

American University in Cairo

## AUC Knowledge Fountain

---

Theses and Dissertations

Student Research

---

Winter 1-31-2023

# The Family Values: Is It Really About the Family? Analyzing The Family in the Egyptian Discourse Through a Sociological Lens

Taher Sabala

tahersabala@aucegypt.edu

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



Part of the [Family, Life Course, and Society Commons](#), [Gender and Sexuality Commons](#), [Judges Commons](#), [Law and Philosophy Commons](#), [Law and Society Commons](#), and the [Sexuality and the Law Commons](#)

---

## Recommended Citation

### APA Citation

Sabala, T. (2023). *The Family Values: Is It Really About the Family? Analyzing The Family in the Egyptian Discourse Through a Sociological Lens* [Master's Thesis, the American University in Cairo]. AUC Knowledge Fountain.

<https://fount.aucegypt.edu/etds/2013>

### MLA Citation

Sabala, Taher. *The Family Values: Is It Really About the Family? Analyzing The Family in the Egyptian Discourse Through a Sociological Lens*. 2023. American University in Cairo, Master's Thesis. AUC Knowledge Fountain.

<https://fount.aucegypt.edu/etds/2013>

This Master's Thesis is brought to you for free and open access by the Student Research at AUC Knowledge Fountain. It has been accepted for inclusion in Theses and Dissertations by an authorized administrator of AUC Knowledge Fountain. For more information, please contact [thesisadmin@aucegypt.edu](mailto:thesisadmin@aucegypt.edu).

**The American University in Cairo**

**School of Global Affairs and Public Policy**

**THE FAMILY VALUES: IS IT REALLY ABOUT THE FAMILY?  
Analyzing The Family In The Egyptian Discourse Through A  
Sociological Lens**

**A Thesis Submitted by**

**Taher H. Sabala**

**To the Department of Law**

**Fall 2022**

**in partial fulfillment of the requirements for the degree of  
the LL.M. Degree in International and Comparative Law**

The American University in Cairo  
School of Global Affairs and Public Policy

THE FAMILY VALUES: IS IT REALLY ABOUT THE FAMILY?  
Analyzing The Family In The Egyptian Discourse Through A Sociological Lens

A Thesis Submitted by

*Taher H. Sabala*

to the Department of Law

Fall 2022

in partial fulfillment of the requirements for the  
LL.M. Degree in International and Comparative Law) has been approved by

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

\_\_\_\_\_

*Hany Sayed* (First Reader)  
*Associate Professor*  
Law Department  
The American University in Cairo

\_\_\_\_\_

*Thomas Skouteris* (Second Reader)  
*Assistant Professor and Chair*  
Law Department  
The American University in Cairo

\_\_\_\_\_

**Graduate Program Director**

**Date**

**GAPP Dean**

**Date**

\_\_\_\_\_

Thomas Skouteris

\_\_\_\_\_

\_\_\_\_\_

Dr. Noha Elmikawy

\_\_\_\_\_

## ACKNOWLEDGMENT

I would like to devote this page to thanking everyone without whom this paper would not have been possible.

I cannot express enough appreciation to my supervisor, Prof. Jason Beckett, for his continuous support during my studies. His patience, motivation, and immense knowledge were always there during this long journey. The outcome of my dissertation would not even be as close to what it becomes without his guidance.

I would like to express my sincere gratitude to the members of my dissertation committee, Prof. Hany Sayed and Prof. Thomas Skouteris, for their time and intellectual contribution to my personal and academic development. This gratefulness goes too to all my professors whom I would not be the person I am today without their invaluable guidance.

A special thank you goes to Prof. Mai Taha, Prof. Khaled Fahmy, Prof. Hanan Kholoussy, and Prof. Pascal Ghazaleh for their support in shaping and developing the dissertation idea with their insightful comments and discussions.

I also want to thank my friend and study/work colleague Ali Moussa for enlightening me with the first clue in my research by saying: “Why do not you talk about the indeterminacy of law in some areas like moral values and family values and how it can be politically instrumentalized to confine human rights.”

I cannot end this part without thanking and acknowledging my best friends' encouragement which I would not have completed my dissertation without it. Thank you Natalia Dybich, Nadine Aboud, Sophia Meziane, and Hana Nassar.

Also, I would like to thank my family: my parents and my sisters, for their support throughout my life.

Last but not least, to my caring, loving, and supportive wife, Menna, and my precious son, Yehia, my deepest gratitude. Thank you for always being there for me. You are the real reason I exist.

The American University in Cairo  
School of Global Affairs and Public Policy  
Department of Law

THE FAMILY VALUES: IS IT REALLY ABOUT THE  
FAMILY?  
Analyzing The Family In The Egyptian Discourse Through  
A Sociological Lens

*Taher H. Sabala*

Supervised by Professor Jason Beckett

ABSTRACT

The Egyptian state has put on its shoulders the responsibility of protecting the family and its values. But how this family, in a massive society like Egypt, can be defined? In this paper, I argue that it has never been about protecting the family. However, it is an attempt to shape the citizens into small separate hives which give the State the power to gain access to the intimate details of its citizens' lives through which they can be easily monitored, managed, and controlled. By analyzing Michel Foucault's work on government, power, sexuality, and family, I travel through a historical journey during the modernization period in Egypt. I attempt to tell the evolution story of the nuclear family in the Egyptian legal discourse and how the state unnaturally shaped it through laws, courts, and intellectuals. This paper attempts to illustrate that what we believe is the ultimate truth is not always the case.

KEYWORDS: Nuclear Family, Power, Morality, Values, Modernization, Egypt, Women, Courts, Shari'a, Foucault.

## TABLE OF CONTENTS

I. Introduction .....	1
II. The New State .....	7
A. Preserving the Family .....	8
B. Preserving the Morality .....	13
C. Preserving the Values .....	16
D. The Egyptian Family .....	18
III. The Philosophical Story Behind the Family.....	19
A. What is Government .....	19
B. What is Power .....	21
C. Biopower .....	26
D. Family .....	30
E. The Philosophy .....	38
IV. The Evolution of the Egyptian Family .....	39
A. Historical Background .....	40
B. Marriage Crisis .....	42
C. Secluding Women .....	45
D. Family vs. Law .....	47
1. Marriage Age .....	49
2. Divorce .....	49
3. Polygamy .....	51
4. Documentation .....	54
5. New Shari'a .....	54
6. Other Realms .....	56
E. Towards More Bureaucratization .....	57
F. The Evolution .....	58
V. Conclusion .....	59

## Introduction

The judges of normality are present everywhere. We are in the society of the teacher-judge, the doctor-judge, the educator-judge, the 'social-worker'-judge; it is on them that the universal reign of the normative is based; and each individual, wherever he may find himself, subjects to it his body, his gestures, his behavior, his aptitudes, his achievements.<sup>1</sup>

~ Michel Foucault

In August 2018, The Egyptian Parliament passed the anti-cybercrime law, which restricts, in article 25, any act that violates Egyptian family values.<sup>2</sup> It was not before a whole year that the “Egyptian authorities have carried out an abusive campaign targeting female social media influencers on charges that violate their rights to privacy, freedom of expression, and nondiscrimination ... such as violating ‘public morals’ and ‘undermining family values.’”<sup>3</sup>

How did judges decide, with such certainty as I will illustrate in the next chapter, that such acts were, in fact, against the family values?

Contrary to the common belief, it was not new for the Egyptian texts to refer to *the family* as a basis of legislation. All the Egyptian constitutions since the declaration of the Egyptian Republic incorporated the family—or *al-usra*, “a term that in the twentieth century signified the conjugal family,” as the basis of the society.<sup>4</sup> The Egyptian constitutions of 1956 and 1964 stated that “the family is the basis of society, and is it based on religion, morality, and patriotism.”<sup>5</sup> In 1971, a commitment on the State was added to that previous statement to “preserve the authentic character of the Egyptian

---

<sup>1</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 304 (2nd Vintage Books ed ed. 1995).

<sup>2</sup> Law No. 175 of 2018 (Law on Combating Cyber and IT Crimes), *al-Jarīdah al-Rasmīyah*, vol. 32 bis, 14 August 2018 (Egypt).

<sup>3</sup> Egypt: Spate of Morality Prosecutions of Women, HUMAN RIGHTS WATCH (2020), <https://www.hrw.org/news/2020/08/17/egypt-spate-morality-prosecutions-women> (last visited Apr 13, 2022).

<sup>4</sup> KENNETH M. CUNO, *MODERNIZING MARRIAGE: FAMILY, IDEOLOGY, AND LAW IN NINETEENTH AND EARLY TWENTIETH CENTURY EGYPT* 2 (2015).

<sup>5</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 16 JAN. 1956, ART. 5; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 24 MAR. 1964, ART. 7.

family, its values and its traditions.”<sup>6</sup> This commitment was extended further with the rise of the Islamic radicals in 2012 to put the obligation on the members of the society themselves to preserve, among those previously mentioned, “the family’s cohesion, stability and the upholding of its moral values.”<sup>7</sup> However, in less than two years, the current constitution lessened the society’s commitment to finally state that “the family is the basis of society and is based on religion, morality, and patriotism. The state shall preserve its cohesion, stability, and the consolidation of its values.”<sup>8</sup> Apart from these minor wording differences, what is typical between all these supreme texts is that they all recourse to *the family* as the basis of society and emphasize its morality, values, and stability. Yet the question goes, is it really about protecting the family? Does the state, any state, really care for the strength of the family and its morality, or is it just an excuse, which in this case would definitely act as a great one, to gather public support for the state’s attempts to shape its citizens into a single unit that can be easily controlled?

This paper focuses on ‘the family’ as the core element of modern society. This paper attempts to tell the story of how this element has been invented and implanted in the legal discourse throughout the nineteenth and twentieth century, and till today, in a manner that gives the State the power to gain access to the intimate details of its citizens’ lives.

The second chapter of this paper is an introduction to my argument that the ideas of the family, values, and morality were unnatural. Instead, as we will see in the rest of the paper, these ideas did have a history. A history that was not totally natural. A history that was invented to assist the state in governing its people. In doing so, the second chapter tackles the Egyptian State from nearly the end of Egypt’s status as a British protectorate till today. Egypt has entered a new political/legal ‘modern’ era. This era needed new laws which reflected its modernity. In this part, I mainly examine courts’ decisions and the certainty that judges have in deciding and interpreting laws under the concept of the family. I also discuss the academic legal jurisprudence and its adaptation of the family and its morality. The media also has a significant role in supporting the

---

<sup>6</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 12 SEP. 1971, ART. 9.

<sup>7</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 25 DEC. 2012, ART. 10.

<sup>8</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 JAN. 2014, ART. 10.



perspective that the family is the primary purpose of the law, and it shall be protected both by the state and society. I chose several unrelated regulations to emphasize the main idea of the paper: personal status law, moving through the criminal code to NGO law, customs regulations, press law, etc. By going back to the regulation that drew this paper's argument, the anti-cybercrime law, I illustrate how the situation, where the family has always been the center of the Egyptian legal system, has always remained the same.

The Egyptian Supreme Constitutional Court, in its interpretation of laws and the extent of its compatibility with the constitution, asserted that

the Egyptian constitution stated that the family is the basis of the society and that its strength is in religion, moralities, and patriotism. The authentic character of the family, with its values and traditions, shall be preserved, emphasized, and developed in the societal relations ... The Constitution has built a frame for the family from religion, moralities, and patriotism that emphasizes its authentic character and reflects its shape. The family shall not be separated from its social role nor be retreated from the higher values of the religion.<sup>9</sup>

On a similar note, scholars agreed that any interpretation of the laws “must not be drawn from the international principles unless they are compatible with the Egyptian society’s traditions.”<sup>10</sup> Family morality is the keyword in this legal discourse. The classical Egyptian legal jurisprudence agreed that the definition of morality should be drawn from the society as a whole, yet not be apart from the collective religious and moral beliefs of the Egyptian reality.<sup>11</sup> The Egyptian Court of Cassation adopted the same principle, as it found that the embarrassment of a small group of people from an act is enough to stigmatize this act of indecency.<sup>12</sup> On the same grounds, it adopted men’s right to discipline their wives, even by light beating, as a long-established principle.<sup>13</sup> This principle, which is drawn from “the constitutional commitment to preserving the cohesion and stability of the family, [...] shows the extent to which the conjugal family

---

<sup>9</sup> al-Mah. kamah al-Dustūriyah al-‘Ulyā [Supreme Constitutional Court], case no. 33, session of 2 December 1995, Maktab Fani [Technical Office] 7, vol. 1, year 15, p. 297.

<sup>10</sup> AHMED FATHI SUROUR, AL-WASIT FI QANOUN AL-‘OQOBAT: AL-QESM AL-KHAS [CRIMINAL LAW: PRIVATE SECTION] 269 (2016).

<sup>11</sup> *Id.*; MUSTAFA MAGDY HARAGA, AL-TA‘LIQ A‘ALA QANOUN AL-‘OQOBAT, [COMMENTARY ON CRIMINAL LAW] VOL. 3, 722

<sup>12</sup> Mah. kamat al-Naqd. [Court of Cassation], petition no. 1318, session of 18 Apr. 1929, Maktab Fani [Technical Office] 1, vol. 1, year 46, p. 270.

<sup>13</sup> Mah. kamat al-Naqd. [Court of Cassation], petition no. 501, session of 02 Jun. 1952, Maktab Fani [Technical Office] 3, vol. 3, year 22, p. 1015; Mah. kamat al-Naqd. [Court of Cassation], petition no. 29, session of 11 Jun. 1991, Maktab Fani [Technical Office] 42, vol. 2, year 59, p. 1348.

has become ideologically normative.”<sup>14</sup>

An excerpt from the explanatory memorandum of law no. 16 of 1952, which criminalized the mere possession or the distribution of any indecent materials by article 178 of the Criminal Code, is vital to understand the public opinion on that matter. The Egyptian Parliament found that

the multiplication of obscene pictures and publications was the reason behind the corruption of the youth, the awakening of the worst instincts in their minds [...], and the disruption of family ties. Before this amendment, the authorities had to prove that common decency was violated, which was a tough job. Thus, the legislator substituted the old requirement and criminalized the mere possession of materials as long as they were indecent in themselves apart from the motive of the possessor.<sup>15</sup>

The Egyptian legislator puts on his shoulders the responsibility to protect the Egyptian family from any disturbance that might tear up its ties. In fact, this protection goes a little bit further by fighting and attempting to eliminate any different *family* other than that one that is ‘legally’ defined. These attempts start from merely non-recognizing and ignoring to actually criminalizing and punishing those who show a sign of breaking from normativity. This protector’s role, which the state has taken, turned “the family space [into] a space of continual surveillance.”<sup>16</sup> This role was “an effort to rid the society of its abnormal members.”<sup>17</sup>

Promoting the family, as we know it nowadays, against the old kinship system is not an exclusive pattern Egypt took as a state and citizens. The third chapter of this paper reads behind the practice Egyptian society has taken. It tries to elaborate on how Egyptian society has been tangled with the concept of the family by focusing on the philosophy of such a pattern. In one of his best books, Michel Foucault argues that while the world was shifting towards capitalism, sex started to be controlled by the state. Sexuality, outside the permitted course, was linked with sin so that it could be easily managed and controlled. The goal was not to eliminate sexual acts but to form a single type of sexuality that is economically useful by reproducing labor capacity.<sup>18</sup> States of that time understood the equation: those who have power enough to control sexual

---

<sup>14</sup> CUNO, *supra* note 5 at 233.

<sup>15</sup> HASSAN SADEQ AL-MARSFAWY, QANOUN AL-‘OQOBAT [CRIMINAL LAW] 612-613 (2001).

<sup>16</sup> MICHEL FOUCAULT, THE HISTORY OF SEXUALITY. 1: AN INTRODUCTION 245 (1990).

<sup>17</sup> Chloë Taylor, *Foucault and Familial Power*, 27 HYPATIA 201, 207 (2012).

<sup>18</sup> FOUCAULT, *supra* note 17 at 5–6; Taylor, *supra* note 18 at 205.

discourse can control the population and consequently will control the economy. Accordingly, “legal sanctions against minor perversions were multiplied, sexual irregularity was annexed to mental illness [...], and all possible deviations [from sexual norm] were carefully described [...] to absorb [...] all the fruitless pleasures.”<sup>19</sup> These patterns “facilitated the penetration of social and self-disciplinary regimes into the most intimate domains of modern life.”<sup>20</sup> And here came the rule of the family. The family was “essential [to the state] for inserting family members into disciplinary institutions.”<sup>21</sup> Parents insisted on putting their kids into schools, barracks, or workshops. And on the other end of the equation, those apparatuses repaid the favor by returning those ‘subjects’ to the family after making sure they would submit to *the family* and its goals.<sup>22</sup> The state has a long-term deal with the family: the family can keep its control over its members’ aspects of life, not just by their blood right, but by pledging to the state “to produce well-disciplined subjects,” and if it fails to do so the state will intervene to make sure that this goal is fulfilled.<sup>23</sup> Accordingly, the nuclear family became the ‘normality’ and “anyone who resist[ed] being part of such a family ... pose[d] a threat to society ... against which [the family itself] has the right to defend itself.”<sup>24</sup>

The fourth chapter returns to Egypt and surfs through the modernization period. The Egyptian state, through law reformers, the press, and intellectuals, was the leading actor in producing and promoting the modern nuclear family, the type of family that we know today: a family that consists of a husband and wife and their children, preferably just two or three.<sup>25</sup> Multiple marriages were discouraged, and the monogamous family

---

<sup>19</sup> FOUCAULT, *supra* note 17 at 36.

<sup>20</sup> ANN LAURA STOLER, RACE AND THE EDUCATION OF DESIRE: FOUCAULT’S HISTORY OF SEXUALITY AND THE COLONIAL ORDER OF THINGS 3 (1995).

<sup>21</sup> Taylor, *supra* note 18 at 205; CHLOË TAYLOR, THE ROUTLEDGE GUIDEBOOK TO FOUCAULT’S “THE HISTORY OF SEXUALITY” 79 (2017).

<sup>22</sup> Taylor, *supra* note 18 at 205.

<sup>23</sup> *Id.* at 205.

<sup>24</sup> *Id.* at 215.

<sup>25</sup> Hanan Kholoussy, *The Nationalization of Marriage in Monarchical Egypt*, in RE-ENVISIONING EGYPT 1919-1952, 317–320 (2005),

<https://cairo.universitypressscholarship.com/10.5743/cairo/9789774249006.001.0001/upso-9789774249006-chapter-12> (last visited Oct 8, 2021).

“was redefined to fit the models of Victorian domesticity.”<sup>26</sup> The state did so by actively promoting “monogamous families that, in turn, would serve as the foundation for a modern state free of social ills.”<sup>27</sup> That was promoted to the public by the modernists as a new family era to the extent that it can be seen in the legal discourse in most law amendments of that time and the public perspective, which could be told through the Palace’s attempts to cover up for the second marriage of Khedive Abbas II although it was legal, in 1910.<sup>28</sup> Looking back at the Egyptian legal template, especially in the legal reforms that took place in the late nineteenth century, one can safely argue that these reforms were illustrated around “the legal reconstruction of the family as the basic unit of society.”<sup>29</sup> This illustration can be easily seen in family law and its reforms, but it can also be perceived in every other legal area with some digging.

My purpose is not to define the family from legal or social lenses. That family, as we will see, is already recognized under the law and, according to the government, shall be protected from “demolish[ing] its values and principles and steal[ing] its innocence.”<sup>30</sup> However, I aim to tell the evolution story of that term in the Egyptian legal discourse from the modernization period until today. I also aim to show how such a term was implanted in Egyptian society and how such a process adopted Foucault’s theories of power, sexuality, and family in an attempt to answer the title question. Is it really about the family?

---

<sup>26</sup> LISA POLLARD, NURTURING THE NATION: THE FAMILY POLITICS OF MODERNIZING, COLONIZING AND LIBERATING EGYPT (1805/1923) 121 (2005).

<sup>27</sup> Kholoussy, *supra* note 26 at 319.

<sup>28</sup> CUNO, *supra* note 5 at 23.

<sup>29</sup> KHALED FAHMY, IN QUEST OF JUSTICE: ISLAMIC LAW AND FORENSIC MEDICINE IN MODERN EGYPT 129 (2018).

<sup>30</sup> EGYPTIAN PUBLIC PROSECUTION, FACEBOOK, (2020), <https://www.facebook.com/1999202686854290/posts/2949414535166429/> (last visited Apr 14, 2022).

## I. The New State

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [obscene materials,] and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.<sup>31</sup>

~ Justice Stewart

In 1964, and in a very different jurisdiction, judges had the same infamous conclusion commonly known for every other judge: we know it, even if we may not be able to define it sometimes, yet we certainly know it. As a former judge, I can say this is what most, if not all, judges believe. I certainly believed it. It is our job, my job, to read, analyze, define, and rule in favor of the right and truth. Even when some texts are not explicit, it is my job to determine the truth, and this truth is always what I know.

In 2018, when the anti-cybercrime law was issued prohibiting any act which goes against Egyptian family values, it was a moment when I felt some confusion. What are these values, how can this family be defined in a massive society like Egypt, and how can I apply such a law that I cannot explain as a judge? These were my first questions. But the answer was already there: I know it when I see it. Most laws have used similar vague terms like decency, morality, and values, and judges never find it tough to rule in favor of the ‘truth.’ Nothing should be different. But this was not the answer I was looking for. Or maybe this was not the question I had been thinking of. What truly puzzled me was: why is it about the family? The family has always been the main element of laws and regulations in Egypt. For anybody with a legal background, and even for an ordinary reader, the legislator has always used the family and its morality as a ground for drafting laws. Maybe it was not as clear as the case in anti-cybercrime law. Yet, it was always there. But, is this concept of the family, the family which I can argue that most people believe is the ultimate truth, a natural idea? In other words, is this family, the nuclear family to be precise, the natural evolution of any society, or was it invented, shaped, and implanted in Egyptian society so that everybody can see it as the truth?

Before digging for an answer to that last question, which I will come to in the following two chapters, this chapter illustrates how that family was always there. In this

---

<sup>31</sup> *Jacobellis v. Ohio*, 378 U.S. 184 (1964)

chapter, I examine Egyptian legal jurisprudence and how it links its laws to the concept of the family. By analyzing the courts' decisions of the Higher Constitutional Court, the Court of Cassation, and the Higher Administrative Court with some reference to lower courts when applicable, I give a detailed view of how courts interpreted laws, with such certainty, by constantly referring to the family. I also examine the academic legal jurisprudence and its adaptation of the family and its morality. This analysis illustrates how the family has always been the center of the Egyptian legal system.

### **A. Preserving the Family**

Back in 1937, when the current Criminal Code was initially issued, it exempted whoever stole from their family from punishment.<sup>32</sup> This rule was taken from the Roman Code “as the property were common between the family members and it was unthinkable that a theft would occur between them.”<sup>33</sup> However, this was amended within only ten years of issuing the law. According to the explanatory memorandum of the law amending this provision, the rationale behind such a provision, especially after the common property principle is no longer applicable, is only meant to protect the family's reputation and structure. However, the legislator saw that keeping this exemption as is would harm the family's interest rather than protect it. Under this assumption, the legislator found that “for the sake of protecting the family structure, it was decided that the theft lawsuit [between the family members] can only be instituted by request from the victim and that he/she can drop the lawsuit and even suspend the sentence at any time.”<sup>34</sup>

Other articles of the Criminal Code also show how much the family is essential to the legislator. Article 291, which was not revoked up until 1999, used to exempt the male kidnapper from the punishment if he married the kidnapped girl.<sup>35</sup> This article, which was copied from the old National Criminal Code of 1904, held high the institution of the family and prevailed over a crime in which its penalty, in standard cases, is up to capital punishment. On another note, article 273, which is still effective, states that “an

---

<sup>32</sup> Law No. 58 of 1937 (Criminal Code), *al-Waqā'i' al-Mis. rīyah*, vol. 71, 5 Aug. 1937, art. 312, (Egypt).

<sup>33</sup> FAROUQ SAIF AL-NASR, QANOUN AL-'OQOBAT [CRIMINAL LAW], THE EXPLANATORY MEMORANDUM OF THE LAW NO.64 OF 1947, 279 (1993).

<sup>34</sup> *Id.*

<sup>35</sup> Criminal Code, *supra* note 32, art. 291.

adulteress may not be tried in front of courts except by a request of her husband.”<sup>36</sup> In an explanation to that, the Egyptian Court of Cassation concluded that

adultery is nothing but a crime ... that affects society as it violates the duties of marriage, which is the foundation of the family and the [public] order in which the community lives... However, since this crime is harming at the same time the interest of the husband, his children, and his family, the legislator decided, in consideration of this interest, that the husband’s consent to file a lawsuit is required.<sup>37</sup>

Another provision under the same Code punishes a man who refuses to abide by his maintenance responsibility by imprisonment.<sup>38</sup> Courts have asserted that “as long as the wife surrenders herself to her husband, obeys him, and does not refrain from moving to him, she has the right to maintenance. The general rule is that for everyone who is ‘imprisoned’ with a right intended for someone else, its maintenance is his responsibility.”<sup>39</sup> The legislator, under this assumption, has found that

the patriarchal authority exercised by its owners ... does not dictate only rights but compares them with their duties that they cannot renounce. These duties must be forced upon them with a criminal penalty which they cannot get rid of except by returning to the family they abandoned and continuing to live with it.<sup>40</sup>

Therefore, the legislator put on his shoulder the responsibility of keeping the family together. As in a civilized country, it is a crime for a man to desert his family “because it means abandoning it, refraining from spending on it, and exposing it to loss ... which leads to its destruction.”<sup>41</sup>

Protecting the family was not always as apparent as those mentioned provisions. Courts and legal scholars have also worked in interpreting vague articles under the umbrella of the family. The Criminal Code states that “the provisions of the Criminal Code do not apply on acts committed, in good faith, pursuant to rights established by virtue of Shari‘a.”<sup>42</sup> In interpreting such immunity, legal scholars have agreed that this

---

<sup>36</sup> Criminal Code, *supra* note 32, art. 273.

<sup>37</sup> Mah. kamat al-Naqd. [Court of Cassation], petition no. 697, session of 19 May 1941, year 11, (Egypt).

<sup>38</sup> Criminal Code, *supra* note 277, art. 293.

<sup>39</sup> Mah. kamat al-Naqd. [Court of Cassation], petition no. 76, session of 25 Dec. 2000, year 65; Mah. kamat al-Naqd. [Court of Cassation], petition no. 326, session of 30 Mar. 1998, year 63; Mah. kamat al-Naqd. [Court of Cassation], petition no. 747, session of 11 June 2013, year 69, (Egypt).

<sup>40</sup> al-Mah. kamah al-Dustūriyah al-‘Ulyā [Supreme Constitutional Court], case no. 45, session of 22 Mar. 1997, year 17, (Egypt).

<sup>41</sup> *Id.*

<sup>42</sup> Criminal Code, *supra* note 32, art. 60.

article regulates the right of the husband to discipline his wife under his responsibility to preserve the family's interest.<sup>43</sup> Shari'a drives the man's right to discipline his wife.<sup>44</sup> Qur'an has asserted that "*men are the caretakers of women, as men have been provisioned by Allah over women and tasked with supporting them financially... And if you sense ill-conduct from your women, advise them [first], [if they persist,] do not share their beds, [but if they still persist,] then discipline them.*"<sup>45</sup> Accordingly, this right has limits. Discipline, or in a more accurate word, 'beating,' must come third after advice and abandonment. Also, beating must be gentle and in good faith, where the husband means only to discipline his wife.<sup>46</sup> And the reason why the legislator has stated this right is its consideration of the family's interest which requires that some of the family's members have authority over the rest. This interest is the right of society as a whole, as disciplining a wife is to put her back on the right track, which conforms with society's welfare.<sup>47</sup>

Courts also have always emphasized this right. According to this well-established principle,

it is permissible for the husband to discipline [his] woman lightly for every disobedience which no prescribed punishment has been set for it. And it is not acceptable for him to beat her severely... The limit of severe beatings referred to is the one that affects the body and changes the color of the skin... This amount is sufficient to consider his act to be outside the limits of his right established by virtue of Sharia'a."<sup>48</sup>

This discipline principle has also been given to the father over his children.<sup>49</sup> This right is one of blood-right. Children are the property of their parents. And where the authority is concentrated at the top of the family, usually in the father, he is the one who practices this discipline over his family members. Egyptian legislator has also assumed the same right

---

<sup>43</sup> MAHMOUD NAGIB HUSNI, SHARH QANOUN AL-'OQOBAT: AL-QESM AL-'AM [EXPLAINING THE CRIMINAL CODE: PUBLIC SECTION] 195-196 (2018).

<sup>44</sup> AHMED AWAD BELAL, MABADE' QANOUN AL-'OQOBAT AL-MASRI: AL-QESM AL-'AM [THE PRINCIPLES OF THE CRIMINAL CODE: PUBLIC SECTION] 176-177 (2009-2010).

<sup>45</sup> Surat al-Nisa', Verse 34.

<sup>46</sup> BELAL, *supra* note 44, at 177-178.

<sup>47</sup> HUSNI, *supra* note 43, at 201-202.

<sup>48</sup> Mah. kamat al-Naqd. [Court of Cassation], petition no. 178, session of 18 Dec. 1933, year 4; Mah. kamat al-Naqd. [Court of Cassation], petition no. 18555, session of 27 Nov. 2008, year 73; Mah. kamat al-Naqd. [Court of Cassation], petition no. 6848, session of 22 Dec. 1994, year 63; Mah. kamat al-Naqd. [Court of Cassation], petition no. 1132, session of 2 Nov. 1975, year 45, (Egypt).

<sup>49</sup> BELAL, *supra* note 44, at 179.



under Sharia'a. On refusing a woman's claim to obtain custodianship from the father who had been fined for beating his child, the court concluded that

beating is one of the discipline methods the father has the right to use if he sees the necessity for it. The father is not considered untrustworthy [of custodianship] if he uses this legitimate right even if courts punished him unless it was proved that he abused his right ... by [habitually] beating his children.<sup>50</sup>

It was not just for Criminal Code to preserve the family. In 1959, when the Egyptian state was re-regulating the right to travel, it stated that it was for the Interior Minister to refuse to issue passports for important reasons.<sup>51</sup> Accordingly, a decree of the Interior Minister was issued stating that issuing a passport for a wife is subject to her husband's approval.<sup>52</sup> Although this decree was revoked over unconstitutionality claims in 2000, the court concluded that giving this right absolutely to the executive authority, represented in the Interior Minister, is unconstitutional as preventing people from their right of traveling is absolute for the legislative or the judicial authorities only. The court added that

the preceding does not preclude the legislator from undertaking—by original legislation—the regulation of granting, renewing, and withdrawing the wife's passport. The legislator must balance between freedom of movement and between what is stipulated in the constitution of ensuring the reconciliation between the duties of the woman towards the family and their work in society and their equality with men without prejudice to the provisions of Shari'a."<sup>53</sup>

Even in the absence of laws, or even when it meant opposing the existing laws clearly, courts never find it hard to rule in favor of preserving the family. Originally, whoever wanted to be a judge in the State Counsel should not be married to a foreigner.<sup>54</sup>

However, when a judge was facing discharge from service upon his marriage to a foreigner, the constitutional court revoked that provision. It concluded that

the family, which is based on religion, morals, and patriotism, is the mainstay of society. The state must work to preserve its original character and the values and traditions it embodies... [Building a family] is also one of the vital personal rights upon which the development of the community and the communication of its

---

<sup>50</sup> al-Mah.kamah al-Guz'iyya al-Shar'iyya [Shari'a District Court], case no. 79, session of 13 Jan. 1930, year 1929, (Egypt).

<sup>51</sup> Law No. 97 of 1959 (On Passports), *al-Jarīdah al-Rasmīyah*, vol. 99, 15 May 1959, art. 11, (Egypt).

<sup>52</sup> Interior Minister Decree No. 63 of 1959, *al-Jarīdah al-Rasmīyah*, vol. 124, 23 June 1959, art. 21, (Egypt).

<sup>53</sup> al-Mah.kamah al-Dustūriyah al-'Ulyā [Supreme Constitutional Court], case no. 243, session of 4 Nov. 2000, year 21, (Egypt).

<sup>54</sup> Law No. 47 of 1972 (State Council Code), *al-Jarīdah al-Rasmīyah*, vol. 40, 1 Oct. 1972, art. 72, (Egypt).

generations is based and through which a human seeks the happiness he wants to attain.<sup>55</sup>

On another unconstitutionality claim, the court also revoked a provision that gave the administrative authority as an employer the right to refuse the husband's request to accompany his wife in her work abroad.<sup>56</sup> The court, with similar words, concluded that

the right to form a family is one of the rights guaranteed by the constitution. This right is closely related to personal freedom... Th[is] right is not separated from the right to preserve it throughout the stages of its existence—to secure it from what would prejudice its unity... Accordingly, the family that includes all [these values] and which is the basic unit of its society should not be separated.<sup>57</sup>

However, in the opposite case, when the same court was tackling women's right to work, its conclusion was confusing. First, the court found that a woman is equal to a man in all fields of life; however, she should not use her work as an excuse to compete with her husband or gain an edge or dominance over him. Also, life between women and men should be based on cooperation, and it is not a form of cooperation when a woman abandons her home to engage in work that exhausts her time, distresses her, or does not suit her nature. Instead, while her work should benefit her community, it must not harm her home. On a second note, the court asserted that a husband should not prevent his wife from working. Yet, it is still his right, which emerges from his male guardianship, to prevent her from work if he realizes that she misuses this right in a manner that deviates it from its purposes. He also has this right if her engaging in work is against the interests of her family, as her primary responsibility is to manage the duties of her home and her children. Thirdly, the court emphasized that while the constitution ensures women's right to work, it must be understood that this right and the family's interest are not parallel. The family should be prioritized over the right to work, so the work is nothing but subservient to the family to serve it and develop its structure. The court concluded that “the religious perfection of a woman requires that she favors her home over everything else. This is an expression of her true understanding of the essence of her faith.”<sup>58</sup>

---

<sup>55</sup> al-Mah. kamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], case no. 23, session of 18 Mar. 1995, year 16, (Egypt).

<sup>56</sup> Law No. 49 of 1972 (On Universities Regulation), *al-Jarīdah al-Rasmīyah*, vol. 40, 5 Oct. 1972, art. 72, (Egypt).

<sup>57</sup> al-Mah. kamah al-Dustūrīyah al-'Ulyā, *supra* note 21.

<sup>58</sup> al-Mah. kamah al-Dustūrīyah al-'Ulyā [Supreme Constitutional Court], case no. 18, session of 3 May 1997, year 14, (Egypt).

Even when courts could not repeal solid, well-established rights, as in the case of husbands' rights to divorce and abandon their wives, they attempted to deter others from abusing this right. It was ruled that

although divorce is a method to terminate a marriage, the spirit of Sharia'a does not allow for arbitrary divorce... Even if divorce is a legitimate right, it should only be used in case of necessity... The court does not argue against the defendant's [the husband's] right to divorce at any time; however, this right should not be abused... Accordingly, the court finds that the claimant [the wife] has the right to claim damages.<sup>59</sup>

## **B. Preserving the Morality**

Family, morality, and honor were linked together. Failure to form a family was equal to a betrayal of the whole society.<sup>60</sup> And it is the responsibility of the state to protect the family: i.e., to preserve morality.<sup>61</sup> Therefore, the legislator and courts have assembled to ensure that morality is well maintained. The Criminal Code was the perfect tool again to threaten whoever thinks of wrecking this morality.

From another explanatory memorandum, which I referred back to in the introduction chapter, the legislator used the protection of the family structure again as an excuse to amend the Criminal Code. The regulation was amended from criminalizing the violation of morality if it was done by publishing indecent materials to criminalizing the mere possession of such materials.<sup>62</sup> The legislator used very harsh words referring to that 'criminal' act. The legislator put upon itself the responsibility of "chasing the evil in its den, narrowing the corruption down to its cradle, and eliminating the factors of decadence before it becomes publicly known."<sup>63</sup> Accordingly, the new amendment "chose to punish even in case of presenting [these materials] even in private ... which, [according to legislator itself,] is anomalous as the normal rules would require [fulfilling] the publicity condition in such indecent crimes."<sup>64</sup>

---

<sup>59</sup> al-Mah. kamah al-Ebteda'iyya al-Ahliyya [National Preliminary Court], case no. 1281, session of 20 Jan. 1926, year 1925, (Egypt).

<sup>60</sup> HANAN KHOLOUSSY, FOR BETTER, FOR WORSE: THE MARRIAGE CRISIS THAT MADE MODERN EGYPT 23 (2010).

<sup>61</sup> *Id.* at 42.

<sup>62</sup> Criminal Code, *supra* note 32, art. 178.

<sup>63</sup> AL-NASR, *supra* note 33, THE EXPLANATORY MEMORANDUM OF THE LAW NO.16 OF 1952, 301 (1993).

<sup>64</sup> *Id.* at 302.

Other articles also clearly punish the incitement of indecency.<sup>65</sup> The result of this incitement is not an element of this crime. The mere incitement is penalized by imprisonment. Those articles had gone through many debates among scholars in their attempt to define which acts would be considered indecent. However, it did not take them too long to reach a more complicated conclusion: indecent acts are those acts that may harm people's modesty.<sup>66</sup> But how do we describe this modesty? In other words, whose modesty has the right to be preserved? Which family, in a massive society like Egypt, does it need protection.?

The previous head of the legislative authority addressed this confusion, attempting to explain the parameters of this modesty. According to him, "indecency should not be limited to whoever was subject to the indecent act, but the whole society should be considered."<sup>67</sup> However, he admitted that there is no doubt that the benchmarks of indecency differ from place to place and from time to time, even in a single society.<sup>68</sup> But if we cannot reach a specific definition even in the same society, how can we refer to the whole society as the benchmark? Yet, he did not suggest how to solve this paradox. Some scholars referred instead to public norms as a benchmark for defining such acts.<sup>69</sup> Others chose Islamic provisions while considering the current evolutions in such a term as a standard.<sup>70</sup> Yet, they all fell into the same paradox. However, in practice, there was an implicit agreement that such a dilemma should be left out of texts and handled in courts. Some scholars have explicitly stated that this arrangement exists between the legislator and judges. They even went further by arguing that it is for the latter to "preserve the morality even if the [whole] society has lost its modesty" because it is for a judge to consolidate the morality.<sup>71</sup>

The Court of Cassation emphasized this last conclusion. In a well-established principle, the court ruled that

---

<sup>65</sup> Criminal Code, *supra* note 32, art. 269 bis.

<sup>66</sup> SUROUR, *supra* note 10, at 269.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> HUSNI, *supra* note 43, at 102.

<sup>70</sup> MAHMOUD NAGIB HUSNI, SHARH QANOUN AL-'OQOBAT: AL-QESM AL-KHAS [EXPLAINING THE CRIMINAL CODE: PRIVATE SECTION] 662 (2018).

<sup>71</sup> HARAGA, *supra* note 11, at 722.

even in a nightclub where [most of] its members were already lost their modesty to the extent that they do not feel any embarrassment [anymore;] still, some of them may feel ashamed of such acts [dancer's dancing], and this is enough for considering this [dancing] a penalized act.<sup>72</sup>

In most cases, it was clear that judges had assigned themselves as crusaders of norms and morality. This rule led many scholars to add the “judicial norm” as a type of norm that should be followed in case the legislator fails to put specific parameters or definitions to the existing crimes.<sup>73</sup>

Recently, the legislator has put on his shoulders the responsibility to make it clear that, whenever it is possible, preserving morality is a part of every new law. NGO law, which was issued in 2019, has gone through many debates among civil society associations. This law gives it all to the government's discretion “to deny registration to independent human rights organizations on vague grounds.”<sup>74</sup> Violating public order and morality were among the main reasons for denying the independent organization's registration.<sup>75</sup> Again, interpreting such vague terms “was left to the arbitrary discretion of that body [the administrative body]” and, of course, to courts.<sup>76</sup> In other words, the excuse of preserving morality becomes a thorn in the side of the constitutional right to freedom of association.

Several other laws have adopted the same exact wording. No products shall be imported, produced, or sold if they violate public morality.<sup>77</sup> No streaming platforms shall be registered if they violate public morality.<sup>78</sup> No press shall publish news if it violates public morality.<sup>79</sup> No patent shall be given to an invention if it violates public

---

<sup>72</sup> Mah. kamat al-Naqd. [Court of Cassation], petition no. 1318, session of 18 Apr. 1929, year 46, (Egypt).

<sup>73</sup> HUSNI, *supra* note 70, at 102.

<sup>74</sup> Egypt: Authorities must repeal the outrageous NGO law, EUROMED RIGHTS, <https://euomedrights.org/publication/egypt-authorities-must-repeal-the-outrageous-ngo-law/> (last visited Nov 14, 2022).

<sup>75</sup> Law No. 149 of 2019 (NGO Law), *al-Jarīdah al-Rasmīyah*, vol. 33 bis (b), 19 Aug. 2019, art. 15, (Egypt).

<sup>76</sup> UN rapporteurs demand review of Egypt's NGO law following complaint, COMMITTEE FOR JUSTICE (2021), <https://www.cfjustice.org/un-rapporteurs-demand-review-of-egypts-ngo-law-following-complaint/> (last visited Nov 14, 2022).

<sup>77</sup> Law No. 181 of 2018 (Customer Protection Law), *al-Jarīdah al-Rasmīyah*, vol. 37, 13 Sep. 2018, art. 13, (Egypt).

<sup>78</sup> Chairman of the Supreme Council for Media Regulation Decree No. 26 of 2020, *al-Waqā'ī' al-Mis. rīyah*, vol. 108, 10 May 2020, art. 31, (Egypt).

<sup>79</sup> Law No. 180 of 2018 (Press Law), *al-Jarīdah al-Rasmīyah*, vol. 34 bis (e), 27 Aug. 2018, art. 23, (Egypt).

morality.<sup>80</sup> And the list goes on that I doubt I can include every time this exact term has been incorporated into Egyptian laws.

### **C. Preserving the Values**

This analysis takes us to the law that triggered writing this paper: the anti-cybercrime law. As I have mentioned in the introduction, this law, more clearly than other laws, punishes “anyone who violates the family values.”<sup>81</sup> Again, and more clearly, the legislator has fallen, deliberately, I believe, into the same paradox. Over dozens of cases that affected Egyptian society throughout the last four years, protecting society against acts that violate Egyptian family values was the central theme. Since the legislator stated this protection clearly under the anti-cybercrime law, social media platforms were dragged under the spot. Since issuing this law, or mainly since courts started interpreting it, it did not need many tools to commit a crime. An account on a social media platform is the primary tool in this crime.

In a five pages statement, the public prosecution “reaffirmed its commitment to continue fighting the shameful crimes violating the principles and values of our society.”<sup>82</sup> It also did not forget to emphasize the role of the parents, educational entities, and other disciplinary institutions in disciplining the children. It added that it “appeal[ed] to all parents to commit to their role towards their children, and to help the official educational and religious organizations in disciplining their children in the right way.”<sup>83</sup>

Courts also followed a similar path. In my research process throughout the courts’ archive in the preparation of this part of the paper, two common elements were always there in all cases: a dancing video of a girl was published via her personal account on a social media platform and criminal charges of violating the family values. In this part, I will try to translate courts’ rulings as accurately as possible in an attempt to illustrate and deliver the picture as is. The next is an excerpt from a court’s ruling.

---

<sup>80</sup> Law No. 82 of 2002 (Intellectual Property Law), *al-Jarīdah al-Rasmīyah*, vol. 22 bis, 2 June 2002, art. 2, (Egypt).

<sup>81</sup> Law No. 175 of 2018, *supra* note 2.

<sup>82</sup> EGYPTIAN PUBLIC PROSECUTION, FACEBOOK, (2020), <https://www.facebook.com/photo/?fbid=2942503029190913&set=a.2000327433408482>, (last visited 24 Nov 2022).

<sup>83</sup> EGYPTIAN PUBLIC PROSECUTION, FACEBOOK, (2020), <https://www.facebook.com/photo/?fbid=3017652188342663&set=a.2000327433408482>, (last visited 24 Nov 2022).

The court has found that the defendant, seduced by fake fame and love of money, was led by the devil and slipped into the path of sin and the filth of disobedience. She chose a crooked road for profiting, not respecting the common religious values and considerations in a society where all the divine religions warn and prohibit corrupting them [the common values]. The devil led her to forget that such acts shall incite the youth to debauchery, seduce their fantasies, and awaken the vilest instincts in their souls... She used her videos to agitate sexual instincts ... which the court had stood before them, and wondered about the message she wanted to send to future generations. The court has found no message but ugliness, aberration, and *fitna*. She departed from the straight path and wreaked havoc on earth; she did not consider the virtues; she outraged the public decency... The court has ascertained that the defendant has broken the principles and morals of Egyptian society, corrupted its values, and stolen its purity.<sup>84</sup>

In another ruling, the court used similar references to morals and values.

The defendant had violated the Egyptian family morals and values when she addressed its members in a way that tore down the family cohesion and undermined the principles that regulate it ... by shooting herself in revealing clothes to seduce the youth and profit from that... The court urges Egyptian families to monitor and supervise their children and control what they connect to on the internet... [The court also urges families] to instill high morals in their children ... to raise them as protectors to this nation's values, principles, and morals.<sup>85</sup>

Even when the previous case was appealed before a higher court, the same conclusion was there:

the defendant appeared in her videos in a way that violates the morals and values of the Egyptian family, which is publicly known by the whole spectrum of society. [These values] promote ethics and consider the public decency, traditions, and norms which the Egyptian society has grown up with since far along ... until it became an integral part of the Egyptian society which it is known for among other nations.<sup>86</sup>

The Supreme Administrative Court was not any much different than the other courts. A recent ruling concluded that the authority was correct in dismissing a university teacher over her publicly published dancing video.

Dancing is a profession for specific people. Teachers shall not dance publicly in a way that would degrade their prestige before their students, as they should appear as the role model... Freedom does not mean indecency, which violates the values

---

<sup>84</sup> Mah. kamat al-Qahera al-Eqtesadiyya [Cairo Economic Court], misdemeanor case no. 410, session of 27 June 2020, year 2020, (Egypt).

<sup>85</sup> Mah. kamat al-Qahera al-Eqtesadiyya [Cairo Economic Court], misdemeanor case no. 479, session of 27 July 2020, year 2020, (Egypt).

<sup>86</sup> Mah. kamat al-Qahera al-Eqtesadiyya [Cairo Economic Court], misdemeanor appeal case no. 246, session of 12 Jan. 2021, year 2020, (Egypt).

and traditions of the society... Personal life is protected under the constitution as long as it is kept secret. However, if people choose to broadcast their own life willingly, they cannot claim that constitutional protection. When its life becomes for the public, they should be accountable if they act against the values and traditions... Personal life is subject to the public order of society as a whole. It is also restricted by the protection of morality and values which all people respect.<sup>87</sup>

The previous is the result of the story I have been trying to tell. The state asserted clearly on protecting the family and its values. Which family does need protection; what are these values; what are acts that would violate those values; why is this violation a part of a cybercrime law? These never were issues, and the legislator never tried to answer. It was up to the courts again to interpret such a law. And courts never failed the state.

#### **D. The Egyptian Family**

In this chapter, I intended to illustrate how the state, through courts, intervenes to interpret every law and regulation, with such certainty, within the family realm. Those cases are just a small example that clearly expresses how judges are always determined to preserve Egyptian family values. By deliberately using vague terms or even leaving some elements outside the texts, laws allow courts to interfere in interpreting each and every law within the family realm. Even when laws sometimes departed from their ultimate goal, courts were there, in their capacity as the judicial arm of the state, to fix these laws and ensure that they were back on their intended tracks: the tracks that judges believe are the truth. The same conclusion was always there for the public to read, digest, understand, and be warned of. Judges' responsibility is to “preserve morality even if the [whole] society has lost its modesty.”<sup>88</sup>

When I look back at how we, as judges, have such certainty in deciding every case or law within the family realm and that we are never hesitant to say that “I know it when I see it,” I argue that this certainty must have a history. How do all judges believe and act that their analysis in such a matter, which is basically the same analysis, is the truth? Are these ideas, which are being illustrated in court decisions, natural ideas? Or must they have a history invented and implanted in society, so we believe it is the truth?

---

<sup>87</sup> al-Mah. kamah al-Id. āriyah al-'Ulyā [Supreme Administrative Court], petition no. 75494, session of 12 Sep. 2022, year 64, (Egypt).

<sup>88</sup> HARAGA, *supra* note 11.



## II. The Philosophical Story Behind the Family

I don't think that we should consider the "modern state" as an entity that was developed above individuals, ignoring what they are and even their very existence, but on the contrary, as a very sophisticated structure in which individuals can be integrated, under one condition: that this individuality would be shaped in a new form, and submitted to a set of a very specific patterns.<sup>89</sup>

~ Michel Foucault

### A. What is Government?

Throughout history, many linguists, authors, scholars, and even politicians tried to answer the very old question: what is a government? What does it mean for a person to govern, what does it mean for them to be governed, what are the characteristics of a government, and how do the public, along with those who are not involved in the political matter, easily refer to, and most importantly respect, a defined system as a government? In its simplest definition, a government is "the group of people who control and make decisions for a country, state, etc."<sup>90</sup> It is also "the institutions, rules, and administration of state authority."<sup>91</sup> In a more detailed version, it is a word that, according to the context it is being used in, can relate to several aspects: "1, It denotes The act of *governing*, as when we speak of 'the business of government.' 2, The *persons who govern* are called 'the government.' 3, The word 'government,' is used for the phrase *form of government* ... 'a monarchical, aristocratical, or republican government.'"<sup>92</sup> Apart from these definitions, to really understand what truly a government is, I shall give a brief historical background about this specific term.

During the medieval ages, the political system was simple, or at least a way simpler than nowadays. Most of the literature of that era would be presented as advice to

---

<sup>89</sup> MICHEL FOUCAULT & JAMES D. FAUBION, *POWER* 334 (2000).

<sup>90</sup> Merriam-Webster.com dictionary, *Government*, <https://www.merriam-webster.com/dictionary/government> (last visited Oct 5, 2021).

<sup>91</sup> THE CONCISE OXFORD DICTIONARY OF POLITICS, (Iain McLean & Alistair McMillan eds., 3rd ed. 2009).

<sup>92</sup> CHARLES KNIGHT, *POLITICAL DICTIONARY: FORMING A WORK OF UNIVERSAL REFERENCE, BOTH CONSTITUTIONAL AND LEGAL; AND EMBRACING THE TERMS OF CIVIL ADMINISTRATION, OF POLITICAL ECONOMY AND SOCIAL RELATIONS, AND OF ALL THE MORE IMPORTANT STATISTICAL DEPARTMENTS OF FINANCE AND COMMERCE* (1845), [https://www.loc.gov/rr/frd/Military\\_Law/Lieber\\_Collection/pdf/PoliticalDictionary\\_Vol-II.pdf](https://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/PoliticalDictionary_Vol-II.pdf) (last visited Oct 5, 2021).

‘the prince’ concerning his conduct and exercise of power.<sup>93</sup> They illustrated the prince as an authority that is above his subjects. When we review the classical governments, if we can refer to these ancient systems as ones, it can be easily noticed that “the prince acquire[d] his principality by inheritance or conquest.”<sup>94</sup> In other words, he gained authority over people either through his parents or through bloodshed and fear; accordingly, he was not naturally a part of his principality. He was an outsider with no tangible link between him and his principality. Thus, he was constantly under threat from those who sought to conquer his principality from outside, on the one hand, and also, from within, by his subjects who did not have a justifiable reason to accept his governance, on the other. The main object behind his exercise of power, which was always in front of his eyes, was protecting what he owned: to keep the link that bound him to his territory and, consequently, to his subjects.<sup>95</sup>

From the middle of the sixteenth century to nearly the end of the eighteenth, a new notion was developed to replace the classical one of *the prince*, which was the art of government.<sup>96</sup> This principle brought to the surface the same questions I have asked above. It developed around it the problems of governing oneself through personal conduct, governing souls and lives under the pastoral doctrine, governing children and household by the head of the family, and governing the state by the prince and how to successfully rule and control.<sup>97</sup> In this doctrine, a governor is the prince or the monarch, but he can also be the judge, the head of the family, the teacher, and the priest. And, if the prince had a transcendent position over his subjects, “all these other kinds are internal to the state or society.”<sup>98</sup> So, the art of ruling the state was not the only government that could be found there. The art of self-government and personal conduct, which is connected to morality, is also a kind of government. The art of governing a family, which “concern[ed with] the individuals who compose the family, their wealth and prosperity,” is another.<sup>99</sup> And while the theory of sovereignty was constantly trying to justify the

---

<sup>93</sup> FOUCAULT AND FAUBION, *supra* note 90 at 201.

<sup>94</sup> *Id.* at 204.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 201.

<sup>97</sup> *Id.* at 202.

<sup>98</sup> *Id.* at 206.

<sup>99</sup> *Id.* at 209.

superior power of the prince that flowed from above to below, the case was not exactly the same in this new principle. Power in the latter does not flow in one direction.

On the contrary, “in the art of government, the task is to establish a continuity, in both an upward and a downward direction.”<sup>100</sup> Those who wish to govern the state must first learn how to govern themselves, their goods, and their legacy. On the other hand, when the state is well governed by a successful governor, those principles of the successful government will be transmitted down to the individuals. The head of the family will be able to look after their family, and “individuals will, in turn, behave as they should.”<sup>101</sup>

The goal here is also different than the classical theory of sovereignty. The territory was the main object of the ancient type of authority, and after that, and definitely as a result of it, came its inhabitants. On the contrary, the new definition of government refers to *things* rather than to territory. The territory is not what it has been governed here, but those things which “are in fact men, but men in their relations, their links, their imbrication with those things that are wealth, resources, means of subsistence, the territory with its specific qualities, climate, irrigation, fertility, and so on.”<sup>102</sup>

Aside from the differences that shaped the two principles, they are both a power to rule. The keyword here is *power*. A king, a monarch, a prince, a priest, and a head of a family all share absolute power over their subjects. This power gives them the authority to rule, order, organize, and expect to be respected. But where did this power come from, and how does it truly work?

## **B. What is Power?**

Let’s also start here from the early beginning. Until the eighteenth century, the dominant type of power was a juridical-legal system, or as Foucault called it, the *juridico-discursive* type of power.<sup>103</sup> It was basically a system of power based on the law and the judicial system. This system's main characteristics were rejection, refusal, deduction, and prohibition. A binary system of licit and illicit acts, permitted and prohibited ones,

---

<sup>100</sup> *Id.* at 206.

<sup>101</sup> *Id.* at 207.

<sup>102</sup> *Id.* at 208–209.

<sup>103</sup> FOUCAULT, *supra* note 17 at 82.

accompanied by punishments in the case of breaking the law.<sup>104</sup> That type of “power [was a] constraint, negativity, and coercion. [It prevented the formation of knowledge, and it did] this by suppressing desire, fostering false consciousness, [and] promoting ignorance.”<sup>105</sup> This power was exercised through law, taboo, and censorship on all levels. It was all about transgression and punishment that was centered on the individual’s body “with the aim of having a corrective effect” on both the criminal and the society.<sup>106</sup> Power institutions on one side and an obedient subject on the other.<sup>107</sup> Or, in simpler words, “some give commands and others obey.”<sup>108</sup>

But why did they obey such a limited power? A power that was poor in resources and methods, “monotonous in the tactics it utilizes, incapable of invention, and seemingly doomed always to repeat itself.”<sup>109</sup> It only said no, prevented, and limited. It was incapable of producing. A power that was centered only on law and taboos while ignoring every other aspect of life. A power that flowed in one direction from top to bottom while depending only on people’s obedience.<sup>110</sup> The main reason behind that acceptance is that

power is tolerable only on condition that it masks a substantial part of itself. Its success is proportional to its ability to hide its own mechanisms... Would they [whom it dominates] accept it if they did not see it as a mere limit placed on their desire, leaving a measure of freedom—however slight—intact?<sup>111</sup>

There is also a historical reason for that. As I have articulated above, those ancient monarchies were established with no priori reason of acceptance and against conflicting powers from within and outside. Those institutions of power had to appear to the public as agencies of regulation and a way of introducing order to gain their acceptance. They functioned as principles of right against the clashing forces. They established peace against a myriad of wars and justice against private settling of claims. They exercised power along with protecting their will through laws and sanctions. The sovereign was the

---

<sup>104</sup> *Id.* at 89.

<sup>105</sup> HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT, BEYOND STRUCTURALISM AND HERMENEUTICS 129 (2nd ed. 1983).

<sup>106</sup> MICHEL FOUCAULT, FRANÇOIS EWALD & ALESSANDRO FONTANA, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE, 1977-1978 6 (Michel Senellart ed., Graham Burchell tran., 1. Picador ed. 2009).

<sup>107</sup> FOUCAULT, *supra* note 17 at 83–85.

<sup>108</sup> Charles Taylor, *Foucault on Freedom and Truth*, 12 POLITICAL THEORY 152, 158 (1984).

<sup>109</sup> FOUCAULT, *supra* note 17 at 85.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 86.

power, and whenever there is power comes right and truth.<sup>112</sup> The sovereign was the center of these two elements. Right, or basically laws and rules, was an instrument of his demands, for his benefits, and his justifications.<sup>113</sup> In other words, “right [was] the right of the royal command.”<sup>114</sup> And this right had two elements, “the legitimate rights of the sovereign on the one hand, and the legal obligation to obey on the other.”<sup>115</sup> Here comes again the exact quote, “some give commands and others obey.”<sup>116</sup> Individuals had to submit to this higher external power rather than resolve it.<sup>117</sup> By their submission, they would be under the protection of the sovereign. Otherwise, they would be presented as social enemies.<sup>118</sup> In this way, law acted as the monarchy’s form of acceptance side by side with its primary function as a weapon wielded by the ruler. Thus, the *juridico-political* dimension was established.<sup>119</sup>

With the development of societies and the rise of new forms of government, new power mechanisms have penetrated that classical type of power: mechanisms that were irreducible to the law. Contrary to the juridico-discursive type of power, arose a new system “whose operation [was] not ensured by right but by technique, not by law but by normalization, not by punishment but by control, methods that [were] employed on all levels and in forms that [went] beyond the state and its apparatus.”<sup>120</sup> These modern technologies of control were not “concerned with law but with normalization. That is, [they were] above all concerned with bringing about a certain result, defined as health or good function.”<sup>121</sup> This type of power was referred to as *disciplinary power*. This power was introduced along with the creation of disciplinary institutions like schools, the military, clinics, work, etc. A type of power that, instead of flowing from above to below, works at all levels. Rather than the classical power of prohibition that was infiltrated from above, the new mechanisms of power came from everywhere to the extent that people

---

<sup>112</sup> MICHEL FOUCAULT & DAVID MACEY, *SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLÈGE DE FRANCE, 1975-76* 24 (Mauro Bertani ed., 2003).

<sup>113</sup> *Id.* at 25.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 26.

<sup>116</sup> Taylor, *supra* note 109 at 158.

<sup>117</sup> FOUCAULT AND FAUBION, *supra* note 90 at 42.

<sup>118</sup> *Id.* at 53–54.

<sup>119</sup> FOUCAULT, *supra* note 17 at 86–88.

<sup>120</sup> *Id.* at 90.

<sup>121</sup> Taylor, *supra* note 109 at 158.

tended not to see it when practicing it.<sup>122</sup> This type of power is a success as it masks its mechanisms. We tend not to recognize it as power. We only see power as one when it takes the form of prohibition, which is not the main object in the case of disciplinary mechanisms. They are successful because we are not aware of them. This power comes from within rather than from above. We believe that doctors, teachers, parents, and others are helping us, which in many cases might be true, so we submit to them voluntarily and fail to see this submission as an effect of power.<sup>123</sup> We tend to focus on the top authority and forget how much power comes from peers, neighbors, and even children. In the case of children, for example, they realize that their parents monitor them; and accordingly, they conform to the social norms. Parents, on the other side, conform to their neighbors' expectations. They discipline their children because they are concerned with their peers' opinions. As a result, children tend to monitor themselves to spare their parents the shame.<sup>124</sup> This also applies to women in patriarchal societies. Even if there is no actual power to force them to be subject to men and even when laws are enriched with gender equality, women still submit to their familial expectations from their children, their neighbors' surveillance, and their friends' opinions. These observations force them to submit to their subordinate status within society.<sup>125</sup> Even when people think they are free to choose their own way of life, they are still subject to social norms. Western societies, for example, tend to see Muslim women who wear hijab as oppressed, whereas they, with their Western fashion, practice freedom and self-expression. However, the truth is that both cases are the result of gender norms which became internalized norms that each society sees as normal and others as abnormal.<sup>126</sup> Norms became the keyword here. Everyone exercises this kind of power—the power of enforcing social norms—over everyone.<sup>127</sup> Even laws are infiltrated with norms; it uses vague terms such as “decency” and “outrage,” forming a kind of uncertainty and building room for doubt while leaving the interpretation to the courts.

---

<sup>122</sup> TAYLOR, *supra* note 22 at 56.

<sup>123</sup> *Id.* at 51–52.

<sup>124</sup> *Id.* at 64.

<sup>125</sup> *Id.* at 65.

<sup>126</sup> *Id.* at 52.

<sup>127</sup> *Id.* at 56.

In this type of mechanism, power should be understood as the multiplicity of force relations, the process which transforms them, the support they find in one another, and the strategies in which they take effect.<sup>128</sup> According to Foucault, *Power* is everywhere as it is produced at every moment, at every point, and from everywhere. It is “the over-all effect that emerges from all these mobilities.”<sup>129</sup> He went on by demonstrating that “power is not something that is acquired, seized, or shared, something that one holds on to or allows to slip away; power is exercised from innumerable points.”<sup>130</sup> That there is no binary opposition between rulers and rules. No such duality comes from the top down and affects limited groups.

On the contrary, relationships of force in families and limited groups are the basis of those relationships of the whole social body. As power is everywhere, it stems from “inequalities of knowledge relationships present in the families.”<sup>131</sup> These inequalities within families form hierarchies. These power hierarchies extend from the family to the global governance as it “fosters inequalities and divisions that enable power to flourish.”<sup>132</sup>

Power always has aims and objectives; however, it is not the result of an individual’s choice, but it “is characterized by tactics that are quite explicit at the restricted level where they are inscribed.”<sup>133</sup> Accordingly, a new type of power should be understood from outside the classical “system of Law-and-Sovereign.”<sup>134</sup> Or, as Foucault articulated it:

It is a question of orienting ourselves to a conception of power which replaces the privilege of the law with the viewpoint of the objective, the privilege of prohibition with the viewpoint of tactical efficacy, the privilege of sovereignty with the analysis of a multiple and mobile field of force relations.<sup>135</sup>

To easily differentiate between those two types of power, Foucault presented a simple example that can be found in all penal codes: *thou shalt not steal*. In a sovereign power,

---

<sup>128</sup> FOUCAULT, *supra* note 17 at 92.

<sup>129</sup> *Id.* at 93.

<sup>130</sup> *Id.* at 94.

<sup>131</sup> Bryant Edward Harden, *Power and Representation in Global Governance*, 2 JOURNAL OF POWER 17, 2 (2014).

<sup>132</sup> *Id.* at 4.

<sup>133</sup> FOUCAULT, *supra* note 17 at 95.

<sup>134</sup> *Id.* at 97.

<sup>135</sup> *Id.* at 102.

this was a simple prohibition that came along with its punishment which, in most cases, took place over the criminal's body. However, in a disciplinary power, and while the same prohibition exists, there are a "series of supervisions, checks, inspections, and varied controls" that can predict whether the action of theft will or will not happen even before the culprit executes it.<sup>136</sup> The punishment will not be limited to physical torture but will include, more importantly, penitentiary techniques such as "obligatory work, moralization, correction, and so forth."<sup>137</sup>

The development of power mechanisms did not stop at that level. A new technology of power has emerged, which, unlike what the disciplinary power did by replacing the classical one, integrated with the former. This new form of power works with the disciplinary power side-by-side but on a different level. Instead of a power that was addressed to the man as a body, this power deals with the man as a living being: as "a global mass that is affected by overall processes characteristic of birth, death, production, illness, and so on."<sup>138</sup> Instead of a power based on *deduction*, this power was "bent on generating forces, making them grow, and ordering them, rather than one dedicated to impeding them, making them submit, or destroying them."<sup>139</sup>

### **C. Biopower**

When we look back again to sovereignty, we notice that for a long time, the sovereign power had the absolute right to decide life and death.<sup>140</sup> This is the classical theory of sovereignty, or "what might be called power's hold over life."<sup>141</sup> The acquisition of power over man as a living being. "The right of life and death was one of the sovereignty's basic attributes."<sup>142</sup> The sovereign had the right to put people to death or let them live. Life and death were not normal phenomena; accordingly, the subjects in this relationship were neither dead nor alive; they were neutral.<sup>143</sup>

---

<sup>136</sup> FOUCAULT, EWALD, AND FONTANA, *supra* note 107 at 4.

<sup>137</sup> *Id.*

<sup>138</sup> FOUCAULT AND MACEY, *supra* note 113 at 242–243.

<sup>139</sup> FOUCAULT, *supra* note 17 at 136.

<sup>140</sup> *Id.* at 135.

<sup>141</sup> FOUCAULT AND MACEY, *supra* note 113 at 239.

<sup>142</sup> *Id.* at 240.

<sup>143</sup> *Id.* at 239–240.



In the nineteenth century, another form of right somehow enhanced the old one. This was “the power to ‘make’ live and ‘let’ die.”<sup>144</sup> This power over life took two forms. As I articulated earlier, the first was centered on the body as a machine: how to optimize its capabilities and exploit its energy in favor of the economy. People were led to schools, barracks, factories, and workshops. They were shaped into one single hive mind. That was the discipline side of this new power which “used to take control over bodies [in an attempt] to increase their productive force through exercise, drill, and so on ... thanks to a whole system of surveillance, hierarchies, inspections, bookkeeping, and reports – all the technology that can be described as the disciplinary technology of labor.”<sup>145</sup> And while the human body became a productive force, “all forms of expenditure that could not be reduced to these relations, or to the constitution of the productive force, all forms of expenditure that could be shown to be unproductive, were banished, excluded and repressed.”<sup>146</sup> People under this domain were considered elements of utilization, as they should only “contribute to the strength of the state.”<sup>147</sup>

Along with this side, in the mid-nineteenth century, another technology of power took control. However, it “d[id] not exclude disciplinary technology; on the contrary, it integrate[d] it.” This new power focuses on the species' body as the basis of the biological processes. To elaborate, it “is addressed to a multiplicity of men, not to the extent that they are nothing more than their individual bodies, but to the extent that they form, on the contrary, a global mass that is affected by overall processes characteristic of birth, death, production, illness, and so on.”<sup>148</sup> Foucault referred to this technology of power as the *bio-politics* against the old *anatomo-politics* of the human body. This new technology marked the beginning of an era of *biopower*: a power that is concerned with the ratio of births and deaths, the rate of reproduction, the fertility of a population, and any other aspect that affects the population as a whole.<sup>149</sup> A power that includes a “set of

---

<sup>144</sup> *Id.* at 241.

<sup>145</sup> *Id.* at 242.

<sup>146</sup> *Id.* at 31.

<sup>147</sup> DREYFUS AND RABINOW, *supra* note 106 at 102.

<sup>148</sup> FOUCAULT AND MACEY, *supra* note 113 at 242–243.

<sup>149</sup> FOUCAULT, *supra* note 17 at 139–140.

mechanisms through which the basic biological features of the human species became the object of a political strategy, of a general strategy of power.”<sup>150</sup>

We can here say that due to the ascending of these two technologies of power, “the ancient right to *take* life or *let* live was replaced by a power to *foster* life or *disallow* it to the point of death.”<sup>151</sup> Those two poles were joined together in the form of concrete arrangements. And while discipline mechanisms deal with individuals and their bodies, biopolitics deals with the population as a political problem, a biological problem, and a power problem. The mechanisms of this new form of power, including forecasts and statistical estimates, do not aim at modifying any given phenomenon or altering a given individual. They “intervene at the level at which these general phenomena are determined;” they make sure that the species “are not disciplined, but regularized.”<sup>152</sup> In other words, while “sovereignty is exercised within the borders of a territory, discipline is exercised on the bodies of individuals, and security [biopolitics] is exercised over a whole population.”<sup>153</sup>

To elaborate on the differences that took place at the end of the nineteenth century, let’s take the theft example that I referred to earlier. While the same code would apply along with its punishments, forms of surveillance, and methods of correction, in this new module, the application of these mechanisms would be governed by whole new concerns.

What is the average rate of criminality for this [type]? ... How much does this criminality cost society, what damage does it cause, or loss of earnings, and so on? ... What is the cost of repressing these thefts? Does severe and strict repression cost more than one that is more permissive; does exemplary and discontinuous repression cost more than continuous repression? ... When one has caught the culprit, is it worth punishing him? What will it cost to punish him? ... The general question basically will be how to keep a type of criminality, theft for instance, within socially and economically acceptable limits and around an average that will be considered as optimal for a given social functioning.<sup>154</sup>

We can quickly notice that aside from the culprit himself, apart from the actual illegal activities, which are still governed by the old methods, what we are indeed dealing with

---

<sup>150</sup> FOUCAULT, EWALD, AND FONTANA, *supra* note 107 at 1.

<sup>151</sup> FOUCAULT, *supra* note 17 at 139.

<sup>152</sup> FOUCAULT AND MACEY, *supra* note 113 at 245–247.

<sup>153</sup> FOUCAULT, EWALD, AND FONTANA, *supra* note 107 at 11.

<sup>154</sup> *Id.* at 4–5.

now is society as a whole. How can the population's actions be predicted, controlled, and regularized for the welfare of the whole society? This is the role of bio-power mechanisms that shape how bio-politics works through society. While disciplinary institutions target individuals as they deviate from norms, the state is concerned with knowing and administrating these norms for the population as a whole.<sup>155</sup> The application of the law did not fade away; however, it operated more as a *norm*. The growing importance assumed by normalization rather than the juridical system of the law is the main consequence of the development of bio-power technology.<sup>156</sup> While laws might be limited to certain areas of life, norms cover all its aspects. There are norms “about how we walk, comport our bodies, gesticulate, speak, eat, sleep, and so forth [, and this type of power is] working to incite, reinforce, control, monitor, optimize, and organize the forces under it.”<sup>157</sup> That is why biopolitics and disciplinary power were able to get access to the individual and population quickly: relying on norms rather than law, on the one hand, and the fact that these norms are internalized by the subjects themselves and circulated through the society rather than exercised from a single higher authority, on the other, are the main characteristics of this new society.<sup>158</sup>

The normalizing society is therefore not, under these conditions, a sort of generalized disciplinary society whose disciplinary institutions have swarmed and finally taken over everything ... The normalizing society is a society in which the norm of discipline and the norm of regulation intersect along an orthogonal articulation [where power] has succeeded in covering the whole surface that lies between the organic and the biological, between body and population ... A power that has taken control of life in general.<sup>159</sup>

To sum it up, power no longer, in most cases, flows from above downward. It circulates within society, comes from everyone, and affects everyone. But how does that affect the family? How did the family, as the central unit of society, evolve to adapt to, and as a result of, these new mechanisms?

---

<sup>155</sup> TAYLOR, *supra* note 22 at 46.

<sup>156</sup> FOUCAULT, *supra* note 17 at 144.

<sup>157</sup> TAYLOR, *supra* note 22 at 45.

<sup>158</sup> *Id.* at 45–46.

<sup>159</sup> FOUCAULT AND MACEY, *supra* note 113 at 253.

## D. Family

The family, like the prison and the asylum, does not exist because it needs to or because we have become so enlightened as to realize that it is the “best” way to deal with certain facts about human nature. Rather it exists as it does as the result of power struggles in which certain people lost and whose histories of resistance have been forgotten.<sup>160</sup>

~ Chole Taylor

Initially, the family was, and somehow still is a sovereign institution. Where in sovereignty, the power “is grounded either by blood-right or blood-conquest,” the authority of the parents over their children is one of blood-right.<sup>161</sup> They justify their power by the fact that these children are *theirs*, not due to any disciplinary mechanisms. Of course, parents monitor their children and control and punish them, but still, their actual authority comes from that blood-right. Accordingly, parents still have this authority even if they do not practice these mechanisms over their children.<sup>162</sup> This right is celebrated in the family, in events such as birthdays, as “a reference to the earlier act ... which gives the family its solidity.”<sup>163</sup> In this sovereign family, like the sovereign state, the authority is concentrated at the top of the family, usually in the father. He is the one who practices this authority over his family members. He has *juridico-discursive* sovereign power that gives him unquestioning obedience over his children. He is the lord of his castle; his children are his possessions which he holds an absolute right over them. This authority is what enables the father to command the obedience and silence of his children and sometimes even of his wife.<sup>164</sup>

For the sovereign state to keep its authority over the family as the central cell of society, law and prohibition were the primary ways. Sexuality was confined to the home where *the couple* became the model.<sup>165</sup> Sexual practices were governed by major codes: canonical law, Christian pastoral, along with civil law, and criminal law. These laws put

---

<sup>160</sup> Taylor, *supra* note 18 at 215.

<sup>161</sup> TAYLOR, *supra* note 22 at 78.

<sup>162</sup> *Id.* at 78–79.

<sup>163</sup> MICHEL FOUCAULT, JACQUES LAGRANGE & GRAHAM BURCHELL, *PSYCHIATRIC POWER: LECTURES AT THE COLLÈGE DE FRANCE, 1973-74* 80 (1. Picador ed. 2008).

<sup>164</sup> Taylor, *supra* note 18 at 213.

<sup>165</sup> FOUCAULT, *supra* note 17 at 3–4.

sex into a binary system of licit and illicit acts. They have centered on matrimonial relations in a way that different kinds of rules surrounded the sexual relation of husband and wife. And breaking these rules was equal to seeking strange pleasures when it comes to measures of condemnation. Any “contrary to nature” acts were considered against the law.<sup>166</sup> The connection between this classical power and sex was always a negative relationship that was built on rejection, refusal, and concealment. This prohibition, which focused on illicit sexual acts, took three main forms: it affirmed that these acts were not permitted, prevented people from talking about it, and denied it even ever existed.<sup>167</sup> In other words, “a single locus of sexuality was acknowledged in social space as well as at the heart of every household, but it was a utilitarian and fertile one: the parents’ bedroom.”<sup>168</sup> Any other sexual behavior which did not aim for reproduction was denied and reduced to silence. And when “it was truly necessary to make room for illegitimate sexualities, [it was transferred] to a place, [like the brothel,] where they could be reintegrated, if not in the circuits of production, at least in those of profit.”<sup>169</sup> The main objective behind that prohibition was that sex renounced itself through the threat of punishment which meant more suppression. To sum it up, sex was controlled even as a mere language. If we look into the family, for example, children were forbidden to talk about sex. And even when “they came to show evidence to the contrary,” a whole system of denial was enforced.<sup>170</sup> Silence and discretion were imposed on it. There was an expurgation of its vocabulary, policing of its statements, and complete control over it.

However, there was an explosion of discourses that were concerned with sex: ones that were encouraged by agencies of power, like the church with its confession system. In other words, there was an “institutional incitement to speak about it, and to do so more and more; a determination on the part of the agencies of power to hear it spoken about, and to cause it to speak through explicit articulation and endlessly accumulated detail.”<sup>171</sup> Take the confession system as an example. The prohibition came along with a confession system which started as a religious ritual that “unfolds within a power

---

<sup>166</sup> *Id.* at 37.

<sup>167</sup> *Id.* at 83–85.

<sup>168</sup> *Id.* at 3.

<sup>169</sup> *Id.* at 4.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 17–18.

relationship [where] the subject confesses only in the presence of authority.”<sup>172</sup> This confession system was the church’s mechanism to keep track of its subjects. People confessed their crimes, their desires, their thoughts, and their sins. People sought forgiveness, recognition, and value from others – represented in priests. Confession played a central role in all aspects of life. It was integrated into one’s soul. People had felt the desire to confess. It was not just an obligation as “it came to signify someone’s acknowledgment of his own actions and thoughts.”<sup>173</sup> The confession system was spread to the extent that the “western man ha[d] become a confession animal.”<sup>174</sup> With the evolution of that system and its integration into society, people did not need priests anymore to confess.

On the contrary, “the obligation to confess [had become ...] so deeply ingrained in us, that we no longer perceive it as the effect of a power that constraints us; on the contrary, it seems to us that truth, lodged in our most secret nature, demands only to surface.”<sup>175</sup> With that in mind, “sex was a privileged theme of confession.”<sup>176</sup> As the silence became the rule on the subject of sex, people were encouraged to confess about their darkest desires. As “verbal decency sanitized one’s speech,” people were pushed to vent in the confession system.<sup>177</sup> And through this system, alongside the censoring and refining of vocabulary, people learned to transform their desires into discourse.<sup>178</sup> Transforming desire into discourse restricted it to reproduction and banished any illicit casual pleasures.<sup>179</sup> The aim was not to repress desire, but to manage, regulate, and control the language of it “that had been carefully expurgated so that it was no longer directly named, sex was taken charge of, tracked down as it were, by a discourse that aimed to allow it no obscurity, no respite.”<sup>180</sup>

At the same time, the family was seen as the perfect ally to this system. As I mentioned earlier, “there have been repeated attempts ... to reduce all of sex to its

---

<sup>172</sup> *Id.* at 61.

<sup>173</sup> *Id.* at 58–59.

<sup>174</sup> *Id.* at 59.

<sup>175</sup> *Id.* at 60.

<sup>176</sup> *Id.* at 61.

<sup>177</sup> *Id.* at 3.

<sup>178</sup> *Id.* at 18–20.

<sup>179</sup> *Id.* at 36.

<sup>180</sup> *Id.* at 20.

reproductive function, its heterosexual and adult form, and its matrimonial legitimacy.”<sup>181</sup> And the family was the perfect unit that could be easily monitored, regulated, and controlled. And with a system that was built around rules that defined what was permitted and what was forbidden; a system whose objective was to reproduce the interplay of relations and maintain the laws that governed them; a system that focused on the link between partners, arose “a [whole] system of marriage, of fixation and development of kinship ties, of transmission of names and possessions.”<sup>182</sup>

With the rise of disciplinary institutions, and with the discursive explosion of sex, the family and its sexuality were governed by a new system. Heterosexual monogamy was given more discretion with its regular sexuality, and a whole system that focused on the sexuality of children, perverted partners, and criminals had the disciplinary institutions’ attention. As a result, there emerged an entire sub-race of these subjects who were hounded, locked up, and even called sick.<sup>183</sup> The obligation to confess took over every field in a way that its subjects have stopped recognizing it as a power relationship. As I previously mentioned, people linked confession to freedom: truth “demands only to surface,”<sup>184</sup> a burden that found its way to vent. With that development, an improved system of confession, which went outside the borders of the classical confession system and involved family members, teachers, psychiatrists, doctors, and even through interrogation system and public tribunals, was the main actor in this disciplinary system. This modified confession system was linked to medical science, which combined with the examination of the subject’s personal history with known signs and symptoms. It was promoted that sex, “the most discrete event in one’s sexual behavior ... was deemed capable of entailing the most varied consequences throughout one’s existence.”<sup>185</sup>

By the end of the eighteenth century, a whole new technology of sexuality had emerged.<sup>186</sup> That was through pedagogy, medicine, and economics that sex became the concern of the state, a matter that required the social body, as a whole, to place itself under surveillance. The classical system of prohibition was substituted with a new

---

<sup>181</sup> *Id.* at 103.

<sup>182</sup> *Id.* at 106–107.

<sup>183</sup> *Id.* at 38–41.

<sup>184</sup> *Id.* at 58–60.

<sup>185</sup> *Id.* at 65–67.

<sup>186</sup> *Id.* at 38.

*scientific* system.<sup>187</sup> To combat children's onanism, for example, it was traced back to its sources, causes, and effects. Surveillance was installed, discourses were imposed, and parents joined teachers in suspicion of all children.<sup>188</sup> Homosexuality was another example of how this system worked. This sexual act became a personage, a childhood, and a whole new species rather than a mere forbidden act.<sup>189</sup> This power demanded the constant and curious presence of its practice, and it was everyone's mission to detect it.<sup>190</sup> And as modern society attempted to reduce sexuality to the legitimate couple, it distributed power and placed it opposite to one another.<sup>191</sup> By separating grown-ups and children, segregating between boys and girls, establishing a polarity between the parent's bedroom and the children's, and so on, these were what gave rise to the conjugal family: a family that worked as a network of pleasures and powers linked together.<sup>192</sup>

Alongside that new technology, a new system has emerged which works with the circuit of sexual partners but in a different way. Instead of a system that was built around rules and licit and illicit, this system operated on new techniques of power. It focused on the family from another perspective. It monitored the main elements of sexuality, such as the regulation of births, the feminine body, and the specification of the perverted. It made it possible for them to develop on its dimension.<sup>193</sup>

With the evolution of power mechanisms, the family had a crucial role within the disciplinary society. It was its role to insert family members into disciplinary institutions, schools, the military, and work. These institutions, on the other side, returned the favor by transforming children into "familialized subjects ... who [would] submit to the family and its goals."<sup>194</sup> As a result, the family did not solely rely on blood-right anymore to justify its authority. This ability to produce well-disciplined subjects into society is another, and more importantly, a justification for its power. It practiced this power over a threat that the "family that fails to produce well-disciplined and normal subjects may lose

---

<sup>187</sup> *Id.* at 41–46.

<sup>188</sup> *Id.* at 42.

<sup>189</sup> *Id.* at 43.

<sup>190</sup> *Id.* at 44.

<sup>191</sup> *Id.* at 45–46.

<sup>192</sup> *Id.* at 46.

<sup>193</sup> *Id.* at 106–107.

<sup>194</sup> TAYLOR, *supra* note 22 at 79.



its authority over its members through the intervention of state and disciplinary institutions.”<sup>195</sup>

This system gave rise to this new kind of family that replaced the old kinship family: a nuclear family that is composed of two relations, parent-child; and husband-wife, rather than extended generations. A family “with its corporeal, affective, and sexual space entirely saturated by the direct parent-child relationship.”<sup>196</sup> This relationship gave “absolute power, [protected by the disciplinary system] to parents over their children.”<sup>197</sup> And with the rise of biopower, and with the aid of medical institutions, the state used the worry about children’s perversion to get parents to observe and control their children fully, and this cultivated a more intimate bond between the parents and the children, which led more to the formation of the cellular family.<sup>198</sup> However, this cellular family was the state’s way of extracting children from the family and bringing them under the state’s power through education, training, and medication.<sup>199</sup> The family became an institution of disciplinary power. These mechanisms mainly target women’s bodies since they bear the main component of reproduction. The state focused on controlling women’s bodies to manage the population’s productivity. On the other side, the precocious sexuality of children was presented as a menace that risked the whole species, and accordingly, their sexuality had to be regulated in order to preserve the future of the biopolitical state.<sup>200</sup>

It might be wondered how it was that easy to infiltrate these mechanisms in the family. If we think of it, biopower conflicts with the sovereign institution of the family. Children tend to be under the control of their parents and not the state. So, what did happen to make this new power acceptable? For the state to control its subjects, it needed the disciplinary institutions to intervene in the family and regulate children’s sexuality rather than keeping it to the parents. Thus, transforming parents into somehow disciplinary figures was the method. By promoting more surveillance and control from the parents over their children to fight onanism, perversion, and sexual conditions, which,

---

<sup>195</sup> Taylor, *supra* note 18 at 205.

<sup>196</sup> TAYLOR, *supra* note 22 at 81–82.

<sup>197</sup> *Id.* at 83.

<sup>198</sup> *Id.* at 82.

<sup>199</sup> *Id.* at 83–84.

<sup>200</sup> *Id.* at 88–91.

if left unattended, might lead to sexual diseases that affect not only the individual but also affect future generations, the whole domestic sphere turned into a clinic. The parents' desire to know more about their children's sexuality produced this close-knit relationship and intimate family bonds, which was easier to control by the state.<sup>201</sup> In a more precise statement, "the child's sexuality [was] the trick by which the close-knit, affective, substantial, and cellular family was constituted and from whose shelter the child was extracted. The sexuality of children was a trap into which parents fell."<sup>202</sup> To clarify this point, it was when parents invested themselves in their children's sexuality that they lost their classical control over sovereign authority and became instruments of the biopower that works for the state.<sup>203</sup> At first, it was for parents to decide their children's sexuality; it was for them to object to their children's sexual education outside the home; however, "now the psychoanalysts are saying: It's ours, the body of pleasure is ours! And the state, psychologists, psychopathologists, and others say: It's ours, this education is ours."<sup>204</sup>

Some did not hesitate to see this new family, along with family values that revolve around it, as "mere extensions of a normalizing American eugenics program that was itself prototypical of Nazi racism."<sup>205</sup> In a way that both movements value the same ideology that *The Family* had to be preserved and fostered and that "non-whites and non-heterosexuals continue to be targeted as dangers," if not to the purity of the race, then to the family.<sup>206</sup> This can be seen in the literature that surrounded the notion of the new family. Historians tended to claim that this family, the monogamous, procreative, and heterosexual, has sprung everywhere since time immemorial. Other types of families that may occur long ago were stigmatized as barbaric in contrast to this new family, which "is the bedrock of civilization ... [that] anyone who resists being part of such family or who undermines its ruse of inevitability in the eyes of the children must be abnormal and poses a threat to society," and the society has the absolute right to defend itself from these threats.<sup>207</sup>

---

<sup>201</sup> *Id.* at 91–94.

<sup>202</sup> Taylor, *supra* note 18 at 211.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 217.

<sup>205</sup> *Id.* at 213.

<sup>206</sup> *Id.* at 214.

<sup>207</sup> *Id.* at 215.

Society's right to defend itself could be seen in a bunch of letters that Foucault gathered in his book, *Disorderly Families*. These letters were written by ordinary families throughout the eighteenth century and submitted to the King of France, asking for his interference to resolve their family disputes. From all these letters, we can easily notice how "the gaze of the others, [either relatives or neighbors,] stocked the intensity of the drama playing out between the partners."<sup>208</sup> To ask for the King's intervention, your dispute had to concern the public. If a wife wanted to leave her husband for another man, this could not be a ground for interference. It had to be presented as "an errant woman, depraved, of extremely bad conduct, with bad morals, who spends too much and enjoys the company of men."<sup>209</sup> This sexual errancy was what troubled the public order.

On the other side, many of these letters asked the head of the state to exercise his own authority when the parents could not control their children's behavior. The parents-children conflicts were located at the "boundaries of the family space."<sup>210</sup> These conflicts were extended to the neighbors, the neighborhood, and any place within "the reach of reputation in a general manner."<sup>211</sup> This was obvious in the fact that the most unbearable situation for the families was when their undisciplined daughter settled close to them. They could not ignore, in this case, the scandalous behavior. In most cases, the girl was not considered domestic trouble, but rather to what harm "she could cause to the family's reputation."<sup>212</sup>

The honor of the family was the main reason behind all these requests. It was important for the parents to show the public that they were good parents who performed their duties in adequately raising their kids. Family ethics were "recentred around the duty of education," and fulfilling this role properly was what validated parents in the eyes of the administration.<sup>213</sup> This honor was recognized as a public order in a way that we could notice some letters submitted not directly from the parents but from the neighbors who were distressed by the unethical behavior. This praise that revolved around *honor*

---

<sup>208</sup> ARLETTE FARGE & MICHEL FOUCAULT, *DISORDERLY FAMILIES: INFAMOUS LETTERS FROM THE BASTILLE ARCHIVES* 40 (Nancy Luxon ed., 2016).

<sup>209</sup> *Id.* at 38.

<sup>210</sup> *Id.* at 127.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 128–129.

<sup>213</sup> *Id.* at 136.

was significant for the state as it established “a permanent regulation of the behavior of individuals.”<sup>214</sup>

### **E. The Philosophy**

In this chapter, I told the philosophical story behind the family. I took *power* as my starting point and tried to illustrate how it developed over the past two centuries. From a power that comes from above, from the sovereign itself, through laws and regulations, prohibition and ignorance, to a power that is everywhere, this was the evolution. A new form of power was formed that was not easy to recognize as it works on every level through norms. I also attempt to define the emergence of biopower: a mechanism that focuses on society as a whole through birth, death, illness, and so on. This mechanism aims to optimize human capabilities and their productive force. I also told the story of the evolution of the confession system, starting from how it was a forced system through the church until it became a way of freedom and truth. This confession assisted the state in keeping track of its subjects. And here came the conjugal family: a small, easily monitored, regulated, and controlled unit. Parents became instruments of biopower through which the state, through disciplinary institutions, intervened to control the family members. This family worked with the state to insert its members into the disciplinary institutions in its attempt to show its ability to produce well-disciplined ‘normal’ subjects into society. This family had to be preserved by the state, and even more by its own members, against any threats of abnormalities or ‘impurity.’

---

<sup>214</sup> *Id.* at 134–137.

### III. The Evolution of the Egyptian Family

It has been argued that “as societies developed materially and socially, they would follow the same route, passing through similar stages.”<sup>215</sup> Scholars whose work was focused on modernization held that the forces of modernization, industrialization, and urbanization, were promoting similar changes in the family globally and toward the “conjugal family pattern [with fewer] kinship ties ... and a greater emphasis on the nuclear family unit.”<sup>216</sup> Those who favor this argument assert that people would progress toward a similar end in any given society with similar realities and conditions. Others linked this development to societies' progression from “nomadic pastoralism to peasant agriculture and to industrialism.”<sup>217</sup> Without getting much into the reason behind such similarities, both sides supported the creation of *the family*. They saw women as best fitted “for the domestic roles of motherhood and household management” to the extent that their work outside their homes was degrading to them.<sup>218</sup>

Egypt was not far from such development. One might even think that, in an Islamic middle eastern country, the interest and emphasis on *the family* have found its cradle within such society. However, this is not entirely true. Contrary to common belief, this development did not originate from Islamic views. On the contrary, “Muslim jurisprudence privileged the extended patrilineal family over the conjugal family in such areas as the marital property regime and inheritance, and it permitted polygyny and easy divorce, which were sources of conjugal family instability.”<sup>219</sup> Precolonial Islamic writings addressed marriage as the licit way for sexual relations and procreation and privileged the extended family over the conjugal family. Praise of the conjugal family as the basis of society and the notion that the purpose of marriage is the formation of a family and childrearing came from Enlightenment thoughts.<sup>220</sup>

This chapter looks at the Egyptian model, throughout the modernization period, through a Foucauldian lens. I attempt to illustrate that the Egyptian nuclear family, as we know of today, was not the norm till recently. The Egyptian state, through many methods,

---

<sup>215</sup> CUNO, *supra* note 5 at 5.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 6.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 2.

<sup>220</sup> *Id.* at 2.

was the reason behind producing and promoting the modern family. Law reformers, the press, and intellectuals combined their efforts to support *the family*. Polygamy and divorce were linked to irresponsibility and recklessness, while the nuclear family was valorized as the most civilized type of living.

### **A. Historical background**

Long before the British occupation, Egypt was an autonomous province of the Ottoman Empire. Polygyny, the harem system, and slave concubinage were important practices that took place in the household government established by Muhammad Ali Pasha in the Khedival dynasty as a part of the Ottoman Empire.<sup>221</sup> These practices had started to diminish by the end of the nineteenth century. Egypt's rulers saw it as an opportunity and tried to imitate the European by presenting themselves as enlightened and modern, especially in their family practices. They let the Europeans understand that the shift from polygynous practice resulted from emulating European civilization.<sup>222</sup>

In reality, however, the shift to monogamy was a consequence of contingent developments, mostly with dynastic politics. Before the four princely weddings, Tawfik, Fatima, Husayn, and Hasan, which were promoted as abandoning polygyny in favor of monogamous marriages, Khedive Ismail had secured an imperial edict changing the system of succession to restrict it to his descendants only. As compensation to the other lines of the royal family, Ismail secured the extended khedival family's support by marrying his children to their cousins. This political/marriage strategy imposed monogamy upon them as "marriage to an Ottoman princess ruled out additional wives or concubines due to her standing, and the same rule applied when the bride was a princess from the khedival family."<sup>223</sup>

On the other hand, Egypt faced bankruptcy and was put under the imposition of European financial control during 1876–78. This economic crisis triggered the Urabi Revolution during 1881–82, which was thwarted by British intervention and an open-ended occupation. Consequently, the khedives relied more on within-family marriage to shore up support and repel any rivalry within their extended family.<sup>224</sup> With the fiscal

---

<sup>221</sup> *Id.* at 10.

<sup>222</sup> *Id.* at 21.

<sup>223</sup> *Id.* at 21–22.

<sup>224</sup> *Id.*

discipline imposed on the Palace after the bankruptcy, accompanied by the slave trade being outlawed in 1877, it became almost impossible to acquire concubines and maintain the large harems of earlier times.<sup>225</sup>

While considering these challenges and the importance of the cultivation of European opinion to strengthen their regime, the khedives sought to present their monogamy as a sign of enlightenment. With the help of modernist intellectuals, they promoted this new family ideology that posited the conjugal family as the elemental unit of society. This had quickly been imitated by the ruling and upper class to the extent that “Lord Cromer, the British counsel-general in Cairo and de facto ruler of Egypt during his tenure (1883-1907), believed that monogamy was gaining ‘amongst the more enlightened Egyptians.’”<sup>226</sup> Especially with the western criticism of the Egyptian family practices, which were seen as “incompatible with a healthy family life,” Egyptian upper classes quickly adopted the example set by the khedival family.<sup>227</sup> With the praise from the western observers, the support from the nobles and upper classes, and the pressure from the Egyptian press and intellectuals, this new family started to spread throughout the whole Egyptian society.<sup>228</sup> And while it is not easy to accurately measure how this affected the public opinion due to the lack of documentation of marriages at this period,

it is telling that when Tawfiq’s son, Khedive Abbas II, contracted a polygynous marriage in 1910, the Palace was careful not to publicize it, even though polygyny was still legal. The Palace was sensitive to the image of the khedive among an Egyptian public that increasingly associated monogamy with enlightenment and civilization.<sup>229</sup>

In sum, the Egyptian state promoted *the family* as the “bedrock of civilization.”<sup>230</sup> The conjugal family, which became the main element of Egyptian society, was valorized.<sup>231</sup> This modern family, which consists of a husband, a wife, and their children, was what the nation pushed its citizens to adopt. Polygamy and sharing a domicile with the extended

---

<sup>225</sup> *Id.* at 22.

<sup>226</sup> *Id.* at 20.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 22–23.

<sup>229</sup> *Id.* at 23.

<sup>230</sup> Taylor, *supra* note 18 at 215.

<sup>231</sup> CUNO, *supra* note 5 at 2.

family were discouraged, often referred to “as emblematic of a bygone age.”<sup>232</sup> Thus, the nation adopted the Victorian model against the old extended kinship system.

By the late nineteenth century and the beginning of the twentieth, the Egyptian state had produced the modern nuclear family. It promoted the recognition that “the nation has invariably been imagined via metaphors of family [to the extent that] Egyptians, during the monarchical era, viewed the institution of marriage as the foundation stone of the emerging nation.”<sup>233</sup> This new family gained widespread acceptance, especially within the middle and upper classes of the Egyptian society.<sup>234</sup> The new ideology was built around the idea that “in any society, the conjugal family was the elemental unit, and that the strength and welfare of the society depended upon a sound family life.”<sup>235</sup> This focus on promoting this new family showed how important marriage was to the nation's welfare, making it an essential element in studying any social and political development that took place in Egyptian society.<sup>236</sup>

## **B. Marriage Crisis**

Analyzing the marriage system has great importance in understanding the evolution of the Egyptian family. It can be seen that marriage in this new modern-nuclear family was praised publicly at that time. The discussions of the family, the conjugal family, as the main unit of the nation, were more than just about *the family*. A connection between the family and the political and social conditions could easily be seen. Some stressed this connection in the late nineteenth and early twentieth centuries and “argued that the family was a “framework” for discussing national issues.”<sup>237</sup> In the early twentieth century, many writers, and even readers, used the term marriage crisis, referring to a “supposed rise in the number of middle-class men who were choosing bachelorhood over marriage.”<sup>238</sup> How the press dealt with the so-called marriage crisis in Egypt shows how

---

<sup>232</sup> POLLARD, *supra* note 27 at 121.

<sup>233</sup> Hanan Kholoussy, *The Nationalization of Marriage in Monarchical Egypt*, in RE-ENVISIONING EGYPT 1919-1952, 317–318 (2005), <https://cairo.universitypressscholarship.com/10.5743/cairo/9789774249006.001.0001/upso-9789774249006-chapter-12> (last visited Oct 8, 2021).

<sup>234</sup> CUNO, *supra* note 5 at 77.

<sup>235</sup> *Id.*

<sup>236</sup> KHOLOUSSY, *supra* note 61 at 1.

<sup>237</sup> CUNO, *supra* note 5 at 151.

<sup>238</sup> KHOLOUSSY, *supra* note 61 at 1.



important marriage was to the nation. In addressing the issue, the press was “using marriage as a metaphor to critique larger socioeconomic and political turmoil.”<sup>239</sup> The modern family discourse was seen as aiming at social improvements. The irresponsibility of married men, failure to support, mainly financially, wives and children, polygyny, and easy divorce were attacked for “the wreckage they made of family life” and the nation.<sup>240</sup> Men were primarily blamed for the marriage crisis. It has been argued that “a man who does not marry is like a deserter from the army: both betray their responsibility and duty to their nation.”<sup>241</sup> Intellectuals of that time saw marriage as an institution that would develop men into responsible and moral subjects, a ‘disciplinary institution’ that would discipline society members into well-disciplined subjects.<sup>242</sup> Press kept on linking marriage to morality; they even went far and beyond by describing “the reluctance of young men to marry [as] a microbe that infects bachelors.”<sup>243</sup>

Using this term, microbe, was not a coincidence. It takes us back to what I highlighted in the third chapter. What the Egyptian intellectuals were doing in their writings was similar to what those scholars who were inspired by Foucault were promoting. We can easily notice the same pattern in both writings regardless of cultural differences. In the third chapter, I mentioned that more surveillance and control from the parents over their children to fight perversions turned the domestic sphere into a clinic.<sup>244</sup> Microbes needed to be fought, and the family had to be preserved and fostered. As non-heterosexuals were seen as a grave danger to the western family, the single Egyptian men were seen as a threat to society. In both cases, society had the absolute right to defend itself from these threats.<sup>245</sup> The public saw that an unmarried man could threaten the state by being easily drawn to political action as he has “no home life to contain him.”<sup>246</sup> Bachelors were stigmatized with being inclined towards “comfort and meekness, and retreat[ing] from shouldering and responsibilities.”<sup>247</sup> Marriage also was linked with

---

<sup>239</sup> *Id.* at 2.

<sup>240</sup> *Id.* at 152.

<sup>241</sup> KHOLOUSSY, *supra* note 61 at 23.

<sup>242</sup> *Id.* at 23–28.

<sup>243</sup> *Id.* at 39.

<sup>244</sup> TAYLOR, *supra* note 22 at 94.

<sup>245</sup> Taylor, *supra* note 18 at 215.

<sup>246</sup> KHOLOUSSY, *supra* note 61 at 27.

<sup>247</sup> *Id.* at 47.

masculinity, and “bachelors could not be made into men until they were made into husbands.”<sup>248</sup> Those who refused to marry were emasculated and labeled as the “female widowers of the nation.”<sup>249</sup> It was “the biggest crime against the honor of the nation,” as some referred to it.<sup>250</sup> Many voices called for government interference to lift the country from this disease. They asked the government to refuse to hire bachelors as it is its responsibility to protect morality.<sup>251</sup> It was to the extent that some parliament members suggested and actually proposed legislation to levy taxes on bachelors who refused to marry in an attempt to force men to choose marriage to avoid such taxes.<sup>252</sup> Although this proposal was not enacted, it showed how society valued marriage and linked it to the state's welfare.<sup>253</sup>

Women also had their fair share of the blaming. By prioritizing society's welfare, it was promoted that “the main function of the family was to raise children, who were the future of the nation.”<sup>254</sup> Due to the importance of the home for childrearing, “the stability and harmony of the family became a social good. The conjugal couple and their children were idealized as ‘the family.’”<sup>255</sup> Accordingly, women's advanced education, work, and involvement within the public sphere were seen as affecting their ability to look after their homes and leading them to ignore their ‘true’ roles. Even with the increase in voices that supported women's education, women’s role was confined to household management and childrearing. The supporters of this new ideology only held that the more education women would get, the more advantage to their domestic roles would gain.<sup>256</sup> According to both views, those immoral, disobedient, single, or, to sum up, those independent women, who refused to follow their assigned path, were seen as threats to men and, therefore, to society as a whole. They were portrayed as one of the main reasons for the marriage crisis, leading to the nation’s destruction.<sup>257</sup>

---

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 42.

<sup>252</sup> *Id.* at 42–43.

<sup>253</sup> *Id.*

<sup>254</sup> CUNO, *supra* note 5 at 77.

<sup>255</sup> *Id.* at 77–78.

<sup>256</sup> CUNO, *supra* note 1 at 78.

<sup>257</sup> KHOLOUSSY, *supra* note 61 at 75.

This restructuring of the household into the new family was seen “as the first steps towards the destruction of tyranny in Egypt and constitutional government.”<sup>258</sup> Therefore, the public demanded more shift towards the new family to the extent that “monogamy, domestic reform, the education of women, and the application of scientific motherhood to the home were considered nationalist strategies that constituted the proven recipe for independence and self-rule.”<sup>259</sup> In this way, the new family was valorized. Anyone failed to abide by its rules was the reason of “corruption, the destruction of morals, and evil doings that affected the entire nation.”<sup>260</sup>

### C. Secluding Women

Accompanied by the support that covered the new family, another aspect must be highlighted, which, I believe, shaped this new society and aided in linking marriage to morality. Contrary to what most might think nowadays, the central feature of the marriage system within the upper and ruling classes at that time was the process of arranging marriages. It included selecting a spouse and negotiating the terms of the marriage contract between the parents, even without the presence of the concerned men themselves in many cases and always without the presence of the woman. The historians understood that “it was not acceptable for families of standing, and certainly not the khedival household, to permit their young women to be seen by or even described to men other than their closest relations.”<sup>261</sup> This practice of secluding women found its support in the public sphere and was praised by the press. A dichotomy between respectable and disreputable women was made where “the former guarded their chastity by covering and not mingling with men, while the latter behaved licentiously by not covering fully, mingling, and even flirting.”<sup>262</sup> Gender integration was believed to be the reason that deterred men from marriage as it “led to [women’s] immoral behavior and inadequate domestic skills.”<sup>263</sup> Women, when reaching physical maturity, they had to be secluded, veiled, and married to a respectable man who was chosen by their families.<sup>264</sup> Although

---

<sup>258</sup> POLLARD, *supra* note 27 at 162.

<sup>259</sup> *Id.* at 168.

<sup>260</sup> CUNO, *supra* note 5 at 152.

<sup>261</sup> *Id.* at 47.

<sup>262</sup> *Id.* at 48.

<sup>263</sup> KHOLOUSSY, *supra* note 61 at 49.

<sup>264</sup> *Id.* at 51.

this was not an Egyptian traditional religious practice, “the [Egyptian] modernists were able to locate the sources of modern civilization within their own cultural heritage—that is, within Islam.”<sup>265</sup> Qur’an supported this pattern: “*And abide in your houses and do not display yourselves as [was] the display of the former times of ignorance.*”<sup>266</sup> Although this verse addressed the Prophet’s wives, it was interpreted as an order to all women. Every reform within the family system was formulated to find its support in “certain readings of Quranic verses and hadiths.”<sup>267</sup> This reliance on Islamic jurisprudence made these reforms “permissible if not incumbent upon believers.”<sup>268</sup> This hybrid ideology was the unique outcome of the Egyptian/Islamic culture. Although most reliable Islamic interpretations did not mandate arranged marriage or seclusion, women were still secluded, veiled, and forced into arranged marriages with men they had not met before.<sup>269</sup> This custom was a sign of honor and morality. Women had to be protected from men, on the one hand, and from themselves, on the other, and the latter was the most crucial part. Women’s sexuality was seen as a threat to the family’s honor and, therefore, to the society as a whole “because of the chaos (*fitna*) it could unleash.”<sup>270</sup>

Even when some activists supported diminishing seclusion, they did not really aim to break the old pattern. They just saw the seclusion as an obstacle against building the new family. According to them, seclusion was what made men hesitant to marry.<sup>271</sup> For them, it remained that “women’s foremost purpose was to become marriageable ... [and] those who condemned arranged marriage were mostly upset by the inability of men to see or choose their wives, not vice versa.”<sup>272</sup> Qasim Amin was among these activists. His work, *The Liberation of Women* 1899 and *The New Woman* 1908, opened the door for a national debate over Egyptian women’s status in society.<sup>273</sup> He advocated for creating an educated and literate woman “who could lead the home and national family into a new era.”<sup>274</sup> His focus was mainly on giving young girls “strong moral training”

---

<sup>265</sup> CUNO, *supra* note 5 at 79.

<sup>266</sup> Surat al-Ahzab, Verse 33.

<sup>267</sup> CUNO, *supra* note 5 at 79.

<sup>268</sup> *Id.*

<sup>269</sup> KHOLOUSSY, *supra* note 61 at 51.

<sup>270</sup> *Id.* at 52.

<sup>271</sup> *Id.* at 52–53.

<sup>272</sup> *Id.* at 53.

<sup>273</sup> POLLARD, *supra* note 26 at 152.

<sup>274</sup> *Id.* at 122.

accompanied by “the science of home economics.”<sup>275</sup> That way, the new generations could grow up with “healthy bodies and minds” which are passed to them from their educated mothers.<sup>276</sup> The whole text was aimed at supporting the family and was based on liberating women to fit into this new family.

Against what is commonly believed, some argued that Amin’s main agenda was not liberating women but actually “exposing the home and its domestic relations” in an attempt to illustrate that modern Egypt has a place among other modern nations by following their path.<sup>277</sup> While he supported women's education and their contribution to society, he only saw this as the best way to prepare them to be good mothers and companions to fit into the new family.<sup>278</sup> According to him, “women were passive and men were active in the contraction of marriages: [...] Men married, whereas women were married off by their male guardians.”<sup>279</sup> This view “represented women as silent or passive bystanders waiting for men to liberate them and/or solicit their participation in the affairs of the community.”<sup>280</sup> Most Egyptians accepted this view and linked the seclusion of women to morality. They “assigned women the burden of representing their nation’s honor and morality.”<sup>281</sup> Even if the bulk of the society did not practice this seclusion due to poverty which compelled them to send their women to work as farmers, servants, and workers, they “have accepted the principle of segregation in theory.”<sup>282</sup> Women were supposed to *abide* in their houses and eventually form a family. This was what morality meant. And morality was another aspect that pushed towards the family.

#### **D. Family vs Law**

Government had come to take on the characteristics of the family: Tyrannical rulers held their citizens captive just like the tyrannical husband-father held his wife and children captive. Men in stage-three societies were not free from the tyranny of their rulers. Therefore, as a means of empowering themselves, they

---

<sup>275</sup> *Id.* at 123.

<sup>276</sup> *Id.* at 159.

<sup>277</sup> *Id.* at 151.

<sup>278</sup> CUNO, *supra* note 5 at 3.

<sup>279</sup> KHOLOUSSY, *supra* note 61 at 51.

<sup>280</sup> MERVAT F. HATEM, LITERATURE, GENDER, AND NATION-BUILDING IN NINETEENTH-CENTURY EGYPT THE LIFE AND WORKS OF 'AÍSHA TAYMUR 199 (2013), <http://site.ebrary.com/id/10467563> (last visited Oct 8, 2021).

<sup>281</sup> KHOLOUSSY, *supra* note 61 at 58.

<sup>282</sup> *Id.* at 51.

tyrannized their wives. Accordingly, women in such societies had very few rights—they could, for example, inherit money and property—but were wholly subservient to the whims, desires, and wills of their husbands, fathers, and masters.<sup>283</sup>

~ Lisa Pollard

With the tremendous public praise that supported the new family, the Egyptian government had to interfere to impose new laws and to reform the old ones in a way that was meant to make sure that this new family ideology was fully instilled in the public minds as the sound, legal, and normative behavior.

Before the mid-nineteenth century, Judges at Shari‘a Courts, the dominant authority of that time, had the power to refer to any Islamic doctrine from the main four doctrines in addressing the different legal claims brought into courts. This gave the courts a broad field of interpretations that could not be let to continue as the government was pushing towards more regulation and interference. In 1865, a Shari‘a Courts Regulation was issued, explicitly declaring that all decisions of these courts should be made only according to the ‘sound opinions’ of the Hanafi school and not any other one.<sup>284</sup> This amendment was the first step towards limiting the power of Shari‘a Courts and bringing it into the state’s field of power.

The founding of Mixed Courts in 1876, followed by the National Courts in 1883, were the turning points in the Egyptian modern legal system toward more secularization, where the jurisdiction of Shari‘a Courts started to diminish to cover only the personal status issues.<sup>285</sup> Family is one of the four main aspects of Islamic jurisprudence among worship, interactions, and sanctions; therefore, it was left to be regulated by Shari‘a. According to Lama Abu-Odeh, there was a compromise between the secular nationalists and the religious leaders to accept the westernization of the whole legal system only by keeping it away from personal status matters.<sup>286</sup> However, contrary to the common belief that it left the family to the Shari‘a sphere, the state interfered to ‘secularize’ Shari‘a.<sup>287</sup>

---

<sup>283</sup> POLLARD, *supra* note 27 at 156.

<sup>284</sup> *Id.* at 136-137.

<sup>285</sup> FAHMY, *supra* note 30 at 68–78; Kholoussy, *supra* note 26 at 320.

<sup>286</sup> Lama Abu-Odeh, *Egyptian Feminism: Trapped in the Identity Debate*, 16 YALE JOURNAL OF LAW & FEMINISM (2015), <https://digitalcommons.law.yale.edu/yjlf/vol16/iss2/2>.

<sup>287</sup> FAHMY, *supra* note 30 at 129.

The years 1920 and 1923 imposed more restrictions on Shari‘a Courts by issuing personal status laws, which regulated most aspects of marriage and divorce and did not let it to courts’ interpretations.

### **1. Marriage Age**

Marriage age, for example, was one of the main aspects that were regulated by the laws. The nation needed mature women, and not girls, to raise well-educated offspring who would build a strong nation. This regulation conformed with “Foucault’s assertion that the formation of the modern family was largely the result of ... state intervention that sought to consolidate and control the nuclear family as an apparatus to create ‘the healthy, clean, fit body, a purified, cleansed, aerated domestic space.’”<sup>288</sup>

This can be seen from two different perspectives. First, this was an announcement, mainly to the west, that supported the “Egyptian claims to being modern ... [and] served as an arena where various Egyptians in and outside the state produced and reproduced notions of nationalist modernity as a condition for the “enlightenment” and “progress” of the burgeoning Egyptian nation and its subjects.”<sup>289</sup> Writers argued that this regulation was another push towards a more civilized state. From another perspective, and most importantly, this was an example of the state’s interference in regulating Shari‘a and not leaving it to its interpretation. As a matter of fact, this regulation “was subjected to such harsh criticism from Muslim jurists ... [to the extent that it was withdrawn for a while before finally passed in 1923] setting the marriage age for women at sixteen and for men at eighteen”.<sup>290</sup> To the opposers, this was a clear breach of the agreement that modernization would leave Shari‘a alone. Shari‘a did not establish a minimum age limit for marriage.<sup>291</sup> However, the law was passed, and with it, the state took a big step toward codifying the new family ideology.

### **2. Divorce**

Before 1920, divorce, like other personal status matters, was also left to the Shari‘a Courts. But as other issues have been codified, divorce also has been regulated by marital

---

<sup>288</sup> Kholoussy, *supra* note 26 at 321.

<sup>289</sup> *Id.* at 322.

<sup>290</sup> *Id.* at 321.

<sup>291</sup> *Id.*

laws. Theoretically, these laws protected women by regulating their rights under the marriage contract. Personal status laws gave women the right to claim divorce for many reasons, especially for the husband's failure to support his children financially. Absence, missing, or ill husband were also among the legal grounds for filing for divorce.<sup>292</sup> However, practice showed that the “unprecedented involvement by the Egyptian government was motivated largely by efforts to make marriage more permanent, but still hierarchical, bond to buttress the family.”<sup>293</sup> This was clearly shown in the earlier memos of Law no. 25 of 1929. As the law drafters had stated, “Egyptian men, contrary to the spirit of Islam, were frivolously exercising their unilateral right to divorce ... [and] it was necessary to restrict and cure such social diseases.”<sup>294</sup> Again, we have been taken back to society’s right, or even obligation, to fight diseases threatening “the stability and welfare of the family and society as a whole.”<sup>295</sup> Although the reformers recommended “that Muslim women stipulate the right to divorce in their marriage contracts, ... [they] urged that they first appeal to a judge to ask for a divorce because if divorce is controlled by the judge, its incidence can be minimized and the institution of marriage strengthened.”<sup>296</sup> Filing for divorce was a complicated case where women, and sometimes men, had to clearly prove their grounds which was not an easy task.<sup>297</sup> If a woman with legal grounds wanted to get a divorce, courts were instructed to scrutinize those grounds. If a woman filed a divorce case for her husband's failure to provide financial support, she had to prove that her husband did not leave her with any source of living. And even if the divorce was issued, the husband had the right to revoke it if he showed that he was willing to provide his wife with the needed support.

Furthermore, if the husband was sentenced to life imprisonment, the wife could not file for divorce if he continued to support her.<sup>298</sup> Although this was modified later to give the wife this right if her husband was imprisoned for at least three years, this did not go without outrageous opposition from Egyptian intellectuals. They saw this reform as “a

---

<sup>292</sup> Personal Status Law 1920 & 1929.

<sup>293</sup> Kholoussy, *supra* note 26 at 324–325.

<sup>294</sup> *Id.* at 325.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 326.

<sup>297</sup> *Id.* at 324.

<sup>298</sup> *Id.* at 328.



danger which threaten[ed] the morals with corruption on one hand and the extermination of the existence of the family on the other.”<sup>299</sup>

So, in reality, restrictions on divorce were made with these new personal status laws and were not entirely left to courts' interpretations. Although the new regulations had given more grounds for women to claim divorce, statistics show that “divorce rates in Egypt steadily decreased over the course of the twentieth century.”<sup>300</sup> The aim was to protect the stability of the family, which reflected the welfare of society as a whole. The truth is that the Egyptian state, in passing marital laws, did not intend to improve women's or men's situation or, even secretly, oppress them. In fact, this was not a factor in the reforming process. This approach was the state's way of stabilizing the nationalist modern family. It did so to reach the “nationalization of marriage:” a married, adult, heterosexual couple who would form a permanent, monogamous family which would act as the cornerstone “for a modern nation free of social ills.”<sup>301</sup>

### 3. Polygamy

Polygamy also had its share of interference. Monogamy was promoted as the ideal system that should take place everywhere: from the Khedive house to the peasants' homes.<sup>302</sup> This started when, as shown at the beginning of this chapter, Khedive Tawfiq chose to marry one wife.<sup>303</sup> As some argued, from that point, “monogamy had become the showpiece of Egyptian modernity” between other nations.<sup>304</sup> This has brought Egyptian intellectuals to denounce polygamy to the extent that the grand *mufti* of Egypt “called for the restriction of polygamy and extolled the benefits of monogamy as the Islamic Ideal, arguing that the Qur'anic verses that legitimized polygamy only did so under extreme cases and simultaneously warned men against it.”<sup>305</sup>

Legal committees proposed many attempts to restrict polygamy. Although these proposals did not pass into legal reforms, they brought social debates that promoted

---

<sup>299</sup> *Id.* at 329.

<sup>300</sup> *Id.* at 332.

<sup>301</sup> *Id.* at 319.

<sup>302</sup> *Id.* at 332–334.

<sup>303</sup> *Id.* at 334.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

monogamy alongside it.<sup>306</sup> It was proposed that a married man should be prohibited from having another wife unless he could prove to the court that he could support his both wives/homes equally.<sup>307</sup> The personal status law of 1929 obliged the husband to declare in detail, in his marriage contract, if he is already married to another woman.<sup>308</sup> It even considered marrying another woman without the consent of his wife as a ground for divorce. Kids were also a crucial part of these legal proposals. It was argued that the majority of neglected offspring were the result of polygamous marriages that lacked the financial support of the male.<sup>309</sup>

Even when Egyptian feminists and women writers insisted that the government should prohibit men from marrying another wife, “they portrayed polygamy as a threat to the Egyptian family, and by extension, the nation.”<sup>310</sup> This shows that it was easier for women activists to get the state's and society's attention and support by bringing the family to the table. They explicitly framed the calls for monogamy "within a discourse of modernity and nationalism.”<sup>311</sup> Many women activists used statements like polygamy “is an obstacle to creating a harmonious home ... [and] if Egypt considered itself a progressive nation it should follow other, more advanced Muslim countries where polygamy had already been abolished or severely limited.”<sup>312</sup> Some even linked polygamy to the bygone times of concubinage and slavery and valorized monogamy as a system “that helped to construct the image of the nuclear family as the building block of the nation.”<sup>313</sup> They refrained, to some extent, from using the arguments of women's rights and welfare and replaced them with arguments which supported building the new family. To the observing eye, these debates show that most of these proposals did not intend to improve women’s lives but “sought legal interventions as a means to represent and control the population along newly national lines.”<sup>314</sup>

---

<sup>306</sup> *Id.* at 333.

<sup>307</sup> *Id.* at 335.

<sup>308</sup> *Id.* at 333.

<sup>309</sup> *Id.* at 335.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 336.

<sup>313</sup> *Id.* at 335–336.

<sup>314</sup> *Id.* at 335.

The irony is, when we look back at Egyptian families in the early twentieth century, we can see how polygamy was not an issue threatening society's fabric. In 1907, the Egyptian census reported a six percent rate of polygamy in married couples.<sup>315</sup> It could be wondered why an increased interest in curtailing polygamy if it was not that common in the first place. Besides the western pressure on Egypt to abandon the old regime and appear amongst the modern nations which I previously tackled, the state also wanted to restrict polygamy as a desire to promote the nuclear households that would work with, or better to say, “would not be able to constitute a threat to its political and socioeconomic power.”<sup>316</sup> This promotion, which nationalist writers and state officials did,

indirectly denounced large familial networks that could potentially encourage subversive activities against the authority of the state; [... it was] another means to control, represent, and subordinate the marital habits of the population to the ordered supervision of the national state. By portraying the nuclear family as the most fruitful reproductive unit ... [it helped the state to] secure its hold over the population.<sup>317</sup>

But why was the nuclear family, and still is, a better structure for the Egyptian society, or to be clear, for the Egyptian state? Attempting to answer this question takes us back again to what I was saying in the third chapter. By promoting monogamy, alongside with previously abovementioned methods, the state made sure that this new kind of family replaced the old kinship family. Looking at the nuclear family structure, we can understand the purpose behind promoting and valorizing it. As I previously mentioned, the nuclear family is composed of two relations: parent-child; and husband-wife, rather than extended generations and family ties.<sup>318</sup> These relationships made it easy for parents to observe their children and gave them absolute power over them.”<sup>319</sup> And with these relationships becoming strong, the state could easily observe the whole society by just following the parents in their methods of raising their children. To the state, no more big, extended families that were not easy to predict their acts were left to threaten the state's

---

<sup>315</sup> *Id.* at 333.

<sup>316</sup> *Id.* at 337.

<sup>317</sup> *Id.*

<sup>318</sup> TAYLOR, *supra* note 22 at 81–82.

<sup>319</sup> *Id.* at 83.

authority. The aim was to transform society into small, separate units under the supervision of the state.

#### **4. Documentation**

At the same time, and to ensure that the state had a complete record of the Egyptian family, more government involvement in the private realms of marriages was initiated. Documentation, recording, and notarizing were relied on with the expansion of the state's role. By the end of the nineteenth century, and with the creation of the marriage registrar system, marriages and divorces were one of many contracts that required official registration forms to the extent that "the law of 1897, [Regulation of the Shari'a Courts,] stated that no claim of marriage or divorce would be heard by a court after the death of one of the spouses unless it was supported by documents that were free of suspicion."<sup>320</sup> This was reformed more strictly in 1923 when the state required that marriages be registered officially. It directed the courts not to hear any marital disputes unless an official marriage certificate was presented.<sup>321</sup>

#### **5. New Shari'a**

The involvement of the State in private matters did not stop there. Shari'a was also developed and transformed by adopting legal norms "that are authorized and maintained by the centralizing state."<sup>322</sup> To strengthen the state's role, Abbas Helmy II authorized the police to enforce orders of wife-obedience "forcibly, even if it led to the use of force and entering homes."<sup>323</sup> This authorization was a modern practice with no precedent in any custom or Muslim family law. It was originated in France, where courts forced married women to live with their husbands wherever they chose by authorizing the police to return runaway wives to their husbands.<sup>324</sup> This new practice, at that time, was "migrated into Algerian jurisprudence during the colonial-era ... [and was linked to and] became a feature of Muslim Algerian law. French colonial knowledge of Muslim family law was the likely vector of its transmission to Egypt."<sup>325</sup> I believe this practice found its support

---

<sup>320</sup> Kholoussy, *supra* note 26 at 323.

<sup>321</sup> *Id.*

<sup>322</sup> FAHMY, *supra* note 30 at 129.

<sup>323</sup> Regulation of the Shari'a Courts 1 of the year 1879 Art 93.

<sup>324</sup> NAPOLEAN CODE 1566 Art 213-215.

<sup>325</sup> CUNO, *supra* note 5 at 185–186.

amongst Egyptian society as it gave the husband more authority over his wife and appeared at the same time as it was a feature that originated from Islamic jurisprudence.

Regardless of this historical fact, the application of this law showed that this practice did not, in fact, contradict Egyptian social norms as it was, somehow, linked to Islamic jurisprudence. Most interpretations of Quranic verses and hadiths supported the wife's duty of obedience. Women are due maintenance from their husbands, and their husbands are due obedience from them.<sup>326</sup> However, the Islamic jurisprudence may, in fact,

put an obligation on the married women to remain at home but [also] exempted her from any obligation to cook, do housework, or care for children. [However,] in the new family ideology the maintenance-obedience relationship lent authority to an ideal of domesticity in which women's vocation of household management and childrearing was emphasized while the exemption of women from household duties was elided.<sup>327</sup>

Some voices refused this common interpretation and saw it as a male-oriented one. They called for a new understanding of this relationship. In her interpretation of the Quranic verses that established men's rights over women, Aisha Taymur argued that there were two elements that shall be considered when referring to male leadership over women. She asserted that men's monopoly of leadership positions in the state enhanced their experience, reason, and knowledge. This gave them an advantage over women that reflected on the familial relationship. Their leadership also derived from the money they spent on their wives in every aspect of life.<sup>328</sup> She argued that men claimed this leadership regardless of their actual position in the family. According to her, men had abandoned the roles that gave them this leadership at the very beginning, yet they held on to the mere idea of leadership. She saw that this relationship was not justified anymore. Men deserted their homes and families and refused to contribute to their familial responsibilities.

On the other hand, women entered the working arena and were exposed to the same experience as men. They became the real guardian of their families, and "the majority had to shoulder the social and economic responsibilities of their strapped

---

<sup>326</sup> *Id.* at 198-199.

<sup>327</sup> *Id.* at 105.

<sup>328</sup> HATEM, *supra* note 281 at 117.

households assuming the authority that used to belong to their husbands.”<sup>329</sup> According to her interpretations, Islam outlined many duties on a husband, including companionship, caring treatment, looking after his wife, and financially supporting her. While in return, wives were only obliged to obey their husbands. She ended her argument by wondering that as long as the husband-wife roles were reversed, “why should she [the wife] not set aside the rules that governed her seclusion and not throw away the veil of her modesty!”<sup>330</sup> However, these voices were against the public norm; therefore, the orders of wife-obedience continued to be enforced by force until eliminated in 1979.<sup>331</sup>

Disobedient wives risked the harmony of the conjugal family, and as it was the main unit of society, this practice threatened the whole nation, and *the family* had to be protected under any means.<sup>332</sup>

## 6. Other Realms

*The family* could clearly be seen in every legal aspect, even outside the realm of personal status. According to the 1852 Penal code, which was an adaptation to the French law, homicide crimes were “claims of men [...] and not claims of god [... which meant that] the victim’s heirs [were those] who have the exclusive right to initiate legal actions and to press charges.”<sup>333</sup> Article 171 of that Penal code asserted that the legal punishment (*Lex talionis*) could not defeat the victim’s personal rights and gave the heirs the absolute right to claim these rights. In contrast, article 172 gave them the right to “refrain from passing their demand before the Shari’a Courts for *Qisas* either claiming *Diyet* (i.e., compensation) in lieu of the death of the malefactor or simply withdrawing all claims against him.”<sup>334</sup> It is clear how the family was the center of this crime. Murder was not only a crime against society but rather “an offense against the family [... which itself] had to decide how to deal with it.”<sup>335</sup> The family, by its ‘blood-right’ to the victim, the same right that I mentioned earlier, and which gave parents their original authority over their children, could decide if they wanted to press charges or not. In the final stage, too, the

---

<sup>329</sup> *Id.* at 120.

<sup>330</sup> *Id.* at 121.

<sup>331</sup> PRESIDENTIAL DECREE NO. 44 OF 1979 CONCERNING AMENDING PERSONAL STATUS LAWS.

<sup>332</sup> CUNO, *supra* note 5 at 200–202.

<sup>333</sup> FAHMY, *supra* note 30 at 93.

<sup>334</sup> THE IMPERIAL OTTOMAN PENAL CODE 1852.

<sup>335</sup> FAHMY, *supra* note 30 at 93.

law gave the victim's family the right to pardon the murderer even after passing a final conviction: they had the power to stop enforcing the execution by accepting "blood money instead."<sup>336</sup> And while in some cases where the victim had no heirs to defend him, the state "had come to take on the characteristics of the family" and appeared in the equation as a proxy of that family.<sup>337</sup> The process of litigation itself was founded around family power. As the identification system was still in its very early stages, the court needed reputable individuals as essential to the litigation process. Individuals could not be identified as witnesses unless they had a good family reputation in society.<sup>338</sup> This can also find its justification in the old Germanic law.

To take an oath, to testify that an individual had not killed, one had to be a relative of the accused. One had to have social relations of kinship with him, which would vouch not for his innocence but for his social importance. This showed the solidarity that a particular individual could obtain, his weight, his influence, the importance of the group to which he belonged and of the persons ready to support him in a battle or a conflict. The proof of his innocence, the proof that he had not committed the act in question was by no means what the evidence of witness delivered.<sup>339</sup>

All the elements were gathered together to support being in a family that protects the individual, on the one hand, and which protects the state on the other.

### **E. Towards More Bureaucratization**

As I have mentioned in the opening of this chapter that "as societies developed materially and socially, they would follow the same route, passing through similar stages," the legal reforms that took place in the nineteenth century in Egypt supported this argument as it easily could be linked to the European modernization.<sup>340</sup> Similarities could easily be noticed between precolonial Egypt and premodern Europe. First of all, the conjugal family was *the family* against what was known in earlier times, where extended kinship groups were the main element of society. Moreover, inventing a family law as a distinct category of law also took place around the same time in both cultures.

---

<sup>336</sup> *Id.* at 123.

<sup>337</sup> *Id.* at 93-94.

<sup>338</sup> *Id.* at 97.

<sup>339</sup> FOUCAULT AND FAUBION, *supra* note 90 at 37.

<sup>340</sup> CUNO, *supra* note 5 at 5.

To describe these legal reforms, it is not as simple as saying that it has undergone a process of secularization per se, as the term Westernization may indicate. In a closer examination, we can say that the legal system has leaned towards more interference from the government, more keeping track of people's practices, or mainly towards more *bureaucratization* "whereby the written word played an increasingly crucial role ... and whereby the spoken word slowly but surely lost its supremacy."<sup>341</sup>

## **F. The Evolution**

In November 2022, a video went viral over social media. A parade, a father carrying his daughter over his shoulders, and hundreds of people marching, chanting, and dancing in a one-minute video in the countryside in Egypt. These parades are common in Egypt in the event of marriage or graduation. Until this point, nothing is strange, a typical day in Egypt. It is not until you read the description under the video: "a father is celebrating his daughter's honor upon examining her virginity after her husband questioned her virginity and divorced her on their wedding night."<sup>342</sup> Nothing else will if this does not describe how the family has become integrated into the Egyptian system.

This chapter went through the Egyptian state's reforms during the modernization period. These reforms, along with the press and intellectuals' support, have drawn the main lines of the nuclear family. By modifying Shari'a to fit the new model, pushing for forming new families, and amending the personal status laws to preserve these families, Egypt, as a state and people, was on the road to this new household structure.

---

<sup>341</sup> FAHMY, *supra* note 30 at 92.

<sup>342</sup> The honorable and pure woman has arrived, O country: A parade in a Village to Prove the Virginity of a Girl, SADA AL-BALAD (2022), <https://www.elbalad.news/5535771> (last visited 21 Nov, 2022).



#### **IV. Conclusion**

I struggled to find a conclusion to this paper. When I first thought of this topic, it was out of a personal experience as a former judge. Before I tried to answer the first question I asked in the title: “is it really about the family?”, it was hard for me to understand why we have to protect the family, and which family exactly needs our, or in this case, my protection. “I know it when I see it,” was my first assumption.

In an attempt to answer those questions, I had to go back as far as I could to understand the beginning of the story. Maybe it did not start in Egypt; that was my first assumption. In this paper, I have put on a philosophical lens, the Foucauldian lens, and looked through the definitions of government, discipline, power, and family. I tried to analyze how the power started as a stream from upside to downward and how it evolved from that level to something that is being applied from everybody over everybody on all levels. I have also illustrated how the family was vital to this evolution. The family’s structure has transformed from being of big tribes until pushed to forming smaller units that were easier to monitor, control, and direct. Under the state’s authority, the family helped insert family members into disciplinary institutions to form well-disciplined members within the society.

Egypt was not in a different scenario. The same transformation happened around the same time. Shaping the new family was the goal of the Egyptian state during the nineteenth century. Laws, press, intellectuals, and each arm of the state have combined to reach this target. New regulations were issued pushing for this new family. Starting from Shari‘a and personal status laws to Criminal Code and every other law, the state has amended its regulations to preserve the family. Courts also interfered in interpreting laws in favor of preserving the family.

Is it really about the family? Does the state, any state, really care for the stability of the family and its morality? I do not believe so. States found an opportunity or even created one, a great one, to monitor, manage, and shape their citizens into single and separate units that can be easily controlled.

Now when I look back at how I began and where I ended up with my paper, maybe this is not the outcome I intended, or maybe there was no preliminary intention when I started thinking of this topic. Will this paper benefit anybody? I do not know. If it

did something, sure it helped me. I believe I just wanted to understand something that I was dealing with on a daily basis; something that was affecting everybody; something that did not make much sense to me, although I assumed that, as a judge, “I know it when I see it.” Now, I understand that maybe “I [do not] know it when I see it.”

The often-quoted words “I know it when I see it” perhaps best encapsulate the current state of ... the law. This simple phrase, embedded in a plurality opinion, carries with it many of the conflicts and inconsistencies that continue to plague ... [the] law... In effect, “I know it when I see it” can still be paraphrased and unpacked as: “I know it when I see it, and someone else will know it when they see it, but what they see and what they know may or may not be what I see and what I know, and that’s okay.”<sup>343</sup>

---

<sup>343</sup> William T Goldberg, *Two Nations, One Web: Comparative Legal Approaches To Pornographic Obscenity By The United States And The United Kingdom*, 90 BOSTON UNIVERSITY LAW REVIEW 28, 2122–2123.