CONTENTS

Acknowledgments .......................................................... xv

Introduction ........................................................................ 1
  1. Mutual Functionality between Legal History and
     Comparative Law ............................................................. 1
  2. Egyptian Law and Its Arab Weight .................................. 4
  3. Methodology and the Art of Borrowing ............................ 9
  4. Types of Courtroom Oaths ............................................. 14

I The Courtroom Oath in Islamic Law, Theory and Practice .... 16
  1. Islamic Law and Methodology: Legal History and
     Historical Law ............................................................... 16
  2. Intimate Involvement of God .......................................... 27
     2.1 The meaning of power ................................................. 27
     2.2 Triple impact of anxiety ............................................. 28
  3. The Islamic Courtroom Oath as a Source of Legal
     Determination ............................................................... 30
     3.1 The courtroom oath and the legal right ......................... 30
     3.2 The binary approach: between the bayyina and
         the oath ...................................................................... 34
     3.3 Criticism of the binary approach .................................. 38
     3.4 The paradox of the badhî and the restriction of
         the oath ...................................................................... 40
  4. The Types and Modalities of Islamic Oath ......................... 43
     4.1 The manifestation of the oath ........................................ 43
     4.2 The interpretation of the future oath—objective
         or subjective .................................................................. 48
     4.3 Extra-legal considerations .......................................... 51
  5. The Technique of the Courtroom Oath .............................. 52
  6. The Positions of the Schools on the Subject of the
     Courtroom Oath: Malikites versus Hanafites .................... 54
  7. The Illusive Mental Dimension of the Islamic Courtroom
     Oath ............................................................................ 60
  8. The Scope of the Courtroom Oath: Issues That May Form
     the Subject of an Oath .................................................. 64
9. A Confrontation between Forms of Proof and Legal Determination: The Oath versus the *Bayyina* ........................................ 69
10. The Defendant and the Courtroom Oath ........................................ 75
   10.1 Affinity (*khulṭa*) .................................................................. 77
11. The Rerendering of the Oath and the Burden of Proof .......... 79
   11.1 The development of dynamic revision ................................... 82
12. The Paradox of Mutual Plaintiffs and Defendants (*taḥaluf*) ................................................................................ 86
   12.1 The lot (*qurʿa*) as a tool for courtroom determination .................. 88
13. Cases in which the Plaintiff Takes the Oath: A Conceptual Challenge for the Hanafites .................. 89
   13.1 Rendering the oath to the plaintiff when the defendant cannot defend himself (*yamīn al-qadāʾ, yamīn al-ʿistīzhār*) .......................................................... 90
   13.2 The course and outcomes of the judicial oath .......................... 92
   13.3 The oath in a *hisba* suit—between human and divine order ......................................................... 95
   13.4 The oath with a single witness ............................................. 96
   13.5 An oath cannot be made regarding an unknown matter .......................................................... 98
   14.1 Ibn Qayyim al-Jawziyya: from form to content .................... 99
   14.2 Restricted judicial space ...................................................... 102
   14.3 Inspection of the legal competence of the parties .................. 103
   14.4 The mute's oath: when both verbal intention and inner intention are concealed .................................. 104
15. Can the Defendant Guide the Wording of the Oath in His Favor? ................................................................. 106
   15.1 Redemption of an oath ('iftidd') as avoidance of danger ............ 111
16. A Religious Element in the Service of Law: The Intensification of the Oath .................................................. 113
   16.1 The text ........................................................................ 113
   16.2 Means of swearing on the *Qurʾān* .................................... 115
   16.3 Repetition ...................................................................... 116
   16.4 Way of ceremony (*ḥāl*) ................................................. 118
   16.5 The dimension of place .................................................... 119
   16.6 The dimension of time ...................................................... 121
   16.7 Non-Muslim ................................................................... 122
CONTENTS

17. The Testimonial Oath ................................................................. 125
18. Special Types of Oaths: Curses (li‘ān) and Qasāma .......... 127
   18.1 The terrible story of ’Uwaymar and his wife Khawla ........................................ 127
   18.2 Management of the curse procedure:
       the ceremony ........................................................................ 130
   18.3 The outcome of the curses procedure:
       Legal analysis ......................................................................... 132
   18.4 Fifty oaths as a single oath: The consequences
       of the qasāma ...................................................................... 135
   18.5 The course of the oath: two schools of thought .... 138

II Sui Generis, The Legal History of Courtroom Oath ........ 143
1. ‘Tortura Spiritualis’ ................................................................. 143
   1.1 The anxiety of the oath and the potential of
       self-destruction .................................................................. 143
   1.2 Decisive and complementary courtroom oaths ... 147
   1.3 First reference: courtroom oath in Judaism ...... 149
   1.4 Second reference: Courtroom oath in Greek
       and Roman law ................................................................. 151
   1.5 Third reference: The oath in European law
       and criticism of the institution ........................................... 153
   1.6 Direct criticism of the courtroom oath ............... 158
2. Courtroom Oath in Egyptian Legal History:
   Continuity and Omission ......................................................... 159
   2.1 The ‘social engineering’ of the courtroom oath ... 159
   2.2 Legislative sources and the functionality
       approach ........................................................................... 162
3. Reinterpretation and the ‘Stifling’ of the Courtroom
   Oath .......................................................................................... 164
   3.1 Reservations concerning the decisive oath in
       Franco-Egyptian law ......................................................... 164
   3.2 The imprisoning framework of modern law ...... 168
   3.3 The old Egyptian code: an individualistic declaration
       and the disappearance of the complementary oath ......................... 170
   3.4 About-turn: from the individualistic approach to
       the sociological one ............................................................ 172
   3.5 The subjection of the oath to the doctrine of the
       abuse of a right (ta’assuf) and the super-
       doctrines ........................................................................... 176
CONTENTS

3.6 The sociological about-turn regarding the finality of the legal hearing ........................................ 179
3.7 The technique of rapprochement and distancing vis-à-vis Islamic law ........................................ 182
3.8 Prevarication around the term Bayyina .................. 184
3.9 Kaffāra (Penance) in the rule of religion and the rule of law: Imitatio Dei ........................................ 186
3.10 Breaking the link with the Islamic sources: an independent entity .............................................. 189

4. The Oath and 'Judicial Truth' as a Double Narrative ................................................................. 191

5. The Restriction of the Oath due to Injury to the Component of Legal Certainty ........................................ 196
5.1 A ghost that may intervene at any stage ................ 197
5.2 The oath and justice .............................................. 199
5.3 The mechanical nature of the decisive oath .......... 201
5.4 Extra-legal considerations .................................... 203
5.5 Custom, society and trust in the realm of the courtroom oath .............................................. 205
5.6 Refusal to take the oath as a source of confession ................................................................. 209

III The Egyptian Courtroom Oath and its Function ............ 212
1. The Franco-Egyptian Courtroom Oath .................... 212
1.1 The source of the written articles .......................... 213
1.2 Doctrines of reference and Legal system ................ 214
1.3 Active involvement by leading French jurists .......... 217
1.4 Borrowing the major transformation undergone by the French legal system .......................... 217

2. Research Methodology ........................................... 218
3. The Paradox of the Courtroom Oath ....................... 221
4. The Presentation of Courtroom Oaths: Decisive and Complementary ........................................ 223
5. The Decisive Oath as a Quasi-Contractual Model ....... 224
6. The Decisive Oath as Equity .................................. 227
6.1 Legal justice and imbalance ................................... 227
6.2 The 'stroll through the realms of justice' parable .... 231
7. Judicial Discretion and the Decisive Oath .................. 232
8. The Motif of Equality: The Oath is Granted to Both Parties ..................................................... 237
9. The 'Ritual' of the Oath and the Parties ..................... 238
CONTENTS

10. The Balance of Threat of the Renderer ........................................... 245
11. The Legal Capacity Required for a Decisive Oath .................. 247
12. The Oath as a Text ................................................................. 248
13. 'Public Order', the Wild Horse, and Morality ......................... 251
14. The Oath and the Role of God as a Default ............................ 254
15. The Rerendering of the Oath ...................................................... 258
16. The Refusal (Nukūl) to Take the Decisive Oath ................... 260
17. The Doctrine of the Finality of the Hearing ........................ 261
18. The Decisive Oath Outside the Courtroom ............................ 262
19. The Complementary Oath ......................................................... 265
  19.1 The management of the complementary oath ................. 268
20. Hybrid Oaths: Between the Decisive Oath and the
    Complementary Oath ............................................................... 270
  20.1 The oath of estimated value ............................................. 270
  20.2 The oath of affirmation ................................................ 271
  20.3 The oath of clarification ('istiṣḥār) ................................. 273
21. The Testimonial Oath ............................................................. 274

IV Comparative Law—Two Oaths, Two Legal Regimes ............... 275
  1. A Current Thesis ............................................................. 275
  2. A Charged Realm of Encounter .......................................... 276
    2.1 A historical perspective: divergence and
        rapprochement ................................................................ 276
    2.2 Two chains of transmission of knowledge ......................... 282
    2.3 The oaths and legal proceeding:
        Four chronological developments .................................. 283
    2.4 Distinct points of departure ......................................... 285
    2.5 Points of contact .......................................................... 289
    2.5.1 The Egyptian shaykh and Judge Makhlūf
            al-Minyāwī .................................................................. 289
    2.5.2 The footnote technique .............................................. 290
    2.5.3 Terminology .................................................................. 292
    2.5.4 The Shari'ā Courts Procedural Law .............................. 293
    2.5.5 The Iraqi civil code ................................................... 295
  3. The Decisive Oath and the Challenge of the Legal
    Right ................................................................................... 295
  4. The Oath between Legal Time and Human Time .................. 300
    4.1 Human time: the Islamic courtroom oath grants
        legitimacy to the Franco-Egyptian oath .......................... 301
    4.2 Time as an agent of mutual threat .................................. 303
5. God as a Key Player ............................................................. 304
6. The Approach of Comparative Justice: Involvement or Interference? ......................................................... 307
7. Legal Reasoning and Intimidation .................................................. 311
8. The Source of Authority: The Courtroom Oath as a Social Function ................................................................. 314
9. Judicial discretion and the Oath .................................................... 317
10. The Mental Foundation of the Oath as a Subversive Element ................................................................. 319
  10.1 'Intention' versus 'will' in the decisive oath ........ 319
  10.2 Mala fide: The mental foundation as a source of risk ................................................................. 321
11. Ceremony, Mysticism, and Ritual .................................................... 323
12. The Oath and the Motif of Equality .................................................. 327
13. The Realm of the Oath .............................................................. 329
14. The Relationship Created between the Parties to the Courtroom Oath ................................................................. 333
  14.1 Access to the institution of the oath ...................... 333
  14.2 The oath as distress for the defendant ...................... 334
  14.3 The oath as the progenitor of a dynamic balance of power ................................................................. 337
  14.4 The approach to non-Muslims as a function of sovereignty ................................................................. 339
  14.5 The oath and considerations in penalization .................. 341
15. Differences in Technique .............................................................. 343
  15.1 The oath and the rerendered oath ...................... 343
  15.2 The formulation of the oath text: Agreement or coercion ................................................................. 344
  15.3 The oath versus the written document ...................... 346
  15.4 The utterer and the text of the oath ...................... 349
16. The Complementary Oath: From a Binary Model to a Dynamic Perspective ................................................................. 351

V Perjury as Ideology: The Motif of Falsehood in the Islamic and Franco-Egyptian Oaths ................................................................. 354
1. Introduction: The Transformation of the Perjury in Franco-Egyptian Law and the Concept of Falsum ........ 354
  1.1 'The concern of the gods' .................................................. 354
  1.2 Modern state and perjury .................................................. 357
  1.3 The changing perception of falsehood ...................... 360
## Contents

2. A Proposed Model for Examining Perjury in Islamic Law
   2.1 The component of falsum: The false oath versus the descending oath
   2.2 The exposure of falsehood and the institution of tazkiyya
   2.3 The use of equivocation and self-preservation
   2.4 The spiritual dimension: The sin and its purgation
      2.4.1 The alternative course approach
      2.4.2 The strict approach
      2.4.3 The lenient approach
   2.5 The doctrine of the legal penalization of perjury in the fiqh

3. Perjury as an Institution and a Procedure in Egyptian Civil Law
   3.1 Perjury between Islamic and Franco-Egyptian law
   3.2 Without fanfare: perjury does not exist, as an institution, in Egyptian law
   3.3 Further step toward the secular perception of falsehood
   3.4 The scope of change in Arab legal systems

4. Perjury versus Courtroom Oath: Complement and Contrast

Bibliography
Index