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Women before the *qāḍī* under the Abbasids

by

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Abstract: In this article, I examine the appearance of Muslim women before the judge during the Abbasid period (132-334/750-945), both in theory and practice. The cases involving women found in law books suggest that they came freely to the court, especially for familial or marital purposes, and that the judges employed some women as court auxiliaries. However, a comparison of judicial manuals and the biographical literature shows that a woman's appearance before the judge could create a social disturbance and that not all women were allowed to appear in court. I argue that the social distinction between those who could leave their houses – and thus come before the judge – and those who could not correlated with the social hierarchy.

Based on Islamic court registers (*sijillāt*), several specialists in Ottoman history have analyzed the social and gender distribution of the litigants who appeared before the *qāḍī*, the Islamic judge. Some studies show that women represented a non-negligible percentage of the litigants – often more than ten percent.[1] Unfortunately, because of the lack of documents for the first centuries of Islam, researchers cannot reach precise results.[2] Judicial practices can be studied only through literary sources, like biographical dictionaries and law compendia.

I wish to thank David Powers, Christopher Melchert and Karen Bauer for their comments on a previous draft of this article.

[1] One of the first quantitative studies of women in Ottoman courts was undertaken by R. C. Jennings, "Women in Early 17th Century Ottoman Judicial Records – The Sharia Court of Anatolian Kayseri," *JESHO*, 18 (1975), 53-114. See also Y. J. Seng, "Invisible Women: Residents of Early Sixteenth-Century Istanbul," in G. R. G. Hambly, *Women in the Medieval Islamic World. Power, Patronage, and Piety* (London, MacMillan, 1998), 241-68. For a review of studies on women under the Ottomans, see I. Agmon, "Women's History and Ottoman Sharia Court Records," *Hawwa*, 2 (2004), 175 ff.

[2] The main exception is represented by the documents of the Geniza, which allowed S. D. Goitein to analyze the phenomenon of Jewish women appearing in the rabbinical court of Fusṭāṭ, mostly during the 11th and 12th centuries. S. D. Goitein, *A Mediterranean Society. The Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza* (Berkeley-Los Angeles-London: University of California Press, 1967-93), 3:332-6.

Nevertheless, the frequent appearance of women in the available sources suggests that the situation was not very different in early Islam.

Muslim women reportedly were confined to private space, while public space was reserved for men. The *qāḍī*'s tribunal, usually held in the chief mosque of the city, served as public space *par excellence*: anyone could attend it, enter a complaint, or simply hear others' complaints. It is necessary to investigate the sources in an effort to reconstruct the actual position of women at the *qāḍī*'s court. An exploration of the legal literature reveals what kinds of cases involving women were expected to be brought before the *qāḍī*. I rely especially on the Iraqi al-Khaṣṣāf (d. 261/874), a Ḥanafī jurist who, in the middle of the ninth century, wrote an important *adab al-qāḍī* manual, and on its tenth-century commentary by al-Jaṣṣāṣ (d. 370/980). In fact, these two works can hardly be separated: al-Khaṣṣāf's original text is included in al-Jaṣṣāṣ's commentary. I will argue that, despite the absence of legal restrictions on the appearance of women before a judge, the prevailing social norm discouraged some women from appearing in court, and that gender issues must be viewed within their specific social context.

1. Legal cases involving Muslim women

1.1. Women as litigants

Women appear frequently in law books about family matters. Ḥanafī jurists discuss several types of cases in which women might be involved in a lawsuit.

The first category deals with personal status, that is, cases relating to marriage and divorce. A man could allege, for example, that a woman was his wife.[3] As al-Khaṣṣāf explains, a woman whose husband went on a long journey and did not return may have remarried; then the first husband might come back and claim that he is her legal husband.[4] Other cases come to mind: David Powers mentions the case of a woman in the fifteenth-century Maghrib who fled from her husband and remarried in a neighboring village.[5] A woman also could allege that a man was her husband.[6] Women were more often involved in

[3] Al-Khaṣṣāf, *Adab al-qāḍī*, ed. Farḥāt Ziyāda (Cairo: The American University in Cairo Press, 1978), 138, 378, 419, 531.

[4] *Ibid.*, 379.

[5] D. S. Powers, "Four Cases Relating to Women and Divorce in al-Andalus and the Maghrib, 1100-1500," in M. K. Masud *et al.*, *Dispensing Justice in Islam. Qadis and their Judgments* (Leiden-Boston: Brill, 2006), 402.

[6] Al-Khaṣṣāf, *Adab al-qāḍī*, 531.

divorce lawsuits. A woman who wanted to be separated from her husband might claim that he had repudiated her three times,[7] or she might claim that her marriage was null and void.[8] A husband could ask the judge to nullify his marriage if his wife suffered from a crippling defect like madness or severe illness (e.g. *baraṣ*, leprosy).[9]

The second category relates to material claims on a husband. Several kinds of cases can be singled out. (1) A woman might complain about the dower (*mahr*): although the claimant was usually the wife's father, the judge could summon the wife to ask her about her father's claim.[10] (2) She could complain about the *nafaqa* or maintenance allowance provided by the husband for his wife's daily needs. Women filed complaints against husbands who did not provide them with enough money or equipment,[11] or who had to go on a journey of several months, and they asked the *qāḍī* to appoint a guarantor (*kafīl*) who would be responsible for paying their *nafaqa*.[12] Alternatively, a woman could ask her brother or another relative to pay her *nafaqa*. If her husband disappeared, she could go to the *qāḍī* and ask him to appoint an agent (*wakīl*) to manage the husband's property and pay her the *nafaqa*. (3) A woman could ask for material commodity, like new dresses,[13] or ask for the employment of a cook.[14] (4) Finally, some divorced women appeared before the judge to receive permission to take their children away from their father to another city.[15]

Another category is sexual intercourse. A wife might accuse her husband of engaging in illicit sexual relations with another woman (*zinā*).[16] The jurists commonly dealt with the case in which one of the spouses could not or did not fulfill his or her sexual obligations. For example, a woman complained that her husband had sworn not to touch her and respected this oath for four mouths (*īlā*). In this instance, the *qāḍī* could impose a divorce between them.[17] Sexual incapacity was also the subject of lawsuits: divorce was automatic if the wife was

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[7] *Ibid.*, 138, 343, 377.

[8] *Ibid.*, 379.

[9] *Ibid.*, 344.

[10] *Ibid.*, 622, 626, 628.

[11] *Ibid.*, 646 ff.

[12] *Ibid.*, 645.

[13] *Ibid.*, 660.

[14] *Ibid.*, 650.

[15] *Ibid.*, 690.

[16] *Ibid.*, 341.

[17] *Ibid.*, 165. Cf. D. S. Powers, "Four Cases," 395.

physically incapable of sexual intercourse.[18] More frequently, however, jurists deal with the incapacity of men: according to Ḥanafī law, the *qāḍī* should pronounce the divorce immediately if a husband appears to be castrated.[19] If he was sexually impotent, the *qāḍī* instituted a long procedure (sometimes lasting more than a year) to determine whether or not he would regain his sexual potency. If the wife proved that her husband was impotent, she was given the choice of remaining married or divorcing him.[20] Al-Jaṣṣāṣ explains that sexual intercourse is a wife's right.[21] Although in theory Islamic law restricts a woman's capacity to ask for divorce, the cases relating to sexuality suggest that some women used judicial strategies to obtain it. This hypothesis is confirmed by al-Subkī, who relates how a woman obtained a divorce after complaining that her husband's penis was too large (*shakat ilay-hi imra'a kubr ālat zawji-hā*).[22]

An ill-treated woman might file a complaint against her husband. In Ḥanafī law, a woman cannot obtain a divorce if her husband harms her.[23] However, according to al-Jaṣṣāṣ, the *qāḍī* must prevent her husband from abusing her.[24] He can order a man to let his wife live in the house of respectable neighbors (*ṣāliḥīn*) who will inform the *qāḍī* about the husband's behavior with his wife. If it appears that he is in fact maltreating her, the *qāḍī* will reprimand him or sentence him to physical punishment.[25] According to Maribel Fierro, such a procedure, found also in Maghribī Mālikī law, may have originated in local Berber customs.[26] The mention of this procedure in early Ḥanafī law, however, suggests that this practice originated in the east or, at least, was widespread in the Islamic empire from an early period.

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[18] Al-Khaṣṣāf, *Adab al-qāḍī*, 643.

[19] *Ibid.*, 643.

[20] *Ibid.*, 633-34. Cf. D. S. Powers, "Four Cases," 396; N. Hentati, "L'*iʿdhār* : une procédure judicaire dans le droit musulman," *ILS*, 13 (2006), 400-1.

[21] Al-Jaṣṣāṣ, in al-Khaṣṣāf, *Adab al-qāḍī*, 632.

[22] Al-Subkī, *Ṭabaqāt al-shāfiʿiyya l-kubrā*, ed. M. M. al-Ṭanāḥī and ʿA.-F. M. al-Ḥulw (Cairo: Hajr, 1413 H.), 3:452. For a different opinion, see Th. Bianquis, *La famille arabe* (Bruxelles: Complexe, 2005), 34.

[23] For the position of Mālikī jurists on this issue, see M. Marìn, "Disciplining Wives: A Historical Reading of Qur'ân 4:34," *Studia Islamica*, 97 (2003), 31

[24] Al-Jaṣṣāṣ, in al-Khaṣṣāf, *Adab al-qāḍī*, 652.

[25] Al-Khaṣṣāf, *Adab al-qāḍī*, 652.

[26] M. Fierro, "Ill-Treated Women Seeking Divorce: the Qur'ānic two Arbiters and Judicial Practice among the Malikis in al-Andalus and North Africa," in M. K. Masud *et al.*, *Dispensing Justice in Islam*, 344.

Finally, women were involved in lawsuits about inheritance,[27] kinship (for example if a woman claims that a foundling is her brother and asks the judge to entrust her with the child),[28] or criminal matters (murder or illegal sexual intercourse).[29] Al-Khaṣṣāf relates the story of a young woman who, upon reaching puberty, asked the *qāḍī* for permission to choose which of her divorced parents she would live with.[30]

On the whole, most of the cases involving women in al-Khaṣṣāf's *Adab al-qāḍī* are related to family law and personal status. Al-Khaṣṣāf refers to women when their gender is essential to the substance of the case. However, he does not cite women involved in lawsuits where their gender is immaterial, as commercial litigations. Al-Khaṣṣāf's *Adab al-qāḍī*, thus, reflects only women's involvement in typically female cases, and leaves in the dark their possible participation in other types of lawsuits.

1.2. Women as auxiliaries in the qāḍī*'s court*

The *qāḍī*'s court was not reserved exclusively for men. Many familial matters compelled the judge to use female auxiliaries. He needed female judicial experts to investigate women's virginity or pregnancy, their sexual defects, and matters relating to hidden parts of the female body (like abortion, birth and suckling); this type of expertise was commonly recommended in lawsuits about female slaves, e.g., when a buyer accuses the seller of fraud.[31] Such experts would determine if a young girl was physically capable of engaging in sexual relations before she got married,[32] or would examine young wives who reportedly were incapable of engaging in sexual relations.[33] According to al-Khaṣṣāf and al-Jaṣṣāṣ, several women might act as experts for the same case.

The status of a female expert's word and its value before the judge is striking. Usually, male Muslim experts are recognized as witnesses, and their word is considered as a testimony

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[27] Al-Khaṣṣāf, *Adab al-qāḍī*, 398, 404.

[28] *Ibid.*, 532.

[29] *Ibid.*, 349.

[30] *Ibid.*, 690.

[31] *Ibid.*, 178, 558, 561, 562.

[32] *Ibid.*, 629.

[33] *Ibid.*, 630, 633. See R. Shaham, "Women as Expert Witnesses in Pre-Modern Islamic Courts," in R. Shaham (ed.), *Law, Custom, and Statute in the Muslim World. Studies in Honor of Aharon Layish* (Leiden-Boston: Brill, 2007), 49-63. Cf. D. Serrano, "Rape in Maliki Legal Doctrine and Practice (8th-15th Centuries C.E.)," *Hawwa*, 5 (2007), 178-9.

(*šahāda*) or information (*khabar*).[34] According to al-Jaṣṣāṣ, however, a woman's word cannot cancel a contract, and her statement must be treated as a claim (*daʿwā*). For this reason, a litigant who disagrees with her may swear that she is wrong. The judge considers him innocent and the woman's word is rejected.[35] According to some Ḥanafī jurists, however, virginity, pregnancy and menstruation can be established only by female experts, and their word must always be recognized as valid in these matters.[36] Al-Sarakhsī (d. 483/1090) tends to recognize women's expertise as authentic testimony. He defines a female's report concerning the intimate parts of another female as information (*khabar*), similar in nature to a report going back to a single authority (*al-āḥād*); but it is also a testimony (*shahāda*), as she must be a free Muslim and use the formulary "I testify" (*ashhadu*) in the judicial proceeding. Moreover, her word is binding, as the *qāḍī* bases his judgment on it.[37]

In addition, the *qāḍī* employed women as auxiliaries when a defendant (male or female) refused to appear in court and hid at home. He had to send two trustworthy men with several women and servants (*khadam*): the male auxiliaries would encircle his house and prevent anyone from leaving, while the women and the servants would enter the house, drive away its female inhabitants and look for the defendant. If they found him, they compelled him to appear at the *qāḍī*'s court.[38] Thus, women were needed to enter the private space of the house, which had to remain hidden from the eyes of any man outside the inner circle of the family.[39]

Women also investigated female witnesses in an effort to determine whether they were trustworthy and honorable. According to al-Khaṣṣāf, only women who are used to mixing with people in the public sphere can conduct this type of investigation.[40]

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[34] J.-P. Van Staëvel, "Savoir voir et le faire savoir : l'expertise judiciaire en matière de construction, d'après un auteur tunisois du 8e/XIVe siècle," *Annales Islamologiques*, 35 (2001), 654.

[35] Al-Jaṣṣāṣ, in al-Khaṣṣāf, *Adab al-qāḍī*, 558.

[36] *Ibid.*, 560. Cf. M. Fadel, "Two Women, One Man: Knowledge, Power and Gender in Medieval Sunni Legal Thought," *IJMES*, 29 (1997), 195.

[37] R. Shaham, "Women as Expert Witnesses," 48-49.

[38] Al-Khaṣṣāf, *Adab al-qāḍī*, 252. See F.J. Ziadeh, "Compelling Defendant's Appearance at Court in Islamic Law," *Islamic Law and Society*, 3 (1996), 310.

[39] On the private status of the house, which could not be entered legally without permission, see E. Alshech, ""Do Not Enter Houses Other Than Your Own": the Evolution of the Notion of a Private Domestic Sphere in Early Sunnī Islamic Thought," *Islamic Law and Society*, 11 (2004), 295ff. This procedure suggests that al-Khaṣṣāf still held the interventionist view of the Ḥanafī Abū Yūsuf (d. 182/798) who, unlike the jurists of other *madhhab*s, allowed entering the house without the permission of its inhabitants. *Ibid*., 298.

[40] *Ibid.*, 314, 422; see also al-Jaṣṣāṣ, in al-Khaṣṣāf, *Adab al-qāḍī*, 314.

Finally, a woman might serve as trustworthy agent (*amīn*) to look after another woman, usually a slave, who claimed to be free, or when two litigants claimed to be her legal owner. The *qāḍī* entrusted the slave girl to a female agent in order to prevent her from having sexual intercourse with one of the two litigants until the resolution of the case.[41] This procedure might also involve a free woman who claimed that she had been repudiated three times, in order to take her away from her husband before the *qāḍī* formally pronounced the divorce.[42]

These cases show that the judiciary needed female auxiliaries who might intervene in all situations in which there was a violation of the *ḥaram* – the domestic, private or female space – forbidden to any man outside the inner circle of the family. In theory, Ḥanafīs even recognized a woman's right to be a *qāḍī*.[43] Indeed, in the first Ḥanafī *adab al-qāḍī* books, women were to a large extent integrated into the court. They appeared in this literature both as plaintiffs and as judicial auxiliaries.

2. Looking for the archetypal female litigant

The fact that *fiqh* books devote considerable attention to women appearing in court leads us to wonder whether religious models contributed to the shaping of legal theory. Few if any explicit injunctions calling on women to appear in the *qāḍī*'s court are found in the *fiqh* literature. Although the jurists do not mention any explicit model, implicit models may

[41] Al-Khaṣṣāf, *Adab al-qāḍī*, 377.

[42] Al-Jaṣṣāṣ, in al-Khaṣṣāf, *Adab al-qāḍī*, 377. Cf. M. Fierro, "Ill-Treated Women," 338.

[43] Al-Jaṣṣāṣ, in al-Khaṣṣāf, *Adab al-qāḍī*, 354. Whereas Ḥanafīs limited women's adjudication to non-*ḥudūd* cases, al-Ṭabarī allowed them to adjudicate any dispute. The Shāfiʿīs and Ḥanbalīs held that only men can serve as judges. Al-Māwardī, *al-Aḥkām al-sulṭāniyya* (Constitutiones Politicae), ed. M. Enger (Bonn: Adolphus Marcus, 1853), 107-8; *id*., *Adab al-qāḍī*, ed. Muḥyī Hilāl al-Sarḥān (Baghdad: Maṭbaʿat al-irshād, 1971), 1:625-8; Ibn Qudāma, *al-Mughnī*, ed. ʿAbd Allāh b. ʿAbd al-Muḥsin al-Turkī and ʿAbd al-Fattāḥ al-Ḥulw (Cairo: Hajr, 1986-90), 14:12-13 (I owe this reference to Christopher Melchert). Byzantine law also excluded women from serving as judges. J. Beaucamp, "Les femmes et l'espace public à Byzance : le cas des tribunaux," *Dumbarton Oaks Papers*, 52 (1998), 132. Despite the theoretical recognition of women serving as judges in Ḥanafī law, E. Tyan found only one female judge in Islamic pre-modern history: Thaml/Thumal was appointed at the *maẓālim* court in 306/918-19, under al-Muqtadir. E. Tyan, *Histoire de l'organisation judiciaire en pays d'Islam* (Leiden: E.J. Brill, 1960), 162; see also Ibn al-Jawzī, *al-Muntaẓam fī tawārīkh al-mulūk wa'l-umam*, ed. Suhayl Zakkār (Beirut: Dār al-fikr, 1995), 8:12; N. M. El-Cheikh, "The Qahramâna in the Abbasid Court: Position and Functions," *Studia Islamica*, 97 (2003), 52-53.

nevertheless have shaped mentalities. We will concentrate here on two examples taken from the Qur'ān and the *Sīra*.

First, the Qur'ān exhorts the Muslim community to resort to justice when a married couple is confronted with discord: "If you fear dissension between a married couple, send forth an arbiter from his family and an arbiter from her family. If they desire reconciliation, God will bring them together. God is All-Knowing, All-Discerning." (Q. 4:35)[44] According to Maribel Fierro, this verse "was never understood to refer to every case of marital discord, given the husband's right to repudiate his wife that is clearly established in other Qur'ānic verses."[45] The exhortation was understood in the context of Q. 4:34, which allows the husband to take action against his wife if she disobeys him: "if after having been admonished, banished and beaten, the rebellious wife still does not obey the husband, then the two arbiters should be appointed. Presumably, it is the husband who asks for arbitration because, for whatever reason, he has no desire to divorce his rebellious wife."[46] However, jurists also understood this rule as "a mechanism for a wife to seek a judicial divorce on the ground of harm."[47]

Q. 4:35 was revealed in an Arabian context where there were no state institutions such as the office of *qāḍī*. The Qur'ān mentions two *ḥakam*s or arbiters chosen by the litigants, who determine whether they should stay married or divorce.[48] This understanding of Q. 4:35 is reported by al-Ṭabarī (d. 310/923). At the end of the 3rd/9th century, however, the *sulṭān* or his delegate was probably the main supervisor of the procedure: the litigants had to complain before him, and he had to choose the two *ḥakam*s if he lacked a clear understanding of the situation of the spouses. Here, the *ḥakam*s act as agents (*wakīl*s) who negotiate an agreement between the litigants.[49] If the spouses refuse to invest them with the power of decision, they intervene as experts or witnesses before the *sulṭān* to determine which of the spouses is at fault.[50] As Fierro has shown, when this procedure was enforced in practice, it was usually the

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[44] Translation by Tarif Khalidi, *The Qur'an* (London: Penguin Classics), 2008, 67.

[45] M. Fierro, "Ill-Treated Women," 325.

[46] *Ibid*., 325. The commentators explain that the "rebellion" of the wife may be caused by the conduct of her husband, or by too small a *nafaqa*. See references *infra*.

[47] *Ibid*., 326.

[48] See Sufyān al-Thawrī (d. 161/778?), *Tafsīr al-Thawrī* (Beirut: Dār al-kutub al-ʿilmiyya, 1403 H.), 94-95.

[49] This corresponds to the Ḥanafī doctrine, which considers the *ḥakamān* to be mere agents of the spouses. Therefore, their decision is not binding. According to the Mālikīs, however, the arbiters are entitled to impose a divorce. Fierro, "Ill-Treated Women," 329, 331.

[50] Al-Ṭabarī, *Tafsīr* (Beirut: Dār al-fikr, 1404 H.), 5:70-71, 75-76. Cf. Muqātil b. Sulaymān, *Tafsīr Muqātil b. Sulaymān*, ed. A. Farīd (Beirut: Dār al-kutub al-ʿilmiyya), 2003, 1:228.

qāḍī who appointed the two *ḥakam*s:[51] this suggests that the litigants had already brought suit before the *qāḍī*. Whatever the modes of application of this procedure may have been in time and space, the Qur'ān itself was regarded as encouraging both men and women to seek justice.

The commentators explain that other verses are related to a judicial context. According to al-Ṭabarī, Q. 58:1ff. were revealed when an Anṣārī woman (named Khawla or Khuwayla)[52] came to the Prophet and asked him about her marital situation after her husband told her that "her back was like his mother's back" (a case of *ẓihār*). In one narrative, al-Ṭabarī compares the situation to that of a trial in which the Prophet was supposed to act as a judge and to deliver a judgment (*fa-yaqḍī fiyya wa-fīka amra-hu*).[53] In addition to this Anṣārī woman, the example of some early Muslim women may have encouraged women to appear in court. It is well known that Arab women held an important political and religious position in early Islam, especially when they belonged to noble families.[54] Of the many women who played an important role in early Islamic politics, three of them may have influenced women's position in the legal sphere.

(1) Khadīja, Muḥammad's first wife, is remembered as an independent woman who managed her business affairs by herself. Although her model does not seem to have influenced women's legal status in Islam, her independence may have encouraged women to undertake judicial actions before the *qāḍī*, especially in case of business litigations.

(2) ʿA/'isha, the youngest of Muḥammad's wives, is an ambiguous character: she appears simultaneously as the archetypal child-wife "that God offered to the pious mature man"[55] and as the woman who opposed ʿUthmān and revolted against ʿAlī, the fourth caliph. During the first years of her marriage to the Prophet, she was accused of illegal sexual intercourse (the so-called "lie case", *ifk*).[56] Strictly speaking, this was not a judicial case, as there was no

[51] M. Fierro, "Ill-Treated Women," 330.

[52] On the disagreements about her *nasab*, see al-Ṭabarī, *Tafsīr*, 28:1. Cf. Muqātil b. Sulaymān, *Tafsīr*, 3:329.

[53] Al-Ṭabarī, *Tafsīr*, 28:5. Earlier *tafsīr*s, however, do not treat the *mujādila* as a plaintiff in a trial, but rather as a woman seeking the opinion of the Prophet. See Muqātil b. Sulaymān, *Tafsīr*, 3:329.

[54] See for example N. Abbott, "Women and the State in Early Islam," *Journal of Near Eastern Studies*, 1 (1942), 106-126.

[55] Th. Bianquis, *La famille arabe médiévale*, 86.

[56] See Ibn Hishām, *al-Sīra l-nabawiyya*, Beirut: Dār al-kutub al-ʿilmiyya, 2001, 674 ff; *EI*^{2}, s.v. ʿA/'isha bint Abī Bakr (W. M. Watt); D. A. Spellberg, *Politics, Gender, and the Islamic Past. The Legacy of ʿA'isha bint Abi Bakr* (New York: Columbia University Press, 1994), 61 ff.

arbiter or judge. Nevertheless, this episode serves as an example – at least for Sunnis – of a high-ranking woman involved in a legal matter during the Prophet Muḥammad's life.[57]

(3) Muḥammad's daughter Fāṭima was involved in a legal case: after her father's death, she publicly contested the first caliph's refusal to award her a share of her father's estate.[58]

These three women contributed to the model of the ideal Muslim female.[59] Reports about these exemplary women may have encouraged them to appear in the *qāḍī*'s court despite the limited public role enjoyed by women in Middle Eastern societies.[60]

3. Looking for the practice

3.1. Biographical sources and their data

Although law books put forth rules for cases in which women might appear in the *qāḍī*'s court, legal doctrine does not necessarily coincide with practice. The jurists talk about women only when dealing with female-related issues like dower, *nafaqa* or divorce. Women were deeply involved in economic life, working in crafts (mainly as weavers and spinsters), trade, and services to other women (hairdressers, midwives, nurses).[61] Although they were supposed to work at home or in other women's houses,[62] far from the public eye, they probably became involved in disputes with sellers, clients and partners.[63] As disputes of this nature are not

[57] For ʿA/'isha's popular image, see D. J. Stewart, "Popular Shiism in Medieval Egypt: Vestiges of Islamic Sectarian Polemics in Egyptian Arabic," *Studia Islamica*, 84 (1996), 41 ff. On her authority to interpret law, see M. Fadel, "Two Women," 191.

[58] See H. Lammens, *Fāṭima et les filles de Mahomet* (Rome: Sumptibus Pontificii Instituti Biblici, 1912), 109-14.

[59] D. A. Spellberg, *Politics*, 151 ff.

[60] It has been argued that the exclusion of Muslim women from the public sphere was not peculiar to Islam in late Antiquity and the early Middle Ages, and that this condition was also shared by Christian and Jewish women in the Orient. See E. A. Doumato, "Hearing Other Voices: Christian Women and the Coming of Islam," *IJMES*, 23 (1991), 177-99.

[61] M. Shatzmiller, *Labour in the Medieval Islamic World* (Leiden-New York-Köln: Brill, 1994), 349-56. For the Mamluk period, see Y. Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society* (Cambridge: Cambridge University Press, 2005), 32 ff. On working women in the Jewish community of Fusṭāṭ during the 11th-13th centuries, see Goitein, *A Mediterranean Society*, 1:127-30.

[62] Shatzmiller, *Labour*, 358 ff ; Rapoport, *Marriage*, 34

[63] In one of the rare examples of working female litigants (going back to the Sufyānid period), two women (perhaps slaves, according to al-Shāfiʿī) were manufacturing mats in a house in Ṭā'if when one of them injured the other, who complained before the *qāḍī* Ibn Abī Mulayka. Wakīʿ, *Akhbār al-quḍāt*, ed. ʿAbd al-ʿAzīz Muṣṭafā

gender-related, the jurists do not explicitly mention women in connection with these "asexual" cases. Therefore, we cannot know whether they were expected to appear in the court or not. If we want to understand whether women did in fact appear before the *qāḍī*, we have to look for other sources. Biographical dictionaries contain narratives that may reflect social practice, especially those dedicated to *qāḍī*s such as the books of Wakīʿ (d. 306/918), al-Kindī (d. 350/961) and Ibn Ḥajar al-ʿAsqalānī (d. 852/1449).[64] These dictionaries, which contain many references to lawsuits, have usually been regarded as reliable historical sources with regard to judicial practices.[65] The following table presents the main types of cases involving women found in biographies of 239 *qāḍī*s who held office in Iraq (193 *qāḍī*s, mainly in Baghdad, Baṣra, Kūfa and Wāsiṭ) and Egypt (46 *qāḍī*s, in Fusṭāṭ) during the Abbasid period (132-334/750-945).

CASE TYPE	NUMBER
Marriage (woman requesting or refusing marriage)[66]	3
Alleged/irregular marriage[67]	2
Divorce[68]	5
Dower (*mahr*)[69]	4

al-Marāghī (Cairo: Maṭbaʿat al-saʿāda, 1947-1950), 1:261; ʿAbd al-Razzāq al-Ṣanʿānī, *Muṣannaf ʿAbd al-Razzāq*, ed. Ḥabīb al-Raḥmān al-Aʿẓamī (Beirut: al-Maktab al-islāmī, 1403 H.), 8:273-74; al-Shāfiʿī, *al-Umm* (Beirut: Dār al-maʿrifa, 1393 H.), 7:34. (I owe this reference to Christopher Melchert.) For Fāṭimid examples, see Goitein, *A Mediterranean Society*, 3:314.

[64] Wakīʿ, *Akhbār al-quḍāt*, *op. cit*.; al-Kindī, *Akhbār quḍāt Miṣr*, in *Kitāb al-wulāt wa-kitāb al-quḍāt*, ed. R. Guest (Leiden: E.J. Brill, 1912) ; Ibn Ḥajar, *Rafʿ al-iṣr ʿan quḍāt Miṣr*, ed. ʿAlī Muḥammad ʿUmar (Cairo: Maktabat al-Khānjī, 1998).

[65] See e.g. Tyan, *Histoire de l'organisation judiciaire*; W. B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005). Although these biographical dictionaries are widely used by historians of legal practices, little reflection has been devoted to their value. I am currently preparing a study of this issue.

[66] Wakīʿ, *Akhbār al-quḍāt,* 3:188; Ibn Abī l-Wafāʾ, *al-Jawāhir al-muḍiyya fī ṭabaqāt al-ḥanafiyya* (Ḥaydarābād: Dāʾirat al-maʿārif al-ʿuthmāniyya, n.d.), 1:148 (also Ibn al-Jawzī, *al-Muntaẓam*, 6:230); al-Khaṭīb, *Taʾrīkh Madīnat al-salām*, ed. Bashshār ʿAwwād Maʿrūf (Beirut: Dār al-gharb al-islāmī, 2001), 9:74.

[67] Wakīʿ, *Akhbār al-quḍāt,* 2:44-45; 3:137.

[68] Ibn Ḥajar, *Rafʿ al-iṣr*, 430/100 (the first number refers to Ibn Ḥajar's Arabic text; the second number refers to my partial French translation of this book: M. Tillier, *Vies des cadis de Miṣr* (Cairo: IFAO, 2002)); Wakīʿ, *Akhbār al-quḍāt,* 2:63, 68; 3:290 (also Ibn Abī l-Wafāʾ, *al-Jawāhir*, 1:209); al-Tanūkhī, *Nishwār al-muḥāḍara wa-akhbār al-mudhākara*, ed. ʿAbbūd al-Shāljī (s.l., 1971-73), 3:227.

Maintenance (*nafaqa*)[70]	3
Child care[71]	2
Adultery/*liʿān*[72]	3
Problems with sexual intercourse[73]	3
Undefined marital dispute[74]	1
Inheritance[75]	2
Contract/property[76]	2
Legal penalties (*ḥadd*)[77]	1
Unknown[78]	7
Total number of female litigants appearing before a *qāḍī*	38
Representative acting for a woman[79]	2
Female witness[80]	2

The data fits very well the typology analyzed earlier. Of forty-two accounts of trials involving women, twenty-six deal with marital disputes (almost two-thirds of the total). The actual rate is probably higher, for six accounts do not explain the nature of the case brought before the *qāḍī*. At first sight, one might conclude that the legal typology reflected in the *adab al-qāḍī* literature was close to judicial practice, and that both the legal and the biographical sources portray women as being deeply involved in judicial practice. This would confirm the

[69] Al-Kindī, *Akhbār quḍāt Miṣr*, 375, 381; al-Khaṭīb, *Ta'rīkh Madīnat al-salām*, 15:53; al-Tanūkhī, *Nishwār*, 2:28.

[70] Ibn Ḥajar, *Rafʿ al-iṣr*, 178/111; 351/142; Wakīʿ, *Akhbār al-quḍāt,* 2:79.

[71] Ibn Ḥajar, *Rafʿ al-iṣr*, 330/181; Wakīʿ, *Akhbār al-quḍāt,* 3:135-6.

[72] Ibn Ḥajar, *Rafʿ al-iṣr*, 119/43, 330/181; al-Khaṭīb, *Ta'rīkh Madīnat al-salām*, 8:554.

[73] Ibn Ḥajar, *Rafʿ al-iṣr*, 328/178, 330/181; al-Subkī, *Ṭabaqāt*, 3:452.

[74] Wakīʿ, *Akhbār al-quḍāt,* 3:138.

[75] Wakʿ, *Akhbār al-quḍāt*, 2:173; Ibn Ḥajar, *Rafʿ al-iṣr*, 121/46.

[76] Ibn Ḥajar, *Rafʿ al-iṣr*, 275/95; Wakīʿ, *Akhbār al-quḍāt,* 3:170 (see also Ibn al-Jawzī, *al-Muntaẓam*, 5:417-9).

[77] Ibn Khallikān, *Wafayāt al-aʿyān* (Beirut: Dār Ṣādir, 1994), 4:180.

[78] Al-Kindī, *Akhbār quḍāt Miṣr*, 374; Ibn Ḥajar, *Rafʿ al-iṣr*, 185/154; Wakīʿ, *Akhbār al-quḍāt,* 2:87, 108, 116; al-Ṣaymarī, *Akhbār Abī Ḥanīfa wa-aṣḥābihi* (Beirut: ʿA/lam al-kutub, 1985), 153; al-Khaṭīb, *Ta'rīkh Madīnat al-salām*, 8:555.

[79] Wakīʿ, *Akhbār al-quḍāt,* 2:128; al-Kindī, *Akhbār quḍāt Miṣr*, 375.

[80] Wakīʿ, *Akhbār al-quḍāt,* 3:134; Ibn Khallikān, *Wafayāt al-aʿyān*, 1:277.

results of several recent studies devoted to women.[81] *Fatwā* literature, usually regarded as representative of actual practice, also corroborates the important position of women at the *qāḍī*'s court.[82]

The scarcity of references to non-matrimonial cases is striking. Only four accounts deal with inheritance, contracts or criminal law (one case of *qadhf* or slanderous accusation of fornication).[83] The biographical dictionaries dedicated to *qāḍī*s are generally interested in a much larger panel of legal cases. Wakīʿ and al-Kindī show a strong concern for commercial matters. Altogether, theirs books contain about 215 reports dealing with commercial claims or debts. Therefore, one would expect to find a higher number of narratives referring to the involvement of women in commercial litigation. Two complementary hypotheses may be formulated. (1) Biographies of *qāḍī*s do not portray actual judicial practice, but rather illustrate theoretical points developed in the legal literature. This would explain why most of the cases involving women quoted in the biographical literature fit the typically female cases found in the law books. Because the narratives were intended to exemplify the theoretical thinking of the *fuqahā'*, there was no need to mention women appearing before the judge in less gender-specific cases. If this hypothesis is confirmed, it would mean that the biographical literature complements *fiqh* books and is part of a wider theoretical literature. The mention of women's cases in biographical literature does not provide a representative picture of how often they frequented the court. (2) Despite their strong participation in economic life, women appealed to the *qāḍī* less frequently than men. It thus remains to examine the extent to which women had access to the *qāḍī's* court.

3.2. Female plaintiffs and social hierarchy

Although it is now acknowledged that, in the pre-modern period, women were present in public space,[84] the cases brought before the judge could give rise to social disturbance. Many cases involving women were related to family or sexual conflicts, private matters that were

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[81] See especially several articles in M. K. Masud *et al.*, *Dispensing Justice in Islam*: M. K. Masud, "The Award of *Matāʿ* in the Early Muslim Courts," 349-81; M. Fierro, "Ill-Treated Women," 323-47; D. S. Powers, "Four Cases," 383-409.

[82] D. S. Powers, "Four Cases," 408.

[83] Cf. for Fāṭimid Egypt, D. Cortese and S. Calderini, *Women and the Fatimids in the World of Islam* (Edinburgh: Edinburgh University Press, 2006), 214.

[84] See for example M. Chapoutot-Remadi, « Femmes dans la ville mamluke », *JESHO*, 38 (1995), 145-64; L. Ahmed, *Women and Gender in Islam* (Yale: Yale University Press, 1993), 119.

made public before the court which usually was held in the chief mosque.[85] Anyone could attend the *qāḍī*'s court and hear the litigants. According to the Ḥanafīs, women appearing as litigants or witnesses had to unveil to establish their identities.[86] This put the woman in an awkward position before her relatives and the community. A trial that took place in Baṣra in the Umayyad period revealed that a woman had been seduced by a young man, who was present in court; her husband was so ashamed that he had no choice but to repudiate her.[87] In 286/899 in Rayy, a woman appeared before the *qāḍī* Mūsā b. Isḥāq al-Khaṭmī, together with her guardian (*walī*), who claimed that her husband had not paid the dower (*mahr*). When the *qāḍī* asked the witnesses to examine the woman without her veil, her husband immediately acknowledged his debt to protect her (and probably himself) from public shame. The wife was so grateful to her husband that she renounced the *mahr* and offered it to him.[88] The fact that judicial procedure broke the social norm could have negative effects on the *qāḍī*'s duty to "give everyone his due" .[89]

Al-Khaṣṣāf dedicates several pages to the specific procedures relating to female plaintiffs. First, the *qāḍī* must hear them on a particular day. Whereas men had to write a petition (*ruqʿa*) with their names and their complaints (the *qāḍī* called them according to the order in which he collected the petitions), women did not have to do so, to protect their reputation (*satr*). Al-Khaṣṣāf advises the judge not to call a woman by her name when summoning her.[90] The Ḥanafī jurist clearly understood that unveiling a woman in court contravened the social norm. For the sake of justice, not only did the judge and the witnesses have to recognize a female plaintiff, but also she had to unveil before the court secretary who was writing the minutes (*maḥḍar*) of the lawsuit. Al-Khaṣṣāf advises the *qāḍī* to look at her and to describe her face to the scribe himself. The *qāḍī* had to see her in any case: the less she was seen by auxiliaries, the better for her honor.[91] According to al-Jaṣṣāṣ, the judge has to protect the

[85] See M. Tillier, "Un espace judiciaire entre public et privé," *Annales Islamologiques*, 38 (2004), 511.

[86] See Wakīʿ, *Akhbār al-quḍāt*, 2:44-45. The Mālikī *madhhab* permitted women to appear with their faces veiled, on the condition that two witnesses could confirm their identity. See Shatzmiller, *Labour in the Medieval Islamic World*, 363.

[87] Wakīʿ, *Akhbār al-quḍāt*, 1:357-58.

[88] Al-Khaṭīb, *Ta'rīkh Madīnat al-salām*, 15:53. On the shamefulness of unveiling at the *qāḍī*'s court, see also al-Iṣfahānī, *al-Aghānī* (Beirut: Dār Iḥyā' al-turāth al-ʿarabī, 1987), 12:68.

[89] See al-Jaṣṣāṣ, in al-Khaṣṣāf, *Adab al-qāḍī*, 96.

[90] Al-Khaṣṣāf, *Adab al-qāḍī*, 54.

[91] *Ibid.*, 99.

reputation of young and attractive women. If they are old and ugly, however, it is not scandalous that everyone see their faces.[92]

Because the tension between exhibition in court and the social ideal of privacy could not be solved in a satisfying way, it is unlikely that all women did go to the *qāḍī*'s court. Khālid b. Ṭalīq, a Baṣran judge from the second half of the 2nd/8th century, refused any representative (*jarī*) in court unless the male or female litigant was ill. When witnesses testified that a female litigant appointed a representative because of illness, the *qāḍī* asked them to prove that she was ill by bringing a sample of her urine to court.[93] Such reports suggest that women who did not want to appear in court appointed representatives.

Muslim jurists distinguish between women who can leave their houses and those who cannot. The Ḥanafī and Iraqi scholar al-Simnānī (d. 444/1052), for instance, distinguishes between the "*barza*" woman, who is allowed to appear in public, and the "*mukhaddara*", who is kept in seclusion.[94] Such a distinction has important consequences for legal procedure. The Egyptian Shāfiʿī jurist al-Muzanī (d. 264/877-78) allows a woman to appoint a representative (*wakīl*), whether she is one of "those who go out or those who do not."[95] Ḥanafī jurists did not regard the appointment of a *wakīl* as a satisfactory solution. According to al-Khaṣṣāf, when a woman involved in a lawsuit is one of "those who do not go out", the *qāḍī* (who cannot leave the court) must send her a trustworthy agent (*amīn*) who replaces him and delivers his judgment. The *amīn* could hear her acknowledgement and make her swear in place of the judge.[96] The same distinction is made in connection with a physical examination to determine if a girl is marriageable: the *qāḍī* can make the determination himself if the girl is from "those who go out", but he must send female experts to her house if that is not the case.[97] The distinction also appears in Maghribī Mālikī law: concerning women's oaths, Saḥnūn distinguishes between those who can go out and those who cannot. The first category must

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[92] Al-Jaṣṣāṣ, *in* al-Khaṣṣāf, *Adab al-qāḍī*, 100. Cf. Q. 24:60.

[93] Wakīʿ, *Akhbār al-quḍāt*, 2:128.

[94] Al-Simnānī, *Rawḍat al-quḍāt wa-ṭarīq al-najāt*, ed. Salāḥ al-Dīn al-Nāhī (Beyrouth-Amman: Mu'assasat al-risāla – Dār al-furqān, 1984), 1:177.

[95] Al-Muzanī, *Mukhtaṣar al-Muzanī* (Beirut: Dār al-maʿrifa, n.d.), 110.

[96] Al-Khaṣṣāf, *Adab al-qāḍī*, 241, 627. See also al-Jaṣṣāṣ, in al-Khaṣṣāf, *Adab al-qāḍī*, 244. Cf. Al-Simnānī, *Rawḍat al-quḍāt*, 1:177, 188.

[97] Al-Khaṣṣāf, *Adab al-qāḍī*, 629.

swear at the mosque, while the second go there only for serious cases, at night, so as not to be seen; in a minor case, however, they may swear at home before a *qāḍī*'s agent.[98]

The biographical literature confirms that some women did not dare come to the *qāḍī*'s court: at the end of the 2nd/8th century, the *qāḍī* of Kūfa Ḥafṣ b. Ghiyāth was walking in an alley (*zuqāq*) with his scribe when a young and pretty woman implored him to marry her to someone, since her brothers ill-treated her.[99] Apparently this woman could approach the judge only in the private or semi-private space of her alley. Similarly, in Ibn Ḥajar's book on Egyptian judges, we read that the *qāḍī* Ibn Zabr (d. 377/987) was approached by a man whose wife wanted to file a complaint against him. The husband would not let her appear in court, because he had sworn to divorce her if she left her house. The *qāḍī* followed him to a blind alley, where the wife explained her case from the roof and the *qāḍī* pronounced his judgment without getting off his mule.[100]

Who were these women who "did not go out" and could not appear in court? Several studies on the Near East in late Antiquity have shown that women's behavior correlated with their social status. According to Joëlle Beaucamp, many women went to the court in Byzantine Egypt.[101] However, not *every* woman could do so easily. Beaucamp observes that between the 4th and the 7th centuries, one in three women turned to a representative when involved in a lawsuit.[102] She concludes that their behavior probably corresponded to a social norm: a woman was inclined to ask a man (usually her husband) to represent her before the judge. This social norm had a counterpart in Byzantine law: in the Code of Justinian, a constitution assigned to Constantine and dated 315 CE forbids women to mix with men at meetings and in lawsuits, lest they act indecently and shamelessly. The Byzantine court was a masculine public space in which a virtuous woman should not be present; so long as she had a father or a husband who could deal with her business, she had to avoid the court.[103] In 6th-century Najrān, E. A. Doumato notes, the veiling and seclusion of women were class-related

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[98] Saḥnūn, *al-Mudawwana l-kubrā* (Beirut: Dār ṣādir, n.d.), 5:136. Cf. Ibn Farḥūn, *Tabṣirat al-ḥukkām* (Beirut: Dār al-kutub al-ʿilmiyya, 2001), 1:159-60. On the testimony of women and its relation to public space in classical *fiqh*, see M. Fadel, "Two Women, One Man," 192-95. On the influence of such procedures on Jewish law, see G. Libson, *Jewish and Islamic Law. A Comparative Study of Custom During the Geonic Period* (Cambrige: Harvard University Press, 2003), 107-9.

[99] Al-Khaṭīb, *Ta'rīkh Madīnat al-salām*, 9:74.

[100] Ibn Ḥajar, *Raf*ʿ *al-iṣr*, 178/111.

[101] J. Beaucamp, "Les femmes et l'espace public à Byzance," 130 ff.

[102] *Ibid*., 131-2.

[103] *Ibid*., 134.

practices. Respectable women received only women as guests in their private apartments and never showed their faces outside. Lower-class women behaved differently: "sex segregation can only function in societies in which there are working women who are not veiled or secluded, because they serve as intermediaries between secluded women and the public, and make the seclusion of some women feasible."[104] Do such class-related practices explain the reluctance of some Muslim women to appear in the *qāḍī's* court?

The legal literature suggests that a woman's social position correlates with whether or not she appears in court. Despite the theoretical equality of the litigants,[105] Islamic law recognizes the existence of a social hierarchy and recommends that the *qāḍī* take it into consideration in his judgments. When a wife asks for maintenance (*nafaqa*), for example, he must take her economic and social status into account. If she is from a modest background, the *qāḍī* must award her a small maintenance even if her husband is rich and a spendthrift. If she is a rich woman, the judge must award her a large maintenance.[106] In the case of seclusion (during a woman's *ʿidda*,[107] or if her husband prohibits her from leaving the house without his consent),[108] al-Sarakhsī proposes that the ruling should be adapted to the woman's social status. Unlike free women, who must stay at home during the entirety of the *ʿidda* period, female slaves – even one who has been manumitted (*mudabbara*), is an *umm walad*[109] or enjoys a contract of enfranchisement (*mukātaba*) – generally can leave their houses during their *ʿidda*, especially if they have to work for their master or to purchase their freedom.[110]

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[104] E. A. Doumato, "Hearing Other Voices," 184.

[105] M. Tillier, "La société au miroir du tribunal," *Annales Islamologiques*, 42 (2008), 157-8.

[106] Al-Khaṣṣāf, *Adab al-qāḍī*, 647.

[107] Al-Shaybānī, *al-Jāmiʿ al-ṣaghīr* (Beirut: ʿA/lam al-kutub, 1404 H.), 230 ; al-Shāfiʿī, *al-Umm*, 5:226. Ḥanafī jurists usually prohibit a divorced woman from leaving her house until the end of her *ʿidda*. A widow may go out during the day in case of necessity, on the condition that she sleeps in her house. Abū Yūsuf, *Kitāb al-āthār*, ed. Abū l-Wafā' al-Afghānī (Beirut: Dār al-kutub al-ʿilmiyya, n.d.), 142; al-Sarakhsī, *al-Mabsūṭ* (Beirut: Dār al-maʿrifa, n.d.), 6:32.

[108] Al-Shaybānī, *al-Aṣl*, ed. Abū l-Wafā' al-Afghānī (Karachi: Idārat al-Qur'ān wa'l-ʿulūm al-islāmiyya, n.d.), 3:272 ff ; al-Muzanī, *Mukhtaṣar*, 295 ; al-Sarakhsī, *al-Mabsūṭ*, 8:173 ff.

[109] As for the *umm walad*, Saḥnūn recognizes her status as much closer to that of a free woman, and states that "some of them go out and others do not." Saḥnūn, *al-Mudawwana l-kubrā*, 5:136.

[110] According to al-Sarakhsī, the husband can forbid her to go out only if he pronounces a revocable divorce (*al-ṭalāq al-rajʿī*), in order to save his honor and to prevent her from giving birth to the child of another man. Al-Sarakhsī, *al-Mabsūṭ*, 6:33.

Some jurists expressly state that the appearance of women before the *qāḍī* depends on their social status. In the 4th/10th century, the Shāfiʿī Ibn al-Qāṣṣ (d. 335/946), who originated from Ṭabaristān and lived in Iraq and Syria, mentions in the context of oaths sworn by women "noble women who do not go out" (*nisā' min ahl al-sharaf lā takhruj*): like al-Khaṣṣāf and the Mālikī jurists, he holds that the *qāḍī* can make women swear at home, and must send them two *amīn*s who take their oath. He also emphasizes the problem of women unveiling before the *qāḍī*, stating that a female witness may remain veiled when testifying, provided that two honorable witnesses (ʿ*adl*) testify to her identity.[111] The fact that some high-ranking women were reluctant to appear in the *qāḍī*'s court is confirmed in biographical accounts. *Ca*. 155/772 in Baṣra, a low-ranking Nabaṭī (i.e. Aramean Iraqi autochthon) complained against a noble woman, the daughter of a former governor of the city. The *qāḍī* Sawwār b. ʿAbd Allāh summoned the woman but she refused to come, and the governor blamed the *qāḍī* for asking such a high-ranking woman to appear in court.[112] When the Egyptian *qāḍī* Ghawth b. Sulaymān was ordered to adjudicate a matrimonial conflict between the caliph al-Manṣūr and his wife, Umm Mūsā – a noble woman from the tribe of Ḥimyar – he asked Umm Mūsā to appoint a *wakīl* to represent her before him:[113] this suggests that the caliph's wife was not supposed to appear before a judge. In the same period, however, some women of high socio-economic status complained directly to the *qāḍī*. These include a landlady who sued the Kūfan governor before Sharīk b. ʿAbd Allāh,[114] and a noble woman from the Banū ʿIjl who asked the *qāḍī* Ḥafṣ b. Ghiyāth to marry her to someone.[115] These counter-examples may be markers of a progressive transition toward stricter seclusion within the upper classes of large Abbasid cities.[116] The increasing weight of this social norm at the end of the 2nd/8th century probably led to the exclusion of some women from the court.

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[111] Ibn al-Qāṣṣ, *Adab al-qāḍī*, ed. A. F. al-Mazīdī (Beirut: Dār al-kutub al-ʿilmiyya, 2007), 75. Cf. Ibn Farḥūn (*Tabṣirat al-ḥukkām*, 1:55), who quotes Ibn Rushd as saying that "according to our custom (ʿ*urf*), respectable women (*dhawāt al-aqdār*) do not leave their houses."

[112] Wakīʿ, *Akhbār al-quḍāt*, 2:62. Cf. *EI*^{2}, s.v. Mar'a (N. Tomiche).

[113] Al-Kindī, *Akhbār quḍāt Miṣr*, 375.

[114] Wakīʿ, *Akhbār al-quḍāt*, 3:170.

[115] *Ibid*., 3:188.

[116] Cf. J. Lecerf, "Note sur la famille dans le monde arabe et islamique," *Arabica*, 3 (1956), 57; *EI*^{2}, s.v. Mar'a (N. Tomiche) ; M. Rahmatallah, *The Women of Baghdad in the Ninth and Tenth Centuries as Revealed in the History of Baghdad of al-Hatib* (Baghdad: Jāmiʿat Baghdād, 1963), 57-60. According to Goitein, seclusion was much stricter in the former Persian lands of the caliphate (Iraq and Iran). He concludes from his study of Jewish

Conclusion

In contrast to Byzantine law, Ḥanafī doctrine do not discourage women from coming to the court: Muslim women have the right to come to the mosque, to complain, to testify and to act as judicial agents. The example of the Prophet's wives and daughters may have contributed to this entitlement. It is more complicated to understand the actual practice of women. At first sight, evidence for this practice is found in biographical reports about women. However, the close correspondence of these reports to the typical "feminine" cases treated in law books calls into question their connection with actual practice. Because of their important contribution to economic life, the scarcity of references to commercial litigations involving women seems suspect. Women who were involved in commercial matters may have brought their disputes before the *qāḍī* only infrequently because of the socio-economic structure of labor (many women worked for their husbands or their masters and therefore were not autonomous "partners"),[117] but this does not explain the whole phenomenon.

The legal and biographical literature both suggest that practice was more varied. First, the necessity to unveil before the judge, in a public space, was perceived as shameful and source of dishonor to women. Second, Muslim jurists had to distinguish between women who could come easily and complain before the *qāḍī* and "respectable" women who did not leave their houses. This distinction appears in the writings of jurists belonging to different *madhhab*s and provinces (Ṭabaristān, Iraq, Egypt, Maghrib), and it suggests that such a distinction spread throughout the Islamic empire. In the Abbasid period, the women who did not leave their houses were probably high-ranking women.[118] According to a prevalent social practice in the late antique Near East, high-ranking women must avoid public exposure. It is likely that their conduct served as a model that spread to other women. From the 3rd/9th century onwards, the *qāḍī*'s court became a space that was attended by men and low-status women. A non-

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women at the rabbinical court of Fusṭāṭ that "with the exception of teenage girls […], women were as active in court as men." Goitein, *A Mediterranean Society*, 3:323, 336.

[117] See the hypothesis of S. Delmare-Lafont about Assyrian working women in "Quelques femmes d'affaires au Proche-Orient ancien," in *Mémoires de la Société pour l'Histoire du Droit et des institutions des anciens pays bourguignons, comtois et romands*, Dijon, 2008, 28-9.

[118] M. van Berkel has shown that high-ranking women of al-Muqtadir's harem could play a political role only in so far as they relied on male allies occupying key positions within the state. M. van Berkel, "The Young Caliph and his Wicked Advisors: Women and Power Politics under Caliph Al-Muqtadir (r. 295-320/908-932)," *Al-Masāq*, 19 (2007), 10, 13, 14.

negligible number of cases involving women may have been brought before the more informal institutions of mediation and arbitration, those of wise and learned men or women locally recognized, in a quarter or a town, for their skills in solving conflicts.[119] This does not mean that women (even high-ranking women) could not use the judicial system. Rather the system had to adapt, encouraging women to use a representative and allowing them to take the oath before a judge's agent. The issue of women's appearance in court highlights the adaptability of Muslim jurists and the ongoing and continuous interaction between legal theory and actual social practices.

[119] On the persistence of such institutions in the Abbasid period, see M. Tillier, *Les cadis d'Iraq et l'État abbasside* (Damascus: IFPO, 2009), 301 ff.