Panel: Islam and Economic Performance

Women's Property Rights in Islamic Law and the Debate over Islamic Economic Performance

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Introduction

Historians of the Ottoman empire, and economic historians of the Middle East have been engaged for some time now in a debate over the reasons for the region's economic decline. A central theme in this debate has been the question of institutions and their role in modern economic history, where the Ottoman experience tends to be disassociated from that of the Arab East and instead be studied in a comparative context with the European one. Having long enjoyed an edge in the debate because of the rich Ottoman archives and documentation, some Ottomanists, adopting a methodological discourse which characterises the historiography of the subject, have neglected to acknowledge the Ottoman economic framework's debt to the undeniable legacy of the Arab East, namely its religious and legal institutions. Other Ottomanists, on the other hand, tend to attribute all faults to this particular legacy at the risk of ignoring all else, something which they do at their own peril. The literature on the subject is too vast to be detailed here, and a comprehensive view of the debate will have to wait for a more opportune moment, but reference to two publications, one of which sees institutions as the key to the survival and longevity of the Ottoman empire, while the other focuses on things "Islamic", will suffice as a background to my own position. Both of these highlight institutions and marshal multi-level evidence, whether for the economic survival, or as being the cause of the economic decline.

In a recent paper Professor Pamuk states that, "Pragmatism, flexibility, and negotiation enabled the central bureaucracy to co-opt and incorporate into the state the social groups that rebelled against it."[1]

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[1]Sevket Pamuk, "Institutional Change and the Longevity of the Ottoman Empire, 1500-1800, *Journal of Interdisciplinary History* 35:2(2004): 225-247. See 228 and the references quoted.

Pamuk claims that a misguided concept of state intervention attributed to the state administration contributed to a misunderstanding of Ottoman economic policies. He argues for recognizing the many instances when the state allowed the markets to dictate economic behaviour, which so far remained undocumented.[2] For instance, a survey of the financial arrangements for tax collection systems may well lead to a conclusion that Ottoman fiscal institutions did in fact incorporate pragmatic solutions to their limited scope. Nonetheless, he is forced to admit that pragmatism did not extend to institutional change. What I have found most persuasive is his inclination to study institutional change, or institutional performance, for their value to the economic history of their own societies and not necessarily in comparison to Europe. I also agree with his final conclusion that "there was pragmatism but that it was limited and did not lead to further capitalist economic development or new forms of economic organization."[3] Namely, that on some level the observations we make when analysing the performance of the previous "Islamic" economies, for lack of a better term, are quite frustrating because the economic performance of the institutions of medieval Islamic societies offer some very useful mechanisms which probably played a role in the Islamic economy, and that by European standards, could have well have delivered new economic institutions and achievements and yet have not.

The second approach can be represented through a paper by Professor Timur Kuran, one of several which he wrote on the subject. Kuran points out that one of the sources of rigidity which blocked the evolution of Islamic society is "Islam's traditional aversion to the concept of legal personhood."[4] One example of the limitations imposed by this could be seen in the ban on interest charged on lending capital:

"Right up to the modern era, Middle Eastern financiers continued to deliver services as individuals or through temporary, small scale, and generally unspecialized partnerships....they lacked legal personhood;

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[2] For examples see p.237 and sq.

[3] P. 247.

[4] Timur Kuran, "The Logic of Financial Westernization in the Middle East," *Journal of Economic Behaviour & Organization*, 56(2005):593-615.

this kept them from being sued as enterprises, thus restricting the financial transactions that others were willing to conduct with them."[5]

The Islamic commercial enterprises suffered not so much through the commercial law itself but because the inheritance law triggered a continuum of fragmentation of wealth.[6] Kuran argues that the Islamic law of commercial partnership, the Islamic inheritance and the *waqf* system are all institutions which blocked evolutionary paths in the direction of modern banking: "Islamic law was a handicap to Muslims", but also that the egalitarian rules of the Islamic inheritance system dampened disparities and gave women some financial protection.[7] I have supported Professor Kuran's previous conclusion regarding the poor economic performance of the *waqf* institution by documenting the poorly enforced institutional property rights particular to the Maliki school of law in the Islamic west,[8] but would now like to challenge some of his conclusions on the latter. On the basis of a study I have just completed I will argue that Islamic law provides individuals with strongly enforced and highly effective property rights, and that those of Muslim women are the case in point.[9]

I may well be doing an injustice to Professor Kuran's entire argument by isolating his treatment of women in Islamic law, from the entire spectrum of the evidence he discusses. Simply put, I would like to

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[5] Ibid., 603.

[6] Ibid., 606.

[7] Ibid., 611.

[8] see Maya Shatzmiller, "Islamic Institutions and Property Rights: The Case of the 'Public Good' Waqf," *Journal of the Economic and Social History of the Orient* 44, no. 1 (2001): 44-74.]

[9] Maya Shatzmiller, *Her Day in Court: Women's Property Rights and Islamic Law in fifteenth century Granada*, forthcoming, (Harvard University Press, 2007). On the documents see *Wathā'iq ᶜarabiyya gharnāṭiyya: Documentos Arábigo-Granadinos*, edición crítica del texto árabe y traducción al español con introducción, notas, glosarios e índices por Luis Seco de Lucena, Madrid, 1961. 2 vol. Hence forward, *Documentos*.

propose that women's property rights were constructed in such a way that the power to effectively receive, hold and control property, and that they shared and were in charge of a large portion of society's wealth and were protected by the inheritance system. That could have enhanced economic performance.

The Documentation, Historical Background, Legal Framework of women's property rights

Written during the very last moments of Islamic political independence in the Iberian Peninsula, the Granadan collection of court documents covers the years between 1421 and 1496, with a strong concentration of documents for the 1480s. These are records of private transactions -- that is, family and commercial deeds that Granadans registered in the Islamic court. The ninety-five Arabic court files show a higher degree of women's involvement in Granada than anywhere else: Ninety-five per cent of the documents refer to a female either transacting family and business deals in some capacity or exercising one or several of her legal entitlements to property. This strong showing of Granadan women in the documents is intriguing for both the sheer number of women represented and for the scope of their property-related activity. The most probable explanation is the role played by the Reconquista wars and the demographic conditions in fifteenth-century Granada, which saw the male population decimated. The need among women of all classes to assume a more active and public role in property matters made their participation greater than under normal circumstances. However, the women in Granada clearly could not have done what the documents indicate unless their property rights were already in place. Thus the demographic conditions magnified the effect of women's property rights but did not create them.

In this study property rights are legal provisions that entitle an individual woman to acquire, keep, and use property in a secure legal environment. These are not to be confused with property itself or with rights to the land, which some Islamic historians have done in spite of the fact that the concept is not easily defined within the framework of Islamic law *(sharîʿa)*. As Farhat Ziadeh notes, following Johansen, "there

is no general theory of property law in the *sharīʿa*."[10] Abandoning a general framework for property rights, an underlying assumption of this paper is that women's property rights were not a novelty in the Middle East, where Islamic law was formulated, but a concept with which the ancient Near Eastern societies were familiar and which was included in the ancient Near Eastern code, and Roman and Justinian law. When the first legal manuals were written in the Islamic Middle East, in the eighth and ninth centuries, all women's property rights -- dowry, gifts, inheritance, separation of assets in matrimony, liberation from male guardianship, and control over property -- were already present. The historical process that facilitated the articulation of women's property rights in Islamic law involve a certain evolution which had taken place within the legal institutions of Arab society at the time.The transition from collectivism to individualism in property ownership involved holding private property, and has been linked to the end of the matrilineal system. Under that regime women did not have the right to own property directly; it was held collectively by the family and administered by the women's brothers.[11] Some legal historians, such as Noel Coulson, see in the advent of women's property rights a revolution in the legal sense because it involved changes in the construct of filiation:

"According to the traditionally accepted picture of this tribal law, women occupied the position of childbearing chattels, generally deprived of proprietary or other rights and sold into a loose sexual liaison with their husbands for a price which was paid to the wife's father or other close male relatives ... The treatment of *nasab* [filiation] in the law indicates a historical change in family relations from the situation before Islam, where the father was the sole basis of legitimacy, to a new situation under Islam, where the maternal connection is as important as the paternal one."[12]

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[10] Farhat J. Ziadeh, "Property Rights in the Middle East: From Traditional Law to Modern Codes," *Arab Law Quarterly* 8, no. 1 (1993): 4: "Is there really a general theory of property law in the *shari'a*? The answer is no."

[11] W. Montgomery Watt, *Muhammad at Medina* (Oxford: Oxford University Press, 1956), 373-88. (Excursus J.)

[12]Noel J. Coulson, "Regulation of Sexual Behavior under Traditional Islamic Law," in *Society and the Sexes in Medieval Islam* (Malibu: Undena, 1977): 66-7. On filiation, see Yvon Linant de Bellefonds, *Traité de droit Musulman comparé,* 13 vols. (The Hague: Mouton, 1965-73), vol. 2, 17-22 (hereafter *Traité*); and Watt, *Muhammad at Medina,* 374.

The Granadan evidence offers a unique opportunity to study the historical and legal context of women's property rights as a mature legal system and at a unique historical moment. I have identified for each of the family or commercial transactions described in the documents the right being exercised, and studied its legal provisions in the *fiqh* (law books,) the *fatwa*s, (legal inquiries) and the notaries manual, *kitāb wathā'iq*. I treat not only property rights enacted between individuals related to one another in myriad family relationships -- that is, individual rights -- but also rights to which males and females were equally entitled but that when exercised by women were subject to special conditions.

Women's Property Rights: The Rights and their Acquisition

The *Sadāq*

The first property right is the right to a *sadāq* uniting all marriages and marriage contracts in Granada, as elsewhere, a sum of money designated in the city's or region's currency, that was given by the groom to the bride and specified in the marriage contract. The *sadāq* was the first of many cash, goods or property transfers that could take place between spouses, but unlike other gifts, the *sadāq* formed a legal category by itself; it was a mandatory gift allotted only to females, and unlike other gifts, had to be gifted at a precise moment.[13] As the first right to be exercised and acquired by a young woman, the *sadāq* can be seen as the right that inaugurates the process of female property acquisition, even though acquiring one's *sadāq* was not always a smooth process. Despite what the legal manuals say about the unified nature of the *sadāq* as a gift, the records reveal the contrary. Unlike other gifts, the *sadāq* was split into two instalments, the first given immediately upon marriage and the second delayed. Unlike other gifts, the content of its first instalment, denominated in local currency, was legally converted in the process into household items. As a

[13] The *sadâq*'s early development as a gift is discussed in Yossef Rapoport, "Matrimonial Gifts in Early Islamic Egypt," *Islamic Law and Society* 7, no. 2 (2000): 1-36. Rapoport's contribution lies in documenting evidence in Egyptian marriage contracts of the *sadâq*'s early practice. His use of the Andalusian and North African material to supplement his argument is controversial. As we shall see, while the principle of *sadâq* remained intact, regional variations in its acquisition abound.

result, the *sadāq* also consisted of acquiring two different kinds of property: material goods in the first instalment and cash in the second. All legal sources, except the *fiqh* (law manual) itself, show that only the first instalment *(naqd)* of the required *sadāq*, pledged in the marriage contract in its entirety to the bride, was delivered at the moment of the wedding. Moreover, on delivery, this portion was transformed into household goods. The second portion became a *kālī'* (deferred instalment), also of a specified monetary value, that was paid later in cash. Although a definite date for its payment was entered in the marriage contract, no payment was made on this date. Since acquisition itself was divided and two acquisition dates were given, the wife acquired her *sadāq* under two different legal property regimes: the first when she was a minor and restricted in property matters and the second when most wives, but not all, had attained the age of majority. This made a significant difference for the potential of the *sadāq* as an economic agent. Once complete, the trousseau had to be delivered to the bride's home so that it would be physically available to her prior to the consummation of her marriage, as required by law. No formal process of taking possession, normally required in all matters of property acquisition and transfer, could be performed since the daughter was usually young and still under the restrictions of her father's guardianship. Since this part of the first instalment of the *sadâq* was the only gift to which the bride was legally entitled before the consummation of her marriage while still under guardianship, problems abound, pitting daughters against fathers. As to the second instalment, all legal manuals agree that a specific date was required for payment of the *kālī',* and that this date was to be inserted in the marriage contract and all marriage contracts have one. However, acquisition of the *kālī'* was a different matter and contravened the letter of the law. In fact, payment never occurred on the stated date but on the occasion of divorce or widowhood. Why, then, was the practice of entering a date maintained at all? This was done to create an obligation and to stipulate that from the specified date onward the debt would be available for collection. Without a definite date, the promise of a payment would not have been valid. Inserting a date in the marriage contract meant that the *kālī'* became a debt owed to the wife that could be neither conveniently forgotten by the husband nor overlooked by the

wife, even if she were willing to do so. If no acquisition took place the amount owed became part of the estate. Having a debt on the husband made it possible to trade it against his property rights. In addition to making it possible to initiate and obtain a divorce, the *kālī'* could also be forgiven in return for the husband's relinquishing either his right to marry a second wife or his right to demand that his wife travel with him, leaving behind her home town and family. Once the principle was admitted, forgiving the *kālī'* expanded to other areas. In their respective manuals, all notaries included the deed of renunciation for the good treatment" that she had received during the marriage. Ibn Mughîth drafted a contract in which a wife signed a deposition *(wadᶜ)* renouncing her right to the deferred *sadāq* in recognition of what the jurist called "her gratification with his companionship and their admirable matrimonial relationship." This Islamic practice of renouncing a property right in favour of "feelings" is also intriguing in other ways -- for instance, because it contravened the rule that in all commercial transactions the value of the items exchanged had to be fully known and had to have a comparable market value. In the case of renunciation, this requirement was not fulfilled: whereas the *kālī'* was always stated in precise and recognized monetary units, this was not the case with "conjugal behaviour." Feelings of "happiness" or the husband's "good" marital conduct could not be expressed in monetary terms. How is that for pragmatism?

Gift *inter vivos*

Receiving and acquiring property was much more powerful for women using the right of gifting *inter vivos*, sometimes in combination with the guardianship over the young married daughter. The law recognizes several modes of property gifting under the terms *hiba, niḥla* and *ṣadaqa*, with the property gifted moving either horizontally among family members, or vertically, from one generation to another. It could consist of a tangible piece of property, such as real estate, but could also be a gift of the right to derive enjoyment and income from a property, such as forgiving a debt or gifting the right to derive income from a building or a field, or the right to use water for irrigation. The actual act of gifting was a complex process involving several steps. It would begin with a declaration by the donor of his intention to make a

gift to the recipient, by making an offer, *ijāb,* and receiving the acceptance of the offer, *qabūl,* from the recipient. The acquisition of the gift had to be accomplished by fulfilling another set of rules. The donor had to perform a conveyance, *ḥiyāaza,* in which he or she made the property available to the recipient, who, for his part, performed a possession taking of the gift, *qabḍ.* Not all schools require a strict physical possession-taking for ownership to be transferred. The practice of making a property gift to minor daughters was of great benefit for women. It was popular among owners who wanted to exclude it from the estate, since females in minority could not legally acquire their gifts, nor could they exercise control over them, which would leave the property in the hands of parents for several years after gifting. Being their daughters' guardians, the donors continued to control the property for all practical purposes as if they were the full owners.

The next phase of property gifting to women could take place at the moment of marriage, although according to the available records, not all regions shared this practice, and the value and legal status of such gifts varied. The marriage contracts in the Granadan collection contained gifts of considerable real estate property, including houses and orchards, as well as very small pieces of property, which were listed next to the mandatory *ṣadāq*, and gifted to brides by the groom, parents, or other family members.

The third stage in the gifting *inter vivos* process was inaugurated as wives were liberated from guardianship, and could make their own gift decisions, and become recipients of gifts without requiring their father's consent.

Inheritance

Together with gifting, estate division was the main factor determining the amount of a woman's property. Nowhere was the impact of women's inheritance rights over their property holdings better displayed than in fifteenth-century Granada at the moment of estate division *(qismat tarika)*. But the Granadan courts were not unique in detailing the deceased's properties; these properties were recorded meticulously in all Islamic regions where an effective centralized administration was in place. Partly

because all parties wanted their share of the estate correctly and legally attributed to them and partly because the state wanted to collect its own share, detailing men's and women's property at the time of death became a central part of court work.[14] Although united by the general rules of the Islamic succession law, estate registration varied according to region, but the benefit of consulting it is obvious. Nonetheless, estate divisions in Granada, including those specified in wills, and instructions for the division of the unencumbered third of an estate were recorded in the documents in the same manner both before and after the 1492 conquest. The frequency of such records reveals regional legal and social patterns, especially those specific to women's inheritance in Granada. Between 1430 and 1495, such divisions were recorded in the Granadan collection in thirty separate documents.[15] Several estate divisions reveal an astounding accumulation of property in female hands. One such case was that of Fātima b. Ibrahīm al-Layti, which was divided in court on 17 August 1468. Her heirs were her husband and five young children, four of whom were still under guardianship when their mother died. Fātima left the following properties: a house, four parcels of land situated in different areas of the city, a vineyard, and more land recently planted with vines. The land, the house, and the vineyard were divided in equal shares, first between the two male children and then among the three daughters, with the father supervising the division and renouncing his share in his wife's estate. By the time the Granadan women described in the records appeared in court for estate

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[14] On the different administrative patterns of the Islamic regions, see the list of estate inventories in Jerusalem's Mamlūk court in Donald P. Little, *A Catalogue of the Islamic Documents from al-Haram al-sarīf in Jerusalem* (Beirut: Orient-Institut der Deutschen Morgenländischen Gesellschaft, 1984), 59-186, documents 21-469. See also Donald P. Little, "Haram Documents Related to the Jews of Late Fourteenth Century Jerusalem," *Journal of Semitic Studies* 30, no. 2 (1985): 227-370; Donald P. Little, "Documents Related to the Estates of a Merchant and His Wife in Late Fourteenth Century Jerusalem," *Mamlūk Studies Review* 2 (1998): 93-193; Huda Lutfi, *Al-Quds al-Mamlūkiyya: A History of Mamlūk Jerusalem Based on the Haram Documents*, Islamkundliche Untersuchungen No. 113 (Berlin: Klaus Schwartz Verlag, 1985), 15-22; and Aharon Layish, "Bequests As an instrument for Accommodating Inheritance Rules: Israel As a Case Study," *Islamic Law and Society* 2, no. 3 (1995): 282-319.

[15] The dates and document numbers for these estate divisions, as shown in *Documentos*, are: 1430 (7c), 1452 (7b, d, e), 1452 (8), 1457 (11), 1458 (12b), 1464 (19a-c, 19e-f), 1464 (20), 1466-68 (21, 22, 23), 1468 (24), 1476 (33a-d), 1482 (43), 1484 (40b), 1483 (47), 1485 (49), 1487 (58), 1490 (64a-b), 1493 (87), 1495 (95).

division, the Islamic inheritance law had been in effect for 800 years. To judge by the Granadan practice, the right of females either to inherit or to acquire inheritance shares was not contested, nor did inheritance pose either legal or practical challenges for women. The other rights, such as the right to hold independent property within a marriage, the right to gift and be gifted, and the right to a *ṣadāq*, did not seem to impede or threaten inheritance acquisition either. The Granadan documents also demonstrate how cooperation within the family mitigated the impact of the law when physical division of an estate was required, whether the estate consisted of land or of houses. The Granadan court cases and the *fatwâs* show that Granadan women dealt with the division of property according to the succession law as sound economic agents, negotiating with co-owners, buying shares, or shifting properties to create equity. Where such evidence exists, it seems to point toward compliance but also reveals that the evolution of social and economic conditions exerted considerable influence on the content of the property that women inherited. For instance, in Damascus, land seemed to disappear from the generational transmission of property, a trend reflected in the content of women's estates. What comes out through the documents rather clearly is that the succession law itself was the best protection for women's property and for the property of their future heirs, who were watchful of their wives', mothers', and sisters' property because it had direct consequences for their own property ownership. The importance of the inheritance component to the entire system of women's property rights lies in the fact that since other family members were directly concerned about whether their mothers, wives, sisters, and daughters could inherit, this right was conscientiously safeguarded because it recognized the central role that women played in the transmission of family property.

Guardianship and the Delayed Acquisition

The extension of the father's guardianship over his daughter in minority lasted for seven years past her marriage. The daughter was referred to in the documents as being *fī hajr*, interdicted her in property matters. This created a temporary legal category for women, who were owners of property but at the same time unable to exercise control over it.

The motivation for keeping married women under prolonged guardianship and interdiction in property matters was clearly a concern for the state of the property. Jurists were of the opinion that a young woman could spend recklessly and that the delay in releasing her from interdiction would prevent her from doing so. They believed that the law was intended to provide young women time to grow and mature and to gain experience in economic matters. The inexperienced young wife, ignorant in the "ways of the world" and unaccustomed to appearing and interacting in public places, needed to be shielded from circumstances where she could lose her property. Given the young age of some brides, this was not unreasonable. Making sound property decisions was indeed a concern, as expressed in the distinction made between puberty, or availability for sexual relations, and intellectual maturity *(rushd)*. The consummation of the marriage, for which brides acquired the first *ṣadāq* instalment, was not sufficient when it came to making financial decisions. Nonetheless, the prolonged guardianship law had some positive effects on women's property ownership and thus on their social and economic status. The frequent appointment of mothers or other female relatives as property guardians empowered them to deal with economic matters and demonstrated a certain degree of confidence in their ability to act as administrators and managers and to make business decisions. Clearly differentiating these two systems was the European husband's greater empowerment compared to that of the Islamic husband. Historians of the Renaissance have seen in women's guardianship during this period evidence of the restricted legal status of Renaissance women. Joan Kelly, for example, sees women's guardianship as reenforcing women's initial exclusion from the benefits of the new economy and society.[16] Thomas Kuehn sees in the "Florentine institution of the *mundualdus* a means of dealing with those potentially dysfunctional moments in the structure of male dominance when women entered the public arena."[17] Julius Kirshner sees granting husbands power over their wives' property as part of a "wider

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[16] Joan Kelly, "Did Women Have a Renaissance?" in *Women, History and Theory,*(Chicago: University of Chicago Press, 1984), 19-50.

[17] Thomas *Kuehn,Law, Family and Women. Toward a Legal Anthropology of Renaissance Italy*. (Chicago and London: The University of Chicago Press, 1991), 237.

pattern in which legislators across northern and central Italy were granting husbands broad control over all the wife's assets, both non-dotal and dotal."[18] By disempowering the wife, the European system of guardianship empowered the husband.

This interpretation of the European context serves to highlight the different position of the Muslim husband. The Islamic system gave the father longer and stricter control over his daughter's property, thus limiting the husband's power. The Muslim husband remained legally irrelevant and practically distanced from his wife's property during her interdiction, and continued to be so for the duration of the marriage. The separation of property in marriage enabled married women to maintain control over their property, while the practice of interdicting a young married woman in the early years of marriage did not negate or limit her potential to be the recipient of property or to otherwise accumulate property during her interdiction. None of her property rights were curtailed, and she continued to inherit and to be gifted property.

Given the potential for misuse of property, the law of guardianship benefited women by prolonging the period during which property could be given to them without the donor's losing control over it. Guardianship enhanced women's capacity to receive property legally from various sources at a young age because it made property transfers from family members more attractive. Once gifted, this property remained the woman's possession and, in the long run, benefited her and her children.

The Body as Property

Childcare (*hadāna*)

The Islamic law extended a woman's property rights to the functions of her body. When studied within their respective legal frameworks, the distinct status given to intercourse, breastfeeding, and childcare might have differed in terms of reasoning and provisions, but they nevertheless retained a

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[18]Julius Kirshner, "Materials for a Gilded Cage: Non-Dotal Assets in Florence, 1300-1500," in *The Family in Italy, from Antiquity to the Present*, ed. David I. Kertzer and Richard P. Saller (New Haven: Yale University Press, 1991), 192.

common background: each was subject to remuneration when fulfilled and, when denied, necessitated that surrogates be compensated, in recognition that the physical functions related to reproduction were subject to female property rights. Unlike breastfeeding, which was regulated in the Qur'an, the law never involved itself with the process of childrearing within a marriage, but when separation, divorce, or widowhood occurred, the change in the mother's legal status had implications for the rest of her property rights, including entitling her to payment for caring for her child. Except for the Mâlikîs, all schools ruled that a divorced mother was entitled to monetary compensation for childcare in addition to maintenance payments, alimony, and any required wages for breastfeeding.[19] A mother first acquired her right to a *hadāna* (childcare payment) once she no longer lived in the same domicile as the father. The biological functions related to reproduction and the female capacity for childcare were brought into the legal sphere of property rights by a unity of purpose.

The *hadāna* was technically a property right, one of those created by motherhood but acquired only when the mother no longer lived in the same domicile as the father. However, the law also granted the right to a *hadāna* payment to the mother's relatives or to the female relatives of the father when they took over care of the child. Bestowing this right on a female was a sign that the law recognized the female body as possessing some unique qualities that should be compensated. In the above example, it was the capacity to provide physical care to the young child that warranted payment, but the recognition of the body as property also incorporated payment for such functions as intercourse and breastfeeding. An examination of how these rights were formulated in the law books, their translation into practice in the notarial manuals, court documents facilitating their acquisition, and *fatwas* detailing jurists' deliberations and decisions

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[19] Yvon Linant de Bellefonds, *Traité de droit Nusulman comparé,* 3 vols. (The Hague: Mouton, 1965-73). vol. 3, 152. On the provision respecting a divorced mother's entitlement to compensation, see 150-76. A shortened version can be found in Y. Linant de Bellefonds, "hadāna," in *EI*^{2}. Approaches to foster parenting differ among the legal schools. Although the Mâlikîs recognized the right to compensation for foster parenting as a property right exchangeable for a *khul*^{c} divorce, they did not recognize it as a right entitling one to supplementary payment; instead, compensation was considered part of the *nafaqa*; see *Traité*, vol. 3, 152.

arising from challenges to them show that jurists granted similar legal status to a select and well-defined number of physical states or outcomes related to reproduction: virginity, circumcision, a child's death at birth, the mother's milk bond, abortion, and childlessness. Each of these was implicated in dimensions of the legal and social standing of the female body and thus subject to women's property rights.

Intercourse and Birth control *(ʿazl)*

From a legal perspective, the first act of intercourse between bride and groom, usually referred to as the consummation of the marriage, was more than a mere physical act: "One can say without exaggeration, that the whole regularization of the marriage is dominated by this idea of consummation."[20] For a daughter still under interdiction, consummation was the great trigger of property acquisition, for it inaugurated the actual acquisition of the *ṣadāq*. All legal schools, with the exception of the Hanafīs, agreed that the bride was entitled to refuse intercourse, and some even gave her the right to request that the marriage be dissolved before consummation had taken place, regardless of whether the husband had paid the *ṣadāq* to the father.

Beyond consummation, intercourse continued to retain its own legal status in the context of property rights, with wives having the option either to permit or to forbid the practice of coitus interruptus *(ʿazl)* as a means of birth control.[21] All legal schools agreed that the practice itself was authorized and lawful but also agreed that it could not proceed without the wife's consent. To sum up, engaging in intercourse with a wife was a property right which the husband acquired by paying the *ṣadāq*. Virginity was

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[20] *Traité*, vol. 2, 239.

[21] Birth control in Islamic law and medicine is treated in Basim Musallam, *Sex and Society in Islam: Birth Control before the Nineteenth Century* (Cambridge: Cambridge University Press, 1983). The following discussion of this subject uses his findings. On the legal provisions for birth control, see 28-38. While pioneering in its comprehensiveness, Musallam was not the first to draw attention to the law's positive view of birth control. G.-H. Bousquet suggested in 1950 that voluntary limitation to reproduction goes hand in hand with Islamic theology and law and that it should become the official ideology of reproduction in Islamic societies; see G.-H. Bousquet, "L'Islam et la limitation volontaire des naissances," *Population* 5, no. 1 (1950): 121-28. This approach of using the law as a tool for legitimation for planned parenthood has now been adopted by Muslim scientists; see Abdel Rahim Omran, *Family Planning in the Legacy of Islam* (London and New York: Routledge, 1992).

required to safeguard this property right, but intercourse was not allowed before compensation had been given. Allowing the use of her body for procreation and pleasure was thus a woman's property right, and she was duly compensated for this use by marriage and by an array of other payments, such as that for maintenance. But because of intercourse's unique association with both procreation and pleasure, it acquired legal status respecting property rights, giving rise to the requirement that a wife consent to and be compensated for the practice of coitus interruptus.

Breastfeeding

Unlike intercourse, which the legal sources debated within the theoretical framework of filiation, the status of breastfeeding was specifically articulated in the Qur'an: "and if you wish to engage a wet nurse you may do so if you pay her an agreed amount as is customary" (2:233).[22] This Qur'anic dictum introduced the notion that breastfeeding was voluntary rather than obligatory, which future generations of jurists could not shake off.

The law recognized not only the female role in reproduction, but also the dominance and centrality of the notion of property rights in society. Granting a wife property rights over the biological functions of her body reflected the existence of a strong and well-defined concept of the body as property. Rights over the body were publicly and officially asserted through acquisition, renunciation in exchange for various considerations, registration in notarized deeds, and the resolution of related disputes before the courts. This legal stand represented the centrality of reproduction and women's bodies to family and society.

Wage Labour

European historiography gives women's wage labour a crucial role in the modern family formation as well as in the rise of capitalism, making it a historical factor in its own right.[23] This

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[22] See the discussion in Avner Gil'adi, *Infants, Parents and Wet Nurses: Medieval Islamic Views on Breastfeeding and their Social Implications* (Leiden: E.J. Brill, 1999), 13-22.

[23] Wage labour has been portrayed as providing sufficient economic independence for the liberation of women and also as the great villain that deprived women of power and status within the

raises the question of whether a similar role could be attributed to Muslim women's wage labour. The European data are relevant to our understanding of how Islamic law regulated female wage labour because they provide us with both a wide thematic framework and an analysis for comparison. A brief look at the historical background to women's wage labour in the Islamic lands, both its dimensions and the occupations that women filled, will help to establish the legal context of wage labour as a woman's property right.[24]

The Islamic law of hire is gender-blind and thus does not lend itself directly to answering gender-related questions, but the legal sources raised issues related to the right of females to engage in wage earning and to keep and control their wages, considerations that were essential to its status as a property right. Unlike the previous rights treated here, which were defined as women's property rights to begin with, the definition of wage labour as a woman's property right was dependent upon legal deliberations

Remuneration for productive labour was acquired and retained in a manner similar to that applied to wages received for services rendered by the female body. Evidence from the late medieval period, between the eleventh and fifteenth centuries, indicates that women's participation in the Gender division of labour was the prevalent rule in manufacturing, unlike other sectors of the economy, such as agriculture, with the strongest showing in the textile industry. Occupations monopolized by women included spinning, dyeing, and embroidery within what was the largest, most specialized, and most market-oriented industry of the Muslim cities.

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family and in society in general; see Louise A. Tilly and Joan W. Scott,, "Industrialization and Gender Inequality," in *Islamic and European Expansion*: *The Forging of a Global Order*, ed. Michael Adas (Philadelphia: Temple University Press, 1993), 243-310.

[24] In previous publications, I have dealt in great detail with the historical records of women's labour, with their occupations, and with the role that they played in the labour force from the eighth to fifteenth century; see Maya Shatzmiller, "Aspects of Women's Participation in the Economic Life of Later Medieval Islam: Occupations and Mentalities," *Arabica* 35 (1988): 36-58; and Maya Shatzmiller, *Labour in the Medieval Islamic World* (Leiden: E.J. Brill, 1994), 347-69.

The scale of women's employment in manufacturing and services, particularly in the textile industry, provided a labour market which was both considerable and diversified. An analysis of women's market related economic activities shows that from the tenth century onward women's participation in the labour force, which remained constant in the rural areas, increased in the towns, where it came to dominate the textile industry through the monopolization of certain tasks. The jurists' decisions on these legal issues demonstrate that engaging in wage labour was seen as a woman's property right. There was a significant historical context for the legal issues, here, as there was for the strict separation of spousal property in marriage. The right to engage in wage labour was upheld by the jurists in absolute terms as a universal property right, but in practice the acquisition of this right appears to have been subject to additional considerations unique to the relationship of competing property rights. The right was mainly challenged when it collided with other property rights; challenges on the grounds that wage labour transgressed the mores of women's conduct were hardly ever accepted by the jurists as having a legal basis. The marriage contract, which had become a vehicle for articulating and guaranteeing arrangements of all sorts, was equally used for wage-labour issues but failed to protect women when the right to engage in wage earning was opposed to the husband's property rights.

At the same time, wage labour was affected by general economic conditions and by the massive employment of women in the textile industry during the medieval period, which made women's wages a common and regular event to which the legal system, jurists, courts, and the social scene all needed to adapt.

Sales and Loans

The women's deeds surveyed here constitute a substantial enough sample for us to attempt to formulate some patterns that, while unique to Granada, may point more generally to the role that property rights played in women's property ownership and in the economy. Women's

commercial activities were concentrated in selling and buying land real estate, in tax farming and brokerage, small local commerce, and in investing in long-distance trade by supplying capital. The documents show a rise in the size of women's property ownership as well as in their share of the land and real estate market in the city: some registered more than one or two deals, while one transaction involved three generations of females in the same family. The Granadan transactions show women alone, pooling their resources together but they also show couples who owned property in equal shares and found it convenient to sell it as a whole to another couple willing to acquire it on the same terms. The upward surge in sales and purchases of land and real estate witnessed in Granada was no doubt related to the unique political event that had taken place there, but it also indicates both the presence of capital and property in the hands of women, which came to them through gifts and inheritance, and the availability of these sources of income for further investment. The documents also show that women were motivated to engage in commercial transactions and to invest in property with anticipation of further gain.

The second activity undertaken by women is revealed by deeds among the Granadan documents that register loans. All loans were taken from or given to close relatives, mostly husbands or children, and discharged at some time or another, usually upon estate division, if not earlier. The presence of heirs made a notarial documentation necessary and required accurate recording of all loans. The loans made between family members were used to provide for shared family goals, such as buying a trousseau, providing for house renovations, buying a vineyard, or buying raw materials. Because there was no conjugal property, it was legally possible for wives to extend loans to their husbands, except that it was also necessary to record these loans very carefully in order to prevent bickering or lawsuits at the time of estate division. These conditions suggest that the dependability of the husband on his wife in financial matters might well have also influenced their relationship, beside having a beneficial effect on his economic activities. When

husbands lacked financial means, they could be expected to show more respectful and cautious behaviour toward their wives. Other loans are reported in court documents from Mamluk Jerusalem:[25] in the 14th century, a woman, a wife of a baker, was involved in extensive credit operations, two villagers owed her 30 dirhams each, another owed her 350 dirhams a bean maker owed her 500 dirhams and her husband owed her 1000 dirhams as his second instalement of her sadaq. Other husbands owed money one 1600, another 10,000. There is also information about a Jewish woman lending 200 silver dirhams and receiving a vineyard as security and a Jewish man who owed his wife 500 dirhams, half of which was the remainder of her *sadaq,* which shows that the Jews registered their marriages according to the Islamic rule. An interesting case was one where several women were described as pooling capital. All these loans made by women were revealed by records of estate divisions and the features appear common to all cases.

The question of women's participation in credit investment through *mudāraba*, or *qirād* (an arm's length investment in long-distance trading), is another form of women's commercial activities that we need to consider when investigating the question of the relationship of credit and loans to women's property rights. No instances of *qirād* were reported in the Granadan documents, but there are instances of *qirād* investment which link Muslim women to the trading universe of the twelve century Mediterranean in the fatwas. Information about females in the Shaykh's household mid 13th century, Ayyubid period, surfaced in the archives of a trading family in the area of the Red Sea port of Quseir, which shows them making investments and talking about tax collection money. They participated in long-distance business travels, actually travelling for either business or pilgrimage. Women were suppliers who sold flour and two

[25] Yossef Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society*, (Cambridge, Cambridge UP, 2005) 24-25

women are mentioned as independent account holders alongside their male counterparts.[26] Investment in long distance trade was not as prominent as real estate sales, but certainly not negligible.

Women's property rights and economic performance

As a corrective to Kuran's thesis that Islamic law crippled Islamic institutions when it came to economic activities and the aversion of the law to legal personhood, I would like to offer the case of Muslim women's property rights. Muslim women's property rights defined women's personhood in legal/economic terms and this personhood achieved real magnitude, first thanks to the legal mechanisms which guaranteed acquisition and protection of these rights, and second, defining them as economic agents, able to initiate economic activities and protect their wealth. How this legal personhood effected economic performance could be measured in terms of the execution of each of the rights and its effect on the economy. The right of women to participate in commercial activities, sales, loans, trade and wage labour would be seen as having a direct, but multi- level effect. To begin with, the massive participation of women in the labour market, in particular in the textile industry, simply doubled the size of the working force in this sector, likely the most productive and trade oriented of the medieval industries. It also generated specialization, job creation, more income for working families and revenue for tax collectors, entrepreneurs and the government. The mass participation was enabled by the right to work for wages and enhanced and encouraged by the right to keep her wages and by the restriction imposed on the husband, or other family members to claim or to share them without her permission. Motivation, access to the markets, identity of partners, the size and nature of the property transacted, and frequency and legal complexities appear to have been consistent in the Middle East and North Africa. The

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[26] Li Guo, *Commerce, Culture, and Community in a Red Sea Port in the Thirteenth Century.The Arabic Documents from Quseir*, (Leiden, E. J. Brill, 2004), 8-9, 18, 26.

similarity of the legal schools in these matters allows us to extend these same conclusions to Muslim women living in different social and economic conditions but under a similar legal system. Other property rights, such as *ṣadāq*, inheritance, gift inter vivos, were instrumental in allowing women to accumulate both wealth and property. This is not to suggest that all property rights had the same effect on women's potential to be economically active, nor that all rights generated equal economic dynamism. For instance, the sad?q's potential as an economic agent was limited. The practice of paying the entire amount in two instalments created two separate items with two potential economic effects. When in the form of cash capital, the *ṣadāq* could, at least in theory, be invested with the expectation of return and growth. However, the *ṣadāq* economic potential was affected not only by the amount of capital that brides received, but equally by their inability to invest it themselves for the duration of their minority status. Still, the question of the *ṣadāq* potential investment value is strictly theoretical given that the first instalment's potential was greatly reduced, or even eliminated, by the practice of converting the original cash capital into a trousseau consisting mostly of household items, including clothes, which were subject to considerable everyday wear and tear. The conversion of cash into goods left the wife in possession of property of declining value. Because the second instalment was in fact a forced loan to the husband by the wife with a delayed and undetermined date of repayment, its investment potential was also limited.

One should not underestimate either the impact of property rights special to women and the defence extended to them by the law and the legal institutions, courts, muftis, notaries, on mentalities. They created a legal and social environment which permitted women, and society at large, not only to feel secure about their ownership, but also to enable them to explore financial opportunities with confidence, to show entrepreneurial skills and for men not to be hostile to such activities on their part.

Property rights also had an effect on the role of the family in the economic sphere. The Islamic family was a very different economic creature once women's property rights were implemented. For once women's property was kept separately from that of their husbands, so that the entire concept of conjugal property was non-existent according to the law. In the secondary literature historians of the family like to talk about "the family property" or "the family business", but in fact when wives gave loans to husbands or allowed their property to stand as collateral for their husbands' business activities, their capital was secure, there was no shared property, but property owned by two equal partners. Women could safely invest with family members because their ownership was guaranteed. In contrast to the situation in Europe, women did not have to wait to become widows in order to lend money, to place capital in the market, or to have a say in or control over their property, demonstrated by the larger participation of widows there. Despite the accelerated activity of European women in this credit area, compared to the limited record of Muslim women, by guaranteeing women's property rights within the marriage and preventing the husband's control of conjugal property, the law neutralized the domination of the "family" while at the same time using it to facilitate and encourage women's investment. Historians who condemn the intrafamily nature of commercial deals because they think that such deals limited women's participation in investment activities assume that free access to market information was so crucial that when denied to women they did not invest. But in the medieval period, successful business enterprises, whether European or Islamic, flourished thanks to the circle of familiarity, which provided for the free flow of information within the family. Intrafamily interaction did not protect against the hazards of investing, but, precisely because of the degree of security that it provided, it did ensure the trust and confidence needed for investment in business deals. Whether the phenomenon of transactions with family members reflects women's limited exposure to the market or instead a more secure way of doing business is a matter of interpretation. Any answer

must adjust modern economic theory to medieval conditions while accounting for legal and regional variables as well as the economic structures of medieval Islamic society.

The Islamic inheritance system, so maligned by assuming that it forced partitioning of the estate, actually guaranteed the secured transfer of property in two lines, male and female, completely separated. It was rather important because of the strong defence that the law extended to property acquisition and control. Wealth did not dissipate as it passed from one generation to another, but instead was protected in the hands of the family members who watched out for their own shares in the estate. Islamic credit giving and commercial activities could be safely undertaken because of it.

Women's Property Rights and the Feminist Discourse on Patriarchy

The evidence presented in this paper has used history to document the positive effects of women's property rights on their capacity to invest, and by extension, on economic life, and on their social environment. But in addition to the economic context, the subject of women's property rights also belongs in the realm of gender studies, pointing to the need for a theoretical framework in which the conclusions may coexist with the Islamic feminist discourse on the law as a patriarchal system. The variety of theoretical interpretations of women's property rights runs the gamut of disciplines from anthropology to history, most frequently within the economic paradigms of marriage.[27] For later periods, a Marxist interpretation is favoured, one that links the loss of the means

[27] Renée Hirschon, "Introduction: Property, Power and Gender Relations," in Women and Property, Women as Property, ed. Renée Hirschon (London and New-York: Croom Helm and St. Martin's, 1984), 1-23. This aspect could be studied in Islamic law by comparing notarial models for the sale of an array of slave girls, such as *jariya,* the singer, *mamluka*, a generic term for a slave girl, and *sabiyya,* a ten-year-old slave girl, a slave girl with a suckling baby, a particularly beautiful slave girl, and a mother of the owner's child, *umm walad*, all of whom have a different status.

of production to the decline of women's status.[28] In the capitalistic societies of nineteenth-century Europe, women were rendered subordinate when the industrial means of production were transferred to private ownership. Valuable as each of these theories is in its particular context, none lends itself very well to an account of the unique relationship between women's property rights, as documented in the Islamic sources, and the involvement of the judicial milieu, the courts, and the jurists in determining their acquisition. A feminist theory of women's property rights has been presented by Carole Rose of Yale University Law school, who in her work analyses women's loss of property as a result of interactions between women, social mores, and the actions of judges.[29] Rose argues that the differences, real or alleged, of the mental and behavioural patterns of men and women affect how they bargain with each other over property. Through a subtle process of coercion, women are pressured to give in to men's demands. Through what she terms "a real or assumed taste for cooperation," women's property rights are eroded.[30] Women's perceived or real weakness in negotiating with related males is encouraged by the law and by the jurists and judges who apply it, leading to systematic inequalities and to the liquidation of women's assets. The reason I refer to this theory in this paper is

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[28] See the discussion in Judith Tucker, *Women in Nineteenth-Century Egypt,* (Cambridge: Cambridge University Press, 1985), 6-7.

[29]Carol M. Rose, "Women and Property: Gaining and Losing Ground," in *Property and Persuasion, Essays on the History, Theory, and Rhetoric of Ownership,* (Boulder, CO: Westview, 1994), 233-63.

[30] Rose, "Women and Property," 236.

because the questions are relevant to the Islamic society as well. For example, did Muslim society expect women to surrender their property in defiance of their property rights? And did Muslim jurists, the Islamic courts, and the Islamic legal system help men to defraud women, thereby curtailing the benefits that the law had given to them? The historical accuracy of portraying Islamic law as patriarchal could well be challenged by bringing Rose's theory to bear on the documented evidence. The permanency of legal deeds for the renouncement of the second *sadāq* instalment in the notary manuals most likely points to a practice. While the service rendered by the notaries in these matters could well have been in use because it was what wives wanted, the discourse that accompanies the act of renunciation -- namely, "in recognition of his kind behaviour" -- is reminiscent of the modern feminist theory which explains how women lose property, while equally serving as an indication of the strength of women's property rights. Yet the evidence from Granada, or for that matter from any of the court documents of the Ottoman empire and the Arab Middle East reflect a different attitude towards women's property from the one described in Rose's model. Muslim jurists defended women's property rights, not because they were radical feminists but because they interpreted the spirit of the law in this manner. The law structured the transmission of wealth through women as well as through males and there was no way around this principle. The smooth inter-generational transmission of the Islamic family property needed women's property rights.

All in all when compared to women's status in medieval and pre-modern European societies, as economic historians have done in comparing Ottoman institutions to

European ones, the Islamic inheritance system was not manipulated to deprive females of their share in the family's wealth, as happened in Europe through the dowry system. Under the Islamic inheritance law, women and men inherited independently from all members of their families and from each other, and male and female children inherited from each of their parents separately. Members of the family kept close tabs on each other's property, whether, land, loans, or deferred *ṣadāq*. Muslim women's property rights structured the legal personhood of women in a way which gave a different meaning to the relationship between women and the institution of the family: The "family" as such, had no legal power over wives, or over women's property once guardianship came to an end. In spite of all this, the low social and economic status of many women in modern-day Islamic societies governed by Islamic law gives rise to concern. Unlike changes to the financial codes, where the Islamic merchant law of the Medieval period was scrapped in favour of modern financial laws, family law has remained intact and continues to regulate marriage, family and inheritance patterns in many Muslim countries. One has to conclude that the culprit is not the law but society which encroached on it.