–246, 254–256, 264–265, 292 n. 20, 294–296,
Criminal court judge(s) 11, 206 n. 6, 237–238, 243, 246, 254, 256
Criminal jurisdiction 165, 244–246, 251, 253–257
Examining judges 248, 250–252
High Judiciary Council 239, 244–245, 255
Indictment Division 246, 252–253
Institute of Judicial Studies 238 n. 6, 255
Juvenile court(s) 11, 15, 237, 241–243, 252, 254–256
Ministry of Justice 13, 29, 83, 103, 123 n. 1, 129, 136, 237–240, 249, 255, 259, 264–267, 269 n. 15, 276–277, 280, 295, 298
National Judicial Examination 240
Official Gazette 243 n. 21
Ordinary court(s) 241 n. 17, 284, 292, 311
Ordinary judiciary 237, 240 n. 9, 285, 292
Public prosecutor(s) 11, 25 n. 7, 29, 186 nn. 19–20, 237–257, 265–268, 269 n. 13, 271, 279–280, 286 n. 4, 289, 292
Public prosecution service 77, 237–238, 244, 247–248, 254–255, 290, 292–293, 312
Regional court(s) 250–251, 255
Women's General Union 240 n. 10
Young Offenders' Act 242 n. 20

Talaq 60 n. 14, 74, 261, 306
Tartus 238 n. 5, 248–249
Technical assistance 263, 274–277
The Egyptian Center for Women's Rights 289
Trustworthy 155
Tunisia 2 n. 1, 6, 9–10, 14, 24, 42, 55, 79, 123, 128 n. 11, 178–179, 181–183, 186 n. 18, 187 n. 21, 188, 189 n. 26, 195–196, 200–201, 241, 290

'Urf (customary law) 71, 129, 206, 212–213, 215–216, 221, 233

Victim 11 n. 9, 40–41, 85, 153 n. 5, 186 n. 20, 247–251
Violence 40–41, 44, 57, 116, 118–119, 181, 184, 186–191, 192 n. 27, 193, 195–201, 214, 217–218, 221, 265, 280

West-Sumatra
Padang 70, 73, 83, 88, 108
Minangkabau 73–75, 88, 115
Matrilineal 73, 88
Wilaya 63, 286, 304
Women 1, 3–16, 23–46, 51–52, 54–65, 67–78, 80–93, 101–102, 104 n. 6, 105–115, 118–119, 123–128, 131–134, 139–150, 153–163, 165–175, 178–184, 186, 188–195, 198, 200–201, 204, 206–234, 237–257, 259–260, 262–266, 269–270, 272–274, 277–282, 284–299, 301–304, 306–312
Women's movement 25, 29, 44, 69–70, 73–75
Women's rights 9, 11, 13, 24, 44, 51, 73–74, 76–77, 92, 109, 124, 128, 142, 144–145, 162, 167, 178, 198, 200–201, 211, 239, 266, 287, 289, 291 n. 17
Workload 28, 35, 110, 195, 197–198, 201, 228, 245, 255, 270–271

Yogyakarta 75 n. 32, 91, 110 nn. 10–11, 114

Al-Zahri, Khulud, see *first female judges*