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To Judge or Not to Judge: A Comparative Analysis of Islamic Jurisprudential Approaches to Female Judges in the Muslim World (Indonesia, Egypt and Iran)

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ARTICLE

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INTRODUCTION

In 941 A.D., Thumal al-Qahramana served in a judicial capacity after initially acting as an advisor to the Muslim head of state.¹ She is the first, and perhaps only, Muslim female judge or “Qadiya” referenced in scholarly discourse on religion, gender, and the law.²

Today, women serve in the judiciary in a number of Muslim majority societies, including the Sudan, Jordan, Palestinian territories, Bahrain, Egypt, Indonesia, United Arab Emirates, Tunisia, Turkey, Lebanon, and Morocco, among others.³ At least one country—Saudi Arabia—explicitly prohibits the appointment of women to the judiciary.⁴ And, while the majority

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1. See AISHA BEWLEY, *MUSLIM WOMEN: A BIOGRAPHICAL DICTIONARY* 157 (Abia Afsar-Siddiqui ed., 2004).

2. See, e.g., Nadia Maria El-Cheikh, *The Qahramana in the Abbasid Court: Position and Functions*, 97 *STUDIA ISLAMICA* 41, 53 (2003).

3. See Margaret Besheer, *For Muslim Women, Education, Economic Empowerment Are Keys to Better Life*, *VOICE AM. NEWS*, Mar. 5, 2007, available at 2007 WLNR 4233966; see also Dima Amr, *Legal Scholars, Religious Experts Debate Islam’s Position on Women Judges*, *MIDDLE E. NEWS ONLINE*, Oct. 1, 2000, available at 2000 WLNR 7948947; Bureau of Int’l Info. Programs, U.S. Dep’t of State, *Arab Women Judges and Lawyers Discuss Women’s Rights in Arab States*, IIP DIGITAL (Feb. 24, 2004), <http://iipdigital.usembassy.gov/st/english/article/2004/02/20040224092239ndyblehs0.695141.html#axzz2dHQSOQ4D>; Peter Kenyon, *Female Judges in Egypt Battle Against Old Ideas*, *NPR* (Apr. 3, 2010, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=125501126>; *UAE’s First Woman Judge Sworn-In*, *UAE INTERACT* (Aug. 10, 2008), http://www.uaeinteract.com/docs/UAEs_first_woman_judge_sworn-in/32305.htm; Salah Nasrawi, *Woman Pursues Egyptian Judgeship*, *ASSOCIATED PRESS*, July 14, 1998, <http://www.apnewsarchive.com/1998/Woman-Pursues-Egyptian-Judgeship/id-7f46e49d0e327a4c32a3b1ec2e31968c>; Ramadan Al Sherbini, *Egypt Appoints 31 Women Judges for the First Time*, *GULF NEWS* (Mar. 23, 2007), <http://gulfnews.com/news/region/egypt/egypt-appoints-31-women-judges-for-the-first-time-1.167750>.

4. See Ann Bayefsky, *UN Outrage over Human Rights Abuses Baldly Selective*, *CHI. SUN-TIMES*, Apr. 13, 2003, available at 2003 WLNR 18616099 (“The Special Rapporteur on the Independence of the Judiciary . . . finds: ‘Saudi Arabia does not permit women judges . . . It was believed that women were unlike men physically, emotionally and in

of Muslim countries have codified no such restrictions, a number have no women judges either.⁵ The subject is contentious and significant particularly amid fluid developments under the rubric of the so-called ‘Arab Spring’ and constitutional reform.⁶

This Article explores the question of women’s agency vis-à-vis a descriptive, comparative, and normative analysis of the experience of female judges in Muslim majority societies. Section I encompasses an introduction to core terms and concepts. Section II examines and catalogues the most prominent religious and cultural narratives used to facilitate women’s entry into and exclusion from the judiciary. Section III considers historical and contemporary experiences in Indonesia, Egypt, and Iran.⁷ The article concludes with a comparative analysis and normative discussion of the subject.

I. INTRODUCTION TO CORE TERMS AND CONCEPTS

A. *Islam and Its Law*

Islam is the third of the Abrahamic faiths, following Judaism and Christianity.⁸ It presently ranks as the world’s second largest religion with practitioners spread across a spectrum of geographically diverse regions.⁹ According to Islamic tradition, the Prophet Muhammad¹⁰ began receiving

thought and that only a small number of women had shown the intellectual maturity to become a judge.”).

5. See Amr, *supra* note 3; Kelleher, *supra* note 3; Kenyon, *supra* note 3; UAE’s *First Woman Judge Sworn-In*, *supra* note 3; Nasrawi, *supra* note 3.

6. See Mary Fitzgerald, ‘We Have Found Our Voice and It Feels Good’, IRISH TIMES, Aug. 25, 2012, at 5.

7. The majority of Muslims are either Sunni (eighty to ninety percent) or Shi’a (ten to twenty percent). For purposes of this Article, Indonesian and Egyptian societies are largely informed by Sunni legal tradition while Iran is predominantly Shi’a. See generally Pew Research Ctr. Forum on Religion & Pub. Life, *Mapping the Global Muslim Population* (Sandra Stencel et al. eds., 2009), [http://www.pewforum.org/Muslim/Mapping-the-Global-Muslim-Population\(6\).aspx](http://www.pewforum.org/Muslim/Mapping-the-Global-Muslim-Population(6).aspx).

8. See Engy Abdelkader, *Animal Protection Theory in U.S. and Islamic Law, A Comparative Analysis with a Human Rights Twist 4* (2013) (unpublished manuscript) (on file with author).

9. See Abdelkader, *supra* note 8.

10. All references to the Prophet Muhammad should be read as encompassing the parenthetical “peace be upon him.”

Divine revelation in the seventh century while residing in a largely pagan society on the Arabian Peninsula.¹¹ These revelations, depicted as having been conveyed to him by the angel Gabriel, occurred in a piecemeal fashion spanning a twenty-three year period,¹² and consisted of moral guidance and legal principles as well as instructive responses to developing events.¹³

Literally meaning “reading” or “recitation,”¹⁴ the Quran is comprised of these revelations to the Prophet Muhammad.¹⁵ The text consists of 114 separately titled chapters¹⁶ of varying lengths¹⁷ that do not adhere to any thematic order or arrangement.¹⁸ As such, Islamic scholars have characterized the Quran as an indivisible whole to be followed in its entirety.¹⁹

Since Muslims regard the Quran as the verbatim word of God, it represents the first source of moral guidance and Islamic law.²⁰

11. See Abdelkader, *supra* note 8; see also SUSAN A. SPECTORSKY, *WOMEN IN CLASSICAL ISLAMIC LAW: A SURVEY OF THE SOURCES* 4 (2011). Muslims regard the Prophet Muhammad as the seal to a long spiritual tradition inaugurated by the Prophet Adam and which also encompasses the guidance of Abraham, Moses, and Jesus, among other Messengers and Prophets.

12. See SPECTORSKY, *supra* note 11; see also MOHAMMAD HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 19 (3d ed. 2005). The Quran itself explains the rationale of graduality in its revelation in the following manner: “The unbelievers say, why has not the Quran been sent down to him [Muhammad] all at once. Thus [it is revealed] that your hearts may be strengthened, and We rehearse it to you gradually, and well arranged.” *QUR’AN*, Sūra XXV: Al-Furqan, verse 32. Therefore Quranic legislation was revealed piecemeal so as to avoid overwhelming and overburdening the faith’s new adherents. See SPECTORSKY, *supra* note 11. See generally WAEEL B. HALLAQ, *SHARIA: THEORY, PRACTICE, TRANSFORMATIONS* 31 (2009).

13. See HALLAQ, *supra* note 12, at 342; see also SPECTORSKY, *supra* note 11; KAMALI, *supra* note 12, at 16–17.

14. See KAMALI, *supra* note 12, at 16.

15. See *id.* (“The revelation of the Qur’ān began with the [Chapter] al-‘Alaq (96:1) starting with the words ‘Read in the name of your Lord’ and ending with the [verse] in [Chapter] al-Mā’idah (5:3): ‘Today I have perfected your religion for you and completed my favor toward you, and chosen Islam as your religion.’”); HALLAQ, *supra* note 12, at 39.

16. See KAMALI, *supra* note 12, at 17. Chapters are also known as “sūras.”

17. See *id.* (“The shortest of the sūras consist of four and the longest of 286 [verses].”).

18. See *id.* at 17–18 (“The [verses] on various topics appear in unexpected places, and no particular order can be ascertained in the sequence of its text.”).

19. See *id.* at 18.

20. See *id.* at 4.

It is interesting to note that while the Quran is held to yield legal certainty because it is believed to represent the literal expression of God, it does not represent a code of laws²¹ as often speculated. Rather, the text depicts itself as guidance to humankind.²² It is comprised of more than 6200 verses and less than one-tenth consists of legal material.²³ Indeed, there are approximately 350 verses relating to matters of legal importance, such as prohibiting the custom of female infanticide or unrestricted polygamy.²⁴ In fact, the crux of the text relates to belief, morality, and spirituality.²⁵

As the first and primary textual source of law,²⁶ the Quran articulates specific guidelines and general principles on major subjects of legal importance.²⁷ A ruling of the Quran may be conveyed in a text that is either unequivocal and clear, or in language that is susceptible to different interpretations.²⁸ A definitive text is one that is clear and specific with no other interpretations.²⁹ Scholars opine, however, that Quranic

21. See SPECTORSKY, *supra* note 11.

22. See Abdelkader, *supra* note 8, at 14. See generally, HALLAQ, *supra* note 12.

23. See KAMALI, *supra* note 12, at 25–26 (“There are close to 350 legal [verses] in the Qur’ān, most of which were revealed in response to problems that were actually encountered. Some were revealed with the aim of repealing objectionable customs Others laid down penalties with which to enforce the reforms that the Qur’ān had introduced.”).

24. See Abdelkader, *supra* note 8, at 4–5.

25. See KAMALI, *supra* note 12, at 26 (“Its ideas of economic and social justice, including its legal contents, are on the whole subsidiary to its religious call.”).

26. See Abdelkader, *supra* note 8, at 5; see also KAMALI, *supra* note 12, at 11–12. The Quranic verse provides the textual authority for all material sources of the Shariah, namely the Quran, the sunnah, consensus, and analogy. The ayah reads: “O you who believe, obey God and obey the Messenger, and those of you who are in authority; and if you have a dispute concerning any matter refer it to God and to the Messenger.” QUR’AN, Sūra IV: Al-Nisa, verse 58. “Obey God” in this ayah refers to the Quran as the first source and “and obey the Messenger” refers to the Sunnah of the Prophet, while “those of you who are in authority” authorizes the consensus of the ulema. See KAMALI, *supra* note 12, at 11–12.

27. See Abdelkader, *supra* note 8, at 19; see also KAMALI, *supra* note 12, at 16–17 (“[Some ulema] even say that [the Quran] is the only source and that all other sources are explanatory to the Qur’ān The revelation of the Qur’ān began with the sūra al-‘Alaq (96:1) starting with the words, ‘Read in the name of your Lord’ and ending with the *āyah* in sūra al-Mā’idah (5:3): ‘Today I have perfected your religion for you and completed my favour toward you, and chosen Islam as your religion.’ Learning and religious guidance, being the first and the last themes of the Qur’ānic revelation, are thus the favour of God upon mankind.”).

28. See KAMALI, *supra* note 12, at 27.

29. See *id.* at 27–28.

legislation consists largely of general principles.³⁰ The question of context, interpretation, and proper application is critical to gender rights discourse, as depicted further below.

Those Quranic verses establishing a general legal principle will require additional elaboration from the Sunnah or Hadith literature, the subsidiary source of religious law.³¹ The Sunnah encompasses the Prophet Muhammad's conduct.³² Believed to have led by word and deed, the Prophet Muhammad's conduct—or Sunnah—was emulated by his contemporaries.³³ During his lifetime the Prophet Muhammad explained and interpreted the Quran as lawgiver and adjudicator.³⁴ Following his demise, Muslims turned to the Prophet Muhammad's conduct as an authoritative source of moral, spiritual, and legal guidance.³⁵ The Sunnah is reflected in written narrations referred to as Hadith.³⁶

The hadith are comprised in canonical collections,³⁷ and often represent the substantive basis of scholarly knowledge concerning Islam's formative period.³⁸ An individual hadith typically consists of information concerning something the Prophet Muhammad did, said or affirmed through silence.³⁹ It also specifies the chain of individuals responsible for substantive transmission to ensure authenticity.⁴⁰

Significantly, disagreement surrounds the authenticity of particular hadith narrations even today.⁴¹ This is particularly

30. *See id.* at 38 (“The often-quoted declaration that ‘We have neglected nothing in the Book’ (al-An’ām, 6:38) is held to mean that . . . the general principles of law and religion are exhaustively treated in the Qur’ān.”).

31. *See* Abdelkader, *supra* note 8, at 5; *see also* KAMALI, *supra* note 12, at 28.

32. *See* Abdelkader, *supra* note 8, at 5; *see also* SPECTORSKY, *supra* note 11, at 4.

33. *See* SPECTORSKY, *supra* note 11, at 4.

34. *See id.*

35. *See id.* *See generally* HALLAQ, *supra* note 12.

36. KAMALI, *supra* note 12, at 29.

37. *See* JUDITH E. TUCKER, THEMES IN ISLAMIC LAW: WOMEN, FAMILY, AND GENDER IN ISLAMIC LAW 12 (Wael B. Hallaq ed., 2008).

38. *See* SPECTORSKY, *supra* note 11, at 7.

39. *See id.*

40. *See id.* (“In an *isnād* the person relating the *matn* of the tradition should have heard it from a reliable transmitter who in turn heard it from another, most likely slightly older, transmitter and so on, back to the person who is the subject of the *matn* or who first related it. An *isnād* that ends with ‘on the authority of the Prophet’ means that the *matn* reports an action, saying, or affirmation made by the Prophet himself.”).

41. *See* TUCKER, *supra* note 37.

relevant for the instant discourse because several hadith are frequently cited as legal authority to support a gender rights-restrictive position.⁴² The role of hadith, and lingering concerns about authenticity, are also examined below.

Nonetheless, the Hadith literature represents the secondary source of Islamic law.⁴³ While no Hadith enjoys the legal stature of a Quranic verse,⁴⁴ Hadith frequently complement and supplement the primary textual source.⁴⁵ Pursuant to this hierarchal legal framework, when confronted with a legal quandary, one initially engages the Quran for instruction.⁴⁶ In absence of Quranic guidance, one consults the Hadith literature.⁴⁷

In the event the Quran sets forth only a general principle, one turns to the Hadith for additional explication.⁴⁸ For these reasons, Hadith influenced the development of Islamic law⁴⁹—the narrations enhanced Quranic interpretation and comprehension, and also inspired insight concerning matters the Quran did not address.⁵⁰

Traditionally, interpretation of the Quran and Hadith were exclusive functions of trained Islamic jurists.⁵¹ It was his or her responsibility to interpret religious texts in accordance to time, circumstance, and the public interest.⁵² Further, they were required to engage the textual sources in proper historical context, with consideration to the circumstances and causes preceding the pertinent text.⁵³

These will prove to be significant considerations to the instant inquiry because interpretation of Islamic law's primary sources falls into one of two categories: gender rights restrictive

42. *See id.*

43. *See* Abdelkader, *supra* note 8, at 5.

44. *See id.*

45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.*

49. *See* TUCKER, *supra* note 37, at 12–13. It bears noting that in Shi'a Islam, the use of hadith is much more select, with only those traditions related by a sect's leaders or imams enjoying acceptance. *See id.*

50. *See* Abdelkader, *supra* note 8, at 5; *see also* TUCKER, *supra* note 37, at 13.

51. *See* KAMALI, *supra* note 12, at 30.

52. *See id.*

53. *See* JAMAL BADAWI, GENDER EQUITY IN ISLAM: BASIC PRINCIPLES 2 (1995).

or rights empowering interpretations. The former translates into harsh realities for significant segments of the world's Muslim female population, including those aspiring to the judiciary.

B. *The "Qadi" or Judge*

Insight into the judge's historical role, including qualifications and functions, may provide greater depth and understanding to contemporary challenges confronting Muslim women. Notably, the pre-modern Muslim judge functioned in a manner wholly distinct from his modern Western counterpart.⁵⁴

As an initial matter, mediation figured prominently in resolving disputes arising in pre-industrial Islamic societies.⁵⁵ These disputes encompassed quasi-legal matters as well as those arising between siblings or spouses.⁵⁶

Notably, the adjudicatory process was intertwined with the disputant's social realities.⁵⁷ Judges resolved conflicts by examining the broader social context in which they arose with an overarching goal of maintaining the parties' future social relationship.⁵⁸ This required judicial familiarity with, and a willingness to investigate the dynamics of, the relationship and history of exchanges between disputants.⁵⁹ This is because justice (as envisioned in classical Islamic law) not only required resolving a conflict, but doing so in such a manner that returns "people back into a position where they can, with the least adverse implications for the social order, continue to negotiate their own arrangements with one another."⁶⁰ The court of pre-

54. See HALLAQ, *supra* note 12.

55. See *id.* at 159.

56. See *id.*

57. See *id.* at 168–69 ("Every case was considered on its own terms, and defined by its own social context. Litigants were treated not as cogs in the legal process, but as integral parts of larger social units, structures and relations that informed and were informed by each litigant. The *qādi's* accommodation of litigants-as-part-of-a-larger-social-relationship was neither the purely customary mode of negotiation (prevailing in the pre-trial stage) nor the black and white, all-or-nothing approach (mostly prevailing in systems where the judge is socially remote from the disputants).").

58. See *id.* at 166.

59. See *id.*

60. See *id.* at 165–66 ("Nearly all else was subject to what one perceptive commentator labeled as 'separate justices,' whereby judges cared less for the application of a logically consistent legal doctrine or principle than for the creation of

industrial Islamic societies also provided a venue where justice was dealt regardless of the wealth, status, or identities of the disputants.⁶¹ The court was committed to universal principles of law, creating a legal culture defined by social and moral equity.⁶² It represented a venue anyone could utilize to resolve a conflict.⁶³ Absent from the picture are highly formalized processes and costly legal representation.⁶⁴ The judge was tasked with upholding these ideals.⁶⁵

While adjudicating matters, the judge was required to remain respectful of the parties and provide his undivided attention.⁶⁶ He was expected to recuse himself from cases involving friends or relatives to preserve impartiality.⁶⁷ In fact, to ensure the integrity of the court, a group of legal scholars attended the court sessions to oversee the proceedings.⁶⁸ The judge was permitted to review his predecessor's prior decisions as his were subject to review as well.⁶⁹

In addition to resolving disputes, the judge's typical activities included supervising charitable trusts; acting as a guardian over orphans; attending to public works; and leading Friday prayers and funeral prayers (an exclusively male

a compromise that left the disputants able to resume their previous relationships in the community and/or their lives as these had been led before the dispute began.”).

61. *See id.* at 167.

62. *See id.*; *see also* HAUWA IBRAHIM, PRACTICING SHARIAH LAW: SEVEN STRATEGIES FOR ACHIEVING JUSTICE IN SHARIAH COURTS 58 (2012) (“Caliph Ali Ibn Talib—the cousin and son-in-law of the prophet Muhammad and fourth of the ‘rightly guided Caliphs’ who succeeded the Prophet—was adopted by the prophet Muhammad and educated under his care. In one of Ali’s earliest declarations on the importance of an independent judiciary, he envisioned a judiciary that would be ‘above every kind of executive pressure or influence, fear or favor, intrigue or corruption.’ So important was this principle that some Muslim judges at that time were willing to be put to death, tortured, or dismissed rather than sacrifice the independence of their office.”).

63. *See* HALLAQ, *supra* note 12, at 167.

64. *See id.*

65. *See id.*

66. *See id.* at 343; *see also* IBRAHIM, *supra* note 62, at 58–59 (“Ali further remarked that a judge should ‘avoid fatigue, weariness, and annoyance at litigants. Understanding the nature of the case posited before him, [the judge] must consider all people equal before [them], in his court, so that the nobility will not expect to receive partial treatment and the humble will not despair for justice. The claimant must produce proof while the court will extract an oath of truth from the defendant.”).

67. *See* HALLAQ, *supra* note 12, at 343.

68. *See id.*

69. *See id.*

province), among other responsibilities.⁷⁰ Notably, the courts also functioned as judicial registries.⁷¹ Transfers of real and movable property, loans, manumissions, bonds of surety, business partnerships, marriages, divorces, estates, divisions of inheritance, and religious conversions, among other transactions, were all recorded at court and copies of the registry issued to the relevant parties.⁷²

Notably, the Quran and Hadith literature do not provide explicit provisions setting forth necessary qualifications or credentials concerning service in the judiciary—although Islamic scholars will later draw upon both of these textual sources to support opinions on the subject. The earliest judges appear to have been males who successfully served as tribal arbitrators.⁷³ As the Muslim community continued to develop, the court became a place of prestige and authority; this perception continues in some segments of the Muslim world, but not in others.⁷⁴ The judge's knowledge of religious legal doctrine earned him deference and authority.⁷⁵ In pre-Industrial Islamic societies, judicial service was viewed as fulfillment of a religious duty to ensure the administration of justice.⁷⁶

It is interesting to note that as the Islamic legal system evolved, judges would come to rely heavily upon “*Muftis*,” legal experts who issued “*fatwa*” or legal opinions representing an

70. *See id.* at 54.

71. *See id.* at 175.

72. *See id.*

73. *See id.* at 36.

74. *See id.* at 52.

75. *See id.*

76. *See* IBRAHIM, *supra* note 62, at 59 (“Caliph Umar ibn al-Khattab, one of the prophet Muhammad’s companions and the second rightly guided Caliph, noted that ‘[t]he office of the Judge is a definite religious duty, and as such, is a generally followed practice.’ He wrote to judges: ‘Administration of Justice is an essential service and practice of the Prophet, which must be followed. So strive to understand reasons put before you and enforce the judgment on the basis of truth whenever it is clear because there is no point laboring for truth without enforcing it. Treat all manner of people who appear before you as equals showing the equality in your demeanor to the parties, the sitting arrangements and the way you dispense justice, so that the weak will not despair and be frustrated about your ability to do justice and the noble will not take you for granted. The onus of proof is on him who makes a claim and the oath is on he who denies it.’” (quoting M. A. AMBALI, *THE PRACTICE OF MUSLIM FAMILY LAW IN NIGERIA* 98 (1998)).

authoritative statement of the law.⁷⁷ In practice, litigants frequently solicited such opinions from a *Mufti* prior to appearing in court, and that opinion was typically dispositive of the case outcome.⁷⁸ Often a litigant who could not secure a favorable opinion would not pursue his case in court.⁷⁹ In complex cases where such an opinion had not already been sought, the judge would request an expert opinion from the *Mufti*.⁸⁰

Over time, these legal opinions (as opposed to the court decisions) were collected and published.⁸¹ The collections represented comprehensive accounts of the law.⁸² Significantly, there is positive historical evidence of women issuing legal opinions, in a similar capacity as *Muftis*, including the Prophet Muhammad's wife, Aisha bint Abu Bakr—a fact that has been used to buttress arguments in favor of Muslim women judges, as depicted below.⁸³

However, the scholarly literature typically references judges, *muftis* and other legal experts as males.⁸⁴ Women are sometimes mentioned as expert witnesses in the realm of 'women's issues.'⁸⁵ They were perhaps most prominently litigants, exercising agency vis-à-vis the Islamic legal system by actively seeking appropriate redress for perceived grievances.⁸⁶ For instance, women appeared in court, argued vociferously and sought prompt payment of their dowry, alimony and child support payments and shares of inheritance.⁸⁷ As previously noted, however, the

77. See HALLAQ, *supra* note 12, at 177.

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.*

82. *See id.*

83. *See, e.g.,* MAULANA ABDUS-SALAM NADVI ET AL., BIOGRAPHIES OF THE WOMEN COMPANIONS OF THE HOLY PROPHET AND THE WAYS OF THEIR SACRED LIVES 42 (2000) ("[Aisha] used to issue 'FATWA' (legal decision under Islamic jurisprudence) during the Caliphats of Hazrat Abu Bakr, Hazrat Umar and Hazrat Uthman.").

84. *See* TUCKER, *supra* note 37, at 32.

85. *See id.*

86. *See id.* at 33.

87. *See* HALLAQ, *supra* note 12, at 168 ("Taking advantage of largely unrestricted access to the court in litigating pecuniary and other transactions, women asserted themselves in the legal arena in large numbers and, once there, they argued as vehemently and 'volubly' as men, if not more so.").

female judge is absent from scholarly inquiry and her reference prompts contentious debate.

II. *THE NARRATIVES*

Legal and juristic developments often represent social manifestations of prevailing attitudes, norms, and customs.⁸⁸ As in a number of societies, popular opinion in Muslim majority lands are influenced by various social, political, and, increasingly, religious considerations.⁸⁹ The influence of religion upon law and society has become increasingly pronounced following the events under the rubric of the ‘Arab Spring.’⁹⁰ Illustrative are the results of public opinion polling conducted by the Pew Research Center, for instance, finding that six in ten Egyptians desire laws strictly adhering to Quranic injunctions.⁹¹ Approximately a third desire adherence to Islamic principles but not necessarily strict conformance with the Quran, and only six percent believe that that the Quran should play no role.⁹² These statistics underscore the significance of religious narratives, liberal and conservative, particularly as they influence women’s lives and choices.

Islamic considerations are particularly dispositive of gender rights inquiries in the Muslim world.⁹³ For many Muslims

88. See Essam Fawzi, *Women Occupying Judiciary Positions in Egypt*, in *WOMEN JUDGES IN THE ARAB REGION: POINT, COUNTERPOINT* 21 (Abdel Moneim Muslim ed., 2001).

89. See *id.*

90. See *Most Egyptians Want Their Laws to Strictly Follow the Quran*, PEW RES. CTR., (Dec. 13, 2012), <http://pewresearch.org/databank/dailynumber/?NumberID=1647>.

91. See *id.*

92. See *id.*

93. See BADAWI, *supra* note 53, at 44–45. (“International bodies and women’s rights organizations tend to consider documents and resolutions passed in conferences as the ultimate basis and standard expected of all diverse peoples, cultures and religions. Committed Muslims, however, both men and women, believe in the ultimate supremacy of what they accept as God’s divine revelation (the Qur’an and authentic hadith). To tell Muslims that one’s religious convictions should be subservient to ‘superior’ man-made (or woman-made) standards or to secular humanism, is neither acceptable nor practical. Even if pressures, economic or otherwise, are used to bring about compliance with such resolutions or documents, the resulting changes are not likely to be deep-rooted and lasting. For Muslims, divine injunctions and guidance are not subject to a ‘voting’ procedure or to human election, editing, or whimsical modifications. They constitute, rather, a complete way of living within Islam’s spiritual, moral, social, political and legal parameters. Imposed cultural imperialism is not the solution.”).

around the globe—from conservatives to moderates to progressives—determining the acceptability of a practice largely depends upon the Islamic stance.⁹⁴ Moreover, this is also true of women whose choices are often influenced, to varying degrees, by these same considerations.⁹⁵ Note, many Muslim women who challenge the status quo are attacked as agents of ‘the West,’ ‘secular,’ or apostates.⁹⁶

This is no less true of the debate surrounding Muslim women judges. At times, the question of Muslim women judges evokes surprise at its even being posed; it provokes anger and consternation in others.⁹⁷ Let us now turn to the emerging narratives employed to facilitate women’s entry into and exclusion from the judiciary.

A. *The Rights Restrictive Stance*

This subsection identifies, catalogues, and describes the gender rights restrictive arguments challenging women’s ascension to the bench.

The first, the “Islamic School of Law Argument,” revolves around the majority opinion of the pre-modern Islamic jurists. By way of background, following the demise of the Prophet Muhammad, his companions and successors settled into numerous cities within the early Muslim empire attempting to incorporate Islamic beliefs and practices into existing legal institutions already in place.⁹⁸ Variations in custom and traditions characterized each of these townships, thus influencing the practice and interpretation of the law including the Quran and Sunnah.⁹⁹ Indeed, while there was often general agreement concerning the broad contours of the law, there were frequent disagreements about the most legally appropriate way to proceed in a specific circumstance.¹⁰⁰

94. See KECIA ALI, *SEXUAL ETHICS & ISLAM: FEMINIST REFLECTIONS ON QUR’AN, HADITH AND JURISPRUDENCE* xii (2008).

95. See Fawzi, *supra* note 88, at 21.

96. See ALI, *supra* note 94, at xiii.

97. See Fawzi, *supra* note 88, at 22.

98. See SPECTORSKY, *supra* note 11, at 13.

99. See *id.*

100. See *id.* at 13–14 (“Sometimes disagreement was between cities: the scholars of Kufa, for example, would disagree with those of Medina; at other times it was local, and the Kufans or the Medinese might disagree among themselves.”).

As a result of these early disagreements, a number of different schools of law (“*madhhabs*”) emerged—each of which was defined by foundational texts, teachings, and other scholarship consisting of rules and principles to assist subsequent scholars in deriving law.¹⁰¹ Each of the Sunni schools of law would come to be known by its eponymous¹⁰² founders: Abū Hanifa (767), Māalik b. Anas (795), Shāafi’ī (820) and Ahmad b. Hanbal (855).¹⁰³ Their teachings comprise the substantive material of classical Islamic law.¹⁰⁴

Notably, the teachings and principles espoused by these founding scholars continue to resonate today with each holding sway in a specific region of the Muslim world.¹⁰⁵ Even today, the pre-modern jurists’ opinions on the question of female judges continue to be cited to support rights restrictive positions. Indeed, the majority of the Sunni schools of law—Maliki, Shafii, and Hanbali—opine that judges must be male.¹⁰⁶ Only if there exists a pressing need, the Hanbali and Shafii schools elaborate, may women then serve in a judicial capacity.¹⁰⁷ Egyptian scholars have adopted the Hanafi position in recent years, while the Shafii school dominates in Indonesia, discussed in greater detail below.¹⁰⁸

101. *See id.* at 14 (“As part of this process, early on in the formative period, jurists developed a set of five qualifications into which all human acts can be divided. An obligatory act is a *fard* or a *wājib*. Performing it leads to reward, omitting it to punishment. At the other end of the scale are acts that are forbidden (*harām*) and lead to punishment. In between are those acts that are recommended (*mandūb* or *mustahabb*), neutral or indifferent (*mubāh*), and disapproved of (*makrūh*). These middle three categories, which provide room for nuance and interpretation, are the qualifications jurists were most concerned with evaluating.”).

102. *See id.* at 9. (“They are more properly referred to as eponymous founders, for they did not in any way claim to be establishing schools; rather, subsequent generations of students recorded their teaching and built on their works, thereby turning them retrospectively into the founders of the four Sunni *madhhabs*.”).

103. *See id.* (specifically, Hanafi, Maliki, Shafii and Hanbali).

104. *See id.* at 3.

105. *See* HALLAQ, *supra* note 12.

106. *See id.* at 342 n.3 (“The majority of the jurists, including the Twelver-Shi’ites, espoused the view that only a man can be a *qādi*.”).

107. *See* BADAWI, *supra* note 53; *see also* Fawzi, *supra* note 88.

108. *See* M.B. Hooker, *The State and Shari’a in Indonesia*, in *SHARI’A AND POLITICS IN MODERN INDONESIA* 33, 36 & 47 n.7 (Arskal Salim & Azyumardi Azra eds., 2003); *see also* Amina Elbendary, *Women on the Bench*, *AL-AHRAM WEEKLY ONLINE*, Jan. 9–15, 2003, <http://weekly.ahram.org.eg/2003/620/fr2.htm>

In contrast, the Maliki prohibition against female judges is unequivocal.¹⁰⁹ The Shiites, dominant in Iran, share the Maliki perspective.¹¹⁰ The majority view frequently relies on rights restrictive interpretations of the Quran to buttress their argument.¹¹¹

Indeed, the pre-modern Islamic scholars understood men and women as fulfilling distinct and complementary social roles, citing the primary textual sources to support a gender hierarchy.¹¹² Specifically, they cite one particular verse¹¹³ to find that the Quran designates men as the financial providers for a household—thus, as bread-winner, he enjoys ultimate legal rights of authority.¹¹⁴

This gendered division of social roles continues to spur debate. Moreover, it resonates beyond the domestic realm¹¹⁵: women are prohibited from assuming the role of financial provider, a role delegated exclusively to men.¹¹⁶ Further, since the verse presumably assigns men guardianship over women, some reasoned that women cannot undertake judicial authority because they could then exercise guardianship over men.¹¹⁷ This represents the Islamic School of Law Argument.

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.*

113. *See* TUCKER, *supra* note 37, at 24–25. Notwithstanding a number of egalitarian, non-discriminatory Quranic verses, one particular verse has proven critical to justifying the assignment of such social roles:

“Men are the managers of the affairs of women
For that God has preferred in bounty
One of them over another, and for that
They have expended of their property.”

For an egalitarian interpretation of this verse, see BADAWI, *supra* note 53..

114. *See* TUCKER, *supra* note 37, at 24 (“There are verses that have provided the basis on which to build gender hierarchies. Out of a total of 6,660 verses in the Qur’an, it has been argued that only six establish some kind of male authority over women.”). The six verses are 2:221, 2:228, 2:282, 4:3, 4:34, 24:30. *See id.* at 24 n.34.

115. *See id.* at 25 (“Although this was interpreted strictly speaking as a familial relationship, with no necessary implications for social roles outside the household, the construction of financial responsibilities as male and financial dependence as female, domestic authority as male and domestic subservience as female, inevitably resonated in the world outside the domestic sphere.”).

116. *See* Abd Al-Hamid Mayhoub, *Scope in Islamic Law for Women Judges*, in WOMEN JUDGES IN THE ARAB REGION: POINT, COUNTERPOINT, *supra* note 88, at 43, 45.

117. *See id.*

The pre-modern jurists also relied on Quranic text to assert the “Testimony Argument.” In doing so, they cite to a singular verse¹¹⁸ distinguishing male and female testimony in financial matters to assert more broadly that female testimony is tainted with disability.¹¹⁹

As a result, particular gender hierarchies prevailed concerning testimony in court.¹²⁰ Men were thought to be superior to women because their testimony was not regarded as equal.¹²¹ The jurists accepted female testimony in property cases but in the circumstance of conflicting evidence, some jurists opined that the testimony of two men was superior to that of a man and two women.¹²² By extension, the pre-modern jurists and a number of contemporary women’s rights detractors argue that women cannot preside over a court in which her testimony is not accepted.¹²³

Indeed, detractors have adopted an expansive reading of this singular verse to support patriarchal notions about female competency, valuation and intellect more generally. Illustrative

118. See BADAWI, *supra* note 53, at 33–34; see also MUHAMMAD FAROOQ-I-AZAM MALIK, *ENGLISH TRANSLATION OF THE MEANING OF AL-QUR’AN* 146–47 (2d ed. 1997) (“O believers! When you deal with each other in lending for a fixed period of time, put it in writing. Let a scribe write it down with justice between the parties. The scribe, who is given the gift of literacy by Allah, should not refuse to write; he is under obligation to write. Let him who incurs the liability (*debtor*) dictate, fearing Allah his Rabb and not diminishing anything from the settlement. If the borrower is mentally unsound or weak or is unable to dictate himself, let the guardian of his interests dictate for him with justice. *Let two witnesses from among you bear witness to all such documents, if two men cannot be found, then one man and two women of your choice should bear witness, so that if one of the women forgets anything the other may remind her.* The witnesses must not refuse when they are called upon to do so. You must not be averse to writing (*your contract*) for a future period, whether it is a small matter or big. This action is more just for you in the sight of Allah, because it facilitates the establishment of evidence and is the best way to remove all doubts; but if it is a common commercial transaction concluded on the spot among yourselves, there is no blame on you if you do not put it in writing. You should have witnesses when you make commercial transactions. Let no harm be done to the scribe or witnesses; and if you do so, you shall be guilty of transgression. Fear Allah; it is Allah that teaches you and Allah has knowledge of everything.” (emphasis added)).

119. See TUCKER, *supra* note 37, at 143–44.

120. See *id.*

121. See *id.*

122. See *id.*

123. See, e.g., Nasrawi, *supra* note 3 (“As for the law, many of Lashin’s opponents base their arguments on the Koran, the Muslim holy book. It stipulates that two women are equal to one man if they are called as witnesses in a court. So, by analogy, they say, a woman cannot be a judge as long as she cannot be a witness by herself.”).

are the reformed legal codes of Jordan, Libya, and Yemen, where a valid marriage contract requires proper witnesses—either two men or one man and two women.¹²⁴ The Quranic verse in question pertains to financial transactions.

Pursuant to the “Nature Argument,” women’s judicial exclusion is justified on account of an emotional nature that renders them incapable of judicial administration in an objective and decisive manner.¹²⁵

Relatedly, the “Physiological Differences Argument” renders women unqualified for judicial posts due to various aspects of their physiology. First, judicial administration may cause preventable injury to an unborn child and/or the expectant mother.¹²⁶ Second, maternity leave will cause undue delays to the court’s administration.¹²⁷ Third, women are unfit to hold judicial office because menstruation symptoms leave them “nervous, unstable, and prone to sudden changes.”¹²⁸

124. See TUCKER, *supra* note 37, at 167 (“And, in some circles, the notion that women make poor witnesses because of sex-linked mental deficiencies has yet to die out. Abou El Fadl cites a fatwa delivered by the Saudi jurist Ibn Baz in 1990, as part of his work with the Permanent Council for Scientific Research and Legal Opinions, which discusses the issue of female witnessing, and particularly the requirement for two female witnesses in the place of one male, in the following terms: ‘Thus, the Prophet explained that their [women’s] intellectual deficiency is in the fact that their memory is weak, and that their testimony needs the corroboration of another woman.’ Abou El Fadl is also careful to note that the Council is an official body and its fatwas carry real weight in the Saudi legal system.”).

125. See Hanim Muhammad Hassan, *Women Assuming Judgeships in Islamic Jurisprudence and Egyptian and International Law*, in WOMEN JUDGES IN THE ARAB REGION: POINT, COUNTERPOINT, *supra* note 88, at 11, 12; Fawzi, *supra* note 88, at 26 (in connection to a survey on Muslim women judges: “The conditions stipulated by the respondents differed, yet most of them indicated a lack of confidence in the ability of women to fulfill such a role, thus agreeing with those who completely refused the issue. Among these conditions were the necessity of female judges being decisive, wise, not changing decisions, and not allowing emotions to rule decisions. Others stipulated that someone must assist female judges in making decisions, and that they may not issue a judgment until after they have discussed the case with others.”).

126. See Hassan, *supra* note 125, at 13.

127. See Fawzi, *supra* note 88, at 29.

128. See *id.* (“This conception of women’s deficiencies was expressed by one of the Islamic leaders in the fifties when he said, ‘from a realistic point of view, a judge must be committed to work throughout the year and may be granted only a limited number of weeks vacation in the summer. If a woman were to be a judge or a prosecuting attorney, what would she do about menstruation, which takes a week of every month? Everyone knows the weak psychological state of women during menstruation. What would she do if the disturbances of pregnancy in its final months

The “No Positions of Authority Argument” characterizes judgeships as a form of public authority for which women are unqualified.¹²⁹ One particular Hadith is commonly cited as evidentiary support: “Abu Bakr attested, ‘when the Prophet, PBUH, learned that the Persians were ruled by a princess he said, ‘those who appoint a woman over them will not succeed.’”¹³⁰

The principle thus derived is a general prohibition against women assuming positions of sovereign power, and the judiciary is viewed as an extension of such power.¹³¹ Women’s rights detractors accuse women holding such authority with committing a sin.¹³²

The following sentiment is illustrative of the “Misogynist, anti-Education Argument”:

What would Ibn al-Thayna’ [e.g. premodern jurist] say were he to know that the notion of women occupying judgeships was being discussed? In his work known as ‘the correctness of prohibiting women from writing’ he said, ‘As for teaching women reading and writing, God forbid, I see nothing more dangerous for them. They are predisposed to treachery and thus for them to obtain this talent would be for them to obtain the greatest means of evil and corruption. As soon as women are able to compose in writing, there would be a letter to Zayd and a note to Amr and a line of poetry to Azab and something else to another man. Women and writing is like an evil man given a sword, or a drunkard who is given a bottle of spirits. Men who keep their wives in a state of ignorance and blindness are sensible, as this is more suitable for them and more useful.’¹³³

Here, preserving a woman’s chastity and honor is directly linked to stymying educational and professional achievement.¹³⁴

The “Protectionist Argument” reasons the exclusion of women from the judiciary helps preserve their dignitary and

darken her mood and wear out her nerves and thus she becomes ill-tempered and unfit for the serious trusteeship of the judiciary?”).

129. See Mayhoub, *supra* note 116, at 43.

130. See *id.*

131. See *id.*

132. See *id.* at 44.

133. See Fawzi, *supra* note 88, at 21.

134. See *id.*

reputational interests against base, immoral men.¹³⁵ Further, the “Deficient Intellect Argument” views women as intellectually inferior AND, thus, inherently incapable of fulfilling judicial functions.¹³⁶ Finally, two additional arguments revolve around women’s alleged inability to issue the death penalty in criminal matters and cultural exceptionalism (e.g. distinguishing it from other cultures where female judges have flourished).¹³⁷

B. *The Rights Empowering Stance*

It is interesting to note that the rights empowering arguments in favor of female judges often represent counterarguments to those set forth above. For instance, gender rights proponents counter the “Nature Argument,” by re-characterizing women’s emotional state as an attribute.¹³⁸ Rather than challenge the false assumption underlying the argument (i.e., all women are inherently emotional), they give it further credence by asserting that women’s innate nature enhances their adjudicatory potential because they are more likely to give due regard to all humane considerations.¹³⁹

Another strand of the Nature counterargument asserts judges are bound by the Rule of Law and, where flouted, higher tribunals may review and rectify lower court decisions accordingly.¹⁴⁰ This procedural mechanism encourages judges to adhere to legal precedents, doctrines and texts.¹⁴¹ With respect to women’s physiology, proponents challenge the menstruation

135. See Mayhoub, *supra* note 116, at 44.

136. See *id.* The following sentiment is illustrative of the lack of intellect argument: “Furthermore, the judiciary demands full thought and mental awareness. Women are not fully capable of this, and are too weak to arrive at a decision of refusal or defense, or face the problems and difficulties of judging with sureness and composition. Women are considered to be lacking in religion and intellect.” *Id.*

137. See *id.* According to the cultural exceptionalism argument, proponents assert their society has its own special customs and values.

138. See Hassan, *supra* note 125, at 12.

139. See *id.* Essentially, they argue the following: “Emotion refines the senses and sensibilities and increases a perception of fairness. Judging in lawsuits does not require that the judge be hardened or oppress emotions and disregard humane considerations. Legislators often pay heed to such considerations when determining legislative texts, taking into consideration extenuating circumstances and extreme circumstances.” *Id.*

140. See *id.*

141. See *id.*

myth by characterizing it as a temporary state while citing to a variety of diseases and illnesses that may afflict sitting judges.¹⁴²

Significantly, gender rights advocates also leverage rights empowered Quranic interpretations.¹⁴³ They promote equal participation, collaboration, and contribution in the public sphere¹⁴⁴ by citing to gender equitable Quranic verses.¹⁴⁵

142. *See id.* at 13 (“If this opinion were sound, women would not be fit for any kind of work at all.”).

143. *See* BADAWI, *supra* note 53, at 9–10 (“The Quran states, ‘And their Lord has accepted of them and answered them: ‘Never will I suffer to be lost the work of any of you, be he/she male or female: you are members one of another . . .’ (Quran 3:195); ‘If any do deeds of righteousness, be they male or female, and have faith, they will enter paradise and not the least injustice will be done to them.’ (Quran 4:124); ‘For Muslim men and women, for believing men and women, for devout men and women, for true men and women, for men and women who are patient and constant, for men and woman who humble themselves, for men and women who give in charity, for men and women who fast (and deny themselves), for men and women who guard their chastity, and for men and women who engage much in Allah’s praise — for them has Allah prepared forgiveness and great reward.’ (Quran 33:35); ‘One Day you shall see the believing men and the believing women, how their Light runs forward before them and by their right hands. (Their greeting will be): ‘Good News for you this Day! Gardens beneath which flow rivers! To dwell therein forever! This is indeed the highest Achievement!’ (Quran 57:12).”).

144. *See id.* at 37 (quoting the Quran as stating: “The believers, men and women, are protectors, one of another: they enjoin what is just and forbid what is evil: they observe regular prayers, practice regular charity and obey Allah and His apostle. On them will Allah pour His mercy; for Allah is Exalted in power, Wise.” (Quran 9:7)).

145. *See id.* at 11 (noting that these proponents argue that the Quran is quite clear about the issue of the claimed superiority or inferiority of any human, male or female, and quoting the Quran: “O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that you may know each other. Verily the most honored of you in the sight of God is (one who is) the most righteous of you. And God has full knowledge and is well acquainted (with all things).” (Quran 49:13). Further, variations in gender, languages, and ethnic backgrounds and by implication, religious claims, do not provide any basis for superiority or inferiority. The implication of “that you may know each other” (Quran 49:13) is that such variations constitute a deliberate mosaic that God created, which is more interesting and more beautiful than a single “color” or a “unisex”. There is a clear categorical statement that the most honored person in the sight of God is the one who is most pious and righteous. This precludes any other basis for superiority, including gender. *See* BADAWI, *supra* note 54. They observe that the verse states that all human beings are created *min thakarin wa-untha*, which can be translated literally as “of male and female”. This means in pairs, as the Quran explicitly mentions elsewhere (e.g. 78:8). Each component of the pair is as necessary and as important as the other and hence is equal to him or her. The wording of this verse has been commonly translated also as “from a (single pair of) a male and a female,” referring to Adam and Eve. This serves as a reminder to all that they belong to the same family, with one common set of parents. As such they are all equal, as brothers and sisters in that broad and “very extended” family.”).

Further, they point to the Quran's silence concerning judicial appointments, qualifications, or responsibilities.¹⁴⁶ In absence of an explicit prohibition against female judges—and in light of the Islamic legal maxim that all things are permitted except what is expressly forbidden—they argue in favor of legal permissibility.¹⁴⁷

These proponents also challenge the legitimacy of rights restrictive interpretations of the Quran, seeking to recast the verses in a new interpretative light.¹⁴⁸ Further, they argue that traditional understandings of the Quran rendering men as leaders in the household should not be extended to the political or legal spheres.¹⁴⁹

As to the alleged disability tainting female witness testimony, gender rights advocates claim that related Quranic references are largely gender neutral.¹⁵⁰ There is one Quranic

146. See KAMALI, *supra* note 12, at 31; see also Fawzi, *supra* note 88, at 22 (“[He] drew his conclusions from the saying of God Almighty, ‘God commands you to deliver trusts back to their owners; and when you judge between the people, that you judge with justice.’ (Surat al-Nisaa’, Verse 58) This discourse is directed at men, women, slaves, and freemen, for the religion is one.”).

147. See KAMALI, *supra* note 12, at 31 (“Others maintain that where the Quran sets forth general principles, it is the Islamic scholars’ responsibility to organize state affairs, including details surrounding the judiciary, in accordance with time and circumstance. Similarly it is also argued that no jurist is able to point to an explicit text in the Quran that categorically excludes women from any lawful type of employment, including the judiciary. Similarly it is also argued that no jurist is able to point to an explicit text in the Quran that categorically excludes women from any lawful type of employment, including the judiciary.”).

148. See, e.g., BADAWI, *supra* note 53. For instance, the Quran is frequently cited to support the proposition that men are superior to women. With regard to the verse quoted in its entirety above, proponents argue that nowhere does the Quran state that one gender is superior to the other. Some interpreters of the Quran mistakenly translate the Arabic word *qiwamah* (responsibility for the family) to the English word “superiority.” The Quran makes it clear that the sole basis for superiority of any person over another is piety and righteousness, not gender, color, or nationality.

149. See *id.* at 38 (with respect to female leadership: “some may argue that according to the Quran (4:34), men are the protectors and maintainers of women. Such a leadership position (responsibility, or *qiwamah*) for men in the family unit implies their exclusive leadership in political life as well. This analogy, however, is far from conclusive. *Qiwamah* deals with the particularity of family life and the need for financial arrangements, role differentiation, and complementarity of the roles of husband and wife (some scholars even contest this interpretation). These particularities are not necessarily the same as the head of state.”).

150. See *id.* at 33–34 (“And for those who launch a charge against their spouses and have (in support) no evidence but their own, their solitary evidence (can be received) if they bear witness four times (with an oath) by Allah that they are solemnly

verse, however, that equates the testimony of two women to a single male in financial matters.¹⁵¹ Gender rights advocates counter that the verse must be understood in proper historical context.¹⁵² Whereas women were not familiar with complex financial transactions due to lack of female participation in that area some 1500 years ago,¹⁵³ this is no longer the reality.¹⁵⁴ The underlying assumption concerning women's deficient financial

telling the truth; And the fifth (oath) (should be) that they solemnly invoke the curse of Allah on themselves if they tell a lie. But it would avert the punishment from the wife if she bears witness four times (with an oath) by Allah that (her husband) is telling a lie; And the fifth (oath) should be that she solemnly invokes the wrath of Allah on herself if (her accuser) is telling the truth (Quran 24:6-9).”.

151. *See id.* at 34–35 (quoting the Quran as stating: “O you who believe! When you deal with each other in transactions involving future obligations in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between the parties: Let not the scribe refuse to write: as Allah has taught him, so let him write. Let him who incurs the liability dictate, but let him fear his Lord, Allah, and not diminish aught of what he owes. If the party liable is mentally deficient, or weak, or unable himself to dictate, let his guardian dictate faithfully. And get two witnesses out of your own men, and if there are not two men, then a man and two women, such as you choose for witnesses so that if one of them errs, the other can remind her. The witnesses should not refuse when they are called on (for evidence). Disdain not to reduce to writing (your contract) for a future period, whether it be small or big: it is more just in the sight of Allah, more suitable as evidence, and more convenient to prevent doubts among yourselves, but if it be a transaction which you carry out on the spot among yourselves, there is no blame on you if you reduce it not to writing. But take witnesses whenever you make a commercial contract; and let neither scribe nor witness suffer harm. If you do (such harm), it would be wickedness in you. So fear Allah; for it is Allah that teaches you. And Allah is well acquainted with all things (Quran 2:282).”).

152. *See* ALI, *supra* note 94, at xxvi (“In engaging with Muslim texts of the past, it is important to consider the ways in which their authors’ base assumptions differ from those of the present.”).

153. *See* TUCKER, *supra* note 37, at 142 (“[This view seems to be buttressed by the fact that the Sunni] jurists recognized that there were certain legally relevant facts that were likely to be known by women alone, such as matters related to childbirth. Establishing the paternity of the child by fixing the date of its birth, or ascertaining whether a baby were stillborn or had lived at least briefly outside the womb, had implications for inheritance and other legal claims. Although the jurists differed as to how many witnesses were required in these cases – Hanafis were satisfied with one or two and Shafi’is insisted on four – they all acknowledged that female testimony alone provided sufficient evidence, often citing a hadith narrative for support.”).

154. *See* Hassan, *supra* note 125, at 17 (“Rather as Shaykh Muhammad Abdu said, it is not among the concerns of women to deal with finances and the like in terms of compensation. Thus, women’s memory is weak in this regard [because it is presumed she is not familiar with finances] unlike their memory concerning household matters which is their field of work and for which their memory is better than men’s. It is human nature to have a strong memory in matters of concern in which one is active. The Shaykh added that there are cases in which the sole witness of women are accepted.”).

expertise no longer holds true—thus, as historical context evolves, so should the formula for male and female witnesses.¹⁵⁵ Indeed, the testimony of a female graduate of the Wharton business school is arguably more credible than that of an illiterate male with no such credentials.¹⁵⁶

In addition, gender rights proponents challenge the Testimony Argument by citing to historical female roles as transmitters of the Prophet Muhammad's statements as set forth in the Hadith literature.¹⁵⁷ Significantly, hadith transmission and court testimony both involve the conveying of factual events thus undermining assertions concerning female disability in testimony.¹⁵⁸

It is significant to note that the Shii outlook on female testimony, dominant in Iran, appears to be more expansive,

155. See TUCKER, *supra* note 37, at 162 (“By the late twentieth century, an eminent Islamic jurist could make this argument in a very explicit fashion, stating that the requirement that a female witness ‘be reminded’ by another woman could fade away, because ‘once society passes beyond that stage and women are allowed to participate more fully in its affairs, and in transactions in particular, there should no longer be a need for such arrangements.’” (quoting Taha J. al-Alwani, *The Testimony of Women in Islamic Law*, 13 AM. J. ISLAMIC SOC. SCI. 173, 174 (1996))).

156. See *id.* at 159–61. (“The late nineteenth- and early twentieth-century reformist jurists engaged these questions of the female legal subject with an eye to explaining, and minimizing, the differences between men and women as legal actors. . . . The reformers wrestled with the Qur’anic formula of two women to one man and the implications it held for female competency. Both Rida and al-Haddad took the position that the Qur’anic verse 2:282 was not a pronouncement on the limitations of Woman as a legal or moral subject, but rather a recognition of certain anthropological realities bounded in space and time. Al-Haddad cited her lack of instruction and her inexperience in business matters at the time of the revelation as key to the correct interpretation of the verse. Rida concurred, and leveled criticism at those interpreters who hold that women are liable to err or forget because of defects in rationality and religion or their innate temperament. Rather, according to Rida, it was their lack of familiarity with business transactions that affected their memory, because it is in the nature of human beings to remember details of those things with which they are most familiar.”).

157. See Al Bayoumi Abdou Bayoumi, *Islamic Law and Permissibility of Women Being Judges*, in WOMEN JUDGES IN THE ARAB REGION: POINT, COUNTERPOINT, *supra* note 88, at 53, 56.

158. See *id.*; see also SPECTORSKY, *supra* note 11, at 192 (“There is also unanimity that only women and never men can be witnesses for things men are not privy to, in particular childbirth and questions asked about women’s bodies which can be answered only if women examine other women ‘between the navel and the knee.’”).

permitting women to testify in a spectrum of cases ranging from debt collection to criminal matters.¹⁵⁹

Sunni Islamic law and normative Muslim practices are also informed by historical precedents from the faith's formative period, as previously noted above. Following the demise of the Prophet Muhammad, four men who were closely associated with him—Abu Bakr, Umar ibn al-Khattab, Uthman, and Ali—led the Muslim community successively.¹⁶⁰ Commonly referenced as the “rightly guided caliphs,”¹⁶¹ their conduct is often cited as instructive, including on matters related to proper Muslim female roles.¹⁶² These and other precedents¹⁶³ are frequently leveraged by women's rights activists to counter adverse narratives negating female authority.¹⁶⁴ Particularly illustrative is Umar ibn Al-Khattab's appointment of a woman, Al-Shifaa, to oversee the marketplace and guard consumers against unsavory business practices.¹⁶⁵ In fact, she was so successful in her post that he appointed another woman, Samra bint Nahik Al-Asadiya,

159. See TUCKER, *supra* note 37, at 142 (“Some Shi'a were also open to the possibility that women could testify in all kinds of cases, including *hudud* cases, although some of the penalties might be reduced if the case rested on a plurality of female witnesses.”).

160. See SPECTORSKY, *supra* note 11, at 5.

161. *Rightly Guided Caliphs*, OXFORDREFERENCE.COM, <http://www.oxfordreference.com/view/10.1093/acref/9780195305135.001.0001/acref-9780195305135-e-0687> (last visited Feb. 12, 2014).

162. See SPECTORSKY, *supra* note 11, at 5.

163. See CLINTON BENNETT, MUSLIM WOMEN OF POWER: GENDER, POLITICS AND CULTURE IN ISLAM 39 (2010) (“In *The Forgotten Queens of Islam* (1993), Mernissi set out to show that Muslim women had in fact occupied positions of power before Benazir. The stories of these women go unsung, rubbed out ‘of official history.’ They are nonetheless available in ‘yellowed’ tomes. She recounts the stories of women who at times in Muslim history exercised power, often against the odds, sometimes through intrigue. As well as regents ruling for infant sons, there were women who ruled in their own right. The problem for men in contemporary times is that women's entry into the public domain breaks convention, shattering the veil designed to separate them.” (citations omitted)).

164. See Fawzi, *supra* note 88, at 28 (“Slightly less than half the sample stated that there are no historical cases of women holding judgeships, and 16.6 affirmed that there have been. However, when they were asked to give examples most of them mentioned cases in which women played a military role or decreed a fatwa (the name of Aisha was oft repeated).”).

165. See BADAWI, *supra* note 53, at 18–19. See generally WOMEN JUDGES IN THE ARAB REGION: POINT, COUNTERPOINT, *supra* note 88.

to serve in a similar capacity in a distinct jurisdiction.¹⁶⁶ These precedents belie the notion that women cannot effectively serve in positions of public authority.

In addition to serving in such administrative positions, Muslim women also participated in the selection of political leaders, legislation, scholarship and instruction, and on the battlefield.¹⁶⁷ Gender rights advocates leverage such historical precedents to undermine narratives concerning the lack of propriety of women serving in positions of authority,¹⁶⁸ and more specifically, administering justice from the bench.¹⁶⁹

Related, gender rights advocates have employed the “Mufti Argument” referring to historical Muslim women roles as *Muftis* who played a critical role in judicial administration. In her capacity as *Mufti*, she collected relevant information, engaged in analogical reasoning and analysis, and rendered an appropriate ruling.¹⁷⁰ As depicted above, the *Mufti*’s legal opinions were frequently dispositive of a case’s outcome.¹⁷¹ Leveraging such historical precedent, advocates question the logic underlying arguments against female judges who convey decisions in a similar manner to the *Mufti*.¹⁷²

166. See Fawzi, *supra* note 88, at 23; see also, Gretel C. Kovach, *After 50 Year Fight, Women Get the Gavel*, CHRISTIAN SCI. MONITOR, Jan. 7, 2003, <http://www.csmonitor.com/2003/0107/p01s03-wome.html> (“These days, the Brotherhood is sponsoring female candidates for parliament, as long as they’re veiled, and Egyptians are using Islam to argue for the expansion of women’s rights, citing role models like the woman appointed judge by the second Caliph Omar Ibn Khattab.”).

167. See BADAWI, *supra* note 53, at 32. (“The near or total seclusion of women is alien to the prophetic period. Interpretative problems in justifying seclusion reflect, in part, cultural influences and circumstances in different Muslim countries. There is ample evidence in authentic (sound) hadith supporting this thesis. Women at the Prophet’s time and after him participated with men in acts of worship, such as prayers and pilgrimage, in learning and teaching, in the market place, in the discussion of public issues (political life) and in the battlefield when necessary.”).

168. See *id.* at 38–39. (“Most arguments for exclusion, however, are based on the following hadith narrated by Abu Bakrah: ‘During the battle of Al-Jamal (in which A’isha, the Prophet’s widow, led an army in opposition to Ali, the fourth Caliph), Allah benefitted me with a word. When the Prophet heard the news that the people of Persia had made the daughter of Khosrau their queen (ruler), he said, “Never will such a nation succeed as makes a woman their ruler.””).

169. See Bayoumi, *supra* note 157, at 56.

170. See *id.*

171. See *id.*

172. See generally WOMEN JUDGES IN THE ARAB REGION: POINT, COUNTERPOINT, *supra* note 88.

Advocates also rely on egalitarian Hadith narrations to counter restrictive sentiments seemingly grounded in religious ideology.¹⁷³ With regard to the Hadith prohibiting female leadership, gender rights proponents¹⁷⁴ question its authenticity and broad application while asserting that it does not represent a categorical exclusion of women to leadership positions.¹⁷⁵

173. See BADAWI, *supra* note 54, at 30–31. Note how this hadith is ignored but others used to detract from women's rights: "According to Prophet Muhammad's (P) saying, 'Women are but sisters (*shaqa'iq*, or twin halves) of men.' This hadith is a profound statement that directly relates to the issue of human equality between the genders. If the first meaning of *shaqa'iq* is adopted, it means that a male is worth one half of society with the female worth the other half. Can 'one half' be better or bigger than the other half? Is there a more simple but profound physical image of equality? If the second meaning, 'sisters,' is adopted, it implies the same. The term "sister" is different from 'slave' or 'master.' [] Prophet Muhammad (P) taught kindness, care and respect toward women in general ('I commend you to be kind to women'). It is significant that such instruction of the Prophet (P) was among his final instructions and reminders in the 'farewell pilgrimage' address given shortly before his passing away." *Id.*

174. See BENNETT, *supra* note 163, at 38. ("Turning to a detailed study of what she calls the 'conversation stopper'—the *hadith* that no people prosper who entrust their affairs to a woman—cited when Benazir was running for office, Mernissi notes how this was suddenly remembered after Ayesha's failed coup against Ali in 656. The fact that a woman had led what was regarded as the first *fitna* (civil war) gave men an excuse to speculate that female leadership results in chaos. *Hadith* were often invented to add authority to men's opinions. Mernissi suggests that this is exactly what Abu Bakra, the narrator did. Ayesha was pardoned, remaining an honored mother of the believers. Women, though, were discouraged from taking part in public life, secluded, and reserved for domestic, child-rearing duties. Mernissi argues that this departed from earlier tradition when Muhammad consulted women and preached gender equality. His wives' advice was often the deciding factor in 'thorny negotiations'. It was after his death that misogyny 'very quickly reasserted itself'. She writes of Muhammad's time as one in which women 'had their place as unquestioned partners in a revolution that made the mosque an open place and the household a temple of debate'. No few *hadith* express Muhammad's fondness for women, such as 'paradise lies at the feet of a mother.' (footnotes omitted)).

175. See BADAWI, *supra* note 53, at 39 ("While this hadith has been commonly interpreted to exclude women from the headship of state, other scholars do not agree with that interpretation. The Persian rulers at the time of the Prophet (P) showed enmity toward the Prophet (P) and toward his messenger to them. The Prophet's response to this news may have been a statement about the impending doom of that unjust empire, which did take place later and not about the issue of gender as it relates to headship of the state itself. Z. Al-Qasimi argues that one of the rules of interpretation known to Muslim scholars is that there are cases in which the determining factor in interpretation is the specificity of the occasion (of the hadith) and not the generality of the wording. Even if the generality of its wording is to be accepted, that does not necessarily mean that a general rule is applicable, categorically, to any situation. As such, the hadith is not conclusive evidence of categorical exclusion.").

In addressing the dominant view of the Islamic schools of law, gender rights advocates attempt to distinguish the primary sources of law from the legal opinions subsequently derived from them.¹⁷⁶ Specifically, advocates argue that the act of legislating is a fallible process influenced by time, circumstance, and culture.¹⁷⁷ As such, the classical jurists' rights restrictive pre-modern opinions should not enjoy finality or Divine reverence.¹⁷⁸

Still others point to those pre-modern jurists, albeit comprising a minority dissent, who opined that women could render authoritative opinions from the bench.¹⁷⁹

176. See *id.* at 45–46 (“Scholars should not continue to quote and repeat some of the long-standing juristic interpretations as if they were equal in authority and finality to the two primary sources of Islam. Nor should they engage in a fragmentary and selective approach in seeking justification of the erroneous status quo. They should realize that even the greatest of jurists are fallible humans, whose interpretations have been affected by the culture and circumstances under which they have lived. With the host of pressing and significant contemporary issues, a fresh *ijtihad* (interpretation) is needed.”); see also SPECTORSKY, *supra* note 11, at 3.

177. See BADAWI, *supra* note 53, at 3; see also SPECTORSKY, *supra* note 11, at 14 (“It is also indispensable for the *fiqh* as a learned discipline whose inner cohesion can only be guaranteed through the acknowledgment that while all scholars and schools of *fiqh* equally derive their norms from the revelation, no scholar’s and no school’s normative interpretation of the revelation can claim a privileged access to truth. All scholars and schools of *fiqh* share in the same activity: probable, but fallible interpretation of infallible texts.” (quoting BABER JOHANSEN, CONTINGENCY IN A SACRED LAW: LEGAL AND ETHICAL NORMS IN THE MUSLIM FIQH 37 (1998))).

178. See BADAWI, *supra* note 53, at 2.

179. See HALLAQ, *supra* note 12, at 342 & n.3 (“Abū Hanīfa held the opinion that women can serve in this capacity in all areas of the law where their testimony is deemed valid, namely, in all areas except *hudūd* offenses and *qisās*. The eponym of the defunct Jarīrite school, Ibn Jarīr, reasoned that because women can exercise *ijtihad* like men, they can serve as judges in the entire gamut of the law The prescriptions extend from personal characteristics and state of mind to the procedure he must follow in his court, all of which, as always, are subject to the multiplicity of legal opinion.”); BADAWI, *supra* note 53, at 18. (“[T]here is no restriction on benefiting from women’s talents in any field. Some early jurists, such as Abu-Hanifah and Al-Tabari, uphold that a qualified Muslim woman may be appointed to the position of a judge. Other jurists hold different opinions.”); Mayhoub, *supra* note 116, at 42; Fawzi, *supra* note 88, at 22–23 (“Reviewing the requisite specifications of a judge according to Ibn Taymiyya, we find that a judge must be ‘pious and a possessor of three essential traits; a witness for the prosecution, a definer of supreme authority, and having jurisdiction in compulsion. The provisions of the judiciary are considered based on faculty, and it must be entrusted with the most ideal, as indicated by Ahmed and others. The most useful and least evil of the unrighteous, and the most just of the imitators and most knowledgeable of tradition should be appointed over others. If one is more knowledgeable and the other more pious, the pious will fear the abyss and the knowledgeable will fear

Gender rights advocates also forward the “Necessity Argument,” explaining that economic, political, legal, and cultural necessity dictates female participation in the public square.¹⁸⁰ Women in the workforce, including as judges, alleviates economic hardship confronting many struggling families.¹⁸¹ Facilitating their ability to make meaningful contributions, they argue, also enhances women’s cultural and social stature.¹⁸² Additionally, they state, female participation on the bench may positively advance judicial administration in a number of states that suffer from a dearth of qualified arbiters and a daunting backlog of cases.¹⁸³ Finally, advocates also rely on women’s professional accomplishments in a spectrum of additional fields to question stymied female advancement in the administration of justice.¹⁸⁴

III. APPROACHES IN INDONESIA, EGYPT, AND IRAN

Religion continues to represent a powerful, influential force on law and society, albeit to varying positive and negative

misgiving.’ Reviewing these stipulations we find that he did not mention that a judge must be male. . . . Shaykh Muhammad Al-Ghazali [] affirmed in his book, ‘Sunna: Between Jurisprudence and Hadith,’ that women are able to hold any position they have qualifications for with the exception of the Caliphate.”).

180. See Hassan, *supra* note 125, at 11.

181. See *id.* (“Women’s participation in the workforce is an economic necessity due to increasing rise of economic burdens. If women did not share these burdens with men, families would not be able to realize their dreams and raise the material standard of their life, rather, they would drown in debt.”).

182. See *id.*

183. See *id.* at 12.

184. See *id.* at 13 (“Some hold that the administration of justice is a form of public authority, and there is a consensus among the Islamic legists that women are not qualified to hold public authority. In this case, authority is known as a power that allows its owner to issue orders to individuals by individual will. In addition to this form of public authority are considered to include legislation of positive law, and work in representative councils. Women have become representatives in the representative councils and have even headed committees As women issue legislation, is it ration to prohibit them from applying it themselves were they to assume judgeships? Women have also held posts in ministries The ministries are considered an authority, as they vest power to issue orders and declarations by individual will and may make allowances or prohibit as it sees fit. Women have also headed the administration of disciplinary cases, which is another public power. In this capacity, women have individually issued a resolution for people to be transferred to the disciplinary courts.”).

degrees, in the Muslim world.¹⁸⁵ This Section surveys religious, social, and political factors impacting women's ascension to the bench in Indonesia and Egypt, as well as her demotion from it in Iran.

A. Indonesia

Indonesia is the most populous Muslim majority country in the world, with an ethnically¹⁸⁶ and religiously diverse population.¹⁸⁷ It inherited the 'civil law' system characteristic of European countries from the Dutch,¹⁸⁸ its prior colonizing power.¹⁸⁹ Notably, its tripartite legal system is comprised of statutory law, customary law ("adat"),¹⁹⁰ and Islamic law.¹⁹¹ This legal pluralism informs its federal constitution,¹⁹² and manifests within its judiciary as well.¹⁹³

185. See Keebet von Benda-Beckmann, *Balancing Islam, Adat and the State: Comparing Islamic and Civil Courts in Indonesia*, in THE POWER OF LAW IN A TRANSNATIONAL WORLD: ANTHROPOLOGICAL ENQUIRIES 216, 216–17 (Franz Von Benda-Beckmann et al. eds., 2009).

186. See Tim Lindsey, *An Overview of Indonesian Law*, in INDONESIA: LAW AND SOCIETY 1, 2 (Timothy Lindsey ed., 1999) ("Indonesian society has long been made up of a diverse range of ethnic groups. Some observers argue that as many as 300 discrete cultures can still be identified although most scholars agree that they can be grouped into 19 main categories." (internal citations omitted)).

187. See Benda-Beckmann, *supra* note 185, at 216–17.

188. See Lindsey, *supra* note 186, at 4. The archipelago was also occupied by the Japanese from 1942 to 1945; they modified the pre-existing colonial legal system only slightly to avert social chaos from erupting. *Id.*

189. See *id.* at 1 ("[T]he development of modern Indonesian law [can be] divided into four periods: . . . the 'traditional' period (up to the early 19th century); the 'colonial' period (from the early 19th century to 1945); the Old Order (from 1945 to March 1966); and the New Order, under Soeharto from March 1966 to 21 May 1998, when he resigned, to be replaced by his former deputy, President BJ Habibie." (citations omitted)).

190. See JOHN R. BOWEN, ISLAM, LAW AND EQUALITY IN INDONESIA: AN ANTHROPOLOGY OF PUBLIC REASONING 9 (2003). *Adat* consist of rules and practices of social life, a culturally appropriate sense of propriety, tradition and custom. *Id.* at 3–4.

191. See TUCKER, *supra* note 37, at 168–69.

192. See Benda-Beckman, *supra* note 185, at 217.

193. See *id.* ("Furthermore, Islamic law applies to marriage and divorce for the Muslim population, so Muslims have to go to an Islamic court for marriage and divorce disputes. The regulation of land is a complex of state law and *adat*, full of contradictions. For kinship and inheritance issues the state legal system leaves its population considerable freedom. Muslims have the choice of bringing their inheritance disputes to a civil or an Islamic court. Civil courts usually apply *adat* law in inheritance cases, while Islamic courts in principle have to apply Islamic law.").

The Indonesian judicial system is unitary, consolidated,¹⁹⁴ and comprised of diverse sets of courts, including Islamic¹⁹⁵ courts.¹⁹⁶ Its Supreme Court includes fifty-one justices and is organized by division, with jurisdiction over four distinct sets of courts: (a) regular courts, including appellate and trial courts, with civil and criminal jurisdiction; (b) Islamic courts with religious jurisdiction; (c) military courts; and (d) administrative courts with limited jurisdiction over government and agency disputes.¹⁹⁷

Notably, the structure of the religious courts was based directly on the secular model; they had a hierarchal appellate mechanism and adopted similar procedural rules.¹⁹⁸ Indonesian courts suffer from low prestige,¹⁹⁹ but remain reflective of this

194. See David M. O'Brien, *The Politics of Judicial Selection and Appointments in Japan and Ten South and Southeast Asian Countries*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 355, 367–68 (Kate Malleson & Peter H. Russell eds., 2006).

195. See Hooker, *supra* note 108, at 34–35 (“The colonial Religious Court System was the main legacy of the Dutch. In 1882, they promulgated the first regulation concerning the Colonial Religious Court system. The law, revised in 1937, established Religious Courts in Java, Madura, Banjarmasin and associated areas of southern Borneo. In 1957, the Indonesian Government promulgated regulations extending the system to the whole archipelago. These regulations constituted the Religious Court system until the reforms of 1989. . . .” (footnotes omitted)).

196. See Benda-Beckmann, *supra* note 185, at 217.

197. See O'Brien, *supra* note 194, at 367–68; LEGAL & JUDICIAL RESEARCH CTR. OF THE SUPREME COURT OF INDON., *JUDICIAL SYSTEM OF INDONESIA* 4 (2003); see also Euis Nurlaelawati & Abdurrahman Rahim, *The Training, Appointment, and Supervision of Islamic Judges in Indonesia*, 21 *PAC. RIM L. & POL'Y J.* 43, 58 (2012) (“Significant changes in both the institutional and juridical supervision of the Islamic courts began to be introduced at the beginning of the 1970s. In 1970, the government issued a new Basic Act on Judicial Power. Article 10 of the act defines the structure of the Indonesian judiciary. The Article first states that judicial power is to be exercised by four types of courts: general courts, Islamic courts, military courts, and administrative courts. The Article next states that the Supreme Court is the highest judicial authority in the country and, as such, has the power to review decisions from the highest appellate authority within all four systems. This language is significant for two reasons. On the one hand, the Law strengthens the legal status of the Islamic courts since it constitutes the first statutory recognition of Islamic tribunals since colonial times. However, the 1970 Law also undermines the authority of the Ministry of Religion with respect to the Islamic courts because it vests appellate authority over Islamic tribunals in the Supreme Court.” (footnotes omitted)).

198. See Hooker, *supra* note 108, at 35.

199. See Anne Wallace & Leisha Lister, *Assessing the Courts*, 10 *CANBERRA L. REV.* 30, 32 (2011) (“The Indonesian judicial system, has long suffered from a poor reputation.’ In 2007, the World Bank described it in the following terms: ‘Thirty years of political marginalization has left Indonesia’s legal institutions degraded and

balance between state, *adat*, and religion.²⁰⁰ Illustrative is the country's 1989 Religious Judiciary Act expanding the Islamic courts' jurisdiction and rendering them equal to the civil courts within the national legal system.²⁰¹ At its introduction, the Act was widely viewed as evidence of Islam's increasingly influential legal prominence.²⁰²

The federal government continued to issue a number of official regulations further expanding the Islamic court's jurisdiction, culminating in the 1991 Compilation of Islamic Law encompassing all issues related to marriage and inheritance.²⁰³ The enhanced role of the Islamic courts has prompted national legal discourse concerning the type of Islamic law that can and should be applied.²⁰⁴

ineffective. Rife with corruption and poorly resourced, the legal institutions suffer from a chronic lack of public trust.'"); *see also* Lindsey, *supra* note 186, at 7 ("[T]he President [] became the de facto source of legal legitimacy. His interference in the judicial process led to the judiciary being increasingly seen as a mere arm of the executive. The legal profession and in particular the judiciary, became degraded and demoralized." (footnotes omitted)).

200. *See* Benda-Beckmann, *supra* note 185, at 217.

201. *See id.*

202. *See id.*

203. *See* TUCKER, *supra* note 37, at 169; *see also* Hooker, *supra* note 108, at 43. This 1991 Compilation of Islamic Law is the most important document on shariah promulgated in modern Indonesia:

The Compilation is not a Law[], but "a guide to applicable law for Judges within the jurisdiction of the Institutions of Religious Justice in solving the cases submitted to them." Articles 3 and 4 of the Compilation's explanatory memorandum or Elucidation—which like all the Elucidations that accompany laws in Indonesia should be read as part of the text of the law itself—appear to state what the "applicable law" is, by setting out the following sources for shariah: (a) standard texts of the *Shafi mazhab*, (b) additional texts from other *mazhab*, (c) existing *yurisprudensi*, (d) the *fatwa* of the *ulama*, and (e) "the situation in other countries" The compilation claims to be a summary of these sources for use by Religious Court judges, but seems to overlook the *Kitah Kuning* or "yellow books" which are the bases for the instruction in the *Pesantren* (local Islamic schools).

Id.

204. *See* TUCKER, *supra* note 37, at 169 ("The notion that Indonesian society has a 'sense of justice' that provides the foundation for basic gender equality in its legal systems, including the Islamic rules of inheritance, was developed by Indonesian jurists in the course of the 1950s and 1960s. Professor Hazairin of the University of Indonesia Law School 'argued that Islamic inheritance law contains general and universal principles, notably the principle that both women and men inherit property, and also specific rules. These rules derive from the Arab culture within which early jurists wrote, and in a different time and place may be discarded' Islamic inheritance rules

It is worth noting that Shafii is the prominent school of Islamic law in Indonesia; the school permits female judges when necessary.²⁰⁵ Notably, Indonesia is not an Islamic state (such as Iran), notwithstanding its overwhelming Muslim majority population and legal deference to the religion.²⁰⁶ Further, it has long enjoyed a reputation for a tolerant form of religious expression that is inclusive in orientation.²⁰⁷ Significantly, laws based upon Islamic principles also encompass references to the Indonesian ideology of *Pancasila*.²⁰⁸ *Pancasila* refers to principles upon which the Indonesian state is based, including the belief in a monotheistic God and a commitment to democracy.²⁰⁹

Even in the world's most populous Muslim-majority country, Muslims grapple to reconcile competing sets of social norms, religious laws, gender equitable concepts, and the rule of law.²¹⁰ These struggles often play out in Islamic and civil courts alike where judges are forced to reconcile claims sounding in religion against those based on customary law or *adat*.²¹¹ Women frequently negotiate their property rights to acquire land in Islamic courts,²¹² and a number of gender equality challenges sound in new rights empowering interpretations of Islamic law.²¹³ These proponents assert Islamic jurisprudence's dynamic

could therefore be brought into line with the prevailing Indonesian sense of justice and practices of gender equality inherent in much of the *adat*." (footnotes omitted)).

205. See Hooker, *supra* note 108, at 47 n.7.

206. See Sebastiaan Pompe, *Islamic Law in Indonesia*, 4 Y.B. ISLAMIC & MIDDLE E. L. 180, 186 (1997-1998).

207. See *id.* at 180-81.

208. See Hooker, *supra* note 108, at 39.

209. See *id.* ("The principles of *Pancasila* most important to *syariah* are its first, a Belief in One Supreme God, and fourth, which embodies a commitment to democracy. For Muslims, the reference to God embodies the *Qur'an* and *Sunna*; however, the mention of democracy refers to a political system for which these sources provide no direct authority. There is of course an Indonesian dimension to these comments. Democracy can be 'guided', and the words of God, which is how we know Him, can be interpreted variously and through the ages.").

210. See BOWEN, *supra* note 190 at 3-4 ("Indonesia is the site of long-standing, diverse efforts to shape lives in an Islamic way, but also of even longer-standing and more diverse efforts to shape them according to local complexes of norms and traditions called *adat*, some 300-plus of them according to conventional calculations – and all this further complicated by shifting sensibilities regarding gender equality and the "rule of law.").

211. See *id.* at 6.

212. See *id.*

213. See *id.* at 8-9.

nature, characterizing it as an evolving effort to resolve disputes by drawing upon legal texts, logic, the public interest, and community consensus.²¹⁴ Consequently, Indonesia's judicial system continues to confront changing circumstances and challenges.²¹⁵

1. The Judiciary

The civil law system of judicial selection as practiced by European countries has influenced the Indonesian process, including the recruitment of Islamic court judges.²¹⁶ Whereas judges in common law jurisdictions are frequently accomplished attorneys, the judiciary represents a distinct career path in civil law systems.²¹⁷

In Indonesia, judges are civil servants whom the Ministry of Justice selects, appoints, transfers, and promotes.²¹⁸ Candidates

214. *See id.* at 9 (“Recent studies by historians and anthropologists have highlighted Islamic legal reasoning as a set of social practices, moving away from older presentations of shari’a as a set of rules to take account of the social contexts within which jurists and others engage in interpretation and justification.” (footnotes omitted)).

215. *See* TUCKER, *supra* note 37, at 168, 170 (“In 2004, Musdah Mulia, the Director of Religious Research and Social Affairs at the Department of Religious Affairs and a well-known advocate for gender equality, headed up a working group for the department charged with reviewing the Islamic Law Compilation (ILC) of 1991. The resulting critique of the ILC focused on the ways in which it contradicted ‘universal basic principles of Islam’ as well as founding ideas of civil society including gender equality, and argued for a revision of the ILC based on Islamic sources and the norms of Indonesian society. The rules of classical ‘Arab’ *fiqh*, including inheritance rules, were developed in a different social and cultural space, one of patriarchy that distorted the original Islamic message of equality. A rereading of the texts in the spirit of this message, combined with attention to the traditions and conditions of present day Indonesians . . .”).

216. *See* Nurlaelawati & Rahim, *supra* note 197, at 49 (“The system of judicial recruitment in Indonesia, including the recruitment of Islamic court judges, is very much influenced by the civil law system of recruitment applied by European continental states.”).

217. *See id.* at 49–50.

218. *See* O’Brien, *supra* note 194, at 367–68. The Ministry of Justice is part of the Executive Branch. “[U]ntil their appointments as full-time government employees, judicial recruits in Indonesia do not receive full or adequate state funding. Thus the judicial recruitment process works to disadvantage poor and middle-class candidates interested in pursuing a judicial career. Moreover, judicial recruitment in Indonesia is burdened by low prestige and salaries and inadequate court facilities, especially in rural areas. Furthermore, like other Indonesian civil servants, judges face civil service performance reviews and work under its direction for promotions and transfers. They

are generally new graduates with strong academic credentials, and at a minimum, a Bachelor of Arts degree in law.²¹⁹ They are required to sit for a written and oral examination,²²⁰ and thereafter undergo a one-year judicial training program.²²¹ Upon successful completion of the program, they are assigned to a district court for additional in-service training as a court clerk prior to embarking upon their judicial careers.²²²

In order to qualify for a judicial appointment to the Islamic Court, the candidate must have academic credentials demonstrating a mastery in Islamic law.²²³ Candidates must

must retire at age fifty-five unless they are promoted to a high court or the Supreme Court, in which case they may retire at age sixty and sixty-five, respectively." *Id.*

219. *See id.*

220. *See* Nurlaelawati & Rahim, *supra* note 197, at 52 ("The oral exam includes a psychometric test developed by the University of Indonesia to assess the candidate's fitness to serve as a judge, a ten-minute interview on issues related to the procedural and substantive law of the Islamic courts, and a test of the applicant's ability to read and comprehend passages from *fiqh* texts dealing with legal issues. To complete the application, the applicant must also submit documentary proof that he or she is free from drug addiction, together with a letter from the local police.").

221. *See* O'Brien, *supra* note 194 at 367-68 ("They must then pass written and oral examinations before admission into a one-year program at the Ministry of Justice Education and Training Center."); *see also* LEGAL & JUDICIAL RESEARCH CTR. OF THE SUPREME COURT OF INDON., *supra* note 197, at 18-19 ("The law graduates will enter the annual examination held by the Department of Justice. The examination is focused on adequate knowledge of the more important branches of the law and on the candidates' intellectual ability and ethics. Those who pass the examination have to follow further training at the Training Centre established by the Department of Justice. The period of the training is 12 months and conducted in Jakarta.").

222. *See* O'Brien, *supra* note 194, at 367-68; *see also* LEGAL & JUDICIAL RESEARCH CTR. OF THE SUPREME COURT OF INDON., *supra* note 197, at 19 ("At the recommendation of the Senior Judge of the respective district court, he/she will be appointed as a full fledged judge and start his/her career in a district court which has a IIB rank (this is the lowest rank of a district court; in gradual order there are district courts with the following ranks: IIB, IIA, IB and IA). The career path of a judge, after being transferred to different districts and in different positions, will be as follows: Senior Judge (*Hakim Ketua*) of several types of district courts, judge of an appellate court and then Senior Judge of a Court of Appeal (appellate court). Afterwards he/she may become justice of the Supreme Court.").

223. *See* LEGAL & JUDICIAL RESEARCH CTR. OF THE SUPREME COURT OF INDON., *supra* note 197, at 42 ("Article 13 [provides:] To be eligible for appointment as a judge of Religious Court a candidate must meet the following requirements: a. be a citizen of Indonesia; b. a Moslem; c. be devoted to almighty God; d. be loyal to the Pancasila and the 1945 Constitution; e. not be former member of the outlawed organization and not be a person who was involved directly in the Counter-revolutionary Movement G 30 S/ Indonesian Communist Party, including the mass organization, or PKI or any other outlawed organizations, a civil servant; possesses a law graduate degree in Syariah or

submit a letter of interest, with detailed information concerning his or her education, health, and good conduct to the national Bureau of Islamic Courts.²²⁴ A written certification declaring that s/he will accept a placement anywhere within Indonesia must also accompany the correspondence.²²⁵

Upon appointment, all judges must undertake an official oath in the name of God, “swear[ing] to ‘be faithful to and defend and apply the *Pancasila* as the basis and ideology of the state, [and] the Constitution of 1945.’”²²⁶

The court’s jurisdiction extends to marriage, inheritance, and charitable endowments.²²⁷ No gendered distinction is made vis-à-vis qualifications, transfers, promotions, or interpretive rights.²²⁸

2. Women

Indonesia has a positive record of gender empowering legislation.²²⁹ Since 1945, the Indonesian Constitution has proclaimed gender equality while laying protection to female participation in the political arena.²³⁰ In 1952, the country ratified the United Nations Convention on Political Rights of Women and enacted legislation empowering women with the right to vote and to serve in the legislature.²³¹ In 1984, it also ratified the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”); more

graduate degree in Law specializing the Islamic; f. be at least 25 years of age; g. of high integrity, responsible, honest, just and have a character that is not culpable.”).

224. See Nurlaelawati & Rahim, *supra* note 197, at 51.

225. *See id.*

226. See Hooker, *supra* note 108, at 41 (alteration in original).

227. *See id.* Articles 49 to 53 articulate the powers of the Court. “Article 49 establishes the courts’ jurisdiction over marriage, inheritance and [charitable trusts].” *Id.*

228. See LEGAL & JUDICIAL RESEARCH CTR. OF THE SUPREME COURT OF INDON., *supra* note 197, at 18–22, 42.

229. See Ani Widayani Soetjipto, *Big Party Politics, Still a Man’s World—A Report on Indonesia, in* GAINING GROUND? SOUTHEAST ASIAN WOMEN IN POLITICS AND DECISION-MAKING, TEN YEARS AFTER BEIJING: A COMPILATION OF FIVE COUNTRY REPORTS 39, 39 (Beate Martín ed., 2004).

230. *See id.*

231. *See id.*

than a decade later, it also ratified the Optional Protocol of the Women Convention.²³²

In 1989, the Religious Judiciary Act codified the selection and appointment of female Islamic court judges.²³³ In fact, women first ascended to the bench in 1964 when two women were appointed to civil judgeships and another fifteen assumed part-time Islamic court judgeships.²³⁴ A subsequent debate ensued among Indonesian Islamic law scholars regarding the permissibility of women serving in such a capacity.²³⁵ In response, government officials utilized the Necessity Argument, asserting the dearth of qualified male judicial candidates;²³⁶ *Shafii* maintained that female judges could serve as necessary.²³⁷ Women have since served on the bench—religious and secular.²³⁸ The Religious Judiciary Act merely codified the normative practice.²³⁹

The government continues to implement positive policy initiatives, most notably gender mainstreaming and voluntary quotas,²⁴⁰ to ensure gender equality and further enhance female political representation and participation.²⁴¹ The United Nations Economic and Social Council characterized gender

232. *See id.*

233. *See* Nurlaelawati & Rahim, *supra* note 197, at 49.

234. *See id.*

235. *See id.*

236. *See id.*

237. *See* BADAWI, *supra* note 53; *see also* WOMEN JUDGES IN THE ARAB REGION: POINT, COUNTERPOINT, *supra* note 88.

238. *See* Nurlaelawati & Rahim, *supra* note 197, at 49.

239. *See id.*

240. *See* Nursyahbani Katjasungkana, Op-Ed, *Woman on Panel of Judges*, JAKARTA POST, Nov. 15 1999, available at 1999 WLNR 1516984. (“In a highly patriarchal society and state system and amidst the prevailing gender imbalance in all aspects of life, particularly in occupations and education, it is very difficult to apply purely a system of meritocracy and all the more so with the inter-gender competition system without any intervention through affirmative action as regulated in Article 4 of the Convention juncto Law No. 7/1984.”).

241. *See* United Nations Entity for Gen. Equal. and the Empowerment of Women, *Gender Mainstreaming*, UN WOMEN, <http://www.un.org/womenwatch/osagi/gendermainstreaming.htm> (last visited Feb. 12, 2014) (“Gender Mainstreaming is a globally accepted strategy for promoting gender equality. Mainstreaming is not an end in itself but a strategy, an approach, a means to achieve the goal of gender equality. Mainstreaming involves ensuring that gender perspectives and attention to the goal of gender equality are central to all activities - policy development, research, advocacy/dialogue, legislation, resource allocation, and planning, implementation and monitoring of programmes and projects.”).

mainstreaming as identifying the gendered consequences of legislation, policies, or programs of a political, economic, and social nature to guard against inequalities.²⁴² While many development programs are designed as gender neutral, they have, in fact, impacted men and women differently with varying rates of access to opportunity.²⁴³ Typically, women trail behind men, with lower rates of participation in projects and society.²⁴⁴

Illustrative of Indonesia's efforts is the Presidential Instruction No. 9/2000 on Gender Mainstreaming in National Development requiring gender mainstreaming by national and local government agencies in planning, implementation, monitoring, and evaluation of all development policies and programs.²⁴⁵ The law is designed to heighten consciousness about gender rights issues, especially among decision- and policy-makers.²⁴⁶ Resulting initiatives include the establishment of a Special Service Room at Indonesian police stations for female victims of violence and proposed regulations requiring the inclusion of a female judge on a judicial panel examining rape cases and other matters involving gendered violence.²⁴⁷

Yet, notwithstanding these legislative initiatives, gender rights advocates continue to voice concern regarding what they view as a patriarchal culture repressive to women's advancement.²⁴⁸ Specifically, they claim that social pressures dissuade women from assuming active roles in the public

242. See Soetjipto, *supra* note 229, at 70–71.

243. See *id.* at 71.

244. See *id.*

245. See *id.*

246. See *id.*; see also Tifa Asrianti, *More Agencies Will Apply Gender-based Budgeting in 2012: Agency*, JAKARTA POST, Oct. 22, 2011, at 4, available at 2011 WLNR 21685153 (“The government will implement what it calls a “gender-responsive budget” in 27 ministries and institutions and 10 pilot provinces next year, according to the nation’s development agency. The policy is part of the 2010-2014 Midterm National Development Plan to create gender-responsive governance, as mandated by a 2000 Presidential Instruction on gender mainstreaming in national development. This includes translating the government’s commitment to upholding gender quality into budgetary policies in which female and male citizens are equally involved in development.”).

247. See Katjasungkana, *supra* note 240 (“[I]ssuance of a regulation requiring the presence of a woman judge on a panel of judges examining every rape case or case of violence against women and other women-related matters, will at least give peace and courage to women to make a legal complaint about their problems.”).

248. See Soetjipto, *supra* note 229, at 39–40.

sphere.²⁴⁹ They cite to traditional cultural norms yielding to a public-private dichotomy that pressures women to restrict their contributions to their families and households—the private domain.²⁵⁰ Women have internalized a sense of gendered inferiority informed by an insecurity concerning their ability to excel in political work.²⁵¹ Moreover, women who pursue political endeavors confront discrimination and prejudice in electoral processes, legislative bodies and political parties.²⁵²

These assertions hold true of the judiciary, too—the number of female judges remains comparatively low.²⁵³ In 1997, women comprised fifteen percent of appellate judges; that number rose by a little more than five percent (to twenty-one per cent) in 1999.²⁵⁴ Notably, as of 1999, female administrative judges were equal in number to their male counterparts.²⁵⁵ Some observers hypothesized that perhaps more women are interested in the administrative judgeships because of the substantive areas involved, which may also not require as much field work or mobility.²⁵⁶

Advocates claim the religious courts hold the most formidable gendered social barriers to entry.²⁵⁷ In Indonesia, religious scholars are often identified with men.²⁵⁸ This is

249. *See id.*

250. *See id.*

251. *See id.*

252. *See id.*

253. *See id.* at 54.

254. *See id.* at 55–56 (“No women sits as chair or vice chair in any of the religious appellate courts. This is a strategic loss because the majority of the population is Muslim, and many legal disputes concerning women and children such as marriage, divorce, and inheritance rights are often resolved through religious courts.”).

255. *See id.*

256. *See id.* at 56.

257. *See id.*

258. *See id.*; *see also*, Nurlaelawati & Rahim, *supra* note 197, at 63 (“The process of becoming an Islamic judge in Indonesia has changed and developed over the years. During the colonial period and in the early years following independence, the creation of Islamic court judges was quite simple. Judges who served on Islamic courts were recruited from among the local *ulama*, who had generally been trained informally in traditional Islamic schools. This began to change in the 1960s as judges were increasingly recruited from among the graduates of formal schools established specifically for the purpose of producing judges for Islamic courts. Since 1989, the process of becoming an Islamic judge has been governed in detail by the Religious Judiciary Act, which itself has gone through a number of revisions in line with changes in policy on the Islamic judiciary and the Indonesian legal system in general.”).

significant because during the country's colonial era, Islamic court judges were selected from among the local circle of religious scholars (e.g. *ulema*), who had been educated in traditional Islamic schools.²⁵⁹ Beginning in the 1960s, religious court judges included formal law school graduates from institutions specifically founded to produce Islamic court judges.²⁶⁰ The gendered perception surrounding Islamic law experts, however, lingers.²⁶¹ In this context, women are often cited as being too emotional and irrational—the Nature Argument—to serve as Islamic law judges; it is peculiar that the argument only arises in the religious judicial context, however.²⁶²

As of 2009, seventy-eight percent of the Islamic trial court judges were male and twenty-two percent were female.²⁶³ The number of women serving as appellate judges in the Islamic courts was even more meager: five percent.²⁶⁴ In 2011, women accounted for 23.4% of all trial court judges across the nation, and 15.4% of appellate judges.²⁶⁵ Much of the country's progress seems to be attributable to more tolerant and inclusive interpretations of Islam, and official promotion of gender mainstreaming policies among all levels of institutional decision-making.²⁶⁶

B. Egypt

Since 1923, all Egyptian Constitutions have explicitly guaranteed gender equality.²⁶⁷ The 1956 Constitution declared

259. See Nurlaelawati & Rahim, *supra* note 197, at 44–45.

260. *See id.* at 45–46.

261. *See id.* at 50.

262. *See* Soetjipto, *supra* note 229, at 56.

263. *See* Nurlaelawati & Rahim, *supra* note 197, at 57.

264. *Id.*

265. *See* Asrianti, *supra* note 246.

266. *See generally* Soetjipto, *supra* note 229 (discussing various programs and efforts aimed at making progress regarding gender inequality).

267. *See* Hassan, *supra* note 125, at 17–18. (“The constitution of 1923 determined in Article 3 that ‘Egyptians are equal before the law, and equal in society in civil and political rights. There is no discrimination between them on the basis of origin, language or religion concerning their public duties and obligations.’ The constitution of 1956 stated in article 31 that ‘Egyptians are equal before the law and equal in rights and public duties. There is no discrimination between them on the basis of sex, origin, language, religion or conviction.’ The constitution of 1971 determined in article 11

Islam the Muslim majority state's official religion but with few details regarding what that meant.²⁶⁸ In 1971, Egypt witnessed the birth of a new Constitution that added Islamic law as a principal source of legislation.²⁶⁹

While the 1971 Egyptian Constitution was initially suspended following President Hosni Mubarak's resignation in 2011 and subsequently voided the following year,²⁷⁰ this Section remains focused upon its provisions as those in effect during the initial appointment and continued ascension of women to the bench.

The 1971 Constitution's notable provisions in the instant context include those referencing Islam as the state religion, establishing Islamic law as a primary source for legislation, and providing gender equality in the political, cultural, and economic areas of life (so long as that does not contravene religious law).²⁷¹ The Constitution was amended in 1980 to reflect Islamic law as the primary legislative source.²⁷² Further, the nation's civil law code also includes specific references to religious law.²⁷³ For instance, the Egyptian civil code of 1949 ranks Islamic law as a secondary source of law upon which a judge may rely in formulating a ruling.²⁷⁴

that 'the state guarantees accommodation between women's duties to the family and to work within society; the state guarantees equality between men and women in the arenas of political, social, cultural, and economic life, keeping in accordance with the rulings of Islamic Law.' Article 40 of the same constitution states, "citizens are equal before the law and in rights and duties; there is no discrimination between them on the basis of sex, origin, language, religion or conviction.")

268. See Adel Omar Sherif, *Constitutions of Arab Countries and the Position of the Shari'a*, in *THE SHARI'A IN THE CONSTITUTIONS OF AFGHANISTAN, IRAN AND EGYPT—IMPLICATIONS FOR PRIVATE LAW* 155, 157–58 (Nadjma Yassari ed.).

269. See *id.* at 158–59.

270. See Michael Lipin, *Egypt's New Constitution: How it Differs from Old Version*, *VOICE* (Dec. 25, 2012), <http://www.voanews.com/content/egypt-constitution/1572169.html>.

271. See Hassan, *supra* note 25, at 18.

272. See Baudouin Dupret, *A Return to Sharia?*, in *THE SHARIA IN THE CONSTITUTIONS OF AFGHANISTAN, IRAN AND EGYPT—IMPLICATIONS FOR PRIVATE LAW*, *supra* note 268, at 161, 163.

273. See *id.*

274. See *id.* ("Also, a realm is explicitly acknowledged for Islamic law and its principles in various sections of the civil code, particularly as regards successions and wills. As for personal status (marriage, divorce, separation, alimony, child custody, inheritance, etc.), it is totally referred to the individuals' denomination, each of those acknowledged in Egypt having its own specific legal texts and competent judicial

These provisions highlight the continued significance of rights empowered interpretations of Islamic law. As noted above, the majority of Islam's classical schools of law prohibit women from serving as judges, including the Hanafi school, codified into statutory law in personal status matters.²⁷⁵

Commentators have observed that there has never been an explicit constitutional or statutory legal impediment to women serving as judges.²⁷⁶ Rather, objections have typically sounded in cultural and social norms as well as religious ideology.²⁷⁷ Illustrative are negative case precedents on this point.

For instance, in 1979, two women lost lawsuits challenging the official rejection of their applications for judgeships on account of their gender.²⁷⁸ The influence of rights restrictive interpretations of Islamic law upon Egypt's secular legal system is evident in the court's ultimate holding:

It is clear from the cases' records, evidence and surrounding conditions that the factors upon which the administrative body based its appraisal of inappropriateness in appointing the plaintiff to the rank of judge are found in the Egyptian environment, and are embodied in two essential fundamentals. The first of these is the common law exemplified in society's longstanding view towards women.

chambers for the various levels of jurisdiction. As regards Muslims, a series of texts have codified the *hanafi* legal tradition." (citations omitted)).

275. See Amina Elbendary, *Women on the Bench*, AL-AHRAM WEEKLY, Jan. 9–15, 2003, <http://weekly.ahram.org.eg/2003/620/fr2.htm> ("Religious scholars have also disagreed on the permissibility of a woman holding senior positions of state, including that of judge. Three of the four main schools of Sunni jurisprudence deny women's right to any such appointment, with the fourth Hanafi school holding that a qualified woman can be appointed judge.").

276. See Hassan, *supra* note 125, at 17–18 ("Egyptian statutory legislation is completely devoid of any text that deprives women from the right to occupy any public post.").

277. See Fawzi, *supra* note 88, at 27 ("Half of the respondents thought that Islamic Law prohibits women from holding judgeships. More than a quarter of the respondents claimed to not know the position in Islamic law on this matter, and slightly less than a quarter of the respondents stated that Islamic Law allows this. When questioned as to the source of religious knowledge on this issue, many of the respondents said they based this opinion on the Hadith that warns of women having guardianship [authority]. However, they admitted that they had not come across reference to the issue itself and thus relied on the position of religion towards women more generally. This position [supposedly] characterizes women as inadequate in terms of reason and religion, and that implies that men are superior to women.").

278. See Hassan, *supra* note 125, at 14–15.

This view holds that women are of a lower level than men, and less significant, either due to the nature of their very being or because of their falling behind men in standards of knowledge and culture. The second factor is the widespread belief that the rulings of Islamic Law prohibit appointing women in any public powers, including the judiciary.²⁷⁹

The ruling alludes to several rights restrictive arguments depicted above, including the Nature Argument and references to the majority opinions of pre-modern Islamic jurists. It also relies upon false assumptions concerning women's inferior intellect, frequently informed by the Witness Argument, and its implications for women's competency more generally.

1. The Judiciary

The Egyptian court system has often served as a model emulated by counterparts in the Arab world.²⁸⁰ A civil law system, greatly impacted by French rules and procedures, it consists of "both regular courts and exceptional court systems"²⁸¹ including administrative,²⁸² civil,²⁸³ and criminal courts, a Supreme Constitutional Court,²⁸⁴ family courts, military courts, national

279. *See id.*

280. *See* Mahmoud M. Hamad, *The Politics of Judicial Selection of Egypt*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD*, *supra* note 194, at 260, 261–62.

281. *Id.*

282. *See* Mohamed S.E. Abdel Wahab, *UPDATE: An Overview of the Egyptian Legal System and Legal Research*, NYULAWGLOBAL.ORG (Oct. 2012), http://www.nyulawglobal.org/Globalex/Egypt1.htm#_The_Egyptian_Legal ("The classical dichotomy of public and private law has resulted in the establishment of the Council of State (*Conseil d'Etat*), which consists of administrative courts vested with the power to decide over administrative disputes pertaining to administrative contracts and administrative decrees issued by government officials and ministries."); *see also* Dupret, *supra* note 272, at 164 ("Administrative law is handled by the Council of State, an institution made up of three sections (Judiciary, Consultative, and Legislative), the highest of which being the High Administrative Court." (citations omitted)).

283. *See* Dupret, *supra* note 272, at 164 ("Civil law is divided into summary courts (for minor issues) and plenary courts at the first instance level, courts of appeal, and the Court of Cassation.").

284. *See* Wahab, *supra* note 282 ("The Supreme Constitutional Court was established in 1970 replacing the Supreme Court established in 1960 and has exclusive jurisdiction to decide questions regarding the constitutionality of laws and regulations, as well as negative and positive conflict of jurisdiction."); *see also* Dupret, *supra* note 272, at 75 ("The Supreme Constitutional Court is competent regarding the interpretation of laws, controlling constitutionality, and conflict resolution concerning

security courts, as well as other specialized courts.²⁸⁵ Notably, there are no religious courts, although, as noted above, Islamic law may inform the court's holdings.²⁸⁶

Egypt's judiciary represents a third independent source of State authority (in addition to the executive and legislative branches), and the executive is responsible for appointments.²⁸⁷ Indeed, similar to Indonesia, judicial selection mirrors the European civil law model.²⁸⁸ Upon completion of a university degree,²⁸⁹ candidates must perform well on a preliminary written examination.²⁹⁰ Upon doing so, a committee of attorneys and judges select those most suitable for the bench based upon applicant character and intellect.²⁹¹ Once finalized, the President issues a decree appointing the new group of judges.²⁹²

competence between jurisdictions. It can be referred to by any judge if the constitutionality of a law or of a statutory text is challenged.”).

285. See Wahab, *supra* note 282; see also Dupret, *supra* note 272, at 163–64 (“As Bernard Botiveau says, ‘today the judicial system, in its general principles and in its outline holds many of the basic characteristics usually found when describing the judicial structure of a modern state: separation of judiciary and administrative jurisdictional orders, of civil and criminal jurisdictions, independence of the judiciary, etc.’ (citations omitted)).

286. See Dupret, *supra* note 272, at 164 (“There is no longer any specifically Islamic jurisdiction, since the denominational courts were abolished and replaced in 1955 by specialised sections of state courts.”).

287. See Fawzi, *supra* note 88, at 23.

288. See Hamad, *supra* note 280, at 262 (“The official prerequisites for admission to the office of magistrate are: (1) the candidate must be an Egyptian citizen who enjoys his civil rights, all the required guarantees of morality, and good reputation, (2) the candidate must have an LLB from an accredited university or an equivalent degree from Al-Azhar, and (3) the candidate must be at least twenty-one years old for the office of public prosecutor, and thirty years old for the court of first instance.”).

289. See *id.* at 262 n.11 (“Law education in Egypt is conducted through national universities, Al-Azhar, and the Police Academy. The curriculum includes all of the normal courses in any modern law college. In addition, certain other groups of courses are related to the Islamic legal system. Thus the construction of the syllabus for the LLB in Egypt is a reflection of the history of the legal development in the country.”)

290. See *id.*

291. See *id.* (“The second important characteristic of successful judicial candidates is a suitable family background. In practice this usually means that they should be from the upper-middle or upper stratum of society. Thirdly, none of a candidate's immediate relatives should have been accused of anti-regime sentiments or activities.” (citations omitted)).

292. See *id.* at 263 (“The State Council has a similar recruitment process. Senior members of the council, such as the president and vice-presidents, serve as gate-keepers to the administrative judiciary. However, the Administrative Prosecution Body is a separate entity with a different selection process. The two main streams of the Egyptian court system, the ordinary judiciary and the State Council, resemble the French system.

In contrast to its Indonesian counterpart, the Egyptian judiciary enjoys high prestige, and the appointment process is highly competitive.²⁹³ Egyptian society accords judges considerable deference, also reflected in their comparatively high government salaries.²⁹⁴

2. Women

As depicted above, for generations, women were prohibited from pursuing judicial careers.²⁹⁵ Women's exclusion is not codified in constitutional or statutory law but reflects normative discriminatory practice by government officials.²⁹⁶ In 1949, a young female law graduate challenged the denial of her judicial application on account of gender; the Egyptian court with appropriate jurisdiction upheld the decision citing social and political grounds.²⁹⁷

Indeed, legal and jurisprudential developments frequently represent social manifestations.²⁹⁸ According to research gauging popular Egyptian thought on the subject, the majority of respondents referenced religion and its law as informing their views.²⁹⁹ Unfortunately, the Egyptian religious stance has an adverse history.

In 1952, the Fatwa Council of al-Azhar University³⁰⁰ issued this legal opinion: "There is general consensus that women are

The first position in the ordinary judicial structure is assistant district attorney, where the fresh appointee stays for one year. The appointee then expects to be promoted to the rank of associate district attorney, which he stays at for about two years. The third rank is district attorney. Based on seniority and competence, the appointee moves to the rank of first class district attorney. This rank is divided into two sub-ranks, A and B. Upon reaching the age of thirty, district attorneys may move to the court structure. Judge rank B is the gateway to the court system. Afterwards the judges are advanced within the judicial structure based on seniority and merit." (citations omitted)).

293. *See id.* at 262.

294. *See id.*

295. *See id.*

296. *See* Hoda Ragheb Awad, *The Legal Status of Women in Egypt: Reform and Social Inertia*, in *WOMEN IN THE MIDDLE EAST AND NORTH AFRICA: AGENTS OF CHANGE* 129, 145 (Fatima Sadiqi & Moha Ennaji eds., 2011).

297. *See* Elbendary, *supra* note 275.

298. *See* Fawzi, *supra* note 88, at 21.

299. *See id.* at 27.

300. *See* Dupret, *supra* note 272, at 162 ("Islam in Egypt is the religion of the state (Art. 2 of the Egyptian Constitution) and its public management is the duty of the *shaykh* of *al-azhar*, of the *mufiti* of the Republic, and of the Minister of *waqf*, under the

not suitable for judicial authority and that it is sinful to charge her with such. The matter is not open for interpretation unless binding proof is had, for there is consensus on the matter.’”³⁰¹

The council was generally composed of senior Islamic law scholars, and notably, they cite to the majority opinion of the pre-modern jurists.³⁰² For decades, varied assertions of the Nature and Islamic Law arguments dominated related public discourse.³⁰³

In 1953, following the Al-Azhar Fatwa, the administrative courts issued a ruling excluding women from the judiciary, reasoning that “traditions and customs” made the appointment of female judges “inappropriate.”³⁰⁴ Several decades later, in 1973, the administrative courts issued another ruling referencing Islamic law as the principal source of law (pursuant to the 1971 Constitution) and reasoned that while no law explicitly prohibited female judges, no provision explicitly provided that right either.³⁰⁵ They chose to continue excluding women from the administrative bench, thus closing the door to such appointments.³⁰⁶

In 1988, a young female honors law graduate tried again, but her application to the administrative courts was denied on account of her gender.³⁰⁷ She appealed the decision and the

direct authority of the President of the Republic. Regarding criminal matters, the sole explicit reference to Islam is the mandatory consulting of the mufti of the Republic in cases where a death penalty is handed down by the criminal court.” (citations omitted)).

301. See Bayoumi, *supra* note 157, at 54–55.

302. See Alaa Abd Al-Muta’al, *The Principle of Equality in Egyptian and International Legislation*, in *WOMEN JUDGES IN THE ARAB REGION: POINT, COUNTERPOINT*, *supra* note 88, at 37 (“The dominant opinion in Islamic jurisprudence is that public powers, including judging among people, are to be held by men and not women.”).

303. See Kovach, *supra* note 166, at 2 (“In 1998, when Egyptian women seemed on the brink of breaking into the judiciary, prominent judges like Mohammed Magdi Murgan panned the idea in the semiofficial press, saying: “The natural place for a woman is the house, in the shadow of a man.”).

304. See Sarah Carr, *Security Checks Don’t Mean Interference in State Council, Says Expert*, *DAILY NEWS EGYPT*, MAR. 5, 2009, available at <http://www.thefreelibrary.com/Security+checks+don't+mean+interference+in+State+Council,+says+expert-a0194991075>.

305. See *id.*

306. See *id.*

307. See Nasrawi, *supra* note 3.

initial decision was subsequently upheld in a 1990 ruling finding the appointment of female judges religiously impermissible.³⁰⁸

In 2000, however, President Hosni Mubarak appointed the first female justice Tahani El-Gebali³⁰⁹ to the Supreme Constitutional Court, which did not include deciding civil or criminal court cases.³¹⁰ At the time, women comprised approximately twenty percent of the legal profession.³¹¹

The achievement appears to have resulted from a convergence of factors, including a secular feminist movement,³¹² and references to Islamic law³¹³ as allowing the practice.³¹⁴ Feminists typically argued that the Egyptian Constitution guarantees gender equality (e.g. Rule of Law) while highlighting women's service in the Egyptian Cabinet and Parliament as evidence of women's ability to achieve.³¹⁵

Also critical to El-Gebali's appointment directly to the Egyptian high court was the support of a prominent and well-respected Constitutional Supreme Court justice.³¹⁶ Chief Justice

308. *See id.*

309. *See* Elbendary, *supra* note 275 ("Until recently a member of the Nasserist Party, El-Gebali has spent her career as a lawyer. Graduating from Cairo University's Faculty of Law in 1973, she later earned a diploma in Islamic Shari'a, and was the first woman elected to the board of the Lawyer's Syndicate in 1989, being re-elected in the following round of elections. During her period at the Lawyer's Syndicate, El-Gebali entered into many controversies with other members of the Muslim Brotherhood-dominated board. In 1992, she was the first woman elected to the Permanent Bureau of the Union of Arab Lawyers. She is also a legal expert at the UN, an international commercial arbitrator and a lecturer at the Arab Institute for Human Rights in Tunis.").

310. *See* Salah Nasrawi, *Egypt Names First Female Judges*, ASSOCIATED PRESS, Mar. 15, 2007, available at <http://www.semissourian.com/story/1193823.html>.

311. *See* Kovach, *supra* note 166.

312. *See id.* ("But thanks to a push by First Lady Suzanne Mubarak, the unofficial cultural capital of the Middle East may soon appoint its first female justices, according to the National Council of Women, established by the president in 2000.").

313. *See* Nasrawi, *supra* note 3 ("There is nothing in Islam which says a woman cannot be a judge. She can be if she is fit for the job," Zaqzouk told *Al-Wafd*, a liberal opposition newspaper. Zaqzouk and others point to secular Tunisia, Iraq and Syria, all Muslim countries in which women serve as judges.").

314. *See* Kovach, *supra* note 166 ("We are an Islamic country, and there is nothing in sharia (Islamic law) that prevents a woman from being a judge," says Mahmoud Yassien Talat, a lawyer representing his daughter Amaany in her bid to begin the track to judgeship.").

315. *See* Nasrawi, *supra* note 3.

316. *See* Ahmed El Sayed, *Female Judges in Egypt*, 13 *Y.B. ISLAMIC & MIDDLE E. L.* 135 (2006-2007).

Fathy Naguib's support facilitated her appointment to the highest court in the Egyptian judicial hierarchy.³¹⁷ Many believed that her appointment would help facilitate enhanced female access to the judiciary.³¹⁸

Yet, debate continued even among those who supported El-Gebali's appointment concerning interpretative rights.³¹⁹ Prominent judges subtly asserted the Nature Argument, insisting that while women may rule on family court cases as well as those related to commercial and property matters, they are not "suited" to decide criminal cases.³²⁰ Others made the Nature Argument more explicitly and unabashedly, claiming women lack the patience and stability required for judicial administration.³²¹

Religious scholars stressed the intersection of the Testimony and School of Laws Arguments—that the Hanafi school of Islamic law only permitted women to judge in substantive areas where her testimony is deemed competent (e.g. family but not criminal).³²² Some jurists asserted the No Positions of Authority argument, claiming a woman could assist or advise men but she should not ascend to an authoritative public position.³²³

By 2003, Egypt's religious authorities embraced the Hanafi school of law's opinion on the issue (e.g. women can judge substantive matters in which their testimony is deemed competent).³²⁴ Even the Muslim Brotherhood, then outlawed,

317. *See id.*

318. *See id.*

319. *See Kovach, supra* note 166.

320. *See id.* ("Judge Murgan still doesn't think women are suitable to rule on criminal cases, but he says he's no longer categorically against women justices. 'We will be happy to see women judges in family courts, in business and property disputes. Women are more honest than men, and they've worked well as judges in many Arabic countries,' he says.")

321. *See Elbendary, supra* note 275 ("In the controversy following the appointments, others have argued that a woman's 'emotional nature' makes her unfit for the judiciary. 'Justice requires patience and sturdiness, which women lack,' Rayyan said.")

322. *See id.*

323. *See id.*

324. *See id.* ("The public has also gradually become more tolerant of the idea. Both the Sheikh of Al-Azhar and the Egyptian Grand Mufti have adopted the Hanafi opinion.")

publicly expressed its assent.³²⁵ These developments should not be overlooked because, for decades, Mubarak refrained from appointing female judges fearing the Muslim conservative response.³²⁶

In 2007, President Mubarak appointed thirty-one women, who previously served as state prosecutors, to judge in the family courts.³²⁷ Similar to El-Gebali's appointment, critical here were the efforts and support of several prominent political figures including the head of the Supreme Judicial Council and the Minister of Justice, both of whom looked favorably upon the appointment of female judges.³²⁸ Prior to their collective appointment, El-Gebali was the sole female judge serving on the Constitutional Court.³²⁹ There are approximately 12,000 judges in Egypt.³³⁰

Still some objected to the 2007 appointment. For instance, an Egyptian Member of Parliament filed a related lawsuit against the Minister of justice alleging that the appointments contravene Islamic law.³³¹ He requested annulment of the Presidential decree placing the women on the bench but to no avail.³³²

Controversy, however, continues to revolve around women's interpretative rights. Women have not yet been appointed to judge in the administrative courts, where cases involve grievances lodged against government agencies.³³³ Unlike civil law judges who interpret legislation, the administrative judiciary "make[s] the law."³³⁴ As recently as

325. *See id.* ("Maamoun El-Hodeibi, supreme guide of the outlawed Muslim Brotherhood, is also of the view that there is no reason why a qualified woman should not hold senior positions in government, including that of judge.").

326. *See* Nasrawi, *supra* note 310.

327. *See* El Sayed, *supra* note 316; *see also* *Women Judges Barred from Influential Egyptian Court*, AGENCE FR. PRESSE, Feb. 15, 2010 [hereinafter *Women Judges Barred*], available at <http://www.google.com/hostednews/afp/article/ALeqM5ixnTkZcV8tMEQaMrYDwhuuhoRf2w>.

328. *See* El Sayed, *supra* note 316, at 136.

329. *See* *Women Judges Barred*, *supra* note 327.

330. *See* *Egypt Judges Row Highlights Unease over Women in Top Jobs*, AGENCE FR. PRESSE, Feb. 25, 2010 [hereinafter *Egypt Judges Row*], available at http://article.wn.com/view/2010/02/25/Egypt_judges_row_highlights_unease_over_women_in_top_jobs.

331. *See* El Sayed, *supra* note 316, at 144–45.

332. *See id.*

333. *See* Carr, *supra* note 304.

334. *See id.*

2009, judges continued to assert the Inferior Intellect Argument, claiming that women “do not have the same levels of intelligence and their brains weigh two grams less than those of men.”³³⁵

Significantly, the administrative court’s assembly, consisting of almost four hundred judges, voted in 2010 to continue its exclusion of women.³³⁶ Human rights experts referred to the decision as emblematic of entrenched gender bias in the judiciary.³³⁷ In response, the Constitutional Supreme Court, following a request for clarification by the Prime Minister, ruled that the assembly lacked proper jurisdiction over the issue.³³⁸ Rather, it tasked the court’s exclusively male executive board to render a finding.³³⁹ Still, judges asserted the Nature and Protectionist Arguments to justify the prior decision to exclude.³⁴⁰ Officials also cited the Physiology³⁴¹ and Islamic law arguments.³⁴² Some have also attributed the push for female judges as an import from “European and American agendas.”³⁴³

335. *See id.*

336. *See Women Judges Barred*, *supra* note 327 (“Three- hundred and eighty judges took part in the general assembly and voted, with 334 rejecting the appointment of females to judicial posts and 42 agreeing, with four abstentions.”).

337. *See Egypt Opens Way for Women Judges in Top Court*, AGENCE FR. PRESSE, Mar. 14, 2010, available at <http://www.google.com/hostednews/afp/article/ALeqM5g5zbVpbsm8eqNS7G7AQ5uFCQ5fkQ> (“It was roundly condemned by the New York-based body Human Rights Watch (HRW), which urged the government to end discrimination against women in judicial positions. “The continuing discrimination insults the many Egyptian women who are fully qualified to serve as judges,” Nadya Khalife, women’s rights researcher for the Middle East and North Africa at HRW, said at the time.”).

338. *See id.*

339. *See id.*

340. *See Egypt Judges Row*, *supra* note 330 (“Despite steps to avoid gender-based discrimination, the idea that a woman’s place is in the home is deeply rooted’ The circumstances are currently unsuitable for women to be judges,’ said Judge Mahmud al-Khodeiri. ‘It’s a difficult job, we work in difficult conditions,’ he told AFP. Khodeiri said judges are not allowed to preside over courts in their place of residence, ‘so how is a woman supposed to abandon her husband and her children and go and work somewhere else?’ ‘Motherhood is something that carries all of society—it can’t be ignored.’”).

341. *See Kenyon*, *supra* note 3 (“The state-run Al-Ahram newspaper reported that the women judges could require lengthy maternity leave, hampering the court’s efficiency.”).

342. *See id.* (“Another high official in the group said he believed that naming women judges would violate Islamic proscriptions against meetings between unrelated men and women.”).

343. *See Al Sherbini*, *supra* note 3 (“We have our reservations on this demand because we know that having female judges is pushed by feminists, and is not aimed at

In essence, female judges in Egypt continue to confront gender inequality vis-à-vis interpretative rights.³⁴⁴ For instance, the State permits them to preside over family matters but excludes them from the criminal and administrative courts.³⁴⁵ Such distinctions reinforce gender stereotyping regarding female competency and capabilities.³⁴⁶ This, in turn, weakens and degrades their judicial stature, negatively impacting the possibility of promotions and career advancement more generally.³⁴⁷

Still, these women are playing pioneering roles in legal and democratic reform while using their talents and education to raise their standard of living, enhancing the economy of their country and challenging entrenched misconceptions about gender.³⁴⁸ These perceptions appear to plague a predominantly male judiciary as well, thus casting doubt upon judicial impartiality.³⁴⁹ That prejudice and discrimination may manifest in the interpretation and application of legal texts in cases involving groups of historically disadvantaged litigants.³⁵⁰

Finally, restrictions to female career achievement may not only be a result of external factors but internal barriers, too.³⁵¹ Female law graduates stymie professional growth by not applying to the bench as a result of insecurity, fear of reprisal, and their own misconceptions about proper Muslim women roles.³⁵²

raising judicial standards. It is meant to promote European and US agendas.” He added that under Islamic Sharia, women were not allowed to become judges. According to Hussain Abdul Razeq, the secretary-general of the leftist Tagmmua Party, the move is significant. ‘But it is incomplete because it allows women to preside over family courts only,’ he said.”).

344. See El Sayed, *supra* note 316, at 135.

345. See *id.* at 136.

346. See *id.*

347. See *id.* at 137.

348. See Fatima Sadiqi & Moha Ennaji, *Introduction to WOMEN IN THE MIDDLE EAST AND NORTH AFRICA: AGENTS OF CHANGE*, *supra* note 296, at 1, 8–9.

349. See Awad, *supra* note 286, at 141.

350. See *id.*

351. See El Sayed, *supra* note 316, at 146–47.

352. See *id.* at 14.

C. Iran

Unlike Egypt or Indonesia, Iran is an Islamic republic with a population of approximately seventy million.³⁵³ Women's roles fall across a wide spectrum, from independent business owners to victims of Iran's morality police,³⁵⁴ to members of Parliament to those who walk silently behind their husbands on a public street, waiting for permission to speak.³⁵⁵ Iranian law empowers women to drive, vote, own property, and attend school.³⁵⁶ The legal system, however, also denies women equal rights in divorce, custody, and inheritance while rendering her court testimony as less credible than her male counterpart.³⁵⁷ The law also codifies her official exclusion from judgeships.

References to Iranian law are commonly categorized into two periods: prior to the Islamic revolution of 1979 and following it.³⁵⁸ The current Iranian Constitution was adopted in 1979 and subsequently amended in 1989.³⁵⁹ It establishes an

353. See Margaret Coker, *Shackled at Birth in Iran, Women Fight to Overcome*, ATLANTA J.-CONST., May 6, 2007, at 1C.

354. See Mitra Shavarini, *The Social (and Economic) Implications of Being an Educated Woman in Iran*, 79 HARV. EDUC. REV. 132, 137 (2009) (“[I]n October 2007, a young woman by the name of Zahra Bani Yaghoub, a medical student at Tehran University, was arrested by the morality police in Hamedan, a city in the foothills of the Alvand Mountains in western Iran, where she was a volunteer physician as part of her medical studies. She was taken in to the police station because she was caught sitting on a park bench with her boyfriend while snacking on sunflower seeds during the month of Ramadan - problematic both because unrelated males and females seen together in public are subject to arrest, and because eating is strictly forbidden in all public areas during the month of Ramadan, when Muslims must fast. Shortly after her arrest, she notified her parents. By law, parents are required to appear before the morality police before their arrested daughter or son is released and must sign a document acknowledging blame and responsibility for their child's morally wayward actions When Zahra's parents arrived to retrieve their daughter from custody, the authorities delivered her corpse and claimed that suicide was the cause of her death.”).

355. See Coker, *supra* note 353.

356. See *id.* (“The majority of university students in Iran are women. Parliament has a small but consistent number of elected female members. Women excel at all fields open to them: the arts, education, business, law.”).

357. See *id.* (“Yet Iran's legal system also codifies traditions that confer second-class status for women. A woman's testimony in court is worth half that of a man. A girl is considered an adult under the law at age 9, but the age for boys is 13. The laws also deny women equal rights in divorce, custody and inheritance.”).

358. See Behrooz Akhlaghi, *Iranian Commercial Law and the New Investment Law FIPPA*, in SHARI'A IN THE CONSTITUTIONS OF AFGHANISTAN, IRAN, AND EGYPT: IMPLICATIONS FOR PRIVATE LAW, *supra* note 268, at 123, 123.

359. See *id.*

Islamic Republic, declaring the supremacy of Islamic law.³⁶⁰ The State authority is comprised of the Supreme Leadership, the Council of Guardians, the Assembly of Experts, and the Expediency Discernment Council.³⁶¹

The Leadership is responsible for the government's conformity with religious law vis-à-vis policy and actions.³⁶² The Council of Guardians, comprised of clerics and legal experts, reviews legislation to ensure conformity with religious and constitutional law.³⁶³ The Assembly of Experts is a body of jurists and scholars subject to popular elections.³⁶⁴ Finally, the Expediency Discernment Council Principle is tasked with mediating conflicts that arise concerning the interpretation of law.³⁶⁵

1. The Judiciary

The Iranian Constitution also divides State power between the executive, the legislative, and the judicial branch.³⁶⁶ The Judiciary is independent of its sister branches of government.³⁶⁷ In contrast to the largely Sunni majority populations in Indonesia and Egypt, Shiites dominate Iranian society.³⁶⁸

Classical Shi'a jurisprudence prohibits women from serving as judges.³⁶⁹ Many Shi'a believe, however, that this is subject to modification in response to changing times and circumstances.³⁷⁰ Presently, opposition to female judges sounds

360. *See id.*

361. *See id.*

362. *See id.*

363. *See id.* at 125 (“If a law is considered unIslamic or unconstitutional, the Council has the authority to veto it. Decisions as to whether a given law is unconstitutional are to be taken unanimously among all 12 council members, whereas the question of conformity with the Islamic Sharia is decided via a majority vote of the clerics. The Council also supervises presidential and parliamentary elections and plebiscites. In case of conflicting interpretations of the provisions of the constitution, the Council is empowered to give a binding ruling.”).

364. *See id.*

365. *See id.*

366. *See id.* at 126.

367. *See id.*

368. *See id.*

369. *See* Bayoumi, *supra* note 157, at 54.

370. *See* Jamileh Kadivar, *Women Working as Judges and Making Judicial Decisions*, in *WOMEN, POWER AND POLITICS IN 21ST CENTURY IRAN* 107, 107–08 (Tara Povey & Elaheh Rostami-Povey eds., 2012).

in rights restrictive interpretations of Islamic law's textual sources.³⁷¹

During Islam's formative period, Shi'a judicial qualifications required religious literacy and the administration of justice.³⁷² The first Shi'a jurist who discussed the gender of judicial candidates was the prominent Iranian Sheikh Toosi (10th century A.D.).³⁷³ He specifically prohibited women from judicial service.³⁷⁴ Other scholars have since adopted his interpretation.³⁷⁵

Some Shi'a jurists have expressed their dissent, arguing that women with requisite knowledge of the law should be permitted to serve as judges.³⁷⁶ They stipulate, however, that she should do so in matters where her testimony is deemed competent.³⁷⁷ This position is identical to the Hanafi position in Sunni Islam, dominant in Egypt.

Still others avoid the question of gender altogether, instead emphasizing the ability to administer justice and possession of requisite knowledge as the credentials of a qualified judicial candidate.³⁷⁸ This position mirrors dominant views during Islam's formative period.³⁷⁹

It is significant to note that the Shi'a legal opposition to women judges generally sounds in rights restrictive interpretations of the Quran, similar to Sunni detractors. Notably, they make Quranic arguments concerning male intellectual superiority (the Inferior Intellect Argument) thereby rendering men more capable leaders naturally

371. *See id.*

372. *See id.* at 110.

373. *See id.*

374. *See id.*

375. *See id.*

376. *See id.* at 112.

377. *See id.* at 111.

378. *See id.* ("My review of the literature demonstrates that the added interpretations were accepted by some jurists and rejected by others. For example, approximately 200 years ago, Sheikh Mohammad Hassan Najafi Saheb, a theorist of state in Shi'a jurisprudence and the author of *Javaher al-kalam* [The Jewel of the Word] discussed 'justice' and 'knowledge' as the two characteristics of judgment and judges. He also stated that other conditions are the added interpretations of later jurists.").

379. *See id.*

equipped to lead and judge.³⁸⁰ In this respect, the Quranic arguments intersect with the No Positions of Public Authority argument according to which judgeships are viewed as an extension of sovereign power.³⁸¹

Further, Shi'a jurists have relied upon rights restrictive interpretations of the Quran to exclude female participation in the public square altogether; by extension, she could not serve on the bench.³⁸² To buttress their point, they reference the lives of the Prophet Muhammad's wives.³⁸³ This may represent a lack of religious literacy or historical knowledge, however, because the Prophet Muhammad's contemporaries, including his wives, were actively engaged in the political, economic, and legal spheres.³⁸⁴

In addition to these arguments, Shii jurists also employ Hadith narratives to support prohibitions against female judges.³⁸⁵ As in Sunni Islam, one of the most frequently cited

380. *See id.* at 112–13. (“There are three Quranic verses which are used by Shi'a jurists to justify their idea of only men working as judges. The first is Verse 34 of the famous chapter on women, Surah al-Nisa Those who refer to this verse argue that men are superior to women in knowledge, wisdom and insight. Therefore they have the right to lead and to make judicial decisions. In this context the act of passing judgment is regarded as a form of leadership The third verse is 228 of Surah al-Baqarah Here jurists have extended the issue of superiority of men over women, which are discussed in this verse, to the subject of judgment and have concluded that for this reason only men can be considered *rejal* (statesman) and can work as judges. This verse is specifically about women's and men's responsibilities towards each other. It relates to divorce, and hence cannot be used to deny women the right to work as judges.”).

381. *See id.* (“According to this view, if women are given the right to make judgments, they should also be given the right to leadership, which, of course, is contrary to their interpretation of this verse.”).

382. *See id.* at 112–13 (“Second Verse is 33 of Surah al-Azhab This verse specifically refers to the wives of the Prophet Muhammad. Jurists have concluded that this position can be extended to all women within any given society and for this reason women should not participate in the public sphere of the community and cannot therefore work as judges.”).

383. *See id.*

384. *See id.*; *see also* Engy Abdelkader, *Using the Legacy of Muslim Women Leaders to Empower*, HUFFINGTON POST (Feb. 27, 2012, 9:24 PM), http://www.huffingtonpost.com/engy-abdelkader/legacy-muslim-women-leaders-empower_b_1284480.html.

385. *See* Kadivar, *supra* note 370, at 114 (“For example, the following narrative mentions the appointment of a man as a judge: ‘The tradition of Abu Khadijeh: - I was commanded by the Imam [Ja'far as-Sadiq (pbuh)] to convey the following message to our friends [Shi'a]: “when enmity and dispute arise among you, or you disagree concerning the receipt or payment of a sum of money, be sure not to refer the matter to one of these malefactors for judgment. Designate as judge and arbiter someone

Hadith prophesies the inevitable failure of any nation led by a woman, referenced and discussed in Section II above.³⁸⁶ Others rely on the Hadith Argument to assert that judicial decision making is a necessary religious undertaking exclusively relegated to the male sphere.³⁸⁷ Naturally, gender rights advocates attempt to undermine such arguments by questioning the Hadith's underlying authenticity.³⁸⁸

2. Women

In 1934, Iran enacted its first law concerning judicial qualifications and there was no mention of gender.³⁸⁹ Women, however, were not appointed to the judiciary until 1970, and they worked in this capacity until the 1979 Revolution.³⁹⁰ The Revolution adversely impacted gender rights issues including the ability of women to serve on the bench.³⁹¹

Immediately following the 1979 Revolution, Ayatollah Ruhollah Khomeini³⁹² prohibited the appointment of women judges, employing Nature and Inferior Intellect Arguments, explaining that the female brain was undeveloped enough AND, as such, lacked judicial capacity.³⁹³ During the transitional government of 1980, all female judges were demoted to administrative positions,³⁹⁴ including perhaps most notably

amongst you who is acquainted with our junctions concerning what is permitted and what is prohibited, for I appoint such a man as judge over you. Let none of you take your complaint against another of you to the tyrannical ruling power.””).

386. *See id.* at 116 (“A nation which placed its affairs in the hands of a woman shall never prosper!”).

387. *See id.* at 115 (“[T]he narratives that prohibit women from formulating judgments and working as judges are related to the arguments of Sheikh Saddogh, the Shi’a scholar and expert in Hadith, who in one of his books, *Man la yahduruhu al-Faqih* [Every Man Is His Own Lawyer][sic], quotes the Prophet Muhammad’s will which was made to Imam Ali. According to Saddogh, the Prophet Mohammad implied that certain tasks are not obligatory for women such as attending Friday prayers, Friday prayers congregations, calling people to prayer, attending sick people or funerals and making judicial decisions.”).

388. *See id.*

389. *See id.* at 108.

390. *See id.*

391. *See id.*

392. Upon the revolution’s success, he was named Iran’s religious and political leader for life. *See* Ayatollah Ruhollah Khomeini— Biography, BIOGRAPHY.COM, <http://www.biography.com/people/ayatollah-ruhollah-khomeini-13680544>.

393. *See* Coker, *supra* note 353, at 1C.

394. *See* Kadivar, *supra* note 370, at 108–09.

Nobel Peace Prize Laureate Shirin Ebadi.³⁹⁵ She was one of approximately one hundred women serving as judges at that time.³⁹⁶

The 1979 Constitution did not codify an explicit legal prohibition against female judges.³⁹⁷ Rather it provided that judicial qualifications are determined by law and Islamic jurisprudence.³⁹⁸ Several years later, in 1982, a new law excluded women from judgeships.³⁹⁹ The exclusion was similarly codified in a 1983 law regarding judicial employment.⁴⁰⁰

In 1985, gender rights advocacy culminated in an amendment to the laws, thus permitting women to serve as advisors in the civil courts and in the Office of the Guardianship of Underage Children.⁴⁰¹ Other legal reform resulted in women serving as advisors in divorce and family courts matters where

395. See Coker, *supra* note 353; see also Linda Deutsch, *Female Nobel laureates push for peace in U.S-Iran tensions*, ASSOCIATED PRESS, Apr. 12, 2006, <http://www.apnewsarchive.com/2006/Female-Nobel-Laureates-Launch-Peace-Bid/id-fdcc986072d9285e7f582d12ae3a2ff2> (“Shirin Ebadi remembers a time years ago when she was one of 100 women judges in the courtrooms of Iran. And she recalls what it was like to be deposed from her job when the Islamic revolution changed everything. ‘After the revolution, we were informed that women could not be judges anymore and women judges were demoted to administrative levels,’ she said in an interview Tuesday in Los Angeles. ‘I became the clerk of the court in which I had been the judge. Of course, I couldn’t tolerate that and I got early retirement.’”).

396. See Deutsch, *supra* note 395.

397. See Kadivar, *supra* note 370, at 108.

398. See *id.* at 108.

399. See *id.* at 108–09.

400. See *id.* at 109 (“Parliament passed the law, which stated the conditions for eligibility: the judge must be a believer, just, a practicing Muslim, and faithful to the regime of the Islamic Republic; he must have been born as a legitimate child, have Iranian nationality, not be addicted to drugs, have the ability to practice *ijtihad* or to have permission from the high judicial council to pass judgments and be a man. In practice, this law denied women the right to work as judges and gave the authority to the high judicial council to implement the law for all those women who were already working as judges. According to this new law female judges either had to be removed from the judiciary or had to work in other areas of the judiciary. As a result female judges were offered a number of options: those who had worked for fifteen years or more could retire, and those who were eligible for administrative positions could work as administrators. Those judges who were not willing to be demoted to administrative positions were offered one month’s salary and other entitlements for every year of their service as a redundancy package. Hence many women were demoted to the position of court clerk.”).

401. See *id.* at 109.

judges were required to consult with female advisors prior to issuing a decision.⁴⁰²

The laws continued to exclude women from serving on the bench, however; female court participation was restricted to an advisory capacity.⁴⁰³ While women presently occupy some judicial posts in Iran, they are still prohibited from rendering the final decision.⁴⁰⁴ These developments were largely in response to increasing numbers of female law graduates demanding equal access to judicial careers.⁴⁰⁵

Indeed, women confront obstacles on the Iranian job market. On the one hand, she is permitted to empower herself with an education but is legally excluded from pursuing particular career tracks and socially denied others.⁴⁰⁶ Often, female applicants are turned away in favor of a prospective male employee who is presumably financially responsible for supporting his family.⁴⁰⁷ In the event she obtains employment, she frequently finds herself in a male-dominated workspace where her colleagues treat her as possessing relaxed morals and religious standards.⁴⁰⁸ This is largely because the population has been socialized to believe that the most honorable status for women is as wife and mother.⁴⁰⁹

402. *See id.* at 110.

403. *See id.* at 109.

404. *See id.*

405. *See id.* (“In 1996 the law was further reformed. According to this reformed law, women who were eligible to work as judges could work as advisors in other legal institutions such as the Supreme Administrative Court and as investigative judges at the Offices of Legal Studies and the Codification of Law in the Ministry of Justice. They could also work as advisors to legal departments and other departments which required judicial positions.”); *see also* Shavarini, *supra* note 354, at 132.

406. *See* Thomas Erdbrink, *Iranian Parliament Delays Vote on Bill That Upset Judiciary, Women’s Activists*, WASH. POST, Sept. 3, 2008, at A9 (“‘The Iranian government has created squadrons of policewomen, bus drivers and female university students,’ she said. ‘But at the same time, they want to turn women into housewives and make them accept polygamy.’”).

407. *See* Shavarini, *supra* note 354, at 132.

408. *See id.*

409. *See id.* (“Or when a young woman is given a job, she typically finds herself in a predominately male work environment. There, she’s made to feel uncomfortable. She tries to be professional but her male colleagues think of her as ‘loose’ . . . cheap . . . unfeminine. They seem to lose respect for her. Remember that in this society, they’ve been raised to believe that the highest respected position for women is that of wives and mothers. This government’s religious propaganda has been that it’s only these women who have a place in heaven. So imagine how a young woman, raised in this era,

IV. *DISCUSSION AND ANALYSIS*

In each of the three countries examined above, perceptions surrounding and interpretations of religion and its law influenced the ability of women to serve as judges. Tolerant, more inclusive interpretations of Islamic law in Indonesia facilitated women's entry into the country's judiciary, including the religious courts, notwithstanding entrenched stereotypes concerning religion as the exclusive domain of men.⁴¹⁰ While Indonesian society widely views the judiciary as corrupt, gender rights advocates continued to push for reform to ensure representative female participation.⁴¹¹

Government policies may account in large part for their success in increasing rates of female participation.⁴¹² Specifically, the practice of gender mainstreaming—unique to Indonesia in the instant analysis—contributes to enhanced women's roles, including in the State's judiciary.⁴¹³ Of the three countries surveyed here, Indonesia enjoys the highest rates of female judgeships and an absence of gendered interpretative restrictions vis-à-vis the law or normative social practice.⁴¹⁴

Yet, perceived barriers to a judicial career were most pronounced around entry to the religious courts.⁴¹⁵ Again, this likely speaks to popular gendered expectations concerning Islamic scholars as male.⁴¹⁶ While Indonesian courts continue to struggle with the type of Islamic law they wish to apply in dispute resolution, it appears they have successfully overcome rights

brainwashed in this system, working in an office is made to feel: she feels internally conflicted.”).

410. See Nurlaelawati & Rahim, *supra* note 197.

411. See generally Hamad, *supra* note 280.

412. See United Nations Entity for Gen. Equal. and the Empowerment of Women, *supra* note 241 (“Gender Mainstreaming is a globally accepted strategy for promoting gender equality. Mainstreaming is not an end in itself but a strategy, an approach, a means to achieve the goal of gender equality. Mainstreaming involves ensuring that gender perspectives and attention to the goal of gender equality are central to all activities - policy development, research, advocacy/ dialogue, legislation, resource allocation, and planning, implementation and monitoring of programmes and projects.”); see also Soetjipto, *supra* note 229.

413. See United Nations Entity for Gen. Equal. and the Empowerment of Women, *supra* note 241.

414. See Asrianti, *supra* note 246.

415. See Soetjipto, *supra* note 229.

416. See *id.*; see also Nurlaelawati & Rahim, *supra* note 197.

restrictive religious interpretations prohibiting women from serving in their ranks.⁴¹⁷ Indeed, Indonesian Islam—as influenced by the country’s rich cultural and religious diversity—has not obstructed women’s professional advancement, thus challenging the assertion that women are necessarily oppressed in all Muslim majority societies.⁴¹⁸

In striking similarity to Egypt and Iran, gender rights activists bemoan a patriarchal society where women’s roles are frequently relegated to the home in the private-public dichotomy.⁴¹⁹ As such, one of the priorities of these advocates must be empowering women and girls with the confidence and capability to succeed in diverse professional contexts, including embarking upon a judicial career.⁴²⁰ While these women may be forced to overcome external barriers to the path of professional success, they must first grapple with internal ones surrounding proper female roles and competence sounding in religious and cultural narratives.⁴²¹ The Indonesian government should work collaboratively with civil society leaders and organizations, as well as religious entities, to design, implement and promote related educational programs focused on female empowerment.⁴²²

417. See BOWEN, *supra* note 190, at 9.

418. See BENNETT, *supra* note 163, at 198.

419. See POMPE, *supra* note 206.

420. See Thuwayba Al Barwani, *Women, Education, and the Redefinition of Empowerment and Change in a Traditional Society: The Case of Oman*, in WOMEN IN THE MIDDLE EAST AND NORTH AFRICA: AGENTS OF CHANGE, *supra* note 296, at 215, 215.

421. See GCC ‘Needs More Female Judges’, GULF DAILY NEWS (Nov. 3, 2008), <http://www.gulf-daily-news.com/NewsDetails.aspx?storyid=233519> (“She said the struggle wasn’t just to convince men they could do the job, but also to get women to believe in their ability). See also, MUSLIM, *supra* note 88, at 25 (“A number of the female respondents held the same view as men in regards to the inadequacy of women and their lack of qualifications for the role of judge. This suggests women’s self image is based on a historically contrived model by men.”).

422. See Barwani, *supra* note 420, at 215 (“Education is the single most important and consistent factor in the empowerment of women, irrespective of race, religion or culture. While there is an ongoing debate regarding the definition of empowerment and whether or not Eurocentric definitions (which typically emphasize independence from and equal rights to men) truly represent the aspirations of women in all societies, the critical importance of education in empowerment remains largely uncontested. Similarly uncontested is the belief that education empowers women to challenge themselves to take roles and responsibilities that enable them to be a catalyst of change.”).

In Egypt, popular, scholarly, and official concepts surrounding Islam and its law have influenced women's (in)ability to ascend to the bench.⁴²³ While not codified in constitutional or statutory law, rights restrictive interpretations were leveraged to categorically exclude women judges for decades.⁴²⁴ It is interesting to note female agency in challenging these discriminatory normative practices before the courts notwithstanding less than ideal outcomes.⁴²⁵ Several factors appear to have clearly contributed to the successful appointment of women to the Egyptian judiciary.

First, the appointments occurred only when prominent religious authorities (e.g. Al-Azhar) modified their previously restrictive position; this development undoubtedly had a positive sociological effect lending moral and religious legal legitimacy to subsequent executive appointments.⁴²⁶ Second, and perhaps related, gender rights advocates countered rights restrictive arguments with rights empowering interpretations of Islam's textual sources, historically misused to subjugate women.⁴²⁷ This has been commonly referenced as 'Islamic feminism.'⁴²⁸ Finally, prominent male members of the judiciary supported the appointment, thus highlighting the male role in traditional societies of facilitating female empowerment and professional success.⁴²⁹

Unlike Indonesia, where courts suffer from a degraded image, Egyptian judges are widely respected and well compensated.⁴³⁰ This may account for the increased social, political, and legal resistance, historically, to women judges in Egypt. If women are generally devalued, they may be viewed as

423. See, e.g., Kovach, *supra* note 166 ("In 1998, when Egyptian women seemed on the brink of breaking into the judiciary, prominent judges like Mohammed Magdi Murgan panned the idea in the semiofficial press, saying: "The natural place for a woman is the house, in the shadow of a man.").

424. See, e.g., Carr, *supra* note 304.

425. See *id.*

426. See, e.g., Elbendary, *supra* note 275.

427. See, e.g., Nasrawi, *supra* note 3.

428. See BENNETT, *supra* note 163, at 37 ("The second position represents what can be called Islamic feminism, although it has male and female supporters. Much discussion focuses on particularly problematic Qur'anic and Hadith verses.").

429. See El Sayed, *supra* note 316.

430. See generally APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, *supra* note 194.

unworthy or undeserving—let alone incapable of managing—a position of such great stature.

Presently, the most prominent issue in the Egyptian context is restrictions on women judge's interpretative rights as demonstrated by the continuing controversy surrounding their appointment to the State's administrative courts;⁴³¹ the rate of women serving as judges also lags far behind Indonesia.⁴³² It appears that gender rights advocates can borrow the following policy initiatives for the Egyptian judiciary from the Indonesian model: gender mainstreaming and quota systems.⁴³³ Further, the significance of rights empowering interpretations of religious law and texts cannot be overstated particularly in light of the country's newly adopted Constitution.⁴³⁴

Like its predecessor, the new Constitution (adopted in December 2012), recognizes Islam as the State religion and designates Islamic law as the primary source for legislation.⁴³⁵ Additionally, Al-Azhar's jurists must now be consulted on all Islamic law matters.⁴³⁶ These provisions will undoubtedly enhance religion's influence in law and society, further underscoring the importance of religious literacy sounding in gender rights empowering interpretations of Islamic law. Again, gender mainstreaming policies and quotas should also be implemented vis-à-vis the judiciary.⁴³⁷ For instance, gender mainstreaming policies may prioritize the significance of appointing judges who are committed to gender equality irrespective of their gender.⁴³⁸

431. See, e.g., Carr, *supra* note 304.

432. See *supra* Part III.A.2 (discussing female judges in Indonesia); see also *Egypt Judges Row*, *supra* note 330 (stating that there are only forty-two women judges in Egypt); cf. Asrianti, *supra* note 246 ("In 2011, women accounted for 23.4% of all trial court judges across Indonesia, and 15.4% of appellate judges.")

433. See Asrianti, *supra* note 246.

434. See Michael Lipin, *Egypt's New Constitution: How it Differs from Old Version*, VOICE AM., Dec. 25, 2012, <http://www.voanews.com/content/egypt-constitution/1572169.html>.

435. See Nariman Youssef, *Egypt's Draft Constitution Translated*, EGYPT INDEP., (Feb. 22, 2012, 1:15 PM), <http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated>.

436. See *id.*

437. See Asrianti, *supra* note 246.

438. See Anita F. Hill, *What Difference Will Women Judges Make? Looking Once More at the "Woman Question,"* in *WOMEN AND LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE* 175, 176 (Barbara Kellerman & Deborah L. Rhode eds., 207).

Iran encompasses the most restrictive conditions where female exclusion from the judiciary is codified in law.⁴³⁹ Unfortunately, rights restrictive interpretations of Shii Islam's textual sources have overpowered more inclusive, tolerant versions—this represents a formidable challenge in the conservative Islamic Republic.⁴⁴⁰ At the time of this writing, gender mainstreaming and quota systems do not represent practical policy options.⁴⁴¹ Gender rights advocates may borrow from the Egyptian model by attempting to cultivate relationships with prominent judges and government officials who support the appointment of female judges. These men may prove powerful allies in related legal reform.

It is significant to highlight that each of the Muslim majority countries analyzed here are culturally distinct and geographically diverse. Within each, Islam and its law manifest differently.⁴⁴² Arguably, Indonesian Islam appears the most tolerant and inclusive of the three, and Iranian Islam most restrictive in orientation.⁴⁴³ Iranian officials must come to realize that violating the rights of its female citizenry harms society as a whole.

According to a number of research studies, there is a positive correlative relationship between female empowerment and contribution and peaceful, prosperous societies.⁴⁴⁴ This point underscores the significance of female participation in all aspects of a society, including as a judicial decision-maker. Indeed, Muslim women judges arguably enhance perceptions of impartiality⁴⁴⁵ and equality by making the judiciary more reflective of their society's diversity.⁴⁴⁶

439. See Kadivar, *supra* note 370, at 107–08.

440. See *id.* at 108.

441. See Asrianti, *supra* note 246.

442. See Bennett, *supra* note 163, at 198.

443. See Nurlaelawati & Rahim, *supra* note 197, at 49.

444. See Deutsch, *supra* note 395, at F4.

445. See Hill, *supra* note 437, at 184–85 (“[T]he role of a judge also has significance in terms of perceptions about representation. The face of judging, in an emblematic way, matters as a reflection of access to justice; the diversity of the bench affects public perceptions of fairness. Finally, diversity among judges is a reflection of how power is distributed in the justice system. Professor Judith Resnik states the issue clearly: ‘In the contemporary world, where democratic commitments oblige equal access to power by persons of all colors whatever their identities, the composition of a

That diversity translates into a potentially wider, perhaps more representative spectrum of official opinions and perspectives on any particular matter.⁴⁴⁷ As US Supreme Court Justice Sandra O'Connor stated in her concurring opinion in *J.E.B. v. Alabama*, a gender discrimination case challenging female exclusion from juries, “[o]ne need not be a sexist to share the intuition that in certain cases a person’s gender and resulting life experience will be relevant to his or her view of the case . . . Individuals are not expected to ignore as jurors what they know as men—or women.”⁴⁴⁸ The exclusion of women from the judiciary can disadvantage litigants.⁴⁴⁹

Their presence also has symbolic significance regarding official deference to gender equality norms and practices that may in turn positively impact popular views and normative practice.⁴⁵⁰ Yet, the role of Muslim women judges has practical

judiciary—if all-white or all-male or all-upper class—becomes a problem of equality and legitimacy.”).

446. *See id.* at 175 (“As we contemplate future appointments, it is important to consider whether in the twenty-first century the judiciary will be a body that looks more like the population it serves.”).

447. *See Lawyer: Female Perspective Needed in Policy-making*, NEW STRAITS TIMES, Sept. 3, 2007, available at 2007 WLNR 17175683 (“More women should be in policy-making positions, especially in Islamic religious institutions. Syariah lawyer Kamar Ainiyah Kamaruzaman said women should serve on state religious councils and state fatwa councils to give views from a woman’s perspective.”); *see also* Hill, *supra* note 437, at 177, 183 (“According to Justice Wilson’s assessment, the different life experiences of women and men cause them to think differently and to approach the law and legal decision making differently. Thus she concluded that including more women in the judiciary would change the substance of the law and the processes by which the law is decided. . . . For example, political scientists Elaine Martin and Barry Pyle studied high courts in all fifty US states, concluding that in divorce decisions ‘a judge’s gender’ tended ‘to be the primary predictor of a judge’s vote.’ In addition, Brenda Kruse’s research has concluded that Justices Sandra Day O’Connor and Ruth Bader Ginsburg are also influenced by their gendered experiences in deciding employment cases. There is also considerable evidence that some male judges’ perspectives cause them to view women’s experiences very differently than women might. Professor Shirley Wiegand has chronicled numerous examples that demonstrate a judge’s apparently limited vision.”).

448. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *see* Hill, *supra* note 437, at 186–87.

449. *See id.*; *see also* GCC ‘Needs More Female Judges’, *supra* note 421 (“So when they legislate, they legislate for men. That’s why we must have women judges. There are one or two in Jordan, but we don’t have any in the GCC.”).

450. *See* Hill, *supra* note 437, at 178. (“The appointment of women to the bench would ‘help shatter stereotypes about the role of women in society that are held by male judges and lawyers as well as by litigants, jurors and witnesses’; help preserve the

effects, too—they help ensure more expeditious resolution of legal disputes in courts suffering from backlogs.⁴⁵¹ Moreover, they help contribute to their familial standard of living, country's economy, and overall social advancement.⁴⁵²

CONCLUSION

In conclusion, it is interesting to note that Thuml al-Qahramana's appointment to adjudicate cases was initially met with popular disapproval.⁴⁵³ In fact, people refused to allow her to hear their grievances.⁴⁵⁴ The tide turned only when a prominent male judge (Qadi Abu'l-Hasan) publicized his approval of her accomplishment, thus positively influencing popular opinion.⁴⁵⁵

Indeed, the more things change, the more they appear to stay very much the same.

public trust by fostering perceptions of diverse representation in the judiciary; reduce problems for women counsel; alter the process of judicial decision-making, and reform legal doctrine particularly in such areas as tort, criminal and family law.”).

451. *See generally* WOMEN JUDGES IN THE ARAB REGION: POINT, COUNTERPOINT, *supra* note 88.

452. *See id.*

453. *See* BEWLEY, *supra* note 1, at 157.

454. *See id.*

455. *See id.*