Women, Mothers, and Children:
Colonization and Islamic Law in the Lebanese State

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ABSTRACT

This thesis investigates the rights of women under Islamic law, focusing on mothers and their children and comparing traditional Islamic law with the contemporary Lebanese legal system. The approach chosen here is to examine the laws pertaining to *nasab* (lineage). My analysis of the evolution in understanding *nasab* ultimately leads to a discussion on the denial of paternity, the *li'ān* procedure, *zinā* (extralegal sexual intercourse), and so-called "crimes of honour," as well as an analysis of the modern notion of citizenship. The pre-modern jurists' understanding is then compared and contrasted with the post-colonial view as it has come to be represented in contemporary Lebanon. Ultimately, I aim to demonstrate that the flexibility with which pre-modern Islamic law was applied found itself seriously impaired by the advent of colonialism, French legal influence, and the subsequent rise of the nation-state – negatively affecting Lebanese women and their rights.

RÉSUMÉ

Ce mémoire a pour but d'explorer le droit des femmes sous la loi Islamique, plus précisément celui des mères et de leurs enfants. Par conséquent, le concept de *nasab* (filiation) sera traité. L'étude du concept de *nasab* entraîne une discussion sur des thèmes inter-reliés tel que le refus de la paternitée, la procédure de *li'ān*, le *zinā*, les crimes motivés par l'honneur, ainsi que le droit à la naturalisation. Cette discussion sera suivie par une analyse comparative entre l'interprétation traditionnelle des lois relatives aux procédures mentionées ci-dessus, et la situation contemporaine au Liban. En somme, ce mémoire a pour but d'établir que la flexibilité dans l'application du droit Islamique a été sérieusement affectée par la colonisation et la naissance de l'état-nation; des changements qui ont engendré un sérieux déclin dans le domaine du droit de la femme. En effet, l'influence légale Française n'a pas – contrairement aux croyances populaires – amélioré la situation de la femme Libanaise, bien au contraire.

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My thoughts go to all the men, women, and children who have been failed by the Lebanese Legal System. It is for them, for my loving Nada, Taha, Liam and all our children that I pursue through scholarship the promise of a better future.

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TRANSLITERATION TABLE

b	=	ب	z	=	ز	f	=	ف
t	=	ت	s	=	س	q	=	ق
th	=	ث	sh	=	ش	k	=	ك
j	=	ج	ṣ	=	ص	l	=	ل
ḥ	=	ح	ḍ	=	ض	m	=	م
kh	=	خ	ṭ	=	ط	n	=	ن
d	=	د	ẓ	=	ظ	h	=	ه
dh	=	ذ	‘	=	ع	w	=	و
r	=	ر	gh	=	غ	y	=	ي

Short: a = ´ ; i = ِ ; u = ُ

Long: ā = ا ; ī, = ي ; ū = و

Diphthong: ay = اي ; aw = او

Introduction

The predominant image one forms when reading about Muslim women from earlier times is that of confined, passive, and submissive figures. Muslim women are presented as a monolithic category and portrayed as voiceless, secluded in their homes, and deprived not only of their rights but even of agency. The presumed archaic and rigid nature of Islamic law is all too often presented as the major culprit behind this state of affairs. As a result, the situation of Muslim women today across the Islamic world is considered the outcome of an outdated Sharīʿa that contemporary Muslims still strive to apply.

Yet, I shall argue – in line with some recent scholarship – that it has been over the last century or so that Muslim women have seen their rights further eroded. Contrary to current misconceptions, jurists writing before the modern period tended to treat women, in their chapters on family law, within a highly defined system of checks and balances whereby rights and duties were elaborated and stated with the underlying assumption of a moral community. As for the pre-modern application of the law, recent scholarship examining court-records and *fatwā*s (legal opinions) has demonstrated that judges exercised a high level of flexibility, and endeavoured to protect women and their rights. This is not to say that Islamic law establishes equity between men and women, as it is undoubtedly more favourable to men – who enjoy a considerable advantage particularly in the realm of marriage and divorce. Yet, it still grants women more rights than those traditionally available to their Jewish and Christian counterparts, and at one time gave Muslim women an advantage

compared to European women. In fact, despite the persistent claims emanating from European authors that the situation of Muslim women was deplorable throughout the pre-modern era, that of contemporaries in Europe, as will become apparent shortly, was far from being any better and was often much worse. The situation of Muslim women has moreover witnessed a drastic change following the advent of European colonialism and the interference of the latter in the local legal sphere – a process to which the new Muslim nation-states have also largely contributed. Consequently, and as will become apparent in the course of this dissertation, Islamic law cannot be held alone culpable, since the modern state and the post-colonial transformation and application of the law have contributed as much, if not more, to the present disadvantages facing women in the Muslim world.

In an effort to contribute to the existing scholarship on the impact of colonization and the rise of the nation-state on the conditions faced by Muslim women, I have chosen to focus on the rights of mothers and their children, comparing and contrasting their legal situation under pre-modern Islamic law and in contemporary Lebanon. This thesis investigates the past and present understandings and application of *nasab* (lineage),[1] as well as *nasab*-related matters. A discussion on *nasab* and the ways through which a child is legally attributed to a mother and father implies an analysis of the mechanisms

[1] *Nasab* is broadly defined as the attribution of a child to a mother and/or father. In its technical sense, *nasab* is defined as the connection between 2 people through birth (however distant it may be), affiliating the individual to a family, clan, or tribe and granting him or her certain rights and obligations. *Al-Mawsūʻa al-Fiqhiyya* 41 (to date) vols. (Kuwait: Dār al-Ṣafwa lil-Ṭibāʻa wal-Nashr, 1990-), s.v. "*Nasab*," 40:231.

through which a man, and more specifically a husband, can deny paternity of a child. This will lead to a close examination of the *li'ān* – a legal procedure allowing the husband to accuse his wife of *zinā* (extra-legal sexual intercourse),[2] and reject paternity of her child.[3] Citizenship rights will also be addressed, since establishing the *nasab* of a child determines his or her nationality. This discussion will require us to engage with the post-colonial Lebanese legal system, given that contemporary Lebanese citizenship laws find their origin in the Code Napoleon. The same applies to *zinā,* as it has been removed from Sharī'a jurisdiction and is currently handled by the Civil Courts in accordance with French-inspired laws and principles. The negative effects of French legal influence on Lebanese women and the failure of the Lebanese nation-state to accommodate its female citizens will thus form part of our discussion.

This dissertation will also challenge the common belief that Islamic religious practice and cultural tradition compels Muslim men to punish their female relatives, in order to preserve family honour, should they suspect that these women engaged in *zinā.* In fact, and as will become apparent in the course of this dissertation, Islamic law considers the honour of female community members as needing to be protected at all costs, and ensures this by providing severe punishments for slander. This stands in sharp contrast with the French law that prevailed until as late as 1975 whereby women were punished

[2] Both fornication and adultery are subsumed under *zinā* (*Mawsū'a*, s.v. "*Zinā,*" 24:18-47).
[3] Aḥmad b. 'Alī al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 3 vols. (Beirut: Dār al-Kitāb al-'Arabī, 1978), 3:291; Badr al-Dīn Maḥmūd b. Aḥmad al-'Aynī, *al-Bināya fī Sharḥ al-Hidāya*, ed. Muḥammad 'Umar, 12 vols. (Beirut: Dār al-Fikr, 1990), 5:363.

according to different – much harsher – criteria than those retained for their male counterparts.

Furthermore, Ḥanafī doctrine will be taken as a standard of comparison throughout, since it constituted the chief Ottoman legal school and has, by force of historical circumstances, significantly influenced contemporary Lebanese family law. The pre-modern jurists' understanding of *nasab*, *li'ān*, and *zinā* will be compared and contrasted with the post-colonial view as it has come to be represented in contemporary Lebanon. Ultimately, I aim to demonstrate that the flexibility with which pre-modern Islamic law was applied found itself seriously impaired by the advent of colonialism and the subsequent rise of the nation-state. Contrary to the colonial claim that the modernizing changes brought to Islamic law were intended to improve it,[4] it will become clear that the transmutation of Islamic law under colonial rule was not, ultimately, to the advantage of women or to the benefit of social harmony. As for the nation-state

[4] Of the many European officials who made this claim, Lord Cromer (British Consul General in Egypt from 1883 to 1907) is certainly worth mentioning. Convinced of the inferiority of Islam on both the religious and social levels, Cromer harshly condemned Islam's alleged "oppressive" treatment of women. In his view, polygamy, veiling, and seclusion were responsible for women's "backwardness" (Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven: Yale University Press, c1992), 152-53). When Cromer was entrusted with the Egyptian educational system, he argued for a "slow" process of educating women, and an increase in the educational fees. The British reshaping of the Egyptian educational system in fact reserved higher education to elite Egyptians, limiting women to nursing, midwifery, and teaching. Cromer blocked women's access to politics both in Egypt and in England where he founded and presided over the Men's League for Opposing Women's Suffrage – which strived to stop British women from obtaining the right to vote. See Mona Russell, *Creating the New Egyptian Woman: Consumerism, Education, and National Identity, 1863-1922* (New York: Palgrave Macmillan, 2004), 117-20. The image of the oppressed Muslim woman in Western discourse was espoused by many Western writers across the centuries (Mohja Kahf, *Western Representations of the Muslim Woman: From Termagant to Odalisque* (Austin: University of Texas Press, 1999), 1-9, 113, 165, 176-79). A number of such negative views were also adopted by British visitors to the Ottoman Empire whose writings will be discussed in section 1.1 "The Depiction of Ottoman Women in European Sources," 8-17.

which later replaced the colonial state,[5] it has adopted and endorsed the colonial view while at the same time claiming to want to accommodate women and their rights, protecting them from the so-called injustices of Islamic law. Yet, the ultimate effect of these efforts on the part of the nation-state – as my findings will show – has been a reduction of women's rights.

[5] Gabriel Piterberg, "The Tropes of Stagnation and Awakening in Nationalist Historical Consciousness: The Egyptian Case," in *Rethinking Nationalism in the Arab Middle East,* ed. Israel Gershoni and James Jankowski (New York: Columbia University Press, 1997), 49.

Chapter One: The Pre-Modern Situation of Muslim Women

Muslim women have been depicted throughout history as oppressed, secluded, and at the mercy of their fathers and husbands. Save for a few exceptions, this is the desolate picture that emanated from the writings of Europeans visiting the Muslim world, who transported this image to the West.[6] Such a depiction, however, was far from accurate. Recent scholarship on Ottoman history has revisited this past, analyzing surviving court-records and debunking several of the misconceptions pertaining to Muslim women of that era.[7] Not only do these records clearly demonstrate that women had access to the court system, but they provide details on the reasons that brought these women to court and the outcome of their cases. Court-records have yielded valuable information on women's lives, the functions they discharged, and the property they owned.[8]

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[6] Aaron Hill, *A Full Account of the Present State of the Ottoman Empire in all its Branches* (London: J. Mayo, 1710), 99, 102-03, 109, 116; Jean Dumont, *A New Voyage to the Levant* (London: M-Gillyflower, 1696), 268; Robert Withers, *A Description of the Grand Seignor's Seraglio or Turkish Emperor's Court* (London: J. Brindley, 1737), 708. In the view of Jean de Thevenot, Ottomans (both Muslims and Christians alike) are snake-eating, mean, weak, lazy, hypocrites and traitors. See Jean de Thevenot, *Relation d'un voyage fait au Levant* (Paris: Claude Babin, 1689), 498-99.

[7] See the works of Leslie Peirce, *The Imperial Harem: Women and Sovereignty in the Ottoman Empire* (New York: Oxford University Press, 1993), 3-12, 267-70; Abdal Rehim Abdal Rahman Abdal Rehim, "The Family and Gender Laws in Egypt during the Ottoman Period," in *Women, the Family, and Divorce Laws in Islamic History*, ed. Amira el-Azhary Sonbol (Syracuse: Syracuse University Press, 1996), 107; Svetlana Ivanova, "The Divorce between Zubaida Hatun and Esseid Osman Aga," in *Women, the Family, and Divorce Laws in Islamic History*, ed. Amira el-Azhary Sonbol (Syracuse: Syracuse University Press, 1996), 116-17; Madeline Zilfi, "We Don't Get Along: Women and *Hul* Divorce in the Eighteenth Century," in *Women in the Ottoman Empire: Middle Eastern Women in the Early Modern Era,* ed. Madeline Zilfi (Leiden: Brill, 1997), 294; Ronald C. Jennings, *Christians and Muslims in Ottoman Cyprus and the Mediterranean World, 1571-1640* (New York; London: New York University Press, 1993), 29, 36.

[8] The work of Abdal Rehim Abdal Rahman Abdal Rehim on court records pertaining to the Moroccan community of 16th century Ottoman Egypt presents an extensive collection of cases pertaining to eight different courts adjudicating matters of personal status between 1525 and 1602. The cases pertain to the following courts: al-Zāhid, al-Ḥākim, Miṣr al-Qadīma, al-Qāhira, Bāb al-Sha'riyya, Qūṣūn, al-Barmashiyya, and Dasht. The 361 court records available in the

Details on the number of times women married, the dowries they received, and the stipulations they inserted into their marriage contracts, as well as the fate of their children in cases of divorce, is also often documented.[9] In effect, these new findings corroborate the dissonant and long-considered-obsolete accounts of a number of European visitors to Ottoman territory who, as will become apparent in the next section, spent a considerable amount of time there and were able to interact with the indigenous population.[10] Their observations are particularly interesting given the fact that Ottoman women can be shown to have enjoyed a number of rights denied to their European counterparts over much of this period.

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second volume deal with every-day life situations of the Moroccan community (e.g. business transactions such as rent and sales registrations, suits involving assaults, inheritance cases, marriage agreements, and divorce settlements). Indeed, out of the 361 total cases available in vol. 2, 78 deal with marriages and divorce requests. See Abdal Rehim Abdal Rahman Abdal Rehim, *Documents of the Egyptian Courts Related to the Maghariba*, 3 vols. (Zaghouan: Centre d'Études et de Recherches Ottomanes, Morisques, de Documentation et d'Information, 1994). For an analysis of Abdal Rehim's cases, see Mida Zantout, "*Khul*': Between Past and Present," (MA thesis: McGill University, 2006), 31-56. Also see Abdal Rehim, "The Family," 96-111; Zilfi, "We Don't Get Along," 264-96; Ronald C. Jennings, "Women in Early 17th Century Ottoman Judicial Records: The *Sharia* Court of Anatolian Kayseri," *Journal of the Economic and Social History of the Orient* 18 (1975): 53-114; idem, "Divorce in the Ottoman *Sharia* Court of Cyprus, 1580-1640," *Studia Islamica* 78 (1993): 155-67.

[9] Abdal Rehim, *Documents*, 2: 16, 26, 27, 33, 38-39, 50, 53, 54, 69, 72, 76-77, 84-85, 86, 95, 115-16, 121-22, 125, 129, 138, 152-53, 183, 185-86, 193, 195, 206-07, 226-27, 228, 231, 232, 233-34, 237, 258, 263, 268-69, 276-77, 277-78, 286, 294-95, 303, 323, 326-27; Zilfi, "We Don't Get Along," 264-96; Jennings, "Women," 53-114.

[10] The names of these authors – in the order that they appear in this dissertation – are as follows: Lady Montagu, Lady Craven, the Baronne Durand de Fontmagne, Lady A.D. Ramsay, Lucy Garnett, Lady Fanny Blunt, Aubry de la Mottraye, Duckett Z. Ferriman, and Dr Guillaume Antoine Olivier.

1.1 The Depiction of Ottoman Women in European Sources

For a large majority of European travellers, Muslim men were malicious and untrustworthy, cruel tyrants enjoying boundless authority over their women.[11] Muslim women, on the other hand, were portrayed as helpless beings dominated by these cruel despots.[12] This depiction was further enhanced by the absurd yet prevailing claim that Islam considers women "reasonable animals" or soulless beings, thus denying them access to paradise.[13] It was this dreadful distortion of Muslim beliefs that was spread to Europe as absolute truth, engraving itself on the minds of those Europeans who never visited the Muslim world. Yet, a number of European observers still managed to contradict this widespread view.[14] In her work on the depiction of Ottoman women in European sources, Asli Sancar reveals the names of a number of European writers who challenged the above depiction and asserted that Ottoman women were at a

[11] See supra note 6.

[12] Lucy Garnett, *The Turkish People: Their Social Life, Religious Beliefs, and Institutions and Domestic Life* (London: Methuen & Co, 1909), 126; Duckett Z. Ferriman, *Turkey and the Turks* (London: Mills and Boon Limited, 1911), 101; Hill, *Full Account*, 109-16. For Jean Dumont, Turks are lazy and opposite Europeans in every possible way. As for Turkish women, they are portrayed as slaves to these tyrant masters. See Dumont, *New Voyage*, 261-63.

[13] De Thevenot, *Relation d'un voyage*, 107. In fact, Lucy Garnett asserts that a number of European writers, including the renowned political philosopher the Baron de Montesquieu (d. 1755), affirmed that Muslim women are soulless and will ultimately be denied access to paradise. The latest that came to the attention of Garnett is the Duchess of Marlborough's "Women's Place in the World," published in the North American Review. For a commentary on this widespread albeit erroneous view, see Garnett, *Turkish People,* 126. Also see Ferriman, *Turkey*, 101. Of the many correspondents of Lady Montagu, it was the Abbé Antonio Conti (d. 1749) who seems to have been most interested in the treatment of Muslim women by their religion. In her letters dated May 1717 and February 1718, Lady Montagu addresses Abbé Conti's concern, and accurately contests this "vulgar notion" that Muslim women are soulless beings who will be denied access to paradise. While she informs the Abbé that Muslim women are guaranteed access to paradise, she also affirms that the place reserved for them is inferior to that of men. It is not clear how Lady Montagu reaches such an erroneous conclusion or on whose authority she reports it. For more, see Robert Halsband, *The Complete Letters of Lady Mary Wortley Montagu*, 3 vols. (Oxford: Clarendon Press, 1965), 1:363.

[14] See supra note 10.

distinct advantage when compared to their European counterparts.[15] The renowned Lady Mary Montagu, whose husband was stationed in Istanbul in 1716, is central to Sancar's account. Well aware of the absurd portrayal of Muslims by European travellers, Lady Montagu painstakingly struggled to demonstrate to her correspondents the erroneous nature of such information.[16] In letters to her family and friends,[17] Lady Montagu repeatedly emphasizes that European travellers often wrote with tremendous certainty about people with whom they barely interacted, whose homes they never entered, and whose language they did not even comprehend.[18]

Lady Montagu's account has received the lion's share of scholarly attention, and yet a number of much less renowned Europeans of the time corroborated her findings. These authors all warned against the ignorance and political bias shown by many of the Europeans who wrote about the Ottomans.[19]

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[15] Asli Sancar, *Ottoman Women: Myth and Reality* (Somerset, N.J.: The Light Inc., 2007), 19, 30-32, 37, 42, 43. I am indebted to the author for bringing the writings of Ferriman, Pardoe, Ramsay, Garnett, and Craven to my attention.

[16] Halsband, *Complete Letters*, 1:315-16, 328-29, 363, 368.

[17] Lady Montagu's personal letters were written during her visit to the Empire (1716-18), and published posthumously in 1763.

[18] Halsband, *Complete Letters,* 1:315-16, 368. In fact, while male Turks did not easily converse with foreigners, the chances of European travellers interacting with Ottoman women were slim, if not impossible. Lady Montagu singles out Jean Dumont and blames him for writing with "equal ignorance and confidence." For more on Dumont's views, see Dumont, *New Voyage*, 160, 167, 175, 194, 261-68. Of the many writers who shared Dumont's position, Robert Withers, George Sandy, John Covel, and Aaron Hill are but a few examples. These names were brought to my attention by Teresa Heffernan. See Teresa Heffernan, **"**Feminism Against the East/West Divide: Lady Mary's Turkish Embassy Letters," *Eighteenth-Century Studies* 33, 2, (Winter 2000): 201-15. For a similar negative depiction of Ottoman women, see the accounts of the naturalist C.S Sonnini and the French savant Comte de Volney (Mary Ann Fay, "Ottoman Women through the Eyes of Mary Wortley Montagu," in *Unfolding the Orient: Travellers in Egypt and the Near East*, ed. Paul and Janet Starkey (Reading, U.K.: Ithaca, 2001), 159); and that of the observer Dernschwam (Yvonne. J. Seng, "Invisible Women: Residents of Sixteenth Century Istanbul," in *Women in the Medieval Islamic World: Power, Patronage, and Piety*, ed. G.R.G.Hambly (New York: St. Martin's Press, 1998), 241-44).

[19] Ferriman warns that the majority of European writers on Turkey have a "political axe to grind" which leaves only a few of their judgments unbiased. See Ferriman, *Turkey*, v.

A closer look at their identity reveals that a large number of such writers were women who enjoyed considerable access to the harems and consequently were able to interact with their Ottoman counterparts.[20] For the traveller Lady Craven, Ottoman women were the "happiest creatures breathing,"[21] and Ottoman men "an example to other nations in the way they treat their women."[22] In fact, European women who made it to the Empire were impressed by the respect that Ottoman men showed to their wives. The Baronne Durand de Fontmagne – a relative of the French ambassador to the Porte[23] – relates that Ottoman men were extremely courteous and would not dare show disrespect or raise a hand to a woman.[24] Motherhood provided women with an additional degree of respect, and children (male or female, married or not) were required to obtain the permission of their mother before sitting down with her.[25] Social status was yet another factor in the respect granted to women; thus a woman

[20] Dr Olivier is a notable exception as it is his function that granted him access to the harem.

[21] Lady Elizabeth Craven, *A Journey Throughout the Crimea to Constantinople* (London: G.G.J. and J. Robinson, Pater-Noster Row, 1789), 233-34. Lady Elizabeth Craven travelled to Russia, Turkey, and Greece in 1785-86.

[22] Ibid.

[23] Henry Carnoy, *Dictionnaire biographique international des écrivains* (Paris: Imprimerie de l'Armerial Français, 1902), 147.

[24] Sancar, *Ottoman Women*, 35.

[25] This is related by Lady A.D. Ramsay – who accompanied her husband W.D. Ramsay to Turkey around 1880. Lady Ramsay attests that mothers were in charge of the household and respected by all its inhabitants: "[H]ow far the patriarchal system prevails I don't know, but it's very usual to find among well to do people (I can't say how it is with the poorer) married sons living with their parents or their widowed mother. In such cases, the mother is 'boss' of the whole concern." For more, see Lady A.D. Ramsay, *Everyday Life in Turkey* (London: Hodder and Stoughton, 1897), 105. Seniority played an important role too and often superseded gender. See Ferriman, *Turkey*, 90-92. This was also true in determining which member of the family was worthy of being a *waqf* (charitable endowment) administrator. In fact, elderly females were often given precedence over male relatives, precisely by virtue of their age. See Haim Gerber, "Social and Economic Position of Women in an Ottoman City, Bursa, 1600-1700," *IJMES* 12 (1980): 146-47.

who married a man of inferior status retained her superior position.[26] It is for this reason that any man who married a member of the Royal House was required to stand with arms crossed until his wife allowed him to sit, and could only talk to her once invited to do so.[27] Lady Montagu laments Muslim women's depiction as helpless beings and asserts that a married Muslim woman was at a clear advantage when compared to her European counterpart, since the former retained her property after marriage.[28] In fact, she viewed the Ottoman woman as "freer than any lady of the universe."[29]

Muslims were especially criticized by Europeans for engaging in polygamy.[30] Yet, while polygamy was religiously and legally condoned throughout the Empire, its practice was certainly not widespread. Lady Montagu affirms that "there is no Instance of a Man of Quality that makes use of this Liberty, or of a Woman of Rank that would suffer it."[31] Lucy Garnett attests that monogamy was no less than the rule for lower classes, and that having more than one wife is an exception in upper circles.[32] These polygamy-related claims are corroborated by two of the male European writers surveyed, namely

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[26] Ramsay, *Everyday Life,* 112. Ramsay reports seeing a woman violently push her husband out the door. It is presumably her social status that allowed her such behavior. See Ramsay, *Everyday Life,* 111.

[27] Lady Fanny Blunt, *My Reminiscences* (London: John Murray, 1918), 164. The particular depiction of the man standing up in arms pertains to the fact that the status of Muslim women was as much a function of social stratification as that of gendered conception.

[28] Ferriman confirms the better condition of the Turkish wife when compared to the English one. See Ferriman, *Turkey*, 84-85.

[29] Fay, "Ottoman Women," 160.

[30] Ahmed, *Women*, 152-53; Kahf, *Western Representations*, 116, 127.

[31] Halsband, *Complete Letters,* 1:329.

[32] Garnett, *Turkish People,* 221. Garnett's accounts are confirmed by other travellers such as Ramsay, *Everyday Life,* 107; and Ferriman, *Turkey*, 83.

Aubry de la Mottraye and Duckett Z. Ferriman.[33] While De la Mottraye states that Muslim men "seldom take more than one [wife]," Ferriman asserts that monogamy was the rule.[34] It would seem that polygamy was an exception that was not only unknown among the lower classes, but an outdated practice among the higher classes where parents were not ready to give away their daughter to a married man.[35]

Aside from polygamy, the veil and seclusion in the harems were two additional issues that often appalled Europeans.[36] Yet, contrary to popular belief, it would seem that veiling was not always the prevailing custom. While women were veiled and secluded in some villages, Lady A.D. Ramsay asserts that they mingled with men in an unveiled state in other nearby villages.[37] Ferriman documents that Christian women in the Greek islands that had no contact with Muslims also went around veiled.[38] As for the harems, while they were often portrayed as exotic and sexualized places where helpless wives and concubines were imprisoned,[39] recent scholarship is now demonstrating that harems were

[33] Both these authors travelled extensively throughout the Ottoman Empire. Ferriman clearly acknowledges that his comments on domestic life are based on the experience of Miss Morton – who unlike him – was able to access the harems and provide him with information that would otherwise have remained a mystery to him. See Ferriman, *Turkey*, vi; Aubry de la Mottraye, *Travels through Europe, Asia, and into Parts of Africa, etc.* 3 vols. (London: T. Woodward, 1732), 1:250.
[34] De la Mottraye, *Travels,* 1:250; Ferriman, *Turkey*, 84.
[35] Ferriman, *Turkey*, 83-84.
[36] See supra note 4.
[37] Ramsay, *Everyday Life*, 102.
[38] Ferriman, *Turkey*, 95-96, 102-03. In fact, the custom of covering a woman's hair lasted, albeit differently, way into the 19th century (Sally Mitchell, *Daily Life in Victorian England* (London: Greenwood Press, 2009), 140-43).
[39] Peirce, *Imperial Harem*, 116-18; Sancar, *Ottoman Women*, 38-42.

merely the private quarters of the upper classes.[40] Clearly, men from the lower classes could not afford to maintain harems, and so polygamy was anything but the widespread phenomenon hinted at by travellers.[41] Yet, while Europeans wrote extensively about the harems, it is worthwhile noting that admission to these harems was practically impossible for men, and especially Europeans since there was no chance of their being related to the women living there – the only criterion for admission.[42] The French physician Guillaume Antoine Olivier, however, was a notable exception.[43] Olivier was possibly the only European male ever to have been granted access to the harem, as his medical expertise was sought for the ill mother of a Turkish official.[44] In his *Voyage dans L'Empire Othoman, L'Egypte et la Perse,* Olivier depicts elite Ottoman women as extremely powerful creatures exerting their influence over public affairs and shaping the decisions of the Sultan in matters of political appointments.[45] Yet, most other (if not all) male European travellers could only satisfy their curiosity by observing the outside of these harems, from a distance. Their inaccessibility was acknowledged by Ferriman whose depiction of domestic Ottoman life was based

[40] A detailed analysis of the harems is beyond the scope of this paper. For more on this matter, see the works of Reina Lewis, *Rethinking Orientalism: Women, Travel, and the Ottoman Empire* (New Brunswick, N.J.: Rutgers University Press, 2004); Peirce, *Imperial Harem,* 3-17; Mary Roberts, *Intimate Outsiders: The Harem in Ottoman and Orientalist Art and Travel Literature* (Durham: Duke University Press, 2007), 5; Sancar, *Ottoman Women*, 38-43; Kahf, *Western Representations*, 121.

[41] For details on the social unacceptability of polygamy, see the works of Abdal Rehim, "Family," 107; Ivanova, "Divorce," 116-17; Yossef Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society* (Cambridge: Cambridge University Press, 2005), 86; Zilfi, "We Don't Get Along," 294; Jennings, *Christians*, 29, 36; Gerber, "Social," 232; Fanny Davis, *The Ottoman Lady: A Social History from 1718 to 1918* (Westport, Connecticut: Greenwood Press, 1986), 87-97. In the view of Ferriman, describing the harem as a despicable prison is "sheer nonsense." See Ferriman, *Turkey*, 101.

[42] Sancar, *Ottoman Women*, 40-42; Seng, "Invisible Women," 241-42, 264-65; Ferriman, *Turkey*, 105.

[43] Fay, "Ottoman Women," 160.

[44] Ibid.

[45] Ibid.

on information provided to him by a Miss Morton – information that would have otherwise been denied to him.[46]

Indeed, several European women befriended ladies of the Turkish elite and were consequently admitted into their private quarters. The fact that these European women were able to access the harems strengthens the credibility of their accounts. It is worth noting that both Lady Craven and Lady Montagu viewed the harem as a sanctuary where well-to-do women were safeguarded from the "impertinent" and "curious" public.[47] Rather than being a place of seclusion where women were confined, the harem was viewed as a sacred space where *elite* women were protected from the rough nature of the world and its curious crowds.[48] The husband himself could easily be denied access to the harem. All it took was for a woman who did not want to enjoy the company of her spouse to put a pair of slippers outside the harem door signalling that she had a lady guest.[49] Moreover, while it is undeniable that harems were often inhabited by more than a few females, this did not necessarily make them all wives or concubines.[50] In fact, the harem sheltered all female members of the family, as well as children and domestic slaves.[51]

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[46] Ferriman, *Turkey*, vi.

[47] Craven, *Journey*, 233.

[48] In fact, Victorian women were often faced with a hostile public. Well-to-do Victorian women had to have a chaperon accompany them everywhere, and middle class women did not venture in the streets without a servant. Also, an unmarried well-to-do woman could not be in a room alone with a man who was not her close relative unless a married woman or a servant who had reached maturity was present (Mitchell, *Daily Life*, 155-56).

[49] Ramsay, *Everyday Life,* 105.

[50] For more on the role of concubines, see Peirce, *Imperial Harem,* 28-56.

[51] Ferriman, *Turkey*, 80-82; Sancar, *Ottoman Women*, 45.

A significant contribution by these more observant European authors – who challenged the biased, mainstream conclusions of most other travellers – was their observation of the substantial difference between slavery as it was practiced in the Islamic world and in North America.[52] While these authors recognized the appalling nature of slavery as it was understood by the European public, they warned against the failure to contextualize it and understand it as it was practiced in the Ottoman Empire.[53] The majority of slaves in the Empire, for instance, were white Circassians, sold by their parents to wealthy Ottomans and taught to look at slavery as a path to fortune.[54] One was, moreover, not a slave eternally: service was limited to a period of 7 years.[55] And while slaves were often freed before the term came to an end, this was not always greeted as a welcome decision. Indeed, it was not uncommon for slaves – who were now members of the family – to implore their masters to keep them.[56] Ferriman relates an incident that occurred when some English women went to visit an Ottoman lady in her harem. In an effort to entertain the guests, who were awaiting the appearance of their host, the English governess in the lady's employ conversed with them. When asked about the identity of the two young [slave] girls standing nearby, the governess referred to them as servants, possibly to spare them the "shame" of being identified as slaves. Yet, what she

[52] Garnett, *Turkish People*, 226; Ferriman, *Turkey*, 115.
[53] Ibid.
[54] The situation of black slaves differed as they handled the rougher work and were more often than not in charge of cooking. Black slaves developed a society for mutual aid creating a fund – used anytime a slave found herself on bad terms with her master. See Garnett, *Turkish People*, 226; Ferriman, *Turkey*, 115.
[55] Ferriman, *Turkey*, 108.
[56] Ibid., 108, 115-16.

had effectively done was utterly offend the girls, who later required an explanation from her. The girls reminded the governess that they were slaves and not paid servants like her.[57] Clearly, these girls viewed the position of slave as superior to that of governess. Ottoman slaves were considered members of the family and required to be dressed and fed like the mistress and her daughters (much of this prescribed by Sharīʿa doctrine).[58] A slave was also educated and provided with an adequate trousseau – should she or her mistress find her a suitable husband.[59] Throughout her visit to Constantinople, Julia Pardoe was careful not to pity slaves as she remembered that 9 out of 10 girls were slaves by choice.[60] What is more, there was no stigma attached to being a slave, such that once freed, the status of a slave was identical to that of any free man or woman (and again, Sharīʿa prescriptions guaranteed this).[61] Ottoman slaves enjoyed greater freedom and were granted more rights than English servants and some rose to become influential within the communities in which they lived.[62] Because slaves accompanied their mistress everywhere, European travellers who were not able to interact with the locals simply assumed that well-to-do men had many wives.[63] In a letter to Lady Mar, dated April 1717, Lady Montagu reflects on the inability of European travellers to distinguish between

[57] Ibid., 108.
[58] Slaves were entitled to a *nafaqa* (maintenance). Should the master fail to provide his slave with an adequate *nafaqa,* the latter was entitled to seek out work and earn an income in order to support him or herself. See Wael B. Hallaq, *Sharīʿa Theory, Practice, Transformation* (Cambridge: Cambridge University Press, 2009), 289. For more on *nafaqa*, see *Mawsūʿa*, s.v. "*Nafaqa*," 41:34-37.
[59] Ferriman, *Turkey*, 112-13.
[60] Julia Pardoe, *The City of the Sultan and Domestic Matters of the Turks: With a Steam Voyage up the Danube* (London: G. Routledge & Co, 1854), 42.
[61] Hallaq, *Sharīʿa*, 194, 307.
[62] Ferriman, *Turkey*, 114-17.
[63] Halsband, *Complete Letters,* 1:328.

an Ottoman lady and her slaves.[64] Indeed, in the eyes of these casual observers – appalled by the legal permissibility of polygamy – the numerous females in a carriage could only be the wives of a single master. Little did they know, there was generally no more than one wife, and many slave girls at her exclusive service.[65]

Clearly, the accounts of those Europeans who did manage to interact with the inhabitants of the Empire offer a picture in sharp contradistinction with that provided by most other European travellers. The fact that these accounts were not in harmony with the conventional depiction of Muslim women and incapable of confirming the alleged backwardness of Islam is precisely what rendered them flawed and trivial in the eyes of the public. Fortunately, the persistence and devotion of a number of scholars in the field has allowed for a revival of such long forgotten accounts and permitted the past of Muslim women to emerge under a different light.[66] The findings of such sympathetic writers were further confirmed by the analysis of surviving court-records that in turn yielded valuable information on the flexible application of Islamic law under the Ottomans.

[64] Garnett, *Turkish People*, 214.

[65] Ferriman, *Turkey*, 106.

[66] See the works of Abdal Rehim Abdal Rahman Abdal Rehim, Mary Ann Fay, Haim Gerber, Svetlana Ivanova, Ronald C. Jennings, Huda Lutfi, Margaret Meriwether, Galal el-Nahal, Leslie Peirce, Najwa al-Qattan, Yossef Rapoport, Asli Sancar, Selin Sancar, Elyse Semerdjian, Yvonne Seng, Amira Sonbol el-Azhary, Judith E. Tucker, Mahmoud Yazbak, Fariba Zarinefab-Shahr, Dror Ze'evi, and Madeline Zilfi.

1.2 Islamic Law and its Application under the Ottomans

Following in the footsteps of Ronald Jennings, a number of contemporary scholars have engaged in court-records analysis, as well as the examination of other related documents such as *fatwā*s and consular reports.[67] Access to this new range of sources has in fact proved that the mainstream depiction of European travellers was far from being accurate, thus validating the dissonant accounts of writers such as Montagu, Ferriman, de la Mottraye, Olivier, Pardoe, Ramzay, Garnett, and Durand de Fontmagne. Thus, we now know that Ottoman women could not have been the confined and helpless beings they were perceived to be. Ottoman women seem to have enjoyed more rights than their European counterparts at the time and even much later.[68] This resulted partly from the fact that Islamic law in itself grants women substantial legal rights, and was further enhanced by a flexible application by Ottoman *qāḍī*s.[69]

Muslim women, in contrast to their European counterparts, retained their own identity after marriage – separate from their husbands' – and they

[67] Judith E. Tucker, " 'And God Knows Best:' The *Fatwa* as a Source for the History of Gender in the Arab World," in *Beyond the Exotic: Women's Histories in Islamic Societies*, ed. Amira el-Azhary Sonbol (Syracuse: Syracuse University Press, 2005), 165-79; Leslie Peirce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (California: University of California Press, 2003); Dror Ze'evi, "Women in Seventeenth-Century Jerusalem: Western and Indigenous Perspectives," *IJMES* 27 (1995): 166; Ivanova, "Divorce," 115; Nelly Hanna, "Marriage among Merchant Families in Seventeenth- Century Cairo," in *Women, the Family, and Divorce Laws in Islamic History*, ed. Amira el-Azhary Sonbol (Syracuse: Syracuse University Press, 1996), 149-50; Zilfi, "We Don't Get Along," 271-72; Abdal Rehim, "Family," 104.

[68] Details on the situation of European women follow in section 1.3: "The Situation of European Women: A Useful Comparison," 33-42.

[69] Galal H. el-Nahal, *The Judicial Administration of Ottoman Egypt in the Seventeenth Century* (Chicago; Minneapolis: Bibliotheca Islamica, 1979), 46-47; Hanna, "Marriage," 148; Zantout, "*Khul*'," 31-56; Judith E. Tucker, "Revisiting Reform: Women and the Ottoman Family Law of Rights, 1917," *Arab Studies Journal* 4, 2 (1996): 12-13.

enjoyed full legal capacity.[70] Indeed, when contracting a *nikāḥ* (marriage), both parties to a Muslim marriage remain independent and continue to be so after an agreement is reached. The wife's legal identity remains intact: she does not "merge" with that of her husband.[71] The *fuqahā'* (jurists) differentiated between 2 types of legal capacity: *ahliyat al-wujūb* (eligibility for duty) and *ahliyat al-adā'* (executive capacity).[72] All human beings, regardless of their sex, race or age qualify for *ahliyat al-wujūb* by the mere fact of their humanity.[73] Only the foetus, at this stage part of another being, namely the mother, is granted an "incomplete" status.[74] As for *ahliyat al-adā'*, this is defined as the ability of a person to act in a manner that is lawful, a status attained upon reaching maturity. Maturity, according to the *fuqahā'*, corresponds to physical development and can therefore be noticed through bodily signs. Should it not

[70] Legal capacity will be used as a starting point, as it is through that very concept that more rights are derived or denied to the wife. Systematic reference to the Victorian wife's legal status will be made in order to demonstrate that Islamic law provided wives with rights that their Victorian counterparts were not granted – even much later. The *Commentaries on the Laws of England* by William Blackstone (1765) will be used as a basis and contrasted with the works of prominent Sunnī *fuqahā'*, as well as the Ottoman application of Islamic law (based on 16th and 17th century's court-records). This comparison aims to shed some light on the more "modern" understanding of a wife's duties that seem to have been influenced by Victorian ethics.

[71] See William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Chicago: University of Chicago Press, 1979), 2: 433-35. This comes in sharp contrast with the situation of the Victorian woman whose marriage transformed her from a feme sole (single woman) into what was known under English Common Law as a feme covert (old French for *femme couverte*), i.e., placed under the shield and protection of her husband. Coverture required that the wife merge with her husband and therefore cease to exist, legally, as a separate entity. A more detailed discussion will follow. In fact, it has been argued that the legal as well as civil position of the Victorian wife resembled that of a slave as both were regarded civilly dead. For more, see Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988), 199.

[72] Hallaq, *Sharī'a*, 226-27; Dawoud Sudqi el-Alami, "Legal Capacity with Specific Reference to the Marriage Contract," *Arab Law Quarterly* 6, 2 (1991): 190-203; Mahdi Zahraa, "The Legal Capacity of Women in Islamic Law," in *Arab Law Quarterly* 11,3 (1996): 245-63; *Mawsū'a*, s.v. "*Ahliyya*," 7:151-67.

[73] El-Alami, "Legal Capacity," 191; Zahraa, "Legal Capacity," 245-48.

[74] Ibid.

manifest itself as such, the different legal schools fixed particular ages at which a minor can be said to have become a mature adult.[75] Both minor males and females who have not reached maturity – if involved in legal matters – are required to be represented by a *walī* (guardian) so as to ensure that their rights are upheld.[76] In addition to the requirement of physical maturity, the person benefiting from *ahliyat al-adā'* should be sound of mind and able to act in a responsible manner.[77] Thus, a person's ability to reason is the major determining factor. Insanity and ineptitude at managing financial affairs are impediments.[78] In short, gender is not a basis for differentiation at either of the two stages, meaning that a woman's legal capacity is not affected one way or the other. Just like a man, her becoming an adult endows her with responsibilities and autonomy in decision-making.[79]

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[75] Hallaq, *Sharī'a*, 227; el-Alami, "Legal Capacity," 191; *Mawsū'a*, s.v. "A*hliyya*," 7:151-67.

[76] El-Alami, "Legal Capacity," 191.

[77] Ibid., 192; Zahraa, "Legal Capacity," 247-48.

[78] Zahraa, "Legal Capacity," 252.

[79] Nonetheless, the *fuqahā'* disagree over whether an adult woman needs a *walī* to contract a *nikāḥ*. With the exception of the Ḥanafī school of law, all the other Sunnī schools require – albeit differently – that a woman, even though an adult, contract a *nikāḥ* in the presence of a guardian. For a detailed analysis, see 'Abd al-Raḥmān al-Jazīrī, *Kitāb al-Fiqh 'Alā al-Madhāhib al-Arba'a*, 5 vols. (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1986), 4:26-53. Among the justifications offered, is the notion that a woman's mingling with men – especially in courtship matters – was harmful to her honour and that of the family (el-Alami, "Legal Capacity," 193). The notion of men having a *daraja* (degree) over women, traditionally interpreted as men having a degree of "preference," is yet another rationalization, as it implies that they are better qualified to secure women more advantageous *nikāḥ* contracts. For more on *daraja*, see Q.2:228. This, and all subsequent Qur'ānic verses are from the translation of Yūsuf 'Alī. Q.2:228 reads: "For those who forsake their wives is prescribed a waiting period of four months. If they go back on their oath, God is All-Forgiving, Compassionate to each. If they are determined on divorce, God is All-Hearing, All-Knowing. Divorced women shall refrain from remarriage for three menstrual cycles. Nor is it licit for them to hide what God has created in their wombs, if they truly believe in God and the Last Day. Meanwhile, their husbands have a better right to take them back if they desire reconciliation. Women have the selfsame rights and obligations in conformity with fairness, but men are a grade more responsible than them. God is Almighty, All-Wise." Yet, whether the presence of a

Enjoying an independent status and full legal capacity, a mature Muslim wife is able to enter into contractual agreements and use the court system to secure her rights independently of her husband (or anyone else for that matter). Recent scholarship on surviving Ottoman court-records provides us with undeniable evidence of Muslim women frequently appearing in courts initiating suits against those with whom they were in conflict – including their own husbands – and countering claims made against them.[80] Women sued for a variety of claims, such as legal separation from their husbands, maintenance, inheritance, or property.[81] Interestingly, the court documents reveal that Muslim wives even took legal action against their husbands on the basis of sexual incompatibility, or an inability to coexist.[82] Records also demonstrate that women brought sipahis (cavalry), janissaries (infantry), and police officers to court.[83] Women who were believed to have infringed the rights of others were also brought to court as defendants.[84]

Given that women married at an early age and remarried rapidly in the event of divorce, and given the fact that a great majority of them did indeed get married, it may be assumed that a large proportion of the women who appeared

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walī is required or not, the Muslim wife keeps her full identity and legal capacity after her marriage.

[80] For more on Ottoman women's access to the court, see Jennings, "Women," 53-114; idem, *Christians,* 14-36; idem, "Divorce," 155-67; and Peirce, *Morality Tales,* 2, 176, 207; Najwa al-Qattan, "Textual Differentiation in the Damascus *Sijill:* Religious Discrimination or Politics of Gender?" in *Women, the Family, and Divorce Laws in Islamic History*, ed. Amira el-Azhary Sonbol (Syracuse: Syracuse University Press, 1996), 191.

[81] Seng, "Invisible Women," 251-64.

[82] Zilfi, "We Don't Get Along," 264-96.

[83] Jennings, *Christians,* 14-36; Seng, "Invisible Women," 247.

[84] Seng, "Invisible Women," 241-42. Haim Gerber documents a case where independent women silk makers were sued by the guild to pay those taxes incumbent upon guild members. The women won the case by virtue of customary law. See Gerber, "Social," 237-38.

in court (even for non-matrimonial purposes) were married.[85] Women were at times represented by a *wakīl* (legal representative), but so too were men.[86] That women often had recourse to the service of a *wakīl* was thus in no way a confirmation of their seclusion or removal from the public sphere. The fact that many did appear in person demonstrates that they were not denied the opportunity of personally defending their cases. Furthermore, the *wakīl* was often another woman.[87] This recourse to a representative was more likely a question of privilege, as the *wakīl* was presumably better suited to handling the client's case, sparing her the burden of attending trial and possibly travelling long distances.

The fact that Muslim women retain their legal identity after marriage also has repercussions on her right to own and retain property. Muslim wives are entitled to keep whatever property they had before entering into a marriage contract, and to have sole possession and control over any acquisitions they make while being married.[88] Not only does a Muslim husband have no rights over his wife's property, he is also required to provide her with a *mahr* (dowry) that she alone can dispose of.[89] Typically, the *mahr* is divided into 2 portions: (1) an advance payment to be delivered to the bride before consummation of the marriage and payable upon the acceptance of the contract; and (2) a deferred part, generally settled (as a matter of practice) when and if the contract is

[85] Rapoport, *Marriage*, 5, 77, 83-84, 86.
[86] Jennings, "Divorce," 158.
[87] Jennings, *Christians,* 32.
[88] For more on Ottoman women and their access to property, see Gerber, "Social," 231-44.
[89] Al-'Aynī, *al-Binãya*, 3:100-05; 'Alā' al-Dīn Abī Bakr b. Mas'ūd al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, 7 vols. (Beirut: Dār al-Kitāb al-'Arabī, 1982), 2:274.

terminated. A wife who has not been paid her full advance portion of the *mahr* can and should refuse her husband's sexual advances.[90] Indeed, jurists insist on her right to deny him sexual access as long as the first portion of the *mahr* due to her has not been received.[91] A common misconception is that the deferred portion is only due when the contract is terminated; the truth is that the wife can request her deferred *mahr* anytime she deems fit. In addition to this, a woman contracting a *nikāḥ* is offered an adequate *nafaqa* (maintenance) that should cover her general expenses such as clothing, food, and housing; indeed, she is not expected to spend it on anyone, including her own children (who are the responsibility of the father).[92] The Ḥanafī jurists determine *nafaqa* according to what is sufficient for a wife to live decently.[93] Yet, while Ḥanafī law does not consider the husband's failure to maintain a wife as reasonable grounds for divorce, it does require that the husband be imprisoned in such an eventuality,[94] and the Ottomans did indeed place husbands in custody for failing to support their wives.[95]

Formerly, marriage was one way – though not the most significant one – in which a Muslim woman could gain access to property, since the *mahr* she

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[90] Al-'Aynī, *al-Binãya*, 4:719-20; Muḥammad Amīn b. 'Umar Ibn 'Ābidīn, *Radd al-Muḥtār*, 8 vols. (Beirut: Dār al-Fikr, 1979), 3:439; al-Shaykh Niẓām et al., *al-Fatāwā al-Hindiyya*, 6 vols. (Diyār Bakr: al-Maktaba al-Islāmiyya, 1973), 3:134.

[91] In his work on 19th century Palestine, Mahmoud Yazbak reports that when the husband consummated the marriage before providing his wife with the advance *mahr*, the *qāḍī* forbade him from having further sexual relations with her unless the advance *mahr* was paid. See Mahmoud Yazbak, "Minor Marriages and *Khiyār al-Bulūgh* in Ottoman Palestine: A Note on Women's Strategies in a Patriarchal Society," *Islamic Law and Society* 9, 3 (2002): 396-409.

[92] *Mawsū'a*, s.v. "*Nafaqa*," 41:34-37.

[93] Ibid., 41:39.

[94] El-Nahal, *Judicial*, 46-47; Abdal Rehim, "Family," 105.

[95] Rapoport, *Marriage*, 53; el-Nahal, *Judicial*, 44-45.

obtained was for her own exclusive use. Ottoman records attest to women having been active in many spheres which indicates that the *mahr* was not their only source of income.[96] As a case in point, Muslim women's share of inheritance in this period was an important form of revenue[97] as they were not required to use this income to support anyone.[98] The Muslim wife's daily expenses are also laid to the charge of her husband, the *nafaqa* being his exclusive responsibility.[99] Furthermore, anything she owns is exclusively hers as she is not even required to spend it on her own children. Should she choose to do so, however, the amount disbursed becomes a debt owed to her by the husband – one that has priority over any other debt the latter may have.[100] A husband's failure to pay his wife back can lead to his imprisonment according to Ḥanafī law, and Ottoman court-records attest to this practice.[101] Ottoman women had many other sources of income as well. They played an important role in the wool industry, they were administrators of small foundations, *waqf*s (charitable endowments) and schools, and they also served as hairdressers, weavers, religious teachers, guarantors of others' bad debts, lenders (occasionally to husbands), brokers, guardians managing the estates of minors, and legal agents

[96] Gerber, "Social," 231-44; Jennings, *Christians*, 25, 31, 33-34; Seng, "Invisible Women," 251-64.
[97] Seng, "Invisible Women," 251-55; Gerber, "Social," 232; Jennings, "Women," 69.
[98] The Ja'farī school grants the daughter (or daughters) of a deceased who has no sons a full share of inheritance. Half of the father's assets is due as the stated Qur'ānic share, and another half on the grounds of *raḥm* (blood relationship). For more, see Muḥammad Ibrāhīm Karbāsī, *Nukhbat al-Aḥādīth fil-Waṣāyā wal-Mawārīth,* 3 vols. (Najaf: Maṭba'at al-Ādāb, 1969), 3-5; Asaf Ali Asghar Fyzee, *Compendium of Fatimid Law* (Simla; India: Institute of Advanced Study, 1969), 97-98.
[99] 'Al-Jazīrī, *al-Fiqh*, 4:554-62.
[100] Ibid., 4:581-84.
[101] El-Nahal, *Judicial,* 46-47.

for other women (and sometimes even men).[102] Ottoman women accumulated lands, houses and other forms of property which allowed them a certain level of security.[103]

Ottoman women reverted to the court in a variety of situations, of which domestic matters were only one category. Nevertheless, they quite often approached the courts over divorce matters.[104] For, while Islamic law safeguards the legal position of a married woman and requires that she receive an adequate *mahr* and *nafaqa*, it does leave the woman who wants to dissolve her marriage with little remedy. While Islamic law grants the husband the right to terminate his marriage contract unilaterally, at will and without litigation, the same does not apply to the woman.[105] Should it be the wife, however, who desires to break the marriage contract, she can – in cases where the husband is himself *nāshiz* (broadly defined as disobedient)[106] or mistreats her – turn to the *qāḍī* and

[102] That Ottoman women were active in commerce and the workforce is reported in a number of works. For more, see Jennings, *Christians*, 25, 31, 33-34; Seng, "Invisible Women," 242; Rapoport, *Marriage,* 32-33; Margaret Meriwether, "Women and *Waqf* Revisited: The Case of Aleppo, 1770-1840," in *Women in the Ottoman Empire*, ed. M. Zilfi (Leiden: Brill, 1997), 128-52; Gerber, "Social," 231-44.

[103] Gerber, "Social," 231-44; Seng, "Invisible Women," 255-64; Jennings, "Women," 97-110.

[104] For more on Ottoman women's access to courts, see Peirce, *Morality Tales*, 209-48; Jennings, "Women," 53-114; Zilfi, "We Don't Get Along," 264-96; Fariba Zarinefab-Shahr, "Ottoman Women in the Tradition of Seeking Justice in the Eighteenth Century," in *Women in the Ottoman Empire: Middle Eastern Women in the Early Modern Era,* ed. Madeline Zilfi (Leiden: Brill, 1997), 253; Iris Agmon, "Muslim Women in Court According to the *Sijill* of Late Ottoman Jaffa and Haifa: Some Methodological Notes," in *Women, the Family, and Divorce Laws in Islamic History*, ed. Amira el-Azhary Sonbol (Syracuse: Syracuse University Press, 1996), 138; Fatima Zohra Guechi, "*Mahkama* Records as a Source for Women's History: *The Case of Constantine*," in *Beyond the Exotic: Women's Histories in Islamic Societies*, ed. Amira el-Azhary Sonbol (Syracuse: Syracuse University Press, 2005), 152-61.

[105] What a husband who wishes to divorce his wife is required to do, however, is – provided she has not violated the code of marriage and become *nāshiz* (disobedient) – compensate her with the unpaid remainder of her dowry and maintenance, befitting her social and economic status.

[106] *Nushūz* (disobedience) in its linguistic sense, was linked by early scholars, jurists, and interpreters of the Qur'ān to the idea of rising (*irtifā'*), i.e., something that rises from the earth

provide him with valid and legally acceptable reasons justifying such an action. If she succeeds in proving her case, she is granted a *tafrīq* (judicial separation) and the husband becomes liable to remuneration.[107] As for the wife who fails to prove that her husband is *nāshiz* or who simply wishes to leave a husband who is not at fault, her only recourse to judicial separation demands some compensation on her part. This second option may arise when the two spouses mutually agree on the dissolution of their marriage, often an initiative on the part of a wife who wishes to separate herself from a husband who is not at fault. In this case, she must in effect ransom herself following a procedure known as *khul'*. *Khul'* is the technical term used for a marital "extraction,"[108] and is defined as the husband's accepting compensation from the wife in exchange for her freedom from the marital relationship. Consequently, women wishing to leave an unhappy marriage are either required to ransom their way out of marriage, or are left to depend on the mercy and understanding of the *qāḍī.*

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reaching a position higher than the ground level it was assigned. In the realm of marriage, a *nāshiz* wife is one who refuses her husband sexual enjoyment. Contrary to popular belief, the idea of *nushūz* was not exclusively applicable to wives, as the term *nāshiz* was used by the *fuqahā'* to describe a husband who mistreats his wife, fails to provide her with a *nafaqa,* or is cruel to her, such as by expressing an aversion to her while still simultaneously retaining her as wife. For more, see the works of Muḥammad b. 'Abd Allāh Ibn al-'Arabī, *Aḥkām al-Qur'ān*, ed. 'Alī Muḥammad al-Bajāwī, 4 vols. (Cairo: Dār Iḥyā' al-Kutub al-'Arabiyya 'Īsā al-Bābī al-Ḥalabī wa Shurakā'uh, 1957), 1:417; Manṣūr b. Yūnus b. Idrīs al-Buhūtī, *Kashshāf al-Qinā' 'an Matn al-Iqnā'*, 6 vols. (Beirut: 'Ālam al-Kutub, 1983), 5:209; Ismā'īl b. 'Umar Ibn Kathīr, *Tafsīr al-Qur'ān al-'Aẓīm,* ed. Muḥammad 'Alī al-Ṣābūnī, 4 vols. (Cairo: Maṭba'at al-Istiqāma, 1956), 1:492; al-Jaṣṣāṣ, *Aḥkām*, 1:374.

[107] *Mawsū'a*, s.v. "*Tafrīq,*" 13:86-92.

[108] Al-'Aynī, *al-Bināya*, 5:291; Ibn 'Ābidīn, *Radd al-Muḥtār*, 3:439; Niẓām et al., *al-Fatāwā al-Hindiyya*, 1:488.

Khul‘ is not the only option in such cases, as Islamic law entitles women to request a *tafwīḍ* (delegated right to divorce).[109] Such a procedure allows a woman to insert a stipulation into her marriage contract by which she is granted the right to initiate divorce should she deem it fit, and without the assistance of a *qāḍī.* Ottoman women were also able to secure more rights by inserting stipulations into their marriage contracts. Ottoman records pertaining to Egypt show that women contracting marriage agreements were allowed to insert stipulations or conditions to which the husband was legally bound.[110] These stipulations allowed women to be granted a divorce while securing their rights should the husband fail to observe these conditions. Even though the Ḥanafī school did not support the insertion of marriage stipulations,[111] Ottoman

[109] *Ṭalāq al-tafwīḍ* is a delegated right to divorce that should be granted by the husband himself and this can only be done upon contracting the marriage. See Ibrāhīm b. Muḥammad al-Ḥalabī, *Multaqā al-Abḥur, wa Ma‘ahu al-Muyassar ‘alā Multaqā al-Abḥur*, ed. Wahbī Sulaymān Ghāwijī al-Albānī, 2 vols. (Beirut: Mu’assasat al-Risāla, 1989), 1:268-69; Lucy Carroll, “*Talaq-i-Tafwid* and Stipulations in a Muslim Marriage Contract: Important Means of Protecting the Position of the South Asian Muslim Wife,” *Modern Asian Studies* 16 (1982):278. Although lawful as per Ḥanafī doctrine, women are rarely granted *tafwīḍ* since it is often associated with some sort of social scandal, despite the fact that the husband is only granting the wife an equal right of choice.

[110] El-Nahal, *Judicial*, 46-47; Hanna, “Marriage,” 148; Zantout, “*Khul‘*,” 31-56; Tucker, “Revisiting,” 12-13. The records demonstrating that marriage stipulations were inserted into contracts are for the most part found in Egypt. And yet, while more scholarly work needs to be done on other regions, recent studies have demonstrated that, despite regional variations (and variations even within the same town), the approach of the courts has proven to be remarkably similar, where structural and systemic unity prevailed. The function and modality of the law were constant and the structural mechanisms, procedure, laws, values, ethics, and adjudication all followed a unified notion of justice. For more, see Hallaq, *Sharī'a,* 16-17.

[111] Most schools of law do not validate the right of a woman to insert stipulations in her marriage contract. In fact, the Ḥanbalī school of law – generally viewed as the most rigid – is the only school to validate a wide range of stipulations, such as forbidding her husband from taking an additional wife or moving her from her place of residence. See Muwaffaq al-Dīn Ibn Qudāma and Shams al-Dīn al-Maqdisī Ibn Qudāma, *al-Mughnī*, 12 vols. (Beirut: Dār al-Kitāb al-‘Arabī, 1983), 7:448-49; Muwaffaq al-Dīn Ibn Qudāma, *al-Kāfī fī Fiqh al-Imām Aḥmad Ibn Ḥanbal,* ed. Sa‘īd Muḥammad al-Laḥḥām, et al. 4 vols. (Beirut: Dār al-Fikr, 1992), 3:39; al-Buhūtī, *Kashshāf,* 5:90-91; idem, *Sharḥ Muntahā al-Irādāt, al-Musamma Daqā’iq ūlī al-Nuhā li-Sharḥ al-Muntahā*, 3 vols. (Beirut: ‘Ālam al-Kutub, 1996), 2:665; ‘Abd-al-Raḥmān b. Muḥammad b. Qāṣim al-Najdī al-‘Āṣimī, *Ḥāshiyat al-Rawḍ al-Murbiḥ Sharḥ Zād al-Mustanqi‘,* 7 vols. (Beirut: s.n., 1983), 6:313-15; Shams al-Dīn Abī

Ḥanafī judges accepted the insertion of such stipulations that, once agreed upon, became binding.[112] Thus, despite the permissibility of polygamy in the opinion of all schools of law, an Ottoman wife who stipulated in her marriage that she be granted a divorce if her husband took another wife always saw her condition upheld in the event that he did so.[113] Divorce records pertaining to Egypt also reveal that women frequently kept their children beyond the age at which they might otherwise have had to be surrendered to their father.[114] In addition, the records show that fathers themselves systematically renounced custody and pledged to support their children even after the wife was married to another.[115] New husbands, moreover, regularly agreed to support their wives'

'Abd-Allāh Ibn Mufliḥ al-Maqdisī, *al-Furū' wa bi-Dhaylihi Taṣḥīḥ al-Furū' li 'Alā' al-Dīn 'Alī b. Sulaymān al-Mardāwī,* ed. Abī al-Zahrā' Ḥāzim al-Qāḍī, 6 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1997), 5:165. A wife's conditions are considered void by the Shāfi'ī and Ḥanafī schools (al-'Aynī, *al-Bināya*, 4:690-91; Abī Isḥāq Ibrāhīm 'Alī b. Yūsuf al-Shīrāzī al-Fīrūzābādī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi'ī wa bi-Dhayl Ṣaḥā'ifiḥī al-Naẓm al-Musta'dhab fī Sharḥ Gharīb al-Muhadhdhab,* ed. Zakariyyā 'Umayrāt, 3 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1995), 2:448). As for the Mālikīs, they accept some of the woman's conditions such as polygamy- and relocation-related stipulations, yet that does not come without a severe warning, as her act falls under the legal norm of *makrūh* (reprehensible, but not forbidden). For more on the Mālikī position, see Aḥmad b. 'Abd al-Ḥalīm Ibn Taymiyya, *Fatāwā al-Zawāj wa 'Ishrat al-Nisā'*, ed. Farīd b. Amīn al-Hindāwī (Cairo: Maṭba'at al-Turāth al-Islāmī, 1988), 161; al-Jazīrī, *al-Fiqh*, 4:88. The Shī'ite position is that a stipulation whereby the wife binds her husband not to move her from her place of residence, unless he acquires her prior consent, is generally acknowledged as valid (Muḥammad b. Ḥasan al-Ṭūsī, *al-Nihāya wā Nukathā, Ta'līf Shaykh al-Ṭā'ifa al-Ṭūsī wal-Muḥaqqiq al-Awwal al-Ḥillī,* ed. Mu'assasat al-Nashr al-Islāmī, 3 vols. (Qumm: Mu'assasat al-Nashr al-Islāmī, 1991), 2:328-30). Interestingly, a woman who stipulates that her husband not deflower her (*yaftaḍḍahā*) can expect that her husband be (for a number of shī'ite *fuqahā'*) bound to her condition, unless she freely and willingly reverses her position (al-Ṭūsī, *al-Nihāya,* 2:328-29). Al Imām Ja'far is reported to have held the position that a husband *laysā lahū minhā illā mā ishtaraṭa* (is only entitled to what he accepted as condition). For more, see Muḥammad Ḥasan b. Bāqir al-Najafī, *Jawāhir al-Kalām fī Sharḥ Sharā'i' al-Islām*, ed. 'Abbās al-Qūshānī, 43 vols. (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1981), 31:98.

[112] Hanna, "Marriage," 148; Abdal Rehim, "Family," 97-103.

[113] Hanna, "Marriage," 148.

[114] Abdal Rehim, "Family," 108-09. The Ḥanafī doctrine dictates that a woman lose custody of her children upon remarriage, unless the new husband is consanguineous (*maḥram*) to the child.

[115] Abdal Rehim, *Documents*, 2:16-17, 49, 120-21, 237-38, 249-50, 256-57, 285-86, 304; Zantout, "*Khul*'," 31-56.

children by another father.[116] Thus, it would seem that having children by another man did not prevent women from remarrying, nor did it result in their losing custody of their offspring. Women time and again requested that their husbands not move them to a different lodging, or leave them without means of support.[117] Significantly, despite the fact that Ḥanafī jurisprudence refuses to enforce stipulations conflicting with what is allowed by Ḥanafī law, Ottoman *qaḍīs* – perhaps recognizing social reality – seem to have readily implemented such conditions.[118] Stipulations were registered in the presence of Ḥanafī judges themselves, and one assumes that these same judges would then see such conditions fulfilled. Nonetheless, while Ḥanafī law was shaped to fit societal needs and while such stipulations were accepted and enforced by Ottoman *qāḍī*s, they are not always deemed valid in the contemporary Muslim world.[119]

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[116] Abdal Rehim, "Family," 108-09; idem, *Documents*, 2:54, 69, 72, 76-77, 263.

[117] Abdal Rehim, *Documents*, 2:16, 115-16, 185-86.

[118] El-Nahal, *Judicial*, 46-47; Hanna, "Marriage," 148.

[119] Except for Saudi Arabia – wherein Ḥanbalī law is applied, stipulations in the contemporary Muslim world are generally invalidated. In the case of Lebanon, it is the Ottoman Family Rights Law of 1917 (*Qānūn Ḥuqūq al-'Ā'ila al-'Uthmānī*) that applies. The Law of 1917 allows women to insert two stipulations into their *nikāḥ*s. Article 38 allows a wife who has inserted the condition that she be granted a divorce following her husband's taking of an additional wife to request a separation should her husband fail to uphold her condition. Article 38 reads, (in the translation of Dawoud Sudqi el-Alami and Doreen Hinchcliffe, *Islamic Marriage and Divorce Laws in the Arab World* (London: Kluwer Law International, 1996), 153): "If a man marries a woman and she stipulates that he should not take further wives and that if he does so either she or the second wife shall be divorced, the contract shall be valid and the condition recognized." Article 48 (in the translation of el-Alami and Hinchcliffe, *Marriage and Divorce Laws*, 154), allows the woman to require that her husband be of the same social condition: "If the guardian gives a mature woman in marriage, with her consent, to a man whom they are unaware is not of equal status and it later becomes apparent to them that he is not of equal status then neither of them shall have the right to object. If, however, equality of status is stipulated at the time of the contract and it is later proved that the husband is not of equal status, either the woman or her guardian may apply to the judge requesting the annulment of the marriage."

In her work on seventeenth- and eighteenth-century Palestine and Syria, Judith Tucker reports that Ḥanafī *muftī*s (jurisconsults) accepted annulment decisions emanating from Shāfi'ī and Ḥanbalī jurists in cases of non-support of the wife.[120] The responses of the *muftī*s whose *fatwā*s Tucker surveys reflect a level of open-mindedness and impartiality lacking even today in the Muslim world. This is true in the response of the *muftī* Khayr al-Dīn al-Ramlī (d. 1081/1671) to the husband who claimed that, while consummating the marriage, he had found that his wife had been previously deflowered. The *muftī* responds that the woman could have lost her virginity by a wide array of actions such as jumping, age, or through menstruation.[121] A similar position is adopted by the renowned Mālikī jurist al-Wansharīsī (d. 914/1508). When asked about the case of a man who finds out his wife is not a virgin, al-Wansharīsī responds that the man is flogged if he uses the term deflowered, but the *ḥadd* (prescribed penalty)[122] does not apply should the man merely state that his wife is not a virgin. The totality of the dowry is due to the wife in both these cases, and she is not to be examined, even by females.[123] Such open-mindedness is also evident in another response where *muftī* Khayr al-Dīn opines that any woman whose husband utters a divorce statement and beats her without cause is entitled to kill the husband if she is otherwise unable to prevent him from

[120] Tucker, "Revisiting," 12-13.
[121] Judith E. Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (California: University of California Press, 1998), 1.
[122] *Ḥadd* (plur. *ḥudūd*) is an offense to which a specified punishment is affixed (*Mawsūʿa*, s.v. "*Ḥudūd*," 17:129-52; Hallaq, *Sharīʿa,* 311-23).
[123] Aḥmad b. Yaḥyā al-Wansharīsī, *al-Miʿyār al-Muʿrab wal-Jāmiʿ al-Mughrib ʿan Fatāwā Ulamāʾ Ifrīqiya wal-Andalus wal-Maghrib*, 13 vols. (Beirut: Dār al-Gharb al-Islāmī, 1981-83), 3:133.

coming near her.[124] Similarly, in his work on seventeenth-century Ottoman Egypt, Galal el-Nahal reveals that cases of divorce initiated by women were often handled by a Ḥanbalī *qāḍī*.[125] Women could in fact rely on the rulings of non-Ḥanafī judges and these decisions were endorsed and accepted by Ḥanafī *qāḍī*s.[126]

To state that Islamic law provides wives with rights equal to those of their husbands would be erroneous, but to claim that Islamic law deprives women of rights that would have otherwise been available to them is also incorrect. While Islamic law undeniably favours men, it should be noted (as will become apparent in the next section) that Muslim women were, in the pre-modern era, still at an advantage compared to their European counterparts. Also, the favoured position of the man is accompanied by a number of obligations that a good Muslim is required to fulfill. In the realm of marriage, the husband is obliged to provide for his wife by offering her a *mahr*, a decent home, and adequate *nafaqa*. Moreover, adult male family members are responsible for the financial wellbeing of their female relatives, which is precisely why Muslim daughters inherit only half the portion allotted to their

[124] Tucker, *In the House of the Law*, 65.
[125] El-Nahal, *Judicial,* 46-47.
[126] Ibid. This is also documented by Tucker who reports that Ḥanafī *muftī*s accepted annulment decisions emanating from Shāfi'ī and Ḥanbalī jurists, in cases of non-support of the wife. See Tucker, "Revisiting," 12-13. Ramadan al-Khowli also attests that Mālikī *qāḍī*s accepted decisions emanating from *qāḍī*s from different *madhhab*s. See Ramadan al-Khowli, "Observations on the Use of *Shari'a* Court Records as a Source of Social History," in *Beyond the Exotic: Women's Histories in Islamic Societies*, ed. Amira el-Azhary Sonbol (Syracuse: Syracuse University Press, 2005), 146. In fact, it would seem that people were aware of the possibility of choosing the school of law that better suits their needs (Nelly Hanna, "The Administration of Courts in Ottoman Cairo," in *The State and its Servants: Administration of Egypt from Ottoman Times to the Present*, ed. Nelly Hanna (Cairo: The American University in Cairo Press, 1995), 53.

brothers. Therefore, when reflecting on Islamic law, one should keep in mind the social values that prevailed at different times and compare contemporary *fiqh* (jurisprudence) works to those of non-Muslim jurists who drafted laws in those times, rather than attempt to understand them solely in light of today's situation and society. The fact that the situation in Europe at the same time and much later was even more detrimental to women places the pre-modern application of Islamic law regarding women in an entirely different light.[127] Jewish and Christian women under Muslim law often turned to Islamic law – directing their claims to the local *qāḍī* – when they hoped to obtain a divorce or secure a share of inheritance.[128]

Ottoman judges showed flexibility in their application of the law, often bypassing it in order to accommodate women. As a case in point, in order to widen the scope of what was deemed acceptable by the Ḥanafī school as grounds for divorce, Ottoman judges accepted the insertion of stipulations and validated decisions emanating from other schools of law.[129] This flexible application of the law and the sympathetic attitude of the judges allowed women to freely direct their queries to the court. The fact that non-Muslim Ottoman women reverted to Islamic law in order to obtain their rights attests to the fact that Islamic law does grant women rights that were not always available

[127] A detailed discussion on the general condition of European women will follow in the next section (1.3 "The Situation of European Women: A Useful Comparison," 33-42).
[128] Jennings, *Christians*, 166. This is also true in the contemporary Muslim world. For more see Dawoud Sudqi el-Alami, "Can the Islamic Device of *Khul*' Provide a Remedy for Non-Muslims in Egypt?" *Yearbook of Islamic and Middle Eastern Law* 8 (2001-2002): 123-24.
[129] El-Nahal, *Judicial*, 46-47; Hanna, "Marriage," 148; Tucker, "Revisiting," 12-13.

to Jewish and Christian women.[130] While Islamic law is clearly more favourable to men (as the upper hand that the husband enjoys in the realm of marriage and divorce is undeniable), it still gave women more rights than those available to their Jewish and Christian counterparts. In fact, *qāḍī*s were indubitably sympathetic to women regardless of their religious affiliation.[131] What is yet more striking is the fact that women in Europe were at an even greater legal disadvantage than their Muslim counterparts, a matter to which we now turn.

1.3 The Situation of European Women: A Useful Comparison

Despite the many claims emanating from European authors whereby they assert that the situation of Muslim women was depressing and pitiable, it is worthwhile noting that the situation of women in Europe was far from being any better.[132] Some of the European writers whose works were surveyed above

[130] Interestingly, non-Muslim Ottoman women are sometimes recorded as having converted to Islam in order to be divorced from their husbands (in the event that he did not convert to Islam as well), as Muslim women cannot legally marry a non-Muslim man. See Jennings, *Christians*, 166. This is also true in contemporary Egypt where Christian women revert to Islamic law in order to be granted a divorce. In fact, Egyptian law stipulates that two non-Muslims of different sects can resort to Islamic law in case of conflict: Article 6 of Law 462 dated 1955 (in the translation of Aznan Hasan, "Granting *Khul*' for a Non-Muslim Couple in Egyptian Personal Status Law: Generosity or Laxity?" *Arab Law Quarterly* 18 (2003): 81) stipulates: "With regards to disputes related to the personal status of non-Muslim Egyptian couples who share the same sect and rite, and who at the time of the promulgation of the Law have their own organized sectarian juridical institutions, judgments will be passed in accordance with their new law, all within the limits of public policy." Shortly after the passage of the law, a Christian Apostolic woman, having converted from Coptic Orthodoxy in an effort (presumably) to resort to Islamic law, successfully petitioned the *qāḍī* requesting a *khul*' divorce on the basis of sectarian difference with her husband. See el-Alami, "Can the Islamic?" 123-24.

[131] For more on the recourse of non-Muslim women to Islamic law, see Najwa al-Qattan, "Dhimmis in the Muslim Court: Legal Autonomy and Religious Discrimination," *IJMES* 31, 3 (Aug. 1999): 432-35.

[132] Hill, *Full Account*, 99, 102-03, 109, 116; Dumont, *New Voyage*, 261-63, 268; Withers, *Description*, 708; de Thevenot, *Relation d'un voyage*, 498-99.

did assert that Ottoman women enjoyed more rights than European ones.[133] In the case of the Victorian wife, it is undeniable that she lost her legal identity after marriage. Upon marriage, the Victorian wife was placed in the position of "coverture,"[134] and her legal existence was suspended as it "merged" with that of her husband.[135] As a result, the Victorian wife became a "feme covert" (old French for *femme couverte*), i.e., placed under the shield and protection of her husband. The very fact that the Victorian wife merged with her husband upon marriage – and ceased to exist, legally, as a separate entity – made it impossible for her to enter into any contractual agreement without her husband's approval.[136] Needless to say, taking legal action against him was unimaginable. A Victorian wife could only take action against a third party and only through her husband. As far as property was concerned, the Victorian wife brought her own dowry to the marriage, losing any control over or right to it.[137] In effect, all her property became her husband's. Should she want to benefit from her own possessions, special provisions had to be made accordingly, thus modifying the marriage contract.[138] The only way a Victorian wife could gain dower rights was if she outlived her husband.[139] Reaching any form of economic – let alone

[133] Fay, "Ottoman Women," 160; Ferriman, *Turkey*, 84-85.
[134] For more on the concept of coverture, see supra note 71.
[135] Blackstone, *Commentaries*, 2:433-35.
[136] See supra note 71. In fact, the situation of the British wife in the late 19th century was similar to that of a slave. See Pateman, *Sexual Contact*, 90-91, 119-20.
[137] Ibid.
[138] Merry E. Wiesner, *Women and Gender in Early Modern Europe* (Great Britain: Cambridge University Press, 1993), 31. For details on the changes that were made to the contract in order to accommodate women who owned property, see Fay, "Ottoman Women," 163; Pateman, *Sexual Contact*, 119.
[139] Tim Stretton, *Women Waging War in Elizabethan England* (Great Britain: Cambridge University Press, 1998), 31.

general – independence as long as her husband was alive was in fact impossible. As for her right to support, it rose out of the very concept of "coverture" and the function of her labor within the household.[140] Indeed, the Victorian wife worked for her husband, who had the right to compel her to it, and any wage she earned was consequently his. It was for these very reasons that he was required to clothe and feed her in a manner consistent with her social level.[141]

All this stands in sharp contrast with the Muslim wife, as Islamic law guarantees her a separate and intact legal entity, and the right to enter contractual agreements and initiate legal suits separately and independently from her husband (or anyone else). What is more, a Muslim wife is presented with a *mahr* that she alone has access to, receives a share of inheritance for her own exclusive use, and retains any property she had or is to acquire during marriage. Despite these clear disadvantages that the Victorian woman faced upon marriage, the British jurist William Blackstone (d.1780) still commented on her situation in the positive, asserting that such laws were for her own benefit and were only designed to protect her.[142] It is therefore not surprising that a number of Victorian women should have used the word slavery when referring to their own situation as women.[143] The notion of "coverture" – whereby a married woman, just like a slave, found herself "civilly dead"[144] – allows for an interesting analogy between a Victorian married woman and a slave.[145] Because

[140] Ibid.
[141] Hendrik Hartog, *Man and Wife in America* (Cambridge: Harvard University Press, 2000), 156.
[142] Blackstone, *Commentaries*, 2:433.
[143] Fay, "Ottoman Women," 161.
[144] Pateman, *Sexual Contract*, 119.
[145] Ibid., 120-21.

obtaining a divorce was a quasi-impossible matter, it was not uncommon for Victorian wives to be sold on the market to the highest bidder.[146] As late as 1884 a wife in Britain was jailed for refusing her husband sexual access, and until 1891, the English husband (whose wife was refusing him sexual access) could restrict her to the matrimonial home so long as she did not make herself sexually available.[147]

The situation of women in France was not all that different from that of their counterparts in Victorian England, and it remained extremely detrimental to women until comparatively recent times.[148] As a case in point, the 1789 "Déclaration des Droits de l'Homme et du Citoyen" was exclusively reserved to males.[149] The drafting by French playwright and activist Marie Olympe de Gouges of the "Déclaration des Droits de la Femme et de la Citoyenne" in 1791[150]

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[146] Samuel Pyeatt Menefee, *Wives for Sale: An Ethnographic Study of the British Popular Divorce* (New York: St Martin's Press, 1981), 1-7. The records surveyed by Menefee indicate that women were traded as slaves in 1073, and regularly after that, from 1553 through to the 20th century. Incidentally, these women were presented to their potential buyers wearing a halter around the neck. It would seem that – in the popular mind – the sale was only deemed valid if the halter was placed around the neck of the traded wife. See Menefee, *Wives*, 1-7; Pateman, *Sexual Contract*, 121; Elizabeth Cady Stanton, Susan B. Anthony and Matilda Joslyn Gage, *The Concise History of Woman Suffrage 1848-1861*, 6 vols. (New York: Arno Press, Inc.,1969), 1:792.

[147] Pateman, *Sexual Contract*, 123. The fact that the English husband could force his wife to the matrimonial home seems to have contributed to the elaboration of the notion of *bayt al-ṭā'a* (a place where the husband can legally and forcibly confine his wife with the help of the local police). This point will be discussed in the next chapter ("Colonization and its Effects on Women and the Law," 42-82).

[148] For more on the situation of French women and (until relatively recent times) their disadvantaged position when they enter a marital agreement, see Simone de Beauvoir, *The Second Sex* (London: Jonathan Cape, 2009), 451-536.

[149] For the text of the declaration of the rights of men, see the translation of Frank Maloy Anderson, ed., *The Constitution and Other Select Documents Illustrative of the History of France, 1789-1907* (New York: Russell and Russell, 1980), 59-61.

[150] Marie Olympe de Gouges' declaration was modeled on the previous declaration (applicable to men only), extending the rights granted to women as well as men. The English translation of de Gouge's declaration is available in Hilda L. Smith and Berenice A. Carroll, *Women's Political and Social Thought, an Anthology* (Bloomington, Indiana: Indiana University Press, 2000), 150-53: "(1) Woman is born free and remains equal in rights to man. Social distinctions can be founded

– whereby the rights granted to men would be extended to women – led to her execution (for her alleged madness and hallucinations) two years later.[151] De

only on general utility. (2) The goal of every political association is the preservation of the natural and irrevocable rights of Woman and Man. These rights are liberty, property, security, and especially resistance to oppression. (3) The principle of all sovereignty resides essentially in the nation, which is none other than the union of Woman and Man; no group, no individual can exercise any authority that is not derived expressly from it. (4) Liberty and justice consist of rendering to persons those things that belongs to them; thus, the exercise of woman's natural rights is limited only by the perpetual tyranny with which man opposes her; these limits must be changed according to the laws of nature and reason. (5) The laws of nature and reason prohibit all acts harmful to society; whatever is not prohibited by these wise and divine laws cannot be prevented, and no one can be forced to do anything unspecified by the law. (6) The law should be the expression of the general will: all female and male citizens must participate in its elaboration personally or through their representatives. It should be the same for all; all female and male citizens, being equal in the eyes of the law, should be equally admissible to all public offices, places, and employments, according to their capacities and with no distinctions other than those of their virtues and talents. (7) No woman is immune; she can be accused, arrested, and detained in such cases determined by law. Women, like men, must obey these rigorous laws. (8) Only punishments strictly and obviously necessary may be established by the law. No one may be punished except under a law established and promulgated before the offense occurred, and which is legally applicable to women. (9) If any woman is declared guilty, then the law must be enforced rigorously. (10) No one should be punished for their opinions. Woman has the right to mount the scaffold; she should likewise have the right to speak in public, provided that her demonstrations do not disturb public order as established by law. (11) Free communication of thoughts and opinions is one of the most precious rights of woman, since this liberty assures the legitimate paternity of fathers with regard to their children. Every female citizen can therefore freely say: "I am the mother of a child that belongs to you," without a barbaric prejudice forcing her to conceal the truth; she must also answer for the abuse of this liberty in cases determined by law. (12) Guarantee of the rights of woman and female citizens requires the existence of public service. Such guarantee should be established for the advantage of everyone, not for the personal benefit of those to whom this service is entrusted. (13) For the maintenance of public forces and administrative expenses, the contributions of women and men shall be equal; the woman shares in all forced labor and all painful tasks; therefore she should have the same share in the distribution of positions, tasks, assignments, honors, and industry. (14) Female and male citizens have the right to determine the need for public taxes, either by themselves of through their representatives. Female citizens can agree to this only if they are admitted to an equal share not only in wealth, but also in public administration, and by determining the proportion and extent of tax collection. (15) The mass of women, allied for tax purposes to the mass of men, has the right to hold every public official accountable for his administration. (16) Any society in which the guarantee of rights is not assured, or the separation of powers determined, has no constitution. The constitution is invalid if the majority of individuals who compose the Nation have not cooperated in writing it. (17) The right of property is inviolable and sacred to both sexes, jointly or separately. No one can be deprived of it, since it is a true inheritance of nature, except when public necessity, certified by law, clearly requires it, subject to just and prior compensation."

[151] Though de Gouges' political activism was a contributing factor in her execution, so was her feminist position, which was then regarded as negative and threatening. For more, see Harriet Branson Applewhite, Mary Durham Johnson, and Darline Gay Levy, *Women in Revolutionary Paris, 1789–1795* (Urbana: University of Illinois Press, 1979), 254-59; Marie Thérèse Seguin, "Pourquoi les revolutionaires ont-ils tranché la tête d'Olympe de Gouges, leur compagne," in *Femmes et pouvoir: Réfléxions autour d'Olympe de Gouges*, ed. Shannon Hartigan, Rea McKay & Marie Thérèse Seguin (Moncton: New Brunswick: Les Éditions d'Acadie, 1995), 18, 33-35; Lisa Beckstrand, *Deviant*

Gouges was charged with composing a work contrary to the desire of no less than the entire nation, and her work deemed a threat to the third republic – which incidentally assigns the legal status of "minor" to married women.[152] By demanding equal rights, De Gouges was in effect escaping from the position assigned to her as woman and consequently reprimanded for daring to bypass the virtues attributed to women.[153] It in fact took French women no less than another 150 years to be granted the right to vote.[154] A look at the position of women in the quasi-sacrosanct Code Napoleon of 1804 – which forms the basis of many legal systems – yields astonishing results. The Code Napoleon relegates women to a position of legal incapacity whereby they share the same rights as criminals, the mentally ill, and children.[155] To the question "what is a woman?"

Women of the French Revolution and the Rise of Feminism (New Jersey: Rosemont Publishing & Printing Corp, 2009), 97, 121; History and Women, "Olympe de Gouges," 18 February 2011, http://www.Historyandwomen.com/2011/02/olympe-de-gouges.html (accessed April 15, 2011); Marie Josephine Diamond, "The Revolutionary Rhetoric of Olympe de Gouges," *Feminist Issues* (1994): 3-23; Shirley Elson Roessler, *Out of the Shadows: Women and Politics in the French Revolution 1789-95* (New York: Peter Lang Publishing, Inc., 1996), 67.

[152] Hartog, *Man and Wife*, 25.

[153] Jone Johnson Lewis, "Olympe de Gouges and the Rights of Woman," last revised 12 December 2008, http://womenhistory.about.com/library/weekly/aa071099.htm (accessed May 30, 2009); Joan W. Scott, 'A Woman who has Only Paradoxes to Offer': Olympe de Gouges Claims Rights for Women," in *Rebel Daughters: Women and the French Revolution*, ed. Sara E. Melzer & Leslie W. Rabine (Oxford: Oxford University Press, 1992), 115. For the full accusation act, see Jean Paul Doucet, "Procès de Marie-Olympe de Gouges Devant le Tribunal Révolutionnaire," http://ledroitcriminel.free.fr/le_phenomene_criminel/crimes_et_procescelebres/fichiers/gouges_acte_accusation.pdf (accessed April 15, 2011); Jeremy D. Popkin, *A Short History of the French Revolution* (New Jersey: Pearson Education, 2006), 88-89.

[154] French women were granted the right to vote in 1944. In the case of the United Kingdom, women over 30 years of age were first given the vote in 1918. They were allowed to vote on the same terms as men in 1928. Spain extended the ballot to women in 1931. As for Belgium, Italy, Romania, and Yugoslavia, they waited until 1946. Switzerland gave women the right to vote in 1971, and women remained disenfranchised in Liechtenstein until 1984. For more, see Stanton, *Concise History*, 6:713, 715,724, 750, 752, 765, 766, 769, 770, 771-804.

[155] The Code Napoleon or French Civil Code was enacted in 1804 and drew upon Roman Law. Articles 1123 and 1124 of the Code Napoleon dictate that: (1123) "*Toute personne peut contracter si elle n'en est pas déclarée incapable par la loi.*" (1124) "*Les incapables à contracter sont, Les mineurs, Les interdits, Les femmes mariées, dans les cas exprimés par la loi, Et généralement tous ceux auxquels la loi a*

Napoleon is reported to have replied that a woman is a second class being when she is single and a minor when married.[156] Even more, Napoleon – addressing the topic of marriage at the Council of State – affirmed that the wife belongs to the husband "body and soul" in the same way that "the fruit tree belongs to the gardener." In his view, it is nature that made women men's slaves. Consequently, the husband has total control over who his wife can see and is entitled to forbid his wife from going out.[157] To cite but a few examples, the Code Napoleon dictates that a woman is (1) not entitled to access schools and universities, (2) incapable of signing a contract and administering her worldly goods, (3) not entitled to political rights, (4) forbidden to work without her husband's approval, (5) unable to dispose of her own salary, and (6) forbidden to travel without her husband's permission.[158] The Code Napoleon also requires that the father consent to the marriage of his daughter – regardless of her age – and forbids a woman from working without the approval of her husband.[159] It should also be emphasized that the Code Napoleon goes so far as to allow the husband physical control over his wife.[160] Interestingly, it has been suggested

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interdit certains contrats." See *Code civil des Français*, 4 vols. (Paris: Imprimerie Impériale, 1804), 1:209.

[156] Association Thucydide, "Les Femmes et la République en France," http://www.thucydide.com/realisations/comprendre/femmes/femmes4.htm (accessed April 19, 2010).

[157] Patrick Weil, *Qu'est-ce qu'un Français? Histoire de la nationalité Française depuis la révolution* (Paris: Gallimard, 2002), 319.

[158] M. F. P. Herchenroder, "The Capacity of Married Women in French Law," *Journal of Comparative Legislation and International Law* 20, 4 (1938): 196-98; de Beauvoir, *Second Sex*, 115, 130, 142.

[159] *Code civil*, 3:200; Marion Musso, "Le Féminisme," http://xlab.club.fr/femi.html (accessed December 4, 2007).

[160] That the French husband enjoyed physical control over his wife also seems to have contributed to the elaboration of the notion of *bayt al-ṭā'a* (see supra note 147). This point will be discussed in more detail in the next chapter ("Colonization and its Effects on Women and the Law," 42-82). For more on French law and *bayt al-ṭā'a*, see Amira el-Azhary Sonbol, "The Woman

that this last right emanated from the failure of Napoleon to control his own beloved Josephine.[161]

Even the advent of the enlightenment had not obliterated the notion that women were a lower breed, subservient to men. Thus, while Jean Jacques Rousseau (d. 1778) asserted that women are made to please men and be subjugated by them,[162] Immanuel Kant (d. 1804) argued that women should be denied the right to citizenship as they lack the moral capacity to achieve full maturity.[163] In the opinion of Kant, the woman must be alienated from the state and subjected to her husband and master – who in turn "acquires" her through marriage.[164] Later, even the revered Charles Darwin (d. 1882) asserted that women are biologically and intellectually inferior to men.[165] It was not until 1907 that a married French woman was allowed to dispose of her own salary.[166] In 1938, French women acquired a "restrained" legal capacity and were consequently allowed to testify in court.[167] As for the right of a French woman to control her own property, this was granted to her only in 1965.[168]

Follows the Nationality of her Husband: Guardianship, Citizenship and Gender," *Hawwa* 1,1 (2003): 112.

[161] Pierre Picarda, "The Status of French Women in France," *Transactions of the Grotius Society* 24 (1938): 71-79.

[162] Jean Jacques Rousseau, *Émile ou de l'éducation*, ed. J.L. Lecercle (Paris: Éditions Sociales, 1958), 224.

[163] Pateman, *Sexual Contract*, 77-115, 168-69.

[164] Ibid., 169-70.

[165] Charles Darwin, *The Descent of Man* (London: John Murray, 1901), 858.

[166] While a married woman was allowed to retain the proceeds of her work in 1907, she was also required to share household expenses with her husband. See Herchenroder, "Capacity," 198.

[167] Ibid., 196-203.

[168] As mentioned previously, the right to vote was granted to French women in 1944 (see supra note 154). As for political equality, it took the advent of the millennium for men and women to be on a par. Passed on June 6th 2000, Law 2000-493 promotes equal political representation between men and women to electoral office and elective positions. For more, see the official

The point here is that European women were at an evident disadvantage compared to their Ottoman counterparts who – as demonstrated above – owned property, retained full control of it after marriage, and enjoyed a separate legal capacity whether they married or not. Besides, it is only recently that European women were able to acquire many of the rights freely enjoyed by European men. The situation of contemporary women living under Islamic law, however, provides a stark contrast, as women seem to have lost rights they freely enjoyed in earlier times and are now desperately striving to obtain rights that their (previously disadvantaged) European counterparts have managed to acquire.

The fact that women living under Islamic law today are worse off than their European counterparts is attributed to the belief that Islam is responsible for rendering the situation of women across the Islamic world as deplorable and pitiable as it all too often is. Yet, while Islam is often blamed for the desolate situation of Muslim women, it was precisely from Islamic tenets, as propounded and expanded by the jurists, that Muslim women derived more rights than their pre-colonial counterparts – such as inheriting, retaining their legal identity and all property after marriage, and maintaining their entitlement to a *mahr* and *nafaqa*.[169] However, this flexible and sympathetic approach witnessed a drastic change following the advent of colonization, when the unfortunate condition of 19th century European women, imported by the colonizers, was slowly adopted by indigenous populations, and later defended by local *qāḍī*s. The following

website of the French National Assembly, Assemblée Nationale Française, http://www.assemblee–nationale .fr/dossiers/parite/mandats.asp (accessed June 8, 2009).

[169] See section 1.2 "Islamic Law and its Application under the Ottomans," 18-33.

chapter addresses the effects of European colonization on Islamic law, focusing especially on the concomitant changes brought to Lebanese law and their repercussions for contemporary Lebanese women and their rights.

Chapter Two: Colonization and its Effects on Women and the Law

Fundamental to colonialism as a cultural project is the idea of a "civilizing mission," a notion whereby indigenous populations are brought closer to modernity by the colonizing forces.[170] In the case of the Islamic world, women were often used as an excuse to justify colonial presence.[171] Colonialism was sustained and validated by Orientalism – an institutional device used to define and depict the "Other." In his groundbreaking *Orientalism*, the late Edward Said (d. 2003) argued that the study of the Orient, a Western academic preoccupation, is itself not devoid of prejudice.[172] Pace Hegel (d. 1831),[173] Said demonstrates that the colonizers defined themselves based on denial of the colonized's difference.[174] The representation of the oriental subject as the "Other" – allowed for a binary form of thinking whereby the Orientals were treated as primitive, backward, and unrefined people, deserving of no freedom.[175] Europeans defined themselves in opposition to Orientals, viewing

[170] John Strawson, "Encountering Islamic Law," 17-21, http://www.witnesspioneer.org/vil/Articles/ shariah/jsrps.html (accessed April 15, 2010).
[171] See supra note 4.
[172] Amongst such authors are Silvestre de Sacy (d. 1838), François-René de Chateaubriand (d. 1848), Gerard de Nerval (d. 1855), Edward William Lane (d. 1876), Gustave Flaubert (d. 1880), Ernest Renan (d. 1892). Even Ignaz Goldziher (d. 1921), Duncan Black McDonald (d. 1943), Carl Becker (d. 1933), C. Snouk Hurgronje (d. 1936), and Louis Massignon (d. 1962) – who undeniably contributed to the study of Islam – were all convinced of Islam's "inferiority." For more, see Edward W. Said, *Orientalism* (New York: Pantheon Books, 1978), 15, 123-97, 208.
[173] Hegel argues that the subject is itself constructed through the "Other" (G.W.F. Hegel, *The Phenomenology of Mind*, trans. J.B. Baillie (New York: Humanities Press Inc, 1964), 162-78, 231-40). While Hegel does not claim that the other is differently constituted, Derrida (in his deconstruction of Western metaphysics) identifies a "binary structure" recognizing the "Other" as different. For more on the concept of the "Other," see Mayda Yeğenoğlu, *Colonial Fantasies: Towards a Feminist Reading of Orientalism* (Cambridge: Cambridge University Press, 1998), 6-9.
[174] Yeğenoğlu, *Colonial Fantasies*, 7.
[175] Said, *Orientalism*, 39-44, 206.

themselves as sophisticated, rational, and civilized.[176] Said argues that the biased approach of these scholars culminated in reconstituting the "Orient" as a European invention characterized by exoticism and romance.[177] Developing this, Said expands on Foucault's relationship between power and knowledge, identifying "close ties between Western knowledge and its will to power."[178] One of Said's main arguments is that Orientalism was precisely what helped produce European imperialism. The very study of the Middle East by Western scholars was in itself an imperialist act as it contributed to the Western perception of Arabs and Muslims as inferior.[179] Ultimately, what Europe achieved was the imposition of its own literary culture and ideology upon "Orientals," while belittling, and gradually displacing, indigenous cultures.[180]

The intellectual effects of Orientalism's colonial discourse were indeed such that they were endorsed and reproduced by indigenous intellectuals. The colonized were quick to endorse the belief that they were inferior beings in need of being civilized by the Europeans.[181] As for the colonizers, they portrayed the indigenous populations as people aspiring to Western standards and values.[182] This infatuation with the West was accompanied by a denigration of local values and culture, an attitude still encountered today. Case in point, the

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[176] Ibid., 67-72.
[177] Ibid., 31-110, 113-23.
[178] Ibid., 3, 12, 59; Yeğenoğlu, *Colonial Fantasies*, 14-15.
[179] Edward W. Said, *Culture and Imperialism* (New York: Knopf, 1993), 191-209, 220-24.
[180] Ibid., 15-17, 42.
[181] Frantz Fanon, *Les damnés de la terre* (Paris: François Maspero, 1974), 153. In fact, Lisa Pollard argues that the Egyptians used the reform of "family politics" (matters pertaining to polygamy and seclusion) to demonstrate to the British that they were now ready for self-rule. See Lisa Pollard, "The Family Politics of Colonizing and Liberating Egypt, 1882-1919," *Social Politics* 7, 1 (Spring 2000): 48-49.
[182] Said, *Culture*, 191-209, 220-24.

plethora of modern-day works by professional Egyptian historians as well as school textbooks used to teach Egyptian national history that reveal a clear acceptance of the Orientalist discourse by these indigenous authors themselves.[183] As a result, new generations of Egyptians are currently being taught a version of history wherein Europe is praised for civilizing the Egyptians and for saving them from the despotic, chaotic, and utterly archaic Turkish rule. Consequently, hundreds of years of Ottoman rule with all its cultural achievements and advances were wiped away. This is not to say that the Ottomans did not have their shortcomings, but the colonizers capitalized on negative aspects of Ottoman rule. The condescending language used by Egyptian historians when referring to their own people and past is contrasted with eulogy when describing the French and British.[184] Yet in order for the Europeans to increase their colonial economic and commercial activities, interference with the indigenous legal system proved necessary.[185] This infatuation with the Europeans was in fact not particular to Egypt. In the case of Lebanon, it is evidenced on a number of levels, varying from the social and linguistic to the legal. It is to the latter that we now turn.

[183] Piterberg, "Tropes," 48-50, 56-57.
[184] Ibid., 52-53, 60.
[185] Hallaq, *Sharīʿa,* 358; David S. Powers, "Orientalism, Colonialism and Legal History: The Attack on Muslim Family Endowments in Algeria and India," *Comparative Studies in Society and History* 31, 3 (July, 1989): 531-71; Allan Christelow, *Muslim Law Courts and the French Colonial State in Algeria* (Princeton, N.J.: Princeton University Press, 1985), 1-2.

2.1 Colonizing the Law

The power of the new nation-states of Western Europe in the nineteenth century was such that it was able to subdue and colonize nine-tenths of the globe and consequently an overwhelming majority of the Muslim world.[186] Colonial administrators, supported by Orientalist scholars, asserted that the Sharīʿa was deficient, inoperative, and totally disconnected from society.[187] It was this very claim that was used to justify the colonizers' intervention in the local legal sphere, forever altering one of Islam's greatest achievements – the Sharīʿa.[188]

While Muslims believe that the Qur'ān was revealed to Muḥammad by God and therefore represents the very word of God, the fact that it addresses only some aspects of everyday life while containing a limited number of positive rulings required hermeneutical intervention. Consequently, the role of the pre-modern Muslim jurists was to elaborate a complete way of life (featuring legal, moral, and other prescriptions) based on clues provided in the Qur'ān and the *Sunna* (practice of the Prophet).[189] Human intervention in the interpretation of the texts resulted in a plurality of opinions, sometimes even contradictory ones,

[186] Hallaq, *Sharīʿa,* 358.

[187] Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 135-48, 150; Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1982), 56, 76-85, 100. For comments on these assertions, see Powers, "Orientalism," 535; Wael B. Hallaq, "The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse," *UCLA Journal of Islamic and Near Eastern Law* 2, 1 (2002):1; idem, *Sharīʿa,* 1-6, 445; Strawson, "Encountering," 9-14.

[188] Hallaq, *Sharīʿa*, 118.

[189] For a fascinating overview of the history of *Sunna*, see the work of Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 46-56.

constituting what is known as the Sharīʿa (path).[190] It is this plurality and the acceptance of a multiplicity of sources that led to flexibility in the application of law, as demonstrated in an earlier part of this dissertation.[191]

European interference in the Islamic legal sphere began towards the end of the eighteenth-century, when Ottoman rule had grown weak and the authorities were in desperate need of preserving some degree of power.[192] At that point, the European powers, with the aid of Ottoman rulers, slowly began a process of undermining Sharīʿa, which was rendered marginal and ultimately totally neutralized.[193] The first step was the implementation of a series of capitulation agreements whereby Europeans were exempted from the jurisdiction of Ottoman courts.[194] This was followed by the integration of mixed courts that were reverted to when one of the parties involved was European or when European interests were at stake.[195] European codes were at the same time gradually introduced in most areas of the law, often without any attempt to adapt them to the new setting and culture.[196] Only family-related matters were spared, allowing Muslims who felt threatened by modernity and Western

[190] Wael B. Hallaq, *An Introduction to Islamic Law* (Cambridge; New York: Cambridge University Press, 2009), 27, 165, 169.
[191] For more, see section 1.2, "Islamic Law and its Application under the Ottomans," 18-33.
[192] Maurits H. Van den Boogert, *The Capitulations and the Ottoman Legal System: Qadis, Consuls and Beraths in the 18th Century* (Leiden; Boston: Brill, 2005); Mark S.W. Hoyle, *Mixed Courts of Egypt* (London; Dordrecht; Boston: Graham & Trotman, 1991), 1-11.
[193] Hallaq, *Sharīʿa,* 429.
[194] Van den Boogert, *Capitulations*, 35-38.
[195] Hoyle, *Mixed Courts*, 1-11; Anver M. Emon, "Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation," *La revue du barreau Canadien* 87 (2008): 13-14; Juan Ricardo Cole, *Colonialism and Revolution in the Middle East: Social and Cultural Origins of Egypt's 'Urabi Movement* (Princeton, N.J.: Princeton University Press, 1993), 65-66, 81-83.
[196] Wael B. Hallaq, "Muslim Rage and Islamic Law," *Hastings Law Journal* 54 (2002-03): 1713; idem, *Sharīʿa,* 371-95.

influence to believe that their Islamic identity was being preserved.[197] Yet, the truth of the matter is that family law – today viewed by contemporary Muslims as authentic – underwent profound alterations, changes that severed it from *fiqh* itself and the very methodology through which it had long operated.[198] Even the terminology for this law was replaced with the notion of "personal status" (a concept according to which each individual follows the laws of its sect), itself of European manufacture.[199]

A survey of pre-modern legal works reveals that, in addition to standard contractual agreements covering a wide spectrum of human transactions, a vast array of matters ranging from washing and praying to dining etiquette and hunting were treated in the Sharīʿa.[200] Thus, pre-modern jurists elaborated a system that regulated the everyday lives of Muslims, one that was not confined to strictly legal matters in the way that one would expect law to operate in the

[197] Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton; Oxford: Princeton University Press, 2008), 69; Judith E. Tucker, *Women, Family, and Gender in Islamic Law* (Cambridge: Cambridge University Press, 2008), 65; Hallaq, *Sharīʿa,* 371, 445-46.

[198] Hallaq identifies 5 types of devices that led to the alteration of pre-modern Islamic law and how it had long operated: (1) the concept of *ḍarūra* (necessity) as it was transported to the realm of legal theory and made to regulate the construction and operation of positive law, (2) a procedural device whereby claims are excluded from judicial enforcement, giving the nation-state an unprecedented right to control the law of procedure as well as legal administration, (3) the use of *takhayyur* (selection) and *talfīq* (amalgamation), (4) reverting to neo-*ijtihād* (an interpretative approach largely free of traditional legal interpretation (Hallaq, *Introduction*, 117), such as limiting the period of conception to one year – versus up to 4 years in the opinion of most schools of law, and (5) validating any law that does not contradict Sharīʿa. For more on these devices and their effects, see Hallaq, *Sharīʿa,* 447-50.

[199] The concept of personal status originated in the Middle Ages, when newly independent, former Roman provinces favoured the application of their customs and traditions as opposed to Roman Law. Consequently, and in order to accommodate those who were to travel to other provinces, rules pertaining to material matters were classified under "Real Status" (*Statuts Reéls*), and those dealing with personal concerns under "Personal Status" (*Statuts Personnels*). Frequent travellers were required to apply the personal status laws of their place of origin; see Bachīr al-Bīlānī, *Qawānīn al-Aḥwāl al-Shakhṣiyya fī-Lubnān* (Cairo: Maʿhad al-Buḥūth wal-Dirāsāt al-ʿArabiyya, Qism al-Buḥūth wal-Dirāsāt al-Qānūniyya wal-Sharʿiyya, 1971), 9-13.

[200] Hallaq, "Muslim Rage," 1707.

West.[201] Nor was the function of the jurists limited to the elaboration of the law, for they were also entrusted with handling communal matters and controlling charitable endowments.[202] Moreover, while certain aspects of society were regulated by pre-modern jurists in accordance with the Sharīʿa, the political and military spheres were under the control of the ruler, thus allowing the law and what then functioned as a state to remain as two separate entities while operating in tandem.[203] This "symbiosis" between Sharīʿa and *siyāsa* (administration)[204] was further made possible by the considerable financial independence of the jurists from the state, an independence that they achieved through the control of *waqf*s.[205] As a result, elaborating and teaching the law was entrusted to the jurists who perpetuated a moral influence on *siyāsa*.[206]

Under colonialism, this arrangement was turned upside down. Whether foreign codes replaced certain areas of Sharīʿa or whether existing laws were abridged and codified, the effect was one and the same: Muslims could no longer rely on the diverse opinions elaborated by the jurists, but had to conform to a predetermined set of regulations.[207] Islamic law was thus transformed from a vast literature handled by qualified jurists with the authority and training necessary to shape it to the needs of the prevailing times and local customs, into

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[201] Hallaq, *Introduction*, 28.

[202] Emile Tyan, "Judicial Organization," in *Law in the Middle East*, ed. Majid Khadduri and Herbert J. Liebesny (Washington DC: Middle East Institute, 1995), 236-78; Wael B. Hallaq, "Juristic Authority vs. State Power: The Legal Crisis of Modern Islam," *Journal of Law and Religion* 19,2 (2002-03): 243-58.

[203] Feldman, *Fall and Rise,* 35; Hallaq, "Muslim Rage," 1710.

[204] Matters such as military taxes, land, treasury, and the *maẓālim* courts (tribunals of grievances) were entrusted to *siyāsa*. See Hallaq, *Sharīʿa,* 208-16.

[205] Ibid., 135-58, 197-221.

[206] Knut Vikør, *Between God and Sultan* (London: Hurst & Co., 2005), 168-84; el-Nahal, *Judicial,* 5-8.

[207] Hallaq, *Sharīʿa*, 366-70.

a rigid and codified system.[208] The pre-modern law was not the only institution made redundant; the very organizing principle that had elaborated it and enabled it to adapt constantly to social developments was also swept away.[209] The pre-modern jurists were in fact stripped of their financial means and slowly left to their own devices. This process started with the confiscation by the central government of charitable trusts – essential to their financial independence – in the early nineteenth century.[210] The *madrasa*s (law colleges)[211] became centralized and were poorly funded, which in turn lowered the standards of education.[212] The vacuum left by the disappearance of the pre-modern jurists was quickly filled by a new elite – trained and ready to take over using the new European-inspired system of hierarchical courts and codes.[213] Yet, without the education, hermeneutic, and knowledge that pre-modern jurists once possessed, what was left of the Sharīʿa (however Islamic) became a rigid text, totally disconnected from social reality.[214]

The considerable moral and epistemic authority that pre-modern jurists enjoyed was altered and placed, along with political affairs, in the hands of the nation-state – yet another alien concept and institution.[215] Codification of the

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[208] Annelies Moors, "Debating Islamic Family Law: Legal Texts and Social Practices," in *Social History of Women and Gender in the Modern Middle East*, ed. Margaret L. Meriwether and Judith E. Tucker (Colorado: Westview Press, 1999), 142.
[209] Hallaq, "Juristic," 243-58.
[210] Powers, "Orientalism," 536-38.
[211] For more on the *madrasa*, see Hallaq, *Sharīʿa,* 153-60.
[212] Hallaq, *Sharīʿa,* 438.
[213] Scott Alan Kugle, "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia," *Asian Studies* 35, 2 (2001): 283.
[214] Hallaq, *Sharīʿa,* 369-70.
[215] Wael B. Hallaq, "Can the Sharīʿa be Restored?" in *Islamic Law and the Challenge of Modernity*, Y. Yazbeck Haddad and B. Freyer Stowasser, eds. (Walnut Creek: AltaMira Press, 2004), 23.

law granted the nation-state considerable control over the elaboration of the law.[216] Its application was in turn left to the newly trained jurists who were only qualified to handle those laws drafted by the powers-that-be.[217] Whatever remained of the Sharīʿa was distorted and re-shaped in order to fit the standards and needs of the nation-state. In his most recent work, Wael B. Hallaq astutely describes the latter as a powerful institution delineating what is lawful and what is not, promoting and asserting through its own educational channel those beliefs that were made official, and creating obedient and efficient citizens.[218] Hallaq correctly argues that the nation-state and the Sharīʿa cannot possibly co-exist. As a matter of fact, while Islamic law may tolerate some competition on the administrative level, the nation-state clearly rejects such meddling.[219] Hallaq depicts the encounter of the Sharīʿa with the newly introduced concept of the nation-state as nothing less than "the most pervasive problem in the legal history of the modern Muslim world,"[220] asserting that all problematic issues pertaining to the formerly colonized entities are reminiscent of the discord that exists between the indigenous systems and the colonial imports that came to characterize the nation-state.[221]

The colonizers, whether to better control dominated lands and secure an irreversible access to indigenous resources, or to attain some level of political and economic stability, or even to "civilize" the indigenous people they

[216] Feldman, *Fall and Rise,* 67; Hallaq, *Sharīʿa,* 367-70.
[217] Feldman, *Fall and Rise,* 79; Hallaq, "Can the Sharīʿa be Restored?" 22-26.
[218] Hallaq, *Sharīʿa,* 357.
[219] Ibid., 357-70.
[220] Ibid., 359.
[221] Ibid., 360.

encountered, sought to establish their own laws and institutions.[222] The denigration of the local system, along with the persistent and systematic claim that Islamic law was archaic, idealistic, and completely divorced from society, paved the way for such foreign interference.[223] The so-called inability of Islamic law to adapt to societal needs was attributed to the presumed closure of the gates of *ijtihād*, a concept that Hallaq has successfully challenged.[224] Be that as it may, the legal system that had long prevailed was either altered or totally replaced.[225] The colonizers, aided in most cases by local agents, implemented new systems based on a European understanding of, and experience with, the law, and in the process altered facets of life in such a way as to shape indigenous people and their institutions according to colonial design.[226]

Whether by force or imitation, the model of the nation-state was implanted in the Muslim world, and this new and all-encompassing system was now entrusted with upholding and ascertaining these newly introduced laws and ideals.[227] The state, sustained by its partner, nationalism, granted itself the unilateral right to make and apply the law.[228] Created as a masculine entity that subordinates the feminine, the nation-state left women at an obvious

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[222] Kugle, "Framed," 271; Hallaq, *Sharī'a,* 358.
[223] Hallaq, *Sharī'a,* 445.
[224] Wael B. Hallaq, "Was the Gate of Ijtihad Closed?" *IJMES* 16, 1 (March 1984): 3-41; Idem, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 24-56, 62-63; Baber Johansen, "Legal Literature and the Problem of Change: The Case of the Land Rent," in *Islam and Public Law*, ed. Chibli Mallat (London: Graham and Trotman, 1993), 29-47.
[225] Hallaq, *Sharī'a,* 369-70.
[226] For a detailed study on Lebanon, see the work of Elizabeth Thompson, *Colonial Citizens: Republican Rights, Paternal Privilege, and Gender in French Syria and Lebanon* (New York: Columbia University Press, 2000).
[227] Hallaq, *Sharī'a,* 450.
[228] Ibid., 357-70, 450.

disadvantage.[229] As a case in point, the French Civil Code that represented the guidelines upheld by the French nation and that was used for inspiration across the Ottoman Empire declared the man to be "the head of the family."[230] As far as nationalists and the new elites were concerned – the entities that later replaced the colonizers – they in fact had no interest whatsoever in sharing the power they were about to appropriate.[231] To be sure, the new ruling power negotiated with the colonizers at the expense of minorities – women being one of them.[232] Women were used by the elites and nationalists and were made to represent the nation and ensure its continuation.[233] Women were relegated to the private sphere and required to reproduce the nation for the male citizen.[234] As a result, the emerging nation-state replicated its predecessor's patriarchal structure and

[229] Hallaq argues that nationalism is a "masculine conception that subordinates the feminine." Based on the purity of the "blood of a nation," and the importance of the sperm in achieving that goal, it was the man who determined national attributes. See Hallaq, *Sharīʿa*, 450-51. For more on the masculine nature of nationalism, see Joseph A. Massad, "Conceiving the Masculine: Gender and Palestinian Nationalism," *Middle East Journal* 49, 3 (Summer, 1995): 471, 480-81; Joane Nagel, "Masculinity and Nationalism: Gender and Sexuality in the Making of Nations,"*Ethnic and Racial Studies* 21, 2 (March 1998): 248-49, 251-52.

[230] *Code civil*, 3:200; Hallaq, *Sharīʿa,* 453.

[231] Hallaq, *Sharīʿa,* 359.

[232] Thompson, *Colonial Citizens*, 3.

[233] While women were made to represent the nation, they were also denied access to the political sphere. See Thompson, *Colonial Citizens*, 113-16, 150-53, 272; Joseph A. Massad, *Colonial Effects: The Making of National Identity in Jordan* (New York: Columbia University Press, 2001), 55. In fact, Beth Baron reveals that Egyptian women were absent from a national ceremony celebrating a sculpture in which the figure of a woman represented the nation. See Beth Baron, *Egypt as a Woman: Nationalism, Gender, and Politics* (Berkeley: University of California Press, 2005), 1-2.

[234] Hallaq, *Sharīʿa,* 451; Russell, *Creating*, 84; Massad, "Conceiving," 475; idem, *Colonial*, 82; Nagel, "Masculinity," 252-53; Omina el-Shakry, "Schooled Mothers and Structured Play: Child-Rearing in Turn of the Century Egypt," in *Remaking Women: Feminism and Modernity in the Middle East*, ed. Lila Abu-Lughod (Princeton: Princeton University Press; Cairo: American University in Cairo Press, 1998), 126-70; Afsaneh Najmabadi, "Crafting an Educated Housewife in Iran," in *Remaking Women: Feminism and Modernity in the Middle East*, ed. Lila Abu-Lughod (Princeton: Princeton University Press; Cairo: American University in Cairo Press, 1998), 91-125; Marilyn Booth, *May Her Likes Be Multiplied: Biography and Gender Politics in Egypt* (Berkeley, California; London: University of California Press, c2001), 173-79.

perpetuated the colonial gender-biased laws.[235] Thus, and as will become apparent in the following chapter, some elements of *fiqh* were capitalized on to enhance women's oppression while others were simply left out. The fact that women are no longer allowed to insert into their marriage contract any stipulation they deem fit is but one example. The situation varies from one country to the other but, generally speaking (and with the exception of Saudi Arabia), women in Muslim countries can insert only a limited number of stipulations into their marriage contracts.[236] In 1975, a marriage contract containing standard stipulations was introduced in Iran and later reformulated in 1982. A similar contract whereby the couple can agree on various stipulations was proposed by the Egyptian Ministry of Justice in 1995.[237] As for Lebanon, the only two stipulations to be accepted are those allowed by the Ottoman Family Law of 1917, namely that the wife be granted a divorce should her husband take an additional wife, and/or if it later becomes apparent to her that he is not of equal status.[238] Incidentally, a man who wants to take an additional wife is not required to inform his first wife of this new union. He should, however, inform his new wife of his existing marriage(s).[239] And while contemporary judges and legists present these changes – allowing for the legal insertion of *some* stipulations – as a major advancement in the situation of women, the truth of

[235] Fanon, *Damnés,* 57.

[236] For more, see Amira el-Azhary Sonbol, "Ṭā'a and Modern Legal Reform: A Rereading," *Islam and Christian-Muslim Relations* 9,3 (1998): 291; Ron Shaham, "State, Feminism and Islamists - The Debate over Stipulations in Marriage Contracts in Egypt," *BSOAS* 62,3 (1999): 462-83; Hallaq, *Sharī'a,* 127.

[237] Hallaq, *Sharī'a,* 460.

[238] See supra note 119.

[239] This information was provided to me by Samāḥat al-Sheikh Abdel Laṭīf Derian, Head of the Sunnī Court of Personal Status in Lebanon, for whose help I am immensely indebted.

the matter is that a wide range of stipulations was accepted and enforced in the Ottoman past.[240] Not only that, a major and essential *fiqh* ruling that amounts to allowing the insertion of any desired stipulation finds itself completely ignored. Indeed, the woman's right to request a *tafwīḍ*[241] is not publicized or made a requirement by the Lebanese nation-state (or any other for that matter), when it would legally and Islamically allow the wife to divorce her husband anytime she deems it fit. Clearly, should contemporary nation-states ever wish to accommodate women as fully as they claim to, they can start by informing women of the recourse to *tafwīḍ* – if not make it a standard stipulation in all marriage contracts. Indeed, despite the nation-state's claim to want to enhance the situation of women as best it can under Islam, the situation of contemporary Lebanese women at least has witnessed nothing less than degradation.[242] This regression is further enhanced by the "modern" requirement that the contemporary Lebanese nation-state conform exclusively to the Ḥanafī school of law.[243] In defense of contemporary *qāḍī*s, their current position is mainly a result of the creation of a contemporary generation of jurists ill-informed and unable to understand those mechanisms previously upheld. The disappearance of major institutions such as *waqf* and the *madrasa*s, and the judges' consequent dependence on the nation-state, must also be taken into consideration. All these

[240] For more on the acceptance of stipulations, see section 1.2, "Islamic Law and its Application under the Ottomans," 18-33.
[241] See supra note 109.
[242] For more on the effects of reform on Lebanese women, see sections 4.3 "*Zinā* in the Lebanese Penal Code," 146-55, and 4.4 "'Crimes of Honour' in Contemporary Lebanon," 155-67.
[243] A discussion pertaining to the application of Islamic law in post-colonial Lebanon follows in the next section (2.2 "The Application of Islamic Law in Post-Colonial Lebanon," 56-65).

drastic changes prepared the ground for the modern application of Islamic law in Lebanon.

2.2 The Application of Islamic Law in Post-Colonial Lebanon

As mentioned previously, while Ottoman judges generally applied Ḥanafī legal doctrine as the official school of the Empire, their judgments were not always limited to the teachings of that school.[244] *Qāḍī*s often chose to uphold opinions emanating from other schools of law precisely in order to accommodate a certain social fact and provide those women in need with more legal options.[245] This started to change when the Ottomans – in an effort to reproduce the European legal system – elaborated a codified Family Law known as the Ottoman Family Rights Law of 1917 (*Qānūn Ḥuqūq al-'Ā'ila al-'Uthmānī*).[246] Based on Ḥanafī *fiqh*, this new law was in effect drafted to regulate matters pertaining to marriage and divorce in a short, concise, abridged manner.[247] As a result, the

[244] This was true in the realm of marriage as in order to widen the scope of what was deemed acceptable by the Ḥanafī school as grounds for divorce, Ottoman judges accepted the insertion of stipulations and validated decisions emanating from other schools of law (el-Nahal, *Judicial*, 46-47; Hanna, "Marriage," 148; Tucker, "Revisiting," 12-13). Also see, Amira el-Azhary Sonbol, "Adults and Minors in Ottoman *Shari'a* Courts and Modern Law," in *Women, the Family, and Divorce Laws in Islamic History*, ed. Amira el-Azhary Sonbol (Syracuse: Syracuse University Press, 1996), 238.

[245] Hanna, "Marriage," 148; Tucker, "Revisiting," 12-13; el-Nahal, *Judicial*, 46-47.

[246] The text of the Ottoman Family Law of 1917 is available in the translation of 'Ārif Afandī Ramaḍān, *Majmū'at al-Qawānīn: Taḥtawī 'alā Jamī' al-Qawānīn al-Ma'mūl bi-Mūjabihā fī Jamī' al-Bilād al-'Arabiyya al-Munsalikha 'an al-Ḥukūma al-'Uthmāniyya* (Beirut: al-Maṭba'a al-'Ilmiyya, 1927), 353-73. The effects of the Ottoman Law of 1917 are discussed at length in Hallaq's *Sharī'a*, 454-73; and Tucker's, "Revisiting," 4-17.

[247] Lamia Rustum Shehadeh, "The Legal Status of Married Women in Lebanon," *IJMES* 30, 4 (1998): 501-19; Akram Yāghī, *Qawānīn al-Aḥwāl al-Shakhṣiyya ladā al-Ṭawā'if al-Islāmiyya wal-Masīḥiyya Tashrī'an wa Fiqhan wa Qaḍā'an* (Beirut: Maktabat Zein al-Ḥuqūqiyya wal-Adabiyya, 2008), 59-60; Marie Rose Zalzal, "Secularism and Personal Status Codes in Lebanon," *Middle East Report* 203 (Spring, 1997): 37.

flexibility that was once the hallmark of Islamic law was made to vanish.[248] The Lebanese nation-state adopted the Ḥanafī school of law (in accordance with the Ottomans), yet it also upheld the principle of a uniform system whereby all *qāḍī*s across Lebanon had to adhere *exclusively* to Ḥanafī *fiqh*.[249] As a result, the acceptance of any other school's doctrine became inconceivable. Considering only the Sunnī position for the purposes of this study, it should be noted that personal matters are today mainly regulated by this 1917 law and the legal corpus of the Ḥanafī school.[250] In practice, however, contemporary Lebanese *qāḍī*s usually restrict their understanding of Ḥanafī *fiqh* to the compiled code of Qadrī Bāshā (d. 1305/1888) – minister of justice under the Ottomans.[251] Thus, the vast Ḥanafī literature is now confined to what Qaḍrī Bāshā deemed important enough to figure in his *Book of Family Law*, a three-volume abridgement of Ḥanafī law.[252] Article 111 of the Decree-Law 241 dated November 4th 1942, which regulates the organization and procedures for the *shar'ī* (both Sunnī and Shī'ī) jurisdictions, provides that: "The Sunnī Judge delivers his judgment on the basis of *arjaḥ aqwāl Abī Ḥanīfa* (the preponderant sayings of Abū Ḥanīfa) unless the

[248] Hallaq, *Sharī'a,* 368-70.

[249] I am heavily indebted to the Badri and Salim el-Meouchi Law Firm whose team kindly provided me with valuable information pertaining to the application of the law in contemporary Lebanon. I especially thank Chadia el-Meouchi, Maya Tabet Chidiac, Melynda bou-Aoun, and Mehdi Husseini for their much appreciated help. The information provided above on the current understanding of Sunnī law was confirmed to the Badri and Salim el-Meouchi team by Judge Abdel Aziz al-Shāfi'ī (Judge in the Sunnī Court of Beirut), as well as Doctor Mohamed Noccari (former General Manager of *Dār al-Fatwā*).

[250] There are 18 religious sects in contemporary Lebanon and each of these sects is governed by its own religious laws. Shehadeh, "Legal Status," 501-19; Yāghī, *Qawānīn*, 59-60. For details on the legal situation of contemporary Christian Lebanese women, see the work of Lamia Rustum Shehadeh, "Coverture in Lebanon," *Feminist Review* 76, (April 2004): 83-99.

[251] Yāghī, *Qawānīn,* 65.

[252] Muḥammad Zayd al-Ibyānī, *Sharḥ al-Aḥkām al-Shar'iyya fil-Aḥwāl al-Shakhṣiyya,* 3 vols. (Beirut: Maktabat al-Nahḍa, 1973).

matter at hand is regulated expressly by the Ottoman Family Rights Law, promulgated in October 25, 1917."[253] Therefore, the general rules governing personal status laws for Sunnī Muslims are based on the doctrine of Abū Ḥanīfa (d. 150/767), which constitutes the "common law," whereas the Law of 1917 is referred to as a "special law" drafted expressly to bridge the gaps existing in Ḥanafī *fiqh* and adapt the latter to the needs of Muslim society. As a consequence, the notion of Muslim society maintained by the law in contemporary Lebanon dates back to 1917, as no real measures have been undertaken to adapt the laws applied to the prevailing society. The following example better illustrates the hierarchy that exists between the Law of 1917 and Ḥanafī *fiqh*: while the Ḥanafī school of law approves the validity of a marriage contracted by the *walī*s of two minors of the opposite sex, this is not deemed legal in contemporary Lebanon.[254] Ḥanafī law validates the marriages of male and female minors who have been married by a *walī*, while still entitling them to *khiyār al-bulūgh* (option of puberty, which allows them to request annulment of the marriage upon reaching maturity) – provided that the *walī* is other than the father or paternal grandfather.[255] The Law of 1917, on the other hand, has

[253] This information has kindly been provided by the Badri and Salim el-Meouchi Law Firm. Article 111 has been confirmed by Article 242 of the Law dated July 16, 1962. For more on the significance of *aqwāl* (opinions) – *ṣaḥīḥ*, *rājiḥ*, etc. – see Hallaq, *Authority*, 133-60.

[254] These details were provided from the Badri and Salim el-Meouchi Law Firm.

[255] The Ḥanafī school allows annulments in cases involving *khiyār al-bulūgh* (option of puberty) and *'adam kafā'a* (absence of social parity). Thus, a minor married by a guardian – other than the father or paternal grandfather – is allowed to contest the marriage by requesting its annulment, upon reaching maturity (*khiyār al-bulūgh*). Also, a *walī* is entitled to annul a marriage if the husband's social background is not in harmony with that of his protégée (*'adam kafā'a*). For more, see Muḥammad b. 'Abd al-Wāḥid Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 10 vols. (Beirut: Dār al-Fikr, 1990), 3:200.

expressly denied the validity of such marriages by fixing the minimum marriage age of boys to 17 and girls to 9.[256]

Thus, in contemporary Lebanon, the Law of 1917 prevails and supersedes Ḥanafī *fiqh*. In compliance with the Special Generalibus Derogant, a contemporary Lebanese Sunnī Judge is essentially required to first look into the Law of 1917.[257] In cases where the solution is not provided by this special law, the judge is then required to refer to Ḥanafī *fiqh*. In short, Lebanon generally relies for its law on legal precedent that dates back almost a century or earlier – this in spite of the fact that society has doubtless evolved or at least changed since 1917. One such case is the current position of the law whereby a girl can be married at 9 years of age.[258] Another example is the failure to grant women equal rights by encouraging them to request a *tafwīḍ*.[259] One cannot help but wonder why Ottoman legists sought to adapt the laws to prevailing circumstances whereas their contemporary Lebanese counterparts deem this problematic and are reluctant to accommodate women. As a case in point, while the Law of 1917 allowed women to insert two stipulations in their marriage contracts, all this achieved was to limit such an insertion to *only two*

[256] Article 7 of the Law of 1917 stipulates that: "It is not possible for anyone to conclude a marriage of a minor boy who has not reached 17 years old and the girl who has not reached 9 years of age." See *Majmū'at al-Qawānīn,* 354.

[257] The Special Generalibus Derogant is a general legal principle giving precedence to a special law over a general one. These details have kindly been provided by the the Badri and Salim el-Meouchi law firm.

[258] See supra note 256.

[259] See supra note 109.

stipulations, deeming only this number valid.[260] This is in sharp contrast with the earlier Ottoman practice allowing for the insertion of any number of such stipulations – validating the Ḥanbalī school's position on the matter.[261]

Unfortunately, the Ottoman Family Rights Law of 1917 has proved to have other shortcomings that effectively deprive women of rights they freely enjoyed beforehand.[262] In her assessment of the Ottoman Family Rights Law of 1917, Judith Tucker has correctly noted that one needs to be a legal expert to recognize the passage on *khul'* – whereas this type of divorce was easily accessible and widely practiced prior to the elaboration of the law of 1917.[263] Another example pertains to a woman's right to divorce following her husband's prolonged absence. Though the law grants such a right after an absence of 5 years, court-records clearly demonstrate that an absence of one year was deemed sufficient by *qāḍī*s of earlier centuries.[264] Moreover, as far as housing is concerned, while the husband is still obliged to provide his wife with a decent shelter, the new law omits the long required and necessary condition of adequate surroundings and neighbours.[265]

In short, whereas Ottoman women often inserted stipulations into their marriage contracts, in the present day this practice – especially when the stipulations appear to contradict what is deemed acceptable by Islamic law –

[260] The Law of 1917 allows women to insert two stipulations into their *nikāḥ*, namely that a wife be granted a divorce should her husband take an additional wife, and/or if it later becomes apparent to her that they are not of equal status. See supra note 119.
[261] El-Nahal, *Judicial,* 46-47.
[262] Hallaq, *Sharī'a*, 122-24; Tucker, "Revisiting," 9-12.
[263] Tucker, "Revisiting," 4-17.
[264] Ibid.
[265] Hallaq, *Sharī'a,* 455.

finds itself either the subject of heated debate, or severely limited by contemporary Muslim states.[266] Given that the Ḥanbalī school is the only one that regularly validates marriage stipulations, Saudi Arabia is among the few Muslim countries to accept them to any wide degree. In the rest of the Muslim world, the only valid stipulations are generally those two sanctioned by the Law of 1917, namely, that a wife be granted a divorce following her husband's taking of an additional wife, and/or that the husband be of the same social status.[267] Thus, it would seem that the contemporary Muslim wife can obtain a divorce if she stipulates that she be divorced upon her husband's remarrying another, not so much as a result of a woman's right to oppose such a union, or because polygamy is not as socially tolerated as it used to be, but, rather, because the Ottoman legislators allowed such an exception in Article 38 of the Ottoman Family Rights Law of 1917. The same applies to the minimum age of marriage. It is precisely because the Ottomans deemed that a boy under 17 and a girl under 9 were too young to enter a marriage agreement that these particular ages became the minimum limits.[268]

In the case of custody, Ottoman practice again compares favourably with the modern approach. In today's Lebanon, children are generally placed with their father (following a break-up) when they reach 7 and 9 years (respectively) for a boy and a girl.[269] Custody age has been extended in favour of the mother in

[266] Shaham, "State," 462-83.
[267] *Majmū'at al-Qawānīn,* 357-59.
[268] See supra note 256.
[269] Ḥanafī law dictates that a woman lose custody of her children upon remarriage, unless the new husband is a *maḥram* (related to the child by consanguinity). Lynn Welchman correctly asserts that Islamic law attributes to the parents different functions whereby the mother is the

some Muslim countries, giving children a few additional years with the female parent, yet children are automatically handed to the father should the mother choose to remarry.[270] This and the modern condemnation of a woman's remarriage tend to prevent contemporary Muslim women from remarrying. By contrast, and as mentioned previously, study of Ottoman Egyptian court-records has revealed that mothers generally kept their children following a divorce regardless of the age of the children and the identity of the new husband (should the woman remarry).[271] The records demonstrate that fathers themselves often renounced custody and pledged to support their children even after the wife married another.[272] New husbands, moreover, regularly agreed to support their wives' children by another father.[273] Thus, it would seem that having children by another man did not prevent women from remarrying, nor did it compel them to lose custody of their offspring.[274]

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custodian of the child whereas the father is considered the child's guardian. See Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam: Amsterdam University Press, 2007), 133-34.

[270] While Law 25 of 1929 pertaining to Egypt extended custody age in favor of the mother, she lost her right of custody upon her remarriage to a non-relative. See Muṣṭafā al-Rāfiʿī, *al-Aḥwāl al-Shakhṣiyya fil-Sharīʿa al-Islāmiyya wal-Qawānīn al-Lubnāniyya* (Beirut: Dār al-Kitāb al-Lubnānī, 1985), 157. Article 20's relevant section of Law 100 of 1985 later replacing Laws 25 of 1920 and 1929 (in the translation of Dawoud Sudqi el-Alami, "Law No.100 of 1985, Amending Certain Provisions of Egypt's Personal Status Laws," *Islamic Law and Society* 1,1 (1994): 127), reads: "A woman's right of custody terminates when a minor boy reaches the age of ten and when a minor girl reaches the age of twelve. After these [respective] ages have been reached, the judge may allow a boy, until the age of fifteen, and a girl, until she marries, to remain in the custody of the woman without payment for custody, if it is apparent that their interests require this."

[271] Zantout, "*Khul*ʿ, 38-40.

[272] Abdal Rehim, "Family," 97-103; idem, *Documents*, 2:54, 69, 72, 76-77, 263.

[273] Abdal Rehim, "Family," 108-09; idem, *Documents*, 2:54, 69, 72, 76-77, 263.

[274] Abdal Rehim, "Family," 108-09; idem, *Documents*, 2:16, 115-16, 185-86.

Despite colonial assertions that reform was necessary to improve the situation of Muslim women,[275] this reform has not always proved to be so accommodating. The reconfiguration of Islamic family law was in fact part of a much larger construction of cultural knowledge featuring a narrative of Islamic law in which reform was the single logical solution.[276] While Norman Anderson argues that reform was necessary to help unhappy Muslim women who – as a result of the rigidity of Ḥanafī law – found themselves stranded in unhappy marriages,[277] the idea that Muslim women were inevitably stuck in unhappy marriages before the introduction of this reform no longer holds.[278] Recent scholarship on the past application of Islamic law has provided us with a picture that differs drastically from that proposed earlier.[279] This is not to say that Anderson's observation of the plight of most contemporary Muslim women is untrue, but it cannot be said of women in the pre-reform era, i.e., under Ottoman administration, and before European influence gathered momentum.[280] Anderson's claim has been countered by later scholars whose methodology is no longer confined to the textual analysis of juridical manuals, but has been enlarged to include the scrutiny of court-records and consequently the past

[275] J.N.D. Anderson, *Law Reform in the Muslim World* (London: The Athlone Press, 1976), 34-42; Schacht, *Introduction*, 100-11.
[276] Hallaq, *Sharīʿa,* 444-45.
[277] Anderson, *Law Reform*, 39.
[278] Abdal Rehim, "Family," 96-111; Jennings, "Women," 53-114.
[279] See the works of Abdal Rehim Abdal Rahman Abdal Rehim, Mary Ann Fay, Haim Gerber, Svetlana Ivanova, Ronald C. Jennings, Huda Lutfi, Margaret Meriwether, Galal el-Nahal, Leslie Peirce, Najwa al-Qattan, Yossef Rapoport, Asli Sancar, Selin Sancar, Elyse Semerdjian, Yvonne Seng, Amira el-Azhary Sonbol, Judith E. Tucker, Mahmoud Yazbak, Fariba Zarinefab-Shahr, Dror Ze'evi, and Madeline Zilfi.
[280] Tucker, "Revisiting," 5, 16; Moors, "Debating," 141-42.

application of Islamic law.[281] In effect, we now know that judges enjoyed more leeway in their *application* of the law (before the advent of codification) and frequently overturned the authoritative, standard doctrines precisely in order to accommodate women.[282] This leeway and flexibility in the application of the law were lost following the adoption of the codification method.[283] While the Ottoman legislators who drafted the Family Rights Law of 1917 legally allowed for the insertion of stipulations into marriage contracts (such as those allowed by Articles 38 and 48), and increased the marriage age for boys to 17 and girls to 9, this did not come without women losing at the same time many of the rights mentioned above. What is more, codifying the law automatically excluded tolerating other stipulations, not sanctioned by the law but widely accepted in earlier times.[284] In addition, very little has been done since to accommodate women, or provide them with additional rights. As a case in point, a girl can, to this date, still be married at 9 years old.[285] In fact, the law is far behind as social custom of marrying girls at the age of 9 no longer holds.

While Ottoman judges – free of the strictures of codification – were allowed leeway in the formulation and application of law, their more "modern"

[281] Abdal Rehim Abdal Rahman Abdal Rehim, Haim Gerber, Svetlana Ivanova, Zouhair Ghazzal, Ronald C. Jennings, Amira Sonbol el-Azhary, Judith E. Tucker, Margaret Meriwether, Mahmoud Yazbak, Fariba Zarinefab-Shahr, Dror Ze'evi, and Madeline Zilfi are amongst these scholars.
[282] El-Nahal, *Judicial*, 46-47; Hanna, "Marriage," 148; Zantout, "*Khul*'," 31-56; Tucker, "Revisiting," 12-13.
[283] Hallaq, *Sharī'a*, 367-69; Feldman, *Fall and Rise,* 66.
[284] Abdal Rehim, "Family," 96-111; el-Nahal, *Judicial*, 46-47; Zantout, "*Khul*'," 31-56.
[285] See supra note 256.

counterparts find themselves far more restricted.[286] Ottoman judges, aware of the changing needs of their society and the growing objection of women to the often quite lawful actions of their husbands (such as taking an additional wife), allowed brides to insert stipulations in their marriage contracts that adapted the *nikāḥ* to their specific situations.[287] Consequently, the Ottomans distanced themselves from Ḥanafī doctrine precisely in order to accommodate the needs of the wife. Unburdened by anything like the "modern" codified view of Islamic law, they seem to have relied on their personal assessment of individual situations and worked to harmonize their laws with society. With this in mind, how can one say that the Sharīʿa is responsible for the legal, mental, political, and social stagnation of the Muslim world? And how can it be so commonly conceived of as a rigid and archaic code of law unable to adapt to a modernizing world, especially when such a depiction runs counter to the Sharīʿa's very essence, which is that of a flexible system not confined by codification but made even more adaptable by the plurality of its sources? This clear difference between the flexible pre-modern understanding and application of the Sharīʿa and the less accommodating contemporary one prompts us to question whether the colonization of the Muslim world by European powers contributed to this alteration, what role the newly introduced concept of the nation-state has had in this change, and how colonization and the rise of the nation-state affected women.

[286] For a discussion on the effects of codified law, see Hanna, "Marriage," 154; Immanuel Naveh, "The Tort of Injury and Dissolution of Marriage at the Wife's Initiative in Egyptian *Maḥkamat al-Naqḍ* Rulings," *Islamic Law and Society* 9,1 (2001): 16-41.
[287] Abdal Rehim, *Documents*, 2:53, 69, 84-85, 86, 125, 206-07, 226-27, 228, 233-34, 263, 276-78, 286, 294-95; Hanna, "Marriage," 148.

2.3 The Effects of Colonization on Lebanese Women's Rights

Contrary to the colonizers' claim of wanting to free Muslim women from the tyranny of Muslim men, the advent of the Europeans did not "save" indigenous women, nor did it grant them more rights.[288] Indeed we have seen how the situation of women in Europe at the time was in itself far less beneficial to women, and it was these archaic and unfair laws that were transferred onto the colonized lands or used as inspiration for change.[289] Most of the Middle East, as a region, emerged as a European-designed entity modeled by its colonizers.[290] At the heart of this project was the creation of various nation-states able to control their subjects within and without the boundaries of the new state, and to regulate every sphere of life.[291] Prior to that, pre-state societies saw differently the distinction between the government and the domestic sphere. It has been argued that women, in pre-state societies, were classified in kinship terms rather than gendered ones.[292] Gender, as a class of its own, emerged with the creation of the nation-state, which made it possible for women to be

[288] See supra note 4. In her work on Zaynab, daughter of a revered Algerian sheikh, who came to succeed her father as the local and spiritual leader in the Jarid region, Julia Clancy Smith demonstrates that Zaynab did not benefit from French support precisely because of her being a woman. In fact, she irritated the French who were amazed that a Muslim woman could be granted such popular praise. Zaynab displayed a remarkable knowledge of administrative structure and challenged the French authorities by reminding them of their duties under the terms of the colonial agreement with the local population. In fact, it would seem that it was the French – not the indigenous population – who expressed concern at the idea of a woman leader. See Julia A. Clancy-Smith, *Rebel and Saint: Muslim Notables, Populist Protest, Colonial Encounters: Algeria and Tunisia, 1800-1904* (Berkeley: University of California Press, 1994), 214-53.

[289] See section 1.3, "The Situation of European Women: A Useful Comparison," 33-42.

[290] Sonbol, "The Woman," 101; Suad Joseph, "The Public/Private: The Imagined Boundary in the Imagined Nation/ State/ Community: The Lebanese Case," *Feminist Review* 57 (1997): 75-76.

[290] Joseph, "Public/Private," 75-76.

[291] Sonbol, "The Woman," 101; Joseph, "Public/Private," 75-77.

[292] Joseph, "Public/Private," 75-77.

discriminated against as women.[293] What the new state successfully achieved was to turn the family into a unit of society, making the model of the family that of kinship par excellence.[294] In her work on the construction of the rights and obligations of the state and its citizens in Syria and Lebanon, Elisabeth Thompson argues that gender hierarchy was itself a pillar of colonial paternalism.[295] Thompson demonstrates that colonizers and colonized negotiated at the expense of women, and that the constant negotiation between the French and the local elites was aimed at maintaining gendered hierarchies of privilege.[296] Politicians sacrificed women for strategic alliances with religious groups as well as the labour movement, and what followed was the formation of a hierarchy of citizens with women at the very bottom.[297] Ultimately, the emerging postcolonial state reproduced the colonial one and elite nationalists retained all the inequities that had earlier prevailed, assuring the "perpetuation of the gendered national pacts that subordinated women in the civic order."[298]

As for the function of new state legislation, this amounted to dictating the rights, duties, and laws that its citizens had to abide by. While upholding the notion of citizenship and claiming to ensure equal rights for all its citizens, these rights and obligations, rather than being made more universal, were in fact gendered. The effects of the rise of the Lebanese nation-state were no less than disastrous for women, if only because women were and still are denied the

[293] Ibid., 77.
[294] Ibid., 81.
[295] Thompson, *Colonial Citizens*, 3, 66-70.
[296] Ibid., 113-16, 150-53.
[297] Ibid., 3.
[298] Ibid., 275-76; Fanon, *Damnés,* 57.

right to pass on their citizenship to their offspring – a crucial tool allowing a Lebanese national to assert his or her own stake in the very nation-state. The promise of the nation-state that all citizens are equal under the law – Article 7 of the Lebanese Constitution unequivocally upholds this principle[299] – is but an illusion, as Lebanese women are systematically relegated to a subsidiary category. For, despite guaranteeing Lebanese citizens equal civil rights without distinction, the discrimination that the nation-state effectively supports against women is evident in various spheres, including citizenship. Interestingly, the origin of this discrimination was neither religious nor cultural, but rather, the result of influence emanating from French law, namely the Code Napoleon.[300] Notwithstanding some four hundred years of Ottoman rule, the political institutions and citizenship laws in Lebanon have undergone thoroughgoing French influence resulting from Lebanon's subjection to twenty-three years of French mandate.[301] Yet this was in no way to the advantage of women given that French law, like English law at the time, placed women under the total control

[299] The full text of the Lebanese Constitution is available in English http://www.servat.unibe.ch/icl/le00000_.html (accessed April 10, 2010). Article 7 of the Constitution dictates that: "All Lebanese are equal before the law. They equally enjoy civil and political rights and equally are bound by public obligations and duties without any distinction."

[300] The Code Napoleon dictates that children of French men *only* are entitled to French citizenship whether born on French soil or not. The French woman who marries a foreigner is given her husband's nationality and can only regain the French one in cases where the husband dies if she resides in France, or if the French government approves her request to want to reside in France. Articles 10, 12, 19 of the Civil Code read as follows: (10) "*Tout enfant né d'un Francais en pays étranger est Français*." (12) "*L'étrangère qui aura épousé un Français, suivra la condition de son mari*." (19) "*Une femme Française qui épouse un étranger, suivra la condition de son mari. Si elle devient veuve, elle recouvrera la qualité de Française pourvu qu'elle réside en France ou qu'elle y rentre avec l'authorisation du gouvernement et en déclarant qu'elle veut s'y fixer*." See *Code civil*, 1:4-5.

[301] Lebanon was under Ottoman rule between 1516 and 1916 and under French mandate between 1920 and 1943.

of their male counterparts.[302] In the realm of citizenship – or being subject to a particular entity or empire, since the notion of citizenship was as yet non-existent as such – Ottoman law by 1925 allowed children born of Ottoman mothers on Ottoman soil to be considered Ottoman subjects.[303] This, however, was in sharp contrast with French law at the time which, until as late as 1960, dictated that children of French men *only* were entitled to French citizenship.[304] It is this French concept, utterly unfair to women, that was later adopted by the Lebanese nation-state, effectively stripping Lebanese women of a right they had previously enjoyed.

Thus, in accordance with French law – and to the clear disadvantage of women – the new nation-state introduced a decree in 1925 dictating that citizenship – except in situations deemed exceptional – was only to be acquired through the father.[305] Yet, despite the popular belief that a situation where the minor children of a Lebanese mother whose non-Lebanese father passed away is exceptional, it would seem that the law only covers those cases where a child is born to a Lebanese woman with no man claiming paternity.[306] Thus, despite the fact that Ottoman law allowed women to naturalize their children when born on Ottoman soil, the case in contemporary Lebanon is undeniably different.[307]

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[302] See section 1.3, "The Situation of European Women: A Useful Comparison," 33-42.
[303] Suad Joseph, "Civic Myths, Citizenship, and Gender in Lebanon," in *Gender and Citizenship in the Middle East*, ed. Suad Joseph (Syracuse, N.Y.: Syracuse University Press, 2000), 127-28; idem, "Descent of the Nation: Kinship and Citizenship in Lebanon," *Citizenship Studies* 3,3 (1999): 313.
[304] See Supra note 300.
[305] Hafīẓa al-Sayyid al-Ḥaddād, *al-Mūjaz fil-Jinsiyya wa Markaz al-Ajānib* (Beirut: Manshūrāt al-Ḥalabī al-Qānūniyya, 2004), 90-91.
[306] This is clearly evidenced in the case of Samira Soueidan – discussed at length in Chapter 4 ("*Nasab*, Adultery, "Crimes of Honour," & Citizenship in Contemporary Lebanon," 121-72).
[307] Joseph, "Civic Myths," 127-28.

Lebanese women married to foreigners are prohibited from transmitting their citizenship to their own children, even when the latter are born on Lebanese soil. Clearly, such a constraint causes these women and their children much hardship – evident in a variety of spheres such as work, property ownership, and schooling – should they choose to live in Lebanon.[308] In reality, the effects of this law are such that a contemporary married Lebanese woman who chooses to marry a foreigner is indirectly encouraged to adopt the citizenship of her husband, since the husband and their children are unable to become Lebanese citizens and enjoy the rights and protections that the nation-state claims to offer to its citizens. The case is undeniably different when it is a Lebanese man who chooses to marry a foreigner, for she and her children are automatically entitled to Lebanese citizenship.[309] Moreover, the children of a Lebanese male national can claim Lebanese citizenship even when born in foreign lands.[310] As a consequence of this French-inspired change, Lebanon systematically rejects Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[311] The convention, adopted in 1979 by the United Nations' General Assembly, defines what constitutes discrimination against women.[312] Article 9 of the convention dictates that:

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[308] For more on the current situation of Lebanese women and children, see Lina Abou Habib, "Gender, Citizenship, and Nationality in the Arab Region," *Gender and Development* 11, 3 (2003): 66-76.

[309] Joseph, "Civic Myths," 127-28.

[310] Ibid.

[311] The United Nation's convention defines what constitutes discrimination against women.

[312] The United Nations, "Convention on the Elimination of all Forms of Discrimination (CEDAW)," http://www.un.org/womenwatch/daw/cedaw/text/econvention.htmm (accessed March 26, 2010).

1- States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2- States Parties shall grant women equal rights with men with respect to the nationality of their children.[313]

The justifications provided by the Lebanese nation-state are neither religious nor cultural, but, rather, political in nature. It has been argued that the measure was designed to prevent Lebanese women from choosing to marry Palestinian men, which would have led to a massive nationalization of Palestinians. Yet, regardless of whether this argument is justified, one wonders why the authorities are not afraid of male Lebanese citizens marrying and passing on their Lebanese citizenship to foreign women, including Palestinians. The truth of the matter is that the nation-state, rather than seeking to provide its citizens with equitable treatment, relegates Lebanese women to a secondary position, often forcing them to be completely dependent on their male counterparts. Thus, it would seem that the concept of the nation-state has authorized the male citizen to interfere in and regulate the affairs of his female counterpart to an extent where the latter is, in many respects, alienated from the very same nation-state. Indeed, it is this very nation-state that replaced the existing Ottoman law allowing women to naturalize their children when born on

[313] Ibid.

national territory, regardless of the nationality of the father, thereby robbing today's women of rights their Ottoman counterparts enjoyed previously. This regression was due to the adoption by the Lebanese nation-state of archaic Western laws and principles – no longer applicable in the West but devotedly enforced in contemporary Lebanon. It is interesting to note that the French understanding of citizenship rights was shared by the British.[314] It was only in 1981 that British women were permitted to pass on their citizenship to their children, and the law only went into effect in 1983.[315] What these British and French nationality laws protected was the idea of paternity as the source of nationhood, in which process women were only useful in terms of their capacity to re-produce the nation for their husbands.[316]

Another loss that the Lebanese woman faces upon marriage is her birth name, as she is required to take on her husband's.[317] Once again, the situation was different prior to the French mandate. For, while contemporary French women are still accustomed to adopting the birth name of their husbands, the matter differs in many contemporary Islamic countries where the woman retains her birth name.[318] The logic in Islamic practice is: Why should a woman who does not lose her legal identity upon marriage be forced to abandon her birth name? Thus, it would seem that this contemporary Lebanese

[314] Massad, *Colonial*, 35-38.

[315] Joseph, "Descent," 313.

[316] Francesca Klug, " 'Oh To Be in England:' The British Case Study," in *Woman-Nation-State*, ed. Nira Yuval-Davis and Floya Antias (New York: St Martin's Press, 1989), 21-22; Hallaq, *Sharī'a*, 451.

[317] Children in most of the contemporary world adopt the birth name of the father, rather than that of the mother, or the birth names of both parents (as is the case in Spain and Spanish-influenced countries). It is the fact that a woman loses her birth name – that is, her father's name – following her marriage while the man retains it that is of interest here.

[318] This, for example, is the case in Saudi Arabia and Jordan.

practice is also the result of French influence. It should be noted that the only European country requiring that a woman retain both her father's and mother's birth names – even after her marriage – is Spain, a country that was subjected to some 700 years of Islamic rule.[319]

Women also seem to have lost rights they enjoyed prior to Western colonization in terms of their ability to enter into contractual agreements. While Islamic law allows married (and unmarried) women to enjoy an independent status and full legal capacity, thus guaranteeing a mature Muslim wife the right to enter into contractual agreements,[320] this has not always been the case in post-colonial Lebanon. Until as recently as 1994, women in Lebanon were unable to own businesses, having lost that right with the advent of the French mandate.[321] Indeed, under Sharīʿa law in pre-modern Muslim societies, businesswomen, and women in general (weavers, hairdressers, brokers, legal guardians, and others), engaged in commercial transactions quite freely.[322] The fact that women lost this right at some point in the post-colonial era – for we know that under pre-modern Sharīʿa, men and women were equals in the commercial world[323] – not to mention the position of the Code Napoleon on the matter (forbidding a married woman to dispose of her property, or seek work

[319] Nearly all of the Iberian Peninsula was under Islamic rule between 711 and 1492.
[320] See Jennings, "Women," 53-114; idem, *Christians,* 14-36; idem, "Divorce," 155-67.
[321] Joseph, "Public/Private," 81.
[322] For more on the participation of pre-modern Muslim women in commerce and their presence in the workforce, see supra note 102.
[323] Women were in fact active in many spheres. They possessed shops and vineyards; they were lenders, investors, artisans and merchants. See Gerber, "Social," 231-44.

should she fail to obtain her husband's approval),[324] seems to indicate that this change was once again the result of French influence. A similar regression can also be depicted in the definition of a wife's duties. Indeed, pre-modern Muslim jurists – even the "strictest" of them – have clearly established that the performance of household tasks is not one of the duties of a Muslim wife.[325] In fact, housekeeping was not a function attributed to the Muslim wife until more recent, post-colonial times, which introduced a palpable Western "touch" to the practice.[326] Domestic functions were therefore added to the duties of a wife, such that failing to be a good and polite housewife became reprehensible.[327] The need for a wife to be proper, exemplary, and docile was also a later innovation. This had not always been part of the Islamic pre-modern and agreed upon understanding.[328] Suckling also became an expected duty of the Muslim wife,

[324] Musso, "Le Feminisme;" Herchenroder, "Capacity," 196-98; de Beauvoir, *Second Sex,* 115, 130, 142.
[325] Ibn Qudāma, *al-Mughnī*, 8:130.
[326] For more details on the duties of contemporary married Muslim women, see the position of the Neo-traditionalists in Kecia Ali's "Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Laws," in *Progressive Muslims: On Justice, Gender, and Pluralism*, ed. Omid Safi (Oxford: Oneworld, 2003), 172-75.
[327] Ali, "Progressive," 172-75.
[328] In the view of the renowned al-Nawawī (d. 1277), the use of improper language, cursing or insulting one's husband was not considered to be *nushūz* (disobedience), per se, though it was regarded as deplorable. See Abū Zakariyyā Yaḥyā b. Sharaf al-Nawawī al-Dimashqī, *Rawḍat al-Ṭālibīn,* 8 vols. (Damascus: al-Maktab al-Islāmī, 1960), 7:369. What did, however, qualify as *nushūz* was the wife's sexual inaccessibility (Ibn Qudāma, *al-Mughnī*, 8:129-31; al-Buhūtī, *Kashshāf*, 5:209). In fact, the need for a wife to be proper, exemplary and docile was clearly a later, more "modern" innovation. Treatises on the subject began to multiply in the 19th century; for example, the year 1874 saw the publication of the popular *Majālis al-Nisā'* (Assemblies of Women). Written by Khwaja Altaf Hussain of Panipat, or "Hali," this fictional dialogue was intended as an easy-to-read Urdu manual for women. Taking the form of a fictional conversation between ordinary housewives, this manual gave women directions on such common household functions as childbearing and education. The message behind it was clear and uncompromising: women were the educators of children and needed guidance and education in order to raise their children and manage their household properly. Domestic functions were therefore added to the duties of a wife, such that failing to be a good and polite

whereas pre-modern jurists required that the husband pay his wife a fee for suckling her own children.[329]

As discussed previously, one of the chief areas where women have witnessed a substantial loss of rights with the advent of Western colonization has been in the realm of marriage, divorce, and custody. This is evidenced by the changes or lack of thereof in the laws pertaining to family matters. Unlike their Ottoman counterparts, for instance, contemporary Lebanese women are not entitled to insert any stipulation that would help them secure better marriage agreements.[330] Indeed the majority, ill-informed as to their rights, are simply unaware that they are entitled to insert the two stipulations that the Ottoman Family Law of 1917 allows for. Not only are women all too often unaware of such rights, they are in fact discouraged from reverting to them – when they are fortunate enough to have been informed of them in the first place. This is clearly evidenced in the case of a woman's right to request a *tafwīḍ*.[331] Those few women who demand *tafwīḍ* are strongly urged to reconsider by the religious authorities, and reminded that they are emotional and sensitive, and can therefore not be entrusted with such a right. While the issue of women's emotionalism is to some extent Islamic or *fiqhī*, the colonial and post-colonial configuration of power placed even much more emphasis on this "nature." As far as custody is concerned, women are automatically deprived of

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housewife became reprehensible. See Gail Minault, *Voices of Silence: English Translation of Khwaja Altaf Hussain Hali's Majalis un-Nissa and Chup ki Dad* (Delhi: Chanakya Publications, 1986), 33-137.

[329] Hallaq, *Sharī'a*, 456.

[330] This is so as the Ḥanafī school rejects the insertion of marriage stipulations, and the Law of 1917 only allows for the insertion of two. See supra note 119.

[331] For more on *tafwīḍ*, see supra note 109.

the children they bring to this world if a divorce occurs and the children reach 7 and 9 years of age, and long before this if they choose to remarry. No assessment of the family situation or of the father's or mother's parenting qualifications is required.

Unfortunately, while pre-modern judges were not restricted by codified law and found ways to accommodate women, the contemporary Lebanese nation-state, by introducing, legitimizing, and enforcing Western-inspired laws, as well as by upholding the concept of a legal code, has been responsible for worsening the situation of women. This failure on the part of the nation-state to accommodate its female citizens is further evidenced in the law's understanding of *ṭāʿa* (obedience),[332] which is intrinsic to the marriage contract, stipulating as it does that a woman owes obedience to her husband while the latter is responsible for her financial and personal wellbeing.[333] However, the notion of *bayt al-ṭāʿa* – a place where the husband can legally and forcibly confine his wife with the help of the local police – does not seem to have existed in the past.[334] As Tucker correctly points out, one cannot disregard the modern innovation in this concept, where the machinery of the state is called upon to compulsorily detain the disobedient wife, a practice that – as we will now see – finds no precedent in pre-modern practice.[335]

[332] Sonbol, "Ṭāʿa," 286.
[333] Ibid., 289-90.
[334] Ibid., 287-88.
[335] Tucker, *Women,* 74-75.

When contracting a *nikāḥ*, a woman agrees to be obedient, although this obedience is really limited to matters pertaining to her sexual availability.[336] In fact, the pre-modern understanding of a marriage is that a woman is required to be sexually available to her husband, thus justifying the latter in confining her to the home should he fear an interruption in this sexual availability.[337] In return, the husband is obliged to provide his wife with an adequate *mahr* and to maintain her by securing her decent lodging, clothing, food, general living expenses, and personal protection.[338] The wife's right to this *nafaqa* should be upheld as long as she is sexually available. The sexual availability of the wife being the *raison d'être* of the *nikāḥ*, her movements are seriously narrowed. This grants the husband *ḥaqq al-iḥtibās li-manfa'atihi* (the right to confinement for his benefit), that is, the right to control her movements and confine her to the home so that he may implement his due right.[339] Thus, the husband is entitled to the right to detain his wife in the home on the basis that he may need to exercise his conjugal right to sexual enjoyment. The *nafaqa*, other than being the result of his obligation to care for his wife and children, is specifically generated from this right to confine her to the home.[340] Thus, a wife is required to submit to *ṭā'a* or risk the loss of her *nafaqa*.

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[336] Al-Kāsānī, *Badā'i'*, 2:334; Muḥammad 'Illaysh, *Sharḥ Manḥ al-Jalīl 'alā Mukhtaṣar al-'Allāma Khalīl*, 9 vols. (Beirut: Dār al-Fikr, 1989), 3:27, 308; Ibn Qudāma, *al-Kāfī*, 3:86; al-Buhūtī, *Kashshāf*, 5:209.
[337] Ibn Qudāma, *al-Mughnī*, 8:131.
[338] Al-Jaṣṣāṣ, *Aḥkām*, 5:209; 'Abd al-Salām b. Sa'īd Saḥnūn, *al-Mudawwana al-Kubrā wa Yalīhā Muqaddimat Ibn Rushd*, 5 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1994), 2:241.
[339] Al-Nawawī, *Rawḍat al-Ṭālibīn*, 7:369; 'Illaysh, *Sharḥ Manḥ al-Jalīl*, 3:545; al-Buhūtī, *Kashshāf,* 5:209; Ibn Qudāma, *al-Kāfī,* 3:84-6; al-Jaṣṣāṣ, *Aḥkām*, 1:375.
[340] *Mawsū'a*, s.v. "*Iḥtibās*," 2:68.

The modern notion of *bayt al-ṭāʿa* differs from the above as it is based on merging both the duty of a wife to be obedient *and* the right that a husband has to limit his wife's movements.[341] Consequently, *bayt al-ṭāʿa* has been understood as the right of a husband to physically detain his disobedient wife in a specific locale – not necessarily the family dwelling – while providing the basic minimum needs that a human being would need to survive.[342] Thus, the contemporary Lebanese wife who fails to obey her husband can be legally detained in such a place until she regains her senses and stops being disobedient.[343] *Bayt al-ṭāʿa* is to this day enforced in Lebanon and the wife whose husband lays a *ṭāʿa* suit against her is even required to appear before a *qāḍī* or face a possible *manʿ al-safar* decree (i.e., she may be banned from leaving Lebanese territory).[344]

In her work on *ṭāʿa* and modern legal reform, Amira Sonbol demonstrates that there were no cases involving *bayt al-ṭāʿa* per se in the Ottoman records that she surveyed.[345] Based on a comparative analysis of Ottoman and modern court-records, Sonbol argues that the Ottoman husband

[341] Sonbol, "Ṭāʿa," 285-86.

[342] This locale should correspond to what is deemed suitable to a person of the same social class.

[343] Shehadeh, "Legal Status," 506.

[344] While the concept of *bayt al ṭāʿa* has not been banned in Lebanon, it should be noted that judges insist that they no longer grant the husband the right to confine his wife to *bayt al-ṭāʿa*. This claim is however contested by the lawyer Ghāda Ibrāhīm who attests that Muslim courts accept *ṭāʿa* cases if the following two conditions are available: (1) that the advanced *mahr* be received by the wife, and (2) that the husband secure her housing. However, Ibrāhīm asserts that a mere mention in the marriage contract that the *mahr* is of symbolic value suffices, and that the housing is no longer required to be adequate and in accordance with the wife's social status. See Ghāda Ibrāhīm, "*Dirāsat Wāqiʿ al-Marʾa fil-Tashrīʿāt al-Maʿmūl bihā ladā al-Ṭawāʾif al-Islāmiyya al-Thalāth*," in *al-ʿUnf al-Qānūnī ḍidd al-Marʾa fī Lubnān: Qawānīn al-Aḥwāl al-Shakhṣiyya wal-ʿUqūbāt*, ed. Marie Roze Zalzal, Ghāda Ibrāhīm & Nadā Khalīfa (Beirut: Dār al-Farābī, 2008), 87.

[345] Sonbol, "Ṭāʿa," 286-88.

had no right to physical custody of his wife and that a disobedient wife could only be deprived of her otherwise due *nafaqa*.[346] In other words, the husband could not force his wife to return to the marital home or to any other locale that he set up for her. The introduction of the right to confine the wife to a selected space only made its appearance in the 20th century.[347] In a case dating from 1767, a husband summoned his disobedient wife to return to him, pledging that he would provide her with a decent home. In response, the father of the woman appeared before the *qāḍī* demanding that his daughter be granted a divorce. While the records do not clearly state that a divorce was granted, the fact that the woman did not return to her husband is clear.[348] This is in sharp contrast with a 1934 case where a wife – who proved that she had been physically abused by her husband – was forced by the court to return to her *abusive* husband.[349]

It may even be argued that the concept of "coverture," so foreign to the Islamic world, reasserted itself once again in the form of this notion of *bayt al-ṭā'a*.[350] It should be remembered that until 1891 English husbands could force their wives to remain in the matrimonial home for the sake of obtaining their rights;[351] and that the Code Napoleon allows the husband physical control over his wife.[352] While the idea of confining the wife in the marital home does exist in some interpretations of pre-modern Islamic law, it was never extended so as to

[346] Ibid., 288; idem, "The Woman," 112.
[347] Sonbol, "Ṭā'a," 289-90.
[348] Ibid., 288.
[349] Ibid.
[350] Sonbol, "The Woman," 116.
[351] Pateman, *Sexual Co*
ntract, 123.
[352] Sonbol, "The Woman," 112.

validate the notion of control over her person, or *bayt al-ṭā'a* for that matter.[353] Despite the fact that an Islamic marriage is based on the idea that the wife be obedient to her husband, and that this obedience has at times been understood as allowing the husband to confine his wife to the home, pre-modern jurists did not fully sanction the physical restriction of a wife's movements.[354] Ottoman records in particular demonstrate that a woman contracting a *nikāḥ* was allowed to insert a stipulation that her husband not relocate her.[355] This is unequivocally the case with the Ḥanbalī school, whose jurists are unanimous in allowing a woman to stipulate that her place of residence not be changed.[356] While the Ḥanafī and Shāfi'ī schools reject the insertion of any stipulation in the marriage contract, Ottoman records clearly indicate that, in practice, Ḥanafī judges allowed women to make such stipulations, including that of not relocating the wife.[357] The Mālikī position is often grouped together with the Shāfi'ī and Ḥanafī by contemporary scholars and is believed to reject marriage contract insertions.[358] A closer look at the sources, however, reveals that while Mālik Ibn Anas (d. 179/795) is reported to have qualified a woman's placing conditions in

[353] Sonbol, "Ṭā'a," 293-94.
[354] Ibid. For a useful discussion on confining or not confining a wife to the house, see Camilla Adang, "Women's Access to Public Space According to al-Muḥallā bi-l-Āthār," in *Writing the Feminine: Women in Arab Sources*, ed. Manuela Marín & Randi Deguilhem (New York: I.B. Tauris & Co Ltd, 2002), 75-94.
[355] Zantout, "*Khul'*, 42-43.
[356] See supra note 111.
[357] The records where a Shāfi'ī *qāḍī* presides are minimal. Consequently, the absence of stipulations in these records does not permit us to draw conclusions on the position of Shāfi'ī judges on the matter.
[358] Ali, "Progressive," 163-83.

the marriage contract as *bāṭil*,[359] the school itself classifies those conditions whereby the wife forbids her husband to remarry or relocate her as valid and not affecting the validity of the contract.[360] Had physical control over the actual person of the wife been widely accepted, any relocation-related stipulation would have been rejected *ipso facto* by all schools. This, and the absence of the *bayt al-ṭā'a* concept in the Ottoman court-records, both seem to indicate that it was European influence (and not Sharī'a law) that favoured and led to the integration of this more "modern" understanding of *ṭā'a*.

2.4 Concluding Remarks

Based on the above, it seems as though women living in the Muslim world, rather than being saved from the so-called dark tyranny of men, were in fact further subdued and made to become legally inferior to their male counterparts. French and British views on women and the rights they were entitled to were, at the time, far less progressive than Ottoman perspectives. Consequently, colonial influence on Muslim women proved to be extremely detrimental, and its effects are still visible today. As a case in point, while being a proper wife and a good housekeeper were not legally required of a Muslim woman in the pre-colonial past, these tasks are now socially considered essential attributes to being a good Muslim wife. This is also true in the realm of citizenship, since a number of women living in previously colonized nations cannot even today nationalize

[359] Ibn Qudāma, *al-Mughnī*, 7:448; Ibn Taymiyya, *Fatāwā*, 161; Abī al-Walīd Muḥammad Ibn Aḥmad Ibn Rushd al-Qurṭubī al-Andalūsī, *Sharḥ Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid, wa bi-Hāmishihi al-Sabīl al-Murshid ilā Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid,* ed. 'Abd Allāh al-'Abbādī, 4 vols. (Cairo: al-Ghūriyya, 1995), 3:1373.

[360] See supra note 111.

their children. As we have seen, archaic European citizenship laws – no longer applicable in Europe – were transposed onto the colonized and are still devotedly enforced in the contemporary Middle East. While Europeans are actively working on changing the laws and attitudes that discriminate against women, the same cannot be said about the Middle East.[361] In fact, the colonized have now absorbed the laws and practices that were imposed on them as though they were integral to their culture and traditions, leading them to resist all change for fear of being further assimilated to the West. Ironically, many Europeans today see such laws and practices as evidence of an outmoded cultural heritage (or even more likely as a sign of Islamic intolerance) that needs to be changed and Europeanized at any cost. In addition, women were time and again used by the elites and nationalists and made to represent the nation in order to ensure its continuation. Yet, what the emerging nation-state has achieved is to replicate its predecessor's patriarchal structure, while perpetuating colonial, gender-biased laws; it retains those aspects of *fiqh* unfavourable to women, while it ignores the checks and balances that once moderated and restrained the nefarious effects of such legal aspects.[362] It has been argued that the nation-state itself is but a masculine entity that relegates women to the function of reproducers.[363] Given that the nation-state is so willing to deny women fundamental civil rights, one wonders at the continued

[361] Despite the commendable work currently undertaken by many activists and organizations in Lebanon, the Lebanese nation-state persistently resists accommodating women or implementing any of the proposals submitted to it.

[362] Hallaq, *Sharī'a*, 443-73.

[363] Ibid., 450-51; Russell, *Creating*, 84; Massad, "Conceiving," 475; idem, *Colonial*, 55, 82; Nagel, "Masculinity," 252-53; el-Shakry, "Schooled Mothers," 126-70; Najmabadi, "Crafting," 91-125.

loyalty to the nation-state manifested in Lebanon and elsewhere. Paradoxically, women themselves participate in their own discrimination by subordinating themselves to men and the gender-biased nation. Not only this, but women ensure the continuity of the nation by mothering and bringing up good male citizens who in turn uphold laws and concepts that are detrimental to women.[364]

In an effort to show even more clearly that Muslim women (as well as their children) lost rights with the advent of colonization and the consequent rise of the nation-state, we now proceed to discuss the concepts of *nasab*, and *nasab*-related matters, namely *li'ān,* and *zinā,* surveying first of all some of the main legal sources on the matter.[365] In the subsequent chapter, the pre-modern juristic position will be compared and contrasted with the contemporary understanding of such laws and their application in contemporary Lebanon.

[364] Hallaq, *Sharī'a*, 451; Klug, " 'Oh To Be in England,' " 21; el-Shakry, "Schooled Mothers," 126-27; Najmabadi, "Crafting," 93.

[365] The following chapter is based on a survey of the works pertaining to the following Ḥanafī jurists: al-Albānī, al-'Aynī, al-Dāsūqī, Ibn 'Ābidīn, Ibn Māza, al-Ḥalibī, al-Jaṣṣāṣ, al-Karkhī, al-Kāsānī, al-Shaykh Niẓām, and al-Zayla'ī.

Chapter Three: The Rights of Mothers and Children under Pre-Modern Islamic Law

That the condition of Muslim women in pre-colonial times was in greater harmony with prevailing conditions than it is now and that the rise of the nation-state did not help improve the situation of women has been shown in the forgoing. The manifestly more flexible pre-modern understanding and application of the law reveals that jurists and *qāḍī*s alike were inclined to treat women within a defined system of checks and balances whereby rights and duties were elaborated in accordance with the fundamental assumption of a moral community. While the nature of the system they operated was undoubtedly patriarchal, gender was not the only criterion. Seniority and social class, for instance, were additional decisive factors. It was therefore not uncommon for pre-modern jurists to favour women in *waqf*-related rulings[366] by virtue of the latter's age and qualifications.[367] Moreover, elite women frequently founded pious *waqf*s aimed at funding religious institutions and scholars.[368]

[366] A *waqf* is an inalienable religious endowment where the founder assigns the usufruct of a property to an individual or institution. There are two types of *waqf*s, the *waqf khayrī* (pious or religious) and the *waqf ahlī* (familial or private). While the former benefits a religious or charitable institution, the property is dedicated to the founder's descendants in the latter. Upon extinction of the family line, the usufruct is transferred to a religious or charitable institution (Powers, "Orientalism," 536).

[367] Margaret L. Meriwether documents that women were often deemed more competent than men in *waqf*-related matters, and appointed as *mutawallī*s (administrators). As a case in point, the court reversed its decision and granted the *waqf* to the founder's sister (not son) by virtue of her age and qualifications. See Margaret L. Meriwether, "The Rights of Children in Ottoman Aleppo, 1770-1840," in *Women, the Family, and Divorce Laws in Islamic History*, ed. Amira el-Azhary Sonbol (Syracuse: Syracuse University Press, 1996), 147-48.

[368] Meriwether attests that women founded more public *waqf*s than men (Meriwether, "Women and *Waqf*," 132-33). Also see Seng, "Invisible Women," 195. It is noteworthy that the al-Qarawiyīn mosque and *madrasa* (law college) complex, the oldest university in the world and one of the most important *madrasa*s in the Muslim world, was established by a woman, Fāṭīma al-Fihrī, in 859. For more, see Abdul Rashid, "Great Women of Islam: al-Fihri - Founder of the Oldest University in the World," *The Urban Muslim Women*, http://theurbanmuslimwomen.

Gender was not the sole determinant in the social sphere either. As mentioned previously, children (married or not) had to obtain the permission of their mother before sitting down beside her, regardless of their gender.[369] And as far as social class was concerned, it is worth remembering that an elite woman who married a man of inferior status retained her superior position.[370] In fact, a man married to a member of the Royal House was required to stand with arms crossed until his wife allowed him to sit, and only talk to her if invited to do so.[371] It was also shown that Muslim women enjoyed an advantage when compared to their European counterparts. While this was true in a number of spheres, it was most notable in the fact that Muslim women retained their legal identity as well as their access to property regardless of their marital status.[372] Nonetheless, Muslim women saw their rights gradually eroded with the advent of colonialism and the rise of the nation-state. It is to this matter that we now turn, beginning with a survey of the pre-modern position of Islamic law on *nasab, li'ān,* and *zinā.* The pre-modern understanding and application of such laws will then be compared and contrasted with the situation in contemporary Lebanon.

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wordpress.com20080804/ fatima-al-fihri- founder- of- the- oldest-university-in-the-world/ (accessed November 6, 2010).

[369] See supra note 25.

[370] See supra note 26.

[371] See supra note 27.

[372] For more, see sections 1.2 "Islamic law and its Application under the Ottomans," 18-33, and 1.3 "The Situation of European Women: A Useful Comparison," 33-42.

3.1 Survey of the Preliminary Sources on *Nasab*

Nasab is defined as the connection between two people by virtue of an association of birth, no matter how close or distant the association may be.[373] Not only does *nasab* attribute a child to a mother and father, it also associates the former to a tribe, clan, or family; and by extension an entire communal network. Of equal importance is the fact that *nasab* secures the financial future of the child in question. Because the financial wellbeing of the family is the exclusive responsibility of its male members,[374] paternity requires that the father provide his child with an adequate *nafaqa* covering his or her daily expenses, food, shelter, as well as a share of his estate.[375] All Sunnī schools of law require that daughters inherit half the share that their brothers do, the reason being that they are never obliged to provide financial support to any member of the family.[376] Indeed, as we have seen, whatever a woman acquires by means of inheritance, work, marriage, or otherwise is exclusively hers. She is not required to spend it on anyone, not even her own children.[377] Furthermore, all her daily necessities are at the charge of the husband.[378] If a father should pass away, his pecuniary obligations are generally transferred onto the shoulders of the child's *male* relatives – who become liable for providing the child with adequate housing and *nafaqa*. When divorce occurs, the divorcée's natural

[373] *Mawsūʻa*, s.v. "*Nasab*," 40: 231.

[374] In cases where a husband is unable to provide for his children while his wife is wealthy, she is required to support the children; yet, whatever she disburses becomes a debt laid against her husband, one that has precedence over any other. For more, see al-Jazīrī, *al-Fiqh*, 4:581-84.

[375] Al-Kāsānī, *Badāʼiʻ*, 2:332; *Mawsūʻa*, s.v. "*Nasab*," 40:235.

[376] In contrast, the Jaʻfarī school grants the daughter (or daughters) of a deceased who has no sons a full share of inheritance. For more, see supra note 98.

[377] Al-ʻAynī, *al-Bināya*, 5:533.

[378] Ibid., 5:489.

shelter is her natal family, and it is her brothers, inheriting double her share, who must provide for her.[379]

Along with the financial wellbeing of the child there was another issue of paramount importance, namely, communal welfare. Marriage was no less than the foundation of communal order, a key institution aimed at attaining social harmony.[380] In order to ensure the sustainability of public order and strengthen the regulating effects of marriage, a child born to a marital union is almost instantly (or at least easily) attributed to the marriage bed.[381] Given the regulating effects of marriage and its importance in determining lineage and ordering society as a whole, it comes as no surprise that most jurists devoted entire sections to the discussion of *nasab*. *Nasab* is also treated in the jurists' sections on *li'ān* – a legal procedure allowing the husband to accuse his wife of *zinā*, and reject paternity of her child (a matter we discuss in the next section).[382] The importance of *li'ān* lies in the fact that it allows the husband to evade both punishment for slander and his paternal responsibilities, otherwise incumbent upon him. The underlying principle in the jurists' determination of *nasab* is that the child belongs to the marriage bed.[383] Consequently, a woman who has been married for 6 months or more is bound to have her child attributed to the

[379] For more on the maintenance due to descendants, see Jamal J. Nasir, *The Islamic Law of Personal Status* (London: Graham & Trotman, 1990), 190-91, 197-200. I am indebted to Janan Harb and Marwan Jamal for introducing me to Dr Nasir, and grateful to Dr Nasir for his kind help.
[380] Hallaq, *Sharī'a*, 271.
[381] The reasoning is based on the maxim whereby *al-walad lil-firāsh wa lil 'āhir al-ḥajar* (the child is to the bed and the fornicator stoned). More details follow in this section.
[382] Al-Jaṣṣāṣ, *Aḥkām*, 3:291; al-'Aynī, *al-Bināya*, 5:363.
[383] Al-Kāsānī, *Badā'i'*, 2:332; al-Jaṣṣāṣ, *Aḥkām*, 3:297.

marital union and therefore to her husband – unless specific steps are taken by the latter.[384]

The origins of this reasoning are traced to the maxim declaring *al-walad lil-firāsh wa lil ʻāhir al-ḥajar* (the child is [attributed] to the bed and the fornicator is stoned).[385] The definition of *firāsh* differs slightly in the writings of the jurists. In the opinion of al-Karkhī (d. 349/960), *firāsh* represents the marriage contract, thus attributing the child to the owner of the contract, namely the husband.[386] In some instances, the jurists – basing their understanding on al-Zaylaʻī (d. 742/1342) – refer to *firāsh* as the sexual act itself.[387] Given that a married woman has one and only one husband, it is assumed that no one other than him can have fathered the newborn child.[388] That the child belongs to the marriage bed and by extension the husband is established, regardless of how *firāsh* is defined, and this in turn ensures the child's financial rights to an adequate support and a share of inheritance.[389] The mere presence of a 6 months old marriage contract allows for *thubūt al-nasab* (establishment of lineage).[390] Whether the marriage is *ṣaḥīḥ* (sound)[391] or not is irrelevant, for *nasab* is established even in cases of a *nikāḥ fāsid* (defective marriage).[392] Clearly, it was concern for the wellbeing of

[384] Ibn ʻĀbidīn, *Radd al-Muḥtār*, 3:542; al-ʻAynī, *al-Bināya*, 5:452. The jurists were unanimous in setting 6 months as the minimum limit. A detailed discussion will follow in this section.
[385] Al-Kāsānī, *Badāʼiʻ*, 2:332; al-Jaṣṣāṣ, *Aḥkām*, 3:297.
[386] Al-ʻAynī, *al-Bināya*, 5:452; Fakhr al-Dīn ʻUthmān b. ʻAlī al-Zaylaʻī, *Tabyīn al-Ḥaqāʼiq Sharḥ Kanz al-Daqāʼiq*, ed. Aḥmad ʻAzzū ʻInāya, 7 vols. (Beirut: Dār al-Kutub al-ʻIlmiyya, 2000), 3:274.
[387] Ibid.
[388] *Mawsūʻa*, s.v. "*Nasab*," 40:238.
[389] Al-Kāsānī, *Badāʼiʻ*, 2:332.
[390] Ibn ʻĀbidīn, *Radd al-Muḥtār*, 3:542; al-ʻAynī, *al-Bināya*, 5:452.
[391] For more on the validity of a marriage, see Nasir, *Islamic Law*, 53-57.
[392] Al-Kāsānī, *Badāʼiʻ*, 3:241; Ibn ʻĀbidīn, *Radd al-Muḥtār*, 3:540; Niẓām et al., *al-Fatāwā al-Hindiyya*, 1:113. Examples of a *fāsid* marriage include one or both parties' lacking the required marriage

the child who, if fatherless, would suffer from social ostracism and reduced inheritance rights, that prompted the jurists to overrule the requirement of a valid marriage in the establishment of *nasab*.

The Ḥanafī elaboration of *nasab*-related laws is based exclusively on the above-mentioned Prophetic report and legal maxim *al-walad lil-firāsh*.[393] Consequently, *sharṭ al-khilwa* (condition of privacy implying physical proximity) – even though considered necessary by other schools – is not retained; whether or not sexual penetration did occur with certainty is rendered irrelevant.[394] The mere presence of a marriage contract represents the *sabab* (cause), and the child born to a married woman is attributed to her husband no matter how far apart geographically they may be. Thus, *nasab* is established even if a *mashriqī* (person living in the Mashriq) marries a *maghribiyya* (person living in the Maghrib),[395] regardless of whether *dukhūl* (consummated sexual intercourse) has occurred *haqīqatan* (in actual reality).[396] Yet, while the existence of a marriage contract is the determining element, specific conditions pertaining to the time at which the child is brought into the world need to be fulfilled. Clearly, it is the importance of marriage in regulating society that prompted the jurists to require that the child be born after a *nikāḥ* is contracted.[397] All schools of law concur that for a child to be indisputably attributed to a marital union, the child

capacity, failure to secure the required witnesses, or an unlawful conjunction on the grounds of affinity or fosterage. For more, see Nasir, *Islamic Law,* 60-63.

[393] Al-Kāsānī, *Badā'i'*, 2:332; al-Jaṣṣāṣ, *Aḥkām*, 3:297.

[394] *Mawsū'a*, s.v. "*Nasab*," 40: 239.

[395] While the *Mashriq* extends from Baghdad to Jerusalem, the *Maghrib* covers modern Morocco, Tunisia and parts of Libya and Algeria.

[396] Al-Kāsānī, *Badā'i'*, 2: 332; *Mawsū'a*, s.v. "*Nasab*," 40:237.

[397] A child born out of wedlock can still be attributed to the father. This matter will be discussed in further detail shortly.

should be born no earlier than 6 months after the contract has been agreed upon.[398] The choice of 6 months is the result of a mathematical calculation based on Qur'ānic verses 46:15 and 31:14.[399] While verse 46:15 dictates that 30 months is the period of bearing and weaning, verse 31:14 is understood to set weaning to 24 months. The difference between these 2 figures represents the 6 months attributed to conception.[400]

Interestingly, a look at Ibn Māza's (d. 570/1174) reasoning on the birth of a child *outside* a marital union provides a fascinating insight into the designation of 6 months as a minimum limit. The position of Ibn Māzā is that the child of an unmarried woman is attributed to the man with whom she had illicit sexual relations, as long as a marriage is later contracted and the child born at least 6 months after the contract took effect.[401] The 6 months limit applies whether the couple was married or not when the sexual act took place. Ibn Māzā's reasoning is particularly revealing, as it seems to indicate that attributing a child to the marriage bed more than 6 months after the *nikāḥ* is contracted gives the couple

[398] Ibn 'Ābidīn, *Radd al-Muḥtār*, 3:542; al-'Aynī, *al-Bināya*, 5:452; Niẓām et al., *al-Fatāwā al-Hindiyya*, 1:373, 558.

[399] Q.46:15 reads: "[W]e enjoined upon man to be kind to his parents. His mother bore him in hardship, And delivered him in hardship; His bearing and his weaning are thirty months. Until, when he is fully grown and reaches forty years, he says: 'My Lord, inspire me to be thankful for Your blessings, Which You bestowed upon me and my parents, And that I act in virtue, pleasing to You. Grant me a virtuous progeny; I have sincerely repented before you, And I have sincerely embraced Islam.' These shall be the ones whose best deeds We shall accept, and whose sins We shall disregard. They shall be among the denizens of the Garden: a true promise which they have been vouchsafed." Q.31:14 reads: "And We enjoined upon man to care for his parents – his mother carried him in hardship upon hardship, and his weaning lasts two years – and to say 'Give thanks to Me and to your parents, and to Me is your homecoming'."

[400] For more, see the work of Jamal J. Nasir, *The Status of Women under Islamic Law and Modern Legislation* (Leiden; Boston: Brill, 2009), 170.

[401] Maḥmūd b. Aḥmad b. 'Abd al-'Azīz b. 'Umar Ibn Māza, *al-Muḥīṭ al-Burhānī fil-Fiqh al-Nu'mānī*, ed. Aḥmad 'Azzū 'Ināya, 11 vols. (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 2003), 3:252.

(who has engaged in illicit sexual relations) a sufficient amount of time to become aware of the pregnancy and engage in a valid marriage.[402] Moreover, even in cases where the couple fails to contract a marriage within the accepted timeframe, it is still possible for the child to be attributed to the man (become legitimate and inherit), if the latter attests to being the father.[403] Incidentally, according to the common law of England, a child born out of wedlock is automatically and irreversibly excluded from legitimacy and inheritance rights.[404]

While 6 months is the agreed upon lower limit, the maximum timeframe during which a child is attributed to a man following his death or divorce from the mother varies from one school to the other. The maximum limit is set at 4 years in the opinion of most schools of law, 9 lunar months for the Ja'farīs, 2 years for the Ḥanafīs, and 5 years in the opinion of Mālik Ibn Anas.[405] Thus, in the case of a *bā'in* (irrevocable)[406] divorce or death of the husband, the Ḥanafī school grants the woman 2 years during which time the child she brings into the world is attributed to that same husband.[407] The upper limit is further extended, and *nasab* established even after the 2 years deadline has elapsed, in cases of a

[402] Ibid.
[403] Ibid.; al-'Aynī, *al-Binãya*, 5:463.
[404] Katherine Reyerson and Thomas Kuehn, "Women and the Law in France and Italy," in *Women in Medieval Western European Culture*, ed. Linda E. Mitchell (York; London: Garland Publishing, New 1999), 147.
[405] Ibn 'Ābidīn, *Radd al-Muḥtār*, 3:540, 558; al-'Aynī, *al-Binãya*, 5:454; *Mawsū'a*, s.v. "*Nasab*," 40:240; Coulson, *History*, 174. The Mālikī position is based on the concept of *raqqad* (the sleeping foetus), according to which an embryo can go to sleep in the mother's womb, remaining dormant until awakened, for whatever reason. For more, see Ziba Mir Hosseini, *Marriage on Trial: A Study of Islamic Family Law: Iran and Morocco Compared* (New York: St. Martin's Press, 1993), 143.
[406] Unlike a case of revocable divorce, where the husband is allowed to take his wife back even against her will, an irrevocable divorce requires him to offer her a new contract and consequently a new *mahr*. For a discussion on *the bā'in* and *raj'ī* divorces, see Nasir, *Islamic Law,* 118-22.
[407] Al-'Aynī, *al-Binãya*, 5:458; Ibn Māza, *al-Muḥīṭ*, 3:253; Ibn 'Ābidīn, *Radd al-Muḥtār*, 3:558.

raj'ī (revocable) divorce.[408] That the jurists were unaware that gestation takes place over 9 months is hardly a possibility (especially given the Ja'farī position on the matter). This in turn begs the question of what motivated the *fuqahā'* to grant such a generous maximum limit allowing a divorced woman or widow to attribute her child to the man with whom she had previously been married. While Qur'ānic verse 31:14 sets incubation at 2 years and may possibly explain the Ḥanafī position on the matter (set precisely at 2 years),[409] it does not shed light on the other schools' positions (who, for the most part, opted for 4 years), thus signalling the existence of another consideration.[410] A crucial element that cannot be evaded or overlooked even when dealing with pre-modern juridical reasoning is the *fuqahā"*s manifest preoccupation with communal wellbeing and social harmony. To be sure, not attributing a child to the marriage bed could have raised questions pertaining to the sustainability of the marriage itself, the honour of the wife, as well as that of her family, clan, or tribe. Casting doubt on whether the husband fathered a child on his wife or divorced wife taints the former's honour in the harshest of ways and would have exposed the child (as well as his mother and all her relatives) to social ostracism. Not only that, it would also have jeopardized the financial wellbeing of the child since it threatened his/her right to *nafaqa*, housing, and inheritance. One way that this generous maximum limit could be reduced was if the wife willingly confirmed

[408] Ibn Māza, *al-Muḥīṭ*, 3:253; al-'Aynī, *al-Bināya*, 5:454; Niẓām et al., *al-Fatāwā al-Hindiyya*, 1:133; al-Zayla'ī, *Tabyīn*, 3:277.
[409] See supra note 399.
[410] Ibn 'Ābidīn, *Radd al-Muḥtār*, 3:540.

that her *'idda* (waiting period)[411] had elapsed.[412] A possible – but not all that likely – solution for a family wanting to reject the *nasab* of a child was to obtain the mother's own declaration that her *'idda* has elapsed. Surely, a woman who confirmed such a thing would be acknowledging that she could not possibly be pregnant from the man she was once married to. It is worth noting that al-Imām al-Shāfi'ī (d. 204/820), out of concern for the child – who if fatherless would most certainly face social ostracism and possible financial hardship – recommends overturning the *iqrār* (acknowledgment) of the mother, even if the child is born 6 months after her own confirmation.[413] In doing so al-Shāfi'ī seeks to spare the mother the shame and disrespect that would otherwise most certainly befall her. As for the Ḥanafīs, they would overturn the *iqrār* of a *ṣaghīra* (minor) who confirms the end of her *'idda* 3 months after her husband's death or divorce, yet gives birth 6 months later.[414] This is another instance where protecting the *ṣaghīra* and her child seems to have been paramount for the *fuqahā';* leading them to disregard the mother's attestation and assume a misjudgment on her part. As for the mature woman who confirms that her *'idda* is over yet gives birth within the 6 months following, her *iqrār* is also invalidated, and her child attributed to the husband.[415] The difference in this

[411] Another way that the maximum limit is reduced is if the husband initiates a *li'ān*. A detailed discussion on *li'ān* follows in the next section (3.2 "*Zinā* and the *Li'ān* Procedure," 97-107. The *'idda* corresponds to 3 menstrual periods, or 3 consecutive months (in cases where the woman no longer menstruates), or the duration of the pregnancy. During this time, the husband is responsible for the *nafaqa* and housing of the divorced wife – to ascertain that she is not pregnant. For more on the *'idda*, see Nasir, *Status of Women*, 158-67.

[412] Ibn Māza, *al-Muḥīṭ*, 3:253; al-'Aynī, *al-Bināya*, 5:454.

[413] Al-Zayla'ī, *Tabyīn*, 3:283.

[414] Al-'Aynī, *al-Bināya*, 5:456.

[415] Al-Zayla'ī, *Tabyīn*, 3:283.

case is that the jurists assume no mistake on the mother's part; rather, it is *yaqīn* (certitude) that reveals her *kadhb* (lie) and nullifies her attestation.[416]

The statement of a widow that the father of her child is her deceased husband is deemed sufficient enough evidence if it is made within 2 years of the husband's death.[417] All the widow is required to do is prove that the child in question is her own. In the view of Abū Ḥanīfa, this amounts to having a visible pregnancy.[418] Alternatively, the delivery should be witnessed by 2 men, or a man and 2 women.[419] For Abū Yūsuf (d. 182/798) and Shaybānī (d. 189/804), the *shahāda* (testimony) of the midwife alone is deemed sufficient – provided she is a free-born Muslim.[420] While this position is endorsed by Aḥmad Ibn Ḥanbal (d. 241/855), al-Shāfi'ī requires that four witnesses be present. Zufar (d. 158/774), on the other hand, excludes the testimony of women altogether.[421] It is worth noting that the act of witnessing a pregnancy amounts to seeing the future mother enter a room and later come out of it with the new-born baby.[422] If the widow can establish that she is the mother (and that her child was born within the allowed timeframe), her child is guaranteed a share of inheritance from the assets of the dead husband. For the Ḥanafīs, an acknowledgement by the heirs (or some of the heirs) that the newborn is the deceased's child is enough to

[416] Al-'Aynī, *al-Bināya*, 5:456; al-Zayla'ī, *Tabyīn*, 3:278, 283.
[417] Al-'Aynī, *al-Bināya*, 5:458; Niẓām et al., *al-Fatāwā al-Hindiyya*, 1:133.
[418] Al-'Aynī, *al-Bināya*, 5:459-60.
[419] Ibn 'Ābidīn, *Radd al-Muḥtār*, 3:545.
[420] Being a free-born Muslim is a necessary requirement to qualify as *ahl al-shahāda* (people entitled to testimony). For more, see al-'Aynī, *al-Bināya*, 5:461-62; Ibn 'Ābidīn, *Radd al-Muḥtār*, 3:548.
[421] Al-'Aynī, *al-Bināya*, 5:460.
[422] Ibn 'Ābidīn, *Radd al-Muḥtār*, 3:545.

attribute the latter to the dead husband.[423] Consequently, the new family member is entitled to inheritance rights.

Questioning the identity of a child's father was one way of accusing the mother of *zinā*, an allegation that was by no means taken lightly by the jurists. Failing to substantiate an accusation of *zinā* in fact renders the accuser guilty of *qadhf* (slander).[424] Given the gravity of slander and of tainting another's honour, proving that *zinā* has indeed occurred was made extremely difficult. The only way a person accusing another of *zinā* can evade being charged of slander is if he or she provides four witnesses of the sexual penetration act.[425] All four witnesses should be willing to testify to what they have seen in detail. Any discrepancy in their accounts makes *them* guilty of slander,[426] and punishable by means of 80 lashes.[427] Not only does accusing a woman of *zinā* taint her reputation, it also harms the honour and integrity of her clan, tribe, or family as a whole.[428] As a consequence, the relatives of a deceased man whose wife or divorced wife gives birth to a child within the allowed timeframe, and who has not attested to the expiration of her *'idda*, are required to provide four witnesses who have seen her fornicate and describe the penetration act as it occurred. In the event that they cannot legally prove that *zinā* has occurred, the child is

[423] Al-Zayla'ī, *Tabyīn*, 3:285.
[424] Al-Kāsānī, *Badā'i'*, 3:237; al-Jaṣṣāṣ, *Aḥkām*, 3:290; al-'Aynī, *al-Bināya*, 5:364.
[425] The witnesses are required to have witnessed the penetration act itself. Al-'Aynī compares this to seeing *al-qalam fil-maḥbara* (the pen in the inkwell). See al-'Aynī, *al-Bināya*, 5:373.
[426] Al-Kāsānī, *Badā'i'*, 3:238.
[427] Ibid., 3:237; al-Jaṣṣāṣ, *Aḥkām*, 3:290; al-'Aynī, *al-Bināya*, 5:364.
[428] Al-Jazīrī, *al-Fiqh*, 5:104.

attributed to the deceased and they are required to share the inheritance with the child in question.

As for the husband who does not want to acknowledge the child, he is granted the right to reject the *nasab* of a child regardless of the mother's *iqrār* that her *'idda* has elapsed, and without providing the required witnesses to prove that *zinā* has occurred.[429] As will become apparent shortly, this advantage – albeit substantial – is highly regulated. The above survey of *nasab* demonstrates that using the law as a punitive tool was not the principle motivation of the *fuqahā'* and that the wellbeing of the mother and child was among their chief concerns. If the heirs do not contest the legitimacy of a child, the latter is attributed to them regardless of the mother's ability to prove that she herself gave birth to the child.[430] In the same way, if a man is willing to confirm that he has fathered an illegitimate child and marries the mother after birth, the child in question is attributed to him.[431] That being said, their preoccupation with both the mother and child alike did not reduce their constant attention to the husband's interest. The preference that the juristic treatises all too often granted men is clearly evidenced by the right of the husband to overturn the requirement of the four witnesses, accuse his wife or divorced wife of *zinā*, and reject paternity of her child. All this is made possible by the procedure known as *li'ān*.

[429] Al-Jaṣṣāṣ, *Aḥkām*, 3:291; al-'Aynī, *al-Bināya*, 5:363.
[430] Al-'Aynī, *al-Bināya*, 5:462.
[431] Ibn Māza, *al-Muḥīṭ*, 3:252; al-'Aynī, *al-Bināya*, 5:463.

3.2 *Zinā* and the *Li'ān* Procedure

Zinā is best defined as extra-legal sexual intercourse. Both fornication and adultery are subsumed under *zinā.*[432] In order to be convicted of *zinā* under Islamic law, the penetration act has to occur in the presence of 4 witnesses who are willing to testify to what they have seen in front of a judge. These witnesses are required to provide the *qāḍī* with the minutest of details so as to confirm that those accused of *zinā* are guilty beyond any possible doubt.[433] A witness who retracts is lashed if punishment has been carried out on the person that the witness has accused and fined if it has not.[434] Another way of being convicted of *zinā* is following one's confession. Even in such cases, one is required to confirm 4 times, on 4 separate instances, that he or she is guilty of *zinā.*[435] In fact, a retraction before the punishment is carried out fully exempts the formerly convicted *zānī* from punishment.[436]

Given the seriousness of slandering any one member of the community and tainting his or her honour, a husband who wants to accuse his wife of *zinā* is required to engage in a *li'ān.* In its linguistic sense, *li'ān* means the banishment or alienation of another.[437] In the marital context, *li'ān* is a testimony allowing the man who cannot provide the required witnesses to accuse his wife of *zinā* without being guilty of slandering her.[438] A husband who engages in a *li'ān* is

[432] *Mawsū'a*, s.v. "*Zinā,*" 24:18-47.
[433] Al-'Aynī, *al-Bināya*, 6: 194; Ibn 'Ābidīn, *Radd al-Muḥtār*, 4:7.
[434] Ibn 'Ābidīn, *Radd al-Muḥtār*, 4:34.
[435] Al-'Aynī, *al-Bināya*, 6: 192-93; Ibn 'Ābidīn, *Radd al-Muḥtār*, 4:10.
[436] Al-'Aynī, *al-Bināya*, 6: 201-02; Ibn 'Ābidīn, *Radd al-Muḥtār*, 4:10.
[437] Al-'Aynī, *al-Bināya*, 5:363.
[438] Ibid.; al-Ḥalabī, *Multaqā al-Abḥur*, 1:287.

therefore absolved from the 80 lashes that are otherwise inflicted on a slanderer.[439] As far as the wife is concerned, the *li'ān* procedure allows her to formally and legally reject his accusations, thus safeguarding her honour.[440] The origin of the *li'ān* procedure stems from Qur'ānic verse 24:6, whereby those who accuse their spouses of adultery without being able to substantiate their accusations are required to testify before God pledging 4 times that they are telling the truth.[441] The recourse to *li'ān* is further accredited by the Prophetic *ḥadīth*s pertaining to Ibn al-'Ajlānī and his wife, as well as referring on Ḥilāl Ibn Umayya and his wife Khawla.[442] The Ḥanafīs define *li'ān* as a joint testimony involving a husband and his wife whereby the husband starts by confirming 4 times that he is sincere and truthful in accusing his wife of *zinā*. Following that, the husband is required to invoke the wrath of God on himself should he be lying.[443] As for the wife, she is required to attest 4 times that her husband is telling a lie and that his accusation is false. She too has to pledge to accept the curse of God if she were to be lying.[444] If a child is at stake, the husband's and wife's statements should make reference to the former.[445] Thus, in order for a *li'ān* to be valid at the procedural level, both man and woman are required to swear 4 times that they are telling the truth and that they pledge to accept the

[439] Al-Kāsānī, *Badā'i'*, 3:237; al-Jaṣṣāṣ, *Aḥkām*, 3:290; al-'Aynī, *al-Bināya*, 5:364.
[440] Al-'Aynī, *al-Bināya*, 5:365-66.
[441] Q.24:6 reads: "And for those who launch a charge against their spouses, and have (in support) no evidence but their own, their solitary evidence (can be received) if they bear witness four times (with an oath) by God that they are solemnly telling the truth."
[442] Ibn Māza, *al-Muḥīṭ*, 4:21; al-Jazīrī, *al-Fiqh*, 5:105; Aḥmad b. Shu'ayb al-Nasā'ī, *Sunan al-Nasā'ī bi-Sharḥ al-Ḥāfiẓ Jalāl al-Dīn al-Suyūṭī,* ed. Ḥasan Muḥammad al-Mas'ūdī, 8 vols. (Cairo: al-Maktaba al-Tijāriyya al-Kubrā, 1930), 5:182-83.
[443] Ibn Māza, *al-Muḥīṭ*, 4:21; al-'Aynī, *al-Bināya*, 5:364-65, 373-74.
[444] Ibn Māza, *al-Muḥīṭ*, 4:21; al-'Aynī, *al-Bināya*, 5:364.
[445] Al-'Aynī, *al-Bināya*, 5:379-80; *Mawsū'a*, s.v. "*Li'ān*," 35:252.

wrath of God should they be lying. The husband is then required to conclude by cursing his wife for engaging in sexual relations with another man while she is expected to voice her anger at his false allegations.[446] Given the unavailability of the four witnesses (a requirement in order to convict someone of *zinā*), the husband and wife are required to provide full evidence themselves, and that is precisely why they testify to God *four* times.

An essential condition of the *li'ān* is that the man and woman engaging in the procedure must have contracted a *ṣaḥīḥ* (sound) marriage, since any *fāsād* (defectiveness) is an impediment to *li'ān*.[447] Consequently, a husband who has contracted a *nikāḥ fāsid* (defective marriage) and who curses his wife or denies fathering her child is not spared *ḥadd*.[448] While the validity of the marriage does not affect the establishment of *nasab*,[449] it does deny the husband the right to request a *li'ān* and be absolved from *ḥadd* in any case where he slanders his wife.[450] As for the wife whose *nikāḥ* is *fāsid*, while she is not entitled to reject her husband's accusation in front of the *qāḍī*, she can demand that her husband be lashed for slandering her.[451] The testimonial nature of the *li'ān* entails that both parties be of *ahl al-shahāda* (qualified to testify), and therefore mature, free-born, sane Muslims.[452] Hence, a slave, a *kāfir* (unbeliever), or a *maḥdūd fī qadhf* (slanderer who has been subjected to *ḥadd*) who accuses his wife of *zinā* without

[446] Al-'Aynī, *al-Bināya*, 5:364-65, 373-77; *Mawsū'a*, s.v. "*Li'ān*," 35:246.
[447] Al-Kāsānī, *Badā'i'*, 3:241.
[448] See supra note 122.
[449] For more on the validity of a marriage, see Nasir, *Islamic Law*, 53-57.
[450] Al-Kāsānī, *Badā'i'*, 3:241.
[451] Ibid., 3:238; al-'Aynī, *al-Bināya*, 5:368.
[452] Al-'Aynī, *al-Bināya*, 5:369.

providing the required four witnesses is lashed.[453] While the pre-modern jurists are extremely tolerant, granting Muslims the benefit of the doubt in assuming that they are good Muslims by default, i.e., men and women who would not conceive of lying in order to be spared earthly punishment, they are much less flexible with those who have already been charged with grave offences. To be sure, a convicted slanderer is no longer granted the benefit of the doubt.[454] The same applies to the woman who has already been convicted of *zinā* on a prior occasion, and whose honour no longer needs to be safeguarded. In such cases, her slanderer is not subjected to *ḥadd*.[455] The husband's exclusive right to engage in a *li'ān* and be absolved from slander-related punishment is based on the assumption that he must have good reasons to doubt his wife's honesty and integrity. This is so since a husband who accuses his wife of *zinā* is also tainting his own reputation.[456] Clearly, a *li'ān* grants the husband the right to alienate himself from a wife he feels or knows to be unfaithful, and more importantly one who has failed to be a good Muslim. It also gives the man who knows or feels that he could not possibly have fathered his wife's or divorced wife's child, the right to deny paternity of the latter. By granting the husband the right to initiate a *li'ān*, the judges have in fact chosen to rely on the free Muslim's integrity, morality, and faith in God. The assumption is that a good Muslim would not consider lying to God – which is exactly what is intended in the modus operandi of the *li'ān.* The same applies to the woman, who, should she be

[453] Ibid., 5:369, 373.
[454] Ibid.; Ibn Māza, *al-Muḥīṭ*, 4:21.
[455] Ibn Māza, *al-Muḥīṭ*, 4:21.
[456] Al-Jazīrī, *al-Fiqh*, 5:104; Hallaq, *Sharī'a*, 315.

a *zāniya* (adulteress), is not to conceal her sin but instead confess and accept punishment for it.

Consequently, a sane, mature free-born husband of good repute who either (1) feels that his wife has engaged in sexual relations with another man, or (2) has seen his wife in the act of *zinā* but is unable to provide 3 additional witnesses to substantiate his claims, or (3) could not possibly have fathered the child because he was away, is provided with a legal remedy allowing him to accuse his wife of *zinā* and deny paternity of her child. As mentioned previously, proving that any one person has engaged in *zinā* is by no means an easy matter.[457] Case in point is a husband who has himself witnessed his wife commit adultery but who cannot charge her with *zinā* if his testimony is not corroborated by that of 3 other witnesses.[458] In fact, a husband in the latter position whose testimony can be corroborated by only 1 or 2 others is not spared punishment for slander if he refers to his wife as *zāniya*.[459] Not only that, anyone who corroborates his claim – including any of the other eyewitnesses – is also liable to lashing.[460] What the husband can and should do in such cases is initiate a *li'ān*. The same applies to cases where the husband feels that he could not possibly have fathered his wife's child. This is so because the Ḥanafī school attributes the child to the marriage bed regardless of physical distance between both parties. Thus, a husband who has been away for a substantial period of

[457] Al-'Aynī, *al-Binā*ya, 5:373.
[458] Al-Jaṣṣāṣ, *Aḥkām*, 3:295.
[459] Ibid.
[460] Al-Kāsānī, *Badā'i'*, 2:340.

time[461] cannot deny paternity of his wife's or divorced wife's child without engaging in a *li'ān*.[462]

One cannot but wonder why the Ḥanafī jurists did not deem physical distance sufficient reason to allow the former to deny paternity and evade the financial responsibilities that would befall him as father. The *fuqahā'* 's manifest concern with communal harmony is an option worth investigating. By this measure, as long as a marriage was contracted, any child born to the wife would be attributed to the husband, thus ensuring a level of social order. Not taking physical distance into consideration may serve to compel a husband to return to or stay with his wife or bear the responsibility occasioned by his physical distance. It also denies the family of the husband any right to contest the legitimacy of the child – should their relative be away or deceased.[463]

Be this as it may, any husband who accuses his wife of *zinā* without providing the required number of witnesses and who does not have recourse to a *li'ān* is guilty of slandering his wife and is lashed as a consequence. In such cases, the slandered wife is required to turn to the *qāḍī* and ask him to undertake a *li'ān* in order to protect her reputation and honour.[464] Upholding the reputation of the wife (and that of her relatives) is precisely what is intended by the *li'ān*. But given that the right of the wife to her deferred *mahr*

[461] In the opinion of the Ḥanafīs, this period is set at 2 years (Ibn 'Ābidīn, *Radd al-Muḥtār*, 3:540, 558; al-'Aynī, *al-Bināya*, 5:454; *Mawsū'a*, s.v. "*Nasab*," 40:240).
[462] As mentioned previously, the Ḥanafī position is that *nasab* is established if a *mashriqī* marries a *maghribiyya* – regardless of whether *dukhūl* (sexual penetration) has occurred *haqīqatan* (with certainty). For more, see supra note 395.
[463] Niẓām et al., *al-Fatāwā al-Hindiyya*, 1:364. More details on the role and interest of the heirs will follow in the discussion on denying paternity (3.3 "Denying Paternity of a Child," 97-104).
[464] Al-Kāsānī, *Badā'i'*, 3:238; al-'Aynī, *al-Bināya*, 5:368; *Mawsū'a*, s.v. "*Li'ān*," 35:248.

and *'idda* do not expire following a *li'ān*, a husband who no longer wishes to remain married has nothing to win should he engage in a *li'ān.*[465] The *mulā'ana* (woman subjected to a *li'ān*) whose marriage has been consummated is absolutely owed the totality of her *mahr.*[466] In cases where the marriage has not been consummated, she is entitled to half the value of the *mahr.*[467] Clearly, a much simpler option available to the husband is that of initiating a *ṭalāq* (repudiation)[468] and unilaterally terminating his marriage, thus sparing himself posthumous divine wrath should he be mistaken. As for the husband whose intention is to shame his wife and accuse her of *zinā* before the *qāḍī* and the entire community, *li'ān* is a poor remedy since it allows the wife to reject legally and socially his accusations, thus safeguarding her honour. Not only that, it also puts him and his family, tribe, or clan at shame. The *li'ān* can accommodate a man willing to abandon his progeny to evade his financial responsibility as father, but in such cases the father cannot possibly claim to be a good Muslim, as he would be lying to God.

A *li'ān* can also be an option for the *zāniya* wife who needs to lie in order to preserve her honour. As long as *zinā* cannot be legally established – and being, short of a confession, extremely difficult to prove – a woman cannot be charged with such a serious allegation without her accuser risking severe punishment. That is why a woman whose husband has witnessed her engaging in sexual relations with another will go unpunished if the husband is unable to

[465] Al-Jazīrī, *al-Fiqh*, 5:116.
[466] Ibid.
[467] Ibid.
[468] For a discussion on *ṭalāq* as well as divorce in general, see Nasir, *Islamic Law,* 113-14.

provide 3 additional witnesses willing to corroborate his testimony.[469] Not only that, should the husband make any reference to the wife being a *zāniya*, he would be guilty of "slandering" her and be lashed as a consequence. The only way he can be spared the slander-related punishment is for him to initiate a *li'ān*. Clearly though, such a woman would also be compromising herself as a bad Muslim and would be bound to suffer the consequences of lying to God in the hereafter.

The importance of preserving one's honour entitles the woman whose husband refuses to initiate a *li'ān* to require the *qāḍī* to order her husband to do so.[470] If the husband is convened by the *qāḍī* yet refuses to confirm his faith in God and curse his wife, he is imprisoned until he agrees to a *li'ān*.[471] As for the woman who doesn't agree to a *li'ān*, she is imprisoned until she accepts the *li'ān*, or admits to *zinā*.[472] While a woman who willingly admits to having engaged in *zinā* is lashed, the same does not apply if she does not deny her husband's accusation.[473] Moreover, for the Ḥanafīs, a woman who confesses to committing *zinā* and then retracts is not lashed.[474] Until a woman has freely and willingly confessed to *zinā* or has been seen engaging in illicit sexual relations by four witnesses, *zinā* cannot be established with certainty, and she is *not* lashed.[475] Significantly, this was not the opinion of Mālik Ibn Anas, al-Shāfi'ī, or Aḥmad

[469] Al-Kāsānī, *Badā'i'*, 3:240.
[470] Al-'Aynī, *al-Bināya*, 5:368.
[471] Ibid.
[472] Al-Kāsānī, *Badā'i'*, 3:238.
[473] Al-'Aynī, *al-Bināya*, 5:369.
[474] Ibid.; *Mawsū'a*, s.v. "*Li'ān*," 35:258.
[475] Al-Kāsānī, *Badā'i'*, 3:238; al-'Aynī, *al-Bināya*, 5:369; Muḥammad b. Nāṣir al-Dīn al-Albānī, *Ṣaḥīḥ Sunan Ibn Māja*, ed. Zuhayr al-Shāwīsh, 5 vols. (Beirut: al-Maktab al-Islāmī, 1988), 4:24.

Ibn Ḥanbal (at least according to two accounts narrated on his authority) as they all required that a woman refusing to engage in a *li'ān* be lashed for *zinā*.[476] Evidently, if the husband is able to provide the required four witnesses – and their testimony is accepted – *zinā* is established and the wife punished accordingly. A *li'ān* is not applicable in such cases, although the husband is expected (but not obliged) to divorce his *zāniya* wife.[477] Once again, it was the jurists' concern with social harmony that motivated such a position, their thinking being that a husband who knows that his wife has already committed adultery (and is consequently not a good Muslim) is only putting himself at risk if he remains married to her. In cases where a husband or wife who engaged in a *li'ān* later confess to lying, *ḥadd al-qadhf* applies in the man's case, and *ḥadd al-zinā* in that of the woman.[478] Should this occur, the husband is punished for slandering his wife and for unjustly accusing her of being a *zāniya*, while the wife having lied during a *li'ān*, is chastised for essentially confessing to *zinā*.[479]

A major characteristic in the jurists' writings is the significant emphasis they place on phrasing. Thus, a husband who says to his wife *yā zāniya antī ṭāliq thalāthan* (you adulteress, you are divorced thrice) is not liable to *ḥadd*, nor is a

[476] Al-'Aynī, *al-Bināya*, 5:369.
[477] Ibid.
[478] Ibid., 5:366; al-Kāsānī, *Badā'i'*, 3:242; al-Ḥalabī, *Multaqā al-Abḥur*, 1:286. Q.24:2 (dealing with *zinā*-related punishment) reads: "The woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by God, if ye believe in God and the Last Day and let a party of the Believers witness their punishment." *Qadhf* is punishable with 80 lashes (al-Kāsānī, *Badā'i'*, 3:238). For the origins of *zinā* and *ḥadd* punishments, see the work of Walter Young, "Stoning and Hand-Amputation: The Pre-Islamic Origins of the *Ḥadd* Penalties for *Zinā* and *Sariqa*," (MA thesis: McGill University, 2005), 56-73.
[479] Al-'Aynī, *al-Bināya*, 5:366; al-Kāsānī, *Badā'i'*, 3:242.

li'ān applicable.[480] While accusing his wife of being a *zāniya* technically gives rise to a *li'ān* (not *ḥadd*), his subsequent divorce terminates the marriage, thus invalidating the recourse to a *li'ān*. As for the husband who tells his wife *antī ṭāliq thalāthan yā zāniya* (you are divorced thrice you adulteress), he becomes subject to *ḥadd* and is not entitled to a *li'ān.*[481] This is so because he slandered the woman after divorcing her, and slandering a third party (as she is no longer his wife) requires *ḥadd*. In the same way, a husband who accuses his wife of *zinā* and mentions the name of her alleged sexual partner is liable to punishment for slander – regardless of whether a *li'ān* has been initiated.[482] To be sure, a *li'ān* only exempts the husband from punishment for his *wife*'s slander. Thus, should the defamed man wish to be vindicated, he can request that his slanderer be lashed.

The continuation of a marriage is impossible following a *li'ān* but the prevailing Ḥanafī position is that a separation does not automatically follow this procedure since the couple has to be legally separated by the *qāḍī.*[483] Abū Yūsuf, Zufar, the Mālikīs, Shāfi'īs and Ḥanbalīs all qualify *li'ān* as a *faskh* (annulment) leading to a *taḥrīm mu'abbad* (irrevocable prohibition), thus making it impossible for the couple to remarry.[484] This is so even if the husband later retracts or the wife attests to having committed *zinā.*[485] Their justification stems from the

[480] Al-Kāsānī, *Badā'i'*, 3:244.
[481] Ibid.
[482] Al-Jazīrī, *al-Fiqh*, 5:118.
[483] Al-Kāsānī, *Badā'i'*, 3:243; al-Jazīrī, *al-Fiqh*, 5:111; al-Jaṣṣāṣ, *Aḥkām*, 3:298; al-'Aynī, *al-Bināya*, 5:375-77.
[484] *Mawsū'a*, s.v. "*Li'ān*," 35:260.
[485] Ibid.

ḥadīth whereby *"al-mutalā'ināyn lā yajtami'ān abadan"* (couples engaging in *li'ān* cannot ever be united).[486] As for Abū Ḥanīfa and Shaybānī, they classify *li'ān* as an irrevocable divorce.[487] Consequently, in cases where the husband retracts or has his wife confirm his accusation, the *ḥurma* (prohibition) is lifted, and the couple are allowed to remarry.[488] The prevailing Ḥanafī opinion also dictates that a man and woman who have engaged in a *li'ān* can be reunited should one of them later attest to having lied.[489] In such cases, the *li'ān* ceases to exist by virtue of its being overturned by a lie. The Ḥanafīs justify their position by limiting the *ḥadīth* to cases where the *li'ān* is still valid.[490] In the event that the *li'ān* involves a child, and the husband later attests to wrongfully accusing his wife of *zinā*, the child in question is attributed to the husband and the latter is required to fulfill all the financial obligations that are incumbent on a father.[491] In fact, and as will become apparent in the next section, denying a child the right to a father or financial support, as well as subjecting him or her to ostracism, were certainly condemned by the law.

3.3 Denying the Paternity of a Child

Given the jurists' evident concern with the wellbeing of the community and that of the children born into it, it is no surprise that attempting to deny paternity

[486] Al-Albānī, *Ṣaḥīḥ*, 4:23; Ibn Māza, *al-Muḥīṭ*, 4:23-24; Abū Dāwūd Sulaymān b. al-Ash'ath al-Sijistānī, *Sunan Abī Dāwūd*, ed. Muḥammad Muḥyī al-Dīn 'Abd al-Ḥamīd, 4 vols. (Beirut: al-Maktaba al-'Aṣriyya, 1980), 1:683.
[487] Ibid.; al-'Aynī, *al-Bināya*, 5:377.
[488] Al-Albānī, *Ṣaḥīḥ*, 4:23; al-'Aynī, *al-Bināya*, 5:377.
[489] Al-Albānī, *Ṣaḥīḥ*, 4:24.
[490] Ibid.
[491] *Mawsū'a*, s.v. "*Li'ān*," 35:261.

came to be a highly regulated matter. While it is not impossible for a husband to reject his wife's or divorced wife's child, specific rules have to be observed. If a husband succeeds in denying fathering his wife's or divorced wife's child, the latter is attributed to the mother.[492] Just as attributing a child to the marriage bed requires specific time-related conditions, the same applies to cases where the paternity of a child is at stake. In the opinion of Abū Ḥanīfa, this amounts to taking immediate action, i.e., denying paternity within one or two days after the birth of the child or while congratulations are still being accepted.[493] Abū Yūsuf and Shaybānī grant the husband who has not shown any sign of acceptance or denial 40 days grace, during which time he is allowed to retract.[494] A man who is congratulated for the birth of "his" child and does not reject these congratulations, or remains silent, is attributed paternity.[495] It is the prevalent principle of *al-sukūt 'alāmat al-riḍā* (silence is a sign of acquiescence) – commonly upheld by the jurists – that operates here.[496] Should the husband be away and return one or two years after the child's birth, he is granted 40 days following his return in which to deny paternity.[497] A husband who does not contest fathering his wife's or divorced wife's child within the allowed maximum timeframe is automatically considered the father.[498] As for the man who

[492] The Prophet himself is reported to have separated a couple following a *li'ān* and attributed the child to his mother. See al-'Aynī, *al-Bināya*, 5:378-79; al-Jazīrī, *al-Fiqh*, 5:115; al-Kāsānī, *Badā'i'*, 3:244.
[493] Al-Jaṣṣāṣ, *Aḥkām*, 3:290; al-Kāsānī, *Badā'i'*, 3:246; al-Ḥalabī, *Multaqā al-Abḥur*, 1:288.
[494] Al-Jaṣṣāṣ, *Aḥkām*, 3:290.
[495] Niẓām et al., *al-Fatāwā al-Hindiyya*, 1:113.
[496] This same principle applies when a marriage is being contracted, where the silence of the woman indicates her approval.
[497] Al-Jaṣṣāṣ, *Aḥkām*, 3:290.
[498] Ibid.

succeeds in denying paternity within the allowed timeframe, he is required to engage in a *li'ān* in order to be absolved from punishment for slander and be legally freed from all paternity-related obligations.[499] A husband who denies paternity after the tolerated time limit is still required to engage in a *li'ān*, not in order to be freed from his responsibilities as father, but to be absolved from *ḥadd* for slander.[500] As far as paternity is concerned, the child is irreversibly attributed to him since he failed to deny paternity within the allowed timeframe.[501] Thus, a husband who fails to react in time is not given the option of rejecting paternity *and* is required to engage in a *li'ān* or be lashed for slander. Finally, a husband who clearly states that he is the father of a given child is not allowed to later reverse his statement and be absolved of his paternal responsibilities.

A husband who engages in a *li'ān* out of doubt over his wife's integrity or because he is unable to prove that she has engaged in *zinā* is not attributed paternity of a child born 6 months or more following his accusation.[502] This is due to the fact that 6 months is the minimum limit required to establish *nasab*. If the child is born prior to the 6 months, the husband is attributed paternity unless he initiates a second *li'ān* allowing him to deny paternity – the first *li'ān* following from his suspicion of *zinā*.[503] A husband who denies fathering a child and whose wife is slandered by a third party before a *li'ān* takes place, is still

[499] Al-Kāsānī, *Badā'i'*, 3:237-40.
[500] Ibid.
[501] Al-Jaṣṣāṣ, *Aḥkām*, 3:290.
[502] Shams al-Dīn Al-Dāsūqī, *Ḥāshiyat al-Dāsūqī 'alāl-Sharḥ al-Kabīr*, 4 vols. (Beirut: Dār al-Fikr, 1980), 2:458.
[503] Al-Dāsūqī, *Ḥāshiyat*, 2:458.

attributed paternity of the child in question. In such cases *ḥadd* applies to the *qādhif* (slanderer), and this in itself is sufficient to confirm the nature of his offence. Consequently, the child is attributed to the husband and the couple is absolved from a *li'ān*.[504] Where a wife has been subjected to a revocable divorce and gives birth to 2 children within 2 years, her former husband is not entitled to deny paternity – unless, of course, she has confirmed that her *'idda* has elapsed.[505] Should the children be born more than 2 years after the divorce, a *li'ān* is in order to confirm *inqiṭā' al-nasab* (rupture of *nasab*).[506] If the man denies fathering the first child and acknowledges the second, both children are attributed to him, and he is punished by *ḥadd*.[507]

As for the man who confesses to falsely accusing his wife of *zinā* and claims paternity of his wife's child (after the *qāḍī* has separated them and attributed the child to the mother), he is not denied paternity, but he is subjected to *ḥadd*.[508] In this way, the jurists punish the husband for falsely accusing his wife of *zinā* while permitting the child to benefit from the financial obligations that a father owes his progeny. The Ḥanafīs do not allow a husband to deny fathering a child by virtue of the latter's difference in skin color.[509] As for the husband who has engaged in a *li'ān*, he is not allowed to marry his daughter to a man whose paternity he has denied prior – as the former may

[504] Al-Albānī, *Ṣaḥīḥ*, 4:25; Niẓām et al., *al-Fatāwā al-Hindiyya*, 1:113.
[505] Niẓām et al., *al-Fatāwā al-Hindiyya*, 1:113.
[506] Ibid.
[507] Ibid.
[508] Ibid.
[509] Al-Jazīrī, *al-Fiqh*, 5:116.

have lied or wrongfully accused the mother of *zinā*.[510] In such cases, it is not impossible that the father of the bride may be that of the groom too.

The cases listed above indicate that denying paternity was a highly regulated procedure and evidently not an easy matter. In their reasoning, the jurists were clearly concerned with protecting both the mother and child. That a woman's child be attributed to her husband is undeniably in her interest; the implication otherwise being that she has committed *zinā*. The same applies to the child, who if declared fatherless, will have to suffer from social ostracism and possible financial hardship. It would seem that the difficulty a husband faces in denying paternity emanates from the fear that he may be attempting to evade his financial responsibilities and jeopardize the wellbeing of the mother and child, thus threatening the entire communal order. In addition, the father's responsibility as provider requires that he supply his children with an adequate *nafaqa*, an obligation that was by no means taken lightly by jurists.[511] Indeed, a man could not simply evade his financial responsibility, whether the interests of a wife, child, or even slave were at stake.[512] As a case in point, while Ḥanafī law does not consider the husband's failure to maintain his wife to be reasonable grounds for divorce, it does require that the husband be imprisoned in such an eventuality,[513] and Ottoman court-records attest to husbands being held in custody for failing to support their wives.[514] It is worth mentioning that jurists

[510] *Mawsūʿa*, s.v. "*Liʿān*," 35:265.
[511] Contemporary law in both Yemen (1974) and Somalia (1975) requires that both man and woman be responsible for maintaining the household. For more, see Tucker, *Women,* 73.
[512] Wives, children, and slaves are entitled to a *nafaqa*. See *Mawsūʿa*, s.v. "*Nafaqa*," 41:34-100.
[513] El-Nahal, *Judicial*, 46-47; Abdal Rehim, "Family," 105.
[514] Rapoport, *Marriage*, 53; el-Nahal, *Judicial*, 44.

have attributed lengthy sections of their works on *nasab* to the discussion of slaves.[515] This is because giving birth to the child of her master moved the slave into the position of *umm al-walad* (mother of the child), granting her the right not to be sold after her master's death – in cases where he acknowledged fathering her child.[516] As for her children, they would have been considered free-born Muslims and therefore secured the same rights as those children born to free mothers – that is, an adequate *nafaqa*, housing, and a share of the father's inheritance.[517]

The one instance where the rules pertaining to paternity can be detrimental to the mother, father, and child alike is if a woman, wrongly convinced of her husband's death, contracts a new (effectively bigamous) marriage. Should she give birth to a child, the latter is attributed to the first husband by virtue of their standing *nikāḥ*.[518] Surely, the intention in such a case is to punish the woman (and her new husband) for wrongfully concluding that the first husband has passed away, and contracting a second marriage. While the *fuqahā'* were generally more concerned with preserving social harmony than with punishing people for their potential sins, they were less tolerant with a woman who failed to ascertain that her husband had indeed passed away before contracting a new marriage. The same applied to the new husband who failed to ascertain whether his wife's previous husband was undoubtedly dead.

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[515] Niẓām et al., *al-Fatāwā al-Hindiyya*, 1:113-26; Ibn Māza, *al-Muḥīṭ*, 3:253; al-Ḥalabī, *Multaqā al-Abḥur*, 2:118-20.

[516] Ibn 'Ābidīn, *Radd al-Muḥtār*, 3:542; Niẓām et al., *al-Fatāwā al-Hindiyya*, 1:113; Ibn Māza, *al-Muḥīṭ*, 3:250-53.

[517] For more on slavery and slaves' rights, see *Mawsū'a*, s.v. "*Riq*," 23:11-93.

[518] Al-Jazīrī, *al-Fiqh*, 5:116; Ibn Māza, *al-Muḥīṭ*, 3:251.

While a child is automatically attributed to the *firāsh* (unless the husband takes proper action within the allowed timeframe), there exists a case where the child is not attributed to the marriage bed by mere virtue of the contract. In fact, if a *boy*'s wife becomes pregnant, the child is not attributed to the boy-husband.[519] This position is reported on the authority of Shaybānī and expounded upon by Ibn Māzā, who confirms that his immature status renders the boy-husband theoretically unable to have sexual intercourse.[520] Yet, even though the jurists deem it impossible for the boy to be the father, they do not require that the wife return the *nafaqa* disbursed by her father-in-law.[521] In other words, the fact that the wife has most probably committed *zinā* – at least in the view of the jurists – does not deprive her of *nafaqa*. It is only in cases where the boy's wife attests to having simultaneously married another that she is required to return the equivalent of 6 months *nafaqa*.[522] One can only be struck by such accommodating reasoning, since the revered Ḥanafī jurist does not seem to be interested in punishing the mother for committing *zinā* (as the boy could not, by law, have impregnated her), or for having contracted a second marriage while the first one is still valid. In cases where there is no simultaneous marriage, the child is attributed to the mother.[523] This compliant position is surely also motivated by the jurists' unequivocal recognition of the woman's sexual needs. It is the woman's marriage to a boy that makes her right

[519] Ibn Māza, *al-Muḥīṭ*, 3:252.
[520] Ibid.
[521] Ibid.
[522] Ibid.
[523] This is because a fatherless child is attributed to the mother. See al-'Aynī, *al-Bināya*, 5:378-79; al-Jazīrī, *al-Fiqh*, 5:115; al-Kāsānī, *Badā'i'*, 3:243.

to sexual enjoyment unattainable and the *fuqahā'* may implicitly have recognized this by turning a blind eye to her extramarital activity. Further proof of this position may be seen in the provision whereby a woman is entitled to request a divorce if her husband pledges not to have sexual intercourse with her for a period of 4 months and then after this period fails to resume sexual relations; in such a case the husband's oath will have the force of a final *ṭalāq*.[524] In cases where the husband does resume sexual intercourse with his wife but prior to the 4 months, the former is liable to a *kaffāra* (penance) for the hardship he has caused his wife.[525]

The rules pertaining to the denial of paternity demonstrate that jurists were highly concerned with the wellbeing of the mother and child. As mentioned previously, a child who is denied paternity is at a financial as well as a social disadvantage. That is precisely why referring to someone as *walad al-zinā* (child of *zinā*) is an offense requiring that the accuser be lashed 80 times for slander.[526] The mother is at an equal disadvantage as her reputation and integrity are severely tainted. That a child not be attributed to a married or previously married mother and father also affects communal harmony in which marriage plays a key role. Thus, accusing a woman of *zinā* is treated as a serious offense and the husband cannot simply state that his wife was not a good Muslim staining her reputation, without being punished for his grave

[524] Hallaq, *Sharī'a*, 286-87; Nasir, *Islamic Law,* 312.

[525] In such cases, the husband is required to free a slave. If freeing a slave is not within his means, the husband is required to fast for 2 consecutive months. Should his medical condition not permit him to fast, he is then required to feed 60 needy persons for one day each. For more on *'īlā'*, see Hallaq, *Sharī'a*, 286-87.

[526] Al-Jazīrī, *al-Fiqh*, 5:115.

accusation. In the same way, he cannot easily deprive the child of *nafaqa*, inheritance, and housing rights. It was with these harmful effects on the child and mother in mind that the jurists elaborated laws pertaining to the denial of paternity. That the intention of the jurists was to estrange a mother from her child or somehow punish her does not hold. To be sure, a woman who gives birth to a child has nothing to gain if her child is not acknowledged by a man who is or was married to her. The grave consequences of accusing a woman of *zinā* and depriving a child of financial rights are precisely what motivated the jurists to require that the husband attest in front of God that he is honest and truthful, but unable to provide proof to support his accusation. Yet, while he is granted a venue allowing him to accuse his wife, she in turn is given the chance to legally, divinely, and publicly reject his accusations, and thereby preserve her honour.

3.4 Concluding Remarks

Given the strict nature of the rules that apply to the husband who wants to accuse his wife of *zinā*, one cannot but wonder how the so-called "crimes of honour" have become so easily tolerated across the contemporary Muslim world.[527] The very nature of such crimes has somewhat become inherently Muslim in the popular mind when it is clear that pre-modern Islamic law did not condone as little as anyone's unsubstantiated accusation of *zinā*, much less killing for it. Whether the man accusing his female relative of *zinā* is her father,

[527] A discussion on "crimes of honour" in contemporary Lebanon will follow in the next chapter ("*Nasab*, Adultery, "Crimes of Honour," & Citizenship in Contemporary Lebanon," 121-72).

brother, or husband does not exempt him from *ḥadd* – if he cannot prove that *zinā* had occurred with extreme certainty. The only way a male relative can be spared *ḥadd* in such circumstances is following a *li'ān*, and only the husband is granted this right. As mentioned previously, any one person accusing another of *zinā* is required to present the *qaḍī* with four witnesses of the sexual act or else be lashed for slander.[528] Moreover, should the testimony of the witnesses be inaccurate, they are themselves liable to *ḥadd*. Even in such cases where the accuser is able to prove that *zinā* occurred with certainty, he is not granted any right over the adulterer's life. What is more, even a husband who has witnessed his wife engage in *zinā* with his own eyes is subjected to *ḥadd* if he slanders her without providing the additional three witnesses.[529] A husband who mentions the name of his wife's alleged sexual partner is guilty of slander and liable to *ḥadd*. For while a *li'ān* absolves the husband from punishment for slandering his wife, it does not exonerate him from punishment for slandering a third party.[530]

As we have seen, the only individual to be granted a somewhat preferential treatment in matters of *zinā* is the husband. Indeed, the husband who has seen his wife commit adultery or doubts her sincerity is spared *ḥadd*, if he engages in a *li'ān*. Yet, this advantage does not allow him to harm the wife, let alone kill her. All it does is grant the husband who doubts his wife's integrity the right to leave her and deny paternity of the child he believes or knows not to be his. The rights of the wife are also taken into consideration by the jurists as she

[528] Al-'Aynī, *al-Bināya*, 5:373.
[529] Al-Kāsānī, *Badā'i'*, 3:240.
[530] Ibid.

is given the opportunity to contest his accusations in front of the *qāḍī*. In fact, proving that *zinā* did occur is next to impossible (if the person does not confess to committing *zinā*), unless the couple has engaged in sexual relations in public – which in itself is a major threat to social order. This begs the question of why the so-called "crimes of honour" and the punishment of Muslim women by their male relatives have become so prominent and are depicted as core to Islamic values and beliefs.

While the interests of the woman were evidently a primary concern of the jurists, they did favour the husband since his right to engage in a *li'ān* and accuse his spouse of adultery while being unable to provide legal proof is not extended to the wife. This is despite Qur'ānic verse 24:6 justifying the recourse to *li'ān* and dictating that the *spouse* is entitled to *li'ān*.[531] While the gender-neutral word *azwājahum* (their spouses) is employed in the verse, the jurists unanimously – regardless of the school they belong to – reserve this right to the husband. One cannot help but notice that, had it been the Qur'ānic intention to limit this right to the exclusive privilege of men, the word *zawjātuhum* (fem. their spouses) would have been used instead.[532] While the jurists do not specifically exclude the possibility that a woman can accuse her husband of *zinā* through a *li'ān*, such an eventuality is not retained either, making it an impossibility – at least in their minds.

[531] See supra note 441.

[532] It is worth mentioning that a number of English translations of the Qur'ān make use of "their wives" instead of "their spouses" for *azwājuhum*. Ṭarīf Khālidī's and Alan Jones' translations are but two examples.

The jurists' understanding of *li'ān* is based on the assumption that the husband is the plaintiff.[533] Consequently, the act of cursing is exclusively his, while anger is reserved to the wife. That a woman would want to curse her husband for engaging in *zinā* (or be separated from a bad Muslim even while unable to prove that he is one) doesn't seem to have been a viable option. The fact that Qur'ānic verse 24:2 is very clear in regarding *zinā* a sin for both men and women alike is not retained.[534] One wonders why only the husband is allowed to separate from a woman he believes to be of bad repute, when those who engage in *zinā* – regardless of their gender – are forbidden to marry good Muslims.[535] While the justification of the jurists is not clearly stated in their works, it is likely to have been triggered by the fact that women do not have the same right to initiate a divorce – a prerogative that the jurists likewise exclusively assigned to the husband.[536] Indeed, while the husband is granted the right to a unilateral divorce,[537] this is not the case of the wife, who is required to convince the judge that marital life is causing her *ḍarar* (harm), or ransom

[533] Al-'Aynī, *al-Bināya*, 5:369.

[534] See supra note 478.

[535] Q.24:3 reads: "Let no man guilty of adultery or fornication marry but a woman similarly guilty, or an Unbeliever: nor let any but such a man or an Unbeliever marry such a woman: to the Believers such a thing is forbidden."

[536] Interestingly, it would seem that viewing divorce as the exclusive prerogative of the husband is only one way of reading Qur'ānic verse 65:1. Indeed, the jurists based their understanding on the renowned Shāfi'ī al-Māwardī (d. 448/1058) who read Q.65:1 as limiting the right of divorce to men. Anver Emon argues that the verse could also be understood as giving an indication of the procedural mechanism that a man should follow when divorcing his wife. Q.65:1 reads: "O Prophet! When ye do divorce women, divorce them at their prescribed periods, and count (accurately), their prescribed periods: And fear God your Lord: and turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness, those are limits set by God: and any who transgresses the limits of God, does verily wrong his (own) soul: thou knowest not if perchance God will bring about thereafter some new situation." For more, see Emon, "Islamic Law," 398-99.

[537] Islamic law does grant women seeking a divorce recourse to a delegated right to divorce (*tafwīḍ*). For more on *tafwīḍ*, see supra note 109.

herself out of the marriage. Should the wife want to be separated from the husband on the grounds that the latter is a *zānī* – causing her *ḍarar* in the form of emotional distress or tainting her reputation due to his being a bad Muslim – she is required to provide the four witnesses or be lashed for slander. Moreover, a wife who can prove that her husband is a *zānī* is only separated from him if the judge himself deems the husband's infidelity a source of *ḍarar*. Be that as it may, the wife is not entitled to testify to God as to her faith and truthfulness and is much less entitled to curse her husband and be separated from him – even if she herself has witnessed him in the act of *zinā*. This leads to another possible justification, namely the one pertaining to witnessing. One wonders if the fact that the *shahāda* of a woman is not accepted on a par with that of a man is what motivated the judge to exclude her from initiating a *li'ān*.[538] Another possible justification stems from a traditional understanding of those Qur'ānic verses that refer to men as *qawwāmūn* (superior), and as having a *daraja* (degree of

[538] The traditional understanding of Q.2:282 requires that the testimonies of 2 women equal that of one man. Q.2:282 reads: "O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between the parties: let not the scribe refuse to write: as God Has taught him, so let him write. Let him who incurs the liability dictate, but let him fear His Lord God, and not diminish aught of what he owes. If the party liable is mentally deficient, or weak, or unable Himself to dictate, Let his guardian dictate faithfully, and get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her. The witnesses should not refuse when they are called on (For evidence). Disdain not to reduce to writing (your contract) for a future period, whether it be small or big: it is juster in the sight of God, More suitable as evidence, and more convenient to prevent doubts among yourselves but if it be a transaction which ye carry out on the spot among yourselves, there is no blame on you if ye reduce it not to writing. But take witness whenever ye make a commercial contract; and let neither scribe nor witness suffer harm. If ye do (such harm), it would be wickedness in you. So fear God. For it is God that teaches you. And God is well acquainted with all things."

preference over women).[539] This attitude is usually justified by a variety of claims, including the fact that women were never prophets, are not active in *jihād* and only inherit half of what men do.[540]

Whatever the motivating reasons, this is clearly another instance where women are deprived of rights their husbands enjoy, thus consigning them to a lower *legal* position. It is important to emphasize that this failure to provide women with equal rights is a legally constructed one, as the Qur'ān does not exclude women from initiating a *li'ān* or cursing their husbands, nor does it free the *zānī* from the repercussions that befall a *zāniya.* The patriarchal nature of society then and now cannot be negated, and women did and still do find venues to be accommodated within the male dominant societies in which they live. Yet, it would seem that contemporary judges are reluctant to accommodate women, one of the reasons being the inflexibility that has been introduced into the law following its codification. Indeed, a look at the contemporary application of Islamic law in Lebanon and the subsequent treatment of *nasab* and *nasab*-related matters, namely *zinā*, "crimes of honour," and citizenship

[539] Q.4:34 reads: "Men are the protectors and maintainers of women, because God has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in (the husband's) absence what God would have them guard. As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (Next), refuse to share their beds, (And last) beat them (lightly); but if they return to obedience, seek not against them Means (of annoyance): For God is Most High, great (above you all)." As for the degree of preference that men are granted, Q.2:228 reads as follows: "Divorced women shall wait concerning themselves for three monthly periods. Nor is it lawful for them to hide what God Hath created in their wombs, if they have faith in God and the Last Day. And their husbands have the better right to take them back in that period, if they wish for reconciliation. And women shall have rights similar to the rights against them, according to what is equitable; but men have a degree (of advantage) over them. And God is Exalted in Power, Wise."

[540] Al-Jaṣṣāṣ, *Aḥkām*, 1:374-75.

rights, reveal the existence of a serious gap with the pre-modern understanding, a change that – as will become apparent shortly – has in no way served the interests of women.

Chapter Four: *Nasab*, Adultery, "Crimes of Honour," and Citizenship in Contemporary Lebanon

Despite four centuries of Ottoman rule and a mere twenty-three years of French mandate, the Lebanese legal system and its laws proved highly susceptible to the French model.[541] Contrary to popular belief, however, this French influence was not to the advantage of Lebanese women. In fact, it was the desolate situation of 19th century European women that came to be reproduced in Lebanon and the Muslim world at large.[542] Colonized women were made to adhere to Victorian values that were much less "liberating" when compared to the then existing Ottoman practice.[543] Ultimately, what the colonial influence achieved was the subordination of the new "modern" woman to her husband, and, significantly, to the newly emerging nation.[544] Muslims themselves began reproducing the colonial discourse, whose main concern was that of creating a "modern" nation essentially Victorian in nature.[545] As demonstrated earlier,[546]

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[541] Lebanon was under Ottoman rule between 1516 and 1916 and under French mandate between 1920 and 1943. This was yet another instance where the colonizers adopted and endorsed the belief that their laws and legal system were inferior to European ones. For more on colonization and its effects, see section 2.1, "Colonizing the Law," 46-56.

[542] Europe colonized most of the Muslim world with some exceptions, such as Saudi Arabia and the United Arab Emirates. For more on the pre-modern situation of European women, see section 1.3, "The Situation of European Women: A Useful Comparison," 33-42.

[543] See sections 1.2, "Islamic Law and its Application under the Ottomans," 18-33, and 2.3, "The Effects of Colonization on Lebanese Women's Rights," 66-81; Pollard, "Family Politics," 57.

[544] Booth, *May Her Likes,* 173-79; el-Shakry, "Schooled Mothers," 126-70; Najmabadi, "Crafting," 91-125. While the works of these scholars pertain to Egypt and Iran, the situation of Lebanon is similar.

[545] Even the revered Qāsim Amīn (d. 1908) – vividly portrayed as the emancipator of Muslim women, saving them from seclusion, veiling, and ignorance – was not innocent of this. See Qāsim Amīn, *Taḥrīr al-Mar'a* (al-Qāhira: Maṭba'at Rūz al-Yūsuf, 1941). Case in point, Amīn's call for women's access to education is limited to a basic level, one that would allow her to become a more educated companion, better company for her husband, and an admirable mother able to produce model male citizens for the nation. As far as unveiling was concerned, it would seem that the harsh condemnation of the "uncivilized" practice of veiling by the West is what contributed most to Amīn's position on the matter. See Ahmed, *Women*, 155-64; Lila Abu Lughod,

the expectation that a woman be well mannered and occupy herself solely with her home and children was not necessarily a return to tradition (or religion, for that matter);[547] it was more a reflection of Western influence. In fact, French law assigned to the husband the position of "head of the family" up until 1970."[548] Ultimately, the project of the nation-state transformed motherhood, in a colonial context, into an essential component in the constitution of national identity.[549] Women became little more than mothers to the male leaders of the future, who were essential to the sustainability of the very nation-state; hence, caring for the family was made synonymous with caring for the nation.[550] Nation-formation began in the womb, while advocating rights for women was often expressed in terms of creating a better nation.[551] With the ultimate goal being the creation of exemplary male leaders,[552] this new domesticated woman became crucial to upholding the sacred family as the core of the nation.[553]

The subordination of women – as will become apparent in this chapter – was strengthened by the introduction of new, European-inspired laws and their codification. One such example pertains to the conditions of citizenship imposed by the Lebanese nation-state.[554] Denying women the right to pass on

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"The Marriage of Feminism and Islamism in Egypt: Selective Repudiation as a Dynamic of Postcolonial Cultural Politics," in *Remaking Women: Feminism and Modernity in the Middle East*, ed. Lila Abu-Lughod (Princeton: Princeton University Press; Cairo: American University in Cairo Press, 1998), 255-62.

[546] See section 2.3, "The Effects of Colonization on Lebanese Women's Rights," 66-81.

[547] For the pre-modern jurists' position on a wife's duties, see supra note 328.

[548] Hallaq, *Sharīʿa,* 453.

[549] El-Shakry, "Schooled Mothers," 126-27.

[550] Klug, " 'Oh To Be in England', " 21.

[551] Najmabadi, "Crafting," 93.

[552] El-Shakry, "Schooled Mothers," 133, 143.

[553] Ibid., 126-27, 132; Najmabadi, "Crafting," 93.

[554] See section 2.3, "The Effects of Colonization on Lebanese Women's Rights," 66-81.

their citizenship to their children codified patrilineality (a vital component of patriarchy), allowing the state to institutionalize a key instrument of reproducing patriarchy.[555] Yet, despite the injurious effects of European legal influence on women, these changes were applauded by Lebanese legislators and welcomed as "modern." The intellectual effects of colonialism were such that the very discourse of the colonizers was endorsed and reproduced by indigenous intellectuals. The renowned intellectual Frantz Fanon (d. 1961) – who was also a psychiatrist – concluded that most of his patients' illnesses resulted from the violence and oppression of colonialism, arguing for a complex understanding of the colonizer-colonized relationship whereby the people, once colonized, ultimately find themselves in awe of their oppressors. Fanon demonstrates that members of the new nation-state's elite perpetuate and reproduce the system that the colonizers set in place. In other words, this new elite replaces the colonizers and oversees the same institutions that had previously been set up and used to control them.[556] In fact, the native bourgeoisie only rises to power in an effort to reproduce the model of the colonizer's bourgeoisie. Fanon argues that the indigenous privileged middle class, having adopted this role, in its turn dominates and scrutinizes the masses.[557] Yet in his view, the indigenous middle class, while convinced of its ability to control the local population, can only fail because of its underdevelopment and "intellectual laziness." Its unreadiness for the task

[555] Joseph, "Descent," 315.
[556] Fanon, *Damnés*, 148-205.
[557] Ibid., 149.

forces it to appeal to the former colonizer for help.[558] Thus, just like so many other colonized populations, the Lebanese adopted an Orientalist discourse portraying the nation as a saviour, as a vehicle capable of transporting the people from Ottoman backwardness to progressive modernity.[559] As a result, Lebanese legislators, aided by French jurists,[560] endeavoured to change the legal system in a way that conformed to the much revered French one.

4.1 The Lebanese Legal System

Although many of the ills of the Lebanese legal system are attributed to the adoption of archaic Ottoman laws, French influence was by far more extensive, more durable, and more detrimental to women in particular. French influence was two-fold, as the Ottomans themselves had already transformed their legal system along French lines in the mid 1800s.[561] The fact that Lebanon was later placed under French mandate only reinforced the position of the civil law.[562] Thus, French influence had begun to affect Lebanon long before the fall of the Ottoman Empire. French schools and missionaries were well established in the region as early as 1840, thus inciting many members of the elite to pursue their

[558] Ibid.

[559] In his analysis of works by professional historians, and school textbooks used to teach Egyptian national history, Gabriel Piterberg demonstrates that there is a clear Egyptian acceptance of two powerful discourses: the Orientalist discourse, and the discourse of territorial Egyptian nationhood, as shaped in the 1920s. Piterberg notes the presence of an Orientalist discourse in non-European nationalist historiographies and contrasts the condescending language that indigenous authors used to refer to their own people with their awe in describing Europeans. See Piterberg, "Tropes," 42-61.

[560] Pierre Catala and André Gervais, *Le droit libanais*, 2 vols. (Paris: Librairie Générale de Droit et de Jurisprudence, 1963), 2:6.

[561] Catala, *Droit libanais*, 2:7.

[562] Ibid.

university studies in France.[563] What is more, the Ottoman government itself had allowed for the establishment of a law school in Beirut in 1913, as a cooperative venture between the local Université Saint-Joseph and the Association Lyonnaise pour le Développement a l'Étranger et l'Enseignement Supérieur et Technique.[564]

As far as the legal system was concerned, the Ottoman authorities adopted, with more or less alteration, the French organizational system and French judicial administration.[565] Most areas of the law were codified according to the French model. The substance of the law was also affected with the introduction of the French Criminal Code in 1840, the Commercial Code in 1850, the Penal and Property Codes in 1858, Civil Procedure in 1861, the Maritime Law Code in 1863, and Criminal Procedure in 1879.[566] A committee in charge of legislating on civil matters (with the Ḥanafī doctrine as a basis) was formed in 1869, resulting in the publication of the *Majallat al-Aḥkām al-'Adliyya* (Journal of Judiciary Rulings), commonly known as the *Majalla*, in 1876.[567] The *Majalla* was replaced in 1932 with an updated version of the French Civil Code, the Code des Obligations et des Contrats (Code of Obligations and Contracts).[568] As for

[563] Antoine el-Gemayel, "Sources of Lebanese Law," in *The Lebanese Legal System*, ed. Antoine el-Gemayel, 2 vols. (Washington, DC: International Law Institute, 1985), 1:18; Catala, *Droit libanais*, 1:5.
[564] The school later became known as the Faculté de Droit et de Sciences Économiques. See Catala, *Droit libanais*, 1:5-6.
[565] Ibid., 1:5.
[566] El-Gemayel, "Sources," 1:17; Catala, *Droit libanais*, 2:90; Feldman, *Fall and Rise,* 61.
[567] El-Gemayel, "Sources," 1:17. Also see Salīm Rustum Bāz, *Sharḥ al-Majalla*, 2 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1923).
[568] Antoine el-Gemayel, "Obligations and Contracts," in *The Lebanese Legal System*, ed. Antoine el-Gemayel, 2 vols. (Washington, DC: International Law Institute, 1985), 1:167.

religious matters,[569] these alone were left to the appropriate religious authorities – with each group abiding by its own religious laws.[570]

France officially assumed direct control of Lebanon in 1920, when the latter was placed under French mandate in the wake of the First World War. For the next couple of decades, the task of creating a Lebanese legal system was undertaken by French jurists and Franco-Lebanese magistrates – whose education was invariably French.[571] Mixed tribunals headed by French and Lebanese judges operated between 1926 and 1946.[572] Such laws as were enacted during the mandate were later retained by the Lebanese nation-state that finally gained official control of the newly independent nation in 1943.[573] The Lebanese Constitution had already been promulgated as early as 1926, but it was amended several times following the country's official independence from mandatory status.[574] As a result, the power to legislate was entrusted to the National Assembly – whose function was to represent the nation as a whole – and new laws became subject to vote by the National Assembly and Presidential approval.[575]

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[569] Religious matters for the Sunnī, Shīʿī and Druze include marriage, divorce, custody, inheritance, and wills. In the case of Christians and Jews, religious courts deal only with marriage, divorce, and custody, leaving inheritance and wills to be handled by civil courts.

[570] Details on different religious groups and the laws and authorities they abide by follow in this section. As far as Muslims were concerned, matters pertaining to what the Europeans referred to as Personal Status were treated by the Ottoman Law of 1917.

[571] Catala, *Droit libanais*, 1:6.

[572] El-Gemayel, "Sources," 1:19.

[573] Ibid., 1:17.

[574] Ibid., 1:23; Nadi Tyan, "Lebanese Political Regime," in *The Lebanese Legal System*, ed. Antoine el-Gemayel, 2 vols. (Washington, DC: International Law Institute, 1985), 1:39.

[575] Ibid., 1:49-51. The President is granted one month to promulgate a text that has passed parliamentary approval. The delay is reduced to 5 days in the case of emergency laws.

The vertically and hierarchically structured judiciary was divided after independence into four main, multilevel court systems: (1) *al-Qaḍā' al-'Adlī* (Judicial Court); (2) *Majlis al-Shūra* (Consultative Council);[576] (3) *al-Maḥkama al-'Askariyya* (Military Tribunal); and (4) *al-Maḥākim al-Dīniyya* (Religious Courts).[577] In so far as *al-Qaḍā' al-'Adlī* is concerned, three court levels were instituted: (1) *Maḥkamat al-Bidāya* (Court of First Instance); (2) *Maḥkamat al-Isti'nāf* (Court of Appeal); and (3) *Maḥkamat al-Tamyīz* (Cassation Court or Supreme Court).[578] Administrative decisions issued by the state or any of its agencies are – in absolute conformity with the French system – entrusted to administrative tribunals with *Majlis al-Shūra* at their heart,[579] as in the case of the annulment of ministerial decrees for abuse of power.[580] Military Courts are assigned matters involving arms and ammunition, crimes against national security, crimes committed in a military facility, and those crimes pertaining to members of the military forces.[581] As for the Religious Courts,[582] their jurisdiction has traditionally been communal, and limited to Personal Status matters.[583] Sunnī, Shī'ī, and Druze religious tribunals have retained jurisdiction over matters

[576] *Majlis al-Shūra* is the Lebanese equivalent of the French Conseil d'État – the highest administrative jurisdiction in France. See Chibli Mallat, "Lebanon: The Importance of a Civil System," *The Daily Star*, February 13th 1997, http://www.mallat.com/articles/issues1997.htm (accessed March 25, 2010).

[577] There are a number of other specialized tribunals such as the Judicial Council prosecuting crimes that the government deems grave, and the *Majlis al-'Amāl al-Taḥkīmī* (Arbitral Labour Council) dealing with Labour Law disputes. See Law Library of Congress, "The Lebanese Judiciary," http://www.loc.gov/ law/help/lebanon.php (accessed May 3, 2010).

[578] The Cassation Court or Supreme Court is the final Court of Appeal. See Law Library of Congress, "Lebanese Judiciary."

[579] Mallat, "Lebanon."

[580] Law Library of Congress, "Lebanese Judiciary."

[581] Ibid.

[582] See supra note 569.

[583] Abdullahi an-Naim, *Islamic Family Law in a Changing World: A Global Resource Book* (London; New York: Zed Books, 2002), 127.

pertaining to marriage, divorce, custody, inheritance, and wills, while Christian and Jewish religious courts deal only with marriage, divorce, and custody, leaving inheritance and wills to be handled by civil courts in instances involving these religious minorities.[584]

In the case of Sunnī Sharīʿa Courts – the focus of this dissertation – two levels are now in place, the Sharīʿa Court of First Instance and the Supreme Sharīʿa Court of Beirut.[585] The authority of the Sharīʿa Courts is however curbed by the possibility of appeal to the *Maḥkamat al-Tamyīz*.[586] As a case in point, a decision of the Sunnī court granting one father custody of his ten-year-old daughter[587] was reversed, in 2007, by Supreme Court Judge Fawzī Khamīs.[588] Khamīs ruled in favour of the mother who claimed that her daughter had been mistreated by the father – giving precedence to the *Qānūn Ḥimāyat al-Aḥdāth* (Law Protecting Juveniles).[589] Yet, it is not in the habit of the Supreme Civil Court to handle matters pertaining to Personal Status and even more

[584] Catholics are granted the extra-territorial right to appeal to the Vatican Rota Court. See Mallat, "Lebanon."
[585] An-Naim, *Islamic*, 127.
[586] Bashīr al-Bīlānī, "Personal Status," in *The Lebanese Legal System*, ed. Antoine el-Gemayel, 2 vols. (Washington, DC: International Law Institute, 1985), 1:268.
[587] Ḥanafī law grants custody to the mother up to the age of 7 in the case of a boy, and 9 for a girl. See al-Jazīrī, *al-Fiqh*, 4:598.
[588] Rania Maktabi, "Family Law and Gendered Citizenship in the Middle East: Paths of Reform and Resilience in Egypt, Morocco, Syria and Lebanon," draft paper presented at the World Bank - Yale Workshop Societal Transformation and the Challenges of Governance in Africa and the Middle East (Yale University, Department of Political Science, January 31 – February 1, 2009), 19-20; Maya W. Mansour and Carlos Y. Dawoud, "Lebanon: The Independence and Impartiality of the Judiciary," *Euro-Mediterranean Human Rights Network (EMHRN)*, February 2010, http://www.euromedrights.net (accessed May 5, 2010), 16.
[589] Maktabi, "Family Law," 19-20.

uncommon for the Supreme Court to interfere with the rulings of religious courts.[590]

The contemporary Lebanese system's vertical structure is inherently different from the pre-modern one, where the power to determine law was entrusted to *muftī*s (judges being deemed insufficiently qualified) and where the notion of increasingly higher courts was not even entertained.[591] When appeals did happen, they were directed to the succeeding judge or the ruler, which in itself opened the door to personal (not corporate) justice.[592] The process was bound to be different in the context of the nation-state – whose hallmark is to rule from above, and whose focal point is that of homogenizing social order, creating good and disciplined citizens who can better serve the nation.[593] By contrast, pre-modern jurists were mainly concerned with mediating disputes in order to maintain an ideal level of social harmony. [594] A major difference between these two systems is apparent in the fact that, while the nation-state subordinates the individual and society alike to a higher political order (and to the codified laws it authorizes and preserves), pre-modern jurists and their Sharī'a were driven by the principle "*al-ṣulḥ sayyid al-aḥkām*" (settlement is the best verdict).[595] These sharp operative differences affected the entire

[590] Marie Rose Zalzal, "*Mu'ālajat al-'Unf al-Manzilī wal-Wiqāya minh fī Qawānīn al-Aḥwāl al-Shakhṣiyya lil-Ṭawā'if al-Masīḥiyya*," in *al-'Unf al-Qānūnī ḍidd al-Mar'a fī Lubnān: Qawānīn al-Aḥwāl al-Shakhṣiyya wal-'Uqūbāt*, ed. Marie Roze Zalzal, Ghāda Ibrāhīm & Nadā Khalīfa (Beirut: Dār al-Farābī, 2008), 17.

[591] Hallaq, *Sharī'a*, 88; Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge: Cambridge University Press, 1989), 63.

[592] Hallaq, *Sharī'a*, 363; Zarinefab-Shahr, "Ottoman Women," 254; David S. Powers, "On Judicial Review in Islamic Law," *Law and Society Review* 26, 2 (1992): 316.

[593] For more on the *modus operandi* of the nation-state, see Hallaq, *Sharī'a*, 357-70.

[594] Ibid; Rosen, *Anthropology of Justice*, 79.

[595] Ibid., 162; Peirce, *Morality Tales*, 92, 123-5.

community or nation (in the modern sense). Because Religious Courts retained control over so-called Personal Status matters, the substance of such laws remained relatively faithful to Ḥanafī doctrine.[596] However, the codification of Personal Status laws confined Sharī'a judges to a textual application of the law ultimately affecting women and their rights.[597] This was not the case in pre-modern times when jurists – well aware of the preferential treatment of men by textual law and unrestricted by codification – endeavoured to shape the law so as to fit societal needs precisely because they operated within a social system of checks and balances.[598] A look at the contemporary understanding of *nasab* and *nasab*-related laws can shed light on the desolate legal situation of contemporary Lebanese women, to which codification, European influence, and the nation-state all contributed. It is to this task that we now turn.

4.2 *Nasab* in Contemporary Lebanon[599]

While a number of French codes were introduced and absorbed by Lebanese legislation, family law (as we saw earlier) was kept under the supervision and enforcement of the Religious Courts.[600] (Yet, we know now that whatever was left of the Sharī'a was distorted to the point of being almost unrecognizable.) This, along with the new codification mindset of an emerging generation of

[596] An-Naim, *Islamic* , 127.
[597] For a discussion on the effects of codification, see Hanna, "Marriage," 154; Naveh, "Tort of Injury," 16-41; Feldman, *Fall and Rise,* 60-68.
[598] El-Nahal, *Judicial*, 46-47; Hanna, "Marriage," 148; Zantout, "*Khul'*," 31-56; Tucker, "Revisiting," 12-13.
[599] I owe much of the information in this section to his Eminence Shaykh 'Abd al-Laṭīf Diriān – President of the Supreme Sharī'a Court of Beirut whose help, kindness, and assistance were essential to the completion of this dissertation, and are greatly appreciated.
[600] Feldman, *Fall and Rise,* 69; an-Naim, *Islamic*, 127.

jurists, became the basis of contemporary Lebanese Sharī'a and how it is applied to Sunnīs. It is worth remembering that the Ottoman Law of 1917 is relied upon in contemporary Lebanon in conjunction with Qadrī Bāshā's codification of Ḥanafī law (when legal remedy cannot be found in the former).[601] More precisely, it is al-Ibyānī's *sharḥ* (commentary) on Qaḍrī Bāshā's work that contemporary jurists revert to.[602] All of these sources will inform our discussion of how contemporary jurists deal with *nasab* and *nasab*-related matters. Reference will also be made to the current position of the Supreme Sharī'a Court of Beirut.[603]

In their treatment of *nasab*, contemporary *qāḍī*s have retained the significant traditional principle of *al-walad lil-firāsh*, whereby a child born to a marriage is attributed to the father by default.[604] The minimum and maximum limits that were adopted by the Ḥanafī jurists also remain unchanged. Article 332 of Qaḍrī Bāshā's code stipulates that 6 months is the minimum period for the conception of a child, 2 years the maximum, and 9 months the most common.[605] The innovation introduced by Article 332 lies in the reference to 9 months as the norm. That it took until the 19th century for the authorities to acknowledge in law that 9 months is the normal period of conception may seem surprising, but the generous maximum limit sanctified by pre-modern jurists was in no way an indication of their ignorance of the duration of human

[601] See section 2.2, "The Application of Islamic Law in Post-Colonial Lebanon," 56-65.
[602] Al-Ibyānī, *Sharḥ al-Aḥkām*. It is only in cases where no answers are to be found in the Law of 1917 or in al-'Ibyānī's *sharḥ* that jurists revert to pre-modern Ḥanafī doctrine.
[603] I am heavily indebted to Mireille Zreik and Abdel Hafiz Daouk for assisting me in addressing many of my questions and queries regarding contemporary Lebanese laws.
[604] Al-Ibyānī, *Sharḥ al-Aḥkām*, 2:4.
[605] Article 332 stipulates that: "*Aqall muddat al-ḥamal sittat ashhur wa ghālibuhā tis'at ashhur wa aktharuhā sanatān shar'an*." See al-Ibyānī, *Sharḥ al-Aḥkām*, 2:3-4.

pregnancy; rather (and as demonstrated previously), the jurists' acceptance of a 2 year timeframe reflected a persistent concern with communal harmony and social accommodation.[606] The alteration had more to do with the intellectual changes that were taking place at the time. The generous maximum duration of pregnancy allowed by pre-modern Muslim jurists was (and still is) often a source of embarrassment for contemporary Muslim thinkers and jurists alike – who attribute it to ignorance rather than their own failure to contextualize the pre-modern position.[607] One such example is the eminent and highly influential Egyptian scholar and jurist Rashīd Riḍā (d. 1935). In his view, the *fuqahā*''s position on the duration of pregnancy was based on the erroneous observations of elderly women and consequently inaccurate, irrational, and defying all logic.[608] Riḍā blames these women for misleading the jurists, adding that even though some pregnancies were lengthy their duration was abnormal and cannot be made into a rule.[609] Riḍā expresses the fear that allowing for such a lengthy duration of pregnancy would tempt some women to take advantage of the flexibility in the law, leading to social chaos.

While pre-modern jurists and Riḍā alike were motivated by a desire to preserve communal harmony, their respective understandings of what social order entails differed. Rather than preserving people's sins from being exposed,

[606] See section 3.1, "Survey of the Preliminary Sources on *Nasab*," 86-96.
[607] Ron Shaham, *The Expert Witness in Islamic Courts: Medicine and Crafts in the Service of Law* (Chicago: Chicago University Press, 2010), 168.
[608] Muḥammad Rashīd Riḍā, *Fatāwā al-Imām Muḥammad Rashīd Riḍā*, 6 vols. (Beirut: Dār al-Kitāb al-Jadīd, 1970), 3:839.
[609] Ibid.

Riḍā's view of social order was based on revealing the truth.[610] Clearly, this reflected more the European approach, which differed from the traditional Islamic view on both the epistemic and social levels. For while Islamic law allows for a long range of time during which a child may be attributed to the husband and seems driven by a concern for social order, its European counterpart understands this differently, placing a greater emphasis on science, rationality, and truth. And just like Qāsim Amīn, Riḍā endorses the Orientalist discourse that ridicules Muslim findings while praising accurate and scientific Western achievements.[611] Yet, while such achievements cannot be demeaned, pre-modern jurists were not claiming to assert scientific evidence, but merely working to preserve social order and communal wellbeing.

While the duration of pregnancy has intrigued doctors over time giving rise to much debate and controversy, the limit debated never exceeded one year.[612] In 1816, British doctors were asked to take a position on the matter at the famous Gardner peerage trial. Though many affirmed that pregnancy cannot exceed 40 weeks, a similar number attested to the contrary.[613] In two cases dating from 1947 and 1948, children born after 346 days and 349 days (after the husband and wife's last sexual encounter) respectively, were attributed to the husband. A few years later, in 1950, the court rejected a case where the child was born after 350 days.[614] Indeed, determining the average

[610] Ibid., 3:840.
[611] Piterberg, "Tropes," 48-50, 56-57.
[612] J.M. Munro Kerr, R.W. Johnstone and Miles H. Philipps, *Historical Review of British Obstetrics and Gynaecology, 1800-1950* (Edinburgh; London: E. & S. Livingstone LTD., 1954), 47-49, 93-96.
[613] Ibid., 47.
[614] Ibid., 95.

duration of pregnancy was based on observation – which is precisely how science adopted a limit in the vicinity of 300 days.[615] This was further supported by the Talmud – the earliest obstetrical calendar – stating that "most women give birth at 9 months after impregnation, some after 7 months."[616] That Muslim jurists could not have been aware of these facts and in ignorance set the duration of a pregnancy at a length from twice to five times the generally agreed upon maximum is clearly impossible, and so their elevated estimate can only be explained by these jurists' persistent and commendable concern with social harmony.[617]

Qaḍrī Bāshā's code sets the minimum conception limit at 6 months, in conformity with pre-modern opinions. Article 333 of the latter dictates that a child born earlier than 6 months after the marriage date is attributed to the father only upon the *iqrār* of the latter.[618] Article 343 furthermore dictates that a *zānī* who impregnates a *zāniya* and then marries her is considered the father of the child, if the latter is born 6 months after the marriage.[619] If the child is born within 6 months of the marriage date, the *iqrār* of the husband is still

[615] Ibid., 48.

[616] *The Babylonian Talmud*, trans. Rabbi Dr I. Epstein, 4 vols. (London: The Soncno Press, 1961), 1:231.

[617] The maximum limit is set at 4 years in the opinion of most schools of law, 2 years for the Ḥanafīs, and 5 years in the opinion of Mālik Ibn Anas. See, Ibn 'Ābidīn, *Radd al-Muḥtār*, 3:540, 558; al-'Aynī, *al-Bināya*, 5:454; *Mawsū'a*, s.v. "*Nasab*," 40: 240.

[618] Article 333 stipulates that: "*Idhā wulidat al-zawja ḥāla qiyām al-nikāḥ al-ṣaḥīḥ waladan litamām sitat ashhur faṣā'idan min ḥīn 'aqḍihi thabata nasabihi min al-zawj fa'in jā'at bihi li aqall min sittat ashhur mundhu tazawwujihā falā yuthbat nasabahu minhu illa idhā idda'āh wa lam yaqūl innahu min al-zinā.*" See al-Ibyānī, *Sharḥ al-Aḥkām*, 2:5.

[619] Article 343 reads as follows: "*Idhā tazawwaja al-zānī muzniyatahu al-ḥāmil min zināh fa wulidat li madā sitat ashhur mundhu tazawwujihā yuthbat nasab al-walad minhu wa laysa lahu nafiyahu wa inn jā'at bihi li aqall min sitat ashhur mundhu tazawwujihā falā yuthbat nasabahu illa idhā idda'āh ghayr mu'tarif innahu min al-zinā.*" See al-Ibyānī, *Sharḥ al-Aḥkām*, 2:17.

required.[620] Here, too, Qadrī Bāshā's position does not depart from the traditional Ḥanafī understanding whereby a man who acknowledges fathering a child conceived out of wedlock and later contracts a marriage is considered the father.[621]

As for the maximum delay to attribute a child to a father after a divorce or the death of the latter, the contemporary position accords to this day with Ḥanafī doctrine.[622] This contrasts with the laws introduced in a number of contemporary nation-states reducing the maximum limit to one year. Egyptian courts are forbidden (since 1929) from disputing cases where the child is born more than one year after the last physical encounter.[623] The same applies to India and Pakistan where – in conformity with English law – a father's acknowledgment is not recognized if physical union was impossible.[624] Article 344 of Qadrī Bāshā's code also upholds the validity of 2 years as the maximum limit within which a widow can attribute her child to her dead husband.[625] More time is granted in cases of a *raj'ī* divorce[626] – provided that the wife does not confirm that her *'idda* has lapsed.[627] In cases of a *ba'in* divorce or the death of the

[620] Ibid.
[621] Ibn Māza, *al-Muḥīṭ*, 3:252.
[622] Many of the works surveyed for this dissertation attest that children in contemporary Lebanon are deemed legitimate when born no sooner than 180 days after the marriage date and within *one* year of the date of separation or death of the husband. See al-Bīlānī, "Personal Status," 1:322; Catala, *Droit libanais*, 1:118-19. However, the Sunnī Court of Personal Status confirmed that 2 years is the maximum limit allowed, citing Article 343 of Qadrī Bāshā as reference.
[623] Article 15 of Law 25 of 1929 stipulates that: "*Lā tusma' 'ind al-inkār da'wā al-nasab li walad min zawja atat bihi ba'da sana min ghaybat al-zawj 'anhā*." See al-Rāfi'ī, *al-Aḥwāl*, 152; Muḥammad Jawād Maghniyya, *al-Zawāj wal-Ṭalāq 'alāl-Madhāhib al-Khamsa* (Beirut: Dār al 'Ilm lil-Malāyīn, 1960), 78.
[624] Hallaq, *Sharī'a*, 465.
[625] Al-Ibyānī, *Sharḥ al-Aḥkām*, 2:19-20.
[626] See supra note 406.
[627] Al-Ibyānī, *Sharḥ al-Aḥkām*, 2:19.

husband, the child can be attributed to the father even after the two-year limit if the divorced husband or the heirs acknowledge the child in question.[628]

The heirs of a deceased man whose widow gives birth to a child within 2 years of her husband's death may want to contest the child's lineage. As demonstrated in the previous chapter, the pre-modern juristic position on the matter was clear and unequivocal. The husband, the divorced husband, and the heirs all had to follow specific, albeit different rules. Indeed, casting doubt on the identity of a child's father exposed the father, the mother, her relatives, and the child to social scandal and possible ostracism. In addition, a fatherless child would most likely have faced financial hardship, since he or she would not be entitled to *nafaqa*, housing, or inheritance from the father.[629] This was especially true in traditional societies and still is wherever men are the primary (if not sole) source of income. Even today, Lebanese men generally achieve better job positions, earn higher incomes, and obtain more social benefits as a result of gender-biased laws as well as societal ideals relegating women to the private realm. As we saw previously, pre-modern jurists required that a husband

[628] Ibid., 2:20.

[629] A mother is in charge of the financial wellbeing of her fatherless child. Yet, she is at a disadvantage since she inherits half the share of her brother(s), is offered fewer jobs, earns lower wages, and receives less social benefits. She may also not have the support of her male relatives. In fact, Lebanese women are all too often denied welfare benefits enjoyed by men and discriminated against in matters pertaining to health care, hospitalization, and other social benefits for family members. For more on the situation of working women and labour laws in contemporary Lebanon, see the United Nations' Information Service, "Women's Anti-Discrimination Committee Takes up Lebanon's Report, Commends Impressive Steps Taken to Promote Gender Equality," July 13th 2005, http://www.unis.unvienna.org/unis /pressrels/ 2005/wom 1514.html (accessed March 26, 2010); United Nations Development Programme, " Programme on Governance in the Arab Region," http://www.pogar.org /countries/ theme.aspx? cid=9&t=4 (accessed March 28, 2010); Lebanese Non-Governmental Organization (NGO) Forum, "Women's Rights Monitor Project, Report on the Elimination of all Forms of Discrimination Against Women (CEDAW)," Draft of Initial Report, March 2000, http://www.lnf.org.lb/windex/report31.html (accessed March 28, 2010).

wanting to deny having fathered his wife's or divorced wife's child must follow specific rules and initiate a *li'ān* or risk being lashed for slandering her.[630] Incidentally, *qadthf* is not retained in Qadrī Bāshā's code which in turn attests to the collapse of a social scheme where the system of legal checks and balances did not tolerate and harshly punished slander. This accommodating yet highly regulated option was not extended to the heirs of a deceased husband who (in order to deny the child's lineage) were instead required to: (1) obtain the *iqrār* of the woman that her *'idda* had elapsed; or (2) have the woman willingly admit to engaging in *zinā;* or (3) secure the required four witnesses to her *zinā*, all of which are not likely to happen.[631] As far as the *li'ān* is concerned, the procedure has become extremely rare if not inexistent in contemporary Lebanon.[632] In fact, the Law of 1917 makes no reference to *li'ān*, nor does al-Ibyānī allocate a section to *li'ān* in his chapter on divorce. A closer look at al-Ibyānī's work, however, reveals that *li'ān* is treated under the entry devoted to *nasab*.[633] The near-disappearance of *li'ān* is explained by the fact that matters pertaining to *zinā* have been removed from Sharī'a jurisdiction and entrusted to the Penal Code.[634] What makes a person guilty of *zinā*, the evidence required, and the related punishments are now all handled by the Civil Courts – according to French-

[630] See section 3.3, "Denying the Paternity of a Child," 107-15.
[631] For more, see section 3.1, "Survey of the Preliminary Sources on *Nasab*," 86-96.
[632] That the *li'ān* procedure is no longer applicable today has been corroborated by a number of scholars working on the Lebanese legal system, who mention *li'ān* in their works or commentaries on Personal Status laws but only as a past and outdated practice. See al-Bīlānī, "Personal Status," 1:312; Catala, *Droit libanais*, 2:112.
[633] Although al-Ibyānī devotes no section to *li'ān* per se (under divorce), the *li'ān* is referred to in the section on *nasab*. Articles 335, 336, 337, 338, 339, 340 all include a discussion on *li'ān*. See al-Ibyānī, *Sharḥ al-Aḥkām*, 2:5, 8-13.
[634] A detailed discussion follows in the next section (4.3 "*Zinā* in the Lebanese Penal Code," 146-55).

inspired laws and principles. This disappropriation of *zinā*-related matters from the realm of Sharīʿa and the consequent suppression of *liʿān* has, however – and contrary to popular belief – proven to be to the disadvantage of the community and the nation, and more particularly to women. For the laws pertaining to *zinā* now in force in the Penal Code show much less concern with sustaining a level of social harmony and instead focus on punishing people for their vices. As mentioned previously, in order to be convicted of *zinā* under Islamic law, one either had to confess to committing *zinā* four times, or have been caught in the act by 4 witnesses willing to testify in front of a judge as to the explicit details of the act, in accordance with the requirements of the law of evidence.[635] It should moreover be noted (again contrary to popular belief) that, strictly speaking, *zinā*-related punishments apply to men and women in the same manner. Yet, in sharp contrast with Islamic law, the nature of contemporary Lebanese laws dealing with adultery is particularly gendered, requiring much less evidence to convict a woman and imposing on her harsher sentences than those attributed to men, thus affecting women to a substantively greater degree than men.

While *nasab*-related cases are not all that common in Lebanon – as couples prefer to sort out such matters privately so as to avoid public exposure – two such cases are worth mentioning.[636] In a case dating from August 2007, the Sharīʿa Court of First Instance rejected a husband's request to deny the paternity of 2 children born to his marriage. The husband, married for 13 years, presented the court with a medical report attesting to his sterility and inability

[635] Al-ʿAynī, *al-Binãya*, 6:194; Ibn ʿĀbidīn, *Radd al-Muḥtār*, 4:7.
[636] These cases were kindly provided by counselor Zeina al-Maṣrī.

to have fathered either of the 2 children. The court rejected his claim arguing that the time allowed by Ḥanafī *fiqh* had long passed and that a *li'ān* could no longer be an option.[637] In conformity with the Ḥanafī understanding, the contemporary Lebanese position is that a man who wants to deny the paternity of his wife's or divorced wife's child has to signal his denial within a specific timeframe, such as when approached to buy child-related products or while congratulations for the birth are being made. In cases where the husband is away, he is considered informed once his wife gives birth.[638] Thus a man who fails to respect the above conditions or who wants to deny fathering a child that he acknowledged previously is not entitled to deny paternity – regardless of whether the couple is separated or not.[639]

Yet despite the fact that the plaintiff in the above case had failed to request a denial of paternity within the allowed timeframe, and despite having considered himself the father of these children for a number of years, the decision of the Court of First Instance was later (April 2008) reversed by the Sharī'a Supreme Court. This was because the husband had initiated a *zinā* suit against his wife, a procedure only made possible by the fact that *zinā* had been transferred into the civil realm. As will be discussed at length in the following section, contemporary Lebanese legislation no longer requires the presence of the 4 witnesses to the sexual act in order to prove that *zinā* has occurred, and

[637] Sunnī Court of Beirut, case 38/2008, record 125.
[638] Article 335 stipulates that: "*Innamā Yaṣuḥ nafīl-walad fī waqtal-wilāda aw 'inda shirā' adawātihā aw fī ayyām al-tahni'al-mu'tāda 'alā 'urf ahlil-balad wa idhā kānal-zawj ghā'iban faḥālat 'ilmihi kaḥālat wilādatuhā.*" See al-Ibyānī, *Sharḥ al-Aḥkām*, 2:5-6.
[639] Ibid., 2:8-9.

slander is no longer punished.[640] The woman countered this claim by presenting documents that she had been artificially inseminated. Yet, with Lebanese legislation being silent on insemination and its relationship or lack of thereof with *zinā*, both parties reached an agreement whereby the husband would drop the *zinā* case if the wife attested that the 2 children were not his; and that is precisely what followed. It was only because the mother attested that the children were not fathered by her husband that the defendant was able to deny paternity of the 2 children. The fact that the husband provided the court with scientific evidence attesting to his infertility was not retained by the court.

This of course brings up the question of the integration of scientific evidence into Islamic law. While ignoring scientific evidence seems irrational to the Western way of thinking, the same cannot be said of the Islamic worldview. In fact, disregarding scientific evidence has proven to be a necessity with regards to Deoxyribonucleic Acid (DNA) testing. DNA testing is still considered a new method in Lebanon, as it is in many regions across the globe. Even though it is said to scientifically determine the identity of a child's father (and mother for that matter), it is not widely available in Lebanon, and certainly not easily accessible, or even acknowledged by everyone.[641] In addition, it is not relied upon by the courts and there is no law that obliges a man to get tested in cases

[640] *Zinā* under contemporary Lebanese law will be discussed in the next section (4.3 "*Zinā* in the Lebanese Penal Code," 146-55). As for *qadthf,* it has not been retained in Qadrī Bāshā's code.

[641] That some people are skeptical of science cannot be dismissed. For some, religion has precedence over science. As a result, they will not favour any scientific advancement over religious law – no matter how accurate it is. In fact, it is not unlikely that this position be adopted by a number of religious figures. For one such example, see Shaham, *Expert Witness*, 169-70.

of *nasab*-related litigation.[642] This is at least partly due to the reluctance in Islamic thinking to expose one's self or family to the public eye. It is in fact a testament to the different Western and Islamic modes of thinking on the purpose of human existence. For while the Western position favours individual rights, the Islamic one places more emphasis on community as a moral structure. Consequently, the question of scientific evidence such as DNA is subject to much debate across the contemporary Islamic world. Because legitimizing such a procedure would disrupt social order, shaking social ties altogether and challenging the question of existence, family, happiness, and one's place within a group; most Muslim jurists refuse to incriminate any one person on the sole basis of DNA results.[643] The eminent Yūsuf al-Qarḍāwī is a notable exception since he accepts DNA results as evidence – at least if it is the woman who requests that such a test be carried out. A similar request made by

[642] DNA testing is not compulsory in Lebanon. The same applies to Egypt, where, in a famous yet hardly uncommon case, the courts attributed (after much debate) paternity of Hind al-Ḥinnawī's daughter to the actor Aḥmad al-Fishāwī. The alleged father denied fathering the child and systematically refused to submit to DNA testing. It would seem that some 14,000 similar cases have been processed by Egyptian courts. This figure is exclusive of illegitimate children who are generally left to grow up in orphanages or on the streets. Their number is estimated to reach into the tens of thousands. This desolate situation seems to be related to the common occurrence of *'urfī* (customary) marriages. A *'urfī* marriage does not require official registration at the court. Nor is the presence of a *walī* required to validate the marriage. Any signed document stating that the couple has been married in the presence of a religious cleric and 2 witnesses will serve. For more on *'urfī* marriages, see Hilāl Yūsuf Ibrāhīm, *Aḥkām al-Zawāj al-'Urfī* (Alexandria: Dār al-Maṭbū'āt al-Jāmi'iyya, 1995), 27-31; Welchman, *Women*, 54-59. In the above case, al-Ḥinnawī claimed that she and al-Fishāwī contracted a *'urfī* marriage, but could not provide evidence to support her claim. See Dena Rashed, "Legally Yours," *al-Ahram Weekly* 797, June 1-7th, 2006, http://weekly.ahram.org.eg/2006/797/fe1.htm (accessed March 22, 2010); Civil Monitor for Human Rights Association, "Egypt: High-Profile Paternity Case is not Unique," http://www.wluml.org/ node/2708 (accessed March 22, 2010).

[643] The justification being that errors may have occurred in the collection or analysis of the samples (Shaham, *Expert Witness*, 171).

the husband should, according to him, be rejected.[644] Yet, most Muslim scholars reject DNA altogether (regardless of who makes the request), as the *li'ān* procedure is deemed sufficient should a man have doubts about or wish to deny his paternity of a child.[645] Contemporary jurists claim that DNA testing is only widely accepted when *maṣlaḥa* (general welfare) is at stake, and mostly rejected in cases where *mafāsid* (cases leading to corruption) are involved.[646] That is precisely why DNA results are fully acknowledged in cases of disasters and were reverted to in January 2010 following the crash of Ethiopian Airlines 409 shortly after its take off from Lebanon.[647]

In the other case, dating from August 2005,[648] a mother petitioned the court in order to establish the *nasab* of her child to a man she claimed to have been married to in February 2005. The woman approached the court with DNA results establishing that the defendant fathered her child born in May 2005 and insisted that a marriage had been contracted at a notary's office in February 2005. In order for a marriage to be valid in contemporary Lebanon, it has to be registered at the court of personal status, a matter that the man pledged to do in August of the same year. The Sharī'a Court of First Instance ruled that the marriage had been contracted in September 2004 – the date when the woman

[644] World Fatwa Management and Research Institute, "DNA Analysis to Establish Paternity? Right of the Father or the Mother?" http://infad.usim.edu.my/modules.php?op=modload&name=News&file=article&sid=10709 (accessed November 1, 2010).
[645] Shaham, *Expert Witness*, 172.
[646] Ibid.
[647] Rājānā Ḥamiyya, "Hal Yatarayyath al-Mas'ūlūn bi I'lān Faḥṣ al Ḥomḍ al-Nawawī," a*l-Akhbār*, 11 February 2010, http://www.al-akhbar.com/ar/node/176797 (accessed October 28, 2010). DNA testing is also used to help establish historical discoveries (Tom Perry, " In Lebanon, DNA May Yet Heal Rifts," *Ṣaḍa al-Waṭan*, September 18, 2007, http://www.arabamericannews.com/news/ index.php?mod=article &cat=Lebanon&article=125 (accessed November 1, 2010)).
[648] Sunnī Court of 'Akkār (Northern Lebanon), reference 33/2008, record 77.

claimed to have received a *mahr* – and consequently attributed the child to the defendant, who was fined and required to pay all the fees related to the case. The court's decision made no mention of the DNA results, though it may be that such results motivated it to validate the marriage back to September 2004 – thus allowing the child to be attributed to the marriage bed.[649] Be that as it may, the decision of the Court of First Instance was subsequently appealed and reversed in March 2009. The Sharī'a Court of Appeal established that the man had only promised to marry the woman, his pledge to officially register the marriage at a later date being taken as a sign of this intention. The woman's confirmation that this was indeed what happened provided the court with 2 *iqrār*s (attestations) that the marriage was never effectively contracted.[650] Of course, given that *nasab* is established through marriage (and not intercourse), the Court of Appeal reversed the initial verdict, thus allowing the man to evade any responsibility as husband and father. It would seem that the Court of Appeal used a bureaucratic technicality to reverse the decision of the Court of First Instance, a procedure possibly aimed at tightening the court's control over marriages and discouraging *'urfī* (customary) marriages.[651]

Whether it is because they consider the Law of 1917 and Qaḍrī Bāshā's code to still serve contemporary societal needs or because they fear opening the doors to reform and foreign influences, contemporary Lebanese Sunnī judges

[649] *Thubūt al-nasab* (establishment of lineage) is established after 6 months of marriage (Ibn 'Ābidīn, *Radd al-Muḥtār*, 3:542; al-'Aynī, *al-Bināya*, 5:452).
[650] Reference 33/2008, record 77. The court asserts that: "*man aqarra bi shay' lazimahu* (one is bound to what he or she attested to).
[651] See supra note 642.

are careful to be as faithful as possible to Ḥanafī jurisprudence. Even the generous maximum limit attributing a child to the marriage bed (up to 2 years following a divorce or the death of the husband) is upheld.[652] The position of contemporary Lebanese judges finds its roots in the idolization of the Sharīʿa, as well as a refusal to change what prior generations endeavoured to achieve. This, coupled with a palpable resistance to change, seems to constitute a rejection of modernity and Western influence. Yet, with 18 religious sects co-existing and constantly struggling to retain their authority,[653] it is no less than the institution of religion itself that finds itself in jeopardy. While one is tempted to assume that contemporary *qāḍī*s applying the Sharīʿa in Lebanon chose to limit the recourse to *liʿān* in order to strip women of rights and further subordinate them to men, it would seem that this omission is more the product of a two-fold acknowledgment on the part of these *qāḍī*s, i.e., a recognition of a serious decline in morality, as well as an acquiescence to the nation-state's exclusive appropriation of the penal sphere. In fact, in a world where morality seems to be in jeopardy, a declaration in front of God no longer carries the same weight it used to in pre-modern times. There is no longer the feeling that a man who is denying paternity of his wife's or divorced wife's child is effectively accusing her of being an adulterer, in the process tainting her honour and, even worse, threatening the entire social order. That is precisely why this chapter devotes a substantial section to a discussion of *zinā* and *zinā*-related laws.

[652] Al-Ibyānī, *Sharḥ al-Aḥkām*, 2:19-20.
[653] See supra note 250.

4.3 *Zinā* in the Lebanese Penal Code

European pressure coupled with a desire to conform to a Western paradigm led the Ottomans to adopt a new Penal Code in 1858 – one that was based on the Napoleonic Criminal Code of 1810.[654] This step was lauded by Europeans since the new code abolished Islamic punishments – punishments that were nevertheless hardly ever enforced and served mainly as deterrents.[655] The indulgent nature of Islamic legal practice did not escape the attention of the British, whose major criticism of the latter referred to its "dull leniency."[656] Governors Hastings and Cornwallis (1786-93) totally discarded Islamic homicide law due to its inherent clemency and its assignment of the choice of punishment to the next of kin – thus taking away that right from the state.[657] Given that women were deprived of many of their rights in the Code Napoleon, it should come as no surprise that Lebanese women were placed at a disadvantage by the growth of French legal influence.[658] Indeed, while the Lebanese Penal Code was promulgated only in 1943, French penetration of the legal realm had been effective since 1858 – the year in which the Ottomans adopted the French Penal Code, allowing for an infiltration of French values and

[654] Catala, *Droit libanais*, 2:90; Feldman, *Fall and Rise,* 60.

[655] Hallaq, *Sharī'a*, 311-12. Elyse Semerdjian asserts that *zinā* was punished by banishment, flogging, or fines rather than stoning. See Elyse Semerdjian, "Gender Violence in Kanunnames and Fetvas of the Sixteenth Century," in *Beyond the Exotic: Women's Histories in Islamic Societies*, ed. Amira el-Azhary Sonbol (Syracuse: Syracuse University Press, 2005), 185; Feldman, *Fall and Rise,* 48-49.

[656] Hallaq, *Sharī'a*, 366.

[657] Ibid., 378.

[658] To cite but a few examples, the Code Napoleon dictates that a woman is: (1) not entitled to access schools and universities, (2) incapable of signing a contract and administering her worldly goods, (3) not entitled to political rights, (4) forbidden to work without her husband's approval, (5) unable to dispose of her own salary, and (6) forbidden to travel without her husband's permission. See Herchenroder, "Capacity," 196-98; de Beauvoir, *Second Sex*, 115, 130, 142.

attitudes. This is clearly evidenced in the realm of *zinā*,[659] where the definition of the "crime" itself was revised. Traditionally defined as extralegal sexual intercourse, where adultery and fornication were both incorporated,[660] *zinā* has come to be labeled as a sexual relationship between a married person and someone other than his/her spouse.[661] Confining *zinā* to adultery greatly diminishes the pre-modern concern with controlling sexual relations and enforces a Western Christian view of marriage as a holy union – rather than a contractual agreement.[662] As far as the legal proof required to convict someone of *zinā*, the longstanding condition of four witnesses to the sexual act is waived and replaced by a range of gendered legal proofs. The same applies to *zinā*-related punishments, where the appalling – though rarely applied – penalties of lashing and stoning are replaced by more "modern" (read "civilized") yet gendered measures.[663] However, not only do these "modern" revisions make it easier for one to be found guilty of *zinā* by its restricted, modern definition and liable to punishment as a consequence, but they are especially prejudiced against women. The highly specific details that witnesses are required to provide under Islamic law are no longer required,[664] women can be convicted on the basis of a wider variety of excuses than men, and the punishment to be inflicted upon women is substantially more severe than that reserved for men.

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[659] Catala, *Droit libanais*, 2:90.
[660] *Mawsūʻa*, s.v. "*Zinā*," 24:18-47.
[661] Laure Moghaizel, *al-Mar'a fil-Tashrīʻ al-Lubnānī* (Beirut: Nawfal, 1985), 193.
[662] In contrast with a *nikāḥ* that is a contractual agreement, a Christian marriage is a divine union. See Jay E. Adams, *Marriage, Divorce, and Remarriage* (New Jersey: Presbyterian and Reformed Publishing Company, 1980), 9-11.
[663] For details on *zinā*-related punishment, see supra note 478.
[664] For more on the nature of such details, see al-ʻAynī, *al-Bināya*, 6: 192-93; Ibn ʻĀbidīn, *Radd al-Muḥtār*, 4:10.

This stands in sharp contradistinction with past practice where the same laws and conditions applied to all sane, adult Muslims, regardless of gender, as will shortly be discussed in more detail.

In order to analyze contemporary Lebanese legislation on *zinā,* a look at the French source that inspired it is necessary. Adultery was considered a crime in France until as late as 1975[665] and treated by Articles 337, 338, and 339 of the French Criminal Code:[666]

> 337. The wife convicted of adultery shall undergo the penalty of imprisonment ranging between three months and two years.
>
> The husband shall have the power of stopping the effect of this condemnation by consenting to take his wife again.
>
> 338. The accomplice of the adulterous wife shall be punished with imprisonment, during the same space of time, and with a fine ranging from 100 to 2,000 francs.[667]

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[665] Moghaizel, *al-Mar'a,* 199; Danielle Hoyek, Rafif Rida Sidawi, and Amira Abou Mrad, "Murders of Women in Lebanon: 'Crimes of Honour' between Reality and the Law," in *Honour: Crimes, Paradigms and Violence Against Women*, ed. Lynn Welchman and Sara Hossain (London; New York: Zed Books, 2005), 115. Adultery is no longer considered a crime in contemporary France; it remains however, a civil fault. Article 212 of the French Civil Code (in the translation of Georges Rouhette, http://www.legifrance.gouv.fr/ html/codes_traduits/code_civil_textA.htm (accessed March 23, 2010)) reads as follows: "Spouses mutually owe each other fidelity, support and assistance," thus turning adultery into a valid cause for divorce for breaching the obligation of fidelity," while Article 242 stipulates that: "Divorce may be petitioned by a spouse for facts ascribable to the other where those facts constitute a serious or renewed violation of the duties and obligations of marriage and render unendurable the continuance of community life." For more on adultery and how it is treated under contemporary French law, see Adeline Daste and Aude Morgen-Guillemin, *Divorce: Séparations de corps et de fait* (Paris: Éditions Delmas, 2007), 38-39; Corinne Renault-Brahinsky, *Droit de la famille* (Paris: Gualine Éditeur, 2006), 135-38.

[666] The French Criminal Code was enacted in 1810 and drew upon Roman Law. Articles 337, 338, and 339 read as follows: (337) "*La femme convaincue d'adultère subira la peine de l'emprisonnement pendant trois mois au moins et deux ans au plus. Le mari restera maître d'arrêter l'effet de cette condamnation, en consentant à reprendre sa femme*." (338) "*Le complice de la femme adultère sera puni de l'emprisonnement pendant le même espace de temps, et, en outre, d'une amende de cent francs a deux mille francs. Les seules preuves qui pourront être admises contre le prévenu de complicité, seront, en outre le flagrant délit, celles résultant de lettres ou autres pièces écrites par le prévenu*." (339) "*Le mari qui aura entretenu une concubine dans la maison conjugale, et qui aura été convaincu sur la plainte de la femme, sera puni d'une amende de cent francs à deux mille francs*." (*Code pénal, ou Code des délits et des peines* (Paris: Garnery, 1810), 257).

[667] In the translation of Tom Holberg, http://www.legifrance.gouv.fr/html/codes_traduits/ (accessed March 21, 2010).

> The only proof which can be admitted against the person charged as an accomplice shall be letters or other correspondence written by the person accused.
>
> 339. The husband who shall keep a concubine in the house where he and his wife live and who shall be convicted upon the complaint of the wife shall be punished with a fine of 100 to 2,000 francs.

The gendered nature of these French laws is evident in a number of areas ranging from the requirements necessary to convict a man or woman of adultery, to the penalty incurred. While a French woman could be accused of *adultère* as long as legal proof was available (in the form of witnesses, letters, correspondence, etc.), the law only considered the husband guilty if he kept a concubine in the marital home. Not only that, but imprisonment was only inflicted upon the wife, whereas the husband was merely fined. The fine incurred by the husband was initially set at a much higher amount (4,000 to 480,000 francs), but this came to be reduced under the Third Republic.[668] The law also shows a level of preference to the convicted wife's accomplice, since the legal proof required to convict him was restricted to letters or documents written by him. Once convicted, however, the male partner was inflicted with both the imprisonment incurred by an adulteress wife *and* the fine applicable to an adulterous husband. The construction of these laws seems to indicate that adultery was only a crime on the part of the woman (since she violated the honour of her husband), and constituted a mere civil fault on the part of the

[668] Anne Marie Sohn, "The Golden Age of Male Adultery: The Third Republic," *Journal of Social History* 28, 3 (Spring, 1995): 470.

husband for having violated the sanctity of the marital home.[669] That is precisely why the wife was liable to imprisonment while the husband was fined. The case of the male accomplice was of course more complex.[670]

Be that as it may, these above-mentioned French laws were taken up by Lebanese legislators and French jurists when they crafted Articles 487 and 488 of the Lebanese Penal Code:[671]

> 487. The wife convicted of adultery shall undergo the penalty of imprisonment ranging from three months to two years. The accomplice of the adulterous wife shall undergo the same penalty if married. If he is not married, the penalty of imprisonment shall be from one month to one year.
>
> What qualifies as legal proofs convicting the partner are letters and documents written by him.
>
> 488. The husband shall undergo the penalty of imprisonment, ranging from one month to one year if he is guilty of adultery in the marital home or does so repetitively and publicly.

These Lebanese *zinā*-related laws are in the main inspired by their French source, with a notable difference pertaining to the punishment imposed on the male accomplice and the adulterous husband, for unlike his French counterpart,

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[669] A fault is distinguished from a crime in that it affects the interests of an individual rather than that of society at large.

[670] This could be the result of the notion of coverture (see supra note 71), the rationale being that the male accomplice has committed a sin against another independent legal entity (namely the husband), while a convicted husband has committed an injury to his wife (whose legal entity has been merged with his).

[671] Article 487 reads as follows: "*Tu'āqab al-mar'a al-zānīya bil-ḥabs min thalāthat ashhur ilā sanatayn wa yuqḍā bil-'uqūba nafsahā 'alā sharīk al-zānīya idhā kāna mutazawwijan, wa illā fal-ḥabs min shahr ilā sana. Fīmā khalā al-iqrār al-qaḍā'ī wal-jinḥa al-mashhūda lā yuqbal min adillat al-thubūt 'alāl-sharīk illā mā nasha'a minhā 'alāl-rasā'il wal-wathā'iq al-khaṭṭiyya al-latī katabahā.*" As for Article 488, it dictates that: "*Yu'āqab al-zawj bil-ḥabs min shahr ilā sana idhā irtakaba al-zinā fil-bayt al-zawjī aw itakhatha lahu khalīla jahāran fī ay makānin kān.*" See *Qānūn al-'Uqūbāt al-Lubnānī* (Beirut: Antoine Edition, 2009), 263-64.

the latter is not spared imprisonment.[672] This was perhaps due to the influence of the principle of equal treatment in the Sharīʿa. Even so, his sentence is substantially lighter than that of the adulterous woman, since the lower limit of his sentence is reduced by a third and the upper limit by half.[673] This gendered approach of the law is also apparent in the evidence required to convict a person of civil-*zinā.*[674] While a woman is convicted if evidence of her unfaithfulness is available (such as witnesses seeing her with a non-*maḥram*, i.e., consanguineous male, phone calls, messages, emails, etc.), her husband is only charged with civil-*zinā* if his adulterous act is committed in the conjugal home.[675] The only way that a husband can be convicted outside the home is if he repeatedly commits *zinā* with the same woman, or does so in a *mushtahara* (public) manner.[676] In sum, while the requirements for the man are specific and highly restrictive, the conviction of a woman is at the discretion of the *qāḍī* – who decides whether the evidence at hand is sufficient.[677] Moreover, the marital status of a man engaging in sexual relations with a married woman is taken into consideration such that an unmarried man benefits from a reduced sentence.[678]

As for the woman who engages in sexual relations with a married man, she is considered a *zāniya* and is liable to punishment regardless of where the

[672] See supra note 666.
[673] Moghaizel, *al-Mar'a,* 199. The case was undoubtedly different in England where adultery was viewed as a civil and moral fault giving rise to the right to divorce or compensation.
[674] In order to avoid confusion resulting from the difference between the pre-modern and contemporary understandings of *zinā*, the term "civil-*zinā*" will be used when referring to the latter.
[675] See supra note 666.
[676] Moghaizel, *al-Mar'a,* 193.
[677] In terms of compensation, this is not the case under Kuwaiti legislation, as men and women are treated equally in matters pertaining to *zinā* (i.e. its conditions for conviction and related punishment). For more on *zinā* laws in Kuwait see, Moghaizel, *al-Mar'a,* 197.
[678] See supra note 666.

act takes place.[679] As far as the nature of the punishment is concerned, while the wife is liable to imprisonment ranging from 3 months to 2 years, the husband's charge is substantially reduced (from 1 month to 1 year).[680] As for the woman who engages in sexual relations with a married man, she incurs the same penalty as the adulterous wife.[681] Her act need not be public or even repetitive, nor is her marital status taken into consideration. This is not the case with the male engaging in sexual relations with a married woman, as he is liable to imprisonment from 3 months to 2 years if married, and 1 month to 1 year if he is not.[682] This gendered disparity in the punishment of members of an adulterous couple has been rightly challenged by the late Laure Moghaizel (d. 1997) on the ground that a partner in *zinā* is an active participant (not an accessory), since the "crime" in question cannot be committed by one person alone.[683]

The contemporary situation is very different from pre-modern practice and highly faithful to its French-inspired model, making it relatively easy to convict a wife of *zinā*. Not only is witnessing the sexual act dispensed with, but a wide range of legal proof incriminates the wife. The matter is undeniably different when a husband is caught in adultery as he is only convicted if found in the marital home, or if his act is openly public and repetitive. This gendered divide is also evidenced in the realm of punishment, with the wife's penalty much higher than that inflicted upon the husband. Another disparity is noted in

[679] Moghaizel, *al-Mar'a,* 194.
[680] Ibid., 195.
[681] Ibid., 195-96.
[682] See supra note 666.
[683] Moghaizel, *al-Mar'a,* 195.

the treatment of male and female accomplices, since a woman who engages in *zinā* with a married man is convicted regardless of where her act takes place and liable to the same penalty as the adulteress – regardless of whether she herself is married or not. This is not the case with the male accomplice, who is only convicted if written documents incriminating him are available; he also benefits from a reduced sentence if not married.[684]

This sharp break from the past is brought into focus by the long standing traditional requirement of four witnesses of the sexual act. As mentioned previously, pre-modern jurists required that four witnesses to the act of sexual penetration be available. What is more, all four had to be willing to testify to what they had seen in detail such that any discrepancy in their accounts made *them* all guilty of slander, and punishable by means of 80 lashes.[685] The rigorous evidentiary requirements are such that the distinguished al-'Aynī (d. 855/1451) asserted that the witnesses' observation of the sexual act must be as clear as if they had seen *al-qalam fil-maḥbara* (the pen in the inkwell).[686] Pre-modern jurists also treated men and women equally in matters pertaining to *zinā*, in clear contrast to the Civil Courts of today, when women face a clear disadvantage. In addition, these jurists do not seem to have been driven by the need to discipline and punish, their main concern being that of attaining a certain level of social harmony. In fact, they were adamant to prevent the tainting of another's honour, regardless of gender. As a case in point, a man who slandered his own wife or anyone he suspected of being a *zānī* was liable to punishment by lashing

[684] Ibid., 197.
[685] Al-Kāsānī, *Badā'i'*, 3:237-38; al-Jaṣṣāṣ, *Aḥkām*, 3:290; al-'Aynī, *al-Bināya*, 5:364.
[686] Al-'Aynī, *al-Bināya*, 5:373.

– unless he was able to provide the required four witnesses or engage in a *li'ān*.[687] Slander was a grave offence regardless of the gender or marital status of the victim. Granted, pre-modern jurists did give the husband an edge over his wife as she could never be absolved from slander should she accuse her husband without legal proof, but that was the only difference between them. What the more "modern" situation has achieved is to loosen the requirements necessary to convict a woman of *zinā* (and a different *zinā*) while limiting those situations that can incriminate the husband. As far as punishment is concerned, the husband (if convicted) benefits from a considerably reduced sentence. While in the case of the male and female accomplices to adultery, only the former receives preferential treatment.

The gendered nature of Lebanese law is the result of earlier French moral and legal influence, according to which the husband was attributed the position of "head of the family" and granted authority over his wife as a result of his superior position.[688] As a case in point, the original French law only fined the adulterous husband if he was guilty of violating the sanctity of the marital home or disrupting public order. The only way that an adulterer would have been imprisoned was if he tainted the honour of another man. As for the honour of the woman, it did not seem to have been much of a concern. Moreover, the damaging effects resulting from the introduction of the French-inspired Penal Code regarding women are not limited to the above-mentioned laws but are

[687] See section 3.2, "*Zinā* and the *Li'ān* Procedure," 97-107.
[688] French law continued to assign to the husband the position of "head of the family" up until 1970. See Hallaq, *Sharī'a,* 453. Article 213 of the Code Napoleon of 1804 (*Code civil*, 1:41) requires that the wife be obedient to her husband: "*Le mari doit protection à sa femme, la femme obéissance à son mari*."

further evidenced by the position taken by the Lebanese Penal Code on a man who kills or injures a female relative. As will become clear in the following section, the male perpetrator is shown extreme leniency, which ultimately results in the subordination of women to their male relatives in an unprecedented manner.

4.4 "Crimes of Honour"[689] in Contemporary Lebanon

The gendered nature of the Lebanese Penal Code is further evinced in cases where a man kills or injures a female relative whom he purports to have discovered in an adulterous situation, or whom he suspects of having compromised her *'iffa* (chastity).[690] Because of the criminal nature of murder and assault, such cases are covered by the Lebanese Penal Code – a modified version of the French Penal Code of 1810. In the elaboration of new penal laws dealing with so-called "crimes of honour," Ottoman and Lebanese legislators built upon Article 324 of the French Penal Code (applied up to 1975), which reads as follows:[691]

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[689] "Crimes of honour" denote cases where that extra-marital sexual intercourse is supposed to have occurred, and that the honour of the woman (not the man) has been affected. While "crimes of honour" is a popular term, it is nowhere to be found in Lebanese law. See Hoyek, "Murders," 111-12.

[690] This matter will be discussed at length shortly. For now, we may translate *'iffa* simply as chastity.

[691] Article 324 (*Code pénal*, 253) reads as follows: "*Le meurtre commis par l'époux sur l'épouse, ou par celle-ci sur son époux n'est pas excusable, si la vie de l'époux et de l'épouse qui a commis le meurtre n'a pas été mise en péril dans le moment même où le meurtre a eu lieu. Néanmoins, dans le cas de l'adultère, prévu par l'article 336, le meurtre commis par l'époux sur son épouse, ainsi que sur le complice, à l'instant où il les surprend en flagrant délit dans la maison conjugale, est excusable*." As for Article 336 (*Code pénal*, 256-57), it dictates that only the husband can accuse his wife of adultery: "*L'adultère de la femme ne pourra être dénoncé que par le mari: cette faculté même cessera, s'il est dans le cas prévu par l'article 339*." For Article 339, see supra note 666.

> 324. Murder committed by the husband upon his wife, or by the wife upon her husband is not excusable if the life of the husband or wife, who has committed such murder, has not been put in peril at the very moment when the murder has taken place.
>
> Nevertheless, in the case of adultery provided for by Article 336, murder committed upon the wife as well as upon her accomplice, at the moment when the husband shall have caught them in the act, in the house where the husband and wife dwell is excusable.[692]

While Law 324 makes it clear that the male spouse may benefit from pardon should he kill his alleged adulterous wife and/or her partner in the marital home, the reverse is not true, and the wife who kills her husband and/or his alleged mistress in the marital home is not granted an excuse. The French position was partially adopted and elaborated upon by the Ottomans in their crafting of Article 188 of the Ottoman Penal Code. Article 188 reads as follows:

> 188. He who has seen his wife or any of his female *maḥram*s with another in a state of disgraceful adultery and has beaten, injured, or killed one or both of them will be exempted [from liability]. He who has seen his wife or one of his female *maḥram*s with another in an unlawful bed and has beaten, injured or killed one or both of them will benefit from an excuse.[693]

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[692] In the translation of Holberg, http://www.legifrance.gouv.fr/html/codes_traduits/.

[693] This translation is by Lynn Welchman, "Extracted Provisions from the Penal Codes of Arab States Relevant to 'Crimes of Honour,' " http:// www.soas.ac.uk/ honourcrimes/ resources/file 55421.pdf (accessed March 26, 2010). Article 188 is available in Arabic in *Qānūn al-Jazā',* trans. 'Ārif Afandī Ramaḍān (Beirut: al-Maṭba'a al-'Ilmiyya, 1927), 57: "*Man ra'ā zawjatahu aw ghayrahā min maḥārimihi ma' shakhṣ ākhar fī ḥālat al-zinā al-shanī' faḍaraba aw jaraḥa aw qatala aḥadahumā aw kilayhimā ma'an fahuwa ma'afū wa man ra'ā zawjatahu aw ghayrahā min maḥārimihi ma' shakhṣ ākhar 'alā firāsh ghayr mashrū' faḍaraba aw jaraḥa aw qatala aḥadahumā aw kilayhimā ma'an fahuwa ma'dhūr.*" Article 188 was translated into French by Grégoire Bey Aristarchi. Aristarchi's translation makes no reference to the husband's pardon nor does it distinguish between an "unlawful situation" and one of "disgraceful adultery." Only the fact that a husband is excused should he kill a female relative and her partner in a situation of in *flagrante delicto* (Latin for "caught red-handed") is mentioned: "*L'individu qui, ayant surpris en flagrant délit d'adultère, son épouse ou une des femmes de sa maison, l'aurait tuée ainsi que son complice est également excusable.*" See Grégoire Bey Aristarchi, *Législation Ottomane ou receuil des lois, règlements, ordonnances, traités, capitulations et autres documents officiels de l'Empire Ottoman*. 7 vols. (Constantinople: Frères Nicolaides, 1873), 2:251.

The Ottoman law departs from its French source in a number of ways, the most notable being that in a situation of "disgraceful adultery" exemption is not restricted to the killing or injuring of one's wife but is extended via the sanctified notion of *maḥram* to a man's right over the lives of his female relatives.[694] In the elaboration of Article 188, Ottoman legislators adopted the principle that a man can be pardoned if he kills his adulteress wife without the requirement of the four witnesses, and expanded this right to include a wide range of female relatives. As a consequence, the perpetrator can be pardoned if the situation is one of "disgraceful adultery" and excused if he finds his female relative in the exigent circumstance of an "unlawful bed." Given that a conviction of *zinā* (with its requirement that the sexual act be witnessed by four people who are liable to punishment if they retract or if there are discrepancies in their detailed descriptions) appears to have been waived in this case, much room is left to determine what qualifies as "disgraceful adultery." One can readily envision that a wide range of situations (in addition to sexual penetration) are subsumed by this article.[695] The law is not at all clear on what constitutes an "unlawful bed."[696]

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[694] It is therefore not surprising that the term *maḥram* has come to be associated with male oppression in more current discourses. For more on the derivative root of *maḥram*, see Wael B. Hallaq, "Forbidden," *Encyclopaedia of the Qur'ān,* General Editor: Jane Dammen McAuliffe, Georgetown University, Washington DC. Brill, 2010, Brill Online, http://www.brillonline.nl/subscriber/entry?entry=q3SIM-00159 (accessed April 7, 2010).

[695] Such situations may well include a couple kissing, or merely being "caught" in a bedroom – regardless of what it is they were doing. In fact, the notion of *al-jurm al mashhūd* has been modified so as to include elements of certitude convincing the witness that the act has been committed. See Moghaizel, *al-Mar'a,* 185-86.

[696] It may be that Ottoman legislators adopted the position of al-Karkhī (d. 349/960), whereby the *firāsh* (bed) represents the marriage contract, not the sexual act itself (as al-Zayla'ī (d. 124/742) understood it to be). For more on *firāsh*, see al-'Aynī, *al-Bināya*, 5:452. This is so as the situation of "unlawful bed" is contrasted with that of "disgraceful adultery," where pardon is only granted to the latter.

Article 324 of the French Penal Code also inspired, albeit differently, lawmakers in Algeria, Egypt, Iraq, Jordan, Kuwait, Libya, Morocco, Oman, Syria, Tunisia, the United Arab Emirates, and Yemen.[697] While the French legal position on the matter has been espoused more or less faithfully in these countries, as in Lebanon, the ultimate effect of the law has been that of subordinating females to their male relatives, encouraging (or at least failing to deter) so-called "crimes of honour."[698] As a case in point, when Lebanese legislators and the French jurists aiding them elaborated the Lebanese Penal Code, they opted for the Ottoman understanding of French law and thus made it even more detrimental to women. The legal treatment of so-called "crimes of honour" was first provided for in Article 562 of the Lebanese Penal Code – applied until 1999:[699]

> 562. Whoever surprises his spouse, or one of his ascendants or descendants or his sister in a witnessed crime of adultery (in *flagrante delicto*) or in a situation of unlawful intercourse, and proceeds to kill or injure one of them, without deliberation, shall benefit from the excuse of exemption.

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[697] While Algeria, Jordan, Syria, and Lebanon retained the element of pardon, it was rejected by Egypt, Iraq, Kuwait, Morocco, Libya, Oman, Tunisia, The United Arab Emirates, and Yemen who granted the perpetrator only a reduced sentence. As far as the range of female relatives whose killing or injuring by a male relative is excused or whose punishment is reduced, Algeria, Egypt, Morocco, and Tunisia limit it to the wife (as opposed to the inclusion of other female relatives). Yet, while the source law was repealed in France, in 1975, this was not followed by the above nations whose Penal Laws were based on the now extinct French model – with the notable exception of Tunisia. Tunisia repealed Article 207 of its Penal Code (dealing with such crimes) imposing the death penalty on a husband who intentionally kills his wife. See Welchman's "Extracted Provisions."

[698] Nadā Khalīfa, "*Dirāsa Ḥawl al-'Unf Ḍidd al-Mar'a fī Qānūn al-'Uqūbāt* (*Muqārana Ma' al-Tashrī'āt al-Duwaliyya*)," in *al-'Unf al-Qānūnī ḍidd al-Mar'a fī Lubnān: Qawānīn al-Aḥwāl al-Shakhṣiyya wal-'Uqūbāt*, ed. Marie Roze Zalzal, Ghāda Ibrāhīm & Nadā Khalīfa (Beirut: Dār al-Farābī, 2008), 121. For more on "crimes of honour" across the Arab and Muslim world, see Jessy Chahine, "Laws in Arab World Remain Lenient on Honour Crimes," *The Daily Star*, September 9th 2004, http://www.dailystar.com.lb/article.asp?edition_id=1&categ_id=1&article_id=8198#axzz0jJDGxaWE (accessed March 21, 2010).

[699] Article 562 was amended by Law no. 7 dated February 20th 1999 whereby the "excuse of exemption" was replaced with the "excuse of mitigation," and the second paragraph was deleted. See Hoyek, "Murders," 117.

> The person who kills or injures on surprising his spouse, or one of his ascendants or descendants, or his sister, in a suspicious situation with another person shall benefit from the excuse of mitigation.[700]

In line with the Ottoman version of the French Penal Code, Lebanese legislators extend an excuse or pardon to a male who might kill or injure a wide range of female relatives – explicitly mentioning the man's female *ascendants*. Granting the male a right over his female ascendants ignores a long-standing tradition where the elderly (especially elderly female relatives) were owed respect by all their descendants – regardless of gender.[701] Be that as it may, the above article dictates that the perpetrator be pardoned or granted an excuse,[702] depending on the mitigating situation at hand (whether in *flagrante delicto*, "unlawful intercourse," or "suspicion"). These situations grant the perpetrator the possibility of pardon; however, none of them entails witnessing the sexual act itself. This is confirmed in that the contemporary understanding of *al-jurm al-mashhūd* ("being caught red-handed") has been modified so as to include elements of certitude convincing the witness that the act has been committed.[703] As for replacing the Ottoman requirement of an "unlawful bed" with that of a "suspicious situation," it effectively opens the door to the inclusion of an even wider range of situations, and can even include finding a woman in the mere company of a non-*maḥram*.

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[700] Ibid., 115.
[701] We have seen previously that European visitors to the Empire were themselves impressed at the respect that older women were granted by their relatives – regardless of the gender or marital status of the latter. See supra note 25.
[702] The excuse of mitigation entails a considerable reduction in the penalty.
[703] Moghaizel, *al-Mar'a,* 185-86.

Even though Article 562 applies to the spouse (in its gender-neutral form), it was understood to apply to the male spouse only.[704] In addition, it appears to stand in sharp contradiction with Article 549 of the Lebanese Penal Code, which imposes the death penalty on whoever intentionally kills an ascendant or descendant.[705] Thus, in order to evade the death penalty imposed by Article 549, the perpetrator is required to prove that his act was not intentional, that he had no prior knowledge of the adulterous relationship, and that he killed or injured the victims on the spot – as a direct and spontaneous reaction to his "surprise."[706]

Article 562 has been heavily criticized for discriminating against women and encouraging so-called "crimes of honour" – or at best failing to deter the occurrence of such heinous crimes.[707] This has culminated in a memorandum proposing that the text of the article be modified so as to: (1) widen the scope of the perpetrator's persona to include female spouses; (2) remove the possibility of pardon; (3) exclude family members (other than the spouse) from the excuse of mitigation; and (4) remove the misleading notion of "suspicious situations" as granting the perpetrator mitigating circumstances.[708] The above proposal was

[704] The fact that only males benefit from the leniency of the law is further strengthened by the assertion that the killing or injuring of one's "sister" not "brother" is pardoned or excused. See Moghaizel, *al-Mar'a,* 187.
[705] Section 3 of Article 549 reads as follows: *"Yu'āqab bil-i'dām 'alāl-qatl qaṣḍan idhā irtukiba: (…) 'alā aḥad uṣūl al-mujrim wa furu'ihi (…)."* See *Qānūn al-'Uqūbāt*, 296-97.
[706] While the law requires that the assailant not have prior knowledge of the victim's relationship, the perpetrator can easily claim to have been ignorant of the situation. Not only that, families often assert that the victim's death was the result of an accident (or suicide even) due to the suspect's fear of social embarrassment, or to protect the perpetrator; and it is not uncommon that the deceased's families waive their rights against the accused – allowing him to benefit from *asbāb mukhaffifa* (mitigating reasons). See Hoyek, "Murders," 121.
[707] Ibid., 116.
[708] Ibid., 117.

rejected and it was not until the advent of the millennium that Article 562 was amended as follows:[709]

> 562. Whoever surprises his spouse or one of his ascendants or descendants or his sister in a crime of observed adultery, or in a situation of unlawful intercourse, and kills or injures one of them, without deliberation, shall benefit from the excuse of mitigation.[710]

As a consequence, the perpetrator is no longer pardoned for killing or injuring a female relative, and the notion of "suspicious situation" was dropped. As for the situations allowing the perpetrator to benefit from a considerable reduction in the penalty, they are now limited to "observed adultery" and "unlawful intercourse." Nevertheless, the fact that the perpetrator is still not required to witness the sexual act, and that his testimony need not be corroborated by witnesses, along with the vagueness of the definition of "observed adultery," still leaves the door open to much abuse. As for the gender neutral "spouse," it remains in force, and whether it now comprises women or not is subject to debate.[711] The list of victims whose killing is excusable still includes a wide range of female relatives, including ascendants. The vague and ambiguous nature of the law, as well as its leniency towards the perpetrator, is such that a substantial number of crimes described as honour-related turn out to be nothing more than attempts to hide personal and financial disputes.[712]

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[709] Ibid. Article 562 was amended on February 10th 1999.
[710] Hoyek, "Murders," 117-18.
[711] See Moghaizel, *al-Mar'a,* 187.
[712] In a study on such crimes in Lebanon, it was reported that of the 16 cases identified between 1994 and 1998, half were carried out for other motives – not related to honour. Instead of capital punishment, the penalties were as follows: one acquittal, a prison sentence of one-year in 4 cases, less than five years in another 4 cases, jail sentences of less than 10 years in 3 cases, and 4

Many calls have been made for the elimination of Article 562 from the Lebanese Penal Code in view of its failure to prevent murders against women, its violation of several United Nations' conventions, and its infringement on Article 7 of the Lebanese Constitution – guaranteeing all citizens equal treatment before the law.[713] Moreover, Article 562 may be deemed futile since most crimes against female relatives can be covered by Article 547 (dealing with intentional murder)[714] and Article 549 (applying the death penalty to anyone who intentionally kills an ascendant or descendant).[715] Be that as it may, judges tend to grant the perpetrator extenuating circumstances even when laws pertaining to intentional murder are reverted to.[716] Equally discriminatory are Articles 193 and 252 of the Penal Code granting the perpetrator whose motive is

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life sentences. See Ranwa Yehya, "Getting Away with Murder," *The Daily Star*, August 27th 1999, http://almashriq.hiof.no/lebanon/ 300/390/392/getting-away.html (accessed March 21, 2010). In another study carried out by volunteer lawyers, 25 cases of women killed in "defense of honour," committed between 1998 and 2003, were surveyed. In one case the husband murdered his wife following his marrying another, as the former had filed a suit against him to acquire the marital home. In another case a violent husband killed his wife and her sister after his wife complained about the beatings to her parents. A father killed his recently divorced daughter as she was pregnant and refused to have an abortion. A father-in law killed his daughter-in-law as a result of his son's refusal to divorce her. Finally, a brother killed his recently married sister because he did not like her husband. See Hoyek, "Murders," 121-34.

[713] Ibid., 121; Moghaizel, *al-Mar'a,* 190-91. For more on Article 7 of the Lebanese Constitution, see supra note 299. Lebanon has signed a number of the United Nations' Conventions. For more details on these Conventions and Lebanon's reservations, see The United Nations' Development Programme, "Lebanon: Human Rights Profile," *Arab Human Rights Index* (AHR), http://www.arabhumanrights.org/ en/countries/country.aspx?cid=9 (accessed March 30, 2010).

[714] Punishment under Article 547 is of 15 to 20 years of forced labour. Article 547 reads as follows: "*Man qatala insānan qaṣdan 'ūqiba bil-ashghāl al-shāqa min khams 'asharat sana ilā 'ishrīn sana*." See *Qānūn al-'Uqūbāt*, 287.

[715] See supra note 705.

[716] Their rulings are based on Article 253 of the Lebanese Penal Code: "*Idhā wujidat fī qaḍiyya asbāb mukhaffifa qaḍat al-maḥkama: badalan minal-i'dām bil-ashghāl al-shāqa al-mu'abada aw al-ashghāl al-shāqa al-mu'aqata ma' sab' sinīn ilā 'ishrīn sana. Wa badalan minal-ashghāl al-shāqa al-mu'abada bil-ashghāl al-shāqa al-mu'aqata lā aqall min khams sanawāt. Wa badalan minal-i'tiqāl al-mu'abbad al-i'tiqāl al-mu'aqat lā aqall min khams sanawāt wa lahā an tukhaffiḍ kul 'uqūba jinā'iyya ukhrā ḥatta thalāth sanawāt idhā kāna ḥadduhā al-adnā yujāwiz dhālika. Wa lahā an tukhaffiḍ al-'uqūba ilā an-nisf idhā kāna lā yujāwiz ḥadduhā al-adnā thalāth sanawāt aw an tastabdilhā bi qarār mu'allil bil-ḥasab sana 'alāl-aqall fīmā khalā ḥālat at-tikrār*." See *Qānūn al-'Uqūbāt*, 133-34. Article 253 (in the translation of Welchman, "Extracted Provisions,") reads as follows: "If there are mitigating circumstances in the case, the court shall rule as follows: instead of the death penalty, heavy

"honourable" a reduced sentence in the first case,[717] and extenuating circumstances if the "wrong" or "dangerous" action of the victim caused him extreme rage leading to her killing, in the second.[718] Not only that, Decree 1422, dated June 27th 1996, broadened the application of Article 252 to include specifically a perpetrator who kills his daughter in a state of extreme anger resulting from her *sū' sulūk* (misbehavior).[719] While requesting the elimination of Article 562 is highly justified, the discriminatory nature of the Lebanese Penal Code does not reside entirely in Article 562, making its potential elimination largely a matter of symbolic value.

Another element to be taken into consideration pertains to the attitude of some Lebanese Criminal and Supreme Court judges (though certainly not all

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labour for life or for a period of 7-20 years; instead of life imprisonment, prison for not less than 5 years; and the court may reduce every other penalty in the case of a felony to three years if its minimum penalty is more [than 3 years], and may reduce the penalty by half if the minimum penalty is not more than three years, or may with a reasoned decision give a sentence of at least one year, unless it is a repeated offence."

[717] Article 193 dictates: "*Idhā tabayyana lil-qāḍī innal-dāfi' kāna sharīfan qaḍā bil-'uqūbāt at-tālia: al-i'tiqāl al-mu'abbad badalan minal-i'dām. Al-i'tiqāl al-mu'abbad aw li khams 'asharat sana badalan minal-ashghāl al-shāqa al-mu'abada. Al-i'tiqāl al-mu'aqat badalan minal-ashghāl al-shāqa al-mu'aqata. Al-ḥabs al-basīṭ badalan minal-ḥabs ma'al-tashghīl. Wa lil-qāḍī faḍlan 'an dhālika an yu'fī al-maḥkūm 'alayh min laṣq al-ḥikm wa nashrat al-mafrūḍīn ka 'uqūba.*" See *Qānūn al-'Uqūbāt*, 85-86. Decree 112 dated September 16th 1983 limited honourable motives to those devout of selfishness, personal considerations, or material benefit. See *Qānūn al-'Uqūbāt*, 86. Article 193 (in the partial translation of Welchman, "Extracted Provisions,") reads as follows: "If the judge establishes that the motive was honourable the following penalties shall apply: life imprisonment instead of capital punishment, life imprisonment or 15 years instead of heavy labour, limited imprisonment instead of limited heavy labour, imprisonment instead of imprisonment with labour (...) The motive is honourable (*sharīf*) if it is characterized by chivalry and decency and free of [the taint of] selfishness, personal considerations and material gain."

[718] Article 252 dictates: "*Yastafīd min-al 'udhr al-mukhaffaf fā'il al-jarīma al-ladhī aqdama 'alayhā bithawrati ghaḍab shadīd nātij 'an 'amal ghayr muḥiqq wa 'alā jānib minal-khuṭūra atāh al-majnī 'alayh.*" See *Qānūn al-'Uqūbāt*, 131. Article 252 (in the translation of Welchman, "Extracted Provisions,") reads as follows: "Whosoever commits the crime in an outburst of extreme anger resulting from a grave and unlawful action of the victim shall be liable to a lesser penalty."

[719] In addition to legally increasing male control over the lives of their daughters, Decree 1422 fails to define what constitutes *sū' sulūk*, leaving it open to broad interpretation. See *Qānūn al-'Uqūbāt*, 133.

of them) whose verdicts denote sympathy to the perpetrator.[720] In a recent study conducted by volunteer lawyers on murders of women, the statements of the judges on crimes motivated by "honour" take into account the "customs" and "traditions" of the perpetrator, qualifying them as "a constant and precious part of his daily life."[721] In one instance the judge went so far as to state that the perpetrator had "no solution except to wash away the shame by murder."[722] Not only that, the rights of children were ignored by the court in two cases.[723] To be sure, mitigating reasons were granted to a man who killed a sister he suspected of being unfaithful to her husband – on the basis that he was a father of three. One wonders why the court did not consider the security of these children living under the parental authority of a violent man to be of equal interest. In another case, a man who had been away from his wife for a number of years was granted mitigating reasons following the murder of a 10 year old (identified in the record as his "illegitimate daughter") on the grounds – later proven false – that the victim was not a virgin.[724] The situation is such that Lebanon's most senior Shīʿī Muslim cleric Ayatullāh Muḥammed Ḥusseyn Faḍlallāh issued a

[720] This is certainly not to say that all Lebanese men or women justify such crimes. In fact, the so-called "crimes of honour" seem to be a primarily rural phenomenon, one that is particular to the lower social classes. See Samantha Wehbi, " 'Women with Nothing to Lose,' Marriageability and Women's Perceptions of Rape and Consent in Contemporary Beirut," *Women's Studies International Forum* 25, 3 (2002): 292. In another study, most of the crimes pertained to Northern Lebanon – the governorate with the highest illiteracy rate and one of the highest rates of families living below the poverty line. See Hoyek, "Murders," 133.
[721] These cases were obtained from the records of the Supreme Court, Criminal Courts, and Juvenile First Instance Courts of Beirut, Mount Lebanon, Bekaa, North Lebanon, South Lebanon, and Nabaṭiyya. Most of the judgments were issued between 1998 and 2003. See Hoyek, "Murders," 119, 122-27.
[722] Ibid., 123.
[723] Ibid., 126.
[724] Ibid.

fatwā (religious edict) in 2007 banning honour-related killings altogether – emphasizing the repulsive nature of the act.[725]

While contemporary Lebanese laws dealing with these so-called "crimes of honour" are often associated with archaic traditions and an outdated cultural heritage (usually identified with Islam) and its alleged negative treatment of women, a look at past practice suffices to demonstrate the erroneous nature of such assertions. As a case in point, the pre-modern situation was one where a husband who hid himself to "surprise" his wife and slay her as a result of his "surprise" was normally killed, not excused.[726] Recourse to private justice was not tolerated and a husband who failed to provide the required number of witnesses was not encouraged to take the law into his own hands. As we saw previously, even the husband who witnessed his wife engage in *zinā* with his own eyes was subjected to *ḥadd* if he slandered her or made any reference to the identity of her partner – without providing the additional three witnesses.[727] Thus, it would seem that the effects of French legal influence have been far more deleterious to Lebanese women than those of Islamic law ever were.

As we saw, while French law excused a husband who surprised his wife with another man and killed them in the marital home, the same leniency was not applied to the wife if she were to surprise him. This principle was later expanded on by Ottoman and Lebanese legislators alike so as to allow the man

[725]AP, "Shia Cleric Bans 'Honour' Killings," *The Times*, August 3rd 2007,http://www.timesonline.co.uk/ tol/ news/ world/ middle_east/ article 2189487. ece (accessed March 26, 2010).
[726] Al-Jaṣṣāṣ, *Aḥkām*, 3:285.
[727] Ibid.

more control and rights over a range of female relatives in order to defend his honour. Yet while honour was a major concern for pre-modern jurists, they did not mandate the husband (or any other man for that matter) to preserve it. That is precisely why a man who accused his wife of being an adulteress without securing the required witnesses was lashed for slander.[728] And even though a husband who engages in a *li'ān* evades slander, a major condition of the *li'ān* is that the wife is given the chance legally and publicly to deny her husband's accusation.[729] All these are indications that pre-modern jurists were greatly concerned with defending a woman's honour and that they certainly did not allow their fellow males to defend their honour at the expense of the lives of their female relatives. This is not to say that pre-modern jurists did not grant men legal advantages over women; rather, what they did not tolerate was men taking the law into their own hands. The biased nature of contemporary Lebanese penal laws results from the adoption of gender-biased French laws and concepts that were further enhanced by Ottoman and Lebanese legislators alike. Even so, despite the clearly negative effects of these French-inspired laws, the new codes were praised for their French (read "modern") element, and endorsed and upheld by administrators of the emerging nation-state. Ironically, the Lebanese nation-state claims to be constantly trying its utmost to accommodate women, shifting the blame of abuse onto religion and outdated traditions it claims to have no control over.

[728] See section 3.1, "Survey of the Preliminary Sources on *Nasab*," 86-96.
[729] See section 3.2, "*Zinā and* the *Li'ān* Procedure," 97-107.

The detrimental effects of French legal influence on Lebanese women and the failure of the Lebanese nation-state to accommodate its female citizens are especially evident in the realm of citizenship law, which decrees that women are not entitled to pass on their nationality to their children. Indeed, establishing the *nasab* of a child determines his or her citizenship. It is to this matter that we now turn through an analysis of the highly revealing case of Samira Soueidan.

4.5 *Nasab* and its Ramifications for Citizenship: The Case of Samira Soueidan

Samira Soueidan is a Lebanese widow residing in Lebanon whose husband was an Egyptian national. Given that Lebanese citizenship laws do not grant Lebanese-born women the right to pass on their nationality to their progeny,[730] Soueidan initiated a lawsuit against the Lebanese state, demanding that her children (who were minors at the time of their father's death) be recognized as Lebanese citizens.[731] In June 2009, Judge John al-Qazzī[732] granted Soueidan a

[730] Details on this matter follow in this section.

[731] Besides the obvious egalitarian argument that would require all Lebanese citizens to enjoy the same rights – regardless of their gender – the motivations of Soueidan were also of financial nature. Indeed, the fact that her children are considered foreigners residing in Lebanon requires her to pay for a residency permit fees. Her failure to secure the permit faces her children with a probable deportation to Egypt. See France 24 International News, "Lebanese Women Wed to Foreigners Fight for Rights," March 6th 2010, http://www.france24.com/en/20100308-lebanese-women-wed-foreigners-fight-rights (accessed September 21, 2010). In addition, Soueidan's *foreign* children do not enjoy any of the benefits that the Lebanese nation-state offers to its citizens. As a case in point, one of Soueidan's daughters could not pursue her higher education as the fees incurred by foreigners are substantially higher than those required of Lebanese nationals. See Amnesty International, "Lebanese Women Must Have the Right to Pass on Nationality to their Children," April 13th 2010, http://www.amnesty.org/en news-and-updates/ lebanese - women- must –have -right -pass- nationality -their- children- 2010-04-13 (accessed September 14, 2010).

favorable ruling.[733] Basing his decision on a more up-to-date understanding of Lebanese citizenship laws, al-Qazzī ordered that all of Soueidan's children be granted Lebanese nationality.[734] Contemporary Lebanese citizenship laws are based on Decree 15 issued on January 19th 1925[735] – a mere reproduction of the French citizenship laws that prevailed then.[736] Article 1 of the decree reads as follows:

> Considered Lebanese is every person born of a Lebanese father. Every person born in the Greater Lebanon territory and did not acquire a foreign nationality, upon birth, by affiliation. Every person born in the Greater Lebanon territory of unknown parents or parents of unknown nationality.[737]

Thus, Lebanese citizenship is acquired through the father or in cases where both parents are unknown.[738] Decree 15 has often been qualified as "obscure" as it does not clearly prohibit a Lebanese mother from passing on her citizenship to her child per se. Yet, it does not grant her that right either.[739] Al-Qazzī's argument was not based on this obscurity in the law, nor was it based on

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[732] I am highly indebted for Judge al-Qazzī's time, help, and kindness. His assistance and support have been instrumental in understanding the contemporary application of citizenship laws in Lebanon and his daily work a real blessing for the Lebanese people. Much of the information provided on al-Qazzī's position in the Soueidan case is based on interviews that al-Qazzī was kind enough to grant me on July 15th and 22nd 2010.

[733] The ruling of al-Qazzī can be seen as a major breakthrough as previous cases of the kind have systematically been rejected by the courts. For more on such cases, see Antoine al-Nāshif, *al-Jinsiyya al-Lubnāniyya baynal-Qānūn wal-Ijtihād* (Beirut: Manshūrāt al-Ḥalabī al-Qānūniyya, 1999), 281-83.

[734] 'Alī al-Mūsawī, "al-Ḥikm bi Qaḍiyyat Soueidan Yufaḍḍil al-Ajnabiyya al-Mutajannisa Lubnāniyan 'alā al-Muwāṭina," *Assafīr* 11595, May 20th 2010.

[735] The full text of Decree 15, dated January 10th 1925, is available in al-Ḥaddād, *Mūjaz*, 90-91.

[736] See supra note 300.

[737] Al-Ḥaddād, *Mūjaz,* 90-91.

[738] In fact, an exception is made when no man claims to have fathered a child. Indeed, a Lebanese mother who confirms that her child is fatherless is entitled to pass on her Lebanese nationality to her child (Muḥammad 'Abd al-'Āl, *Ahkām al-Jinsiyya al-Lubnāniyya* (Beirut: Manshūrāt al-Ḥalabī al-Qānūniyya, 2007), 335-56).

[739] Mahā Zarāqiṭ, "al-Qaḍā' Yatajāwaz al-Siyāsa: Awlād al-Lubnāniyya Lubnāniyūn," http://www.al-akhbar.com/ar/node/142101 (accessed September 21, 2010).

an effort to assert Article 7 of the Lebanese Constitution – clearly stating that all Lebanese citizens are equal before the law.[740] Al-Qazzī's judgment resulted from a desire to equate between a Lebanese-born mother and a naturalized Lebanese one, and was rendered on the basis of Article 4, which entitles a woman who acquires Lebanese citizenship following her marriage to naturalize her minor children from a *former* husband.[741]

Unfortunately, al-Qazzī's groundbreaking ruling was deemed highly controversial and was consequently short-lived.[742] The decision to grant Soueidan's children Lebanese nationality was overturned in the following July and September through two appeals by the public prosecutor and the Ministry of Justice, respectively.[743] The decision of al-Qazzī was annulled on May 18th 2010 by Supreme Court Judge Mary al-Maouchi. In the view of al-Maouchi, the ruling of al-Qazzī could not be validated as the decision to grant Lebanese citizenship is a right enjoyed by none other but the President.[744] Al-Maouchi gave

[740] Article 7 of the Constitution dictates that: "All Lebanese are equal before the law. They equally enjoy civil and political rights and equally are bound by public obligations and duties without any distinction." See supra note 299.
[741]Article 4 of Decree 15 dated 1925 dictates that: "The spouse of a foreigner, who has become a Lebanese citizen, as well as the children of full age of such a foreigner, may, if they so request, obtain the Lebanese nationality, without satisfying the residence condition, whether by virtue of the regulation giving this nationality to the husband, the father or the mother or in a special regulation. Likewise, the minor children of a father acquiring the Lebanese nationality, or a mother acquiring the said nationality and who remained alive after the death of the father, shall become Lebanese unless they reject this nationality within the year following their majority." (Al-Ḥaddād, *Mūjaz*, 90-91).
[742] For comments on al-Qazzī's ruling, see Nidhār Ṣāghiya, "Shabaḥ John al-Qazzī, Maḥkamat al-Isti'nāf Tughliq Abwāb al-Ijtihād," *Al-Akhbār* 1130, June 1st 2010; al-Mūsawī, "al-Ḥikm;" Mahmūd Ṣāleḥ, "Iftirāq al-Muwāṭina Bayna Awlād al-Zawjayn al-Ajnabiyyayn," *Annahār*, May 17th 2010; Amnesty International, "Lebanese Women;" Dalia Mahdawi and Carol Rizk, "Landmark Ruling Granting Citizenship to Children of Lebanese Mother Overturned," *The Daily Star*, May 19th 2010; Juhayna Khālidiyya, "Ta'jīl al-Ḥukm bi Isti'nāf al-Qarār," *Assafīr*, April 14th 2010. I am indebted to Judge al-Qazzī and Rula Masri for providing me with a copy of these articles.
[743] Ṣāghiya, "Shabaḥ;" al-Mūsawī, "al-Ḥikm."
[744] Mahdawi, "Landmark Ruling."

precedence to the literal meaning of the law, basing her judgment on the fact that Decree 15 only allows the woman who acquires Lebanese nationality through her husband to pass it on to her children.[745] The Supreme Court reiterated the original position of the French-inspired decree dictating that a Lebanese woman loose her nationality when she marries a foreigner.[746] Al-Maouchi concluded that the intention of the legist could not have been that of extending Article 4's effects to the Lebanese woman who marries a foreigner, and on that basis rejected the decision of al-Qazzī.[747] Al-Maouchi's reasoning and position on the matter excluded any possibility of shaping the law as to fit social needs and accommodate Lebanese women by merely allowing them to benefit from equal civil rights. This position comes in sharp contrast with al-Qazzī's whose verdict was aimed at providing women with a solution, accommodating their *basic* needs.[748] That the decision of al-Qazzī was not welcomed by the nation-state and its Supreme Court is made clear by the appeal initiated by the public prosecutor and the Ministry of Justice, as well as the Supreme Court's verdict. What is more, it was reported that al-Qazzī was banned from talking directly to journalists, who had to submit an interview request to none other

[745] Al-Ḥaddād, *Mūjaz,* 90-91.
[746] See supra note 300; Joseph, "Civic Myths," 128. The law was amended in 1960 at which point women were given the choice of citizenship upon marriage (Joseph, "The Public/Private," 81). The origin of this law is to be found in the French Code whereby once the French woman married a non-national she changed nationality. As a foreigner, she had to register with the authorities in order to be issued a foreign identity card. It should be noted that the French woman who married a foreigner lost her employment if she was a civil servant and could be forced to leave France in order to accompany her spouse. Both these are the result of her requirement to obey her husband. For more, see Weil, *Qu'est-ce qu'un Français?* 319-21.
[747] Al-Mūsawī, "al-Ḥikm."
[748] Ibid.

than the Ministry of Justice.[749] The ruling of al-Qazzī was nonetheless lauded by a number of Lebanese citizens as well as organizations actively working to improve the situation of Lebanese women.[750]

Those who opposed al-Qazzī's judgment were motivated largely by political and demographic considerations, being for the most part indifferent to the idea of solving the problems of the female Lebanese population. Their argument was that allowing Lebanese women to pass on their nationality to children whose fathers are not Lebanese would increase the number of nationalized Palestinians, leading to a greater Muslim-Christian divide.[751] Despite the absurdity of the argument in that it forces Lebanese women to pay for the weaknesses of the Lebanese nation-state, it should be noted that recent statistical studies indicate that the percentage of Lebanese women married to Palestinians is negligible.[752] While efforts by various human rights groups in Lebanon aimed at changing citizenship laws have gained momentum in the past few years, the drafting of new legislation remains a pending issue in the Lebanese parliament.[753] It should be remembered that the French citizenship law – used as a basis for a wide number of Arab countries – has long been

[749] Mahdawi, "Landmark Ruling."
[750] Of notable mention is the CRTDA (Collective for Research and Training on Development - Action) whose campaign entitled "My Nationality, a Right for me and my Family" (implemented with the assistance of a number of Lebanese civil society organizations) has lent much support to Lebanese women. I am indebted to Rula Masri for the information she provided me on the CRTDA and its actions, as well as her putting me in contact with Judge al-Qazzī. For more information on the CRTDA, see http://crtda.org.lb/en (accessed September 14, 2010).
[751] CRTDA, "al-Ḥukūma wal-Ṭaqm al-Siyāsī 'Āmatan Yakhdhalān al-Nisā'," June 4th 2009.
[752] Saadā 'Alwa, "Ghālibiyyat al-Sunnīyyāt Mutazawijāt min Falasṭīniyyīn wal-Masīḥīyyāt min Sūrīyīn wal-Shī'iyyāt min 'Irāqīyīn," *Assafīr*, July 7th 2009.
[753] CRTDA, "Nationality Campaign's Claims Memorandum," November 8th 2005, http://old.crtda.org/ crtd.org/ www/wrn/ doc/pdf/Claims_Memorandum_05_Lebanon_eng.pdf (accessed September 21, 2010).

changed in France,[754] and more recently in Egypt, Algeria, and Morocco.[755] Yet, contrary to popular belief, the current situation of Lebanese women (and most Arab women)[756] is not the result of outdated Arab or Islamic influences and traditions that favour men over women. Rather, it is once again the result of French influence, namely that of the Code Napoleon.[757]

The detrimental nature of French citizenship laws can be traced back to the concept of coverture – requiring that the wife merge with her husband and therefore cease to exist, legally, as a separate entity.[758] That is why a French woman who married a foreign male national was to be automatically subsumed under him – along with her children. As a result, dead or alive, a husband's wife and children were to be placed under him, given his family name, and bestowed with his national identity.[759] That is precisely what made her lose her French nationality following her marriage to a foreign man. It was only in cases where a French woman married to a foreigner was widowed that she could petition to

[754] Children of French women acquired the French nationality following the Law of 1927 (Charles Peretti, *De la nationalité Française* (Paris: Rousseau et Cie, 1931), 19-21). Yet, it took all the way to 1973 for French men and women to be on par with regards to citizenship laws. See Weil, *Qu'est-ce qu'un Français*? 336-37.

[755] In Egypt and Morocco, women were entitled to pass on their nationality to their children in 2004 and 2005, respectively. Algerian women now give their nationality to their husbands and children. See CRTDA, "Nationality Campaign's Claims Memorandum;" Association Démocratique des Femmes du Maroc (AFDM), "We Won the Battle not the War," http://www. learningpartnership.org/ citizenship / 2007/01/ won-battle-morocco (accessed September 15, 2010).

[756] For details on the situation of Arab women and citizenship laws, see Sa'īd Yūsuf al-Bustānī, *al-Jinsiyya al Qawmiyya fī Tashrī'āt al-Duwal al-'Arabiyya* (Beirut: Manshūrāt al-Ḥalabī al-Qānūniyya, 2003), 128-35.

[757] This is also the case in matters pertaining to "crimes of honour." For more, see section 4.4 "'Crimes of Honour' in Contemporary Lebanon," 155-67.

[758] See supra note 71.

[759] Weil, *Qu'est-ce qu'un Français*? 319-37.

regain her French citizenship.[760] French law was thus amended so as to allow women to retain their nationality or petition to re-acquire it. Later, French women were granted the right to pass on their nationality to their spouse and children.[761] As for Lebanese legislators, they only amended the law as far as it affected those women who wanted to remain Lebanese nationals (or re-acquire their initial nationality).[762] The only instance where a Lebanese woman can have her child be Lebanese is when no father claims paternity.[763] Be that as it may, no solution was provided to the woman who is Lebanese and wants her children to be recognized as Lebanese nationals as well – as in the case of Soueidan. The matter was different before the introduction of French-inspired elements to the law, since the children of Ottoman women born on Ottoman soil were considered Ottoman subjects.[764] Yet, rather than looking at the *foreign* origins of Lebanese citizenship laws, its inadequacies, and the major drawbacks that it imposed on women, Lebanese politicians and legislators alike choose to justify the validity of such archaic laws whose effects are extremely harmful to women and children, thus solving the political challenges they are faced with at the expense of female Lebanese citizens.

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[760] The French woman who marries a foreigner is given her husband's nationality and can only regain the French one in cases where the husband dies if she resides in France or if the French government approves her request to want to reside in France. Article 19 reads as follows: "*Une femme Française qui épouse un étranger, suivra la condition de son mari. Si elle devient veuve, elle recouvrera la qualité de Française pourvu qu'elle réside en France ou qu'elle y rentre avec l'autorisation du gouvernement et en déclarant qu'elle veut s'y fixer*." See *Code civil*, 1:4-5.

[761] See supra note 754.

[762] Article 2 of the Law dated January 11th 1960 entitles the Lebanese woman married to a non-Lebanese national to retain her Lebanese nationality. Article 3 of the same law allows the Lebanese women who lost her Lebanese nationality following her marriage to a foreigner to re-acquire her Lebanese citizenship. See Badawī Abū Dīb, *al-Jinsiyya al-Lubnāniyya* (Beirut: Sader Publishing, 2001).

[763] 'Abd al-'Āl, *Ahkām,* 335-56.

[764] Joseph, "Civic Myths," 127-28; idem, "Descent," 313.

Conclusion

This dissertation has tried to argue that the European colonial system, given its interference with the indigenous local legal sphere, and also its successor, the nation-state, have not worked for the benefit of women. Through an analysis of the interrelated pre-modern concept of the evolution of *nasab*, paternity, *li'ān*, citizenship, *zinā*, and the so-called "crimes of honour," I have argued that the dismantling of the Sharī'a and its replacement with "modern" European codes have had the effect of subordinating Lebanese women to their male counterparts in an unprecedented manner – an effort to which the nation-state has largely contributed. By contrast, in their construction of the laws pertaining to women, mothers, and children, pre-modern jurists showed a much greater level of concern with safeguarding the rights and honour of the mother and child. Well aware of the advantage men are granted by the law and in an effort to ensure that they not evade their moral and financial responsibilities, pre-modern jurists attributed a child to the marriage bed up to 2 years following a divorce or the death of the husband. The same concern with the wellbeing of the mother and child prompted these jurists to elaborate specific and restrictive laws pertaining to the denial of paternity. Not only does casting doubt on the identity of a child's father harm the latter socially and financially, it also taints the mother's honour in the harshest of ways. That is why accusing one's wife or divorced wife of *zinā* without four witnesses of her extra-marital sexual act gave rise to punishment for slander. As for the husband who doubted his wife's or ex-wife's chastity or witnessed her engage in *zinā* but could not substantiate his

accusation, he was absolved from punishment for slander only if he accused her by means of a *liʿān.* Yet, the *liʿān* also granted the wife the right to publicly and legally reject her husband's accusations, preserve her honour, and secure her deferred rights. Slander was treated as a serious offense and the husband (or anyone else for that matter) could not simply state that a woman was a poor Muslim and stain her reputation – not without being severely punished for such a grave allegation. As for killing a wife or any other female relative over doubts as to her chastity, the killer would likely have faced capital punishment. Whilst the nature of the system in which pre-modern jurists operated was undoubtedly patriarchal, the understanding and application of the law reveals that jurists were inclined to treat women within a defined system of checks and balances whereby rights and duties were elaborated in accordance with the fundamental assumption of a moral community.

The situation in contemporary Lebanon is an undoubtedly different one where the application of Sharīʿa is no longer flexible and shaped so as to ensure a level of social harmony. While Sunnī Lebanese *qāḍī*s have demonstrated faithfulness to Ḥanafī doctrine in their understanding and treatment of *nasab* and paternity-related laws, the *liʿān* procedure is no longer recognized. This is due to the fact that *zinā* (the cause leading to the initiation of a *liʿān*) has been removed from the realm of the religious and entrusted to the civil law. As a consequence, it is not dealt with by Sharīʿa-inspired laws but those French-inspired ones that were introduced by the nation-state and its bureaucrats – all in an effort to "modernize" the existing laws. Yet, what these modernizing

changes effectively achieved was the elaboration of a new set of gendered laws, whereby the male has come to enjoy a clear advantage over his female relatives. This is evidenced in a number of ways, ranging from the legal proof necessary to convict a person of *zinā* and the related punishment incumbent on those convicted, to the penalty incurred if a man kills a female relative he suspects of being a *zāniya*. As we saw previously, the Lebanese Penal Code grants a pardon to a male relative who kills or injures an alleged *zāniya* – regardless of whether he witnessed the extramarital sexual act, or has witnesses to support his accusations. This is in sharp contrast with past Islamic practice where killing a female relative without providing four witnesses to her extra-marital sexual act was not tolerated by the jurists and was punishable by the perpetrator's own death. In fact, one cannot help but wonder why the excuse of "customs" and "traditions" avowed today was not countenanced by pre-modern *qāḍī*s to justify such heinous crimes, and why the nation-state that has declared itself sole legislator and ultimate authority does not take action to protect its female citizens. While upholding the notion of citizenship and claiming to ensure equal rights for all its citizens, the nation-state's rights and obligations, rather than being universal, are gendered. This is evidenced by the fact that Lebanese women are deprived of the right to assert their own stake in the very nation-state, and denied the right to pass on their citizenship to their own children – this as a result of French legal influence. That the nation-state admits that its justifications are of a political (not cultural or religious) nature reveals that female Lebanese citizens are paying for the nation-state's political

shortcomings. This strengthens the argument that, rather than seeking to provide its citizens with equitable treatment, the nation-state relegates Lebanese women to a secondary position, often forcing them to be completely dependent on their male counterparts. With this in mind, it is irrational to hold the Sharīʿa solely responsible for the legal, mental, political, and social stagnation of the Muslim world. Nor can it be so commonly conceived of as a rigid and archaic code of law unable to adapt to a modernizing world, especially when such a depiction runs counter to the Sharīʿa's very essence, which is that of a flexible system not confined by codification but made even more adaptable by the plurality of its sources.

The subservient position of Lebanese women is not restricted to the civil realm since they are at a disadvantage under religious law as well. While the situation of Lebanese women is not by a long sight uniform (as they enjoy more or less rights depending on their religious denomination), the general position is one where women stand at a disadvantage when compared to their male counterparts of similar faith.[765] In the case of Sunnī Muslims – the focus of this work – the contemporary understanding and application of Sharīʿa demonstrates that *qāḍī*s are now confined to codification and are reluctant to accommodate women for fear of deviating from what is dictated by the legislation. One such example pertains to the insertion of marriage stipulations. The right that the Law of 1917 grants women to insert two stipulations into their marriage contracts is upheld and perceived as a major improvement

[765] For information on the legal situation of Jewish, Christian, and Muslim women in contemporary Lebanon, see Shehadeh, "Legal Status," 501-19.

(considering that Ḥanafīs reject all marriage stipulations). The possibility of inserting additional conditions however is rejected on the basis that the Ḥanafī school rejects all marriage stipulations – even as the two codified in 1917 are upheld. What is more, Lebanese women are rarely informed of their right to insert these two stipulations, or of the possibility of initiating a *khul*ʿ for that matter. Lebanese women are generally counseled against divorce and dissuaded from requesting a *tafwīḍ* – on the basis of their alleged emotional and sensitive nature. Unaware of their legal rights, prevented from securing better marriage contracts, and financially dependent on their husbands, it is not uncommon for women to find themselves trapped in unhappy marriages. This is further made possible by the favoured legal position of men, a point strengthened by the contemporary *qāḍī*s' inability to accommodate women in the way their predecessors did. While this advantage was traditionally accompanied by a duty to act morally and impartially, the matter seems to be of lesser importance in our own time, when morality as a regulating force is seemingly in jeopardy.

The contemporary understanding of Sharīʿa as a rigid and inflexible code, the *qāḍī*s' inability to shape the law so as to fit societal changes, and Muslim men's attachment to their advantageous (and presently uncurbed) legal rights, along with the inadequate supply of information to women, all lead to a resistance on the part of many Muslims to proposals aimed at granting women more rights – even those that Muslim women enjoyed in earlier times – on the basis that they are not Islamic. This position frustrates those Muslims who feel that accommodating women in no way contradicts Islamic law and tends to

reinforce the belief that improving the situation of women emanates from European and North American ideals, thus excluding any possibility of indigenous solutions. Rather than accepting the leading discourse that perceives laws discriminating against women as evidence of an outmoded cultural heritage (or even more likely as a sign of Islamic intolerance), establishing that some of these laws are in fact foreign in origin could well be the starting point for much needed enhancement of the situation of Muslim women through the adoption of local, organic solutions.

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No account of the letter ‘ or articles al-, an-, den, el-, de, la & the is taken in classifying the entries.

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