Mediation

Whereas the great majority of disputes in industrial societies are nowadays resolved by state-instituted courts of law or arbitration regulated by state law, typically pre-industrial societies, and certainly those of Islam, were only marginally subject to government intervention. To put it slightly differently, in pre-modern Islamic societies, disputes were resolved with a minimum of legislative guidance, the determining factors being informal arbitration and, equally, informal law courts.

Furthermore, it appears to be a consistent pattern that, wherever mediation and law are involved in conflict resolution, morality and social ethics are intertwined, as they certainly were in the case of Islam in the pre-industrial era. By contrast, where they are absent, as they are in the legal culture of Western and, increasingly, non-Western modern nation-states, morality and social ethics are strangers. Morality, especially its religious variety, thus provided a more effective and pervasive mechanism of self-rule and did not require the marked presence of coercive and disciplinarian state agencies, the emblem of the modern body-politic.

In speaking of the “legal system,” it would be neither sufficient nor even correct to dwell on the law court as the exclusive vehicle of conflict resolution. In any system, what goes on both outside the court and prior to bringing litigation before it are stages of conflict resolution that are just as significant to the operation of the legal system as any court process. This is particularly true in closely knit social structures, such as traditional Islamic societies, where groups tended to manage conflicts before they were brought before a wider public forum, mainly the law court. It was within these groups, from Malaya to Morocco, that the initial operation of the legal system began, and it was through the continued involvement of such groups that the Muslim court was able to accomplish its task of conflict resolution. For, as we shall see, it was inconceivable for the Muslim court in particular to process claims regarding disputes without
due consideration of the moral sensibilities and communal complexities of the social site from within which a dispute had arisen.

Disputes occurring prior to and outside the court’s involvement thus centered in the various small communities which made up Muslim societies. The extended family, the clan and the tribe constituted the core and kernel of social existence, even when they happened to be intersected by other social orderings. Small villages predominantly consisted of these units, but in towns and cities other units of social coherence shared the demographic landscape. The neighborhood, an important unit of social organization, constituted a sort of corporate group that was at times based on kinship, but at others on religious or other unifying ties. The neighborhoods of the Christians, Jews, immigrant communities (Armenians, Maghrebites, Franks), as well as the guilds of the tanners, soap-makers, porters, physicians, copper merchants and the like, were fixed presences in Muslim cities. Each neighborhood consisted of dozens, even hundreds, of families and houses, with shops, public facilities, a house of worship, a school, a public bath, a public fountain, and several small streets or alleys connected to a main road. The neighborhood was usually contained within walls, with guarded gates at the points leading to the main roads of the city.

It was the extended family that constituted the unshakable foundation of social existence and, as such, its members always stood in a relationship of solidarity with each other. The family not only constituted an economic unit of production, but provided lifetime security for its members. The family, in other words, defined much of human relationships, and made an investment not only in the well-being of its individual members but also in ensuring their moral and legal compliance; for “it was commonly accepted that they could suffer when a member of the group offended … In the words of a Malay text, ‘Parents and children, brothers and sisters, share the same family fortune and the family repute. If one suffers, all suffer.”

Even before the appearance of corporate professional guilds under the Ottomans of the fifteenth and sixteenth centuries (guilds which further enhanced the inner groups’ dynamics of mediation and conflict resolution), the extended family, clan, religious communities, neighborhoods and the various loosely organized professions all provided extensive social networks for informal conflict resolution. Many private disputes, such as spousal discord and disagreements over joint family property, were often

mediated by the head of the household or an authoritative figure in the clan or neighborhood. Village imams, as well as the elders of nomadic, semi-nomadic and settled tribes, commonly appear in court records as having intervened as arbitrators in disputes prior to the arrival of the case before the judge. As much under the Ottomans as under the Malayan Laws of 1667 (Dato Sri Paduka Tuan), village elders were to report to authorities any and all crimes that might disrupt public order or the life of the community. But these elders also played a crucial role in mediation and conflict resolution. Indeed, many court cases in which the claimants’ evidence was inconclusive were resolved (often at the recommendation of the judge) by such mediators during the process of litigation, and before the judge passed sentence. At times, the “PEACEMAKERS” would be relatives of the claimant and/or defendant or simply residents of the same neighborhood. At others, these peacemakers were officials of the court, specifically appointed to carry out this particular task. Cases were often dismissed by the judge when mediators from within or without the court were successful in settling the dispute.

The legal maxim “AMICABLE SETTLEMENT is the best verdict” represents a long-standing tradition in Islam and Islamic law, reflecting the deep-rooted perception, both legal and social, not only that arbitration and mediation are integral to the legal system and the legal process but that they even stand paramount over court litigation, which was usually seen as the last resort. In a society that viewed as sacrosanct all family relations and affairs, disputes involving intimate and private matters were kept away from the public eye and scrutiny. For every case that went to court – and these were countless – many more were informally resolved at the local level, with the intervention of the elders, the imam, the household matriarch, or others of equal prestige and authority. Informal mediation was also necessary in order to avoid the escalation of conflict. In communities that heavily depended on group solidarity and in which the individual was defined by his or her affiliation to larger group-units, private disputes had great potential for becoming “expandable into political disputes between competing groups.”2 If the sanctity of family was paramount, it was so also because it constituted an integral part of a larger consideration, namely, the maintenance of social harmony. Attending to and eliminating disputes at the most local level preempted the escalation of disputes that might have disrupted such harmony.

The court

In chapter 1, we noted the role Muslim judges played in resolving disputes through informal arbitration and through the court process. Like arbitration, the court process was never remote from the social world of the disputants. It was embedded in a social fabric that demanded a moral logic of social equity rather than a logic of winner-takes-all resolutions. Restoring parties to the social roles they enjoyed before appearing in court required social and moral compromise, where each party was allowed to claim at least a partial gain. Total loss was avoided wherever possible, and was usually only countenanced when a litigant had caused an irreparable or serious breach of social harmony and the moral code.

In this system, judges cared less for the application of a logically consistent legal doctrine or principle than for the creation of 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. But even when this was not possible, and even when the victim recovered all damages, the wrongdoer was also usually allowed a partial recovery of his moral personhood, for, by the informal nature of the Muslim court, the parties and their relatives, neighbors and friends were allowed to air their views in full and without constraint, defending the honor and reputation of one litigant or the other.

Such a collective and public expression permitted even the loser to retain some moral dignity, for this defense explained and justified the compelling circumstances under which wrongdoing had taken place. This amounted to a moral exoneration that could, in the community’s imagination, border on the legal. For although the actual legal punishment here may have been inevitable, the circumstantial compulsion under which the wrongdoing occurred left the loser and, particularly, his relations (who were both the moral extension and moral predicate of the culprit and who would have to leave the court to resume their communal lives) able to retain sufficient dignity to allow them to function in the normative and morally structured social world. The moral foundations of such a reinstatement constituted the means by which the court – with its socially oriented structure – fulfilled one of its chief tasks, namely, the preservation of social order and harmony.

Social equity, which was a major concern of the Muslim court, was defined in moral terms, and it demanded that the morality of the weak and underprivileged be accorded no less attention than that attributed to the rich and mighty. As the former undoubtedly saw themselves (and were seen) as equal members of the moral community, the court had to afford them the same kind of treatment it did the latter, if not even more
attentively. It was particularly the court’s informal and open format that permitted the individual and defenders from within his or her micro-community to argue their cases and special circumstances from a moral perspective. But it was also the commitment to universal principles of law and justice that created a legal culture wherein everyone expected that injustices against the weak would be redressed and the wrongdoing of the powerful curbed. This was an expectation based on a centuries-long proven practice where peasants almost always won cases against their oppressive overlords, and where Jews and Christians often prevailed in court not only over Muslim business partners and neighbors but also against no less powerful figures than the provincial governor himself.

The Muslim court thus afforded a sort of public arena for anyone who chose to utilize that space for his or her defense. The highly formalized processes of the modern court and its structure of legal representation (costly and tending to suppress the individual voice of the litigants, let alone their sense of morality) were unknown to Islam. So were lawyers and the excessive costs of litigation that prevent the weak and the poor from pressing their rights. The Muslim court succeeded precisely where the modern court fails, namely, in being a sanctified refuge within whose domain the weak and poor could win against the mighty and affluent.

A case in point was women. Considerable recent research has shown that this group received not only fair treatment in the Muslim court but also even greater protection than other groups. 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.3 Protected by a moral sense of honor and sanctity, they asserted their rights and privileges within the court as well as outside it. And when legal doctrine proved restrictive toward them – as it sometimes did – they developed strategies in response that were recognized and accommodated in the law court.

That the court was embedded in both society and social morality is attested to by the nature of the court’s social constitution, on the one hand, and by the legal-mindedness of the very society the court was designed to serve, on the other. The qadi himself was typically a creature of the culture in which he adjudicated disputes. Embedded in the moral fabric of social relations, he could have no better interest than to preserve

these relations. If mediation and arbitration sought to achieve social equity and to preserve the individual’s sense of morality, the qadi had to absorb these imperatives into his court and accommodate them within a normative legal framework. 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 party to a case.

The qadi’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). Rather, the qadi mediated a dialectic between, on the one hand, the social and moral imperatives – of which he was an integral part – and, on the other, the demands of legal doctrine which in turn recognized the supremacy of the unwritten codes of morality and morally grounded social relations.

Yet the qadi was not the only socially linked official in the court. All other functionaries, most notably the witnesses and the court officials, shared the same social and moral landscape. Much of the work of the court related not only to the investigation of events but also, and perhaps more importantly, to that of the moral integrity of the persons involved in litigation or in these events.

One of the qadi’s primary duties was to recruit court officials (called CERTIFYING-WITNESSES) who possessed moral integrity and who themselves were in turn charged with the task of assessing the moral worth of people involved in a particular litigation, primarily situation-witnesses appearing on behalf of the litigants. The function of certifying-witnesses, who were fixtures of the court (unlike situation-witnesses), would have been rendered impossible without local knowledge of existing customs, moral values and social ties. Impossible not only because the knowledge of others would be inadequate and insufficient but, more importantly, because the credibility of the testimony itself – the bedrock of adjudication – would cease to be both testable and demonstrable. For moral trustworthiness – the foundations of testimony – constituted a personal moral investment in social ties. To lie meant in effect to risk these ties and, in turn, to lose social prestige, honor and all that was productive of life’s networks of social obligations.

Each case was inscribed into the minutes of the court, and attested at the end of the minute by certifying-witnesses whose number ranged from two to several. Although these witnesses, retained and paid by the court, hailed usually from the higher social classes – some of them being prominent jurists and provincial magnates – other witnesses who accompanied
the litigants obviously represented the entire spectrum of social classes in the wider population, particularly the lower strata. Their attestation at the end of each record summing up the case amounted not only to a communal approval of, and a check on, court proceedings in each and every case heard by the court, but also a depository of communal memory that guaranteed present and future public access to the history of the case. In many ways, therefore, these witnesses functioned as community inspectors of the court’s business, ensuring the moral integrity of its procedures, just as their counterparts, the court’s legal experts (usually muftis), ensured the soundness of the application of law.

Like judges and certifying-witnesses, the scribe of the court (who wrote down the minutes of court proceedings) was also a member of the local community and himself a jurist of some sort. His ties to the community enhanced the already strong connections between the court and the society which the court was designed to serve. The scribe was instrumental in preserving social and legal continuity between court and society (and it was oftentimes the case that senior scribes were appointed as deputy-qadis).

Litigants and consumers of the law appeared before the qadi without ceremony and presented their cases without needing professional mediation, for Islamic law had no lawyers. The litigants spoke informally, unhampered by anything resembling the discipline of the modern court. They presented their cases in the way they knew how, without technical jargon. This was possible because in the Islamic system of justice no noticeable gulf existed between the court as a legal institution and the consumers of the law, however economically impoverished or educationally disadvantaged the latter might be. Yet, it was not entirely the virtue of the court and qadi alone that made this gap virtually nonexistent, for some credit must equally be given to these very consumers. Unlike modern society, which has become estranged from the legal profession in multiple ways, traditional Muslim society was as much engaged in the Shar’i system of values as the court was embedded in the moral universe of society. It is a salient feature of that society that it lived legal ethics and legal morality, for these constituted the religious foundations and codes of social praxis. To say that law in pre-modern Muslim societies was a living and lived tradition is merely to state the obvious.

If law was a lived and living tradition, then people knew what the law was. In other words, legal knowledge was widespread and accessible, thanks to the mufti and other legists who were willing to impart legal knowledge free of charge, and nearly at any time someone wished to have it. The social underdogs thus knew their rights before approaching the court, a fact that in part explains why they won the great majority of
cases in which they happened to be plaintiffs. Their counsels were neither lawyers who spoke a different, incomprehensible language, nor higher-class professionals who exacted exorbitant fees that often made litigation and recovery of rights as expensive as the litigated object.

But the spread of the legal ethic and legal knowledge in the social order was also the function of a cumulative tradition, transmitted from one generation to the next, and enhanced at every turn by the vibrant participation of aspiring law students, the greater and lesser muftis and the imams, and by the occasional advice that the judge and other learned persons dispensed while visiting acquaintances, walking in the street or shopping in the market. Thus when the common folk appeared before the court, they spoke a “legal” language as perfectly comprehensible to the judge as the judge’s vernacular “moral” language was comprehensible to them. Legal norms and social morality were largely inseparable, one feeding on and, at the same time, sustaining the other. As much a social as a legal institution, the Muslim court was eminently the product of the very community which it served and in the bosom of which it functioned.

**Women**

Before we conclude this chapter, we must say something more about women and law. Our sources, which largely consist of court records, tell us little about the social background of the women involved in court proceedings, how they were viewed by the individual members of their social group, how they were perceived and positioned in the larger group making up their immediate communities, and, more importantly, how influential and disadvantaged women differed from each other in reaping the benefits of the law. It is clear, however, that personal rectitude played a decisive role in legal proceedings, a fact that translated into decisions and injunctions in favor of women who themselves were of such a character or supported by female witnesses seen to have an equally elevated moral character. If judicial evidence is the thread by which justice hangs, then rectitude and moral character are the filaments from which the thread is made. And rectitude and morality were no less the province of women than they were of men.

The pervasive legal conviction that women possessed full legal personality largely explains the fact that women enjoyed as much access to the Muslim courts as did their male counterparts. Like men, they approached the courts not only with prior knowledge of their rights, but with the apparent conviction that the courts were fair and sympathetic, and operated with the distinct inclination to enforce their rights. They often represented themselves in person, but when not – and this being typically
in the case of women (and many men) of the higher classes, including non-Muslim women – they normally had a male relative, a servant or their business manager represent them. By all indications, when they approached the court in person, they did so on the same terms as did men, and asserted themselves freely, firmly and emphatically. The courts allowed for a wide margin of understanding when women were assertively forthright, giving them ample space to defend their reputation, honor, status and material interests. They approached the court as both plaintiffs and defendants, suing men but also other women. Muslim women sued Christian and Jewish men and women, and these latter sued them in turn (though litigation between religious denominations appears to have been substantially less frequent than within each respective denomination). Manumitted female slaves took their former masters to court as often as they sued others for defaulting on a debt owed to them, or for a breach of pecuniary or other contracts. Women sued for civil damages, for dissolution of their marriages, for alimony, for child custody plus expenses, for remedies against defamation, and brought to trial other women on charges of insolvency and physical assault. But women were also sued by men on charges of physical abuse.

It is certainly true that Islamic law, reflecting the social make-up of the great majority of Islamic communities, promoted gendered social and legal structures. Equally true, as some historians have observed, is the fact that “the court language privileged the social status of men and Muslims over women and non-Muslims.”4 But nothing in this language or in the court itself could diminish the rights of women or even discourage them from approaching the court, much less take away from them the full rights of property ownership, of juridico-moral rectitude or of suing whomever they pleased. This was equally true of non-Muslim women, who, in the language of the court, were doubly underprivileged by the facts of being women and non-Muslims. Yet their rights, as well as their actual legal and social powers, were no more disadvantaged than their Muslim counterparts.

It is also true that in legal doctrine a woman’s testimony, in most areas of the law, carried half the weight of that of a man. However, we have few data on the actual effects that such juristic discrimination had on the actual lives and experiences of women. How, in other words, did this evidentiary rule affect their marital, familial and property rights – among

others – and, equally important, how were these effects perceived and interpreted by Muslim women themselves? Judging by the available evidence, the overall and relative effect of such discriminatory evidentiary rules certainly compares not unfavorably to the experience of their contemporary European counterparts.

Evidence of the innocuousness involved in women’s diminished evidentiary value is the glaring fact that women appeared in court as plaintiffs or defendants in every sphere of legal activity, ranging from criminality to civil litigation. Although the majority of cases bringing them to the court (admittedly not the only province of law) were economic in nature, they were active on several other fronts. It may even be said that courts often preferred women as guardians of minors, asking (and paying) them to manage the orphans’ financial affairs and the wealth they inherited. They were no less hesitant to sue on behalf of these minors than they were with regard to their own farms, agricultural tools, weaving equipment, livestock and slaves.

Much litigation about property related to lapsed divorce payments and inheritance settlements. In either case, the common presence of women in court, mostly as plaintiffs, attested to the relatively advantageous positions in which they stood. Divorce, as the jurists understood very well, and as legal practice testifies, was a very costly financial enterprise for the husband, let alone that in many cases it was effectively ruinous (a fact which may also explain the rarity of polygamy). Upon divorce, the ex-wife was entitled to maintenance for at least three months, delayed dower, children’s maintenance, any debts the husband incurred to her during the marriage (a relatively frequent occurrence), and if the children were young, a fee for nursing. And if the husband had not been consistent in paying for marital obligations (also a relatively frequent occurrence), he would owe the total sum due upon the initiation of divorce.

In this context, it must be clear that when women entered marriage, they frequently did so with a fair amount of capital, which explains why they were a source of lending for many husbands and why so many of them engaged in the business of money-lending in the first place. In addition to the immediate dower and the financial and material guarantees for her livelihood, the wife secured a postponed payment, but one that she could retrieve at any time she wished (unless otherwise stipulated in the contract). But equally significant was the trousseau that she received from her parents, customarily consisting of her share of her natal family’s inheritance paid in the form of furniture, clothing, jewelry and at times cash.

Many women, before or during marriage, were also endowed with a waqf portion, giving them further income. Whatever the form of the trousseau and the total wealth they could accumulate, women were entirely aware of
their exclusive right to this wealth, and understood well that they were under no obligation to spend any portion of it on others or even on themselves. They apparently spent their own money on themselves only if they chose to do so, since such expenses as pertained to sustenance, shelter and clothing (in the expansive meaning of these terms if the husband was prosperous) were entirely his responsibility, not hers. In other words, unlike that of husbands, the property of wives was not subject to the chipping effect of expenditure, but could instead be saved, invested and augmented.

Considering the unassailability over the centuries of these rights – which on balance availed women of property accumulation – it is not surprising that, in the historical record, unilateral divorce by the husband appears to be less common than *khulʿ*, the contractual dissolution of marriage (where the wife surrenders some of her financial rights in exchange for divorce). The relative frequency of *khulʿ* in Istanbul, Anatolia, Syria, Muslim Cyprus, Egypt and Palestine has been duly noted by historians. It is a phenomenon that explains – in this context – three significant features of Muslim dissolution of marriage. First, while the husband could divorce unilaterally, there was also a “price” that he paid for this prerogative. In other words, the average husband was constrained by hefty financial deterrents, coupled with legal and moral deterrents installed by the law as well. Second, the husband’s unilateral divorce in effect also amounted to a one-way transfer of property from the husband to the wife, beyond and above all that he was – for the duration of the marriage – obliged to provide his wife by default. In fact, an important effect of this transfer was the fact that many repudiated women purchased the husband’s share in the matrimonial house, funneling the divorce payment due to them toward such a purchase. Third, *khulʿ*, within the economic equation of Muslim marriages, was in a sense less of a depletion of the woman’s property because the payment by the wife was usually the delayed dower her husband owed her, plus her waiting period allowance. This was so typical that the juristic manuals reflected this practice as a normative doctrine. The point, however, remains that it was the very financial promise made by the groom that was used as the bargaining chip for *khulʿ*.

*Khulʿ*, a means by which a woman could exit an unhappy marriage, provides an excellent context to assess domestic violence against women and other causes of their marital discord. Because they had fairly easy access to the courts, unhappy wives had the option of addressing themselves to the qadi, who would assign officials of the court to investigate the abuse or other harm that made these women’s marriage unbearable. If abuse was proven, the court had the power to dissolve the marriage, as it often did. The law also allowed the woman the right to self-defense,
including, under certain circumstances, the killing of an abusive husband. But if the husband was not at fault, a wife who found her marriage unbearable could at least dissolve it by *khul*.

The formal legal aspect of such situations might well be augmented by another social aspect. Obviously, the ties of the wife/woman with her original family were not, upon marriage, severed, and her parents, brothers and sisters continued to watch closely as the marriage of their daughter/sister unfolded. It was, after all, the parents of the wife who had usually arranged the marriage, and who were at least to some extent responsible for it as well as for the well-being of their daughter. If the marriage failed, they not only had to deal with such a failure in the public space, but also had to “take back” their daughter, with all the economic and other consequences this “taking back” might entail. Their interest in the success of their daughter’s marriage explains the close scrutiny many families exercised (and still do) to prevent abuse by the husband of their daughter (including such measures as the beating of the abusive husband by the wife’s brothers). Unlike the present situation of many women who, in the nuclear family of today, must fend for themselves, women in earlier Islamic societies continued to have the psychological and social – and when necessary economic – backing of their original families. This obviously did not prevent abuse in all cases, but it did contribute significantly to its reduction. However, when all attempts had failed, the wife’s original family, often with the collaboration of the husband’s own family, would exercise the necessary pressures to bring the marriage to an end, before the *qadi* or not.

Finally, a few words about women and property rights are in order. Making up about 40 percent of the real estate dealers in some cities, women regularly approached the court to register their sales and purchases, recording in this way the fact that they were heavily involved in transactions related to house transfers. As court litigation and registries show, women owned both residential and commercial properties, mainly rent-earning shops. They often owned their own houses, and frequently jointly purchased houses with their husbands, during, but also before, the marriage. As already mentioned, when they were repudiated by their husbands, they often bought the latter’s share in their matrimonial house with the very money their husbands owed them as a result of divorce.

Women were also participants in one of the most powerful economies in Muslim lands, namely, the real property dedicated as *waqf*, which, by the dawn of European colonialism, constituted between 40 and 60 percent of all real property. Except for the largest endowments, usually established by sultans, kings, viziers and emirs, many of the founders of
medium-size and smaller waqfs were women. They often founded and managed endowments alone, and to a lesser extent they were also co-founders, along with males and other females. A relatively impressive number of waqfs were established by manumitted female slaves associated with the political and military elites, and these too established waqfs independently as well as with their (former) masters (a fact that attests to the financial, and even political, power of female slaves). Waqfs of modest range appear to have been established by men and women in equal numbers. Their participation in the important waqf economy began early on, and steadily increased throughout the centuries. By the eighteenth century, women constituted between 30 and 50 percent of waqf founders. In some places, there were more women establishing endowments than men. In certain cities, a significant number, and at times more than half, of the endowments established by women were public, dedicated to religious and educational purposes or to caring for and feeding the poor. And like men, most women creating endowments purchased their properties for this purpose.

It is only reasonable to assume that more women benefited from waqf endowments as beneficiaries than there were women who founded such endowments. Quantitative evidence of the proportions of men and women who were waqf beneficiaries has still to be tabulated, but the general evidence thus far points to well-nigh equal numbers. The theory that the juridical instrument of waqf was used to deprive females of their entitlements to inheritance no longer stands, for it appears, to the contrary, that the waqf was resorted to in order to create a sort of matrilineal system of property devolution. Equally important, however, was the crucial factor of avoiding the partition of family property (which Quranic inheritance tended to do), this frequently having harmful economic effects that were curbed by having recourse to the waqf instrument. It should therefore not be surprising to find many waqf deeds that allocate to the beneficiaries the same proportional entitlement to the estate as the Quranic shares.

One historian has found that in eighteenth- and nineteenth-century Aleppo women were disadvantaged as inheritors in less than 1 percent of the 468 waqf deeds she examined. Women generally designated more females than males as beneficiaries, while some 85 percent of men designated their wives and/or daughters, a situation that obtained in

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sixteenth-century Istanbul as well. The same pattern occurs with regard to rights of residency in the family dwelling of the founder. The great majority of waqf deeds – in Aleppo, Istanbul and elsewhere – did not discriminate against females, nor did they limit their rights in any way. But when they did, the restriction did not preclude the right to live in the house until marriage, or to return to it when they became orphaned or divorced. Nor did preclusion apply to female descendants, a fact that “left the door open for married women and their spouses and their offspring to claim their rights to live in the house.”

Women were also deemed to be as qualified as men in their capacity as managers of endowments, an influential administrative and financial position. Although there were more men than women performing this function, a large number of women appear as administrators of waqfs established by their fathers, mothers, grandparents and distant relatives. In the eyes of the court too, women manifestly had precedence over younger males as administrators. And like men, women reserved for themselves the right to be the first administrators of their own endowments. They also reserved and used the right to sue against infringements of waqf rights, on behalf of themselves as well as others.

In sum, Muslim women were full participants in the life of the law. As one historian has put it with regard to Ottoman women, they “used their right of access to the courts to promote their interests, in which a manumitted slave could restrict the claim of her past master to her estate, where a farm woman could challenge the claim of a creditor upon the expensive livestock she had purchased, where a widow could assert her priority right to buy her husband’s share in real property, and where a woman traveling alone from one village to another could charge a police officer with obstructing her path.” But if the law depended, in its proper functioning, on the moral community, then women – just as much as men – were the full bearers of the very morality that the law and the court demanded. And as moral denizens, or denizens who aspired to the power that was generated by moral character, they engaged in the law, losing and winning on the way. As participants in the legal system, they developed their own strategies, and drew on the moral and social resources available to them. They no doubt lived in a patriarchy, but the inner

6 Ibid., 138–39.
dynamics of this patriarchy afforded them plenty of agency that allowed them a great deal of latitude. That “Islamic modernity” has often proven to be oppressive of women, as we shall see in chapter 8, cannot take away from the fact that for a millennium before the dawn of modernity they compared favorably with their counterparts in many parts of the globe, particularly in Europe.