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Law versus Medical Science: Competition between Legal and Biological Paternity in an Egyptian Civil Court

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Abstract

The 1942 lawsuit that is translated, annotated and analyzed in this article raises questions about the judicial acceptability of new types of evidence developed by modern science. A husband who suspected that his wife was carrying the child of her lover asked the *ahlī* court of summary justice in Alexandria to determine the identity of the child's biological father by means of a blood-group test. The judge's refusal to comply with the request, on the grounds that he lacked jurisdiction, reflects a decision by Egyptian legislators and judges to leave the establishment of paternity to evidentiary rules that are shaped by cultural values about marriage, legitimacy and morality. These values do not always favor decision-making based on the full range of scientifically available facts.

Keywords

paternity (biological, legal), paternity tests, adultery, shari'a and civil courts, expert witnesses, Islamic law vs. modern science

Introduction: Standard and Expert Witnessing

Islamic law, or *fiqh*, maintains a clear preference for oral testimony predicated on eye-witnessing (*shahāda*) over any other mode of evidence. Schacht, the leading twentieth-century scholar in the field, claimed that *fiqh* prohibits judges from relying on circumstantial

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evidence.[1] In a recent article, however, Johansen has challenged this thesis by demonstrating that several jurists, foremost among them two Hanbalis, Ibn Taymiyya (d. 1328) and his disciple Ibn Qayyim al-Jawziyya (d. 1351), did allow the qāḍī (henceforth qadi) to use physical signs as probative indicators, especially in criminal matters relating to female fidelity and paternity. In the absence of a confession or direct evidence, qadis also accepted circumstantial evidence in civil cases.[2]

The group of witnesses who served qadis by assessing the significance of physical signs included medical practitioners, midwives, merchants, tailors, weavers, builders, engineers and farmers. These experts (*ahl al-khibra*, sg. *khabīr*) provided the courts with professional evaluations, each in his respective field.[3] The phenomenon of expert witnessing is intriguing because it combines the cultural-social and the legal: Expert witnessing is one of the principal channels for importing 'external' knowledge into the courtroom. This enables the court to keep abreast of social practices and customs as well as the ever-expanding body of professional and scientific literature. Knowledge provided by experts is thus crucial to any court system that wishes to preserve its relevancy to the society in which it functions and is supposed to serve.

The Legal Case

The paternity lawsuit from 1942 that is translated, annotated and analyzed in this article focuses on the judicial acceptability of new types of

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1) Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 192-93. See also Noel James Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 125.

2) Baber Johansen, "Signs as Evidence: The Doctrine of Ibn Taymiyya (1263-1328) and Ibn Qayyim al-Jawziyya (d. 1351) on Proof," *Islamic Law and Society* 9 (2002): 173-75, 177, 188-89. See also ʿAbd al-Karīm Zaydān, *al-Mufaṣṣal fī aḥkām al-marʾa waʾl-bayt al-muslim fiʾl-sharīʿa al-islāmiyya*, 11 vols. (Beirut: Muʾassasat al-Risāla, 1994), 5:111-12. Scholars often mistakenly consider a physical sign as circumstantial evidence. A physical sign, such as a spot of blood, a fingerprint or a crack in a wall, is a probative indicator. Only after an expert draws conclusions from such an indicator, in a judicial context, does it become a piece of circumstantial evidence.

3) The theoretical attitude of the *fiqh* towards expert testimony and the historical practices of this type of testimony are extensively dealt with in Ron Shaham, *The Expert Witness in Islamic Courts: Medicine and Crafts in the Service of Law* (Chicago: University of Chicago Press, 2010), Chapters 1-3.

evidence developed by modern science. The case involved a well-to-do man and his much younger wife. It seems that after seven years of marriage the wife became dissatisfied with their relationship, due to differences of temperament between her and her older husband and the fact that they had not produced children. This dissatisfaction pushed her into the arms of a lover, much younger than her husband. At some point, the husband suspected that she was carrying the child of her lover. The husband filed a lawsuit at the indigenous (*ahlī*) summary justice court, against the woman (now his ex-wife) and her lover (now her legal husband), demanding a blood-group test for the baby, the current husband and himself to determine the identity of the child's biological father. Aware that his denial of paternity could not be accepted by the *sharī'a* (henceforward shari'a) court, because the child had been born less than one year after the date of divorce and was registered formally as his son, he applied to the civil court. He argued there that the aim of his demand to have the medical test carried out immediately was to facilitate his claim for monetary compensation from his ex-wife. This claim was justified on the grounds of the prejudice she caused him by affiliating to him her son, who was not, biologically speaking, his. The summary civil court judge was in a bind: A request to establish a factual legal situation (*ithbāt ḥāla*) in order to prevent a loss of legal rights was arguably in his jurisdiction, but the results of the medical test might jeopardize the legal paternity of the child (a personal status matter) and cast suspicion of adultery on the mother (a criminal matter). These potential ramifications of the medical test worried the judge and caused him to hesitate. The court document demonstrates how the judge dealt with this difficult dilemma.

Before I engage in an in-depth analysis of the case, I provide some background on the following topics: The *fiqh* rules concerning paternity and adultery and the use of expert testimony in this respect; the influence of modern science on evidentiary rules applied by modern courts in general and on the establishment of paternity in particular; the development of the modern legal profession, and the reorganization of the Egyptian court system from the late-nineteenth to the mid-twentieth century.

Establishment of Paternity in *Fiqh* and the Use of Experts for that Purpose

The *fiqh* criteria for establishing paternity (*nasab*) are lenient, for two reasons. The first is concern for the welfare (*maṣlaḥa*) of the child and its rights (especially inheritance). This concern is mentioned in the Qur'an and hadith, as well as in the ethical and legal literature. The second concern is to minimize the number of situations in which Muslims (especially women) are accused of committing adultery (*zinā*), which, as one of the *ḥudūd*, is a severe religious offense.

To safeguard these concerns, a valid marriage is the most important criterion for establishing paternity. According to the principle that "the child is affiliated to the [marriage] bed" *(al-walad li'l-firāsh*), the husband's paternity of a child born to his wife during their valid marriage (or within the maximum pregnancy period subsequent to divorce) is automatically established.[4] Hanafi doctrine holds that paternity may be established even if there was no physical contact between the spouses during their marriage. Paternity also may be established in irregular (*fāsid*) marriages and in cases in which the existence of marriage is questionable *(al-waṭ' bi-shubha*).[5] On the one hand, the husband's ability to deny his paternity of a child born to his wife is restricted to the procedure known as *li'ān*;[6] on the other, any child born outside of wedlock, whether to an unmarried mother or to a married woman (i.e., in case of adultery), is, according to the *fiqh*, illegitimate: s/he has no paternity (only maternity) and no male agnate legally required to care for his/her upbringing.

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[4] The marital presumption of paternity has been dominant in Western law as well. See Shaham, *Expert*, 156-57.

[5] Literally "intercourse involving doubt (or uncertainty)," this term refers to a situation in which a man has intercourse with a woman whom he wrongly believes is his legal wife or concubine. The jurists tend to relieve those involved in *al-waṭ' bi-shubha* from the accusation of adultery and to legitimize the child born as a result of such a union, assuming that the intentions of Muslims are good.

[6] The procedure of *li'ān*, based on Qur'an 24 (al-Nūr):6-9, brings about dissolution of marriage through mutual imprecation of the spouses in a case of unproven charges of adultery against the wife. By this process the wife is exempted from the punishment (*ḥadd*) for adultery, the husband from the *ḥadd* for false accusation of adultery (*qadhf*), and his paternity over his wife's baby is not established.

The use of experts for the establishment of paternity was an acceptable Islamic practice. Already in pre-Islamic times, Arabs had perfected the science of physiognomy (*qiyāfa*), which enabled them to verify paternity by finding similar signs (*imārāt*; *ʿalāmāt*) on the bodies of the child and his biological parents. The Hanbali Ibn Qayyim al-Jawziyya explains that these signs are invisible (*ẓuhūr khafī*) to the ordinary human eye and that only the physiognomy expert (henceforward *qāʾif*), due to his unique sensory abilities, can detect them. Ibn Qayyim adds that the Prophet, the Companions, and the four Righteous Caliphs all considered physiognomy to be an indicator for establishing paternity (*jaʿalahā dalīlᵘⁿ min adillat thubūt al-nasab*) and made use of it.[7] In practice, physiognomy probably was used only in those exceptional cases in which the principle of "the child is affiliated to the [marriage] bed" could not be applied and therefore did not immediately settle the issue, e.g., for establishing the paternity of children born to female slaves.[8]

The Scientific Revolution and Legal Reform

The history of modern science in Middle-Eastern societies is best understood as an encounter between East and West. This encounter, the characteristics of which may have varied according to local circumstances, affected both science and the adopting culture.

The transformations of expert witnessing in the modern period, both in European, American and Middle Eastern legal systems, are due to the scientific revolution and to the reform of legal systems. In his excellent study on the development of expert witnessing in the English and American legal systems between the eighteenth and twentieth centuries, Tal Golan writes that "science and law are mutually supporting belief systems and deeply connected social institutions heavily invested in each other." Scientific and technological developments bring to the courts within days or weeks new forms of knowledge claims. These claims have challenged judicial practices and inspired the development

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7) Ibn Qayyim al-Jawziyya, *al-Ṭuruq al-ḥukmiyya fi'l-siyāsa al-sharʿiyya* (Beirut: Dār Iḥyāʾ al-ʿUlūm, n.d.), 17, 225.

8) *EI*², s.v. Ḳiyāfa (T. Fahd).

of new evidence rules.[9] Expert witnessing patterns currently in operation in legal systems are therefore the product of a long, and at times painful, dialectic process by which science, its legal applications and the legal system itself have all been shaped through continuous dialogue and interaction. On the one hand, the legal system has assisted science by providing the courtroom as an arena in which scientists can present their innovations and thereby gain public exposure. On the other, legal systems have learned to accommodate modern science and, in return, have gained novel probative means that have resulted in a much more efficient and reliable system of justice.

Legal Reform in Modern Egypt

Starting in the last quarter of the nineteenth century, Egypt chose to reform its traditional shari'a legal system along the line of the civil-law model, especially the French one.

As convincingly argued by Nathan Brown, the decision to enact legal reforms, which reflects a major shift in political culture, from a decentralized state model to a centralized and penetrative one, was neither accidental nor directly imposed on Egypt by the colonial powers. Rather, adoption of the civil-law model was an informed strategic decision made by local administrative and legal elites. These elites, including a new generation of lawyers and judges trained in the Western tradition, viewed the civil-law model of the centralized state as more efficient than the Anglo-American common-law model in securing legal order and the rule of law, thereby contributing to a more rapid release from colonial control.[10] One consequence of this historical change was that Egypt adopted the hierarchical and centralized system of expert witnessing typical of civil-law systems and authorized this system to serve the national courts in any field that required professional expertise.[11]

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9) Tal Golan, *Laws of Men and Laws of Nature: The History of Scientific Expert Testimony in England and America* (Cambridge Mass. & London: Harvard University Press, 2004), 2.
10) Nathan Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge: Cambridge University Press, 1997), Ch. 2.
11) On the development of this system of expert witnessing, see Shaham, *Expert*, Ch. 4.

By the end of the nineteenth century, the development of the civil law model in Egypt created a dual court system which persisted until the abolition of the shariʿa courts in 1955: on the one hand, the shariʿa courts, whose jurisdiction had been restricted significantly, adjudicated personal status, inheritance and *waqf* cases. Qadis of the shariʿa courts were trained *ʿulamāʾ* (henceforth ulama), graduates of al-Azhar or of similar institutions, who applied codifications of *sharʿī* family law, or, in the case of a gap in the code, Hanafi doctrine.[12] The combined application of *fiqh* and statutory codes in the shariʿa courts resulted in a hybrid law, something between the shariʿa and Western law. On the other, the *ahlī* courts, established in 1884, adjudicated civil and criminal matters by applying codes that were derived from European (mainly French) models. The civil court judges, who were trained in the European (mainly Continental) tradition, both inside and outside Egypt, had only a partial and second-hand knowledge of the shariʿa. The different orientation of these two groups of judges was a source of tension within the Egyptian court system.[13]

Returning to our court case: The creation of the dual court system in Egypt removed the offense of illicit sexual intercourse (*zinā*) from the jurisdiction of the shariʿa: *zinā*, punishable according to the Qurʾan by 100 lashes (a *ḥadd* punishment),[14] is, according to modern Egyptian

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12) On developments in the training of judges in the early twentieth century, see Ron Shaham, "Shopping for Legal Forums: Christians and Family law in Modern Egypt," in *Dispensing Justice in Islam: Qadis and their Judgments*, ed. Muhammad Khalid Masud, Rudolph Peters and David S. Powers (Leiden: Brill, 2006), 456-57; Farhat J. Ziadeh, *Lawyers the Rule of Law and Liberalism in Modern Egypt* (Stanford Cal.: Hoover, 1968), 55-61.

13) On the emergence of the modern Egyptian secular legal profession, see Donald M. Reid, *Lawyers and Politics in the Arab World, 1880-1960* (Minneapolis: Bibliotheca Islamica, 1981), chapters 1 & 5, especially 17-24, 121-25; Ziadeh, *Lawyers*, 44-55; Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharīʿa into Egyptian Constitutional Law* (Leiden: Brill, 2006), 67-73. On the ambiguity of the legislation concerning the division of jurisdiction between the shariʿa and the indigenous courts, which was a source of concern for judges in both systems, see Ron Shaham, "An Egyptian Judge in a Period of Change: Qāḍī Aḥmad Muḥammad Shākir (1892-1958)," *Journal of the American Oriental Society* 119.3 (1999): 443.

14) According to one juristic opinion, 100 lashes is the sole punishment for illicit sex. According to another, the punishment of 100 lashes applies if the offenders have never previously experienced licit sex (in which case they are defined as *ghayr muḥṣan*), while if

law, a criminal offense adjudicated by the civil courts that apply a French-oriented criminal code. According to this code, the punishment for *zinā* is usually a short period of imprisonment. Also, whereas the *fiqh* stipulates that an adulterer may be convicted on the basis of the testimonies of four eye-witnesses to the act (or the acknowledgement of the suspect/s), the modern Egyptian Code of Criminal Procedure permits conviction on the basis of circumstantial evidence, such as incriminating written correspondence between the couple. Unlike adultery, the establishment of paternity (*ithbāt nasab*), as a personal status issue, remained in the jurisdiction of the shariʿa courts, which applied the traditional *fiqh* presumption of *al-walad li'l-firāsh*.

The Resistance of Family Law to the Integration of New Technologies

The development in Egypt of scientific technologies in general and of medical knowledge and of forensic medicine in particular, starting in the early nineteenth century,[15] and the establishment of a state-affiliated system of forensic medical experts, created new options in the field of evidence, especially in criminal law. Although ulama resistance to the adoption of Western technologies was common, based on religious, moral, socio-economic and political grounds, which often overlap, no major successful technology was barred or effectively resisted.[16]

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they did previously experience licit sex (i.e., if they are *muḥṣan*), their punishment is harsher: stoning to death. The stoning punishment is based on the "stoning verse," which is not included in the canonical text of the Qur'an.

15) On the development of medical knowledge in general and forensic medicine in particular, see Khaled Fahmy, "Law, Medicine and Society in Nineteenth-Century Egypt," *Egypte Monde Arabe* 34 (1998), 17-51; idem, "Women, Medicine and Power in Nineteenth-Century Egypt," in *Remaking Women: Feminism and Modernity in the Middle East*, ed. Lila Abu-Lughod (Princeton: Princeton University Press, 1998), 35-72.

16) Uri M. Kupferschmidt, "Western Technologies, Big and Small, in the Middle East," Unpublished paper submitted for discussion at the Baer Forum, Tel Aviv University, 16 April 2004, 9-11; Uriel Heyd, "The Ottoman ʿUlemā and Westernization in the Time of Selīm III and Maḥmūd II," in *Studies in Islamic History and Civilization*, ed. Uriel Heyd (Jerusalem: the Magnes Press, 1961), 70-73. On the complex relationship between Islamic teachings and scientific findings, especially medical ones, among both medieval and modern Muslim scholars, see Vardit Rispler-Chaim, "Egyptian *Fatwa*s on Medical Matters:

Family law has been particularly resistant to the integration of new technologies. As noted, while Middle Eastern nation-states secularized the majority of legal fields along Western lines, family law (including inheritance and *waqf*) has remained in the orbit of the shariʿa, only parts of which have been codified. From the point of view of the emerging nation-states, since family law was the most developed field of the shariʿa, one in which the ulama had always enjoyed a monopoly, it was better to reform those legal fields in which competition from the ulama would not be so severe. According to reformist ideology, family law belongs to the private sphere more than to the public one; its political significance is therefore lower and the state could leave it almost entirely to the control of the ulama without risking too much of its power. In this way the state paid lip service to the shariʿa, thereby placating the ulama and avoiding a direct conflict with them.

The secularization of most of the fields of law has had the effect of reinforcing the religious tone of those few branches that remained in the domain of the shariʿa. Family law has become the "last bastion" of the ulama and, consequently, extremely sensitive and resistant to reform. Any attempt to bring about family-law reforms has triggered polarized and highly emotional political conflicts. Public debates on family law reform were and still are conducted almost entirely within an Islamic framework and have a markedly political aspect; the state often retreats from planned reforms out of fear of a religious backlash or in the hope of gaining political legitimacy and support.[17]

For traditionalists, including the ulama, family law is a sacred law and the foundation of the most important social institution, the family. They therefore regard any desertion of *sharʿī* family law as prejudicial to the divine character of the law as well as a threat to the Islamic patriarchal order. With respect to the tension between the modern and the patriarchal orders, the shariʿa occupies a special place: It symbolizes the golden age of Islam; it vindicates a present in which Islamic societies are subordinate to the West; it serves as a buffer against the rapid erosion

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A Dialogue between Religion and Science," in *The Intertwined Worlds of Islam: Essays in Memory of Hava Lazarus-Yafeh*, ed. Nahem Ilan (Jerusalem: The Ben-Zvi Institute, 2002), esp. 493-96 (in Hebrew).

17) Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law* (London: I. B. Tauris, 2000), 10-13.

of traditional ways of life and against the aggressive penetration of Western values; it serves as a shelter in a world characterized by uncertainty and chronic economic crisis; it is a genuine answer to the crisis of identity; and, above all, it is an ideology whose role is to justify unequal divisions of power, e.g., gender relations.[18]

Statutory Reformist Legislation on the Establishment of Paternity

Developments in the field of forensic medicine have had potential ramifications for the establishment of paternity: the almost irrefutable *shar'ī* presumption of *al-walad li'l-firāsh* may be challenged by the discovery of novel scientific techniques (first by blood-group tests and later by HLA [human leukocyte antigens] typing and DNA testing), which make it possible to establish biological paternity with virtual certainty.[19] As demonstrated by our court case, this challenge was a source of tension in the daily work of the courts.

The fact that family law has been particularly resistant to the integration of new technologies explains why the reforms introduced by Muslim states, including Egypt, in the domain of paternity, have been minimal and procedural in nature, rather than substantial. These states have not yet accepted the use of medical techniques in paternity cases. Thus, the legal paternity created by the principle of *al-walad li'l-firāsh* overcomes any evidence indicating that the legal father is not the biological father.[20]

The only intervention of the Egyptian legislature in the field of paternity involves the length of pregnancy. This issue presents a clash between sanctified knowledge and scientific knowledge, because the maximum pregnancy periods according to the *fiqh* are much longer than the period known on the basis of scientific observation. This is a clear instance in which traditional medicine has served as a strategic conservative means for protecting the cohesion of families in general

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18) Ibid., 199.

19) Shaham, *Expert*, 159-61.

20) Aḥmad Muḥammad Ibrāhīm, *Ṭuruq al-ithbāt al-shar'iyya, ma'a bayyān ikhtilāf al-madhāhib al-fiqhiyya wa-sawq al-adilla wa'l-muwāzana baynahā thumma muqārana bi'l-qānūn wa-mu'allaqan 'alayhi bi-aḥkām al-naqḍ*, 3rd ed. (Cairo: Maṭba'at al-Qāhira al-Ḥadītha li'l-Ṭibā'a, 1985), 473-75.

and women in particular.[21] Such a contradiction between traditional and scientific knowledge, added to the revolutionary change in the quality of science, have forced modern Muslim jurists to reconsider the relationship between religious law and science, particularly in the field of medicine, which increasingly relies on branches of modern science and has ceased to be a field of practical wisdom. The maximum period of pregnancy prescribed by the *fiqh* (five years according to the Malikis and four according to the Shafiʿis) has become a source of embarrassment for modernist intellectuals and professionals, especially those exposed to contact with Westerners. Pushing for reform, the modernist Rashīd Riḍā (d. 1935) argued in one of his legal opinions that the determination of the maximum length of pregnancy by the ulama is not a divine prescription (*naṣṣ dīnī*). The classical ulama's knowledge in this field was based on questioning old women, who may have been wrong, so this knowledge is not binding. Even if a particular pregnancy did last four or five years, was it proper, asks Riḍā, to base legal rules on exceptional cases? Modern medicine, he continues, has developed considerably, and females in modern times are much more knowledgeable about their bodies than were females of old. If modern knowledge is rejected, Riḍā concludes, there is a danger that educated Muslims will cease to respect their religion as divine.[22]

Another trigger for paternity-related legal reform was recurring complaints by Egyptian males to the Egyptian Ministry of Justice to the effect that the application of Hanafi doctrine, which prescribes a maximum pregnancy of two lunar years, in the field of paternity, compelled them, as legal fathers, to assume economic responsibility for supporting children born to their wives or divorcees from other men. Responding to these complaints, Egyptian legislators (in Article 15 of the 1929 family-law code) prohibited the shariʿa courts from hearing any claim for the establishment of paternity in the following cases: if the absence

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21) Another device intended to save a woman from distress when she has become pregnant out of wedlock is the North-African customary concept of "the sleeping embryo," recognized in Mālikī doctrine, which refers to an extended period of pregnancy during which the embryo does not develop. See Aharon Layish, *Divorce in the Libyan Family* (New York and Jerusalem: New York University Press and Magnes Press, 1991), 112, 161.

22) Muḥammad Rashīd Riḍā, *Fatāwī al-imām Muḥammad Rashīd Riḍā*, 4 vols. (Beirut: Dār al-Kitāb al-Jadīd, 1970), 3:836-41.

of physical contact between the spouses after the date of their marriage is established; if the child is born more than one (solar) year subsequent to his father's absence; or if the child is born to a divorcee (or a widow) more than one year after the date of divorce (or the husband's death). The one-year period specified by Article 15 is roughly consistent with the maximum duration of pregnancy according to medical opinion, to wit, nine months, the duration of normal pregnancy, plus a "safety period" of three months, to cover all exceptional cases.

Egyptian legislators have chosen to deal with paternity disputes by procedural means (depriving the courts of jurisdiction in certain circumstances) rather than by directly reforming the *fiqh* paternity rules. Like the reforms pertaining to the minimum age at marriage and to the duration of the waiting period, this policy was adopted to prevent a direct clash with the religious establishment.[23]

Shariʿa Court Practice in Paternity Claims in the First Half of the Twentieth Century

From 1929 until 1955 the shariʿa courts decided paternity cases on the basis of Hanafi *fiqh* and the 1929 legislation. The qadis, whose first priority was the child's interests, were willing to confirm paternity even in doubtful cases. Verification of the identity of the natural father beyond any doubt was only a secondary priority.[24] The result of this judicial policy was that children were sometimes affiliated to men who probably were not their natural fathers.[25]

Whereas in criminal cases the use of blood tests has become the norm,[26] the use of medical examinations to determine the identity of

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23) Ron Shaham, *Family and the Courts in Modern Egypt: A Study Based on Decisions by the Sharīʿa Courts, 1900-1955* (Leiden: Brill, 1997), 156.

24) For a detailed discussion, see ibid., 156-64.

25) This was probably true in the West as well. See Shaham, *Expert*, 156-57.

26) See, for example, Saʿīd Aḥmad Shuʿla, *Qaḍāʾ al-naqḍ fī nadb al-khubarāʾ: majmūʿat al-qawāʿid al-qānūniyya allatī qararathā maḥkamat al-naqḍ bi-dawāʾirihā al-madaniyya waʾl-jināʾiyya khilal 76 ʿāmm*^{an} (Alexandria: Munshaʾat al-Maʿārif, 1998), 188-89. Here, a criminal case, probably a rape, led to the birth of a baby. The defendant argued that he could not be the father, due to a difference in blood-group type between him and the baby. The court rejected the claim, on the grounds that similarity of blood group between parents and descendants is not a condition for establishment of paternity. The Court of Cassation,

the natural father has been rare. In two cases from the shariʿa courts in which paternity was denied by the presumed father, it was the court itself that encouraged the man to undergo a blood test, although the test was not conducted.[27] Other qadis held that in the event of contradiction, Hanafi rules of paternity take priority over the outcome of an expert medical examination. In one such a case, a blood test ordered by the Public Prosecutor (*niyāba*)[28] revealed that the present husband of the mother was not her child's natural father. The court refused to consider this evidence and confirmed the husband's paternity on the grounds that the child had been born a little over six months (the minimum pregnancy period, according to the *fiqh*) after his mother's marriage to the same husband. In another case the husband argued that he had been away from his wife for the three years immediately preceding her giving birth. He therefore asked the court to send him and the baby girl for a blood test; the court refused, arguing that the need to perform such a test was preempted by the need to apply Hanafi doctrine.[29]

Analysis of the Court Document: Litigant Strategies and Judicial Practices

In our 1942 court case the civil judge turned down the request of the plaintiff, the legal father, to conduct the medical tests, which had the

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in October 1968, criticized this judicial approach, arguing that the judge, by failing to consult an expert on a question that was purely scientific, had prejudiced the legal rights of the defendant.

27) *Al-Muḥāmāt al-sharʿiyya* 17:382 no. 58—the Shariʿa Court of First Instance in Damanhur (15 November 1941); *Al-Muḥāmāt al-sharʿiyya* 20:193 no. 40—the Shariʿa Court of First Instance in Cairo (9 May 1948).

28) The *niyāba* is the Egyptian counterpart to the French *parquet* in which members of the judicial corps supervise the investigation and prosecution of crimes and represent state interests in court. Established for the first time in the framework of the Mixed Courts, the *niyāba* continued to operate within the *ahlī* (later renamed *waṭanī*, "national") courts. The most comprehensive account of this institution is found in Enid Hill, *Mahkama! Studies in the Egyptian Legal System* (London: Ithaca Press, 1979), 57ff, and index, s.v. *niyāba*. See also Brown, *Rule of Law*, 28, 36 and references in index.

29) *Al-Muḥāmāt al-sharʿiyya* 9:348 no. 70—the Shariʿa Court of First Instance in Cairo (10 March 1938) and *al-Muḥāmāt al-sharʿiyya* 15:61 no. 7—the Shariʿa Court of First Instance in Banī Suwayf (28 October 1941), respectively.

potential of determining that he was not the child's natural father. Before I discuss the grounds for the court decision, I comment on a number of aspects relating to the plaintiff's judicial strategy and to the art of judging manifested by the court.

The plaintiff executed a multi-channeled judicial strategy, informed by weighing his chances in three judicial arenas: He launched a criminal procedure against his ex-wife, claiming that she had committed adultery. In response to the recommendation of the *niyāba*, he withdrew his complaint. Aware that his chances to secure a shariʿa court affirmation of the denial of his paternity were slim, he filed at the civil court of summary justice a request to conduct blood tests, seeking to negate his biological paternity over his ex-wife's child. He planned to use the findings of the blood tests as evidence in a civil lawsuit in which he would demand that his ex-wife compensate him for the prejudice she caused by affiliating to him a child that was not biologically his.

The judicial strategy executed by the plaintiff suggests that patriarchal ideology, embedded in family law, is not free from inconsistencies and contradictions, which are manipulated by individuals to negotiate their familial and conjugal relationships in the courts. Such negotiations are conducted without the litigants contesting the sanctity of the shariʿa or the theoretical eternality of its rules. The litigants, who do not necessarily adhere to the *sharʿī* model of family relations, nevertheless conduct their marital disputes within the framework of *sharʿī* discourse. The courts become sites for challenging the very rules they are supposed to apply. Thus the courts bear the burden of maintaining the *sharʿi* model and at the same time adapting it to ever-changing social customs, changes in human knowledge, and the introduction of new scientific technologies.[30]

One of the main influences on the judge in the case under discussion is French law. Much has been written on this influence, starting in the nineteenth century, including its affect on the training of Egyptian lawyers, both in Egypt and in France.[31] As rightly argued by Enid Hill, major features of judicial institutions, as well as substantive law, that are derived from their French counterparts were Egyptianized over the

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30) Mir-Hosseini, 14-15, 192, 198, 200.
31) Ziadeh, *Lawyers*, 63, 150.

course of the next 100 years. Egyptian society has shaped and altered the received Western law to suit its own purposes, with the result that this law has become both uniquely Egyptian[32] and at the same time not detached from its French origin. In our case, French legal influence on the civil Egyptian judiciary is demonstrated by the fact that the judge, on his own initiative and to justify his holding of lack of competence to rule in the case, distinguished Egyptian law, in which personal status courts are separate from civil courts from French law, in which the court system is unified.

A second manifestation of the influence of European law on Egyptian law is the judge's use of judicial precedents. He cited contradictory precedents on the competence of the civil courts in *ithbāt al-ḥāla* lawsuits, as well as a precedent supporting his interpretation that the civil courts are precluded from intervening in personal status matters, such as paternity. *Fiqh* does not recognize judicial precedent as a valid source of law, and reliance on judicial precedents was uncommon in premodern Hanafī court practice.[33] It was not until the twentieth century that shariʿa court qadis began to cite precedents, under the influence of the civil courts.[34]

Until the 1950s, Egyptian shariʿa court qadis rarely mentioned Qadrī Pasha's 1875 codification of Ḥanafī family law as a source for their judgments in cases of gaps in Egyptian family law codes.[35] Rather, they preferred to consult standard Hanafi (uncodified) *fiqh* works.[36] By contrast, civil judges, like the judge in our case, who were not trained in *fiqh*, frequently cited Qadrī's code, and interpretive compilations based on it, as well as modern summaries of *fiqh* law. This trend continued

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32) Hill, *Mahkama*, 1.

33) Muftis however cited legal opinions of earlier muftis. See David S. Powers, *Law, Society, and Culture in the Maghrib, 1300-1500* (Cambridge: Cambridge University Press, 2002), 215.

34) Shaham, "Shākir," 441-42.

35) Judges are instructed by law that, in the absence of any statutory provision, they must refer to the most prevalent opinion of the Hanafi school (*arjaḥ al-aqwāl fī madhhab Abī Ḥanīfa*).

36) Shaham, "Shopping," 455, 463-66. See also idem, "Shākir," 448-49, where I demonstrate that Shākir, a senior qadi at the shariʿa courts, often quoted post-classical Hanafi jurists when dealing with *sharʿī* matters; when dealing with matters relating to state legislation, however, he quoted works by Egyptian jurists trained in the European tradition.

in the national family law courts, which in 1955 replaced the shariʿa courts. Although the substantive law applied by these courts was identical to the law applied by the shariʿa courts prior to their abolition, judges trained in the civil-law tradition gradually replaced the qadis. Because the civil judges' knowledge of *fiqh* was modest, they tended to consult modern summaries of *fiqh*, as well as Qadrī's code and its interpretations, more often than *fiqh* works.[37]

Summary of Court Decision Regarding the Use of Blood-Group Tests for Establishing Paternity

In our 1942 case the judge who denied the request to conduct blood-group tests based his decision on the fact that granting the plaintiff's demand would lead to one of three possible results: (1) the child would be declared to be illegitimate; (2) the woman's commission of illicit sexual relations would be established; or (3) the plaintiff would establish evidence against the wife to support his claim for monetary compensation in his civil lawsuit.

The court declared itself incompetent to entertain the plaintiff's lawsuit on the following grounds: (1) establishment of paternity is subject to the exclusive jurisdiction of the shariʿa courts; and (2) the case involved illicit sexual relations presumably committed by a married woman. The court held that, according to both *fiqh* texts and the Egyptian statutory penal code, a paternity test cannot serve as evidence for illicit sexual relations. It was therefore legally impossible to compel the mother's new husband to submit to such a test. Even if blood tests established that the plaintiff was not the baby's natural father, they did not constitute a proof against the mother's new husband. Therefore,

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37) Baudouin Dupret, "The Practice of Judging: The Egyptian Judiciary at Work in a Personal Status Case," in Masud, Peters and Powers, *op. cit.*, 150. Cf. Immanuel Naveh, "Application of the Sharīʿa in Civil Courts in the Twentieth Century: A Comparative Study Based on Decisions of Civil Courts in Matters of Personal Status and waqf of Muslims in a Muslim State (Egypt) and in a Non-Muslim State (Israel)," Ph.D. dissertation, The Hebrew University (December 1997), 385 (in Hebrew); unlike Dupret, Naveh found that when there was a lacuna in state law, Egyptian civil judges referred to Hanafi sources and to the conflict of opinions among Hanafi scholars.

the baby must be affiliated to the plaintiff, in accordance with the *fiqh* presumption that "the child is affiliated to the [marriage] bed."

Applying the shari'a, the court held that a woman's claim regarding the identity of her baby's father should be accepted unless her involvement in illicit sexual relations is established. Be that as it may, illicit sexual relations may be established only by testimony, not by a physical test, which violates the privacy of a woman's body and her chastity. Nor should the current husband of the mother take the blood test, said the court, because such an examination, by possibly establishing that he was the biological father, would indirectly slander the wife's moral reputation.

According to the court, the credibility of the physicians affiliated with the Forensic Medicine Authority and their respect for the chastity of women were not relevant to the case. Had there been a desire to use medical tests in such circumstances, the court argued, the legislators should have introduced this procedure to the shari'a courts, the proper and exclusive legal arena for dealing with paternity issues. Because the legislators had not taken this step, it was impossible for a civil judge to initiate such a procedure on his own. By refusing the plaintiff's demand for the performance of paternity tests, the court created a situation in which the plaintiff, who surely was not the biological father, could not escape recognition as the legal father and economic responsibility for the upbringing of the child.

Conclusion

Nearly seven decades after the case discussed in this essay, the legal presumption of paternity, i.e., affiliation of the child to its mother's legal husband, remains unassailable in Egypt. Egyptian law does not make a room for using scientific tests for establishing paternity. This indicates that Egyptian legislators have chosen to leave the establishment of paternity to evidentiary rules that are shaped by cultural values that do not always favor decision-making based on the full range of scientifically available facts. The social purposes served by this presumption of paternity—defending the integrity of the marital family, protecting against the bastardization of children and preventing the exposure of immoral behavior by the parents—remain the dominant social

norms. The attitude of Egyptian law towards biological (now genetic) tests for establishing paternity is not rooted in opposition to scientific knowledge or techniques. Genetic testing is commonly used in some legal fields (e.g., criminal law). The main obstacle for introducing paternity tests is the desire of legal elites, as well as other dominant power groups, to defend traditional notions of marriage and paternity. Traditional elites fear that the erosion of the marital family will bring about undesired social consequences and result in social chaos.[38] These concerns explain the fact that in the Muslim world in general, and in Egypt in particular, scientific means for establishing biological paternity are not yet used in paternity cases.[39] Also, the struggle of these elites to defend traditional perceptions of family law is part and parcel of their effort to defend their position of political influence, endangered by new secular-scientific-professional elites. It seems that the Egyptian religious establishment has so far succeeded in preventing the promulgation of legislation that contradicts religious paternity rules.[40]

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38) Al-Ghazzali (d. 1111) and Ibn Khaldun (d. 1407) justified the harsh punishment of illicit sexual relations on the grounds that such relations bring about mixing of paternal filiations (*ikhtilāṭ al-ansāb*) and end in social chaos and collapse (*inqilāb*) of the established social order. See Delfina Serrano, "Muslim Feminists' Discourse on *Zinā*: new Paradigms in Sight?" in *Liebe, Sexualität, Ehe und Partnerschaft – Paradigmen im Wandel*, ed. Roswitha Badry, Maria Rohrer & Karin Steiner (Freiburg: Fördergemeinschaft wissenschaftlicher Publikationen von Frauen e.V., 2009), 114-16.

39) For a precedential first case in the Egyptian legal system (from the 2000s), in which a family court ordered the alleged father to take a DNA test in the context of a paternity case, see the discussion of *Hinnawi vs. Fishawi* in Shaham, *Expert*, 175-81; Serrano, "Muslim Feminists," 117-21.

40) In Israel, where Islamic paternity rules apply to Muslim-minority citizens, the Supreme Court (sitting as a high court of civil appeal), in a precedential decision issued in 1995, created the legal construct of 'civil paternity,' distinguished from the 'legal paternity' recognized by Islamic law. In a case involving a child born out of wedlock, the shari'a court rejected the mother's request to affirm the paternity of the presumed father and to require him to maintain the child; the civil courts could not come to the mother's rescue, the matter being a personal status issue and therefore not under their jurisdiction. The Supreme Court, however, declared the biological father as the "civil father," requiring him to take full responsibility for the child's upbringing. See Yitzhak Reiter, "Qadis and the Implementation of Islamic Law in Present day Israel," in *Islamic Law Theory and Practice*, ed. Robert Gleave & Eugenia Kermeli (London & New York: I.B. Tauris, 1997), 206; Aharon Layish, "Adaptation of a Jurists' Law to Modern Times in an Alien Environment: The *Sharī'a* in

Although the resistance of a Muslim society to the use of scientific tests in paternity cases may be the most interesting aspect of the case, of equal interest is the fact that the application of shariʿa law in one section of a legal system affects the decisions of judges in other sections of the same system not formally governed by shariʿa law. Put differently, the fact that the shariʿa courts had exclusive jurisdiction in cases involving the establishment of paternity, and that they adjudicated such cases according to Hanafi *fiqh* (in addition to one isolated statutory stipulation), deterred the civil judge, who was not formally bound by shariʿa law, from allowing the performance of blood-group tests. We have no data on the worldview of this particular civil judge. Did he share the conservative patriarchal perception of the family and of gender relations or was he more liberal? It is plausible that if the civil judge had jurisdiction over all possible legal consequences arising from adultery, i.e., the criminal aspects as well as the issue of paternity, he would not have barred the medical test. One may speculate that this sophisticated judge chose to tackle the lawsuit in such a sensitive way because, as a loyal and professional servant of the Egyptian judicial system, he was not prepared to transgress the jurisdiction of the shariʿa courts. Also, he wished to prevent the grave social consequences that would have been caused to the defendant and her child had he permitted the tests. In addition, the judge may have been reluctant to allow plaintiffs to take advantage of the fact that the shariʿa courts and the civil courts applied different sets of procedural and evidentiary rules. Such forum shopping had a dangerous potential of depriving people of their legal protections. Finally, sensing that a "hot potato" had been thrown into his court, this careful civil judge chose to refrain from establishing a judicial precedent (i.e., by allowing blood tests for determining paternity) of explosive sociopolitical potential and to transfer the onus of decision in such a delicate matter to the legislators and to the shariʿa court system.

Israel," *Die Welt des Islams* 46 (2006), 181-82. Whether parallel developments will take place in Egyptian law remains to be seen.

Annotated Translation of the Court Decision[41]

The Alexandria *Ahlī* Court of First Instance
Magistracy of Summary Justice[42]
26 January 1942

The Legal Principles[43]

[…]

The Court

The plaintiff submitted this lawsuit, stating that he had married the first defendant more than seven years ago in spite of the age gaps between them and the [different level of] life spirit that was surging in each one of them. During that period they led a life of plenty and opulence and he hoped for a child, not knowing that he was sterile without hope [of recovery] (Document 3 of the plaintiff's file from 15 August 1941 containing the testimony of Dr. Qanawātī concerning the inspection of the semen, which determined the absence of spermatocyte in it). Matters continued naturally between the spouses until, on 8 June 1941, the plaintiff and his wife met a person, the second

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41) The court decision is found in *al-Muḥāmāt*, vol. 22 (1941), nos. 8-10, pp. 755-60. *Al-Muḥāmāt* is the journal of the Egyptian civil lawyer syndicate, first published in 1920.

42) The jurisdiction of summary justice concerns issues in which immediate judicial treatment is needed to prevent the loss of legal rights. Two conditions must be met in order to facilitate the competence of summary justice: one, the element of immediacy; two, the claim concerns a temporary procedure (*ijrā' waqtī*) and not a decision on the legal right itself (*aṣl al-ḥaqq*). The perception of summary justice originated in French law in the late seventeenth century, and it seemed that Egyptian law followed suit in this respect (Article 45 of the code of procedure). Examples of issues that are included in the jurisdiction of summary justice are claims of possession or acquisition (*ḥiyāza*); requests for autopsy; disputes concerning inheritance, last wills and testaments and gifts; claims relating to the administration of an estate (*ḥirāsa qaḍā'iyya*) and an interim order to pay alimony; and, as in our case, requests for "establishment of a situation" (*ithbāt ḥāla*). See http://www.f-law.net/law/archive/index.php/t-15211.html. See also Hill, 23-4.

43) In *al-Muḥāmāt*, the original court decision (starting with the word "the court") is preceded by the section "the legal principles" (*al-mabādi' al-qānūniyya*). This section contains a summary of the decision added by the journal's editor for the benefit of his readers. I have not translated that section, which is not an integral part of the decision.

defendant, who made meaningful gestures towards the [plaintiff's] wife; he [viz., the plaintiff] became suspicious. Subsequently, he looked for the house of the young man who had attracted the attention of his wife and found that he lived near him. From the postman, he [viz., the plaintiff] obtained a letter in his wife's handwriting that clarified the existence of an improper relationship between a married woman and a single man. On 3 August 1941 he notified the *niyāba*, which investigated the factual findings relating to the first and second defendants [i.e., the wife and her lover]. Because the plaintiff was asked [by the *niyāba*] to discontinue this investigation,[44] he withdrew his complaint on 1 September 1941 and the documents were preserved. He divorced his wife triply on 6 August 1941 (see the investigation protocol document no. 4 in the plaintiff's file). The wife gave birth to a son on 15 September [756][45] 1941 and she married the second defendant four days later, on 19 September 1941 (document 2 in the plaintiff's file). The dispute between the parties intensified and the baby was officially registered[46] as the son of the plaintiff. The first defendant [i.e., the newborn's mother] filed a suit for maintenance and custody (*ḥaḍāna*) at the shariʿa court. When the issue became intolerable for the plaintiff, according to his claim, he formed and fashioned this lawsuit, asking to establish the state (*ithbāt ḥāla*) of the plaintiff, the second defendant and the baby, by means of an inspection by a forensic physician (*al-ṭabīb al-sharʿī*),[47] in order to ascertain who was the biological father of this child. In his lawsuit, the plaintiff relied on a judgment handed down

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44) The document does not explain why the *niyāba* asked the plaintiff to discontinue the investigation. Perhaps the *niyāba* thought that the nature of the written correspondence between the wife and her lover was insufficient for establishing illicit sexual relations according to the evidentiary requirements of the criminal code.

45) This is the end of p. 756 in the original document.

46) Literally: registered in "the Newborn Book" (*Daftar al-Mawālīd*), i.e., the official diary in which every newborn is registered for administrative needs.

47) The term 'forensic physician' refers to expert physicians who are affiliated with the Forensic Medicine Authority (*Maṣlaḥat al-Ṭibb al-Sharʿī*), a statutory organization under the Egyptian Ministry of Justice. In other words, they are 'official experts' (*khubarāʾ wizārat al-ʿadl*), unlike the 'registered experts' (*khubarāʾ al-jadwal*), private practitioners who are recognized as experts by the courts. The courts are instructed to employ, as a first priority, the official experts. See Shaham, *Expert*, chapter 4 (especially pp. 110-11), on the organization of the Egyptian expert system, and chapters 5 and 6 on the involvement of medical experts in family law and civil claims.

in lawsuit no. 618, 1934, Alexandria Summary Justice.[48] He was determined to submit a claim at the civil *ahlī* court demanding compensation for the prejudice caused to him. Because he needed evidence, the outcome of which is the establishment of the situation, he submitted the current lawsuit in the above-mentioned fashion.

A claim for *ithbāt al-ḥāla*, by commissioning a forensic physician, may be fashioned according to the circumstances and the events, either for proving virginity or lack thereof, which affect the entitlement to full or half of the dower upon consummation of the marriage or the absence thereof,[49] or to establish the pregnancy or the absence thereof, which affect the entitlement to maintenance or the absence thereof, during the waiting period (*'idda*) or marriage, or to establish inheritance [rights] or [rights in] a last will and testament, or to establish paternity or to deny it.[50] The establishment of a situation (*ithbāt al-ḥāla*), by commissioning a forensic physician, may be for establishing a particular fact (as in the current lawsuit), from which it may be inferred that her husband was not the father of her child. Put differently, [the *ithbāt al-ḥāla* process may result in] denial of paternity and in the indirect establishment of adultery. No matter which pattern characterizes the current lawsuit in its various forms, it leads necessarily to one of three things [viz., results]: (1) the denial of paternity (2) the establishment of paternity (3) the creation of a probative indicator (*dalīl*) that may be used in a civil court for claiming compensation, as done by the plaintiff.

Before investigating these three [above-mentioned] hypothesis (*furū'*), it must be mentioned that the courts have differed with respect to *ithbāt al-ḥāla* lawsuits, by commissioning the forensic physician to establish one of the above-mentioned issues; a few judgments held for

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48) I was unable to locate this court case.

49) If the divorce takes place prior to the consummation of marriage, the wife is entitled to only half of the dower. The fact that a married woman is still a virgin may serve as circumstantial evidence for lack of consummation. On virginity tests in the context of conflicts over the consummation of marriage, see Shaham, *Expert*, 85-7, 124.

50) If a wife is pregnant upon divorce or the death of her husband, her pregnancy affects her entitlement to waiting-period maintenance and inheritance, and also the paternity of her fetus and its inheritance rights from the divorcing or deceased husband. When the pregnancy of such a wife is denied by her ex-husband or his heirs, verification of pregnancy by a midwife or a physician is legally required. See Shaham, *Expert*, 88-9, 128-30.

the impossibility of executing *ithbāt al-ḥāla* procedures, because they are related necessarily—sooner or later and directly or indirectly—to issues that are at the heart of personal status, such as establishment of paternity and its denial, which is outside the jurisdiction of the summary court (*al-Muḥāmāt* 16:406). Others said that *ithbāt al-ḥāla* lawsuits [filed] for the above-mentioned reasons include precautionary measures, [carried out] at the expense of the person who asks to perform them [i.e., the plaintiff], and that the judiciary is required to permit it [i.e. the *ithbāt al-ḥāla* procedures] in all situations (*al-Muḥāmāt*, vols. 8 and 15, p. 521[51] and [the book of] Rātib,[52] article 321, pp. 219-20 and the judgment submitted by the plaintiff in the present case). Those who hold an alternative opinion claim that it is impossible to force the defendant to execute the request for *ithbāt al-ḥāla* in person and that, if the matter is like that, there is no obligation (*iltizām*) and no agreement (*taʿāqud*) on the existence of *ithbāt al-ḥāla* or the absence thereof, and the summary justice courts therefore do not decide on such a request, because the lawsuits will be unacceptable ([the book of] Rushdī,[53] article 304, pp. 350-51). However there is no room for the opinion that the lawsuit is unacceptable because, prior to deciding whether the suit is acceptable or not, it is required to investigate the counterclaim of lack of competence, which is the first counterclaim to be investigated before anything else; [this investigation] is necessary for establishing whether the court has jurisdiction with relation to what was presented to it, [and the investigation should take place] before [referring to] any opinion, whether right or wrong [757].

The second defendant made the counterclaim of lack of competence; *ithbāt al-ḥāla*, by [the plaintiff] requesting the commissioning of the forensic physician for establishing that a child is not the [biological] son of his [legal] father, may seek to establish evidence that would be used at the shariʿa court for deciding a *sharʿī* issue—[e.g.,] the denial of paternity or the cancellation of maintenance or of maternal

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51) The reference from *al-Muḥāmāt*, vol. 15 is identical to the one that appears later in the court document and discussed in note 53 below.

52) Possibly Muḥammad ʿAlī Rātib, Muḥammad Naṣr al-Dīn Kāmil and Muḥammad Fārūq Rātib, *Qaḍāʾ al-umūr al-mustaʿjala*. The fifth edition, including two volumes, was published in 1969 by ʿĀlam al-Kutub in Cairo.

53) To date I have been unable to find this work.

custody—as in the dispute that actually takes place with respect to this [i.e., the current case] before the shariʿa court. [This is] because the shariʿa courts do not have in their organization or codes something equivalent to *ithbāt al-ḥāla*, in a case in which the aim is to establish a sheer material *sharʿī* situation that is not related at all to monetary rights; but this does not justify the competence of the *ahlī* courts in *ithbāt al-ḥāla* lawsuits at that time (*al-Muḥāmāt*, vol. 15 no. 7, decision no. 342, p. 523).[54] What is worth considering and acting upon is the examination of the situation that is presented. If it is evident that it concerns, even remotely, a personal status jurisdiction, the [court of] summary justice is precluded from investigating it. It is clearly known that the regular courts do not interfere with the jurisdiction of personal status (Articles 15-16 of the Law for the Organization of the *Ahlī* Courts; *al-Muḥāmāt* vol. 15:153, decision no. 140;[55] and Ṣafwat Bek,

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54) The number of the case is 242 and not 342 as mentioned in the judgment. In this case the heirs of the deceased—his mother and brothers—filed a claim against the deceased's widow, who argued upon his death that she was two-months pregnant by him. She demanded that the guardian court nominate her as a guardian of her fetus and allocate maintenance for her from the usufruct of the *waqf* in which her deceased husband was a beneficiary. The plaintiffs argued before the judge of summary justice at the Cairo *Ahlī* Court of First Instance that the deceased did not have any children by the defendant during those years of marriage in which he was perfectly healthy; that due to his severe medical situation in the months preceding his demise it was unlikely that the defendant conceived a child from him; and, that the defendant did not attend the guardian court in person, apparently fearing that the judge would discover her fraudulent claim of pregnancy—all that implied that the defendant was committing a fraud (by prolonging her waiting period, during which she is entitled to maintenance, and by demanding inheritance rights for her 'fetus'), which affected the monetary rights of the plaintiffs. The plaintiffs therefore demanded that the defendant be submitted to a pregnancy test by the forensic physician. Again, the defendant did not attend the court session. After presenting the contradictory judicial practices regarding the competence of the *ahlī* courts in these circumstances, the court decided as follows: although the request for forensic inspection is apparently framed as a personal status issue—paternity—the claim is connected to monetary rights, because if the prolongation of the waiting period is unjustified, it reduces the entitlement of the plaintiffs as heirs. Thus, the issue was within the competence of the indigenous court; the court instructed the forensic physician to inspect the defendant.

55) I was unable to find this particular court decision; but see, for example, *al-Muḥāmāt* vol. 15, issue 2, pp. 99-100, no. 47, in which the husband, who had divorced his wife prior to the consummation of marriage, secured a decision from the shariʿa court on the return of half of the amount of dower he had paid. Concurrently, the husband filed a claim at the civil court, demanding that his ex-wife return to him a ring he claimed she had been given

Qaḍāʾ al-Aḥwāl al-Shakhṣiyya,[56] pp. 26-7), whether the issue concerns the establishment of inheritance [rights], paternity or denial of paternity, prior to death or subsequent to it, marriage, divorce, dower, or trousseau, and the basis of the matter is disputed.

This court opines that, if a claim for *ithbāt al-ḥāla* is presented in a manner whose aim is to establish a monetary right, [i.e.] to submit a claim for compensation on the grounds of the occurrence of adultery—if this took place—and the *ithbāt* in itself affects the core of the personal status dispute, even if the plaintiff has not yet filed it, in the future *ithbāt al-ḥāla* [procedures] will have grave and important consequences that contradict the principles of the shariʿa (*qawāʿid al-sharʿ*), the least of which is the denial of paternity and affiliation; if that were to take place, the court of summary justice is incompetent. The position of anyone who holds that *ithbāt al-ḥāla* is useful at the court of summary justice, even if the matter is linked to denial of paternity in the future (such as the court decision submitted as evidence by the plaintiff)—is unusual, because it is not this court [viz., the summary justice court] that is [judicially] competent to confirm that a child is legitimate or not; and it is not a ruling by this court that confirms that a child born more than a year after the date of divorce [between the parents] or demise [of the mother's husband] is not affiliated to his father (according to Article 15 of Code no. 25 year 1929). Whether or not the lawsuit was fashioned as a demand for compensation, it is inescapable to confront [the issue], whether paternity is established or not, so that the outcome of the judgment on compensation will be the one the plaintiff is seeking.

From another perspective, it is necessarily inescapable, when a claim for compensation is investigated, to address the issue of whether adultery was proven or not; the establishment of evidence for illicit sexual relations is obviously limited in criminal cases to the existence of

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by him as an engagement gift. The civil appeal court turned down the lawsuit, on the grounds that the determination of the status of the gift (an engagement gift or part of the dower), as a personal status issue, was in the exclusive jurisdiction of the shariʿa court.

56) Aḥmad Ṣafwat, *Qaḍāʾ al-aḥwāl al-shakhṣiyya li'l-ṭawāʾif al-milliyya* (Cairo: Maṭbaʿat al-Rajāʾ, [1936]). The author was a lawyer trained in Britain who was active in Egyptian legal reforms and in formulating innovative legal methodologies. His above-mentioned work is also quoted by Shākir. See Shaham, "Shākir," 449 nt. 54.

convincing correspondence [between the alleged adulterers], or cases of "flagrante delicto," or the presence of a Muslim [male] in the house of a married woman [who is not his wife]. The commissioning of a forensic physician to conduct a blood test, to verify whether or not the newborn is the son of his father, is not mentioned [by state law] as evidence [for adultery]. It is also obvious that the establishment of illicit sexual relations, according to the shariʿa, is a matter that the jurists delved into in their studies, and there are many opinions among them concerning it, which indicate that it is inescapable, regarding a state of "flagrante delicto" in its *sharʿī* meaning, that the man be found in the arms of the woman and that they are seen in this situation.

Because the adultery lawsuit itself was suspended with the consent of the husband before he requested the *ithbāt al-ḥāla*, it is obligatory to consider whether this request has consequences [758] in itself. It has no consequences, for two reasons: (1) the plaintiff repudiated (*nafā*) the adultery lawsuit and withdrew from it; and (2) it is impossible to compel the second defendant to submit to a medical inspection, because he is entitled to refuse and there is no way for this court to enforce that on him physically or by way of monetary threats.[57] If the plaintiff agrees to submit himself for inspection, and if it is established that his blood group is not that of the newborn, this does not indicate the establishment of anything against the second defendant. To whom then will the newborn be [affiliated]? He definitely will be [affiliated] to the [marriage] bed, whether or not the plaintiff agrees to that. Because it is required [from the judge], before the judgment is issued, [to make sure]

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57) According to Egyptian law it is impossible to require a putative father to take a blood test. This is also the position of the Israeli Genetic Data Law (effective December 2001). The Israeli civil courts hold that it is desirable for the court to obtain the litigant's consent to conduct the test. The reluctance of the Israeli courts emanates from their concern that the results of the test will bring about the bastardization of the child by the rabbinical courts. Unlike the Egyptian and the Israeli systems, in the United Kingdom and France the courts order blood tests; moreover, according to the uniform paternity laws of several states in the United States and also in Germany, the courts are authorized to enforce blood tests. American law does not view this enforcement as an infringement of constitutionally guaranteed personal liberties. Rather, the welfare of the child, emanating from the right to know who his biological father is, as well as considerations of public interest and general justice, take precedence over the infringement of the personal liberties of the person who is required to take the test. See Shaham, *Expert*, 164-66.

that the judgment does not become an object of mockery, it is useless to demand *ithbāt al-ḥāla*, on the grounds that the first [read: the second] defendant may refuse [to undergo the inspection], and he is definitely refusing and does not agree to that at present [i.e. from the moment the judge asked him if he was ready to submit to the blood test].

With respect to the first defendant, the woman's statement is [considered] reliable so long as her adultery has not been established by acceptable legal means, according to man-made or divine law. For this reason, it is unnecessary to violate her chastity, even remotely, by submitting her, the newborn and his father to medical inspection, by testing their blood. The jurists explained the means for establishing paternity and for denying it, for establishing adultery and the absence thereof, and for establishing pregnancy and its denial; [they] clarified that the establishment of the birth of a child, born within the framework of an irregular (*fāsid*) marriage or of *al-waṭʾ bi-shubha*,[58] starts by [considering] various time periods, from the time of consummating the marriage, or the time of [the conclusion] of the [marriage] contract, according to circumstances and events. [The purpose of considering these time periods] is to make it possible to facilitate [matters] for the woman and to prevent hardships from her, [while at the same time] respecting [the presumption] that the child is [affiliated] to the [marriage] bed; [all these legal mechanisms aim] to protect the chastity [of women] and to prevent hardship. They [viz., the jurists] clarified how the denial of paternity takes place within the framework of a valid marriage between the spouses, and that it takes place by way of *liʿān*,[59] [i.e.,] by taking the oath that justifies the testimony of [each] one of them, [i.e.,] four testimonies in the name of Allah that he/she is telling the truth and the fifth that the curse of Allah will fall on him/her if he/she is lying (see pp. 14-18 in Zayd Bik [Bey], *al-Aḥkām al-Sharʿiyya*, part 2).[60] The jurists established specific principles for [determining the paternity of] a child of a divorcee [born] during the waiting-period, by

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58) On this term see n. 5 above.

59) On this term, see also n. 6.

60) Muḥammad Zayd al-Abyānī, *Sharḥ al-aḥkām al-sharʿiyya fiʾl-aḥwāl al-shakhṣiyya* (Cairo: ʿAbd Allāh Wahba, 1924), 3 parts in 2 vols. Al-Abyānī taught shariʿa law at Madrasat al-Ḥuqūq al-Khadīwiyya. From 1886, this was the new name of the school of administration, the primary function of which was to train officials for the various departments of

the time periods they clarified and explained concerning the means for establishing the birth and the acknowledgment of paternity and sonship by the testimony of an upright free Muslim female, if he [viz., the presumed father] denies the identity of the child (*ankara taʿyīn al-walad*),[61] and other probative channels specified by the shariʿa on which the court of personal status bases its adjudication. Finally, in Article 15 of Law No. 25 of the year 1929, it is stipulated that the court is precluded from hearing a paternity suit relating to the child of a wife—if it is established that there was no contact between her and her husband since the conclusion of marriage—or a wife who gave birth more than one year after her husband left her, or the child of a divorcee or a widow, if she gave birth more than one year after the divorce or death of her husband. The venue in which this law is applied is not in front of this [i.e., the civil] court but in front of the shariʿa court, and the court of summary justice does not rely on it [i.e., the 1929 Law] for the sake of *ithbāt al-ḥāla*. A paternity suit is heard only in accordance with what is necessitated by it in the framework of the evidentiary principles that

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the government. This school became the School of Law of the Egyptian University when it was founded in 1925. See Ziadeh, *Lawyers*, 21.

Al-Abyānī's work is a commentary on the semi-official codification of Ḥanafī personal status law by Muḥammad Qadrī Pasha. The judge refers to the section on "the establishment of paternity of a child born within the framework of an irregular marriage or *waṭʾ bi-shubha*" (*fī thubūt nasab al-walad al-mawlūd min nikāḥ fāsid aw waṭʾ bi-shubha*). This reference is odd, because the marriages between the plaintiff and the defendant, as well as between the defendant and her second husband, were both valid.

As for Muḥammad Qadrī Pasha (1821-88), who was Minister of Justice during the rule of Khedive Tawfīq (r. 1879-92) and very active in formulating the Egyptian civil code, his enduring reputation is derived from his three books codifying the rules of three fields of Islamic law: civil law or transactions, *waqf*, and personal status (the above-mentioned *al-Aḥkām al-sharʿiyya fīʾl-aḥwāl al-shakhṣiyya*). These three works are basic in their fields, not only in Egypt but also in several countries that apply Hanafi law (Ziadeh, *Lawyers*, 20). For example, shariʿa court qadis in the State of Israel frequently relied on Qadrī's work, sometimes preferring it over those provisions of the 1917 Ottoman Family Rights Law that are not based on Hanafi doctrine. See Aharon Layish, *Women and Islamic Law in a Non-Muslim State* (New York & Jerusalem: John Wiley & Israel Universities Press, 1975), 3.

[61] According to *fiqh* doctrine, if the husband argues that the newborn presented by his wife or divorcee as his child is not the child to whom she has given birth, the testimony of one upright free Muslim female (usually the midwife who attended the delivery) in support of the wife's claim is sufficient for rejecting the husband's argument. See Shaham, *Expert*, 91-2.

are permitted by the shariʿa. [That] the shariʿa restricts the principles for establishing adultery, the denial of affiliation and of paternity, the establishment of pregnancy and the lack thereof, in a manner explained in the shariʿa books, demonstrates respect for the woman's rights, by abstaining from distressing or prejudicing her. [The shariʿa therefore] does not impose interdiction on her freedom, and it assumes that those women who believe [in Allah] do not conceal what came out of their wombs and [facts about their] children by way of denial; [the shariʿa) leaves it to them [i.e., women] to tell the truth about the existence of their children (*bi-wujūd awlādihinna*), according to the statement of Allah: "It is not lawful for them that they should conceal that which Allah has created in their wombs; and for those with a child, their period shall be till they bring forth their burden."[62] If it is incumbent on them to abstain from denying what Allah has created in their wombs, then they are [considered] reliable if they deliver their babies, and we consider them trustworthy concerning that. We do not uphold the inspecting of their intimate parts[63] or anything [759] that speaks evil of what came out of their intimate parts (al-Qurṭubī part III, printed by Dār al-Kutub, p. 118).[64]

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62) The judge combines here fragments of two Qurʾanic verses. The first part of the citation is from Q. 2 (al-Baqara):228, obliging divorcees to report that they have witnessed the passage of three menstrual cycles subsequent to the divorce or, alternatively, that they are pregnant. The second part is from Q. 65 (al-Ṭalāq):4, which mentions the length of the waiting period for those women who do not menstruate or who are pregnant; for the latter, the waiting period lasts until they give birth. The translation of the verses follows Mohammed Marmaduke Pickthall, *The Glorious Qurʾan.* 3rd ed. (Elmhurst NY: Tahrike Tarsile Qurʾan, 2006).

63) Text: *furūdihinna*; read: *furūjihinna*.

64) Muḥammad b. Aḥmad al-Qurṭubī, *al-Jāmiʿ li-aḥkām al-qurʾān*, 10 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya, 1993), vol. 2 (parts 3-4), 79. According to al-Qurṭubī, a woman knows best about her menstrual cycles or pregnancy, and her own report about her situation is therefore considered reliable. He quotes Sulaymān b. Yasār (a Medinese jurist, d. ca. 110/728) who said: "We have not been ordered [by Allah] to 'open' women and look into their intimate parts (*lam nuʾmar an naftaḥa al-nisāʾ fa-nanẓura ilā furūjihinna*); rather, because women are considered reliable, reporting on their physical intimate situation was delegated to them." Al-Qurṭubī adds that the prohibition on women concealing information on their cycles or pregnancies sought to prevent them from prejudicing their husbands, by infringing on the latter's legal rights or duties (returning the divorcee to marital life during the waiting period or paying her alimony). He quotes Qatāda (b. Diʿāma al-Sādūsī, a Basran jurist, d. 117/735) to the effect that in pre-Islamic Arabia it was common for a

The reason for this [viz. legal position] is the obligation to convey trust in reports on the womb. If, however, it is impossible [to trust a woman's report], there is no escape from applying the *sharʿī* probative means, [i.e.,] the testimony of upright witnesses, without inspecting the hidden parts of the woman's body, even if she consents to that. If we abstain from inspecting them, how much the more so is it forbidden to say about them, in an indirect manner, that they are not trustworthy concerning their chastity, by medically inspecting the person who argues that he had illicit sex with one of them. If the *sharʿī* principles regarding the establishment of affiliation or pregnancy, or the lack or denial thereof, or of establishing adultery, or the absence thereof, are contradicted, the principles of the personal status code will be harmed. We do not take into consideration the argument that forensic physicians are trustworthy regarding female chastity, because the issue is not [their] trustworthiness regarding female chastity in a case in which one of the articles of personal status is presented; rather, it is the implementation of a statutory *sharʿī* principle (*mabdaʾ qānūnī sharʿī*), which it is impossible to set aside or ignore; if [this is] not [the correct legal interpretation], then the legislator should set down probative principles based on forensic medicine for [the application of] *ithbāt al-ḥāla* in the shariʿa courts themselves. It is impossible to draw an analogy from French law [to the case under discussion], because the French have a unified court system, whereas here [i.e., in Egypt] the jurisdiction of personal status is separated [from civil jurisdiction].

If the request for *ithbāt al-ḥāla* is granted in the case at hand, it is impossible to argue that this court has used the jurisdiction of criminal investigation that is reserved for establishing adultery, which is the reason why the plaintiff wishes to file a claim for compensation. Consequently, there is no option but to regard the plaintiff's request as being outside the competence of this court.

For all these reasons it is incumbent to hand down a decision on the court's lack of competence.

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bride to conceal her pregnancy, to facilitate the affiliation of the fetus to her new husband. In our case, the woman did the opposite: she married her lover only after giving birth, making sure to affiliate her newborn child to her ex-husband, the plaintiff.

[Lawsuit of…, represented by al-Ustādh Muṣṭafā Salāma, against…,[65] represented by al-Ustādh ʿAbd al-Fattāḥ al-Ṭawīl, No. 246 Year 1942, in the presidency of the honorable judge ʿAbd al-ʿAzīz Sulaymān]

65) The names of the litigants are erased by the editor of the journal to protect their right to privacy.