BU Institute on Culture, Religion & World Affairs

Key Issues in Religion and World Affairs

Crones, slaves, and the caliph's daughter: The complexities of gender in pre-modern Muslim legal texts

Marion Katz

Professor of Middle Eastern and Islamic Studies, New York University
March 16, 2015

Marion Holmes Katz is a Professor of Middle Eastern and Islamic Studies at New York University. Her research focuses on pre-modern Islamic law, gender, and ritual. She is the author of books including *Body of Text: The Emergence of the Sunni Law of Ritual Purity* (2002) and *Women in the Mosque: A History of Legal Thought and Social Practice* (2014).

In Egypt towards the end of the second century of the Islamic calendar (the beginning of the ninth century of the common era), a scholar nicknamed Sahnun questioned his teacher Ibn al-Qasim about the doctrine of the nascent Maliki school regarding the rendering of judicial oaths. He inquired,

> Are you of the opinion that women who are nubile and unmarried and women who are not nubile and unmarried, female slaves, male slaves, slave women who have born a child to their masters, slaves who are under contract to earn their freedom, and slaves who will be manumitted at

their masters' death render their oaths in the mosques?

Ibn al-Qasim replied,

> I only asked Malik about women, where they render their oaths. He said, "As for any important matter, for it they [women] are made to go out to the mosques. If she is a woman who goes out in the daytime, she is made to go out in the daytime and give her oath in the mosque. If she is one of those who do not go out, she is made to go out and night and give her oath there."

Sahnun's initial question may startle or confuse us with its long and apparently eclectic list of labels differentiated by sex, age, and various modulations of unfree legal status. In response, Ibn al-Qasim proves to have presented the master with a question that seems more natural to us moderns: What about women? However, Malik's answer once again plunges us into unfamiliar category distinctions by positing a division between women who are willing to appear in public during the daytime and those who venture forth only at night.

It is often not difficult to excavate such passages of early and classical Islamic legal texts for the specific categories we are already looking for – in this case, perhaps extracting the reference to women and discarding with some relief its motley set of companions in the text. Having just used this passage in a book that is avowedly about the history of women's mosque access as a legal issue, that is certainly one thing that I have done myself. However, as I hope also appears in the book, I see the history of Muslim jurists' debates over the legal status and religious propriety of women's presence in mosques as very much a story about the ways in which the category of women intersects with and is riven by other considerations of role and status – in that case, particularly by distinctions between women of different age cohorts or with differential commitments to pious or prestigious ideals of gender segregation.

In the legal Maliki school, which gained an early and lasting dominance in Andalusia and North Africa, the question of women's mosque attendance elicited deeply engrained assumptions about the behavioral norms appropriate for women at different stages of the life cycle, with the ideal of female seclusion

applied particularly to the nubile and marriageable young woman and loosened considerably with respect to the mature matron. It was only with the intervention of Ibn Rushd "the Grandfather" (d. 1126 CE) that Maliki rulings on women's mosque attendance were systematically linked to the concept of *fitna* (sexual temptation) and the fear of seduction was extended to all but the most aged women, postponing the privileges of maturity from the matron to the crone. Other issues elicited different distinctions among women. For instance, the question of a wife's obligation to do housework (or, alternatively, her entitlement to domestic help financed by her husband) led Maliki scholars to make distinctions not only between couples of varying financial resources, but between social strata; according to Sahnun's Andalusian contemporary ʿAbd al-Malik ibn Ḥabib, a low-status wife is not entitled to a maid even if her husband is rich, while an aristocratic husband's status may be degraded by his wife's doing housework even if she is herself of humble origins.

These examples should suffice to suggest that when it comes to early and classical Islamic legal discourses, "Can a woman do x?" or "Is a woman entitled to Y?" is not always a well-formed question. Even when early Muslim jurists addressed such questions to their peers, they often elicited answers that signaled deep distinctions among different categories of women and intersections with other kinds of status concern. This fact should be of concern to us, because in the field of Islamic studies we have long been in the habit of asking precisely this kind of question. Thus, it behooves us to think a bit more about the typologies of women presented in legal texts and what they can tell us about women's history and about the law. Scholars including Baber Johansen, Kecia Ali, and Hina Azam have made major steps towards understanding how such categories as gender and slave status were intertwined in the logics of legal argumentation, but there is still more work to be done on the many category and status distinctions crowding our sources.

The deepest cleavage between different categories of women in formative and classical Islamic law is, of course, that between free and slave women. As is well

known, slave women were not subject to the same ideals of modesty that jurists asserted (with varying impact on social practice) for free women. In the very early period such distinctions seem to have been systematic and potentially enforceable. Among free women, gender roles were also complicated by more diffuse considerations of social status. As we have seen, Malik is reported to have deferred to the preferences of women who chose not to go out in public during the daytime, a custom that may have reflected the pious or elitist aspirations of the individual women and/or the status and wishes of her family. The differential manners and conventions applying to women of different classes did not pertain only to issues of coverage and mobility, but to other classes of prerogatives and duties. According to the report of Ibn al-Qasim in the *Mudawwana*, Malik is said to have held that "a woman of low status" could designate an unrelated man to contract a marriage on her behalf, while a "noble woman" would have her marriage dissolved if it was contracted without the participation of her marriage guardian – he offers the examples of "a freedwoman, a black woman, or a convert to Islam" to illustrate what kind of woman would be regarded as "lowly." The same source reports that Malik held that a woman is obligated to breastfeed her child whether she wants to or not – unless she is noble and wealthy, in which case her husband must pay for a wet-nurse to feed and tend the child.

Like the divisions among women of different ages, some of these distinctions were moderated or rejected over time. Ibn Ḥabib reported that when he visited Medina, he observed that no slave woman – no matter how pretty – went out without her head uncovered and her hair exposed; however, writing back in Andalusia, he himself recommended that the authorities prevent pretty slave women from venturing into the streets with uncovered heads and advised they could be distinguished from free women by other means. Later authors such as the thirteenth-century Maliki Qur'an commentator al-Qurtubi categorically stated that slave women should not go out uncovered. Similarly, later Malikis generally rejected the doctrine that a woman of low social status could designate an

unrelated man to contract a marriage on her behalf. In contrast, it is palpable in the sources that high-status wives continued to assert their entitlement to have their husbands provide them with domestic servants. Ibn Rushd "the Grandfather," whom we have already encountered applying the concept of *fitna* to the question of women's mosque attendance, responded to a legal inquiry about the practice of stipulating in marriage contracts the wife's high status and resulting entitlement to domestic service -- a legally problematic custom that is nevertheless reflected in Maliki notarial manuals of that period and beyond. The "woman who does not go out in the daytime," or later the "secluded woman" (*mukhaddara*), continued to be a relevant category over a period of centuries, and there is reason to think that in a range of times and places it designated real patterns of pious practice or status maintenance that distinguished some women.

The point here is not simply that, particularly in the early period, Islamic legal constructions of gender were less monolithic and essentialist than is sometimes assumed. To some extent, the acknowledgment of diversity of this kind can be a useful corrective in itself; for instance, to recognize that a specific sub-set of free women were distinguished by the limitation of their public mobility is to realize the artificiality of legal passages suggesting that all free women were largely confined within the home, as when some authors argued that a free wife need not be supplied with proper shoes or outerwear. However, the diversity of habitus and prerogatives assigned to women by legal scholars is not in itself liberatory. Rules may be no less restrictive for being differentiated according to status; power was exercised both over free women who were compelled to cover their hair or faces and slave women who were compelled to expose them (although both surely also have exercised agency in ways that are difficult to document today). I believe, however, that all of this becomes more meaningful when it compels us to realize that "Was this rule good for women?" is often not a well-formed question. It elides the fact that women had different roles – and potentially different interests – over the course of their lifecycles, as well as ignoring the fact that various classes of women were very differently situated. To

say that wives are not obliged to do housework, although accurate for an important strand of Maliki opinion, begs the question of who performs that labor – and for most scholars, the answer was lower-status women, some of whom (of course) were also wives.

Rather than, so to speak, grading pre-modern Islamic law for its degree of conformity to modern ideals of dignity or equity for women, it may be more useful to mine it for what it can tell us about, for instance, the ways in which the female lifecycle was envisioned and the habitus and prerogatives or limitations associated with each stage in different periods and places. For instance, the beginning and end of a woman's procreative potential and the perceived emergence and extinction of her sexual allure are both major factors in juristic discourses about women, although their interrelation and comparative importance changed over time. To the extent that we focus on Islamic legal discourse for its own sake, rather than for the variable extent to which it shaped or reflected social realities, these examples may force us to acknowledge that they care somewhat less about gender – and somewhat more about social status – than we have traditionally acknowledged.

Another step towards problematizing the category of 'women' is to better integrate men into our discussion of gender in Islamic law. This is not as easy as it sounds, because although men are ubiquitous in legal texts, they are also largely invisible. In formative and classical Islamic legal discourses men are an unmarked category; the default legal person is a free Muslim adult male, but precisely because this identity is a default position, its distinctive characteristics rarely come into view. In terms of the legal implications of the stages of the male life cycle, scholars including Leslie Peirce and Khaled al-Rouayheb have pointed to the role of the *amrad*, the adolescent youth whose beard has not yet fully sprouted and who is assumed to be erotically alluring (although not sexually licit) to adult males. The introduction of the *amrad* into discussions of issues such as prayer leadership and mosque-based mixing in legal sources of later centuries suggests that even as the growing focus on sexual allure served as a rationale

for gender segregation over an ever greater proportion of the female lifespan, it also blurred gender lines in interesting way. It would be difficult to argue that the beardless or sexually desirable (*mushtaha*) male youth played a role compared to the presumptively desirable woman, either in terms of the dynamics of legal discourse or of any practical impact on social or ritual life. Not only was the presumptively alluring stage of male adolescence limited in duration (and often implied to pertain to only a minority of sultry youths), but very few actual legal limitations were placed on the *amrad*. Nevertheless, the fact that legally relevant male lifecycle terminology clusters around the transition to maturity suggests a significant difference between male and female life trajectories as imagined by legal scholars; unlike in the case of a woman, the waning of neither reproductive capacity nor physical appeal is of interest to the jurists.

However, in other areas there were significant (if often neglected) distinctions in the duties and prerogatives of males. One example is the obligation to attend Friday prayers, which can reasonably be seen as a symbolically important instance of gender differentiation in the ritual law. Even if all scholars acknowledged that a woman who attended Friday prayers could validly perform them, and many acknowledged that such attendance was at least permissible (if not desirable), the fact remains that the obligation to attend was one of the vital insignia of the adult Muslim male. However, the link between the duty to attend Friday prayers and maleness is attenuated when we realize how many Muslim men must have lived and died without ever being subject to this obligation. In this regard, male slaves were situation somewhat like elderly wives – not obligated to attend Friday prayers but able validly to perform them, subject to the permission of their owners. Perhaps even more significantly, all Sunnis excluded nomads from the obligation and prerogative of holding Friday prayers; Shafi'is excluded villages too small to yield a quorum of forty resident men, and Hanafis limited the institution of Friday prayers to residents of a major town, defined by jurists not only in terms of size and economic complexity but of the presence of Muslim authorities providing order and justice. Now, these are distinctions

among communities, rather than among male individuals. However, this kind of distinction means that we cannot by any means identify the obligation to attend Friday prayers with adult Muslim manhood; only certain males were so situated that they bore this ritual obligation that so significantly distinguished them from women. The plaintive tones of some questioners who approached muftis with queries about their communities' eligibility to hold Friday prayers suggests that this was an exclusion that could be keenly felt. It may thus be that we should think of the default person of classical Islamic law not only as a free adult Muslim male, but as a free adult *urban* Muslim male. Our study of gender and pre-modern Islamic law will only be enhanced when we enrich our knowledge of the many labels and distinctions that cross-cut the dichotomy between men and women.

Further reading:

Kecia Ali, *Marriage and Slavery in Early Islam* (Harvard University Press, 2010)

Hina Azam, *Sexual Violation in Islamic Law* (Cambridge University Press, 2015)

Baber Johansen, "The Valorization of the Human Body in Muslim Sunni Law," *Princeton Papers in Near Eastern Studies* 4 (1996), pp. 71-112.

Leslie Peirce, "Seniority, Sexuality, and Social Order: The Vocabulary of Gender in Early Modern Ottoman Society," in Madeline C. Zilfi, ed., *Women in the Ottoman Empire* (Brill, 1997), pp. 169-196.

Khaled El-Rouayheb, *Before Homosexuality in the Arab-Islamic World, 1500-1800* (University of Chicago Press, 2005)