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## Modernizing Muslim Family Law: The Case of Egypt

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37 Vand. J. Transnat'l L. 1043-1146 (2004)

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### Modernizing Muslim Family Law: The Case of Egypt

37 Vand. J. Transnat'l L. 1043-1146 (2004)

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# Modernizing Muslim Family Law: The Case of Egypt

Lama Abu-Odeh\*

## ABSTRACT

*The Author discusses the dynamics of family law reforms in modern Egypt as an instance of similar dynamics of reforms in other Muslim countries. The forces that push for reforms as well as those that try to limit them are also introduced.*

*The Author begins by describing the historical legal background shared by the vast majority of Muslim countries, including Egypt. An account of the general evolution of Islamic law—from a dominant system existing within an Islamic state to a subordinate system existing within an overall secularized legal system characterized by legal borrowing from European codes—is given. Islamic law has survived in the modern era primarily through family law, having lost jurisdiction over most other areas of law.*

*The Author next describes the nature of modern reforms of family law in Egypt. She argues that these reforms have been structurally limited because the Egyptian elites controlling the state pursued the policy of splitting the difference between the demands of women activists in Egypt pushing for liberal feminist reforms and those of a conservative religious intelligentsia that was antagonistic to these reforms. This policy of splitting the difference was notable in the nature of legislative reforms, family law adjudication by lower family courts, as well as in the constitutional adjudication of family law issues by the Supreme Constitutional Court of Egypt.*

*The Author ultimately argues that the only way to push for reforms in family law without the constraining influences of the religious intelligentsia is to secularize the legal system in its totality.*

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## I. INTRODUCTION

Egyptian feminists who advocate reform of Egyptian family law are often charged with supporting changes that are un-Islamic.<sup>1</sup> The charge is of such normative appeal that it is often hard to dismiss. To understand its normative power, one has to place the charge of “un-Islamicity” directed at reforming feminists by their adversaries in a larger context, that of the modern history of the Egyptian legal system.

During the second half of the nineteenth century, Egypt made a historic decision to dispose of the rules of Islamic law in most areas and fields of the law.<sup>2</sup> However, the Islamic rules on the family were preserved.<sup>3</sup> Egyptian elites understood this to be part of a badly

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1. See Lama Abu-Odeh, *Egyptian Feminism: Trapped in the Identity Debate* 21 (Jan. 2004) (unpublished manuscript) (on file with author); see also Fauzi M. Najjar, *Egypt's Laws of Personal Status*, 10 ARAB STUD. Q. 319, 323-25 (1988) (on file with author).

2. See J. N. D. Anderson, *Law Reform in Egypt: 1850-1950*, in *POLITICAL AND SOCIAL CHANGE IN MODERN EGYPT* 209, 217-24 (P. M. Holt ed., 1968) (describing changes in the laws of Egypt, as embodied by the adoption of various Codes that were largely European in origin, that took place in the second half of the nineteenth century).

3. See *id.* at 217-19 (noting that the *Shari'a* courts, and the sacred law which they applied in the old traditional way, remained largely unchanged, and “it was only in the *Shari'a* courts, and the community courts of the non-Muslim communities, that an uncodified law was still applied in the old, traditional way; but these courts were strictly confined to matters of family law in its widest connotation (marriage, divorce,

needed move toward modernization, a process that unfolded over time but seems to have been completed by the mid-twentieth century.<sup>4</sup> For most areas of the law, Egyptian elites chose to borrow (in the manner of legal transplants) European laws that displaced the rules of the inherited legal system.<sup>5</sup> Europeanization inevitably led to secularization.<sup>6</sup> For those who were (and indeed, for those who still are) opposed to Europeanization and secularization, the Islamicity of the rules on the family came to symbolize the last bastion of a dismantled Islamic legal system, the reform of which threatened to flood Egypt with the European and the secular.<sup>7</sup> Thus, attachment to medieval patriarchy came to mean attachment to the Islamic.

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paternity, guardianship, and succession) and the law of *waqfs* and gifts”); *infra* Part II.A (providing a definition of *waqfs*); see also DAWOUD SUDQI EL ALAMI & DOREEN HINCHCLIFFE, *ISLAMIC MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD* 3 (1996) (recognizing that “although by the mid-nineteenth century many areas of traditional Islamic law had been swept away . . . , changes in the law of the family came later and were undertaken with great delicacy”); Margot Badran, *Competing Agenda: Feminists, Islam and the State in Nineteenth- and Twentieth-Century Egypt*, in *WOMEN, ISLAM AND THE STATE* 201, 201 (Deniz Kandiyoti ed., 1991) (reporting that in nineteenth century Egypt, “[t]he former broad purview of the religious establishment was eroded piecemeal in the drive toward secularisation of education and law. The only exception to this was the sphere of personal status laws”).

4. See Daniel Crecelius, *The Course of Secularization in Modern Egypt*, in *RELIGION AND POLITICAL MODERNIZATION* 67, 73-89 (Donald Eugene Smith ed., 1974). As the author notes, this process of modernization and secularization of most areas of Egyptian law and society, save the realm of the family, began with a process in the nineteenth century marked by the “differentiation of political and religious structures.” *Id.* at 73. Although modernizing and secularizing elites “did not openly challenge the traditions and concepts of the *ulama* [religious scholars] nor totally abandon the basic concepts of Islamic government,” the effect of their project was that “the scope of the *shari’ah* [Islamic law] was reduced to personal status law (marriage, divorce, inheritance, etc. . . .).” *Id.* at 75, 79. Throughout the process of modernization and secularization, family law and “the liberation of women” were issues that “involved the *ulama* in constant political conflict with their modernizing government.” *Id.* at 83-84.

5. See JOHN H. BARTON ET AL., *LAW IN RADICALLY DIFFERENT CULTURES* 22 (1983) (asserting that the French influence in Egypt can actually be traced to the short “visit” made by Napoleon to the country in the late eighteenth century and that although the French invaders were driven out of Egypt after only three years, “[n]ot only was Egypt’s intellectual system shaken; its new reformers would look to France.” Indeed, “[o]ut of the political and military confusion that followed the Anglo-Turkish defeat of France there arose the first of Egypt’s modernizers, Muhammed Ali.”); M. Cherif Bassiouni & Gamal M. Badr, *The Shari’ah: Sources, Interpretation, and Rule-Making*, 1 *UCLA J. ISLAMIC & NEAR E.L.* 135, 166 (2002) (noting that around the middle of the ninth century, Egypt “adopted a number of codes modeled after French prototypes”); see also JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* 47 (2d ed. 2001) (explaining the adoption of European codes in Egypt and other parts of the Ottoman Empire).

6. See Crecelius, *supra* note 4, at 80 (reporting that “the twin goals of the emerging social and political elites, nationalism and liberal reform, were explicitly framed on the basis of secular principles derived from the West”).

7. See Najjar, *supra* note 1 (giving a detailed account of the opposition posed by religious, conservative elites to various attempts at family law reform in the

This Article argues that while secularizing the legal system in Egypt through European transplants allowed for the possibility of either dismissing or radically reorganizing various elements of the doctrine on the family inherited from medieval Islamic jurisprudence to make it more progressive, it was also the same secularization/Europeanization process that placed limits on and defined the ceiling of such progressive reforms. This is so because historically, in order for all other laws to be secularized, family law had to represent the limit of, the exception to, or the sacrificial lamb of secularization.<sup>8</sup> In order for family law to be legislatively reformed, progressively interpreted by secular judges, or actively protected by elite constitutional judges, the outer limits have to be convincingly defined for a difficult-to-please religious audience.<sup>9</sup> It is through making patriarchal pronouncements on the outer limits that the “reformer” gains legitimacy for his or her reforms in the eyes of watchful religious contenders. This Article argues further that it is this unceasing and obsessive look to the outer limits that preempts a full-fledged secular critique of patriarchal relations of the family in Egypt.

Part I of this Article begins by providing an account of the Taqlid legal system, the pre-modern Islamic legal system that prevailed in the Muslim world (including Egypt) up to the early part of the nineteenth century, before modern legal transformations started to take place. It was during this pre-modern era that the vast majority of Islamic rules on the family were developed and articulated.<sup>10</sup>

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twentieth century in Egypt, an opposition portrayed as a defense of Islam in the face of Western-inspired secularism and feminism, for which there is much evidence in present day Egypt); see also Mariz Tadros, *What Price Freedom?*, AL-AHRAM WEEKLY ONLINE, Mar. 7, 2002, at <http://weekly.ahram.org.eg/2002/576/fe1.htm>. Tadros reports on changes made to the procedural personal status law in Egypt in 2000 that allows women to seek *khul* divorce (a divorce granted to the wife without there existing one of the established grounds for seeking such divorce, usually in exchange for her giving up certain financial rights). The author observes:

Judging by the level of social hostility and discontent in the People’s Assembly and in the opposition newspapers two years ago when the procedural law was being discussed, it is not difficult to see why the government is cautious about touching the personal status law itself, which is the central bastion of the patriarchal system.

*Id.*

8. See John L. Esposito, *Introduction, in ISLAM, GENDER, AND SOCIAL CHANGE* ix, xv (Yvonne Yazbeck Haddad & John L. Esposito eds., 1998).

9. See *id.* (“[M]odern Muslim family law reforms were initiated then by governments, implemented from the top down, and often rationalized and legitimated in the name of Islam by using (or, as some would charge, manipulating) Islamic principles and legal techniques.”).

10. See JAMAL J. NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* 12-13 (3d ed. 2002) (describing the process by which each of the four major Sunni schools of law

Those very same rules, intricately modified, constitute the contemporary doctrine on the family in Egypt as well as the rest of the Arab world.<sup>11</sup> Part I also includes a structural reading of the Taqlid doctrine on the family and argues that while Taqlid law does not have an internally coherent view of the family—with each school of Taqlid law having its own doctrinal arrangement on the relationship between husband and wife—the differences between these schools amount to no more than possible positions within an overall gender regime that could be described as hierarchical to the benefit of the husband. This hierarchical regime has nevertheless a strong underlying element of transactional reciprocity of obligations between the spouses, in which husbands provide money in the form of maintenance, and wives provide conjugal society in return.

Part II begins by offering an account of the introduction of European legal transplants in Egypt, transforming the very nature of the legal system as a whole. It shows the ways in which, as a result of both the centralization and the Europeanization of the legal system, Taqlid law was crowded out of its historic jurisdiction until it was left with only the family to regulate.<sup>12</sup>

Part III proceeds to describe the modern doctrine on the family in Egypt, including the ways in which it was reformed and amended once European legal transplantation occurred. In order to understand the scope and nature of the various statutes adopted in Egypt with the goal of reforming rules and laws concerning the family, a comparative approach is used.<sup>13</sup> Part III places Egyptian reforms in a comparative relationship with those undertaken in Jordan and Tunisia. A comparative summary also includes the rules on the family under the Hanafi doctrine, an Islamic school of law that developed in the Taqlid era and that historically had the largest influence on Egyptian law.<sup>14</sup> Part III includes the Hanafi rules to

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worked to consolidate their legal doctrines during the early part of this legal era, from approximately the tenth to the thirteenth centuries).

11. See *id.* at 14-15; see also N. J. COULSON, A HISTORY OF ISLAMIC LAW 84-85 (1964).

[B]y the fourteenth century various legal texts had appeared which came to acquire a particular reputation in the different schools and areas of Islam. Representing for each school the statement of law ratified by the *ijma* [consensus of Islamic legal scholars], they retained their paramount authority as expressions of *Shari'a* law until the advent of legal modernism in the present century.

12. See *infra* Part II.A-C.

13. See *infra* Part III.A-B.

14. Bassiouni & Badr, *supra* note 5, at 166 (observing that in general, under Ottoman rule, the Hanafi school of law was “the official *madhhab* [legal doctrine] of the empire”); see Charles C. Adams, *Abu Hanifah, Champion of Liberalism and Tolerance in Islam*, in ISLAMIC LAW AND LEGAL THEORY 377, 384 (Ian Edge ed., 1996) (noting that



show the extent to which the Egyptian reforms departed from their historic Taqlid origins.

A spectrum of reform possibilities emerges from this comparative picture. While Tunisian legislative reform appears to represent the most liberal approach, the Hanafi doctrine sits on the other end of the spectrum as the most conservative. Jordan and Egypt are located in the middle and are examples of countries that enacted what can be characterized as centrist reforms. Indeed, Tunisia seems to have gone as far as to legislate liberalism in its family code in a manner that has no parallel in the Arab world.<sup>15</sup> Tunisian lawmakers introduced terms such as “equality” in their legislation and made a concerted effort to abolish the structure of gendered reciprocity and complementarity inherited from Taqlid law.<sup>16</sup> By comparison, the Egyptian legislature preserved gender reciprocity, while at the same time chipped away at the husband’s surplus of powers in the family.<sup>17</sup> The aim of the Egyptian legislation seems to be to replace the marital status regime provided for under Hanafi doctrine, the prevailing Taqlid doctrine in Egypt, with that of contract.<sup>18</sup>

Part IV argues that the family courts in Egypt have continued the legislative approach of chipping away at the husband’s power in the family, without, however, destroying the regime of reciprocity. Part IV looks at lower family court and appellate court adjudication interpreting some of the new legislative rules.<sup>19</sup> Egyptian courts

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the Hanafi school is credited with a liberal, analogy-based approach to legal reasoning); JOSEPH SCHACHT, INTRODUCTION TO ISLAMIC LAW 40 (1964) (stating that the Hanafi school of law was founded by the jurist Abu Hanifa (d. 767)).

15. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 239 (“Tunisian law has been held to be the most progressive of the laws of the region, in that it includes the most radical provisions of any of the Arab laws.”).

16. See *id.* at 239-47 (providing the text of the Tunisian Personal Status Code, or *Majallah*).

17. See *id.* at 51-52. The authors, referring to legislative and presidential decrees of the 1970s and 1980s aimed at reforming personal status laws in Egypt, report:

There had for some time been a movement to amend the personal status laws, which had remained unaltered despite social changes. Some members of the Popular Assembly proposed a draft law amending the laws of personal status, which was examined and confirmed by the Assembly during June and July 1985. The resulting Law No. 100 of 1985 revised and replaced certain provisions of the laws of personal status, including provisions in the areas of *ta’a* (obedience), registration of divorce, *mut’a* (compensation to a divorced woman), maintenance for the wife and custody.

*Id.*

18. See *id.* at 52-62 (providing the text of various Egyptian laws of personal status); *infra* Part III.C.

19. See *infra* Part IV.A-B.

limited the husband's power in the marital relationship by restricting the interpretation of the wife's duty of obedience in the family, as well as expanding rather drastically the grounds available for her to request a divorce. The aggregate effect of these judicial moves, it is argued, has been to further undermine the status regime inherited from the Hanafi doctrine and push it more aggressively toward a contractual one.<sup>20</sup>

Part IV also presents an account of the way the judges of the Supreme Constitutional Court of Egypt (SCC) attempt to defend legislative reforms in family law from the attacks of religious groups. Specifically discussed are the Court's rulings after the 1980 amendment to Article 2 of the Egyptian Constitution, which establishes that "the principles of Islamic Sharia are the principal source of legislation."<sup>21</sup> The amendment prompted religious groups to argue that certain legislative reforms in family law were un-Islamic, or contrary to the Shari'a. Part IV argues that the SCC has pursued a strategy of splitting the difference between the demands of the religious detractors and those of Egyptian feminists on the question of how to interpret those reforms.<sup>22</sup>

This Article concludes by arguing that legislative and adjudicative reforms and interpretive strategies that move from defining a marital relationship as one of status to one of contract, as well as splitting the difference between the demands of religious advocates and those of feminist reformers, represent the ways in which the Egyptian secular male elites have introduced reform in the area of family law.<sup>23</sup> These strategies attempt to strike a centrist compromise so as to mediate the demands of the feminists and those of their adversaries—the religious intelligentsia.

The Egyptian path to family law reform represents the rule rather than the exception in the Islamic world. Many other countries have adopted a centrist compromise, as Egypt did, (although each adopted one that is uniquely its own), to navigate the complex interaction between the need to reform family law while still preserving a semblance of Islamicity in this law.

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20. See *infra* Part IV.A-B.

21. Dr. Hatem Aly Labib Gabr, *The Interpretation of Article Two of the Egyptian Constitution by the Supreme Constitutional Court*, in HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT 217 (Kevin Boyle & Adel Omar Sharif eds., 1996). Before the amendment, Article 2 of the 1971 Constitution dictated that "the principles of Islamic Sharia are a principal source of legislation." *Id.* (emphasis added).

22. See *infra* Part IV.C.

23. See *infra* Parts II.D, V.

## II. FAMILY LAW UNDER THE PRE-MODERN ISLAMIC LEGAL SYSTEM OF TAQLID

The bulk of legal rules on the family that permeate contemporary legislation in Egypt were adopted from the pre-modern Islamic legal system that Muslims refer to as Taqlid. It is therefore important to offer a description of this legal system as well as the rules that emerged from it. This section begins by providing an account of Taqlid as a system, including its distinct institutional structure and historical legal consciousness, and proceeds to describe the rules themselves.

The best way to understand how the Taqlid legal system emerged and how it acquired its internal qualities and dynamics is to contrast it first with the legal era that preceded it, namely, that of Usul al-Fiqh (Usul), and second, with that which proceeded it, namely, the modern legal era of European transplantation.

### A. *Usul Al-Fiqh*

*Usul al-Fiqh*, meaning the “sources of jurisprudence,” is a reference to the legal theory of the famous jurist Shafi’i, written in the ninth century.<sup>24</sup> The era of Usul was one in which the schools of law started to make an appearance through engaging in the legal activity of innovating rules inspired directly by the sources of the religion.<sup>25</sup> Shafi’i, in his book *al-Risala*, argued that all rules of law applied by *qadis* (judges) in the various Muslim territories should be based directly on holy sources.<sup>26</sup> Shafi’i defined these sources as the Quran and *Hadith*.<sup>27</sup> His theory, with its stress on the prominence of

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24. See SCHACHT, *supra* note 14, at 41, 45-48. (explaining that Shafi’i’s theory was a powerful intervention in the legal culture of the time, as exemplified by the statement that “Shafi’i’s legal theory is a perfectly coherent system, superior by far to the theory of the ancient schools, and he became the founder of the *usul al-fikh*, the discipline dealing with the theoretical bases of Islamic law”).

25. See ESPOSITO, *supra* note 5, at 2 (noting the once divergent legal techniques and sources employed by early schools of law and the eventual establishment of four common sources of Islamic law).

26. See WAEL B. HALLAQ, *A HISTORY OF ISLAMIC LEGAL THEORIES* 28-31 (1997) (explaining Shafi’i’s theory as divine in origin).

27. *Id.* at 29 (“In establishing the general principles of legal reasoning, Shafi’i insisted that no legal ruling can be propounded if it is not ultimately anchored in the Book of God and/or the Sunna of His Prophet.”); ESPOSITO, *supra* note 5, at 5 (explaining that Sunna is a reference to the collection of Hadith, or the reported traditions of the Prophet Mohammad, i.e., everything he had been reported to have said, done, or approved). Hallaq observed that Shafi’i’s theory is understood to have mediated between the two prevailing legal camps of his time. See HALLAQ, *supra* note 26, at 18-19. Esposito noted that the first camp was that of *Ra’y*, or opinion, giving judges the freedom to use their discretion to innovate rule, while the second was that of *Hadith*, insisting that all rules should be based on the two holy texts, the Quran and

the “text” (Quran and Hadith) as the basis of the rules, and the relegation of *qiyas*, or analogy, and “discretion” to a secondary status, prompted some of the main jurists of the time, who came to slowly acquire students and followers, to base the rules of law they had innovated on some textual basis.<sup>28</sup>

The schools of law, attributed retrospectively to these famous early jurists, came into being and acquired their own distinct identity through a complicated historical and theoretical process in which they both acquiesced to Shafi'i's demand for textual foundationalism but also resisted his proscription.<sup>29</sup> In the end, the schools came to be identified in their jurisprudence along the spectrum of text on the one side and discretion on the other, some leaning in their doctrinal activity toward the one end and the others leaning toward the other.<sup>30</sup> This intense legal activity was taking place as the Islamic state came into being and was progressively expanding its

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the Sunna of the Prophet. See ESPOSITO, *supra* note 5, at 2. In addition, Coulson explained that

[A]sh-Shafi'i's scheme embodied a compromise between divine revelation and human reason in law and thus endeavoured to reconcile the basic conflict of principle in the early schools between the 'party of Tradition' (*ahl al-hadith*) and 'the party of reasoning' (*ahl al-ra'y*). It was a legal theory which expressed, with irrefutable logic, the innate aspirations of Muslim jurisprudence.

See COULSON, *supra* note 11, at 61.

28. See HALLAQ, *supra* note 26, at 33 (“What may be seen as a reconciliation between the traditionalists and the rationalists—a reconciliation that began to manifest itself only toward the very end of the third/ninth century—may also be seen as a general acceptance of the rudimentary principles of Shafi'i's thesis.”).

29. See COULSON, *supra* note 11, at 90.

Hanafi and Maliki law . . . were in existence before Shafi'i formulated his theory of *usul*, and although much of their law was already formally expressed in terms of that theory, in particular as Traditions from the Prophet [Sunna], there was residuum of local doctrine which was not so expressed; this the Hanafis and Malikis proceeded to rationalise, in the course of the ninth century, by modifying and supplementing ash-Shafi'i's theory in a variety of respects.

30. See *id.* at 70-71.

[t]hose who were prepared to accept the precise terms of ash-Shafi'i's doctrine on the role of Traditions were a minority and thus, despite the consistent repudiation of this possibility by ash-Shafi'i himself, the Shafi'i school of law . . . represented the middle position between those whose attitude toward Traditions was more reserved and those whose enthusiastic support of them was carried to extremes.

See also HALLAQ, *supra* note 26, at 33-35 (proposing that Shafi'i's *al-Risala* was unnoticed for more than a century after his death as the proponents of *ra'y* and *hadith* accommodated Shafi'i slowly).

territories.<sup>31</sup> The administrators of this state felt the need to apply law that was “Islamic” to the new subjects and converts.<sup>32</sup>

Whatever the sympathy of a particular school was during the time of Usul, this era was marked by the busy and elaborate legal activity of articulating rules of law for the first time in Islamic history.<sup>33</sup> Much of this legal activity took the form of *ijtihad*. “As conceived by classical Muslim jurists, *ijtihad* is the exertion of mental energy in the search for a legal opinion to the extent that the faculties of the jurist become incapable of further effort.”<sup>34</sup> This activity of innovation is understood to have come to an end with the advent of the Taqlid era.<sup>35</sup>

### B. Institutional Structure and Legal Consciousness of the Taqlid System

Taqlid, meaning imitation, or conformism, is the word used (in a somewhat derogatory way) to describe the legal system that prevailed following the era of Usul in the Islamic world for a period of roughly

31. See generally ANN K.S. LAMBTON, STATE AND GOVERNMENT IN MEDIEVAL ISLAM xvi-xvii (1981) (describing the evolution of Islamic political ideas during the expansion of the Muslim conquests).

32. See *id.* The author writes:

With the expansion of the Muslim conquests from the year 37/657-8 onwards there gradually evolved a body of political ideas. . . . Broadly speaking three main formulations can be distinguished; the theory of the jurists, the theory of the philosophers and the literary theory. . . . All three formulations set forth the divine nature of the ultimate sovereignty and pre-suppose the existence of a state within which the earthly life of the community runs its course and whose function is to guarantee the maintenance of Islam, the application of the *shari'a*, and the defence of orthodoxy against heresy. . . . The first formulation, that of the jurists, is the most truly Islamic of the three. . . . There can also be discerned in it the expression of a religious ideal in opposition to practice.

*Id.*

33. See HALLAQ, *supra* note 26, at 16.

[T]he last quarter of the first century [seventh century A.D.] saw an upsurge of intellectual legal activity in which Arab Muslims and non-Arab converts took part. Interest in legal issues no longer was limited to an elite who were privileged to have been affiliated with the Prophet or with his Companions. This increasing interest in these issues was reflected in the evolution of various centers of legal activity throughout the Islamic lands. In the beginning of the second century, the most prominent centers were the Hijaz, Iraq, and Syria. Egypt became such a center soon thereafter.”)

34. Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT'L. J. MIDDLE E. STUD. 3, 3 (1984) (“In other words, *ijtihad* is the maximum effort expended by the jurist to master and apply the principles and rules of *usul al-fiqh* (legal theory) for the purpose of discovering God’s law.”).

35. See COULSON, *supra* note 11, at 80-81 (explaining the replacement of the “right of *ijtihad*” with the “duty of *taqlid*”).

nine hundred years, from the tenth to the nineteenth century.<sup>36</sup> What distinguishes it as a unique era in its own right is that during this time, Muslim jurists and judges appear to have abandoned, for the most part, the religio/legal project of coming up with new rules of law directly inspired by the sources of the religion, or *ijtihad*.<sup>37</sup> Rather than pursue the project of legal innovation typical of the preceding era of Usul, these jurists/judges concentrated their legal activity on consolidating the legal doctrine of the school of law they were affiliated with and to which they had deep feelings of loyalty.<sup>38</sup> One followed (imitated, conformed with) the doctrine of one's school rather than attempting a fresh reading of the word of God to come up with new rules.<sup>39</sup> Taqlid, one might say, is the era of the schools of law during which the doctrines of the various schools were treated as the law of the land, seriously displacing and overshadowing the Quran and prophetic traditions as the sources of the law.<sup>40</sup>

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36. SHERMAN A. JACKSON, *ISLAMIC LAW AND THE STATE* 79-80 (1996); COULSON, *supra* note 11, at 80-81; COULSON, *supra* note 11, at 80-81.

37. See COULSON, *supra* note 11, at 80-81; ESPOSITO, *supra* note 5, at 128; Joseph Schacht, *The Schools of Law and Later Developments of Jurisprudence, in* ORIGIN AND DEVELOPMENT OF ISLAMIC LAW 57, 73 (Majid Khadduri & Herbert J. Liebesny eds., 1955).

By the beginning of the fourth century of Islam (about A.D. 900) the point had been reached, however, when the scholars of all surviving schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards no one could be deemed to have the necessary qualifications for independent reasoning in law, and that all future activity would have to be confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down once and for all. It followed that from then on every Muslim had to belong to one of the recognized schools.

*But see* JACKSON, *supra* note 36, at 73-83 (recognizing the debate regarding whether the "closing of the door of *ijtihad*" had really occurred); Baber Johansen, *Legal Literature and the Problem of Change: The Case of the Land Rent, in* ISLAM AND PUBLIC LAW (Chibli Mallat ed., 1993) (noting the scholarly debate regarding whether *ijtihad* came to an end in the tenth century); Hallaq, *supra* note 34, at 4 (asserting that the idea that "the gate of *ijtihad* was closed" completely with the dominance of the Taqlid system is false, and that, to the contrary, the gate of *ijtihad* was never closed either in theory or in practice).

38. See ESPOSITO, *supra* note 5, at 128.

39. See JACKSON, *supra* note 36, at 95; LAMBTON, *supra* note 31, at 12 ("*Ijtihad*, the exercise of independent reasoning, gave way to *taqlid*, the unreasoning acceptance of the final state of the doctrine as laid down by each school in its recognised handbooks").

40. See COULSON, *supra* note 11, at 84. The author notes:

From the tenth century onwards the effect of the doctrine of *taqlid* was mirrored in the literature of the law. This consisted mainly of a succession of increasingly exhaustive commentaries upon the works of the first systematic exponents of the doctrine such as Malik, ash-Shaybani and ash-Shafi'i. Further glossaries were appended to these commentaries; different views and lines of

The main operators in the legal system of Taqlid were the four principal Sunni schools of law, namely the Hanafi, the Shafi'i, the Maliki, and the Hanbali,<sup>41</sup> each named after a historic jurist appearing in the previous era of Usul.<sup>42</sup> Each school developed its own distinct legal doctrine, or *madhhab*,<sup>43</sup> as well as its own gendarme of jurists, *qadis* (judges), *muftis*,<sup>44</sup> and students. The political ruler often

development were collated and amalgamated, and concise abbreviated compendia were produced. Authors, almost without exception, betrayed a slavish adherence, not only to the substance but also to the form and arrangement of the doctrine as recorded in the earliest writings. By the fourteenth century various legal texts had appeared which came to acquire a particular reputation in the different schools and areas of Islam. Representing for each school the statement of the law ratified by the *ijma'* [consensus of the community, or of the *ulama* (religious scholars)], they retained their paramount authority as expressions of Shari'a law until the advent of legal modernism in the present century.

*Id.*

41. The above-mentioned schools of law are considered the dominant schools within the Sunni branch of Islam. Shi'ites, by contrast, have their own internally differentiated schools and their own distinct legal theory. This article only covers the doctrines that were in operation within the Sunni branch.

42. See ESPOSITO, *supra* note 5, at 128 (reporting that "[a]fter the eleventh century, all jurists officially followed one of the established law schools, rather than attempting to form new ones"); see also LAMBTON, *supra* note 31, at 4 (noting the four main schools of Islamic law and their origins).

43. As one author has noted:

The word *madhhab* meant a number of different things, depending on how the word was used and in what particular context. One sense of the word indicated personal affiliation to the doctrine of an *imam* [founder of the school], a meaning which had fully emerged and been solidified by the middle of the fourth/tenth century. Perhaps a more important sense of the term was its signification of the positive and theoretical doctrine of the *imam* in particular and of his followers in general. In this sense, therefore, the *madhhab* acquired the meaning of 'a school's authoritative doctrine' . . .

WAEEL B. HALLAQ, *AUTHORITY, CONTINUITY, AND CHANGE IN ISLAMIC LAW* 61 (2001).

44. "*Mufti*" is a reference to a juristconsult who issued "nonbinding advisory opinions (*fatawa*, or *fatwas*) to an individual questioner (*mustafti*), whether in connection with litigation or not. . . . In their different venues, both *qadis* [judges] and *muftis* are specialized in handling the everyday traffic in conflicts and questions falling within the purview of the *shari'a*." Muhammad Khalid Masud et al., *Muftis, Fatwas, and Islamic Legal Interpretation*, in *ISLAMIC LEGAL INTERPRETATION* 3 (Muhammad Khalid Masud et al. eds., 1996). "They [*muftis*, or juristconsults] issued *fatwas* in response to a wide range of questions emanating from individual Muslims of every status, including *qadis* and political authorities such as the *caliph* or sultan." *Id.* at 4. In regards to the difference between *muftis* and *qadis*, and the opinions they issued, the author reports that "Islamic legal doctrine generally encourages *qadis* to consult with legal experts before issuing a judicial decision (*hukm*), especially in difficult, unusual, or sensitive cases. . . ." *Id.* at 10. However, "[w]hereas a judgment [issued by a *qadi*] entails direct action, a *fatwa* provides access to shari'a knowledge in the form of a considered opinion. Whereas a judgment carries the presumption of finality, a *fatwa* enters a world of competing opinions." *Id.* at 19. As another author asserts, "the

allowed these schools to operate for the benefit of their respective constituencies (disputants and legal opinion seekers).<sup>45</sup> The ruler either adopted a particular *madhhab* as the official law of his territory—allowing other schools to cater to their constituencies and followers while privileging the official *madhhab*—or chose to distribute state resources equally between the various schools without privileging one at the expense of the others.<sup>46</sup>

The legal rules produced by the schools within this system acquired authoritative power through their attribution to a famous jurist of the past.<sup>47</sup> Any new rule had to be projected back onto a historical authoritative figure revered among the members of the school of law in whose doctrine this rule was making an appearance.<sup>48</sup> The identity affiliation of the people operating the system, as well as that of the constituencies they offered their services to, was not so much with Islam as with the *madhhab* of the school of law they belonged to.<sup>49</sup> A constituent was a Hanafi, a Shafi'i, a Maliki, or a Hanbali.<sup>50</sup> Narration of the old masters' legal

function of the *mufti* was essentially private; his authority was based on his reputation as a scholar, his opinion had no official sanction, and a layman might resort to any scholar he knew and in whom he had confidence." Schacht, *supra* note 37, at 76.

45. The role of muftis, as legal specialists, was vital because of the centrality of legal reasoning in every individual's capacity as both a member of a political community and a religion governed by these laws. The complexity of the taqlid system meant that educated guidance was a necessity. As one author expressed,

[t]he members of the public had been in need of specialist guidance from the very beginning of Islamic law, and this need grew stronger as the law became more technical and its presentation more scholastic. The practical importance of the sacred law for the pious Muslim is much greater than that of any secular legal system for the ordinary law-abiding citizen.

Schacht, *supra* note 37, at 75.

46. See JACKSON, *supra* note 36, at xxv (specifically in the case of thirteenth century Egypt, "whereas in theory all of the Sunni schools were recognized as equally authoritative, the fact that they were not all equidistant from the source of power (i.e., the state) inevitably conferred an added authenticity upon the views of some, peripheralizing where not obliterating those of others.").

47. See *id.* at 82-83. ("The quest for authority to back and validate legal interpretations is reflected in a number of phenomena. . . . [J]urists often disguise their own interpretations as having originated with earlier authorities."); see also COULSON, *supra* note 11, at 94-95.

48. See JACKSON, *supra* note 36, at 82-83; see also BERNARD G. WEISS, THE SPIRIT OF ISLAMIC LAW 88-97 (1998) (providing a detailed description of the method used by jurists to bolster their opinions with historical support).

49. See JACKSON, *supra* note 36, at 79 (noting that even "legal opinions themselves came ultimately to be judged not on the basis of their intrinsic quality but by whether or not they carried the endorsement of the *madhhab* as a whole"); Schacht, *supra* note 37, at 68-70 (listing the different regions and nations that historically ascribed to each of the four Sunni schools).

50. Indeed, once a "validly deduced view" was endorsed by one of the four Sunni schools on a disputed question of law, and was confirmed by consensus (generally of the



opinions, or those of the Prophet's Companions, on a given micro-matter was the most common way of reporting legal rules.<sup>51</sup>

Under Taqlid, each school of law produced its own internally complex structure of jurists, judges, and *muftis* whose role was to engage in pedagogy, adjudication, and interpretation of the doctrine of the school.<sup>52</sup> There was little attempt under the Taqlid system to rationalize or abstract the doctrine of the school to make it easy to implement, a desire symptomatic of the rise of the modern nation-state with its centralized legal system.<sup>53</sup> In fact, the doctrine of the school was scattered in a vast literature varying from treatises to commentaries to books on responsa (*fatwa*).<sup>54</sup>

The legal actors in the system attempted to manage complex cases and to avoid the application of conflicting rules to the same situation by relegating cases to the hierarchical organization of the school.<sup>55</sup> Thus, the simple cases went to the lower jurists and the

legal scholars of the school), it became binding on the entire community, or all the members of the school. See JACKSON, *supra* note 36, at 108. In regard to the modern era, one author reports that, "[e]ven though Islamic law was disestablished in most Muslim nations in the nineteenth century, most Muslims have continued to be associated with the particular school that has historically dominated their region." Clark Benner Lombardi, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State*, 37 COLUM. J. TRANSNAT'L L. 81, 94 (1998). In addition, the author notes that "[t]he Hanafi school claims the nominal allegiance of sixty percent of all Muslims in the world—including most Egyptians." *Id.*

51. See LAMBTON, *supra* note 31, at 4 (reporting that "[i]n due course much of what had originally been arbitrary decisions by scholars was projected backwards and ascribed to the prophet or one of the great figures of the past").

52. See generally GEORGE MAKDISI, *THE RISE OF COLLEGES* (1981). Each school's jurists, *muftis*, and judges were trained in *madradas*. As Makdisi reports, "[i]n classical Islam, the *madrada* was the institution of learning par excellence, in that it was devoted primarily to the study of Islamic law, queen of the Islamic sciences." *Id.* at 9. The author explains:

These institutions of learning may be further divided into exclusive and unrestricted institutions: exclusive, in that they were devoted to a particular *madhab*, and admission was restricted to members of that *madhab*; unrestricted, in the sense that members of all schools could be admitted. Exclusivity applied only to institutions teaching law.

*Id.* at 10.

53. See JACKSON, *supra* note 36, at 98-99. In the absence of consensus on any given issue, differences of opinion were allowed to stand, and a multiplicity of plausible legal opinions existed between *madhhabs*. See *id.* In addition, within each school, internal complexity was created as jurists resorted to the formulation of new, distinct classifications and exceptions rather than modifying a religiously mandated rule. See *id.*

54. See COULSON, *supra* note 11, at 84-85; Johansen, *supra* note 37, at 32-33; see also *supra* note 44 (defining "*fatwa*").

55. See JACKSON, *supra* note 36, at 97. The author reports that according to the "hierarchical internal structure" of the *madhhabs*, there were three ranks: beginners, graduate students, and masters or teachers—the *muftis*, whom he also calls *ra'is*. "It

harder ones went to the more senior ones.<sup>56</sup> And in the end, “God knows best.”<sup>57</sup> The place of a single jurist in the hierarchy was determined by his knowledge and mastery of the doctrine of the school and of its legal methodology.<sup>58</sup>

New rules to be applied to new situations were derived from the *madhhab* of the school.<sup>59</sup> This was done by following the principles developed by the master authorities of this *madhhab*, constituting a kind of “*usul* of the School.”<sup>60</sup> Shafi‘i’s methodology for deriving new

was the *ra‘is* who represented the *madhhab* on difficult and extremely controversial issues. It was also the view of the *ra‘is*, along with that of his closest competitors within a school, that stood the greatest chance of becoming the view of the *madhhab*.” *Id.*

56. *See id.*

57. *See* NORMAN ANDERSON, LAW REFORM IN THE MUSLIM WORLD 38 (1976) (reporting that “[i]t was God himself and his law which were sovereign, not the Government or people”).

58. *See* JACKSON, *supra* note 36, at 96-101.

59. *See id.* at 82-83. Jackson writes:

As it became increasingly apparent that the view most likely to receive the widest application was that which could be shown to enjoy the widest endorsement within a school at large, jurists found themselves in need of ways to show that their conclusions had not deviated from the position of the *madhhab*, or at least from what they could claim the position of the *madhhab* should be. . . . [N]o longer was it the case that a view was rendered orthodox merely by the fact that it issued from an authorized jurist; it was now the *madhhab* as a whole that conferred this status upon a view.

*Id.*

60. *See* HALLAQ, *supra* note 43, at 61. “Whereas the earlier period (which had ended, so to speak, by the middle of the fourth/tenth century) was one of almost indistinguishable plurality, the century or two immediately succeeding it witnessed a significant narrowing of doctrinal possibilities.” *Id.* Thus, as Hallaq explains, *taqlid* involved “the act of following the totality of the founder’s legal doctrines as a methodologically systematic structure. . . .” *Id.* at 86. This “*usul*,” connoting a methodology unique to a given school, is to be distinguished from Shafi‘i’s methodology, which he had sought to have all schools comply with. As Jackson reports:

[I]n extrapolating from the *madhhab* of an Imam [founder of a school] a jurist also had to be certain not to violate any legal precepts, or so-called *qawa‘id*. Legal precepts are essentially broad-based rules or tests deduced from the aggregate of opinions of the early Imams. . . . [W]here the need did arise to consult scripture on an unprecedented matter, legal precepts ensured that the resulting interpretations did not violate the *madhhab* of the respective Imam.

*See* JACKSON, *supra* note 36, at 92-93. In addition, it was not enough

for a jurist to have mastered the discipline of *usul al-fiqh*. This is because . . . ‘there are many precepts of the *shari‘ah* relied upon by the Imams and the ancient masters that are nowhere to be found in the books of *usul al-fiqh*.’ In the final analysis, what this stipulation comes down to is the *prima facie* counterintuitive conclusion that, whereas mastery of *usul al-fiqh* had been enough to qualify a jurist to practice *ijtihad* in the early period, now it would not be enough to qualify him to engage successfully in *taqlid*!

rules became overshadowed and displaced by each school's own *usul*.<sup>61</sup> These sub-rules were understood to be derived essentially from the rules of the *madhhab* rather than a fresh reading of the holy texts following the methodology of *Usul al-Fiqh*.<sup>62</sup>

During the *Taqlid* era, change in the legal doctrine of any of the schools was acknowledged implicitly rather than explicitly given the authoritative hold of the opinions of the masters of the school.<sup>63</sup> It often took place at the lower level of the system through, for example, legal opinions given by *muftis* or cases adjudicated by judges, without such change being reflected in the official treatises of the school.<sup>64</sup> Official treatises were typically used for pedagogical purposes, and they allowed the doctrine of the school to have the appearance of an unchanging code.<sup>65</sup> It is the fact that legal doctrine never changed in an explicit way that marked this period inaccurately as one of *Taqlid*, or imitation.<sup>66</sup> Recent historians of Islamic law have argued that in

*Id.* For this reason, the author asserts that “[*t*]aqlid, in other words . . . represents a more rather than less advanced stage of legal development.” *Id.* at 93.

61. See HALLAQ, *supra* note 43, at 57-75 (detailing the historical processes by which there was a “rise and augmentation of school authority”); JACKSON, *supra* note 36, at 73 (noting that the *madhhabs* were “a tightly-knit structure held together by mutual subscription to a strict body of legal rules”).

62. See HALLAQ, *supra* note 43, at 57-75.

63. See Johansen, *supra* note 37; see also JACKSON, *supra* note 36, at 97-102. Jackson refers to the implicit process of change as “legal scaffolding” by the statement:

Rather than abandon existing rules in favor of new interpretations from the sources, needed adjustments are sought through new divisions, classifications, distinctions, exceptions and expanding or restricting the scope of existing rules. To be sure, only ranking jurists acquired enough authority over time to be able to challenge an incumbent view or introduce a new one; and it was only they who possessed enough skill to engage successfully in legal scaffolding.

*Id.* at 97.

64. See Johansen, *supra* note 37, at 29-47; see also JACKSON, *supra* note 36, at 97-102. Hallaq reports:

On the micro-level . . . plurality of opinion within a given school was literally the name of the game. Each school possessed a vast corpus of opinions attributed to the founder, his immediate followers, and later authorities. In other words, they represented the total sum of doctrinal accretions beginning with the founder down to any point of time in the history of the school.

HALLAQ, *supra* note 43, at 122.

65. See JACKSON, *supra* note 36, at 98 (“For even where the rules on the books appear to have lost a measure of suitability, they remained important repositories of authority.”); see also Johansen, *supra* note 37, at 31 (“Islamic law, as embodied in these texts, remained largely unchanged after the tenth and eleventh centuries.”).

66. See JACKSON, *supra* note 36, at 77-78. The author notes that although there may be difference of opinion on whether the gate of *ijtihad* truly closed completely during the *taqlid* era, “it seems clear that by the later middle ages the activities of the individual jurist came to be significantly circumscribed by his membership in a particular *madhhab*. The *madhhab*, moreover, clearly became the context within which

fact new rules were invented all the time during the Taqlid era in a complex way, and that to characterize the era as stalemated and one of endless imitation is simply false.<sup>67</sup>

By the tenth century, Taqlid displaced and transcended Usul in the Islamic world, and the modern legal system identified as European legal transplants displaced and transcended Taqlid by the nineteenth century. However, while Taqlid displaced Usul, occasional medieval jurists during the Taqlid era would call for the re-innovation of Taqlid law through a return to Usul.<sup>68</sup> In addition, while the modern legal system identified as European transcended Taqlid, it nevertheless incorporated some of *its* rules whenever it desired to mark its doctrine as “Islamic,” as has been the case with family law.<sup>69</sup> Similarly, some jurists called for a return to Usul in the

all interpretive activity took place.” *Id.* at 77. “*Ijtihad*, understood here not merely as the fresh, unfettered and direct interpretation of scripture but also as the clear and open advocacy of views as having resulted from such a process, ceased to be dominate from around the 6th/12th century.” *Id.* at 78. In addition, the author explains the negative connotations of the word *taqlid*: “As a technical term, ‘*taqlid*’ is commonly translated as ‘blind following,’ ‘imitation,’ ‘servile imitation,’ ‘unquestioning acceptance,’ ‘unreasoning acceptance.’ Such appellations tend not only to cast *taqlid* in a wholly negative light but also to obscure the basic logic underlying the institution itself.” *Id.* at 80. Wael Hallaq points out that an alternative way to look at some historical instances of *taqlid* is not simply as “blind imitation,” which has a negative connotation, but as the positive loyalty which an adherent had to his school. HALLAQ, *supra* note 43, at 103-04. Hallaq further points out that:

This loyalty would not have been the same had the jurists found it necessary to vindicate the school’s principles at every state of reproducing doctrine. Loyalty meant precisely the acceptance of these principles—though not necessarily unquestioningly—and more importantly, it meant applying them to individual cases. . . . [L]oyalty also meant a defense of the principles as well as of the hermeneutics of the school.

*Id.*

67. See HALLAQ, *supra* note 43, at 119 (insisting that “*taqlid* is far from the blind following of an authority, as a number of major Islamicists have claimed”); JACKSON, *supra* note 36, at 101 (“[L]egal change and innovation both remain realities even under a régime of *taqlid*.”). See generally Johansen, *supra* note 37.

68. See Hallaq, *supra* note 34, at 10-33; see also Schacht, *supra* note 37, at 74 (noting that the Zahirī school in theory rejected *taqlid* and that a follower of this school, the prominent jurist Ibn Taymiyya, and other adherents considered it dangerous to follow blindly anyone but the Prophet Mohammad).

69. Indeed, many authors note the fact that elites and legislators were hesitant to “reform” or replace Islamic laws on the family with secular laws of European origin because of the strong public conception of the importance of the Islamicity of said rules. See, e.g., EL ALAMI & HINCHCLIFFE, *supra* note 3, at 3 (writing that

[f]or Muslims, the Shari’ah is the law of God. . . . The Shari’ah covers all aspects of life and every field of law—constitutional, international, criminal, civil and commercial—but at its very heart lies the law of the family. Although by the mid-nineteenth century many areas of traditional Islamic law had been swept away . . . changes in the law of the family came later and were undertaken with great delicacy.

modern era as a response both to the contemporary European influence in the legal system and the stalemated Taqlid.<sup>70</sup> Indeed, Muslim legal modernists of the twentieth century acquired prominence through continuing the Taqlid tradition of calling for a return to Usul.<sup>71</sup>

### C. A Legal Narrative of Marriage and Divorce in the Taqlid Treatises

The issues covered in the Taqlid treatises in the realm of the family demonstrate the manner in which the Taqlid jurisprudence regulated the two general legal acts of marriage and divorce. A legal narrative is presented here on marriage and divorce by discussing topics related to these two fundamental legal acts typically dealt with in the Taqlid treatises.<sup>72</sup> How did marriage take place? What legal

70. See JOHN L. ESPOSITO, ISLAM THE STRAIGHT PATH 139-40 (1998) (explaining that the South Asian modernist Muhammad Iqbal

regarded the condition of Islam as a 'dogmatic slumber' that had resulted in five hundred years of immobility due to the blind following of tradition and believed that the restoration of Islamic vitality required the 'reconstruction' of the sources of Islamic law. . . . Iqbal rejected the centuries-long tendency to regard Islamic law as fixed and sacrosanct. Like other Islamic revivalists and modernists, he believed that Muslims must once again reassert their right to *ijtihad*, to reinterpret and reapply Islam to changing social conditions[]).

ESPOSITO, *supra* note 5, at 129 (noting that the Egyptian modernist Muhammad Abduh wrote in the early twentieth century of the "disease of *taqlid* that afflicted many Muslims" and called on Muslims to engage in *ijtihad*).

71. See HALLAQ, *supra* note 26, at 210.

72. The *Taqlid* treatises differ on the level of micro-discussions they delve into. The topics they cover demonstrate the manner in which the *Taqlid* jurisprudence regulated the two general legal acts of marriage and divorce, and include the marriage contract (*aqd al-nikah*); the guardian (*al-wali*); equality (*'kafaa*); the unlawfals (*al-muharramat*); the marriage of pleasure (*nikah-al-mutaa*); (*nikah al-shighar*); the dowry (*al-sidaq, al mahr*); the terms of the marriage contract (*shurut al-aqd*); (*khayar fi al-nikah*); publicizing the marriage (*al-walima*); treatment of wives, which includes equality of treatment, leaving the house without permission, sexual enjoyment, housework, and disobedience (*ghasam bayna al-zawjat*); divorce (*talaq*); maintenance, which includes the maintenance of the wife, children, parents, relatives, and other members of the household (*nafaqa*); and custody (*hadana*).

*Al-muharramat*, or unlawfals, refers to the women a man cannot legal marry. The topic of "unlawfals" covers the way the law organizes the prohibitions dictated by the "incest taboo" among others. Sura 4:23 of the Qur'an declares, "[f]orbidden to you are your mothers, your daughters, your sisters, your paternal and maternal aunts, the daughters of your brothers and sisters. . . ." THE KORAN 63 (N.J. Dawood ed., 1994). Sura 4:22-4:24 provide in general the sources of *al-muharramat* for reasons of affinity and consanguinity. See *id.*

The topic of *shurut al-aqd* covers what may or may not be included as terms in the marriage contract by either party. Couples are permitted to stipulate conditions in their marriage contract; however, stipulations must comply with the principles of the *shari'a*. "If any condition could be proven void under the Sharia, it should not be

actions were necessary for one to be married, stay married, get divorced, get custody of children, and then move on? This section is for the benefit of the uninitiated reader who is unfamiliar with the Islamic legal system and the way Muslims have legally conducted their marriages and divorces. It is important to note that the legal narrative related to each of these issues still holds true for most Muslims today.<sup>73</sup>

An important point related to the topic of marriage under Taqlid law and under general Islamic legal doctrine is that Muslim women retain both their juridical personality as well as whatever property they own when they enter marriage.<sup>74</sup> In addition, they are under no

stipulated at all, and if made, must be deemed null and void." NASIR, *supra* note 10, at 58.

In regard to publicizing the marriage, or *al-walima*, it is reported that the first of the Caliphs recognized by the Sunnis to legitimately succeed the Prophet Mohammad as the leader of the Muslim community, Abu Bakr, stated that "[m]arriage in secret is not allowed until it is publicized and witnessed." *Id.* at 56. The Prophet Mohammad himself is reported to have said, "[p]ublicize marriage even with timbals." *Id.*

73. See DR. M. AFZAL WANI, *THE ISLAMIC LAW ON MAINTENANCE OF WOMEN, CHILDREN, PARENTS & OTHER RELATIVES* 30 (1995).

Toward the end of the last century the British and French Colonial forces replaced in their dominions the Islamic administrative, civil and revenue laws by modern codes of civil and criminal law. However, the Islamic laws relating to personal status, including matters like marriage, divorce, *mahr*, maintenance and succession continue to remain, till date, applicable in all Muslim countries and also to the Muslims of many other non-Muslim states. In many of these countries the Muslim Personal Law has been fully or partly codified.

74. See *id.* at 8. Dr. Wani reports that

[t]he Quran . . . manifestly recognises the rights of women to earn, hold and inherit property. Her property is not the property of the husband. She enjoys a separate legal existence. If the husband predeceases the wife she inherits a part of his property and if the wife predeceases the husband he also inherits a part of her property.

See also Dr. Zahia Qaddura, *Woman's Rights in Islam*, in *I ISLAM AND FAMILY PLANNING* 67, 79 (International Planned Parenthood Federation ed., 1974). Dr. Qaddura notes that "Islam gave woman the right to administer her own financial affairs and to develop her own capital. . . . Neither her husband nor her father had the authority to prevent her from, or restrict her freedom of action in the exercise of any of the functions she felt inclined to undertake." *Id.* In addition, Professor Esposito asserts that "[a]lthough each party in a marriage may inherit from the other, neither acquires interest in the property of a spouse because of the marriage." ESPOSITO, *supra* note 5, at 23. Another author explains that "[t]he duties imposed by the law do not impose any financial duty on a wife with respect to her marital life . . . and her husband has no authority over her property. Indeed, she has full freedom to manage her own property whatsoever. Her property is entirely independent from his." Muhammad Abu Zahra, *Family Law*, in *ORIGIN AND DEVELOPMENT OF ISLAMIC LAW* 141 (Majid Khadduri & Herbert J. Liebesny eds., 1955). For a discussion of this rule and its practical significance in the lives of women in nineteenth century Egypt, see JUDITH E. TUCKER, *WOMEN IN NINETEENTH-CENTURY EGYPT* 44-45 (1985).

obligation to maintain the marital household except under limited circumstances when the husband is in need.<sup>75</sup>

In order for a marriage to take place, there must be an offer and acceptance.<sup>76</sup> Any party can include terms in the contract as long as such terms do not violate “the nature of marriage.”<sup>77</sup> The husband has to pay the woman her dowry, or *mahr*, immediately upon the marriage as an effect of the contract unless the wife agrees to defer payment of some or the entire amount to a future time.<sup>78</sup> The *mahr* is paid to the bride herself, not to her father or any other party.<sup>79</sup> Having received the agreed share of her *mahr*, the woman must then move to her husband’s residence (which, by law, should be appropriate)<sup>80</sup> and provide him with her “conjugal society.”<sup>81</sup> It is

75. The maintenance of children is, as is the general maintenance of the household, the sole responsibility of the husband. However, as one author notes,

[i]f the father is indigent, the mother, if possessing sufficient means, has to maintain the child. If the mother has no property or an earning she cannot be forced to maintain the child. Since her obligation to maintain the child is not absolute [unlike that of the father], she is to be reimbursed by the father whenever it becomes possible for him.

WANI, *supra* note 73, at 228.

76. See ESPOSITO, *supra* note 5, at 16.

Essential to the marriage is the offer (*ijab*) of one contracting party and the acceptance (*qabul*) of the other, occurring at the same meeting before two witnesses. . . . A distinguishing feature of Islamic law is the power (*jabr*) that it bestows upon the father or grandfather, who can contract a valid marriage for minors that cannot be annulled at puberty. The right of guardianship is known as *wilayat* and the guardian is a *wali*.

*Id.* The offer is made by the woman (or her guardian, or agent) to be accepted by the man (or his guardian if a minor, or agent). See MUHAMMAD JAWAD MAGHNIYYAH, THE FIVE SCHOOLS OF ISLAMIC LAW 260 (1995). “[M]arriage is performed by the recital of a marriage contract which contains an offer made by the bride or her deputy (*na’ib*), such as her guardian or agent (*wakil*), and a corresponding acceptance by the groom or his deputy.” *Id.*

77. See Zahra, *supra* note 74, at 140-41.

78. See *id.* at 141-42; see also ESPOSITO, *supra* note 5, at 24 (noting that “the practice of dividing the dower into two portions, prompt (*muqaddam*) and deferred (*muakhhkar*), is universal in the Hanafi school”); NASIR, *supra* note 10, at 86 (explaining if the woman decides to defer the payment of some of her *mahr*, then it becomes divided into two parts, the immediate or prompt *mahr*, paid upon contract, and the deferred *mahr*, paid either on some agreed upon date, or, if such date is not set, upon divorce or death).

79. See ESPOSITO, *supra* note 5, at 23.

80. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 20.

The law requires that the dwelling which a husband provides for his wife must fulfill certain requirements. It must be safe structurally and situated in a safe locality so that the wife is not afraid to go outside. Further it must be free from the presence of other members of the husband’s family.

NASIR, *supra* note 10, at 79-80.

understood that the husband has earned this right to her society by paying the wife's *mahr*.<sup>82</sup> The wife then starts to earn her daily maintenance (*nafaqah*) as his spouse so long as she commits herself to him.<sup>83</sup> If she proves to be "disobedient" by leaving the house without his permission or without good reason, or denies him sexual access, she loses her maintenance money.<sup>84</sup>

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It is the duty of the husband to provide, and the right of the wife to have, a suitable matrimonial home. . . . The wife should follow the husband to the matrimonial home, provided that it complies with the *Sharia* requirements, that is, that it should be in accordance with the husband's financial standing; habitable, private and not occupied by others, even if they are the husband's kin; and provided that the husband is trustworthy toward her and her assets, and has paid her dower or the agreed prompt portion thereof.

81. "Conjugal society" involves providing the husband sexual access as well as not leaving the house without his permission. Thus, as one author describes it, maintenance is due the wife after the celebration of a valid marriage contract if she "places, or offers to place, herself in the husband's power so as to allow him free access to herself at all lawful times" and if "she obeys all his lawful commands for the duration of marriage." NASIR, *supra* note 10, at 98. As another author reports, "[a]ccording to the Hanafis, when a wife confines herself to her husband's house and does not leave it except with his permission, she shall be regarded as 'obedient'. . . . Thus the cause which entitles her to maintenance, according to the Hanafis, is her confining herself to her husband's home. . . ." MAGHNIYYAH, *supra* note 76, at 357-58.

82. See MAGHNIYYAH, *supra* note 76, at 316.

83. See ESPOSITO, *supra* note 5, at 25 (reporting that the husband is obliged to pay his wife her maintenance (*nafaqah*) "unless she refuses him conjugal rights or is otherwise disobedient").

84. See *id.*; see also WANI, *supra* note 73, at 49. Wani reports:

A wife is said to be a *nashizah* when she is refractory, unsubmitive or disobedient, that is, when she does not abide by the Islamic instructions regarding her behaviour toward the husband without any reasonable cause. In actual practice a wife is deemed to be a *nashizah* when she leaves her husband's house without any just reasons and when she does not allow him access to her. A wife who leaves her husband's house, on her own, without any justifiable cause is not entitled to maintenance. . . .

*Id.* Another author reports that "[o]bedience is a right which the husband can demand of his wife. By obedience is meant that she should transfer herself to his domicile, live with him, and that they should live together in harmony." Zahra, *supra* note 74, at 145. Another author asserts that "[s]ince it is the *tamkeen* [conjugal society], i.e. the availability of the wife for her husband, and not the marriage contract itself, that makes maintenance the lawful right of the wife, this right shall be lost if the husband is denied access to the wife. . . ." NASIR, *supra* note 10, at 99. In addition, for a definition of obedience, see MAGHNIYYAH, *supra* note 76, at 357-59. "If a wife leaves her husband's home without his permission or refuses to reside in a house which fits her status, she shall be considered 'disobedient' and shall not be entitled to her maintenance according to all the schools." *Id.* at 359. The author adds that "[t]he schools concur that a disobedient wife is not entitled to maintenance. But they differ regarding the extent of disobedience which causes the maintenance to subside." *Id.* at 357.



If the husband wishes to end the marriage, he divorces his wife by uttering a legally accepted formula under certain conditions,<sup>85</sup> after which the divorced wife spends her *idda* (waiting period) in her husband's residence<sup>86</sup> and receives support from him.<sup>87</sup> During this period the husband may return his wife to himself and cancel the divorce without her consent.<sup>88</sup> The purpose behind *idda* is to allow the husband to reconsider his decision and to determine whether the wife is pregnant, in which case her waiting period extends until she gives birth.<sup>89</sup>

If it is the woman who wishes to divorce her husband and there are no grounds that are legally acceptable for her to request it, she can still exit the marriage through a *khul* divorce.<sup>90</sup> If the husband agrees to *khul*, the woman must usually pay him some or all of her *mahr*, waive the deferred part of her *mahr*, or both—although this is not a necessary condition.<sup>91</sup> If the husband agrees to the divorce,<sup>92</sup> then he is in no position to return her to himself during the waiting period without her consent.<sup>93</sup>

Once the waiting period is over, the divorce becomes final and the financial obligations between the couple are terminated, unless they have minor children. In this case, the wife receives custody of

85. See ESPOSITO, *supra* note 5, at 28-34 (describing the five classifications of divorce in Islam).

86. See MAGHNIYYAH, *supra* note 76, at 415.

87. See ESPOSITO, *supra* note 5, at 35; see also MAGHNIYYAH, *supra* note 76, at 356 (noting “[t]he legal schools concur . . . that the maintenance of a divorcee is *wajib* [obligatory] during the *iddah*. . .”).

88. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 23 explaining that

[n]o particular formality is attached to revocation of *talaq* [divorce] and it may be made expressly by the husband declaring that he has revoked the *talaq* or implied by the husband's conduct, such as resuming cohabitation, and even, in the Hanafi law, by merely kissing or touching his wife . . . he has the right to revoke the *talaq* if he wishes, whether his wife wants him to do so or not.

MAGHNIYYAH, *supra* note 76, at 417 (noting that “[*ajl-raj'ah* in the terminology of legists is restoration of the divorcee and her marital status. It is valid by consensus [of the four schools] and does not require a guardian, or *mahr*, or the divorcee's consent, or any action on her part. . .”).

89. See ESPOSITO, *supra* note 5, at 20, 34.

90. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 27-28 (providing a general explanation of *khul* divorce).

91. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 27-28.

92. See ESPOSITO, *supra* note 5, at 104 (explaining that for a judge to be able to declare a *khul* divorce, the husband must agree to it).

93. MAGHNIYYAH, *supra* note 76, at 417 (explaining that “[t]he schools concur that it is necessary that the divorcee being restored be in the *iddah* of a revocable divorce. Thus there is no *raj'ah* for . . . the divorcee of *khul*' against a consideration, because the marital bond between the two has been dissolved.”).

the children until they reach a particular age.<sup>94</sup> During this time, the husband has to maintain the divorced wife and the children under her custody.<sup>95</sup> The wife's custody, however, only includes nurturing and nursing the children, while the husband retains the power of "instruction" and guardianship, including administering the child's property and money.<sup>96</sup> After the custody period is over, the children live with their father.<sup>97</sup>

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94. See NASIR, *supra* note 10, at 159 ("All Schools, Sunni and Shia alike, hold that the mother, whether she is separated or living with her husband, has the first claim to the custody of her infant, but she cannot be compelled to undertake it due to her inability to do so. . ."). The schools differ, however, over the age until which the mother has custody, but it is usually at the end of the childhood years and before they become of majority age. *Id.* at 170; see also ESPOSITO, *supra* note 5, at 35 ("Under Hanafi law, the divorced mother has the right to custody of her male child until he is seven years old and of her female child until puberty, set at age nine.").

95. "[M]aintenance is a right of the minors who have no property, on their father. . . ." NASIR, *supra* note 10, at 174. If children have the means to provide maintenance for poor parents, they must do so. *Id.* However, the father alone has the responsibility of financial support of minor children. See THE HEDAYA 146 (Charles Hamilton trans., 1975) ("The maintenance of infant children rests upon their father; and no person can be his associate or partner in furnishing it. . ."). While the mother in general has custodial duties related to her children, many of these duties, such as suckling, can be delegated, at the expense of the husband/father—

If the child be an infant at the breast, there is no obligation upon the mother to suckle it, because the infant's maintenance rests upon the father, and in the same manner the hire of a nurse; it is possible, moreover, that the mother may not be able to suckle it, from want of health or other sufficient excuse, in which case any constraint upon her for that purpose would be an act of injustice.

*Id.* However, in the case of adult daughters, or adult sons who are disabled (and thus cannot work to support themselves), there is disagreement; in some cases, the maintenance, "rests upon the parents in three equal parts, two-thirds being furnished by the father, and one-third by the mother, because the inheritance of a father from the estate of his son or daughter is two-thirds, and that of a mother one-third." *Id.* at 148. The same author notes that other schools assign "the whole of the maintenance . . . upon the father. . ." *Id.* As for the maintenance of the wife after divorce, one author notes that "[y]oung children remain in the custody of their divorced mother, unless she is otherwise unfit. . . . While she nurses the young children and cares for the rest, it is the father's responsibility to bear the full cost of this care and equitably compensate the mother therefore." HAMMUHAD 'ABD AL 'ATI, THE FAMILY STRUCTURE IN ISLAM 246 (1977).

96. See NASIR, *supra* note 10, at 158-59 (noting the "guardianship of education (*wilayat al-Tarbiyya*) [is] believed under the *Sharia* to be the duty of men rather than women" while "guardianship of property (*al wilayatu alal maal*) if the child has any property, [is] again a task for men rather than for women").

97. See MAGHNIYYAH, *supra* note 76, at 351-52. However, as the author explains, this is not necessarily the case, and rules differ according to the school of law. For instance, under Shafi'i doctrine, there are no set ages until which the mother has custody; instead, "the child shall remain with its mother until it is able to choose between the two parents; and when it has reached the discriminating age it will choose between the two. . . . [I]f the child keeps quiet and does not choose any one of them, the custody shall lie with the mother." *Id.* The author also reports that under Hanbali doctrine, although the mother has custody until the child is seven years of age,

After divorce, when there are no minor children under the custody of the woman, she maintains herself by spending her own money if she has any or by being provided for by one of her male relatives, as long as they are able financially to do so.<sup>98</sup>

The marriage and divorce narrative that I have put together from a reading of the doctrinal areas covered in the medieval Taqlid treatises is somewhat simplistic and leaves out some details, nuances, and qualifications. It is designed to give the reader a quick sense of the way Taqlid jurisprudence conceived of the distribution of wealth and power between men and women (husband and wife, father and child) at the beginning of marriage, during marriage, and after its termination.

#### *D. The Family in the Doctrine of the Taqlid Schools of Law: A Structuralist Reading*

The Taqlid rules on marriage and divorce, outlined above, established a general framework within which the family was expected to operate. This framework served to define the marital relationship and indeed can be read and understood to have set the boundaries and limits for the rights and obligations of both the wife and the husband. Therefore, the rules that have historically defined the status of the woman and man within the family, particularly within the marriage, are important to understand not only for the influence they had in defining past notions of patriarchy and for legally defining particular gender roles, but also because these same rules are the precursor to the contemporary family law in Egypt as well as the rest of the Arab world.<sup>99</sup>

Providing a structural reading of family law doctrine under the regime of Taqlid is not an easy. The doctrines of each school of law, as was explained above, were scattered in multiple treatises, each having a different status within the doctrine. Over time, these

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irrespective of sex, "after that, the child can chose to live with one of the parents." *Id.* at 352.

98. ABD AL-AZIZ MUSA AMIR, *AL-AHWAL AL-SHAKHSIYAH FI AL-SHARIA AL-ISLAMIYYA* 513 (2d ed. 1976) (on file with author).

Femaleness is the cause of maintenance since a female is incapable of maintaining herself. Consequently her maintenance is the obligation of her relatives, whether she was young or old, whether she was in fact capable of working or not. As for the female who does work, then she has no right to maintenance and is expected to use her income to support herself.

99. See ESPOSITO, *supra* note 5, at 47 (noting that although codes modeled on those found in European countries were introduced in much of the Islamic world by the nineteenth century, (in the case of Egypt, France), "Islamic law, however, remained central to family law").

treatises were reproduced, commented upon, and the commentaries themselves commented upon. Moreover, each such collection contained majority and minority views within the school, such views changing slowly over time through the very act of exposition and commentary. In addition, as was also mentioned above, doctrine was embodied in the collection of *fatwas*, legal opinions given by *muftis* (Islamic scholars) in response to questions posed by private individuals outside the context of litigation; *qadis* (judges) in the context of litigation; and even by the ruler himself. However, this author is by no means the only “modern” presented with what seems on first blush to be such an unnerving task. Condensation for the sake of exposition of doctrines developed over centuries inside a system that accommodated and managed internal divisions of opinion on any given matter left Muhammad Jawad Maghniyyah, the author of the book *The Five Schools of Islamic Law*, equally puzzled. As Maghniyyah asserts,

[*F*]iqh [jurisprudence] is an infinite sea, as one matter can be divided into different ramifications, about any of which the schools’ opinions may be numerous and contradictory, including the opinions of the *fuqaha* [jurists] of the same school, or even the opinions of the same scholar. Any one trying to have full conception of any ethical matter, will encounter the severest hardship and suffering, let alone the whole *fiqh*, with its branches: the rituals (*ibadat*), and transactions (*mu’amalat*) according to all schools?!<sup>100</sup>

Daunting as the task is, this section argues for the following structural features of the doctrines of the schools:

The views of the four Sunni schools of law on any given doctrinal area relating to marriage and divorce are widely divergent from each other, so that differences between them sometimes read like the difference between earth and sky.

No one school has an internally coherent view of the family that can be distinguished from the views of the next one. It is very difficult indeed to do a reading of the doctrine of a given school that would allow one to predict the position of the school on the next doctrinal issue.

- Example 1: Although the doctrine of the Hanafi school of law, unlike that of other Sunni schools, gives the woman of majority age complete freedom to marry without requiring her guardian’s consent, it nevertheless gives the guardian the right to dissolve her marriage after she has married on the basis of the doctrine of *kafaa* (equality).<sup>101</sup> Moreover, those

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100. MAGHNIYYAH, *supra* note 76, at xiv.

101. See ESPOSITO, *supra* note 5, at 15, 21. As one author put it, “Abu Hanifa was just as severe regarding the conditions with respect to suitability (*kifa’a*) as he was liberal in granting freedom to a woman to choose her husband.” Zahra, *supra* note 74,

who belong to the Hanafi school interpret this doctrine very loosely, providing several grounds according to which the guardian can exercise his right, paradoxically giving him enormous power over the fate of the marriage.<sup>102</sup>

- Example 2: While the doctrine of the Maliki school of law allows the wife to request divorce on the basis of “harm,”<sup>103</sup> it nevertheless gives the guardian absolute freedom to marry off his daughter of majority age and treat her consent as absolutely unnecessary.<sup>104</sup>

As divergent as the schools are in their views, they do, however, agree on the nature of the legal acts that need to be undertaken for a marriage to take place, for it to continue, and those that are needed for it to terminate. They also share common ideas about the nature of the transactional relationship that the contract of marriage establishes between men and women and the way in which patriarchal power within the family (that of the husband or father) is organized. These nodal points of agreement on the general doctrinal structure of marriage and divorce arise because of a “topical” consensus among the Taqlid jurists (rather than a consensus of opinion about a given legal matter). In other words, if one is to discuss marriage and divorce under the Taqlid jurisprudence, then one needs to discuss a particular set of topics.<sup>105</sup>

Internal tensions permeate the doctrines on the family.

- Example: Under the topic of “contract conditions,” one notes the tension between, on the one hand, treating marriage as purely “contractual” in the sense that it is open for contractual terms to be included by either husband or wife and, on the other hand, the idea that marriage is “status”

at 138. According to the doctrine of *kafaa*, which is contemplated by all four major schools of Sunni law, the husband has to be of “equal” status to his wife; otherwise, the marriage is subject to dissolution either upon the request of the wife (if she had been married by her guardian) or by the guardian if the woman married without his consent. See ESPOSITO, *supra* note 5, at 15, 21.

102. See Zahra, *supra* note 74, at 138; see also IBN ABIDIN, HASHIYAT RADD AL-MUHTAR, Vol. 3, 84-95 (2d ed. 1979); NASIR, *supra* note 10, at 61 (reporting that “[e]quality, which can be defined as parity of status, is considered by the Hanafis in six matters: lineage, Islam, freedom, property, trade or craft, and piety”).

103. See ENCYCLOPEDIA OF ISLAMIC LAW: A COMPENDIUM OF THE VIEWS OF THE MAJOR SCHOOLS 539-40 (Laleh Bakhtiar ed., 1996) (explaining that the only other school of law to accept harm as grounds for a divorce initiated by a wife is the Hanbali school); see also AL-SADEQ ABD AL-RAHMAN AL-GHARYANI, MUDAWWANAT AL-FIQH AL-MALIKI WA ADILLATUHU 12-15 (1st ed. 2002).

104. See COULSON, *supra* note 11, at 94 (“In Maliki law a marriage can be validly contracted only by the bride’s guardian”); see also AL-GHARYANI, *supra* note 103, at 560 (“The father has the right to coerce his virgin daughter to marry, whether she was a minor or of majority age, even if she reached forty.”).

105. For a list of these topics, see *supra* note 72.

that *precludes* including certain terms that are regarded as “violating the nature of marriage.”<sup>106</sup> This tension arises when the following questions are discussed in the treatises: Can a woman stipulate in the marriage contract that her husband cannot take a second wife?<sup>107</sup> Can she stipulate that

106. See, e.g., MAGHNIYYAH, *supra* note 76, at 267-69; see also ESPOSITO, *supra* note 5, at 22-23. Professor Esposito reports:

The wife’s ability to make conditions, provided that they are not contrary to the object of marriage, can resolve many inequities in areas such as polygamy and divorce. . . . Agreements on conditions can be drawn up at the time of the marriage or afterward, and are valid and enforceable provided they are not contrary to the policy of the law. Conditions that are contrary to the object of marriage (for example, clauses saying that the wife need not live with her husband or that the husband need not maintain his wife) would be void, although the marriage would still be valid. However, clauses that extend the natural consequences of marriage, such as a husband’s promise to maintain his wife in a certain lifestyle, are valid.

*Id.* Another author notes that the Islamic marriage contract “is open for additional, but legitimate, conditions and its terms are, within legal bounds, capable of being altered.” AL ‘ATI, *supra* note 95, at 59. Other authors assert that, while some stipulations are not valid, those that “merely reinforce the normal effects of marriage,” for instance, “agreements fixing the amount of dower [*mahr*], or fixing the amount of maintenance to be paid to the wife,” are “both valid and enforceable.” EL ALAMI & HINCHCLIFFE, *supra* note 3, at 9. For yet another discussion of the terms that can be included in the marriage contract and those that cannot, see IBN QUDAMA, AL-MUGHNI, Vol. 10, 42-62 (Abdullah Al-Turki & Abd Al-Fattah Al-Hilu eds., 1986) (on file with author).

107. See MAGHNIYYAH, *supra* note 76, at 267-68. Maghniyyah reports:

The Hanbali school is of the opinion that if the husband stipulates at the time of marriage that he will not make her leave her home or city, or will not take her along on journey, or that he will not take yet another wife, the condition and the contract are both valid and it is compulsory that they be fulfilled, and in the event of their being violated, she can dissolve the marriage. The Hanafi, the Shafi’i and the Maliki schools regard the conditions as void and the contract as valid. . . .

*Id.*; see also ESPOSITO, *supra* note 5, at 22 (discussing women’s ability to make conditions in marriage, such as clauses “that eliminate the husband’s right to take a second wife”). Other authors note that “[t]he majority of Muslim jurists hold . . . any measure which attempts to vary or modify a normal incident of marriage as void. Applying the doctrine of severance, they expunge it from the contract, which then remains valid.” EL ALAMI & HINCHCLIFFE, *supra* note 3, at 9. Only adherents of the Hanbali school of law “maintain that any stipulation which is not itself forbidden, or which is not expressly contrary to or inconsistent with the contract of marriage, will be valid.” *Id.* The authors add:

Thus a stipulation in the marriage contract that the husband will not take a second wife is void according to the non-Hanbali Sunni schools. . . . According to the majority doctrine a man has a right to take four wives at any one time. This right is a normal incident of marriage and may not be varied. The Hanbalis, however, hold that such a stipulation is not itself forbidden, for the law merely allows a man to have up to four wives; it does not require him to do so. Nor is it contrary or inconsistent with the contract of marriage. Accordingly, the

she can divorce him whenever she wishes?<sup>108</sup> Can she stipulate that she does not owe him the duty of obedience?<sup>109</sup> Can she stipulate that she will reside in her hometown and will not be forced to live elsewhere?<sup>110</sup>

As divergent as the schools are in their views, these views tend to pull toward a particular position on the spectrum of possible opinions on any given legal matter. This tendency to “pull toward” highlights the general sensibility of these jurists on the question of gender and the way relations within the family should be organized.

- Example: Whereas the doctrine of the Hanafi school of law holds that women of majority age should consent to their marriage and can indeed marry without the presence of a guardian, the three other Sunni schools insist that in such cases, a woman’s consent is unnecessary and the presence of the guardian is “foundational.” Some limit this requirement to women who have not been married before (*bakr*).<sup>111</sup>

Although the views tend to pull toward a position on a spectrum of possible opinions on any given legal matter, they also clearly exclude

Hanbalis regard it as valid, and if the husband in contravention of the stipulation marries a second wife, his first wife will have a right to have her marriage dissolved. . . . A stipulation may also take the form of a conditional *talaq* [divorce]. Thus the husband may stipulate that he will not take a second wife, but if he does so, the marriage will be automatically dissolved.

*Id.* at 10; see also AL-GHARYANI, *supra* note 103, at 520-21.

108. See AL-GHARYANI, *supra* note 103, at 268; see also ABD AL-RAHMAN BIN MUHAMMAD AL-JAZIRI, *KITAB AL-FIQH ALA AL-MADHAABIB AL-ARBAA*, Vol. 4, 89-92 (Maktabat Al-Eeman, Al-Mansoura, 1999) (on file with author).

109. See AL-JAZIRI, *supra* note 108, at 89-92; ESPOSITO, *supra* note 5, at 22 (noting that some schools allow a stipulation to the marriage contract so as to, “grant the wife greater freedom of movement”).

110. See MAGHNIYYAH, *supra* note 76, at 267-68; see also AL-JAZIRI, *supra* note 108, at 89-92; *supra* note 106.

111. ENCYCLOPEDIA OF ISLAMIC LAW: A COMPENDIUM OF THE VIEWS OF THE MAJOR SCHOOLS, *supra* note 103, at 423. The author reports:

The Shafii, Maliki and Hanbali schools are of the opinion that the guardian has the sole authority with respect to the marriage of his sane and major female ward if she is a virgin. But if she is a person who has been married previously (*thayyib*), his authority is contingent on her consent. Neither can he exercise his authority without her consent, nor can she contract marriage without his permission. . . . The Hanafis regard a sane, grown-up female as competent to choose her husband and to contract marriage, irrespective of her being a virgin or a non-virgin. No one has authority over her, nor any right to object, provided she chooses one her equal and does not stipulate less than a proper dower (*mahr al-mithl*) for the marriage. If she marries someone who is not her equal, the guardian has the right to object and demand the annulment of the contract.

*Id.*

a number of others, so that such views do not seem to exist anywhere. This exclusion delimits the boundaries beyond which the opinions of *none* of the schools venture; in other words, they define the outer limits of the general sensibility of these jurists.

- Example: All the jurists agree on the position that the husband has the right to *talaq*, what in U.S. legal discourse is called no-fault divorce.<sup>112</sup> When it comes to women, they unanimously agree on two things. First of all, women do *not* have an equivalent right to no-fault divorce,<sup>113</sup> and second, women *can* enter into a consensual agreement with their husbands to “buy” their divorce against a particular consideration (the *khul* divorce).<sup>114</sup> Having thus delineated the outer limits of women’s privileges through implicit collective agreement, the schools proceed to have divergent views on women’s legal abilities *within* these boundaries. Thus one finds them having divergent views on the question of whether women can request divorce from a judge on specific grounds, and what those grounds might be. For instance, Hanafi doctrine denies women any grounds for divorce without the husband’s consent,<sup>115</sup> and the Maliki school of law takes the radical step of allowing women to request divorce on the basis of “harm.”<sup>116</sup> The rest of the

112. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 22.

The most common method by which marriages are dissolved in the Muslim world is by the husband exercising his right of *talaq*. . . . Islamic law grants to the husband the right unilaterally to terminate the marriage at will without showing cause and without having recourse to a court of law.

113. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 29.

A wife according to all the schools and sects may only terminate her marriage unilaterally when such a power is delegated to her by her husband. Otherwise a wife who is unhappy in her marriage and who wishes to obtain a dissolution must petition the court for divorce by judicial decree, showing cause why such a decree should be granted.”)

ENCYCLOPEDIA OF ISLAMIC LAW: A COMPENDIUM OF THE VIEWS OF THE MAJOR SCHOOLS, *supra* note 103, at 501 (observing that “[t]here is consensus that the divorcee is the wife”).

114. For a discussion of *khul* divorce, see *supra* note 7 and *infra* Part III.

115. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 29.

The law of the Hanafi school is the most restrictive toward women in the matter of divorce. The sole ground on which a Hanafi wife may obtain a dissolution of her marriage is her husband’s inability to consummate the marriage. . . . It was the unfortunate position of Hanafi wives in the Ottoman Empire which caused the promulgation of the first reform to the law of personal status in 1915.

116. See *id.* at 31-32. The authors report that



schools aggregate in the middle, allowing women divorce on one or more “objectively acceptable grounds” such as imprisonment or long absence of husband, non-payment of maintenance, insanity, or infliction with an incurable disease.<sup>117</sup>

A close reading of the aggregate positions of the schools on various legal issues suggests a particular gender regime within which all these schools historically worked. The differences between the schools, it seems, amount to no more than possible positions within this overall gender regime without any school constituting a meaningful critique of, or departure from, the views of the next one. This gender regime could be described as hierarchical to the benefit of husband/guardian but with a strong underlying element of transactional reciprocity of obligations. In a nutshell, the reciprocity amounts to a situation in which husbands provide money, in the form of maintenance, and women provide conjugal society in return.

The question that the reading above raises is the following: is it conceivable that a radically different gender regime could be constructed by picking and choosing from the rules of these schools, such as was done by the modern Egyptian legislature?<sup>118</sup> In other

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Maliki law is unique in that it allows a woman to obtain a divorce on the grounds of *dharar* (prejudice), by invoking wrongful acts by the husband or by claiming that living with her husband is harmful and prejudicial to her or by claiming that there is discord between her husband and herself.

*Id.* at 31. Further,

[w]rongful acts of which the wife might complain include beating her without cause or with undue severity, refusing sexual relations, insulting her or her family and preventing her from leaving the matrimonial home to visit her parents. It is sufficient for a divorce to be granted that the husband has committed a single act contrary to law or custom against the wife.

*Id.* at 31-32.

117. See *id.* at 30. For instance, the authors report that “the Shaf’i school allows the court to grant a decree of judicial divorce (*faskh*) where the husband willfully refuses to maintain his wife.” In addition, the authors report:

Hanbali law recognizes the various physical and mental defects and also recognises further grounds on which a judicial divorce may be granted. A wife may obtain a divorce if her husband is absent for a ‘prolonged’ period of time—usually interpreted as six months, even if the husband continues to provide her with maintenance during his absence—or if he abstains from having sexual relations with her for a similar period. . . . The failure of the husband to provide maintenance, whether this is because of willful refusal or inability for whatever reason, is also a ground on which a petition may be brought.

*Id.*

118. See TAHIR MAHMOOD, STATUTES OF PERSONAL LAW IN ISLAMIC COUNTRIES 6 (1995) reporting that

words, can a modern legislator, not feeling the need to be affiliated with a particular school but proceeding with a uniquely *supra-madhab* sensibility,<sup>119</sup> come up with a new doctrine on the family by combining together the most “progressive” rules, whatever their genealogical origin might be? Could this doctrine conceivably constitute a critique of and departure from the gender regime constructed by the Taqlid schools of law?

What is noteworthy is that most contemporary legislatures proceeding with a pick-and-choose legislative methodology or approach have thus far, as is demonstrated below, fallen short of realizing the project that liberal feminist advocates of family law reform in these countries have pushed for. Such legislation continues to hint at and aspire to this kind of feminist reform while consistently failing to achieve it.

The Taqlid legal system, with all its varied interpretations on family law issues (particularly the marital relationship), lasted into the nineteenth century in Egypt. Transformations were made in the legal system in the nineteenth and twentieth centuries, however, that brought about the demise of the Taqlid system. The ways in which European legal transplants were introduced into the system altered the very nature of law and legality in the country.

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[u]nification of personal law has been achieved in the Muslim world by assuming that all or most of the different schools of Islamic jurisprudence are equally valid and acceptable, and by applying to them the principle of eclectic choice (*takhayur*). The choice has been exercised in different countries under the legislative, executive or judicial powers of the state often through juristic aid and advice.

See also *id.* at 56; ESPOSITO, *supra* note 5, at 120 (writing about the reformist methodology used to formulate the rules embodied in Egyptian Law No. 25 of 1929 and noting that “[w]hereas *takhayur* traditionally was restricted to selection of the dominant opinion of another law school, the reformers extended it to the adoption of an individual jurist’s opinion”).

119. *Supra madhab* refers to supra doctrinal. A *supra madhab* jurist is one who is not affiliated with the doctrine of any specific *Taqlid* school of jurisprudence but adopts rules in an eclectic way from either one of them to achieve his reformist project. See HALLAQ, *supra* note 26, at 210 (Acknowledging that the doctrine of a single school no longer served the purposes of the reformers, recourse was made to a device according to which law could be formulated by an amalgamated selection (*takhayur*) from several traditional doctrines held by a variety of schools. . . . Moreover, the reformers resorted to the so-called *talfiq* according to which part of the doctrine of one school is combined with a part from another.”); Aharon Layish, *The Contribution of the Modernists to the Secularization of Islamic Law*, 14 MIDDLE E. STUD. 263, 263 (1978) (observing that “[t]he modernists tried to synthesize the *materia* of the Sunni schools of law by the doctrine of selection (*takhayur*) or combination (*talfiq*, lit. patch-work). . . . Muhammad Rashid Rida likewise called upon *‘ulama* to free themselves from partisanship for particular schools.”).

### III. TRANSFORMATION OF THE LEGAL SYSTEM FROM TAQLID LAW TO ONE INFLUENCED BY EUROPEAN CODES

#### A. Centralization of the Egyptian State During the Reign of Mohammad Ali

The decline of the Taqlid legal system in Egypt began with the reign of Mohammad Ali in the early part of the nineteenth century.<sup>120</sup> A one-time all-powerful Ottoman Governor of Egypt, Ali embarked upon what he saw as a modernization project that was to transform Egypt forever.<sup>121</sup> Particularly detrimental to the Taqlid legal system during this era were his efforts to centralize the state.<sup>122</sup> Centralization meant that the carefully calibrated relationship between the *ulama* (jurists who were the overseers of the Taqlid legal system) and the political ruler that was typical of the pre-modern era could no longer be maintained.<sup>123</sup>

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120. See JASPER YEATES BRINTON, *THE MIXED COURTS OF EGYPT* 5 (1968) (describing this important figure in Egyptian history as “[t]he creator of modern Egypt, the Albanian adventurer Mohammad Ali, born in the same year as Napoleon and by 1807 master of Egypt by right of conquest . . .”); BYRON CANNON, *POLITICS OF LAW AND THE COURTS IN NINETEENTH-CENTURY EGYPT* 9 (1988) (“Few periods of Ottoman history have intrigued scholars as much as the 1805-48 governorate of Muhammad ‘Ali, founder of the dynasty that ruled Egypt until the mid-twentieth century. Muhammad ‘Ali’s draconian methods of reconsolidating political control in Cairo following withdrawal of Napoleon’s expeditionary force in 1802 became a special focus for historians.”); TUCKER, *supra* note 74, at 25 (writing that “Muhammad ‘Ali officially became *wali* (viceroy) of Egypt in 1805, and, having managed to annihilate his political opponents by 1812, he embarked on an ambitious program of increasing state revenue to the end of gaining strength and independence for Egypt, still *de jure* under the suzerainty of the Ottoman Empire”).

121. See Crecelius, *supra* note 4, at 73-77. The author reports that “[t]he reign of Muhammad Ali Pasha (1805-49) marks the beginning of the differentiation of political and religious structures in modern Egypt. His decisions and programs have in fact largely determined the course that secularization has taken over the last century and a half in Egypt.” *Id.* at 73.

122. See ALBERT HOURANI, *A HISTORY OF THE ARAB PEOPLES* 272-73 (1991) (discussing the historical events of this period); see also KHALED FAHMY, *ALL THE PASHA’S MEN* 9-10 (1997) (explaining the efforts toward centralization).

123. See Crecelius, *supra* note 4, at 73-74.

The first and most abrupt move toward the differentiation of religion and state came in the attacks Muhammad Ali made against the political influence of the *ulama*. . . . Above all, he departed from traditional principles of Islamic government by refusing to accept the advice and mediation of the *ulama* in the councils of state.”)

See also Afaf Lutfi al-Sayyid Marsot, *The Beginnings of Modernization among the Rectors of al-Azhar, 1798-1879*, in *BEGINNINGS OF MODERNIZATION IN THE MIDDLE EAST* 268-69 (William R. Polk & Richard L. Chambers eds., 1968) (describing the

Mohammad Ali's project involved the centralized appropriation by the ruler of the economic and regulatory powers of the state.<sup>124</sup> This policy proved to have a detrimental effect on the schools of law in two respects. First of all, Ali appropriated the schools' financial resources through his "annexation" of the *waqf* institutions.<sup>125</sup> For Ali, the *ulama* and their institutions were among several social and economic forces or intermediaries (others being tax farmers, merchants, and guilds) that had to be either obliterated or controlled so that the state could have power over their revenues.<sup>126</sup> As a

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historical relationship between the *ulama* and the political ruler in the following manner:

[u]nder the later Mamluks the '*ulama*' had achieved a close relationship with the ruling group and had become the natural leaders of the people, thus serving as a bridge between their unruly rulers and the population at large. This was manifest in the increasing dependence of the Mamluks on the '*ulama*' in negotiating between opposing Mamluk factions, in consulting with them on matters of import, and above all by a notable increase in the wealth of the *shaykhly* class.

124. See Crecelius, *supra* note 4, at 73-74; see also CANNON, *supra* note 120, at 12-14 (explaining Ali's centralization efforts); FAHMY, *supra* note 122, at 9-10 (reporting that between 1805-1820, as governor of Egypt on behalf of the Ottoman Sultan, Muhammad 'Ali, "managed to tighten Cairo's control over the provinces by fighting corruption in the local bureaucracy, by conducting a cadastral survey that was crucial in abolishing the tax farming system (*iltizam*) and in the cancellation of the immunities on agricultural land belonging to mosques and pious foundations (*awqaf*), and, most importantly, by getting rid of . . . the power of the military landlords, the Mamluks, who had been in effective control of the province for centuries in spite of Ottoman legal suzerainty. Centralization of political and administrative control was also enhanced by rapid increase in agricultural productivity."); HOURANI, *supra* note 122, at 273 (describing the changes introduced in Egypt by Muhammad 'Ali).

125. See Tamir Moustafa, *Conflict and Cooperation Between the State and Religious Institutions in Contemporary Egypt*, 32 INT'L J. MIDDLE E. STUD. 3, 4 (2000).

Muhammad 'Ali (1805-48) was the first Egyptian ruler to challenge systematically the power of Egypt's religious institutions. As part of his program to build a modern Egyptian state and challenge the Ottoman government for control of the empire, Muhammad 'Ali reorganized land ownership and nationalized 600,000 feddans (623,000 acres) of waqf land that had previously financed mosques and religious schools and formed the economic foundation of the *ulama*.

See also Crecelius, *supra* note 4, at 73-74 (discussing 'Ali's efforts to differentiate church and state).

126. See Crecelius, *supra* note 4, at 73-74; see also CANNON, *supra* note 120, at 12-13; TUCKER, *supra* note 74, at 29-30 (explaining 'Ali's struggle to get control over the social structure). Cannon describes the process by which the power of tax farmers, merchants and guilds was appropriated by the state in the following passage:

Muhammad 'Ali began with a concerted drive to regain central control over Egypt's actual revenue-earning power. To do this, he forcibly revived the Ottoman Islamic theory of state ownership (*miri*) of all agriculturally productive land previously under tax farmer intermediaries. Soon after his first

consequence, the *ulama* found themselves being demoted from being institutionalized elites to being alienated and disenfranchised.<sup>127</sup> Ali not only ravaged the *ulama*'s financial institutions, but he also started to build an educational system to compete with and take the place of the religious one that the *ulama* historically controlled.<sup>128</sup> This alternative educational system, primarily designed to educate the bureaucratic and military elites that Ali needed to run his modern state, produced a secular elite that identified with Europe and came to see the *ulama* and their institutions as pre-modern and conservative.<sup>129</sup>

In addition, the centralized state established as a result of Ali's unabashed use of his regulatory powers seriously competed with *madhhab* as a source of law. Ali, as part of his modernization project, issued for the first time in Egypt a substantive body of laws that may be termed as public law, taking little heed of the Taqlid rules on the questions these regulations tackled.<sup>130</sup> Ali saw this public law as

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political tasks were accomplished by brutal suppression of local Mamluk interests in Egypt's military and landholding system, Muhammad 'Ali extended central controls down to the smallest localized units of economic productivity. For town dwellers, this brought a decline in fiscal and administrative autonomy for traditional guilds responsible for the welfare of many artisans and small shopkeepers. . . . In short, the ultimate authority of the Cairo governor to regulate nearly every aspect of provincial economic and administrative activity became an accomplished fact.

CANNON, *supra* note 120, at 12-13.

127. See Crecelius, *supra* note 4, at 74 (observing that "[t]he regime's attacks upon the political influence of the *ulama* and its seizure of most of the revenues that sustained the vast system of schools, mosques, takiyahs, and ceremonies of the religious community had a terrible effect upon the religious institutions in Egypt. Deprived of most of their revenues and ignored by the new regime, religious institutions entered a period of rapid and continuous decline.").

128. See Moustafa, *supra* note 125, at 4; see also F. ROBERT HUNTER, EGYPT UNDER THE KHEDIVES 1805-1879 17 (1984) (discussing the Europeanization of education); TUCKER, *supra* note 74, at 122-23 ("Muhammad 'Ali founded a number of schools modeled on the European system. The Council of Public Instruction, established in 1836, supervised 54 state-run primary and secondary schools throughout Egypt during the latter part of Muhammad 'Ali's reign.").

129. See TUCKER, *supra* note 74, at 122-23. Tucker writes:

Not surprisingly, given the emphasis on reforms calculated to promote technological transformation, other new educational institutions focused on military, professional, and technical training geared to introduce European practices. . . . This new educational system functioned alongside the older system of elementary schools attached to mosques (*kuttabs*), and the advanced religious and classical education offered by al-Azhar.

*Id.*; see also Crecelius, *supra* note 4, at 73-74 (assessing the roles of the educated elite).

130. See Rudolph Peters, "For His Correction and as a Deterrent Example for Others," *Mehmed 'Ali's First Criminal Legislation (1829-1830)*, 6 ISLAMIC L. & SOC. 164, 164 (1999). Although this article looks specifically at criminal legislation and codes enacted by Ali, the author's analysis is instructive for other areas of the law as well. In

necessary for the state to appropriate, distribute, and control the economic and financial resources to be channeled primarily to the needs of the strong army that his modernization efforts focused on.<sup>131</sup> One of the components of this public law was an elaborate set of punitive (penal) legal regulations that allowed Ali to control resistance to the newly centralized state.<sup>132</sup> Eventually, the *qadi* courts, associated with the Taqlid era, were forced to compete with a

fact, the author notes that “[t]he convening of the consultative council (*Meclis-i Mesveret, Meclis-i Umumi*) in September 1829 (3 Rabi’I 1245) marked the beginning of Mehmed ‘Ali’s legislative activity in the fields of criminal, constitutional and commercial law.” *Id.*

131. See TUCKER, *supra* note 74, at 29. Tucker notes that laws put in place under Muhammad Ali affected the diverse aspects of Egyptian life that needed to be under the control of the modernized, centralized state to achieve Ali’s goals. Thus, the state was empowered to regulate and tax commercial activities in general and agriculture in particular, and “[s]tate intervention in agriculture and trade . . . formed part of the State’s attempt to mobilize agricultural resources to the political end of generating revenues for building a strong military force.” *Id.*; see also CANNON, *supra* note 120, at 19 (noting that “almost all of Muhammad ‘Ali’s important internal reforms had been organized to support a strong military budget”); FAHMY, *supra* note 122, at 9 (asserting that “Mehmed Ali started to found a modern army in Egypt, an army which was based on conscription and which relied on the institutions of the modern state that he founded mainly to serve that army”).

132. See Peters, *supra* note 130, at 173. The author, focusing on the area of criminal law, reports that:

It was Mehmed ‘Ali’s ambition to impose a centralized and rational order upon his realm. The effects of this endeavor are evident in various domains of society, such as agriculture and the military. Criminal law, by its nature, is crucial to such a policy of disciplining, and the new laws must be regarded as a means to achieve this centralization and rationalization. The idea of centralization was very much vested in his person. Mehmed ‘Ali wanted to be the ultimate authority in criminal justice and the new laws expressed the notion that all punishment derived from his omnipresent authority, even if it was in fact imposed by his agents. Lawfully inflicted punishment ought to represent and symbolize the centrality of his power.

*Id.*; see also Khaled Fahmy, *The anatomy of justice: forensic medicine and criminal law in nineteenth century Egypt*, 6 ISLAMIC L. & SOC. 224, 231-34 (1999). Fahmy notes that “[a]lthough some aspects of legal reform were indeed influenced by European law, these developments aimed more at tightening the grip of the government over its populations than at spreading ‘legal knowledge concerning rights, duties, freedoms and remedies.’” *Id.* at 231. In addition, Fahmy links this desire to control the population with Ali’s goal of independence:

[a]s early as September 1829, when he passed his first penal legislation, and much before he first expressed his desire for official independence from the Ottoman Empire in the late 1830s, Mehmed Ali was already using law, and penal law in particular, to carve out an independent realm for himself in which his laws and his bureaucracy would reign supreme at the expense of the Sultan’s.

*Id.* at 233-34.

number of other judicial bodies.<sup>133</sup> These new judicial bodies included those that Ali set up to allow those affected by the regulations, primarily peasants, to present their grievances concerning actions taken by government officials.<sup>134</sup>

As Ali consolidated a centralized, strong state, (one that was armed with newly created regulatory instruments) the residues of Taqlid law that remained in effect acquired the character of the law of the private and the personal.<sup>135</sup> Such private legal activities, left untouched by the state's regulations, were primarily but not exclusively related to the family. These matters came to be understood as the privileged domain of Taqlid.

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133. See CANNON, *supra* note 120, at 23-25. The author describes "a series of administrative options for different types of litigation introduced by Muhammad 'Ali" that "encouraged separation between the (primarily personal status) functions of the *qadi* and secular judicial prerogatives of government. This was especially true where penal or basic fiscal considerations were at stake. . . . Muhammad 'Ali himself consciously tried to found a system of specialized *majalis* or councils to carry out a variety of secular judicial functions." *Id.* at 23. Commercial disputes, for instance, could be settled before "two separate merchants' councils (Ar. *majalis at-tujjar*) created in 1845. . . . They could arbitrate disputes between capitulatory and local subjects alike." *Id.* at 25. The author asserts that, in general, "sectarian jurisdiction tended to diminish whenever the power of central political authorities rose enough to offset the traditional influence of the religious classes in many key areas." *Id.* at 23.

134. See FAHMY, *supra* note 122, at 172 (reporting that "[b]y curbing the high-handed behavior of officials, these codes aimed at protecting Egyptian subjects. . . . These legal texts must be read as a pledge on the part of the sovereign to see that justice was done once he was informed by petition of any injustice suffered by his subjects"); see also CANNON, *supra* note 120, at 24.

In his own provincial operations in the 1830s and 1840s, Muhammad 'Ali delegated a portion of his own high executive prerogatives to a single specialized body known as the Council of Egyptian Judicial Rulings (Ar. *majlis al-ahkam al-misriyya*). . . . [T]he Cairo Council served primarily as a superior court for the Egyptian governorate. It reviewed, for example, petitions against Muhammad 'Ali's own officials who, in the absence of a distinct judicial branch of government, traditionally settled village-level disputes not clearly reserved for local sectarian jurisdictions.

135. See NADAV SAFRAN, *EGYPT IN SEARCH OF POLITICAL COMMUNITY* 32 (1961). The author suggests that Ali was motivated by political realities to leave some areas of the legal system intact while changing others:

[Ali] left untouched the system of religious courts, even though he had a very low opinion of them, in order not to raise complications with the Ottoman sultan to whose hands the jurisdiction over these courts ultimately reverted; but he established two courts independent of Muslim Law in Cairo and in Alexandria to settle commercial disputes and had criminal justice administered almost exclusively by the executive authorities in a summary fashion.

*Id.* Thus, this may be one reason why personal status laws escaped Ali's "modernizing" touch.

### B. *The Defeat of Ali and The Europeanization of Egypt*

The second onslaught on Taqlid took place in the second half of the nineteenth century, following the death of Ali and the defeat of his modernization project. The Ottoman elites of Istanbul, who considered Egypt one of their most important provinces, felt the secessionist threats of Ali's rising power and collaborated with contemporary European powers, primarily Britain, to destroy him.<sup>136</sup>

One of the consequences of Ali's defeat was to subject Egypt to the terms of the treaties that Istanbul had entered into with a number of European countries, symbolizing the end of Egypt's autonomy.<sup>137</sup> This in effect destroyed the state economic monopolies that Ali masterminded<sup>138</sup> and the corresponding legal regime, as European countries insisted that tariffs on commodities entering the

136. See FAHMY, *supra* note 122, at 22, 291-97. Britain perceived Ali as a threat to its imperial interests in India, Egypt being an important country en route to this most precious British colony. As Fahmy describes it, Ali's expansion "seriously challenged Britain's most ambitious imperialist designs and was regarded in London and Bombay as a threat to Britain's possessions in Asia, her communications with India and her influence in Istanbul." *Id.* at 294-95. Britain was also worried about the detrimental effect that Ali's rising power could have on an already weakened Ottoman Empire that had come to be the object of several European countries' colonial interests. See *id.* In other words, the British feared that Ali would jeopardize the efforts taken by the competing European powers to save the dying "sick man of Europe," as the Ottoman Empire was called at the time, which had until then kept the Empire in one piece. See *id.* at 294-97. Fahmy thus reports that the British viewed Ali as "causing a grave threat . . . by giving the Russians the opportunity and the pretext to encroach onto Ottoman lands, and possibly to do away with the Ottoman Empire altogether. [British Foreign Secretary] Palmerston's motto of 'the preservation of the integrity of the Ottoman Empire' was his most effective bulwark against possible Russian aggression. . . ." *Id.* at 294-95. See also CANNON, *supra* note 120, at 15-17 (describing additional, economic motivations that drove the Europeans to scheme with Istanbul to intervene in Ali's rule).

137. See FAHMY, *supra* note 122, at 291 reporting that

on 1 June 1841, the Sultan issued a *firman* naming Mehmed Ali as governor of Egypt for life and granting his male descendants the hereditary rights of the governorship of Egypt. In addition, though, the *firman* stipulated that the Pasha reduce the size of his army to 18,000 troops in peace-time. Moreover, the Sultan added that 'all the Treaties concluded and to be concluded between my Sublime Porte and the friendly Powers shall be completely executed in the Province of Egypt likewise.'

See also CANNON, *supra* note 120, at 19 (describing the conditions imposed by the *firman* of 1841).

138. See CANNON, *supra* note 120, at 19 (reporting that the Ottoman Sultan Abdulmecid, in conjugation with the European countries that helped him defeat Ali, insisted on the suppression of his "system of government commercial monopolies"); HUNTER, *supra* note 128, at 31 (noting that, as a result of the European/Ottoman intervention, in 1840 Ali had to "accept the Anglo-Turkish Commercial Convention of 1838 which banned all monopolies in the Ottoman empire").



Egyptian market be removed.<sup>139</sup> More important for the Taqlid legal system, however, was the fact that a new legal era commenced in Egypt that was marked by a process of Europeanization. This was to become the second severe blow dealt to the Taqlid legal system. During this period, Europe figured strongly in the life of Egyptian elites, something that brought with it two contradictory outcomes—the first can be described as a normative liberal legalism and the second as a political legal imperialism.

As the Khedavis, descendants of Ali and the ruling Turkish elites of Egypt, embarked on the project of turning Egypt into a “part of Europe” during the second half of the nineteenth century, radical legal reforms started to take place.<sup>140</sup> The migratory onslaught of European communities into Egypt—one element of the Khedavis’ Europeanization policy—established European commercial interests in the country and helped merge Egypt into the international market by creating a cash-crop economy based on cotton.<sup>141</sup> This in turn

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139. See CANNON, *supra* note 120, at 19-20. Cannon writes that “by urging that reconfirmation of Egypt’s obligations within the general capitulatory system should be followed by a new round of most favored nation treaties based on the 1838 Anglo-Ottoman convention, London laid the basis for capitulatory politics that continued to operate for half a century after 1841.” *Id.* Another author discusses the devastating results of the loss of tariff protections for local Egyptian industries that Ali’s monopolies had allowed to flourish:

[M]onopolies were believed to have been the backbone of the Pasha’s economic policy and to have given his industries the protection they needed to compete with European goods. Having lost that protection, the infant industries and the services connected to them fell to ruins. . . . The Egyptian factories found it difficult to produce commodities that could compete with foreign, mostly British, goods. . . . Local industries were closed down after losing their protective tariff barriers. At the same time, foreign merchants flooded the Egyptian market with their cheap goods after the collapse of the Pasha’s monopoly system.

FAHMY, *supra* note 122, at 13; see also Ahmed Abdel-Rahim Mustafa, *The Breakdown of the Monopoly System in Egypt after 1840*, in POLITICAL AND SOCIAL CHANGE IN MODERN EGYPT 300 (P.M. Holt ed., 1968) (reporting that “[t]he Egyptian government, finding that there was no escape from the plain and obvious sense of the treaties, consented to suppress the duties heretofore levied at Bulaq, the port of Cairo”).

140. Crecelius, *supra* note 4, at 77-78; see also HUNTER, *supra* note 128, at 44-45. Hunter notes that new courts were set up all over Egypt: “The formation of these courts was the last step in the elaboration of a new judicial administration for Egypt.” *Id.* at 45. Legal reforms were felt not only in Cairo but in other areas of the country as well: “During the 1860s and 1870s, a new judicial administration emerged in the countryside, and administrative and agricultural councils were formed to supplement those provincial units of government created by Muhammad Ali.” *Id.* at 44. In addition, a Department of Justice was established: “In 1872, perhaps because of the growing need to control and coordinate the various elements that now made up the legal order, an executive organ, the Department of Justice, was created.” *Id.* at 45.

141. See HUNTER, *supra* note 128, at 38. The author describes:

prompted several European countries to intensify their request for legal privileges and concessionary benefits for their nationals living in Egypt.<sup>142</sup> Such privileges and concessions led to the radical evolution of the consular legal system and eventually to the establishment of the unified legal system of Capitulations.<sup>143</sup>

Creditors also demanded legal assurances as Egypt amassed a considerable amount of international debt to finance infrastructure

[T]he rapid emergence of a European and Levantine fiscal-commercial bourgeoisie. The two most important components of this class were the promoters whose companies undertook the construction of public works, and the merchant-financiers who established banks and had ties with investment houses in Europe. These men not only represented an institutional base for Egyptian trade with Europe, but most important, they also provided a new means of financial support for Egypt's rulers. The viceroys used these Europeans to facilitate the extension of cash crops, and European merchants and bankers became a source of easy credit by providing short-term loans and purchasing government bonds.

*Id.* See also TUCKER, *supra* note 74, at 31-35 (providing a complete discussion of the "cotton boom" to hit Egypt at this time and the results in rural Egypt); Mustafa, *supra* note 125, at 306 (asserting that subsequent to Ali, the leaders of Egypt were effectively "opening the doors of Egypt to the growing Western capitalism and to European immigration").

142. See BRINTON, *supra* note 120, at 5. The author reports "the establishment of a complete immunity from the jurisdiction of local courts and from the application of local laws" for foreigners under the consular or Capitulations system and explains that, "[p]rompted largely by reasons of practical necessity and convenience, little by little the consuls assumed jurisdiction in all cases, civil or criminal, which involved their nationals. . . . It was an expansion of consular jurisdiction . . . based purely on usage." *Id.* He continues that "[t]he consul's jurisdiction was necessarily confined to the enforcement of the laws of his own country . . . [.] [t]herefore, foreigners were subject only to their own laws, as such laws were interpreted by their own consuls." *Id.*

143. See *id.* at 5-6; see also Herbert J. Liebesny, *The Development of Western Judicial Privileges, in ORIGIN AND DEVELOPMENT OF ISLAMIC LAW* 326 (Majid Khadduri & Herbert J. Liebesny eds., 1955). Liebesny reports that "[b]y the nineteenth century the capitulatory rights of the various powers had thus grown into a well-systematized framework of law and procedure" and provides a very concise description of the system of Capitulations. *Id.* However, this is not to suggest that the Capitulations were not in existence prior to the nineteenth century. See, e.g., CANNON, *supra* note 120, at 6. Cannon describes the capitulatory system in place in Egypt centuries earlier; in fact, he asserts:

The series of bilateral treaties that constituted the Ottoman capitulatory system probably reached their highest degree of efficiency in the seventeenth century. This was before military defeats made the Ottoman Empire vulnerable to a variety of forms of external coercion by both friends and enemies. Initially modeled after much earlier "chapters" (It., *capitula*) of commercial and judicial privileges granted by Mamluk sultans to Italian traders in medieval Egypt, the first capitulatory treaties with Europeans were signed from a position of strength, not weakness. In fact, until the eighteenth century, whatever benefits derived from such Ottoman-Christian agreements were technically reciprocal.

*Id.*

projects and other elements of its modernization scheme.<sup>144</sup> Foreign nationals, creditors, and international contractors demanded to be exempt from the jurisdiction of Egyptian Taqlid law, which was seen as either lacking sufficient legal assurances or simply too primitive to accommodate such complex international economic and financial transactions.<sup>145</sup>

As a means of paying the huge foreign debt being incurred, the Egyptian government heavily taxed the local peasants.<sup>146</sup> This left them hostage to the power of moneylenders who were mostly foreigners residing in Egypt.<sup>147</sup> As Egyptian peasants struggled to

144. See HUNTER, *supra* note 128, at 38; TUCKER, *supra* note 74, at 31-32.

145. See CANNON, *supra* note 120, at 7, 39-43. As Cannon notes, before the transplantation of laws based on European codes in Egypt:

[T]he Ottomans possessed only a very rudimentary body of imperial *qanun* or secular administrative law to supplement the sectarian rulings applicable to Ottoman subjects in their own private affairs. From the sixteenth century onward, only certain privileged provinces enjoyed the possibility of systematic reference to special codes of imperial decrees, or *qanunnahmes*, pertaining to administrative or land tenure questions in their zones. These were supposed to give guidelines for a separate jurisdiction free from sectarian interference in areas of recognized governmental concern, especially in fiscal matters. They embodied neither uniform rules applying throughout the Empire nor provisions for commercial transactions or private contract and property relations that European law would eventually group under the civil umbrella of the Napoleonic Code.

*Id.* at 7.

146. See TUCKER, *supra* note 74, at 32.

147. See *id.* at 31-34.

The cycle of small peasant debt has been amply illustrated: forced to borrow at high rates of interest in order to get the seed and animals necessary for sowing and paying monthly installments on their taxes, the peasants then had to repay these loans, often in kind, at harvest time when crop prices were lowest.

See also Sayyid 'Ashmawi, *Perceptions of the Greek Money-lender in Egyptian Collective Memory at the Turn of the Twentieth Century*, in MONEY, LAND AND TRADE 244, 253-54 (Nelly Hanna ed., 2002) (providing a detailed account of foreign moneylenders in Egypt, particularly Greeks). The author observes:

Although he made very little profit which he used to purchase more stock, the Greek grocer lived on next to nothing and lent money to the peasants at exorbitant interest rates. He bought land, traded in cotton and built an astonishing fortune, despite being barely able to make ends meet when he first saw Egypt.

*Id.* at 253. The author adds:

Many Egyptians displayed a certain aversion to money-lending because Islamic religious values prohibited usury. Money-lenders, therefore, were mainly Greeks who owned grocery shops in rural areas. They sold consumer goods to peasants on a retail basis, taking the cotton crop as security, and lending on a wide scale to rural inhabitants.

regain ownership of their mortgaged lands from both foreign moneylenders and local elites, Taqlid law proved even more inadequate because it failed to regulate such forms of contractual relationships.<sup>148</sup> The establishment of the Capitulations Court System in 1875 was seen as a resolution to the legal chaos, inviting all foreigners to adjudicate claims between each other and between themselves and Egyptians in the newly established courts.<sup>149</sup> In addition, Civil and Commercial Codes and Codes on Procedure, with a very strong French influence, were passed to regulate actions dealt with by these courts.<sup>150</sup>

### *C. British Colonization and Reactions to the Continued Europeanization of the Egyptian Legal System*

The third legal era during which Taqlid law was transformed began with the colonization of Egypt by the British in 1882 and lasted until 1948, when a national Egyptian Civil Code was passed.<sup>151</sup>

*Id.* at 253-54.

148. See CANNON, *supra* note 120, at 39-40.

149. See Liebesny, *supra* note 143, at 30-31; see also BRINTON, *supra* note 120, at 9, 23-25 (referring to the courts as the "Mixed Courts of Egypt" and reporting that "[t]he fourteen capitulatory powers which gave adherence to the regime of the Mixed Courts were Germany, Austria, Belgium, Denmark, Spain, the United States, France, Great Britain, Greece, Italy, Sweden, Holland, Portugal, and Russia").

150. See Bassiouni & Badr, *supra* note 5, at 166. As the authors report:

In 1875, it [Egypt] adopted a number of codes modeled after French prototypes. This can be explained by the fact that the codes were intended for application by the Mixed Courts, which had jurisdiction over cases involving European and U.S. citizens residing in Egypt. The Mixed Courts were abolished in 1949.

*Id.*

151. The importance of this legal development cannot be underestimated, as codification is a new and recent phenomenon in majority Muslim countries where Islamic law historically prevailed. It is interesting that, although often also codified or formulated as man-made legislation, albeit legislation based on Islamic legal rules, personal status law consistently has a separate existence from other branches of the now-codified law. See MAHMOOD, *supra* note 118, at 2.

In most of the Islamic countries major branches of law now stand fully codified under state authority. There are in these countries, both Arab and non-Arab, written constitutions and codified laws of contracts, crimes, civil and judicial procedures, evidence, labour relations, trade and commerce, intellectual and industrial property, taxation, etc. . . . [In addition,] [m]any Islamic countries now have a national civil code. Known in the Middle East as *qunun-i-madani*, the first few among these were drafted by the celebrated Arab [Egyptian] jurist Abd al-Razzaq al-Sanhuri. The Arab civil codes cover laws of contracts, obligations, partnership, transfer of property, etc., but not personal law (family relations and succession). In the Arab countries personal law has been either

## 1. British Colonization and Subsequent Legal Developments

In 1883, a year after the British colonized Egypt, a national court system was established for the purpose of adjudicating cases among Egyptians that was modeled on the Capitulations Court System both in structure and textual foundations.<sup>152</sup> The Codes applied in the national courts were very similar to those of the Capitulatory courts, with the exemption that some Taqlid rules were included.<sup>153</sup> As a result of the establishment of the national court system, the *qadi* Taqlid courts saw themselves overseeing an even more contracted jurisdiction, namely, that of the family (marriage, divorce, inheritance, and wills) and *waqf* (charitable institutions).<sup>154</sup>

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separately codified, or left uncoded; but nowhere has it been made part of the civil code.

152. See Liebesny, *supra* note 143, at 331 reporting that “[i]n 1883 native or National Courts were organized in Egypt which followed more or less the pattern of the Mixed Courts and which had jurisdiction in matters involving Egyptians only;” see also BRINTON, *supra* note 120, at 157-58.

Whereas the Mixed Courts were established prior to the British occupation of Egypt in 1882 . . . the Native Courts were not instituted until 1883, their existence being the result of an effort to put an end to the defects of the existing system of purely Moslem courts. The new courts were modeled largely on the Mixed Courts themselves. . . .

153. See FARHAT J. ZIADEH, *LAWYERS, THE RULE OF LAW AND LIBERALISM IN MODERN EGYPT* 35 (1968). The author reports that in the new courts, although it was decided that to a large extent “the laws applicable in the mixed courts [would] be followed,” there were many areas “which were to be amended for conformity to the conditions in the country,” and as far as codes, “separate codes were prepared.” *Id.* In addition, “[q]uestions which touched upon Islamic law were referred for comment to Shaykh Bahrawi, Mufti of the Ministry of Justice.” *Id.*; see also HERBERT J. LIEBESNY, *THE LAW OF THE NEAR & MIDDLE EAST* 71 (1975). As Liebesny reports:

The new judicial system . . . necessitated not only a new court structure, but also new procedural and substantive laws. The new codes were taken largely from French law and were, in fact, prepared by a French lawyer, M. Manoury. . . . Those parts of the Civil Code which dealt with domestic relations were omitted, but the books regulating property rights and obligations were largely adopted. Certain rules of traditional Egyptian law, particularly those concerning certain property rights, were incorporated into the new Egyptian Code. The Commerical Code, the procedural Codes and the Penal Code also followed the French prototypes.

*Id.*

154. See BRINTON, *supra* note 120, at 159-63. Brinton writes that:

In the Religious Courts was encountered that broad domain of jurisdiction over questions of personal status which has always played a large role in the complicated legal machinery of the former Ottoman Empire. . . . The distinction involved no idea of inferiority or humiliation, but was the natural result of the great diversity of social and religious organizations existing throughout the

Under this process of intense European influence, Taqlid law and its normative character were greatly transformed. First of all, as the Code came to be seen by the Europe-identified elites of Egypt as the universal, the modern, and the embodiment of advanced legal thought, Taqlid came to be seen as the local, the pre-modern, and the primitive.<sup>155</sup> This was so despite the fact that the introduction of the Code in Egypt was the culmination of a long process of imperial pressure by European interests.

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country. Such questions had to be left to the only authorities capable of solving them.

*Id.* at 159; see also RON SHAHAM, FAMILY AND THE COURTS IN MODERN EGYPT 11-12 (1997). Shaham, reporting on "modernist legislation" imposed by the government in Egypt to put in place "Western-oriented" reforms, notes that there was a

gradual restriction of the jurisdiction of the *shari'a* courts. During the Ottoman period, the jurisdiction of these courts had included personal status and pious endowment (*waqf*), as well as civil, criminal, and administrative affairs. But in the early nineteenth century Muhammad 'Ali had already begun to diminish this jurisdiction by establishing alternative civil courts that applied Western-inspired codes of law. This process was continued by his successors and later promoted by the British. The 1897 law, pertaining to evidence and procedure in the *shari'a* courts, restricted their jurisdiction to personal status and *waqf*. . . . The jurisdiction taken from the *shari'a* courts was transferred to civil courts, among them Indigenous Courts (*mahakim ahliyya*), established in 1884. . . . These courts applied European-oriented laws.

*Id.* Liebensy reports:

The Egyptian law reforms of the late nineteenth century thus established three separate court systems: the mixed courts, the native courts, and the religious courts (*shari'a* courts and the courts of the Jewish and Christian communities). In addition there were consular courts which retained jurisdiction in some matters with regard to citizens of their country.

See LIEBESNY, *supra* note 153, at 76.

155. See ZIADEH, *supra* note 153, at 58. As the author describes, lawyers were divided into members of the so-called Shari'ah Bar and those of the National Bar.

The Shari'ah Bar was never able to gain the same prestige as the National Bar. In the first place, its members for the most part did not have as high a level of education. In the second place, the practice of the *shari'ah* advocates was limited to matters of personal status, a field of law which was not, except for *waqf* cases, as lucrative or as commanding of respect as other fields of law. The really decisive factor in this lack of prestige was the fact that the *shari'ah* advocates were the defenders of a religious order that was constantly giving way to secular ideas and progressive legislation.

*Id.*; see also TIMOTHY MITCHELL, COLONISING EGYPT 84-85 (1988). Al-Azhar, "the oldest continuing centre of scholarship and law anywhere in the world," established in Cairo a thousand years ago, is a key example of institutions that embodied and preserved local religious learning and traditions. *Id.* at 84. Offering training in religious law and other traditional areas of learning, the author reports that "[t]he techniques of order and authority exemplified in the learning of al-Azhar could not cope with the political and economic transformations taking place." *Id.* at 85.

In addition, as the Code became the embodiment of universal legal liberalism applying equally to everybody, Taqlid came to be seen as expressive of sectarian specificity applying only to matters of deep interests to religious Muslim communities.<sup>156</sup> In this sense, Taqlid law was now equal in status to Coptic law, which regulated the personal status affairs of Copts (the Christian community) in Egypt.<sup>157</sup> As such, Taqlid law became the exception to the jurisdiction of the national courts rather than representing the origin and basis of national law.<sup>158</sup>

Perhaps the most significant transformation to Taqlid law during this legal era was more institutional than normative. The centralization of the regulatory powers of the state not only allowed it to create a surplus of laws on top of Taqlid law through the promulgation of the Code(s), eventually turning Taqlid law itself into an exception, but it also allowed for the annexation of the domain of Taqlid as it promulgated laws intervening in Taqlid law and applying to *qadi* Taqlid courts.<sup>159</sup> These statutes were passed beginning in the last two decades of the nineteenth century and culminated in various statutes regulating the family that were passed in the twentieth century.<sup>160</sup> These statutes include those that forced *qadi* courts to follow European laws of procedure as they adjudicated cases included

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156. See BRINTON, *supra* note 120, at 159-60.

157. See *id.* at 162-63. Brinton notes that “[the] non-Moslem had the same right to resort to their own religious courts as had the native Moslem himself” and

[t]hese non-Moslem religious courts comprised the most complicated system of courts in Egypt. . . . The jurisdiction of these courts covered all questions affecting personal status (marriage and divorce, etc.). . . . At the head of these communities, numerically considered, stood the Orthodox Copts, a Christian sect of great antiquity and one of the most solid and important elements in Egyptian life.

*Id.*

158. See *id.* at 160.

159. See *id.* at 161; see also SHAHAM, *supra* note 154, at 11-12 (describing the curtailment of the *shari’ah* courts); ZIADEH, *supra* note 153, at 56 (noting that the *shari’a* courts

had been the ordinary courts of the country, with a jurisdiction which theoretically embraced every type of case, both civil and criminal. . . . Serious reorganization was not undertaken until May 27, 1897, when a decree was issued setting up three levels of courts and defining the jurisdiction of each in questions of personal status only. From then on jurisdiction of these courts no longer depended upon the *shari’ah*, but upon statute.

160. See BRINTON, *supra* note 120, at 161-62; see also SHAHAM, *supra* note 154, at 12-15. The original law of procedure that changed the jurisdiction and functions of the *shari’a* courts was the 1897 law (as amended in 1909 and 1910). See *id.* at 12. Laws of personal status passed in the twentieth century include Law No. 25 of 1920; Law No. 25 of 1929; Law No. 77 of 1943; and Law No. 71 of 1946. See *id.* at 14.

under their shrunken jurisdiction.<sup>161</sup> Furthermore, Taqlid courts were only to apply the decisive opinion of the Hanafi school of law on matters of marriage and divorce, thus defining the doctrinal sources of Taqlid law to be applied.<sup>162</sup> This institutional annexation reinforced the very European, modern, and historically un-Islamic idea that the privileged and sole source of the law is the regulatory

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161. See BRINTON, *supra* note 120, at 161; see also SHAHAM, *supra* note 154, at 12-14. Shaham reports that the procedural legislation passed in 1897

reformed the *shari'a* rules of procedure by introducing, for example, a statute of limitations of fifteen years on claims denied by the defendant. . . . This meant that the *qadis* were forbidden to try such claims once this period had passed if there was no legal excuse (*udhr shari'*) for failure to submit the claim until then.

*Id.* at 13. In addition, European rules of evidence were introduced, and *shari'a* courts were forced to follow them:

Reform of the Islamic rules of evidence included the acceptance of documents as valid proof in a court of law. The Sunni schools had regarded documentary evidence as secondary and subordinate to oral evidence. . . . Egyptian statutory legislation equated written with oral acknowledgement, accepted documentary evidence as if it was not suspect, and set up regulations for determining the authenticity of documents. . . .

*Id.* Similarly, there were "procedural reforms" concerning oral testimony, giving the option to "swear in" as well as to cross-examine witnesses. *Id.* This conflicts with the *shari'a*, according to which the only way to credit a witness is by the *tazkiya* test, which involves inquiring about his honorable record. *Id.* at 13-14. The author cites many other foreign procedural elements introduced into the laws to be applied by the *shari'a* courts, and also notes that the new procedural rules included a total reorganization of the *shari'a* courts in a way foreign to the traditional system.

The organization of the *shari'a* courts system that had existed during the Ottoman period was reformed as well: the concept of institutional hierarchical appeal, alien to the *shari'a*, was introduced; and the 1897 Law (which was further modified in 1909 and 1910) organized the *shari'a* courts into three stages: Courts of Summary Justice (*mahakim juz'iyya*), Courts of First Instance (*mahakim ibtida'iyya*) and a Supreme Court (*mahkama 'ulya*).

*Id.* at 12.

162. See SHAHAM, *supra* note 154, at 12-13.

Although the majority of the Muslim population in Egypt adheres either to the Shafi'i school (in Lower Egypt) or to the Maliki school (in Upper Egypt), the dominant school in the Egyptian *shari'a* courts is the Hanafi, a legacy of Ottoman rule. From the early nineteenth century, the Hanafi school acquired exclusive status in the courts, regardless of the personal affiliation of the litigants. The procedural legislation directed to the *shari'a* courts (starting from 1880) ordered these courts to judge according to the decisive opinion within the Hanafi school (*arjah al-aqwal fi madhhab Abi Hanifa*), except for matters in which the legislators specifically ordered the courts to apply reform statutory legislation based on the instructions of alternative schools.



power of the state and not that of the private *ijtihad* of the jurists, as was the case under the Taqlid legal system.<sup>163</sup>

## 2. Reactions to Colonization, Modernists, and Nationalism

In 1948, a national Egyptian Civil Code was passed.<sup>164</sup> The promulgation of this Code (annulling the earlier Civil Code that applied to the national courts), which was drafted through the elaborate reconstructive work of the famous Egyptian jurist Sanhuri, marked the beginning of an autonomous Egypt with its own independent laws.<sup>165</sup> The Egyptian Parliament passed the Code on the very day the regime of Capitulations was abolished, setting the stage for the Egyptian national courts to become the primary courts of the land and the repository of Egyptian national sovereignty.<sup>166</sup>

163. See generally ANDERSON, *supra* note 62. This is of course within the general framework of the decline of *ijtihad* during the Taqlid era; as the author's authoritative work notes, although by "about the end of the third century of the Muslim era, it was commonly accepted that the 'door of *ijtihad*' had become closed," and "the development of the law became progressively more and more moribund,"

[t]here was always, it is true, a certain measure of progress or evolution, since new situations and problems arose which had to be solved by the *fatawi*, or reasoned opinions, of some leading jurist; but, in the main, the continual sequence of accepted textbooks took the form of commentaries and digests based, century after century, on the commentaries and digests of the past.

*Id.* at 7. Because the *shari'a* "was regarded as a divinely given blue-print to which society—ruler and subject alike—must always do their utmost to approximate," even early suggestions to officially (that is, under the authority of the state) codify the law "was successfully resisted; so it remained an amorphous volume of partly contradictory doctrine, to which lip-service, at least, was invariably given. . . ." *Id.* at 9-10. Eventually reform, which involved not only codification; the establishment of courts that rivaled and limited the jurisdiction of the *shari'a* courts; and the positioning of the state as the promulgator of laws, even if at times based on Taqlid rules, "came not from below but from above. . . . [T]hese reforms were imposed on them [ordinary Muslims] by the Government." *Id.* at 14-15. The reaction in Egypt and in many other countries, although not always involving a demand to return to the authority of knowledgeable jurists as the source of law (who are often seen as having been coerced by recent reform processes by the state of their traditional power and independence), is often "the pressure for a greater reliance on the *Shari'a* as the source of the general law." *Id.* at 193. Indeed, religious Muslims often use modern, secular forums such as the Supreme Constitutional Court of Egypt to pursue their demands, rather than seeking *fatwas* or opinions of Islamic jurists.

164. See Bassiouni & Badr, *supra* note 5, at 167; *supra* note 150 and accompanying text (providing an overview of the general historical context).

165. See Bassiouni & Badr, *supra* note 5, at 168-69 ("The Egyptian Civil Code of 1948 and its progeny in other Arab countries are mainly the result of the efforts of Abd al-Razzaq al-Sanhuri (1895-1971 C.E.), the most influential Arab jurist of the 20<sup>th</sup> century.").

166. See *id.* at 167-69.

This era witnessed the emergence of two groups of legal elites, each reacting in its own way to the effects of Europeanization of the Egyptian legal system.<sup>167</sup> These elites spearheaded two legal modernization projects that were in effect hostile to each other but at the same time incorporated in their respective projects the historical claims of the other.<sup>168</sup> The first group was composed of people like Muhammad Abduh and Rashid Rida.<sup>169</sup> These elites were confronted with both the de-Islamicization of the legal system in Egypt and the rising hegemony of notions of legal liberalism in the world.<sup>170</sup> Their response was to critique the medieval theory of Usul al-Fiqh which, as is indicated above, had a deep influence on the Taqlid schools of law.<sup>171</sup> They offered alternative ways of “legislating” law that was Islamic by shifting the hierarchical ordering of the sources of law included in the theory of Usul.<sup>172</sup> They proposed that the doctrines of public welfare and public interest (*maslahah*, *istislah*) replace *qiyas* (analogy) as a privileged source of law.<sup>173</sup> Thus if a particular social need was not covered by specific religious texts (the traditional sources of the law), then “a jurist

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167. See SAFRAN, *supra* note 135, at 61. As the author reports, the result of Europeanization in general and British colonization in particular was

that two major trends, destined to be of crucial importance in the evolution of Egypt during the first half of the twentieth century, were formulated during this period. At first they seemed to have much in common, and the men responsible for them at times collaborated with each other; but as they developed and crystallized, they became increasingly alternative and competing platforms. One approach, formulated by Muhammad ‘Abduh and modified by Rashid Rida, spoke for a reformist Islam; the other, formulated by Mustafa Kamil and Lutfi al-Sayyid, promoted a nationalist ideal to which was attached a rationalist liberal philosophy.

*Id.*

168. See *id.*

169. See HALLAQ, *supra* note 26, at 212, 214-20 (providing background on ‘Abduh and Rida). See generally MALCOM KERR, ISLAMIC REFORM: THE POLITICAL AND LEGAL THEORIES OF MUHAMMAD ‘ABDUH AND RASHID RIDA (1966) (reporting that both traditionally trained *‘ulama*, Egyptian Muhammad Abduh (1849-1905) and Syrian Rashid Rida (1865-1935) sought religious reform based on rational exploration of the needs of modern society that did not betray the essential doctrines of Islam).

170. See KERR, *supra* note 169, at 205 (reporting that “[b]y the early 1920’s Rashid Rida was embittered to discover that his most formidable opponents were . . . the Western-educated secularists, who were ready to push his own utilitarian principles beyond the bounds to which his intellectual background restricted him”).

171. See HALLAQ, *supra* note 26, at 212-20.

172. See KERR, *supra* note 169, at 194.

173. See ESPOSITO, *supra* note 5, at 145; Layish, *supra* note 119, at 266-67. As Hallaq put it, “[w]hat Rida excluded from the domain of traditional *qiyas* he replaced by the concept of *maslaha*.” HALLAQ, *supra* note 26, at 217. As Kerr describes it, according to Rida, “*qiyas*, with all that it entailed not only of deductive reasoning but of semantic study of texts of the Qur’an and hadith, was merely a roundabout way of arriving at the same conclusions that could be reached by the equally valid (but much simpler) process of *istislah*.” KERR, *supra* note 169, at 194.

should select an interpretation that best accorded with the public interest (*maslahah*).”<sup>174</sup>

These Islamic modernists, as they came to be called, also articulated and rationalized the doctrine of *supra-madhab*.<sup>175</sup> Abduh argued that the state should not be confined to the rules of one *madhab* but should be free when appropriate to seek the rules for its purposes in the doctrine of any school of law.<sup>176</sup> This legal strategy was eventually incorporated and standardized in the statutes regulating the family in Egypt,<sup>177</sup> producing a now very familiar figure in Egypt as well as in the rest of the Arab world: the contemporary religious jurist, legal adviser to the Ministry of Justice on family law whose whole training and legal sensibility is that of *supra-madhab*.<sup>178</sup> In fact, one could say that the dominance of the *supra-madhab* sensibility among almost all of the contemporary religious jurists represents the last blow dealt to the Taqlid system, with the latter’s intricate distribution of legal activity among several schools of law.<sup>179</sup>

It is unfortunate that the propagation of the *supra-madhab* legal sensibility may be the only tangible result of the Islamic

174. ESPOSITO, *supra* note 5, at 145.

175. Anderson, *supra* note 2, at 223. Anderson reports the following of Abduh and his contemporaries:

Why, they argued, should the courts always be required to follow the dominant opinion in the Hanafi school—particularly in matters such as the judicial divorce of misused wives, where the dominant Hanafi doctrine is rigid in the extreme, and some of the other schools much more liberal? Had not the individual Muslim in his private life always enjoyed considerable latitude as to which school he would follow, whether in general or in any particular question . . . was there not considerable authority for the proposition that it was within the competence of the ruler, when public interests so required, to require his courts to abandon the dominant opinion of the school they normally follow in favour of the ruling of some other reputable juristic authority of the past?

*Id.*; see MAHMOOD, *supra* note 118.

176. See Anderson, *supra* note 2, at 223.

177. For an example of such a statute, see HALLAQ, *supra* note 26, at 210.

178. See MAHMOOD, *supra* note 118, at 6. The author’s assertion that such efforts involve *ijtihad* in the classical sense, however, can be disputed. See *id.* The author claims that “[t]he jurists of the time, while advising the state, have arrived at their conclusions through the Islamic processes of *ijtihad* (search for required legal solutions of newly arising problems), having recourse where necessary to the Islamic doctrines of *masalih al-mursala* (public interest) and *siyasa shar’iyya* (state’s legal policy).” *Id.*

179. *Supra-madhab* sensibility permeates family court cases in Egypt decided by otherwise secular judges. For court decisions that are evidence of such judicial leanings, see PRINCIPLES OF SHARIA ADJUDICATION OVER FIFTY YEARS (MABADI AL-QADA AL-SHARI) 657-59 (Ahmad Nassr al-Jundi ed., 1974) (on file with author). Thus contemporary Egyptian judges are as much at ease quoting passages from Hanafi medieval treatises as they are quoting Maliki works.

modernizing project of Abduh and his contemporaries.<sup>180</sup> In fact, some historians of Islamic law argue that contrary to these modernizers' intentions, rather than providing the basis for a new modernized Islamic law, their critique of Usul and the alternative methods for lawmaking that they proposed ultimately provided the methodological rationalization for the European-influenced secular legal system in Egypt.<sup>181</sup> Moreover, the institutional proposals of these modernizers tended to copy the models of the institutions of the liberal state but with Islamic names, lending further legitimacy to the legal institutional structure already in place in Egypt.<sup>182</sup>

The second group of legal elites to emerge during British colonial rule was the secular nationalists, descendants of the lawyers trained in the Capitulations as well as the earlier national court system.<sup>183</sup> These lawyers were educated either in Europe or in the modern law schools set up in various Egyptian universities.<sup>184</sup> The curriculum of these law schools was at this time (and still is today) based primarily on European civil law.<sup>185</sup> These lawyers constituted an emergent power around the turn of the century and spearheaded, either as students or as professionals, the nationalist movement agitating against British colonialism (as well as against Egyptian royalty.)<sup>186</sup> The rhetoric of the secular nationalists included the liberal discourse

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180. See HALLAQ, *supra* note 26, at 258-62; Layish, *supra* note 119.

181. See Layish, *supra* note 119, at 267-73. The author's critique of the Islamic modernists' project and its results is summarized as follows:

The liberally-oriented modernist movement in Islam, founded by Muhammad 'Abduh, has failed signally. It has not succeeded in achieving its main objective, viz. reshaping Islamic doctrine so as to adapt it to the requirements of modern society. . . . They sincerely strove to renew Islamic law from within through its authorized functionaries. Not only did this endeavor miscarry, but the ideological infrastructure and technical procedural mechanism created by them for this purpose caused, on the one hand, a disruption of traditional Islamic legal doctrine and, on the other, prepared the ground for intensive parliamentary secular legislation.

*Id.* at 263. Thus, the author reports that, "[t]he modernists unwittingly made an appreciable contribution to the secularization of Islamic law." *Id.* at 267.

182. See *id.*

183. See Creelius, *supra* note 4, at 77-78. As the author reports, "[t]he second half of the nineteenth century appears to be the key period of secular gestation . . . when new institutions, concepts, and elites coalesced to form the basis of a modern state and society." *Id.* at 77. Thus, there emerged a "modernizing native elite . . . and the spread of Western political concepts" among them. *Id.* at 78.

184. See ZIADEH, *supra* note 153, at 63.

185. This was (and still is) necessitated, of course, by the fact that most laws in place in Egypt were (and still are) transplants of European civil law, the only exception being the law of personal status.

186. See ZIADEH, *supra* note 153, at 63.

of constitutional rights.<sup>187</sup> For the nationalists, the system of Capitulations came to symbolize not modernity and universalism but imperialism and violation of Egypt's sovereignty.<sup>188</sup> Sanhuri, the Egyptian jurist assigned the task of drafting a new Civil Code for an independent Egypt (promulgated in 1948) was a decided member of this group of elites, sharing its Europe-identified but also paradoxically nationalist liberal consciousness.<sup>189</sup>

Just as the Islamic modernists had to contend with "legal liberalism" as the emergent norm among the competing secular elites, so did Sanhuri have to contend with the demands (claims) made by the Islamic modernizers about the role of Islamic law in the Egyptian legal system.<sup>190</sup> His Civil Code drafting project was marked

187. See *id.* at 67-68; see also Crecelius, *supra* note 4, at 82 ("[A] secular political theory, derived entirely from the West and resting on the concepts of constitutionalism, consultative or representative government, nationalism, and popular sovereignty, evolved in the latter part of the nineteenth century and gained rapid acceptance. . .").

188. See ZIADEH, *supra* note 153, at 100.

During the 1800s Egypt had been intent upon emulating Europe and had been ready to accord legal privileges to its citizens. In the early 1900s, however, the country was swept by a spirit of nationalism which gave precedence to all things national and was aimed at consolidating the basic fabric of the nation. . . . [I]t was natural that the nationalist movement, which was out to abolish the capitulations altogether, also directed its attention to the mixed courts and their gradual elimination.

189. See Enid Hill, *Islamic Law as a Source for the Development of a Comparative Jurisprudence, the 'Modern Science of Codification' (1): Theory and Practice in the Life and Work of 'Abd Al-Razzaq Ahmad Al-Sanhuri*, in ISLAMIC LAW: SOCIAL AND HISTORICAL CONTEXTS 148-49 (Aziz Al-Azmeh ed., 1988).

190. See Amr A. Shalakany, *The Analytics of the Social in Private Law Theory: A Comparative Study* 223-231 (April 5, 2000) (unpublished SJD dissertation) (on file with author). J. N. D. Anderson reports:

The responsibility for drafting this new code was entrusted to a committee under the chairmanship of 'Abd al-Razzaq Ahmad al-Sanhuri Pasha. Their work was much discussed, both in the press and among experts; their draft was extensively debated, both in the Senate and the Chamber of Deputies; and the code was eventually promulgated in July 1948, and brought into operation on 15 October 1949. Considerable publicity was given at the time, moreover, to the fact that the new code had drawn extensively on 'the decisions of Egyptian courts, comparative legislation and the *Shari'a* as its sources of amendment and enrichment. . . . the Explanatory Memorandum states unequivocally that its authors derived from the *Shari'a* 'many of its general concepts and many of its detailed provisions'; the Report of the Committee of Civil Law reiterated this claim and remarked that 'the strengthening of the links between this draft code and the provisions of the *Shari'a* represents a retention of a spiritual heritage which deserves to be preserved and used'; and Sanhuri, when challenged as to why he had not based it more firmly on the *Shari'a*, stated categorically: 'I assure you that we did not leave a single sound provision of the *Shari'a* which we could have included in this legislation without so doing. . . . We adopted from the *Shari'a* all that we could adopt, having regard to sound principles of modern legislation; and we did not fall short in this respect.'

by a preoccupation with incorporating Taqlid rules representing the Islamic in a piece of legislation that he also thought should include the latest and most advanced achievements in codification in the world.<sup>191</sup> An independent Egypt should be one that is both modern but also loyal to its own historical traditions.<sup>192</sup>

Sanhuri's codification strategy attempted to mediate the tension between Taqlid law and European law (seen as "modern" law by the secular elites) by inventing the category of the "social."<sup>193</sup> Influenced by the latest insights of the French sociological school of jurisprudence of the 1920s and 1930s, Sanhuri argued that the most advanced codes were the ones that most closely approached in their rule structure the idea of "the social" (as opposed to the "individualist").<sup>194</sup> Further, he argued that the "social" was what medieval Islamic jurisprudence also based its rules upon.<sup>195</sup> The comparative legal methodology that Sanhuri followed in drafting his Code led him to read the insights of the German code, considered the most advanced at the time, into Taqlid law and to incorporate Taqlid either as discrete rules or by symbiosis through German law.<sup>196</sup> In the end, the Egyptian Civil Code came to reflect a European social agenda embodied in a legal instrument that represented, in the fashion of European codes, the universal, the rational, and the rule of

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Anderson, *supra* note 2, at 227.

191. See Shalakany, *supra* note 190, at 209-14, 223-31; see also Anderson, *supra* note 2, at 227 (quoting Sanhuri that his code mostly relied on existing Egyptian decisions but also incorporated some principles from the *Shari'a*).

192. See Shalakany, *supra* note 190, at 223-31; Anderson, *supra* note 2, at 227.

193. See Shalakany, *supra* note 190, at 208-24. Thus, "according to Sanhuri, the code is at once a 'modern' and 'Islamic' document, and as such represents the ultimate exercise in resolving the tension between modernity and tradition, while at the same time 'socializing' modern law." *Id.* at 224.

194. See *id.* at 209-13.

195. See *id.* at 229-36. Maurits S. Berger describes the doctrine of "public policy" found in the Code. See Maurits S. Berger, *Conflicts Law and Public Policy in Egyptian Family Law: Islamic Law Through the Backdoor*, 50 AM. J. COMP. L. 555, 568 (2002) ("The legal principles which are considered to pertain to public policy are those principles that aim at realizing the public interest, from a political, social as well as economic perspective, which [principles] are related to the highest order of society, and supersede the interests of individuals."). Berger quotes the Explanatory Memorandum (issued by Sanhuri's drafting committee), which explains that "[t]he judge should be cautious not to hold his private opinions on social justice to be the general tendency of public policy and morals. He is obliged to apply the general opinion (*madhhab 'amm*) to which society in its entirety adheres, and not a private individual opinion." See *id.* at 558 n.5, 568 (quoting the Explanatory Memorandum to the Draft Law of the Civil Code, published as part of the parliamentary Collection of Preparatory Works).

196. See Hill, *supra* note 189, at 167-68 (describing the objective nature of Sanhuri's code); see also ZIADEH, *supra* note 153, at 142 (noting that Sanhuri borrowed from up to twenty civil codes from around the world).

law.<sup>197</sup> Contrary to the fashion of European codes, however, Sanhuri did not draft a section on family law as part of his Code.<sup>198</sup> That was to remain the privileged legal domain of Taqlid law.<sup>199</sup>

It is noteworthy to mention that when Sanhuri set out to draft the Civil Code, he had the ambition of drafting a section on family law that would be applicable to both Muslims and Copts in Egypt; however, he eventually dropped this plan.<sup>200</sup> What is significant about this is that it provides a hint as to the way the secular nationalist legal elites regarded the status of family law in the nascent independent state of Egypt.<sup>201</sup>

Sanhuri's desire to include family law in the Civil Code and apply it to both Muslims and Copts reflects the fact that he and other nationalist reconstructive lawyers aspired to overcome and transcend the quality of sectarian specificity that Taqlid law had acquired in the preceding era.<sup>202</sup> The secularist nationalist aspiration considered that, through inclusion in the Civil Code, family would acquire the Code's quality of the universal, becoming thereby applicable to all the citizens (nationals) of Egypt equally. Sectarian law was to them symbolic of a pre-nationalist era in which different sectarian communities applied their own discrete laws, which, to the nationalist secular mind, would be reminiscent of the Capitulations and Consular legal systems, given the fact that it was the reigning logic of sectarianism and the "personality of laws" that rationalized the application of the law of their country of origin to foreign nationals living in Egypt.<sup>203</sup>

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197. See Shalakany, *supra* note 190, at 207; see also Hill, *supra* note 189, at 172 ("Sanhuri himself, writing some twenty years later, says that 'the new Code continues to be representative of Western civil culture, not Islamic legal culture. . . .").

198. See Hill, *supra* note 189, at 167. Although initially Sanhuri proposed the inclusion of personal status laws in the revised civil code, he seems to have given up on the idea of including family law in his codification project. *Id.* On the exclusion of personal status law from the civil code, see MAHMOOD, *supra* note 118, at 2. In addition, for a discussion on the trend extending throughout the Arab world, see *supra* note 151 and accompanying text.

199. LIEBESNY, *supra* note 153, at 136 (reporting that the law of marriage and divorce "is still covered by Islamic legal principles. . . .").

200. See ZIADEH, *supra* note 153, at 117, 138. "Al-Sanhuri proposed the appointment of a committee to codify the entire field of civil law, including personal status. Personal-status law was to be based on the *shari'ah* but to be so designed as to be suitable for non-Muslims as well." *Id.* at 138.

201. See *id.* at 121-23 (noting how reformers intended to radically change the family).

202. See *id.* at 117.

203. See NATHAN J. BROWN, *THE RULE OF LAW IN THE ARAB WORLD* 63 (1997). The author reports that "[c]riticisms of separate courts of personal status emerged as early as the 1890s and grew steadily from the 1930s on." *Id.* at 62. He explains:

Behind most of these criticisms lay the belief . . . that the existence of separate and autonomous personal status courts, with their own laws, procedures,

Ultimately, the closest that the secular nationalist elites came to overcoming the sectarian specificity of Taqlid family law was not by including it in the Civil Code, but by simply incorporating the Taqlid *qadi* courts into the national court system under Nasser in 1955.<sup>204</sup> Although these courts are now part of a unified secular court structure, the family law that they apply still has the quality of religious Taqlid law.<sup>205</sup> The judges who oversee these cases vary in their educational background, with some having graduated from Al-Azhar University, a renowned religious institution (though drastically secularized under Nasser),<sup>206</sup> and others having studied in the law schools of secular Egyptian universities.<sup>207</sup>

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training, and personnel was inconsistent with a unified, centralized, national judiciary. Thus, the dominant attitude toward these courts differed only in degree from nationalist denunciations of the Mixed Courts. Both were seen to limit governmental authority and national sovereignty.

*Id.* at 63.

204. *Id.* at 63, 67-68. As Brown reports, “[i]n justifying abolition in 1955, the government claimed to be removing ‘all traces of exceptional judicial systems with their consequential limitations of governmental authority which tended to undermine the national sovereignty of the country.’” *Id.* at 63.; see also LIEBESNY, *supra* note 153, at 101 (providing the text of the actual law that abolished the Shari’a courts and those of religious minorities, Law No. 462 of 24 September 1955). Gamal Abdel Nasser ruled Egypt from 1952 to 1971. See JOHN L. ESPOSITO & JOHN O. VOLL, *ISLAM AND DEMOCRACY* 173-74 (1996).

205. BROWN, *supra* note 203, at 67-68.

Yet if there was no compromise over the structure of the courts and the unification of the judiciary, the potential opposition (especially the *Shari’a* Courts themselves) was mollified by two concessions rendering the reforms more conservative. First, the content of the law applied by the courts was not changed. Earlier proposals that centered on reform and even unification of Egypt’s personal status law were ignored. Thus objections to the measure on religious grounds were robbed of much of their potency, and had to center not on the law itself but on the judges applying it. With special personal status sections being established within the National Courts, it would now fall to secular judges to apply religious law. Yet even this feature of the unification was made less objectionable to the personnel of the *Shari’a* Courts by the second concession: *Shari’a* judges were transferred to the new personal status sections, and the *Shari’a* bar was allowed to continue to practice in personal status cases.

206. See Crecelius, *supra* note 4, at 86-87.

207. ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK 169 (Abdullahi A. An-Na’im ed., 2002) (noting that although there “are judges trained in *Shari’a* presiding over family law cases within the National Courts . . . appeals are heard by regular judges in the Court of Appeals and then the Court of Cassation”). Although there are judges trained in religious law and familiar with the Taqlid rules residing at the lower levels of the court system, courts of appeal tend to be dominated by judges with a purely secular, non-*Shari’a* training. *Id.*



### D. A Compromise on the Question of Women and the Family

This section argues that dropping family law from Sanhuri's civil code symbolizes a historic abandonment by the male secular legal elites of the question of women.<sup>208</sup> This abandonment allowed them to avoid the agonizing problem of how to reconstruct family law in a manner parallel to that of reconstructing other areas of law, such as contract law. The historical question that remains unanswered is how Sanhuri would have confronted this problem and how he would have used his comparative legal methodology, with its mediation strategies, to construct a family law that is both modern and Islamic. One wonders whether the European liberal feminism of his time would have helped him in the same way the "social" helped him in mediating the reconstruction of contract law. The main legal influences at work in Sanhuri's project were not those of mainstream French legal thought but those of oppositional, generally leftist responses to the mainstream in France represented by the sociological school of Geny and Lambert.<sup>209</sup> It is not clear, however, how sympathetic to feminism Sanhuri and the other Egyptian secular nationalists were.<sup>210</sup>

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208. Author Margot Badran notes that despite the modernization of state and society led by the secular male legal and political elites in Egypt in the nineteenth and twentieth centuries.

The personal status laws, or family laws, became a last bastion of control over women. The patriarchal family would not relinquish this control, nor would the state exact it. Having removed all other areas of law from the jurisdiction of Islam, the state had left Muslim religious authorities in control of Islamic personal status laws.

MARGOT BADRAN, *FEMINISTS, ISLAM, AND NATION* 124 (1995).

209. See Shalakany, *supra* note 190.

210. See Badran, *supra* note 3, at 204. It may be easier to draw links between Egyptian feminism and the Islamic modernists in the late nineteenth and first half of the twentieth century than between feminism and the secular nationalists. See *id.* For instance, one author reporting on the emergence of feminism during this time period in Egypt asserts:

This emergent feminism was grounded, and legitimized, in the framework of Islamic modernism expounded toward the end of the century by Shaikh Muhammad 'Abduh. . . . 'Abduh turned a revolutionary corner when he proposed that believers, by which he meant the learned, could go straight to the sources of religion, principally the Quran and the *Hadith*, for guidance in the conduct of everyday life. Through *ijtihad*, or independent inquiry into the sources of religion, 'Abduh demonstrated that one could be both Muslim and modern and that indeed not all traditional practice was in keeping with Islam. In dealing with gender issues, 'Abduh confronted the problem of patriarchal excesses committed in the name of Islam. He especially decried male abuses of the institutions of divorce and polygamy. The opening out encouraged by *ijtihad* had a number of consequences. While Muslim women's earliest feminist writing

Dropping family law from the Civil Code also meant that it was abandoned to Taqlid law as transformed throughout the past two centuries: first, through the forces of centralization and Europeanization and, second, through the entrenchment of the *supra-madhab* legal sensibility among jurists, as described above. In addition, religious elites came to embrace family law as the last domain of their influence and treated every attempt at statutory reform as another assault on the Islamic by the secular elites running the state.<sup>211</sup> Although the secular male elites exempted family law

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may not have been immediately inspired by Islamic modernism, it was not long before it developed within this framework.

*Id.*

211. See Najjar, *supra* note 1 (noting that statutes aimed to “reform” family law were passed in 1920, 1923, 1929, 1943, 1979, and 1985); see also ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK, *supra* note 207, at 169-70. The analysis of these statutes by various authors is illustrative of this dilemma, demonstrating that reforms were justified and explained using Islamic principles espoused by ‘Abduh and other modernists in an attempt to avoid or answer the attacks of the conservative religious elites. One author reports:

A watershed in Egyptian family law reform occurred when Law No. 25 of 1920 was passed. The enactment of this law, and the second phase of the reform in 1929, resulted in an expansion of divorce rights for women. . . . These reforms were significant, not only for the substantive changes in the law that they effected, but also for the process through which they were achieved. The Egyptian reforms were cloaked under the veil of the ‘acceptable’ reform mechanism of *takhayyur*. By drawing from the liberal tenets of the Maliki school’s divorce law, the Egyptian reforms counteracted the more rigid tenets of the Hanafi school’s divorce law that predominated in Egypt. . . . Relatively recent developments in family law reform are testament to the recyclability of the various legitimating mechanisms for adapting Islamic law to changing circumstances. In 1979, Anwar Sadat issued Law No. 44 by presidential decree during parliamentary recess, as provided for in the Egyptian Constitution, so that the legislature could not block passage of the law. Known as ‘Jihan’s Law,’ . . . the provisions of Law No. 44 gave women further protection in the event of a husband’s subsequent polygamous marriage by affording a woman the right to a divorce, as provided for in the Maliki and Hanbali traditions, should a husband fail to inform his original wife of a subsequent marriage or should such a marriage harm her in any way. Once again, by invoking Maliki and Hanbali teachings, reforms were attempted under the protection of Islamic sanction. . . . As a result of opposition to the reforms, a decree of the Supreme [Constitutional] Court of Egypt struck down Law No. 44 in 1985. . . . [A] new law, resembling the old Law No. 44, was passed. This new law, Law No. 100 [of 1985], is currently the main legislation that determines the rights of women in the family law context.

Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of all Forms of Discrimination Against Women: Are the Shari’a and the Convention Compatible?*, 44 AM. U. L. REV. 1949, 1986-89 (1995). For a discussion of Law No. 25 of 1920, see Anderson, *supra* note 2, at 224-25 (reporting that “Law No. 25 of 1920 had introduced some very welcome reforms in the sphere of marriage and divorce by the simple expedient of adopting a ‘weaker’ Hanafi view, or the dominant view of one of the other Sunni schools, in place of the dominant Hanafi doctrine”).

from the project of legal reconstruction of the Civil Code, they nevertheless chose to support piecemeal reform legislation on the issue.<sup>212</sup> Each piece of legislation, in turn, opened up a confrontation with a religious elite that was already anxious about its limited jurisdiction, translating every attack on the patriarchal as an attack on the Islamic.<sup>213</sup>

It is interesting that the main ideological driving force behind these statutory reforms was Egyptian secular feminism, which rose and came into prominence during the first half of the twentieth century.<sup>214</sup> While the male secular elites allied themselves politically

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Anderson also discusses the statute passed in 1923, concerning minimum age for marriage. *See id.* at 225 (“[I]n 1923, the registrars of marriages had been forbidden to register any union in which the bride and bridegroom had not reached the age of 16 and 18 respectively”; and the *Shari’a* Courts “were also precluded from hearing any matrimonial cause whatever where the parties had not reached these ages at the time of litigation.”). Regarding the 1929 law, the author adds:

As for a husband’s unilateral repudiation of his wife, the expedient of an eclectic choice between the doctrines of the different schools and jurists was stretched, in the provisions of Law No. 25 of 1929, to include certain dicta attributed to early jurists before the schools had crystallized, together with opinions put forward by certain radical thinkers of a rather later period, with the result that most forms of repudiation which the husband did not really intend to be effective were henceforth deemed not to end the marriage relationship.

*Id.* For a discussion of the overturning of Law No. 44 of 1979 (Jihan’s Law) in 1985 and the subsequent passage of Law 100 a few months later, see Badran, *supra* note 3, at 225. *See also* Adrien Katherine Wing, *Custom, Religion, and Rights: The Future Legal Status of Palestinian Women*, 35 HARV. INT’L L.J. 149, 171 (1994). Wing, after describing in detail the changes made to personal status law by the provisions of Law No. 44, notes that “[u]nder great pressure from traditionalists, the [Supreme] Constitutional Court overturned these amendments on procedural grounds in 1985. The Parliament subsequently passed a nearly identical law. . . .” *Id.*

212. *See* J. N. D. Anderson, *Law as a Social Force in Islamic Culture and History*, 20 BULL. OF THE SCH. OF ORIENTAL & AFR. STUD. 13, 27 (1957) (reporting that “piece-meal reforms in the law of marriage and divorce were introduced in Egypt in 1920, 1923, and 1929, to be followed in 1943 . . .”). This trend is not limited to Egypt. Wing, *supra* note 211, at 165 (reporting that “[a]s early as the nineteenth century, Muslim feminists, liberals, and leftists called for *sharia* reform, particularly in the area of personal status”). Today, all Muslim states, with the exception of Saudi Arabia, have enacted some type of reform, albeit in piecemeal fashion. *Id.*

213. *See* Najjar, *supra* note 1; *see also* Susan E. Marshall & Randall G. Stokes, *Tradition and the Veil: Female Status in Tunisia and Algeria*, 19 J. MOD. AFR. STUD. 625, 628 (1981) (noting that certain groups of elite, particularly in “late-developing” or “new” States, frequently engage in the “selective affirmation of tradition, wherein certain features of the traditional value system are plucked out, and symbolically heightened so as to serve as an ideological centre-piece”). This tendency would be heightened in the case of the religious elite because their very livelihood and role or position in society is conceived to be under attack when family law reform is proposed.

214. Badran, *supra* note 3, at 208. The author reports that “[f]rom 1923, feminism crystallised around a set of demands, a broad agenda of claims for political, social, economic, and legal rights. However, initial priority was given to women’s

with the agitating Egyptian secular feminists (along with some enlightened *ulama*), they nevertheless always ended up following the strategy of splitting the difference between the demands of the conservative religious elites and those of the feminists—a strategy followed by judges as well as legislators.<sup>215</sup> This strategy has meant that the march toward a legal liberal feminist understanding of the family, which was the political agenda underlying Egyptian feminism, was continuously disrupted.<sup>216</sup> One of the most striking features of the debate on family law in Egypt is the relative stability of its terms throughout the twentieth century.<sup>217</sup>

In the debate concerning family law in Egypt, both during the process of modernization that took hold during the independence era as well as in current times, feminists pushed for legal reform of Taqlid rules that established inequality in the family.<sup>218</sup> Their demands included a prohibition of polygamy, equal access to divorce for women and men, an increase in the financial rights of women, elimination of child marriage, and the end to the legal institution of obedience within marriage.<sup>219</sup> On the other hand, there were (and indeed still are) religious elites, allied over time with different religious groups, declaring every one of these demands to be an assault on a God-given right.<sup>220</sup> In the middle were the secular male

education followed by new work opportunities and the reform of the personal status law.” *Id.* Badran notes that some of the demands put forth by the feminists were “granted relatively easily, such as equal secondary school education for girls and raising the minimum marriage age for both sexes (achieved in 1923 and 1924 respectively).” *Id.* For a more complete account of Egyptian feminism by the author, see BADRAN, *supra* note 208.

215. See generally BADRAN, *supra* note 208; Badran, *supra* note 3.

216. See Badran, *supra* note 3, at 202 (“Whatever their competing interests, the state and religious forces have retained patriarchal forms of control over women.”).

217. See Abu-Odeh, *supra* note 1; Najjar, *supra* note 1.

218. For an account of early feminists, such as those who formed the Egyptian Feminist Union (EFU), and their struggle for family law reform in the first half of the twentieth century, see BADRAN, *supra* note 208, at 124-35. For a discussion of the continuation of their struggle in the second half of the twentieth century, including the promulgation by President Sadat of Jihan’s Law and its subsequent repeal, see Najjar, *supra* note 1. For an overview of liberal feminist approaches to family law reform, see Abu-Odeh, *supra* note 1.

219. See BADRAN, *supra* note 208, at 124-35; ESPOSITO, *supra* note 5, at 48-49, 58-59.

220. See, e.g., Najjar, *supra* note 1. Analyzing debates arising from attempts to reform family law in Egypt in the twentieth century, Najjar gives various accounts of religious elite arguing against what they considered attacks on men’s God-given rights. For instance, during the debate concerning Law 44 of 1979, or Jihan’s Law, the author reports that Muhammad Khamis, an attorney and head of the “fundamentalist organization” Muhammad’s Youth (*Shabab Sayyidna Muhammad*)

charged that to decree that a wife has the right to seek divorce if her husband exercises his *Shari’a* prerogative to marry another ‘is to repudiate polygamy, and Islam, which legalizes it. . . .’ Khamis charged that the law ‘closes the door

elites who were busily splitting the difference between the demands of the two as legislators and judges by restricting but not outlawing polygamy; adding more grounds for wives to be granted divorce, yet not equalizing access to it; and reinterpreting and restricting the terms of the wife's obedience but not abolishing it.<sup>221</sup> Unfortunately for Egyptian feminists, the light of liberal feminism remains teasingly quivering at the end of the tunnel, as it has been for decades.

### III. LEGISLATING THE FAMILY

During the processes of legal change that took place in Egypt in the nineteenth and twentieth centuries, Taqlid law was transformed, not only as a legal system per se, but also *doctrinally*, as it was incorporated into modern legislation. To understand this process, it is useful to compare and highlight changes in Taqlid in Egypt with what took place in Jordan and Tunisia. In addition, it is also useful to understand the doctrine of the Hanafi school of law related to the family, as codified by the Egyptian Qadri Pasha in the late nineteenth century, when codification of laws as legislative style became dominant in Egyptian legal culture.<sup>222</sup> His codification of Hanafi doctrine never became official law in Egypt,<sup>223</sup> but it is interesting to consider because codification resulted in a concise and accessible account of the doctrine, which otherwise sits in multiple medieval treatises and commentaries and is hard to access without elaborate effort.<sup>224</sup> Hanafi doctrine constitutes the background body of rules that the modern Egyptian statutes are seen as departing from and intervening in. Likewise, Hanafi doctrine greatly influenced the Jordanian legislature when it set out to comprehensively codify

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completely in the face of those who would like to marry another wife according to God's Book and the Traditions of His Prophet. . . .

*Id.* at 325.

221. See ESPOSITO, *supra* note 5, at 58-61.

222. See NASIR, *supra* note 10, at 35-36. As the author reports, in Egypt, "the eminent jurist Muhammad Qadri Pasha compiled in 1893 *The Sharia Provisions on Personal Status*, a book of 646 Articles on marriage, divorce, gift, interdiction, wills and inheritance, all based on the Hanafi doctrine." *Id.*

223. EL ALAMI & HINCHCLIFFE, *supra* note 3, at 51.

224. Codification as style may have greatly distorted the complexity of the Hanafi doctrine produced under the Taqlid legal system. The code's style of enlisting abstract general rules may very well be detrimental to a doctrine expressed in response to specific questions or hypothesis and able to tolerate a great degree of conflict and contradiction.

family law.<sup>225</sup> Hanafi doctrine can also be used comparatively to show how far modern Arab legislatures have departed from the legislative model on the family contemplated by the Taqlid legal system.

Tunisia provides an interesting instance of legislating liberalism in family law that has no parallel anywhere in the Arab world.<sup>226</sup> However, the doctrine that historically prevailed in North Africa and that influenced Tunisian legislation on the family was that of the Maliki school and not that of the Hanafi.<sup>227</sup>

The data from this comparative analysis has been summarized in the table below. The table is followed by a discussion of the information.

### A. Comparative Data

Issue	Qadri Pasha's <i>Shari'a Provisions on Personal Status (Compiling Hanafi Doctrine)</i> <sup>228</sup>	Egypt	Jordan	Tunisia
1. Father's Consent to Daughter's Marriage <sup>229</sup>	- Under Article 51 of Pasha's rules, the father's consent is not required if the daughter is of	- Unregulated by statute. The rule under Hanafi doctrine governs by default. <sup>233</sup>	- Under the dictates of Jordanian Personal Status Law No. 61 (1976), the	- Under Article 3 of the Tunisian <i>Majallah</i> (Code) of Personal Status, (Decree 13, 1956), the father's consent

225. See Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 7 (1997); see also Wing, *supra* note 211, at 160 (reporting that the 1976 Jordanian Law of Personal Status "is based upon the Hanafi school of jurisprudence").

226. See Mounira Charrad, *Repudiation versus Divorce: Responses to State Policy in Tunisia*, in WOMEN, THE FAMILY, AND POLICY 51 (Esther Ngan-ling Chow & Catherine White Berheide eds., 1994).

Reform of family law in Tunisia constitutes an interesting case of intended and dramatic innovation in the legal norms governing gender relations and family life. It is an example of a government enacting a law as an instrument of social change in an Islamic country where family matters had been regulated by traditional Islamic legal doctrine. Gaining significance outside of Tunisia, the reforms became a model for advocates of women's rights elsewhere in the Islamic world.

227. See MOUNIRA M. CHARRAD, STATES AND WOMEN'S RIGHTS 31 (2001) (noting the "overwhelming presence of Malikism" in the Maghribi region, which includes Tunisia, Algeria and Morocco).

228. QADRI PASHA, AL-AHKAM AL-SHARIYYAT FI AL-AHWAL AL-SHAKHSIYYAT ALA MADHHAD AL-IMAM ABI HANIFA AL-NUMAN (1997) (on file with author).

229. I use the term "father" to refer to "guardian," the latter being the legal term referring to one who plays this role. In the absence of the father, another male relative replaces him as the substitute-father.

230. See PASHA, *supra* note 228, at 114.

231. See *id.* at 110.

232. See *id.* at 112.

233. EL ALAMI & HINCHCLIFFE, *supra* note 3, at 51.

	majority age. <sup>230</sup> - Under Articles 34 <sup>231</sup> and 44, <sup>232</sup> however, the father can contract the marriage of a minor daughter even by force.		guardian's consent is required in all cases; <sup>234</sup> however, under Article 13, an exception is made if the woman is of majority age and has been married before. <sup>235</sup>	is not required if the daughter is of majority age. <sup>236</sup> - However, under Article 6, the consent of both the father and the mother is required for the marriage of a minor child. <sup>237</sup>
<b>2. Kafa' Doctrine</b>	- Under Article 52 of Pasha's rules, if the daughter marries one who is not her equal against her father's wishes, the contract is void. <sup>238</sup>	- Unregulated by statute. Rule under Hanafi doctrine governs by default.	- Under Article 22 of the Jordanian Code, if a woman denies having a guardian and marries, and then her guardian appears, he can dissolve her marriage on the basis of "inequality." <sup>239</sup>	Non-existent.

Prior to codification, Egyptian personal status law had been based primarily on the Hanafi school. The first laws to be introduced had drawn from all the schools of law, but it was provided in Law No. 78 of 1931 that in the event of no textual provision existing, reference was to be made to the most appropriate opinion of Abu Hanifa.

234. *See id.* at 81. Articles 9-12 set the rules for "Guardianship in Marriage." Article 9 declares that "[t]he marriage guardian shall be a male agnate in the order set down in the most appropriate opinion of the Madhhab of Abu Hanifa." *See id.* Under Hanafi rules, the father has first priority for guardianship; in his absence, the paternal grandfather has priority. *See id.* In addition, Article 6 discusses the procedure by which a judge may at times conduct a marriage despite the opposition of the guardian. *See id.* at 80.

235. *See id.* at 82.

236. *See id.* at 239.

237. *See id.* at 240. The text of Article 6 given by the authors does not reflect the change made in the law in 1993 to require the consent of the mother as well as that of the guardian in such cases; reference to the 1993 change can be found in ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK, *supra* note 207, at 182-83.

238. *See PASHA, supra* note 228, at 114. According to Article 63 of Pasha's rules, equality includes consideration of lineage (which includes "Arabness" and Islam), wealth, "goodness," and profession. *See id.* at 117.

239. *See EL ALAMI & HINCHCLIFFE, supra* note 3, at 85. Article 20 of the Code defines equality in terms of wealth, meaning he is capable of paying the dowry and maintaining the wife. *See id.* at 84. The husband's equality is measured *only* at the time of the marriage contract. *See id.* Article 20 reads as follows:

It shall be required for the marriage to be binding that the man be of equal status to the woman in financial terms, that is the husband should be able to provide the immediate portion of the dower and maintenance for the wife. Equality shall be observed at the time of the contract but if it ceases thereafter this shall have no effect on the marriage.

<p><b>3. Maintenance of Wife</b></p>	<p>- Under Article 160 of Pasha's rules, maintenance, which is the obligation of the husband, is earned by the wife from the date of the contract. <b>240</b></p> <p>- Under Articles 171 and 169, the wife loses her maintenance if she leaves the house or works without her husband's permission. <b>241</b></p> <p>- According to Article 150, the specific elements of maintenance are food, clothing, and residence. <b>242</b> Medical expenses are not specified as being a necessary part of maintenance. <b>243</b></p>	<p>- Under Article 1 of Law No. 100 (1985), maintenance, which is the obligation of the husband, is earned by the wife from the date of contract. <b>244</b></p> <p>- Article 1 provides that the wife loses her maintenance if she leaves the house without her husband's permission <b>245</b> or if she works and it is judged that her work involves "abuse of the right" or that it is contrary to the interests of the family, provided that in both cases her husband requests she stops working. <b>246</b></p>	<p>- Under Article 35 of the Jordanian Code, maintenance, which is the obligation of the husband, is earned by the wife from the date of contract. <b>247</b></p> <p>- Under Article 69 of the Jordanian Code, the wife loses maintenance if she leaves the house without any legal excuse, <b>248</b> or when she prevents her husband from entering a home that she owns. <b>249</b></p> <p>- Under Article 68 of the Code, she also loses</p>	<p>- Under Article 23 of the Tunisian Majallah, the husband is the "head of the family," and he is responsible for the maintenance of his wife and children. <b>251</b></p> <p>- Also under Article 23, the wife has to contribute to the maintenance of the family if she has money. <b>252</b></p>
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*Id.*

240. See PASHA, *supra* note 228, at 145.

241. See *id.* at 147.

242. See *id.* at 143.

243. See *id.*

244. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 52. Under Article 1 of Law No. 100 (1985), the wife earns her maintenance once she "submits" herself to her husband, even if by law and not actually. See *id.* In all references to Law 100 of 1985, the author is referring to the laws of personal status as they read today because of the amendments made by Law 100; thus, they are technically the articles of Law 25 of 1929, as amended by Law 100 of 1985.

245. See *id.* Under Article 1, an exception is made for those times when she leaves the house for reasons allowed by virtue of law or custom, or due to necessity. See *id.*

It shall not be deemed grounds for forfeit of maintenance if the wife leaves the matrimonial home without the permission of her husband in circumstances in which this is permitted by a rule of the Shari'a for which there is some text or prevailing custom or where this is required by necessity.

*Id.*

246. See *id.* at 52-53. Article 1 also dictates that she loses her maintenance if she commits apostasy or refuses to "submit" herself to her husband without any legal reason, or is obliged to do so for reasons outside her husband's control. See *id.* at 52.

247. See *id.* at 88.

248. See NASIR, *supra* note 10, at 100. The Code does not define what this legal excuse might be.

249. See *id.*

250. See *id.*

251. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 243.

252. See *id.*



			maintenance if she works outside the house without her husband's permission. <sup>250</sup>	
<b>4. Discipline of Wife by Husband</b>	- Under Article 209, the husband has the right to discipline his wife for "trespasses" not punishable by <i>hadd</i> , <sup>253</sup> but the same article establishes that he cannot beat her severely under any circumstance. <sup>254</sup>	- Unregulated by statute. Hanafi rule governs by default.	- Unregulated by the Jordanian Code, except for the declaration in Article 69 that the wife has the right to be "disobedient" without losing her maintenance by leaving the house if her husband beats or mistreats her. <sup>255</sup>	- Under Article 23 of the Tunisian Majallah, both spouses are obligated to treat each other well and avoid inflicting any harm on each other. <sup>256</sup>
<b>5. Polygamy</b>	- Under Article 19 of Pasha's collection, a man may have up to four wives. <sup>257</sup>	- Under Article 11 of Law No. 100 (1985), a man may marry up to four wives, but he has to inform both his current and future wives of the other marriage(s). <sup>258</sup>  - Under Article 6 of Law No. 100 (1985), the wife can request a divorce if she can prove harm, material or emotional, resulting from the new marriage. <sup>259</sup>  - In addition, under Article 11, the new wife can request a divorce if she learned after the marriage that her	- Under Article 28 of the Jordanian Code, a man may have up to four wives. <sup>261</sup>  - However, under Article 19(1), the wife can stipulate in the marriage contract that he cannot take another wife; if he does so regardless, the marriage contract with the stipulation is dissolved and the wife retains all her financial rights. <sup>262</sup>	- Under Article 18 of the Tunisian Majallah, polygamy is prohibited and is punishable by one-year imprisonment and/ or a fine of 240,000 francs. <sup>263</sup>

253. See PASHA, *supra* note 228, at 157. "Hadd" is an Islamic punishment decreed by the Quran for a specific set of crimes such as homicide, highway robbery, drinking wine, and adultery. See SCHACHT, *supra* note 14, at 175.

254. See PASHA, *supra* note 228, at 157.

255. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 95.

256. See *id.* at 243.; see also ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK, *supra* note 207, at 183 (noting that the Tunisian Majallah requires "spouses to treat each other well" during marriage).

257. See PASHA, *supra* note 228, at 107.

258. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 58.

259. See *id.* at 56.

260. See *id.* at 58.

261. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 86; NASIR, *supra* note 10, at 67.

262. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 83-84.

263. See *id.* at 242; NASIR, *supra* note 10, at 67.

		husband had other wives. <sup>260</sup>		
<b>6. Divorce by Wife</b>	<p>- Under Article 260 of Pasha's collection, a husband can delegate to his wife the right to divorce.<sup>264</sup></p> <p>- Article 273 also provides for <i>khul</i>, whereby a wife can buy her freedom from the marriage by giving up some or all of her financial rights.<sup>265</sup></p> <p>- In addition, under Article 298, a wife can request a divorce if her husband is only capable of anal intercourse.<sup>266</sup></p>	<p>- Under Article 4 of Egyptian Law No. 100 (1985), a judge can grant a wife a divorce for continual failure by her husband to provide maintenance,<sup>267</sup> and under Article 9, if her husband suffers from a serious disease.<sup>268</sup></p> <p>- Under Articles 12 and 13 of Egyptian Law No. 100 (1985), the wife can get a divorce in case of long absence of husband, and under Article 14, in case of his imprisonment.<sup>269</sup></p> <p>- Under Article 6, in case of harm inflicted by the husband, the wife can also get a divorce.<sup>270</sup></p> <p>- Hanafi grounds for divorce are also available to the wife.</p> <p>- Because of changes made in Egyptian procedural personal status law in 2000, women can now apply for <i>khul</i> divorce.<sup>271</sup></p>	<p>- Under Article 19(i) of the Jordanian Code, a husband can delegate to his wife the right to seek divorce without his consent.<sup>272</sup></p> <p>- Consensual divorce (<i>khul</i>) is provided for in Articles 103-109.<sup>273</sup></p> <p>- Under Article 115, a woman has the right to request a divorce if her husband has an incurable disease.<sup>274</sup> Other grounds include, under Article 120, insanity;<sup>275</sup> under Article 130, his imprisonment;<sup>276</sup> and under Article 123, his absence.<sup>277</sup> In addition, under Article 127, a wife can request a divorce if her husband does not pay maintenance,<sup>278</sup> and under Article 132, if he inflicts harm on her.<sup>279</sup></p>	<p>- Under Article 31 of the Tunisian Majallah, divorce is available for both spouses either through mutual consent, if either can prove the other harm inflicted by other, or upon the husband's desire or wife's request.<sup>280</sup></p>

264. See PASHA, *supra* note 228, at 170-71.

265. See *id.* at 174. When seeking a '*khul*' divorce, a woman in general agrees to give up some or all of her financial rights in exchange for an exit from the marriage. The woman does not have to base her request on one of the grounds for divorce established by the law. As one author put it, "[a]part from the divorce effected by the husband, marriage may be dissolved by mutual consent by the wife giving the husband something for her freedom. . . ." NASIR, *supra* note 10, at 115.

266. See PASHA, *supra* note 228, at 179.

267. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 53.

268. See *id.* at 54.

269. See *id.* at 59.

270. See *id.* at 56.

271. See Reem Leila, *Before you sign on the dotted line . . .*, AL-AHRAM WEEKLY, June 22-28, 2000, at <http://weekly.ahram.org.eg/2000/487/li2.htm>; Mariz Tadros, *The beginning or the end?*, AL-AHRAM WEEKLY, Mar. 9-15, 2000, at

<p><b>7. Woman's Financial Rights after Divorce</b></p>	<p>- Under Article 311 of Pasha's collection, a woman has a right to maintenance during her waiting period of three menstrual cycles (<i>idda</i>).<sup>281</sup> Under Article 316, if she is pregnant, she is entitled to</p>	<p>- The wife has all of the financial rights given to her under Hanafi doctrine.  - In addition, under Article 18 of Law 100 (1985), she has the right to maintenance for at</p>	<p>- The wife has all of the financial rights given her under Hanafi doctrine.  - In addition, under Article 134 of the Jordanian Code, if she</p>	<p>- Under Article 35 of the Tunisian Majallah, the wife has the right to maintenance during her waiting period of three months (<i>idda</i>) unless she's pregnant, in which</p>
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<http://weekly.ahram.org.eg/2000/472/fr2.htm>; Mariz Tadros, *Freedom—at a price*, AL-AHRAM WEEKLY, May 25-31, 2000, at <http://weekly.ahram.org.eg/2000/483/li1/htm>; Tadros, *supra* note 7; see also Susan Sachs, *Egypt's Women Win Equal Rights to Divorce*, N.Y. TIMES, Mar. 1, 2000, at A1.

With the new law, a woman will be able to divorce her husband, with or without his assent. . . . Even with Egypt's new law, a wife who wants a divorce over the objections of her husband will have to return to him any money or property that he paid her upon the marriage.

272. See LYNN WELCHMAN, *BEYOND THE CODE: MUSLIM FAMILY LAW AND THE SHAR'IA JUDICIARY IN THE PALESTINIAN WEST BANK* 260 (2002). Article 19 reads as follows: "If a condition is stipulated in the contract that is of benefit to one of the parties, is not inconsistent with the intentions of marriage, does not impose something unlawful and is registered in the contract document, it shall be observed. . . ." *Id.* As another author describes it, "[t]he law also allows the wife to make certain stipulations in the marriage contract that may create rights. She may specify in the marriage contract that she can obtain a divorce without resorting to judicial proceedings. . . . Although legally permitted, such stipulations are rarely made, due to either a reluctance to defy local custom or a lack of knowledge about this option." Wing, *supra* note 211, at 162-63.

273. For a discussion of these Articles, see WELCHMAN, *supra* note 272, at 272-76. Under Jordanian law, as under the Taqlid rules, for a wife to get a *khul* divorce, the consent of the husband is required. Thus, the husband cannot be obliged to agree to the divorce. As the author put it, under Jordanian law, "[i]t is not therefore a case of the wife having a guaranteed 'right' to obtain a *talaaq* [divorce] from her husband by giving up her financial rights. . . ." See *id.* at 273. In addition, under Article 102 (b) of the Jordanian Code, "if the woman is under the age of legal majority (*rushd*), then the *khul*' is not valid unless her legal guardian (*wali al-'amr*) gives his consent to her renunciation of her rights." *Id.* at 275. Recently, a "temporary law" was passed by the Jordanian government, with the public support of the King and Prime Minister, while the parliament was in recess, to allow women to file for a *khul* divorce without their husband's consent. When the Parliament convened at the end of the summer, however, it was rejected. For a discussion of this law, see *Divorce Blow for Jordan Women*, BBC NEWS WORLD ED., Aug. 4, 2003, available at [http://news.bbc.co.uk/2/hi/middle\\_east/3123661.stm](http://news.bbc.co.uk/2/hi/middle_east/3123661.stm). See also *Jordan Woman Wins Right to Divorce*, BBC NEWS, May 13, 2002, available at [http://news.bbc.co.uk/2/hi/middle\\_east/1985271.stm](http://news.bbc.co.uk/2/hi/middle_east/1985271.stm).

274. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 103.

275. See *id.* at 105.

276. See *id.* at 107.

277. See *id.* at 105.

278. See *id.* at 106.

279. See *id.* 108-09. For a lengthy discussion of this Article, see WELCHMAN, *supra* note 272, at 285-87. For a discussion of all the grounds for divorce available to the wife, see Wing, *supra* note 211, at 162.

280. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 245.

281. See PASHA, *supra* note 228, at 183.

	<p>maintenance for the entire term of her pregnancy.<sup>282</sup></p> <p>- Under Article 106, the wife also has a right to her deferred</p>	<p>least two years if she was divorced against her will.<sup>288</sup></p> <p>- Also, under Article 10 of Law 100 (1985), when a wife</p>	<p>claims she was harmed because she was divorced against her will, she has the right to up to one year of</p>	<p>case the maintenance covers the term of her pregnancy.<sup>292</sup></p> <p>-She also has the right to her</p>
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282. See *id.* at 184.  
 283. See *id.* at 129.  
 284. See *id.* at 133.  
 285. See *id.* at 174-79.  
 286. See *id.* at 174.  
 287. See *id.* at 175.  
 288. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 60.  
 289. See *id.* at 57.  
 290. See *id.* at 109. The Article reads as follows:

If the husband divorces his wife arbitrarily (*ta'assufan*), such as if he divorces her for no good reason (*sabab ma'qul*), and she applies to the *qadi*, he shall award her against the man who divorced her such compensation (*ta'wid*) as he considers appropriate, provided that it shall not exceed the amount of her maintenance for one year . . . . This shall not affect the rest of the matrimonial rights of the divorced woman, including maintenance for the *'idda* period.

WELCHMAN, *supra* note 272, at 339.

291. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 108.  
 292. See *id.* at 246.  
 293. See Majallat Al-Ahwal Al-shakhsiyya [Tunisian Family Code], art. 13, at 30 (Muhammad Al-Habeeb Al-Shareef ed., 1997) (Tunis.) (on file with author).  
 294. See WANI, *supra* note 73, at 204. The relevant provision reads as follows:

As regards the women to be indemnified for material injury in terms of money, the same shall be paid to her after the expiry of *iddat* and may be in the form of retention of the matrimonial house. This indemnity will be subject to revision, increase or decrease in accordance with the changes in the circumstances of the divorced wife until she is alive or until she changes her marital status by marrying again. If the former husband dies this indemnity will be a charge on his estate. . . .

*Id.*; see also NASIR, *supra* note 10, at 121. As Nasir describes:

The new Article 31 as amended under Act No. 7/1981 rules that the injured spouse shall be granted damages for any material or moral injury inflicted as a result of divorce at the request of either party. The woman shall receive damages for any material injury in the form of a monthly allowance, to run after the expiry of the *iddat*, to secure for her the same standards of living she was accustomed to during her marriage. Such an allowance shall be liable to revision upwards or downwards as circumstances change, and shall continue for the lifetime of the divorcee or until she remarries and her social status changes, or on acquiring such property as to enable her to do without such an allowance.

*Id.* In addition, Mounira Charrad described the amendment to the Tunisian Code, the 1981 law on divorce, as significant because it "introduces the possibility of 'life-long alimony' for a divorced woman. (Prior to 1981, compensation was paid in a lump sum.) A divorced woman can now select to receive a regular monthly or yearly payment until death or until she remarries." Charrad, *supra* note 226, at 56.

295. See NASIR, *supra* note 10, at 121; WANI, *supra* note 73, at 204.

	<p>dowry.<sup>283</sup></p> <p>-In addition, Article 118 guarantees the wife's right to keep the household items and furniture she contributed to the marriage.<sup>284</sup></p> <p>-<i>Khul</i> divorce is regulated by Articles 273-297.<sup>285</sup> In the case of <i>khul</i> divorce, according to Article 274, a wife's financial rights depend on the agreement made with the husband.<sup>286</sup> Articles 276-277 dictate that she may give up all or part of these financial rights.<sup>287</sup></p>	<p>seeks a divorce based on harm, if the court determines that she suffered harm at the hands of her husband, the wife keeps all her financial rights.<sup>289</sup></p>	<p>maintenance.<sup>290</sup></p> <p>- Also, under Article 132, if the court determines that she suffered harm at the hands of her husband, the wife keeps all her financial rights.<sup>291</sup></p>	<p>deferred dowry;<sup>293</sup> and, under the provisions of Article 31, if the court determines that the husband caused her harm, she is awarded a monthly alimony as well as a decent residence.<sup>294</sup> Article 31 provides that both of these provisions apply until she remarries or earns money and can make do without alimony.<sup>295</sup></p>
<p><b>8. Rules on Custody</b></p>	<p>- Under Article 365 of Pasha's rules,<sup>296</sup> the mother has priority in custody of the children, for which she earns a fee from the father.<sup>297</sup></p> <p>Article 391 dictates that her custody over the children lasts until a boy is seven years old and a girl is nine.<sup>298</sup></p> <p>- Under Article, upon remarriage, the mother loses custody, unless she marries a <i>mahram</i>,<sup>299</sup> and under Article 393 she cannot travel with the child for long distances<sup>300</sup> without the father's permission.<sup>301</sup></p> <p>-Under Article 420, the father retains full guardianship rights over the children, even while they are</p>	<p>- Hanafi rules apply with the following modifications: Under Article 20 of Law 100 (1985), custody ends when the boy is ten years old and the girl is twelve,<sup>303</sup> under the same article, the judge can order that the children stay with their mother until the boy is fifteen years old and the girl gets married.<sup>304</sup> However, again under the provisions of Article 20, she does not earn the custody fee during the extended period.<sup>305</sup></p> <p>- Under Article 18b(3) of Law 100 (1985), after divorce the husband has to provide an independent residence for the mother and his</p>	<p>- The mother has priority of custody, for which she earns a fee.<sup>307</sup></p> <p>- Under Article 161 of the Jordanian Code, custody lasts until the boy is nine years old and the girl is eleven, although Article 162 provides that the period can be extended for the entire time of their minority.<sup>308</sup></p> <p>- Under Article 156 of the Jordanian Code, if the mother remarries, she loses custody, unless she marries a <i>mahram</i>.<sup>309</sup> Also under Jordanian law, she can't travel with the child</p>	<p>- Under Article 67 of the Tunisian Majallah, the mother has no priority of custody. Instead, custody can be awarded to either parent according to the "best interests of the child," which is determined by a judge.<sup>311</sup></p> <p>- Also under Article 67 of the Tunisian Majallah, the mother as custodian makes decisions on her child's travel, studies and financial affairs.<sup>312</sup></p> <p>- Article 58 provides that the mother loses custody if she marries,<sup>313</sup> unless the judge determines otherwise.<sup>314</sup></p> <p>- Article 56</p>

296. For rules on custody, see PASHA, *supra* note 228, at 199-207, arts. 366-94.

297. *See id.* at 199.

298. *See id.* at 206.

299. *See id.* A *mahram* is one who is prohibited to marry the child for reasons of consanguinity.

300. The exception is if she is returning to her own home.

301. *See PASHA, supra* note 228, at 206-07.

	in their mother's custody. <sup>302</sup>	children during the term of custody and if he doesn't, depending on the circumstances, they may have the right to live in the marital apartment (without him) unless he provides them with a separate home. <sup>306</sup>	outside of the country without the father's consent. <sup>310</sup>	provides that a fee for custody is taken from the child's money if s/he has any, and if not, the father pays their expenses. <sup>315</sup>  - If the mother-custodian doesn't have a place to live, the father has to provide her a
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302. See *id.* at 214.

303. See Dawoud S. El Alami, *Law No. 100 of 1985 Amending Certain Provisions of Egypt's Personal Status Laws*, 1 ISLAMIC L. & SOC'Y 116, 127 (1994); see also ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK, *supra* note 207, at 172 ("The divorced mother is entitled to custody of boys until the age of ten and girls until the age of twelve.").

304. See El-Alami, *supra* note 303, at 127; Najjar, *supra* note 1, at 335.

305. See El-Alami, *supra* note 303, at 127; Najjar, *supra* note 1, at 335.

306. See WELCHMAN, *supra* note 272, at 334; El-Alami, *supra* note 303, at 122.

307. See WELCHMAN, *supra* note 272, at 332-34.

308. NASIR, *supra* note 10, at 172. Article 162 reads as follows: "Custody by the mother who devotes herself entirely to the care and education of her children shall run until they reach puberty." *Id.*; see Lynn Welchman, *The Development of Islamic Family Law in the Legal System of Jordan*, 37 INT'L & COMP. L.Q. 868, 877 (1988).

309. See NASIR, *supra* note 10, at 163-64. As the author expresses this traditional rule of the Hanafi and Maliki schools of law:

The Hanafis and Malikis deprive the woman of the right to custody should she marry a stranger (a person outside the child's paternal or maternal family) or a relation of the child who would not, in other circumstances, be prohibited from marriage to the child, such as a cousin. However, should she marry a relation of the child who would be prohibited from marriage to it in any circumstances, such as the child's uncle, then the custodian would not lose her right to custody, and loving care for the infant would then be assumed, even if the wife's attention to the child may compromise part of her services to her husband.

*Id.* at 163.

310. See Dr. Moussa Abou Ramadan, *The Transition From Tradition to Reform: The Shari'a Appeals Court Rulings on Child Custody (1992-2001)*, 26 FORDHAM INT'L L.J. 595, 609 (2003). The author reports that "[s]ection 166 of Law No.61 of Personal Status in Jordan provides that a person with whom the child is staying cannot leave the Kingdom with the child, unless the guardian agrees, subject to the prior assurance of his welfare." *Id.*

311. See NASIR, *supra* note 10, at 162; Charrad, *supra* note 226, at 56.

312. See Majallat Al-Ahwal Al-shakhsiyya [Tunisian Family Code], at 169 (Muhammad Al-Habeeb Al-Shareef ed., 1997) (Tunis.) (on file with author). However, under Article 61 of the Majallah, she will "lose her right to custody if she moves to or settles in a different town where it would be difficult for the father or guardian to look after the interests of the child." NASIR, *supra* note 10, at 167.

313. Again, an exception is made if the person she marries is a *mahram*. See NASIR, *supra* note 10, at 164.

314. See *id.*

315. See Majallat Al-Ahwal Al-shakhsiyya [Tunisian Family Code], at 143 (Muhammad Al-Habeeb Al-Shareef ed., 1997) (Tunis.) (on file with author).

316. See *id.*

<p><b>9- Maintenance and Guardianship of Children<sup>317</sup></b></p>	<p>- Under Article 396, the father maintains the children if they do not have money of their own, until the boy can earn a living, and the girl gets married. <sup>318</sup></p> <p>- Under Article 420, the father has guardianship rights over the person and the money of his minor children or those still maintained by him. <sup>319</sup></p> <p>For example, under Article 420, the father has the power to force his minor children to marry, <sup>320</sup> and under Article 422, he can hire his children out for employment. <sup>321</sup></p>	<p>- Under Article 18b(2) of Egyptian Law No. 100 (1985), the father maintains the children if they do not have money of their own until the girl marries or earns a living and until the boy is fifteen years old, if he is capable at that time of earning a living. <sup>322</sup></p> <p>- The father has guardianship rights over his children until the age of twenty-one. <sup>323</sup></p>	<p>- Under Article 168 of the Jordanian Code, the father maintains the children if they do not have money of their own; until the boy can earn a living, unless he is a student; and until the girl marries. <sup>324</sup></p> <p>- Under Article 169, the father is obliged to cover the expenses of the children's education until they get their first university degree. <sup>325</sup></p> <p>- Under Article 165, the male guardian of</p>	<p>residence. <sup>316</sup></p> <p>- Under Article 46 of the Tunisian Majallah, the father maintains the children until they are of majority age or until they finish their education. <sup>328</sup> Also under Article 46, the father maintains his daughter until she works or marries. <sup>329</sup></p> <p>- Under Article 47, if the father cannot maintain them, then it is the mother who is responsible for their maintenance. <sup>330</sup></p> <p>- Under Article 154, the father is the guardian of</p>
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317. There is a distinction between custody and guardianship. Under Article 395 of Pasha's rules, a father (as guardian) has the obligation to discipline, educate, and instruct his children, as well as maintaining them if they have no money, until a boy can earn money and a girl gets married. *See* PASHA, *supra* note 228, at 199. The mother (as custodian) is required to take care of the children and nurse them as long as they need it. *See id.* In addition, guardianship is important under the doctrine of all four schools of law in relation to the marriage contract—as Maghniyyah describes it, “[w]ilayah [guardianship] in marriage implies the legal authority granted to a competent guardian to be exercised over one under a legal disability for his or her advantage.” MAGHNIYYAH, *supra* note 76, at 292. Under the doctrine of the Shafi, Maliki, and Hanbali schools, this “legal disability” means that a woman, even if she is “sane” and “major” and a “maiden”, or a sane, grown-up virgin, cannot contract her own marriage. *See id.* Thus, as the author puts it, “[c]ustody has no connection with guardianship (*wilayah*) over the ward with respect to marriage; it is limited to the care of a child for its upbringing and protection for a period of time during which it requires the care of women.” *Id.* at 349. This distinction is found in the rules of all Taqlid schools of law. However, because under the doctrine of the Hanafi school a “sane, grown-up female” is “competent to choose her husband and to contract marriage, irrespective of her being a maiden or a *thayyib*,” the distinction between guardianship and custody does not imply the same role in marriage under Hanafi rules as it does under the rules of the other schools. *Id.* at 292. The distinction is important, however, as it relates to other issues, as evidenced by the dictates of Article 395 of Pasha's rules.

318. *See* PASHA, *supra* note 228, at 207.

319. *See id.* at 214.

320. *See id.*

321. *See id.* at 215. Under Article 422, however, a daughter can only be “hired” out to a woman to teach her a craft and in some other specified jobs. *See id.*

322. *See* El-Alami, *supra* note 303, at 121-22. Also according to Article 18b(2), if a son is fifteen years old but is pursuing a level of education “appropriate for a person

			either the unmarried woman who is under forty or the woman divorcee who "cannot be left on her own" can request that the woman joins him in his household. <sup>326</sup> If she refuses, she loses her maintenance. <sup>327</sup>	minor children unless he is deceased, in which case the mother is the guardian. <sup>331</sup>
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### B. A Comparative Reading of the Legislative Regulation of the Family

The comparative data provided in the table above allows one to make several observations. First, as mentioned earlier, if one were to put these examples on a spectrum of legislative possibilities, the Hanafi doctrine and Tunisian law would sit on the two opposite ends of the spectrum while Jordan and Egypt would represent two intermediary positions. The Hanafi doctrine would stand for the Taqlid conception of gendered relations in the family—hierarchical to the benefit of the husband and the male guardian—with a strong

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of his status and ability," his father continues to be liable for his maintenance. *Id.* at 122.

323. Egyptian Law on Rules of Guardianship Over Money, Law No. 119 of 1952, art. 1 (Egypt) (on file with author).

324. See Qanun Al-Ahwal Al-Shakhsiyya [Jordanian Family Code], at 89 (Ratib Atallah Al-Dthaher ed., 1983) (Jordan) (on file with author).

325. See MAHMOOD, *supra* note 118, at 135. The text of Article 169 reads as follows: "As regards children whose maintenance is obligatory for their father, their maintenance will include expenses of education at all levels—primary, secondary and higher—provided that the child is capable to study, in accordance with the resources of the father." *Id.*

326. See Qanun Al-Ahwal Al-Shakhsiyya [Jordanian Family Code], at 89 (Ratib Atallah Al-Dthaher ed., 1983) (Jordan) (on file with author).

327. J.N.D. Anderson, *The Syrian Law of Personal Status*, 17 BULL. OF THE SCH. OF ORIENTAL & AFR. STUD. 34, 43 (1955). The author reports that, according to "the usual Hanafi rule," previously married women and "spinsters who are no longer young" do not have to live with their male guardian from whom they receive their maintenance, "unless there are special reasons to cause apprehension about their moral safety," in which case they have to live with him if he asks them to do so, facing a loss of maintenance if they refuse. *Id.*

328. See MAHMOOD, *supra* note 118, at 175. The text of Article 46 reads as follows: "Maintenance of minor descendants, how low soever, is binding on the ascendants. A girl is entitled to such maintenance till the responsibility is taken over by her husband, and a boy till the age of sixteen years or till he becomes capable to earn." *Id.*

329. See *id.*

330. See *id.* at 176.

331. See *id.* at 178.



underlying element of transactional reciprocity of obligations between the spouses. Tunisia, on the other hand, would represent the approach closest to the U.S. model of equality between the spouses. The Egyptian and Jordanian legislative approaches, situated in the middle, represent the attempt to curtail, often half-heartedly, the conspicuously brutal aspects of husband and father power typical of the Hanafi doctrine that they have inherited without dismantling the hierarchy between the spouses or between father and daughter.

### 1. The Tunisian Model

Although the Tunisian model<sup>332</sup> contains elements that are close to the U.S. notion of gender equality,<sup>333</sup> what is significantly absent from the Tunisian approach is the doctrine of privacy; a doctrine which has historically played a critical role in regulating the family in the United States. A cursory and formalist reading of the rules in the Tunisian *Majallah* (Code) suggests that the law does not shy away from regulating matters over which the curtain of privacy is typically pulled in the United States.<sup>334</sup> Such matters include

332. The significance of the reforms put in place in Tunisia, unique among majority Muslim countries, cannot be overstated. See CHARRAD, *supra* note 227, at 218 (“On 13 August 1956, less than five months after the proclamation of independence, a new Tunisian Code of Personal Status (CPS) was promulgated. The code profoundly changed family law and the legal status of women.”). For another author’s summary of the changes in family law brought about by the Tunisian *Majallah*, see Kristin J. Miller, *Human Rights of Women in Iran: The Universalist Approach and the Relativist Response*, 10 EMORY INT’L L. REV. 779, 827 (1996). In addition, the Tunisian *Majallah* is applied to Tunisians of all religions, “ending the application of rabbinical law to Jewish personal status matters. . . .” ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK, *supra* note 207, at 182; see also EL ALAMI & HINCHCLIFFE, *supra* note 3, at 239 (quoting the *Majallah*).

333. See CHARRAD, *supra* note 227, at 215-31.

334. Elene G. Mountis, *Cultural Relativity and Universalism: Reevaluating Gender Rights in a Multicultural Context*, 15 DICK. J. INT’L L. 113, 135 (1996). In the United States, “[t]raditionally, by respecting the sanctity of family privacy, states have been reluctant to intrude in family affairs.” *Id.* One unfortunate consequence is that “[p]olice often will not intrude on violent domestic quarrels.” *Id.*; see also Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2157 (1996). According to Siegel, courts in the United States traditionally espoused the “evils of interfering with family government.” *Id.* In addition, the author reports that, historically,

while authorities denied that a husband had the right to beat his wife, they intervened only intermittently in cases of marital violence: Men who assaulted their wives were often granted formal and informal immunities from prosecution, in order to protect the privacy of the family and to promote ‘domestic harmony.’ In the late 1970s, the feminist movement began to challenge the concept of family privacy that shielded wife abuse . . . .

*Id.* at 2118. Indeed, in its landmark decision, *Roe v. Wade*, the United States Supreme Court relied on earlier cases that established a doctrine of privacy in regard to family

maintenance obligations within the family and a detailed regulatory account of how the relationship between husband and wife should ideally be organized.<sup>335</sup>

For instance, Article 23 of the Majallah provides for the obligation of maintenance by both husband and wife, good reciprocal treatment by both spouses, and the division of labor within the family between both husband and wife.<sup>336</sup> One of the principal ways in which the Tunisian legislature sought to change the hierarchical relationship it inherited from the Maliki Taqlid legal system<sup>337</sup> was

or marital affairs, also known as privacy of the marital relation and the marital home, extending it to declare a woman's right to have an abortion. See Susan Clement et al., *The Evolution of the Right to Privacy after Roe v. Wade*, 13 AM. J. L. & MED. 368, 373 (1987). As Joel Feinberg notes:

[United States courts] decisions take a zig-zag path, but they do exhibit a pattern. The zone of privacy is extended from the essential intimacies of the marital relation, to heterosexual intimacies generally, to decisions about whom to marry, to decisions about 'family planning,' child-rearing, modes of family living, and finally to decisions about the termination of pregnancy.

Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideas in the Constitution?*, 58 NOTRE DAME L. R. 445, 487 (1983). Yet another author reports that in the United States, "courts and commentators still conceive of family privacy in terms of negative liberty—keeping the government out of family affairs. . . ." Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1831 (1995). In addition, another author sums up the connection or link made in the United States between this idea of privacy and other even greater ideals, such as democracy and freedom, when reporting that the Supreme Court "consistently has been hesitant to intervene in family affairs, recognizing that familial autonomy and privacy are at the very heart of the existence of a democratic society." Wendy Meredith Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. 583, 600-01 (1987). These ideas are quite foreign in the Islamic and, for our purposes, the Tunisian context.

335. See Charrad, *supra* note 226, at 51-52. As the author puts it, "[r]eform of family law in Tunisia constitutes an interesting case of intended and dramatic innovation in the legal norms governing gender relations and family life." *Id.* at 51. Charrad adds that the "thrust" of the Code was to "redefine the rights and obligations of men and women within the family." *Id.* at 52.

336. ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK, *supra* note 207, at 183. As Professor Abdullahi A. An-Na'im describes, "[d]uring marriage, spouses are to treat each other well, to fulfill their marital duties 'as required by custom and usage' and to cooperate in running family affairs, including the upbringing of children." *Id.*

337. Mounira Charrad, *State and Gender in the Maghrib*, 163 MIDDLE E. REP. 19, 20 (Mar.-Apr. 1990). The Maliki school of law, that which has historically predominated in the Maghrib (Tunisia, Morocco, and Algeria), "gives male members of the kin group extensive control over key decisions affecting women's lives." *Id.* Charrad notes that "[w]omen need not give consent to marriage during the marriage ceremony, and instead it is the consent of her guardian that makes the marriage valid; and there is no legal minimum age for marriage." *Id.* Other features of Maliki law are the same as other schools, namely that the husband has the privilege of breaking the marital bond at will, while the circumstances under which a woman may be granted a divorce are restricted; if a man chooses to repudiate his wife (*talaq*), she has no legal recourse; a man has the legal right to marry as many as four wives; and women receive half of

to undermine as much as possible the division of responsibilities and powers within the family. As discussed previously, gendered reciprocity was based on the idea that the husband's duty to maintain the wife and the children allowed the exercise of a set of powers in the family. Thus the wife owed the husband obedience, as did the children over whom he exercised guardianship powers. Tunisian legislators assumed that if the wife wanted to exercise powers similar to those of the husband, she should be willing to take on parallel responsibilities.<sup>338</sup>

One of the most original legislative interventions to occur in Tunisia was the move to impose upon the wife the responsibility of participating in the maintenance of the family, if she has money of her own.<sup>339</sup> In return, the wife acquired several powers, including the power to consent to the marriage of a minor child,<sup>340</sup> equal power to divorce her husband,<sup>341</sup> the power to make custodial decisions

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what a man would in inheritance. *See id.* The Tunisian law of 1956 fixed the minimum marriage age at eighteen years for males and fifteen years for females; these were later raised to twenty and seventeen "for considerations including the dignity of marriage, lessening parental interference, reducing the chance of divorce, and also reducing population growth rates." Fazlur Rahman, *A Survey of Modernization of Muslim Family Law*, 11 INT'L J. MIDDLE E. STUD. 451, 455 (1980). In addition, "a medical certificate of physical fitness is required to establish the capacity for marriage," and the registration of marriages is required, imposing a fine and imprisonment for not doing so. *Id.* at 456. What makes the Tunisian code most unique, however, is that polygamy was abolished. *See id.* at 457. As Rahman notes, Tunisia is the only country to use an "Islamic basis" to ban polygamy in its personal status laws. *See id.* "The Tunisian prohibition on polygamy was based on the standard Modernist reasoning that since the Qur'an requires that justice be done among wives and also warns at the same time that it is impossible to do justice among co-wives, this amounts to a prohibition." *Id.*

338. CHARRAD, *supra* note 227, at 224-25.

339. *See id.*

A new element introduced in the Majalla concerned the financial responsibility of the woman to her husband and children. Whereas in Islamic law a woman's property remained her own without becoming part of the household assets, the Majalla required the wife to contribute to the expenses of the household, if she had the means to do so. By making the wife provide for the household when appropriate, the Majalla placed the division of responsibilities between the spouses on a new plane.

340. *See ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK*, *supra* note 207, at 182-83 ("Marriage below the age of legal majority requires the consent of the guardian and (since 1993) of the mother; recourse may be had to the judge in the event of their refusal.").

341. *See MAHMOOD*, *supra* note 118, at 174. Article 31 of the Majallah reads as follows: "(1) A decree of divorce shall be given: (i) with the mutual consent of the parties; or (ii) at the instance of either party on the ground of injury; or (iii) if the husband insists on divorce or the wife demands it." *Id.*; *see also* CHARRAD, *supra* note 227, at 225 ("The CPS [Code of Personal Status] changed regulations in fundamental ways. . . . The wife and husband were equally entitled to file for divorce, and they could do so by mutual consent. One of them could also file alone. . . .").

relating to children,<sup>342</sup> and the power to exercise the guardianship role in the absence of the husband.<sup>343</sup> More important, the wife no longer owes her husband the duty of obedience, one of the most important institutions of the Taqlid legal system.<sup>344</sup>

There are, however, peculiarities in the Tunisian equality strategy. For instance, the theme of husband/father maintenance of the wife and family still runs deep in the modern Tunisian doctrine on the family. It is the husband/father who is still considered the primary provider in the family (“the head of the family”), whereas the wife/mother contributes only secondarily and only if she has money.<sup>345</sup> In return for this secondary position as provider, the wife gets guardianship powers over children only secondarily and contingently if the father is absent or dead.<sup>346</sup>

The secondary position of provider contemplated by the Tunisian Majallah places the wife in certain respects, not as her husband’s equal, but rather as the interceptor of the male line of responsibilities and powers in the family. Financial responsibilities and powers under the Taqlid system often followed a male line.<sup>347</sup> If the husband

342. See ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK, *supra* note 207, at 183. As the author reports, in the case of divorce, “[i]f the mother is awarded custody, she is authorized to exercise the prerogatives of the guardian in matters related to the ward’s travel, education and financial affairs. . . .” *Id.*

343. See MAHMOOD, *supra* note 118, at 178. Article 154 of the Tunisian Majallah reads as follows: “The guardian of a legally disabled person shall be the father and, if he is dead or disqualified, the mother . . . .” *Id.*

344. See al-Hibri, *supra* note 225, at 11-12 (“The present Tunisian Code no longer requires obedience, although it continues to describe the husband as the ‘head of the family.’”); see also Rana Lehr-Lehnardt, *Treat Your Women Well: Comparisons and Lessons From an Imperfect Example Across the Waters*, 26 S. ILL. U. L.J. 403, 411 (2002) (“Only Tunisia has completely abolished wife obedience from its personal status codes.”).

345. See ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK, *supra* note 207, at 183.

346. See Charrad, *supra* note 226, at 56. As Charrad explains:

While increasing women’s custody rights, the CPS [Code of Personal Status] nevertheless maintains male power in making a distinction between custody and guardianship. . . . When the father is alive, the CPS systematically makes him the child’s guardian after divorce, even when the mother has custody and thus takes daily care of the child. . . . It automatically makes the mother the guardian in case of the father’s death, and in that case only.

*Id.* Charrad adds that it was only after a law was passed in 1981 modifying the Majallah that the mother is automatically made the guardian in case of the father’s death; the original Code only considered her as one among many possible guardians, and it was up to the judge to decide based on the “child’s best interest” whom to select. *Id.*

347. It is instructive to look at three classes of financial responsibilities and powers: marriage guardianship and guardianship of property, maintenance of children, and custody of children after the mother’s period of custody (*hadanah*) is finished.

One author defines guardianship responsibilities connected to marriage as follows:

[M]arriage guardianship is the legal authority invested in a person who is fully qualified and competent to safeguard the interests and rights of another who is incapable of doing so independently. It is the authority of a father or nearest male relative over minors, insane, or inexperienced persons who need protection and guardianship.

AL 'ATI, *supra* note 95, at 70. Thus, "[t]he schools concur that it is necessary for a *wali* [guardian] to be an adult Muslim male." MAGHNIYYAH, *supra* note 76, at 296. In the case of the marriage of a minor, under the doctrine of the Shafi'i school of law, in the absence of the father, it is the paternal grandfather who is competent to contract the marriage; under Maliki and Hanbali doctrine, only the father can do so; and under Hanafi doctrine, in the absence of the father and the grandfather, guardianship in marriage passes to "other relatives, even if it be a brother, or an uncle." *Id.* at 294. Guardianship never passes to the mother or another female relative. As Hamilton A.R. Gibb puts it, although under Islamic law parties to a contract must always give their consent, "that of the bride, particularly the virgin bride, is normally expressed through her father, guardian, or other male relative, but never the mother." Hamilton A. R. Gibb, *The Heritage of Islam in the Modern World (III)*, 2 INT'L J. MIDDLE E. STUD. 129, 132 (1971). As for guardianship of property, the fact that this responsibility and power follows a male line is also clear.

Under Hanafi law, the guardian of the property of minor children is their father; after the father's death, his executor; after the father's executor, the paternal grandfather; after him, his executor. After the last, the Court may take charge of the property. . . . Neither the minor's mother nor uncle, nor brother, nor sister is entitled to act as the guardian of the minor's property, except on being appointed by the father, or paternal grandfather of the minor or by the Court; none of them has the power to sell or mortgage or otherwise deal with the minor's immoveable property. . . .

FAIZ BADRUDDIN TYABJI, MUHAMMADAN LAW 228-31 (1940).

As one author describes it, maintenance of minor children "includes the expenditure for nourishment, health, education and training." WANI, *supra* note 73, at 227. He makes clear that "[u]nder Islamic law it is the father who is primarily responsible to provide maintenance to his children, male and female, whether in his own custody or in the custody of someone else." *Id.* Should the father not be able to do so, "[n]ext to the father the burden shifts to the grand-parents." *Id.* at 228. Some authors report that in some situations, if the father cannot maintain the children, the mother should do so, if she is able to; such maintenance is usually characterized as voluntary (not obligatory, like in the case of the father) and is to be paid back to the mother by the father when he has the means to do so. *See supra* note 75. Even in the opinion of those commentators that call for the mother to maintain the children when the father cannot, after the mother, the responsibility shifts to the paternal grandparents, particularly the paternal grandfather: "If the father is poor, the mother is bound to maintain the children. And, failing her, it is the duty of the paternal grandfather. . . ." ASAF A. A. FYZEE, OUTLINES OF MUHAMMADAN LAW 184 (1955).

Under the *Taqlid* rules of all four major Sunni schools of law, after the period of custody when the children are young (*hadanah*), custody of the children passes to the father (and his family). As Professor Esposito notes:

The awarding of custody to the father is a consistent social reflection of the workings of a traditional, patriarchal, patrilocal family. The family emphasizes the paternal line of ancestry and makes the central residence the home of the paternal grandfather, where many women (aunts, grandmother) are available within the family to care for children.

was not available to assume responsibility and power for reasons of absence or death, his father was required to maintain the family or exercise guardianship powers.<sup>348</sup> Allowing the wife to take on this role after the husband/father means that, in several doctrinal matters, rather than being the husband's equal, the wife has simply become the next in line to exercise powers and responsibilities.<sup>349</sup> In other words, she is now the husband's "father."

There are dangers associated with the wife's new position of equality as conceived by the Tunisian legislature. She loses certain privileges that the Taqlid legal system had awarded to her by virtue of its conception of the gendered organization of the family. First, the wife can no longer assume that her own wealth and property are completely outside her husband's reach, as was the case before.<sup>350</sup> Whereas under the Taqlid regime she was, in general, immune from the requirement that she participate in maintaining the family, this is no longer the case.<sup>351</sup> Second, the Tunisian wife can no longer benefit from the Taqlid legal presumption that she has priority of custody over young children after divorce. Tunisian legislators have replaced this with the standard used by judges in the United States to award custody—namely, the best interests of the child.<sup>352</sup> In the United States this seemingly egalitarian standard has proved to be

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ESPOSITO, *supra* note 5, at 35-36.

Besides *Taqlid* rules of law, of course, there are rules of custom and usage that apply as well; said customs vary according to countries, regions, and ethnic groups, although they also generally dictate a male line of financial responsibilities and powers. Thus, one author describes "[t]he pressure of old Arab custom" as "itself the reason for emphasis on the male family representative" when discussing marriage guardianship. Gibb, *supra*, at 132.

348. See *supra* note 347. Further evidence of this rule is the present text of Article 47 of the Tunisian Majallah, which makes clear that it is breaking from traditional norms when specifying that the mother now precedes the grandfather in maintaining the child upon the father's death. See *supra* note 346.

349. See MAHMOOD, *supra* note 118, at 176. The text of Article 47 of the Majallah reads as follows: "The mother shall, in the event of the father's poverty, precede the grandfather in providing maintenance to her child." *Id.* As one author notes:

The Majalla made the father and mother both responsible for the care of a child, as long as they lived together. If the father was no longer able to provide for the child, either in case of death or for any other reason, the next person called upon to assume responsibility was the mother, who now came before any other relatives in the order of responsibility.

Charrad, *supra* note 226, at 227.

350. See EL ALAMI & HINCHCLIFFE, *supra* note 3, at 243 (quoting the Majallah); see also ESPOSITO, *supra* note 5, at 96 (reporting that Tunisia requires "both the husband and the wife to participate financially in maintaining the household.").

351. See ESPOSITO, *supra* note 5, at 96.

352. See NASIR, *supra* note 10, at 162; Charrad, *supra* note 226, at 56.

disastrous for women.<sup>353</sup> Several authors have pointed out that some judges in the United States use this doctrine to privilege men over women.<sup>354</sup>

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353. To understand why this is the case, one has to first understand the history behind child custody standards in the United States. In the United States, like in Tunisia, before the “best interests of the child” doctrine was widely adopted in the 1970s and 1980s, there was a legal preference for women in the custody of small children; this priority for mothers was expressed in terms of the “tender years” doctrine. See Sylvia A. Law & Patricia Hennessey, *Is the Law Male?: The Case of Family Law*, 69 CHI.-KENT L. REV. 345, 347-48 (1993). With the abandonment of the maternal preference or priority in custody and the advent of the “best interests of the child” doctrine, a supposedly gender neutral standard is used. See *id.* at 348. However, as the authors note:

[T]he ‘best interest’ standard favors the party with the greatest resources to mount an expert-based claim. In most cases that is the man. Further, the ‘best interest’ standard is extremely vague and unpredictable. Vagueness and uncertainty in custody standards work to the advantage of the party who is less committed to maintaining custody, typically the man. Mothers give up solid legal claims to marital property or child support to resist the man’s ‘Brer Rabbit’ claim to custody. A law that systemically forces women to give up honest economic claims to care for their children is biased against women.

*Id.* at 350. In the 1970s, feminists had argued *against* a preference for mothers because of the terms that were used to frame such preference: “[A]lthough feminists later came to distrust the best interests standard, they initially supported the innovation because the tender years presumption seemed to reinforce stereotyped gender norms.” Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CALIF. L. REV. 615, 620 (1992). One reason for the current distrust of the “best interests of the child” doctrine is that custody is not awarded based on past performance *per se* but on a variety of factors judged to determine the parents’ *future* ability to raise the child. Without taking into account their pre-divorce role in the upbringing of the child, factors such as income may produce an advantage for fathers that is hard for mothers to compete with, especially since they often gave up or limited their income-earning capacity to raise their children. In addition, the potential for custody to go to the father scares mothers into giving up legitimate rights in exchange for custody at the face of fathers’ claims. The author’s comments regarding these issues sums up the problem:

Feminists increasingly express dismay that contemporary custody law dilutes the importance attached to the primary caretaking role of mothers. Although the risk that mothers face of losing a custody dispute is greater under the best interests standard than under the tender years presumption, in practice, courts applying the best interests standard continue to favor mothers for custody. The formally gender-neutral rule generates uncertainty, however, by sending misleading signals to both men and women about fathers’ prospects for custody. This uncertainty can lead women, who care more about having custody than do men, to insure custody by trading away claims for support and property.

*Id.* at 626. Thus, the author argues that, instead of the current, supposedly gender neutral approach, because “[m]ost feminists agree that women have been disadvantaged by traditional marital roles . . . custody law can best serve women’s interests by strongly supporting mothers’ custody claims.” *Id.* at 618. These issues are summarized well by another author, who asserts that:

Even if the father does not want custody, his lawyer often will advise him to claim it in order to have a bargaining chip with which to bargain down his

wife's financial claims. Second, the abolition of the maternal preference has created situations where a father who wants custody often wins even if he was not the primary caretaker prior to the divorce -- on the grounds that he can offer the children a better life because he is richer than his former wife. In these circumstances, the ironic result of a mother's sacrifice of ideal worker status for the sake of her children is that she ultimately loses the children.

Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 838 (1989). Another author, arguing that the "best interest of the child" principle is "unjust," explains that "according to the best interest principle, the child's welfare is the dominant consideration. The law does not take any account of the needs and rights of the parents. . . ." Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 16 (1987). The author asserts that "if one parent, usually the mother, has devoted crucial years to child care and perhaps given up her career to do so, it seems prima facie right that she should get custody." *Id.* at 17. However, for an analysis of problems related to making custody decisions based solely or primarily on the role as primary caretaker before the divorce, see Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427 (1990). The author does conclude, however, that

for opponents of the [caretaker] preference, integrity demands a recognition of the rationale for the standard. They must face criticism of the broad best interests standard, which risks unwise results, stimulates litigation, permits manipulation and abuse, and allows a level of judicial discretion that is difficult to reconcile with an historic commitment to the rule of law. The costs of this system, especially for children, mothers and those with the least resources to resist threats of litigation, are readily apparent.

*Id.* at 499-500. Thus, many contemporary authors in the United States, given the continuing reality of gender roles in the family and marital relations, and in the interest of justice, are actually advocating a return to maternal priority in custody or, in the minimum, a priority based on a (past) primary caretaker standard. See, e.g., Elster, *supra*, at 16-18, 30-31, 37-39. The issue of joint custody is beyond the scope of this discussion, but it is also an important and current one. For instance, see Brian J. Melton, *Solomon's Wisdom or Soloman's Wisdom Lost: Child Custody in North Dakota—A Presumption That Joint Custody is in the Best Interests of the Child in Custody Disputes*, 73 N.D. L. REV. 263, 274-80 (1997).

354. See Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 697 (1998) ("Single working mothers are particularly at risk when they are in custody disputes with fathers who have remarried 'stay-at-home' wives. Courts have shown a preference for these conforming stepmothers."). In the United States, considerations of wealth, for instance, disadvantage mothers who, in general, earn less than fathers; paradoxically, if a woman works and thus has to send her child to day care, she can also be at a disadvantage, especially if the father has a new wife who is willing to stay at home with the child. As another author reports:

In *Burchard v. Garay*, a trial court awarded custody to the father on two grounds: he earned more money and his new wife could care for the child at home. The mother needed to use day care while she worked. Justice Bird, concurring in the California Supreme Court's reversal, emphasized the injustice of this decision. It places women in a catch-22 situation: If she did not work, she could not possibly hope to compete with the father in providing material advantages for the child. She would risk losing custody to a father who could provide a larger home, a better neighborhood, and other material goods



It is important to note that not only did the new Tunisian standard de-privilege women in custody decisions, it also de-privileged the female line of custody that the Taqlid legal system provided for. Thus, under the new regime, if a woman loses custody for reasons of, say, remarriage, the custody does not go to her mother, as was the case under Taqlid law,<sup>355</sup> but to her husband.<sup>356</sup> In other

and benefits. If she did work, she would face the prejudicial view that a working mother is by definition inadequate . . . .

Scott Altman, *Should Child Custody Rules be Fair?*, 35 U. LOUISVILLE J. FAM. L. 325, 329 (1996-97). The author also reports that:

[I]nequalities provoked feminist objections to *Ireland v. Smith*, the Michigan decision transferring custody to the father because the mother needed to use day care while she attended class. The trial court explained that a single parent cannot attend a prestigious university and raise a child effectively. After public criticism, the appellate court reversed. Cases considering day care and wealth illustrate the mixed state of custody law.

*Id.* at 330. The author adds that, “[s]ome feminists claim judges deprive women of custody for the smallest deviation from expected gender roles. They note fathers win primary custody in more than 50% of litigated cases. . . .” *Id.* at 338. In addition, “[t]he vagueness and uncertainty of the ‘best interest’ standard vests tremendous discretion in trial court judges.” Law & Hennessey, *supra* note 353, at 350. For a detailed description of gender bias in custody cases decided under the “best interests of the child” standard, see Susan Beth Jacobs, *The Hidden Gender Bias Behind “The Best Interests of the Child” Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845, 858-74 (1997). Jacobs argues that all of the following factors contribute to such gender bias: fathers in general have greater economic resources; courts scrutinize a mother’s employment more closely than that of the father; judges prefer what they consider “traditional lifestyles”; and judges scrutinize more closely a mother’s non-marital sexual relations than those of a father. *See id.* at 858-74. As to the issue of the employment of the mother and judges using this as an excuse to give custody to the father, another author has noted that “[i]n the area of child custody, courts typically have not rewarded working women.” Amy D. Ronner, *Women Who Dance on the Professional Track: Custody and the Red Shoes*, 23 HARV. WOMEN’S L.J. 173, 174 (2000). This same author adds that “the best interests of the child standard, with its flexibility, can turn against women who work outside of the home.” *Id.* at 215.

355. *See* ESPOSITO, *supra* note 5, at 36.

In the absence of or disqualification of the mother, female relatives in the following order receive custody: (1) mother’s mother h.h.s [however high so ever]; (2) father’s mother h.h.s.; and (3) full sister or other female relatives, including aunts. In the default of female relations, the following male relatives obtain the right of custody: (1) father; (2) nearest paternal grandfather; (3) full brother; (4) consanguine brother; and (5) full brother’s son and other paternal relations (in the order of the nearest male relative determined in the same order as that of inheritance).

*See also* WANI, *supra* note 73, at 226.

A mother who is leading an immoral life loses her privilege of custody of the child. A divorced or widowed mother who has married another man does not remain entitled to the custody of minor child if the man to whom she has married does not fall within prohibited degrees of marriage to the child. The

words, in custody cases the husband intercepts the female line so that he is now the wife's "mother."

The reciprocal interception by the husband of the female line in cases of custody and by the wife of the male line in cases of guardianship suggests that the Tunisian legislative intent is actually to replace the extended family model as a form of social organization with that of the nuclear family.<sup>357</sup> The spouses now stand, in a reciprocal exchange of roles, as the center of the family to the exclusion of other relations, namely their fathers and mothers. This is reinforced by the fact that fathers no longer have the power, under Tunisian law, to "marry" off minor daughters by force, nor is their consent required for marriage of daughters of majority age.<sup>358</sup>

right revives on the termination of such marriage. . . . Where the mother is dead or disqualified to have the custody of the child, certain female relations of the child subject to the preferential position of maternal over paternal relations, are entitled to the custody of the child. Some of such relatives in order of preference will be: i) mother; ii) mother's mother; iii) mother's mother's mother; father's mother . . . .

356. In addition, in the case of the mother's death, custody also goes to her husband. See MAHMOOD, *supra* note 118, at 176-77 (quoting Article 67). The relevant provision of Article 67 reads as follows: "Where the parent entitled to custody dies while the marriage of the parents is dissolved the right shall pass on to the surviving parent." *Id.*

357. See CHARRAD, *supra* note 227, at 215, 219-21. As Charrad notes:

In the same way as other reforms weakened what was left of tribal solidarities, so did family law reform. This stands in sharp contrast to the codification of family law in the Mudawwana of 1957-58 in Morocco and the 1984 Family Code of Algeria, where the model of the extended patrilineage was explicitly institutionalized and recognized in the new state. Tunisia in comparison equipped itself with a family law that sanctioned essentially a nuclear model of the family and expanded women's rights.

*Id.* at 215. The author also reports that "[t]he code dropped the vision of the family as an extended kinship group built on strong ties crisscrossing a community of male relations. It replaced it with the vision of a conjugal unit in which ties between spouses and between parents and children occupy a prominent place." *Id.* at 219. The author suggests that the motivation behind the political move to reform the law of personal status and broaden women's rights was the desire to bring about

a transformation of kinship, which they [the political elite] saw as a necessary condition for broader social, political, and economic changes. The initiators saw the reform as a step toward altering kinship organization and fostering new behavior patterns . . . . Their primary objective was to encourage the development of a modern nation-state.

*Id.* at 220. Thus, "[t]he lawmakers in effect intended to design a law that would alter kinship relations by also emancipating men from kin control, not only women." *Id.*

358. Article 5 of the Tunisian Majallah sets the minimum marriage age at seventeen for women and twenty for men, and provides that "[t]he making of a contract of marriage for a person below the specified age shall depend upon special permission from the courts and this permission shall only be given for pressing reasons and for the obvious benefit of both spouses." EL ALAMI & HINCHCLIFFE, *supra* note 3, at 240

When one also considers the outright legislative prohibition of polygamy in the Tunisian Code<sup>359</sup> as well as the abolition of the institution of obedience, with both being unique in modern Arab legislation, it becomes clear that the new family is not only nuclear but one based on companionship and love. The assumption by the modern Tunisian legislature is that the relationship between spouses is now more personalized than it was the under the Taqlid regime, bringing reciprocal expectations of attachment and intimacy. It is not clear, however, to what extent the legal advocacy of the companionate family undermines the social power of extended family formations and female subordination in modern Tunisia.<sup>360</sup>

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(quoting the Majallah). Article 3 of the Majallah reads as follows: "Marriage shall only be contracted with the consent of both spouses and it is essential for the validity of the marriage that it be witnessed by two trustworthy witnesses and that a dower be specified for the wife." *Id.* at 239. In addition, Article 9 provides that "[b]oth husband and wife shall have the right to make the contract themselves or to appoint as proxy whomsoever they wish." *Id.* at 240. *See also* ESPOSITO, *supra* note 5, at 99 (reporting that Tunisia's law, among the most "liberal," allows both men and women to freely contract their own marriages).

359. EL ALAMI & HINCHCLIFFE, *supra* note 3, at 242 (quoting the Majallah). Article 18 of the Tunisian Majallah reads as follows:

Polygamy is prohibited. Any man who marries while he is already married before the bond of his previous marriage is dissolved shall be punished by one year in jail and by a fine in the amount of two hundred and forty thousand francs or by one of the two penalties.

*Id.*

360. CHARLES A. MICAUD, *TUNISIA: THE POLITICS OF MODERNIZATION* 148 (1964) ("The results of the new legislation may not be spectacular."). For instance, "[a] puritanical Code has increased penalties for loose morals. Not only illicit lovers but the best-intentioned ones are severely dealt with; elopement is punishable by two years in jail." *Id.* at 149. As another author notes, the reality of sex relations and the issue of female "emancipation" cannot be changed by legislation alone. *See* Lorna Hawker Durrani, *Employment of Women and Social Change*, in *CHANGE IN TUNISIA* 63-66 (Russell A. Stone & John Simmons eds., 1976). For instance, regarding the supposed emancipation of women through work, as espoused by many elite in post independence Tunisia, including ex-President Bourguiba, she reports that "[t]his ideal is largely unrealized, as most girls hand over their wages directly to family or husband, who then allocate what money the women may need for personal expenses." *Id.* at 66. In addition, "a strict segregation of the sexes operates in many factories," and "[s]tudents in the University of Tunis restaurant eat with their own sex, and those girls who broke this informal rule were thought loose." *Id.* at 67.

## 2. Hanafi Doctrine

Hanafi doctrine, as codified by Qadri Pasha, is on the other end of the spectrum, and it advocates a particularly patriarchal structure for the family. This is so because, even in comparison with the other schools of law, under the Taqlid legal system, the Hanafi doctrine gave women fewer financial rights in marriage<sup>361</sup> as well as fewer means to exit the martial relationship.<sup>362</sup> At the same time, Hanafi rules reward the husband more for his financial obligations by adding to his powers in marriage.

For instance, under Hanafi doctrine, the wife's maintenance does not necessarily include her medical expenses if she falls ill.<sup>363</sup> In

361. Authors have noted distinctions between the doctrine of the Hanafi school and other schools in relation to maintenance, for example. As one author has noted:

The difference between the Hanafis and the other Sunni schools regarding the question is that the other schools regard maintenance as *awad al-ihitibas* (consideration of the husband's control over his wife) with no gratuitous element at all, while the Hanafis regard it as *jaza' al-ihitibas* (reward for the husband's control over his wife), but also including an element which they term *sila* (which may be translated as 'relation, connection, link, tie, bond, present, gift, grant'). . . . The other schools of Sunni law, however, as we have seen, do not regard maintenance as a gift from the husband to the wife, but as a debt and they recognise the right of the wife to sue for arrears.

EL ALAMI & HINCHCLIFFE, *supra* note 3, at 21-22. Thus under Hanafi doctrine, unlike that of the other three major Sunni schools, a wife cannot sue for arrears; "[t]he reason for this doctrine is that the Hanafis regard maintenance as (in part) a gift and in Hanafi law a gift is completed only when delivery has taken place." *Id.* at 21.

362. See WANI, *supra* note 73, at 78-81; see also EL ALAMI & HINCHCLIFFE, *supra* note 3, at 29 (reporting that

[t]he law of the Hanafi school is the most restrictive toward women in the matter of divorce. The sole ground on which a Hanafi wife may obtain a dissolution of her marriage is her husband's inability to consummate the marriage. Hanafi law will allow a wife a dissolution only if she can show that she was unaware of her husband's impotence at the time of the marriage. If a wife seeks a dissolution on the grounds of her husband's impotence the court will delay giving a decree for a period of one year. If the husband succeeds in consummating the marriage during this period, no decree will be granted. . . . The burden of proof is on the wife to establish the alleged impotence; in the case of non-virgin wives, this burden is difficult to discharge.

Anderson, *supra* note 212, at 27 (reporting that "according to the dominant Hanafi doctrine a Muslim wife could obtain no dissolution of her marriage even if her husband departed to a distant land and left her permanently without support, or proved, unknown to her, to be afflicted, even at the time of the marriage, with some dangerous disease").

363. See MAGHNIYYAH, *supra* note 76, at 365-66. For instance, the author notes that "it has been narrated from the Hanafi's that medicines and fruits are not *wajib* [obligatory] on the husband during the period of dispute between the couple." *Id.* He adds:

addition, the woman is not allowed a divorce even in the case of harm.<sup>364</sup> If the husband beats his wife, her only resort is to go to a judge and request that he be reprimanded, which will happen only in the case that the judge determines his exercise of his disciplinary powers was in excess, meaning he beats her too severely.<sup>365</sup> The wife, under Hanafi doctrine, is not even allowed to leave the house in this case, lest she be declared disobedient for leaving without her husband's permission, which would result in her loss of maintenance.<sup>366</sup> Thus, under Hanafi doctrine, a wife can very well find herself stuck in an abusive situation, especially if she is too poor to afford leaving the house to escape abuse or to bargain her way out the marriage through *khul*.

This particular arrangement of doctrinal elements, unique to Hanafi law, produces a marital regime that is closer to one of "status" rather than one of "contract." In this regime, women get much less and men much more than a transactional contractual arrangement would warrant. This is far from being a marital contract in which obedience is exchanged for maintenance. The status-like powers of the husband in the Hanafi doctrine is moreover reinforced by the fact that the Hanafis are quite strict about the kind of terms women are able to stipulate in their marriage contract to protect themselves from the punitive aspects of Hanafi law.<sup>367</sup> For instance, a wife

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[I]t is certain that the Shari'ah has not explicitly defined the limits of maintenance, but has only made it *wajib* on the husband, leaving it to be determined in accordance with '*urf* (usage). . . . And there is no doubt that '*urf* disapproves the conduct of a husband who while possessing the means neglects his wife who needs medical attention. . . .

*Id.* at 366.

364. See ESPOSITO, *supra* note 5, at 51 ("In the Hanafi school . . . there are virtually no grounds upon which a wife can free herself from an undesirable marriage except for her husband's impotence."). "In contrast to the other schools, especially the Maliki school, which was the most liberal in this regard, under Hanafi law, wives had to endure desertion and maltreatment with no recourse through divorce." *Id.* For instance, unlike other schools of law, "[i]n classical Hanafi law . . . neither inability nor refusal to maintain is considered sufficient grounds for the dissolution of a marriage." *Id.* at 26. In addition:

The Hanafi school shows more preference for the male in that it does not allow the wife the right to past maintenance unless a distinct agreement was previously made. The wife who, after a period of time, sues for maintenance, has no means to obtain payment of her husband's past-due debt. In contrast, the Shafii and Hanbali schools consider maintenance arrears to be the husband's ongoing debt that can be claimed regardless of the amount of time that has elapsed.

*Id.*; see also WANI, *supra* note 73, at 78-81.

365. See *supra* note 254 and accompanying text.

366. See *supra* note 84 and accompanying text.

367. See ESPOSITO, *supra* note 5, at 22.

cannot stipulate that her husband cannot take another wife, and that in the event he did so, she would not have the power to dissolve the marriage.<sup>368</sup> A stipulation otherwise would be treated as void for violating the nature of marriage.<sup>369</sup> The marriage contract itself, however, would still be considered valid.<sup>370</sup> In many respects, a poor wife under Hanafi doctrine resembles a wife living in the United States during the nineteenth century, when Blackstone's legal regime of the wife's subjugation to her husband prevailed.<sup>371</sup>

### C. *The Specific Case of Family Law Reform in Egypt*

The strategy of both the Egyptian and Jordanian legislatures, representing the intermediate positions on the spectrum, is to disassemble the doctrinal elements of the status regime of the Hanafi doctrine and to transform them into one that is more contractual. Both have an initial commitment to the traditional rules, and they treat their respective pieces of legislation as simply an intervention in, and modification of, the Hanafi doctrine.<sup>372</sup> Under the laws of both countries, if the legislation fails to regulate a particular matter,

368. *See id.*

One important right granted by the Hanbali (but not Hanafi) law school that gives women a certain amount of independence and status in marriage is her right to insert conditions that are favorable to her directly into the marriage contract. . . . For example, clauses may be added that eliminate the husband's right to take a second wife or that grant the wife greater freedom of movement.

Al-Hibri reports that "Hanafis consider the condition prohibiting the husband from taking another wife null and void because it is viewed as encroaching upon a legitimate right of the husband." Al-Hibri, *supra* note 225, at 22-23. She adds that:

[T]he Hanafi attitude toward such conditions appears as highly patriarchal. The Hanafi view is also contrary to the Prophet's position which ranked promises (conditions) in the marriage contract highest among all types of promises, and urged their fulfillment. Only the Hanbali school follows carefully the Prophet's pronouncement on this matter.

*Id.* at 23.

369. *See* MAGHNIYYAH, *supra* note 76, at 262; *see also* ESPOSITO, *supra* note 5, at 22 ("Conditions that are contrary to the object of marriage . . . would be void.").

370. *See* MAGHNIYYAH, *supra* note 76, at 262; ESPOSITO, *supra* note 5, at 22.

371. *See* BLACKSTONE'S COMMENTARIES 441-42, 446 (St. George Tucker ed., 1965).

372. There is an important difference, however, between the approach of the Jordanian and Egyptian legislatures. MAHMOOD, *supra* note 118, at 21-24. Whereas the former set out to *codify* family law, the latter only passed discrete brief pieces of legislation on the subject. *Id.* In other words, Jordanian elites made an elaborate effort to achieve a comprehensive treatment of issues included under "personal status," while Egyptian legislators did not. *Id.* For a discussion of the Jordanian Code of Personal Status of 1976, *see id.*

resort is made to the decisive opinion of the Hanafi school.<sup>373</sup> In contrast, Tunisian lawmakers do not see themselves as intervening in the Maliki doctrine, the ruling doctrine in North Africa under the Taqlid legal system. Indeed, the Tunisian legislature, rather than being constrained or bound by traditional legal rules, has codified a new legal regime.<sup>374</sup>

It is possible to assess the differences between the Tunisian legislative strategy and that of Egyptian (and Jordanian) lawmakers. Whereas Tunisian lawmakers attempted to grant women equality by taking an elaborate step toward abolishing the relationship based on reciprocity assumed by the Taqlid legal system (obedience for maintenance),<sup>375</sup> those in Egypt made no attempt in this direction. Under Egyptian law, maintenance is still the primary responsibility of the man, and it is from this responsibility that he derives all sorts of powers (women's obedience, unilateral no-fault divorce, and guardianship rights). In addition, the primary responsibility of the woman is still to obey her husband in return for maintenance, while at the same time being deprived of the same powers as a man.<sup>376</sup> No

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373. For reference to Article 183 of the Jordanian Law of Personal Status, "requiring recourse to the majority opinion of the Hanafi school in any matter not explicitly covered by the code," see WELCHMAN, *supra* note 272, at 3. See also MAHMOOD, *supra* note 118, at 22. For reference to procedural legislation under which courts in Egypt must apply Hanafi law in the absence of a rule or law found in "reform statutory legislation based on the instructions of alternative schools," see SHAHAM, *supra* note 154, at 13. It is the case in many majority Muslim countries that in absence of a legislated rule, the doctrine of the prevailing school of law is applied. See MAHMOOD, *supra* note 118, at 5 (reporting that "[o]utside the scope of the codified laws the locally dominant school of Islamic law has been, generally, retained by the statutes as the residual law in most Muslim countries [e.g., Maliki law in Algeria, Kuwait, Libya and Morocco; and Hanafi law in Afghanistan, Jordan, Sudan and Syria]") (brackets in original).

374. The Tunisian Majallah, however, does not constitute a complete abandonment of Taqlid law. The legal acts involved in entering marriage and exiting it under Taqlid law are still incorporated in the Majallah. Such acts include contracting marriage, payment of *mahr*, the *idda*, etc. However, these acts are organized within a regime of "spousal equality in companionate marriage," a radical departure from the vision of the family under Taqlid.

375. Thus, Tunisian women came to acquire some of the powers and responsibilities of the Tunisian man (guardianship and maintenance), and the Tunisian man lost some of the powers he originally had, taking up responsibilities historically associated with women (no obedience and paternal custody).

376. The new legislation on *khul* divorce passed in Egypt allows the wife to buy her freedom from the marriage without getting her husband's consent. ESPOSITO, *supra* note 5, at 60. As Professor Esposito reports, "[u]nder a new law that came into effect in March 2000, a woman can divorce her husband, with or without his agreement, in exchange for returning to him any money or property he paid to her upon their marriage. This is a variation on *khul* divorce." *Id.* The reason why this is a variation of *khul* is that in the case of *khul* divorce the consent of the husband is needed. See *id.* at 32. For this reason, Professor Esposito refers to it as a "mutual divorce" or a "common consent" divorce. *Id.* In addition, traditionally *khul* does not require financial

attempt has been made to destroy this legally enforced division of labor to achieve a semblance of equality between the spouses. Of course, the maintenance/obedience transaction leaves women's personal wealth and property untouched, safe from the demands and needs of the family.

Egyptian lawmakers followed a strategy of reform based on a set of discrete steps and actions. First, they increased women's maintenance rights by including medical expenses in the list of items that constitute her maintenance "package"; this was a departure from the Hanafi doctrine.<sup>377</sup> In addition, the law requires that the divorcing husband provide his custodian wife and her children with a residence to use as part of her custodial fees.<sup>378</sup> Second, Egyptian lawmakers reduced the requirements of women's duty of obedience. For instance, the Hanafi presumption that a working wife is disobedient when she leaves the house without her husband's permission is reversed.<sup>379</sup> Under new laws, the presumption is that she is not disobedient unless it is judged that her work constituted an "abuse of right or is contrary to the interests of the family" and her husband asked her to stop working.<sup>380</sup>

In addition to increasing women's maintenance rights and limiting her duty to obey her husband, Egyptian reforms have chipped away at the supra powers that Hanafi doctrine allows the husband because such powers were considered to be in excess of the transactional deal of maintenance for obedience.<sup>381</sup> In this respect, the powers of the husband were seriously curtailed when the disciplinary institution of the "house of obedience" was abolished in 1967.<sup>382</sup> Egyptian feminists agitated in the sixties to put an end to

compensation on the part of the wife to the husband (by returning the *mahr* he has paid her, or waiving her deferred *mahr*, for instance), but it is allowed as a way for her to convince him to consent to the divorce. *See id.* ("[A]warding the dower is not absolutely necessary. A *khul* repudiation can also take place without payment of compensation by the wife.").

377. MAHMOOD, *supra* note 118, at 106. Article 1(3) of Law 100 of 1985 reads as follows: "Maintenance shall include food, clothing, lodging, medical and other expenses recognised by law." *Id.*

378. *Id.* at 113. Under the dictates of Article 18-C of Law 100 of 1985, "[t]he divorcing husband shall provide for his minor children from the divorced wife and their custodian a proper and independent house." *Id.*

379. *Id.*

380. *Id.* at 107. Article 3(4) provides that the right of maintenance shall not be affected "if the wife goes out for a lawful employment—except when this right has been abused by her or where it is prejudicial to the interest of the family and the husband prevents her from so doing." *Id.* at 113.

381. For a general discussion of such changes brought about by twentieth century "reforms" to Egyptian family law, which faced vehement opposition from conservative religious elites, see Najjar, *supra* note 1.

382. *See* Najjar, *supra* note 1, at 331. As Professor Esposito explains:



what they saw as a deeply humiliating practice inflicted on women who chose to leave the marital home.<sup>383</sup> Although they succeeded in abolishing the practice of using the police to enforce obedience judgments, obedience itself remains a legal duty that wives owe their husbands in exchange for their maintenance.<sup>384</sup>

Another blow dealt to the Hanafi husband's supra powers was brought about by legislation that grants women the power to request divorce for harm (Law 25 of 1929) and requires judges to grant women divorce if they fail to prove harm but still insist on terminating the marriage (Law 100 of 1985).<sup>385</sup> The latter effectively

Egyptian family law included a provision, known as *bayt al-taah* (house of obedience), that permitted a husband to restrict his wife to their home. Under traditional Egyptian law, a wife who 'refused to obey' and left her husband might be forcibly returned by the police and confined until she became more obedient. *Law No. 100 of 1985* instead requires the husband to send his wife a summons to return home via an official. The wife then has thirty days to object in court and present her lawful grounds for refusing to obey the summons. If it becomes apparent to the court that reconciliation is not possible and the wife petitions for divorce, the court is to follow arbitration procedures.

ESPOSITO, *supra* note 5, at 60. For the text of the relevant article of Law 100 (1985), see MAHMOOD, *supra* note 118, at 111. Another author describes the "house of obedience," an expression derived from Egyptian popular culture, as follows:

According to the 1897 and later the 1931 Law (Articles 345-46), a husband, armed with an obedience decree issued by the court, could seek the help of the police in forcing his rebellious wife to return to his house (this recourse was called 'the house of obedience,' *bayt al-ta'a*). . . . From the beginning of the twentieth century, Egyptian women's movements attacked the compulsory character of the house of obedience and demanded its abolition. They were supported by some modernist jurists. . . . As a result of such opposition, the government abolished this institution on 13 February 1967.

SHAHAM, *supra* note 154, at 73. As the author notes, "[t]his kind of enforced obedience is not mentioned in either the Qur'an or the Hadith; but as a customary practice in Egypt, the Sudan, and other parts of Africa, it became part of state law." *Id.*

383. For a discussion of the legal process by which the institution was abolished, see Najjar, *supra* note 1, at 331-32. Even earlier, pioneering feminists, such as those who comprised the Egyptian Feminist Union (EFU), also advocated the abolition of the institution, but without success. See BADRAN, *supra* note 208, at 131-32.

384. Thus, Article 11-B (translated by other authors as Article 11 bis 2) declares that:

If a wife refuses to live with her husband without having a right to do so, her maintenance may be stopped from the date of refusal. Refusal without right shall be taken into consideration if she does not return to the matrimonial home on her husband's demand. . . .

MAHMOOD, *supra* note 118, at 111.

385. See MAHMOOD, *supra* note 118, at 109. Article 6 of Law 25 of 1929 (as amended by Law 100 of 1985) reads as follows:

If a wife alleges that the husband has been cruel to her in a way which makes the continuance of the marital relationship impossible for women of her class,

means that Egyptian wives have come close to acquiring access to no-fault divorce. Divorce is conditional, however, upon the woman's willingness to go through an elaborate process of attempted reconciliation with the husband, which is mediated by the court as required by the law.<sup>386</sup> This conciliation process is not required when the husband divorces the wife.<sup>387</sup>

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she can apply to the *qadi* [judge] for divorce. The *qadi* shall grant her dissolution of marriage . . . if the allegation is proved and no mutual reconciliation between the spouses seems possible.

*Id.* The article then provides that “[w]here the *qadi* rejects the wife’s plea and she later repeats her allegation but is unable to prove it, he shall appoint two arbitrators. . . .” *Id.* Article 10 stipulates that if the arbitrators cannot “effect a reconciliation,” then they will declare who has fault and grant a divorce. *Id.* at 110. The assignment of fault is important because it impacts the financial rights the woman will have upon divorce. *See id.*

386. The Hanafi husband’s disciplinary power has been seriously undermined because the statutory reforms offer a woman a way out of marriage. Rather than being caught in the “poor abused wife zone,” what customarily happens now in Egypt if the wife desires to leave an abusive marital relationship is the following: first, the wife leaves the house and the husband cuts off her maintenance on the grounds that she left the house without his permission; second, the wife sues in court for her maintenance; third, the husband argues that she had been disobedient and obtains an “obedience” judgment requiring her to come back home; fourth, the wife responds by requesting divorce based on harm and argues that she had left the house for harm inflicted on her by husband; fifth, the wife tries to prove harm in court.

If the judge fails to reconcile her with her husband and she succeeds in proving harm, the wife is granted a divorce. If, however, she fails to prove harm and insists upon divorce, then the court appoints arbitrators from each spouse’s family who are instructed to look into the reasons for disagreement and attempt to reconcile the spouses. If they fail, then apportionment of harm and reimbursement takes place. If the arbitrators decided that harm came really from the wife herself, the wife stands to lose her deferred dowry and maintenance during her *idda*. If, on the other hand, it turns out that the husband was the source of the harm, she maintains all her financial rights. If the arbitrators decide that harm was caused by both spouses, then each pays the other proportionally for the harm inflicted on the other. If the arbitrators differ among themselves, then the court takes over again and attempts reconciliation yet another time. If it fails, with the wife insisting on terminating the marriage, then the court grants her divorce. Apportionment of harm and reimbursement is attempted again, this time according to the court’s discretion. This process is outlined in Articles 6-11 of Egyptian Law 25 of 1929, as amended by Law 100 of 1985. For the text of these Articles, see MAHMOOD, *supra* note 118, at 109-10.

387. *See* MAHMOOD, *supra* note 118, at 109. Article 5-A of Law 25 of 1929, as amended by Law 100 of 1985, reads as follows:

A husband who divorces his wife shall get the divorce registered within thirty days from the date of pronouncement. If the divorced wife is present at the time of registration, her knowledge of divorce shall be recognized. But if she is not present, the registrar shall notify the *talaq* [divorce] to her through a court official and get delivered to her or her nominee a copy of the certificate of divorce. Every divorce shall be effective from the date of the pronouncement—

That the transactional quality of the Taqlid marriage contract has been legislatively rehabilitated is indicated by two facts: (1) that husbands in Egypt are no longer able to use the police to force their “disobedient” wives to return to the marital home, and (2) that Egyptian women are no longer trapped in an abusive marriage but can exit through either divorce for harm or *khul* regardless of the husband’s consent. Marriage is now simply obedience for maintenance; if one is not offered, the other is denied. Husbands no longer have extra powers (such as discipline and the “house of obedience”) to force women to commit to this transaction or anything else in addition. The Egyptian legislature achieved these reforms not by abolishing the husband’s disciplinary powers, recognized independently by the Hanafi doctrine as part of the list of powers provided to husbands.<sup>388</sup> Rather, the changes were made through small legislative moves taken on other fronts, the aggregate effect of which was to strip these disciplinary powers of their otherwise brutal impact.<sup>389</sup>

The Egyptian legislative policy of adding to the wife’s maintenance rights, reducing the requirements of the wife’s duty of obedience, and chipping away at the husband’s supra powers stands in contradistinction with the Tunisian legislative policy of introducing a complex, liberal notion of equality between the spouses.

#### IV. ADJUDICATING THE FAMILY IN EGYPT

To truly understand steps taken to reform family law in Egypt, one must look at the way in which the judiciary has decided cases related to the issues of obedience and a wife’s request for divorce based on harm. Abolishing the “house of obedience,” allowing wives to request divorce for harm, and more recently, granting women the right to a *khul* divorce without having to obtain the husband’s consent were all significant steps taken by means of legislation to

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except when the husband has concealed it from the wife, in which case for the purposes of succession and other financial rights it will become effective on the date when it comes to her knowledge.

*Id.* One limit to the husband’s right to divorce his wife when he wishes is that she must be informed; under classical Taqlid rules, a wife could be divorced and not even know it; that is, it was not required that she be informed. *See* ESPOSITO, *supra* note 5, at 30 (reporting that the wife “does not have to be present nor must she be informed” of the fact that her husband has repudiated, or divorced, her).

388. *See* sources cited *supra* note 255.

389. The Jordanian legislature made the even more radical legislative move of not considering the woman who leaves the house as a result of mistreatment by her husband as disobedient. *See supra* note 255 and accompanying text. The Jordanian Code still allows such a wife her maintenance.

chip away at the status regime of the Hanafi doctrine. In addition, Egyptian courts have continued the legislative path of disassembling the elements of the Hanafi doctrine that in effect traditionally produced the status regime.

Two moves taken by the judiciary released women from the disciplinary rule of the husband. First of all, Egyptian courts decided ambivalently and gradually that women beaten by their husbands do not owe their spouses a duty of obedience. Second, the courts have treated obedience cases as separate from and irrelevant to the outcome of cases concerning requests for divorce based on harm. It is important to note, however, that the decisions of the Egyptian courts are contradictory and conflict enough to open to question the exact effectiveness of these judicial moves.

### A. Adjudicating Obedience

Several women have appeared before Egyptian courts because they were charged with disobedience for leaving the marital home without their husband's permission. These women responded by stating that they had left because their husbands beat them. The question before the court was whether to accept this argument, particularly given the fact that these women were not requesting a divorce because of harm. What these women wanted instead was simply to leave the house to escape the harm inflicted on them by their husbands, without losing the maintenance they desperately needed. Under the law, if judged disobedient, these women stood to lose their maintenance. Below various cases and the decisions made by the court are discussed.

#### 1. Obedience is Still Owed the Husband Even if He Beat His Wife

##### Case 1:

Obedience is the wife's legal duty as soon as she is awarded her prompt *mahr* and a legal residence is provided for her to inhabit.<sup>390</sup>

##### Case 2:

The husband has the right to his wife's obedience and to "her enjoyment," and he cannot beat or discipline her. If he did, she should resort to court, which must then reprimand him and prevent him from hurting his wife. *The wife, however, does not have the right to disobey him on the ground that he beat her.*<sup>391</sup>

##### Case 3:

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390. Case No. 4056/30 (30/10/41) 10/56 (on file with author).

391. Case No. 474/39 (30/6/40) 8/136 (on file with author).

The husband has the right to his wife's obedience and to "her enjoyment" by virtue of the marriage contract, and she does not have the right to withhold herself from him for reasons of harm and battery. She also has no right to leave the house for that reason, as long as she lives among good neighbors. *If her husband beat her, she should complain to the judge, who would punish and discipline him.*<sup>392</sup>

## 2. Court May Discipline A Husband Who Beats His Wife by Depriving Him of the Wife's Obedience

### Case 4:

If a husband beats his wife without justification, he ought to be disciplined *even* if the beating was not severe. There is no particular and prescribed way on how to discipline such a husband; it is up to the judge to decide on this question. The judge may therefore decide to deprive the husband of his wife's duty of obedience.<sup>393</sup>

## 3. A Husband Who Beats His Wife Loses His Right to Her Obedience

### Case 5:

A husband who beats his wife is not to be entrusted with her. He therefore loses his right to his wife's obedience.<sup>394</sup>

## 4. Applying the Same Standard of Harm for Both Divorce and Obedience

### Case 6:

The law has allowed the wife to request divorce for harm if living with the husband has become impossible. This being the case, harm that is severe enough to allow the wife to get a divorce is enough to allow wife less than that: disobedience. What other courts have decided—namely, that such a conclusion would lead to "obstructing" marriage contracts—is baseless.<sup>395</sup>

Most cases dealing with the question of obedience attempt to define the outer limits of this legal duty in various contexts. They deal with questions such as whether the wife is disobedient when she refuses to move to a new residence upon her husband's request; if she had stipulated in the marriage contract that she would only live in a

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392. Case No. 1/35 (1/12/35) 7/200 (on file with author).

393. Case No. 45/29 (13/4/30) 1/912 (on file with author).

394. Case No. 2254/40 (23/11/31) 3/633 (on file with author).

395. Case No. 723/35 (2/5/26) 7/870 (on file with author).

specific residence;<sup>396</sup> if she leaves the marital home because her husband was appropriating her money;<sup>397</sup> and if she leaves the marital home because her husband engaged in homosexual practices.<sup>398</sup>

### B. *Adjudicating Divorce Based on Harm*

A series of decisions by the Egyptian Court of Cassation, the highest court of appeal in Egypt, have affirmed that the issue of disobedience is to be treated as different from, and its outcome regarded as irrelevant to, the issue of the same wife's request for divorce based on harm. The Court has decided that these issues should be seen as independent from each other, based on the fact that the cause of action for one is different from that of the other. In addition, the facts that trial courts are to take into consideration when assigning fault are different for the two issues. Separating disobedience from divorce based on harm has the effect of breaking yet another part of the chain of imprisonment husbands had imposed on their wives under Hanafi doctrine.

Although the courts might feel strongly that wives should earn their maintenance by offering obedience, this being the nature of the marriage transaction, objections do not arise when the wife is requesting an end to this marital transaction through divorce for harm. Maintenance is no longer due in this case, and the court simply has to apportion the blame between the spouses and determine if the husband owes the wife anything, or vice versa. To prove that disobedience was justified requires a strict standard of harm, whereas in the case of divorce for harm, the standard is a looser one. To transfer the standard of the one case to the other would be unfair.

#### Case 1:

The case on obedience differs from the case on divorce for harm. The first is based on abandonment and departure from the marital home, while the second is based on the wife's claim that her husband harms her. The outcome of the obedience case does not preclude the court from looking into the wife's request for divorce based on harm.<sup>399</sup>

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396. See Case No. 396/43 (6/2/44) 5/53 (on file with author) (ruling that wife was disobedient).

397. See Case No. 1218/931 (24/8/32) 5/912 (on file with author) (ruling that wife was not disobedient). *But see* Case No. 38/33 (21/1/34) 5/647 (on file with author) (ruling that wife was disobedient).

398. See Case No. 1458/48 (22/11/48) 21/90 (on file with author) (ruling that wife was disobedient).

399. Cassation 29/3/1967, No. 19, 35 (on file with author); *see also* Cassation 17/11/1971, No. 26, 38 (on file with author).

Case 2:

Declaring a wife disobedient in a case on obedience does not preclude the court from adjudicating her request for divorce based on harm. When the lower court refused to consider the outcome of the obedience case, it was making the correct decision.<sup>400</sup>

Case 3:

It is not correct to argue, as the lower court did, that the wife's submission to her husband after she was adjudged disobedient indicates the absence of harm justifying her request for divorce. The two cases are different from each other and should be treated as such.<sup>401</sup> On the other hand, the Court of Cassation also decided the the next case.

Case 4:

The lower court investigating the question of harm in a divorce case *can* look into the facts that have transpired in the case on obedience, and it is up to the court to decide whether these facts amount to harm inflicted by the husband, thus justifying granting the wife a divorce. The court, however, has to be clear in its reasoning.<sup>402</sup>

The bulk of the cases concerning the granting of divorce based on harm done to the wife address the question of what kind of acts the court should take into account when assessing the harm done. The question is of importance not so much because a woman might be denied a divorce—a woman can get a divorce even if she fails to prove harm. What makes the issue important is the fact that there will be an allocation of responsibility after the divorce is granted, and this allocation has financial consequences.<sup>403</sup>

The Court of Cassation as well as the lower courts have produced a wealth of cases defining the kind of acts that are to be considered harmful. The definition of harm tends to be elitist, and

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400. Cassation 24/11/1976, No. 4, 45 (on file with author).

401. Cassation 14/3/1979, No. 5, 47 (on file with author).

402. Cassation 5/11/1975, No. 10, 43 (on file with author).

403. MAHMOOD, *supra* note 118, at 110. Article 10 of Egyptian Law 25 of 1929, as amended by Law 100 of 1985, provides that:

Where the arbitrators are unable to effect a reconciliation—(i) if the fault lies on the part of the husband, the arbitrators can decree a single irrevocable divorce, assuring that the wife will not lose any of her rights which would normally arise from the marriage and on divorce; (ii) if the fault lies on the part of the wife, they can decree a divorce subject to payment of compensation by the wife; (iii) if the fault lies with both parties, they can decree a divorce either without compensation or on payment of compensation commensurate with the blame on either side; and (iv) if the causes of discord are unknown and the fault cannot be located, they can decree a divorce without compensation.

*Id.*

what is harm for a rich woman is not harm for a poor one. The Court of Cassation thus defined harm as “inflicting verbal or physical injury on the woman in a way that does not befit people of her *social status*.”<sup>404</sup> The Court of Appeals likewise reasoned that “what a woman of a certain social class finds tolerable another of a different social class does not.”<sup>405</sup> In another case, the court decided that, “harm does not have to be repeated. A single hurtful act is sufficient to allow wife to request divorce, particularly considering that the woman concerned is a *working and educated woman*.”<sup>406</sup> In yet another instance, the Court of Cassation declared that, “the charge being made by the husband that his wife was in contact with her ex-husband is a charge which is not tolerated in any *social milieu* and leads to poisoning the relationship between the spouses.”<sup>407</sup>

The financial consequences for poor women of the definition of harm that Egyptian courts have adopted can be great. Unfortunately, however, the published texts of these cases do not provide any details about the way the courts allocated financial responsibilities between spouses upon granting the wife a divorce.

### C. Constitutionalizing the Family

Responding to pressure from an increasingly vocal Islamic movement, and in the midst of a controversy in the country as to the Islamicity of Egyptian legislation, the Egyptian political elite passed an amendment to Article 2 of the Egyptian Constitution of 1971.<sup>408</sup> The Amendment changed the wording of the Article from the seemingly benign “the principles of Islamic Sharia are a principal source of legislation” to the more overreaching “the principles of

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404. Cassation 18/4/1962, No. 28, 29 (on file with author) (emphasis added). As one author reports:

It is said that it is natural for a working class woman to get beaten and for men of her social class to be polygamous. If a working class wife would come to court and argue that she had been harmed by her husband who beats her or that he had taken another wife, she is told this does not constitute harm ‘the likes of her cannot tolerate’ and she is denied divorce.

*The Status of Egyptian Women in Personal Status Law, in THE LEGAL CONSCIOUSNESS OF THE EGYPTIAN WOMAN (AL-WAI AL-QANUNI LIL-MARA’AH AL-MIRIYYAH)* 105 (Ahmad Abdullah ed., 1995) (on file with author).

405. Appeal 11/12/1965, No. 89, 82 (on file with author).

406. Case No. 33, Year 50, Personal Status 31/3/1981 (on file with author) (emphasis added).

407. Cassation 17/4/1984, No. 37, 53 (on file with author) (emphasis added).

408. See Gabr, *supra* note 21, at 217. The amendment was passed in 1980. See Lombardi, *supra* note 50, at 81.



Islamic Sharia are *the* principal source of legislation.”<sup>409</sup> The implication of such an amendment for an otherwise predominantly secular legal system took some time to unfold. For years, the Supreme Constitutional Court of Egypt (SCC)<sup>410</sup> avoided confronting this matter head-on, despite the fact that its docket filled up with Article 2 cases almost immediately after the amendment came into effect.<sup>411</sup> The Court’s evasion tactics consisted of either striking down

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409. Gabr, *supra* note 21, at 217 (emphasis added); Lombardi, *supra* note 50, at 86. As one author reports, “[t]he provision contained in Article 2 of the Egyptian Constitution is not peculiar to Egyptian constitutional law. Similar provisions are found in numerous Arab constitutions.” Kilian Bälz, *The Secular Reconstruction of Islamic Law: The Egyptian Supreme Constitutional Court and the “Battle over the Veil” in State-Run Schools*, in LEGAL PLURALISM IN THE ARAB WORLD 231 (Baudouin Dupret et. al. eds., 1999).

410. For a description of the Court, see Marie-Claire Foblets & Baudouin Dupret, *Contrasted Identity Claims Before Egyptian and Belgian Courts*, in LEGAL PLURALISM IN THE ARAB WORLD 63 (Baudouin Dupret et. al. eds., 1999). The authors report that:

Egypt also has a constitutional court, the Supreme Constitutional Court, established by the Constitution which has been active since the promulgation of its organic law (Law No. 48 of 1979) and the adoption of its internal regulation. . . . The Supreme Constitutional Court is competent in issues with regard to the interpretation of the law, monitoring constitutional issues and deciding conflicts of competence between the courts. At the request of a judge it can be called upon to decide on the constitutional status of a law.

*Id.* Authors have recognized the “crucial role of the Egyptian Supreme Constitutional Court in determining the nature of public life in Egypt as a modern state formally governed by principles of Islamic *Shari’a* laws.” Ran Hirschl, *Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend*, 15 CAN. J.L. & JURIS. 191, 197 (2002). This same author, in another article, describes the establishment of the Court as follows:

In 1979, President Anwar al-Sadat, with the support of the secular high-income bourgeoisie, initiated the establishment of the Egyptian Supreme Constitutional Court and granted a relatively wide authority of judicial review. The constitutional reform of 1979 also ensured the Court’s formal independence from government, political parties, and other improper influences and interferences. Given the fact that Egypt has a presidential system of government in which the executive enjoys a wide range of powers, it is somewhat surprising that the Supreme Constitutional Court was granted a relatively wide authority of judicial review over administrative and presidential legislative powers, and even more surprising that the Supreme Constitutional Court has maintained and even fortified its relative independence since its establishment.

Ran Hirschl, *The Struggle for Hegemony: Understanding Judicial Empowerment Through Constitutionalization in Culturally Divided Polities*, 36 STAN. J. INT’L L. 73, 114 (2000).

411. See Hirschl, *The Struggle for Hegemony*, *supra* note 410, at 115 (“Following the establishment of judicial review in 1979 and the 1980 constitutional amendment, the Egyptian Supreme Constitutional Court has increasingly been called upon to

legislation coming to its review under this Article on procedural grounds,<sup>412</sup> thereby avoiding looking into the substantive ramifications of the amendment to the Article, or of declaring the non-retroactivity of the amendment, allowing the Court to treat all laws that had been passed before it as being immune from challenges under the Article.<sup>413</sup>

Using the tactics described above, the Court was able to uphold challenged legislation twelve consecutive times, buying itself precious time until the moment came when it had to decide on the exact reach of Article 2.<sup>414</sup> That moment came in 1993,<sup>415</sup> and from then on, the SCC has produced a body of cases that are historic both for what they say about Egypt's judicial elites' attitude toward the general project of Islamicization and also for the ingenuity of the test developed by the Court in adjudicating cases under Article 2.<sup>416</sup>

determine the constitutionality of legislative and administrative acts on the basis of their adherence to the principles of the Shari'a.").

412. See Foblets & Dupret, *supra* note 410, at 63. The authors report that an examination of the jurisprudence of the Court demonstrates that, especially in its early years, "when it comes to dealing with issues of unconstitutionality, it has tended not to become involved in interpreting *shari'a*, rather it has followed a strict technical principle. . . ." *Id.* One instance of this was Law 44 of 1979 (Jihan's Law), reforming various aspects of family law. See Najjar, *supra* note 1, at 337; see also *supra* text accompanying note 211 (discussing "Jihan's Law").

413. See Foblets & Dupret, *supra* note 410, at 63. The authors report that in a 1985 decision, "the Supreme Constitutional Court formulated a principle which has become law, that of the non-retroactive implementation of Article 2. Thus the Court rejected the right to pass judgment on the constitutionality of texts pre-dating 1980." *Id.*; see also Awad Mohammed El-Morr, *Judicial Sources for Supporting the Protection of Human Rights*, in THE ROLE OF THE JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS 8 (1997) (citing the Supreme Constitutional Court's decision that statutes need only abide by Article 2 of the Constitution if enacted after "the current language of Article 2 of the Constitution was adopted"); Scott Kent Brown II, *The Coptic Church in Egypt: A Comment on Protecting Religious Minorities from Nonstate Discrimination*, 2000 BYU L. REV. 1049, 1085 (citing the Supreme Constitutional Court's "refusal to apply Article 2 of the Constitution (the 1980 *shari'a* amendment) to any legislation that was enacted before the article was adopted [amended] in May 1980"). Bälz reports:

[T]he S.C.C. defined application of Article 2 of the Egyptian Constitution with respect to time. In a leading case in 1985 concerning the constitutionality of interest claims ('Azhar-case'), it was held that only 'with the day the amendment . . . of Article 2 of the constitution came into force on 22 May 1980, the legislative power (*sultat al-tashri'*) became *bound* when enacting new laws or amending laws, which predated this day, to observe that these laws must conform to the principles of Islamic law (*mabadi' al-shari'a al-islamiyya*). . . .

Bälz, *supra* note 409, at 234-35.

414. Lombardi, *supra* note 50, at 90. ("[T]he SCC remained adamant. It reaffirmed the non-retroactivity of the *shari'a* on twelve separate occasions.")

415. *Id.* at 90, 97.

416. See *id.* at 99-102 (summarizing the test); see also *infra* note 445 (discussing the strategies taken by the Court in Article 2 cases).

By looking at three important cases that came before the SCC under Article 2 and the reasoning that the Court adopted in each case, insight as to how the Court is handling the amendment and its effects on legislation can be attained. These particular cases, in their aggregate, delimit the Court's ideological position on the social matters at hand. Each case, like the majority of such cases, presents the Court with the question of what to do about the "battle of the sexes" and the fate of patriarchy in Egypt.<sup>417</sup>

In the first case, decided in 1997, the SCC was presented with the issue of the constitutionality of Article 11 of the 1929 Law on the family, which gives the judge the right to grant a woman a divorce upon a determination that reconciliation with the spouse is impossible.<sup>418</sup> The Court agreed with the plaintiff that according to the Quran, divorce is the absolute right of the husband.<sup>419</sup> However, it contended that there was another determinate rule in the Quran that was relevant to the dispute, the rule requiring the appointment of an arbitrator from each spouse's family to reconcile the spouses in the case of dispute.<sup>420</sup> The Court argued that while under this particular rule it is clear that the task of the arbitrators is to attempt to reconcile the spouses, it does not specify what the arbitrators

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417. It is a fact worthy of mention that the absolute majority of cases presented to the Supreme Constitutional Court under Article 2 are related to family law and inheritance, the two areas of the law that remain based on *sharia* (although in codified form). It is interesting that non-religious laws are rarely brought to the attention of the Court for non-conformity with Article 2. The reasoning that the Court adopts in these cases is interesting because it demonstrates the judicial test that the Court developed to examine the constitutionality of legislation under Article 2 of the Constitution. This test embodies a choice that is only one among many that the Court could have made, each such choice having its own variant "Islamicizing" imprint on the system. In other words, the test speaks volumes on how far or near the SCC is willing to go to promote the project of Islamicization. See *infra* note 445 (analyzing and describing the test).

418. Case No. 82, Judicial Year 17, 1997 (on file with author). The relevant provision of Article 11 reads as follows:

If the court is unable to bring about agreement between the spouses and it becomes obvious to the court that they cannot live together, and if the wife insists upon divorce, the court shall rule for their irrevocable divorce with the forfeit of all or part of the wife's financial rights and her obligation to pay appropriate compensation if this seems appropriate.

EL ALAMI & HINCHCLIFFE, *supra* note 3, at 57-58 (quoting Article 11 of Law No. 25 of 1929, as amended by Law No. 100 of 1985).

419. Case No. 82, Judicial Year 17, 1997, at 5 ("While Talaq has been legislated by God in his wisdom and gave the power to enforce it to the man since he is more rational and wiser. . .") (translation by author).

420. See *id.* at 6 ("Since arbitrating between husband and wife when there is discord between them is based on God's command, 'And when you fear discord between them, send them one arbitrator from his family and one from hers, if they desire reconciliation God will make matters well between them. . .') (citing verse 4:34 of the Qur'an, found in the chapter (*sura*) titled Women (Al-Nisa)) (translation by author).

should do if they fail in their efforts.<sup>421</sup> This being the case, the Court argued, Article 11 is not unconstitutional because it grants the arbitrators the power to recommend divorce to the judge.<sup>422</sup>

Granting such powers to the arbitrators is within the realm of human-made legislation (or *ijtihad* as the Court sometimes called it) since it touches on the question of what extra powers arbitrators should be given—itsself a subject of dispute among the various medieval schools of jurisprudence.<sup>423</sup> The Court completely glossed over the fact that granting the arbitrators and consequently the judge the respective powers of recommendation and divorce was tantamount to constricting the husband's absolute power to divorce his wife.

In the second case, decided in 1996, the Court was presented with the infamous question of the veil or headscarf.<sup>424</sup> The court was charged with reviewing the constitutionality of an executive order issued by the Minister of Education<sup>425</sup> prohibiting schoolgirls from wearing the *niqab* and the *hijab* in all schools below the university level.<sup>426</sup> The edict created such an outcry that the government eventually amended it, confining the prohibition to instances where

421. See *id.* (translation by author).

[H]owever, jurists have differed as to who has the power to enforce divorce when there is discord in the family and the husband refuses to divorce his wife. . . . Some jurists have argued that the arbitrators who have the power to try and make amends between the spouses have also the right to divorce the wife from her husband and others have restricted their power to that of making amends. . . .

422. The assumption is that the judge would then grant a divorce on behalf of the husband.

423. See Case No. 82, Judicial Year 17, 1997, at 6 (translation by author).

Since the legal provision under dispute legislated within the power of the legislature to deduce Sharia rules taking into account Sharia proofs—has treated the arbitrators as having the power to study the cause of the dispute between the spouses and to recommend to the judge the reasons for it, the respective responsibility of the spouses, and whether separation should take place with (or without) compensation according to the assigned responsibility of each. . . . [T]his rule does not contradict a determinate rule of the Sharia, but legislates an area that has been an object of controversy among the jurists . . . and takes into account the general welfare of the people as Sharia has recognized it. . . .

424. Case No. 8, Judicial Year 17, 1996 (on file with author). For a discussion of this case, see Brown, *supra* note 414, at 1089. See also Bälz, *supra* note 409, at 238-42.

425. Edict #113, 1994 (on file with author).

426. See Foblets & Dupret, *supra* note 410, at 67-68. Specifically, the decree established that girls must wear particular school uniforms: "The decree in question requires all girls to wear the uniform of the school they attend." *Id.* at 68. These uniforms did not include a *hijab* or the *niqab*. *Id.*

permission to wear the veil from the girl's parents was absent.<sup>427</sup> The challenge to the edict by the Islamicists, however, was relentless.<sup>428</sup>

The court read the various verses in the Quran that could be relevant to the issue at hand and concluded that these verses recommended that women should cover some parts of their body, but it found no evidence that they required women to cover their hair or face.<sup>429</sup> The Court also argued that the prophetic traditions were equally ambiguous on this question.<sup>430</sup> Moreover, the medieval jurists themselves disagreed on exactly which parts of the woman's body should be covered.<sup>431</sup> The Court then sought to discover a principle

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427. Edict #208, 1994 (on file with author). As Lombardi reports:

Islamist lawyers promptly brought Article 2 challenges to the edict. Alarmed by the popular reaction to the decree, the Minister of Education softened it. He issued a new edict (#208/1994) which amended the earlier edict. Under the new edict, schoolgirls could wear the *hijab* if they received permission from their parents.

Lombardi, *supra* note 50, at 107-08. In addition to the consent of the parents, the decree also established that veiling has to be based on the free will of the student "and that it is not due to coercion from any other person or organization." Bälz, *supra* note 409, at 230. However, the *niqab*, which covers the face, was not allowed: "The ministerial decree stipulates that all students should be free to adopt the veil if they choose, as long as it does not hide the face and their guardian can certify that this decision has not been taken under duress." Foblets & Dupret, *supra* note 411, at 68. As another author put it, "[t]he *niqab*, the facial veil covering the entire face, was banned from state-run schools through this decree. To wear a *hijab*, a head scarf, was all that remained permissible." Bälz, *supra* note 409, at 229.

428. See Lombardi, *supra* note 50, at 108 ("Under the new edict, schoolgirls could wear the *hijab*. . . . Plaintiffs, however, continued to fight the decrees in court. . . ."). For the specific facts concerning the father who brought the case, a man named Mahmud Wasil, and his two daughters, Maryam and Hagir, who were not allowed to attend school because they were wearing the *niqab*, see Foblets & Dupret, *supra* note 410, at 67.

429. Lombardi, *supra* note 50, at 108. As Lombardi reports, "[t]he SCC first identified two passages of the Qur'an which require women to cover up those parts of their body that are sexually appealing to men, but it found none that specifically required women to cover their hair or their faces." *Id.* See also Bälz, *supra* note 409, at 238.

430. See Lombardi, *supra* note 50, at 109. As Lombardi describes it:

In the *sunna* literature, there were reports that the Prophet had asked women to cover everything but their heads and faces. But, said the SCC, there was no evidence that the Prophet had required some women to wear the *hijab* or *niqab*. Since there was no clear declaration in the Qur'an or *sunna* that women must wear the *hijab* or *niqab*, the SCC declared itself fairly certain that the sharia did not specifically require women to wear the veil.

*Id.*

431. See El-Morr, *supra* note 413, at 16 (reporting that "Islamic jurists disagree as to the proper construction of the Qur'an and the confirmed or alleged sayings of Mohammed the Prophet with regard to women's dress"). The author, Chief Justice El-Morr of the Supreme Constitutional Court of Egypt, describes the case in length. See

behind these disparate evocations on women's dress and concluded that it was the principle of modesty.<sup>432</sup> The purpose of modesty, the Court explained, is to prevent illicit sex.<sup>433</sup> The Court decided that banning the veil would not lead to illicit sex and therefore did not violate the principle of modesty.<sup>434</sup> The edict, according to the Court, was consequently constitutional.<sup>435</sup>

The third case reviewed Article 11 of Law No. 100 of 1985, which grants the wife the power to request a divorce if her husband takes another wife.<sup>436</sup> The plaintiff argued that granting the wife such

*id.* at 14-19; *see also* Bälz, *supra* note 409, at 238-39 (discussing the findings of the SCC).

432. *See* Bälz, *supra* note 409, at 238. As Bälz reports, the Court stated the following in regards to modesty and women's dress:

Islam elevates the standing of the woman, requires her to preserve her modesty, and obliges her to cover her body from being despicable or sacrificing her dignity in order to protect woman from whatever may damage, or be detrimental to, her shame. ( . . . ) Therefore, she does not have the right to choose her dress according to her entirely free will.

*Id.* For the Chief Justice's point of view on modesty and women's dress, *see* El-Morr, *supra* note 413, at 16-17.

433. *See* Lombardi, *supra* note 50, at 111. The Court reasoned that:

The way that a woman looks should express her modesty in a way that will permit her legally to do what she needs to do in life, and which simultaneously keeps her away from that indecency/immorality (*ibtizal*) which arises when men approach her because of the way her body looks and which leads her to sin (*ithm*) and affects her position and situation. The question then was whether the *niqab* ban promoted immodest behavior in opposition to the fundamental principle that women must dress modestly. The SCC evaluated the ban by focusing on what ends the principles of modesty are to serve. The SCC found that modesty is, at its heart, designed to prevent illicit sex.

*Id.*

434. *Id.*

435. *See* Foblets & Dupret, *supra* note 410, at 68. As one author put it, by ruling as it did in this case, the Supreme Constitutional Court "advocated the 'middle course' by refusing to impose an excessive dress code but upholding a very modest one." Brown, *supra* note 413, at 1089.

436. Case No. 35, Year 9, 1994 (on file with author). Article 11 of Law No. 25 of 1929, as amended by Law No. 100 of 1985, provides that "[a] wife whose husband takes a second wife may petition for divorce from him if she is affected by some material or moral harm of a kind which would make it impossible for a couple such as them to continue living together, even if she has not stipulated in the contract that he should not take further wives." EL ALAMI & HINCHCLIFFE, *supra* note 3, at 58 (quoting Article 11 bis of Law No. 25 of 1929, as amended by Law No. 100 of 1985). The Article also provides that:

If the judge is unable to effect reconciliation between them he shall grant her an irrevocable divorce. The wife's right to petition for divorce on these grounds shall be forfeit upon the elapse of one year from the date of her knowledge of the other marriage. . . . Her right to petition for a divorce shall be renewed whenever he marries another woman.

powers was in clear violation of the husband's right, granted him by the explicit dictates of the Quran, to marry up to four wives.<sup>437</sup> In other words, he argued that the law was in violation of his right to practice polygamy. The court went out of its way in this case to argue that no such violation really existed. The court asserted that as a constitutional court, it had the duty to "practice its role of constitutional review in a limited way always trying to interpret the legislation in such a manner that avoids striking it down."<sup>438</sup> This assertion was quite striking, given the court's practice of overt judicial activism when the question of constitutionality is not related to the Shari'a.<sup>439</sup>

The court agreed with the plaintiff that men have the absolute right<sup>440</sup> to practice polygamy, to marry up to four wives, and that such a right was universal and "transcended time and space."<sup>441</sup> The court went even further by insisting that although treating wives equally is a requirement of polygamy, this was only a "restriction of the right and not a cause of it."<sup>442</sup> By making this latter assertion, the court seemed to be distinguishing its position from those who argue that polygamy may be prohibited by law because the requirement of fairness associated with the Quranic license to be polygamous is impossible to achieve.

It is surprising that after asserting the absoluteness and universality of the right to practice polygamy, the Court proceeded to argue that granting the wife the right to request divorce cannot be seen as jeopardizing the husband's right to practice the same. This is so because the law stipulates that the wife has to prove to the court that she has been harmed by the second marriage and that this harm was "real not illusory, actual not imagined, demonstrable not assumed, independent of the incident of the later marriage although occasioned by it."<sup>443</sup> Had the law, the court argued, assumed harm

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*Id.*

437. See Case No. 35, Year 9, 1994, at 3 (on file with author). "The plaintiff argues that the provision under dispute violates Quranic text that licenses polygamy and that restricts it only with the requirement of fairness in treating wives. Moreover the provision does not specify the kind of emotional harm that allows the wife to demand divorce. . . ." *Id.* (translation by author).

438. *Id.* (translation by author).

439. For a discussion of such cases, see, for example, El-Morr, *supra* note 413.

440. Sometimes the Court refers to it as a "license."

441. Case No. 35, Year 9, 1994, at 3.

442. *Id.* at 8 ("Since polygamy is based on the rule of fairness—which is a restriction of the right and not a cause of it—injustice and bias will not take place and no harm will befall the wife when her husband takes another wife.") (translation by author).

443. *Id.* at 9 ("The right of the wife to demand divorce when her husband takes another wife is not based on her merely hating him or feeling repulsed by him, but requires that she establishes harm prohibited by Sharia, such harm must be real not

from the incident of polygamy, or alternatively, made the second marriage contingent on the consent of the first wife, then it could indeed have been read as seriously undermining the husband's right to be polygamous. Granting the judge discretion on this question ensured that the harm argued by the wife was "objective and not whimsical."<sup>444</sup>

One detects from the three cases discussed above that underpinning the judicial passivism of the court is an ideological position based on promoting what may be described as a moderate social agenda.<sup>445</sup> Of the two ideological positions that almost always constitute the background to these cases, namely a religious one and a feminist one, the court always takes an intermediate position

illusory, actual not imagined . . . which negates good treatment expected of marital relationships. . . .") (translation by author).

444. *Id.* The cases above allow us to detect the various strategies taken by the Court in the Article 2 cases. In the vast majority of these cases, the Court espouses judicial passivism. It has an almost exaggerated reluctance to strike down legislation, exerting an elaborate, though intelligible, effort to avoid doing so. Indeed, the very test of constitutional review that the Court has developed is clear evidence of this judicial passivism. According to this test, the Court first searches for determinate rules in the Qur'an and sometimes in the prophetic traditions that might allow a reading of the legislation under its purview to be in violation of the principles of the shari'a. The Court often finds that no such rules exist. The Court is careful to assert that whatever rules that do exist that contradict the legislation are not found in the primary textual sources of Islamic law (i.e. the Qur'an and the Sunna) but instead have been formulated by jurists and are the subject of controversy among the various medieval schools of jurisprudence. Subsequently, the Court asserts the right of the legislature to legislate outside the domain of the determinate rules in the name of public interest and declares the law to be constitutional.

Alternatively, the Court reads into the various determinate, but ambiguous rules of the shari'a a general principle and proceeds to decide that the legislation under review falls short of violating this principle. In both cases, the Court's random references to the views of the medieval schools of jurisprudence are designed to either prove that the rule in question is controversial, meaning there exists a variety of positions on said rule, or to support the validity of the legislation by showing that some medieval jurist had advocated a rule similar to it.

The fact that this test is quite loose or flexible seems to express the Court's commitment to the preservation of the legislative domain as it exists today in the Egyptian legal system, as well as its desire to deliver it from the encroaching reach of the interpretive arm of God's law.

The somewhat passive posture taken by the Court is rendered all the more striking when one considers that the SCC manifests the radically different posture of serious, almost brutal activism when deciding if a piece of legislation conforms to the other articles of the Constitution. This is especially so in cases dealing with the "rights" and "freedoms" of citizens in relation to the State. In these cases the SCC seems almost too willing to strike down legislation that is in violation of the Constitution. For a discussion by the Chief Justice of the SCC of several such cases, see El-Morr, *supra* note 413.

445. On this point, see Hirschl, *The Struggle for Hegemony*, *supra* note 410, at 115 (reporting that "the Egyptian Supreme Constitutional Court has demonstrated its consistent policy by adopting a relatively liberal, middle-of-the-road approach in its interpretation of the Muslim Shari'a rules").



between the two.<sup>446</sup> While the religious position on polygamy is that it should be an absolute, unrestricted right of the husband, and the feminist one is that it should be prohibited, the court upheld a rule that constricted the practice of polygamy and allowed the first wife a way out. While the religious position is that divorce is the unilateral right of the husband, and feminists argue for an equal right for women to divorce, the SCC upheld a rule that allowed the judge to intervene on behalf of the woman in certain cases, allowing her to escape a bad marriage. In addition, while some religious groups think that women should be veiled, and feminists believe that the law should not regulate women's dress, the SCC affirmed the principle of modesty as the limit of the legislature's reach and as a compromise between the two positions.

## V. CONCLUSION

Legislative and adjudicative reforms and interpretive strategies that move from defining a marital relationship as one of status to one of contract, as well as splitting the difference between the demands of religious advocates and those of feminist reformers, represent the ways in which the Egyptian secular male elites have introduced reform in the area of family law and how they later, as judges, defended it. These strategies attempt to strike a centrist compromise so as to mediate the demands of the feminists and those of their adversaries—the religious intelligentsia.

In addition, the cases decided by the Supreme Constitutional Court, discussed above, raise two questions that are of particular relevance to secular feminism. The first is related to the rule outcome, whereby one must ask what to think about, for instance, divorce being the absolute right of the husband while women must apply to the courts and are only granted it in certain cases; or about the fact that polygamy is an absolute right of the man, curbed only by certain restrictions; or about no to veils, but yes to modesty.

The second question that these cases raise is related to the legitimation discourse by which the Court arrives at its decisions. One must ask what to think about the Court wanting to appear to be doing a genuine reading of the religious texts, thereby representing, for instance, polygamy as an absolute right of the husband, so as to satisfy an increasingly disgruntled religious audience or movement. One wonders if this was the only way the Court could have demonstrated that it was genuinely engaging with the requirement of

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446. For example, see Chief Justice El-Morr's discussion on modesty and the clothing of women, El-Morr, *supra* note 413, at 16-17.

Article 2 of the Constitution, which requires that Islamic law be the primary source of legislation. In other words, one questions whether, in the case of polygamy, it was really necessary for the court to adopt this form of representation to be able to later create an endless list of exceptions that more or less make this so-called absolute, universal right not so absolute and universal after all. Therefore, the question becomes whether, in order to get the desired rule, the Court should sacrifice what could be a liberal, reformist, or secular feminist legitimation discourse for one that focuses on a reading of religious texts. One may very well argue that in the case of polygamy, for instance, this was the best rule possible under the circumstances but that the legitimation course followed by the Court to reach the outcome is not the most desirable; in other words, one may agree with the outcome but oppose the methodology.

In addition, related more to the issue of secularism than to that of feminism, one wonders if the test the Court has developed, in attempting to seriously engage with the religious texts, panders too much to the religious intelligentsia. This may be the best possibility under the circumstances and thus the Court should not be attacked for giving too much determinacy to the religious texts despite the fact that its analysis typically uncovers that they contain few determinate rules. But is there a way that the religious texts could have been done away with altogether for representing a set of ethical teachings or rules that are bound by their historical context? Such an act would have furthered the cause of secularism in modern day Egypt.

The dilemmas that are raised by the Court's test and its strategy to split the difference echo those of the legislative strategy adopted in the vast majority of Islamic countries, in which reform takes place within the framework of a religious text. Many argue that this is the sole path reform can take because it is the most realistic. But an equally plausible path to reform would be to do away completely with the religious text and to use whatever resources the state has to impose a secularization path. The complexity of such an approach and the costs that might come with it is the subject of a future article.©

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