6-1-2016

The divinity of personal status law in Egypt

Maha Muhammad Asaad

Follow this and additional works at: https://fount.aucegypt.edu/etds

Recommended Citation

APA Citation
https://fount.aucegypt.edu/etds/1333

MLA Citation
https://fount.aucegypt.edu/etds/1333

This Master's Thesis is brought to you for free and open access by the Student Research at AUC Knowledge Fountain. It has been accepted for inclusion in Theses and Dissertations by an authorized administrator of AUC Knowledge Fountain. For more information, please contact thesisadmin@aucegypt.edu.
THE DIVINITY OF PERSONAL STATUS LAW IN EGYPT

A Thesis Submitted to the

Department of Law

In partial fulfillment of the requirements for the degree of

Master of Arts in International Human Rights Law

By

Maha Muhammad Asaad

June 2016
THE DIVINITY OF PERSONAL STATUS LAW IN EGYPT

A Thesis Submitted by

Maha Muhammad Asaad

To the Department of Law

June 2016

In partial fulfillment of the requirements for the degree of

Master of Arts in International Human Rights Law

Has been approved by the committee composed of

Professor Hani Sayed
American University in Cairo
Date ____________________

Professor Jasmine Moussa
American University in Cairo
Date ____________________

Professor Thomas Skouteris
American University in Cairo
Date ____________________

Professor Hani Sayed
Law Department Chair ________________________________
Date ____________________

Ambassador Nabil Fahmy
Dean of GAPP ______________________________
Date ____________________
ABSTRACT

The personal status laws in Egypt have been subject to considerable debate. Between Feminists and Islamists; these are some who call for reforms and those who call for the return to the Shari’a. In spite of the differences, the constant in this debate has been the knowledge that the personal status laws are divine. This paper challenges this narrative through examining the historical development of the Shari’a as a whole then move on to specific aspects of the personal status law, namely, divorce and child custody. It argues that the personal status law have been altered and modified through decades, and shifted from the original form of the Shari’a law.
# TABLE OF CONTENTS

*Introduction* .............................................................................................................. 1

I. *Historical Background* ......................................................................................... 3

A. Development of Islamic Legal History-Shari’a and Fiqh .............................. 7

B. Development of Islamic Legal History – Shari’a and Seyasa, and Misconceptions ........................................................................................................ 8

C. Development of Islamic Legal History – Seyasa and Other Developments 9

D. The Modernist elite and the nineteenth century development of Egypt’s personal status law ................................................................. 13

E. Codification .............................................................................................................. 15

F. Role of the Supreme Constitutional Court ......................................................... 17

II. *The Current Personal Status Law* ................................................................. 21

A. Modern Law and Patriarchy ............................................................................. 21

B. Divorce and Child Custody - Introduction ..................................................... 26

1. Child Custody .................................................................................................... 26

2. Divorce ............................................................................................................ 32

3. Khul’ law ......................................................................................................... 35

   a. Khul’ in the ottoman era

*Conclusion* ............................................................................................................. 39
INTRODUCTION

The personal status laws in Egypt have always been labeled as religious, hence divine in nature, and unchanged through time. This thesis primarily discusses the notion of the divinity of these laws, and provides an insight into how these laws developed over time. This development was sometimes due to individual interpretations, at some other times as a result of sovereign intervention, and lasts, due to civilizations’ collisions. The paper will trace these changes in two particular legal domains in contemporary Egypt: divorce and child custody.

This thesis begins with a review of the literature that reflects as the “common knowledge” regarding the Egyptian legal system in both scholarly literature produced within Egypt, and abroad. Most of these opinions and intellectual findings point to one claim: the Egyptian legal system is a dual system; meaning religious laws represented by Shari’a deal with personal status issues, while secular laws represented by man made laws deal with the rest of the legal field. The advocates of this narrative claim that there is no point in time when both legal systems overlapped.

This thesis argues that the Egyptian personal status laws are not divine. They are not holy in nature. Throughout history, they have been changed, altered, modified, and tampered with. This modern version of the personal status law has little, and in some instances nothing to do with the original form of the Shari’a law that existed prior to the modernization era. The modern version is detached from the past, primarily influenced by the social and political changes that occurred throughout the past decades. In reality, these laws are inspired by religion, yet they are far from where they started, and probably far from what the legislator intended them to be. This is mainly because, Shari’a law, in general, has never existed in a vacuum. It has always been a form of human made laws to either complete or complement it, hence assisting in adapting it to the societal needs.

Chapter one discusses the history of the legal system in Egypt as a backdrop to understanding when and how the Shari’a in general, and the personal status laws specifically, developed. Contrary to some scholars’ opinion, it will be shown that Shari’a has always been flexible in nature, accommodating the changes in its environment and society. The infused nature of the legal system during the pre-modern era will be manifested via the existence of Shari’a and Seyasa tools; which
coexist to complement each other rather than contradict each other. Then, the chapter concluded with the start of the codification efforts, which stripped away the Shari’a from its most significant aspect, namely its flexibility to adapt to time and place.

After going through chapter one, it will be evident that: one, the Shari’a has always been changing, and adaptable; two, Seyasa, which is a secular tool, was introduced by the sovereign powers in an attempt to legitimize their intervention in the passing of laws, and gradually became an essential tool to complement Shari’a across different areas of the law; three, Codification of laws resulted in more distance from Shari’a, and less flexibility in general to abide by it.

Chapter two details the personal status law: child custody, and divorce legislation. First, the real start of the personal status laws straying away from Shari’a and its principles came about due to foreign intervention. A clear and striking example is the introduction of the patriarchal concept into the Egyptian legal system, a concept, contrary to common knowledge in the Egyptian society, which was predominantly conceived from the Napoleonic Code. This chapter will make clear how the codification affected the personal status law. Also, it will shed light on child custody legislation and how, in the pre-modern era, the ‘Urf and customs often affected the qadi’s ruling. It will also show how, in the post-modern era, legislation included concepts that are not necessarily derived from Shari’a. The divorce legislation will also demonstrate the differences between the pre and post-modern era.

To conclude, the application of the Shari’a has always had a secular tool that complemented it. There has been no point in the Egyptian legal history when the Shari’a has been strictly adhered to and applied solely. Hence, it is evident that the personal status laws that govern Egyptian daily lives are far from being divine, and unchanged.
I. Historical Background

It is considered common knowledge, across all social and economic classes, that the personal status laws are solely based on religion. No one questions that knowledge. That is the most exceptional aspect of the Muslim society.¹

As a woman growing up with such knowledge, you cannot help but associate your rights as a subject in the society with religion. The danger of this knowledge and such association lies in two respects: the first aspect is the acceptance this commonality creates: the acceptance by women of these laws and the position these laws dictate on them in society. The second aspect is the danger that lies in the association with religion, which makes challenging these laws equal to challenging religion itself and Allah’s will. Thus, any attempt at changing or reforming the personal status law would amounts to an attack on the principles of Islam.²

Moreover, law books authored in Egypt distinguish between those laws that apply to personal status issues and laws that apply to other issues. One professor, Ali Negeda, explains in his book, Rules of Islamic Shari’a, that there is a difference between the laws that govern personal status issues and the rest of the laws that govern the criminal, civil and maritime issues. He goes on to explain that the statutory laws of Egypt govern the financial aspects of the state, and any other aspect, except issues of personal status laws. According to professor Negeda, personal status laws for Muslims and non-Muslims have always been adjudicated according to the Islamic Shari’a for Muslims. As for Christians and Jews, their respective laws are inspired by their own respective religions. In his book, he also defines the personal status law, as the law that solely adjudicates all matters relating to the family, from marriage, divorce, custody, adoption and inheritance.³

Much of the literature produced on this subject, particularly literature authored in the English language, uses the term Muslim law to describe laws applicable in Muslim

---

countries. This term refers to the combination of both *Shari’a* and *Fiqh*. In the book *Major Legal Systems in the World Today*, Rene David further explains that the Muslim legal systems are derived purely from Islam, mainly the *Quran*. This makes the Muslim legal law completely different from any other legal system. The nature of the Islamic legal system makes it impossible to have any European influence, and vice versa. The book does acknowledge that the Muslim world has positive laws, yet makes an interesting and relevant observation that “all the branches of the Muslim law are linked to the Islamic religion with equal force, a distinction has to be made in practice. The law of the family and persons has always been considered the most important in the *Shari’a*. There were some aspects of the European influence of course, yet the connection between the religion and law was not broken. For example, the constitutional law of almost every Muslim country, and in the case of Egypt has always included adherence to Islamic law.

The contribution of the “Western Scholarship” to the understanding of the development of the Muslim legal history has not been accurate. Enid Hill criticizes “Western scholarship” on the Middle East, which focuses on Islamic law and its modernization either through studying the historical texts and institutions, or the history of Islamic law. However, the legal systems of the Middle East are more complicated than that. The law in the Middle East is a combination of Islamic law and European adopted codes, as well as national legislation. Yet, Hill ascertains that the authors that were interested in a deeper understanding of the law in the Middle East were able to distinguish that the family law and inheritance law were strictly adhering to the rule of Islamic law.

---

4 The difference between *Shari’a* and *Fiqh* will be illustrated later.
6 *Id* at 474.
7 *Id* at 474.
9 *Id* at 280.
Coulson also, criticizes the western scholars describing the development of the Islamic jurisprudence as non-existent, and a law divorced from historical development. As the revealed will of God, hence the Shari’a has been dominant in Muslim territories, yet static and only adapted itself to the internal needs of its society. The Islamic jurisprudence cannot be measured against any societal historical development. It has been controlling Muslim societies and not being controlled by the Muslim societies. The lack of this historical developments attributed to the nature of the Sharia’a and the role of the jurists. The latter is measured against the discovery of the divine commandment and not measured against any external factors of the society. As for the Shari’a and since the revelation ceased with the death of the prophet Muhammad, it was hence immutable. To the Western Scholars in conclusion, Islamic law lacks the dimension of the historical development. Yet when Muslim countries were faced with the Western laws of political, economic and institutional laws that were foreign to the Islamic law and its Shari’a, there was no other option before them but the desire to change to be closer to the European model. Hence the development of the Islamic legal system intersects with the emergence of the western laws in Islamic territories. So modern European laws saved the Islamic antiquated laws from their inadequacy to adapt to the modern systems of economics and trade. As a result of the capitulations in the Ottoman era, the Islamic territories had to adopt the European version of the criminal and commercial laws. The commercial code in 1850 and the penal code in 1858 were both direct translation from the French code, In addition to the commercial procedural code in 1861, and the maritime code in 1863. As a result, the modern codes replaced entirely parts of Islamic laws such as the penal code.

11 Id at 1.
12 Id at 2.
13 Id at 2.
14 Id at 2.
15 Id at 149.
16 Id at 150.
17 Id at 150.
18 Id at 151.
19 Id at 151.
20 Id at 151.
The danger of this contention lies in the following; first, the advocates of this line of thought imply, and cement the idea that the personal status law is solely based on religion. Second, is the notion that there was a time when laws in Egypt were solely based on the Islamic Shari’a.

This chapter will demonstrate that, in the pre-modern era, the personal status law did not strictly adhere to Shari’a law. Furthermore, in the post modern-era after the French invasion of Egypt in 1798, the paper will demonstrate that the European influence did affect the personal status laws in Egypt. Mainly, the French law was the force behind the patriarchal laws that affected negatively the rights of women in marriage, divorce and child custody; this was followed by the intervention of the modernists in the 20th century which eventually led to significant changes in the personal status laws.

In addition, One of the many problems, which may have created a misconception about Islamic legal history is the contribution of the Western academic scholars and their definition of Islamic legal history.\(^\text{21}\) The historians primarily concentrate on the divine revealed scriptures of the \textit{Quran} and the \textit{Sunnah}.\(^\text{22}\) The best way to describe some of the historian’s work on the history of Islam in general would be the term “scriptuarlism”,\(^\text{23}\) which would means, that the historian’s main focus is on the norms of the divine scripture of the \textit{Quran} and \textit{Sunnah}, excluding all other aspects of the law such as criminal justice, administrative, or any political norms that carried on at the time.\(^\text{24}\) The danger of this approach is giving the impression that legal reform happened outside the realm of religion, cementing the notion of the duality of the law.

The truth about Islamic jurisprudence is that it is a legal system just like civil law or common law in terms of complexity. It is common in the literature on the subject to distinguish between secular legal systems and Islamic law by claiming that Islamic law is the command of a divine entity and as for the secular law it is the commands of a human entity.\(^\text{25}\) These claims have some truth to them, yet they are considered an

\(^{21}\text{Id at 4.}
\)
\(^{22}\text{Id at 6.}
\)
\(^{23}\text{Id at 6.}
\)
\(^{24}\text{Id at 6.}
\)
\)
oversimplification of the importance of human agency in the production of Islamic law.\textsuperscript{26} Islamic law, unlike its secular counterpart, covers a range of issues, from the relationship between humans and God, to matters that relate to social and political interactions, and generally the relationship between human beings and each other.\textsuperscript{27}

The first chapter in the thesis deals with the development of the Islamic legal history, and attempts to clear few misconceptions: \textsuperscript{28} First, is the perceived lack of development throughout the Islamic legal history. Second, is the notion that \textit{Shari’a} dominated the legal arena until the emergence of the European laws. Scholars often ignored the connection between Islamic law and the \textit{Seyasa}, which sheds light on the dynamics of the legal system and its development before the emergence of the European laws. Through the concept of \textit{Seyasa} and its connection to the \textit{Shari’a}, it will be clear that both have always existed, yet never separately.

\textbf{A. Development of Islamic Legal History - \textit{Shari’a} and \textit{Fiqh}}

To some scholars, \textit{Fiqh}, or “Islamic jurisprudence” is the framework used to refer to the \textit{Shari’a}’s sources, namely the \textit{Quran} and the \textit{Sunnah}. Later in the paper, the main differences between \textit{Shari’a} and \textit{Fiqh} will be elaborated on. It is safe to state that scholars have regarded the \textit{Fiqh} as unchangeable and unable to adapt to societal changes.\textsuperscript{29} The \textit{Sunni Fiqh}, for example, was formulated by four schools in a period which is known as the \textit{Taqlid} period of \textit{Fiqh}.\textsuperscript{30} Within this period all the fatwas and the legal opinions rendered had to be issued by previous jurists. To historian and scholars, this made the Islamic law only connected to the history of God, whose sources were restricted to the \textit{Quran}, \textit{Sunnah} or \textit{Ijma’}.\textsuperscript{31} To Western historians, Islamic legal history was frozen in time from the tenth century up until the Napoleon invasion of Egypt in 1798.

\begin{itemize}
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id at 31.
\item \textsuperscript{28} Amr el Shalakany, \textit{Islamic legal history}, ABB,7,1, Article 1. (2008).
\item \textsuperscript{29} KHALED FAHMY & RUDOLPH PETERS, The Legal History of Ottoman Egypt, ABB. 129, 6,2 (1999) www.jstore.org/stable/3399309.
\item \textsuperscript{30} SHALAKANY, supra note 28, at 13.
\item \textsuperscript{31} Id at 14.
\end{itemize}
Schacht’s general idea is that Islamic law was limited to personal status law, and in some cases a limited presence of the Islamic law could be present in other aspects of the legal system, i.e; the constitutional law, taxation law, penal codes and so on. As for the contractual obligations, they received a partial application of the Shari’a throughout the Islamic history. Schacht claims that in the private law section though there was the ‘Urf, Hhyal and Shurut. With the assistance of Fiqh, those customary practices and conditions, were turned into contractual obligations. Hence Schacht reaches the conclusion that these areas of the law were a collective effort between the Fiqh and institutional structures, as Schacht describes them “secular” laws.

For example: in the pre modern courts, qadis belonged to various jurisprudential schools (Madhaheb). The qadis would use these Madhaheb as a guide and, in court, they would rule based on the 'Urf and customs of the community. It will be clear in the child custody section, chapter two, how 'Urf influenced this field’s legislation and its application in the Ottoman era.

B. Development of Islamic Legal History – Shari’a and Seyasa, and Misconceptions
Al imam Al-Shaf’y, in his treaties Al-Risala, instituted a mode of mediating between reason and revelation. He argued in his book that even though the law already exists in the divine Quran, Sunnah and Ijma’, human reasoning plays a pivotal role in determining the law within the divine sources or even by extending the rules already existing to other questions through reasoning or qias.

The relationship between the Shari’a and Seyasa, has a significant historical importance, as it has been perceived as a separation of powers. As previously mentioned, Shari’a only existed in the personal realm and the Seyasa in the public one. First, it should be clear that there has always been, on some level, a form of separation in the Islamic legal thought. But the new laws that were passed by the

32 Id at 16.
33 Id at 16.
35 SHALAKANY, supra note 28, at 13.
Khedives never ignored the Shari’a in their rulings. However they complemented each other, for example, the Qada’ and Seyasa; in the case of homicide; and the Shari’a principle of pardoning the defendant is considered to be inadequate in a modern state, given the public security concerns. Here, it was decided to leave the Shari’a to the personal claims of the victim or of his heirs, and the public claims handled by the Seyasa. Everything that is Shari’a is not Seyasa and vice versa. And anything that relates to Seyasa is considered outside the realm of Islamic legal history. For example, Schacht in his book, Introduction to Islamic law, uses the terms Islamic law and Shari’a synonymously, with the definition of the Shari’a holding the meaning counter of the Seyasa.

So far, the common narrative is as follows: Napoleon’s invasion of Egypt in 1798 leads to a series of legal reforms, which resulted in a full-scale replacement of the Shari’a law in the year 1883. Two thinkers have challenged this whole narrative, Khaled Fahmy and Rudolph Peter offering a radical rethinking of the Egyptian legal development. Their revelation leads to two important findings: first, that there were Egyptian criminal law reforms in the first three quarters of the nineteenth century that were merely a continuation of the Ottoman tradition of legislation through qanun and not the result of Westernization. Second, these reforms were not considered a departure from Islamic law; rather they were a legal development rooted in the doctrine of Seyasa Shariyya.

C. Development of Islamic Legal History – Seyasa and Other Developments

The development of the Seyasa Shariyya during the Islamic Empire first emerged with the emergence of the Islamic empire as a military power. The Islamic empire
attempted to expand their wealth and geographic advantage. Under the Abbasids from 750 to 850CE, the Caliphs sought to establish their power through the enforcement of the Shari‘a. During this period the madhaheb flourished, and the qadis were officially instructed to adjudicate in accordance with the madhaheb. Yet, the Abbasids failed in their quest. They failed to apply the Shari‘a to public law, especially the criminal law. In this area of law, the Abbasids adopted some administrative procedural rules that originated in the pre-Islamic era in order for the caliph to settle the disputes for which normative legitimacy are found to be outside the Fiqh and Shari‘a. These administrative procedures were known as Mazalim and Muhtasib.

Under the Mazalim, the caliph heard and investigated issues ranging from the denial of justice to unlawful administrative acts. This procedure continued to grow and developed into a more formal court setting throughout the Ottoman era. The same happened with the muhtasib, or the inspector, who would inspect a wide range of issues from theft, to administrative issues. That too, survived throughout the Ottoman era, which developed in the police force, as we know them now. According to Schacht, this is when Seyasa Shariyya was developed, even though the Seyasa Shariyya was not fully developed until the thirteenth century during the Mamluk era. The Abbasids developed a way to fuse the Seyasa and the Fiqh by granting the caliph the attributes of a scholar to bind him to the sacred law. Along with the development of the Mazalim and the Muhtasib came the qanun. The sultans from the fifteenth century issued the quawaneen. It was believed that the sultans aimed to conform the qanun with Islamic Shari‘a; And, in some cases to complement the Shari‘a. A case at hand: is the Ottoman qanun which developed different punishments for zina or adultery. These newly developed “Zina” laws were only applied in cases where suspects could not be convicted under the rules of the Shari‘a; For example fines were used as a form of punishment. This clearly contradicts the Shari‘a punishment for adultery, which was specified to be stone throwing and whipping.

42 Id at 17.
43 Id at 17.
44 Id at 18.
45 Id at 18.
46 Id at 18.
47 Id at 22.
Khaled Fahmy in his book *Law, Medicine and Society in the Nineteenth-Century Egypt* argues that members of the society in the nineteenth century, in both the urban and the rural areas, understood the differences between the *Shari‘a* and the *Seyasa*. For instance, they were aware that the medical evidence including the autopsy was imperative to the legal applications.\(^{48}\) Fahmy further states in his book that:

Nowhere do we see people confusing al-siyasa with "secular law," or thinking that there was a fundamental clash between it and the *Shari‘a*, a legal system that was only later in the century and in much twentieth-century "modernization theory" literature, referred to as a defunct, obsolete religious law that had to give way to the rational, "modern" legal codes imported from Europe. Indeed, an analysis of the reasons for which people approached the police shows that the police with their siyas‘a laws were often thought of as a means by which people could achieve what they understood as their *Shari‘a* rights.\(^{49}\)

Fahmy discusses the *majalis* themselves, and how they dealt with the *Shari‘a*, stating:

What becomes clear from these cases is that, in spite of applying new legislations passed by the Khedives, the *majalis* were not ignoring the *Shari‘a* in their rulings. As demonstrated, these laws themselves were often referring to the *Shari‘a*...\(^{50}\)

Hence, a dual system of criminal justice did exist in the nineteenth century, and prior to the 1883 reforms.\(^{51}\) There were councils that were responsible for the application of the *Qanun*, and the *qadi* courts that were responsible for trying offenses such as homicide, sexual offenses, and assaulting. It was often that the same case would go through both systems.\(^{52}\) The cases would be heard first in the *qadi* court, and often referred to the council, as cases were rarely found for the plaintiff due to the strict rules of procedure and evidence in applying the *Qanun*.\(^{53}\) Rudolph Peters, comments on this dual system by arguing that the legitimacy rested on the *Seyasa* principles.\(^{54}\) These laws were regarded *Seyasa*. Their aim was to unify and rationalize the judicial

\(^{48}\) *Id* at 77.
\(^{49}\) *Id* at 77.
\(^{50}\) *Id* at 77.
\(^{51}\) *Id* at 76.
\(^{52}\) *Id* at 76.
\(^{53}\) *Id* at 76.
\(^{54}\) *Id* at 76.
administration and were never regarded as laws that circumvent the Shari’a laws, rather ones that complement the already existing legal system.55

As a result of these legal developments, the Egyptian legal system acquired a distinctive form. As if Egypt was an independent nation, despite the fact that, at that time, the country was officially part of the Ottoman Empire.56 Even the dynamics of the majalis illustrate the interconnected relationship between the Shari’a and the Seyasa. Even in the majils structure itself, the mixture could be easily noted. The majalis el Shari’a would be resided over by a Shafi’y or a Hanafy judge, who was appointed by the grand mufti, who in turn was appointed by the Khedive.57 The secular majalis would examine cases after they had been passed to them by the Shari’a majalis, and the judges would not pass rulings that would contradict the Shari’a majalis ruling.58 Another example of how Shari’a and the Seyasa have always been considered complementary to each other is found in a book written by an Egyptian forensic medical examiner, Muhammad El Shubasi: He instructs his student to properly examine the causes of death as each cause would have different retroactions in the Shari’a, like whether homicide would require qasas or not.59

In conclusion, there has always been development in Islamic legal history. It has been demonstrated that the legal development was gradual and pre-dated the Napoleonic invasion and had a pure Egyptian flavor to it. Does that mean that the modern European development had no bearing whatsoever on the Egyptian development? No, as the Egyptian legal system was influenced by the “less enlightened aspect” of the European development,60 which will be examined in the second chapter of this paper.

The Seyasa and the Shari’a’s relationship has a significant importance to the conclusions of this paper, and to the conclusion that personal status laws inspired by Shari’a today are not solely based on religion. It has also been made clear that there has always been a connection between Shari’a and Seyasa as both have

55 FAHMY, supra note 29, at 131.
56 Id at 132.
57 Id at 264.
58 Id at 264.
59 Id at 266.
60 FAHMY, supra note 35, at 226.
complemented each other. Regardless of what has been written in history books, there has always been development, and there has always been human made laws to complement the Shari’a laws; This is important to understand to answer to those who call for the return of Shari’a.\textsuperscript{61}

D. The Modernist elite and the nineteenth century development of Egypt’s personal status law

This section will examine the second half of the nineteenth and the first half of the twentieth century. When the decision was made to dispose of most of Egypt’s laws and replace them with new laws.\textsuperscript{62} It will also examine the different players that came to the legal scene and how they contributed to the current legal reality. Mainly, this section will discuss the role of the secular nationalist elite in this process.\textsuperscript{63} In addition to the impact of the process of codification on the personal status laws. And finally, it will examine the role of the Supreme Constitutional Court and how it deals with personal status issues.

During the second half of the nineteenth century, there was opposition to the “Europeanization” process. This opposition came from the religious elite, as they were called at the time. To those religious figures the last straw represented the family law.\textsuperscript{64} Europeanization also represented a problem for the caretakers of this reform. In the event they would change the entire legal system into a more secular legal system, family law would have to go through those same changes as well, in order for it to be interpreted and used by secular judges in the courts of law.\textsuperscript{65} In order for secularization to take place, there had to be a limit drawn on any reform that could affect the family law. That was necessary to appease the religious constituency.\textsuperscript{66}

\textsuperscript{61} Id at 3.
\textsuperscript{63} Id at 1045.
\textsuperscript{64} Id at 1046.
\textsuperscript{65} Id at 1047.
\textsuperscript{66} Id at 1047.
During this era two types of elite were present on the legal scene. The first one was composed of Muhammad Abdu and Rashid Rida.\(^6^7\) This group proposed an alternative method of reform that was based on the *maslaha* or the public interest,\(^6^8\) and, as Lama Abu-Odeh describes it, the concept of the “supra-madhāb”. Which Muhammad Abdu explains it as the state’s ability to adopt rules from all madhaheb and to not be confined to one specific madhab.\(^6^9\) They proposed that the doctrine of public interest would replace the *qyas* or analogy.\(^7^0\) Hence, when a particular question regarding a social need arose that was not covered by a specific divine text, the jurist should respond to this question or need based on the public interest or *maslaha*.\(^7^1\) As far as the second proposition, this group proposed that the state should not restrict itself to the rules of one madhab, rather the state should be free to attend to its needs through accessing all the madhaheb.\(^7^2\)

The second group of elite was the secular nationalist male elite, this group was composed of European educated lawyers, or lawyers who had obtained their degrees from the national Egyptian universities yet studied the European civil codes. These lawyers were influenced by the European civil law and introduced new concepts such as the constitutional rights and so on.\(^7^3\) For the new nationalist elite capitulation became a symbol of the violation of the Egyptian sovereignty and a form of oppression, not modernization. Sanhuri the Egyptian jurist that was assigned to draft the new civil code belonged to this group.\(^7^4\)

Both groups had to cope with the existence and demands of the other. Sanhuri had to face the “Islamic modernizers” demands for a role in the newly reformed legal system.\(^7^5\) He attempted to reconcile both Islamic law and European law; His intervention was based on the concept of the “social” rather than the individual.\(^7^6\) Sanhuri claimed that the new concept of the “social” which was newly developed by

\(^{6^7}\) *Id* at 1090.

\(^{6^8}\) *Id* at 1090.

\(^{6^9}\) *Id* at 1091.

\(^{7^0}\) *Id* at 1090.

\(^{7^1}\) *Id* at 1091.

\(^{7^2}\) *Id* at 1091.

\(^{7^3}\) *Id* at 1093.

\(^{7^4}\) *Id* at 1093.

\(^{7^5}\) *Id* at 1094.
the French sociological school of jurisprudence was what the Islamic jurisprudence was already built on.\textsuperscript{77}

The nationalist elite even aimed at drafting a family code that would apply to both Muslims and Copts equally.\textsuperscript{78} They aimed at a universal code that applied to all citizens.\textsuperscript{79} Yet in this new attempt Sanhuri failed to incorporate family law in the new consolidated civil code.\textsuperscript{80} The significance of this attempt lies in the insight it provides on how the elite regarded the status of the family law. The nationalist elite desired to overcome the sectarian nature of the family law. They anticipated that the inclusion of family law in the civil code would give the family law the same universality as the civil code, and thus be applied to all citizens. The sectarian family laws represented the pre-nationalist era where different groups within the society apply different laws.\textsuperscript{81} The closest they ever got to including the Taqlid family law in to the new civil code, was to include the Taqlid qadi into the national court system in 1955.\textsuperscript{82}

\section*{E. Codification}

Through the process of modernization, the Shari’a law was codified as part of the march towards centralization. Codification as a general concept seems to be logical; it should provide for stability, transparency, and justice to all. Yet, in the case of Islamic jurisprudence, the effects of the codification could be contested. The codification of the Shari’a resulted in the mummification of the Shari’a and Fiqh. in doing so its most valuable aspect was lost, the connection the Shari’a laws had to society’s needs, and the flexibility that the Shari’a law had in applying its rules. Since the codification, the Shari’a law, and along with it women’s rights, lost their contemporary essence, and were trapped in the nineteenth century. Given the nature of the Shari’a and the Fiqh, the codification resulted in setting aside a big portion of

\begin{flushleft}
\textsuperscript{77} Id at 1094.
\textsuperscript{78} Id at 1095.
\textsuperscript{79} Id at 1095.
\textsuperscript{80} Id at 1095.
\textsuperscript{81} Id
\textsuperscript{82} Id at 1096.
\end{flushleft}
the Shari’a law contents.\textsuperscript{83}

To be able to fully comprehend the magnitude of the transformation of the Shari’a law through codification, it is necessary to understand the nature of the code itself and whether the Shari’a fits into its frame or not. Wael Hallaq in his article \textit{What is Shari’a?} As agreed with the legal experts that “the code come to replace all previous inconsistent customs, morals and laws”\textsuperscript{84} it must as well be, complete, exclusive, clear to produce both order and authority. Modern laws always claim superiority over any other form of law, and in the event that a pre-existenting law is still in effect, it is only through the permission of modern law and on its terms and conditions.

Modern laws should not only be declaratory but also universal and individualistic in nature. There has to be conformity in the law’s application. The Shari’a by contrast, does not claim exclusive authority. On the contrary it depends on the customs and the cultures of the societies. The Shari’a law has always worked with, actually to be more precise intertwined with societal customary law. The Shari’a as a law was not declaratory, as it does not announce itself to be the exclusive authority and come to replace all other orders. The Shari’a, claimed no internal uniformity, which is why it was able to sustain its diversity and flexibility. This feature in particular is what aided the Shari’a to accommodate the different societal changes. This accommodation helped with the pluralism that depended on an individualistic idea.\textsuperscript{85} In the end, the modern attempts, the codification of the Shari’a law and the Fiqh resulted in creating a legal system that has little resemblance to its original form: a new legal system that unfortunately lacks its main characteristics, most importantly the flexibility of its pre-codified legal system.

Another aspect of the codification of the personal status law is the passive effect it had through dropping it from the civil code. It meant that the legislator left the personal status law to the Taqlid law in its transformed form. The Taqlid law has also been transformed by modernization and through the entrenchment of the “supra

\textsuperscript{83} Wael B. Hallaq, What is Shari’a? 169., 12 Y.B Islamic &Middle E.L.151 2005-2006.
\textsuperscript{84} Id at 169.
\textsuperscript{85} Id at 171.
Furthermore it also meant that the religious ‘Ulama came to be attached to the personal status law as the last realm, where they still can exercise their power.  

Women’s rights were especially affected by the codification of the personal status laws. The personal status issues post-codification are adjudicated in national courts applying the Hanafy madhab. Judges would strictly apply the Hanafy madhab. Pre-codification, the personal status issues were adjudicated in Shari’a courts were the qadi had a wide range of both jurisdiction and discretion i.e. the Shari’a courts adjudicated civil, criminal, and administrative affairs, in addition to the personal status issues. The qadi would have the discretion not to adhere to the strict rules of the Hanafy madhab, and explore all the jurisprudential schools for a solution to the issue at hand. The qadi’s would apply an uncodified form of Shari’a usually infused with the changing social realities of his communities. This was particularly beneficial to women in obtaining their rights. For example; women were able to obtain a no fault divorce or khul’, which was only applied in Egypt in 2000.Qadi’s could use their discretion to stray from the predominant interpretation of the Shari’a. In various cases when the qadis would aim to proving the marriage consummation for the purpose of establishing the woman’s rights, they would allow the martial meetings after the contract signing, which is a clear contradiction to the Shari’a rule of legal privacy.

The codification of the family laws in general has transformed the way the law operates. Personal status laws lost their flexibility, which negatively affected women’s position in the family.

**F. Egypt’s Contemporary Judicial Elite**

---

88 *id* at 128.
89 *id* at 129.
90 *id* at 129.
91 *id* at 130.
92 *id* at 131.
In contemporary Egypt, there are a number of examples of the strategy that the male elite follows in dealing with women’s issues. In the fight for their legal equality in the family, women had several demands: equal access to divorce, the abolishment of polygamy, increase of financial rights and the elimination of child marriage. Of course the religious elite would always respond to these demands being a trespass on their “God-given rights”. Following their strategy to indirectly deal with the issues, the male elite would not, as legislators and judges, abolish polygamy but rather restrict it. They would not equalize the right of divorce but rather grant more grounds for divorce.

This strategy is evident in some of the Supreme Constitutional Court, and the Supreme Administrative Court rulings. The following cases demonstrate this strategy:

In 1994, the constitutional court ruled on the constitutionality of a divorce. The plaintiff was the soon to be ex-husband. He was contesting the constitutionality of certain provisions No. 11 of 1929, which provided for a wife’s right to divorce based on harm resulting from taking another wife. He argued that law No. 11 of the year 1929 contradict the second Article of the Egyptian constitution, which confirms that the Islamic Shari’a is the principal source of legislation. The court’s ruling was in favor of the defendant.

What is interesting here is not the ruling, but the reasoning. The court argued that law No. 11 does not contradict with the Shari’a, and added that the concept of harm is entrenched in the Shari’a. The court cited verses from the Quran and the Sunnah to provide proof of the existence of the concept of harm. And Hence, it concluded that a law allowing divorce based on the concept of harm does not defy the Shari’a rules. The court in its argument and reasoning depended on the Quran and Sunnah to confirm the right of the woman in divorce.

Another case brought before the constitutional court, contested the validity of the education ministry’s decision, no 113 for the year 1994. The decision stated the

---

93 LAMA, supra note 62, at 1100.
94 Id at 1101.
95 Id at 1101.
96 The Egyptian Supreme Constitutional Court, available at, hccourt.gov.eg. case 35.
guidelines for girls’ dress code in public schools. The guidelines stipulate that in order for the girls to wear the Higab, permission has to be granted from her parents. The father of two girls contested the constitutionality of the law after a school rejected his daughters for wearing the Niqab. The father contested the law based on the freedom of religion and the non-conformity with Article 2 of the constitution. The Court ruled for the constitutionality of the decision by distinguishing between the principle of the Shari’a and the rules of the Shari’a. Rules are open for different interpretation. Applying it to the case, the court stated that there is no clear rule to stipulating the permission of the Niqab. The court stated that covering the girls face would hinder her from interacting with society, which the principles of the Shari’a never stipulated.97

In third and final example, the Supreme Administrative Court assumed a similar stance in 1997. In July 1996, the Ministry of Health issued a decree no 261/1996 that forbade in its first article the female gentile mutilation (FGM) both in public and in private. FGM has been entrenched in religion through opinions of some of the jurists, and is a widespread cultural practice.98 It’s a wide spread practice in Egypt unfortunately. The decree was contested by Islamist: sheikh Youssef el Badri in the administrative court. The Administrative Court ruled in favor of the plaintiff, the ruling was contested later by the Ministry of health in the supreme administrative court. The Supreme Administrative court ruled against the previous administrative court decision upholding the decree to forbid the practice of FGM. In this example, the court’s ruling was based on several questions: What is the legal basis for the mutilation of women’s bodies? How far is this issue related to Islamic principles? And finally, is the plaintiff entitled to raise this issue? Similar to its counterpart, the court held the right to interpret the principle of Shari’a and to determine what is it within the customs that is considered in conformity with the Islamic religion.99

The Supreme Constitutional Court has the power of statutory interpretation and judicial review; where by the court ascertains and reaffirms the true intent of the

98 Id at 37.
99 Id at 37.
legislator.\textsuperscript{100} It is the constitutional court’s role to make sure that any legislation is in conformity with the constitutional law.\textsuperscript{101} It is clear that the SCC, since the 1980 constitution and its Article 2, has been trying to compromise between the Islamic enthusiasts and feminists. By always taking an intermediate position between the two.\textsuperscript{102}

In conclusion, the first chapter has demonstrated through the historical development of the Shari‘a and its applications, that there has never been a strict adherence to the rules of the Shari‘a. The Shari‘a rules themselves can be adjusted and amended according to societal changes. Also it was argued that the codification process stripped the Shari‘a of one of its main characteristics namely its flexibility.

II- The Current Personal Status Law

This Chapter will specifically discuss two integral issues in the personal status law, divorce and child custody. It will also highlight the main differences between the Shari‘a and the modern personal status law to demonstrate, in concrete terms, that the personal status law was influenced by more than just the Shari‘a; which makes the law in some respects even inconceivable to be associated it. This chapter will discuss two main points: The first is the different philosophical approaches to gender, law,

\begin{itemize}
\item[\textsuperscript{100}] \textit{Id} at 4.
\item[\textsuperscript{101}] \textit{Id} at 3.
\item[\textsuperscript{102}] LAMA, supra note 62, at 1144.
\end{itemize}
and the application of the law itself. The second is the divorce legislation, and child custody legislation.

**A. Modern Law and Patriarchy**

One of the main differences between the pre-modern legal system based on the *Shari’a* and the modern personal status law, is the philosophical approach to gender and law. There is a patriarchal approach to the modern personal status law that did not exist in the pre modern era. This section will examine this point further.

A court in 1937 defined the personal status as follows:

> By personal status is meant the totality of what differentiates one human being from another in natural or family characteristics according to which the law based legal principles in regards to his social life such as if the human being is male or female, if he is married or widower, a divorce, a father, or legitimate son, or if he is a full citizen or less due to his age or imbecility or insanity, or if he is fully civilly competent, or is controlled in his competency due to a legal reason.\(^{103}\)

The modern definition of personal status law has taken a different approach to human interaction in the society. It viewed the citizens through certain characteristics, sole as being male, female, and through certain needs that resulted in an unequal system that placed the control with the capable i.e. male over the less capable i.e. women and children. The biological difference becomes a liability denying women their competence. This difference happened incrementally; starting from the year 1885 where the first reformed law focused on regulating marriage.\(^{104}\)

The fundamental principles of marriage, divorce and the relationship between men and women is set out in the *Quran*. Yet, the details that surround those principles often depend on customs and *’Urf*. For example, the compatibility of the spouses is

---

\(^{103}\) SONBOL, *supra* note 2, at 187.  
\(^{104}\) *Id* at 189.
set in the *Quran*, yet the dowry and the property depends on the customs of the country and the city where the union is taking place.\textsuperscript{105}

With the beginning of the Ottoman modernity, women were affected in two ways, the first was that the Ottoman state developed a sense of state hegemony. And the modern state institutions and legal structures took a different form. Along with this development, the patriarchy developed as well.\textsuperscript{106} It is evident in the marriage contracts that date back to the sixteenth century in which wives were able to introduce certain conditions into the marriage contract. For example; the wife might have a condition in the marriage contract that would allow her to divorce her husband’s future wives.\textsuperscript{107} Those conditions have no parallel in the modern marriage contracts today.

Secondly, development, took place under the imperial powers. Laws that pertain to women’s rights were influenced by the new borrowed nineteenth century European codes.\textsuperscript{108} The influence was found for example in the newly definition of marriage: “a contract between a man and a women by which she is lawfully to him with the object of forming and family and producing children”.\textsuperscript{109} This definition and the concept of marriage for the production of children, was foreign to the Egyptian legal and social discourse.

Hence this era introduced to the Egyptian society new forms of modernization. Banks, schools, and universities were all based on systems and codes borrowed from the French and British codes.\textsuperscript{110} The new modern schools and universities taught new concepts related to gender that were promoted by the elite and the middle class of Egypt.\textsuperscript{111}

A Napoleonic code was borrowed and applied to the Egyptian legal system. Although this code was not directly applied in the *Shari’a* courts, it had direct effects on

\textsuperscript{105} SONBOL, supra note 34, at 108.
\textsuperscript{106} Id. at 108.
\textsuperscript{107} Id. at 88.
\textsuperscript{108} Id. at 108.
\textsuperscript{109} Id. at 111.
\textsuperscript{110} Id at 111.
\textsuperscript{111} Id.
women’s rights in marriage and divorce and created a patriarchal structure for the Egyptian family.\textsuperscript{112}

The patriarchal characteristics of the Napoleon code could be detected in the amendments of the 1885 law that focused on “marriage”, and the amendments that took place in the 1920s that changed “marriage” to “family”.\textsuperscript{113} The shift is significant as the first amendment focused on marriage that entailed two persons and their respective rights, while the second law just focuses on the family’s interests as a unit.\textsuperscript{114}

The Napoleon code reads as follows:

The Napoleon code […] is especially based on the rights and authority of the husband as chief of the family, and on the respect, which has to be paid to him by his wife and children. The husband is considered to be the best able to manage the family fortunes, and that respect and in his capacity as head of the family, the rights given to him sometimes override those of his wife and children.\textsuperscript{115}

The modern scholars sought to relate the new concepts laid out in the code to the Islamic \textit{Shari’a}, through the ideas of obedience and superiority. This code was later adopted and translated into law directly affecting the right of women to divorce, as will be seen later in detail.\textsuperscript{116} But its important to note here that this Code was the beginning of the requirement of the husbands consent to divorce. It was also the root of requiring the wife to prove harm if she wanted a divorce without the consent of the husband. Moreover, in order for the wife to prove harm, she had to be confined to a list of behaviors by the husband to be granted a divorce. For example, the wife has to prove bodily harm, or that her husband was impotent and in that case the divorce was not even granted immediately, a period of a year had to be given for the husband to cure himself or provide proof that her husband has not been supporting her, which is

\textsuperscript{112} Id at 112.
\textsuperscript{113} Id at 192.
\textsuperscript{114} Id at 189.
\textsuperscript{115} Id at 112.
\textsuperscript{116} Id at 112.
difficult to prove.\textsuperscript{117} All of this is far from the divorce rights the women enjoyed before the introduction of these patriarchal laws.

Another example of the damaging effect of the new patriarchal law is the guardianship laws in Egypt. Under the new modern laws, the mother has no right to guardianship over the person or property, yet the father or grandfather can select her as a trustee.\textsuperscript{118} This is contrary to the pre modern laws, whereby the \textit{qadi} including the Hanafy \textit{qadis} would always grant the mother the guardianship over her children and their property if she so wished. Following the modernization, even if the mother was granted the right of guardianship over life and property, a male guardian has to be appointed and has authority over her actions.\textsuperscript{119}

Patriarchy even took a greater form than just the husband in the household. In 1974 a mother sued for an extension of the custody of her daughter until the daughter got married. This is valid under the \textit{Maliky madhab}, which is not the \textit{madhab} applied in Egypt. The \textit{Hanafy madhab} is the one applied in Egypt, which mandates that girls should be under the father’s guardianship from the age of twelve. The plaintiff based the argument on the unconstitutionality of the law using only the \textit{Hanafy madhab} when the constitution didn’t specify a certain \textit{madhab} to be applied. The case was dismissed by the judge claiming that the \textit{Mushar’} or law drafter chose the \textit{Hanafy} law to be applied in Egypt and since he is the guardian of the state, his authority cannot be questioned.\textsuperscript{120}

Another example of the influence of the Napoleon Code and its patriarchal philosophy is found in the citizenship laws, which entailed the denial of the female citizen her right to pass her nationality to her children, unlike her male counterpart.\textsuperscript{121} This law has since been abolished in Egypt, but only in the year 2004.

There are thousands of court cases from the eighteenth and the nineteenth century that were not used as a reference in the codification process or even later made accessible

\begin{flushleft}
\textsuperscript{117} \textit{Id} at 112.
\textsuperscript{118} \textit{Id} at 113.
\textsuperscript{119} \textit{Id}.
\textsuperscript{120} \textit{Id}.
\textsuperscript{121} SONBOL, \textit{supra} note 2, at 190.
\end{flushleft}
to the judges for reference. The judges themselves were trained using different procedures and sources, which was logical since the law itself was completely different.

Sticking to the same example of the marriage contract, the striking difference between the pre-and the post modernization marriage contracts is that the former was open to the inclusion of the conditions, such as the wife’s refusal of the husband’s taking another wife, or the husband stating that the wife can not leave the house without his permission. The marriage contract deteriorated over time. In the third year of Hijra the contracts showed great flexibility in the conditions and the demands of women. While from the Ottoman rule period and the introduction of the patriarchal codes that took place at the beginning of the modernization. The contracts showed rigidity in their stipulated conditions.

Another example of the great difference between Shari’a law and the modern personal status law is the concept of obedience; the original concept of obedience revolves around the husband providing for his wife, and the wife in return being obedient to him. In pre-modern Shari’a it as a negotiating matter not in absolute terms. Pre modernization, the obedience meant the husband would ask his wife not to leave the house without his permission: The wife had a choice of either abiding by her husband’s wishes or getting out of the marriage. It was only in the modernization era when the concept of obedience developed into full obedience to the husband in addition to what is called the house of obedience. In the 1920, the state, as part of its new responsibility in protecting the family, had jurisdiction to apprehend the wife where she refused to return to the marital house. It was shocking to learn that the full obedience, and the house of obedience never existed in the Islamic world before the modernization era. In fact, the origin of this law is the Victorian philosophy and values. The law existed in Great Britain until the twentieth century under the principle of the covertures, which allowed the husband to lock up his wife to insure the marital

122 Id at 190.
123 Id at 192.
124 Id at 196.
relationship. This new form of obedience was not only applied to Muslim women, but Christian women as well in the law 25 of the year 1920, amended in the years 1929, 1979, 1985.

Another example shows that modern laws have been influenced by societal change and the modernization era and the adoption of the European codes, and in some instances not even influenced by the Islamic Shari’a.

B. Divorce and Child Custody

The legislation governing child custody and divorce has been chosen as part of the thesis to demonstrate that legislation continued to evolve. From the nineteenth century up until the attempts at modernizing legislation. This evolution has sometimes been influenced by the Islamic Shari’a, and at other times influenced by international concepts or societal needs. The difference is the players influencing the change and the factors they used to form these changes. To elaborate, the state as a player and an influencer had little to do with the legislation applied in courts in the nineteenth century; major influencers in molding legislation were culture and traditions. This is as opposed to the changes in the pre-modern era, when the state was the sole manipulator of legislation.

1. Child Custody

125 Id. at 197.
126 Id.
127 Id at 4.
128 Id at 201.
129 Id at 202.
The child custody legislation during the Ottoman rule and its application in courts, as in other legislations, was unique in its flexibility. Yet in no point in time did the courts apply any code using any framework other than the Islamic Shari‘a law. This unique combination of using the Shari‘a law framework and being flexible at the same time, led to different laws being applied depending on the time, place and ‘Urf.

To further illustrate, during the Ottoman rule, the public could pick and choose the madhab they wished to apply to their dispute. Certain patterns could be detected from this method. Despite the Hanafy being the official madhab of the Ottoman Empire, the Egyptian public, both in lower and Upper Egypt, preferred the Maliky and the Shaf’i madhaheb. Yet in 1897, after a round of legal reforms, the Hanafy madhab was established as the main source of Islamic laws in Egypt.

Under the Ottoman rule the place and the ‘Urf played a major role and influence in the Shari‘a court. As mentioned above, the public was free to choose from the madhab, and hence the Shari‘a courts were still applying the Malaky and Shaf‘i madaheb. This diverse legal system allowed the judges more freedom in the interpretation of the madaheb and in creatively finding solutions to issues that might not be covered by the Hanafy madhab. The ‘Urf also affected the judges in another sense. The judges were trained and educated by Al Azhar or similar schools like the Salihyya al-Nijmiyya and certified to provide the public with Fatway. It was quite common for those judges to reside over courts in their native areas were they were familiar with the ‘Urf and customs of the people.

2. Child custody in contemporary Egypt

This section will explore state intervention and how it affects the law, in addition to the adoption of new concepts that are totally foreign to the Shari‘a.

131 Id at 237.
132 Id at 237.
133 Id at 237.
134 Id at 237.
135 Id at 256.
136 Id at 238.
Issues relating to the custody and guardianship of minors occur during or after the dissolution of marriage. In Islamic law the custody and guardianship of minors is separated into the physical custody of minors and guardianship over their property.\(^{137}\) In broad terms, the guardianship of children resides with the father from birth to maturity. Yet, after the dissolution of marriage, and the separation of parents, the physical custody, or the *hadana*, is granted to the mother.\(^{138}\) If for any reason the mother is not capable of caring for the child during the *hadana*, the custody is transferred first to the maternal grandmother, then followed by the paternal side of the family starting with the paternal grandmother and so on.\(^{139}\)

The *hadina* has to enjoy certain basic qualities to qualify. She has to be sane and capable of caring for the child. Yet in the event the *hadina* remarried to a stranger, someone not related to the child and whom the child could marry. during the years of the *hadana*, custody is automatically transferred to the next in line.\(^{140}\)

Basing laws on the Hanafy doctrine is a tool by the state to establish its hegemony on the family and gender relations.\(^{141}\) According to the Hanafy doctrine, the age the *hadana* ends is when boys turn seven and the girls turn nine. Then the custody is transferred to the father.\(^{142}\) The Shaf’y and the Hanbaly share the same view, yet the Maliky only shared their age limit when it came to boys as for girls he extended the custody till marriage.\(^{143}\) This age limit has changed though subsequent law 20 of the year 1929 which stipulates, “that a divorced mother is entitled to custody of a child until the age of 10 in the case of a son and until the age of twelve in the case of a daughter, but the judge may extend custody to fifteen years for a son and until marriage for a daughter”.\(^{144}\) This was the condition that the judge would deem the prolongation of the *hadana* period, in the best interest of the child.\(^{145}\)

---

137 RON SHAHAM, FAMILY AND THE COURTS IN MODERN EGYPT, 178, Koninklijke Brill, Leiden, the Netherlands, edited by Ruud Peters and Bernard Weiss, 3 (1997).
138 *Id* at 178.
139 *Id*.
140 *Id*.
141 SONBOL, *supra* note 129, at 252.
142 *Id* at 179.
143 MOUSSA, *supra* note 86, at 187.
In 1985, feminists were able to claim a little victory for themselves when they succeeded in incorporating the *Maliky* provisions in the law 100 of the year 1985, extending the *hadana* age from nine to ten for boys, and twelve years of age for girls; this is while the mother receives a custody fee from the father. The judge in this case would have discretion to extend the *hadana* for the boys till the age of fifteen and the girls till marriage.\(^{146}\) Article 20 of the law 25 of the year 1929, also amended by law no 100 of the year 1985 provided both parents with the right to visit their children. The court has the right to intervene in case the parents do not agree on a frequency to meet or on a venue. This law is in perfect conformity with Article 9 of the Convention on the Rights of the Child, which stipulates the importance of the courts intervention to maintain the child’s relationship with the child’s parents except if it is contrary to the child’s best interest.\(^{147}\)

Yet, law 100 of the year 1985 differentiated between the age by which the minor boy and minor girl’s custody would be transferred to the father. And Based on this discrimination in March 2005 Article 20 of the law was amended to equate both genders. The *hadana* hence was extended for both genders till the age of fifteen. The new law also canceled the automatic transfer of custody to the father; instead the judge would have to consider the preferences of the children.\(^{148}\) Furthermore, Article 70 of the law no 1 of the year 2000, allows the public prosecutor to intervene in disputes concerning the custody until the courts ruling resolves the dispute.\(^{149}\)

The marriage of minors in custody is one of the issues that has evolved over time and, whose practice has drastically changed.\(^{150}\) *Welayet el ijab*, provided the guardian with the power to marry his minor children, girls and boys at any age.\(^{151}\) The *madhaheb* were different in granting marriage guardianship over the minors: *Shaf‘y* and Hanafy school extended it to the grandfather, the *Hanafy* school to the brother, and the *Maliky* school to the *Kafil*. Yet, the marriage contracts arranged by the father

---

146 MOUSSA, *supra* note at 86, at 187.
147 *Id* at 187.
148 MOUSSA, *supra* note at 86, at 188.
149 *Id* at 188.
150 SONBOL, *supra* note 129, at 239.
151 *Id* at 241.
of his minor children, were not to be contested in courts as opposed to the marriage contracts arranged by other guardians.\textsuperscript{152}

During the personal status law reforms that took place in the twentieth century particularly in the year 1931, raising the age of marriage by law was hailed by feminists as a great success. Before this amendment, the guardians were able to marry minors at any age. The law required a minimum marriage age of sixteen for girls and eighteen for boys.\textsuperscript{153}

The reforms that took place in the twentieth century were assumed to have been based on the Hanafy madhab, the predominant madhab in Egypt at the time.\textsuperscript{154} But different madhaheb were predominant in different areas of the country before the reforms of the 1880. In the 1880, a committee selected by the state was given permission to choose from the Hanafy madhab the most acceptable interpretation. In addition, they were also allowed to search for other interpretations in other madhaheb for issues not included in the Hanafy madhab.\textsuperscript{155} Hence the laws that were applied in the twentieth century were selective laws. Before the reforms, different laws were applied to different parts of the country; and 'Urf was the factor that determined which law should be applied where.\textsuperscript{156}

3. Best interest of the child

There were more amendments to the 1929 law. Law no 1 of the year 2000 and the year 2005, the law equated treatment between genders. The law stated that both girls and boys should stay in the hadina’s custody to the age of fifteen. What is special about this law is the cancellation of the automatic transfer of minors to their father, and the judge’s obligation to question the minor’s preference as to whom she or he

\textsuperscript{152} \textit{Id} at 241.  
\textsuperscript{153} \textit{Id} at 255.  
\textsuperscript{154} \textit{Id} at 256.  
\textsuperscript{155} \textit{Id}.  
\textsuperscript{156} \textit{Id}.
would like to live with. The significance of this amendment lies in the legislators’ consideration of the best interest of the child.

The legislators’ understanding of the concept has evolved through time. Before the previously mentioned amendments, the best interest of the child meant the child spent his first years with the mother then transferred to the father. Yet, after the amendments the concept was upheld through granting the mother the custody till the age of fifteen then involving the children in the custody decision. Even though the concept enjoys international consensus, it is highly subjective nature could lead to different outcomes depending on the cultural context and therefore different interpretations. This is demonstrated below with three different custody cases that showcase the impact of the progression of the law on women’s rights to custody.

Case No 19 of the year 1985:

There have been several custody battles concerning by the best interest of the child concept. In case No 19 of the year 1985, an Egyptian mother was fighting for the custody of her daughters. The father wished to have the custody of their two girls transferred to him after the mother married a “stranger”; under law this would disqualify the hadana of the mother. The judge dismissed the case basing his decision on the best interests of the children stating that the father travels for work which is a life style not in the girls’ best interest. The judge also commented on the mother’s marriage to a stranger being the lesser harm than the instability of the father’s lifestyle.

In Case No. 210 of the year 2004, before the 2005 amendments stated above, a father was suing his ex-wife for the custody of their two boys. The judge ruled that the mother should hand over the custody of her two boys to their father, and she was ordered to pay for all court expenses including the lawyers’.

157 MOUSSA, supra note 86, at 188.
158 Id at 188.
159 Id at 189.
160 Id.
161 Custody ruling, session 19 march 1985.
The judge based his decision as follows: Since both the children reached the age of 17 and 13 respectively, and as they have been in their mother’s custody and no longer in need of her care; and as it is in their best interest to be in their father’s custody, so that he can raise and take care of them. The first paragraph of law No 100, Article No 20 from Law No 25 of the year 1929, amended by law No 100 of the year 1985 that states that the “mother’s right to custody ends as the son reaches the age of 10 and as the daughter reaches the age of 12, and it is allowed for the judge, after these ages, to keep the son till the age of 15 and the daughter until she gets married, without custody fees.\(^{162}\)

The following case was adjudicated after the amendment of the year 2005, case no 211 of the year 2006: In this case the mother was suing for the custody of her children. As apparent from the court documents, the father had the physical custody of both children and prevented the mother from her lawful physical custody. The judge ruled that the children be given to the mother, and the father should pay for all administrative and lawyers’ fees. The judge based his ruling on; law No 100 Article No 20 from Law No 25 of the year 1929, which had its first part replaced by Article No 1 of the law No 4 of the year 2005, which stipulates that the mother’s custody ends when both son and daughter reach the age of 15; and it is allowed for the judge, after these ages, to keep the son till the age of maturity, and the daughter until she gets married without custody fees.\(^{163}\)

### 4. Divorce

In the pre modern era, the unequal right to divorce was entrenched in marriage contracts. The man could unilaterally divorce his wife at will. Yet, in order for the wife to get a divorce she had to establish without a doubt to the judge her grounds for divorce. These grounds ranged from impotence, to violence, to non-support.\(^{164}\) If the wife was able to prove the above, and was granted the divorce by court it would be

---

162 Shobra Court for Family Affairs (district 54) – 29 Dec 2004 (case No 210 – year 2004).
164 SONBOL, supra note 2, at 195.
called a “judicial” divorce. There was also the divorce by delegation, where by the husband delegated the right to divorce to his wife. This option was rarely used as it carried a social stigma, and it was also conditioned on the husband’s approval.\textsuperscript{165} The third course of action was divorce by \textit{khul’}.\textsuperscript{166} This was not even an option in Egyptian legislation till the year 2000.

The Egyptian state has been unwilling to change the divorce legislation for the longest time.\textsuperscript{167} And it has impacted women of all classes. For example, in order for women to obtain a judicial divorce \textit{“tatliq”}, she has to establish harm from her husband’s disappearance or imprisonment to the judge through evidence and at least two witnesses. And, even if the woman succeeds at providing the above, it would still take her eight to ten years to obtain the divorce not to mention the bureaucratic hassle of the court system and facing non-sympathetic judges which is both exhausting and costly.\textsuperscript{168}

In 1899, several feminists legal reformers and writers urged the state to intervene to help resolve the divorce epidemic in Egypt. The suggestion was for the state to limit the man’s right to unilaterally divorce his wife, and, only permit the man to divorce his wife before a judge. The Egyptian Feminists Union were the most vocal regarding the issue, and campaigned vigorously in the 1920s and 1930s None of the suggestions were legislated. Finally, the legislator responded with law no 25 of the year 1929. The legislator stated in the memorandum that they aimed at preserving the family life in Egypt through curbing the man’s unilateral right to divorce. The legislator also added that men where abusing their power contrary to the Islamic prescriptions of divorce being the last resort.\textsuperscript{169}

Law no 25 of the year 1929 declared the divorce invalid in certain circumstances such as intoxication, being under duress, or forcing the wife or a third party to commit a certain act, or refrain from committing a certain act. If a man utters several oaths at

\textsuperscript{165} MOUSSA, \textit{supra} note 86, at 192.
\textsuperscript{166} \textit{Id} at 88.
\textsuperscript{168} \textit{Id} at 149.
\textsuperscript{169} \textit{Id}. at 86.
once, it would only be counted as one oath. In certain conditions the divorce would be irrevocable; in the event it took place before consummation, or the divorce oath was uttered on three separate occasion. Or the divorce took place in exchange for money.\(^{170}\)

To legislate the law into limiting unilateral divorce the legislator had to bypass the Hanafy madhab by combining several principles from other madhaheb. They adopted minority legal opinions that were stricter of a man’s right to unilateral divorce.\(^{171}\) The second attempt at reform came in 1979 law no 44. It dealt with polygamy and established it as grounds for divorce. The law stipulates that a husband marrying another wife without the first wife’s consent could be considered as harming the first wife, and could be granted an automatic divorce by the judge, provided she so requested within a year from the date she first knew about the marriage.\(^{172}\) The law declared that polygamy equates harm. And if the wife didn’t consent to the husband’s marriage, she could get a divorce within a year of her knowledge of his second marriage.\(^{173}\)

The law also tackled the issue of the woman’s knowledge of the divorce. Divorce under Sunni law is an “extra judicial-divorce” Meaning there is no need for a court’s intervention or any official documentation. The law required the man to document his divorce, yet it did not automatically give course to the consequences of the divorce except from the time of the wife’s knowledge of the divorce. The wife is to be considered notified if she attended the notification of the divorce, or was informed by a notification to her place of residence.\(^{174}\) The third set of reforms in law 44 was mediation by court through which the court attempts to reconcile the couple. If the court failed within six months, the court would rule for divorce.\(^{175}\)

\(^{170}\) Id at 87.
\(^{171}\) Id at 86.
\(^{172}\) ELISA GIUNCHI, Adjudication Family Law in Muslim Courts 111.
\(^{173}\) LYNN WELCHMAN, EGYPT, NEW DEAL ON DIVORCE, 6, 2004. available at https://core.ac.uk.
\(^{174}\) Id at 6.
\(^{175}\) Id at 7.
This law was challenged immediately, and was deemed unconstitutional by the Supreme Constitutional Court in 1985. In same year law 100 of 1985 was discussed by parliament. Law no 100 was an amended version of its predecessor. The law reiterated the knowledge of the wife, and provided a limit of thirty days for the wife to be notified, and the consequence of the divorce to take place. Or, in case the husband hid the divorce from the wife, the consequences would take effect from the time of her knowledge.\footnote{176}

The polygamy section of the law, had to be replaced by the requirement of the wife’s establishing the harm that affected her from the husband’s marriage.\footnote{177} As for the third and last section of the law, the mediation between the couple was left unchanged.\footnote{178}

This failure taught women a valuable lesson. Women’s rights groups learned that legal reform had to be initiated from the bottom up, rather than enforced from above, and reforms need to be a combination of a grass root mobilization and governmental support. It also emphasized the importance of having a religious framework for their future reforms.\footnote{179} Rights groups since then have focused on two major projects: the Marriage contract and \textit{khul’} law.\footnote{180}

\textit{5.Khul’ law}

\textbf{a. Khul’ in the Ottoman era}

\textit{Khul’} divorce derives its legitimacy from the \textit{Sunnah}. The wife of Thabbit ibn qays ibn shammaas came to the Prophet Muhammad (peace be upon him) and said “oh messenger of Allah, I do not find any fault with Thabbit in his character or his religious commitment, but I do not want to commit any act of Kufr after becoming a Muslim.” The Prophet then asked her, will you give back his garden? The garden was
given to her as a dowry- and she replied yes. The Prophet then said to Thabbit; “take your garden and divorce her.” This was narrated by Al-Bukhaari,5273.\textsuperscript{181}

There is also verse 1:229 of the \textit{Quran} that stipulates:

And it is not lawful for you that ye take from women aught of that which ye have given them; except (in the case) when both fear that they may not be able to keep within the limits (imposed by) Allah. And if ye fear that they may not be able to keep the limits of Allah, in the case it is no sin for wither of them if the woman ransom herself.\textsuperscript{182}

During the Ottoman rule, most of the divorce cases that were brought to the \textit{Qadi} were \textit{khul’} divorces, they were cases that involved a wife that wants to be granted a divorce without the consent of her husband.\textsuperscript{183} This type of divorce is different than \textit{talaq}, where the wife has to establish harm to be granted divorce, and she is not required to relinquish her financial rights. During the Ottoman era almost all of the \textit{khul’} divorce cases were ruled in favor of the wife.\textsuperscript{184}

As will be seen later the \textit{khul’} divorce was never enacted in modern Egypt (19\textsuperscript{th} century). It was never included in any amendment to the personal status law till the year 2000. The state’s intervention and conscious decision not to include this law in Egypt, despite the fact that the court records that date back to the Ottoman era, clearly indicate and confirm women have been able to divorce themselves, is a clear example of how the personal status laws have strayed over the years from its original form. Affected in this case by the state’s hegemony and control of the family, is the inequality towards women through consciously depriving them of the right to initiate divorce, the same as men.

In 2000, the \textit{khul’} law was adopted by the parliament. As Law no 1 of the year 2000, Article 20 of the law granted women the right to an irrevocable divorce from the husband in exchange for the dower, and the forfeiting all of her financial rights.\textsuperscript{185} Under this law the wife had to only express her desire to be divorced from her husband without proving harm. The husband’s consent to the divorce is irrelevant to

\textsuperscript{182} MOUSSA, supra note 86, at 217.
\textsuperscript{183} SONBOL, supra note 144, at 105.
\textsuperscript{184} Id.
\textsuperscript{185} MOUSSA, supra note 86, at 194.
the procedures, yet the court mandates a reconciliation session that would not exceed three months, and if the couple had children then they would have to go through a second round of reconciliation that is thirty to sixty days apart from the first round.\footnote{186 Id at 195.}

It is safe to claim that enacting this law did not emanate from the need to resort to the \textit{Shari’a}; Yet there was another need to promulgate new conditions and procedures to the litigation in matters of personal status law.\footnote{187 Id at 214.} The number of women that wait for years for a divorce ruling, and those who have failed in obtaining a divorce ruling were the main motivation for the parliament to enact such a law.\footnote{188 Id at 214.}

Law no 1 of the year 2000 is a perfect example of how the personal status law has been affected by patriarchy and the shift from religion emphasized in the objection to the law. With clear references in the \textit{Sunnah} and \textit{Quran}, in addition to preexisting case law from the Ottoman era, it still took the parliament five sessions of deliberations over the course of nine years of debates to enact the law. This provision was met by religious dissent from both the parliament members and the religious figures in Egypt.\footnote{189 Id at 221.} It also amplifies the patriarchal attitude the Egyptian society has towards personal status law.\footnote{190 Id at 225.} Some of the parliament members objected to the law based on its violation of the husband’s guardianship over women, claiming that it is a God given right to man provided in the \textit{Shari’a}.\footnote{191 Id at 214.}

Some scholars in Al-Azhar and the Islamic Research Academy, a state sponsored research academy, objected to a certain aspect of Article 20 of the law. And in spite of their objection, the grand mufti declared the law to be in conformity with the \textit{Shari’a} principles.\footnote{192 Id at 214.} The debate that took place regarding the provision was mainly based on whether or not the law was in conformity with the four \textit{Sunni} jurisprudential schools. The \textit{Sunni} schools unanimously agreed that the husband had to consent to the \textit{Khul’} procedures, as this form of divorce was considered a right of the husband not the

\begin{center}
\footnotesize{\textsuperscript{186} Id at 195.  \\
\footnotesuperscript{187} Id at 214.  \\
\footnotesuperscript{188} Id at 214.  \\
\footnotesuperscript{189} Id at 221.  \\
\footnotesuperscript{190} Id at 225.  \\
\footnotesuperscript{191} Id at 214.}
\end{center}
wife.193 Even after the approval of the grand mufti, the law was still being contested. Hence, the government had to amend the law, and introduce a mediation period, for the purpose of attempting to save the marriage, before granting the woman the divorce,194 this was in addition to abandoning other provisions in the law, in a form of quid pro quo, for the adoption of the *Khul’* divorce.195
Conclusion

This thesis has showcased that, contrary to Egypt's formal educational messages, and in contrast to some of the scholars’ work, Shari‘a was far from a stagnant and isolated source of laws. Since the beginning of Islamic legislation, the Qadis were often impacted by the changes in their community and society; 'Urf played a major role in molding the laws. In addition, Qadis had discretion in choosing from a wide range of jurisprudence. The sovereign intervention created “Seyasa Shariyya”; a secular tool that aimed at helping them pass laws. Later it became a full-fledged system that was infused with the Shari‘a law complementing it and never replacing it. This is imperative to reply to those claiming that Shari‘a has been applied exclusively; and needs to be applied exclusively. Gradually, and with the exposure to the colonial powers, even the personal status laws were altered and changed, sometimes in accordance with Shari‘a and sometimes away from it. This paper also showcased the patriarchal impact of European laws namely the Napoleon Code had on the personal status law, and how negatively it affected women’s rights and gender relations.

Questioning the personal status law and its origins is essential for the further development of the personal status law and women’s rights. It is essential to understand, that Shari‘a was never solely adhered to. It became apparent that personal status laws, through the development of the divorce and the child custody legislation, were affected by the same factors that influenced the Shari‘a. ‘Urf, societal changes including European codes and societal needs such as soaring divorce rates, affected personal status issues in the pre modern era, and drafting personal status laws in the post modern era. Thus, the Egyptian personal status law is a conglomerate of secular tools, social needs and changes infused with religion.