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Flexibility versus Rigidity in the Practice of Islamic Family Law

The last decades have witnessed a sustained critique of the mainstream Orientalist notion that classical Islamic family law was rigid, inflexible, and homogeneous. Many historians have used innovative methods to demonstrate that jurists and judges in precodification times enjoyed the intellectual space to translate the principles of the Qur'an and Sunna into socially workable rules. Yet, perhaps unwittingly, these authors have presented classical Islamic family law as flexible by contrasting it with postcodification legal practice. The latter is represented as characterized by rigidity and textuality due to, among other things, the prominent role of the nation-state in many Muslim countries. On the basis of extensive fieldwork in 2002–2003, this article juxtaposes the claim of inflexibility with ethnographic material in order to properly conceptualize the present-day practice of Islamic family law. I argue that the role of the state should not be overemphasized at the expense of the analytical significance of actors' agency, including that of the judges, in effecting change. The analysis shows that, despite codification, Islamic family law in many Muslim countries is still characterized by flexible, heterogeneous, and context-bound implementation. [flexibility; Islamic family law; judges; Palestine; shari'a]

Until the collapse of the Ottoman Empire, family affairs in this part of the world were the domain of religious scholars, who ruled on domestic disputes according to principles established by different schools of Islamic jurisprudence (*madhahib*). With the emergence of postcolonial states in Muslim-majority countries, Muslim reformists and state officials worked together to codify the scattered books and rules of different Islamic schools of jurisprudence (*fiqh*) into a unified personal status code. Many historians argue that *shari'a*,¹ and by extension Islamic family law (henceforth IFL), also known as personal status law, lost its flexibility because of the profound changes instigated by modernization, particularly the process of codification.

However, this article argues that IFL, like all legal codes, does not operate in a vacuum; it is bound by a context in which the judge's worldview, state structure, and people's agency together set the conditions and thus influence the quality and style of legal practice. Emphasizing the role of the state and downplaying the role of social agents skews the interplay between structure and agency. On the basis of ethnographic research in the Gaza city shari'a courts,² the author argues that the judges (*qudah*, *qadi*), as legal and social actors, are aware of

the discrepancy between codified law and social reality and attempt to bridge the gap.³

Context

shari‘a courts in historical Palestine underwent significant differential transformation in the course of the twentieth century. Under the Ottoman Empire they constituted a broad-based and plural institution, representing the state in social, administrative, legal, educational, religious and charitable matters. The courts’ sphere of intervention was, however, progressively reduced and ultimately limited to management of personal status issues and Islamic endowment (*waqf*). Concomitantly, the effective sphere of the courts’ jurisdiction, albeit territorially fragmented after 1948, widened in social terms, reaching beyond the towns into the countryside and later into the refugee camps.

Among Palestinians, the qadi still claims a degree of moral influence transcending the scope of his administrative and legal attributes. Unlike his Ottoman predecessor, who was transferred every year to preclude local involvement, he tends to be a full member of the community in and for which he applies IFL. The implications of his decisions reach beyond the domain of personal status, affecting significant aspects of social practice. The qadi emerges as a key actor in regulating relations within and between families or descent-based groups bound, split, or opposed by ties of agnatic solidarity (*nasab* or *‘asabiyya*) or matrimonial alliance (*sihr* or *musahara*). Through the qadi’s arbitration, the “mutually constitutive relationship between kin and court [is] revealed” (Doumani 2003:174).

The family affairs of Muslims in Palestine are (formally) regulated by IFL (also known as personal status law) as implemented by shari‘a courts.⁴ These deal with issues such as marriage, divorce, inheritance, custody, lineage (*nasab*), and so forth. The Palestinian Authority created the institution of the chief judge (*qadi al-qudah*), answerable to the president of the Palestinian authority, to preside over the shari‘a court judiciary. Then followed the court of appeal and the judges of first instance. Recently, a third judicial level was created: the High shari‘a Court.

After the signing of the Oslo agreements (1993) between Israel and the Palestinian National Organization, Palestinians faced a mishmash of different legal systems applied in both the Gaza Strip and the West Bank (Ottoman, British, and Jordanian laws, and Israeli military orders). In both areas, shari‘a courts maintain control over the application of family law. In the West Bank, they apply the Jordanian Law for Personal Status (1976); in the Gaza Strip, they apply the Law of Family Rights of 1954, issued by the Egyptian Governor General (appointed after the 1948 War), with particular reference to the Book of Personal Status Rulings (BPSR) according to the School of Abu Hanifa, compiled by Qadri Pasha in 1875. This unique pluralism has produced a legal system in which new legislation cohabits with the older legal order instead of replacing it (Muhaisen 2008:3). This is notably the case in the interplay between family law and customary law.⁵ The educational training, class background,

and worldview of the judges add even more “flavor” to the mixture, and influence the nature of the legal process.

The Debate on Flexibility in Islamic Law

Sonbol (1996), who examines marriage and divorce cases of minors in Egypt during the Ottoman period, relates the flexibility of IFL to the Ottomans’ recognition of different *madhahib* in different parts of the Empire. She argues that with the establishment of the nation-state and the advent of modernity, codified law moved society from dependence on flexible interpretations of the *shari‘a* based on different views of *madhahib* toward a situation in which the state plays a vital role in constructing social relations. In her view, the *shari‘a* was never fixed; rather, it fluctuated with historical process.

Sanadjian (1996) associates the rigidity of the codified Islamic law with the role of the state in legitimating “selected” social norms. What to exclude or include depends upon many factors, including the worldview of the legislators, their power, and the level of the socioeconomic development of a given society. In general, people observe Islamic norms, but when these are codified, they become rigid due to the tendency of Muslim scholars to draw strict lines between the licit (*halal*) and the illicit (*haram*), a tendency that contradicts the Qur’anic verses defining all practices that are not specifically prohibited as being permissible.

In her work on the *fatawa* or *fatwa* (legal rulings on Islamic law) and decisions of judges in Syria and Palestine during the seventeenth and eighteenth centuries, Tucker (1998) emphasizes yet another point with regard to the issue of flexibility. Tucker believes that Islamic *shari‘a* (defined as a set of flexible rules and fluid regulations) and the nature of Islamic law (as uncoded and subject to the qadi’s discretion and mufti’s subjectivity) were helpful to women. The judges and jurists (*muftis*) were attentive to the customs and norms (*‘urf*) of their communities. Codification was meant to “fix” a definitive interpretation of *shari‘a*, thus standardizing it and minimizing the judges’ subjectivity.⁶ She observes that “as soon as the law is codified, gendered rights and gendered duties become incontrovertible points of law, brooking no adjustments or modifications except from on high” (Tucker 1998:185). She regrets that the flexibility of the premodern legal system is nowhere visible today.

The issue of lack of flexibility of “modern” codified law is emphasized by Sonbol (1996), Sanadjian (1996), and Tucker (1998). While Sonbol links it with the termination of the *madhahib* by the modern states, Sanadjian gives precedence to the role of the state in legitimizing the “acceptable” norms. Tucker contends that “codified law cannot, by definition, be flexible and fluid law” (1998:184). However, the three authors base their conclusions on political abstraction; they do not advance empirical material, case studies, observations, or statistics to prove that today’s practice differs from that in the Ottoman period. Further, they demonstrate a tendency to draw a dichotomy between the application of Islamic law in the premodern and postcolonial/modern nation-state periods. This logic causes them to resort to further dichotomies such as codified versus uncoded; fluidity versus fixity; flexibility

versus standardization; modern versus premodern; and, in the case of Tucker, the judges' subjectivity versus objectivity of the binding law. These dichotomies lead them to formulate the preemptive conclusion typified by Tucker: "The legal system that permitted such flexibility is nowhere to be seen today, nor it is really conceivable in the context of contemporary society" (Tucker 1998:186). This portrayal ignores the fact that people contest and subvert the conceived power of law, especially in such a context as Gaza, in which the state has often been extraneous to the people of the land.

It is not only historians interested in the role of the state in gendering society who engage in this debate. Hallaq, a prominent scholar in classical Islamic law, draws a firm distinction between classical and "modern" Islamic legal systems. He identifies the following five differences:

In classical times, the judge or the *mufti* (or any legal professional for that matter) engaged himself, at one and the same time, in a tradition in which (1) he acquired legal education through the method of "closed texts," which, together with the *ijaza* (license) system, constituted a fundamentally different sort of training from that which the modern law school offers; (2) he was apprenticed, during and after his graduate study, in shari'a courts where doctrine met practice and where the imposing intellectualism of the law collided with, but was always synthesized with, the reality of society and judicial practice; (3) the religious ethic was the sole dominating force and final arbiter of legal legitimacy; (4) the entire juristic (doctrinal) and judicial enterprise was thoroughly supported by financially and administratively self-sufficient and independent institutions; and (5) the authority of the jurist was individualistic and exclusively personal (*ijthadic*). [Hallaq 2004:41]

The above differences fall into three categories: education and training of judges, administrative and financial independence of shari'a courts, and predominance of the ethical stance of Islam.

With reference to education, in both Gaza and the West Bank, judges are still trained according to the methods specified by Hallaq. They are educated in shari'a schools, where they study jurisprudence (*fiqh*) and theology (*usul al-din*), which influence the way they handle cases. According to Palestinian law, they can also study in law faculties with a focus on shari'a; these schools do not have *ijaza* (licenses), so the graduates receive a formal degree from shari'a faculties. In this context, it is useful to recall Asad's (2001:14) observation when reviewing the work of Egyptian reformist Muhammad Abduh: shari'a students are given more knowledge of devotions (*'ibadat*) and less of law (*mu'amalat*), which "presupposes an entire range of moral and spiritual disciplines."

To some extent, the content and method of training of modern judges is not very different from that of their predecessors. In the Palestinian territories, and before the establishment of the Palestinian Authority in 1993, judges were trained as scribes (*kuttab*, *katib*) and then elevated to the rank of shari'a court judges. In addition to

legal knowledge, a judge also needs to have knowledge of court administration and of the life of his community. Above all, he needs to have a high sense of morality that guides all his actions. While working as a *katib*, the judge learns how to register marriage contracts (*hujaj*); draw up documents relating to divorce, inheritance, and legal representation (*wikalat*); and work out the procedures for handling cases.

A typical example of this training was that of Shaykh Judah, who was 86 years old when I interviewed him in 2003. Judah, who was born in Haifa and studied shari'a at Al-Azhar University in Cairo, had been a judge during the British mandate. In 1945, he was appointed *katib* of the Haifa shari'a court. In 1946, he was sent to work as a *katib* in al-Majdal (a section of Gaza district under British control) where a branch of the shari'a court had been established. After the 1948 war, al-Majdal was incorporated into the Jewish state and Judah was forced to move to the remnants of the Gaza district, later known as the Gaza Strip, where he worked for several decades as a judge in many shari'a courts.

Civil lawyers, even though allowed to practice in both civil and shari'a courts, cannot become shari'a court judges. Until recently, lawyers who graduated from shari'a colleges could become judges in the shari'a court only if they first practiced as scribes. This changed in 2003, when a quicker option became possible. Gaza Deputy Chief Judge Mahmud Salama explained in an interview that under the current system, vacancies are announced in the local newspapers. The applicants must have at least a first degree in shari'a or theology, and preference is given to those who have an MA or PhD in shari'a studies from a prominent university.

But if shari'a college graduates or scribes prove their competence, we take them. When the applicants sit for the oral exam, I ask them a standard set of questions: You are going to the mosque to pray. Suddenly you see a big crowd of people. Obviously, there has been a quarrel. What should you do? Continue to the mosque so that you can pray on time, or intervene? And if you intervene, what will you say? What values will you emphasize when talking to them?⁷

These questions sum up important requirements for a judge: the ability to lead the community, to be an advisor to the people, and to guide them to peaceful solutions. The judge should be a peacekeeper and a community leader. He should be articulate, have the ability to express himself in speech, and intervene in disputes firmly. As the deputy chief judge explained:

I want to know whether the applicant is able to give a speech, whether he is familiar with the people's daily problems, and whether he is concerned about participating in solving these problems. Judges are not expected to sit behind the bench and only follow the book; that qualification is tested by the written exam. They are expected to be active in people's daily life and deliver the message of Islam. Another important issue is the fact that the shari'a court is mostly used to by poor people, particularly women. Judges should be empathetic and able to convey the ethical message of

Islam when communicating with them. The economic background of our judges and their studies should enable them to fulfill such a task.

With reference to the second criterion identified by Hallaq, the Palestinian Authority granted the shari'a courts administrative and financial independence and they proceeded to accumulate greater power than ever before. The chief judge had ministerial rank and he was answerable only to the president. The first chief judge, Abu Sardana, integrated the shari'a judges and other personnel into the governmental bureaucracy, making them civil servants. However the shari'a courts retained their judicial autonomy; in 2002, the Palestinian High Court ruled that it could not intervene in the decisions made by shari'a courts.

Quite a few elements that impart flexibility to the legal system are still operational in many Muslim states. Like all other laws, IFL is not an autonomous system; it is bound by a context in which the judge's worldview, state structure, and individual agency together affect legal practice. Highlighting one element (in this case, the role of the state) and downplaying others (the judge, the people who come before him, and their social and political environment) does not provide an adequate understanding of what is really going on in the courts where IFL is practiced. My emphasis on flexibility does not entirely negate the role of the state, but, rather, attempts to draw a more nuanced and balanced portrait of the operation of IFL.

To arrive at a more precise appraisal, we need to examine how these factors and actors interact, and when and how in the course of their interaction they come to construct a particular social reality. To understand the application of law, we must examine what people do in court, not just whether people obey the formal legal code (Griffiths 1992:157). However, before proceeding with the analysis, it is important to clarify the term "flexibility."

Conceptualizing flexibility

Legal anthropologists have developed a sophisticated conceptualization encompassing the source, significance, relevance, and function of flexibility. Gluckman (1955) associates flexibility with the hierarchy of legal principles in every legal system. At the lower levels of the hierarchy, the principles are more precise and specific, while at the higher levels they are "unspecific . . . flexible . . . and multiple" (Gluckman 1955:364). Legal principles above the lowest level may exhibit some degree of overlap or conflict because of their broad definition and multireferential origin. It is this imprecision that enables flexibility in the application of law: "The judges manipulate the flexibility of the concepts—what is often denigrated as their 'ambiguity'—as they do the multiplicity of laws, to achieve justice" (Gluckman 1955:364).

Moore (1978) views the social domain's influence on legal practice as the main factor enabling flexibility. To study the application of law, one must go beyond rules and principles and examine the interrelationships between social processes and legal practice. The influence of the social field in the legal arena indicates the degree to which it is possible to counter, manipulate, circumvent, remake, replace, and unmake the rules (Moore 1978:1). Any legal setting contains rich, individual, and situational

disparities, and therefore transformation is continuous, notwithstanding great variations in pace and degree (Moore 1978:1). This means that a variety of social processes “dictate the mode of compliance and non-compliance to state-made legal rule” (Moore 1973:721). Similarly, Griffiths (1992:162) observes that judges, lawyers, and litigants are at once key agents in the law’s application and as well as “responsible for obstructing, deflecting and transforming” the law. To fully understand how the law is applied, the researcher must investigate the context within which it operates and within which disputes are settled.

If Gluckman’s (1955) approach (the hierarchy of legal principles) is applied to investigating the practice of IFL, the legal principles that tend to remain imprecise are those related to public interest (*maslaha*), seeking the most equitable solution (*istihsan*), avoiding harm rather than conferring benefits (*dar’ al-madarr awla min jalb al-manafi*), conformity with prevalent social customs, and the general morality in the community (see Kamali 1989). As will be demonstrated later, such general concepts provide room for judges to bridge the gap between codified law and social reality when ruling on or mediating familial disputes.

Before discussing the situation in Palestine further, it is instructive to summarize the findings of a study of Islamic legal practice in Morocco by Rosen (1989). Highlighting Rosen’s study does not mean overlooking the notable work by other scholars such as Shaham (1999) and Botiveau (1997) on Egypt, Mir-Hosseini (2000) on Iran and Morocco, and Hirsch (1998) on Kenya, each of whom sheds important light on the application of IFL. However, their primary focus is not on the question of flexibility.⁸

Rosen (1989) identifies five crucial elements that constitute the context within which IFL is applied in modern Muslim Morocco: (1) political environment (relation between a postcolonial state and the shari’a court system), (2) legal principles employed by judges (justice and fairness), (3) cultural specificity within which judges operate (emphasis on negotiation), (4) subjectivity of judges (discretion), and (5) social and educational background of judges.

When applying “state law” to resolve disputes, the judge tries to ensure that neither party benefits at the expense of the other: “The judge’s discretion is at times influenced by a sense of fairness that yields a result contrary to the clear letter of law” (Rosen 1989:67). When a conflict arises between the law and the judge’s ideals about justice, he tries to find a solution either by basing his ruling on a minority opinion in order to match the social with the legal or by referring to a broader moral or legal concept, in order to arrive at a socially desired result. Interestingly, this is also the way American judges act when the law does not correspond to their conception of justice (Rosen 1989:71). The point here is not to assert that the judge is free to rule any way he likes, but to acknowledge his need to legitimize his ruling with proper referencing.

Palestine: Balancing Different Principles

The amount of secondary literature available for a systematic study of the code and application of IFL in the Gaza Strip is sparse. Although Palestinians arguably

constitute the most studied nation in the Arab Middle East in terms of politics, very few recent sociological studies focus on the workings and transformations of Palestinian society. Moreover, even when scholarly research is conducted, it often centers on the West Bank, due to that area's greater historical, political, religious, and geographical significance. Smaller, poorer, and isolated Gaza is frequently treated as an extension of the West Bank, simply because both these parts of Palestine were occupied by Israeli forces at the same time. However, the differences between the two regions in terms of their legal framework and political and social milieu, though commonly overlooked, are significant (see Roy 1995). This article concentrates on Gaza; its focus is not on the formulation of law from above but on the remaking of law from below.

One of the reasons for the discrepancy between textual law and law in practice lies in the desire of the judge to achieve two different objectives: protecting weak members of society and preserving social order. The judge tries to achieve a balance in various ways, and he implements the law flexibly by emphasizing the text of IFL in some cases, and recalling broader principles derived from his religious education in others. For example, a judge could decide that the rights and obligations of specific members of the family are overridden by the greater principle of care and well-being of the weak party directly or indirectly involved in the dispute.

One judge outlined a custody case involving three children whose parents had divorced.⁹ The children, all female, were living with their father because a divorced mother loses her custody rights when she marries another, non-*mahram*, man.¹⁰ The children had been living with their father for three years when the eldest, having just attained the age of 14 years, complained to her mother that her father had tried to molest her. The mother went to the judge to explain the situation to him. In a custody case in any court, a judge cannot take the children away from their father unless the case against him is proven; even in a shari'a court, the children cannot be returned to their mother because it is forbidden by both shari'a and codified family law. Additionally, the daughter's honor would be irretrievably sullied by exposing a "private dispute" through a court hearing. To provide justice, the judge decided to use the importance of reputation (*sum'ah*) in Gazan society to pressure the man into giving up the children. He contacted the father and threatened to jail him for sexual harassment of his daughter; when the father denied the accusation, the judge pointed out that his social standing would be damaged by the mere charge of molestation. Social ramifications are most significant in a society metaphorically depicted by its inhabitants as a house with thin walls. "If I cough in the north, those in the south will hear me" is a common expression among Gazans, describing the forced proximity arising from their distorted historical trajectory and the geography of occupation. The father decided not to take the risk and agreed to send the children to live with their mother. Thus, in order to protect the children, the judge ignored the rule of law regarding punishment for an offense, as well as the father's legal custody rights. The flexibility here does not relate so much to the room given to the judge in the IFL, as to his individual judgment that provided the best solution for the specific case at hand.

Judges display a similar attitude when hearing cases involving a *wali*'s rights.¹¹ During one hearing, a judge refused to authorize the marriage of a *thayyib* (nonvirgin) woman in the absence of her father, despite her legal right to marry, and the presence of her uncle and two brothers.¹² The uncle said the father was working in Israel and could not attend the hearing. However, the judge insisted that the father had to give permission for the marriage and had to be present at the ceremony. The marriage was delayed until the father could appear in person. The judge later explained to me that he had suspected the woman and family members accompanying her of wanting to conclude the marriage without the father's knowledge, which could have caused a family quarrel later: "We cannot, as a court, turn a blind eye to the consequences of our decisions."¹³

However, in another case, the judge was willing to let a virgin woman, forbidden by law to marry without a guardian's permission, to marry against her father's will.¹⁴ The father, a drug addict, did not want his daughter to marry because she earned a monthly salary with which he bought his narcotics. The judge first appealed to the father to consider his daughter's welfare:

This is a time of utmost happiness in your daughter's life. It would not be good for her to marry without your consent. That would be bad for both of you. It would also ruin your daughter's image in the eyes of her in-laws . . . She is 21-years-old and this may be her last chance to marry.

Finally, he warned the father that unless he proved the suitor was not eligible, he himself would act as the daughter's *wali* and allow the marriage.¹⁵

In some cases, even the payment of maintenance (*nafaqa*), which is an obligation under IFL and one of the pillars upon which gender relations are molded, can be trumped by principles of family unity, larger social cohesion, and so on. Sometimes, when the judge feels that further conflict could lead to undesirable consequences for the two parties' families and the wider community, he may force a wife to give up her right to the minimal *nafaqa* (*nafaqat al-'idda*).¹⁶ The judge does this out of awareness that the families, and perhaps even the clans (*hamayil*) of both parties, might intervene in the conflict and widen it to serve other interests if it is not resolved.

Concern for protecting the rights of the weak, while maintaining social harmony, is a principle pervading the system, and it is not restricted to magistrates. In one instance, the deputy chief judge personally suggested to a woman a stratagem to retain custody over her children, even though he was not involved in the court case. Adala, a divorced 35-year-old primary schoolteacher, had been awarded *nafaqa* of 25 Jordanian Dinars (equivalent to \$35) for each of her 10 children, the total sum amounting to more than 60 percent of her ex-husband Ziyad's salary. To pressure her to give up the *nafaqa*, Ziyad, who had remarried, filed for custody of the two eldest daughters. Adala, worried that the daughters would be treated as servants by the new wife, petitioned the court, through a lawyer, to declare the father ineligible to be their custodian.¹⁷ When this tactic failed, the lawyer went with Adala and six of her children to the deputy chief judge to explain that Ziyad's motive for filing for custody was to pressure Adala to give up the *nafaqa*, not concern for the welfare of

his daughters. The deputy chief judge said he would order the court to review the case, and then outlined a plan to counter the father's strategy. He said the daughters should tell the judge they did not want to be separated and that all the children wanted to live with their father, adding: "We, on our part, will put pressure on him to take all the children." When they arrived at the father's home, the children "should be noisy, break plates, play football indoors and switch the TV on and off all the time. In other words, they have to drive the wife crazy." On the day of the hearing, the children followed the strategy in court as well as at their father's home and, within an hour of their arrival, they were returned to their mother's house.

The deputy chief judge also told Adala, who works at a school run by a foreign organization and therefore earns more than teachers in other schools, that it was unfair to claim 60 percent of Ziyad's salary and that she would have to compromise if she wanted to retain the children. She decided that JD 100 (equivalent to \$140) would suffice.

IFL is based on the assumption that both agnatic (*al-ansab*) and maternal (*al-akhwal*) kin are acting in good faith and with equal degrees of responsibility and decency. However, in practice, the agnates generally try to use their legal precedence to further their personal interests. The role of the judge is to bridge the gap between the ideal and the social reality; that is, to mediate between the claims of the law and the manifestation of self-interest, while simultaneously considering the rights of the weakest party: the child.

The judges have to deal with people from different social backgrounds and with different power resources. They have to understand the power balance between litigants and the social status of each party. To achieve this objective, they interrogate litigants about their background, their family ties, the institutions in which they work, where they live, and so forth. Another tactic is the use of court officials to obtain information about litigants. Judges use ushers (doormen) and court clerks as agents to help them understand what is going on outside the courtroom.

The usher is more than just a doorman. Over time, he becomes familiar with the proceedings of the shari'a courts and sometimes intervenes in cases before they reach the judge. He listens to and advises litigants, offers to persuade lawyers to represent poor women without a fee, and gives advice to any woman who asks for it. On one occasion, I heard an usher consoling a woman who had lost her suit, telling her that he would "speak" about her case to a member of the appeal court.

Judges are more interested in cleaning up the "social mess" than in focusing strictly on the judicial aspects of the conflict (see Nader 1969:72). In this regard, they can decide cases not only through legal conclusions, but also through tactics that show the degree of their discretion. One day, a woman who had sued for nafaqa did not appear in court for the hearing. Instead of postponing the case or dismissing it, the judge told the usher to phone the woman to remind her of the hearing. When the husband asked him to postpone the case, the judge told him gently, "Your wife must be busy preparing your children for school." He then instructed the lawyer to present the case of another litigant until the woman arrived, about an hour later. In contrast,

on another day, when a man who was petitioning for custody over his children arrived only five minutes late, the judge adjourned the case, telling him he should respect the court's schedule.

When judges are confronted with a difficult case (involving powerful people or when the case is exceptionally serious), they consult with the chief judge and other judges to reach a collective decision. Another strategy is simply to buy time by adjourning the case for a week, unless they feel that a quick judgment is required. Judges also consult with community leaders. I often heard them asking litigants to send their *makhahir* (leader of a given "community" or extended family) for consultation. The tactics of judges range from in-court mediation to the application of customary law to out-of-court negotiation and threats. The reasoning methods (*ijtihadic*) of modern judges are akin to those of their predecessors, for they exercise personal reasoning (*ra'y*), consult with each other in order to reach consensus (*ijma'*), and use the most equitable (*istihsan*) and the best solution (*istislah*) to serve the community. This *ijtihadic* action¹⁸ is indeed different from the *Ijtihadic* endeavor of the grand jurists. Yet its bearing on the community within which IFL is applied is crucial.

Instead of taking a legalistic approach, the judges remind those who come before them of the norms of Palestinian society. For example, a husband has to provide maintenance to his family by both law and custom; when he fails to do so, the judge does not merely regard it as a violation of the law, he also invokes principles related to what the society and religion consider normal and acceptable behavior. This was shown in several cases in which men were forced to pay *nafaqa* to their wives and children or were denied a house of obedience (*bayt al-ta'a'*) order.¹⁹ Litigants, too, phrase their appeals to judges in terms ensuring that religious and social norms are observed. Women frequently address a judge as "father of Muslims," "protector of God's worshippers," and so forth. Similarly, even when protesting the judge's interventions, men frame their objections in religious and moral terms.

However, women and men's vocabularies are different and so their interaction with the judge rests on a different kind of communication. While women's appeal to the judges' religious beliefs is laudatory, men do not employ this tactic. They may tell the judge: "You are not following the shari'a," or "You are influenced by the soft voice of women," which upsets the judge and consequently disempowers them (see also Hirsch 1998 for a somewhat different distinction between men's and women's repertoires in Kenyan Kadhi's courts).

For women, the action of filing a suit, regardless of its outcome, is an empowering step. Although some assume that judges' function in these situations is to safeguard the law, these judges often supply women with the means to overcome their difficulties and thus assist them in strengthening their bargaining position vis-à-vis husbands (see Hirsch 1998 on women's success in kadhis' courts in Kenya). Women, moreover, carefully choose which norms to invoke and in what forum to do so. Asserting a claim in a public forum, that is, the court, enables female litigants to make their voice heard by those who are present, particularly the judge. The courtroom in Gaza is not a place in which only litigants, lawyers, and the judge deliberate the case behind closed doors. Unless the case is declared *in camera*, it is open to lawyers

representing clients in other cases, friends of litigants, other litigants waiting for their cases, and so forth. In this sense, the court is a public space involving a variety of participants and audience, which suggests that the prevailing social norms are maintained and everyone's conduct is scrutinized. Information thus understandably reaches out beyond the courtroom walls.

When a woman uses such a setting to press a claim, she makes use of an "audience," which implies that she is also appealing to widely shared norms of acceptable behavior. An appeal to the judge as "the father of Muslims" is part of an attempt to get him to play his presumed role not only as a justice provider and community member, but also as a religious leader who should not permit women to be denied justice in his own province.

Conclusion

This article has employed an anthropological method to analyze codified IFL in action. After reviewing the work of Hallaq (2004), Tucker (1998), Sonbol (1996), and Sanadjian (1996), I argued that the establishment of the nation-state, more than 100 years ago in many Muslim-majority countries, did not necessarily lead to cessation of the flexibility that had characterized classical application of IFL. The argument was not meant to negate the role of the state, but rather to highlight the fact that the state is only one among "many arenas in society where regulatory activities take place" (Griffiths 1992:156).

The judge's familiarity with the community norms direct him to find solutions that do not depart from the prevailing morality of the community. This further implies that flexibility might be stretched or tightened in accordance with judges' embeddedness in, and responsiveness to, the norms of their community. Their adherence to the notion of "protecting the weak" is not informed by a desire to compensate for gender asymmetry or hierarchies based on age. Like all members of society, they are influenced by the dominant gender discourse, and they act in such a way that their "protective" solution neither disturbs the community's norms nor questions the gender asymmetry and age hierarchy inherent in law and social practice.

Women for their part are granted protection so long as they appear to be victimized. They therefore strive to get the judge's sympathy by appealing to his leadership in the community or his religious role. This directs our attention to women's profound knowledge of the gender norms prevailing in society. It reveals the extent to which gender is paradoxical. The same gender ideology that discriminates against women in one situation provides them with the means for compensation in another.

The complex role of judges reminds us, once again, that law and implementers of law are far from impartial, let alone gender-neutral. Gender roles and relations organized by IFL will continue to be arenas for contestation as long as they mirror changes in the wider society and thus pose critical questions to their organizing legal framework. By the same token, judges are far from immune to the drastic change taking place in Palestinian society in which rapid political transformation; new forms of governance, daily occurrence of violence, and foreign occupation provide the background against

which judges operate. Judges will continue to face the challenge of maintaining a coherent world-view and continuity while acknowledging the vibrant social change. In order to come to terms with this, judges found in their innovative interpretations a way to tie law in with the present. In this sense, what appears to be fixed is in fact a continuous renewal.

Researchers need to study the social working of IFL to supplement the doctrinal approach and statutory presentation, which understandably fail to notice the extent to which the judges exercise agency in recording, suppressing, or making only oral judgments when applying the law. Such analysis would produce a more nuanced understanding of both legal procedures and societies in which IFL offers a code of reference.

Notes

Except for Chief Judge Mahmud Salama, who gave his permission to use his actual name, all other names used in this article are pseudonyms.

1. The literature on Islamic law presents many, often contradictory, definitions of shari'a. This article does not engage in these debates but endorses the definition by Dupret (2007:89), who points out that "shari'a is understood as Islamic law as revealed by God (in the Qur'an or Koran) through His Prophet Muhammad (Sunna or Prophetic Tradition)."
2. My analysis is principally based on 14 months of fieldwork in the Gaza Strip between 2002 and 2003. I observed on a daily basis the operation of two court-rooms in the Gaza City shari'a court, and I had the opportunity to discuss issues related to the application of IFL with the judges who preside over other shari'a courts in the Gaza Strip. I interviewed many lawyers and spoke with tens of litigants in their "waiting rooms." Archival material that dates back to 1918 was documented and analyzed. This ethnography was published in Shehada (2005).
3. For the strategies of women as active agents in claiming their rights, see Hirsch 1998; Shehada 2005, 2009a, 2009b).
4. The study of IFL has been long dominated by a strictly legal perspective (see Pearl 1987; Nasir 2002; Edge 1996; Musa 1958; Abu Zahra 1950; El 'Alami 1992; Welchman 1999, 2000). Al-Qasim (2000) studies the theory and practice of IFL in the framework of the Jordanian Law of Personal Status. Some, notably Arab, scholars have chosen to look at particular provisions in IFL such as inheritance, marriage, divorce, and the role of the guardian (see 'Abdel Hamid 1984; Ansari 1982; Ayyush 1985; Badran 1967; Bakri 2000). Others, such as Bentwich (1948), Botiveau (1993a, 1993b, 1999), and Hassaniyya (1994), look at IFL in specific Muslim countries. Dupret et al. (1999) examine the notion of legal pluralism in the Arab world, whereas Abdo (1997) scrutinizes the articulation of gender and class with regard to law in the post-Oslo Palestinian Territories. The interplay of Islamic law and culture was envisaged by Gerber (1994, 1999) and Masud (2001). Scholarship on the anthropology of law developed in the late 1980s and early 1990s, including that of Dwyer (1990:2), who emphasized the importance of studying the application of IFL through the "eyes of people." Hirsch (1998) used

an ethnographic method to analyze the strategies adopted by actors—including judges—in court proceedings. Rosen (1989) investigated the application of IFL in Morocco.

5. In Palestine, customary practice, as Welchman (2000:6) contends, “constitutes a stronger controlling force than the [family] ‘law’.” Yet, as she points out, only a few systematic studies examine the interplay of customary and formal laws in Palestine (6–7).
6. “Legal codes no longer offer a variety of possible interpretations; rather they work to standardize cases and minimize the judicial subjectivity” (Tucker 1998: 184).
7. Interview with Deputy Chief Judge Mahmud Salama, December 2003.
8. In Egypt, for example, codification has not led to inflexible application of IFL. Shaham (1999) and Botiveau (1997) demonstrate that when judges feel that codified law does not provide a “just” answer, they refer to sources such as Hanafi *fiqh*, principles of the shari‘a or the Qur‘an to ensure justice. Mir-Hosseini’s (2000) ethnographic research makes an important contribution to the application of IFL in Morocco and Iran. She explores the tension between shari‘a and modern legal systems, and the negotiation of rights by female litigants. She also compares the operation of shari‘a in the two Muslim countries. However, given her focus on the gendered nature of the law, she offers little analysis of the role, conduct, and various interventions of the judges. Hirsch (1998) is also concerned with the gender performativity in the court, providing insights into the flexible application of IFL and the importance of the ethical stance of the judges. She points out that although the discourse of judges in relation to sexuality, parenthood, and marriage is highly gendered, it is not necessarily based on relationships of domination and submission. Judges have often supported the strategies of women. Women, Hirsch observes, are treated as legal agents and they often reject their fathers’ wishes when choosing husbands. My work and that of Hirsch have somewhat different foci. While Hirsch focuses on the images men and women create about themselves when communicating with the judges, my focus is more on the image of the judge in the eyes of litigants. My particular focus in this article is upon the perception of the litigants, men and women, regarding the identity and role of the judge; the way they address him shows that they see him more as a religious leader and community member than as a legal figure.
9. Interview with Judge Anis Abu Salman, of the first instance court of Khan Younis, March 2, 2002.
10. A *mahram* is a person whose degree of consanguinity with the ward would prevent him or her from marrying the ward.
11. The term *wali* can mean protector, master, guardian, or even slave, depending on the context. Here, it means religious authority, as well as protector of Muslims.
12. This practice is not in conformity with the law, which specifies that a thayyib needs no wali, and can conclude her marriage contract herself, since women acquire full legal capacity in this regard after their first marriage. Article 34 of BPSR states that the presence of a “*wali* is a condition for the marriage of those

- who are under-age.” The wali is not required for the marriage of free, mature, and sensible couples (*al-hurr wa al-hurra al-‘aqilayn al-balighayn*).
13. Qadi al-Ansari heard this case in 2002, at the shari‘a courts of Gaza city.
 14. The case was heard by Judge al-Karmi, at the shari‘a courts of Gaza city.
 15. The justification for this in the shari‘a is that the major wali (a judge) is entitled to replace the minor wali (a father).
 16. Nafaqat al-‘idda is the maintenance that a man is obliged to pay for three months after unilaterally divorcing his wife.
 17. Further details about the case cannot be provided here because of space limitations.
 18. Muslim jurists (*muftis*) may produce legal judgments applicable to all similar cases including those that might arise in the future. Given their universality, such judgments could be labelled Ijtihad with upper case (I). The judges’ decisions however, are limited to the parties involved in a dispute. Hence, they might be read as ijthad with lower case (i).
 19. A husband can petition the shari‘a court for an order against a “disobedient” wife. If the court is satisfied that the wife has refused to carry out her marital duties, it can order her to go to the ‘house of obedience’ (*bayt al-ta‘a*); that is, to end her disobedience.

References

- Abdel Hamid, Mohamed
 1984 *al-ahwal al-shakhsiyya fi al-shari‘a al-islamiyya* (Personal Status in the Islamic shari‘a). Beirut: Dar al-Kitab al-Arabi.
- Abdo, Nahla
 1997 Muslim Family Law: Articulating Gender, Class and the State. Theme issue, *International Review of Comparative Public Policy* 9:169–193.
- Abu Zahra Mohamed
 1950 *al-ahwal al-shakhsiyya: qism al-zawaj* (Personal Status: Marriage). Cairo: Daral-Fikr al-Arabi.
- Al-Qasim R M.
 2000 *qanun al-ahwal al-shakhsiyya al-urduni bayn al-nazhariyya wa al-tatbiq* (Jordanian Law of Personal Status: Theory and Practice). Paper presented at the conference on Personal Status Laws in the Arab World: Theory, Practice, and Chances for Reform, Amman, March 12.
- Ansari, Sarah
 1982 Statutory Provisions Relating to Polygamy in Muslim Societies. *Islamic and Comparative Law Quarterly* 2(3):223–231.
- Asad, Talal
 2001 *Thinking About Secularism and Law in Egypt*. Leiden: ISIM.
- Ayyush Diab
 1985 *ahwal al-zawaj wa al-talaq fi al-diffa al-gharbiyya al-muhtalla* (Marriage and Divorce in the Occupied West Bank, an Analytical Statistical Study). *Bulletin of the University of Bethlehem*, December 4. A 5

Badran Abulaynin B.

- 1967 *al-zawaj wa al-talaq fi al-islam* (Marriage and Divorce in Islam). Alexandria: Dar Alnahdah Alarabiya.

Bakri Ala

- 2000 *al-ab'ad al-qanuniyya wa al-idariyya wa al-taghyirat 'ala al-mahakim al-shar'iyya fi filastin, 1995–2000* (Legal and administrative measures and change in the shari'a courts in Palestine 1995–2000). Paper presented at Birzeit University Women's Studies Center Comparative Islamic Law Project, Ramalla, April 12–15.

Bentwich, Norman

- 1948 *The Legal System of Palestine under the Mandate*. Middle East Journal 2(1): 33–46.

Botiveau, Bernard

- 1993a *Contemporary Reinterpretation of Islamic Law: The Case of Egypt*. In *Islam and Public Law*. Mallat Chibli ed. Pp. 261–277. London: Graham and Trotman.

- 1993b *Loi islamique et droit dans les sociétés arabes* (The Islamic Law and Rights in the Arab Societies). Paris: Karthala – IREMAM.

- 1997 *Al-shari'a al-islamiyya wa al-qanun fi al-mujtama'at al-arabiyya* (The Islamic shari'a and Law in Arab Societies). Cairo: Sienna.

- 1999 *Palestinian Law: Social Segmentation versus Centralization*. In Baudouin Dupret, Maurits Berger, and Laila al-Zwaini, eds. Pp. 73–87. *Legal Pluralism in the Arab World*. The Hague: Kluwer Law International.

Coulson, Noel J.

- 1964 *A History of Islamic Law*. Edinburgh: Edinburgh University Press.

Doumani, Beshara, ed.

- 2003 *Adjudicating Family: The Islamic Court and Disputes between Kin in Greater Syria, 1700–1860: Family History in the Middle East: Household, Property, and Gender*. Albany: SUNY Press.

Dupret, Baudouin

- 2007 *What Is Islamic Law? A Praxiological Answer and an Egyptian Case Study*. *Theory, Culture & Society* 24(2):79–100.

Dupret, Baudouin with Maurits Berger and Laila al-Zwaini

- 1999 *Legal Pluralism in the Arab World*. The Hague: Kluwer Law International.

Dwyer, Daisy Hilse

- 1990 *Law and Islam in the Middle East: Law and Islam in the Middle East*. New York: Bergin & Garvey.

Edge, Ian

- 1996 *Islamic Law and Legal Theory: The International Library of Essays in Law & Legal Theory*. Dartmouth: Aldershot.

El 'Alami Dawoud S.

- 1992 *The Marriage Contract in Islamic Law in the shari'ah and Personal Status Laws of Egypt and Morocco*. London: Graham & Trotman.

Gerber, Haim

1994 *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective*. Albany: State University of New York.

1999 *Islamic Law and Culture 1600–1840*. Leiden: Brill.

Gluckman, Max

1955 *The Judicial Process among the Barotse of Northern Rhodesia*. Manchester, UK: Manchester University Press.

Griffiths, John

1992 *Legal Pluralism and the Social Working of Law*. Paper presented at the 3rd Benelux-Scandinavian Symposium. Amsterdam, January 3–5.

Gulliver, P.H.

1997 *Case Studies of Law in Non-Western Societies: Introduction*. In *Law in Culture and Society*. Nader Laura, ed. Pp. 11–23. Berkeley: University of California Press.

Hallaq, Wael

2004 *Can the shari‘a be Restored?*. In *Islamic Law and the Challenges of Modernity*. Haddad Y Yvonne and Stowasser F Barbara eds. Pp. 21–53. Walnut Creek, CA: AltaMira Press.

Hassaniyya Islah

1994 *al-ahwal al-shakhsiyya lil-muslimin (Muslim Personal Status)*. In *al-mar‘a wa al-qanun fi qita’ ghazza (Women and Law in the Gaza Strip)*. Laila Tarazi, Salwa Sayigh, Fatima Mukhallati, and Islah Hassaniyya, eds. Pp. 42–88. Gaza: (NB).

Hirsch, Susan

1998 *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court*. Chicago: University of Chicago Press.

Kamali, Hashim M.

1989 *Sources, Nature and Objectives of shari‘ah*. *The Islamic Quarterly* 33(4):215–235.

Makdisi, John

1985 *Legal Logic and Equity in Islamic Law*. *The American Journal of Comparative Law* 33(1):63–92.

Masud, Khalid M.

2001 *Muslim Jurists’ Quest for the Normative Basis of shari‘a*. Leiden: ISIM Publications.

Mir-Hosseini, Ziba

2000 *Marriage on Trial: A Study of Islamic Family Law*. London: I.B. Tauris.

Moore, Sally F.

1973 *Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study*. *Law and Society Review* 7(4):719–746.

1978 *Law as Process: An Anthropological Approach*. London: Routledge and Kegan Paul.

Muhaisen, Wadi Fouad

- 2008 The Palestinian Legal System. Electronic document, <http://www.ptheyap.org/showcase/politicsandlaw/palestinianlegalsystem.htm>, accessed July 31.

Musa, Yousif Mohamed

- 1958 *Ahkam al-ahwal al-shakhsiyya fi al-fiqh al-islami* (Measures of Personal Status in Islamic Jurisprudence). Cairo: Dar al-Kitab al-Arabi.

Nader, Laura

- 1989 *Harmony Ideology: Justice and Control in a Zapotec Mountain Village*. Stanford: Stanford University Press.

Nasir, Jamal

- 2002 *The Islamic Law of Personal Status*. The Hague: Kluwer Law International.

Pearl, David

- 1987 *A Textbook on Muslim Personal Law* (2nd ed.). London: Croom Helm.

Rosen, Lawrence

- 1989 *The Anthropology of Justice: Law as Culture in Islamic Society*. Cambridge: Cambridge University Press.

Roy, Sara

- 1995 *The Gaza Strip: The Political Economy of De-development*. Washington, D.C.: Institute for Palestine Studies.

Sanadjian, Manuchehr

- 1996 A Public Flogging in South-Western Iran: Juridical Rule, Abolition of Legality and Local Resistance. *In* *Inside and Outside the Law: Anthropological Studies of Authority and Ambiguity*. Olivia Harris, ed. Pp. 157–184. London: Routledge.

Shaham, Ron

- 1999 An Egyptian Judge in a Period of Change: Qadi Ahmad Muhammad Shakir 1892–1958. *Journal of the American Oriental Society* 119(3):440–456.

Shehada, Nahda

- 2005 *Justice without Drama: The Enactment of Family Law in the Gaza City shari'a Court*. Maastricht: Shaker Publications.

- 2009a *House of Obedience: Social Norms, Individual Agency and Historical Contingency*. *Journal of Middle Eastern Women's Studies*. 5(10):24–49.

- 2009b *Negotiating Custody Rights in Islamic Family Law*. *In* *Permutations of Order: Religion and Law as Contested Sovereignties*. Thomas G. Kirsch and Bertram Turner, eds. Pp. 247–263. London: Ashgate publication.

Sonbol, Amira, ed.

- 1996 *Adults and Minors in Ottoman shari'a Courts and Modern Law: Women, the Family and Divorce Laws in Islamic History*. Syracuse: Syracuse University Press.

Tucker, Judith

- 1998 *In the House of Law: Gender and Islamic Law in Ottoman Syria and Palestine*. Berkeley and Los Angeles: University of California Press.

Welchman, Lynn

- 1999 *Islamic Family Law: Text and Practice in Palestine*. Jerusalem: WCLAC.
- 2000 *Beyond the Code: Muslim Family Law and the shari'a Judiciary in the Palestinian West Bank*. The Hague: Kluwer Law International.
- 2003 *In the Interim: Civil Society, the shari'a Judiciary and Palestinian Personal Status Law in the Transitional Period*. *Islamic Law and Society* 10(1):34–70.