

Child Custody in Islamic Law

Premodern Muslim jurists drew a clear distinction between the nurturing and upkeep of children, or “custody,” and caring for the child’s education, discipline, and property, known as “guardianship.” Here, Ahmed Fekry Ibrahim analyzes how these two concepts relate to the welfare of the child, and traces the development of an Islamic child welfare jurisprudence akin to the Euro-American concept of the *best interests of the child* enshrined in the Convention on the Rights of the Child (CRC). Challenging Euro-American exceptionalism, he argues that child welfare played an essential role in agreements designed by early modern Egyptian judges and families, and that Egyptian child custody laws underwent radical transformations in the modern period. Focusing on a variety of themes, including matters of age and gender, the mother’s marital status, and the custodian’s lifestyle and religious affiliation, Ibrahim shows that there is an exaggerated gap between the modern concept of the *best interests of the child* and premodern Egyptian approaches to child welfare.

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Child Custody in Islamic Law

*Theory and Practice in Egypt since the
Sixteenth Century*

AHMED FEKRY IBRAHIM

McGill University



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To my mother, Nabawiyya Naji
To my children, Alya and Zayn
To their mother, my friend, Sara Nimis

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PROOF

Contents

<i>Acknowledgments</i>	<i>page viii</i>
Introduction	1
Part I Child Custody and Guardianship in Comparative Perspective	27
1 Child Custody in Civil and Common Law Jurisdictions	29
2 The Best Interests of the Child in Islamic Juristic Discourse	56
Part II Ottoman-Egyptian Practice, 1517–1801	109
3 Private Separation Deeds in Action	111
4 Ottoman Juristic Discourse in Action, 1517–1801	134
Part III The Transition into Modernity	163
5 Child Custody in Egypt, 1801–1929	165
6 Twentieth- and Twenty-First-Century Child Custody, 1929–2014	192
Conclusion	229
<i>Bibliography</i>	239
<i>Index</i>	257

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ix

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Introduction

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Convention on the Rights of the Child, art. 3, para. 1

The title of this book, *Child Custody in Islamic Law*, generally refers to Islamic law in the Sunni tradition. I focus on Sunni Islamic juristic discourse, especially in early modern Egypt, as well as Ottoman-Egyptian court practice to write a history of the concept of the best interests of the child in early modern Egypt based on a reading of both juristic discourses and court practices. These earlier discourses and practices are juxtaposed with those dominating contemporary Egyptian law as a result of modernity. The contemporary discourses of the child's best interests represent a hybrid of both Islamic and Euro-American modes of lawmaking. This book examines overall themes relating to child custody and guardianship, and concentrates on pivotal points of continuity and change, as well as tensions and incompatibility between premodern Islamic law and the child-centered modern international standard of the best interests of the child as the main principle that drives decisions concerning children in many jurisdictions across the world. One of the main questions this book addresses is whether there was a concept similar to the Euro-American concept of the best interests of the child (henceforth the best interests standard) in early modern Egyptian juristic discourse and practice. This comparative aspect, where scholars try to see how certain historically prevalent religious concepts overlapped or varied from modern legal discourses, has already been done, for instance, in the Jewish tradition but not

2 Introduction

with regard to Sunni Islam, rendering this investigation groundbreaking in this regard.¹

In the Euro-American legal historiographical imaginary, there is an inherent teleological vision of progress, the result of the hard labor of Euro-American lawyers, legislators, and feminist organizations, whose combined efforts produced the best-interests-of-the-child standard. The main achievements of this standard were (1) making the determination of custody *child-centered*; (2) bringing into focus the individual needs of each child; and (3) utilizing social science research in determining what is best for each child on a case-by-case basis. The best interests standard, where each child's best interests are determined by the judge, cannot escape being culturally contingent, especially since legislators in many Western jurisdictions offer little guidance to judges on what exactly constitutes the child's best interests, allowing social perceptions to shape such a standard more dynamically.² Historical research dealing with countries such as England, France, and the United States, to mention a few, has shown that the maturation of the modern concept of the best interests of the child in Euro-America was the result of a long and nonlinear process of evolution wherein two main approaches persisted. In early modern England, for instance, one approach defined the child's welfare in the negative, wherein judges were only allowed to interfere with the father's absolute common law right to custody when the child's physical or moral health was seriously threatened. Absent gross abuse, judges generally awarded full custody and guardianship rights to fathers.

In the Sunni Islamic legal tradition, the situation was similar among many jurists whose presumptive rules – themselves justified through

¹ More recently, similar comparative work has been done between Jewish and American tort law theories. Yuval Sinai and Benjamin Shmueli, "Calabresi's and Maimonides's Tort Law Theories-A Comparative Analysis and a Preliminary Sketch of a Modern Model of Differential Pluralistic Tort Liability Based on the Two Theories," *Yale Journal of Law & the Humanities* 26: 1 (2015).

² On the concept of the best interests of the child and its inherent indeterminacy, see Abdullahi An-Na'im, "Cultural Transformation and Normative Consensus on the Best Interests of the Child," *International Journal of Law, Policy and the Family* 8:1 (1994): 62–81; Philip Alston, UNICEF, and International Child Development Centre, *The Best Interests of the Child: Reconciling Culture and Human Rights* (Oxford; New York: Clarendon Press; Oxford University Press, 1994); Philip Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights," *International Journal of Law, Policy and the Family* 8:1 (1994): 1–25; Stephen Parker, "The Best Interests of the Child – Principles and Problems," *International Journal of Law, Policy and the Family* 8:1 (1994): 26–41; John Eekelaar, "The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism," *International Journal of Law, Policy and the Family* 8:1 (1994): 42–61.

welfare of children discourse as well as paternal rights – were based on a host of calculations such as the child’s age and gender, the mother’s marital status, and the parents’ religious affiliation and lifestyle choices. These presumptive rules were only abandoned when the child was in danger of being subjected to gross abuse or serious harm. We shall call this narrow, negatively defined approach the *basic interests approach* or simply the *child welfare approach*. Both of these terms refer to a general concern for the well-being of children, but they fall short of the technical meaning of the best interests of the child as it is often understood in international law. The *best interests approach* defines the child’s welfare positively, in terms of who provides the best care for a given child, without relying on presumptive rules for all children based on the gender and age of the child, and the marital status or religious affiliation of the parent. Without drawing a distinction between these terms, one may fall into the trap of always equating conceptualizations of premodern Islamic juristic discussions of the welfare of the child with modern Euro-American and Muslim nation-state legislation about the best interests of the child. One must caution here that this bifurcation of rules between a concern for the basic interests of the child when there is a conflict with the rights of custodians and a wider, positive focus on the best interests of the child was not the only factor determining rules of custody. The final rules often obtained nuance from a matrix of social practices, hermeneutic commitments,³ and methodological approaches that go beyond this distinction.

Let us now turn to child custody in Islamic juristic discourse in the premodern period, that is, prior to the early nineteenth century for Middle Eastern jurisdictions. Premodern Muslim jurists drew a clear distinction between the nurturing and upkeep of a child, or “custody” (*ḥaḍāna*), and caring for the child’s education, discipline, general acculturation, and managing her or his property, known as “guardianship” (*wilāya*). These two terms are similar to “physical custody” and “legal custody” in some US jurisdictions, where physical custody refers to where and with whom the child resides, and legal custody refers to the person or persons who make decisions about the child’s education, healthcare, and religious instruction. In this book, I examine both *ḥaḍāna* and *wilāya* as they relate

³ Based on Iser’s premise that the text imposes some logical constraints, a semi-objective view of hermeneutics and reception, one would argue that the textual sources on child custody, which were limited to a few reports, must have placed limited constraints on jurists. On hermeneutics, see further Terry Eagleton, *Literary Theory: An Introduction* (Minneapolis: University of Minnesota Press, 1983).

4 Introduction

to the welfare of the child, both in premodern Islamic juristic discourse and Ottoman-Egyptian court practice.

In premodern Islamic legal discourse, jurists used many words to refer to the well-being of the child, but they did not use them consistently as technical terms in all discussions of custody. These terms include “the benefit of the child” (*manfaʿat al-walad*), “the welfare of the child” (*maṣlaḥat al-walad*), and “the good fortune of the child” (*ḥaẓẓ al-walad*).⁴ These terms were not necessarily used by jurists to denote an overriding principle to be applied by judges in the narrow sense of the best interests of a given child in a particular historical context in the same way that technical legal terms such as “best interests of the child” (*maṣlaḥat al-ṭifl*” or *maṣlaḥat al-maḥḍūn*) are sometimes used in modern state legislation.

In order to locate the logic of child custody lawmaking in premodern Islamic law, I will focus on three main avenues, namely (1) finding explicit discussions of whether custody is a right of the custodian or the child; (2) exploring the rationalizations advanced by jurists to justify different rules; and (3) examining court decisions to theorize child welfare considerations. It is therefore necessary to link the macrodiscussion of whether child custody is a right of the custodian or the ward to discussions of the justifications of different microrules of positive law. Through juristic justifications, we can gauge how much impact considerations of the welfare of the child had on lawmaking.

Jurists assumed that child custody law was designed to promote the welfare of children. According to jurists, wards, custodians, and guardians have interlocking rights and the latter two have duties. When a conflict of rights arises, the child’s most *basic interests* (as opposed to her or his *best interests*, such as simply who can provide the best care) are prioritized by all jurists to avoid risking the child’s physical health or moral uprightness. Jurists assigned the physical and moral well-being of the child the highest value in times of conflict between the child’s right to be cared for and the custodial parent’s right to assume custody. This is the minimum threshold of the child’s interests supported by all Sunni jurists, regardless of where they stand on the issue of whether custody is a right of the ward or of the custodian.

To give an example, some jurists argued that certain forms of bad morality do not justify taking a child away from his or her mother (more

⁴ Muwaffaq al-Dīn Ibn Qudāma al-Maqdisī, *Al-Mughnī*, ed. Rāʾid b. Ṣabrī b. Abī ʿAlafa (Beirut: Bayt al-Afkār al-Dawliyya, 2004), 2:2007–2008; Ibn Qayyim al-Jawziyya, *Zād Al-Maʿād Fī Hudā Khayr Al-ʿIbād*, ed. Shuʿayb al-ʿArnaʿūt and ʿAbd al-Qādir al-ʿArnaʿūt, 3rd edn. (Beirut: Muʿassasat al-Risāla, 1998), 5:392.

on this in Chapter 2), as long as there was no danger to the child's life or religion. In other words, most jurists would not take away custody from a custodial mother upon the request of the father even if he could provide the best care for a given child. These rules may be seen as violating the best interests of the child in favor of the rights of the custodial parent. Conversely, allowing the child to choose the parent with whom he or she wishes to reside upon reaching the age of discernment (*tamyīz*),⁵ as is the case in the Shāfi'ī and Ḥanbalī schools, represents a juristic best interests approach, which transcends the basic needs of children. In this case, the child's decision is presumably driven by a sense of comfort with and attachment to one parent more than the other. One could argue that the child's needs are prioritized over those of the father in this case, for the father may never have any right to custody should the child choose to continue living with his mother until puberty, according to Shāfi'ī law. As we shall see, some of the rules of jurists were based on a basic interests approach (defined negatively as the absence of gross abuse), while others based their rules on a best interests approach (defined positively as the *accrual of benefits*, not only the *avoidance of harm*, such as soliciting the child's preferences), which resembles the modern Euro-American concept of the best interests of the child. Despite the presumed *origins* of these rules as being based on a negative or positive definition of child welfare, once they were established as the law of the different Sunni schools after the dominance of legal conformism (*taqlīd*), they were assumed by most jurists to be universal in their application. They were deemed to represent the *welfare* of all children at all times, rather than looking at the best interests of a particular child at a particular moment. Thus, even though many of the justifications may have originated from a best interests ethos, once they were frozen in the age of *taqlīd* as the school doctrines, they ceased to be compatible with the best interests of the child as they are understood in international law.

Whether child custody is a right of the child or the custodian can be misleading because although jurists who consider custody to be a right of the child are more likely to maximize considerations of the best interests of the child over the rights of the custodian, there is not always a consistent correlation between the jurist's position on who has the right of custody and the positive rules of the various questions of age of custody transfer,

⁵ This is also the age at which to start systematic education. On the age of discernment, see further Avner Giladi, *Children of Islam: Concepts of Childhood in Medieval Muslim Society* (New York: St. Martin's Press, 1992), 52–54.

6 Introduction

visitations, travel, guardianship, and so on (more on this in Chapter 2). Although conceptualizations of the threshold at which jurists were willing to privilege the child's interests over those of the custodian must have played a role in Islamic positive laws on custody, there are many interlocking factors that were equally, if not more, important. These include the practices of early Muslim communities and/or hermeneutic restrictions such as the existence of famous prophetic traditions denying women custody upon remarriage, and the collective interpretation within the school unit. What complicates this question further is that it is often hard to gauge where a particular jurist stands on the question of who has the right of custody. It is sometimes equally hard to gauge what the predominant school position is and how strong the minority position is. The Mālikī school is a case in point. We see many references to Mālik and some very important Mālikī authorities considering child custody to be a right of the child, all while asserting that the Mālikī dominant position is the exact opposite. It is unlikely that the Mālikī dominant position that custody is a right of the custodian had always been such, given the views of Mālik himself.

This book aims to investigate the logic of both Islamic juristic discourse and Ottoman court practice in the early modern period and the ways in which these discourses and practices offer non-Euro-American “strange parallels” and idiosyncrasies.⁶ My contention is that early modern (and medieval) Islamic juristic discourse contains both a narrow and a broad notion of child welfare. Both the narrow and broad notions were cited by jurists in justifications of their various child custody and guardianship rules. With the dominance of legal conformism (*taqlīd*), most jurists treated custody and guardianship norms as presumptive rules that were assumed to dominate adjudication with little discretion left for judges, except in cases of serious harm to the child. In actual court practice in Ottoman Egypt, the situation was different. Judges allowed families to agree on any child custody arrangements that they deemed fit, even when the arrangements violated the discourse of jurists not only in the official Ḥanafī school but also according to the majority of Sunni jurists. Between 1517 and the middle of the seventeenth century, parents were able to enter into private separation deeds, according to which women were able to travel with their children and remarry without losing custody. Some women were even able to have veto power over the father's exclusive guardianship rights (both of person and property). They were also able

⁶ Lieberman, *Strange Parallels*, 2:xxi–117.

to preempt the father's prerogative to take the children with him if he relocated to another town. These private separation deeds, which were notarized by Ottoman-Egyptian judges, were binding. There is hardly an Egyptian court register of the sixteenth or first half of the seventeenth century where such agreements did not appear in such a formulaic manner as to suggest that they were happening on a large scale. These agreements were taking place in Mamluk Egypt and continued during the Ottoman period until the second half of the seventeenth century, with the last case I found coming from 1670. After this date, no such agreements appear in a large sample numbering over 17,200 divorce cases, approximately 600 cases of which deal with custody and guardianship issues.

These private separation deeds were binding against the almost unanimous Ḥanafī position, which completely rejected many such agreements as contrary to the welfare of the child based on their presumptive rules of what benefits all children of all times. The Ḥanafīs assumed, for instance, that all boys must not live with their mothers beyond the age of ten, lest they internalize feminine dispositions. Allowing families to agree on any custody arrangement contradicting the rules of author-jurists, as long as the welfare of a given child was not harmed, represented a unique vision of the child's welfare; the Mālikīs, for example, did not justify or perhaps even imagine the types of agreements that were notarized in Ottoman Egypt.⁷

Some of these agreements appear in *shurūṭ* works, where sample separation deeds are presented, such as al-Asyūṭī's (d. 880/1475) *Jawābir al-'Uqūd wa-Mu'īn al-Quḍāh wa'l-Muwaqqi'īn wa'l-Shuhūd* (*The Pearls of Contracts: Manual for Judges, Scribes, and Witnesses*).⁸ These contract formula manuals presented contracts in the four Sunni schools, each formula satisfying the specific school's applicable rules, and were followed in Ottoman Egypt, with some of the formulas appearing almost verbatim. By the second half of the seventeenth century, the Ḥanafī position dominated and private separation deeds were no longer binding, while the more problematic agreements completely disappeared from the court registers.

With the Ḥanafization policy of the nineteenth century, the system of child custody became more rigid. This rigidity coexisted with the revival of

⁷ Abū al-'Abbās Aḥmad b. Yaḥyā al-Wansharīsī, *Al-Manhaj Al-Fā'iq Wa'l-Manhal Al-Rā'iq Wa'l-Ma'nā Al-Lā'iq Bi-Ādāb Al-Muwatthiq Wa-Aḥkām Al-Wathā'iq*, ed. 'Abd al-Raḥmān b. Ḥammūd b. 'Abd al-Raḥmān al-Aṭram (Dubai: Dār al-Buḥūth li'l-Dirāsāt al-Islāmiyya, 2005), 2:565–566.

⁸ Shams al-Dīn Muḥammad b. Aḥmad al-Minhājī al-Asyūṭī, *Jawābir Al-'Uqūd Wa-Mu'īn Al-Quḍāh Wa'l-Muwaqqi'īn Wa'l-Shuhūd*, ed. Mus'ad 'Abd al-Ḥamīd Muḥammad Sa'danī (Beirut: Dār al-Kutub al-'Ilmiyya, 1996), 2:89–99.

8 Introduction

the strand of thought on child custody that defined the welfare of the child more broadly. This approach began to dominate legal thinking on child custody toward the end of the nineteenth century, with the rise of a new hybrid family ideology where mothers were assumed to be the nourishers of children. In 1929, influenced by the domestic ideology and the new emphasis on the nuclear family, Egypt started a process of legislation in a bid to minimize the rigidity of Ḥanafī law. Judges were given greater discretion in child custody arrangements, and the child's age requiring female custody was raised successively over the course of the twentieth and early twenty-first centuries, mirroring Euro-American nineteenth- and early twentieth-century values, as well as international child-welfare conventions.

In my discussions of child custody and guardianship, whether in juristic discourses or court practices, I focus on eight main themes that should give us a good, albeit not an exhaustive idea, of the ways in which custody and guardianship interacted with child welfare. These themes are (1) age and gender; (2) the mother's marital status; (3) the custodian's lifestyle; (4) the custodian's religious affiliation; (5) visitation rights; (6) relocation with the ward; (7) maintenance; and (8) guardianship. Due to the comparative nature of this project, both implicitly and explicitly, it is fitting to start this book with a brief historical overview of the evolution of child custody jurisprudence in a few Western jurisdictions (Chapter 1). Chapter 2 establishes the centrality of the child's welfare in premodern juristic discourse. I then pose the question of whether Ottoman-Egyptian judges were permitted to exercise a level of discretion in their rulings whereby they could assess the child's best interests (Chapters 3 and 4). Chapter 5 covers Egyptian child custody law during the period of 1801–1929, while Chapter 6 discusses the age of codification of Islamic child custody law from 1929 to 2014, which often responded to changes in Euro-American and international law. But before we embark on our journey, it is fitting to investigate a few important threads, the first of which are the political implications of this study, especially in the context of Islamophobia, and questions of cultural imperialism or specificity and exceptionalism.

CULTURAL IMPERIALISM AND THE HEGEMONY OF HUMAN RIGHTS DISCOURSES

The notion of the best interests of the child, the basis of international conventions regulating the welfare of children, which have become an essential standard in many modern Muslim-majority countries, cannot

escape being comparative since it has been presented as a Euro-American product exported into other countries through international treaties backed by Western hegemons. One of the objectives of the comparative aspect of this monograph is to free Islamic law from its “historiographic ghetto,” to use Victor Lieberman’s words in reference to Southeast Asia, as well as challenge European exceptionalism by arguing for comparability and overlaps, rather than reinforce dichotomies between legal cultures that “evolved” organically to accommodate child rights, and others that were mere recipients of legal innovation.⁹

The comparative approach shows that despite the absence of clear cultural or material links between early modern England and the United States on the one hand and early modern Egypt on the other, one finds similar processes of accommodation of child welfare in the courts. This comparative approach can be deeply problematic, as it considers Western conceptualizations of the best interests of the child as the yardstick by which to judge how countries respect children’s rights. This is arguably another hegemonic discourse in which Western nations, through their influence on international law standards, set the parameters of the discussion, overlooking cultural specificities and communal approaches to children’s welfare that go beyond the interests of each particular child. In a word, it privileges the individual over the collective, and therefore some have rejected it as a Western tool of cultural imperialism. For example, Jād al-Ḥaqq, Egypt’s late rector of al-Azhar, had some reservations about certain stipulations of the Convention on the Civil Aspects of International Child Abductions (CCACA), as an attempt to maintain a sense of cultural purity.¹⁰ Others, as we shall see in Chapter 6, have embraced this discourse as part of the modern promise of progress.

While acknowledging that the welfare of the child is the underlying logic behind the entire system of Islamic child custody law, opponents of the best interests standard often assume that this welfare had already been determined by jurists in immutable general rules linked to such factors as gender, age, and lifestyle choices. These cultural purists – not only with respect to child custody but also regarding human rights discourses more broadly – often exaggerate cultural difference. Ironically, they have found allies in scholars forging a postmodernist critique of liberalism,

⁹ Victor B. Lieberman, *Strange Parallels: Southeast Asia in Global Context, c. 800–1830: Volume 2 Mainland Mirrors: Europe, Japan, China, South Asia, and the Islands* (New York: Cambridge University Press, 2013), 2:xxi, 2.

¹⁰ Dār al-Iftā’ al-Miṣriyya, *Al-Fatāwā Al-Islāmiyya Min Dār Al-Iftā’ Al-Miṣriyya* (Cairo: Maṭba’at Dār al-Kutub wa’l-Wathā’iq al-Qawmiyya, 2012), 13:221–230.

secularization, and enlightenment discourses, which they cogently argue were often manipulated and instrumentalized in the service of empire and Euro-American neo-imperialism. The association between these discourses and postcolonial authoritarian regimes on the one hand, and between them and Euro-American neocolonialism on the other, especially in the context of post-9/11 warmongering, places the proponents of these discourses in a precarious situation. Nothing is more telling about the tension inherent in engaging in discussions of human rights in an accommodationist mode than the debate that erupted over the Palestinian hip-hop group DAM's song about honor killing when Lila Abu Lughd and Maya Mikdashi charged that the group succumbed to an international machine that blames only tradition for people's problems.¹¹ In other words, the projects of scholars critical of the way in which minority rights, women's rights, or queer rights were manipulated as tools of neo-imperialism often coalesce with purist approaches to tradition within Islamic law. The second approach, which we may call "modernist," buys into the discourse of modernity and some forms of liberalism and seeks to find sites of compatibility between Islamic law and international conventions. It is in this spirit that I frame this discussion, while being sensitive to the theoretical and political implications of this project, but also of the support it receives in Muslim jurisdictions, as evidenced by the internal critical readings of tradition aimed at accommodating human rights discourses.

Both approaches and their concomitant critiques warrant further interventions, but this is not the objective of this study. My objective is not prescriptive in that it does not claim that the best interests standard *should* be followed by Muslim societies on philosophical grounds or that Muslim nations *should* resist the discursive and international law tyranny of Euro-America, which aims to make the legal systems of these Muslim nations in its own image. It is rather a descriptive study that seeks to understand *how* premodern juristic discourses and practices compare to the best interests standard. Certainly, choosing to study this topic may be itself seen as

¹¹ On the debate over the hip-hop group's dealing with honor crimes, see Rochelle Terman, "Islamophobia, Feminism and the Politics of Critique," *Theory, Culture & Society Theory, Culture & Society*, 2015. On the charge that secular Arabs became proxies of a secular project, see Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton, NJ: Princeton University Press, 2015), 79. On the Euro-American exportation of gay identity in the Arab world, see Joseph A. Massad, *Desiring Arabs* (Chicago, IL: University of Chicago Press, 2008), 160–190; Rosalind C. Morris and Gayatri Chakravorty Spivak, *Can the Subaltern Speak?: Reflections on the History of an Idea* (New York: Columbia University Press, 2010).

cheerleading Euro-American hegemony. To this potential critique, I would counter that since many Muslim nation-states, women's groups, NGOs, and religious scholars consider the best interests standard a model to be emulated and accommodated, the topic is therefore worthy of study as an indigenized discourse. Further, considering the interests of the children as the ultimate goal of child custody law should not be a prerogative left to one hegemonic discourse to claim. As I show in this study, Islamic juristic discourses and practices challenge the assumption about the uniqueness of the Euro-American experience in this respect. Indeed, there are "strange parallels" in Islamic juristic discourses and practices and sites of convergence with and divergence from the best interests evolution of child custody in some Euro-American jurisdictions.¹²

Despite the largely descriptive mode that I adopt in this book, I argue, however, that if we view Islamic law as a *discursive tradition* that contains both praxial and doctrinal elements,¹³ the best interests of the child becomes part of the legacy of Islamic law and can therefore be mobilized as such by those who search for an overlapping consensus with liberal discourses of child rights. The mobilization of the best interests standard as an essential part of the legacy of Islamic law can be achieved if we treat the judicial and scribal practices of Ottoman judges and scribes to be part of the normative structure of premodern Islamic law.¹⁴ As we shall see in our discussion of private separation deeds (Chapter 3), which were in tension or contradiction with the discourses of author-jurists, judicial authorities devised a very formulaic language that was used with little change over centuries in early modern Egyptian courts. The consistent use of these formularies over centuries represents an act of valorization of these socio-legal practices of child custody, making them part and parcel of the legacy of Islamic law both as a legal tradition and a normative system. To both premodern jurists and modern reformers, this view of Islamic legal practice is counterintuitive due to the dominance of *taqlid* as a legal hegemony in the eleventh through thirteenth centuries and the ensuing shift of authority from judges to author-jurists.¹⁵ In other words, for judicial

¹² Lieberman, *Strange Parallels*, 2:xxi–117.

¹³ Ahmed Fekry Ibrahim, "Islamic Law as a Discursive Tradition," in *Sustainable Diversity in Law: Essays in Memory of H. Patrick Glenn*, ed. Helge Dedek (Oxford: Oxford University Press, forthcoming); Talal Asad, *The Idea of an Anthropology of Islam* (Washington, DC: Center for Contemporary Arab Studies, Georgetown University, 1986).

¹⁴ Shahab Ahmed, *What Is Islam?: The Importance of Being Islamic* (Princeton, NJ: Princeton University Press, 2015), 1–175.

¹⁵ Ahmed Fekry Ibrahim, "Rethinking the *Taqlid* Hegemony: An Institutional, *Longue-Durée* Approach," *Journal of the American Oriental Society* 136:4 (2016): 801–816.

practices to have the force of law, they must be valorized by author-jurists rather than judicial authorities. With some aspects of the law, certain practices in contradiction with the law were valorized by author-jurists through subsidiary sources such as “judicial practice” (*amal*) or “custom” (*urf*). Other practices, however, were never normalized by author-jurists. One might think of modern reform as continuing this naturalization of judicial practices in the case of child custody law.¹⁶

These practices were driven by pragmatic considerations that went beyond the limited options available to judges and scribes in the ideal juristic discourses of Sunni author-jurists. The pragmatic nature of some of the judicial decisions on child custody warrant a broader discussion of pragmatic adjudication and pragmatism from a comparative perspective.

PRAGMATISM

Pragmatism comes in many varieties, and the differences among pragmatists are rife, which makes the task of outlining its main tenets exceedingly complex.¹⁷ In what follows, I discuss some of the central tenets of pragmatism, both in its philosophical and legal varieties. *Philosophical pragmatism* is a movement that originated in the United States during the second half of the nineteenth-century. It represents a critique of foundationalism and a shift to the practical consequences of propositions. In the *Fixation of Belief*, Charles Sanders Peirce, credited by many as the father of pragmatism, rejected Cartesian epistemological foundationalism, opting for a fallibilist view consistent with realism. Other philosophers

¹⁶ For examples of the process of valorization of judicial practices introduced by author-jurists in the case of cash *waqf* (endowment) and the valorization of the judicial practice of forum selection, see further Ibrahim, “Islamic Law as a Discursive Tradition”; Miriam Hoexter, “*Qāḍī, Muftī* and Ruler: Their Roles in the Development of Islamic Law,” in *Law, Custom, and Statute in the Muslim World*, ed. Ron Shaham (Leiden: Brill, 2006), 67–85; Ahmed Fekry Ibrahim, *Pragmatism in Islamic Law: A Social and Intellectual History*, 2nd edn. (Syracuse: Syracuse University Press, 2017).

¹⁷ On different pragmatisms and the difficulty of determining who is a pragmatist, see John P. Murphy, *Pragmatism: From Peirce to Davidson* (Boulder: Westview Press, 1990), 21–79; Ruth Anna Putnam, “Taking Pragmatism Seriously,” in *Hilary Putnam: Pragmatism and Realism*, ed. James Contant and Urszula M. Żegleń (London; New York: Routledge, 2002), 7–11; Nicholas Rescher, *Realistic Pragmatism: An Introduction to Pragmatic Philosophy* (Albany, NY: State University of New York Press, 2000), 1–56. On different stages of the development of both “classical” pragmatism and neo-pragmatism, see further Michael Bacon, *Pragmatism: An Introduction* (Cambridge, UK; Malden, MA: Polity, 2012); John R. Shook and Joseph Margolis, *A Companion to Pragmatism* (Malden, MA; Oxford: Blackwell Pub., 2006).

associated with this movement include William James, John Dewey, and Richard Rorty. The so-called pragmatic maxim central to pragmatism assumes that we can only have reflective clarity about propositions when we identify their “practical consequences,”¹⁸ a focus consistent with Peirce’s endorsement of fallibilism. According to Peirce, we are constantly approaching the truth, but we may at times veer away from it. In Peirce’s optimistic view, society as a whole, rather than the individual, and possibly all sentient beings can ultimately reach the truth through self-correction.¹⁹ According to James, pragmatism does not tell us its view of the good; neither does it stand for specific results. What it offers is a method of inquiry and a theory of truth, both of which were derived from the pragmatists’ view of knowledge. To pragmatists, knowledge is neither absolute nor permanent. It is tied to action, rather than contemplation. Truth is what works in shaping our world, which Dewey limited to the empirical.²⁰

Legal pragmatism draws on the anti-formalism and anti-foundationalism of philosophical pragmatism, viewing law as a practice that depends on context and instrumentality, rather than secure formal foundations. Legal pragmatism is both a descriptive and a normative legal movement. Pragmatists hold that human thought only arises in a situated context and that it is not in fact possible to view matters a-contextually.²¹ The theory of pragmatism, therefore, necessarily has a descriptive element, since legal decisions have historically been informed by contexts that can be unmasked to show the frequent fallacies of claims of formalist determinacy. In its normative version, legal pragmatism calls for an instrumentalist jurisprudence based on empirical data.

According to pragmatists, the foundationalist views of law are illusory, for they do not describe the reality of legal reasoning and the pragmatic approach to law is better suited to bringing about *substantive* justice, that is, doing what is right in a particular case even if that goes against legal rules.

¹⁸ On the essential differences between canonical pragmatists and neo-pragmatists, see further Richard Rorty, “The Banality of Pragmatism and the Poetry of Justice,” *Southern California Law Review* 63 (1989–1990): 1813–1814; Christopher Hookway, *The Pragmatic Maxim: Essays on Peirce and Pragmatism* (Oxford: Oxford University Press, 2012), 1–4.

¹⁹ B. Z. Tamanaha, “Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction,” *American Journal of Jurisprudence* 41: 1 (1996): 325; Hookway, *The Pragmatic Maxim*, 5–10; Richard Rorty, *Consequences of Pragmatism: Essays, 1972–1980* (Minneapolis: University of Minnesota Press, 1982), xiii–xliv, 160–175; Cornel West, *The American Evasion of Philosophy a Genealogy of Pragmatism* (Madison, WI: University of Wisconsin Press, 1989).

²⁰ Tamanaha, “Pragmatism in U.S. Legal Theory,” 321–329. ²¹ Tamanaha, 334.

14 Introduction

The pragmatic focus on the consequences supports paying greater attention to substantive justice since what matters is the consequences of legal decisions, rather than the slavish following of rules. This does not mean that legal rules should be ignored, but rather that they must be treated as only one of many factors to be considered when deciding a case. This notion of substantive justice is the product of the values of the judge, which may be similar to those of the larger collective in a homogenous society, but not necessarily in a heterogeneous society. In this sense, pragmatism does not promote a particular ideology or legal result; rather, it links legal decisions to societal values.²² As such, some legal theorists rejected pragmatism (or “practical reason”) as subjectivist and visceral, and therefore, pragmatic adjudication, in their view, contradicts the rule of law, that is, certainty, stability, and predictability. Others argue that “unprincipled” decisions could be taken in a morally appalling, unegalitarian direction. However, as Rorty reasons, legal theory does not offer a defense against those types of decisions, while Farber contends that practical reason can indeed provide legal predictability and stability.²³ The critical legal studies movement (also known as “critical pragmatism”) is a recent child of the pragmatic movement, although critical legal scholars eventually disagreed with some of the tenets of canonical pragmatism. They also rejected pragmatic acceptance of liberal democratic institutions, themselves the objects of the ire of critical legal scholars.²⁴

²² Tamanaha, 335–337; Thomas F. Cotter, “Legal Pragmatism and Intellectual Property Law,” in *Intellectual Property and the Common Law*, ed. Shyamkrishna Balganesh (Cambridge University Press, 2013); Thomas F. Cotter, “Legal Pragmatism and the Law and Economics Movement,” *Georgetown Law Journal* 84:6 (1996): 2071–2142; Richard A. Posner, “Pragmatic Adjudication,” *Cardozo Law Review* 18 (1996–1997): 1–20; Richard A. Posner, *Overcoming Law* (Cambridge, MA: Harvard University Press, 1995); Richard A. Posner, *The Problems of Jurisprudence* (Cambridge, MA: Harvard University Press, 1990), 18–26; Joseph Singer, “Legal Realism Now,” *California Law Review* 76:2, no. 2 (1988): 468–470; Duncan Kennedy, “Form and Substance in Private Law Adjudication,” *Harvard Law Review* 89:8 (1976): 1685–1778; Helge Dedek, “The Splendour of Form: Scholastic Jurisprudence and ‘Irrational Formality,’” *Law and Humanities* 5:2 (2011): 349–383.

²³ Daniel A. Farber, “The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law,” *Vanderbilt Law Review* 45 (1992): 533–534; Rorty, “The Banality of Pragmatism and the Poetry of Justice,” 1818; Nancy Levit, “Practically Unreasonable – A Critique of Practical Reason: A Review of the Problems of Jurisprudence by Richard A. Posner,” *Northwestern University Law Review* 85:2 (1991): 494–518; Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Belknap Press, 1986); Tamanaha, “Pragmatism in U.S. Legal Theory,” 336–338; Hart argues that any legal system requires some judicial discretion in some cases, despite the importance of predictability in the law. H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 138–144.

²⁴ Tamanaha, “Pragmatism in U.S. Legal Theory,” 337–338, 348; Critical pragmatists such as Singer argue that in order to combat “complacent pragmatism,” judgements should focus

To sum up, legal pragmatists emphasize (1) contextualism, (2) anti-foundationalism, and (3) consequentialism. In their view, the a priori and abstract style of legal reasoning, which does not account for context and relies heavily on formalistic rules rather than consequences, does not reflect the reality of legal reasoning. Pragmatists also argue that empirically and scientifically relevant data should have an impact on legal decisions, without a narrow focus on *stare decisis*. They contended that judges should turn their attention to the consequences, context, and contingency of laws, rather than narrowly rely on precedent and analogical reasoning.²⁵ According to Dewey, the logic of judicial decisions should be “*relative to consequences rather than to antecedents.*”²⁶

Viewing precedent and formal rules as less important in actual legal decisions than the judge’s own context buttresses the philosophy of legal realism as well. Legal realism and pragmatism are both instrumentalist in their outlook and their incorporation of the social sciences in the legal process.²⁷ Tamanaha explains that philosophical pragmatism influenced legal theory in two phases: the first through the work of Oliver Wendell Holmes, and the second via the work of legal realists. Holmes was a member of the conversation society named “the Metaphysical Club” in Cambridge, Massachusetts, which included Charles Sanders Peirce and William James. Judge Holmes applied many of the precepts of philosophical pragmatism to law,²⁸ and famously declared that courts “decide cases first and determine the principle afterwards.”²⁹ Commenting on Holmes’s work, Richard Posner, an American judge and one of the main figures associated with pragmatic adjudication, argues that Holmes emphasized

on the underlying power structures and therefore one must wonder not just whether a legal practice works but also for whom. Joseph William Singer, “Property and Coercion in Federal Indian Law: The Conflict between Critical and Complacent Pragmatism,” *Southern California Law Review* 63 (1989–1990): 1821–1841; Ruth Anna Putnam, “Justice in Context,” *Southern California Law Review* 63 (1989–1990): 1797–1810.

²⁵ Some have defined the essential elements of pragmatism differently. Hilary Putnam, for instance, focused his attention on such traits as: antiscepticism, fallibilism, the rejection of the fact-value distinction (a question on which pragmatists held different positions), and the primacy of practice. Richard Warner, “Pragmatism and Legal Reasoning,” in *Hilary Putnam: Pragmatism and Realism*, ed. James Contant and Urszula M. Żegleń (London; New York: Routledge, 2002), 25.

²⁶ John Dewey, “Logical Method and Law,” *Philosophical Review* 33:6 (1924): 26 emphasis in the original.

²⁷ Tamanaha, “Pragmatism in U.S. Legal Theory,” 315–319.

²⁸ Tamanaha, “Pragmatism in U.S. Legal Theory.”

²⁹ Cited in Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown, and Co., 1881), xviii; Steven Harmon Wilson, *The U.S. Justice System: Law and Constitution in Early America* (ABC-CLIO, 2012), 161.

ethical relativism, turning law “into dominant public opinion in much the same way that Nietzsche turned morality into public opinion.”³⁰ Benjamin Cardozo was another important jurist who advocated pragmatic jurisprudence in *The Nature of the Judicial Process*. Cardozo advocated an instrumental, forward-looking concept of law, a pragmatic approach that makes law subservient to human needs. According to him, the lawmaking choices of judges should be concerned with the goal, which raises the question of where should the judge get the knowledge of what serves social interests. Cardozo’s answer points to experience, study, and reflection. In Posner’s view, Holmes, Cardozo, and legal realists were also pragmatists, since pragmatism gave legal realism most of its shape.³¹ Pragmatism, according to Posner, is not simply the method that should be followed in American courts; it is also the method that has historically been followed in reality despite claims to the contrary. In other words, he makes both positive and normative claims about the place of pragmatic adjudication in American jurisprudence.³² In *The Banality of Pragmatism and the Poetry of Justice*, Rorty argues that while pragmatism was novel and shocking when it emerged, by his time it had been fully absorbed into American common sense. He cites Thomas Grey as saying that it is indeed the “implicit working theory of most good lawyers.”³³ Fish exclaims, “If the pragmatist account of things is right, then everyone has always been a pragmatist anyway.”³⁴

Three definitions of pragmatic adjudication may illuminate what is at stake in bringing philosophical pragmatism into the realm of law. Dworkin, an unsympathetic opponent of pragmatic adjudication, describes it thusly: “The pragmatist thinks judges should always do the best they can for the

³⁰ Posner, *The Problems of Jurisprudence*, 240.

³¹ Cotter, “Legal Pragmatism and Intellectual Property Law”; Cotter, “Legal Pragmatism and the Law and Economics Movement”; Posner, “Pragmatic Adjudication”; Tamanaha, “Pragmatism in U.S. Legal Theory,” 342; Posner, *Overcoming Law*; Posner, *The Problems of Jurisprudence*, 18–26; Singer, “Legal Realism Now.”

³² Posner, *The Problems of Jurisprudence*, 9–33, 462–465; Posner, *Overcoming Law*, 1–29; Cotter, “Legal Pragmatism and the Law and Economics Movement,” 2071–2142; Daniel A. Farber, “Legal Pragmatism and the Constitution,” *Minnesota Law Review* 72 (1987–1988): 1331–1387; Cotter, “Legal Pragmatism and Intellectual Property Law,” 213–217; Posner, “Pragmatic Adjudication,” 1–20. Rescher argues that pragmatism is the epistemological counterpart of ethical utilitarianism: Rescher, *Realistic Pragmatism*, 7–8; Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1991), 51–97.

³³ Rorty, “The Banality of Pragmatism and the Poetry of Justice,” 1811–1813.

³⁴ Cited in Tamanaha, “Pragmatism in U.S. Legal Theory,” 353; Stanley Fish, “Almost Pragmatism: Richard Posner’s Jurisprudence,” *The University of Chicago Law Review* 57:4 (1990): 1464.

future, in the circumstances, unchecked by any need to respect or secure consistency in principle with what other officials have done or will do.” Posner offers his own counter-definition: “Pragmatist judges always try to do the best they can do for the present and the future, unchecked by any felt *duty* to secure consistency in principle with what other officials have done in the past.”³⁵ These definitions of pragmatic adjudication have two principles in common despite being offered by both an opponent and a proponent of pragmatic adjudication, to wit: (1) a focus on consequences, (2) a relativist, contextual anti-foundationalism. It is these two elements of pragmatic adjudication that will inform my use of the term in this book, that is, in the sense that the focus should be on the consequences of actions and the context,³⁶ rather than immutable formal rules.³⁷

In his critique of adherence to old formal rules, Dewey admonishes:

Here is where the great practical evil of the doctrine of immutable and necessary antecedent rules comes in. It sanctifies the old; adherence to it in practise [sic] constantly widens the gap between current social conditions and the principles used by the courts. The effect is to breed irritation, disrespect for law, together with virtual alliance between the judiciary and entrenched interests that correspond most nearly to the conditions under which the rules of law were previously laid down.³⁸

Incidentally, if one replaces “the doctrine of immutable and necessary antecedent” in Dewey’s critique of common law formalism with *taqlid*, we would end up with something similar to a common critique of the formalism of Islamic law under the regime of *taqlid* in the work of Schacht

³⁵ Richard A. Posner, *The Problematics of Moral and Legal Theory* (Cambridge, MA: Belknap Press of Harvard University Press, 1999), 241; Dworkin, *Law’s Empire*, 161.

³⁶ Posner was taken to task for neglecting differences between different types of pragmatism by Matthew H. Kramer, “The Philosopher-Judge: Some Friendly Criticisms of Richard Posner’s Jurisprudence,” *The Modern Law Review* 59:3 (1996): 465–478; Posner, *The Problems of Jurisprudence*, 27; Richard A. Posner, *The Problematics of Moral and Legal Theory* (Cambridge, MA: Belknap Press of Harvard University Press, 1999), 227–228.

³⁷ Posner has a very narrow definition of pragmatism which is: “looking at problems concretely, experimentally, without illusions, with full awareness of the limitations of human reason, with a sense of the ‘localness’ of human knowledge, the difficulty of translations between cultures, the unattainability of ‘truth,’ the consequent importance of keeping diverse paths of inquiry open, the dependence of inquiry on culture and social institutions, and above all the insistence that social thought and action be evaluated as instruments to valued human goals rather than as ends in themselves.” Posner, *The Problems of Jurisprudence*, 465.

³⁸ Dewey, “Logical Method and Law,” 26; Also cited in Tamanaha, “Pragmatism in U.S. Legal Theory,” 333.

(a contemporary of Dewey) and Coulson, to mention but two.³⁹ According to this assumption, a gap is created between social conditions and legal principles, leading to a tension between law and society. By contrast, the idea of “practical reason,” which is what American pragmatists use to reach their judgments, includes analogy, pattern recognition, intuition, social experience, and tacit knowledge,⁴⁰ all of which may be the ingredients of *ra’y*, a form of reasoning that was rejected by early Islamic formalists such as al-Shāfi‘ī.⁴¹

Although the formal rules of author-jurists under the regime of *taqlid* in Islamic law correspond in many ways to the formalism of the common law, one important difference between the concept of pragmatic adjudication in the American context and my use of the term in the Islamic context has to do with the nature of legal interpretation. Unlike the common law, Muslim judges of the postclassical period were left with far less discretion,⁴² which means that their pragmatic adjudication looked distinctly different from that of their common law brethren. This is not to say that postclassical Islamic judges did not make interpretive choices, but rather that these choices were often circumscribed by the legal establishment, which means that most forms of pragmatic adjudication were institutionally driven, that is, they were designed by the judiciary and the state, such as the permission of forum selection by the Egyptian Ottoman judiciary.⁴³ What is described as *pragmatic* in my discussion of Islamic law does not refer to the justification of judicial decisions, that is to say, it is not a form of practical reasoning offered to justify decisions,⁴⁴ but pragmatic choices made both by the

³⁹ Joseph Schacht, *An Introduction to Islamic Law* (Oxford [Oxfordshire]; New York: Clarendon Press, 1964), 69–75; Noel James Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1962), 7, 73, 182–201.

⁴⁰ Posner, *The Problems of Jurisprudence*, 71–123; Farber, “The Inevitability of Practical Reason,” 542.

⁴¹ Schacht, *An Introduction to Islamic Law*, 37–48; Coulson, *A History of Islamic Law*, 36–61.

⁴² Ahmed Fekry Ibrahim, “The Codification Episteme in Islamic Juristic Discourse between Inertia and Change,” *Islamic Law and Society* 22:3 (2015): 157–220.

⁴³ Ibrahim, *Pragmatism in Islamic Law*, 2017.

⁴⁴ Posner defines practical reason as “the methods by which people who are not credulous form beliefs about matters that cannot be verified by logic or exact observation.” These methods include, among other things, common sense, experience, intuition, precedent, and custom. On practical reason, see Posner, *The Problems of Jurisprudence*, 71–72; John M. Cooper, *Reason and Human Good in Aristotle* (Cambridge, MA: Harvard University Press, 1975); Levit takes Posner to task for his notion of practical reasoning and his call for its utilization in adjudication. She argues that it runs counter to the scientific method, which teaches simplicity, depth, falsifiability, and openness. According to her, practical reasoning, its reliance on common sense, visceral intuition, and common sense

judiciary and by individual judges to accommodate perceived social goods, against the formal rules of author-jurists.

I have previously used the term “pragmatic eclecticism” to refer to forum shopping and doctrinal shopping to achieve certain sociolegal results. The concern of jurists, or more specifically the Ottoman judiciary, was to find legal solutions to what they perceived to be social problems, and, for that reason, they facilitated forum shopping. In this book, another form of pragmatism emerges in Ottoman-Egyptian courts. It was premised, not on forum selection, but rather on treating the austere parent-centered juristic discourse as default rules, rather than mandatory rules, allowing many private separation deeds to be made in contradiction to the discourse of jurists in order to accommodate a social expectation that parents know what is best for their children on a case-by-case basis. This move, which took the spirit of the law over its letter, is similar to American legal pragmatism in that it was concerned with accommodating dominant social (or judicial) values. In fact, the pragmatism that one finds both through pragmatic eclecticism and the pragmatic adjudication on child custody discussed in this book functioned, as we shall see, alongside a formalist strand in Islamic law, where judges followed the letter of the law in some cases. Thus, I argue in this book that Islamic law used a mix of formalist and pragmatic approaches alongside one another. This reminds me of Posner’s insightful observation about American law: “Extreme positions are more fun, but in jurisprudence the true as well as the good is to be found between the formalistic and ‘realistic’ extremes.”⁴⁵ Posner’s centrist position is borne out by the historical evolution of child custody adjudication in the United States, as we shall see in Chapter 1. Despite divergent approaches to accommodating social values regarding childrearing in both Euro-American and Egyptian societies of the early modern era, both approaches represent clear examples of pragmatic adjudication.

PREMODERN JURISTIC DISCOURSE AND PRACTICE: TIME AND GEOGRAPHY

In this monograph, I make a clear distinction between discourse and practice, even though judicial practice itself is accessed through discourse.

mean that decisions cannot be falsifiable or open. For a critique of Posner’s practical reasoning, see further Levit, “Practically Unreasonable – A Critique of Practical Reason: A Review of the Problems of Jurisprudence by Richard A. Posner.”

⁴⁵ Posner, *The Problems of Jurisprudence*, 32.

I use “discourse” here to refer to the legal doctrines and rules articulated by jurists outside of the court. This discourse includes various genres, some of which are closer to the activities of judges than others. Legal responsa (*fatāwā*) collections are arguably far closer to the work of judges, than say a work on positive law (*furūʿ*). By the same token, a work on legal theory (*uṣūl*) is further from the activities of judges, especially after the thirteenth century, than a work on positive law. Since we must access the activities of judges through discourse written by court scribes with practical rather than theoretical legal knowledge, the distinction between discourse and practice is more concerned with the context of lawmaking as opposed to the medium of its communication.

The concept of premodern juristic discourse may be seen as treating all juristic discourses of over a millennium as a monolith. It implies that the juristic discourses on custody were unchanged, suggesting that Muslim societies were static and somehow committed to their textual sources in a way that smacks of orientalism. This was certainly not the case. There were many ways in which Muslim societies changed their legal discourses and practices depending on the area of law under examination and the socioeconomic contexts of the different regions.

Premodern Sunni Muslim jurists often treated existing legal pluralism and its ensuing multiplicity of legal rules as equally normative. These rules existed both within each of the four surviving Sunni schools and across school boundaries, as a result of geographical and hermeneutic differences dating as far back as the formative period of Islamic law. Another reason for the persistence of Sunni legal pluralism is the absence of a central code imposed by early Muslim polities due to the historical relationship between jurists and the state. As early as the eighth and ninth centuries under the Abbasids (750–1258), there was hostility among many scholars to state intervention in matters of law and theology, as evidenced by the jurists’ position on the Abbasids’ desire to impose a central code during the reign of al-Manṣūr (r. 754–775), as well as the Qur’an Inquisition of 833–848.⁴⁶

This unique politico-legal context gave rise to potentially unlimited legal pluralism and uncertainty. Many jurists perceived extreme legal pluralism as a threat to legal predictability and the efficient administration of justice. It fell to jurists to balance the requirements of justice and legal

⁴⁶ Dimitri Gutas, *Greek Thought, Arabic Culture the Graeco-Arabic Translation Movement in Baghdad and Early ‘Abbāsīd Society (2nd–4th/8th–10th Centuries)* (London; New York: Routledge, 1998), 75–83; Ahmed Fekry Ibrahim, *Pragmatism in Islamic Law: A Social and Intellectual History* (Syracuse: Syracuse University Press, 2015), 35–36.

predictability by managing two competing modes of lawmaking – “personal interpretive freedom” (*ijtihād*) and “interpretive conformism” (*taqlīd*) – within the school unit. They gradually limited interpretive freedom over the course of the eleventh to thirteenth centuries by arguing for the dearth of legal skills.⁴⁷ This process reached maturity in the thirteenth century, when jurists sought to sift through legal pluralism to determine the more preponderant views within each school, a process known as *tarjih*.⁴⁸ These preponderant (*rājih*) or dominant views were supposed to be applied by judges in their court rulings. Despite the jurists’ efforts to rein in doctrinal diversity through the limits they placed on *ijtihād*, Sunni Islamic law retained much of its pluralism in the four extant schools as well as in intra-school doctrine.

The slow dominance of *taqlīd* coincided with a juristic justification of forum and doctrinal selection, known in the primary sources as *tatabbu’ al-rukhaṣ/takhayyur*, that is, picking and choosing legal doctrines on the basis of the legal result rather than their hermeneutic weight. When this selection was combined in the same transaction, it was known as *talfīq*. This process of forum and doctrinal selection, which I elsewhere named “pragmatic eclecticism,” was utilized in Egyptian Ottoman courts, as we shall see in this monograph, to facilitate various social and economic needs. In the modern period, it became the bread and butter of Islamic legal reform.⁴⁹

To offer a nuanced view of the Islamic law of child custody, one must pay attention to time and geography. The best way to speak to the general trends of Islamic juristic discourse toward child custody is to examine works of juristic discourse that were considered paradigmatic, and indeed the texts of practice in entire regions. By covering most of these famous texts, which were utilized in many regions of the Islamic world, it is hoped that we will have a good sense of the various juristic discourses on child custody. Most of the works consulted here were written by jurists who were either from Egypt, or studied and taught there, or whose works were

⁴⁷ Ibrahim, “Rethinking the *Taqlīd* Hegemony: An Institutional, *Longue-Durée* Approach.”

⁴⁸ Wael B. Hallaq, *Shari’ā: Theory, Practice, Transformations* (Cambridge, UK; New York: Cambridge University Press, 2009), 73–77; Mohammad Fadel, “The Social Logic of *Taqlīd* and the Rise of the *Mukhtaṣar*,” *Islamic Law and Society* 3:2 (1996): 193–233; Sherman A. Jackson, “*Taqlīd*, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory: *Muṭlaq* and *’Amm* in the Jurisprudence of Shihāb Al-Dīn Al-Qarāfī,” *Islamic Law and Society* 3:2 (1996): 165–192; Ahmed Fekry Ibrahim, “Rethinking the *Taqlīd-Ijtihād* Dichotomy: A Conceptual-Historical Approach,” *Journal of the American Oriental Society* 136:2 (2016): 285–303.

⁴⁹ Ibrahim, *Pragmatism in Islamic Law*, 2017.

widely used in Egypt. For example, Muḥammad b. al-Ḥasan b. Mas‘ūd al-Bannānī (d. 1194/1780) was born in Fez but studied and taught at al-Azhar, where his commentary on al-Zarqānī was popular. Another example is *al-Fatāwā al-Hindiyya*; though it was not written in Egypt or by an Egyptian jurist, it was highly influential in Egyptian Ḥanafī jurisprudence, as evidenced by its frequent citation by Egyptian jurists.

With regard to time, I will focus on works authored in the early modern period, which for the purposes of this book starts with the Ottoman invasion of Egypt and ends in the nineteenth century, or books that may have been authored before that period but which were considered important texts by early modern jurists. Many of the works authored by early modern Egyptian jurists were commentaries on earlier medieval works. One example is *Minhāj al-Ṭālibīn* of al-Nawawī, which received many commentaries throughout the early modern period. Important variations found in the discourses of major works of jurisprudence will be further explored. This approach, while extremely time-consuming, is hoped to ensure that periodic transformations in child custody arrangements do not go unnoticed. It is important to caution that the absence of clear transformations in juristic discourses does not mean that the Muslim societies of the early modern period were static or that social changes were not reflected in the realm of law. As we shall see in Chapters 3 and 4, the dynamic natures of the Ottoman-Egyptian societies of the sixteenth, seventeenth, and eighteenth centuries was matched in legal practice inside the courtroom but not always in juristic discourses.

In order to make consistent the process of determining the most influential works in the four Sunni schools, my choice of legal manuals of analysis will be informed by the following approach. I will (1) look at biographical dictionaries to see how the school’s textual authorities were constructed in the school’s communal imaginary; (2) pay attention to works of law cited in court records of Ottoman Egypt; and (3) look for works which received commentaries, suggesting that they were considered important enough to act as a *matn*. In the Shāfi‘ī school, for instance, there is hardly disagreement that the works of al-Nawawī and al-Rāfi‘ī represent the climax of the school’s achievement in the thirteenth century. In later centuries, the works of al-Ramlī and al-Haytamī were specifically mentioned by Shāfi‘ī authors as the authoritative works followed in different regions, with al-Ramlī’s *Sharḥ al-Minhāj* being mentioned in many court records.⁵⁰ The probate courts

⁵⁰ “Court of Miṣr Al-Qadīma, Sijill 22 (1092–1681), Archival Code 1006–000160,” Dār al-Wathā‘iq al-Qawmiyya, Cairo, doc. 199, 70.

(both the Qisma ‘Arabiyya and Qisma ‘Askariyya) contain book titles found both in the private libraries of jurists and those of the literati.⁵¹

THE COURT RECORDS AND THE QUESTION OF VOICE

Also related to the question of discourse is the issue of voice. How can we know that the words that scribes are using to refer to the interaction between litigants and the judge are the actual words of the legal actors? These legal documents were written in the court in the presence of litigants and later used as legally binding documents, and therefore one should assume that when facts are presented, they are a good reflection of the events. Most court documents were written in full while the litigants were in attendance, and detail was corrected by the litigants in attendance, as evidenced by the corrections of information and crossing out of other information that are found in the court records. One also notices, however, that there are many formulaic expressions that keep appearing where they are supposed to be the words of the different actors in the court. One example is when many litigants ask judges to “do what is required by the sharī‘a” (*fi’l mā yarāh al-shar‘*) so frequently and formulaically in the court records.⁵² It is unlikely that litigants would make such an obvious request, since they are standing before a judge who is supposed to implement Islamic law. In these cases, one should safely assume that these are part of the scribes’ repertoire of expressions that fill in the logical blanks in the case. While the details contained in these documents must have been a faithful reflection of the information provided by subjects of the law, the language used may not always have been the exact words of those individuals. One should also assume that the testimonies were often presented in the vernacular, rather than the formulaic legalese of Ottoman scribes.⁵³

⁵¹ For examples of books found in the probate inventories of seventeenth-century personal libraries of jurists, see “Court of Qisma ‘Askariyya, Sijill 26 (1019/1610), Archival Code 1003–000105,” *Dār al-Wathā‘iq al-Qawmiyya*, Cairo, doc. 81, 41; doc. 85, 45.

⁵² See, for instance, “Court of Al-Bāb Al-‘Ālī, Sijill 293 (1190/1776), Archival Code 1001–000656,” *Dār al-Wathā‘iq al-Qawmiyya*, Cairo, doc. 131, 90.

⁵³ For a discussion of the use of court records as evidence as well as larger historiographical questions about the accuracy of court records, see Dror Ze’evi, “The Use of Ottoman Sharī‘a Court Records as a Source for Middle Eastern Social History: A Reappraisal,” *ILS Islamic Law and Society* 5:1 (1998): 35–56; Leslie P. Peirce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley: University of California Press, 2003), 8–9; Iris Agmon, *Family & Court: Legal Culture and Modernity in Late Ottoman Palestine* (Syracuse, NY: Syracuse University Press, 2006), 41–46; Boğaç A. Ergene, *Local Court,*

24 Introduction

For sixteenth- to late nineteenth-century courts, I have examined a total of 17,200 cases drawn from 11 courts (al-Bāb al-‘Ālī, Bābay al-Sa‘āda wal-Kharq, Būlāq, al-Gharbiyya, Mudīriyya Asyūt, Miṣr al-Shar‘iyya, Miṣr al-Qadīma, Qanāṭir al-Sibā‘, al-Qisma al-‘Arabiyya, al-Qisma al-‘Askariyya, and al-Ṣālihiyya al-Najmiyya). Approximately 600 cases of this sample had some relation to child custody or guardianship. The earliest register, the first of Miṣr al-Qadīma, was dated 934/1528.⁵⁴ The last register of this sample, which I examined at Dār al-Wathā‘iq al-Qawmiyya in six long visits over three years, comes from 1895, the court of Miṣr al-Shar‘iyya.⁵⁵ I have also examined hundreds of published shari‘a court records from the period of 1929–1954, shortly before the integration of the shari‘a courts into a national court system.

PERIODIZATION

I divide this book into three periods: 1517–1801, 1801–1955, and 1955–2014. My division is informed by legal transformations, rather than the important questions of modernity and Ottoman vis-à-vis Egyptian identity. The first period begins with the Ottoman conquest of Egypt and ends with the Ottoman reconquest of Egypt after the French occupation of 1798. The choice of 1801 was motivated by the new Ottoman policy of Ḥanafization reported by al-Jabartī, which was to increase in tempo throughout the nineteenth century, radically transforming the legal system as well as child custody and guardianship. Beginning in 1801, I will only use Gregorian dates for simplicity. This period ends with another momentous event, namely the abolition of the shari‘a courts and the incorporation of Islamic family law into a unified judiciary in 1955.

Provincial Society, and Justice in the Ottoman Empire Legal Practice and Dispute Resolution in Çankırı and Kastamonu (1652–1744) (Leiden; Boston, MA: Brill, 2003); Guy Burak, “Evidentiary Truth Claims, Imperial Registers, and the Ottoman Archive: Contending Legal Views of Archival and Record-Keeping Practices in Ottoman Greater Syria (Seventeenth-Nineteenth Centuries),” *Bulletin of the School of Oriental and African Studies*, 2016, 1–22; 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* 9:2 (2002): 168–193; Baber Johansen, “Formes de Langage et Fonctions Publiques: Stéréotypes, Témoins et Offices Dans La Preuve Par l’écrit En Droit Musulman,” *Arabica* 44:3 (1997): 333–376; Wael B. Hallaq, “The *Qāḍī’s Dīwān (Sijill)* Before the Ottomans,” *Bulletin of the School of Oriental and African Studies* 61: 3 (1998): 415–436.

⁵⁴ “Court of Miṣr Al-Qadīma, Sijill 1 (934/1528), Archival Code 1006-000001,” Dār al-Wathā‘iq al-Qawmiyya, Cairo.

⁵⁵ “Court of Miṣr Al-Shar‘iyya, Sijill 61 (1306/1895), Archival Code 1017-000160,” Dār al-Wathā‘iq al-Qawmiyya, Cairo, 1017-000160.

Within this judiciary, legislators continuously “reformed” Islamic custody laws in line with evolving conceptions of female domesticity and child welfare. This process continued until Egypt’s 2014 constitution.

For the period 1517–1801, I will use the words “Ottoman” (especially to describe a polity) and “Egyptian” (to describe a geography) interchangeably. These terms should not be taken to refer to distinct ethnic groups that stood in tension with one another. In my view, like Toledano, it would be anachronistic to impose such an ethnic distinction. To give an example, no distinction would be made between “Ottoman” judges and “Egyptian” or “Arab” judges since some of the judges sent by Istanbul were ethnically non-Turkic and spoke several Islamicate languages. In addition, when the sources discuss judges and their deputies, they generally do not make a distinction based on ethno-linguistic categories. To be sure, there are some limited exceptions to this, especially immediately following the Ottoman conquest, when the local judiciary and scholars opposed some of the judicial practices of the invaders. Within decades of Ottoman rule, this trend slowly dissipated as Ottoman rule and judicial practices were normalized over time.⁵⁶ A more fruitful distinction between different actors is one based on status as a scholar or a member of the military elite or merchants, all of which were linguistically and ethnically diverse.⁵⁷

With respect to Islamic legal development, my periodization scheme consists of (1) the formative period, which starts with the birth of Islam in the seventh century and ends with the rise of schools roughly around the tenth century; (2) the classical period starts with the rise of schools and ends with the institutionalization of *taqlīd* by the end of the twelfth century and beginning of the thirteenth century; (3) the postclassical period extends from the thirteenth century to 1500; and (4) the early modern period extends from the 1500s to 1820s. Many important social and legal changes took place during these different periods of Islamic legal history. Though I focus on the early modern period in this monograph, much of the discourse of child custody law remained largely unchanged throughout these different periods. Although there are gradual breaks that

⁵⁶ Ahmed Fekry Ibrahim, “Al-Sha’rānī’s Response to Legal Purism: A Theory of Legal Pluralism,” *Islamic Law and Society* 20:1–2 (2013): 118–119.

⁵⁷ Ehud R. Toledano, “Review Article: Mehmet Ali Paşa or Muhammad Ali Basha? An Historiographic Appraisal in the Wake of a Recent Book,” *Middle Eastern Studies* 21:4 (1985): 141–159; Khaled Fahmy, *All the Pasha’s Men: Mehmed Ali, His Army, and the Making of Modern Egypt* (Cairo; New York: American University in Cairo Press, 2002), 1–37.

mark these different periods, these changes are usually limited to legal institutions and legal theory and less to substantive law.⁵⁸

TERMINOLOGY

The word *guardianship* in English refers to two types of childcare, the first restricted to managing the child's estate, while the other refers to physical custody, which in turn includes both nurturing the child and making decisions about his or her education and other major decisions.⁵⁹ The terms *ḥaḍāna* and *wilāya* do not always fit exactly the English terms "custody" and "guardianship." Another complication is the word *wiṣāya*, which means "testamentary guardianship," with the caveat that guardianship here refers only to making decisions about the child's education and managing his or her financial assets. To make it easier for English speakers to read this book, I will use the word "custody" to refer to *ḥaḍāna* and "guardianship" to refer to *wilāya*. The English reader should be aware that when I use the word "guardianship" to refer to Islamic law, I am using only part of the semantic space of the English word, namely that of dealing with management of the child's assets and major life decisions such as education and marriage. By the same token, when I use the word "custody" to refer to Islamic law, I am restricting the term to the sense of providing the child with basic nurture and care.

Muslim legal scholars used several technical terms to describe their various activities, including *muftī* ("juris-consult"), *qāḍī* ("judge"), *uṣūlī* ("specialist in legal methodology"), and *faqīh* ("jurist"). The term "jurist" is so general that it captures all of these terms, which is why I use "jurist" and "author-jurist" (*muṣannif*), with the latter emphasizing the juristic function of writing legal manuals, to refer to the activities of writing law books whether dealing with substantive law, procedural law, or legal methodology. Otherwise, I will use the terms *muftī* and *judge* to refer to the juristic activities of giving nonbinding legal opinions and issuing legal rulings, respectively.

⁵⁸ Ibrahim, *Pragmatism in Islamic Law*, 2015, 21–28.

⁵⁹ Mary Ann Mason, *From Father's Property to Children's Rights: The History of Child Custody in the United States* (New York: Columbia University Press, 1994), 65–67.