CHAPTER I

The Law, the Courts, and the Muftis

QUESTION: Two men were married to two virgins and each consummated the marriage. Then one claimed after consummation that he had found his bride already deflowered, and he sent her back to her family. Then he abducted her sister by making a night raid on her [the sister's] husband's house in the village, aided by a group of peasants. Now he wants to annul the marriage, but his wife claims that it was indeed he who deflowered her. Can he annul the marriage? If he accuses her of *zina'* [illicit intercourse] and she is found [somehow] to have been previously deflowered, should she be sentenced for *zina'*, and then killed, or suffer *hadd* punishment [the punishment prescribed by the Qur'an] or *ta'zir* [discretionary punishment], or is her testimony to be accepted?

ANSWER: The man's claim that "I found her deflowered" is of no consequence, because even if he really had found her deflowered he still must pay the entire *mahr* [dower] as legal opinion stipulates, and he does not have the option of annulling the marriage. And in any case, being deflowered does not necessarily mean that illicit intercourse has taken place, for virginity can be lost by jumping, or through menstruation, or with age, and so forth. The wife is guilty of nothing, and the one who did to her what has been mentioned above disobeys God, may He be exalted. The testimony of the

> woman is valid, such is the situation, and the dower in its entirety is required. . . . He [the husband] must bring his wife's sister back to the place from which he abducted her, and he should be imprisoned until he does so. And God knows best.[1]

Muslim legal thinkers in the seventeenth- and eighteenth-century Arab world were actively engaged in the discussion of women's place in their society. As this *fatwa*, or legal opinion, offered by Khayr al-Din al-Ramli, an eminent seventeenth-century jurist, suggests, they were able and willing to take on questions that spoke directly to the basic issues of women's rights in any society: it was the exercise of male power, the power to coerce and control the female, that Khayr al-Din sought to define and limit here. In the many fatwas offered and in the Islamic courts of the period, Muslim thinkers drew on a broad range of resources—their inherited legal tradition, their observations of their own society, their own ability to reason and judge—to address the questions of male power and female protections, of the law and gendered social roles, and of the existence, ultimately, of an Islamic gender system and its relevance to their own local society.

My decision to explore the ways in which this group of Muslim thinkers and Islamic institutions constructed gender in a particular time and place was influenced by how frequently today we see tradition and authenticity invoked as supports for a restrictive interpretation of women's rights and social roles. Fatima Mernissi, the prominent Moroccan feminist, has called for the revisiting of Islamic history, so that the definition of the authentic and the traditional would not be left solely in the hands of those with an antifeminist agenda. Her own work on the rereading of sacred Islamic texts, the Qur'an and the *hadith* (the traditions of the Prophet Muhammad), joins a battle of interpretation that is being waged with the concerns and needs of contemporary Muslim women in mind.

> The return to the past, the return to tradition that men are demanding, is a means of putting things "back in order." An order that no

longer satisfies everybody, especially not the women who have never accepted it. The "return" to the veil invites women who have left "their" place (the "their" refers to the place that was designated for them) to leave their newly conquered territories. And it is implied that this place in which society wants to confine them again is to be marginal, and above all subordinate, in accordance with the ideal Islam, that of Muhammad—the Prophet who, on the contrary, preached in A.D. 610 a message so revolutionary that the aristocracy forced him into exile.

The journey back in time then is essential, not because the pilgrimage to Mecca is a duty, but because analysis of the past, no longer as myth or sanctuary, becomes necessary and vital.[2]

Mernissi's study of the Qur'anic commentators, *hadith* collectors, and biographers of the early Islamic period juxtaposes the Prophet Muhammad's revolutionary message of social equality among all people to the conservative and regressive interpretations of that message as perpetrated by some powerful male members of the early Muslim community. In brief, Muhammad's revelation, as well as his daily words and deeds, pointed the way toward women's rights and gender democracy, but much of what he won for women was quickly modified, distorted, or completely lost as the political leaders and scholars of the first few centuries of Islam shaped tradition through various processes of selective and self-serving interpretation.

In returning to the sacred texts of the Qur'an and *hadith*, Mernissi sought to engage the Islamic tradition in its most central and authoritative form. An Islamic view of gender did not congeal into a fixed and hardened form, however, in those early years. On the contrary, a variety of interpretive texts—Qur'anic commentaries, *hadith* collections, biographies, and legal writings of all kinds—formed a growing and changing corpus of authoritative material that could be read and referenced by Muslim thinkers. As political structures, economic rhythms, and social arrangements changed over time, Muslim thinkers reflected on the relevance of various texts for their own times even while they added to the

authoritative corpus with interpretive works of their own. Part of the task of reclaiming tradition, then, should include careful study of that tradition as it was shaped and molded throughout Islamic history. It is the long history of Islamic thought and of the lives people lived in harmony or tension with this thought that constitutes the Islamic heritage; and it is this history that furnishes a touchstone for understanding the whole process of creation of tradition and offers the possibility of remembering and redeeming a past as neither "myth nor sanctuary."

LAW AND SOCIETY

In the following pages I explore the ways in which the intellectuals and the general population of a particular society and culture—in this case the urban milieu of Syria and Palestine in the seventeenth and eighteenth centuries—posed questions about gender and devised answers that suited their sense of their inherited tradition as well as their immediate needs. As they discussed and elaborated the *shari'a* (Islamic law) and took their business to the Islamic courts, they imbued legal texts with a meaning taken from their own lives. The study of the ways in which a Muslim community constructed a legal discourse on gender in a relatively "normal" period, at least one free of the social turmoil produced by war, conquest, or rapid economic transformation, allows us to glimpse how one Muslim society understood the law and the gender system it ordained, and how it re-created tradition, without reference to outside pressures.

I do not mean to suggest that the law and the courts played a privileged role in the construction of gender in this society. Gender relations and roles were inscribed in local customs, oral tradition, and various writings both sacred and profane, only a small portion of which have been closely examined by modern scholars.[3] My decision to focus on the law was partly a practical one: there is a particularly rich body of sources for the study of legal discourse in the form of period fatwas (collections

of judicial responsa) as well as the records of the Islamic courts themselves. None of this material is transparent, of course, as I discuss below with respect to problems of approach and method, but it is abundant and readily available. In addition, my undertaking of what is essentially a legal study also reflects my sense of the locus of current debates on women and gender. Much of the discussion of women and men, their natures and capacities, in countries where the majority of the population is Muslim today, is being framed in terms of how Islam genders society through the precepts of the shari'a. And it is the shari'a, in one form or another, that is the official law governing gender relations in the vast majority of these countries.

Although many of the current discussions of Muslim women's rights and power and of their appropriate place in society and their relations with men are anchored in an understanding of the nature of Islamic law, there is wide disagreement about how to approach this law. Practicing Muslims view the shari'a as divine in origin, based on Qur'anic revelation and the traditions of the Prophet Muhammad. The existence of the law makes it possible for them to lead a good Muslim life: it provides guidance by setting forth the rights and responsibilities of family members and by prescribing the kind of individual behavior that is acceptable or laudable, as opposed to undesirable or expressly forbidden, in the context of a Muslim society.

Even among Muslims, however, there is a disagreement about what the shari'a is and how we are to draw upon it for guidance. Conservative thinkers embrace and justify gender difference as it is inscribed in some parts of the shari'a; their resistance to change and interpretation rests on the notion that we should not tamper with the tenets of the shari'a that have been transmitted to us. The various regulations about marriage and divorce, child custody, and family obligations—all highly gendered—are to be scrupulously observed. As Barbara Stowasser points out, a twentieth-century conservative like Shaykh al-Sha'arawi of Egypt may feel the need to defend aspects of the shari'a against criticism coming from the West by using information gleaned from the natural, social, or

pseudosciences, but he will remain utterly opposed to any adjustment of the law to accommodate modern needs.[4] The shari'a is God's law for all time; the Muslim jurist preserves and transmits that law but does not interpret it. This conservative position is predicated on the idea that the law originated in the Qur'an and the *sunna* (the sayings and doings of the Prophet), underwent a brief period of growth and development through interpretation by the founders of the various legal schools, and then settled into an ideal and enduring form. The shari'a, then, passed down through the Islamic centuries, is complete and sufficient as a guide for gender relations in the modern world.

Conservatives in Islam cannot but feel somewhat beleaguered: they constantly confront two competing positions in Islamic circles that, in their own very different ways, treat the law as far less rigid. On the one hand, there is the position of the Islamic reformists who, since the days of the nineteenth-century thinkers al-Afghani, Muhammad 'Abduh, and Muhammad Rashid Rida, have subscribed to the idea that qualified Muslim jurists can and should undertake to interpret the law so as to make it a relevant and useful guide for life in the modern world. The reformer returns to the Qur'anic text as the basis for the law and argues for a reading that emphasizes the equality rather than the complementarity of the sexes. In general, he locates the statements of the Qur'an about gender in sociohistorical context: those statements describe how best to deal with gender issues, given the conditions of the time. Fazlur Rahman, a reformer or modernist liberal (as he terms it) in his own right, discusses the reformer and his agenda in sympathetic terms:

> In the field of the general rights of spouses, while the Qur'an proclaims that husband and wife have reciprocal rights and obligations, it adds that "men are but one degree superior to women" (II,228) because the man is the breadwinner and responsible for the sustenance of the wife (IV,34). From this, two diverging lines of argument have resulted. The conservative holds that this statement of the Qur'an is normative, that the woman, although she can possess and even earn wealth, is not required to spend on the household, which

> must be solely the concern of the male, and that, therefore, the male enjoys a certain superiority. The modernist liberal, on the other hand, argues that the Qur'anic statement is descriptive, that, with the inevitable change in society, women can and ought to become economically independent and contribute to the household, and hence the spouses must come to enjoy absolute equality.[5]

In such ways the reform or liberal position claims the juristic right to interpretation (*ijtihad*) when it is necessary to preserve the true intention of the text, as opposed to its surface utterances, which are bound by the temporality, as opposed to the universality, of the Qur'anic message. This is the argument that indeed has buttressed many of the attempted and actual reforms of the shari'a in the realm of personal status in the twentieth century.

On the other hand, there are the Islamists, the second of the two groups opposing the conservative view, who also call for a return to Qur'anic principles, but without the reformist agenda. To return truly to the Qur'an and the *sunna* is to strip away the accretions and false practices produced by centuries of corruption and misrule, to reclaim the pure Islamic message. It is the original message about gender, as divined from various Qur'anic verses and the practices of the early Muslim community, that must serve as a guide for life in all times and places. Islamists deny the legitimacy of the reformist agenda: there is no need to adjust the shari'a to modern life, for the shari'a has eternal relevance.

But this shari'a is the law as gleaned from the original sources; in other words, Islamists are forced to engage in a good deal of interpretation if they are to construct a shari'a without the benefit of assistance from centuries of legal thought and practice. They undertake such interpretation solely to reach the true meaning of the sacred texts, however, not to cater to transient human needs and impulses. Such an approach guided the members of Iran's Assembly of Experts, convened in 1979 to fashion a constitution for the new Islamic Republic. "On matters relating to marriage, divorce, and polygyny, he [Ayatollah Safi] said, the jurists and the men in the assembly would base their decisions on the

rulings of the Qur'an. They would do so even if these rulings upset women or were disliked by some men. And since the Constitution would reflect God's commandments, the members would decide these issues in the same way, whether or not there was a single woman in the assembly, and explain their decisions to the people."[6] Here we have a clear statement of an Islamist methodology: God's rules for marriage are to be found in the Qur'an and then applied to Muslim society, regardless of sociohistorical context. The Islamist clerics give themselves and other devout Muslims an active role in the construction of a modern shari'a, but it is not a role justified by the demands of modernization or the pressures of the West.

In addition to codifying shari'a family law, Islamization programs in Iran, Pakistan, and Sudan have included the introduction of laws that not only criminalize extramarital sex but also prescribe severe punishment for contraventions. Because the nature and punishment of these *hadd* (pl. *hudud*) crimes, as well as the evidence needed to convict, are defined in the Qur'an, the activation of these laws appears to fall well within the Islamists' mandate. Supporters of Islamization argue that the institution of severe punishments (from lashing to stoning, depending on the status of the perpetrators) for both partners in any form of extramarital sexual intercourse does not discriminate against women—for punishment is equally harsh. Indeed, at least one scholar insists that the record in Pakistan shows that the "*hudud* ordinances," despite objections raised by human rights organizations, have not had an adverse impact on women, largely because so few cases result in punishment, and because men are more likely to be found guilty than are women.[7] But in the context of the Islamist program of instituting the shari'a in order to redraw Muslim society, the activation of *hudud* laws lies in the context of a legal system that allows men but not women to seek sexual variety through multiple spouses and ease of divorce: it is the sexual *control* of women that is largely at issue here. It has also been noted that in some cases, such as Sudan and Iran, the Islamization of criminal law has tended to relax the

rules of evidence and expand the application of *hudud* punishments well beyond that envisioned by the classical formulations of the shari'a, thus resulting in novel forms of repression.[8]

Not all Islamists agree that codification of the shari'a is necessary to, or even desirable for, the realization of an Islamic society. Although Islamists who have moved into positions of political power have not hesitated to legislate in the name of the shari'a, a serious argument can be made that codification and legislation actually contravene the law. Some Islamists who do not hold state power, like those in Egypt, oppose codification of the shari'a on the grounds that the law exists as a reference and guide for judges, not as an instrument of state control.[9] Muslim jurists or others with sufficient knowledge and probity must preserve the ability to apply the shari'a in specific circumstances as they know best: the law is God's law, not to be harnessed to the needs and interests of the state.

Although today's Muslim legal scholars may differ in orientation and approach, most efforts toward the elaboration of an Islamic gender system are being undertaken principally by the pens and voices of Islamist interpreters. The Islamist vision of an Islamic gender system not only lays great emphasis on male/female difference in social life, but also posits Islamic law on gender as unitary, unchanging, and sacrosanct, a law whose roots in the early Islamic period serve to define and structure gender difference for all time. In reaching back to the early sources in order to construct a version of the shari'a for the present, to be embodied in civil codes that govern male-female relations in the family and penal codes that criminalize illicit sexual activity, Islamist thinkers display little or no systematic interest in the intervening centuries of Islamic history and thought.

My purpose here, then, is to raise some questions about the history of Islamic legal discourse on gender, and to challenge, I hope, what seems to be an ahistorical and incomplete vision of what Islam has to say about, and do with, gender. I follow in Fatima Mernissi's footsteps, but focus on a different time and place. My concern here is not with the

vision, intentions, and life of the Prophet Muhammad and his early followers, but rather with a Muslim community that, some thousand years later, spoke, wrote, and lived an Islamic tradition. I approach this material as a historian, a feminist, and a non-Muslim. I look at gender in two distinct ways.[10] First, gender is a *symbolic construction* produced, in this instance, by the Muslim thinkers who developed a consciously Islamic legal discourse on gender over the great breadth of time and space of Islamic history. I do not mean to suggest that this discourse was produced in isolation from a lived social world. On the contrary, the Muslim intellectuals who elaborated legal positions on the rights, power, and social responsibilities of men as men and women as women inhabited, and responded to, the society of which they formed a part. Their construction of gender as symbol cannot be isolated from the second aspect of gender—gender conceived of as a *social relationship.*

Gender as a social relationship is the product of the historical development of human experience, a relationship that changes, evolves, and adapts in rhythm with a changing society. We are fortunate to be able to draw, not only on the ruminations of prominent jurists (the *muftis*), but also on the minutes of actual proceedings of the Islamic courts in order to understand how legal thought developed in relation to the strategies that individuals pursued in court. Women and men pressed claims or defended interests on the basis of gender, and the court judges (*qadis*) and jurisconsults (*muftis*) molded their judgments and opinions in response to these laypeople's arguments and activities. Study of the court records, then, helps us to recognize the dynamics of interaction between scholarly legal discourse and the lived experience of the many Muslims, and non-Muslims as well, who brought their own expectations and understandings of gender and family to the Islamic courts. The courts witnessed the interaction between gender as symbol and gender as social relationship on a concrete level. Islamic legal discourse evolved in rhythm and reciprocity with the development of gendered social relations on the ground. Any study of the law must be a historical study, in the sense that social context—the ways in which the law was elaborated

in response to concrete social, economic, and political conditions—is of paramount importance.

LAW AS HISTORY

Until rather recently, Ottoman Syria and Palestine in the eighteenth century would not have been targeted as fertile ground for inquiry into the development of Islamic law: received wisdom has long held that jurists in this period applied the law in a mechanical fashion, in accordance with the idea that the "gate of *ijtihad*" had been closed, and that jurists therefore had no license to interpret the law in response to changing situations. The authoritative pioneers of Western scholarship on Islamic law, Joseph Schacht and J. N. D. Anderson, concurred that the late ninth century marked the end of the development of Islamic legal doctrine.[11] From that point forward, Muslim jurists worked with stable sacred texts and settled doctrine: their task was one of explaining and applying the law, not of interpreting it. The jurists no longer expended effort on mastering and interpreting God's law through the exertion of their mental powers of analysis: the main mental activity for jurists was not *ijtihad* (interpretation) but rather *taqlid*, the acceptance and application of the doctrines of established schools and jurists. Islamic jurisprudence (*fiqh*) had thus become a theoretical construct without history; the *usul al-fiqh*, the sources and methodology of the law, had become a form of arcane and mummified knowledge that had little or nothing to do with the social experiences of Muslims over the ensuing centuries. Actual legal practice, by contrast, continued to be shaped by all sorts of other influences, including local custom, political expedience, and the whims of local officials. The study of Islamic law was the study of cultural artifact, whereas the study of actual legal practice was the study of the vagaries of political and economic life.[12] Islamic law, the thinking went, would have nothing to tell us about the social history of a Muslim community.

Recent scholarship focusing on Islamic law and society, however, has sharply questioned such conclusions. First, the entire concept of the

"closing of the gates of *ijtihad*" has been thoroughly undermined. Wael Hallaq, in his "Was the Gate of Ijtihad Closed?" demonstrated that *ijtihad* was clearly a widely accepted practice throughout the Islamic centuries, though not necessarily so termed. Although the use of *ijtihad* was at times controversial, there was never a consensus that the law was no longer open to interpretation. Indeed, as Rudolph Peters argues elsewhere, a living tradition of *ijtihad* was pressed into the service of the Islamic movements of the eighteenth and nineteenth centuries. Muslim thinkers like Shah Wali Allah (d. 1762) and al-Sanusi (d. 1859) criticized blind adherence to any one legal school and viewed *ijtihad* not just as a permissible practice but as a responsibility of Muslims.[13] There is nothing particularly innovative, then, in the use Islamists and Reformers make of *ijtihad*. More important, the license some Muslim jurists exercised in interpreting the law opens the door to the possibility that legal doctrine was not in fact frozen, but rather was evolving in rhythm with social and political developments over the centuries.

A closer look at the actual mechanisms by which the law evolved suggests that it was not primarily changes in the texts of *usul al-fiqh* that allowed for doctrinal development, but rather innovation in other legal genres. Prior to the modern (and contested) codification of the shari'a, no one text or definitive set of texts embodied the whole of Islamic law. Like bodies of law elsewhere, Islamic law has had a long and vast textual life: through the medium of a number of different types of texts, Muslim thinkers have attempted to understand and implement God's law. Brinkley Messick, in his study of text and law in Yemen, points to the possibility of change and fluidity in a scholarly tradition based on a plurality of authoritative texts:

> Authoritative texts are as fundamental to the history of shari'a scholarship as they are to the history of other intellectual disciplines. Such a text was "relied upon" in a place and time: the knowledgeable consulted it, specialists based findings upon it, scholars elaborated its points in commentaries, teachers clarified its subtleties, students committed its passages to heart. . . . The

> fates of such texts were diverse, ranging from an enduring general prominence or more limited respect among the cognoscenti to a purely ephemeral authority and the all-but-forgotten status of the superseded.[14]

A Muslim jurist of, say, the early eighteenth century would be well acquainted with (and would have committed to memory large parts of) a number of authoritative texts—including the Qur'an, the *hadith* reports, works of *furu' al-fiqh* (the substantive Islamic law that was elaborated in a variety of texts, including the *mutun* or textbooks that summarized the doctrine of his own legal school) and the *shuruh* (commentaries on legal doctrine in relation to specific situations or problems)—as well as the collections of fatwas (the responsa or answers to specific legal queries) that had been delivered by previous jurists of his school and by others who enjoyed a reputation for learning and uprightness.

Some types of legal texts accommodated change and growth in legal doctrine, while others were fairly impermeable. Scholars accepted the Qur'an and the *hadith* reports as authoritative texts, not subject to any revision in substance or interpretation. And despite the persistence of the claim to *ijtihad*, there is little evidence to suggest that the *mutun* underwent any significant substantive development after the tenth and eleventh centuries. Indeed, according to Baber Johansen, Western scholars who based their theory of the steady-state character of Islamic law on their readings of *mutun* were not mistaken in their claims of continuity and conservatism. When we come to the *shuruh* texts, however, we begin to see some room for maneuver: in the process of commenting on the *mutun*, the jurists even within a given school of law demonstrate the possibility of multiple legal opinions about a particular doctrine. The commentaries offer different legal opinions concerning the interpretation of doctrine, thereby suggesting that schools of law can harbor more than one opinion on a given point. It is the fatwa collections, however, that are, for Johansen, the locus of doctrinal change.[15]

In a fatwa, the mufti (jurisconsult) responds to a question concerning the application of law to a specific problem confronting a member of his

community. In devising his answer, the mufti may review the relevant material from *mutun* and *shuruh* literature as well as citing fatwas from renowned muftis of his own legal school. He weighs and sifts these opinions in light of the details of the actual case before him and reaches a decision that may constitute a restatement of prior opinion or actually entail a shift in the interpretation of legal doctrine. In either case, there is little doubt that the mufti knew himself to be engaged in an enterprise of considerable mental effort in which he called upon not only his knowledge of the texts of his tradition but also his ability to deal with many internal contradictions in the tradition and interpret the meaning of these texts in the specific historical context before him. The resulting fatwa was not a binding legal judgment but rather a considered opinion, of an informational nature, that had no necessary outcome but might, of course, have a significant impact in a particular case and, moreover, on the law over time.[16]

Muftis did not proceed in their deliberations in an entirely random fashion. They were guided in their work by manuals that outlined both the qualifications a mufti should bring to the work of issuing fatwas and the procedures he should employ. An examination of manuals (*adab al-mufti*) of the Hanafi legal school from the fifteenth, sixteenth, and seventeenth centuries should leave us in no doubt that muftis were expected to have the training and knowledge necessary to take on a challenging task.[17] Although the manuals differ in details, they all include the requirement that a mufti be in control of the received texts, including the Qur'an, the *hadith*, the biographies of the companions of the Prophet, the key histories, and the texts essential to a mastery of the theory and principles of the law in general and of his own legal school in particular. In some cases, a mufti is also expected to know Arabic grammar, arithmetic, and the customs of the people of his community. The mufti acquires such knowledge to the end of developing his capacity for *ijtihad*, and although some authors of the manuals doubt whether individuals fully capable of interpreting the law can be found, there is no question that such is the mandate of the mufti. The mufti should be guided in the

process of interpretation, according to the manuals, by his clear recognition of a hierarchy of textual sources. When he evaluates legal texts, for example, the Hanafi mufti should privilege the writings of the eponymous founder of that school, Abu Hanifa (d. 767). The works of his disciples, Abu Yusuf, Muhammad b. Hasan, Zufur b. Hudhayl, and Hasan b. Ziyad, enjoy derivative authority and should be weighed in that order. When the mufti comes to make a decision, he draws on his knowledge of the texts and his capacity for interpretation; if he must choose between two equally valid positions, he should choose the one that is more convenient for his petitioner.

As scholars begin to pay more attention to the muftis and their fatwas, we are learning to appreciate the role the fatwa has played in the evolution of legal doctrine. In Hallaq's examination of a murder case in twelfth-century Cordoba, jurists applied the existing legal doctrine of the Maliki school and allowed the victim's brother and sons to demand the execution of the murderer as their right of retaliation. The victim's children were still in their legal minority, however, and therefore could not exercise their right to choose between retaliation and the payment of blood-money. Several Maliki jurisconsults and the Maliki judge in the case concurred that the doctrine pertaining to this case, elaborated by none other than Malik b. Aras himself, supported the position that the victim's agnates could act unilaterally as long as the children were still minors. At this juncture, a leading Maliki jurist of the time, Ibn Rushd, chose to issue a fatwa in which he acknowledged the existing legal doctrine but argued that the application of the doctrine in this case violated the principles of Islamic law: the jurists had failed to take into account the fact that the murderer was drunk at the time of the crime, the need to protect the rights of the minor children, and the Islamic preference for pardon over execution. Above all, he insisted in his fatwa on his responsibility as a legal thinker to exercise his mental powers:

> [Those seekers of knowledge] did not understand what lay behind my opinion, and they thought that the jurisconsult must not