Two Women, One Man: Knowledge, Power and Gender in Medieval Sunni Legal Thought


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Many Muslim feminists have argued that at the core of Islam lies a gender-neutral belief system that has been obscured by a centuries-long tradition of male-dominated interpretation. Although this gender-neutral system of belief had been almost entirely suppressed by the ruling Islamic discourses, according to Leila Ahmed, marginalized discourses such as Sufism and the antinomian Carmathians were able to preserve Islam's message of the ethical equality of men and women. Amina Wadud-Muhsin argues that the traditional verse-by-verse method of Qur'anic exegesis, along with its domination by male practitioners, marginalized female experiences in understanding revelation. In her view, these two factors ultimately led to the suppression of the Qur'an's message of gender equality. Fatima Mernissi, in *The Veil and the Male Elite*, instead argues that the religious scholars of Islam, because of their fear of subjectivity, were content with a purely empirical science of religion—a methodology that left the door wide open to the manipulation of revelation through interpretation. Unlike Ahmed, however, she recognizes that even within the dominant discourse of the Sunni scholars, not all spoke of women in the same monotonously misogynistic voice.

Whether or not one finds these arguments convincing, they raise a fundamental problem relating to the viability of any ethical discourse in the context of social inequality. If social inequality, whether it is grounded in gender, race, or class, is so powerful that it can sometimes obscure an ethical truth, and at other times suppress it entirely, one is left to wonder whether ethical discourse can ever be efficacious in realizing social change. These arguments also raise an important hermeneutical question: to what extent is interpretation simply an objective process of extracting meaning from a text, and to what extent is it fundamentally subjective, in reality being no more than a reflection of the reader's particular circumstances and tastes? To differing extents, these authors share a view of reading that suggests that the understanding of a text has more to do with the circumstances surrounding the activity of interpretation than with the text itself. If this is the case, however, arguing that Islam contains a message of gender equality verges on the absurd, because "Islam" would
have as many teachings on gender as the different social circumstances in which it is interpreted. Perhaps for this reason Wadud-Muhsin has rightly pointed out that the question of Islam and gender as posed may simply be an anachronism. Instead of focusing on the meaning of revelation, then, it may be more fruitful to examine texts and discourses for a specific period to see what light they can shed on issues of gender for that period.

Although one is rightly skeptical of any interpretation that claims for its results universal validity, this skepticism should not lead to the assumption that all reading is simply a reflection of the reader’s particular circumstances. Thus, the possibility that an interpretation of a text such as the Qur’an could emerge that moves beyond an existing sociological reality should not be precluded a priori. This is especially true if the interpretation uses a methodology that interrogates the text instead of just using it to confirm pre-existing social beliefs. This view also seems to be shared by Mernissi, whose criticisms of the religious scholars are not so much that they found their own misogyny confirmed by God in revelation, but rather that they failed in creating “principles, laws, or axioms that would allow the reader to distinguish the structural from the circumstantial.” In concluding that the religious sciences were all empirical, however, Mernissi may have been guilty of generalizing based on the nature of the sources she used—exegesis (tafsir) and Prophetic reports (hadith).

Jurisprudence (fiqh), by contrast, was an interpretive science whose very meaning, “understanding,” connoted an ability to transform the countless “facts” of revelation into “principles, laws, or axioms.”

To claim, as do these Muslim feminists, that Islam advocates a message of gender equality implies, however, that there is an objective core of meaning in revelation accessible to any fair-minded reader, male or female. If this is the case, the claim that Islam proclaims a message of gender equality ought to have manifested itself in the consciousness of at least some of the male readers who are recognized as being central in the formation of the Muslim canon. And if the characterization of jurisprudence as being that Islamic science which, to use Mernissi’s terminology, transcended the empirical in order to distinguish the structural from the accidental is correct, then it is the most likely domain wherein issues that bear upon gender equality could have been discussed in a critical manner. Because the issue of gender equality in Islam is too large a topic to discuss in one paper, this paper will discuss the issue of gender equality as it arises in a complex of related issues: the production, reproduction, and application of medieval Islamic law as it appears in the works of Sunni jurists from the post-Ayyubid period. I will, moreover, contrast the treatment of this issue in the separate domains of exegesis and jurisprudence. I will argue that jurisprudence, precisely because it takes a broader interpretive perspective, allows for the possibility of a gender-neutral interpretation of female participation in the law to emerge. Exegesis, on the other hand—which was dominated by the atomistic methodology of verse-by-verse interpretation—allowed the misogynistic assumptions of the reader to dominate the text. Equally important, this paper also demonstrates that legal interpretation cannot be understood simply as a “reflection” of social beliefs. What is most striking about the medieval Sunni legal discourse on this complex of issues is the extent to which it exists in tension with popular notions of gender roles.
TWO WOMEN EQUAL ONE MAN: QUR’AN 2:282 IN EXEGESIS

The best-known example of discrimination against women in the law and its application is the relative weight given to women's testimony as witnesses in comparison to men's. The origin of this discrimination seems to lie squarely in the Qur’ân's treatment of testimony, where God commands the believers to bring two male witnesses, or in the absence of two males, a male and two females, to witness certain types of contracts:

O believers, when you contract a debt one upon another for a stated term, write it down. . . . And call in to witness two witnesses, men; or, if they be not men, then one man and two women, such witnesses as you approve of, lest one of the two [women] err, then the other will remind her.

That the possibility of error is explicitly attributed to the female witnesses and not the males allows for the interpretation that women are more prone to error than men, and for that reason a female witness needs a second woman to remind her. In other words, the Qur’ân seems to be saying, at least by way of implication, that the testimony of a woman is less credible than that of a man.

This common-sense reading, moreover, was adopted by various exegesists throughout Islamic history. The fact that women were more prone to error, they explained, was a result of their “nature.” Whereas the theologian Fakhr al-Din al-Razi (d. 1210) explained that the woman’s different biological nature made her more prone to forget than a man, the 20th-century Egyptian Sayyid Qutb argued that it was the woman’s psychology—specifically her motherly instincts—that prevented her from possessing the objectivity necessary for a witness.9

It seems that the first exegete to challenge this notion was the celebrated Egyptian modernist and reformer Muhammad ʿAbduh, when he denied that the requirement of two female witnesses was based on the different natures of men and women; instead, he argued that both men and women have the same capacity for remembering and forgetting, the sole difference being that the different economic roles of men and women in society made each vulnerable to forgetting those things which were not part of his or her daily experience.10 Thus, while a woman was more prone than a man to make a mistake regarding a commercial transaction, she would be more likely to be correct concerning a household matter. Muslim modernists have taken ʿAbduh’s lead in interpreting this verse as being the result of a temporal division of labor between the sexes. According to them, the apparent rule established by this verse was neither universally applicable across time nor generally applicable to all cases tried by a court.11

THE POLITICS OF TESTIMONY:
RIWĀYA/FATWĀ VERSES SHAHĀDA/ḤUKM

For the different exegesists whose opinions I have surveyed, Qur’ân 2:282 was taken as having established epistemological criteria regarding the relative credibility of male and female witnesses based on their respective stature as repositories and transmitters of knowledge. For post–11th-century jurists (fuqahāʾ), the acceptance of testimony or its rejection by a judge was not an issue simply of credibility; it was also intimately
connected to issues of social status, such as the witness’s religion and whether the witness was free or slave. Witnesses, however, are only one of several human elements who participate in the judicial process, others being the plaintiff, the defendant, and the judge. In principle, it is only the disputing plaintiff and defendant who have interests at stake in the process. However, the witnesses and the judge possess power. The witnesses provide, for purposes of the judicial proceedings, a “truthful” account of what actually transpired between the plaintiff and the defendant. The judge imposes his own version of legal reality on the two contesting parties. For these reasons, both the defendant and the plaintiff have an interest in insuring that witnesses and judges exercise their power responsibly. Although judges and witnesses are distinguished from other participants in the legal process by virtue of their possession of specialized knowledge without which the process could not move forward, the fact that they possess the political power to impose this knowledge on others who might have different answers to the same questions transforms the judicial process from a neutral process of discovery of truth to one that is laden with partisan interests—the plaintiff seeking the vindication of his claim, the defendant seeking to prove the falsity of the charge entered against him, and both the plaintiff and the defendant trying to prevent an arbitrary use of power by the judge and the witnesses that would lessen each’s chance of winning the case, not to mention that the judge and the witnesses might have hidden interests in the outcome of the case.

In brief, although the judicial process requires the specialized knowledge of the judge and the witnesses for its operation, it is also an intersection of knowledge and power. Because of the presence of power, the legitimacy of the judicial process is always subject to challenge. Therefore, the role of the witness and the judge can be understood only when the political context of their functions within the judicial process is afforded the same attention that has traditionally been given to their roles as “objective” providers of specialized information to that process. Precisely because Islamic procedural law assigns to gender an important role in determining who can participate in the judicial process, to what extent, and in what capacity, it also provides a rich site for the exploration of the relationships governing knowledge, power, and gender in medieval Muslim legal thought.

Any adequate understanding of the obstacles limiting the admission of female testimony in Islamic law must first come to terms with the manner in which legal discourse attempted to differentiate what I call “political” discourse from “normative” discourse. The former was embodied in those statements which, if admitted, would lead to some immediate, binding consequence, usually in favor of one party and against another. Moreover, the beneficiary of this statement could seek to have it imposed on the losing party in the event of the latter’s non-compliance. A witness’s testimony and a judge’s verdict are both political because the consequences of each are immediate, tangible, and binding, irrespective of the consent of the party who contests either the facts presented by the witnesses or the rule of law applied by the judge. Normative discourse, on the other hand, if admitted, establishes a universal norm or fact, but only potentially affects tangible interests. Muslim jurists used the terms shahāda (testimony) and hukm (verdict) to distinguish discourse that had political consequences from the normative discourse that was described with the terms riwāya (narration) and fatwa (non-binding legal opinion).
Interestingly, Islamic law established different criteria to evaluate the truth of political and normative speech. A disputed fact, in the context of a lawsuit, could generally be established by the testimony of two men. On the other hand, normative statements used by an independent interpreter of the law (mujtahid) as material sources for the derivation of the law need only have been narrated by one person. The narration of normative statements, unlike testimony, was explicitly gender-neutral. Thus, Fatima’s narration of a Prophetic saying or precedent would be as probative as ‘Ali’s, assuming that both narrators were credible (‘adl).\(^{14}\) Negatively, statements such as legal claims (da‘āwā) were prima facie so laden with self-interest that they were always in need of independent corroboration, no matter how truthful the claimant was thought to be. Like narration, moreover, a claim’s truth or falsehood had no relationship to the gender of the claimant.\(^{15}\)

Because the truth or falsity of political and normative statements are judged according to mutābaqa—that is, a correspondence theory of truth—one suspects that considerations other than epistemological ones lay at the heart of the distinction between shahāda and riwāya. In other words, something other than a woman’s general ability to gain, preserve, and communicate knowledge to others must have been behind the decision to reject her uncorroborated statements in the particular context of testimony before a judge. This suspicion is confirmed by the analysis of these two terms provided by the 13th-century Egyptian jurist al-Qarafi (d. 1285), who argued that the law distinguishes between these two types of statements because of their different contexts. Al-Qarafi observed that in cases of riwāya, the narrator (rāwi) is himself affected by the report. Therefore, he has little interest in lying. Conversely, because the witness suffers no harm should he lie or make a mistake, he has little interest in ensuring the accuracy of his testimony. Paradoxically, it is the very disinterestedness of the witness that gives rise to suspicion about the reliability of his testimony. For this reason, the law required a second witness to corroborate the first witness’s testimony.

Equally important are the differing degrees to which riwāya and shahāda are socially regulated: because the topics of narration have universal applicability, society itself has a universal and continuing interest in investigating the truth of these reports. Thus, al-Qarafi argues that in the case of narration, there is a natural social mechanism of corroboration that will usually root out any lies or mistakes made by individual narrators. Even if a mistake or lie should occur, humanity has until the end of time to discover it. In testimony, however, it is only the party against whom the false testimony is entered who has an interest in discovering the lie or the mistake. Furthermore, the consequences of false testimony are immediate and severe, possibly leading to the loss of property or life and limb. The chances that the wronged individual will be able to prove the falsity of the testimony in a timely fashion is almost nil. Therefore, the law requires two witnesses to establish a fact in a court of law in an attempt to create a formal system of corroboration in the absence of a natural, social method of corroboration.\(^{16}\)

Just as the narration of Prophetic reports was part of the normative domain, and therefore was not subject to the gendered rules of testimony, the process by which legal norms were derived from those reports was also considered normative. Interpretation of revelation, then, was also free of gender restrictions. Therefore, a woman’s
opinion (fatwa) in law was just as valid and morally binding as the legal opinion of a man. Thus, a woman could legitimately be a mufti, a legal expert whose task it was to communicate legal rules to nonspecialists, including at times judges and other holders of political power. Ibn al-Salah’s (d. 1245) treatment of this issue is typical of the Sunni jurists of the post-Ayyubid period. He noted in his work Adab al-mufti wa-l-mustafti that:

Maleness and freedom are not required of the mufti, just as is the case for the narrator . . . because the mufti is taken to be one reporting the law in a manner non-specific to a person, and in this respect, he is like a narrator, not a witness. Moreover, his fatwā is non-binding, in contrast to a judge’s [verdict].

JUSTIFYING THE GENDERED NATURE OF TESTIMONY (SHAHĀDA),
PART I: WOMEN AS PARTICIPANTS IN SCHOLARLY DISCOURSE

If a woman’s transmissions of Prophetic reports, her legal opinions, and her legal claims were treated in the same manner as those of men, how did the law structure courtroom testimony so as to weaken the testimony of women in certain cases, even excluding it entirely in some? Modern scholarship, lay Muslim opinion, and even the opinion of the majority of exegetes have been united in assuming that this marginalization of women’s testimony was premised on a gendered epistemology. For this reason, Leila Ahmed mistakenly writes that had the medieval law of testimony prevailed in the early centuries of Islamic history, the reports of women regarding the life of the Prophet would not have been incorporated into normative religious doctrine. What she presents as a seeming contradiction is resolved by the fact, as we have seen, that testimony and transmission were regulated differently.

Although jurists must have been tempted to, and in fact did, argue that women were inherently less reliable than men, especially in nonlegal discourses, leading jurists could not so easily endorse general discrimination against the testimony of women on epistemological grounds. Had there been a natural quality inherent in women rendering their statements more unreliable than those of men, the law should have consistently discriminated against the statements of women, whether in the normative or in the political domain. Furthermore, if the law deemed a woman’s rationality to be so defective that even in the recollection of facts she was not to be trusted, it would seem that the law should a fortiori reject her interpretations of revelation as being necessarily defective. In fact, however, we have seen that a woman’s legal opinion (fatwa) was considered to be on par with that of a man. The equality, moreover, that women’s reports enjoyed with men’s in other areas of the law was not just a theoretical possibility; indeed, the fact that many women, to differing extents, participated in the production and reproduction of the theoretical sciences that were the backbone of religious learning no doubt also played an important role in circumscribing the types of arguments that could be marshaled to justify this discrimination.

Among the first generation of Muslims, there were several women who were involved in both the transmission of the new religion as well as the development of its legal doctrine. The most prominent of these women was ‘A’isha bint Abi Bakr, the youngest wife of the Prophet Muhammad. She was not only an important transmitter of religious doctrine, she was also recognized as an independent legal authority by
both her contemporaries and succeeding generations of Muslim religious scholars. She practiced this freedom as an interpreter of the law to issue legal opinions on controversial legal matters. Often, later jurists would bolster their positions with her opinions. The fact that ‘Aisha was a wife of the Prophet gave her privileged status as a transmitter of religious doctrine. It was her own qualities as an individual, however, that afforded her the authority to interpret law.

Female participation in the production and reproduction of the religious sciences did not cease, however, with the demise of the first generation of Muslims. The domain most widely recognized by modern scholarship in which women continued to participate alongside men was the public transmission of the hadith, the normative reports containing the history of the Prophet and the earliest Muslim community. Evidence of female participation in this realm can be found in the many diplomas (ijāzas) containing women’s names and in the colophons of manuscripts that mention women as teachers and as students. Further evidence of the recognized role of women’s scholarship is the fact that many of these female scholars were even given academic titles, such as al-musnida, which can be translated roughly as “the authority.”

Jonathan Berkey, in his important study of the educational system in medieval Cairo, suggests that women’s participation in the intellectual life of Cairo was largely limited to the purely historical science of hadith. However, there is some evidence that women also participated openly and legitimately in the more speculative branches of the religious sciences, such as positive law and speculative legal philosophy. Al-Hattab, a North African jurist of the 16th century, carefully mentions in the introduction of one of his works the names of his teachers, his teachers’ teachers, and the chain of authorities (isnād) that linked him to the authors of the various books that he had studied in his legal career. Two women appear in these chains of authorities. The first woman, Zaynab bint al-Kamal al-Maqdisiya al-musnida (d. 1339), seems to have been involved only in the transmission of hadith. The second woman, however, Umm al-Hasan Fatima bint Khalil al-Kattani (or al-Kinani), transmitted to al-Hattab the works of the great Maliki jurist Shihab al-Din al-Qarafi. Through the transmission of this woman, then, al-Hattab received al-Qarafi’s encyclopedic work on Maliki positive law, the Dhakhira; three works on speculative legal philosophy, Tanqih al-fusul, Sharh tanqih al-fusul, and Sharh al-maḥsūl; a work on the legal principles of the Maliki school, al-Qawā'id; and al-Ummiyya fi idrāk al-niyya, a work discussing the notion of intention and intentionality in the law.

Although the number of men who studied the religious sciences far exceeded that of women, it is sufficient to note that the participation of women in the production and reproduction of religious knowledge was of a sufficient pedigree and skill that female authorities were recognized to be the intellectual equals of men by the institutions of learning within certain medieval Muslim societies, even in the context of law. This official recognition is implicit in the fact that a woman’s transmission of a book, a hadith, or a legal opinion did nothing to lessen the legitimacy of the text being transmitted or the validity of the norm being enunciated. This fact of women’s recognized participation as intellectuals created awareness of the contradiction between the epistemological equality women enjoyed in the production and transmission of knowledge and her marginalized position in political contexts, whether as a witness or as a judge in a court of law. Furthermore, it lessened the plausibility of
any argument that sought to ground discrimination against women’s testimony in the nature of the female.

**JUSTIFYING THE GENDERED NATURE OF TESTIMONY (SHAHĀDA),
PART II: WOMEN AS POLITICALLY MARGINALIZED SOCIAL ACTORS**

I have located two post-12th-century arguments that attempt to defend the gender-based distinctions established in the medieval Islamic law of testimony. These arguments are important because they agree with the modernist position that ultimately locates the source of this discrimination not within the woman and her proclivity to telling the truth or lack thereof, but rather to specific social circumstances and the role that women played within those social circumstances.

The first argument is made by al-Qarafi. His presentation displays much of the same ambivalence, if not to say outright confusion, that jurists faced in attempting to understand Islamic law’s evidentiary discrimination against women. He begins by noting the difficulty courts have in enforcing their decisions. This institutional argument is compounded by the fact that men (including himself) in his 13th-century Egyptian society viewed women as being generally inferior to men. These two premises intersect in the person of the witness whose testimony before a judge has the effect of creating a “true” account of a past event. As a result of this “true” narrative, the losing party becomes obliged to act in a manner contrary to his wishes. Al-Qarafi argues that losing parties bear a grudge toward the witnesses who testified against them in court. In the eyes of the losing party, the witnesses exercised authority and dominion (sultan wa ghulaba wa qahr wa istilah) over them and were therefore responsible for their loss of the lawsuit. This resentment against the witnesses is greatly compounded when the losing party knows that his loss was a result of a woman’s testimony. Subsequently, there is a greater likelihood that the losing party (whom al-Qarafi assumes is a man) will not respect the court’s decision. Two women were required by the law in order to lessen the blow to the losing party’s already wounded male pride, thereby increasing the chance that he would voluntarily comply with the court’s decision.

Al-Qarafi adds as a second justification for this evidentiary discrimination a remark that displays the same reasoning used by Sayyid Qutb and al-Razi: that women are inherently deficient in reason and religion (al-nisā nāqiṣāt ‘aql wa din). Therefore, it is appropriate that two women should be required in order to lessen the harm that occurs from their deficient memories. Al-Qarafi’s commentator, Ibn al-Shatt (d. 1323), describes this argument as weak because if one accepts that female witnesses are deficient in reason and religion, this deficiency must also be present when a woman acts as a narrator of hadith. In that case, harm would still occur as a result of her deficient reason and character. However, he adds the narration of a woman—unlike her testimony—does not need to be corroborated before it is accepted. Therefore, by default, we are left with only the first of al-Qarafi’s two arguments as a plausible account for the basis of the discrimination.26

The second argument is advanced by the 15th-century Syrian Hanafi jurist al-Tarabulusi. He begins his analysis by explicitly noting that the reports of men and women are equally probative. Despite this, the law refused to consider an individual
woman's statement a proof (hujja) because the law, in order to avoid social corruption and disorder, obliged her to stay at home. He remarks that:

Our opinion is valid because a woman is equal to a man in that [characteristic] upon which the qualifications of testimony are based, and these are the ability to see, to be precise, to memorize, and to rehearse testimony because of the existence of the implement of this power, and it is reason, [that faculty] which distinguishes things and comprehends them and a speaking tongue. Thus, the testimony of women gives rise to overwhelming likelihood [of truth] and to certainty in the heart about the truth of the witnesses. This is in contrast to the testimony of women by themselves, which is not accepted. Although their statements result in probability, the law did not take it into account as a proof because they are forbidden to go out because that leads to disorder and corruption, and the cause of corruption must be removed. Thus, a male was required as one of the two witnesses to prevent decisively the occurrence of corruption to the extent possible.27

His argument seems to be that while the truth value of testimony is independent of the speaker's gender, women are required to stay at home to prevent the inevitable social corruption that results from the casual mingling of the sexes. The law discriminates against the testimony of women in order to discourage the use of female witnesses. By increasing the costs associated with female witnesses, the law ensures that individuals will be more likely to ask men to witness their civil transactions, thus reducing the need for women to leave their homes. In this manner, the law of testimony helps preserve the sexual boundaries of society by reducing the need for women to mingle with strange men.

Al-Qarafi's first argument, as well as al-Tarabulusi's, both justify discrimination against women's testimony on grounds other than epistemological ones. After all, neither of their arguments calls into question the credibility of women's testimony as such; instead, the two arguments point to the social costs of treating a woman's testimony as the equivalent of a man's: for al-Qarafi, this would have been a reduction in voluntary compliance with the decisions of the court, while for al-Tarabulusi the cost would have been an increase in sexual licentiousness. For both these men, these social costs were too high to be paid.

These arguments, then, should be considered political because they are based on an attempt to balance the competing interests of society and individuals. Based on these arguments, if it were possible to have a society in which men would voluntarily comply with verdicts regardless of the gender of the witnesses who presented the damaging evidence, or in which the casual mingling of the sexes did not lead to an increase in sexual licentiousness, the legal rule regulating female witnesses would presumably need revision.

Finally, the arguments of al-Qarafi and al-Tarabulusi about the rules regarding the statements of women in medieval Islamic law are important for what they say, how they say it, and what they do not say. One would expect that any discussion of women's testimony in medieval Islamic law would be centered on Qur'an 2:282. In fact, neither al-Qarafi nor al-Tarabulusi refers to it. Instead, their chief concern is to rationalize a legal doctrine that seems to take a slightly schizophrenic stance in its assessments of the reliability of women's statements. This fact in and of itself is significant in demonstrating the maturity of Muslim jurisprudence in the Ayyubid period—while Islamic law may have been derived ultimately from revelation, it was no longer being
interpreted solely with reference to revelation. Rather, it was being interpreted from the internal perspective of jurisprudence itself, one of whose ultimate goals was the creation of systematic legal rules that were internally coherent. In light of jurists’ desire to create internally coherent legal doctrine, the fact that no Sunni jurist suggested purchasing doctrinal coherence at the price of extending the discriminatory rules of testimony to the field of narration stands as strong circumstantial evidence that these medieval jurists realized that attributing a general intellectual inferiority to women was, within the existing structure of Islamic law, an untenable position.

PUBLIC AND PRIVATE SPACE, NORMATIVE AND POLITICAL DISCOURSE, AND GENDER

The political nature of testimony is also reflected rather clearly in the different evidentiary standards required for a claimant to prove her case. Islamic procedural law generally divides claims into those which are financial and those which deal with the body. A woman’s testimony has to be corroborated by a man’s, according to jurists, but it is admissible in the first place only if the dispute is financial. Therefore, the testimony of women is not only excluded entirely from all capital cases, but it is also excluded from claims of marriage and divorce, because those cases encompass issues dealing primarily with the human body and its status. On the other hand, in issues of fact dealing exclusively with the female body, the testimony of two female witnesses uncorroborated by a male witness is enough to win the claim. Significantly, the testimony of women is admitted in these cases because they involve facts to which men are not privy (mā lā yazhar li-l-rijāl).

Instead of the cliché that in Islamic law, a woman’s word is worth half of a man’s, a more meaningful characterization of Islamic evidentiary discrimination against women would be that medieval Islamic law imagines legal disputes taking place across a public–private continuum. Because public space is regarded as men’s space, the admissibility of women’s testimony gradually decreases as the nature of the claim acquires more and more of a public quality. Thus, in a dispute regarding whether a baby was stillborn or died after birth, for example, the testimony of two women is sufficient, despite the fact that the dispute is both financial, in that the fact in question establishes rights of inheritance, and bodily, in that it establishes nonmonetary legal obligations. The private nature of the event precludes a male (public) presence, and therefore the law admitted the testimony of women uncorroborated by the testimony of men. It should be noted that this is the case in spite of the fact that men’s interests—indeed, often the interests of the state itself—were affected by these cases. Financial transactions, being essentially private matters, likewise admit the testimony of women. Because they are generally witnessed by men, however, they are quasi-public, and therefore the role of women is reduced. At the other, fully public end of the continuum, cases such as assault and robbery, because they occur in the public domain, excluded the testimony of women entirely. This is also the case with marriage and divorce: although they are private relations, they must meet standards of public recognition much more rigorous than that involving a mere financial transaction.

On the other hand, though, we have seen that something so public as the transmission of Prophetic hadiths and the enunciation of legal norms transcended gender boundaries altogether, a fact that causes us to reconsider the whole notion of “public.”
It seems that in the exclusion of women’s reports, two factors are actually involved: whether the content of that report is public or private, and whether the context of that report is political or normative. Al-Qarafi had already made use of this notion when he noted that because witnesses exercise power over the parties to a lawsuit, a plurality of witnesses was required. Interestingly, though, the transmission of learning, whether it was in the form of hadith or in the form of law, was never recognized as a political act. In contrast to testimony that bound a particular third party, the transmission of a hadith or of a legal ruling, because it contained a normative standard, bound all human beings, including the reporter, to the end of time. The very universality of the fact or the norm being reported removed it from the domain of political speech, where extra safeguards are provided to protect the particular interests involved, and placed it in the domain of narration, where all humans, free and slave, male and female, are equal. Most important, the existence of such a normative domain gave women the legal right to participate in court procedures that seem, at first glance, to fall squarely within the public domain and for that reason should have precluded the possibility of women’s participation outright.

That the intrusion of the normative domain upon the political could open up further space for women’s participation in the legal system is evidenced by al-Tarabulusi’s discussion of the procedure used by judges in certifying the reliability of witnesses (ta’dil). According to him, because this process is a religious affair (min umur al-din), the opinions of men and women regarding the credibility of witnesses are equal, just as is the case in their transmission of reports (riwāyat al-akhbār)—that is, hadiths. Because this function is now understood to be an instance of transmission and not testimony, the Hanafis allow a judge to certify a witness based on a woman’s statement as long as she “is barza, one who mixes with the people and engages them [in commerce and other affairs], because she has experience in their affairs [in this case], thus making the [judge’s] question [of her] meaningful (idhā kānat imra’atan barzatan tukhālit al-nās wa tuʾāmiluhum li-anna lahā khibratan bi-umūrihim fa-yufid al-suʿāl).” This is a paradoxical result, because al-Tarabulusi, in the same work, will later say in defense of the law’s evidentiary discrimination against women that the law forbids them to leave their homes.132

Similarly, because fatwas are normative speech, gender plays no part in the construction of a valid legal opinion. Perhaps even more remarkable, however, is that expert testimony was also considered normative for the same reason that legal opinions were normative: court-appointed experts, it was believed, simply reported facts about the external world that were universally valid, just as a mufti reported facts about the law that were universally valid. If one man was wounded by another, for example, the gravity of that wound was purely a medical question independent of the parties involved in the lawsuit; therefore, the testimony of the court-appointed doctor investigating the wound lacked the partisan nature that was the distinguishing characteristic of testimony. Maliki jurists, for example, were so committed to the notion that expert testimony was objective that they did not subject it, unlike ordinary testimony, to rebuttal. For this reason, Ibn Hisham (d. 1209) noted that:

There is no rebuttal of them (i.e., their expert opinions), because they were not asked to testify. Indeed, the judge only asked them for information, so they provided him with it. Rebuttal is only allowed in [cases of] doubt and suspicion of the witnesses, and this has been the basis of [legal] practice according to the master jurists.133
Because this type of information was understood to be “objective,” women in theory could, and in practice actually did, serve as court-appointed expert witnesses. When the court did appoint a female expert witness, the court would accept her assessment of the facts without seeking a corroborating statement from another expert, female or male.34

Berkey explained the relative paucity of women who studied jurisprudence in contrast to their more active participation in the transmission of hadith by noting that:

Women were systematically excluded from holding judicial posts that would position them to resolve disputes among men . . . A similar concern may have lurked subconsciously behind their apparent exclusion from the intensive study of subjects such as jurisprudence, where the assertion of a woman’s analytical and forensic skills could have threatened to place her—intellectually, at least—in a position of authority over men.35

While the assertion that women were excluded, at least by custom if not by law, from positions in which they could exercise power over men is almost certainly true, Berkey’s statement must be read in light of what medieval Muslims understood to be acts of power. Muslim jurists, for reasons already mentioned, were unanimous in permitting women to interpret the law and issue legal opinions.

What is most surprising, though, is even those functions that Muslim jurists took to be overtly political, such as testimony and judgeship, were never entirely closed to the possibility of women’s participation. To the extent that women participated in these tasks, of course, they would have been recognized as exercising actual power over men. In financial affairs, for example, the testimony of women, although relatively weaker than that of men, could prove decisive. Nor is it true that there was a consensus among jurists that women could not be judges.36 Rather, it is precisely because the majority of Muslim jurists understood testimony to be political that the Hanafi legal school allowed women to serve as judges for all cases admitting female testimony.37 Al-Tabari (d. 923), meanwhile, permitted women to be judges in all areas of the law, arguing that if their fatwas were legitimate in all areas of the law, then a fortiori their rulings as judges must also be valid.38

TRANSCENDING THE POLITICAL/NORMATIVE DICHTOMY:
IBN TAYMIYYA AND IBN QAYYIM AL-JAWZIYYA

The dominant juridical discourse, as represented above, was premised on the existence of a normative realm and a political realm. The former was characterized as a domain of human life regulated by universal norms, as a result of which harmony existed between the interests of credible individuals (ʿudāl) and the truth. Although this does not guarantee that all statements of credible individuals will prove to be true, it allows us to be reasonably sure that their statements in this context are made in good faith and are not the result of deliberate deception and manipulation.39 The political realm, in contrast to the normative realm, is that domain of life dominated by selfish, particular interests. The hold of these particular interests on even credible individuals is so strong that the statements of normally veracious individuals in this context cannot be taken at face value. In other words, when particular interests are involved, a higher degree of skepticism is required due to the presence of tangible interests.
Although we might find the idea of the existence of such a normative domain to be naive, belief in its existence nonetheless offered women greater space for participating in the legal system than would otherwise have been the case. On the other hand, we also find a few but important jurists—namely, the Syrian Hanbalites Ibn Taymiyya (d. 1327) and Ibn Qayyim al-Jawziyya (d. 1350)—who rejected this distinction between political speech (shahâda) and normative speech (riyâya) altogether. While arguing that the testimony of a slave should be treated in the same manner as that of a free person, the latter said:

It should not be argued that transmission is less stringent [in its stipulations] than testimony, and therefore more precautions should be taken in the latter in contrast to transmission [of Prophetic reports]. Although many have adopted this doctrine, it has neither been proved nor is it correct. Indeed, the most important thing for which precautions should be taken and precision required is testimony about the Prophet, may God bless him and grant him peace, for a lie [or mistake] about him is not like a lie [or mistake] about someone else. . . . The reason for which his [viz., the slave's] transmission [of Prophetic reports] was accepted is the same reason his testimony [before a judge] should be accepted. 40

Obviously, this argument for the admissibility of a slave's testimony, based as it is on the fact that the slave's transmission of Prophetic reports was admissible, held implications for the wider acceptance of women's testimony, a fact that was not lost on Ibn al-Qayyim. In developing his argument for increasing the admissibility of women's testimony, he argued that the purpose of testimony was to gain truth about a past event. Therefore, if a woman was believed to be reliable in her testimony regarding financial dealings, she must be assumed, all things being equal, also to be reliable in other areas of life. 41 Limiting her testimony to financial claims, therefore, was arbitrary.

The second part of Ibn al-Qayyim's argument dealt directly with the issue of whether gender was a material factor in determining the relative credibility of a witness. For Ibn al-Qayyim and Ibn Taymiyya, the answer was simple: a judge should be allowed to rule based on the testimony of men or women, as long as that evidence was likely to be true. The gender of the witness, then, was made secondary to the issue of whether the witness's testimony was credible in itself. For this reason, both Ibn Taymiyya and Ibn al-Qayyim rejected the two-women-equal-one-man rule that lay at the heart of discrimination against women's testimony. They argued that this rule resulted from ignoring the difference between recording testimony for the purpose of protecting a right in the event of a future dispute, known as tahammul al-shahâda, and testifying before a judge, known as adâr al-shahâda. Thus,

There is no doubt that the reason for a plurality [of women in the Qur'anic verse] is [only] in recording testimony. However, when a woman is intelligent and remembers and is trustworthy in her religion, then the purpose [of testimony] is attained through her statement just as it is in her transmissions [in] religious [contexts] (emphasis mine). 42

Although this seems to be a prima facie reasonable interpretation of the verse in question, Ibn Taymiyya also felt compelled to demonstrate the weakness of interpreting Qur'an 2:282 to justify evidentiary discrimination against women in general. He begins by noting that the plain meaning of the verse is not directed toward judges but, rather, toward individuals who are involved in a transaction. Thus, the verse's
significance, if it has any relevance at all to courtroom proceedings, is only implicit. The implicit meaning of this verse, if taken to address judges, would be, “Rule with two male witnesses. And if not two male witnesses, then one male and two female witnesses.” He points out astutely, however, that no school of Muslim law has actually restricted a judge to using only two male witnesses, or in their absence one male and two female witnesses. Instead, Muslim jurists agree that a judge is also allowed to rule based on various combinations of witnesses, oaths (yāmin), and the refusal to swear (al-nukāl). It is therefore known with certainty that the implicit meaning of the verse was not intended by the Lawgiver. He concluded the argument by noting that “the command to ask two women to testify at the time of recording [the testimony] does not necessitate that judgment cannot be rendered with a number less than this. . . . The means by which a judge rules are broader than the means by which God advised the possessor of a right to protect it.” Ibn Taymiyya and Ibn al-Qayyim, then, reach the conclusion that the admissibility of testimony is not determined by gender but, rather, by credibility. When a woman offers credible testimony, therefore, the judge must admit it, just as he would admit the credible testimony of a man.

One should not infer from their analysis, however, that Ibn al-Qayyim and Ibn Taymiyya believed there was no difference in the probative value of men’s and women’s testimony. Indeed, Ibn al-Qayyim maintains that although Qur’ān 2:282 does not prejudice the admission of female testimony qua testimony before a judge, it does establish that two male witnesses are usually the best guarantee that one’s rights will be respected in the event of a future challenge. Interestingly, his explanation of why this is so turns on sociological as well as epistemological arguments. Thus, he says that “the testimony of one man is superior to [that of] two women because it is usually impossible for women to attend court sessions, and their memory and precision is less than that of males [emphasis added].” What he means here, obviously, is that an individual who is seeking the most effective means of preserving his rights will prefer male witnesses, as they will be more likely than female witnesses to be able to testify before a judge in the event of a dispute.

Of the two reasons raised by Ibn al-Qayyim, however, it is the relative lack of freedom of movement that would most likely prejudice an individual against using female witnesses. After all, Ibn al-Qayyim is willing to grant the equality of a woman’s testimony to a man’s as long as the individual woman is “intelligent and remembers and is trustworthy in her religion.” Presumably, when one seeks witnesses to one’s transactions, one would seek those who are recognized as trustworthy, regardless of their gender. It is the fact that a female witness lacks the same access as a man to court that renders her substantially less useful in preserving one’s rights and, therefore, less desirable as a witness.

As if to confirm that this is the actual reason that it is preferable to use men as witnesses, Ibn al-Qayyim argues that the admission of the testimony of one man and two women is a valid basis for judgment, even in the presence of two male witnesses. Because the female witness shares with a male witness the qualities of honesty, trustworthiness, and religiosity, when her testimony is corroborated by another woman, her testimony may actually become stronger than the uncorroborated testimony of the male witness. Moreover, the probative value of the testimony of certain exceptional women, such as Umm al-Darda’ and Umm ʿAtiyaa, is without doubt greater than that of a single man of lesser stature.
The clear thrust of Ibn al-Qayyim’s analysis of women’s testimony is that it must be treated individually. Although he does believe that women are generally more prone to committing errors than men, this does not in itself justify blanket discrimination against the testimony of women, the result of which would be the rejection of truthful evidence. Indeed, whenever a woman has shown herself to be credible, her evidence should be admitted. Moreover, it would not be wildly speculative to suggest that he would have agreed to the proposition, had it been suggested to him, that any perceived deficiencies in women’s reason and memory were more likely a result of sociological factors than of biological ones.48

CONCLUSION

I began this essay with the observation of many Muslim feminists that historical Muslim societies have experienced a tension between an Islam that is ethically egalitarian and bears a message that is explicitly gender-neutral and an Islam that is historically determined, with certain pragmatic regulations that tend to obviate that ethical message. Ahmed advanced this thesis forcefully, saying:

There appears, therefore, to be two distinct voices within Islam, and two competing understandings of gender, one expressed in the pragmatic regulations for society . . . , the other in the articulation of an ethical vision. . . . While the first voice has been extensively elaborated into a body of political and legal thought, which constitutes the technical understanding of Islam, the second—the voice to which ordinary believing Muslims, who are essentially ignorant of the details of Islam’s technical legacy, give their assent—has left little trace on the political and legal heritage of Islam.49

The detailed analysis in this essay of the manner in which post-Ayyubid Sunni jurists treated the various issues related to women’s participation in the production, transmission, and application of the law, however, we discovered that the ethical voice certainly did leave a trace on the medieval doctrine. Perhaps the conclusions reached by these jurists are not what we would have wanted them to be, but that does not detract from the fact that they realized that Islamic law’s evidentiary discrimination against women constituted a legal problem—that is, something that was problematic even within the parameters of Islamic law. Even al-Qarafi, who attempted to ground this discrimination in the nature of women, was forced to develop a sociological argument that, although hardly palatable to modern sensibilities, plausibly argues that this discrimination had as much to do with male chauvinism as it did with female witness’s presumptive lack of credibility. Al-Tarabulusi’s defense of the law, meanwhile, seems to have taken into account the weakness of any argument claiming that this discrimination was a result of the inferior probative value of a woman’s testimony. Like al-Qarafi, then, al-Tarabulusi proposed a sociological argument in defense of this rule, which, according to him, helped preserve the sexual mores of his society.

For both of these authors, the difficulty of the established laws regarding women’s testimony was not so much that it discriminated against women but, rather, that it was contradictory, at times treating women’s statements in the same manner that it treated men’s, while at other times discriminating against it. This contradiction had been resolved by the creation of two distinct arenas for speech—one normative, where
gender was not an issue in evaluating the probative value of a statement, and the other political, where it was. For Ibn Taymiyya and Ibn al-Qayyim, though, the only issue was the probative value of the statement, regardless of the normative or political context of the statement. Thus, both of these jurists urged that judges be allowed to treat a woman's testimony in the same manner as a man's as long as the judge found the woman's testimony to be probative.

The importance of the categories of normative and political speech, however, is not limited to the narrow issue of women's testimony before a judge. Because testimony was considered to be political speech, it was not difficult to argue, as the Hanafi school did, that women could be judges in all cases that admitted women's testimony. Conversely, because the communication of legal opinions was considered to lie in the normative domain, there was complete agreement among Sunni jurists that women could be muftis. It was as a result of the law's acceptance of women as muftis, moreover, that led al-Tabari to argue that a woman could be a judge in all areas of the law.

To conclude, then, one must agree with Ahmed that there are two voices within Islam regarding gender: one ethical and one pragmatic. But, it also cannot be denied that their relationship was in constant tension, if not in an outright dialectic. The rules of positive law, fiqih, treating women express their relationship rather clearly. It is especially obvious in the law's treatment of women's statements, as we have shown above. This also reveals the nature of jurisprudence as a discourse, in contrast to that of exegesis—the task of the latter is simply to explain the meaning of the verse at hand; the jurist, however, must take into account a much wider set of data before reaching his judgment. Because jurists necessarily had to take into account all the legal rules regulating women's statements, they were forced to reconsider the basis of evidentiary discrimination against women's testimony. When they did this, it became obvious that impeaching the probative value of women's statements based on their gender was not a satisfactory explanation of the law. It was this realization that led them, or at least some of them, to offer sociological explanations. The jurists' treatment of this issue should be contrasted with that of the exegetes, none of whom, as far as I was able to ascertain, even attempted to explain why the normative statements of women were granted the same moral and scientific weight as those made by men, while women's testimony was deemed to be less weighty than that of men.

In light of the preceding evidence, moreover, one can no longer simply assume that modernist interpretations of Qur'an 2:282 represent a radical break from Islamic law; indeed, from the perspective of fiqih, the sociological interpretation, not the natural or the psychological one, is the only plausible reading of the verse. Furthermore, this suggests that Muslim modernism in general, and Muslim feminism in particular, might profit from exploiting problems and tensions that have long been recognized to exist within Islamic law. In the long run, this strategy may be more successful than claiming the need for a "new" jurisprudence that is to be derived ex nihilo from the original sources of Islamic law. This assumes that many of the issues that make up the modernist agenda have potential solutions waiting to be derived from already existing principles of Islamic law. Although this may or may not actually turn out to be the case, the evidence presented regarding women's testimony suggests that the battle between the "two voices" of Islam manifested itself more dramatically in positive law than it did in other arenas of religious discourse. There-
fore, any study of gender in the Islamic middle periods that ignores *fiqh* is not only dangerously incomplete, but it will also probably miss the most interesting medieval discussions of gender.

**NOTES**

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2Ahmed, *Women and Gender*, 66–67. She also argues, however, that the gender-neutral message of Islam mitigated the misogynistic practices that prevailed in Near Eastern societies.


4What Mernissi means by empirical is that the task of a religious scholar was to collect positive facts, whether these were in the form of sayings attributed to the Prophet or his companions or the opinions of other scholars. According to Mernissi, religious scholarship did not attempt to “transcend” these facts by extracting from them general universal rules that could serve as a check against both arbitrary, subjective interpretation and errors in the facts themselves; Mernissi, *The Veil*, 128.

5Ibid., 75, 77.

6Wadud-Muhsin implies this when she notes in her preface that “the question of the concept of woman in the Qur’an did not arise—perhaps because the concept of gendered man did not arise” (Wadud-Muhsin, *Quran*, v).


8This is doubly true in the case of exegesis, where her main source was Muḥammad ibn Jarir al-Ṭabarī’s encyclopedic work *Jāmi‘ al-bayān fī ta‘wil āy al-qur‘ān*, in which he sought to gather every opinion expressed by a recognized scholar.

9Fakhr al-Dīn al-Rāzī, *Taftīs al-kabīr*, 32 vols. (Cairo: Al-Maṭbā‘a al-Bahā‘iyya al-Miṣriyya, 1357/1938), 7:122; Sayyid Qutb, *Fi ḥizb al-qur‘ān*, 6 vols. (Cairo: Dār al-Shuruq, n.d.), 1:336. It is worth noting, moreover, that both Qutb and al-Rāzī rely on sciences external to the discourse of revelation—the former, psychology, and the latter, Aristotelian biology—to interpret the verse and reach their conclusion that women were inherently less veracious than men. Al-Qurtubi does not give an explanation of why a woman’s testimony is worth half of a man’s, although he accepts that as the meaning of the verse. See Muḥammad ibn ʿAḥmad al-Qurtubi, *al-Jāmi‘ li-aḥkām al-qur‘ān*, ed. ʿAḥmad ʿAbd al-ʾAlim al-Bardūnī, 20 vols. (Cairo: Dār al-Kitāb al-ʿArabī, 1387/1967), 3:389–98. It is possible that his belief that women are intellectually inferior is such an obvious fact that he does not even need to mention it explicitly. See his explanation of the sentence “al-rīzāl qaʾawwāmūn ‘alā al-nisā‘” in al-Nisā‘, 4:34, where he explains that the husband’s right to discipline his wife, command her obedience, manage her affairs, prevent her from leaving her home, and so on, all based solely on his discretion, is at least partially a consequence of his possession of *ʿaql*: Al-Qurtubi, *al-Jāmi‘ li-aḥkām*, 5:169.


13For more information regarding the manner in which law regulated statements of legal significance, see ʿAḥsan at-Dīn ʿAbd al-Wahhāb ibn ʿAḥmad al-Subkī, *al-ʿAshbāḥ wa-l-naẓā‘ir*, 2 vols., ed. ʿAdīl ʿAḥmad ʿAbd
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14 Al-Qarāfī, al-Furāq, 1:4–5.

15 Thus, in disputes between a husband and a wife, each party’s claim is evaluated solely as a function of its inherent plausibility or lack thereof. In the Maliki school, for example, the wife will be taken on her word that her marriage was consummated based simply on the evidence of the couple’s having had an opportunity to consummate the marriage, even if the husband denies the occurrence of intercourse. See Aḥmad al-Dardīr, al-Sharh al-saḥīh, 4 vols., ed. Kamāl Waṣfī (Cairo: Dār al-Maʿarif, 1986), 2:438–39. Similarly, the gender of the litigants was not an issue in determining which party to a lawsuit had the right to take the oath and whether that oath would be effective in winning the claim.


18 Ahmed, Women and Gender, 74.


20 For example, the 14th-century jurist al-Zarkashi wrote a book that gathered `A`īsha’s legal opinions, al-Iṣāba fīmā istadrakathu `a`īsha `alāl al-sahāba, wherein she challenged the accuracy of the opinions of her male colleagues.

21 For more on the controversial nature of `A`īsha bint Abi Bakr, see D. A. Spellberg, Politics, Gender, and the Islamic Past, The Legacy of `A`īsha bint Abi Bakr (New York: Columbia University Press, 1994).


24 Muhammad ibn Muhammad al-Ḥaṭṭāb, Mawḥūb al-jalīl, 6 vols. (Beirut: Dār al-Fikr, 1412/1992), 1:9. It should also be noted, however, that some of the works on hadith that al-Ḥaṭṭāb mentions as having been transmitted through Zaynab dealt with the theoretical science of hadith and, therefore, involved more than the simple recollection of a text. For more information on this woman, see Ibn Ḥajar al-Asqalānī, Al-Durar al-kāmiʿa fi ʿa`īn al-mī`a al-thāmin, 5 vols., ed. Muhammad Sayyid Jād al-Haqq (Cairo: Dār al-Kutub al-Ḥaditha, 1966), 2:209–10. For the biography of Umm al-Ḥasan, see Muhammad ibn ʿAbd al-Raḥmān al-Sakḥāwī, Al-Dawʾ al-lāmī` li-ahl al-qarn al-tāsī`, 12 vols. (Beirut: Dār Maktabat al-Ḥayāt, 1966), 12:91.

25 The twelfth volume of al-Sakḥāwī’s Dawʾ focuses exclusively on promoting the prominent women of the 19th Islamic century. Some of these women whom he explicitly mentioned as having studied legal works include Amat al-Khalīf bint ʿAbd al-Latif ibn Sādaq, 12:9; Amat al-Qahīr bint Qasim ibn Muhammad, 12:10; Bayram bint Ahmad ibn Muhammad al-Malikīyya, 12:15; Khadija bint Abī al-Rahmān, 12:28; and ʿA`īsha bint Ali, 12:78–79. It should be added that Sakḥāwī’s information can hardly be considered conclusive or complete. For example, in his biography of Umm al-Ḥasan (see n. 24) he failed to mention that she had transmitted works of positive law and legal methodology. Ibn Ḥajar also described some of the women in his work as having both studied the law and understood it well. See Ibn Ḥajar, Al-Durar, 3:307–8, 5:167–68.


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28Hanafis, however, will admit women’s testimony in all cases, with the exception of capital cases and crimes of blood vengeance: al-Ṭârûbulusî, Mu‘in al-ḥukkâm, 91–92.


30Ibn al-Shâṭî noted that “the law made the [testimony of a] woman like [that of a] man in cases where his absence is absolutely impossible and it made her [testimony] like his where his absence is simply coincidental with the stipulation of another [woman’s] corroboration (inna al-sharṭ ‘a‘ala al-mâr‘a ka-l-rajul fi mahâll ta‘adhdhur ittiḥârî ‘ihi al-ilâlî‘a wa ja‘alâhâ mithlhu bi-sharṭ al-istiţâhâr bi-‘ukhrâ fî maha‘all ta‘adhdhur ittiḥârî ‘ihi al-ilâlî‘a, Ibn al-Shâṭî, Tahâtib al-furqân, 1:6).

31The public’s interest in marriage is reflected in the fact that individuals have a responsibility to report to judges men who have divorced their wives but continue cohabiting with them, even when their wives are unwilling to file for divorce. Financial claims, on the other hand, can be entered only by the aggrieved party himself.

32Al-Ṭârûbulusî, Mu‘in al-ḥukkâm, 87. Malikis, however, do not admit a woman’s statement in this case even though they agree with the Hanafis that this is an instance of narration and not testimony. In this case, the Malikî rule contradicts the basic logic that distinguishes between narration and testimony.


36Emîl Tyan, Histoire de l’organisation judiciaire en pays d’Islam, 2nd ed. (Leiden: E. J. Brill, 1960), 163. Although the Hanafis were the only Sunni school to allow women to be judges, several prominent individual jurists also permitted it. Among them were the celebrated Muḥammad ibn Jârîr al-Taβarî, Muḥammad ibn al-Ḥasan al-Shaybâni al-Ḥanâfi, who, although a disciple of Abu Hanîfa, agreed with al-Taβarî in permitting women to be judges in all areas of the law, unlike the rest of Abu Hanîfa’s followers, who restricted women’s judicial competence to cases that admitted their testimony. See Abû al-Walîd Sulaymân ibn Khalaf al-Bâjî, al-Muntasa‘a, 7 vols. (Cairo: Dâr al-Fikr al-‘Arabî, 5:182; Abû al-Walîd Muḥammad ibn Aḥmad Ibn Rûshîd (Avero rê), Bi‘dawîl al-muṣhtâhid, 2 vols. (Beirut: Dâr al-Fikr, n.d.), 2:344; Mu‘awwâf al-Dîn ‘Abd Allâh ibn Aḥmad Ibnu Qudâma, al-Mughînî, 14 vols., ed. ‘Abd al-Fâṭîmâ Muḥammad al-Hurî and ‘Abd Allâh ‘Abd al-Munîm al-Turkî (Cairo: Dâr Hâjrî, 1986), 14:12; Abû al-Walîd Muḥammad ibn Aḥmad Ibn Rûshîd (the Grandfather), Kitâb al-muqaddîmâr, 3 vols., ed. Sa‘îd Aḥmad A‘raîb (Beirut: Dâr al-Ghârî al-Islâmî, 1988), 2:258. Likewise, al-Hattab reported that Ibn al-Qasîm is also said to have considered the appointment of women to the bench to be permissible, although later Malikis were unsure whether he held the same opinion on this issue as al-Taβarî and al-Shaybâni, or agreed with the majority of the Hanafî school, who would restrict women to those cases where their testimony was admissible (al-Hattab, Mawâhib al-jalîl, 6:87–88).

37The gist of the Hanafî argument was that witnesses are similar to judges in that both exercise power over the litigants. Because a woman when testifying against a litigant exercises power over that litigant, there is no reason to believe she cannot exercise power over that same litigant in the capacity of a judge. See Tyan, Histoire, 162. For more on the analogy between judges and witnesses in Islamic law, see Fadel, “Adjudication,” 76–77. In general, it seems that the Hanafî madhhab was the most liberal of the Sunni schools of law regarding the question of the legitimacy of women’s political power. See, for example, Ibn al-Humam, who notes that “when a woman is ruler, her command establishing the Friday prayer is valid, although her actual leading of it is not” (wa al-mar‘a ‘a‘idâ kânât sulâtâna yajîb amrûhâ bi-l-tâqâm là iqâmatuhâ). Muḥammad ibn ‘Abd al-Wâḥîd Ibn al-Humâm, Sharḥ fâţî al-qadrî, 10 vols. (Cairo: Muṣṭáfâ al-Bâbî al-Halâbî, 1970), 2:55.

For this reason, al-Qarafi notes that if a slave were to transmit a hadith whose meaning would require that he be granted his freedom, he would nevertheless still be believed despite the fact that he has a particular interest in the truth of his report because “narration is far removed from suspicion” (bāb al-rivwāya ba‘id ‘an al-taham jiddan). Al-Qarafi, al-Furqāq, 1:16.

Ibn Qayyim al-Jawziyya, al-Turq al-hukmiyya, ed. Muḥammad Jamil Ghāzī (Cairo: Maṭba‘at al-Madani, 1977), 245. Others defended the exclusion of slaves’ testimony by arguing that testimony is a type of political jurisdiction (wilāya) and, therefore, any witness must by definition be free. Ibn al-Qayyim described this argument as being particularly weak (Ibn al-Qayyim, al-Turq, 248).


Wa lā rayba anna āhādihi al-ḥikma fi al-ta‘addud hiyā fi al-taḥammul fa-anmū idhā ‘aqalat al-mar‘a wa ḥaḍrat wa kānā mimman yūthaq bi-dināhā fa-inna al-maqsūd hāsil bi-khabarhā kā-mā yahṣul bi-akhbār al-diyānāt (ibid.).

La yatzam min al-amr bi-istishhād al-mar‘atayn waqt al-taḥammul allā yuḥkama bi-aqalla minhumā . . . fa-l-turq allati yuḥkuum bihi al-hākim awsa‘ min al-ṭurq allati arshadā allāhu sāhib al-hāqq ilā an yuḥfaṣa ḥaqqahu bihi (ibid., 95–96). Al-Qurtubi made a similar argument in arguing for the legitimacy of a judge’s verdict based on the testimony of one witness and the oath of the claimant: Al-Qurtubi, al-Jāmī‘ li-akhām, 3:392. Ibn Taymiyya also made the remarkable claim that a verdict based upon the testimony of single woman along with the oath of the claimant would be valid: wā law qiil yuḥkam bi-shahādat imra‘a wa yamin al-tālib la-kāna mutawahijah (Ibn al-Qayyim, Flūm al-muwaqqīn, ed. Tāhā, 95).


Umm al-Dard‘a’ Khayra bint Abi Hadrad. She was a famous Ansari companion of the Prophet. She died in Syria during the caliphate of ‘Uthman ibn ‘Affan. Ibn ‘Abd al-Barr described her as being virtuous, intelligent, and possessing good judgment, in addition to having great piety. A large group of successors transmitted different hadiths on her authority. See Ibn Hajar al-‘Asqalānī, al-Isāba fi tamyīz al-sahāba, 13 vols., ed. Tāhā Muhammad al-Zaynī (Cairo: Maktatab al-Kulliyāt al-Azhariyya, 1297/1917), 12:241–42.

Umm ‘Atiyaa Nusayba bint al-Harīth was also an Ansari companion of the Prophet. Several of her hadiths have been included in the works of al-Bukhari and Muslim: ibid., 13:253–54.

Wa lā rayba anna al-ṣan al-mustafād min shahādat mithl umm al-dard‘a’ wa umm ‘atiyya aqwā min al-ṣan al-mustafād min rajul wāhid dānuhumā wa dānu amthālīhitim (ibid., 236).

This conclusion is also consistent with the sense of the root ‘a-qa-la in classical Arabic and in the usage of the term ‘aqil by the jurists and the scholars of hadith. Thus, Ridwān al-Sayyid argues that in “the opinion of the scholars of hadith and the jurists, the [intellectual] inequality among people is not a result of [differences in] instinctive reason, but rather [a result] of their judgment or practical reason. Reason develops in an individual just as his body develops, just as his other instincts develop. It is the experiences of the environment or the surroundings which produce the [capacity for] practical reason (i.e., judgment), wherein people are unequal.” He also quotes al-Mawardi as saying that “everything needs reason, but reason is in need of experience.” See Ridwān al-Sayyid, al-Umm wa al-suṭa‘a wa al-jam‘a‘ (Beirut: Dār Iṣrā‘, 1404/1984), 195–96.

Ahmed, Women and Gender, 65–66.