Fall 2-10-2022

The Immutability of Personal Status Law

Leena Soliman
leenasolaiman@aucegypt.edu

The American University in Cairo

School of Global Affairs and Public Policy

THE IMMUTABILITY OF PERSONAL STATUS LAW

A Thesis Submitted by

Leena Soliman

To the Department of Law

Spring 2022

in partial fulfillment of the requirements for the degree of

LL.M. Degree in International and Comparative Law

The American University in Cairo

School of Global Affairs and Public Policy

THE IMMUTABILITY OF PERSONAL STATUS LAW

A Thesis Submitted by

Leena Soliman

to the Department of Law

Spring 2022

in partial fulfillment of the requirements for the degree of

Master of Laws (LLM) Degree in International and Comparative Law

has been approved by

Jason Beckett (Supervisor)
Assistant Professor
Law Department
The American University in Cairo _____

Thomas Skouteris (First Reader)
Associate Professor
Law Department
The American University in Cairo _____

Hani Sayed (Second Reader)
Associate Professor
Law Department
The American University in Cairo

_____

Graduate Program Director	**Date**	**School Dean**	**Date**
_____	_____	_____	_____
Thomas Skouteris		Ambassador Dean Fahmy	

ACKNOWLEDGEMENTS

First and foremost, I would like to thank my family for their never-ending support. I would never be where I am without you; my mother and father for their constant emotional care and financial support. I love you both endlessly.

To the person who helped me the most and put up with me, even when he absolutely didn't have to, Nour, I am deeply thankful for all the time you spent hearing me whine over and over and explain to you my arguments and topic, despite not having the faintest idea of what I was talking about. Thank you for bearing with me.

And lastly, I would like to thank Dr. Jason Beckett for his guidance and support. Thank you for reading a thousand draft carefully and helping me with every word, sentence and paragraph. You helped me in many ways, I would not have come along this far without your help and supervision.

The American University in Cairo

School of Global Affairs and Public Policy

Department of Law

THE IMMUTABILITY OF PERSONAL STATUS LAW

Leena Soliman

Supervised by Professor Jason Beckett

ABSTRACT

Personal Status laws in Egypt were first coded in 1920 and were slightly amended throughout time. They were based on religious texts, and hence, are treated as words and teachings of God. Thus, the amendments that were developed throughout history were a result of different interpretations. Throughout the twentieth century, personal status laws in Egypt were enacted by the Egyptian state to build marriage as a more permanent bond as intended by traditional Islamic jurisprudence. Providing women with more marital rights, including more grounds for judicial divorce, was believed to strengthen the marital bond. This paper will trace the insight of different legal domains and developments over time and how these laws are interpreted as Sharia rather than Fiqh. This thesis attempts to highlight the distinction between *Fiqh* and Sharia by addressing the application of Islamic Sharia in Egypt and the textual sharia rules and teachings on personal status matters.

TABLE OF CONTENTS

I. INTRODUCTION

The status of women in Muslim societies ignites heated debates among scholars in the fields of human rights and women's rights. Muslim family law, in particular, is often understood as having an antagonistic relationship to human rights and inhibiting progress toward gender equality. Women are treated inferior to men and consistently suppressed by law in Muslim communities in the name of Islam. Muslim societies claim that Sharia necessitates some practices which produce inequalities and discrimination within personal status law. Sharia refers to the system of Islam as developed and historically understood by Muslim scholars during the first three centuries of Islam.1

Muslims tend to believe that the legal principles and norms of Sharia derive from religious authority. In reality, however, Muslims around the world have different interpretations and practices on which their cultural and political realities are based.[2] Adopted principles are then made legally binding by the state through their enactment as law and enforcement by its courts. That Muslim communities approach and enforce Sharia principles differently is apparent in the fact that a nation's laws tend to follow the view of a specific Islamic Jurisprudence (*madhab*) or a given school and exclude the opinions of other schools or jurists.[3] Egypt, for example, under the direction of al-Azhar, draws its interpretations from the Hanafi madhab. Al-Azhar is the oldest and most renowned institution in Islamic law. The Fatimid Caliphate founded the institution in 970 CE as a center of Islamic teaching. Al-Azhar now serves as an institution from which the courts and legislators seek *fatwas* (Islamic opinions).[4]

---

1 Baderin, M. (2009). Understanding Islamic law in theory and practice. Legal Information Management, 9(3), 186-190.

2 *Id.* at 190.

3 Jackson, S. A. (1996). Islamic law and the state: the constitutional jurisprudence of Shihāb al-Dīn al-Qarāfī (Vol. 1). Brill. 108

4 Timothy, M. (1988). Colonising Egypt. Berkely-Los Angeles-Oxford. 84-85

This thesis argues that personal status law necessarily evolves based on *fiqh* rather than Sharia. While Sharia is often characterized as a concrete set of principles, personal status law actually derives a broad range of applications and interpretations of Sharia from the *madhabs*. Acknowledging the human-derived basis of the law and its ever-evolving nature provides opportunities to contextualize Sharia interpretations in different social spheres while still honoring its principles. Doing so ultimately allows Muslim communities to respond to and cope with their changing social needs.

This thesis begins by highlighting the distinction between *Fiqh* and Sharia by addressing the application of Islamic Sharia in Egypt and the textual sharia rules and teachings on personal status matters. Examining the theoretical framework of Egyptian personal status laws reveals a distinction between Egyptian Islamic jurisprudence and the divine texts. Egyptian personal status law has never been codified in a comprehensive code, making it inaccessible and difficult to understand.[5] In addition, while Sharia dictates personal status law, family court judges are also trained at secular law schools. Thus, there are consequences of turning *fiqh* into state law that judges are expected to apply without an appropriate background in Islamic *fiqh*.

In most cases, courts turn to *Mufti al-Azhar,* the foremost jurist at al-Azhar, for a decision.[6] Therefore, distinguishing between Egyptian Islamic jurisprudence and the divine texts matters because Egypt's personal status codes are vague enough to leave room for interpretation. Judges who are not trained in *fiqh* legitimize their decisions by drawing on sources such as statutory family codes, religious sources, customary norms, and court precedents.

Next, this thesis explores the historical development of Egyptian personal status law. Understanding the nature and development of Sharia is vital to addressing current issues in Muslim personal status law. Reading the principles of Sharia, drawn from

---

5 Najjar, F. M. (1988). Egypt's Laws of Personal Status. Arab Studies Quarterly, 319, 323-25

6 Haddad, Y. Y., & Esposito, J. L. (Eds.). (1997). Islam, gender, and social change. Oxford University Press.

edicts in the Quran and Sunnah, and the historical development of Egyptian personal status law together makes clear that family law is not static. Instead, it evolves. This is explained herein by the history and evolution of Sharia and its confinement in law throughout history across Islamic countries.

Furthermore, the history of personal status law shows that limiting it to Sharia is a very recent phenomenon that emerged during the colonial period of the late nineteenth and early twentieth centuries. Nevertheless, given the confinement of Sharia to personal status law after independence in the majority of Islamic countries, the relationship between the broad framework of Sharia and the limited principles of personal status law becomes problematic.

There are also risks of stagnation and distortion in upholding the normative authority of Muslim personal status law, which is based on a traditional pre-modern system. Early traditions have grown unfit for policymaking and should not be applied within the radically different legal frameworks of modern nation-states. For instance, a particular Sharia view of maintenance (*nafaqa*) for a divorced woman or a person entitled to custody of children is part of a broader system of social and legal relations. But the social and legal relations the view was developed under, are those of the jurists who first understood them expressed that legal opinion. They are now outdated. Applying that same opinion in contexts with vastly different social and legal relationships is counterproductive, not only from the perspective of today's societies but also from that of Sharia's founding scholars. The problem is compounded when there is no possibility of reviewing or reformulating jurisprudence despite substantial changes in social and legal relations. However, there is no possibility for coherent review and reformulation of such principles without exploring the origins of Sharia in historical context.

This thesis argues that these issues can only be addressed by changing the nature and content of Muslim personal status laws in Islamic countries. This change is already happening as personal status laws in most Islamic countries today are enacted in statutory form by the state rather than derived directly from traditional sources of Sharia. Also, whether a judgment is based on a selection by a judge or a statute, it is enforceable and legally binding only by the state's authority. These modern Sharia-

based laws derive power from the state rather than religious responsibility. This source of their authority represents a stark deviation from the past.

This thesis holds that it is best to recognize that this field, like other fields of law, derives its authority from the state's political will. When Sharia-derived laws are recognized as laws enforced by the state rather than divine authority, it is easier to reform the law to adapt to modern situations. Rather than claiming that the legal authority of personal status law rests on Sharia, the state should acknowledge it as a living, developing system. Acknowledging this would allow for more innovative approaches to personal status law reform. Such reforms may still be guided by Islamic principles derived from *fiqh* and *ijtihad* without being confined to traditional understandings of Sharia.

Egypt was one of the first countries to adopt the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and ratify it in 1981.[7] However, Egypt's representative to CEDAW stated that Islamic law "had already liberated (women) from any form of discrimination."[8] Thus, Egypt entered reservations concerning several articles such as Article 2, articulating the commitment to eradicate discrimination; Article 9, delineating equal citizenship rights; and Article 16, containing provisions for eradicating discrimination in marriage and the family.[9] Egypt expressed its concern with Article 16, stating that a reservation is necessary to comply with Sharia. It claimed that the provision's obligations "must be without prejudice to the Islamic Sharia provisions".[10]

This thesis also argues that acknowledging the human-derived nature of the law and the need for a more innovative approach would resolve many of the critical issues in personal status law concerned with marriage, divorce, and custody. Accepting the

---

7 Brandt, M., & Kaplan, J. A. (1995). The Tension between Women's Rights and Religious Rights: Reservations to Cedaw by Egypt, Bangladesh and Tunisia. Journal of Law and Religion, 12(1), 105–142. https://doi.org/10.2307/1051612

8 *Id.* at 118

9 *Id.*

10 *Id.*

inevitable role of human choice and interpretation in the formation of Muslim personal status law does not dictate the approach to the Quran or Sunnah of the Prophet on marriage, divorce, custody, and so forth. These ideas would enable the foundation of a new personal status law system that is based on sound social policy for present Islamic societies. It would allow for adaptable and relevant understandings of the Qur'an and Sunna. Therefore, I suggest that human agency relates to the reflection on policy rationale and the meaning of those texts in the context of seventh-century Arabia, instead of its literal application in all social settings forever.[11] While it is common to presume that Islamic law is divine, that position is, rather, a misunderstanding of the nature and importance of human agency in the creation of Islamic law.[12]

Still today, human agency should decide how to interpret those texts as social policy and articulate a purpose in the modern context. The application of Sharia as an immutable, comprehensive normative system represents a misunderstanding. Sharia was not applied this way in the pre-colonial period. Human agency played a crucial role in the interpretation of the Quran and Sunna. This is evident because these divine sources can be interpreted and applied only in the specific context of time and place. The importance of human agency is also evident in the diversity of opinion among Muslim scholars and various schools of Islamic Jurisprudence. Muslims throughout time have benefitted from a diversity of opinion and competing views that are seen as equally valid from Sharia. This is further demonstrated by an overview of the application of Sharia throughout history.

11 KHALED ABOU EL FADL, The Great Theft, Wrestling Islam From The Extremists, 30 (first edition, New York, NY, Harper San Francisco 2005) (2005).

12 *Id.* at 31

II. UNPACKING KEY CONCEPTS

A. How Islam Changed Personal Status in Arabia

In pre-Islamic Arabia, the most common marriage contracts resembled a sale where the woman was, essentially, her husband's property.[13] The wife's tribe would receive payment of her dowry upon their marriage. The wife would follow the husband to his tribe and bear his children, considered "his blood."[14] There was a strong emphasis on the fidelity and chastity of the woman, so her family would limit her freedom to ensure her reputation and the family's honor. Women were excluded from inheriting any wealth or land, as it would be transferred to another tribe. Thus, women were entirely dependent on their husbands for maintenance and support and were subject to her status as a married woman, subject to her husband's kindred. Men completely subjugated women. Before marriage, women's fathers, brothers, and close relatives remained in control of much of their lives. Then, after marriage, power was transferred to their husbands.[15] Women had no voice in initiating or terminating their marriage. Men's right to marry limitlessly also contributed to the inferior status of women.[16]

The Quran came to change the social foundation from blood kinship and tribal loyalty to the basic unity of the extended family. It came to recognize that women were part of a strong family; this recognition can be seen in reforms in marriage, divorce, and inheritance of family law.[17] The Quran intended to raise women's status and achieve a measure of equality. The Quran specified requirements for a marriage contract; for the

13 Esposito, J. L. (2001). Women in Muslim family law. Syracuse University Press. *See also*, Shaham, R. (1997). Family and the Courts in Modern Egypt: A Study Based on Decisions by the Sharī'a Courts, 1900-1955 (Vol. 3). Brill, 14.

14 Esposito, J. L. (1975). Women's Rights in Islam. Islamic Studies, 14(2), 99-114.

15 *Id.* at 114

16 *Id. See also*, Family and the Courts in Modern Egypt: A Study Based on Decisions by the Sharī'a Courts, 1900-1955 (Vol. 3). Brill, 14.

17 *Supra* note at 114

agreement to be in written form despite the custom of oral contracts, for at least two witnesses to be present at the time of the contract, etc.[18]

The verses of the Quran gradually replaced and revised tribal customs in Medina with new rules.[19] Some of the most fundamental reforms made by the Quran to customary law are to strengthen the family and improve the status of women.[20]

"In the realm of marriage, for example, the Quran commands that only the wife and not her father or other male relatives should receive the dower (*mahr*) from her husband: "And give the women [on marriage] their dower as a free gift" (IV:4). Thus, the woman becomes a legal partner to the marriage contract rather than an object for sale. In addition, unlimited polygamy was curtailed, and the number of wives limited to four. However, a final injunction stressed that if the husband did not believe that he could be equally fair to each of his wives, he should marry only one: "Marry women of your choice, two, three or four. But if ye fear that ye shall not be able to deal justly [with them] then only one" (IV:3).

In another place, the Quran continues: "Ye are never able to be fair and just as between women, even if that were your ardent desire" (IV:129).[21]

When read holistically then, the Quran prohibits polygamy. Divorce and inheritance were also examples of Quranic reforms of existing practice. Divorce reforms included creating the iddah (waiting period) of three months for an opportunity for reconciliation or until delivery before a husband can divorce his wife if she was

---

18 Masud, M. K., B. Messick and D.S. Powers (1996) Muftis, fatwas, and Islamic legal interpretation Cambridge, MA: Harvard University Press, pp. 3r 3a

19 Ḥammūdah ʿAbd al-ʿAṭī. (1970). The family structure in Islam (Doctoral dissertation, éditeur nonidentifié).https://pdfs.semanticscholar.org/a20d/66d75003ce38825bd31aa9da85b98027f26f.pdf.

20 *Id.*

21 *Id.*

pregnant. Inheritance also came to be amended by the Quran to include women in inheritance as they were excluded under the agnatic system that preceded Islam.[22]

B. What is Sharia?

The term Sharia refers to the divine sources of Islamic law, specifically the Qur'an and the *Sunnah* of Prophet Muhammad.[23] *Fiqh*, on the other hand, is the human jurisprudential aspect of Islamic law.[24] It refers to the understanding of Sharia by Muslim jurists. Therefore, it is not immutable. It is distinguished from the legal rulings of Sharia that are considered divine and immutable. *Fiqh*, as we can recognize by examining the history of Islamic law and its implementation in the next section of this thesis, is not divine and changes according to time and circumstance.[25] It is crucial to stress the distinction and the epistemological implications because *fiqh* is incorrectly equated with Sharia.[26] Therefore, the immutability of law derived from Sharia, which some Islamists claim, does not apply to *fiqh*, a juristic interpretation of Sharia. Consequently, we must distinguish between *fiqh* and Sharia sources and rules.

Fiqh texts, which are primarily patriarchal and are enforced as divine texts to invoke legal practices, result from the status of personal status law in the legal scene today.[27] Because of the literal interpretations and the restrictive understanding of the religious text in Islam, women have become victims of the abandoned flexibility and leniency of Sharia as an emancipatory force in family law.[28]

---

22 *Supra* note at 13. *See also*, Shaham, R. (1997). Family and the Courts in Modern Egypt: A Study Based on Decisions by the Sharī'a Courts, 1900-1955 (Vol. 3). Brill, 14.

23 *Supra* note 1 at 187

24 *Id.*

25 *Id.*

26 Mir-Hosseini, Z. (2009). Towards gender equality: Muslim family laws and the Shari'ah. Wanted: equality in the Muslim family, 23-64.

27 Mashhour, A. (2005). Islamic Law and Gender Equality-Could There Be a Common Ground: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt. Hum. Rts. Q. 564

28 *Supra* note 26 at 23-64.

Fiqh was established by the four schools of thought during the *Taqlid* period.[29] During this period, all the legal opinions and *Fatwas* were issued by jurists. Therefore, historians and scholars presumed Islamic law formulated during this period to be derived from the Quran, Sunnah, *ijmaa*, and *qiyas* rather than regarding *fiqh* in the understanding of the sources of Sharia.[30] This presumption enabled jurists and scholars to codify Sharia law as part of the centralization process. This codification may be considered logical because it ensures the stability and transparency of the legal system. However, the (nominal) codification of the Sharia actually resulted in the mummification of Islamic law. This codification not only compromised the flexibility that Sharia law ensured; it also closed the gate for any potential interpretation of Sharia that would be consistent with modern times.

C. What are the basic sources of Sharia?

Sharia is based on two primary sources: the Quran and the Sunnah.[31] The Quran is the principal source of Sharia and is supplemented by the Sunnah.[32] However, the prescriptions of the Quran and the Sunnah require interpretation. Many of the Hadith of the Prophet (part of the Sunnah) interpret some of the verses of the Quran. Therefore, after the death of the Prophet in 632 CE, the need for a continuing process of interpretation became more critical.[33] This resulted in the development of *ijma* (consensus) and *qiyas* (analogy) as two secondary sources in case the primary sources did not have answers for any given question or appeared to be ambiguous or inconsistent.[34]

---

29 Shalakany, A. A. (2008). Islamic legal histories. Berkeley J. Middle E. & Islamic L., 1, 1. 13

30 *Id.* at 13

31 Alarefi, A. S. (2009). Overview of Islamic law. International Criminal Law Review, 9(4), 708

32 *Id.* at 708

33 *Id.* at 709

34 Alarefi, A. S. (2009). Overview of Islamic law. International Criminal Law Review, 9(4), 709

Quran is the primary source of Sharia. It is the divine word of God that was revealed to Muhammad by the Angel Gabriel in its precise meaning and wording to verify that Muhammad is God's Messenger.[35] The Quran was revealed over a period of 22 years, ending with Prophet Muhammad's death in 632 CE.[36] The Prophet was accustomed to reading the Quran to his companions after its revelation, who would compete in reciting the Holy Quran as a book of spiritual guidance.[37] The legal verses of the Quran include 70 verses on family and inheritance, 60 verses on obligation and contracts, 30 verses on criminal law, and 20 verses on legal procedure.38 Qur'anic rules are classified to include: rules relevant to the Islamic faith, such as the belief in God, his Angels, the revealed Book, the Day of Judgement and Fate; ethical rules such as rules on the virtues every Muslim should have and deeds they should abstain from; and practical rules such as general behavior.[39]

Additionally, Quranic jurisprudence includes rules for worship, dictating daily prayers, fasting, pilgrimage, and Islamic rituals and forms of worship in general, as well as rules dictating everyday life such as business contracts and the relationship between Muslims and everyday dealings.[40] However, the Quran does not offer details explaining the rules and jurisprudence. For example, there is no mention of the sum of money in which charity is payable or the details of worship.[41] There are also no details dictating anything. The philosophy constructing Quranic legislation is that general, flexible principles are arranged to accommodate the needs of people at all times and in all places, allowing the variety of interests of nations as they develop and

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.* at 711

40 *Id.* at 711

41 *Id.*

time as it passes.[42] The Holy Quran goes into detail on only rare occasions. However, the Prophet himself supplied details during his life.[43]

The Sunnah is the second leading source of legislative rules after the Quran. The Sunnah consists of all the sayings, deeds, or settlements issued by The Prophet. It also includes all the deeds and practices he approved.[44] The Sunnah details the obligation to pay charity (*Zakat)* and perform prayer and pilgrimage. To maintain Sunnah's accuracy, scholars developed a system to recognize different categories of Hadith (Prophet's Sayings and teachings). The basic idea for understanding how to evaluate the text of Hadith is to establish whether it is correct, good, weak, or false.[45]

The third source of Sharia is i*jma* (consensus of opinion). *Ijmaa* is defined as the unanimous agreement among Muslim scholars during the period after the Prophet's death on legal judgments on a particular incident.[46] If a judgment cannot be reached through the Quranic texts or the Sunnah of the Prophet, Muslim scholars interfere using the general rulings of Islam based on *ijmaa* or *qiyas*.[47] The process of *ijmaa* happens through consultation (*shura),* which is legislated in Islam.[48] There are four principles for *ijmaa* to be reached: First, there should be several scholars at the time of the incident to ensure varied opinions. Second, all Muslim scholars have to unanimously agree on the judgment of the incident, irrespective of their nationality, race, or school of thought. Third, the *Mujahidin* (those knowledgeable in Islamic law and Sunnah) should express their points of view clearly and openly.
Fourth, *ijmaa* should be formulated only if the viewpoints are unanimously agreed upon.[49]

---

42 *Id.*

43 *Id.*

44 *Id.* at 712

45 *Id.* at 713

46 *Id.*

47 *Id.*

48 *Id.* at 714

49 *Id.* at 715

Finally, *qiyas* is the fourth primary source of Sharia; *qiyas* refers to settling between two things. It is used to establish a decision, rule, or judgment due to a specific case using the rule or judgment of another particular case.[50] *Qiyas* has four elements. The first is using the original (*asl*) as a standard. Second, the branch (*far'*) is the similar or resembling case refers to the occurrence for which a rule is sought. Third, the cause (‘*illah*) intends to provide a link between the origin and the branch. Fourth, the rule or principle of the origin, which the Quran, Sunnah, or *ijmaa* prove.[51]

D. The Islamic Schools of Thought

The major schools of Islamic thought (*mudhahib*, sing. *madhab*) emerged relatively late. The timing of their emergence shows how the Sharia we know today continued to evolve until relatively recently, as did the authoritative collection of Sunna and the development of its methodology (*fiqh).* The main surviving schools of Islamic jurisprudence emerged after the death of the Prophet (after 632 CE).[52] However, later developments and the evolution of these schools were influenced by demographic, political, and social factors. These factors led to their becoming more regionally specific. This was the case for the Shia school, and it also led to the extinction of some schools such as the al-Tabari School in the Sunni tradition.[53]

Two of the four major Sunni schools still in use today were the first to be developed and became the most geographically widespread: the Hanafi and Maliki schools. The Hanafi School was the first school of jurisprudence.54 It was founded by Imam Abu Hanifah Numan Bin Thabit, born in Iraq in 699 BE. Abu Hanifah Numan was a great non-Arab scholar who was famous for his intelligence. He belonged to a period of successors of the Prophet's companions.[55] He developed a new approach known as ‘*ra'y'* or subjective decision-making that primarily depended on Qur'an and the

---

50 *Id.* at 716

51 *Id.*

52 Nasir, J. J. (Ed.). (1990). The Islamic law of personal status. Brill Archive. 12-13

53 *Id.*

54 *Supra* note 34 at 718

55 *Id.*

Sunnah.[56] His approach was investigated using *ijma* and *qiyas*. It also followed traditions and reason. While several legal doctrines and works have been ascribed to him, Abu Hanifah himself never wrote any systematic work of jurisprudence or created a formal code.[57] Instead, his pupils transmitted his works on Jurisprudence. It enjoyed the support of the Abbasid Dynasty in its origin point, Iraq, and elsewhere in the Middle East, Northeast Africa, and Western Asia. For the Abbasids, it was a center of state power. From its origin in Iraq, it also spread to Afghanistan and later to the Indian subcontinent. Indian Muslims later brought it to East Africa. The ruling authority remained an essential characteristic of the Hanafi school until the Ottoman Empire, and Hanafi law is still predominant in Iraq, Turkey, Syria, Jordan, Sudan, Egypt, Palestine, and India.[58]

The Maliki School, meanwhile, emerged in the city of Medina on the Arabian Peninsula. It was founded by Imam Malik bin Anas, born 713 CE.[59] Imam Malik was a great scholar of Hadiths and Sunnah.[60] He constructed a code of law titled *al-Muwata* based on the legal practices of Medina. *Al-Muwata* covers several areas of Islam, ranging from rituals of prayer and fasting to the proper conduct of business relations.[61] While the legal code is supported by 2,000 traditions attributed to the Prophet, it has been criticized by scholars who question the authenticity of the Hadith. Those critical of the code claim that the work was an interpretation of Imam Malik's personal legal reasoning.[62] The Maliki school differs from the other *madhabs* in the

---

56 *Id.*

57 *Id.* at 719

58 Weiss,B. G and Green, A. H. (1987) A survey of Arab History, revised ed., Cairo: American .

University Of Cairo Press. 155. *See also*, Melchert C. - (1999) 'How Hanfaism came to originate in Kufa and traditionalism in Medina, Islamic . Law and Society 6,3:318-47. It is worth noting that alongside the Hanafi School, the Shia Jafari School is common in Iraq and Turkey, while the Shafiite School still enjoys some prominence in Palestine.

59 *Supra* note 34 at 719

60 *Id.*

61 *Id.*

62 *Id.*

sources from which it derives its rulings. The other three schools of thought derive their sources first from the Quran, then from the Sunnah, i*jma,* and *qiyas*. In contrast, the Maliki School uses the practice of the people of Medina as its source.[63] From its origin in Medina, the Maliki school of thought spread across northern Africa to Libya, Tunisia, Algeria, and Morocco, and farther south to Eritrea, Sudan, Nigeria, Gambia, Senegal, and Ghana. It also grew popular in other territories of the Arabian Peninsula, including Kuwait.[64]

A third school, the Shafiite, originated in Cairo. Its founder, Muhammad ibn Idris Al-Shafiʿi, was born in Palestine in 767 CE.[65] He migrated and lived in Cairo during the early years of his life and was a student of Malik Bin Anas. He became an expert on the Hanafi and Maliki schools.[66] Al-Shafiʿi was influenced by both Abu Hanifah and Malik Bin Anas' teachings before he founded his own school. He enclosed his writings and *fatwas* that came to be known as "The Old" (*al-Qadim)* and "The New" *(al-Jadid).* These volumes correspond to his stays in Iraq and Egypt.[67] He also authored many books, including *al-Risalah fi Usul al-Fiqh*, which greatly influenced Islamic *fiqh*. Because of the popularity of his work, al-Shafiʿi was eventually called the father of Islamic Jurisprudence.[68] The Shafiite school spread outward from Cairo with the Jafari school to Yemen and along the Indian coastline. It also spread to parts of East Africa and Southeast Asia via Arab trade routes. Today, the Shafiite school remains predominant in Sri Lanka, Indonesia, the Maldives, Singapore, and Malaysia.[69]

The fourth and final major school of thought, the Hanbali, was founded by Imam Ahmed Bin Hanbal, born 780 CE in Baghdad. He was the student of Imam As-Shafiʿi

---

63 *Id.*

64 *Supra* at 22

65 *Supra* note 34 at 719

66 *Id.* at 720

67 *Id.*

68 *Id.*

69 Esposito and Barry Rubin (2009), Guide to Islamist Movements, Volume 2, ME Sharpe, ISBN 978-0-7656-1747-7

and he directed his efforts towards studying the Sunnah. Imam Ahmed Bin Hanbal was considered to be more of a traditionalist than a jurist as his works resemble a collection of tradition rather than legal opinion.[70] He created *al-Musnad*, a collection of 30,000 traditions. He based his teachings on the Quran and Sunnah. He accepted *ijma and qiyas* only where necessity dictated it.[71] The Hanbali school has always been the least popular. It came close to extinction before it was revived by Ibn Abdel Wahab's puritanical movement in Arabia during the late eighteenth century. It remains confined to the region until today.[72]

The dynamics and timing of the emergence of each school influenced their views on Sharia. The Hanafi and Malaki *madhabs* emphasized pre-existing practices. Meanwhile, the Shafiite and the Hanbali schools drew on their views of the theories of Sharia. Differences emerged through the schools of thought's intellectual contexts and the period in which each school emerged, developed, and was influenced by the politics and rulers of the time. The schools also influenced each other and were shaped by social and economic experiences of their times.[73] While the schools depended on the text of Quran and Sunnah for the source of its knowledge, they differed in their use of *ijma* (consensus) and *qiyas* (analogy) in resolving legal disputes.[74] It is worth noting that there remain great differences among the four major schools of thought and the way that societies interpret or apply them today.[75] However, there are no differing opinions among the four schools of thought regarding the basic principles of Islam..[76]

---

70 *Supra* note 34 at 721

71 *Id.*

72 *Supra* note 69 at 310. Arabia is primarly Saudi Arabia, Qatar, UAE, Bahrain, Syria, Oman, Yemen, Iraq and Jordan. It's important to note that while Hanbali School of Thought might not be the dominant school of thought of these countries, its followers are predominantly found in the mentioned countries.

73 *Supra* note 34 at 718

74 *Id.*

75 *Id.*

76 *Id.*

Consensus (*ijmaa*) is a principle that acted as a factor, reflecting the central content of all Sunni schools through the principle of independent reasoning (*ijtihad*). The principle that the consensus of all schools of thought must conform to create an authoritative law means that, if there is more than one opinion on a specific issue, all schools must be accepted as legitimate to produce a rule (*hukm*).[77] While this principle reflects the flexibility and adaptability of the rules of Sharia, a strong emphasis on consensus resulted in a negative consequence: the notion that the possibility of ijtihad no longer exists by the tenth century as Sharia was believed to have been fully elaborated by the time. The decline and breakdown of Islamic societies' political and social institutions during this time was probably also an explanation for the necessity of this rigidity.[78]

77 Weiss, B. (1998) The Spirit of Islamic Law, Athens: University of Georgia Press.122 – 127 and Kamali, M. H. (1991) Principles of Islamic Jurisprudence, Cambridge: Islamic Text Society. 168 – 172

78 *Supra* note 29

III. TRUE SHARIA IS NOT IMMUTABLE

Analyzing Sharia's True Principles

There have been more recent developments and adaptations of Sharia through legal opinions (*fatwas*) throughout time. However, judicial developments occurred within an already established framework. So, while judicial developments worked around newly issued *fatwas*, there has not been any real change to Sharia's basic structure. Sharia has remained "immutable" over many decades, and its content has continued to reflect the political, economic, and social conditions of the eighth to tenth centuries.[79] Thus, adaptions of Sharia grew more and more detached from modern realities and societal and state developments. [80]

Whereas Islamic law had been applied throughout history via *fiqh*, based on human reasoning and interpretations of Islamic texts, the need for a rule-based legal system led to Sharia's rigidification. This rigidification meant that Sharia lost its essence as a lenient and flexible method of solving disputes. Societies' dual commitment to embracing some form of Sharia, particularly in private matters, and creating a coherent legal system, created an immutable form of Muslim personal status law. This compromise, however, produced a distortion in the true principles of Sharia.

The historical background of the development of Sharia shows that modern interpretations of Sharia as immutable, comprehensive, and normative are a distortion of its true principles. Sharia has traditionally been much more lenient and flexible. Today's understanding of Sharia as immutable limits is potential for further reform.

This preliminary analysis raises several further questions concerning the legitimacy and meaning of Sharia and its application in today's system: Has Sharia been excised from its founding principles, stripped of its ability to evolve, and imprisoned within a stagnant Egyptian legal system? How do religious believers reconcile their belief in the inviolability and unity of religious legal matters with the practices of the state legal system? Within this system, legislation is done via

---

[79] *Supra* note 85 394 - 395

[80] *Id.*

statutory enactment, and the law is applied in courts. These questions are explored further in this section, taking Egypt as a case study.

Even though the term Islamic law is mainly used to refer to the legal aspects of Sharia, it is also essential to note that Muslims tend to perceive that the legal quality of those norms and principles is based on their assumed religious authority.[81] However, Sharia principles are legally binding via the state and state actors, who enforce and implement them. Accordingly, Muslim personal status laws governing family relations, marriage, and divorce, based on Sharia, are known as *Shariat al ahwal al-shakhseya*, literally personal status laws, in Arabic. Confining Sharia to family law matters is a very recent phenomenon that emerged during the colonial period of the late nineteenth and early twentieth centuries.

Maintaining the normative authority of Islamic family law based on a pre-modern system unfamiliar to policymakers, legal professionals, and the general public is problematic and brings risks of distortion and stagnation.[82] Applying Islamic Family Law within a radically different legal and constitutional framework of the modern nation-state can be counterproductive.[83]

As previously noted, many schools of Islamic jurisprudence developed after Prophet Muhammad's death. General principles also began to emerge during the first century of Islam through the practices of community governors, judges, and leaders.[84] The views of leading scholars also shaped general principles.[85] As noted earlier, the timing of the emergence of each school has influenced the content and orientation of their views on Sharia.[86] Gradually, all possibilities of Ijtihad slowed down by the tenth century because Sharia had been exhaustively interpreted elaborated. Sharia's developments and adaptations through *fatwas* and judicial developments occurred within an already established broader methodology and principles. Specialists continue to question the scope of belief in the immutability of family law over the last

[81] *Supra* note 34.

[82] *Id.*

[83] *Id.*

[84] *Supra* note 27 at 567

[85] *Id.*

[86] *Id.*

thousand years and refine our knowledge of how the system worked at different stages of history.[87]

However, the core content of the existing "Sharia," or, to be more accurate, Muslim family law in practice, continues to reflect the social, political, and economic conditions of the eighth to tenth centuries. Hence, the legal system continues to grow away from the developments and realities of our state and society. Muslim family law became the symbol of Islamic identity. The state played an essential role in mediating the relevance of Sharia as a broader legal and political system of government and social organization in order to maintain the historical religious identity of Muslims through the application of Sharia.

Islamic societies underwent a significant transformation, as European model nation-states were created from Islamic societies as part of a global system. These changes radically transformed the political, economic, and social relations in the region. The Europeanization process in Egypt excluded family laws as those opposed to Europeanization and secularization saw family laws as the last straw of the Islamic legal system and chose to preserve Islam in the face of western-inspired secularism and feminism.[88]

Modern legal transformations began in the mid-nineteenth century as explained before. These transformations affected Islamic rules on the family, which had been articulated and developed during the pre-modern era. Such rules had grown outdated because Sharia was believed to have reached its peak of development during a much earlier period. As such, there was no possibility for further development. Codified principles of Sharia constituted the contemporary doctrine on the family in Egypt and the rest of the Arab world.[89]

Before these rules were developed, the *Taqlid* legal system prevailed in Egypt to necessitate the structural arrangement within the family to position the husband to provide for "maintenance." In contrast, the wife provides conjugal loyalty in return.

---

[87] *Supra* note at 14.

[88] *Supra* note 96 at 1043.

[89] Joseph Schacht, The Schools of Law and Later Developments of Jurisprudence, in ORIGIN AND DEVELOPMENT OF ISLAMIC LAw 57, 73 (Majid Khadduri & Herbert J. Liebesny eds., 1955).

During the secularization process, the *Taqlid* system was left to regulate only the family laws. The Taqlid was developed during the early Islamic societies in the 2nd century of the Islamic calendar (*hijri*)[90] and was deemed invalid by Muslim practice.[91]

Technically the meaning of *taqlid* is to follow the opinion or word of another without proof. In plain terms, it means to follow the opinion of a jurist without knowing the authority of their opinion, or questioning the basis of his opinion in Quran, Sunna and *Ijma (*consensus).[92] *Taqlid* was used to describe the legal system that prevailed in the Islamic world for nine hundred years, from the tenth to the nineteenth century.[93] During this period, Muslim scholars and jurists seemed to abandon the religious and legal project of *ijtihad,* the process in which Muslim jurists and scholars come up with new rules and reasonings inspired by the sources of religion.[94] Muslims and scholars tended to conform with the doctrine of one's school instead of attempting to read the word of God to reconstruct new rules.[95] During the era of Taqlid, schools of law treated the doctrines of various schools as the law of the land, displacing and overshadowing the Quran and Sunnah as the sources of the law.[96] Muftis, judges and jurists hardly attempted to rationalize the doctrine of their schools of thought to easily implement a centralized legal system.[97] Rather, they scattered the doctrines of their schools in several literature including treatises or commentaries to books as *fatwa.*[98]

Most of the legal rules comprising family legislation in Egypt were adopted from pre-modern Islamic legal systems such as Taqlid.[99] The laws and rules of Taqlid

---

[90] *Id.*

[91] Nyazee, I. A. (1983). THE SCOPE OF TAQLĪD IN ISLAMIC LAW: THE SCOPE OF TAQLĪD IN ISLAMIC LAW. Islamic Studies, 22(4), 1–29. http://www.jstor.org/stable/20847243

[92] *Id.*

[93] *Supra* note 96 at 1054

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* at 1057

[98] *Id.*

[99] *Id.* at 1051

that were amended during and after the Europeanization process trace back to the historic *Taqlid* origins in the 10th century, which gradually stripped the husband of his excess power within the family. In the years 1985, these reforms managed to limit the husband's power in marriage and restrict the interpretation of the wife's duty to obey the husband, expanding her grounds to request a divorce.[100]. Reforms, such as the Law 100 of 1985, are described as an attempt of Egyptian secular male elites to strike a compromise and mediate the demands of contemporary feminists and religious intelligentsia.[101] In other words, it was an attempt to modernize personal status law while maintaining the law's Islamic character. For example, Egyptian lawmakers attempted reform by following discrete steps and actions; they increased women's maintenance rights by including medical expenses as part of the items constituting her maintenance package, which is not consistent with the Hanafi school of thought.[102] They also reduced women's obligation to obey her husband such as being considered disobedient if she leaves her house for work without her husband's permission, which is also inconsistent with Hanafi doctrine. [103] Egyptian feminists also fought to end humiliating practices of using the police to enforce obedience as a legal duty.[104]

Legislators also granted women the power to request divorce for harm (Law 25 of 1929), and allowed women to be granted a divorce even if they fail to prove harm (Law 100 of 1985).[105] Between the years 1929 and 1985, Law No 77 of 1943 on Inheritance, Law No 71 of 1946 on Testamentary Bequests, and Law No 62 of 1976 concerning maintenance were issued.[106] Law No. 62 of 1976 established a system in which women who couldn't get their maintenance rights from court rulings could get financial support from the Nasser Social Bank. The fund was collected from ex-

[100] *Id.* at 1050

[101] *Id.*

[102] *Id.* at 1128

[103] *Id.*

[104] *Id.* at 1129

[105] *Id.*

[106] Bernard-Maugiron, N. (2010). Personal status laws in Egypt. Promotion of Women's Rights (Cairo: Federal Ministry for Economic Cooperation and Development, 4.

husbands and fathers.[107] This system could not work because the bank faced issues collecting funds from debtors. Law No 1 of 2000 and Law No 11 of 2004 stipulated that those funds will be apaid by administrative fees of registration of marriages, divorces, and births as well as allocations from the Finance Ministry and private donations.[108] It also stipulated that if the debtor is a government employee, 50 percent of his salary is automatically deducted to pay for the alimony.[109] If he is an employee or a business owner in the private sector, he is required to deposit the maintenance amount in the bank at the beginning of each month.[110]

After obtaining their independence from colonial rule, Muslim societies chose to be bound by national and international obligations of membership in a community of nation-states.[111] Despite the apparent differences in the social development and political stability levels that Islamic societies attain, they all live under constitutional regimes that require respect for minimum rights of non-discrimination and equality. Even if legal systems and national constitutions fail to acknowledge or provide these obligations in Egypt, a minimum degree of compliance is ensured by legal, political, economic, and other means of international relations. One example of this is their obligations to the CEDAW agreement, which Egypt ratified with reservations.[112] These reservations are one of the main reasons the legal system continues to apply Islamic law to personal status law.

This section has shown that Sharia was never free from state supervision, nor did it ever have an exclusive jurisdiction throughout history. The actual practice of Muslim states and societies does not support the concept of immutable principles of Shariah. The system's modern rigidity departs from the flexibility with which Sharia

---

[107] *Id.* at 6

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] Amira El Azhary Sonbol, The Genesis of Family Law; how Shari'a, Custom and Colonial Laws Influenced the Development of Personal Status Codes, 179, available at www.musawah.org/sites/default/files/Wanted-AEAS-EN-2ed.pdf.

[112] Brandt, M., & Kaplan, J. A. (1995). The Tension between Women's Rights and Religious Rights: Reservations to Cedaw by Egypt, Bangladesh and Tunisia. Journal of Law and Religion, 12(1), 105–142. https://doi.org/10.2307/1051612

was initially intended to be applied. Muslim practice in pre-colonial eras allowed parties to seek an Islamic opinion from jurists within their madhab and accept their ruling. Muslims have always sought *fatwas* to address their religious needs, including laws governing family matters. At the same time, however, modern legal systems understandably attempt to codify and unite the principles of Sharia for an easier and more consistent application.[113]

Thus, the dilemma remains whether personal status law can remain governed by Sharia, when the remaining legal system is governed by secular law. Why does family law remain unchanged, governed by Sharia? Does this mean that personal status law is "divine" law? The most common answer to these questions is that family law is explicit in detail in the Quran and Sunna, unlike other realms of law. Inheritance law and other areas of family law remain the most developed in Sharia. Thus, it is more pragmatic to reform every other aspect of law. Another answer is that governments tend to distinguish between the public and the private sphere, making the private sphere less politically significant and leaving it in the hands of religion.

[113] *Supra* note 96 at 1095

IV. THE PROBLEM OF PERSONAL STATUS LAW IN EGYPT

A. Overview of Personal Status Law in Egypt

Personal Status Law in Egypt reflects a conservative patriarchal model of Islamic society that restricts women's rights found in the Quran and Sunna. Islamic Sharia governed all aspects of law in Egypt until the 19th century. By the end of the 19th century, the legal system had been secularized in all aspects of life except the family sphere.[114] Egypt's secular commercial, criminal, and civil codes were adopted based on the French code. The only branch of law that remained unchanged was Personal Status Law, in which Hanafi jurisprudence was strictly applied. Family law remained unreformed until the Egyptian Laws of Personal Status of 1920 and 1929. The requirement of official documentation of marriage was established in the early 1900s. In 1923, marriage registrars were required to ensure that the bride and groom were of the legal age to conclude their marriage. In 1931, the Law of the Organization and Procedure of Sharia Courts prohibited courts from hearing marriage disputes where the bride and groom had not reached the legal age.

Regarding divorce, the first changes during the Ottoman Empire in 1915 came to grant women the right to divorce her husband if he deserts her or is diagnosed with a contagious disease that endangers her.[115] Later, other grounds for divorce were established by Law No. 25 of 1920 and Law No. 25 of 1929. New grounds for a woman to seek divorce in these laws included the husband's failure to provide maintenance, husband's dangerous or contagious disease, desertion, or maltreatment.[116]

---

114 El-Alami, D., & Hinchcliffe, D. (1996). Islamic marriage and divorce laws of the Arab world. Brill. 60

115 *Id.* at 53

116 *Id.* at 54

In Law No. 25 of 1920, women were also granted and ensured the right to maintenance. Expressly, Article 1 of Law No. 25 of 1920 stipulated that maintenance was a debt owed by the husband, which should be calculated from the divorce date.[117] Articles 4 and 5 ensured that maintenance could be extracted from the husband's property. Article 5 also stipulated that a wife could be granted an immediate divorce if the husband failed to provide maintenance due to his financial means or absence or if his location was unknown. However, the divorce could be revoked if the husband proved his goodwill by paying the current maintenance. Article 3 of Law No. 25 of 1920 stipulated that the husband may stop paying maintenance after two years or until the woman would stop having menses for an entire year.[118] The law maintained that if the wife does not have custody of the children, she is entitled to at least two years of maintenance if she was divorced against her will.[119] These laws aimed to fix the maximum *iddah* possible, set at three years, without nursing.

In 1929, the issue was amended again to set minimum and maximum periods for *iddah*. The maximum period was set at one year from the divorce date. Article 7 of Law No. 25 of 1929 addressed the issue of custody of the children. It stipulated that boys would stay with their mothers until the age of nine and girls until the age of eleven, then the custody would be passed to the father. The potential for harm to the mother due to this law was not acknowledged. The Egyptian legislation refused to consider any school of law other than Hanafi.[120]

Article 6, of Law No. 25 of 1929, addressing maltreatment as grounds for divorce, decreed that a wife bears the burden of proof. However, the wife must establish proof of the harm, whether by submitting medical reports, filing a police report, or obtaining two witnesses in cases of physical harm. These terms, perhaps particularly obtaining witnesses, can be complicated.[121] The wife has the right to petition if the

117 *Id.* at 59

118 *Id.* at 56

119 *Id.* at 60

120 *Id.* at 60

121 Edwards, J., & Cornwall, A. (Eds.). (2014). Feminisms, empowerment and development: Changing womens lives. Zed Books Ltd..

qadi denies her claims. She also has the right to be appointed two arbitrators if the qadi denies her petition a second time. The arbitrator's task is to investigate the causes of conflict and submit recommendations for conciliation to the court, according to article 8. If all reconciliation attempts fail, the qadi is instructed to grant her an irrevocable divorce.[122]

The reforms of Law No. 25 of 1920 and 1929 did not address all issues in need of reform. However, the reforms sought to improve the status of women significantly. The second phase of the reform as well sought to expand women's divorce rights.[123] The process in which these reforms took place was also noteworthy as they were drawn from the liberal tenets of the Maliki School's divorce law.[124] The *tafliq* (selection) doctrine was used to select principles from the Maliki school and depart from the Hanafi school as a means of reform.[125] The reform came to preclude abuses against women that occurred in the Muslim community. It aimed to prevent false marriage claims; control and prevent child marriages; restrict men's unilateral right to divorce; and counter the abuses of women's rights to repudiation. The law stipulated that registrars of marriage are forbidden to register any marriage in which the bride and groom had not reached the age of sixteen and eighteen.[126] The provisions of Law No.25 of 1929 also stretched the husband's unilateral repudiation of his wife to deem the repudiation ineffective in case the husband did not intend to end the marriage.[127] The law of 1929 still provides the basic guidelines of family law in Egypt. A later development of this law established grounds to enable women to obtain a judicial divorce.

The historical changes in the Egyptian personal status law reflect the sociological changes throughout time. Two features characterize personal status law in Egypt: First, the broad conception encompassing questions of marriage, divorce, and

122 *Supra* note 146 at 60

123 Lama Abu Odeh at 1098

124 *Id.* at 1098

125 *Id.* at 2005

126 *Id.* at 1099

127 *Id.* at 1099

paternity. Second, the principle of the religious personality of law that exclusively organizes this branch of law. The principle of the religious personality of laws is a principle in which each religious community has a specific personal status law that applies depending on the acknowledged affiliation of the individuals involved. As mentioned before, the rules of personal status law have never been codified in a comprehensive code. In 1875, Qadri Pasha, an Egyptian Jurist, attempted to compile Hanafi Law provisions.[128] Even though this work was never promulgated, his codification remains a significant source of inspiration for judges working on personal status law cases.[129] Codification of laws became dominant in Egyptian legal culture in the late nineteenth century. Qadri Pasha's codification of the Hanafi school of law was significant as it formulated a brief and accessible account of the doctrine.[130] During the first half of the twentieth century in Egypt, various statutory laws were adopted, including Law No. 25 of 1920, which concerned the maintenance and other questions of personal status.[131] It was followed by No. 25 of 1925, which gave women the right to file for divorce on different grounds, in addition to Law No. 77 of 1943 concerned with inheritance and Law No. 71 of 1946, concerned with testamentary bequests.[132]

These reforms took place but were of secondary importance to the declaration of the Arab Republic of Egypt in 1952, so they were interrupted. The issue of personal status law then resurfaced in the seventies. Despite numerous proposals and discussions of legal drafts, no new personal status law was adopted until 1979. Before 1979, a series of personal status laws were in force. These included Law No. 25 of 1920, concerned with maintenance and other questions of personal status; Law No. 56 of 1923, concerned with sharia courts regulations and the legal age or marriage; Law No. 25 of 1929, concerned with women's divorce rights; Law No. 78 of 1931, concerned with Sharia Courts organization; Law No. 77 of 1943 concerned with

128 Bernard-Maugiron, N., & Dupret, B. (2008). Breaking up the family: Divorce in Egyptian law and practice. Hawwa, 6(1), 1.

129 Lama Abu Odeh 1101

130 *Id.*

131 *Supra* note 160 at 1

132 *Id*

inheritance; Law No 71 of 1946 concerned with testamentary bequests; and Law No. 68 of 1947 and its amendments such as Law No. 629 of 1955 and Law No. 103 of 1976. Further personal status laws in force at the time included Act No. 131 of 1952, concerned with guardianship; Law No. 119 of 1952 concerned with property guardianship; Law No. 462 of 1955 transferring court cases that were promulgated by Sharia and communitarian courts to national courts; and Law No. 62 of 1976 concerning provisions to alimonies.[133]

In 1979, while the Assembly was in recess, President Sadat issued a decree complying with Article 147 of the constitution. The Parliament approved the decree-law, which became Law No. 44 1979.[134] The new law amended the previous law to include many demands made over the century by Egyptian feminists.[135] The new law gave women the right to divorce if their husbands married without notifying them. The Supreme Constitutional Court then declared the new law unconstitutional in May 1985, as many judges challenged its conformity with the constitution. It was struck down on procedural grounds. The Supreme Constitutional Court considered the president's powers instead of examining the law from an Islamic law angle. Because the president issued the law while the Assembly was in recess to ensure its approval, the court decided the process via which the law was made was unconstitutional. [136] Two months later, the people's assembly passed the first legislation enacted by an Egyptian assembly on personal status law. The new legislation was almost identical to law No. 44 of 1979 and remains the main legislation shaping women's rights in the family law context. [137] It gave women the right to divorce their husbands if they were to take another wife without notifying them.[138]

Later, Article 11 of Law No. 25 of 1920 was amended by Law No. 100 of 1985. The amendment required that a marriage contract must indicate whether the husband was

133 *Id.*

134 *Supra* note 146 at 116

135 *Id.*

136 *Id.* at 117

137 *Supra* note 34 at 1098

138 *Id.*

already married. If he were, the contract must include the name and address of his prior wife or wives.[139] It also stipulated that the notary must notify the first wife of his new marriage. The husband is also required to provide maintenance for his wife during their marriage, including her personal resources, regardless of her religion. He must provide her with all necessary expenses as required by law. If he fails to do so, a court order shall execute the maintenance on his property. The maintenance provided by the husband is established based on his wealth.[140]

Law No. 100 of 1985 stipulates that the mother has custody of her children until her children reach a certain age. The age at which custody transfers to the father is ten for boys and twelve for girls. A judge can also extend custody until a boy reaches 15 and a girl marries. However, in this case, custody would be extended without continuation of compensation from the father.[141] The law also stipulates that a mother has the right to stay in her matrimonial domicile as long as she maintains custody of her children or until she remarries.[142] The husband cannot stay in the matrimonial domicile unless he offers other suitable, independent housing. If the house is not rented, the husband can live in it independently if he provides an alternative. The husband is also required by law to pay his minor children's maintenance. A son is owed maintenance until 15 unless he is disabled and deemed incapable of earning. Daughters are due maintenance payments until they marry or are able to earn an income.[143]

1. Egyptian Personal Stats Laws Governing Polygamy

Egyptian personal status law permits polygamy. It was neither regulated nor restricted in the Personal Status Law of 1929. In 1985, an amendment was made stipulating the husband's obligation to declare his marital status in the marriage contract.[144] The amendment stated that the husband must state the name of his wife or wives and that

139 Forte, D. F., & Pearl, D. (1990). A Textbook on Muslim Personal Law. Journal of the American Oriental Society, 110(3).

140 *Supra* note 34 at 117

141 *Supra* note 160 at 123.

142 *Id.*

143 *Id.*

144 *Supra* note 1.

his wives should be informed of the new marriage by an officially registered letter.[145] It is worth noting that as mentioned before, the texts of the Quran actually prohibits polygamy when reinterpreted.[146]

After being informed of their husband's new marriage, a wife or wives then have the right to ask for a divorce if the new marriage would cause them any moral or financial harm (*darar*). A wife has the right to demand a divorce for a year after being officially informed of the husband's new marriage. However, practically, it is difficult to prove harm, especially moral harm, in these cases, since emotional harm is difficult to prove.[147] Law No. 25 of 1929 aims to offer the first wife remedy if her husband's remarriage harmed her. Therefore, the legislature allowed women to file for divorce on various grounds, including divorce for absence of financial maintenance, desertion, or a significant defect such as madness, chronic illness, etc. Nevertheless, these options remained subjugated to the judge's discretionary power of assessment.[148]

A woman must also present two witnesses who can attest to having seen or heard acts of bad treatment inflicted by the husband to prove harm. These testimonies are subject to the unconstrained assessment of the judge. Of course, some physical violence can occur in the bedroom, where there are no external witnesses. The wife could obtain medical reports and file a police report. In cases where the wife could not obtain medical reports at the time or failed to file a police report, this abuse would likely not surface at court as witnesses would not have seen or heard the abuse.[149]

2. A Woman's Right to Divorce in Egyptian Personal Status Law

After the reforms of the 1920s and the Khul law of 2000, personal status law provided women with the right to obtain a judicial divorce on the grounds of harm. The different grounds by which a woman could get a judicial divorce are listed in the

145 *Id.*

146 *Supra* note 21

147 *Supra* note 1

148 *Supra* note 160 at 4

149 Edwards, J., & Cornwall, A. (Eds.). (2014). Feminisms, empowerment and development: Changing womens lives. Zed Books Ltd..

Personal Status Law of 1929 and amended by the Law of 1985. An irrevocable judicial divorce could be obtained on the following grounds of harm or maltreatment: serious defect of the husband, moral or material harm in case of polygamy, failure of the husband to pay maintenance, imprisonment for three or more years, and desertion for more than one year. In some of these cases, conditions apply. For example, when seeking divorce on the grounds of moral or material harm in the case of polygamy, a woman must provide witnesses, as described earlier. When a husband is imprisoned for three or more years, a woman may only seek divorce after one year of the sentence has passed.

The wife also bears the burden of proof for any of these grounds for divorce.[150] The law does not specify the harm by which a wife can ask for a divorce. The court of cassation identified causes of the husband's harm as physical or verbal harm that does not suit anyone in her position.[151] The amount of harm can only be verified with proof and evaluated by the court. It can differ from one case to another. For example, a judge in may rule that moderate physical violence is not harmful if local social customs and norms allow the husband to discipline his wife. This might be the case among specific rural communities. However, the same type of physical violence among the upper class may be considered excessive harm.[152]

Lama Abu Odeh writes in her work that it is considered normal for a working-class woman to be beaten by her husband. She writes that it is also typical for men of the working class to be polygamous. She mentions that if a working-class woman were to go to court because she is beaten or her husband had taken another wife, she would be told that "this does not constitute harm the likes of her cannot tolerate and is denied divorce." [153] Regardless of these felt discrepancies, the Egyptian Court of Cassation

150 Chemais, A. (1996). Obstacles to divorce for Muslim women in Egypt. Hoodfar, Shifting Boundaries. 63

151 *Id.*

152 *Id.*

153 Lama Abu Odeh at 1136

defined harm as "inflicting verbal or physical injury on the woman in a way that does not befit people of her social status."[154]

The law also dictates that if a wife leaves her matrimonial house without her husband's consent, she is considered *nashiz* or disobedient.[155] A wife is labelled *nashiz* when she is not submissive or obedient. In Islam, obedience is considered a husband's right. He should have the power to demand things of his wife, meaning that "she should transfer herself to his domicile, live with him, and that they should live in harmony."[156] However, in practice, a wife is considered *nashiz* if she leaves the husband's house without a justifiable reason. If a wife does this, she is no longer entitled to maintenance. This applies regardless of the woman's reason for leaving home. For example, she could be deprived of maintenance if she decides to leave the house if her husband beats or harms her.[157] A wife must complain to the judge and prove harm to secure her divorce rights.

Article 11 of the amendment of 1985 entails that if the woman refuses to obey her husband, she will be deprived of her maintenance. Maintenance payments cease effective whenever she leaves the marital house. This date is confirmed after her husband requests her return via a formal warning delivered by a police officer or someone the wife has delegated.[158] The law allows the husband to file an obedience case against the wife. The obedience case can be mentioned in the divorce case for the judge to investigate, affecting his verdict. Researcher Amina Chemais studied the obstacles facing women who seek divorce in Egypt and found this process problematic. Chemais' work revealed that husbands send formal warnings of

---

154 *Id.* - Cassation 18/4/1962, No. 28, 29 (on file with author)

155 DR. M. AFZAL Wani, M. A. (2003). Maintenance of Women and Children Under Muslim Law: Legislative Trends in Muslim Countries. Journal of the Indian Law Institute, 45(3/4), 409-428. *See also* Id at 1063

156 Boonstra, H. (2001). Islam, women and family planning: A primer. The Guttmacher Report on Public Policy, 145

157 *Supra* note 182

158 *Id.* at 54

disobedience with bad intentions: to make it more difficult for the wife to obtain a divorce or avoid paying maintenance.[159]

In cases where the wife successfully obtains a divorce, she is still faced with several challenges to obtain her right to maintenance. One of the biggest challenges in such cases is substantiating a husband's income. In order to rule in a maintenance case, the court must decide the amount of spousal or child maintenance based on the husband's earning capabilities.[160] Thus, the court orders an investigation. However, such investigations are often informal, unsystematic, and abused by the defendant.[161] Whether the defendant works in a formal or informal sector, the employers usually do not provide accurate information to the court. Employers do so to show support to their employees or because the husband bribes his informal sector employer to conceal his actual income and assets from the court.[162] Examining such challenges highlights the difficulty and atrocious measures women go through to gain their rights. This is not in accord with Sharia. Neither the Quran, nor Sunnah dictate such rules and rigid procedures for women settle disputes concerning family law.

Likewise, there is no basis for *bayt al-ta'a* in the Quran or Sunna. On the contrary, the concept opposes many Quranic stipulations. It opposes stipulations that men and women have similar rights and that men should not take undue advantage of their wives or injure them.[163] Lawmakers were selective in their approach to divorce in family law. The laws favor men since the laws were created by traditionalists and fundamentalists, which is why feminist activists fought hard for reforms.[164] For example, legislators rejected *talaq thalath*. *Talaq thalath* is the husband's

159 *Id.* at 59

160 *Id.*

161 *Id.*

162 *Id.*

163 "Women shall have rights similar to the rights against them" Quran, Sura 2, verse 228.

"Men must… not take (their wives) back to injure them, (or) to take undue advantage." Quran, Sura 2, verse 231.

164 *Supra* note 27

pronunciation of the three formulae ("I divorce you, I divorce you, I divorce you") at one time, after which the divorce takes effect after the woman fulfills her *iddah.* It was rejected because Islamic jurisprudence schools of thought recognized *tallaq thalath* as invalid. The schools rejected the concept behind the Islamic divorce procedure. The Islamic procedure dictates that spouses can repudiate the marriage up to three times until it becomes irrevocable and absolute, creating a bar to remarriage between them.[165] The Egyptian legislature considered a triple repudiation made a one-time equivalent to a single revocable repudiation since 1929.[166] Their rejection of Talaq Thalath is to keep in line with Islamic jurisprudence.

On the other hand, legislators did not dismiss Bayt Al Ta'a's concept. Instead, they chose to include it in the law based on Islamic Jurisprudence. Therefore, it can be argued that the same logic used to dismiss the notion of Talaq Thalath and can be used to dismiss Bayt Al Ta'a. Given that, Bayt Al Ta'a is humiliating and incompatible with women's status today as partners in marital life, employees, and educated citizens. While Bayt Al Ta'a might have functioned somehow when women were expected to be only housewives and adhere to society's traditional gender roles, it is no longer applicable today.[167] There have been shifts in family structure and society, which demand shifts in personal status law. Women today have expanded their roles to be one of or sometimes the only economic provider for the family. Thus, women cannot be expected to be labeled *nashiz* and return to their matrimonial house if they leave for work or can no longer endure harm from their husbands, who take advantage of their wives' economic or social needs.

Even though the Personal Status Law amendment of 1985 set guidelines for divorce in Egypt, it failed to respond to developments in Egyptian society or tackle many family problems. Family courts are overloaded by divorce cases, many of which take over ten years to settle due to the obstacles to proving harm.[168] Despite the mention of

---

165 Ali, K. (2007). Muslim Sexual Ethics: Understanding a Difficult Verse, Qur'an 4:34'. The Feminist Sexual Ethics Project.

166 *Supra* note 160 at 7

167 *Supra* note 27

168 *Id.*

similar principles in the Quran and Sunna, the Khul' Law of 2000 was treated like an innovation in the press and Egyptian parliament. The Quran states: "Give the women whom you marry their (mahr) with a good heart, but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it without fear of any harm (as Allah had made it lawful)."[169]

While there is no explicit mention of the word "khul," the Quran refers to a ransoming procedure. There is also precedent for Khul, established during the Prophet's time, authorized by him as stated in Hadiths and Sunnah. The precedent comes from the case of Thabit bin Shammas and his wife Habiba bent Sahl. The wife came and said: "O Messenger of God, I do not hate Thabit neither because of his faith nor his nature, except that I fear unbelief (not to be able to abide by the limits of Islam)." Prophet Mummamed, Peace be upon him, said, "Will you give back his orchard?" She said "Yes," and she gave it back to him and he (the Prophet) said to Thabit "O Thabit! Accept your garden and divorce her at once."[170]

The Khul' Law No 1 of 2000 was promulgated to facilitate and speed up repudiation cases and personal status law cases to fix the issue of the court backlog.[171] The law gives the wife the authority to unilaterally divorce the husband if she pays back the dowry registered in the marriage contract, and forfeits all her financial rights.[172] While she undergoes a reconciliation period for three months, if reconciliation fails, she can irrevocably divorce her husband without the need prove any harm.[173] The law was a subject of controversial debate among the press and in Parliament. Thirty-four of fifty-two parliament members approved the law, eight of whom were women.[174]

---

169 Qur'anic verse (4:4) AL Nisaa'

170Al Bukhari, Al Imam Abi Abd Allah Muhammad bin Ismail , Fath Al Bari Bi Sharh Sahih Al Bukhari , ed. By Abdel Rahman Mohhamad, 17 vols, Cairo:Maktabet wa matba'et Mustafa Al Babi al Halabi, 1959, 9:327

171 Al-Sharmani, M. (2011). Islamic feminism and reforming Muslim family laws. 13

172 *Id.*

173 *Id.*

174 *Supra* note 27

B. Changes in the Basis of Personal Status Law

To conclude, the basis of personal status law in Islamic countries needs to be significantly changed. The immutability of Sharia as a body of principles binding Muslims is not supported by historical Muslim practice. Further, throughout history, Sharia has not had exclusive jurisdiction. Instead, the state has always exercised some level of secular jurisdiction. Even in the areas where Sharia has historically been applied, it has never been free from state supervision.

Moreover, the institutionalization of Muslims' ability to seek and act upon independent fatwa does not exhaust the possibilities of independent legal advice. This can be done voluntarily without control from the state. Seeking fatwas has always been a valuable source for believers to address their personal religious needs, even matters concerning legal advice or opinion. Finally, social developments and legal reforms that made fiqh more accessible also exposed political and moral issues within the interpretation of Sharia. These changes exposed selective enforcement of some of the norms of jurists' and scholars' interpretation of Sharia texts over others.

The main question is whether personal status law can remain governed by Sharia when all other aspects of the legal system are governed by secular law. This question begs a further discussion. It can be discussed further by examining the following questions: Why has personal status law continued to be governed by Sharia, and how can this arrangement be justified? As such, is personal status law divine? Alternatively, is it governed by human opinion, expressed through jurists and authors? Are the opinions of these jurists and authors an expression of divine will? What might be a better approach to the current situation that would create a fairer situation for Muslim women without compromising the religious identity of Muslim societies and Islamic devotion?

As mentioned before, all aspects of the legal system of most Muslim countries are currently governed by secular state law except for personal status law. Personal status law is governed by Sharia jurisdiction. One of the main reasons for this has been that family law has been traditionally the most developed area of Sharia, in which jurists had the highest power. One of the arguments supporting this has been that Quran and Sunna govern matters related to family law in more explicit detail than other matters.

Matters related to commercial, criminal, and land law, for example, are not governed strictly by Sharia. For this reason, some argue that it is more practical and possible to introduce reforms in other areas of law.

Additionally, Muslim countries' governments somehow deployed the western distinction between the private and the public domain. Because personal status law is deemed a private matter, it made more sense to be left as a matter of religion that is politically less significant. For this reason, it also made sense to leave it in the hands of the *ulama*. Therefore, governments followed the practice of colonial powers. They reduced the jurisdiction of Sharia, removing it from most aspects of the legal system like the economy and public law. However, they excluded personal status law from this secularization process since it was politically insignificant.[175]

Nevertheless, these arguments raise more questions than they answer. The success of any government reforms of the pre-existing legal system relied on several factors, such as the balance of powers between modernist and conservative groups that continue shifting today. So far, governments prefer opting for more control over personal status law to satisfy conservatives. The question of why conservative forces would settle for personal status law and not aim for commercial and criminal law remains. Why not aim for total control over all institutions and state law? One claim is that because Sharia principles and doctrines are fluid, they cannot be enforced within a unified legal system. The framework of such a legal system is too rigid.

As a model for moral order established and developed from a premise in legal discipline, instead of actual practical human experience, Sharia challenges confinement to clearly defined or established legal principles of general application. The development of Sharia was a "phenomenon of legal science, not the state playing legislator." [176] The provisions of Sharia have historically been flexible and open-ended. Variations in Sharia-derived law have arisen from individual moral choices. Impersonal institutions like today's courts cannot assess them. In other words, Sharia

175 *Supra* note 104

176 Schacht, J (1964) An Introduction to Islamic Law, Oxford; Oxford University Press.

no longer functions as its initial desired body of principles by acting as a positive law of the state.

The irony is that by failing to face the modernizing elite of the state, Muslim countries choose to sacrifice the fundamental human rights of women for political expediency. These elite are the real problem. They have made personal status law the last upholder of religious principles and abandoned the administration of real justice by confining family law to the control of Muslim jurists. The secularization of all fields of the legal system has rendered the religious tone of personal status law the only remaining aspect of Sharia law. Ironically, this was strongly influenced by the lack of opposition to the sudden abandonment of Sharia in all other fields of law as personal status became the only disputed issue. Therefore, the debate over personal status law is a sensitive issue in the Muslim community and a significant struggle between modernists and traditionalists in the Muslim world.

There are two central sides to this debate. Sharia is completely directed within an Islamic framework, in which state enforcement is taken for granted. Besides, because the debate between modernists and traditionalists obtained a sharp political edge, sometimes personal status reforms had to be revoked to avoid a religious backlash against governments.[177] Therefore, the debate shifts according to the underlying tensions between different sides of the time. At the top of the debate is the fluctuating balance of power between state and religion, influenced by various factors such as the failure of leaders to deliver their promises of political development and independence.

The political manipulation of religious legitimacy has been a common theme for centuries. However, what is new are the gender relations that have grown to be an integral part of this society and its politics. The changing position of women in Muslim societies is new.[178] Modernists had the upper hand to change gender relations

177 Najjar, F. M. (1988). Egypt's Laws of Personal Status. Arab Studies Quarterly, 323-25

178 Kandiyoti, D, (1991)'Introduction', in D. Kandiyoti (ed.). Women, Islam, and the State, London:Macmillan.

during the early twentieth century. They aimed to enhance women's autonomy and equality. However, fundamentalists took over the political platform by the end of the century. They chose to reverse any advances towards gender equality. The central question of women's emancipation remained an issue throughout the century. Fundamentalists considered the abandonment of Sharia in personal status law as the final defeat of a patriarchal Islamic order. Meanwhile, modernists considered this abandonment a necessary step towards creating a more progressive society. The fundamental misconception of expressing the issues in these terms is associating family law with historical interpretations of Sharia, let alone with Islam as a religion.

At first glance, family law may appear to be derived from Sharia in most Muslim countries. However, when examining the application of personal status law, one finds that it has little to do with Sharia's lenient and flexible fundamental nature. Its application is contrary to the intention of Sharia's founding jurists. The foundation of the debate is flawed. The topic is sure to remain contentious, too, until it addresses more valid questions that have been overlooked or intentionally suppressed in the past. The question remains: To what extent does personal status law relate to the life of Muslims today? If it does relate at all, through what processes is it translated into the reality of Muslims' society? [179] Today, Sharia-derived personal status law is touted as the sole body of principles upholding the Islamic identity of social relations. However, the reality of how Sharia-based personal status law operates is unclear, as it is difficult to go through the case laws occurring in courts every day.

179 *Supra* note 26 at 12-13

V. A Suggested Process Towards Changing Personal Status Laws in Egypt

Personal status laws in Egypt, specifically ones regarding women's rights, have historically been the most immutable parts of the law. Twentieth century modernizers have often used it as a "sacrificial lamb" or a bargaining chip in order to successfully impose secular codes in the areas of civil, criminal and commercial issues.[180] There's a plethora of changes that could be made to personal status laws that would create massive change for women. Unfortunately, it's often not as simple as, for example, suggesting a bill abolishing polygamy in Egypt claiming a revised interpretation of Islamic teachings. The resistance likely to be met by the parliament, the general public and law enforcers will either keep the bill from being passed, have it appealed and removed or rarely implemented. It would also make aggressive retaliation with more regressive laws and social norms a lot more likely.

A good example of conservative retaliation is what followed the American civil war in 1865— the war that managed to abolish slavery in the US. Despite its success, for the decades following came a slew of both legal and social retaliations, such as the enactment of Jim Crow laws designed specifically to disenfranchise Black Americans and legalize their segregation. Over 400 statues of slave owners were also erected all throughout the country as a symbol of American pride, many of which are still up today.[181] Without proper strategy, Egypt could face similar repercussions for minimal progress. Therefore, in order to minimize resistance in a country that's already majorly charged in the conservative direction, one must take a more careful and holistic view of the sociocultural mechanism that helps create, amend or abolish laws in a more permanent manner when it comes to personal status laws.

[180] Moussa, J. (2011). *Competing fundamentalisms and Egyptian women's family rights: International law and the reform of Shari'a-derived legislation*. Leiden: Brill.

[181] A&E Television Networks (2022). Jim Crow Laws https://www.history.com/topics/early-20th-century-us/jim-crow-laws

A. The Sociocultural Mechanism Behind Policy Making

The human ability to self-govern and run a society through collectively chosen laws is quite the phenomenon. Historically speaking, human beings in the context of a lawless society were relatively primitive, impulsive and difficult to control. The way human beings developed even the most primitive forms of a legal system was by recognizing and channeling incentives.[182] For example, in a society where theft has never been battled, it could feel impossible to set a law that prohibits it. If anyone could take what isn't theirs whenever they need it, and there is no real promise of properly preventing theft in general, many members in that society would be perfectly happy with theft as long as they were the strongest and most protected, and the rest would've likely taken all necessary measures to prevent theft of their property— thus the normalization of the crime. Without proper foresight as to how much better society would be without theft, everyone lacks the incentive to properly put that law in place.

B. The Gap Between Egyptian Law and Accepted Practice (The De Jure De Facto Gap)

Another obstacle to note specifically when speaking of Egyptian law is how disconnected society is from its legal system; the de jure/de facto gap. Egypt has suffered from decades of authoritarian rule and corruption, and one of the consequences of the citizens' disconnection from the legal system.[183] This generally means that a significant portion of a nation has lost faith in the legal system to grant them real justice with truly important matters. Egypt has long been seen as a country mainly driven by cultural norms rather than by its own legal system. This further complicates the process of creating any real change for women through the law, since the guarantee of its implementation becomes less of a guarantee.

---

[182] Bodley J. (2012), *Anthropology and Contemporary Human Problem.*

[183] Gloppen S. (2014) *Courts, Corruption and Judicial Independence.*

Because of this disconnect, there are currently plenty of social norms and traditions that are discriminatory or violent against women that remain common despite having harsh legal penalties. According to a survey by UNICEF, an estimated 87.2% of Egyptian women between the ages of 15-49 have undergone female genital mutilation (FGM)[184], despite it being illegal and punishable by up to 20 years in prison[185]. UN Women has also reported that over 99.3% of Egyptian girls and women have experienced sexual harassment in their lifetime despite its illegality and despite its drastic increases in punishment over the years, including the most recent amendment officially rendering it a felony with a minimum of 5 years in prison or a penalty of up to 300,000 EGP.[186]

This means that the cultural forces pushing for such normalized violence against women are much stronger than the legal system at the moment, and therefore should be studied more carefully in order to increase citizen engagement with the law, and to implement the right laws to tackle the problem more effectively.

C. A Feminist Interpretation of the Qur'an and Hadith

Many people from around the world, academics, and laymen alike, look to religion, namely Islam and wonder whether it is, in its essence, antithetical to women's rights by modern standards. I argue that this perception is largely due to the fundamentalist view of Islam that has remained dominant and unconfronted for decades, therefore becoming the main shaper of laws and social norms across Muslim

[184] 28 Too Many (2017). ***Country** Profile: **FGM in Egypt.*** https://www.refworld.org/docid/5a17ef454.html

[185] Farouk M. (2021). *Egypt cabinet toughens law banning female genital mutilation.* https://www.reuters.com/article/egypt-women-law-idUSL8N2JW26Z

[186] Reuters (2021). *Egypt tightens punishment for sexual harassment.* https://www.reuters.com/world/middle-east/egypt-tightens-punishment-sexual-harassment-2021-07-12/

countries, including Egypt. Before we jump into suggested amendments and implementation strategies for personal status laws, we will first lay out some more progressive feminist interpretations of the Qur'an and Hadith.

As with every set of laws that human beings decide to collectively abide by— Islamic teachings, including Qur'an and Hadith, are segmented into central, relatively immutable laws and philosophies, followed by peripheral laws designed to either complement or help implement those main laws. Muslim reformists suggest that the reason behind many of the regressive laws in Muslim countries, specifically those that discriminate against women, are likely the result of falsely centralizing teachings that were meant to be peripheral and vice versa. This tends to change the entire meaning of the text and the conclusions people walk away with.[187] For example, some of the most commonly recalled aspects of Islam, both by Muslims and non-Muslims is its list of controversial prohibitions such as pre-marital sex, gambling, the consumption of alcohol, pork, carrion and blood, the meat of carnivorous animals, or meat that isn't prepared according to Islamic laws.[188]

Mainly as a result of the fact that these are the most heavily socially enforced laws, above all else, many Muslims make the mistake of centralizing these prohibitions, while ignoring other more commonly mentioned messages of the text. By doing so, the prohibitions seem immutable, random and arbitrary, therefore leaving room for assumptions as to the values behind such prohibitions. A common take-away message is the "blind obedience and the repression of all your desires," a central philosophy for many Islamic fundamentalists. However, many Muslims recognize the Qur'an's central message to be that God is a loving creator that wants the best for all His creations, and that there is one path or 'al siraat al mostaqeem' which when followed, brings blessings, and when strayed from, chaos ensues— from the most famous and commonly recited verse in the Qur'an 'alfatha'. When putting

[187] Barlas, A. (2002). "*Believing women" in Islam: Unreading patriarchal interpretations of the Qur'an*. Austin, TX: University of Texas Press.

[188] Fischer J. (2008). Religion, science and markets. *EMBO reports*, *9*(9), 828–831. https://doi.org/10.1038/embor.2008.156

these prohibitions in context of this central message, one can deduce that the values motivating these prohibitions are ones like family preservation, ensuring a life free of addiction, animal abuse, disease, etc., rather than just blind obedience to arbitrary laws.

D. ***The Revolutionary and Pro-rebellion Interpretation of Islam***

Muslim religious scholar, Reza Aslan, also points out the often-forgotten fact that all religions, including Islam, commonly centralize the concept of revolution against stubborn unjust systems for the sake of a more just world. Aslan claims that all Abrahamic religions revolve around the concept that God is He who transcends all systems of power, and that all his messengers sought to reverse the social order against all odds. "When the sky cracks, and the stars fall, scattering, and when the seas burst forth, and when the graves are turned inside out, a soul will know what it put forth and left behind." Quran (82:1-5) Ironically, Aslan argues, this interpretation of Islamic teachings argues for an awakened conscience rather than the blind loyalty to older systems. This therefore negates the conservative desire to glorify the status quo rather than consistently re-evaluate it in good faith.

E. Reinterpreting Women's Roles in Society in Qur'an and Hadith

Bringing this back to Quranic verses that pertain to women's rights and roles in society, many Muslim feminist reformists, including Asma Barlas, argue that these phrases (which happen to be representative of less than 0.01 percent of the text) are often cherry-picked, interpreted from a patriarchal lens, and falsely centralized above all other verses and sayings in the Qur'an and Hadith, respectively[189], including verses that directly contradict such interpretations. Many Muslim feminists aim to re-centralize Islamic teachings back to the concept of a genderless, loving and all-knowing God, so as to naturally encourage the public to revisit laws, and social norms that seem to oppose this central message, namely the unequal treatment of women.[190]

[189] *Id.*
[190] *Id.*

Many Egyptian feminists that had made waves over the past year, including Malak Boghdady, point out the hypocrisy and selective piousness of Egyptian society when it comes to enforcing Islamic teachings: 'How come we're only an Islamic country when we're talking about limiting the freedoms of women? Corruption, sexual harassment, honor killings, denial of inheritance rights, all strictly prohibited in Islam, yet fly under the radar, but women's freedoms is what raises a red flag?' This rightfully points to the fact that the persistence to keep personal status laws that specifically denigrate women are often not a sign of allegiance to Sharia Law nor Islam in general, but a society that has grown accustomed to the benefits of a system that consistently favors men over women. Otherwise, the deviation from Islamic instructions would be a point of criticism across all matters, not just with regards to women's behavior. Thus, I suggest a holistic strategy in order to reform personal status laws to produce more equality for women.

As stated earlier, implementing laws that promote equality among women is more than just about passing bills. One of the main obstacles standing in the way of true personal status law reform of Egypt's personal status laws is our sociocultural norms. Without proper consideration of such norms surrounding any particular issue, the passing of new laws will be futile— either because traditionalists and conservatives will immediately appeal the law, or because of resistance in its implementation, which would in turn reduce public trust in the legal system. However, with enough effective structural changes in our laws in a way that substantially and positively affects women's position in society, we could begin to soften the sociocultural norms that stand in the way of true change.[191]

In other words, the more effectively we introduce and implement laws that help remove layers of oppression off Egyptian women— or abolish obsolete, outdated ones— the easier it becomes to implement more laws that may have once been an

[191] Varner, Iris I. and Varner, Katrin (2014) "The Relationship Between Culture and Legal Systems and the Impact on Intercultural Business Communication," *Global Advances in Business Communication*: Vol. 3, Article 3.
Available at: https://commons.emich.edu/gabc/vol3/iss1/3

impossibility. In this chapter, my policy-making strategy won't just be focused on drafting adequate amendments to personal status laws, but on ways that could help minimize resistance and ensure their implementation in a more consistent manner. My strategy will also be aiming to increase citizen engagement, mobilize women's groups in an attempt to amplify Egyptian women's voices.

F.Suggested Amendments to Personal Status Law

Most personal status laws that are in major need of reform when it comes to women's rights, are due to the fact that they have been taken out of sociocultural context and applied at a time when social dynamics between men and women are radically different.

1. A Woman's Right to Divorce in Egyptian Personal Status Law

There seems to be mixed opinions among Egyptian feminists with the regards to the proper amendments required to our marriage and divorce laws. This is mainly due to a difference in feminist philosophy when it comes to the roles of men and women in society. [192] There seems to be a general consensus that divorce laws should be made more equal among men and women, so that women are not burdened with extra requirements and sacrifices in order to instigate the divorce themselves. However, opinions seem to diverge when it comes to the financial aspects of Khul' and divorce.

Cultural feminists and post-modern feminists place a high priority on considering the cultural conditions of women in Egypt while implementing or amending laws. Cultural feminists recognize a distinctive "women's voice" that needs to be amplified in order to achieve true equality. Cultural feminists often accept domesticated gender roles for women in the name of cultural relativism, and also accept traditions such as the husband being the main financial provider of the household, regardless of the

[192] Moussa, J. (2011). *Competing fundamentalisms and Egyptian women's family rights: International law and the reform of Shari'a-derived legislation*. Leiden: Brill.

wife's personal wealth or employment status. Some cultural feminists stand on the side of creating fully equal divorce laws for men and women. On the other hand, secular and radical feminists argue that financial obligations from husband to wife is an anti-feminist idea based on the notion that a woman cannot provide for herself, and is therefore antithetical to the concept of equality.

Secondly, the financial aspect of marriage is a largely contextual matter and should therefore be reflected as such in the law. Many reformists argue that the necessity for maintenance to be paid was set during a time when women were relatively biologically confined, due to increased chances of birthing children prior to the invention of contraceptives. Women therefore lacked the capacity to be as active as men. Consequently, the natural arrangement for the majority of cases was the domestication of women while men paid maintenance so as to support their household. [193]

However, it is an undeniable fact that the conditions for women have drastically changed, and therefore the conversation about revising the husband's obligation to maintenance is long overdue. The husband's obligation to pay maintenance should be placed under the condition that the woman is either unemployed, employed at a relatively low-paying job, or should it be mandated and agreed to by both parties in the marriage contract. In the case of divorce, all conditions of maintenance payment by the divorced husband remain if maintenance was within the marriage agreement to begin with.

This grants Egyptian women the ability to opt into this arrangement should it fit their personal worldview about marriage, while also granting women the right to remain on equal financial standing as their husbands as well. Since the system currently in place to evaluate the husband's income in order to calculate the owed maintenance is informal, unreliable and often abused, I suggest the penalty for forgery and perjury be

[193] Hanafi S, Tommeh A. (2019) *Gender Equality in the Inheritance Debate in Tunisia and the Formation of Non-Authoritarian Reasoning.*

legally raised, particularly if the woman has proven to be impoverished or in dire financial circumstances.

2. Women's Custody Rights To Children

The same argument could be made about context when it comes to the laws on the topic of custody of children. Secular and radical feminists often argue that the global inclination to favor mothers over fathers when it comes to child custody falls under the category of benevolent discrimination, namely that women are naturally more nurturing than men and therefore are usually assumed to be more suitable for custody than the father.[194] In light of that, I suggest that custody laws require a thorough investigation regarding the financial and emotional fitness of both parents for custody as opposed to assuming fitness based on gender. Custody of children should also not be depended on the gender of the child, but their needs instead.

Some cultural feminists may argue that distinct essentialist natures exist between men and women, generally rendering women more "nurturing" than men. However, I argue that this amendment does not contradict this claim. Should women generally be the more fit custodian of the child, the investigations carried out will surely reflect it. This is in order to protect the cases where this is not necessarily the case and to remove some of the social pressure off women to be nurturing beings all the time.

3. Obedience In Marriage

With regards to wife's obedience to her husband, this one also appears to be from cherry-picked verses in the Qur'an while leaving out verses that emphasize equal value and mutual respect required between husband and wife. For example, 'they (women) are a garment for you (men) and you are a garment for them.' These laws

[194] Moussa, J. (2011). *Competing fundamentalisms and Egyptian women's family rights: International law and the reform of Shari'a-derived legislation*. Leiden: Brill.

were also suggested at a time with radically different social norms among men and women, where women were heavily segregated from men and assigned entirely different roles in society. Since men were the breadwinners, the ones who worked in the fields, while women were mostly at home, it makes relatively more sense at the time that obeying the husband helped maintain a relatively safer household dynamic.

Hadith Bukhari states: "A man is expected to be the guardian of [his] family, whereas a woman is expected to be the guardian of their home and children." In light of that, it would make sense in that context that 'leaving the home' could result in no maintenance— since that was the typical marital arrangement of their time. However, I argue that many of the definitions accepted by Egyptian law as "disobedience" require serious revision. Prophet Muhammad had also said: 'There is no obedience in evil deeds. Obedience is only required in what is good.' (Hadith 12) The current connotation for the word "obedience," particularly in the context of modern Egyptian culture, means obedience of whatever is asked, including things you perceive as harmful. In light of that, I suggest that obedience, as a legal reason behind depriving women of her rightful maintenance should be abolished.

4. Egyptian Personal Stats Laws Governing Polygamy

As stated earlier, the Qur'an, once the verse is read fully, actually prohibits polygamy. The number of men in polygamous marriages in Egypt is also just less than 1%, making it a relatively unpopular choice among Egyptians. There have already been some controversies spurred in attempt to shed light on the prohibition of polygamy in Islam. In 2019, Ahmed al-Tayeb, the Grand Imam of Al-Azhar publicly stated that polygamy is forbidden in Islam and 'an injustice to women'.[195]

> "In 90 per cent of cases – and I am not exaggerating – polygamy involves injustice toward the wife, her family and her children," said Sheikh al-Azhar Ahmed al-Tayeb. "Polygamy is an example of a distorted understanding of the

[195] Jansen M. (2019) *Muslims in Egypt divided over calls to end polygamy.*

> Koran and the Sunnah [traditions] of the Prophet . . . polygamy is a right that is restricted by conditions, such as the condition of fairness. If there is no fairness, polygamy becomes haram [prohibited]. This issue is not open for experiments."

Although he didn't call for the legal prohibition, this suggests that there may be more of a consensus on its baselessness in Islamic texts, and that there could therefore be room for its prohibition to be successful in the near future. Al-Tayeb did receive a backlash for his comment, particularly from Al-Nour member Sameh Abdel Hamid Hamouda, who recommended polygamy 'if you can afford it' as it 'would give many unmarried women the chance to have a family and children.' The Al-Nour party is well known for its roots in 18th-century Saudi Wahhabism, one of the most extremist sects of Islam.[196]

G.Implementation Strategies of Personal Status Law Amendments

1- The Indirect Approach

Many of personal status laws are bulky and convoluted, and boldly reversing or adding a controversially progressive law comes with its risks. Therefore, I suggest that indirect approaches also be taken just in case it minimizes the potential for resistance. For example, abolishing polygamy could be a risky move that could warrant heavy retaliation from conservatives. Therefore, we could also implement laws to ensure husbands are left with very little room to abuse it—which may end up completely deterring some men from the idea of polygamy.

Another example would be to bargain with certain laws in order to obtain or abolish others. For example, by implementing laws that grant a better chance of custody to the father, should he be seen as the more fit parent, this could then leave room in the

[196] *Id.*

general public to discuss the possibility of equalizing divorce laws. Another indirect approach would be to soothe some of the sociocultural resistance against feminist reform. One of the main reasons behind the resistance faced from the public regarding women's rights reform is the perception that it's Western Influence in a Trojan horse attempting to erase Egyptian culture. Therefore, by implementing laws in the field of cinema that demand a certain limit to Western representation of feminism, as opposed to Egyptian forms of feminism, this may eventually reverse the impression in people's minds necessarily linking women's rights movements with Western intervention.

An example of implementing law in cinema that ended up majorly affecting cultural norms, particularly with regards to women's rights is Egypt's 'Clean Cinema' laws that were implemented in the 1990s. These laws prohibited intimate scenes between men and women on screen but seemed to leave in scenes where men show aggressive sexual behavior towards women, while women remain docile. Many activists argue that these laws are a major driver for the sexual harassment and sexual abuse crisis happening in Egypt right now.[197]

2- The Direct Approach

The direct approach refers to the bold suggestion of code changes on the basis of a feminist interpretation of the Qur'an and Hadith. Although preventing retaliation from the public is important in order to prevent a scenario where women end up with more damaging laws that diminish their rights, it would also be an important part of a larger strategy to periodically take the bold and direct approach for a few reasons: It gauges the public and lets lawmakers know just how far the country has come with regards to the changes they find acceptable. It's important not to underestimate the level of progress in the country when strategizing about reform. It sends a bold and necessary message to the disenchanted women in the country who may have previously lost faith that anyone within the legal system is in their corner, or it sends a bold and necessary warning to all male citizens pursuing criminal behavior against women that

[197] Abdulkader R. (2020) Clean Cinema and Egypt: *How Normalized Are Portrayals of Harassment?*

the matter is being taken more seriously. Also, it emboldens Egyptian feminists, which could in turn heighten citizen engagement and trust in the system. It could also possibly help close the disconnect between citizens and their legal system, as it incrementally encourages more women to use the law to get their justice as opposed to resorting to social norms. Bold legal moves could be particularly powerful, especially this year following the women's rights movement against sexual harassment.

VI. CONCLUSION

The perspective presented in this thesis offers a framework through which personal status law can be changed. It also clarifies that Sharia-based family law is not divine nor immutable and should be subject to change. Therefore, the reader can recognize the link between secular law, Sharia-based family law, customary social practices, the history and development of Islamic law, the impact of colonialism, and the effect of political events on all the above. This thesis has highlighted the tensions between the legacies of cultural norms and the legal practices that led to establishing the current legal system. It has done so to emphasize that human agency, not Sharia law, plays an essential role in the development and conception of personal status law. Differences between the four schools of thought and the various Islamic customary practices result from human actions and decisions.

The focus of this thesis was to emphasize the cultural and political dimensions that factored into the development of personal status law in Egypt. Therefore, this thesis aims to acknowledge that personal status law in Egypt today is not and should not be considered divine and immutable. Like all aspects of the legal system of Egypt, family law has been shaped by many factors. The most significant of these factors have been the development of the legal system, the political will of legislators and lawmakers, and human interpretations of Sharia. It has not been shaped by the will of God nor the Prophet's *Sunnah* to the extent traditionalists argue.